SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 10, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16082 The People of the State of New York Ind. 720/02
Respondent,

-against-

Ming Jian Huang,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered August 21, 2012, resentencing defendant to an aggregate term of 50 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: MARCH 10, 2016

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Manzanet-Daniels, JJ.

244-
245 &
M-372 Index 303745/14

Ana Iris Salazar, et al.,
Plaintiffs-Respondents,

-against-

Rafael Pantoja,
Defendant-Appellant,

CitiMortgage, Inc., etc.,
Defendant-Respondent.

_____

Rafael M. Pantoja, New York, appellant pro se.

Balfe & Holland, P.C., Melville (Lee E. Riger of counsel), for Ana Iris Salzar, Bernice Collado and Intervenida Salvador, respondents.

DelBello Donnellan Weingarten Wise & Wiederkehr LLP, White Plains (Bradley D. Wank of counsel), for Citimortgage, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered on or about October 22, 2014, which granted plaintiffs' motion for a preliminary injunction enjoining defendant Pantoja from evicting plaintiffs or in anyway dispossessing them of any ownership or residential interest in the subject property, and order, same court and Justice, entered on or about July 8, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment against defendant Pantoja and declared that the deed

conveying the property from nonparty Rapsil Corporation to Pantoja is void as against all subsequent purchasers, unanimously affirmed, with costs.

The deed at issue was signed by "the Rapsil Corporation" and not an individual on behalf of the corporation, and no officer, director or attorney of the corporation acknowledged the deed. Accordingly, the motion court correctly concluded that the deed is void as against all subsequent purchasers (*see* Real Property Law §§ 291, 309[1], [3]; 309-a(1); *Matisoff v Dobi*, 90 NY2d 127, 134 [1997]).

The doctrines of collateral estoppel and res judicata do not bar plaintiffs' challenge to the conveyance of the deed from the Rapsil Corporation to Pantoja, as that issue was never litigated or decided in the prior foreclosure action (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985] [collateral estoppel]), nor did the conveyance involve the same transaction or series of transactions at issue in the foreclosure action (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981] [res judicata]).

M-372 ***Ana Iris Salazar, et al. v Rafael Pantoja***

Motion to enlarge record denied.

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

ENTERED: MARCH 10, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Richter, JJ.

276-
277-
278-
279

Index 100524/08

Bruce Schwartz,
Plaintiff-Respondent,

-against-

Boom Batta, Inc., et al.,
Defendants,

Robert Watman, et al.,
Defendants-Appellants.

_____

Law Office of Glenn A. Wolther, New York (Glenn A. Wolther of counsel), for appellants.

Gottlieb Ostrager LLP, White Plains (Warren S Gottlieb of counsel), and Law Offices of Douglas T. Tabachnik, P.C., New York (Douglas T. Tabachnik of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 28, 2014, which, insofar as appealed from as limited by the briefs, granted plaintiff Bruce Schwartz's motion for summary judgment as against defendant Robert Watman on the first cause of action pursuant to Debtor and Creditor Law § 273-a, awarded Watman the amount of $2,020,964.29, unanimously modified, on the law, the award vacated, and the matter remanded for a trial on valuation of the fraudulently conveyed assets, and otherwise affirmed, without costs. Order, same court (Jeffrey K.

Oing, J.), entered April 3, 2014, which granted plaintiff's motion to confirm a referee's report recommending, insofar as appealed from as limited by the briefs, that a hearing was necessary to determine the value of the property fraudulently conveyed and that defendants Watman and Tim Ouellette should be precluded from offering certain evidence at trial, unanimously affirmed, on the law, without costs. Appeal from orders, same court (Jeffrey K. Oing, J.), entered on or about November 6, 2013 and November 22, 2013, which, insofar as appealed from as limited by the briefs, preliminarily enjoined the transfer or encumbrance of funds in the amount of $1,941,303.35 from certain of Watman's accounts and of Watman's membership interest in TCC 39th LLC, unanimously dismissed, without costs, as abandoned and superseded.

Contrary to defendants' contention that an action to recover pursuant to Debtor and Creditor Law (DCL) § 273-a may only be brought against the judgment debtor, both a transferee of a debtor's assets and beneficiary of the conveyance who participated in the fraudulent transfer may be found liable under DCL § 273-a (*Constitution Realty v Oltarsh*, 309 AD2d 714, 716 [1st Dept 2003]; *Gruenebaum v Lissauer*, 185 Misc 718, 727-728 [Sup Ct, New York County 1945], *affd* 270 AD 836 [1st Dept 1946];

Farm Stores v School Feeding Corp., 102 AD2d 249, 255 [2d Dept 1984], *affd in part and appeal dismissed in part* 64 NY2d 1065 [1985]; *Stochastic Decisions, Inc. v DiDomenico*, 995 F2d 1158, 1172 [2d Cir 1993], *cert denied* 510 US 945 [1993]). Because defendants acknowledge for purposes of this appeal that the conveyance of the trademarks at issue here from defendant Boom Batta, Inc. to defendant Do the Hustle, LLC was constructively fraudulent, plaintiff is entitled to partial summary judgment on liability against defendant Watman on his cause of action pursuant to Debtor and Creditor Law § 273-a.

While "[a]s a general rule, the creditor's remedy in a fraudulent conveyance action is 'limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance'" (*Manufacturers & Traders Trust Co. v Lauer's Furniture Acquisition*, 226 AD2d 1056, 1057 [4th Dept 1996], *lv dismissed* 88 NY2d 962 [1996]), a court of equity may award a personal judgment against a party in lieu of setting aside a transfer (*Constitution Realty,* 309 AD2d at 715). Setting aside the fraudulent conveyance of the trademarks here is not an adequate remedy, where the transferee and subsequent licensees exploited the use of the fraudulently conveyed property in an effort to reap profits and return of the trademarks would not

avail plaintiff.

However, plaintiff fails to point to anything in the record to establish the value of the trademarks. Although he points to moneys defendant Watman received from the licensees, which operated bars and nightclubs, such evidence tends to show, at most, that Watman received such money from the operation of the clubs in which he was an investor. Plaintiff points to nothing in the record tending to establish how much of the money from the operations of the clubs that Watman received derived from the trademarks. Accordingly, a trial on damages is necessary to determine the value of the trademarks that were fraudulently conveyed, including the value derived from their subsequent licensing and exploitation.

In view of the dilatory tactics and recalcitrant behavior engaged in by defendants throughout this litigation, we find that Supreme Court did not abuse its discretion in confirming so much of the referee's report as recommended precluding defendants from proffering any documentary evidence or non-expert witnesses at trial. Nor did Supreme Court abuse its discretion in denying

Watman's cross motion to amend his answer. He acknowledges that the only affirmative defenses sought to be added are merely "application[s] of the law" (*see generally Bag Bag v Alcobi*, 129 AD3d 649 [1st Dept 2015]).

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

ENTERED: MARCH 10, 2016

CLERK

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

297 The People of the State of New York, Ind. 1215/13
Respondent,

-against-

Tarsaun Harris,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan Mansell of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered February 27, 2015, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of four years, to be followed by three years of post-release supervision, unanimously affirmed.

Defendant did not waive his right to appeal from the judgment because the Court never advised defendant of the consequences of the appeal waiver, or spoke to defendant to ensure he understood the rights he was forfeiting by signing the waiver (*see People v Oquendo*, 105 AD3d 447 [1st Dept 2013], lv denied 21 NY3d 1007 [2015]). Although defendant signed a written waiver, this "was no substitute for an on-the-record explanation

of the nature of the right to appeal" (*People v Ramos*, 122 AD3d 462 [lst Dept 2014]). Furthermore, the written waiver says that defendant was "advised by the Court of the nature of the rights being waived," but that never occurred. Rather, the court told defense counsel to explain the waiver of appeal to defendant, and following an off-the-record conference between defendant and his counsel, counsel indicated defendant had signed the waiver. Counsel's confirmation that he told defendant about the waiver cannot substitute for the court conducting its own inquiry.

Defendant argues that the written waiver, which is a standard form, is invalid because it chills a defendant's right to file a notice of appeal and creates ethical dilemmas for defense attorneys. The People counter by arguing that the waiver contains exceptions allowing defendant to file a notice of appeal with respect to certain claims that are not waivable. Because the waiver is not enforceable on other grounds, we need not decide this issue.

Although defendant's claim is not waived, we decline to reduce his sentence. Defendant received six months more than the minimum sentence that he had been originally promised because he did not timely appear on the sentencing date and was late on the adjourned date. The court had warned defendant, when it let him

remain at liberty pending sentence, that it would give him additional jail time if he did not appear. The court ultimately gave defendant less than the five years incarceration it told defendant he would receive if he did not appear for sentencing. We do not find defendant's sentence to be unduly harsh under the circumstances.

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

463 The People of the State of New York, Ind. 4084/09
Respondent,

-against-

Donald Miller,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered July 14, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. The purchasing undercover officer's description of the seller included a very detailed clothing description, and there was sufficient proximity to the officer's observation of defendant coming out of a building he had entered after the sale to make it highly unlikely that the person arrested was not the seller, but an identically dressed innocent person (*see People v Coleman*, 77

AD3d 591 [1st Dept 2010], *lv denied* 16 NY3d 829 [2011]). Accordingly, there was probable cause for defendant's arrest.

The court properly exercised its discretion in denying defendant's mistrial motion, made on the ground that a police witness mentioned the recovery of a sum of cash other than buy money from defendant, after the court had precluded such evidence. The court's curative actions, including striking the testimony, were sufficient (*see People v Santiago*, 52 NY2d 865 [1981]), and the offending testimony was not particularly prejudicial in any event. Defendant's challenges to the content and timing of the court's instruction on disregarding stricken testimony are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

464 Kathleen Pfleshinger, Index 307887/10
Plaintiff-Respondent,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Appellants.

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

O'Dwyer & Bernstien, LLP, New York (Mary Gladys T. Oranga of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered on or about April 8, 2015, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when, while standing and riding on defendants' bus, the bus stopped suddenly causing her to fall and strike her head. Defendants submitted evidence showing that the bus was traveling between five and seven miles per hour, that it was not operated in a negligent manner, and that no other passengers who were

standing fell when the bus stopped.

In opposition, plaintiff failed to raise a triable issue of fact. Other than alleging that the bus "stopped short," plaintiff failed to provide "objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant" (*Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 830 [1995]; *see Tallant v Grey Line N.Y. Tours, Inc.*, 67 AD3d 497 [1st Dept 2009]; *Gioulis v MTA Bus Co.*, 94 AD3d 811 [2d Dept 2012]).

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

465 In re Commissioner of Social Services on behalf of Maria G.,
Petitioner,

-against-

Rafael V.,
Respondent-Respondent,

Chelsey G.,
Nonparty Appellant.

_____

Larry S. Bachner, Jamaica, for the child Chelsey G., appellant.

Law Offices of Joseph S. Hubicki, New York (Joseph S. Hubicki of counsel), for respondent.

_____

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about September 15, 2014, which, after an estoppel hearing, dismissed the paternity petition commenced by petitioner Commissioner of Social Services as assignee of the subject child's mother, unanimously affirmed, without costs.

The Family Court exercised its discretion in a provident manner in finding that it was in the child's best interests to dismiss the paternity petition on equitable estoppel grounds. The record shows that, although the then 16-year-old child was told by her mother that respondent was her biological father when she was approximately five years old, she considered the mother's

husband to be her father and had maintained a parent-child relationship with him since she was about six months old (*see Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 5 [2010]). The child never saw respondent until petitioner, as assignee of the child's mother, commenced the instant paternity proceedings against him to recoup public assistance the child received.

Although the child's attorney consented to genetic marker testing, he equivocated at the hearing, and there is no evidence in the record from the child herself, who is now 17 years old, that she wants to have respondent declared her biological father and to establish a father-daughter relationship with him (*see Terrence M. v Gale C.*, 193 AD2d 437, 437 [1st Dept 1993], *lv denied* 82 NY2d 661 [1993] ["It would be incongruous, illogical and unrealistic to conclude that a child would be any less devastated by being forced to accept a stranger as her father"]

[internal quotation marks omitted]; *compare Matter of Carol S. v Gerard D.*, 276 AD2d 377 [1st Dept 2000]).

We have considered the attorney for the child's remaining arguments and find them unavailing.

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

466 Maria Maysonet, et al., Index 150526/11
Plaintiffs-Appellants,

-against-

EAN Holdings, LLC, et al.,
Defendants,

Cornelius M. Cooper, et al.,
Defendants-Respondents.

_____

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellants.

Law Offices of Kevin M. McGowen, New York (Debora Jacques of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 23, 2014, which granted the motion of defendants Cooper and Sharma-Cooper for summary judgment dismissing the complaint and any cross claims as against them, unanimously affirmed, without costs.

After driving up from Florida overnight as a passenger in a rental car driven by defendant Rivera, plaintiff was seriously injured when Rivera's car turned left from Broadway onto 120th Street, and was struck by defendant Sharma-Cooper's oncoming car. The Cooper defendants demonstrated prima facie that Rivera was negligent through the deposition testimony of both drivers, which

established that, in violation of Vehicle & Traffic Law § 1141, Rivera failed to yield the right of way to Sharma-Cooper, who had a green light in her favor and was "within the intersection or so close as to constitute an immediate hazard," when he made the left turn (*see Foreman v Skeif*, 115 AD3d 568 [1st Dept 2014]; *Cadeau v Gregorio*, 104 AD3d 464, 465 [1st Dept 2013]).

Contrary to plaintiffs' contention that Rivera's testimony raised an issue of fact as to whether he had a green light in his favor after he turned, Rivera's testimony was clear that he had a green light while driving south down Broadway, did not notice any traffic signal after he turned at 120th Street, and proceeded to cross oncoming traffic without stopping. Since both drivers testified that they had green lights in their favor while driving on Broadway, Sharma-Cooper had the right to assume that the light was red for cross traffic and that other drivers would stop for the red light (*Siegel v Sweeney*, 266 AD2d 200, 201 [2d Dept 1999], citing PJI 2:79).

Sharma-Cooper's testimony also established the absence of any triable issue of fact as to her negligence. She testified that she had been driving within the speed limit and immediately slammed on her brakes when she saw Rivera's car "flash" in front of her, but could not avoid the accident that occurred within a

second later (*see Foreman v Skeif*, *supra*; *Cadeau v Gregorio*, *supra*). Plaintiff submitted no evidence that would support a finding that Sharma-Cooper could have avoided the accident or was negligently operating her vehicle (*id.*).

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

467 Joan C. Lipin, Index 150972/14
Plaintiff-Appellant,

-against-

David E. Hunt,
Defendant,

Danske Bank, et al.,
Defendants-Respondents.

_____

Joan C. Lipin, appellant pro se.

Mintz Levin Cohn Ferris Glovsky & Popeo, P.C., New York (Francis J. Earley of counsel), for Danske Bank, respondent.

Allegaert Berger & Vogel LLP, New York (Lauren Pincus of counsel), for ULF Bergquist, Evelyn F. Ellis, Dana A. Sawyer, Krainin Real Estate, Ann Susan Markatos, Robert Gary Lipin, David A. Berger, Allegaert Berger & Vogel LLP and Deborah Lovewell, respondents.

Lewis Brisbois Bisgaard & Smith LLP, New York (Jordan Ehrlich of counsel), for Joseph R. Mazziotti and Mark K. Anesh, respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered October 20, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss, denied plaintiff's motions for default judgments, imposed a permanent injunction on plaintiff enjoining her from commencing any actions in Supreme Court regarding her deceased father's estate without prior court approval, and denied plaintiff related

relief, unanimously affirmed, without costs.

The Supreme Court properly dismissed the complaint without leave to replead. In relevant part, the court properly dismissed claims against defendant Danske Bank as barred by res judicata (*Matter of Josey v Goord*, 9 NY3d 386, 389-390 (2007]; *Marinelli Assoc. v Helmsley-Noyes Co.*, 265 AD2d 1, 5-6 [1st Dept 2000]; *see also Smith v Russell Sage Coll.*, 54 NY2d 185, 192 [1981]). Plaintiff has repeatedly unsuccessfully litigated, or could have litigated, the claims she asserts against Danske Bank, which relate to the disputed coin collection and administration of her father's estate (*see Lipin v Hunt*, __ F Supp 2d __, 2015 WL 1344406, *2, 2015 US Dist LEXIS 35700, *7-9 [SD NY 2015]).

The Supreme Court also properly dismissed claims against Judge Mazziotti on res judicata grounds. Plaintiff previously sued Mazziotti in Maine, and her suit was dismissed because her claims were based on actions Mazziotti had taken in his judicial capacity, for which he was "absolutely immune from suit" (*Lipin v Ellis*, __ F Supp2d __, 2007 WL 2198876, *9, 2007 US Dist LEXIS 54489, *32 [D Me July 26, 2007], *affd* __ F Supp2d __, 2007 WL 2701493, 2007 US Dist LEXIS 67417 [D Me Sept. 10, 2007], *affd Lipin v Ellis*, __ F3d __, 2008 US App LEXIS 28002 [1st Cir 2008]; *see also Rosenstein v State of New York*, 37 AD3d 208 [1st Dept

2007]). Plaintiff's claims in the instant suit similarly arise from Mazziotti's conduct as a judge who presided over proceedings regarding her deceased father's estate in Maine.

The court properly dismissed claims alleging a violation of Judiciary Law § 487 and related attorney misconduct against defendant attorneys Mark. K. Anesh, David A. Berger, and Berger's firm Allegaert Berger & Vogel LLP, who represented various defendants in prior suits brought by plaintiff, because plaintiff's allegations were based on statements that were "absolutely privileged," i.e., they were made in the course of judicial proceedings, and were material and pertinent to the issue to be resolved in those proceedings (*Bisogno v Borsa*, 101 AD3d 780, 781 [2d Dept 2012]). To the extent that plaintiff challenges dismissal of her claims alleging that Anesh violated criminal laws, those claims were properly dismissed for lack of standing, since "the district attorney [] generally retains sole authority to prosecute such criminal activity (*Kinberg v Kinberg*, 48 AD3d 387, 387 [1st Dept 2008], *lv denied* 11 NY3d 702 [2008]). The same is true to the extent that she asserts claims against Francis J. Earley, counsel for Danske Bank, who is not a named defendant in the action.

In light of defendants' timely pre-answer motions to

dismiss, plaintiff was not entitled to default judgments against any defendants (*see* CPLR 3012[a]; CPLR 3211[f]).

Finally, in light of plaintiff's seemingly endless pursuit of the same frivolous claims in numerous courts, the court properly enjoined her from commencing any further actions without prior court approval (*Bikman v 595 Broadway Assoc.*, 88 AD3d 455 [1st Dept 2011], *lv denied* 21 NY3d 856 [2013]; *Jones v Maples*, 286 AD2d 639 [1st Dept 2001], *lv dismissed* 97 NY2d 716 [2002]; *see also Lipin v Hunt*, __ F Supp 2d __, 2015 WL 1344406, *1 n 1, *11, 2015 US Dist LEXIS 35700, *2-5 n 1, *35-36 [SD NY 2015] [listing over 10 suits commenced by plaintiff relating to her late father's estate or its administration]).

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

468 The People of the State of New York, Ind. 6029/11
Respondent,

-against-

Joshua Muhammad,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered November 26, 2012, convicting defendant, after a jury trial, of assault in the second degree, resisting arrest, unlicensed operation of a motor vehicle and aggravated unlicensed operation of a motor vehicle in the second degree, and sentencing him, as a second felony offender, to an aggregate term of four years and a $500 fine, unanimously affirmed.

The verdict was based on legally sufficient evidence and not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations, including those relating to the arresting officer's characterizations of his injuries. The

evidence amply supports the conclusion that defendant caused the officer physical injury. The officer's injuries were plainly more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]; *see also People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]).

The court properly exercised its discretion in permitting the People to introduce rebuttal evidence consisting of recorded phone conversations that contradicted defense evidence tending to show that defendant did not cause the officer's injuries and that he was the victim of police brutality (*see People v Hodges*, 99 AD3d 629, 630 [1st Dept 2012], *lv denied* 20 NY3d 1062 [2013]. Furthermore, even if the testimony was "not technically of a rebuttal nature but more properly part of the offering party's

original case," the court had discretion to allow it (CPL 260.30[7]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

469 Fred Simcha Wang, Index 653250/13
Plaintiff-Appellant,

-against-

LSUC, et al.,
Defendants-Respondents,

John Does 1-10, et al.,
Defendants.

_____

Fred Simcha Wang, appellant pro se.

Furman Korneld & Brennan LLP, New York (Stefanie A. Singer of counsel), for LSUC, respondent.

Pepper Hamilton LLP, New York (Adam B. Michaels of counsel), for Dr. Joel Jeffries and Centre for Addiction and Mental Health, respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Jeanne A. Barry of counsel), for Dr. Stephen R. Swallow, Dr. Lance L. Hawley and OCCT, respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered September 10, 2014, which granted defendants' motions to dismiss the complaint, with prejudice, for lack of jurisdiction, unanimously affirmed, without costs.

The Supreme Court properly dismissed the complaint for lack of jurisdiction. The complaint alleges that the defendants conspired to perpetrate an elaborate fraudulent scheme to deprive plaintiff, formerly a licensed Canadian attorney, of his law

license in Canada. The defendants include the regulating authority for attorneys in Ontario Canada, three doctors who examined plaintiff, and the professional organizations to which those doctors belong. As determined by the lower court, plaintiff, who bears the burden of showing jurisdiction upon a motion to dismiss pursuant to CPLR 3211(a)(8), failed to demonstrate that the defendants transacted significant business in New York, and to the extent that any business was transacted, plaintiff failed to demonstrate any connection to the claims asserted in this case (CPLR 302(a); *O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 [1st Dept 2003]; *Paterno v Laser Spine Inst.*, 24 NY3d 370, 376 [2014]).

Plaintiff also failed to demonstrate that the defendants were subject to conspiracy jurisdiction because he did not sufficiently allege the elements of a conspiracy, or that any part of the conspiracy occurred in New York (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 98 [1st Dept 2002], *affd* 100

NY2d 215 [2003], *cert denied* 540 US 948 [2003]).

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: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

470-
471-
472 Index 650741/09

Lew Nussberg, also known as
Lev Nussberg,
Plaintiff-Appellant,

-against-

Gary Tatintsian, also known as
Garri Tatintsian, et al.,
Defendants-Respondents,

Viktoria Pukemova,
Defendant.

- - - - -

Lew Nussberg, also known as
Lev Nussberg,
Plaintiff-Respondent,

-against-

Gary Tatintsian, also known as
Garri Tatintsian, et al.,
Defendants-Appellants,

Viktoria Pukemova,
Defendant.

_____

Franzino & Scher, LLC, New York (Davida S. Scher of counsel), for Lew Nussberg, appellant/respondent.

Shapiro Arato LLP, New York (Eric Olney of counsel), for Gary Tatintsian and Gary Tatintsian Gallery, Inc., appellants/respondents.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 12, 2014, against defendants

Gary Tatintsian and Gary Tatintsian Gallery, Inc., in plaintiff's favor, unanimously affirmed, without costs. Judgment, same court, Justice, and a jury, entered July 22, 2015, awarding defendant-counterclaim plaintiff Gary Tatintsian Gallery, Inc. (the Gallery) $5 as against plaintiff-counterclaim defendant, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 23, 2014, to the extent it denied plaintiff's motion for renewal of his motion to preclude some of defendants' witnesses, unanimously dismissed, without costs.

The court erred by requiring expert testimony on valuation; defendants could prove value in other ways (*see e.g. Park W. Mgt. Corp. v Mitchell*, 62 AD2d 291, 298 [1st Dept 1978], *affd* 47 NY2d 316 [1979], *cert denied* 444 US 992 [1979]; *Credit Suisse First Boston v Utrecht-America Fin. Co.*, 84 AD3d 579 [1st Dept 2011]). Because value was a crucial part of the trial, we would normally remand for a new trial. However, a new trial is unnecessary, because plaintiff's argument on his renewal motion, i.e., that defendants' experts should have been precluded, is meritorious.

Defendants are correct that the right of direct appeal from the order that denied plaintiff's renewal motion terminated with the entry of the final judgments (*see e.g. Matter of Aho*, 39 NY2d 241, 248 [1976]). Since plaintiff did not appeal from either of

the judgments, his appeal from the order must be dismissed (*see e.g. Moore v Federated Dept. Stores, Inc.*, 94 AD3d 638 [1st Dept 2012], *appeal dismissed* 19 NY3d 1065 [2012]). However, his arguments about the renewal order can be heard on defendants' appeal from the judgments (*see* CPLR 5501[a][1]; Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5501:5).

The court should have granted renewal based on our decision in the prior appeal (111 AD3d 441 [1st Dept 2013]) and, on renewal, granted plaintiff's motion to preclude defendants' experts, because none of the experts had "viewed the consigned works before they left the United States in 2009" (*id.*). Without this expert testimony, defendants would have been unable to prove that the works they acquired from plaintiff were forgeries, and thus they would have been unable to prove their set-off defense/counterclaim. Although a trial was unnecessary, we affirm the 2014 judgment, which gave plaintiff judgment on the 2009 contract. Technically, the Gallery should not have been awarded any damages on the 2006 contract, but since plaintiff has not appealed from the 2015 judgment, that judgment, too, is affirmed.

Contrary to defendants' contention, our decision need not

have disastrous effects on the art market. We limit both this decision and our decision on the prior appeal to the facts of this case, i.e., a situation where defendants did not claim until many years after the sale and consignment that the artworks were forged, and they were unable to produce the people who had custody of the art between the time defendants sold it and the time they returned some of it to the United States; and plaintiff claimed that defendants, or the non-produced custodians of the art, forged it; and the custodians resided in a country that did not abide by the Hague Convention, so that plaintiff was unable to obtain evidence from them.

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

473-
474 The People of the State of New York,
Respondent,

-against-

Rashid Rahman,
Defendant-Appellant.

Ind. 1979/10

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Goodwin Procter LLP, New York (Meghan K. Spillane of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

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Judgment, Supreme Court, Bronx County, (Dominic R. Massaro, J.), rendered March 21, 2013, as amended March 10, 2014, convicting defendant, after a nonjury trial, of burglary in the second degree, attempted assault in the first degree (two counts) and criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years; and order, same court and Justice, entered on or about July 24, 2014, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The admission of a witness's grand jury testimony under the hearsay exception for past recollection recorded, coupled with the witness's extensive invocation of his privilege against self-

incrimination, violated defendant's right of confrontation. However, we find the error to be harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Provided that a proper foundation is laid, grand jury testimony may be admitted as past recollection recorded, and its admission does not violate the Confrontation Clause where the witness testifies at trial and is subject to cross-examination (*People v DiTommaso*, 127 AD3d 11, 15 [1st Dept 2015], *lv denied* 25 NY3d 1162 [2015], because "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements" (*Crawford v Washington*, 541 US 36, 59 n 9 [2004]). However, this may not apply when a witness appears at trial but invokes the Fifth Amendment (*see People v Ryan*, 17 AD3d 1, 4 [3d Dept 2005]; *see also United States v Wilmore*, 381 F3d 868, 871-873 [9th Cir 2004]). Not every instance in which a witness invokes the privilege against self-incrimination will give rise to a Confrontation Clause violation; rather, "the Sixth Amendment is violated only when assertion of the privilege undermines the defendant's opportunity to test the truth of the witness' direct testimony" (*Bagby v Kuhlman*, 932 F2d 131, 135 [2d Cir 1991], *cert denied* 502 US 926 [1991]).

Here, the witness asserted his Fifth Amendment rights and refused to answer questions that had a direct bearing on testing the truth of his grand jury testimony. Thus, the witness's extensive assertion of his Fifth Amendment rights regarding the material facts "undermine[d] the process to such a degree that meaningful cross-examination within the intent of the [Confrontation Clause] no longer exist[ed]" (*United States v Owens*, 484 US 554, 562 [1988]; *see also Bagby*, 932 F2d at 135).

Nevertheless, the error was harmless under the standard for constitutional error. There was overwhelming direct and circumstantial evidence establishing all the elements of the crimes, and no reasonable possibility that the error contributed to the conviction.

The court did not violate defendant's right to be present at a material stage of the trial when it excluded him from an unrecorded proceeding (from which the prosecutor was apparently also excluded) at which the court discussed with the above-mentioned witness and his attorney the witness's invocation of his Fifth Amendment rights. The proceeding concerned legal matters and dealt only with the rights of the witness (*see People v DeJesus*, 32 AD3d 753, 754 [1st Dept 2006], *lv denied* 8 NY3d 879 [2007]), and did not "involve testimony or concern issues about

which defendant had special knowledge" (*see People v Whitt*, 304 AD2d 378, 379 [1st Dept 2003], *lv denied* 100 NY2d 589 [2003]).

Defendant has not preserved his claim that his attorney's absence from this interview violated his right to counsel (*see People v Garay*, 25 NY3d 62, 67-68 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find that the discussion of the witness's right to invoke his Fifth Amendment privilege did not affect a substantial right of defendant, but only affected the witness's rights, and thus did not require defense counsel's presence. Unlike the situation in *People v Carr* (25 NY3d 105, 113 [2015]), there is no reason to believe that anything that transpired at the interview could have had any impeachment value. In any event, given the witness's assertion of his privilege, as discussed previously, any impeachment would have been impracticable.

Defendant's challenge to the validity of his waiver of the right to a jury trial, made in writing in open court in accordance with law, is unpreserved, as well as being unreviewable for lack of a sufficient record, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. There is no evidence that the court promised a limited scope of sentencing in return for a jury

waiver, that counsel made any such representation to defendant, or that defendant relied on any such promise in waiving his right to a jury trial.

Defendant received effective assistance of counsel at sentencing. We perceive no basis for reducing the sentence, or running it concurrently with defendant's Kings County sentence.

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

477 The People of the State of New York, Ind. 5581/11
Respondent,

-against-

Rhonda Stone,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered January 8, 2013, convicting defendant, after a jury trial, of nine counts of robbery in the second degree, and sentencing her to concurrent terms of five years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). An extensive chain of evidence leads to the inescapable conclusion that defendant intentionally took part in a robbery by providing her accomplices with otherwise unexplained knowledge of the location of valuables in the targeted premises, and by acting as a getaway driver.

The court properly exercised its discretion in admitting evidence that defendant lived in Queens within a few blocks of

the two alleged accomplices (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]). This evidence was relevant when viewed in the context of the overall pattern of evidence, and was not unduly prejudicial.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

479 The People of the State of New York, Ind. 4874/09
Respondent,

-against-

Jarod Skinner,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered November 8, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

481 George L. Villafane, Index 300330/09
Plaintiff-Appellant,

-against-

Industrial Construction
Management, Ltd.,
Defendant-Respondent.

Raphaelson & Levine Law Firm, P.C., New York (Steven C. November of counsel), for appellant.

Burke, Conway, Loccisano & Dillon, White Plains (Michael G. Conway of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 27, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendant failed to establish prima facie that it is an out-of-possession landlord with no right of reentry or maintenance (*see Vasquez v RVA Garage*, 238 AD2d 407 [2d Dept 1997]). In addition to testimony as to the terms of an oral lease agreement with the commercial tenant, defendant offered only a carefully tailored affidavit by the tenant's principal, who is also the

mother of defendant's principal. This evidence is not sufficient to eliminate any material issues of fact from the case (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

482 The People of the State of New York, Ind. 4817/13
Respondent,

-against-

Jesse Lee,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgment, Supreme Court, New York County (Richard Carruthers, J., at plea; Gregory Carro, J., at sentence), rendered March 5, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Andrias, Saxe, Kapnick, JJ.

483 [M-6053] In re Robert Stuart, et al., Petitioners, Ind. 2647/14

-against-

Hon. Bonnie G. Wittner, etc., et al., Respondents.

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The Blanch Law Firm, New York (Ryan G. Blanch and Daniel L. Bibb of counsel), for Robert Stuart and Extension Software, petitioners.

Law Office of Parkman and White, New York (William White of counsel), for Susanne Stuart, petitioner.

Law Office of Jeffrey Chabrowe, New York (Jeffrey Chabrowe of counsel), for Patrick Read, petitioner.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Bonnie G. Wittner, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Carey Ng of counsel), for Eric Seidel, respondent.

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

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

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

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

ENTERED: MARCH 10, 2016

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Manzanet-Daniels, JJ.

15565 Paul Davis, Index 654027/13
Plaintiff-Appellant,

-against-

Scottish Re Group Limited, et al.,
Defendants-Respondents,

Jonathan Bloomer, et al.,
Defendants.

_____

Guzov, LLC, New York (David J. Kaplan of counsel), for appellant.

Mayer Brown LLP, New York (Jean Marie L. Atamian of counsel), for Scottish Re Group Limited, Scottish Re (U.S.), Inc., Jeffrey Hughes and Raymond Wechsler, respondents.

Schulte Roth & Zabel LLP, New York (Howard O. Godnick of counsel), for SRGL Acquisition, LDC and Cerberus Capital, LLC., respondents.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Joshua S. Margolin of counsel), for Massachusetts Mutual Life Insurance Co., Benton Street Partners I, L.P., Benton Street Partners II, L.P., Benton Street Partners III, L.P. and Larry Port, respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), as amended, entered on or about October 15, 2014, modified, on the law, the facts, and in the exercise of discretion, to allow plaintiff to replead, as limited herein, the fourth and the sixth causes of action, and otherwise affirmed, without costs.

Opinion by Andrias, J. All concur except Tom, J.P., and Moskowitz, J. who dissent in part in an Opinion by Moskowitz, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Richard T. Andrias
Karla Moskowitz
Sallie Manzanet-Daniels, JJ.

15565
Index 654027/13

_____x

Paul Davis,
Plaintiff-Appellant,

-against-

Scottish Re Group Limited, et al.,
Defendants-Respondents,

Jonathan Bloomer, et al.,
Defendants.

_____x

Plaintiff appeals from the order of the Supreme the Court, New York County (O. Peter Sherwood, J.), as amended, entered on or about October 15, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the fourth, sixth, seventh, ninth and tenth causes of action for lack of standing, inter alia, and to dismiss the complaint as against the Benton Street Partners defendants for lack of jurisdiction.

Guzov, LLC, New York (David J. Kaplan and Debra J. Guzov of counsel), and Silvia Bolatti, P.C., New York (Silvia Bolatti of counsel), for appellant.

Mayer Brown LLP, New York (Jean Marie L. Atamian and James Ancone of counsel), for Scottish Re Group Limited, Scottish Re (U.S.), Inc., Jeffrey Hughes and Raymond Wechsler, respondents.

Schulte Roth & Zabel LLP, New York (Howard O. Godnick and Andrew D. Gladstein of counsel), for SRGL Acquisition, LDC and Cerberus Capital, LLC., respondents.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Joshua S. Margolin, Jennifer J. Barrett and Jennifer Swearingen of counsel), for Massachusetts Mutual Life Insurance Co., Benton Street Partners I, L.P., Benton Street Partners II, L.P., Benton Street Partners III, L.P., and Larry Port, respondents.

ANDRIAS, J.

Plaintiff, a resident of Mexico, holds more than 2.4 million shares (representing approximately 48%) of the Non-Cumulative Perpetual Preferred Shares (PPS) of defendant Scottish Re Group Limited (Scottish Re), a Cayman Islands reinsurance company. Prior to a 2011 merger, which is one of the transactions at issue, he also held more than 13 million shares (representing approximately 20%) of Scottish Re's common stock.

In this action, plaintiff asserts both direct and derivative causes of action against Scottish Re, its American operating subsidiary Scottish Re (U.S.), Inc. (SRUS), certain members of the Board of Directors of Scottish Re and SRUS (the Directors), Massachusetts Mutual Life Insurance Company (sued here as MassMutual Insurance), Cerberus Capital Management, L.P. (sued here as Cerberus Capital, LLC), and various entities affiliated with MassMutual and Cerberus (collectively, the Investors). Plaintiff alleges, inter alia, that the Directors, under the control of the Investors, directed Scottish Re to undertake an undervalued cash-out merger, in which the Investors acquired all of the outstanding common shares of Scottish Re, and a dividend strategy that benefited the Investors and unfairly prejudiced the minority shareholders.

Supreme Court granted defendants' motions, made pursuant to

CPLR 3211(a)(1), (3), (7) and (8), to dismiss the fourth, sixth, seventh, ninth and tenth causes of action for lack of standing, and to dismiss the complaint as against the Benton Street Partners defendants for lack of jurisdiction. We now modify to grant plaintiff leave to replead the fourth and sixth causes of action, to the extent authorized herein, and otherwise affirm.

In determining whether plaintiff has standing, we must first analyze the fourth and sixth causes of action to determine whether they are direct claims, as pleaded by plaintiff, or derivative claims.

Under the internal affairs doctrine, claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation (*see Hart v General Motors Corp.*, 129 AD2d 179, 182 [1st Dept 1987], *lv denied* 70 NY2d 608 [1987]), in this case the Cayman Islands. To determine whether a claim is derivative or direct, Cayman law looks to whether the shareholder's loss is merely "a reflection of the loss suffered by the company" and "would be made good if the company had enforced its full rights against the party responsible" (*Johnson v Gore Wood & Co.*, [2002] 2 AC 1, 36 [internal quotation marks omitted]). Particularly,

"[u]nder Cayman law, shareholders may not recover

> 'reflective losses,' which are losses that the company itself could recover if it chose to initiate legal action. The Cayman courts have held that '[w]here a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss by the company . . . there is no discretion involved.' (*Johnson v Gore Wood & Co.*, [2002] 2 A.C. 1, House of Lords). A shareholder cannot sue in a personal capacity for a loss unless that loss is distinct from that of the company, and this rule applies regardless of whether the company itself intends to sue" (*Varga v McGraw Hill Fin. Inc.*, 2015 NY Slip Op 31453[U], *28 [Sup Ct, NY County 2015]).

In the fourth cause of action, plaintiff alleges that the Directors and the Investors breached their fiduciary duties and "unfairly prejudice[d]" the minority shareholders

> "by pursuing and implementing a dividend policy, and other corporate actions, that resulted in PPS and ordinary shareholders not obtaining any dividend payments in the past, and placing shareholders in a position of not expecting to obtain significant dividend payments in the near future, while at the same time creating windfall dividends for the Investors in a manner which is clearly oppressive, unjust and inequitable, and which in essence constitutes a disguised partial liquidation of the Company."

Plaintiff seeks to recover damages to be determined at trial, which he believed to be in excess of $40,000,000.

The claim, as pleaded, cannot be sustained. Plaintiff's attempt to characterize the dividend policy of which he complains as discriminatory, making the claim a direct one, contains allegations that confuse derivative and individual rights (*see*

Abrams v Donati, 66 NY2d 951, 953 [1985]). The deficiencies in plaintiff's pleadings, detailed by the dissent, make it virtually impossible to discern just how the dividend policy was discriminatory and therefore affected plaintiff individually within the meaning of *Brinckerhoff v JAC Holding Corp.* (10 AD3d 520, 521 [1st Dept 2004] [holding that where some shareholders "received a lesser benefit than other shareholders" the harm was "suffered individually"]).

However, plaintiff should be given an opportunity to replead to remedy the pleading deficiencies cited by the dissent with respect to his *Brinckerhoff* claim as against the Directors only. Although a challenge to a decision to pay dividends would generally be derivative, plaintiff asserts, inter alia, that his claim is direct because the disproportionate payment of dividends is discriminatory and directly harmed him as a minority shareholder. Thus, rather than corporate mismanagement, plaintiff asserts unequal treatment in the form of an intentional, premeditated plan to pay the Investors huge windfall dividends while freezing out minority shareholders in order to induce them to sell their shares to the Investors at a steep discount.

In the sixth cause of action, plaintiff alleges that the Directors and Investors breached their fiduciary duties when they

improperly forced him out of holding his ordinary shares "by unfair procedures imposed in the Merger transaction by conflicted parties who intentionally misled other minority shareholders, improperly inducing and coercing them into a misinformed and invalid vote to approve the Merger." Plaintiff alleges, inter alia, that the Directors: (i) failed to give a complete and unbiased opinion about the share price, disclose the conflicts, and pursue alternative proposals, and (ii) used the false threat that the minority would receive no compensation if the merger did not go through. Plaintiff further alleges that "[t]he Investors, having been in a position to significantly influence the conduct of the Board and the Company, breached their fiduciary duty to minority shareholders by pursuing the Merger transaction and using their influence to cause the Board to act." As to his claim for relief, plaintiff alleges that

> "[t]he Company and the ordinary shareholders have been damaged by the Director Defendants' and the Investors' breaches of fiduciary duty in the Merger in an amount to be proven at trial but believed to be in excess of $5,000,000. In the alternative, Defendants' breaches of fiduciary duty entitle the ordinary shareholders to rescission of the Merger and/or a redistribution to them of approximately one third of the Company's book value of $600 million, which was their proportionate share of the total value of the Company when the ordinary shareholders were bought out in the Merger."

This claim, as pleaded, cannot stand as it merges direct claims with derivative claims, with plaintiff alleging that the board's conduct caused harm to both himself and the company and seeking rescission of the merger as alternative relief (*see Abrams v Donati*, 66 NY2d at 953-954; *Serino v Lipper*, 123 AD3d 34, 40-41 [1st Dept 2014]). However, plaintiff should be given leave to replead to separate his direct claim of being induced by the Directors to part with his common shares in Scottish Re for less than their true value from his derivative claim alleging harm to the company (*see Shaker v Al-Bedrawi*, [2002] EWCA Civ 1452, [2003] Ch 350 EWCA), and to set forth facts to establish the special circumstances necessary under Cayman Islands law to create a fiduciary duty between the Directors and plaintiff as a minority shareholder.

The dissent believes that leave to replead should not be granted because "the complaint gives no indication that any special circumstances exist here," and "plaintiff makes clear in his complaint that there was no such [special factual] relationship." I disagree.

Under Cayman Islands law, a director does not owe any fiduciary duties to minority shareholders solely based on his or her relationship to the company (*see Peskin v Anderson*, [2001] 1 BCLC 372). However, under *Peskin*,

> "there may be special circumstances in which a fiduciary duty is owed by a director to a shareholder personally and in which breach of such a duty has caused loss to him directly (eg [sic] by being induced by a director to part with his shares in the company at an undervalue), as distinct from loss sustained by him by a diminution in the value of his shares (eg [sic] by reason of the misappropriation by a director of the company's assets), for which he (as distinct from the company) would not have a cause of action against the director personally.
>
> "The fiduciary duties owed to the company arise from the legal relationship between the directors and the company directed and controlled by them. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a special factual relationship between the directors and the shareholders in the particular case. Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations, such as a duty of disclosure of material facts to the shareholders, or an obligation to use confidential information and valuable commercial and financial opportunities, which have been acquired by the directors in that office, for the benefit of the shareholders, and not to prefer and promote their own interests at the expense of the shareholders" (*Peskin*, at 379; *see also Hayat v Al-Mazeedi*, 28 Mass L Rptr 243, 2011 WL 1532109, *3-4, 2011 Mass. Super LEXIS 73, *8-10 [Super Ct, Jan. 10, 2011, No. 08-1004]).

In *Peskin*, as examples of the requisite special factual relationship, the court referred to

> "instances of the directors of a company making direct approaches to, and dealing with, the shareholders in relation to a specific transaction and holding themselves out as agents for them in connection with the acquisition or disposal of shares; or making material representations to them; or failing to make material disclosure to them of insider information in the context of negotiations for a take-over of the

> company's business; or supplying to them specific information and advice on which they have relied . . .” (*Peskin*, at 379).

Here, plaintiff has alleged, inter alia, that the merger transaction “was effected through improper misinformation and coercion so as to induce the minority shareholders into selling their shares at a severely depressed price,” that the Directors “presented inaccurate and biased information to the minority shareholders to induce a favorable vote” and engaged in a “deliberate campaign of misinformation,” and that the Directors “deliberately intimidated the ordinary shareholders by repeatedly asserting that in the absence of the Merger, the ordinary shareholders would receive no compensation whatsoever for their shares” (*compare Feiner Family Trust v Xcelera.com*, 2008 WL 5233605, *7, 2008 US Dist LEXIS 102019, *22-23 [SD NY, Dec 15 2008] [denying leave to file a third amended complaint because it “fail[ed] to describe any contact between [the] Plaintiffs and Defendants that could give rise to a fiduciary relationship, such as acting as Plaintiffs' agent in the context of a specific transaction, or supplying them with specific information and advice on which they relied, or failing to make disclosures of insider information in the context of a take-over”], *affd* 352 Fed Appx 461 [2d Cir 2009]). Accordingly, at the motion-to-dismiss stage, we cannot determine, as a matter of law, that plaintiff

will be unable to allege the requisite special circumstances for imposition of a fiduciary duty running from directors to shareholders under Cayman law, and the breach thereof.

However, to the extent the fourth and sixth causes of action are predicated on the majority shareholders' alleged breach of their fiduciary duties to the minority, they lack merit since there are no such fiduciary duties under the governing law of the Cayman Islands, which undisputedly follows English law (*see Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 404 [1st Dept 2008]; *Feiner Family Trust v VBI Corp.*, 2007 WL 2615448, *7, 2007 US Dist LEXIS 66916, *22 [SD NY, Sept 11, 2007, No. 07-Civ-1914 (RPP)]; *see also Phillips v Manufacturer's Secs. Ltd.*, [1917] 116 LT 290, 296). Hence, leave to replead is not granted as against the Investors.

The derivative claims asserted in the seventh, ninth and tenth causes of action, were correctly dismissed for plaintiff's failure to comply with Order 15, Rule 12A, of the Grand Court Rules of the Cayman Islands. The rule is applicable in the courts of this state as a substantive, rather than procedural, condition precedent to the continuation of a derivative action, as the underlying remedy is extinguished if a plaintiff fails to file an application to continue the derivative action (*see ARC Capital, LLC v Kalra*, 2013 NY Slip Op 31316[U], *8 [Sup Ct, NY

County 2013]; *see also Tanges v Heidelberg N. Am.*, 93 NY2d 48, 54 [1999]). Accordingly, the law of the forum of incorporation governs plaintiff's derivative claims (*see* 2013 NY Slip Op 31316[U], *10), and plaintiff is barred from asserting those claims. Indeed, plaintiff does not even allege that he attempted to comply with the Grand Court Rule.

We disagree with the contrary view that the rule is unlike the condition precedent of a derivative demand merely because it contemplates a legal determination by a court rather than a business judgment by a board committee. While the Grand Court Rule involves a purely legal judgment made by the court alone, rather than a business judgment by the board, we find this to be a distinction without a difference. A derivative demand, on the one hand, and an application under the Grand Court Rule, on the other, each constitute conditions precedent to the right to bring the lawsuit. For purposes of deciding whether a derivative action may proceed, there is no meaningful legal difference between the two.

In view of this ground for dismissal, it is unnecessary to consider whether plaintiff's derivative causes of action are also barred by the English common-law proscription against derivative suits brought by individuals.

Finally, while it is the policy of New York courts to give

effect to forum selection clauses (*see Sterling Nat. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006]), plaintiff may not enforce the forum selection clause against the Benton entities. Plaintiff is not a signatory to the merger agreement containing the forum selection clause he seeks to enforce against the Benton entities, and was at most an incidental beneficiary (*see Magdalena v Lins*, 123 AD3d 600, 600-601 [1st Dept 2014]; *ComJet Aviation Mgt. v Aviation Invs. Holdings*, 303 AD2d 272, 272 [1st Dept 2003]). Moreover, the agreement expressly negates an intent to permit enforcement by persons or entities not parties thereto (*see Specialists Entertainment, Inc. v Moore*, 115 AD3d 424, 425 [1st Dept 2014]). Nor do any of the exceptions allowing enforcement by or against a nonsignatory apply to permit him to enforce the forum selection clause (*see Freeford Ltd. v Pendleton*, 53 AD3d 32, 39 [1st Dept 2008], *lv denied* 12 NY3d 702 [2009]).

Accordingly, the order of Supreme Court, New York County (O. Peter Sherwood, J.), as amended, entered on or about October 15, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the fourth, sixth, seventh, ninth and tenth causes of action for lack of standing, and to dismiss the complaint as against the Benton Street Partners defendants for lack of jurisdiction, should be modified,

on the law, the facts, and in the exercise of discretion, to allow plaintiff to replead, as limited herein, the fourth and the sixth causes of action, and otherwise affirmed, without costs.

All concur except Tom, J.P. and Moskowitz, J. who dissent in part in an Opinion by Moskowitz, J.

MOSKOWITZ, J. (dissenting in part)

I agree with the majority's conclusion that the IAS court properly dismissed the fourth, sixth, seventh, ninth, and tenth causes of action. I also agree with the majority that the IAS court properly dismissed the complaint as against the Benton Street Partners defendants. However, I part ways with the majority on the issue of whether plaintiff should be permitted leave to replead the fourth and sixth causes of action, as the face of the complaint makes clear that plaintiff cannot plead that any of the defendants owed a fiduciary duty to him personally. Accordingly, I respectfully dissent.

The Parties

Defendant Scottish Re Group Limited (Scottish Re or the Company) is engaged in the business of reinsurance through its operating subsidiaries in the Cayman Islands, Ireland, and the United States. Scottish Re also has a United States subsidiary, defendant Scottish Re (U.S.), Inc. (SRUS).[1]

As the majority notes, plaintiff, a shareholder of Scottish Re, holds more than 2.4 million Non-Cumulative Perpetual Preferred Shares (PPS) of the Company and, before the merger at issue here, held over 13 million ordinary shares. Plaintiff was

[1] The facts are taken from the allegations in the complaint and are assumed to be true.

a substantial investor, as his 2.4 million PPS shares were almost 50% of the shares of that class when issued, and his 13 million ordinary shares were about 20% of the 68 million total.

Defendant Cerberus Capital, LLC[2] is a limited partnership organized and existing under Delaware law with its principal place of business in Manhattan. Defendant SRGL Acquisition, LDC (SRGL) is a subsidiary of Cerberus and exists under the laws of the Cayman Islands with its principal place of business in Manhattan. Defendants Benton Street Partners I, L.P. (Benton I), Benton Street Partners II, L.P. (Benton II), and Benton Street Partners III, L.P. (Benton III) (collectively, Benton), are subsidiaries of defendant MassMutual Insurance.[3] Defendant Benton I is a limited partnership organized and existing under the laws of the Cayman Islands; defendants Benton II and III are limited partnerships organized and existing under Delaware law.

In 2006, Scottish Re was struggling financially. However, in 2007, Benton and SRGL (collectively, the Investors) invested

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[2] According to defendants, there is no entity named "Cerebus Capital, LLC" and they assume plaintiff meant to name "Cerebus Capital Management, L.P." as a defendant.

[3] According to defendants, there is, in fact, no such entity as "MassMutual Insurance"; rather, plaintiff meant to name "Massachusetts Mutual Life Insurance Company" as a defendant. Nonetheless, I will refer to the entity as "MassMutual," the name used in the complaint.

in Scottish Re, each eventually owning 500,000 Convertible Cumulative Preferred Participating Shares (CCPPS). Under the purchase agreement, Benton's and SRGL's shares entitled them each to vote 750,000 ordinary shares, or approximately 34% of the voting shares of Scottish Re. Further, of the nine new directors of Scottish Re appointed just after issue and purchase of the CCPPS, five were managing directors or officers of the Investors, and two others had significant ties to the Investors.

In 2008, Scottish Re decided to cease originating new reinsurance business. By April of that year, the Investors caused the Company's shares to be delisted from the New York Stock Exchange so that those shares were no longer subject to the U.S. Securities and Exchange Commission's reporting requirements. This action, plaintiff alleged, eventually resulted in reduced liquidity of the Company's minority shares.

The Orkney Transaction

In 2009, certain affiliates of Cerberus (other than SRGL) bought $700 million in notes of Orkney Holdings, a subsidiary of SRUS, on the secondary market. On April 15, 2011, through privately-negotiated agreements with the noteholders, Scottish Re repurchased all the notes held by the Cerberus affiliates (the Orkney transaction). Scottish Re agreed to pay the Cerberus affiliates less for their notes, i.e., a 35% discount from par

value, than it paid the unaffiliated noteholders for theirs, i.e., a 10% discount from par value.

The Orkney transaction required the approval of the disinterested members of the Scottish Re board of directors, who engaged legal counsel and financial advisors to analyze the transaction. Ultimately, those directors did, in fact, recommend to the Scottish Re board that the repurchase be approved.

The Dividend Payment

Beginning in early 2011, Scottish Re's financial health improved; thus, under the Certificate of Designation (COD), the document governing the PPS, the Company would have been allowed to pay dividends to the PPS holders. However, Scottish Re did not pay dividends for two years, except for once in October 2012. Plaintiff asserts that the dividend payment merely constituted lip service to Scottish Re's obligation under the COD, and that the failure to pay dividends reflected a strategy designed to diminish or eliminate returns to the PPS holders and pressure them into selling their interests to Scottish Re at a steep discount. As a result, plaintiff asserted, the Investors effectively received over $100 million in dividends from 2011 until the commencement of this action in November 2013, while the PPS holders received only about $1 million in dividends during that period.

The Merger

In January 2011, SRGL and Benton proposed that they acquire all outstanding Scottish Re ordinary shares in a merger transaction for $0.21 per share. Accordingly, the board of Scottish Re formed a special committee of directors to review SRGL and Benton's offer; the special committee, in turn, retained legal and financial advisors, the latter of whom evaluated the offer for financial fairness. In April 2011, after negotiations, the special committee obtained a 43% increase in the offer price, from $0.21 per ordinary share to $0.30 per ordinary share. The special committee then recommended that the board of directors approve the merger.

In May 2011, the Investors announced the intended merger of newly-created nonparty SRGL Benton Ltd. with Scottish Re. The merger's stated purpose was to provide ordinary shareholders -- that is, minority shareholders, or shareholders other than the Investors and their affiliates -- with liquidity for their interests through payment of the merger consideration. The holders of ordinary shares of Scottish Re would receive $0.30 per share, those shares would be canceled, and the Investors would be issued new ordinary shares; the Investors would thereby have 100% of Scottish Re's voting shares.

Nonetheless, according to the allegations in the complaint,

the merger was flawed and coercive from its inception, because the Investors denied the ordinary shareholders critical information and threatened them with the loss of their investment unless they approved the merger. Also, plaintiff asserted, the fairness opinion and its approval by the special committee of ostensibly disinterested board members was flawed because two of the four members of the special committee had significant yet undisclosed ties to Cerberus and MassMutual.

Notably, an information statement circulated to the ordinary shareholders before their vote to approve the merger notified them of the right to dissent from the merger share valuation and to request that a Cayman court appraise it; a copy of the Cayman statute that provides for such right was included in that information statement. Plaintiff, in his complaint, admitted expressing his displeasure to Scottish Re's board about the merger price and the insufficient information provided to the shareholders regarding the merger and the Orkney transaction, but he explicitly chose to not invoke his appraisal right.

Benton signed the merger agreement, as did the other merger parties. The agreement contained a forum selection clause providing that each party submit to the exclusive jurisdiction of the courts of New York in any proceeding arising out of the merger agreement or the transaction. The merger agreement also

barred enforcement by non parties, stating that it "inure[d] solely to the benefit of each party hereto." Further, the merger agreement stated, "[N]othing in this Agreement, express or implied, is intended to or shall confer upon any other Person any right, benefit or remedy of any nature whatsoever under or by reason of this Agreement other than . . . the rights of the Ordinary Shareholders to receive the Merger Consideration." The unaffiliated ordinary shareholders approved the merger agreement, and the merger closed on August 24, 2011.

Commencement of this Action

In November 2013, plaintiff commenced this action against, among others, Scottish Re, its directors, and the Investors. In the complaint, plaintiff alleged that, through their control of Scottish Re and its subsidiaries, the Investors froze out the minority ordinary shareholders of Scottish Re. Further, plaintiff alleged, the Investors pressured the PPS holders to tender their shares at a discounted price, while simultaneously implementing an oppressive dividend strategy directed at the holdout PPS holders and carrying out a partial redemption that violated the COD. Plaintiff further alleged that in the Orkney transaction, Cerberus, using its position as a controlling shareholder and advisor to Scottish Re, caused Orkney Holdings to sell the notes back to Scottish Re at a loss to Scottish Re. At

the same time, plaintiff asserted, the Investors and the director defendants announced the merger, which was meant to consolidate those defendants' complete control of Scottish Re.

The complaint contained 10 causes of action. The first, second, and third causes of action asserted breach of contract claims against Scottish Re, while the fifth cause of action asserted a claim of tortious interference with contract against Benton, MassMutual, SRGL, and Cerberus. The fourth cause of action sought to recover for breach of fiduciary duty from the individual director defendants and from the Investors, the latter in their capacity as majority shareholders owing a duty to the minority. The sixth cause of action also sought to recover for breach of fiduciary duty from those same defendants. The seventh cause of action asserted waste against the director defendants, and the eighth cause of action asserted an aiding and abetting claim against the Investors. The ninth and tenth causes of action, both labeled derivative, asserted breaches of fiduciary duty based on the director defendants' approval of the Orkney transaction.

The Motions to Dismiss

Defendants moved separately to dismiss, among other things, the fourth, sixth, seventh, ninth and tenth causes of action. The motions were based on the derivative nature of those claims

and plaintiff's lack of standing to sue derivatively. Specifically, defendants argued, derivative claims are barred under Cayman law unless the plaintiff first applies to the court and shows grounds for an exception, and plaintiff had taken neither of those actions. Further, defendants asserted, plaintiff's claims lacked merit under Cayman law, because under that law, as opposed to New York law, majority shareholders do not owe fiduciary duties to the minority.

Benton moved to dismiss on the additional ground of lack of jurisdiction, asserting that it did not have New York contacts.

The Order Appealed

The IAS court found, among other things, that the fourth and sixth causes of action were derivative, rather than direct, claims, because the harm alleged would be to Scottish Re, not to plaintiff. As to the fourth cause of action, alleging improper dividend payments, the court noted that it was characterized as improper distributions of corporate assets, reflecting a loss suffered by the corporation; the court rejected plaintiff's argument that the harm alleged was discriminatory because it was suffered by the minority. The court also found that the undervaluation of the merger share price alleged harm to the corporation, not to plaintiff.

Moreover, the court held, plaintiff lacked standing to bring

any of the derivative claims, for failure to obtain, or even seek, leave of court to do so, as required by the Grand Court Rule. That rule applies to every shareholder derivative action under Cayman law, and provides, in pertinent part, that a plaintiff must seek leave to continue the derivative action once the defendants give notice that they will oppose it:

> "(2) Where a defendant in a derivative action has given notice of intention to defend, the plaintiff must apply to the Court for leave to continue the action.
>
> "(3) The application must be supported by an affidavit verifying the facts on which the claim and the entitlement to sue on behalf of the company are based.
>
> "(4) Unless the Court otherwise orders, the application must be issued within 21 days after the [date on which defendant gave its notice of intention to defend]" (Order 15, Rule 12A, of the Grand Court Rules of the Cayman Islands).

The court found that the Grand Court Rule is a substantive rule, not a procedural one, and thus applies in New York courts under conflict of laws principles and the internal affairs doctrine.

The court further found that, even if the Grand Court Rule did not warrant dismissal, dismissal was warranted for lack of standing under the English case of *Foss v Harbottle* ([1843] 2 Hare 461), which allows derivative claims only by the corporation, except in certain circumstances where individuals may bring those claims. Rejecting plaintiff's contention that the "fraud on the minority" exception applies, the court found

that plaintiff had failed to plead the required element that the defendant directors had control of the corporation. Plaintiff had not alleged that the Scottish Re directors individually held a majority of the voting shares (as opposed to shares held by others, such as Cerberus and MassMutual, which allegedly held a majority of the voting shares prior to the merger). In reaching this conclusion, the court also rejected plaintiff's argument that the directors had control over a majority of the voting shares because some of the directors were nominated and employed by the majority; the court found that, under Cayman law, such nomination or employment is not deemed to give the directors the voting power of the shareholder.

Finally, the court dismissed the claims against Benton for lack of personal jurisdiction. In so doing, the court did not mention the forum selection clause contained in the merger agreement.

Analysis

The parties agree that the issues are governed by the law of the Cayman Islands because Scottish Re is incorporated there and the internal affairs doctrine provides that claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation (*see Hart v General Motors Corp.*, 129

AD2d 179, 182-183 [1st Dept 1987], *lv denied* 70 NY2d 608 [1987]).

Nonetheless, citing *Brinckerhoff v JAC Holding Corp.* (10 AD3d 520, 521 [1st Dept 2004]), plaintiff relies on New York law in arguing that the fourth cause of action is direct, rather than derivative, because the issuance of dividends was discriminatory. Plaintiff further contends that the claimed loss here cannot be considered "reflective" (the English and Cayman Islands case law term for a loss suffered only by the corporation and therefore derivative) because the cause of action mixes the direct loss to plaintiff individually with a loss to the corporation, and under Cayman law, a mixed claim is considered direct. According to plaintiff, a mixed claim is permitted because the "reflective" loss rule is perceived as a limitation on the plaintiff's presumptive right to sue, and the defendant has the burden of showing that the claim is reflective and should be barred.

Although this Court has noted that whether a claim is derivative or direct sometimes "is not readily apparent" (*Yudell v Gilbert* (99 AD3d 108, 113 [1st Dept 2012]), an examination of the fourth cause of action reveals that the "unfair prejudice" part of the allegations is advanced merely as an introduction characterizing the cause of action, but is not supported by allegations of fact. Plaintiff also alleges that the PPS and minority shareholders were all denied dividends, while the

Investors received windfall dividends. However, elsewhere in the complaint, where the alleged facts are more fully set forth, plaintiff first alleges that dividends were not paid to the PPS holders for a sustained period, but does not state that any other shareholders received dividends during that period so as to render the treatment of the PPS holders discriminatory.

Plaintiff further alleges that Scottish Re, through the Investors that controlled it, paid the ordinary shareholders a dividend not commensurate with the one paid to the PPS holders, but he fails to allege the contractual or other dividend rights of either group that would explain why their entitlements were required to be commensurate. Additionally, although plaintiff alleges that the Investors paid themselves over $100 million in dividends while the PPS holders received only about $1 million, he fails to set forth any nonconclusory details about those payments.

Given the allegations in the pleadings, it is unclear whether the precise harm complained of concerns (a) the dividends paid to both the ordinary shareholders and the PPS holders compared to the dividends paid to the Investors; (b) the dividends completely withheld from the PPS holders; or (c) the dividends paid to the ordinary shareholders compared to those paid to the PPS holders. Thus, as the majority agrees, we cannot

glean from the complaint how the dividend policy was discriminatory and affected the plaintiff individually so that he falls under the aegis of *Brinckerhoff* (10 AD3d at 521). The alleged harm seems to have been, in general, the wrongful distribution of Scottish Re's assets, and was therefore a derivative claim, not a direct one (*see Yudell*, 99 AD3d at 114).

Further, even assuming for the sake of argument that the claim could be amended to plead a direct claim rather than a derivative one, the claim would still fail on the ground that plaintiff cannot properly plead the existence of a fiduciary duty. Under Cayman Islands law, majority shareholders do not owe fiduciary duties to the company or to minority shareholders (*see Feiner Family Trust v VBI Corp.*, 2007 US Dist LEXIS 66916, *22, 2007 WL 2615448, *7 [SD NY, Sept. 11, 2007, No. 07-Civ-1914 (RPP)]; *see also Phillips v Manufacturer's Sec. Ltd.*, [1917] 116 LT 290, 296). Likewise, a director does not, solely by virtue of his or her office, owe any fiduciary duties to minority shareholders collectively or individually (*see Peskin v Anderson*, [2001] 1 BCLC 372, 378).

To be sure, as the majority accurately notes, there may be special circumstances under which a director owes a fiduciary duty personally to a shareholder, and under which a breach of that duty has caused loss to the shareholder directly -- for

example, by being induced by a director to part with his shares at an undervalue -- as distinct from loss sustained by reason of a diminution in the value of his shares -- for example, by reason of a director's misappropriation of the company's assets (*Hayat v Al-Mazeedi*, 28 Mass L Rptr 243, 2011 WL 1532109, *3-4, 2011 Mass Super LEXIS 73, 8-10 [Super Ct, Jan. 10, 2011, No. 08-1004]). In the former instance, the shareholder may have a cause of action against the director personally (*id.*; *see also Peskin*, 1 BCLC 372 at 379 [a director may owe a fiduciary duty to a shareholder that, if breached, would permit the shareholder to bring a direct action against the directors where the shareholder "establish[ed] a special factual relationship between the directors and the shareholder[]"]).

However, the complaint gives no indication that any special circumstances exist here. Quite to the contrary, plaintiff makes clear in his complaint that there was no such relationship between him and the directors or the Investors, stating, among other things, that the information about the challenged transactions was presented to the minority shareholders at arm's length in the form of a detailed information statement, which plaintiff states that he received. Plaintiff also alleges that far from relying on any of the director defendants' alleged omissions and misrepresentations, he wrote to the board of

directors to challenge the merger and the Orkney Transaction. Similarly, never does plaintiff allege that any director contacted him directly with respect to the challenged transactions (*see Feiner Family Trust*, 2007 US Dist LEXIS 66916, *23, 2007 WL 2615448, *7). In fact, never does plaintiff allege that he placed trust and confidence in the Scottish Re directors or the Investors. Accordingly, because the complaint is bereft of any suggestion that a special relationship existed -- indeed, the complaint suggests that the converse was true -- I disagree with the majority that plaintiff should be permitted to replead with respect to the existence of a special relationship.

As to the sixth cause of action, plaintiff repeatedly states that the cause of action is for breach of fiduciary duty "to the Company and to the shareholders." Although plaintiff alleges "prejudice" to the minority shareholders and "minority oppression," and seeks damages in his favor, the gravamen of the wrong alleged is the merger price per share suffered by all of the shareholders, not just plaintiff individually. Similarly, the alternative relief sought (rescission of the merger) bespeaks a derivative claim, not a direct one. At any rate, even assuming that plaintiff could somehow plead facts rendering the sixth cause of action direct rather than derivative, the cause of action would still suffer from the same deficiency as the fourth

cause of action -- namely, that there was no fiduciary duty or special relationship between plaintiff and any of the defendants.

For the reasons set forth above, I would affirm the order to the extent appealed from as limited by the briefs.

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

ENTERED: MARCH 10, 2016

CLERK