SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 14, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15498 Justin Nazario, Index 105608/11
Plaintiff-Appellant,

-against-

222 Broadway, LLC, et al.,
Defendants-Respondents.
- - - - -
222 Broadway, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Knight Electrical Services Corp.,
Third-Party Defendant-Respondent-Appellant.
- - - - -
[And Other Third-Party Actions]

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Arye, Lustig & Sassower, P.C., New York (D. Carl Lustig III of counsel), for appellant.

O'Connor Redd LLP, Port Chester, (Amy L. Feno of counsel), for respondent-appellant.

Lawrence, Worden, Rainis and Bard, P.C., Melville (Leslie McHugh of counsel), for 222 Broadway, LLC, and Jones Lang LaSalle Americas, Inc, respondents.

Cerussi & Spring, P.C., White Plains (Thomas F. Cerussi of counsel), for Lime Energy Co., respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright,

J.), entered April 7, 2014, which denied plaintiff's motion for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims, and, upon a search of the record, dismissed those claims, and granted defendants' motions for summary judgment on their contractual indemnification claims against third-party defendant, modified, on the law, to reinstate the Labor Law § 240(1) claim and grant plaintiff's motion for partial summary judgment on that claim, and to deny defendant 222 Broadway, LLC's (Broadway) motion for summary judgment on its contractual indemnification claim, and otherwise affirmed, without costs.

The motion court erred in dismissing the Labor Law § 240(1) claim on the ground that third-party defendant (Knight) exclusively supervised and controlled plaintiff's work. "[O]wners and contractors not actually involved in construction can be held liable, regardless of whether they exercise supervision or control over the work" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003] [internal quotation marks and citation omitted]). Contrary to the motion court's reading of *Blake*, the duties of the owner and contractor cannot be delegated (*id.* at 286, 287).

Plaintiff established prima facie that the ladder from which he fell did not provide adequate protection pursuant to Labor Law

§ 240(1). The evidence, including testimony from disinterested coworkers, shows that plaintiff was performing electrical work as part of a retrofitting or renovation, and was reaching up while standing on the third or fourth rung of a six-foot A-frame wooden ladder, when he received an electric shock from an exposed wire. He fell to the floor, holding the ladder, which remained in an open, locked position when it landed (*see Vukovich v 1345 Fee, LLC*, 61 AD3d 533 [1st Dept 2009] [summary judgment granted on Labor Law § 240[1] claim, where plaintiff fell from an unsecured ladder after receiving electric shock while working as a pipe fitter]). While, as our concurring colleague points out, the ladder itself may not have been defective, it is not a requirement that a worker injured by a fall from an elevated height demonstrate that the safety device was defective or failed to comply with safety regulations (*see Williams v 520 Madison Partnership*, 38 AD3d 464, 465 [1st Dept 2007], *citing Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985]). The worker's burden is to show that the absence of adequate safety devices, or the inadequacy of the safety devices provided to protect the worker from a fall, was a proximate cause of his or her injuries (*see Smith v Hooker Chem. & Plastics Corp.*, 70 NY2d 994, 995 [1988] [absence of any safety device]; *Rodriguez v*

Forest City Jay St. Assoc., 234 AD2d 68 [1st Dept 1996] [inadequate safety device]).

For instance, in *Felker v Corning, Inc.* (90 NY2d 219, 224 [1997]), the Court analyzed two different elevation-related risks involved in the accident of a worker who, while painting an alcove area, fell from his ladder over an alcove wall and through a suspended ceiling. The first risk identified by the Court, the inherent risk caused by raising the worker to a height above the alcove wall, was sufficiently addressed by the defendants who provided a stepladder as an enumerated safety device, and there were no allegations that it "was defective, that it slipped, tipped, was placed improperly or otherwise failed to support plaintiff" (*id.*). The second risk was that the worker needed to reach over the alcove to paint in an elevated open area; for this task, there was a "complete failure to provide any safety device," and there was no view of the evidence which could lead to the conclusion that the absence of a safety device, violating Labor Law § 240(1), was not the proximate cause of the accident (*id.* at 225).

Blake v Neighborhood Hous. Servs., as noted by our concurring colleague, cautions that a case brought under Labor Law § 240(1) must show both a statutory violation, which includes

the failure to provide a sufficient safety device, and that the violation was a contributing factor to the injury (1 NY3d at 289). The mere fact that a worker falls from a ladder or a scaffolding is not enough, by itself, to establish that the device did not provide sufficient protection (*id.* [*citations omitted*]). The worker must show that Labor Law § 240(1) was violated and the violation was a proximate cause of the injury (*id.*). In *Blake*, the plaintiff injured his ankle when the upper portion of his extension ladder retracted while he was using it; he testified that the ladder was stable and in proper working condition, and that he was not sure he had locked the extension clips in place before he ascended (*id.* at 283, 284). Because the jury held that the ladder was adequate to have provided the necessary protection from a fall, the accident happened solely because of the way plaintiff used the ladder (*id.* at 284). The sole proximate cause of the accident was his negligence (*id.* at 290).

Where a plaintiff makes a prima facie showing that a sufficient safety device was not provided, and its absence was a contributing factor to the injury, the burden shifts to the defendant to show that there is a plausible view of the evidence that there was no statutory violation and that the plaintiff's

own acts or omissions were the sole cause of the accident (*Blake*, at 289, fn 8, citing *Klein v City of New York*, 89 NY2d 833, 835 [1996]).

Here, plaintiff was injured when he was jolted by the electrical charge and although he hung onto the ladder, because it was not secured to something stable, it and he fell to the ground (*see Vukovich v 1345 Fee, LLC*, *supra*, 61 AD3d at 533; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271 [1st Dept 1999]; *see also Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998] ["well settled that failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1)"]).[1] The lack of a secure ladder is a violation of Labor Law § 240(1), and is a proximate cause of the accident (*see Wise v 141 McDonald Ave.*, 297 AD2d 515, 516 [1st Dept 2002]).

Our conclusion follows the reasoning in *Blake*, and is in harmony with our decision in *DelRosario v United Nations Fed. Credit Union* (104 AD3d 515 [1st Dept 2013]), where we held that

[1] We note that one of plaintiff's coworkers averred that none of the workers, including plaintiff, was provided a safety belt, possibly an additional safety device to use while working on the ladders (*id.*).

the ladder on which the plaintiff was working was inadequate to prevent him from falling when he was struck by a live electrical wire and, as he pulled away from the wire, the ladder "wobbled and moved" and caused him to lose his balance and fall (*id.* at 515). In *DelRosario*, the inadequacy of the ladder was held to be a proximate cause of his injury (*id.*). We therefore disagree with our concurring colleague that our holding in *DelRosario* has caused a split among the Appellate Divisions or deviates from the teachings of the Court of Appeals.

Defendants' arguments that plaintiff caused his own injuries by working on the fixture without protective gloves before the power supply was turned off could at most establish comparative negligence, which is not a defense to a Labor Law § 240(1) claim (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]). Nor is there an issue of fact whether plaintiff's injuries were caused by a fall from a ladder. Notwithstanding that the records of plaintiff's visit to the emergency room refer merely to electrocution-related injuries without mentioning a fall from a ladder, and that plaintiff wrote on a medical form months later that his back injuries may have been caused by his lifting a machine and falling from a ladder, the evidence – which includes plaintiff's, his coworker's, and his foreman's testimony – that

he sustained his injuries in falling from a ladder is overwhelming (*see Susko v 337 Greenwich LLC*, 103 AD3d 434 [1st Dept 2013]).

Knight's argument that plaintiff was not engaged in a activity covered by Labor Law § 240(1) is unpreserved, and we decline to consider it. Contrary to Knight's contention, this "is not a purely legal issue apparent on the face of the record but requires for resolution facts not brought to plaintiff's attention on the motion" (*Rodriguez v Coalition for Father Duffy, LLC*, 112 AD3d 407, 408 [1st Dept 2013] [internal quotation marks omitted]).[2]

In light of our grant of partial summary judgment to plaintiff on his Labor Law § 240(1) claim, we do not reach the issue whether the court correctly dismissed the Labor Law § 241(6) claim (*see Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]).

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[2] The concurring opinion questions whether any type of safety devices enumerated in Labor Law § 240(1), could adequately protect against the force of electricity which is capable of knocking down a worker from any location. It queries whether the Legislature intended that Labor Law § 240(1), designed to protect workers from the danger posed by the force of gravity, should be applied to the danger represented by the force of electricity. There is nothing to suggest, however, that falls from elevated surfaces following contact with live electricity, should be carved out from the statute.

Defendants Lime Energy Co. (Lime) and Jones Lang Lasalle Americas, Inc. (Jones) are entitled as a matter of law to contractual indemnification by Knight, since plaintiff's injuries arose out of the "Work" performed under the subcontract between Lime and Knight, which obligated Knight to indemnify Lime, and Jones as Lime's "client," for claims, liability, losses, and expenses "arising from the Work performed hereunder," and, in light of the unchallenged dismissal of the Labor Law § 200 and common-law negligence claims against said defendants, their liability is purely vicarious (*see Rainer v Gray-Line Dev. Co., LLC*, 117 AD3d 634 [1st Dept 2014]). Contrary to Knight's contention, the indemnity provision is not void under General Obligations Law § 5-322.1 because it requires Knight to indemnify Lime for its own negligence, since Lime was free of negligence (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990).

Broadway is not entitled to contractual indemnification by Knight since the indemnification clauses on which it relies are contained in contracts to which it was not a signatory and in which it was not named as an indemnitee (*see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Sicilia v City of New York*, 127 AD3d 628 [1st Dept 2015]). Nor is there any basis for a finding that Lime and Knight intended Broadway to be a third-

party beneficiary of their subcontract, which referred to a different entity as the property owner and did not mention Broadway (*see Naughton v City of New York*, 94 AD3d 1, 12 [1st Dept 2012]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

All concur except Tom, J.P. who concurs in a separate memorandum as follows:

TOM, J.P. (concurring)

While I disagree with the majority's ruling and find there is a question of fact preventing the award of partial summary judgment on plaintiff's Labor Law §240(1) claim, I am constrained, based on this Court's precedent, to concur with the court's final disposition. In *Vukovich v 1345 Fee, LLC* (61 AD3d 533 [1st Dept 2009]), we awarded summary judgment as to liability to a pipe fitter who fell from a ladder after receiving an electric shock, reasoning that "[t]he ladder provided to plaintiff was inadequate to prevent him from falling . . . and was a proximate cause of his injuries" (*id.* at 534). In *Caban v Maria Estella Houses I Assoc., L.P.* (63 AD3d 639, 639 [1st Dept 2009]), we upheld the award of summary judgment to an electrician who similarly sustained injury when he fell from a ladder as the result of an electric shock while "repairing malfunctioning exterior floodlights," rejecting the defendants' contention that the work was mere routine maintenance not covered by the statute. We previously held that the activity in which plaintiff was engaged at the time of injury – replacing ballasts in lighting fixtures – constitutes the repair of a building or structure within the contemplation of the statute (*Piccione v 1165 Park Ave.* 258 AD2d 357 [1st Dept 1999], *lv dismissed* 93 NY2d 957

[1999]).

Relying on *Vukovich* and *Caban*, plaintiff postulates that because he fell from a ladder after receiving an electric shock from an exposed wire, it is axiomatic that the ladder on which he was standing failed to afford him with the necessary protection required by Labor Law § 240(1). Plaintiff concedes in his brief that the ladder furnished to him was not defective and that the several accounts he gave of the manner in which he sustained injury are inconsistent. Nevertheless, he asserts that "[d]espite there being no apparent defects in the A-frame ladder from which plaintiff fell, and despite plaintiff's various and conflicting explanations on [sic] what caused him to fall, the fact that the ladder failed to protect him from falling was sufficient to establish liability in his favor under Labor Law § 240(1)." While defendants devoted the bulk of their moving papers to the matter of indemnification, third-party defendant Knight Electrical Services Corp. did take issue with plaintiff's contention, expressly stating that defendants cannot be held statutorily liable if the ladder was not shown to be defective.

This Court has held that recovery under Labor Law § 240(1) is available where "[t]he record establishes that the ladder provided to plaintiff was inadequate to the task of preventing

his fall when he came into contact with the exposed wire and was a proximate cause of his injury" (*DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515, 515 [1st Dept 2013]). Thus, our precedent supports plaintiff's stated basis for summary judgment as to liability. That said, this Court's precedent cannot be reconciled with that of the Court of Appeals, which has made clear that merely because a worker falls from a safety device does not mean that, under a principle of strict liability, recovery under the statute is available. In *Blake v Neighborhood Hous. Servs. of N.Y. City* (1 NY3d 280, 288 [2003]), the Court of Appeals cautioned against "the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party" (*see also Beesimer v Albany Ave./Rte. 9 Realty*, 216 AD2d 853, 854 [3d Dept 1995]). This pronouncement is clearly inimical to plaintiff's chief contention that the failure of the ladder to prevent his fall is sufficient to establish defendants' liability. To the contrary, as the majority here recognizes, the Court of Appeals instructs that in the absence of a statutory violation and any demonstration that the violation was a contributing cause of the fall, no prima facie violation of Labor Law § 240(1) is made out (*Blake*, 1 NY3d at 289); and in the absence of a prima facie case, plaintiff is

not entitled to summary judgment irrespective of the strength of defendants' opposition (CPLR 3212 [b]; *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

The majority correctly notes that a worker injured by a fall from an elevated height is not necessarily required to show that the safety device provided was defective, and must instead show that the absence of adequate safety devices or the inadequacy of the devices provided was a proximate cause of his or her injuries. Yet the majority holds defendants liable under Labor Law § 240(1) absent any proof that the safety device provided was a proximate cause of plaintiff's injuries.

While failure to supply any safety device whatsoever constitutes a violation of the statute, record evidence is required to establish the need for such protective device, a point made plain in *Izrailev v Ficarra Furniture of Long Is.* (70 NY2d 813, 815 [1987]), in which the trial record contained "unrebutted proof" that the plaintiff's decedent should have been provided with various items necessary to perform electrical work on a malfunctioning sign. Likewise, in *Quackenbush v Gar-Ben Assoc.* (2 AD3d 824, 825 [2d Dept 2003]), "unrebutted evidence" established that defendants failed to provide the plaintiff with proper protection to prevent a fall after sustaining an electric

shock. Here, the record on appeal contains no such unrebutted evidence, prompting plaintiff's resort to the conclusory assertion that the mere fact he fell from a ladder establishes that the safety devices furnished to him were inadequate to provide proper protection, the very proposition rejected in *Blake* (1 NY3d at 288-289), which the majority concedes. Indeed, to recover under the statute, "a worker must demonstrate the existence of an elevation-related hazard contemplated by the statute and a failure to provide the worker with an adequate safety device" (*Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]).

To be clear, prior to this Court's holdings in *Vukovich* and *DelRosario*, all four Departments were unanimous in finding that a question of fact exists on the issue of liability under Labor Law § 240(1) when a plaintiff worker falls from an A-frame stepladder as a result of an electrical shock, and where there is no evidence the ladder is defective and no record evidence of the need for another device (*see Grogan v Norlite Corp.*, 282 AD2d 781 [3d Dept 2001]; *Donovan v CNY Consol. Contrs.*, 278 AD2d 881 [4th Dept 2000]; *Weber v 1111 Park Ave. Realty Corp.*, 253 AD2d 376, 378 [1st Dept 1998]; *Gange v Tilles Inv. Co.*, 220 AD2d 556, 558 [2d Dept 1995]).

The reason for this unanimity is obvious: It flows from the Court of Appeals holdings in *Blake* and *Izrailev*. As the Third Department remarked in *Grogan*, "where, as here, there is no evidence that the ladder slipped, collapsed or was otherwise defective, the question of whether the ladder provided proper protection is a factual one and neither the injured worker nor the owner is entitled to summary judgment on a Labor Law § 240(1) claim" (282 AD2d at 782).

Notably, in *Gange*, which this Court quoted approvingly in *Weber*, the Second Department elaborated:

> the fact that the plaintiff fell off of the ladder only after he sustained an electric shock does not preclude recovery under Labor Law § 240(1) for injuries sustained as a result of the fall from the ladder (*see*, *Izrailev v Ficarra Furniture*, 70 NY2d 813). However, the plaintiff is not entitled to summary judgment under Labor Law § 240(1) as there are questions of fact as to whether, inter alia, the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether the plaintiff should have been provided with additional safety devices (220 AD2d at 558).

Thus, this Court's more recent precedent represents a clear split in appellate authority with both the Court of Appeals and the three other Departments, a fact that the majority, despite its hesitance to do so, must accept.

In short, pursuant to the Court of Appeals holdings and those of the three other Departments, for plaintiff to prevail in this matter he must present evidence - for example from an expert - that he should have been provided with additional safety devices and that the failure to do so was a contributing cause of the accident. Indeed, this is precisely the type of proof put forward in both *Izrailev* and *Quackenbush*.

Moreover, whether a violation of section 240(1) was a contributing cause of the accident is generally a jury question (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]), and "a directed verdict on the issue of liability is appropriately limited to those cases in which the only inference to be drawn from the evidence is that a failure to provide appropriate protective devices is the proximate cause of the plaintiff's injuries" (*Weber*, 253 AD2d at 377, *citing Zimmer* at 524). Because more evidence is needed to determine whether plaintiff should have been provided with additional safety devices, it would be inappropriate to draw such an inference from the evidence presented thus far.

Accordingly, the majority's reliance on cases not involving an electric shock and which focus on unsecured ladders which were clearly inappropriate for the worker's task are not on point nor

particularly helpful (*see e.g. Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152 [1st Dept 1998]).

While the majority notes that in *DelRosario* the inadequacy of the ladder was found to be a proximate cause of the plaintiff's injury, the point is that such holding is contrary to the authority requiring further evidence of the need for additional safety devices (*see Izrailev, supra*) or finding that in the absence of such evidence an issue of fact is presented (*see Grogan, supra*).

Contrary to the majority's implication, I am not suggesting that all falls from elevated surfaces following contact with live electricity be carved out of the protections of Labor Law §240 (1). On the other hand, I am suggesting that the majority's holding here and our precedents in *DelRosario* and *Vukovich* have created a special class of decisions which, contrary to the foundational Court of Appeals holdings in this area, remove a plaintiff's quintessential burden to establish causation under the Labor Law. Here, the majority grants plaintiff summary judgment under § 240(1) solely upon plaintiff's fall from a ladder after receiving an electric shock from an exposed wire without proof that the ladder was a contributing cause of plaintiff's injuries. The purpose of Labor Law § 240(1) was to

protect workers with safety devices working in elevated work sites and not to dispense with a party's burden of proof.

As a further consideration, in cases where a risk due to an elevation-related hazard is demonstrated, recovery is predicated on the rationale that "one or more devices of the sort listed in section 240(1) would allegedly have prevented the injury" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). In this matter, it is "uncontroverted fact that plaintiff's fall was initially precipitated by a shock from an exposed wire." Plaintiff concedes that his fall was not the result of any defect in the ladder and, indeed, has identified none. Unaddressed by the parties and not reached in any of the cases dealing with falls involving electric shocks is the question of whether the Legislature intended that a statutory provision designed to protect the worker from the danger posed by the force of gravity (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]) should be applied to the danger represented by the force of electricity. Put differently, it is far from clear that the provision of a device enumerated in Labor Law § 240(1), or any similar safety device, would adequately protect against a force quite capable of knocking a worker from even the best ladder or scaffold, as this matter illustrates. As noted in *Narducci v*

Manhasset Bay Assoc. (96 NY2d 259, 267 [2001], quoting *Rocovich*, 78 NY2d at 513 [external quotation marks omitted]), even "a violation of [Labor Law § 240(1)] cannot 'establish liability if the statute is intended to protect against a particular hazard, and a hazard of a different kind is the occasion of the injury.'"

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

ENTERED: JANUARY 14, 2016

CLERK

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

15972-
15973 Arnold Wandel, et al.,
Plaintiffs-Appellants,

Index 651830/12

-against-

James Dimon, et al.,
Defendants-Respondents.

JP Morgan Chase & Co.,
Nominal Defendant-Respondent.

Chimicles & Tikellis LLP, Wilmington, DE (Robert J. Kriner, Jr. of the bar of the State of Deleware, admitted pro hac vice, of counsel), for appellants.

Sullivan & Cromwell LLP, New York (Richard C. Pepperman, II of counsel), for respondents.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered January 17, 2014, which granted, without prejudice, defendants' motion to dismiss the complaint for failure to show that pre-suit demand on the board of directors of nominal defendant JPMorgan Chase & Co. was excused, unanimously affirmed, without costs.

In 2012, in what became known as the "London Whale" debacle, JPMorgan's synthetic credit portfolio (SCP), managed by traders in its Chief Investment Office (CIO), lost at least $6.2 billion as a result of high-risk trading activities, despite public

representations that the CIO was engaged in low-risk hedging activities. In this derivative action for breach of fiduciary duties, plaintiffs allege that the CIO losses were "the direct consequence of Defendants' failures to properly implement appropriate internal controls, oversight and risk management."

Plaintiffs did not serve a demand on JPMorgan's Board prior to filing suit. Rather, they allege that a demand would have been futile because at least a majority of the Board faces a substantial likelihood of liability for consciously disregarding numerous red flags warning of the CIO's lack of oversight and pervasive disregard of its internal mandate and risk limits, including letters from a shareholder advocacy group, warnings from regulators, and risk-limit breaches. Plaintiffs also allege that demand is excused because the Board reached a self-serving conclusion of no breach without conducting a reasonable and good faith investigation into the CIO's misconduct.

The issue whether a pre-suit demand is required or excused is governed by the law of Delaware, the state of incorporation of JP Morgan (*Central Laborers' Pension Fund v Blankfein*, 111 AD3d 40, 45 n 8 [1st Dept 2013]; *David Shaev Profit Sharing Account v Cayne*, 24 AD3d 154 [1st Dept 2005]). Under Delaware law, in order for a derivative suit to go forward, a shareholder must

either make pre-suit demand on the corporation or seek to be excused from making a demand on grounds of futility (Delaware Rules of the Court of Chancery, rule 23.1; *see In re Citigroup Inc. Shareholder Derivative Litig.*, 964 A2d 106, 120 [Del Ch 2009]).

Plaintiffs' claim, based on the Board's alleged failure to properly exercise its oversight duties, is premised on the theory of liability articulated in *In re Caremark Intl. Inc. Derivative Litig.* (698 A2d 959, 968 [Del Ch 1996]). Under *Caremark*, where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard of their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith (*see Stone v Ritter*, 911 A2d 362, 370 [Del 2006]). However, while a director has a duty to attempt in good faith to ensure that an adequate information and reporting system exists, "no rationally designed information and reporting system will remove the possibility that the corporation will violate laws or regulations, or that senior officers or directors may nevertheless sometimes be misled or otherwise fail reasonably to detect acts material to the corporation's compliance with the law" (*Caremark* at 970).

The *Caremark* theory of recovery "is possibly the most

difficult theory in corporation law upon which a plaintiff might hope to win a judgment" (*Caremark*, 698 A2d at 967). The requisite bad faith indifference is difficult to prove; "[e]ven a showing of gross negligence by a majority of the Board will not suffice" (*In re SAIC Inc. Derivative Litig.*, 948 F Supp 2d 366, 381 [SD NY 2013], *affd sub nom Welch v Havenstein*, 553 Fed Appx 54 [2d Cir 2014]). Furthermore, "where a claim of directorial liability for corporate loss is predicated upon ignorance of liability creating activities within the corporation . . . only a sustained or systematic failure of the board to exercise oversight — such as an utter failure to attempt to assure a reasonable information and reporting system exists — will establish the lack of good faith that is a necessary condition to liability" (*Caremark*, 698 A2d at 971). The likelihood of directors' liability is significantly lessened where, as here, the corporation exculpates the directors from liability to the extent permitted by Delaware law (*see DiRienzo v Lichtenstein*, 2013 WL 5503034, *28, 2013 Del Ch LEXIS 242, *95 [Del Ch 2013], *appeal refused* 80 A3d 959 [Del 2013]; *In re Goldman Sachs Group, Inc. Shareholder Litig.*, 2011 WL 4826104, *18, 2011 Del Ch LEXIS 151, *58-59 [Del Ch 2011]).

In *Caremark* cases, allegations of demand futility are

analyzed under the principles set forth in *Rales v Blasband* (634 A2d 927, 933-934 [Del 1993]) (*Wood v Baum*, 953 A2d 136, 140 [Del 2008] [the Rales test governs when "the subject of a derivative suit is not a business decision of the Board but rather a violation of the Board's oversight duties"]). Under *Rales*, the plaintiff must plead particularized facts raising "a reasonable doubt that, [at] the time the complaint [was] filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand" (*Rales*, 634 A2d at 934). To rebut the presumption of disinterestedness, the plaintiff must plead particularized facts that, if proved, would establish that a majority of the directors face a "substantial likelihood" of personal liability for the wrongdoing alleged in the complaint (*id* at 936 [internal quotation marks omitted]). A "mere threat" of liability is insufficient (*id*. [internal quotation marks omitted]; *see also In re Goldman Sachs Group, Inc. Shareholder Litig.*, 2011 WL 4826104 at *18, 2011 Del Ch LEXIS 151 at *59 ["A simple allegation of potential directorial liability is insufficient to excuse demand, else the demand requirement itself would be rendered toothless, and directorial control over corporate litigation would be lost"]).

Here, plaintiffs failed to make the requisite showing that the board could not exercise independent business judgment because a *majority* of directors faced a substantial likelihood of liability for the challenged conduct. At the time plaintiffs filed their complaint, the board consisted of 11 directors. At most, plaintiffs showed that four of them – inside director Dimon and the three members of the Risk Policy Committee – faced a substantial likelihood of liability (*see Loveman v Lauder*, 484 F. Supp 2d 259, 266-269 [SD NY 2007]). "Because a majority of the directors are independent, demand is not excused" *(Blaustein v Lord Baltimore Capital Corp.*, 84 A3d 954, 959 [Del 2014]; *Wayne County Empls.' Retirement Sys. v Dimon*, 2015 WL 6079958, *2, 2015 US App LEXIS 17936, *45 [2d Cir 2015]).

In *Wayne County*, the Second Circuit held that the county retirement system's pleading, which raised claims similar to the instant claims arising out of the London Whale debacle, did not satisfy the requirements for alleging a *Caremark* claim predicated on failed oversight of business risk. Although the complaint cited instances in which warning signs of excessive risk reached members of the Board, and identified members of the Board who received particular warnings, the Second Circuit held that "Wayne County cannot sustain its burden by relying on red flags that

reached a single Board member or a minority of the Board: 'Delaware law does not permit the wholesale imputation of one director's knowledge to every other for demand excusal purposes'" (2015 WL 6079958 at *2, 2015 US App LEXIS 17936 at *4-5, quoting *Desimone v Barrows*, 924 A2d 908, 943 [Del Ch 2007]). Noting that "the most urgent signs were given in a single quarter in which an audit report was prepared and delivered, and the severe loss followed the audit report by a few days or a couple weeks," the court also found that "even if there were red flags warning of facially improper business risk, the warning signs were not received, let alone ignored, over a sustained period of time[,] [and] Wayne County has not pled a sustained or systematic failure of the [B]oard to exercise oversight," as required by *Caremark* (2015 WL 6079958 at *2, 2015 US App LEXIS 17936 at *5). This reasoning applies equally to plaintiffs' claims in this action.

Plaintiffs' argument that demand was excused because the board had already reached the conclusion that it was not

responsible for the events about which plaintiffs complain is unavailing (*see generally Desimone*, 924 A2d at 950; *In re infoUSA, Inc. Shareholder's Litig.*, 953 A2d 963, 986 [Del Ch 2007]).

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

ENTERED: JANUARY 14, 2016

CLERK

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

15990 In re Lafayette Boynton Hsg. Corp., Index 56887/11
Petitioner-Appellant,

-against-

Ronald Pickett,
Respondent-Respondent.

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Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Matthew Tropp of counsel), for respondent.

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Order of the Appellate Term of the Supreme Court, First Department, entered on or about August 22, 2014, which affirmed an order of the Civil Court, Bronx County (Javier E. Vargas, J.), entered on or about October 8, 2013, granting respondent tenant's motion to, among other things, be restored to possession of the subject apartment upon his payment of $14,030.59 to petitioner landlord by a specified date, affirmed, without costs.

We reject the landlord's contention, premised on RPAPL 749(3), that the Civil Court lacked the authority to grant the tenant's post-eviction motion (*see Matter of Brusco v Braun*, 84 NY2d 674, 682 [1994]; *see also Parkchester Apts. Co. v Scott*, 271 AD2d 273, 273 [1st Dept 2000]). "[T]he Civil Court may, in appropriate circumstances, vacate the warrant of eviction and

restore the tenant to possession even after the warrant has been executed" (*Brusco*, 84 NY2d at 682; *see also Harvey 1390 LLC v Bodenheim*, 96 AD3d 664, 664 [1st Dept 2012]). Here, the Civil Court providently exercised its discretion, as the record shows that the long-term, disabled tenant "did not sit idly by[,]" but instead made appreciable payments towards his rental arrears and "engaged in good faith efforts to secure emergency rental assistance to cover the arrears" (*Harvey*, 96 AD3d at 665; *see also Parkchester*, 271 AD2d at 273-274). Moreover, the tenant has paid the rental arrears for the unit and the landlord's costs for the underlying proceeding (*see Parkchester*, 271 AD2d at 273), and the record shows that the delays in payment were, to a certain extent, attributable to others, including the landlord (*see 2246 Holding Corp. v Nolasco*, 52 AD3d 377, 378 [1st Dept 2008]).

All concur except Saxe, J. who concurs in a memorandum as follows:

SAXE, J. (concurring)

Previous case law supports and justifies the majority's affirmance of the order on appeal, which restored the evicted tenant to possession upon full payment of all overdue arrears. However, I write separately to express two concerns. First, the way in which the case law has developed with regard to vacating warrants of eviction after those warrants have already been executed, prompts me to question the underpinnings and validity of recent case law on the subject. My other concern focuses on how the law, unfairly, forces landlords to serve as de facto no-interest lenders to low-income tenants who rely on the slow process of obtaining grants and supplemental payments to help cover their rent.

The tenant in this case, who is disabled, has resided at the subject apartment for more than 30 years, and the source of his income is Supplemental Security Income from the Social Security Administration. The landlord commenced this nonpayment proceeding on October 5, 2011, and the proceeding was not ultimately resolved until two years later, *after the tenant had already been evicted*, when the tenant's rental arrears were finally paid up in October 2013 and the tenant restored to possession.

The litigation process during much of those two years was typical. Although nonpayment proceedings are contemplated as summary proceedings, created "to afford landlords an *expeditious* means of recovering real property from tenants who refused to remit rent after a demand" (Daniel Finkelstein & Lucas A. Ferrara, Landlord and Tenant Practice in New York § 14.1 at 132 [West's NY Prac Series, vol G, 2014] [emphasis added]), in cases such as this, litigation can extend for months. If the tenant agrees that rent arrears are due and owing, and that he or she lacks a viable defense to the nonpayment proceeding, that tenant often enters into a stipulation acknowledging the rent arrears and creating a payment schedule (*id.* at § 14:418 at 331), as well as "provid[ing] for the entry of a money judgment and a final judgment of possession in the landlord's favor, with the issuance of a warrant of eviction 'forthwith,' and its execution stayed pending the tenant's compliance with the agreement's terms" (*id.* at § 14:425 at 333). Under the stipulation, if the tenant fails to make the agreed-on payments, the money judgment and judgment of possession will become enforceable based on the expiration of the stay, and the warrant of eviction may be turned over to the City Marshall to be executed after 72 hours' notice is given to the tenant (*id.* at 14:471 at 358-359; *see* RPAPL 749).

What often happens thereafter is that the tenant finds that the agreed-upon schedule did not provide sufficient time to obtain the necessary funds. When elderly or disabled low-income tenants have difficulty covering their expenses with their income, they may seek to obtain charitable grants, supplemental payments by the New York State Department of Social Services (DSS), "one shot deals"[1] from the New York City Human Resources Adminsitration (HRA) and the like. However, the process by which such funds are applied for and obtained is sometimes slow and laborious. The tenant therefore applies to the court for an extension of the stay.

Here, the tenant entered into a stipulation of settlement agreeing to the issuance of a warrant of eviction, to be stayed for a period of time to allow him time to pay the rent arrears, which were initially $5,250.60. Thereafter the tenant brought seven motions seeking stays of the warrant of eviction and additional time to pay the ever-accumulating arrears. The tenant was repeatedly granted extensions and stays of eviction on

[1] The New York City Human Resources Administration offers a "One Shot Deal" emergency assistance program to help people who "cannot meet an expense due to an unexpected situation or event" (*see* http://www1.nyc.gov/nyc-resources/service/1205/one-shot-deal-short-term-emergency-assistance [accessed December 11, 2015])

condition that he pay the arrears by a new set date, each extension based on showings that charitable grants, payments by the DSS or "one shot deals" from the HRA had been approved for payment. However, by the time those promised payments were eventually made, new arrears had accrued, so the landlord was still not made whole by those eventual payments, and the cycle of extensions and only partial payments continued.

The aspect of this case that concerns me is what occurred after the court denied any further stays on August 15, 2013 and allowed execution of the warrant of eviction, explaining that the tenant had "utterly failed to show any ability to pay the longstanding arrears which now amount to $12,370.00" and "merely rehashes all arguments and provides stale evidence of payments long credited." The eviction took place on September 13, 2013. Then, although the court denied the tenant's first two post-eviction motions to stay the landlord from re-letting the apartment, it later granted yet another post-eviction motion by the tenant to stay the landlord from re-letting, upon the tenant's tender of $7,539 in open court. The tenant was restored to possession upon his tender of an additional $7,515.21 before October 23, 2013, which constituted a final payment of all sums then owed to the landlord.

Appellate Term affirmed, holding that the Civil Court had not abused its discretion in vacating the warrant of eviction and conditionally restoring the tenant to possession of the apartment upon his payment of all rent arrears, eviction costs, and attorneys' fees then due. Appellate Term observed that the record established good cause for the relief, because the tenant had tendered a substantial portion of the rent arrears and demonstrated that various agencies had committed funds. Appellate Term also remarked that the landlord had contributed to some of the delays in resolving the rent claim, by losing the checks tendered by DSS on tenant's behalf, which then had to be reissued. Lastly, Appellate Term explained that the protracted nature of the proceedings did not warrant forfeiture of the tenancy, given tenant's good faith and ultimately successful efforts to make landlord whole by securing emergency rental assistance and tendering the rent arrears and landlord's litigation costs, including attorneys' fees. This Court affirms.

In its appeal to this Court, the landlord correctly points out that while RPAPL 749(3) authorizes the vacatur of warrants of eviction "for good cause shown" *before* the warrant is executed, the statute does not authorize the *post eviction* vacatur of warrants of eviction that have already been executed. However,

while RPAPL 749(3) does not provide for any post-eviction remedies for an eviction, the Court of Appeals has affirmatively stated that courts may grant such relief, even after a warrant of eviction has been executed. In *Matter of Brusco v Braun* (84 NY2d 674 [1994]), it said, "the Civil Court may, in appropriate circumstances, vacate the warrant of eviction and restore the tenant to possession even after the warrant has been executed" (*id.* at 682). So, while the statute may not give the Civil Court the authority to vacate an already-executed warrant of eviction, case law provides that authority.

However, *Brusco* did not address what "appropriate circumstances" might entail. Notably, *Brusco* did not involve an evicted tenant restored to possession. The decision's acknowledgment that a tenant may be restored to possession after a warrant of eviction has been executed was simply one item in a list of ways that the law protects tenants against unjust or erroneous eviction. Its sole citation in support of that proposition was *Solack Estates v Goodman* (78 AD2d 512 [1st Dept 1980]). In *Solack Estates*, an elderly tenant was evicted pursuant to a default judgment obtained while she was on vacation in Florida; she was restored to possession when it was established that she had timely sent her rent checks, albeit to

an outdated address. That decision concluded that "[u]nder the circumstances, the Civil Court was correct in vacating the warrant of eviction and restoring the tenant to her apartment" (*id.* at 513). More recently, this Court echoed *Brusco*'s pronouncement of the "appropriate circumstances" test, in a case that did not involve a post-eviction situation (*see Harvey 1390 LLC v Bodenheim*, 96 AD3d 664, 665 [1st Dept 2012]). The legal standard these cases provide regarding whether to restore a tenant to possession *after* an eviction is that of "appropriate circumstances."

Because the statutory standard of proof to vacate a warrant of eviction *before* the warrant is executed is "for good cause shown" (RPAPL 749[3]), one might expect that a more exacting standard should be employed where a tenant seeks to be restored to possession *after* eviction, since the landlord-tenant relationship had already been terminated at that point, eliminating the tenant's rights to reside in the leased premises. Yet, a number of cases of this Court have imported the "good cause" standard that RPAPL 749(3) provides for vacating unexecuted warrants of eviction, and have applied it to already executed warrants of eviction so as to restore tenants to possession; some cases have also adopted an "abuse of discretion"

standard of review of such trial court decisions. For example, in *102-116 Eighth Ave. Assoc. v Oyola* (299 AD2d 296 [1st Dept 2002]), we affirmed an order restoring a tenant to possession upon payment of all rent arrears. Without describing the facts of the case, we said that "[u]nder the particular facts and circumstances ... Civil Court properly exercised its discretion and for good cause vacated the warrant of eviction so as to restore respondent to possession of the subject premises" (*id.* at 296).

Similarly, in *Parkchester Apts. Co. v Scott* (271 AD2d 273 [1st Dept 2000]), this Court upheld the grant of a tenant's post-eviction application to be restored to possession, observing that the tenant's motion had been accompanied by proof of payment of the balance due on the judgment against him, plus additional accrued rent. In the remaining brief discussion, the decision imports to this post-eviction situation the "good cause" standard of RPAPL 749(3):

> "good cause to support the Civil Court's vacatur of the warrant of eviction was demonstrated through proof from the 63-year-old tenant that, notwithstanding recent illness, he made appreciable payments towards the judgment and, while a tenant for 20 years, had apparently had no prior delinquency record and, prospectively, had arranged for automatic withdrawal of monthly rent from his bank account"

(*id.* at 273-274).

To sum up: the initial case law that allowed already-evicted tenants to be restored to their tenancy applied a standard of "appropriate circumstances," while subsequent cases permit a tenant's restoration after eviction for "good cause shown," which standard is satisfied by good faith and eventually successful efforts by a long-term tenant to satisfy his or her rent obligation, despite hardships. In addition, some recent cases suggest that on appeal the trial court's decision must be given the substantial latitude of an abuse of discretion standard of review.

Appellate Term here, like this Court in *102-116 Eighth Ave. Assocs. v Oyola* (299 AD2d at 296) and like Appellate Term in *Three in One Equitites LLC v Santos* (43 Misc 3d 142[A], 2014 NY Slip Op 50847[u] [App Term 1st Dept 2014]), seems to have cited all of the foregoing standards.

I submit that we should reconsider the standard of proof necessary to vacate an already-executed warrant of eviction.

When the posture of the litigation is that a warrant of eviction was issued based on conceded rent arrears, but was stayed to give the tenant time to obtain the overdue funds from any available sources, the "good cause" standard of RPAPL 749(3) makes perfect sense. This Court has observed, "The policies

underlying the rent stabilization laws are generally better served by holding out to a tenant the opportunity usually afforded in a nonpayment proceeding to cure the breach of his rent obligations" (*2246 Holding Corp. v Nolasco*, 52 AD3d 377, 378 [1st Dept 2008]). Focusing on the facts of *2246 Holding*, this Court explained that

> "[r]espondent's multiple defaults were largely the result of a delay in payment by HRA. Petitioner was aware, at the time of the settlement, that a portion of the amount due was to be paid by HRA. An indigent tenant who resides in an apartment for many years should not be evicted where she has made diligent efforts to comply with the terms of the settlement agreement, only to be stymied by events beyond her control"

(52 AD3d at 378).

Facts such as these constitute sufficient and appropriate grounds for staying and vacating warrants of eviction that have not yet been executed. But since a completed eviction ordinarily terminates the tenant's interest in the property and entitles the landlord to treat the previously-rented premises as its own, a court should not undo that eviction, unless the tenant makes a showing of something more than the type of "good cause" that justifies vacating an unexecuted warrant.

For an example of the type of greater showing that should be required, we must return to the case *Brusco* relied on for the

proposition that an executed warrant of eviction may be vacated, *Solack Estates*. The showing in *Solack Estates* justified reversing an already-executed warrant of eviction and restoring the evicted tenant to possession, because the evicted tenant there showed that the basis for the landlord's underlying claim — nonpayment of rent — was incorrect (although neither fraudulent nor based on perjury) (78 AD2d at 513). Instead, her rent payments had been sent, as she had done previously, to an address that had been superseded (*id.*). The finding of an error in the allegations supporting the issuance of a warrant of eviction certainly justified vacating that warrant and restoring the tenant to possession.

In contrast, a showing that after he was evicted, the evicted tenant has, at long last, succeeded in pulling together funds from enough sources to pay off arrears that accumulated over a two-year period, does nothing to show that the factual premise for the eviction was incorrect. It comports with recent case law, but it should not be enough.

I submit that to undo an eviction, the tenant should be required to satisfy more stringent criteria than the type of "good cause" that justifies vacating an unexecuted warrant. Rather, the tenant's showing should be of the type of

circumstances contemplated in *Brusco* and *Solack Estates*; that is, that incorrect assumptions or findings were made in issuing the warrant of eviction that undermines the basis for its issuance in the first place. And, the appellate standard of review of such an order should be stricter than the broad abuse of discretion standard.

Finally, I feel compelled to recognize the involuntary and unacknowledged burden cases such as this place on landlords. While the tenant's rent arrears are eventually paid, and the landlord reimbursed for its legal costs for the underlying proceeding, the landlord is not made whole. Since it has no choice but to wait however long it takes for the rent to be fully paid — here, the landlord waited two years — without any interest being paid on the unpaid rent, it is in effect forced to underwrite the tenancy.

Important public policy considerations necessitate ensuring that elderly and disabled low-income tenants are not made homeless because of the normal delays in the issuance of funds from social service agencies that these tenants regularly rely on to help make up shortfalls in their ability to keep up with their monthly rent. It is shameful, however, that we are relying on the private property owners who happen to rent apartments to such

tenants, requiring them to cover the shortfall for months, or even years, rather than, as a society, making sure that elderly and disabled low-income tenants have access to the necessary funds *in a timely manner* so they can stay current on their rent.

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

ENTERED: JANUARY 14, 2016

CLERK

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

16002 In re Marsid Realty Co., Index 571073/13
Petitioner-Appellant,

-against-

Ching Leou Liu,
Respondent-Respondent,

"John Doe," et al.,
Respondents.

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Cutler, Minikes & Adelman, LLP, New York (Johnathan Z. Minikes of counsel), for appellant.

John D. Gorman, New York, for respondent.

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Order, Appellate Term of the Supreme Court, First Department, entered August 14, 2014, which, to the extent appealed from as limited by the briefs, on affirming a judgment of the Civil Court, New York County (David J. Kaplan, J.), granting petitioner-landlord's holdover petition subject to respondent-tenant's right to cure, permanently stayed the warrant of eviction, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs and the permanent stay vacated.

The landlord brought this holdover petition seeking to evict the rent-stabilized tenant pursuant to (9 NYCRR) section 2524.3(f) of the Rent Stabilization Code, on the ground that she

failed to renew her expiring rent-stabilized lease. The Civil Court found, and the Appellate Term affirmed, that the landlord tendered a timely and proper lease renewal. On appeal, the tenant concedes that she did not timely renew the lease, but submits that she is entitled to keep her rent-stabilized apartment because "equity abhors a forfeiture" (*Thompson v 490 W. End Apts. Corp.*, 252 AD2d 430, 437 [1st Dept 1998] [internal quotation marks omitted], *lv denied* 92 NY2d 814 [1998]).

We disagree. The tenant was given numerous opportunities to sign the renewal lease. Indeed, following trial, she was given several copies of the renewal lease in open court after the court granted the tenant an opportunity to cure in the form of a 10-day stay pursuant to section 753(4) of the Real Property Actions and Proceedings Law (*see e.g. id.*; 6 *Greene St. Assoc. v Robbins*, 256 AD2d 169, 170 [1st Dept 1998]). The court went on to caution the tenant to sign the lease and pay the difference in rent. The tenant, however, did not comply, and later admitted in a posttrial hearing that she had still not signed the renewal lease. At the conclusion of the hearing, the court rejected the tenant's contentions as not credible, and found that her testimony at both the hearing and the trial had been "deceptive and intended to frustrate [the landlord]'s rights." The

Appellate Term affirmed the factual findings and sustained the possessory judgment in the landlord's favor.

We find that under these circumstances, and given the credibility determinations, the Appellate Term improvidently permitted the tenant to continue occupancy in the apartment.

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

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

ENTERED: JANUARY 14, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16640 The People of the State of New York, Ind. 1081/12
Respondent,

-against-

Miguel Rodriguez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Rivellese 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 (Edward J. McLaughlin, J.), rendered on or about August 12, 2014,

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: JANUARY 14, 2016

CLERK

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

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16641 Ronald White, et al., Index 155487/12
Plaintiffs-Appellants,

-against-

Peter Hoffman,
Defendant-Respondent.

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Arye, Lustig & Sassower, P.C., New York (Jay A. Wechsler of counsel) for appellants.

The Law Firm of Kevin M. McGowen, New York (Debora L. Jacques of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about August 8, 2014, which denied plaintiffs' motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff Ronald White alleges that he was injured when, while riding his bicycle on a designated path, defendant fellow bicyclist made a sudden left hand turn in front of plaintiff causing him to strike defendant's bicycle. The record, including the parties' deposition testimony, presents triable issues of

fact as to whose negligence caused the subject accident (*see Bruni v City of New York*, 2 NY3d 319, 328 [2004]).

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

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

ENTERED: JANUARY 14, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16642 In re Moises G., and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Luis G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Cassey M. Cole of counsel), attorney for the children.

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Order, Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about November 21, 2013, which, to the extent appealed from as limited by the briefs, found that respondent father had neglected the subject children, unanimously affirmed, without costs.

Family Court's finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]), including testimony that the father had engaged in a severe act of domestic violence against the mother by stabbing her multiple

times in their apartment while the children were in another room (*see Matter of Madison M.* [*Nathan M.*], 123 AD3d 616, 616 [1st Dept 2014]; *cf. Matter of Daphne G.*, 308 AD2d 132, 134 [1st Dept 2003] [vacating neglect finding where the child was in a foster home at the time of the alleged domestic violence]). The evidence shows that the elder subject child heard the mother screaming for help, and that the mother was hospitalized for a month as a result of the incident. A single incident of domestic abuse is sufficient to support a finding of neglect where, as here, the father's judgment was strongly impaired and the children were harmed or in imminent danger of becoming harmed (*see Matter of Jared S.* [*Monet S.*], 78 AD3d 536, 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]; *see also* Family Ct Act § 1012[f][i][B]).

We perceive no reason to disturb Family Court's evaluation of the evidence, including its credibility determinations, as its

findings are supported by a sound and substantial basis in the record (*see Matter of Troy B.* [*Troy D.*], 121 AD3d 570, 571 [1st Dept 2014]; *Matter of Jeromy J.* [*Latanya J.*], 122 AD3d 1398, 1398-1399 [4th Dept 2014], *lv denied* 25 NY3d 901 [2015]).

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

ENTERED: JANUARY 14, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16643 The People of the State of New York, SCI 3433N/13
Respondent,

-against-

Midomio Cisnero,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Richard M. Weinberg, J.), rendered on or about January 15, 2014,

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: JANUARY 14, 2016

CLERK

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

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16646 The People of the State of New York, Ind. 1951/11
Respondent,

-against-

Rafael Montanez,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Cravath, Swaine & Moore LLP, New York (Alexander V. Maugeri of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

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Judgment, Supreme Court, New York County (Patricia Nunez, J. at suppression hearing; Bruce Allen, J. at jury trial and sentencing), rendered December 18, 2012, as amended January 22, 2013, convicting defendant of two counts of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 16 years to life, unanimously affirmed.

The court properly exercised its discretion in permitting a police officer to identify defendant as the person depicted in a surveillance videotape. This testimony "served to aid the jury in making an independent assessment regarding whether the man in the [video] was indeed the defendant" (*People v Russell*, 79 NY2d

1024, 1025 [1992]), because there was "some basis for concluding that the witness [was] more likely to correctly identify the defendant from the [video] than [was] the jury" (*People v Sanchez*, 95 AD3d 241, 249 [1st Dept 2012], *affd* 21 NY3d 216 [2013]).

Defendant's objection, which was expressly limited to the testimony of the officer, failed to preserve his challenge to testimony by the victim of one of the burglaries about her recognition of defendant in the video, and we decline to review this claim in the interest of justice. As an alternative holding, we similarly find that the court properly exercised its discretion in admitting the testimony. We also conclude, as to both witnesses, that the court minimized any prejudice by delivering thorough limiting instructions on the role of the jury in deciding whether defendant was the person depicted in the video. In any event, as to both witnesses, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The hearing court properly denied defendant's motion to suppress a lineup identification. Although, after a witness identified defendant from a photo array, an officer should not have told the witness that he had picked out "the perpetrator," any suggestiveness was attenuated by the passage of 19 days

between the photo procedure and the lineup (*see People v Perez*, 128 AD3d 465 [1st Dept 2015]).

Defendant's challenge to the prosecutor's summation is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that any improprieties in the summation were harmless in light of the overwhelming evidence of guilt as to both crimes.

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

ENTERED: JANUARY 14, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16648 The People of the State of New York, Ind. 3398/11
Respondent,

-against-

Jermen Bates,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

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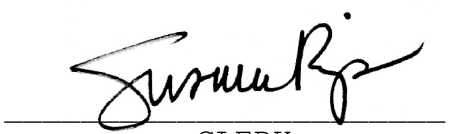
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Leonard Livote, J. at plea; George R. Villegas, J. at sentencing), rendered on or about August 28, 2013,

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

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

ENTERED: JANUARY 14, 2016



CLERK

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

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16649 Mimosa Equities Corp., Index 150017/14
Plaintiff-Respondent,

-against-

ACJ Associates LLC, et al.,
Defendants-Appellants.

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John Ramsen, Farmingdale, for appellants.

Hankin & Mazel, PLLC, New York (Mark L. Hankin of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered December 9, 2014, which denied defendants ACJ Associates LLC and Jadam Equities LLC's motion to dismiss the complaint pursuant to CPLR 3211(a)(1), unanimously affirmed, without costs.

The documentary evidence upon which defendants moved to dismiss the complaint is a letter agreement executed by plaintiff and defendant ACJ Associates LLC confirming plaintiff's satisfaction of a wraparound mortgage and note held by ACJ, in which the signatories released each other from all claims "*with respect to only or arising from only* the Loan and/or Wraparound Mortgage." Defendant Jadam Equities LLC, ACJ's escrow agent, is holding monies deposited by plaintiff for the payment of real estate taxes by ACJ, pursuant to a rider to the wraparound

mortgage. Although the rider is incorporated by reference in the mortgage, the limiting language of the release makes it clear that the parties did not intend the release to cover escrowed monies for real estate taxes (*see Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381 [1st Dept 2007]). Thus, the documentary evidence does not conclusively establish a defense to plaintiff's claim that it is entitled to a refund of the escrowed monies (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

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

ENTERED: JANUARY 14, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16652 Victoria David, etc., Index 16628/05
Plaintiff-Appellant,

-against-

Narendralall Persaud, D.O., et al,
Defendants,

Philip Martin Hutchison, D.O., et al.,
Defendants-Respondents.

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Irom, Wittels, Freund, Berne & Serra, P.C., Bronx (Richard W. Berne of counsel), for appellant.

Garson & Jakub, LLP, New York (Susan M. McNamara of counsel), for Phillip Martin Hutchison, respondent.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital, respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about September 5, 2014, which granted defendant Philip Martin Hutchison, D.O.'s motion and St. Barnabas Hospital's cross motion to renew their motions for summary judgment, and upon renewal, dismissed the complaint, unanimously affirmed, without costs.

In this action for medical malpractice, plaintiff alleges, inter alia, that defendant Dr. Daniel Cerbone, an emergency room (ER) attending, and Dr. Philip Martin Hutchinson, a surgeon, failed to properly diagnose and treat a postoperative infection

allegedly sustained by plaintiff's decedent during a January 18, 2003 ER visit at defendant St. Barnabas Hospital. Plaintiff alleges that complications from this infection led to decedent's death on February 9, 2004, more than one year later.

In 2013, the motion court denied all defendants' motions and cross motions for summary judgment dismissing the complaint. Dr. Cerbone appealed, and this Court reversed as to him on the ground that, inter alia, "plaintiff's expert failed to causally relate the alleged four-day delay in diagnosis and treatment of the postoperative infection and/or liver abscesses to decedent's death" (114 AD3d 412, 413 [1st Dept 2014]).

The court properly applied the law of the case doctrine (*J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809 [2d Dept 2007]). Renewal of defendants' motion and cross motion for summary judgment was also proper, since dismissal of the complaint as against Dr. Cerbone constituted a change in the law (*see* CPLR 2221[e][2]; *Spierer v Bloomingdale's*, 59 AD3d 267 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009]; *Engel v Eichler*, 300 AD2d 622, 623 [2nd Dept 2002]). While plaintiff argued that the expert submissions constituted new evidence precluding application of law of the case (*see Holloway v Cha Cha Laundry*, 97 AD2d 385, 386 [1st Dept 1983]), her "renewal" arguments were

based on information already known to her (*see Keating v Town of Burke*, 105 AD3d 1127, 1128 [3rd Dept 2013]), and were "nothing more than the [affirmation and affidavit] of newly retained experts" (*Giberson v Panter*, 286 AD2d 217, 218 [1st Dept 2001], *lv denied* 97 NY2d 606 [2001]); *McDermott v New York Hosp.-Cornell Med. Ctr.*, 42 AD3d 346, 346 [1st Dept 2007].

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

ENTERED: JANUARY 14, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16653 The People of the State of New York, Ind. 1542/13
Respondent,

-against-

Edward Greenman,
Defendant-Appellant.

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Edward Greenman, appellant pro se.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J. at dismissal motion and sentencing; Daniel McCullough, J. at jury trial), rendered July 29, 2014, convicting defendant of criminal tampering in the first degree and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

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]). Defendant's claim that the evidence failed to establish the elements of first-degree criminal tampering is without merit. Insofar as defendant argues that his conviction was based on perjured testimony, we find no material inconsistency between the officers' trial testimony, their grand

jury testimony and the felony complaint, nor do we find any basis for disturbing the jury's credibility determinations.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: JANUARY 14, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16654-
16655 Index 103331/12

Rajagopala S. Raghavendra, also known as Randy S. Raghavendra, etc.,
Plaintiff-Appellant,

-against-

Edward Brill, et al.,
Defendants-Respondents.

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R. (Randy) S. Raghavendra, Hicksville, appellant pro se.

Proskauer Rose, LLP, New York (Susan D. Friedfel of counsel), for Edward A. Brill, Proskauer Rose LLP, Lee C. Bollinger and The Trustees of Columbia University, respondents.

Gordon & Rees, LLP, New York (Adam S. Furmansky of counsel), for Louis D. Stober, Jr., and Law Office of Louis D. Stober, Jr., LLC, respondents.

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Order, Supreme Court, New York County (Lucy C. Billings, J.), entered March 13, 2014, which denied plaintiff's motion for a default judgment and related relief, discontinued the action, and granted defendants' cross motions for sanctions, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 2, 2014, which, inter alia, denied plaintiff's motion for renewal, unanimously dismissed, without costs, as abandoned. The Clerks of this Court and Supreme Court are directed to accept no filings from this plaintiff as to the matters herein without the prior leave of their respective

courts.

Plaintiff's motion for a default judgment and related relief was frivolous. The court providently exercised its discretion in granting defendants' cross motions for sanctions against plaintiff to the extent of imposing a sanction in the modest amount of $5,000 for plaintiff's failure to comply with a court-ordered stipulation and for his frivolous motion practice.

Plaintiff abandoned his appeal from so much of the December 2, 2014 order as denied his renewal motion by failing to address the order in his briefs on appeal (*see Mehmet v Add2Net, Inc.*, 66 AD3d 437 [1st Dept 2009]).

Given plaintiff's continued assertion of frivolous claims and arguments, defendants' request that this Court exercise its authority to impose further sanctions on plaintiff is granted, as indicated.

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

ENTERED: JANUARY 14, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16656 The People of the State of New York, Ind. 4995/91
Respondent,

-against-

Lamont Scott,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about May 7, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly considered defendant's youthful offender adjudication when it assessed points under the risk factors for criminal history and recent prior offense (*see People v Arnold*, 126 AD3d 463 [1st Dept 2015], *lv denied* 25 NY3d 910 [2015]). Defendant's inappropriate sexual behavior in prison, including coercive conduct, supported the assessment under the risk factor for unsatisfactory conduct while incarcerated.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841

[2014]). The mitigating factors alleged by defendant were already taken into account in the risk assessment instrument, and the record does not establish any basis for a downward departure, given the seriousness of defendant's sexual offense.

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

ENTERED: JANUARY 14, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16657 Board of Directors of Windsor Owners Corp., Plaintiff-Respondent, Index 155985/14

-against-

Elaine Platt, Defendant-Appellant.

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Elaine Platt, New York, appellant pro se.

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for respondent.

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Order, Supreme Court, New York County (Peter H. Moulton, J.), entered May 5, 2015, which, to the extent appealed from, denied defendant's motion for leave to renew her motion to dismiss the claim for consequential damages, unanimously affirmed, without costs.

The new facts offered by defendant on her renewal motion would not change the prior determination (*see* CPLR 2221[e][2]). The mere fact that the plaintiff in a related federal action

chose not to depose defendant does not support defendant's theory that her disclosure of attorney-client communications will not play a role in the determination of that action or a state action brought by the same plaintiff.

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

ENTERED: JANUARY 14, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16658 The People of the State of New York, Ind. 2624/12
Respondent,

-against-

Mady Diakite,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 22, 2013, convicting defendant, upon his plea of guilty, of criminal possession of forgery devices (two counts) and scheme to defraud in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

Defendant, who contends that his plea was involuntary because the court never advised him that he could be deported as a result of his plea (*see People v Peque*, 22 NY3d 168 [2013]), has not established that the exception to the preservation requirement set forth in *Peque* (*id.* at 182-183) should apply. The record demonstrates that defendant knew of his potential deportation, by virtue of the notice of immigration consequences

served upon him and the prosecutor's application for an increase in bail due to defendant's prior federal conviction for bank fraud and the fact that he was not a United States citizen. Review of defendant's unpreserved claim in the interest of justice is unwarranted, because the circumstances of the plea render it highly unlikely that defendant could make the requisite showing of prejudice under *Peque* (*id.* at 198-201) if granted a hearing.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 14, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels,, JJ.

16659 The People of the State of New York, Ind. 953N/13
Respondent,

-against-

Qing Yu,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Rivellese 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 (Bruce Allen, J.), rendered on or about December 6, 2013,

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

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

ENTERED: JANUARY 14, 2016

CLERK

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

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

16660N In re HSBC Bank U.S.A., etc. Index 650562/11

- - - - -

Ofra Levin, et al.,
Plaintiffs-Respondents,

-against-

HSBC Bank USA, N.A., et al.,
Defendants-Respondents,

Darek Jura, et al.,
Proposed Intervenors-Appellants.

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Rigrodsky & Long, P.A., Garden City (Timothy J. MacFall of counsel), and Cohen Law Group, P.C., New York (Brian S. Cohen of counsel), for appellants.

Turk & Davidoff PLLC, New York (Adam Seth Turk of counsel), for Ofra Levin, 33 Seminary, LLC Binghousing Inc. and Michael Park, respondents.

Stroock & Stoock & Lavan LLP, New York (James L. Bernard of counsel), for HSBC Bank USA respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 17, 2015, which denied proposed intervenors Darek Jura and Leah Hanes's motion to intervene in this class action, unanimously affirmed, with costs.

The record amply supports the IAS court's denial of the motion for intervention, both with respect to intervention as of right under CPLR 1012 and permissive intervention under CPLR 1013. As this Court has held, "Distinctions between intervention

as of right and discretionary intervention are no longer sharply applied" (*Yuppie Puppy Pet Prods., Inc., v Street Smart Realty, LLC,* 77 AD3d 197, 201 [1st Dept 2010]).

"Consideration of any motion to intervene begins with the question of whether the motion is timely," and the IAS court properly denied the motion on these grounds (*id.*). Proposed intervenors have known about this action for years, and in fact their current counsel drafted and filed the original class-action complaint on plaintiffs' behalf. One of the proposed intervenors was even a party to the action before voluntarily withdrawing his claims to pursue a parallel action in federal court. As it is uncontested that the proposed intervenors knew about the pending action for over a year, the IAS court properly denied the motion to intervene as untimely (*RKH Holding Corp. v 207 Second Ave. Realty Corp.*, 236 AD2d 254, 255 [1st Dept 1997]).

The IAS court's additional findings in support of denying the motion – that the class representatives and their counsel would adequately protect the proposed intervenors' interests – are also fully supported. The class representatives are not obviously adverse to the remainder of the class and have sufficient familiarity with the case, while their counsel are

experienced class action attorneys who have been involved with similar litigations.

We have considered the proposed intervenors' remaining arguments and find them unavailing.

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

ENTERED: JANUARY 14, 2016

CLERK