

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**NOVEMBER 25, 2014**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzairelli, Manzanet-Daniels, Gische, Clark, JJ.

13581 Fausta Javier Feliz, Index 301624/10  
Plaintiff-Respondent,

-against-

Daka Holdings, LLC,  
Defendant-Appellant.

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Lester Schwab Katz & Dwyer LLP, New York (Steven B. Prystowsky of counsel), for appellant.

Trolman Glaser & Lichtman, PC, New York (Michael T. Altman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 3, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff sustained injuries in a fire in defendant's building. The fire originated in a mattress, which was left by a tenant in a building hallway and was set on fire by an unidentified person. Triable issues of fact exist as to whether it was foreseeable that someone might set fire to a mattress that was left in the hallway, particularly in light of the averments of plaintiff's fire safety expert that it is "common knowledge that mattresses

left in the public areas of multiple dwellings are often set on fire," and that "mattresses pose an acute hazard due to the phenomenon of people setting [them] on fire" (see *De Los Santos v Amsterdam Apts. Mgr., LLC*, 85 AD3d 648 [1st Dept 2011]).

Defendant's witnesses also testified that the building superintendent was required to remove any mattresses found in building common areas, because mattresses "could catch fire."

Furthermore, the record shows that the subject mattress was placed in the hallway as early as 4:00 p.m. on the date of the fire, that the fire was started at about 7:30 p.m., and that the building superintendent ordinarily swept the building's common areas, and made arrangements for removal of any bulky debris, every afternoon between 4:00 p.m. and 5:00 p.m. Accordingly, there are triable issues as to whether defendant had actual or constructive notice of the hazardous condition posed by the mattress in the hallway (see e.g. *Munoz v Uptown Paradise T.P. LLC*, 69 AD3d 401 [1st Dept 2010]).

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

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ENTERED: NOVEMBER 25, 2014

  
CLERK

Gonzalez, P.J., Mazzairelli, Manzanet-Daniels, Gische, Clark, JJ.

13582 Kari R., etc., et al., Index 350060/10  
Plaintiffs-Respondents,

-against-

New York City Housing Authority,  
Defendant-Appellant.

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Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel),  
for appellant.

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

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.),  
entered March 28, 2014, which, to the extent appealed from,  
denied defendant's motion to strike what it contended was  
plaintiffs' new theory of liability and the proffered testimony  
of plaintiffs' expert at trial, unanimously affirmed, without  
costs.

In this action arising from the infant plaintiff's slip and  
fall in a puddle of urine that defendant, through its agents,  
left sitting for days on the landing of the staircase immediately  
outside plaintiffs' apartment, the motion court correctly  
determined that plaintiffs' expert testimony was a mere  
amplification of plaintiffs' consistently pleaded negligence  
claims, and not a new claim or theory that plaintiffs had failed

to specify in their notice of claim (see *Portillo v New York City Tr. Auth.*, 84 AD3d 535, 536 [1st Dept 2011]).

We have considered the remaining arguments and find them unavailing.

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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.

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2001]). As petitioner admitted that she received the T-3 notice in January 2011, and there is no evidence that she requested a hearing, this article 78 proceeding, commenced more than a year later, is time-barred.

Petitioner's argument that the Housing Authority told her to disregard the notices is unavailing, as an agency cannot be estopped from enforcing its policies (see *Matter of Muhammad v New York City Hous. Auth.*, 81 AD3d 526, 527 [1st Dept 2011]). Further, even if petitioner reasonably relied on the Housing Authority's alleged misrepresentation, this proceeding is still time-barred. Indeed, petitioner admitted that she received an eviction notice from her landlord in September 2011 advising her that she had been terminated from the Section 8 subsidy program. Accordingly, she was aware of the Housing Authority's determination in September 2011, but failed to commence an article 78 until more than four months later (see *90-92 Wadsworth Ave. Tenants Assn. v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 227 AD2d 331, 331-332 [1st Dept 1996]).

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Gonzalez, P.J., Mazzairelli, Manzanet-Daniels, Gische, Clark, JJ.

13585 Perini Corporation, Index 601720/03  
Plaintiff-Respondent,

-against-

City of New York, etc.,  
Defendant-Appellant.

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Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor of counsel), for appellant.

Duane Morris LLP, New York (Charles Fastenberg of counsel), for respondent.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered August 13, 2013, which granted plaintiff's motion to dismiss defendant's seventeenth and eighteenth affirmative defenses and first and second counterclaims alleging fraud in the inducement and fraud/illegality in the performance, respectively, as time-barred, unanimously affirmed, without costs.

Plaintiff's statute of limitations defense is not barred by the doctrine of law of the case, which "applies only to legal determinations resolved on the merits" (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). The order that granted defendant leave to amend its answer to include the subject affirmative defenses and counterclaims did not mention the statute of limitations.

The record amply supports a finding that, with due diligence, defendant could have discovered the fraud more than

two years before it brought its fraud counterclaims (see CPLR 213[8]; *Ghandour v Shearson Lehman Bros.*, 213 AD2d 304 [1st Dept 1995], *lv denied* 86 NY2d 710 [1995]). We reject defendant's contention that it did not know of the fraud, since "[i]t is knowledge of facts not legal theories that commences the running of the two-year limitations period" (*TMG-II v Price Waterhouse & Co.*, 175 AD2d 21, 23 [1st Dept 1991], *lv denied* 79 NY2d 752 [1992]). In particular, the November 2002 letter from defendant's own resident engineer indicated that plaintiff had provided "'contrived paperwork in an effort to prove higher DBE [Disadvantaged Business Enterprises] participation'" to qualify for the municipal contract. The February 2003 letter from the State Department of Transportation to the City Department of Transportation indicated that one of plaintiff's DBE contractors did not do any work on the project and that plaintiff had actually performed the work of one of its other contractors. Moreover, a 2004 press release indicated that plaintiff had been involved in a conspiracy to commit fraud, and a May 8, 2007 article in *The New York Daily News* stated that plaintiff was under investigation by the U.S. Attorney's office for its activities involving DBE contractors.

Contrary to defendant's contention, its denial of knowledge of the fraud in its counterclaim complaint and in the affidavits upon which it relied is not entitled to be accepted as true

because it is contradicted by the documentary evidence (see *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

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

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Gonzalez, P.J., Mazzarelli, Manzanet-Daniels, Gische, Clark, JJ.

13586 Bernard Kim, Index 152371/12  
Plaintiff-Respondent,

-against-

Harry Hanson, Inc.,  
Defendant-Appellant.

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Zaremba Brownell & Brown PLLC, New York (Richard J. Brownell of counsel), for appellant.

Smiley & Smiley, LLP, New York (Joshua E. Bardavid of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered August 19, 2013, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff sustained injuries while engaged in a personal training program, under a trainer's supervision and instruction, at a one-on-one training facility owned and operated by defendant. Plaintiff alleges, inter alia, that the personal trainer negligently instructed and supervised him in the lifting of an excessive amount of weight.

Prior to beginning training at defendant's facility, plaintiff executed a release wherein he acknowledged that there were "inherent risks in participating in a program of strenuous exercise" and released defendant from "all claims . . . which I . . . may have against [defendant] . . . for all injuries . . . which may occur in connection with my participation in the

program.” It is undisputed that General Obligations Law § 5-326 does not bar enforcement of this release as defendant’s facility is an instructional, and not a recreational, one. However, the language of the release does not reflect a clear and unequivocal intent to limit liability for negligence (see *Gross v Sweet*, 49 NY2d 102 [1979]). While the release warned of the risks inherent in undergoing a strenuous exercise program, it does not “express[] any intention to exempt . . . defendant from liability for injury . . . which may result from [its] failure to use due care . . . in [its] training methods” (*id.* at 109). Unlike in *Debell v Wellbridge Club Mgt., Inc.* (40 AD3d 248 [1st Dept 2007]), the release does not purport to release defendant from all personal injury claims, “*whether or not based on the acts or omissions of [defendant],*” or contain other language conveying a similar import (*id.* at 248; see also *Gross* at 108).

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ENTERED: NOVEMBER 25, 2014

  
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Gonzalez, P.J., Mazzarelli, Manzanet-Daniels, Gische, Clark, JJ.

13588 In re Tahjae K.,

A Person Alleged to be  
a Juvenile Delinquent,  
Appellant.

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Presentment Agency

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

Zachary W. Carter, Corporation Counsel, New York (Ingrid R.  
Gustafson of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Gayle P.  
Roberts, J.), entered on or about January 13, 2014, which  
adjudicated appellant a juvenile delinquent upon a fact-finding  
determination that he committed acts that, if committed by an  
adult, would constitute the crimes of robbery in the third  
degree, grand larceny in the fourth degree, criminal possession  
of stolen property in the fifth degree, and menacing in the third  
degree, and placed him on probation for a period of 13 months,  
unanimously affirmed, without costs.

The finding was not against the weight of the evidence (see  
*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no  
basis for disturbing the court's determinations regarding  
credibility and identification. The victim testified credibly  
that during the robbery he could see appellant clearly, from  
inches away, and that the incident lasted long enough for the two  
to have numerous verbal exchanges. Moreover, the victim's

ability to make a reliable identification was enhanced by the fact that he had seen appellant many times before the robbery, often for long periods of time, and appellant's challenges to this evidence are unavailing.

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Gonzalez, P.J., Mazzarelli, Manzanet-Daniels, Gische, Clark, JJ.

13590      Triad International Corp.,      Index 652744/12  
            Plaintiff-Appellant,

-against-

Cameron Industries, Inc.,  
et al.,  
Defendants-Respondents.

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Lazarus & Lazarus, P.C., New York (Michael E. Murav of counsel),  
for appellant.

Schlacter & Associates, New York (Jed R. Schlacter of counsel),  
for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.),  
entered on or about September 6, 2013, which, to the extent  
appealed from as limited by the briefs, granted defendants'  
motion to dismiss the complaint as against defendant Khayyam,  
unanimously affirmed, without costs.

Plaintiff's fraud claim against Khayyam is duplicative of  
its contract claim against defendant Cameron Industries, Inc.,  
since plaintiff seeks the same compensatory damages for both  
claims (*see Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d  
896, 898-899 [2d Dept 2010]; *Mañas v VMS Assoc., LLC*, 53 AD3d  
451, 454 [1st Dept 2008]). On appeal, plaintiff seeks to amend  
its complaint. However, its purported fraud damages are actually  
contract damages. Plaintiff seeks to be placed in the same  
position that it would have been in had Cameron performed (i.e.,  
made payment) under the contract (*see Mañas*, 53 AD3d at 454).

Therefore, repleading would be futile (see e.g. *Megaris Furs v Gimbel Bros.*, 172 AD2d 209 [1st Dept 1991]; *Teachers Ins. Annuity Assn. of Am. v Cohen's Fashion Opt. of 485 Lexington Ave., Inc.*, 45 AD3d 317, 319 [1st Dept 2007]).

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performed on the day of the accident (see *Seleznyov v New York City Tr. Auth.*, 113 AD3d 497 [1st Dept 2014]; *Williams v New York City Hous. Auth.*, 99 AD3d 613 [1st Dept 2012]).

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*cert dismissed* 548 US 940 [2006]; *Matter of New York Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332 [2005]).

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Gonzalez, P.J., Mazzarelli, Manzanet-Daniels, Gische, Clark, JJ.

13596-

Index 101619/12

13597 Vilma M. Sanchez, etc.,  
Plaintiff-Respondent,

-against-

Farbod F. Hay, et al.,  
Defendants-Appellants.

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Kishner & Miller, New York (Bryan W. Kishner of counsel), for appellants.

Wrobel Schatz & Fox LLP, New York (Steven I. Fox of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered October 23, 2013, which granted plaintiff's motion for summary judgment, dismissed defendants' counterclaims and denied defendants' cross motion to amend their answer, directed the parties to arrange for a time and place to close on the sale of the subject apartment no later than December 19, 2013, directed defendants to pay plaintiff's attorneys' fees, and ordered a hearing on damages on the second cause of action for breach of contract, unanimously affirmed, with costs. Order, same court and Justice, entered January 27, 2014, which denied defendants' motion for leave to renew, and directed the parties to proceed to mediation/trial, unanimously affirmed, with costs.

The motion court properly determined that plaintiff is entitled to specific performance and ordered the parties to proceed with the closing on the sale of the subject apartment.

Plaintiff established that she was ready, willing and able to perform pursuant to the contract, and that she had taken all the necessary steps to close, including retaining counsel, securing financing, and ordering title insurance (see *Gindi v Intertrade Internationale Ltd.*, 50 AD3d 575 [1st Dept 2008]).

In opposition, defendants failed to present evidence sufficient to raise a triable issue of fact as to plaintiff's ability and willingness to close on February 6, 2012. Although plaintiff and her counsel were not present at the date and time stated in her time of the essence letter, the record reflects that defendants' counsel had previously rejected a closing on that date and declared the time of the essence letter a nullity. Plaintiff reasonably declined to appear in the face of that rejection.

The trial court properly found that plaintiff is entitled to attorneys' fees. The unambiguous contract provision which unmistakably provides for the award of reasonable attorneys' fees to the prevailing party in "any litigation," is not, as defendants' argue, limited to disputes arising from defendants' post-closing occupancy of the apartment (see *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1999]).

Defendants' motion to renew was properly denied because the alleged "new" fact, that the closing had taken place as the court had directed, was not relevant to plaintiff's ability to close in

February 2012 (see CPLR 2221[e][2]).

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

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ENTERED: NOVEMBER 25, 2014

  
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Gonzalez, P.J., Mazzarelli, Manzanet-Daniels, Gische, Clark, JJ.

13598 Andrew Lavooott Bluestone, Index 110903/11  
Plaintiff-Respondent,

-against-

J. Tortorella Heating &  
Gas Specialists, Inc.,  
Defendant-Appellant,

J. Tortorella Swimming Pool  
Service and Maintenance, Inc.,  
Defendant.

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Harris, King & Fodera, New York (Dawn Gilbert of counsel), for  
appellant.

Andrew L. Bluestone, New York, respondent pro se.

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Order, Supreme Court, New York County (Joan M. Kenney, J.),  
entered July 19, 2013, which denied defendant J. Tortorella  
Heating & Gas Specialists, Inc.'s motion for summary judgment  
dismissing the complaint as against it, unanimously reversed, on  
the law, with costs, and the motion granted. The Clerk is  
directed to enter judgment accordingly.

Tortorella Heating established prima facie, through  
deposition testimony, contracts, and work orders, that it  
installed a pool heater for plaintiff, which did not involve the  
use of chemicals. In opposition, plaintiff failed to submit  
evidence showing that Tortorella Heating introduced chemicals  
into the pool as part of its heater installation work (see  
*Edelman v O This Way Up, Inc.*, 117 AD3d 640 [1st Dept 2014]).

Plaintiff failed to identify any record support for his

contention that Tortorella Heating “completely dominated and controlled” defendant Tortorella Swimming Pool Service and Maintenance, Inc. so as to perpetuate a fraud or commit a wrong against him (see *Etex Apparel, Inc. v Tractor Intl. Corp.*, 83 AD3d 587, 588 [1st Dept 2011]). Indeed, the complaint alleges a breach of two separate contracts entered into with two separate entities, namely, Tortorella Heating and Tortorella Swimming Pool, and plaintiff testified that he understood they were separate corporations.

Since Tortorella Heating’s heater replacement work did not involve the use of chemicals, plaintiff cannot invoke the doctrine of *res ipsa loquitur* to hold it liable for the damage allegedly caused by chemicals to the vinyl lining of his pool (see *Edelman*, 117 AD3d at 641; see also *Hodges v Royal Realty Corp.*, 42 AD3d 350 [1st Dept 2007]).

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he did not engage in illegal or criminal activity "at that time nor any time prior," that he did not "mak[e] any sale to any person that day," that he was not "involved in any drug sale" and that he did not "hav[e] a drug related conversation on that day with any person." Accordingly, defendant sufficiently denied the drug sale that was the basis for his arrest. Under the circumstances, this was enough to require a hearing (see *People v Hightower*, 85 NY2d 988 [1995]; *People v Rivera*, 42 AD3d at 163).

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Gonzalez, P.J., Mazzairelli, Manzanet-Daniels, Gische, Clark, JJ.

13600 The People of the State of New York, Ind. 1048/04  
Respondent,

-against-

Roger Brown,  
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

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

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Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about February 3, 2011, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although defendant challenges the court's alleged assessment of 20 points under the risk factor for "duration of offense conduct with victim," the court expressly found that it was unnecessary to determine if points should be assessed under this category because even without those points, defendant's score of 80 points would still be within the range making him a presumptive level two sex offender. As such, we find it unnecessary to determine the propriety of the assessment of the contested points (*see People v Lucas*, 118 AD3d 415 [1st Dept 2014]).

Regardless of whether defendant's correct point score is 80

or 100, the court properly exercised its discretion in declining to grant a downward departure, since the mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument (see *People v Gillotti*, 23 NY3d 841, 861 [2014]). Moreover, defendant's newly asserted claim that he should receive a downward departure based on his age (50 years) at the time of his release from prison is unpreserved, and without merit in any event, particularly in light of the seriousness of the underlying offense committed against a mentally impaired child.

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favor of arbitrability (see *DiBello v Salkowitz*, 4 AD3d 230, 232 [1st Dept 2004]).

The court properly rejected petitioners' various arguments that it was not bound by the arbitration clause. Petitioners cannot both seek coverage under a policy and claim not be bound by its provisions (see *God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006]). Similarly, the fact that respondent has disclaimed coverage does not strip it of its rights under the arbitration clause (see *id.*). Furthermore, although petitioners extensively argue the merits of the case, the merits are outside the scope of a proceeding to compel or stay arbitration (see *Matter of Prinze [Jonas]*, 38 NY2d 570, 574 [1976]; CPLR 7501). Thus, we agree with respondent that any statements as to the merits made in the court's order were mere dicta and not binding on the parties (see *Edge Mgt. Consulting v Irmis*, 306 AD2d 69 [1st Dept 2003]).

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Gonzalez, P.J., Mazzarelli, Manzanet-Daniels, Gische, Clark, JJ.

13602        In re Angel Castro,  
[M-4472]        Petitioner,

Ind. 202/10

-against-

Hon. Eduardo Padro, etc.,  
Respondent.

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Angel Castro, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael A. Berg  
of counsel), for respondent.

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

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

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

ENTERED: NOVEMBER 25, 2014

  
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(see *People v Cintron*, 12 NY3d 60, 7 [2009], *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]). Although the predicate conviction that formed the basis for the override occurred many years ago, defendant's overall background demonstrated a propensity to commit sex crimes against children (see e.g. *People v Jamison*, 107 AD3d 531 [1st Dept 2013], *lv denied* 22 NY3d 852 [2013]; *People v Poole*, 105 AD3d 654 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]). We also note that defendant has also been convicted of failing to comply with sex offender registration requirements.

The court properly determined that it lacked discretion to decline to designate defendant a sexually violent offender and predicate sex offender. Because the crime of sexual abuse in the first degree is defined as a sexually violent offense under the Sex Offender Registration Act (Correction Law § 168-a [3][a][i]; Penal Law § 130.65), the court lacked discretion to decline to

designate defendant a sexually violent offender (see *People v Bullock*, \_\_ AD3d \_\_ [Appeal No. 12785, decided simultaneously herewith]; *People v Faulkner*, \_\_ AD3d \_\_ [Appeal No. 12914, decided simultaneously herewith]; *People v Golliver*, 97 AD3d 734 [2d Dept 2012], *lv denied* 19 NY3d 813 [2012]; *People v Williams*, 96 AD3d 421 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]; *People v Lockwood*, 308 AD2d 640 [3d Dept 2003]).

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factors he cites.

The court properly designated defendant a sexually violent offender and a predicate sex offender, since he was convicted of persistent sexual abuse, an enumerated sexually violent offense (see Correction Law § 168-a[3][a][ii]; [7][b], [c]). The court also properly determined that it lacked discretion to do otherwise (see *People v Golliver*, 97 AD3d 734 [2d Dept 2012], *lv denied* 19 NY3d 813 [2012]; *People v Williams*, 96 AD3d 421 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]; *People v Ayala*, 72 AD3d 1577 [4th Dept 2010], *lv denied* 15 NY3d 816 [2010]; *People v Lockwood*, 308 AD2d 640 [3d Dept 2003]; see also *People v Bullock*, \_\_ AD3d \_\_ (Appeal No. 12785); *People v Rodriguez*, \_\_ AD3d \_\_ (Appeal Nos. 12865-12866) decided herewith). In any event, the court made an alternative determination that even if it had such discretion, the result would be the same, and we see no reason to disturb that determination.

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concede, is unlawful to the extent indicated (see, e.g. *People v Cruz*, 112 AD3d 478 [2013], *lv denied* 23 NY3d 1019 [2014]).

The Decision and Order of this Court entered herein on September 23, 2014 is hereby recalled and vacated (see M-4914 decided simultaneously herewith).

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Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13350      87 Chambers, LLC, et al.,      Index. 104437/10  
                 Plaintiffs-Respondents,      590322/11  
                      590312/12

Catlin Insurance Co. (UK),  
etc.,  
Intervening Plaintiff,

-against-

77 Reade, LLC, et al.,  
Defendants-Respondents,

Concrete Courses Corp., et al.,  
Defendants.

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Weidlinger Associates, Inc.,  
Defendant-Respondent-Appellant,

BKSK Architects LLP,  
Defendant-Appellant-Respondent,

Vacex, Inc., et al.,  
Defendants.

- - - - -

77 Reade, LLC, et al.,  
Third-Party Plaintiffs-Respondents,

-against-

Richard C. Mugler Co., Inc.,  
Third-Party Defendant.

- - - - -

77 Reade, LLC, et al.,  
Second Third-Party Plaintiffs-Respondents,

-against-

Fruma Narov, et al.,  
Second Third-Party Defendants.

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Menaker & Herrmann LLP, New York (Paul M. Hellegers of counsel),  
for appellant-respondent.

Gogick, Byrne & O'Neill, LLP, New York (Stephen P. Schreckinger  
of counsel), for respondent-appellant.

Weg & Myers, P.C., New York (William H. Parash of counsel), for 87 Chambers, LLC and IBC Chambers, respondents.

Brown Gavalas & Fromm LLP, New York (David H. Fromm of counsel), for 77 Reade, LLC and Leeco Construction Corp., respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about August 5, 2013, which, to the extent appealed from as limited by the briefs, denied the respective summary-judgment motions of defendants BKSK Architects, LLP and Weidlinger Associates, Inc. to the extent they sought dismissal of plaintiffs' second amended complaint and all common-law indemnification and contribution cross claims as asserted against them, unanimously modified, on the law, to the extent of granting BKSK's motion in its entirety, and granting Weidlinger's motion solely to the extent of dismissing plaintiffs' claims under the Administrative Code of the City of New York, except the claim under former Administrative Code § 27-1013(b)(1), and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the second amended complaint and all cross claims asserted against BKSK.

While plaintiffs alleged violations of former Administrative Code § 27-1013(b)(1), that provision was repealed effective July 1, 2008 (see *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 489 n 2 [2012]), and the partial collapse of plaintiffs' building, allegedly caused by the excavation work being performed at the adjoining property located at 77 Reade Street in

Manhattan, occurred in April of 2009. Accordingly, plaintiffs' claims should have been brought under the equivalent provision now contained in Administrative Code § 3309.4 (*id.*).

Plaintiffs' section 3309.4 claim against BKSK should have been dismissed because BKSK was not "the person who cause[d] an excavation or fill to be made" within the meaning of that provision (§ 3309.4). Indeed, BKSK was neither the owner of the 77 Reade Street property nor the contractor who performed the excavation (*see Coronet Props. Co. v L/M Second Ave.*, 166 AD2d 242, 243 [1st Dept 1990]). Further, BKSK's designs for the proposed building, which included a cellar and subcellar, and its knowledge that some excavation would take place, do not raise an issue of fact as to whether it "cause[d] an excavation" within the meaning of section 3309.4.

Plaintiffs' negligence claim against BKSK should have been dismissed because BKSK's contractual obligations to the owner of the 77 Reade Street property do not give rise to tort liability in favor of plaintiffs (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-140 [2002]). BKSK's contract with the owner did not specifically impose any duties with respect to the excavation phase of the project and expressly stated that BKSK did not have control over, and was not responsible for, the construction means and methods or the safety precautions taken in connection with the work. BKSK's involvement in discussions related to the means and methods to be employed in the excavation, and its general

responsibilities to visit the site during construction to monitor compliance with the contract, do not raise an issue of fact as to whether it entirely displaced the owner's duty to maintain the premises (*see id.* at 140-141). Plaintiffs do not allege any other basis for imposing tort liability on BKSK.

BKSK was also entitled to summary judgment dismissing the cross claims asserted against it by defendants Leeco Construction Corp. (the general contractor) and 77 Reade, LLC (the owner of the 77 Reade Street property). The contribution cross claims should have been dismissed because BKSK owed no duty to the other defendants or to plaintiffs (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 559 [1992]). Further, the common-law indemnification claims should have been dismissed because BKSK was not actively at fault in bringing about the damage caused to plaintiffs' building and it did not exercise actual supervision or control over the damage-producing work (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375-376 [2011]).

Weidlinger was not entitled to summary judgment dismissing plaintiffs' Administrative Code section 3309.4 claim as asserted against it, since there is an issue of fact as to whether Weidlinger substantially contributed to the design and methodology employed during the excavation process and therefore was a "person" who "cause[d] an excavation" within the meaning of section 3309.4 (§ 3309.4). Furthermore, the court properly denied Weidlinger's motion seeking dismissal of plaintiffs'

negligence claim. Although Weidlinger's employee testified that Weidlinger had no duties during the excavation phase of the project, plaintiffs submitted admissible evidence suggesting that Weidlinger assumed responsibilities related to the excavation and recommended excavation design changes, which were adopted over the excavation contractor's objections and purportedly were the cause of the damage to plaintiffs' building (see *Espinal*, 98 NY2d at 141-142). The court properly denied the branch of Weidlinger's motion seeking dismissal of all cross claims asserted against it, given the issues of fact pertaining to Weidlinger's fault and possible negligence.

Plaintiffs' claims under Administrative Code sections 27-723 and 27-724, and former sections 27-1028, 27-1029, and 27-1032, are dismissed as abandoned as against both BSKS and Weidlinger, since plaintiffs failed to address them in their motion papers or on appeal (see *Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009]).

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

ENTERED: NOVEMBER 25, 2014

  
CLERK





280 AD2d 423 [1st Dept 2001], *lv denied* 96 NY2d 715 [2001]).

Petitioner contends that she cannot understand or speak English and that the Housing Authority failed to provide adequate translation services for her. However, the record indicates that petitioner understood the proceeding and that the translation provided was accurate and complete (*see People v Perez*, 198 AD2d 446 [2d Dept 1993], *lv denied* 82 NY2d 929 [1994]; *Matter of Lizotte v Johnson*, 4 Misc 3d 334, 341-42 [Sup Ct, NY County 2004]).

Petitioner contends that the hearing officer failed to develop the record and elicit testimony regarding several important mitigating factors, i.e. her health, her emotional state, her nearly 30-year unblemished tenancy, and whether the excluded person continued to pose a threat to the other residents. However, notwithstanding that petitioner represented herself at the hearing, the hearing officer was not obligated to develop the record for her (*see Matter of Moore v Rhea*, 111 AD3d 445, 445 [1st Dept 2013]). The hearing officer explained the procedures to petitioner, answered her questions and clarified his answers when petitioner indicated that she did not understand, and repeatedly stated that petitioner had the right to ask questions of the Housing Authority's witness and to call her own witnesses (*compare Feliz v Wing*, 285 AD2d at 427).

We reject petitioner's argument that the penalty of termination of her tenancy is excessive. Petitioner claims

certain mitigating factors, but she "is not [for example] caring for disabled children, foster children, or grandchildren" (see *Matter of Romero v Martinez* (280 AD2d 58, 64 [1st Dept 2001], *lv denied* 96 NY2d 721 [2001])). Nor does the fact that termination of her tenancy will create a hardship for her render the penalty shocking to the conscience (*Matter of Whitted v New York City Hous. Auth.*, 110 AD3d 447, 448 [1st Dept 2013])). The excluded person's criminal activity is serious, and the stipulation's provision that her presence in the apartment will result in the termination of petitioner's tenancy is clear (see *Matter of Gibbs v New York City Hous. Auth.*, 82 AD3d 412 [1st Dept 2011])).

In light of the above, petitioner's motion for a temporary restraining order is academic.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: NOVEMBER 25, 2014

  
CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Manzanet-Daniels, JJ.

13605 Moon 170 Mercer, Inc., Index 155605/12  
Plaintiff-Respondent,

-against-

Zachary Vella,  
Defendant-Appellant.

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

Cordova & Schwartzman, LLP, Garden City (Jonathan B. Schwartzman  
of counsel), for respondent.

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Order, Supreme Court, New York County (Lawrence K. Marks,  
J.), entered December 3, 2013, which, to the extent appealed  
from, granted plaintiff's motion for summary judgment as to  
liability on its claim to enforce defendant's personal guarantee  
of a lease, and directed the Clerk to enter judgment in  
plaintiff's favor in the amount of \$414,114.27, unanimously  
modified, on the law and the facts, to the extent of striking  
that portion of the order awarding damages, and remanding the  
matter for discovery and a trial on the issue of damages, and  
otherwise affirmed, without costs.

Plaintiff landlord demonstrated its *prima facie* entitlement  
to summary judgment on the issue of liability by establishing  
that defendant signed an absolute and unconditional guaranty of a  
commercial lease, that the tenant was in arrears in payment of  
base rent and additional rent, and that defendant failed to

perform under the guaranty (see *International Plaza Assoc., L.P. v Lacher*, 104 AD3d 578, 579 [1st Dept 2013]). Defendant asserts that plaintiff wrongfully evicted the tenant. However, the tenant's wrongful eviction claim was asserted in a separate action against plaintiff and its principal, Michael Shah, and has been dismissed. We note that defendant cannot avail himself of the breach of contract and fraud claims asserted by the tenant in that action because they are independent causes of action that may only be asserted by the tenant (see *Walcutt v Clevite Corp.*, 13 NY2d 48, 55-56 [1963]).

Defendant alleges that Shah fraudulently prevented the tenant from raising the necessary monies to pay off its rent arrears and thereby limit his liability under the guaranty. However, the tenant fell into arrears prior to the alleged fraud (see *Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 113 AD3d 457, 459-460 [1st Dept 2014]). Moreover, defendant has not asserted that he was directly and personally defrauded by Shah's alleged fraud (*Taylor-Fichter Steel Constr. Co., Inc. v Fidelity & Cas. Co. of N.Y.*, 258 App Div 235, 237 [1st Dept 1939]).

However, since defendant has shown discrepancies in the amounts allegedly owed, including that plaintiff failed to account for the security deposit and conceded that it miscalculated certain items, there is an issue of fact as to the quantum of damages due under the guaranty (see *Eugenia VI Venture*

*Holdings, Ltd. v AMC Invs., LLC*, 35 AD3d 157, 159 [1st Dept 2006]). Accordingly, we remand for discovery on damages and a trial on that issue. The damages trial shall not include the issue of whether plaintiff is entitled to attorney's fees under the guaranty, since the motion court has already denied that relief and plaintiff has not challenged its determination.

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ENTERED: NOVEMBER 25, 2014

  
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said that he was moving to withdraw his plea, expressly stated that he was ready to proceed with sentencing. Moreover, he made only generalized complaints about police practices in unrelated cases against other persons, and about his counsel's performance. Accordingly, the circumstances did not warrant further inquiry.

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

ENTERED: NOVEMBER 25, 2014

  
CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Manzanet-Daniels, JJ.

13611 In re Zayvion Jamel Lewis S.,  
etc.,

A Dependent Child Under  
the Age of Eighteen, etc.,

Jason Frederick H., etc.,  
Respondent-Appellant,

The New York Foundling Hospital,  
Petitioner-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

Daniel Gartenstein, Long Island City, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

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Order, Family Court, Bronx County (Gayle P. Roberts, J.),  
entered on or about June 29, 2012, which, inter alia, determined  
that respondent father abandoned the subject child, unanimously  
affirmed, without costs.

Clear and convincing evidence, including respondent's own  
testimony, established that he abandoned his child (Social  
Services Law § 384-b[4][b], [5][a]). The fact that respondent  
was incarcerated during the relevant time period did not excuse  
him from his parental obligations (*see Matter of Alicia M.*, 22  
AD3d 384 [1st Dept 2005]). Petitioner agency was not required to  
prove that it exercised diligent efforts to reunite the family or  
assist respondent in establishing contact (*see Matter of Asia  
Sabrina N. [Olu N.]*, 117 AD3d 543 [1st Dept 2014]), nor was there

any evidence indicating that the agency discouraged respondent from having contact (see *Matter of Bibianamiet L.-M. [Miledy L.N.]*, 71 AD3d 402 [1st Dept 2010]; *Matter of Dennisha Shavon C.*, 295 AD2d 123 [1st Dept 2002]).

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

ENTERED: NOVEMBER 25, 2014

  
CLERK



Friedman, J.P., Renwick, Moskowitz, Richter, Manzanet-Daniels, JJ.

13613 Robert Lim, et al., Index 650120/12  
Plaintiffs-Respondents,

-against-

Joel Kolk, et al.,  
Defendants,

James J. Cox,  
Defendant-Appellant.

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Brian R. Hoch, White Plains, for appellant.

Eisenberg & Carton, Port Jefferson (Lloyd M. Eisenberg of  
counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.),  
entered October 19, 2012, which, insofar as appealed from, denied  
so much of defendant James J. Cox's (defendant) motion to dismiss  
the fraud and aiding and abetting breach of fiduciary duty claims  
against him on statute of limitations grounds (CPLR 3211[a][5]),  
unanimously reversed, on the law, without costs, and the motion  
granted. The Clerk is directed to enter judgment accordingly.

As this Court previously held, "the fraud cause of action  
accrued in December 2005 when the last allegedly fraudulent check  
was issued from the deceased's bank account" (111 AD3d 518, 519  
[1st Dept 2013]). We reject plaintiffs' contention that they  
could not have discovered defendant's participation in the  
alleged fraud until June 2010. Plaintiffs could have, with  
reasonable diligence, discovered defendant's participation in May  
2007, when plaintiffs were authorized to obtain and examine the

deceased's financial records (*see id.*). Accordingly, the fraud cause of action, brought more than two years from the date the alleged fraud could have been discovered and more than six years from the date the cause of action accrued, is time-barred (*see id.*; *see also* CPLR 213[8]; *cf. Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]).

Given this Court's prior determination that, based on the allegations of actual fraud, the breach of fiduciary duty claim against defendant Joel Kolk was subject to the six-year limitations period (*Lim*, 111 AD3d at 519), that limitations period also applies to the aiding and abetting breach of fiduciary duty claim against defendant (*see Ingham v Thompson*, 88 AD3d 607, 608 [1st Dept 2011]). The two-year discovery accrual rule also applies, as the claim sounds in actual fraud, as opposed to constructive fraud (*cf. Kaufman v Cohen*, 307 AD2d 113, 126-127 [1st Dept 2003]). Nevertheless, the claim is time-barred under either limitations period for the same reasons that the fraud claim was untimely.

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

ENTERED: NOVEMBER 25, 2014

  
CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Manzanet-Daniels, JJ.  
13615 The People of the State of New York, Ind. 5521/11  
Respondent,

-against-

Alam Mohammed,  
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about August 14, 2012,

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: NOVEMBER 25, 2014

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





to resolve their disputes during court conferences with an intent to avoid additional legal expense for the estate and trust. To the extent law office failure accounted for the delay in serving an answer, that is an additional basis for finding the executor's excuse reasonable (see *Shure*, 121 AD2d at 888; *Interboro Ins. Co. v Perez*, 112 AD3d 483 [1st Dept 2013]).

We would find further that the Surrogate properly determined at the time that it was in the best interests of the estate and trust to deny the petition to compel an accounting (see generally *Matter of Taber*, 96 AD2d 890 [2d Dept 1983]). Petitioner argued only generally that the as yet unsubstantiated administration expenses appeared high and potentially threatened her interest in the estate and trust, and she failed to show that she was precluded from obtaining the executor's administrative records. Moreover, there is evidence to support a finding that petitioner has no interest in the estate and trust.

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ENTERED: NOVEMBER 25, 2014

  
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challenges to the constitutionality of the statute under which he was convicted (see Executive Law § 71). As an alternative holding, we reject defendant's claims on the merits. We note that defendant has a prior felony conviction and cannot legitimately claim that he is entitled to possess a stun gun.

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

ENTERED: NOVEMBER 25, 2014

  
CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Manzanet-Daniels, JJ.

13620 Emmanuel O. Okocha, Index 103637/09  
Plaintiff-Appellant,

-against-

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

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Maduegbuna Cooper, LLP, New York (Samuel O. Maduegbuna of  
counsel), for appellant.

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

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Order, Supreme Court, New York County (Margaret A. Chan,  
J.), entered July 31, 2013, which, insofar as appealed from,  
granted defendants' motion for summary judgment dismissing the  
complaint alleging discrimination and retaliation under the State  
and City Human Rights Laws, unanimously affirmed, without costs.

The court correctly dismissed plaintiff's discrimination  
claim based on defendants' alleged failure to promote plaintiff  
from an Attorney Level II position to one of two Attorney Level  
III positions posted in November 2006. Plaintiff's claim fails  
because the latter positions were never filled, as there was no  
longer a need for the positions (*see Brown v Coach Stores, Inc.*,  
163 F3d 706, 709 [2d Cir 1998]; *Subramanian v Prudential Sec.*,  
*Inc.*, 2003 US Dist LEXIS 23231, \*22 [ED NY, Nov. 20, 2003, CV-01-  
6500 (SJF) (RLM)]). Nor did defendants discriminate against  
plaintiff by failing to promote him from Attorney Level II to  
Attorney Level IV in January 2008; the two attorneys promoted to

the latter positions had previously been Level III attorneys and therefore were more qualified than plaintiff for promotion to Level IV (*see Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965-966 [1st Dept 2009], *lv denied* 14 NY3d 701 [2010]). We reject plaintiff's contention that defendant Human Resources Administration's (HRA) investigations into his maintenance of a private practice of law constituted adverse or differential treatment. An arbitrator sustained the misconduct charges against plaintiff and upheld the penalty of termination of employment imposed in grievance proceedings. The allegations of misconduct were thus fully substantiated and plaintiff's attempt to collaterally attack the arbitrator's findings of misconduct cannot now be countenanced.

The doctrine of collateral estoppel precludes plaintiff's claim that the HRA misconduct investigations were initiated in retaliation for his commencement of this action; plaintiff raised this contention in the arbitration, and the arbitrator expressly rejected it (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *Acevedo v Holton*, 239 AD2d 194, 195 [1st Dept 1997]). Although plaintiff's claim that the HRA failed to promote him in retaliation for his prior complaints of mistreatment is not barred by collateral estoppel, it fails on the merits. HRA's actions in failing to promote plaintiff were not materially adverse or disadvantageous to him since, as noted above, the November 2006 job postings were never filled and the January 2008

job postings were filled by objectively better-qualified candidates (see generally *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004], and *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]).

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: NOVEMBER 25, 2014

  
CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Manzanet-Daniels, JJ.

13621 Ayana Webb, et al., Index 101329/00  
Plaintiffs, 603427/03

David Smith, et al.,  
Plaintiffs-Appellants,

-against-

Gladys Smith, et al.,  
Defendants-Respondents.

- - - - -  
Oritani Bank, etc., et al.,  
Nonparty Respondents.

[And Another Action]

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Law Offices of Steven Newman, New York (Steven Newman of  
counsel), for appellants.

Rothenberg Law Offices, Bohemia (Bruce Rothenberg of counsel),  
for Smith respondents.

Herrick, Feinstein LLP, New York (Adam J. Stein of counsel), for  
Oritani Bank and Cell Tower Lease Acquisition, LLC, respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick,  
J.), entered December 13, 2012, which granted defendants Gladys  
Smith and Mark Smith's motion to vacate an order, same court and  
Justice, entered October 15, 2010, and, upon vacatur, reinstated  
an order, same court and Justice, entered October 19, 2006,  
reinstating a stipulation of settlement dated April 22, 2000,  
unanimously affirmed, without costs.

Seven siblings inherited an apartment building from their  
mother, who died intestate on June 6, 1994. By deed dated May  
27, 1998, ownership of the property was transferred from the

seven siblings to defendant Gladys Smith, one of the siblings. The deed was individually executed and acknowledged by five of the siblings. On behalf of plaintiffs Peter and David, Gladys executed the deed as their "attorney in fact," pursuant to powers of attorney executed by them. On April 22, 2000, the parties entered into a stipulation of settlement of action no. 1.

By order entered on or about July 7, 2005, the court granted Peter and David's motion to vacate the stipulation based on their claim that the powers of attorney that Gladys used to transfer the property to herself were forged. Ultimately, a special referee found that "there was no proof, evidence or testimony adduced at the hearing that the . . . transfer was the product of the fraudulent use of the powers of attorney at issue." By order entered October 19, 2006, the court confirmed the special referee's report, set aside the July 7, 2005 order, and reinstated the stipulation of settlement.

In March 2010, Peter and David moved to reargue their motion to vacate the stipulation, to reinstate the July 7, 2005 order, void the stipulation, and vacate the transfer. They argued that the failure to record their powers of attorney with the Surrogate's Court, in violation of EPTL 13-2.3(a) and Uniform Rules for Surrogate's Court (22 NYCRR) § 207.48, rendered the deed transferred by the use of those powers void ab initio. By order entered October 15, 2010, the court granted the motion for reargument, on default and, upon reargument, vacated the

stipulation and declared the deed void ab initio.

The court providently exercised its discretion in vacating the October 2010 order and reinstating the stipulation of settlement (see CPLR 5015[a][1]). Gladys and Mark established that they had not been served with the reargument motion papers. Peter and David's admission that the motion papers sent to Gladys's and Mark's home addresses were returned by the post office rebutted the presumption of proper mailing (see e.g. *Chaudry Constr. Corp. v James G. Kalpakis & Assoc.*, 60 AD3d 544 [1st Dept 2009]; *Northern v Hernandez*, 17 AD3d 285 [1st Dept 2005]). Thus, Gladys and Mark demonstrated "a sufficient and complete excuse" for their default (*Bianco v Ligreci*, 298 AD2d 482, 482 [2d Dept 2002]). They also demonstrated a meritorious defense to the action, i.e., the validity of the powers of attorney and the transfer of property pursuant thereto.

Contrary to Peter and David's argument based on the failure to record their powers of attorney, EPTL 13-2.3, which addresses powers of attorney "relating to an interest in a decedent's estate," does not apply here (see *Lorisa Capital Corp. v Gallo*, 119 AD2d 99, 108 [2d Dept 1986]). Upon their mother's death intestate, title to her real property automatically vested in the children by operation of law (see *Waxson Realty Corp. v Rothschild*, 255 NY 332 [1931]; *Pravato v M.E.F. Bldrs.*, 217 AD2d 654 [2d Dept 1995]). In any event, the failure to record the powers of attorney, which the court found had been validly

executed, does not alone serve as a basis for declaring the deed void ab initio.

Vacatur of the October 15, 2010 order also serves the substantial interests of justice (see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]), given the potential effect of the order on innocent encumbrancers of the property who were not parties to the action and were not put on notice of Peter and David's challenge to the validity of Gladys's deed (see e.g. CPLR 6501; CPLR 1001[a]; *Matter of 27th St. Block Assn. v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 160 [1st Dept 2002]).

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

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: NOVEMBER 25, 2014

  
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and it provided reasonable cause to believe that defendant possessed an open container containing alcohol with the intent to consume it in public, in violation of the Open Container Law (Administrative Code of City of NY § 10-125[b]). Accordingly, the police properly pursued defendant (see *People v Canty*, 55 AD3d 330 [1st Dept 2008], *lv denied* 11 NY3d 896 [2008]; *People v Bothwell*, 261 AD2d 232, 234-35 [1st Dept 1999], *lv denied* 93 NY2d 1026 [1999]; *Matter of Johnnie A.*, 253 AD2d 578 [1st Dept 1998]) and lawfully recovered the weapon he discarded during the chase.

Although it is apparent from the record of the sentencing proceeding that the court did not believe that defendant was entitled to youthful offender treatment, it did not make the requisite explicit determination on the record at sentencing (see *People v Rudolph*, 21 NY3d 497 [2013]; *People v Flores*, 116 AD3d 644 [1st Dept 2014]; *People v Smith*, 113 AD3d 453, 454 [1st Dept 2014]).

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

ENTERED: NOVEMBER 25, 2014

  
CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Manzanet-Daniels, JJ.

13623-

Ind. 2908/90

13624 The People of the State of New York,  
Respondent,

-against-

Eladio Lantigua,  
Defendant-Appellant.

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Jorge Guttlein & Associates, New York (Jorge Guttlein of  
counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-  
Levi of counsel), for respondent.

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Order, Supreme Court, New York County (Ruth Pickholz, J.),  
entered July 10, 2012, which denied defendant's CPL 440.10 motion  
to vacate a judgment, unanimously affirmed.

Defendant's claim under *Padilla v Kentucky* (559 US 356  
[2010]) is unavailing, because that decision has no retroactive  
application to defendant's case (see *People v Baret*, 22 NY3d 777  
[2014]).

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

ENTERED: NOVEMBER 25, 2014

  
CLERK



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr.,            J.P.  
Dianne T. Renwick  
Richard T. Andrias  
Rosalyn H. Richter  
Barbara R. Kapnick,            JJ.

12785  
Ind. 30146/11

x

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The People of the State of New York  
Respondent,

-against-

James Bullock,  
Defendant-Appellant.

x

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Defendant appeals from the order of the Supreme Court,  
New York County (Roger S. Hayes, J.), entered  
on or about July 6, 2012, which adjudicated  
him a level one sexually violent offender  
pursuant to SORA.

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

Cyrus R. Vance, Jr., District Attorney, New  
York (Yuval Simchi-Levi and Ellen Stanfield  
Friedman of counsel), for respondent.

ANDRIAS, J.

In 2008, defendant was convicted in North Carolina of sexual battery. Based on his relocation to New York, the Board of Examiners of Sex Offenders (Board) determined that defendant was required to register under the Sex Offender Registration Act (SORA) (Correction Law art 6-C) and recommended that he be designated a level one sex offender. Finding that the North Carolina conviction was the equivalent of sexual abuse in the first degree, a sexually violent offense under Correction Law § 168-a(3), Supreme Court found that it was compelled to adjudicate defendant a level one sexually violent offender (see Correction Law § 168-a[7][b]), which subjects him to lifetime registration with the Division of Criminal Justice Services (Correction Law § 168-h[2]).

On this appeal, defendant argues that his North Carolina conviction of sexual battery is not comparable to a conviction in New York state for sexual abuse in the first degree, and that he is not required to register under SORA. He also argues that the court erred when it concluded that it lacked the discretion to deviate from the sexually violent offender designation. For the reasons that follow, we find these arguments unavailing.

Defendant is required to register as a sex offender in New York under SORA on the basis of his North Carolina conviction of

sexual battery, which includes the essential elements of sexual abuse in the first degree (Penal Law § 130.65[1]). The essential elements requirement may be satisfied when “the conduct underlying the foreign conviction . . . is, in fact, within the scope of the New York offense” (*Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 753 [2007]). Regardless of whether the North Carolina statute could be viewed as criminalizing some conduct that might not be covered by the New York statute, clear and convincing evidence supports the conclusion that in the North Carolina case defendant forcibly subjected another person to sexual contact for the purpose of sexual gratification (see Penal Law § 130.00[3]).

Defendant was properly adjudicated a sexually violent offender. Sexual abuse in the first degree is deemed a “sexually violent offen[se]” under Correction Law § 168-a(3) (a), and a person who commits that crime - or the equivalent- is defined as a sexually violent offender under Correction Law § 168-a(7) (b).

Departing from established precedent of the Appellate Divisions, the dissent would adopt defendant’s argument that a court has the discretion to decline to designate a defendant a sexually violent offender, even where he or she falls within the statutory definition, and would remand to Supreme Court for a de novo determination of defendant’s designation, giving due

consideration to the recommendation of the Board. We disagree.

When a sex offender from another state has established residence in New York, "[t]he board shall determine whether the sex offender is required to register with the division [of criminal justice services]" (Correction Law § 168-k[2]). Pursuant to the 2002 amendments to SORA, Correction Law §§ 168-k and 168-l were amended to require the Board to recommend and a court to determine whether the offender is a sexual predator, sexually violent offender, or predicate sex offender. The court must also determine the level of community notification that will be assigned (see L 2002, ch 11, §§ 15 and 17).

The amended section 168-k(2) provided:

"After reviewing any information obtained, and applying the guidelines established in subdivision five of section one hundred sixty-eight-1 of this article, the board shall within sixty calendar days make a recommendation regarding the level of notification pursuant to subdivision six of section one hundred sixty-eight-1 of this article and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article . . . . It shall be the duty of the county court or supreme court in the county of residence of the sex offender, applying the guidelines established in subdivision five of section one hundred sixty-eight-1 of this article, to determine the level of notification pursuant to subdivision six of section one hundred sixty-eight-1 of this article and whether

such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. . . ."<sup>1</sup>

The amended Section 168-1(6) provided:

"Applying these guidelines, the board shall within sixty calendar days prior to the discharge, parole, release to post-release supervision or release of a sex offender make a recommendation which shall be confidential and shall not be available for public inspection, to the sentencing court as to whether such sex offender warrants the designation of sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. In addition, the guidelines shall be applied by the board to make a recommendation to the sentencing court which shall be confidential and shall not be available for public inspection, providing for one of the following three levels of notification depending upon the degree of the risk of re-offense by the sex offender."

"While [the] Court is directed to apply SORA's Risk Assessment Guidelines in making both determinations . . . , the

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<sup>1</sup>Correction Law § 168-n(1) was similarly amended to require that "[a] determination that an offender is a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article shall be made prior to the discharge, parole, release to post-release supervision or release of such offender by the sentencing court applying the guidelines established in subdivision five of section one hundred sixty-eight-1 of this article after receiving a recommendation from the board pursuant to section one hundred sixty-eight-1 of this article" (see L 2002, ch 11, § 20).

statutory definition of sexually violent offender, namely, a sex offender convicted of one of several enumerated sexually violent offenses, does not allow for a discretionary determination" (*People v Lockwood*, 308 AD2d 640, 640 [3d Dept 2003]). Thus, although the "level suggested by the RAI [risk assessment instrument] is merely presumptive and a SORA court possesses the discretion to impose a lower or higher risk level if it concludes that the factors in the RAI do not result in an appropriate designation" (*People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; see also *People v Pettigrew*, 14 NY3d 406, 409 [2010]), the Court of Appeals has observed that

"since 2002, SORA has compelled a defendant convicted of a 'sexually violent offense' to register at least annually for life (Correction Law § 168-h [2]; see Correction Law § 168-a [3][a][7]; [b]; L 2002, ch 11, §13). The same is true of a predicate sex offender--a person who is convicted of a sex offense or sexually violent offense after having previously been convicted of such an offense (Correction Law § 168-a [7][c]; § 168-h[2]). But for others, the registration period depends on the risk level designation that is assigned at the SORA proceeding--level one, evidencing a low risk of reoffense, level two, a moderate risk, and level three, a high risk. Individuals determined to have the lowest risk of reoffense - level one offenders--are relieved of the duty to register after 20 years while level two and three offenders must register at least once each year for life (Correction Law § 168-h)" (*People v Mingo*, 12 NY3d at 570-571 [footnotes omitted]).

Consistent with this view, in *People v Williams* (96 AD3d 421, 422 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]), this Court held that a sexually violent offender "designation was required by statute" because the defendant pleaded guilty to "an enumerated sexually violent offense" (see also *People v Bunger*, 78 AD3d 1433, 1434 [2d Dept 2010] ["inasmuch as defendant's conviction for rape in the first degree is deemed a sexually violent offense for the purposes of the Sex Offender Registration Act . . . we conclude that he was properly classified as a sexually violent offender"], *lv denied* 16 NY3d 710 [2011]; *People v Ayala*, 72 AD3d 1577, 1578 [4th Dept 2010] ["(p)ursuant to Correction Law § 168-a(3), defendant is a sexually violent offender by virtue of his 1986 conviction of sodomy in the first degree"], *lv denied* 15 NY3d 816 [2010]).

The dissent would abandon this established precedent, concluding that the prior decisions of all four Appellate Divisions did not engage in an adequate analysis of SORA and that read in the context of the entire statutory scheme, such statutory definition serves as a threshold consideration as to whether a sex offender is eligible to be classified as a sexually violent offender. In support, the dissent emphasizes that Section 168-1(6) provides that "[a]pplying these guidelines," the Board makes a recommendation "to the sentencing court as to

whether such sex offender warrants the designation of sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article" and that Section 168-n(1) states that after receiving the recommendation the court shall make its determination on the issue "applying the guidelines." The dissent reasons that the use of the term "warrants" and reference to the guidelines establish that the court has the discretion to determine whether a defendant should be designated a sexually violent offender.

However, that statute only details the procedure for SORA adjudications, describing how after the Board indicates whether a defendant is a sexually violent offender, a court conducts a hearing in which it reviews the Board's recommendations and officially pronounces the defendant's designation. While the court is not bound by the recommendation of the Board, there is nothing in the language of the Correction Law that states that the court has discretion to not designate as sexual predators, sexually violent offenders or predicate sex offenders those defendants who meet the respective statutory definitions.

In essence, the dissent is trying to equate the nondiscretionary role of the court to designate sexual predators, sexually violent offenders and predicate sex offenders, who are

defined by statute, with the Board's assessment of points against an offender. However, the assessment of points gives the court the authority to conclude an upward or downward departure is appropriate where circumstances warrant (see generally *People v Gillotti*, 23 NY3d 841 [2014]). In *Gillotti*, the Court of Appeals explained:

“Under SORA, a court must follow three analytical steps to determine whether or not to order a departure from the presumptive risk level indicated by the offender's guidelines factor score. At the first step, the court must decide whether the aggravating or mitigating circumstances alleged by a party seeking a departure are, as a matter of law, of a kind or to a degree not adequately taken into account by the guidelines . . . . At the second step, the court must decide whether the party requesting the departure has adduced sufficient evidence to meet its burden of proof in establishing that the alleged aggravating or mitigating circumstances actually exist in the case at hand . . . . If the party applying for a departure surmounts the first two steps, the law permits a departure, but the court still has discretion to refuse to depart or to grant a departure. Thus, at the third step, the court must exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants a departure to avoid an over-or under-assessment of the defendant's dangerousness and risk of sexual recidivism” (23 NY2d at 861).

The court does not have such discretion, however, where the sex offenses are defined by statute.

This interpretation is consistent with statements in the legislative history of the 2002 amendments which demonstrates that the purpose of the bill was to bring SORA into full compliance with federal statutes (see Memorandum of Senator Dean G. Skelos, 2002 NY Legis Ann; see also Budget Report on Bills, Bill Jacket, L 1995, ch 192). The Budget Report explained:

"In order to remain eligible for full Federal Byrne Formula Grant Funding, New York must demonstrate compliance with the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Program (Wetterling Act), the Pam Lychner Sexual Offender Tracking and Identification Act of 1996 (Lychner Act), section 115 of the General Provisions of Title I of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act (CJSA) and the Campus Sex Crimes Prevention Act. The provisions of the bill will satisfy the necessary requirements including:

- "• The Lychner Act mandates lifetime registration for recidivists and aggravated offenders. This bill amends New York's registration requirements to ensure lifetime registration for these offenders.
- "• CJSA . . . . also requires a state to prescribe a heightened registration requirement for sexually violent predators. This bill meets this criteria by defining sexual predators and requiring these offenders to register for life and personally verify their residence address every 90 days."

The Governor's Program Bill Memorandum #102 explains:

"The Lychner Act mandates lifetime registration for recidivists and aggravated offenders: A state may not demonstrate compliance with the Lychner Act if it allows such an offender to be relieved of the lifetime registration requirement. Currently, the Sex Offender Registration Act only provides for lifetime registration for those offenders designated a level 3 risk. The risk level is assigned by the sentencing court and the court is not obligated to designate an offender a level 3 in cases where the offender has committed an aggravated offense or is a repeat offender."

Nor is the result that a level one offender will be subjected to lifetime registration anomalous. The statute plainly requires risk-level-one offenders to be designated sexually violent offenders when they commit enumerated sexually violent offenses (Correction Law § 168-a[3][a][b], [7][b]; see *People v Argueta*, 114 AD3d 651 [2d Dept 2014] [granting a downward departure from a risk level of two to a risk level of one, but noting that the defendant would remain a sexually violent offender subject to lifetime registration]). In this regard, we note that although sexually violent level one offenders must register for life, their names are not publicly available on the Internet Directory maintained by the Division, which contains information relating to level two and three

offenders (see Correction Law § 168-p[1]). Rather, the public can obtain information about a specific level one offender by calling a toll-free telephone number maintained by the Division (see Corrections Law § 168-q [1]).

We have considered and rejected defendant's remaining arguments, including those addressed to any alleged differences between the Risk Assessment Instrument and the court's findings.

Accordingly, the order of the Supreme Court, New York County (Roger S. Hayes, J.), entered on or about July 6, 2012, which adjudicated defendant a level one sexually violent offender pursuant to SORA, should be affirmed, without costs.

All concur except Renwick, J. who dissents in an Opinion.

RENWICK, J. (dissenting)

In this SORA proceeding, defendant appeals the determination by Supreme Court that he must register as a level one, sexually violent offender by virtue of his North Carolina conviction of sexual battery. The principal issue that we must decide is whether Supreme Court erred in determining that it lacked authority to accept the Board of Examiners of Sex Offenders' recommendation that defendant should not be adjudicated a sexually violent offender, an adjudication which triggers lifetime registration as a SORA sex offender (see Corrections Law § 168-n). For the reasons discussed herein, I respectfully disagree with the majority's conclusion that Supreme Court does not have the discretion to accept or reject the recommendation of the Board of Examiners, and, thus, we should remand the proceeding to Supreme Court for a de novo determination, giving due consideration to the recommendation of the Board. Accordingly, I dissent.

#### Factual and Procedural Background

The genesis of this appeal stems from the October 16, 2008, guilty plea of defendant in a North Carolina state court to sexual battery.<sup>2</sup> The conviction arose from allegations that in

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<sup>2</sup> Defendant received a sentence that included a prison term of 60 days and 18 months of probation.

the early morning on May 4, 2008, defendant approached a 17-year-old female neighbor from behind as she was about to enter her home. After telling her to be quiet, defendant, who was also 17 years old, threw her down to the ground, placed his hands over her mouth, and lifted her shirt. Defendant then proceeded to lift up her bra and place his mouth and hands on her breasts. When she started to cry, defendant told her that he was not going to rape her. Upon his arrest, defendant told the police that he just wanted to "scare" his neighbor, but did not intend to rape the neighbor.

Sometime in 2011, defendant moved to New York and was informed by the Board of Examiners that, since he had been convicted of a sexual offense in another jurisdiction and resided in New York, he was required to register as a sex offender under SORA. Having made that determination, the Board of Examiners made a recommendation to Supreme Court as to the risk level that should be assigned to defendant. The Board of Examiners prepared a Case Summary and Risk Assessment Instrument (RAI) and assigned defendant a total of 40 points, correlating to a presumptive risk level one, signifying a low risk of re-offense. The Board recommended that a departure from the presumptive risk level one was not warranted. Moreover, the Board recommended that defendant should not be adjudicated a sexually violent offender,

even though the North Carolina conviction qualified as a sexually violent offense as defined under SORA.<sup>3</sup>

The People did not agree with the Board of Examiners' recommendations. First, in its submissions to Supreme Court regarding risk level, the People argued that defendant should be assessed 115 points, designating him a presumptive level three sex offender. Among other things, the People pointed out that the Board of Examiners failed to take into account that defendant committed a second sexual battery within a few weeks after committing the instant offense.<sup>4</sup> Second, the People recommended that defendant should be adjudicated a sexually violent offender.

In his submissions to Supreme Court, defendant argued that he should be adjudicated a level one sex offender. Defendant maintained that he only intended to "scare" his neighbor, he took responsibility for his actions, and in North Carolina, he was "deemed to present the lowest level of risk." Further, defendant argued that his subsequent sexual battery conviction "had no impact on [his] risk assessment level in North Carolina," because

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<sup>3</sup> Under SORA, a sexually violent offender is a sex offender convicted of a sexually violent offense, which includes a conviction for sexual abuse in the first degree (see Corrections Law § 168-a[1], [3][a], [7][b]; Penal Law § 130.65).

<sup>4</sup> The instant offense took place on May 4, 2008, while the second offense took place on May 30, 2008.

that conviction would only warrant 10 additional points under the factor dealing with unsatisfactory conduct while confined, since it was committed while on probation. Defendant argued that there was no basis for an upward departure, as suggested by the People. He asserted that, although his sexual offenses happened within a matter of days, those acts were "shocking" and "aberrational" given his character and overall behavior. To corroborate his contentions, defendant submitted letters from family, friends, and teachers. Defendant also noted that he had sought psychological counseling to address his actions during May of 2008. Finally, defendant opposed the People's request that he should be designated a sexually violent offender, maintaining that he was not convicted of an offense that would warrant such a designation.

At the inception of the SORA determination proceeding, Supreme Court stated that it would only consider the Board's recommendation that was based primarily on defendant's October 16, 2008 conviction, and it thus disregarded the People's proposed RAI. First, the court found that defendant's North Carolina conviction was an offense which included "all the essential elements" of sexual abuse in the first degree under New York law, since throwing the victim to the ground, lifting up her shirt with his teeth, and fondling her breasts met the definition

of forcible compulsion.

Second, Supreme Court concurred with the Board's RAI that defendant was a risk level one to the extent it found that he should be assessed 30 points, rather than the 40 points recommended by the Board. The court stated that had defendant's score been higher, it would have considered a downward departure, since he apologized for what he did and was seeking treatment to address his behavior. The court took into account the letters it received on behalf of defendant, as well as his involvement in a church. The court further considered that defendant's offenses all occurred within "[two] weeks of his life." Rejecting the People's categorization of defendant as sadistic, the court found that defendant was trying to make amends for his actions.

Finally, Supreme Court held that if it had discretion, it would have adhered to the Board's recommendation not to designate defendant a sexually violent offender. The court, however, found that defendant's October 16, 2008 conviction in North Carolina was the equivalent of sexual abuse in the first degree under New York law, and although the court found the result to be "anomalous," it believed that it lacked discretion to deviate from defendant's designation as a sexually violent offender.

On this appeal, defendant argues that since his North Carolina conviction of sexual battery is not comparable to a

conviction in New York state for sexual abuse in the first degree, he was not required to register under SORA.

Alternatively, defendant argues that at the SORA hearing, Supreme Court erred when it concluded that it lacked discretion not to designate him a sexually violent offender.

#### Discussion

For the reasons the majority states, I agree that Supreme Court correctly found that defendant's North Carolina conviction demonstrated that he committed sexual abuse in the first degree under New York Penal Law, requiring his registration as a sex offender. However, as indicated, the majority incorrectly finds that the statutory definition of sexually violent offender under SORA, namely a sex offender convicted of one of several enumerated sexually violent offenses, does not allow for a discretionary determination (see Correction Law § 168-a [3][a], 7[b]). In my view, the statutory definition of sexually violent offender cannot be read in isolation. Rather, when read in the context of the entire SORA statute, it becomes clear that the definition articulated is the threshold consideration to determining whether a sex offender is eligible to be classified as a sexually violent offender.

Under SORA, when an offender is convicted of an offense that requires registration as a sex offender, an assessment must be

made regarding "the risk of a repeat offense . . . and the threat posed to the public safety" by the sex offender (Correction Law § 168-1[5]). The SORA statutory scheme assigns such task both to the Board of Examiners and the "adjudicating court."<sup>5</sup> As to the Board of Examiners, Corrections Law § 168-1[5] requires that the Board shall develop guidelines and procedures to "assess the risk of a repeat offense by such sex offender and the threat posed to the public safety." Further, the statute specifically mandates that "[s]uch guidelines shall be based upon, but not limited to," certain enumerated facts that are either "indicative of high risk of repeat offense" or that "minimize risk or reoffense" (*id.*). Accordingly, the Board opts to create an objective RAI that provides a risk level combining risk of re-offense and danger posed by a sex offender. As required by the SORA Act, the instrument includes factors related to the offender's current offense, his criminal history, his post-offense behavior while confined for the offense, and his planned release environment

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<sup>5</sup> I use the phrase "adjudicating court" to refer to the forum that has jurisdiction over a SORA determination proceeding after receiving a recommendation from the Board of Examiners. This is usually the judge who presides over a sex offense case and sentences the sex offender. With regard to individuals convicted in another jurisdiction, the court where the offender resides holds a SORA determination proceeding to determine the offender's risk level and classification.

(see Correction Law § 168-1[5]).<sup>6</sup>

Applying the aforementioned SORA guidelines, the Board is required to make two recommendations to the adjudicating court. First, the statute states that "the guidelines shall be applied by the board to make a recommendation to the [adjudicating] court . . . providing for one of the following three levels of notification depending upon the degree of the risk of re-offense by the sex offender." If the risk of repeat offense is low, a level one designation shall be given to such sex offender. If the risk of repeat offense is moderate, a level two designation shall be given to such sex offender. If the risk of repeat offense is high and there exists a threat to the public safety, a level three designation shall be given to such sex offender.

The second recommendation - the one at issue here - is whether the sex offender must be classified as either a sexual predator, sexually violent offender or predicate sex offender. Specifically, Corrections Law § 168-1(6) provides:

**"Applying these guidelines,** the board shall .  
. . . make a recommendation . . . to the  
[adjudicating] court as to whether such sex

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<sup>6</sup> The RAI assigns numerical values to each risk. The presumptive risk level is then calculated by adding the points that the offender scores in each category. If the total score is 70 points or less, the offender is presumptively level one; if more than 70 but less than 110, he is presumptively level two; if 110 or more, he is presumptively level three.

offender **warrants** the designation of sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article" (emphasis added).

As the aforementioned legislative scheme indicates, the statute is quite clear: Based on the factors outlined in the statutory guidelines, the Board of Examiners recommends to the adjudicating court whether a defendant "warrants" the designation of a sexual predator, sexually violent offender, or predicate sex offender, as defined in Correction Law § 168-a(7), as well as which of the three levels of notification the defendant should be assigned based upon "the risk of a repeat offense" and the "threat posed to the public safety" (Correction Law § 168-1[5].)

After receiving the Board of Examiners' recommendations as to the levels of notification and the designation of sex offender, the adjudicating court must make "a judicial determination" as to both. The adjudicating court is to use the same factors as the Board in making its determination (see *People v Stevens*, 91 NY2d 270 [1998]). Specifically, Corrections Law 168-n provides:

"§168-n. Judicial determination.  
1. A determination that an offender is a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred

sixty-eight-a of this article shall be made . . . by the sentencing court *applying the guidelines* established in subdivision five of section one hundred sixty-eight-1 of this article after receiving a recommendation from the board pursuant to section one hundred sixty-eight-1 of this article.

"2. In addition, *applying the guidelines* established in subdivision five of section one hundred sixty-eight-1 of this article, the sentencing court shall also make a determination with respect to the level of notification, after receiving a recommendation from the board pursuant to section one hundred sixty-eight-1 of this article [emphasis added]."

Despite the clear statutory language and legislative scheme giving the Board of Examiners the required task of making a recommendation to the adjudicating court as to whether the sexual offender should be classified as a sexually violent offender, the People argue - and the majority agrees - that the court has no authority under SORA to accept, or let alone consider, the Board's recommendation. What is the purpose of the recommendation, then? Indeed, there is nothing in the statutory language that either explicitly or implicitly states that the court has no discretion to accept or reject the Board of Examiner's recommendation and that the court should instead adjudicate a sex offender to be a sexually violent offender **solely** on the statutory definition of sexually violent offenses under SORA.

To the contrary, it is worth repeating that, after the Board of Examiners makes the threshold determination that an offense qualifies as a sexually violent offense as defined under SORA, the statute explicitly provides two additional steps for making a final determination to classify a sex offender as a sexually violent offender. First, the Board of Examiners makes a **recommendation**, after applying the SORA guidelines, as to whether the sex offender "**warrants**" designation as a sexually violent offender. Second, after receiving this recommendation, the court, upon "applying the guidelines," makes the judicial determination whether to classify a sex offender as a sexually violent offender. Had the legislature intended this classification to be automatically based on a qualifying conviction, it would not have given the Board of Examiners the initial task of making a recommendation to the court on whether to adjudicate an offender a sexually violent offender. In addition, it surely would not have created such redundancy and made it mandatory to consider the statutory "guidelines" in determining whether to classify a sex offender as a sexually violent offender. Accordingly, the only logical, reasonable and just interpretation of the statute is that the adjudicating court has the discretion to consider and accept the Board of Examiners's recommendation whether to adjudicate a sex offender a

sexually violent offender.

The conclusion I reach here is entirely consistent not only with the statutory text and legislative scheme, but also with the legislative purpose of SORA. Although, pursuant to SORA, the Board of Examiners developed guidelines and procedures to assess the risk of a repeat offense by a sex offender and the threat the offender poses to the public safety, the final result is fact-specific and determined by the totality of each case's individual circumstances. Indeed, the SORA guidelines themselves are based upon an individualized approach that is mandated by federal law (see former 42 USC §14071[a][2]); 42 USC § 16901 *et seq.*), and they are designed to "eschew per se rules [so] that risk should be assessed on the basis of a review of all pertinent factors (see Correction Law §168-1[5] & [6]" (SORA: Risk Guidelines and Commentary at 3 [2006]; see also *People v Wroten*, 286 AD2d 189, 197 [4th Dept 2001], *lv denied* 97 NY2d 610 [2001]). The People, however, propose an interpretation of the statute that would deprive the Board of Examiners and the adjudicating court of such individualized and fact-specific assessment. In my view, we should reject this narrow interpretation that would not further the government interests advanced by SORA of maximizing community protection without infringing on the individual interests more than is necessary to achieve that aim.

Contrary to the majority's assertion, "the legislative history of the 2002 amendments" does not require the conclusion that the legislature intended to deprive the court of discretion as to whether or not to adjudicate a sex offender a sexually violent offender, pursuant to the Board of Examiners' recommendation. The New York rules of statutory construction provide "that if the legislative intent is clear no attempt at construction should or will be made, and that rules of construction for a statute are to be invoked only where its language leaves its purpose and intent uncertain" (McKinney's Cons Laws of NY, Book 1, Statutes § 76, Comment at 168-169). With respect to legislative history, the rules specifically provide that "[w]here the legislative language is clear, there is no occasion for examination into extrinsic evidence to discover legislative intent; only where legislative language is ambiguous is the consideration of extrinsic evidence warranted. In other words, where no ambiguity or doubt appears in a statute, the court should confine its attention to the statute and not allow extrinsic circumstances to introduce a difficulty in the interpretation of plain language" McKinney's Cons Law of NY, Book 1, Statutes § 120, Comment at 242). Pursuant to these rules of construction, the Court of Appeals has held that "[r]esort to legislative history will be countenanced only where the language

is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the enactment" (*Matter of Auerbach v Board of Educ. Of City School Dist. Of City of N.Y.*, 86 NY2d 198, 204 [1995]).

Finally, I am cognizant that our decision in *People v Williams* (96 AD3d 421, 422 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]) and subsequent cases (*see e.g. People v Faulkner*, \_\_ AD3d \_\_ [Appeal No. 12914, decided simultaneously herewith] and *People v Rodriguez* \_\_ AD3d \_\_ [Appeal No. 12865-66, decided simultaneously herewith]) come to a different conclusion,<sup>7</sup> and we should not deviate from it without careful consideration. Like the adjudicating court, *People v Williams* concludes that the statutory definition of sexually violent offender, i.e., a sex offender convicted of one of several enumerated sexually violent offenses, does not allow for a discretionary determination. However, in my view, our reliance, both in *Williams* and in this case, solely on the statutory definition of sexually violent offender is misplaced because it fails to consider the additional

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<sup>7</sup> Other Departments have reached a similar conclusion to *People v. Williams* (*see eg People v Bunger*, 78 AD3d 1433 [2d Dept. 2010], *lv denied* 16 NY3d 710 [2011]; *People v Ayala*, 72 Ad3d 1577 [4th Dept 2010, *lv denied* 19 NY3d 813 [2012]; *People v Lockwood*, 308 AD2d 640 [3d Dept 2003]). However, like *Williams*, these decisions failed to address the statutory provisions addressed herein.

relevant statutory provisions discussed herein necessary to provide an accurate understanding of the legal framework under which sex offenders are classified as sexually violent offenders.

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

ENTERED: NOVEMBER 25, 2014

  
CLERK