SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 25, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7314 North American Airlines, Inc., Index 602985/09
Plaintiff-Respondent,

-against-

Wilmington Trust Company, etc., et al.,
Defendants-Appellants.

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

Eversheds Sutherland (US) LLP, Atlanta, GA (Shawn D. Rafferty of the bar of the State of Georgia, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 7, 2017, which, to the extent appealed from, granted plaintiff's motion for summary judgment on the causes of action for breach of a lease agreement, ordering a damages trial thereon, and conversion, and for dismissal of defendant Wilmington Trust Company's (WTC) counterclaims for breach of contract, unanimously affirmed, with costs.

Plaintiff alleges that defendant, the owner trustee of a trust holding a Boeing 767 airplane, breached a contract governing the lease of the airplane by refusing to reimburse it

for necessary maintenance work and repairs to one of the airplane's engines. Plaintiff also alleges that defendant wrongfully drew money under a letter of credit funded by plaintiff in lieu of a security deposit minutes before it was to expire. Defendant alleges that plaintiff breached the lease by failing to timely redeliver the plane and by failing to return it in the required condition.

The motion court correctly granted plaintiff summary judgment on the claim for breach of the lease agreement. Defendant contends that plaintiff's right to reimbursement is governed by two separate provisions and that the court erroneously overlooked one of them. This argument is unpreserved and, in any event, without merit.

Section 4.3(b)(ii)(A)(2) is ambiguous, because the term "full performance restoration" is not defined, and it is unclear what that term entails (*see Frenkel Benefits, LLC v Mallory*, 142 AD3d 835 [1st Dept 2016]). The uncontroverted extrinsic evidence submitted to show the customary usage of the term (*see id.*; *Fox Film Corp. v Springer*, 273 NY 434, 436 [1937]; *J.P. Morgan Inv. Mgt. Inc. v AmCash Group, LLC*, 106 AD3d 559 [1st Dept 2013]) supports plaintiff's argument. Plaintiff's expert affidavit demonstrates that the term "full performance restoration" is used commonly in the commercial aviation industry to describe engine

maintenance equivalent to the "performance workscope" that was performed on the subject engine, and defendant's evidence does not rebut this showing. Further, defendant's evidence acknowledges that "full performance restoration" was performed on the engine.

We reject defendant's argument that the "full performance restoration" that was done does not qualify as reimbursable work because the shop visit was not made for the purpose of "restor[ing] the [e]ngine performance (i.e. EGT margin)." Although the shop visit was initially occasioned by a blade failure, and plaintiff did not know what the EGT margin was at the time the blade damage was discovered, it is undisputed that the EGT margin was found to be low and that its restoration was performed. The fact that the EGT margin restoration was a consequence, as opposed to a purpose, of the shop visit does not bar plaintiff from reimbursement.

Defendant's argument that the conversion claim should be dismissed because it "actually constitutes a potential claim for contract damages" is unpreserved and, in any event, unavailing. The damages sought on the conversion claim did not directly arise from breach of the lease, but only as a consequence of drawing down the funds under the letter of credit. They are also distinct from those damages sought on the breach of contract

claim (*cf. Cronos Group Ltd. v XcomIP, LLC*, 156 AD3d 54, 75 [1st Dept 2017] [where conversion claim merely restated claim for damages for breach of contract based on failure to pay charges due and owing, it was properly dismissed]).

The court correctly granted plaintiff summary judgment on the conversion claim. While section 4.3(a) of the lease grants defendant broad discretion in drawing on the letter of credit, it also indicates that the purpose of the letter of credit is to ensure recovery of funds owed by plaintiff or expended as a consequence of plaintiff's breach of the lease. Although defendant technically complied with the requirements of the letter of credit by submitting a letter certifying that an "Event of Default" had occurred when it drew the funds, it has not demonstrated that it sustained damages as a result of plaintiff's alleged breach so as to be entitled to retain the funds. Defendant exercised unauthorized dominion over the money in question (see *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384 [1st Dept 1992]) and transferred it to nonparty Air Italy S.p.A. Therefore, plaintiff is entitled to recover on its claim for conversion. Defendant's argument that it could properly draw on the letter of credit to recover unpaid rent and Maintenance Reserve Payments that stemmed from plaintiff's retention of the airplane after the lease's

termination date is unpreserved, and unpersuasive, as WTC had not sustained the above damages at the time of the draw.

The court correctly dismissed defendant's breach of contract counterclaims. Defendant's contention that plaintiff is judicially estopped to argue that defendant may not assert the counterclaims on behalf of Air Italy is unpreserved and, in any event, without merit. Further, the record does not support defendant's contention that Air Italy became a trust beneficiary, or had a possessory interest in the plane. Defendant's contention that, in any event, it is still entitled to pursue the breach of contract counterclaims in its capacity as owner trustee and lessor, pursuant to the trust agreement and lease is unpreserved and we decline to address it.

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9085 The People of the State of New York, Ind. 729/16
Respondent,

-against-

Gregory Anderson,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered March 23, 2017,

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

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

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

ENTERED: APRIL 25, 2019

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

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9086 In re Purple Metellus, Petitioner, Index 101719/17

-against-

Maria Torres-Springer, etc., et al., Respondents.

Sanctuary for Families Center for Battered Women's Legal Services, New York (Dana Kaufman of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for Maria Torres-Springer, respondent.

Determination of respondent Department of Housing Preservation and Development (HPD), dated September 25, 2017, insofar as it granted respondent MPlaza LP's request for a certificate of eviction, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Shlomo Hagler, J.], entered May 7, 2018), dismissed, without costs.

HPD's determination that the excessive noise caused by occupants or visitors to petitioner's apartment constituted a nuisance, in violation of a previously ordered stipulation during her probationary period, is supported by substantial evidence (*see Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045-1046 [2018]). There is ample evidence in the record

that petitioner's residence continued to be the source of excessive noise, which the hearing officer found was not credibly refuted by the testimony of petitioner and her son.

Petitioner is not entitled to another or different opportunity to cure the nuisance, having been provided with two previous opportunities to do so, which failed.

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

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9087 In re Richard I., Jr.,
Petitioner-Respondent,

-against-

Darcel I.,
Respondent-Appellant.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Anne Reiniger, New York, for respondent.

Steven P. Forbes, Jamaica, attorney for the child.

_____

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about April 5, 2018, which, after a hearing, granted petitioner father's application for sole physical and legal custody of the subject child, unanimously affirmed, without costs.

The determination that the father established that there has been a sufficient change of circumstances such that a modification of the custody arrangement was in the child's best interests has a sound and substantial basis in the record (*see McGinnis v McGinnis*, 159 AD3d 475 [1st Dept 2018]; *cf. Matter of David H. v Khalima H.*, 111 AD3d 544 [1st Dept 2013], *lv dismissed* 22 NY3d 1149 [2014]). While respondent mother had been the child's primary caretaker, the child struggled in school, was

often late to school and had poor hygiene. The child was also suspended twice from school for violent behavior, and the mother failed to enroll him in therapy despite recommendations by the school. On the other hand, the father worked with the school to help the child improve, enrolled the child in individual therapy and participated in sessions with him, and consistently provided for the child's care and well-being (*see Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]).

The forensic evaluator found that both parents had a strong relationship with the child, but that the father was more willing than the mother to facilitate the noncustodial parent's relationship with the child (*see Matter of Damien P.C. v Jennifer H.S.*, 57 AD3d 295 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009]). Furthermore, the court properly struck the mother's testimony after she failed to appear to complete her testimony and drew a negative inference on that basis (*see Matter of Rosemary V. [Jorge V.]*, 103 AD3d 484 [1st Dept 2013]).

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9088 G.G.N., an Infant under the Age of Eighteen Years by Gamil N. as parent and natural guardian et al., Plaintiffs-Respondents,

-against-

Precious P. Ramos, et al., Defendants-Appellants.

Index 23140/16E

Picciano & Scahill, P.C., Bethpage (Andrea E. Ferrucci of counsel), for appellants.

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for respondents.

Order, Supreme Court, Bronx County (Donna Mills, J.), entered May 3, 2018, which, inter alia, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

On April 20, 2016, at about 3:26 p.m., then 11-year-old infant plaintiff G.G.N. (plaintiff) was walking east to west in the crosswalk of the Grand Concourse at its intersection with East 165th Street when he was struck by a 2013 Chevrolet Malibu owned by defendant Venus E. Cherrington and operated by defendant Ramos.

According to the police accident report, Ramos was driving Cherrington's car "southbound on Grand Concourse in the center

lane approaching intersection of East 165 St with a steady green traffic signal" when he struck plaintiff, who "was crossing from East to West across Grand Concourse in the north side marked crosswalk against pedestrian crossing signal" after "emerging from behind an uninvolved vehicle which was stopped in the left turn only lane of the southbound Grand Concourse."

Ramos testified that he was in the left lane with the green light when the accident happened. He was traveling at about 25 miles per hour until the impact. Ramos testified that plaintiff was running and to Ramos's left when he "just came behind an SUV, a big utility vehicle" that was waiting before the crosswalk at the red light controlling the lane to turn left. Plaintiff was in the crosswalk when the accident happened and Ramos did not see him until a "couple of seconds" before the accident.

Plaintiff's brother and another eyewitness maintained that plaintiff was in the crosswalk and almost to the other side of the street when the light turned green and Ramos accelerated, striking plaintiff.

Defendants moved for summary judgment on the issue of liability. Defendants argued that they could not be held liable for plaintiff's injuries because the record showed that Ramos had the right of way, was traveling at a reasonable speed, and did not see plaintiff until after he ran out from the SUV about 10

feet away from Ramos's vehicle, leaving Ramos with less than two seconds to react.

Plaintiffs cross-moved for summary judgment on liability, asserting that the record established that plaintiff was in the marked crosswalk when the accident happened and that his injuries were the result of Ramos's violation of Vehicle and Traffic Law § 1111 by failing to yield the right of way or use reasonable care to avoid striking plaintiff. Plaintiffs asserted that they were entitled to a lesser burden of proof in light of the fact that plaintiff is incapacitated.

The motion court denied the cross motions on liability, finding triable issues of fact.[1] We now affirm.

Summary judgment is precluded where, as here, there are differing versions as to how an accident occurred (*see Medina-Ortiz v Seda,* 157 AD3d 499 [1st Dept 2018]; *Martinez v Clean Air Car Serv. & Parking Branch One, LLC*, 148 AD3d 569 [1st Dept 2017]; *Susino v Panzer*, 127 AD3d 523, 524 [1st Dept 2015]; *Ramos v Rojas*, 37 AD3d 291, 292 [1st Dept 2007]; *DeRosa v Valentino*, 14 AD3d 448 [1st Dept 2005]). Defendant Ramos maintains that he had the light and was traveling at 25 miles per hour when plaintiff

[1]The court granted plaintiffs' cross motion for summary judgment on the issue of serious injury. That ruling is not at issue on the appeal.

darted from behind the car in the turn lane; plaintiffs' witnesses claim that plaintiff was crossing lawfully in the crosswalk when the light changed and Ramos abruptly accelerated.

Plaintiffs, however, should receive the benefit of a jury charge under the *Noseworthy* doctrine (*see Noseworthy v City of New York*, 298 NY 76, 80-81 [1948]), which permits a plaintiff to prevail on a lesser degree of proof, since it is undisputed that plaintiff is unable to speak and confined to a hospital bed as a result of the accident (*see Williams v Hooper*, 82 AD3d 448, 449-453 [1st Dept 2011]).

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9089 Vertical Systems Analysis, Inc., Index 650808/17
Plaintiff-Appellant,

-against-

Peter J. Balzano,
Defendant-Respondent.

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Law Offices of Edward Weissman, New York (Edward Weissman of counsel), for appellant.

Bashwiner & Deer, LLC, New York (Joseph A. Deer of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered July 5, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The motion court correctly granted dismissal. Defendant established, as a matter of law, that he did not violate the parties' employment agreement including its nonsolicitation provision. Defendant, an elevator inspector, did not provide unique or extraordinary services or have access to any trade secrets or propriety information that would require the enforcement of a restrictive covenant (*Harris v Patients Med., P.C.*, 169 AD3d 433 [1st Dept 2019]). In opposition, plaintiff failed to raise any issue of material fact. The evidence plaintiff presented to demonstrate defendant's alleged intention

to violate the nonsolicitation clause was unauthenticated and unavailing. No damages as a result of defendant's actions were alleged. Plaintiff failed to demonstrate that the nonsolicitation clause was reasonable as a matter of law (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999]).

With respect to the defamation claim, plaintiff failed to plead it with the required particularity (CPLR 3016[a]; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Specifically, the complaint fails to state whether the utterances were verbal or written, the specific time and location at which the utterances were made and, most critically, to identify a single person who allegedly heard the offending utterances. No damages were alleged.

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

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9090 Bank of America, N.A., Index 380815/08
Plaintiff-Respondent,

-against-

Dhanraj Budhan,
Defendant-Appellant,

Citibank, N.A., as Trustee, et al.,
Defendants.

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Anderson, Bowman & Zalewski, PLLC, Kew Gardens (Dustin Bowman of counsel), for appellant.

Aldridge Pite, LLP, Melville (Kenneth M. Sheehan of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about May 11, 2018, which, after a traverse hearing, denied defendant's order to show cause, and vacated the stay on the execution of the judgment of foreclosure and sale, unanimously affirmed, without costs.

The affidavit of service was prima facie evidence of proper service, and defendant's conclusory denials were insufficient to rebut that presumption. Four attempts to serve defendant at the subject premises at diverse times, including early in the morning and later at night, were sufficient to establish due diligence under CPLR 308(4) (*see Brown v Teicher*, 188 AD2d 256 [1st Dept 1992]). Although the process server had no independent

recollection of the service and did not bring his log book to the hearing, plaintiff's position rested on the process server's affidavit of service and defendant's testimony (*see Korea Exch. Bank v Yung Hyo Kim*, 32 AD3d 690, 691 [1st Dept 2006]). Here, the affidavit of service stated "confirmed with the neighbor," which was authenticated by the process server.

"There are no rigid standards governing the due diligence requirement for substituted service pursuant to CPLR 308(4)" (*Bank Leumi Trust Co. of N.Y. v Katzen*, 192 AD2d 401, 401 [1st Dept 1993]). Plaintiff's process servicing company inquired as to defendant's actual residence, using, among other sources of information, a subscription only database known as the "IRB database" which showed that defendant was associated with four different addresses. The company also called the phone number of defendant's employer that was listed on the loan application and was advised that defendant no longer worked there. To the extent that the IRB results, listing defendant's addresses under the words "Address Summary/Probable Current Address," were not properly admitted as business records, service was nevertheless proper.

As Supreme Court noted, the deed listed defendant's address as the subject premises and defendant, whose testimony Supreme Court found "not credible," failed to produce any documentary

evidence in support of his argument that he did not reside at the subject premises at the time of service. While the mortgage, unlike the deed, listed defendant's address elsewhere, the mortgage also provided that all requisite notices must be sent or delivered to the subject premises unless defendant notified plaintiff of an alternative address. Defendant did not submit evidence at the traverse hearing that he provided plaintiff with such notice, further undermining his claim that he did not reside at the subject premises at the time of service.

Furthermore, the court did not err in limiting the process server's testimony regarding his use of a GPS system and his alleged history of fraudulent practices. The process server testified that he did not use GPS at the time of service, and any allegedly improper practices were not relevant to the service at issue (*see Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418 [1st Dept 2012]).

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9091 In re Pamela Equities Corp., Index 162661/15
Petitioner-Appellant,

-against-

The Environmental Control Board
of the City of New York, et al.,
Respondents-Respondents.

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Community Housing Improvement Program,
Inc. and Rent Stabilization Association
of New York City, Inc.,
Amici Curiae.

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Rich, Intelisano & Katz, LLP, New York (Robert J. Howard of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for amici curiae.

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Judgment, Supreme Court, New York County (Lucy Billings, J.), entered October 16, 2017, to the extent appealed from as limited by the briefs, denying the petition to annul respondent Environmental Control Board's determination, dated August 27, 2015, which imposed penalties for violations of Administrative Code of City of NY § 28-210.3, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Administrative Code § 28-210.3 prohibits the owner of a

multiple dwelling classified for permanent use to permit the use or occupancy of the dwelling for other than permanent residence purposes. Petitioner's contention that it did not violate this provision because it did not have knowledge that its tenants were using their apartments for transient occupants is unpreserved, and we have no discretionary authority or interest of justice jurisdiction to reach the issue (*Matter of Khan v New York State Dept. of Health*, 96 NY2d 879 [2001]; *Matter of Boyd v Perales*, 170 AD2d 245, 246 [1st Dept 1991], *lv denied* 78 NY2d 851 [1991]; *Matter of Curry v New York City Hous. Auth.*, 161 AD3d 578, 579 [1st Dept 2018]).

The penalty assessed against petitioner is consistent with Administrative Code § 28-202.1 and 1 RCNY 102-01[g][1], as petitioner failed to establish at the hearing that it had corrected the violations of Administrative Code §§ 28-210.3 in fewer than 38 days following the notice of violation. The

penalty is not excessive and does not shock the conscience (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]; *Matter of Reese v Rhea*, 96 AD3d 430, 430 [1st Dept 2012], *lv denied* 20 NY3d 860 [2013]; *Matter of 42/9 Residential LLC v New York City Envtl. Control Bd.*, 165 AD3d 541, 542 [1st Dept 2018]).

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9092 In re Carl Hawkins, Index 155642/17
Petitioner-Appellant,

-against-

Carmen Fariña, etc., et al.,
Respondents-Respondents.

_____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

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

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Judgment (denominated an order), Supreme Court, New York County (John J. Kelley, J.), entered on or about May 10, 2018, denying the petition to annul a determination of respondent New York City Department of Education (DOE) to terminate petitioner's probationary employment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

A probationary employee may be terminated without a hearing for any reason or no reason at all, as long as the dismissal was not unlawful or in bad faith (*see e.g. Matter of Duncan v Kelly*, 9 NY3d 1024 [2008]). Here, petitioner alleges no facts to show that his termination was for an illegal or an improper reason, and, absent such allegations, his characterization of his termination as having been in bad faith is purely speculative (*Matter of Turner v Horn*, 69 AD3d 522 [1st Dept 2010]). Rather,

the record shows that petitioner was terminated on grounds of misconduct and violations of applicable regulations (*see e.g. Matter of Lambert v Kelly*, 78 AD3d 554 [1st Dept 2010]). His arguments on appeal amount to an assertion that DOE erred in reaching these determinations, but such assertion does not raise issues of fact as to bad faith (*see Matter of Green v New York City Hous. Auth.*, 25 AD3d 352 [1st Dept 2006]), nor does the record support such a conclusion.

Furthermore, petitioner complains that DOE's Office of Special Investigations failed to interview one particular student and to turn over investigatory materials. These alleged irregularities in the process, however, without more, do not constitute bad faith or a deprivation of a substantial right (*see Matter of Leka v New York City Law Dept.*, 160 AD3d 497 [1st Dept 2018]).

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

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9093 The People of the State of New York, Ind. 6138/11
Appellant,

-against-

Thein Stewart,
Defendant-Respondent.

_____

Cyrus R. Vance, Jr., District Attorney, New York (Stephen Kress of counsel), for appellant.

Center for Appellate Litigation, New York (Robert S. Dean of counsel), and White & Case LLP, New York (Matthew L. Nicholson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about October 4, 2017, which granted defendant's CPL 440.10 motion to vacate a judgment of conviction rendered March 27, 2013, and dismissed the indictment, unanimously affirmed.

We previously held this appeal in abeyance pending a hearing on defendant's 440.10 motion (151 AD3d 478 [1st Dept 2017]). After a hearing, Supreme Court granted the motion, finding that counsel rendered ineffective assistance by failing to make a proper speedy trial motion, and it dismissed the indictment.

Counsel filed a speedy trial motion, alleging well over the required threshold of 183 days of chargeable time. However, because of counsel's miscalculations, these allegations included

substantial periods that were not in fact chargeable. As a result, the court deciding the speedy trial motion found that only 174 days were chargeable. However, if counsel had waited only 10 more days to file the motion, the circumstances of the case establish that this additional period would unquestionably have been charged to the People, as counsel was aware. Thus, the threshold would have been exceeded, and the court would have been required to grant the speedy trial motion. Instead, the filing of the premature motion stopped the clock and rendered the People's additional unreadiness excludable.

The CPL 440.10 hearing record establishes that counsel had no strategic reason for filing the speedy trial motion in the form and at the time he did, and that his handling of the motion was objectively unreasonable. Furthermore, the prejudice prong of a single-error ineffectiveness claim was satisfied, because "[i]t is well settled that a failure of counsel to assert a meritorious speedy trial claim is, by itself, a sufficiently egregious error to render a defendant's representation ineffective" (*People v St. Louis*, 41 AD3d 897, 898 [2007]).

The remedy of dismissal, rather than ordering further proceedings, was appropriate in the circumstances presented in

light of the finding that the indictment would have been dismissed on speedy trial grounds but for the ineffective assistance (*see e.g. People v Turner*, 10 AD3d 458, 460 [2d Dept 2004], *affd* 5 NY3d 476 [2005]).

We find the People's remaining arguments unavailing.

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9094-
9095 Eaton Vance Management, et al., Index 654397/17
Plaintiffs-Appellants,

Eaton Vance CDO X PLC, et al.,
Plaintiffs,

-against-

Wilmington Savings Fund Society,
FSB, etc., et al.,
Defendants-Respondents,

J. Crew Group, Inc., et al.,
Defendants.

_____

Brown Rudnick, LLP, New York (Sigmund S. Wissner-Gross of counsel), for appellants.

Seward & Kissel, LLP, New York (Mark D. Kotwick of counsel), for Wilmington Savings Fund Society, respondent.

Kirkland & Ellis LLP, New York (Josh Greenblatt of counsel), for J. Crew International Cayman Limited, J. Crew Domestic Brand, LLC, J. Crew Brand Holdings, LLC, J. Crew Brand Intermediate, LLC and J. Crew Brand, LLC, respondents.

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Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 25, 2018, which, to the extent appealed from, granted defendants J. Crew International Cayman Limited, J. Crew Domestic Brand, LLC, J. Crew Brand Holdings, LLC, J. Crew Brand Intermediate, LLC and J. Crew Brand, LLC's (collectively, J. Crew) motion to dismiss the fraud causes of action as against them, and granted defendant Wilmington Savings

Fund Society, FSB's motion to dismiss the complaint as against it with prejudice, unanimously affirmed, with costs.

The motion court correctly found that the no-action clause in the amendment to the Term Loan Agreement (TLA) barred all but the breach of contract claims, which allege that all or substantially all of the TLA collateral was transferred without unanimous approval; claims alleging the transfer of substantially all of the collateral without unanimous approval are a specifically delineated exception to the no-action clause (*see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 43 [2018]; *Beal Sav. Bank v Sommer*, 8 NY3d 318, 332 [2007]). That the underlying factual basis for the fraud claims is the same disputed transaction underlying the contract claims does not bring the fraud claims within that narrow exception.

Pursuant to the exculpatory provision of the TLA, Wilmington Savings Fund Society, as administrative agent and collateral agent, cannot be held liable for any action taken by it at the request of the required lenders, absent bad faith (*see SNS Bank v Citibank*, 7 AD3d 352, 355 [1st Dept 2004]). Plaintiffs-appellants contend that the dismissal of the complaint as against Wilmington, i.e., a breach of contract claim, should be without prejudice. However, they do not allege bad faith or facts known or even suspected that would support a finding of bad faith, and

they failed to demonstrate that they can cure that fatal deficiency (*see Automobile Coverage, Inc. v American Intl. Group, Inc.*, 42 AD3d 405, 407 [1st Dept 2007]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 56 [1st Dept 2012]; *Gallant v Kanterman*, 198 AD2d 76, 79 [1st Dept 1993]).

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

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9096 In re Kaeyden H., and Another,

Children Under Eighteen Years
of Age, etc.,

Manuel H.,
Respondent-Appellant,

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

_____

Simpson Thacher & Bartlett LLP, New York (David Elbaum of counsel), for appellant.

Dawne A. Mitchell, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the children.

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Order, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about June 21, 2018, which, to the extent appealed from as limited by the briefs, inter alia, precluded respondent Manuel H. from disseminating certain transcripts and notes from a Family Court proceeding, unanimously modified, on the law, to the extent of allowing appellant to share those transcripts and notes with his defense counsel in a related criminal proceeding, and otherwise affirmed, without costs.

An individual facing parallel Family Court and criminal proceedings can provide documents lawfully obtained in the Family Court matter to his or her criminal defense counsel (*Matter of Sean M. [Yanny M.]*, 151 AD3d 636 [1st Dept 2017]). Although the

documents at issue in *Sean M.* were ACS's investigative reports, there is no meaningful distinction between those documents and the transcript at issue here that would warrant a different outcome.

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9097 The People of the State of New York, Respondent, Ind. 1536/14

-against-

Paul Lee, Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 28, 2014, convicting defendant, upon his plea of guilty, of criminal sale of a firearm in the first degree and conspiracy in the fourth degree, and sentencing him to an aggregate term of 17½ years, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea on the ground that the court failed to advise him at the plea proceeding of the term of postrelease supervision is subject to preservation requirements under the circumstances presented. Defendant was advised of the term of PRS "at the outset of the sentencing proceeding," and thus "could have sought relief from the sentencing court in advance of the sentence's imposition" (*see People v Murray*, 15 NY3d 725, 727 [2010]; *see also People v Crowder*, 24 NY3d 1134, 1136-1137 [2015]). Moreover, at

sentencing defendant moved to withdraw his plea on a ground not at issue on appeal. The record establishes that, after the court had stated the precise terms of the sentence including the term of PRS, defendant conferred with counsel and had ample opportunity, before sentence was actually imposed, to expand his plea withdrawal motion to raise this issue.

We decline to review defendant's unpreserved claim in the interest of justice. In any event, the record as a whole establishes the voluntariness of the plea.

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9098 The People of the State of New York, Ind. 3545/14
Respondent,

-against-

Jaered Greene,
Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Natalie Rea of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Felicia A. Yancey of counsel), for respondent.

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Order, Supreme Court, Bronx County (Eugene Oliver, Jr., J.), entered on or about June 16, 2016, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The fact that the victim's lack of consent was due only to an inability to consent by virtue of age did not result in an overassessment of points under the applicable risk factors (*see People v Fryer*, 101 AD3d 835, 836 [2d Dept 2012], *lv denied* 20 NY3d 859 [2013]; *People v Wyatt*, 89 AD3d 112, 129-130 [2d Dept 2011], *lv denied* 18 NY3d 803 [2012]). There was a 12-year age disparity between defendant and the victim, and this was

not defendant's first offense based on sexual contact with a minor. Furthermore, defendant's claim that he did not know the victim was underage was contradicted by the victim's grand jury testimony. Similarly, there was no overassessment for defendant's prior conviction of endangering the welfare of a child, because that conviction was based on virtually the same conduct as the current conviction, that is, nonforcible sexual intercourse with an underage victim.

Defendant also failed to establish that his response to sex offender treatment warranted a departure, and the other mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument. We have considered and rejected defendant's remaining arguments.

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9099 Frank M. Weiser, et al., Index 655851/16
Plaintiffs-Appellants,

-against-

Citigroup, Inc., et al.,
Defendants-Respondents,

Susanne Strows, et al.,
Defendants.

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Law Office of David R. Lurie, PLLC, Brooklyn, (David R. Lurie of counsel), for appellants.

Hughes Hubbard & Reed LLP, New York (Marc A. Weinstein of counsel), for respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 3, 2018, which, insofar as appealed from as limited by the briefs, granted defendants Citigroup, Inc., Citibank, N.A., Citi Private Bank, Citicards, and Citicorp Credit Services, Inc. (USA)'s motion to dismiss the causes of action for conversion and money had and received as against Citicorp Credit Services (Citi Credit) and the causes of action for breach of contract and violations of Uniform Commercial Code (UCC) 4-401 (against Citibank), unanimously affirmed, without costs.

Plaintiffs allege that their long-time bookkeeper, defendant Susanne Strows, perpetrated a fraud against them over a period of seven years, presenting checks drawn on their checking account

with Citibank to plaintiff Dr. Weiser for signature, representing that the checks were for the payment of business expenses, and later altering the checks to add her own personal credit card account number, and using the checks to pay her own credit card bills. Plaintiffs allege that, because of the trust that Dr. Weiser reposed in Strows, this fraud went undetected until February 2016, when Citibank's representatives reported it to Dr. Weiser in person.

Citibank's actual knowledge of the fraud in February 2016 is, at this pleading stage, enough to sustain the claim of commercial bad faith that would render Citibank ineligible for the protection of UCC 3-405(1)(c) (*see Getty Petroleum Corp. v American Express Travel Related Servs. Co.*, 90 NY2d 322, 331-32 [1997]; *Prudential-Bache Sec. v Citibank*, 73 NY2d 263, 275 [1989]), i.e., the "fictitious payee" or "padded payroll" defense (*Getty*, 90 NY2d at 325, 329).

However, UCC 3-405(1)(c) bars plaintiffs' claims against Citi Credit. Nowhere in any of their papers — either the complaint or Dr. Weiser's opposition affidavit — do plaintiffs allege other than conclusorily that Citi Credit, like Citibank a subsidiary of defendant Citigroup, Inc., had actual knowledge of the fraud. Plaintiffs acknowledge in the complaint that Citibank and Citi Credit, while affiliates, are separate corporate

entities. They allege no facts that would support a veil-piercing or alter ego theory; they make no such argument on appeal. The fact that Strows's employer paid her credit card bills, even for years, does not alone establish that Citi Credit, which performed credit card services for Citigroup, had the requisite "actual knowledge" to fall within the commercial bad faith exception to UCC 3-405(1)(c) (*see e.g. Hartford Acc. & Indem. Co. v American Express Co.*, 74 NY2d 153, 163 [1989]).

Although plaintiffs' claims against Citibank are not barred by UCC 3-405(1)(c), they are barred by plaintiffs' failure to satisfy a condition precedent to suit created by UCC 4-406(4) and Citibank's checking account rules and regulations as set forth in its CitiBusiness Client Manual (*see Clemente Bros. Contr. Corp. v Hafner-Milazzo*, 23 NY3d 277 [2014]; *Gluck v JPMorgan Chase Bank*, 12 AD3d 305, 306 [1st Dept 2004]; *Josephs v Bank of N.Y.*, 302 AD2d 318, 318 [1st Dept 2003]). Plaintiffs failed, as required by the manual, to "notify us [Citibank] in writing within 30 days after we send or make available to you [plaintiffs] your account statement and accompanying items of any errors, discrepancies, or unauthorized transactions." The manual warned that this failure would result in Citibank's not being liable "for debits or charges to your account resulting from such errors, discrepancies, or lack of authorization, or for losses resulting

from subsequent related occurrences." The last disputed check was issued in February 2016. Although, as the complaint alleges, Dr. Weiser told the Citibank representatives in his office on February 5, 2016 that none of the checks used to pay Strows's credit card bills were "properly payable," plaintiffs did not notify Citibank in writing that the checks were unauthorized until July 2016, more than 30 days after the last relevant statement and accompanying items had become available to them.

Contrary to plaintiffs' contention that Citibank failed to provide account statements that contained information sufficient to enable a vigilant customer to detect wrongdoing, the documentary evidence demonstrates that, together with the account statements, Citibank regularly forwarded to plaintiffs copies of the cancelled checks, which showed Strows's personal credit card number written on the "re:" line. The cases on which plaintiffs rely are distinguishable, as the courts in those cases did not find as a matter of law that the account statements and returned checks contained sufficient information to enable the depositors to detect wrongdoing (*see Arrow Bldrs. Supply Corp. v Royal Natl. Bank of N.Y.*, 21 NY2d 428 [1968]; *Key Appliance v National Bank of N. Am.*, 75 AD2d 92 [1st Dept 1980]).

Plaintiffs contend that, in light of its actual knowledge of

Strows's fraud, Citibank should be estopped to raise the UCC 4-406 bar to their suit. However, as indicated, the record demonstrates that, far from concealing the fraud, Citibank gave plaintiffs all the documentation they needed to discover it.

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9101 The People of the State of New York, Ind. 774/15
Respondent,

-against-

Christopher Gonzales,
Defendant-Appellant.

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Larry Sheehan, Bronx, for appellant.

Darcel D. Clark, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ethan Greenberg, J. at suppression hearing; Miriam R. Best, J. at jury trial and sentencing), rendered October 6, 2017, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The hearing evidence established a lawful traffic stop.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence amply supported

the conclusion that defendant possessed a loaded pistol that was in his car.

The court properly denied defendant's request for a missing witness charge (*see generally People v Gonzalez*, 68 NY2d 424, 427 [1986]). The uncalled police witness would not have been able to provide any material testimony. At most, the officer could have testified about a matter relating to the chain of custody for the pistol, which was never at issue at the trial.

The court providently exercised its discretion when it denied defendant's mistrial application based on the jury's stated inability to reach a verdict, and instead delivered an *Allen* charge. To the extent defendant is challenging the content of the charge, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it to be without merit.

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9102
[M-2970] In re VCP One Park REIT LLC, et al., Petitioners, OP 153/18

-against-

New York City Tax Appeals Tribunal, et al., Respondents.

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Greenberg Traurig LLP, New York (Carmen Beauchamp Ciparick, Glenn Newman and Ivy Lapides of counsel), for petitioners.

Zachary W. Carter, Corporation Counsel, New York (Andrew G. Lipkin and Joshua Sivin of counsel), for respondents.

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Determination of respondent New York City Tax Appeals Tribunal, dated February 16, 2018, which modified the decision of an administrative law judge that held that petitioners' transfer of an economic interest in real property was entitled to the reduced New York City Real Property Transfer Tax (RPTT) rate applicable to real estate investment trust (REIT) transfers and cancelled Notices of Determination that had imposed additional such taxes, to the extent of reversing the finding that the transfer was a REIT transfer subject to the reduced rate and setting forth a different calculation of taxable consideration to be taxed at the 2.625% RPTT rate, unanimously confirmed, and the proceeding commenced in this Court pursuant to CPLR 506(b)(4) and

article 78, dismissed, without costs.

Under Title 11, Chapter 21 of the Administrative Code of the City of New York, a REIT transfer subject to the reduced RPPT rate occurs, where, as relevant here, there is an instrument transferring real property or an economic interest therein to a newly formed REIT, the value of the ownership interests in the REIT received by the grantor as consideration for the transfer is at least 40% of the value of the equity interest in the real property or economic interest therein transferred by the grantor to the grantee, and the grantor retains its ownership interest in the REIT for at least two years (the 40% Test) (Administrative Code § 11-2102.e[2][C]).

The Tax Appeals Tribunal properly applied the relevant code provisions in determining that the transfer at issue here did not satisfy the 40% Test so as to qualify as a REIT transfer subject to the reduced RPTT rate, and properly calculated the amount of consideration subject to the RPTT.

Petitioners cannot rely on Administrative Code § 11-2102.e(3), which provides that "(f)or purposes of determining the consideration for a real estate investment trust transfer taxable under this subdivision e the value of the real property or interest therein shall be equal to the estimated market value as determined by the commissioner of finance for real property tax

purposes as reflected on the most recent notice of assessment issued by such commissioner . . .", as a basis for making the transfer a REIT transfer subject to the reduced RPTT rate. That subsection does not supersede Administrative Code § 11-2102.e(2)(C)'s specifications for the satisfaction of the 40% Test, including with respect to any specifications regarding the calculation of the consideration of the REIT interests received by the grantor for the conveyance or transfer or the total consideration for the conveyance or transfer received by the grantor, and petitioners fail to show that the Tribunal erred to the extent it applied the 40% Test under the terms of Administrative Code § 11-2102.e(2)(C) or in its calculation of the consideration subject to the RPTT rate of 2.625% applicable to the non-REIT transfer.

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9104 The People of the State of New York, Ind. 2925/17
Respondent,

-against-

Amanda Coleman,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Katherine Kulkarni 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 (Abraham L. Clott, J.), rendered February 22, 2018,

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

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

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

ENTERED: APRIL 25, 2019

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9105 Raymond Flavin, Index 308500/10
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

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Law Office of Carl Sanders, New Rochelle (Carl A. Sanders of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about October 11, 2017, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the claims for false arrest, false imprisonment, malicious prosecution, and violation of civil rights under 42 USC § 1983, unanimously affirmed, without costs.

The claims for false arrest and false imprisonment were properly dismissed, since the officers' testimony and corroborating documentary evidence established prima facie probable cause for plaintiff's arrest and plaintiff failed to raise a triable issue of fact. Plaintiff's denials of having engaged in any criminal acts are contradicted by defendant's documentary evidence, including a report by an undercover officer that plaintiff sold drugs to him, the search warrant of his

apartment arising from that transaction, and voucher paperwork showing that drugs were found on his person, and drugs, pre-recorded buy money, and a gun were found in his apartment (*see Fowler v City of New York*, 156 AD3d 512 [1st Dept 2017], *lv dismissed* 31 NY3d 1042 [2018]). Plaintiff's contention that the officers fabricated evidence is conclusory and insufficient to raise a triable issue of fact (*see De Lourdes Torres v Jones*, 26 NY3d 742, 771 [2016]).

The court properly dismissed the malicious prosecution claim, as there was probable cause for the arrest and the absence of evidence that such probable cause dissipated between the arrest and commencement of criminal proceedings (*see Brown v City of New York*, 60 NY2d 893, 894-895 [1983]; see *also Broughton v State of New York*, 37 NY2d 451, 457-458 [1975], *cert denied* 423 US 929 [1975]).

Plaintiff failed to allege a claim for a civil rights violation under 42 USC § 1983, since he failed to set forth an official policy or custom of the City that caused the officers to violate his constitutional rights (*see De Lourdes Torres*, 26 NY3d at 769). At most, plaintiff has "alleged only a single instance

of wrongful conduct by a municipal employee without authority to make decisions regarding official policy" (*Saidin v Negron*, 136 AD3d 458, 459 [1st Dept 2016], *lv dismissed* 28 NY3d 1069 [2016]).

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9106-
9107N Trade Expo Inc., et al., Index 160214/13
Plaintiffs-Appellants,

-against-

Sterling Bancorp, et al.,
Defendants-Respondents.

_____

Law Office of Michael H. Joseph, P.L.L.C., White Plains (Michael H. Joseph of counsel), for appellants.

Platzer, Swergold, Levine, Goldberg, Katz & Jaslow, LLP, New York (Stan L. Goldberg of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 5, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered July 5, 2018, which denied plaintiffs' motion for discovery sanctions, unanimously affirmed, without costs.

Defendants' affidavits pursuant to *Jackson v City of New York* (185 AD2d 768 [1st Dept 1992]) adequately set forth their good faith efforts to comply with discovery with averments, inter alia, that: (i) defendants' personnel had conducted a thorough search for requested documents in all areas where said documents and/or information were likely to be found; (ii) no documents were knowingly disposed of by defendants so as to undermine

plaintiffs' right to full discovery; and (iii) defendants did have some policies in place for keeping and maintaining files, but evidently the policies were not universal or particularly detailed, and somewhat left to the discretion of the file creator to determine what records were most pertinent for business purposes.

No evidence was offered from which a reasonable inference could be drawn that either a connection or relationship existed between plaintiffs and defendants such that plaintiffs could rely upon, or claim inducement by, defendants' conduct in monitoring a nonparty retailer's fiscal health pursuant to the terms of a factoring agreement between defendants and the retailer, and hold defendants accountable on an equitable theory of unjust enrichment where the retailer allegedly misappropriated plaintiffs' goods from plaintiffs' own bailee, thereafter sold them, and the resulting account receivables were collected by defendants pursuant to the factoring agreement terms, with no

evidence offered to indicate plaintiffs' awareness of the conversion (*see generally Georgia Malone & Co., Inc. v Reider*, 19 NY3d 511, 516 [2012]; *Sorenson v Winston & Strawn, LLP*, 162 AD3d 593 [1st Dept 2018]).

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

ENTERED: APRIL 25, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9108N Rafael Castro, Index 302697/15
Plaintiff-Appellant,

-against-

Parkview Commons Condo,
Defendant,

BX Parkview Associates, et al.,
Defendants-Respondents.

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

Fleischner Potash LLP, New York (Nancy Davis Lewis of counsel), for respondents.

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Order, Supreme Court, Bronx County (Donna Mills, J.), entered on or about March 23, 2018, which granted defendants-respondents' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to comply with a self-executing order directing him, inter alia, to respond to various outstanding discovery demands within 45 days or be precluded from offering evidence as to liability and damages at trial (*see* CPLR 3126[2]). Plaintiff failed to demonstrate a reasonable excuse for his non-compliance and a meritorious claim and therefore may not be

relieved from the dictates of the conditional order (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]).

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

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

ENTERED: APRIL 25, 2019

CLERK

CORRECTED OPINION - JUNE 4, 2019

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Peter Tom
Marcy L. Kahn
Peter H. Moulton, JJ.

8522
Index 650949/13

_____x

LDIR, LLC, etc., et al.,
Plaintiffs,

Ace Securities Corp. Home Equity Loan Trust, Series 2007-ASAP1, by HSBC Bank USA, National Association, as Trustee,
Plaintiff-Appellant,

—against—

DB Structured Products, Inc.,
Defendant-Respondent,

HSBC Bank USA, National Association, as Trustee,
Defendant,

Ace Securities Corp. Home Equity Loan Trust, Series 2007-ASAP1,
Nominal Defendant.

_____x

8523
Index 652985/12

_____x

Freedom Trust, etc.,
Plaintiff,

Ace Securities Corp., Home Equity Loan Trust, Series 2006-FM1, by HSBC Bank USA, National Association, as Trustee,
Plaintiff-Appellant,

—against—

DB Structured Products, Inc.,
Defendant-Respondent,

HSBC Bank USA, National Association, in its capacity as Trustee of ACE Securities Corp. Home Equity Loan Trust, Series 2006-FM 1,
Nominal Defendant.

_____x

In these appeals, in separate actions, plaintiff HSBC Bank USA National Association, as Trustee appeals from the orders of the Supreme Court, New York County (Marcy S. Friedman, J.), entered March 29, 2018, which granted defendant DB Structured Product's motions to dismiss the first amended complaints, and denied plaintiff Trustee's motions for leave to file proposed second amended complaints.

Holwell Shuster & Goldberg LLP, New York (Brandon DeMay, Michael S. Shuster, Neil R. Lieberman and Jack L. Millman of counsel), for appellant.

Simpson Thacher & Bartlett LLP, New York (William T. Russell, Jr., Isaac Rethy, John

A. Robinson and Magdey Abdallah of counsel), for respondent.

RICHTER, J.

These appeals arise from two residential mortgage backed securitization transactions. Defendant DB Structured Products, Inc. (DBSP) was the sponsor of each of the securitizations. As sponsor, DBSP selected and purchased a pool of residential mortgage loans from various loan originators, and then sold the loans, through intermediary ACE Securities Corp. (ACE), to two securitization trusts. The trusts, in turn, issued securities backed by the loans that were sold to investors. The two securitizations were completed pursuant to materially identical Mortgage Loan Purchase Agreements (MLPAs) and Pooling and Servicing Agreements. Plaintiff HSBC Bank USA, N.A. (Trustee) is the trustee of the trusts in both securitizations.

In Section 6 of the MLPAs, DBSP made numerous representations and warranties about the quality of the loans, including that no fraud or misrepresentations had taken place, and that the loans were underwritten in accordance with the relevant guidelines. In Section 7, DBSP promised that, upon receiving notice or upon its own discovery of any breach of

the representations and warranties, it would cure the breach, or else repurchase or substitute the mortgage loan. Section 7 also imposed a notice obligation on DBSP, ACE and the Trustee, stating that "[u]pon discovery by [DBSP], [ACE] or [the Trustee] . . . of a breach of any of the representations and warranties . . ., the party discovering such breach shall give prompt written notice to [DBSP]." As evident from the plain language, this notice provision is nonsensical because it requires DBSP to give notice to itself of breaches it discovers.

After the transactions closed, DBSP performed a due diligence review of the mortgage loans and allegedly learned of numerous breaches of representations and warranties, yet never notified the Trustee, or any other party to the transaction, of those breaches. As relevant here, the Trustee moved for leave to file second amended complaints alleging that DBSP (i) breached the agreements by conveying loans that were not in accord with the representations and warranties, and (ii) violated its express and implied contractual duty to notify the Trustee of the loan breaches. The motion court denied the Trustee's motions, concluding that the failure to notify claims were not viable because the governing agreements

did not, either expressly or impliedly, require DBSP to notify the Trustee of DBSP's discovery of breaching loans. The court also found that the breach of representation and warranties claims were untimely. These consolidated appeals ensued.

It is well settled that "[a] request for leave to amend a complaint should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law" (*CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 64-65 [1st Dept 2016] [internal quotation marks omitted]). "A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks omitted]).

Judged by these standards, the motion court should have granted the Trustee's motions for leave to file the amended complaints with respect to the express breach of contract claims based on DBSP's failure to notify the Trustee of the loan breaches.[1] It cannot be said, at this early stage of the

[1] There is no merit to DBSP's alternative argument that the failure to notify claims were not properly pleaded. The proposed second amended complaints specifically allege that DBSP violated its express contractual obligation to notify the

proceedings, that these claims are "palpably improper or insufficient as a matter of law" (*see CIFG Assur.*, 146 AD3d at 65 [internal quotation marks omitted]). Nor has DBSP asserted, let alone shown, that it would suffer any prejudice or surprise directly resulting from the delay.

In rejecting the Trustee's attempt to amend the complaints, the dissent concludes that the parties' agreements do not impose any express obligation on DBSP to provide notice to the Trustee of breaches of representation and warranties. In fact, the relevant contractual language contained in Section 7 of the MLPAs is ambiguous on this point. A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning" (*Greenfield v Philles Records*, 98 NY2d 562, 570 [2002]). Conversely, "[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*Feldman v National Westminster Bank*, 303 AD2d 271, 271 [2003], *lv denied* 100 NY2d 505 [2003] [internal quotation marks omitted]).

Trustee of loan breaches. This allegation suffices under New York's liberal pleading rules to give DBSP sufficient notice of the claim, and DBSP has suffered no prejudice.

The language at issue is ambiguous because, as noted earlier, it nonsensically obligates DBSP to provide notice to itself of breaches it discovers. Allowing the clause to remain as written would render this provision meaningless. Importantly, "[i]n construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless" (*Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Associates*, 63 NY2d 396, 403 [1984]; *see Westview Assoc. v Guaranty Natl. Ins. Co.*, 95 NY2d 334, 339 [2000] [courts should avoid interpretations that would render contractual language mere surplusage]).

The parties set forth two reasonable interpretations that would give meaning to the disputed provision. In the Trustee's view, because DBSP is included in the list of entities that are required to *provide* notice, in order for the provision to make sense, there must be some entity, *other than DBSP*, that DBSP must notify. Thus, the Trustee would give meaning to the provision by adding language to make clear that other entities were entitled to notice. DBSP, on the other hand, argues that the only entity entitled to *receive* notice under the provision is DBSP, and that, due to "alleged

drafting imperfections," DBSP was mistakenly included in the list of entities obligated to *give* notice. Thus DBSP would give meaning to the provision by excising the language that requires DBSP to provide notice.

We should not, at the pleading stage of this litigation, choose between the parties' two reasonable competing interpretations. The dissent, although recognizing that the provision requires DBSP to notify itself, resolves the ambiguity in DBSP's favor by excising language from the provision. The dissent's decision to adopt DBSP's interpretation over that of the Trustee cannot be reconciled with the Court of Appeals' decision in *Castellano v State of New York* (43 NY2d 909 1978]). In that case, the use of a certain word in a part of a lease clause was grammatically inconsistent with the rest of the lease. The parties offered two different reasonable ways to change the clause so as to make it grammatically correct. As here, each of those ways involved altering a word in the lease. Rather than choosing one suggested alteration over the other, the Court remitted the matter for further proceedings to "explore all that may be offered to show what is the proper interpretation of [the

disputed language]" (43 NY2d at 912).[2]

Likewise here, because the disputed provision is reasonably susceptible to more than one interpretation, "it cannot be construed as a matter of law, and dismissal . . . is not appropriate" (*Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 402 [1st Dept 2010]). Instead, the matter should proceed to discovery as to the parties' intent (*see Foot Locker, Inc. v Omni Funding Corp. of Am.*, 78 AD3d 513 [1st Dept 2010] [where notice provision in a contract was ambiguous, parol evidence is necessary to interpret the provision]; *330 W. 86th St., LLC v City of New York*, 68 AD3d 562, 563-564 [1st Dept 2009] ["Resolution of . . ambiguities (in a deed) must await discovery as to the intent of the parties"]; *Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 43 [1st Dept 1999] ["Where . . . internal inconsistencies in a contract point() to ambiguity, extrinsic evidence is admissible to determine the parties' intent"]).

Although further discovery is needed to determine whether

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[2] We disagree with the dissent's view that other provisions in the agreements make clear the parties' intent as to the disputed language. These other provisions shed little light on whether the parties intended for DBSP to notify the Trustee of loan breaches, and do not resolve, as a matter of law, the ambiguity presented here.

the parties intended to provide for an express obligation to notify the Trustee, no such implied duty exists. Thus, the court properly denied leave to amend to add claims for breach of the implied covenant of good faith and fair dealing (*see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]). Further, those claims are duplicative of the express failure to notify claims (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 [1st Dept 2011]).

Finally, for the reasons stated in *ACE Sec. Corp. v DB Structured Prods., Inc.* (112 AD3d 522 [1st Dept 2013], *affd* 25 NY3d 581 [2015]), the breach of contract claims based on breaches of representations and warranties accrued on the closing date of the MLPAs, and are barred by the six-year statute of limitations on contract causes of action (CPLR 213[2]; *see also Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc.*, 139 AD3d 519, 520 [1st Dept 2016]).

Accordingly, the orders of the Supreme Court, New York County (Marcy S. Friedman, J.), entered March 29, 2018, which granted defendant DBSP's motions to dismiss the first amended

complaints, and denied plaintiff Trustee's motions for leave to file proposed second amended complaints, should be modified, on the law, to grant the Trustee's motions for leave to file the amended complaints solely with respect to the express breach of contract claims based on DBSP's failure to notify the Trustee of the loan breaches, and otherwise affirmed, without costs.

All concur except Tom,
J.
who dissents in part in
an Opinion.

TOM, J. (dissenting in part)

I disagree with the conclusion of the majority that the relevant contract language was ambiguous and requires further fact-finding, and respectfully dissent. Plaintiff trustee alleges that defendant breached its contractual obligations to notify the trustee of breaches of representations and warranties, breached the implied covenant of good faith and fair dealing, and breached representations and warranties in connection with pools of residential mortgage loans in securitizations governed by Mortgage Loan Purchase Agreements (MLPA) and Pooling and Servicing Agreements (PSA).

Assuming each proposed amended complaint pleads a breach of contract claim based on an express contractual duty to notify the trustee, the claim nevertheless fails, because there is no such duty in the agreements. The MLPA and PSA in each case do not require defendant to give notice to the trustee or other parties of breaches of representations and warranties.

Section 7 of the MLPA is titled "Repurchase Obligation for Defective Documentation and for Breach of Representation and Warranty." Section 7(a) states,

> "Upon discovery by the Seller [defendant],

> the Purchaser or any assignee, transferee or designee of the Purchaser [i.e., the trustee] . . . of a breach of any of the representations and warranties contained in Section 6 that materially and adversely affects the value of any Mortgage Loan ..., the party discovering such breach shall give prompt written notice to the Seller [defendant]."

This provision obligates other parties to give notice to defendant of breaches they discover, but does not require defendant to notify anyone, including the trustee, of breaches it discovers. Hence, on this basis the intent of the parties is evident in the unambiguous contractual language that the seller must receive notice as a predicate to its obligation to cure, as further defined in 7(a). Once the seller received notice, regardless from whom, it was obligated to cure. The majority's conclusion that further fact-finding with respect to the intent of the parties is necessary contravenes the contractual language and the intent of the parties.

The next sentence in section 7(a) of the MLPA states that within 60 days of the Seller's "discovery or its receipt of notice of" any such breach, the Seller shall cure the breach or else repurchase or substitute the loans within 90 days of its "discovery or receipt of notice" of the breach. Thus, defendant's obligation to repurchase any loans in breach of

the representations and warranties pursuant to section 7 is triggered only by its learning of the breach, either by discovering the breach itself or by being notified of the breach by another party. There is no need for defendant to notify anyone else to trigger or fulfill its obligation to remedy any breach.

Plaintiff correctly points out that Section 7(a) requires that "[u]pon discovery by the Seller . . . of a breach . . . the party discovering such breach shall give prompt written notice to the Seller," i.e., that defendant notify itself. However, this requirement does not create an ambiguity. While courts ordinarily try to avoid treating contractual language as "surplusage" (*Maxine Co., Inc. v Brinks's Global Servs. USA, Inc.*, 94 AD3d 53, 56 [1st Dept 2012]), I conclude that the requirement may be excised without either a trial or discovery, because our interpretation is consistent with the parties' intent with respect to that clause and the contract as a whole (*see Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]). It is also consistent with a similar provision in the PSA. Section 2.03 of the PSA states that if the trustee discovers that the "Sponsor," defined elsewhere as defendant, materially breached any representation or warranty under the

MLPA, "the Trustee shall promptly notify [defendant] and the Servicer" of the breach and ask defendant to cure the defect within 60 days of the notice or repurchase the Mortgage Loan within 90 days of the notice.

As the motion court correctly observed, the narrow language in the MLPAs and PSAs, which requires notice to defendant only, renders this case distinguishable from cases in which this Court found a "failure to notify" claim. Those cases imposed an express contractual obligation on the defendants to notify other parties of a breach of a representation or warranty (*see e.g. Bank of N.Y. Mellon v WMC Mtge., LLC*, 151 AD3d 72, 75 [1st Dept 2017]; *Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 133 AD3d 96, 101 [1st Dept 2015], *mod* 30 NY3d 572 [2017]).

Nor is there any basis for inferring an implied contractual duty to notify the trustee. Plaintiff correctly points out that without a requirement that defendant, which is in a better position to discover problems with the underlying loans, notify the trustee when it discovers any breaches, the trustee might not discover such breaches in time to enforce

compliance with the repurchase protocols. However, plaintiff, a sophisticated party to the transaction, did not negotiate the inclusion of such a notice requirement in the MLPA (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 476 [2004]; *see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 105 AD3d 412, 413 [1st Dept 2013]). I decline to read into the contract the implied obligation which the majority's conclusion would allow.

It follows that the motion court correctly dismissed the claims of breach of the implied covenant of good faith and fair dealing based on an implied duty on defendant's part to notify the trustee (*see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]; *Skillgames, LLC v Brody*, 1 AD3d 247, 252 [1st Dept 2003]; *Triton Partners v Prudential Sec.*, 301 AD2d 411 [1st Dept 2003]). In any event, those claims are duplicative of the failure to notify claims (*see Deutsche Bank Natl. Trust Co. v Quicken Loans Inc.*, 810 F3d 861, 869 [2d Cir 2015]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 [1st Dept 2011]).

For the reasons stated in *ACE Sec. Corp. v DB Structured*

Prods., Inc, (112 AD3d 522 [1st Dept 2013], *affd* 25 NY3d 581 [2015]), the breach of contract claims based on breaches of representations and warranties accrued on the closing date of the MLPAs, and are in both cases barred by the six-year statute of limitations on contract causes of action (CPLR 213[2]; *see also Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc.*, 139 AD3d 519, 520 [1st Dept 2016]).

Orders, Supreme Court, New York County (Marcy S. Friedman, J.), entered March 29, 2018, modified, on the law, to grant the Trustee's motions for leave to file the amended complaints solely with respect to the express breach of contract claims based on DBSP's failure to notify the Trustee of the loan breaches, and otherwise affirmed, without costs.

Opinion by Richter, J. All concur except Tom, J. who dissents in part in an Opinion.

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

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

ENTERED: APRIL 25, 2019

CLERK