SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 20, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5391 Paul Davis, Index 654027/13
Plaintiff-Appellant-Respondent,

-against-

Scottish Re Group Limited, et al.,
Defendants,

Jonathan Bloomer, et al.,
Defendants-Respondents-Appellants,

SRGL Acquisition, LDC, et al.,
Defendants-Respondents.

_____

Boies Schiller Flexner LLP, New York (Eric Brenner of counsel), for appellant-respondent.

Mayer Brown LLP, New York (Jean-Marie L. Atamian of counsel), for respondents-appellants.

Schulte Roth & Zabel LLP, New York (Andrew D. Gladstein of counsel), for SRGL Acuisition, LDC and Cerberus Capital Management L.P., respondents.

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

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Order, Supreme Court, New York County (O. Peter Sherwood,

J.), entered July 19, 2017, which, insofar as appealed from as limited by the briefs, denied the motion by the directors of defendant Scottish Re Group Limited (the director defendants) to dismiss the third cause of action (breach of fiduciary duty), granted the director defendants' motion to dismiss the fourth cause of action (breach of fiduciary duty), and granted the motions by defendants SRGL Acquisitions, LDC, Benton Street Partners I, L.P., Benton Street Partners II, L.P., Benton Street Partners III, L.P., Massachusetts Mutual Life Insurance Company, and Cerberus Capital Management L.P. (the investor defendants) to dismiss the sixth cause of action (unlawful act conspiracy), unanimously modified, on the law, to grant the director defendants' motion to dismiss the third cause of action, and to deny their motion to dismiss the fourth cause of action to the extent it asserts claims against defendants Jeffrey Hughes, Larry Port and Raymond Wechsler based on the "sufficient information duty" under Cayman Islands law, and otherwise affirmed, without costs.

The complaint, which was amended following the prior appeal (*Davis v Scottish Re Group Ltd. [Davis I]*, 138 AD3d 230 [1st Dept 2016], *mod on other grounds* 30 NY3d 247, [2017]), still fails to allege "a special factual relationship between the directors and

the shareholders ... bring[ing] the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations" with regard to either the dividend policy that is the subject of the third cause of action or the merger transaction that is the subject of the fourth cause of action (*id.* at 237).

However, to the extent the director defendants gave shareholders an information statement providing information and recommendations about the merger transaction, they owed the shareholders a "sufficient information duty" (*Sharp v Blank*, [2015] EWHC 3220 [Ch], ¶ 5). This is not a duty of loyalty, which would require the directors to subordinate their interests to the shareholders' interests, but "if [the directors] are going to invite the shareholders to a meeting, common fairness requires that they explain what the purpose of the meeting is" in a "clear and comprehensible" manner (*id.* at ¶ 21). Contrary to the director defendants' contention, plaintiff did not raise this "sufficient information duty" theory for the first time on this appeal. Although he did not so label his theory, as this Court recognized in *Davis I*, plaintiff has consistently claimed that the director defendants breached a duty to him by providing misleading information in connection with the merger (138 AD3d at

235).

Nor are the complaint's allegations about misinformation given to shareholders in the information statement conclusory. The complaint alleges that the information statement failed to disclose that two directors on the special committee negotiating merger terms had ties to the investor defendants, who proposed the merger, that it failed to disclose any details about the search for alternate proposals, which was illusory, that it failed to provide a meaningful valuation of ordinary shares using industry standards for the insurance business, and that it failed to disclose the impact on the stock value of a parallel bond transaction. Moreover, the complaint alleges that, while the information statement warned that the investor defendants could wipe out the ordinary shareholders by redeeming their convertible cumulative preferred participating shares, it misrepresented the likelihood of that occurrence.

The allegations underlying the sixth cause of action, which alleges unlawful act conspiracy against the investor defendants, are conclusory and therefore fail to state a cause of action.

Plaintiff's request for jurisdictional discovery pursuant to CPLR 3211(d) as to certain director and investor defendants is denied. Initially, plaintiff has never appealed from the prior

order of the lower court holding that it lacked personal jurisdiction over seven of the director defendants. Additionally, plaintiff has failed to demonstrate "the possible existence of essential jurisdictional facts that are not yet known" which would warrant jurisdictional discovery (*Copp v Ramirez*, 62 AD3d 23, 31 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]).

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

ENTERED: MARCH 20, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5710-
5711 The People of the State of New York,
Respondent,

-against-

Clarence Rouse,
Defendant-Appellant.

Ind. 2621/13

_____

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

Darcel D. Clark, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (James W. Hubert, J.), rendered April 23, 2015, as amended April 30, May 18, and May 20, 2015, convicting defendant, after a jury trial, of attempted murder in the second degree, criminal use of a firearm in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 18 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]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The evidence, viewed as a whole, supports an inference that

defendant had the requisite homicidal intent when he fired a shot that appeared to be aimed directly at a group of fleeing men (*see generally People v Getch*, 50 NY2d 456, 465 [1980]). The jury could have reasonably concluded that defendant was not firing a warning shot.

Defendant was not deprived of a fair trial by the court's comments, during the cross-examination of the police witnesses, that allegedly denigrated defense counsel. While the court may have displayed exasperation at counsel's repeated failure to comply with the court's rulings and directives, it was justified in acting "to keep the proceedings within the reasonable confines of the issues and to encourage clarity rather than obscurity in the development of proof" (*People v Moulton*, 43 NY2d 944, 945 [1978]; *see also People v Melendez*, 31 AD3d 186, 196-198 [1st Dept 2006], *lv denied* 7 NY2d 927 [2006]). Assuming that some of the court's comments may have been better left unsaid, a review of the record as a whole shows that "the jury was not prevented from arriving at an impartial judgment on the merits" (*Moulton*, 43 NY2d at 946).

The evidentiary rulings challenged by defendant were provident exercises of discretion that did not deprive defendant of a fair trial or impair his right to cross-examine witnesses

and present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). Defendant received a full opportunity to cross-examine a police witness about his involvement in a ticket-fixing scandal, and the additional areas that counsel wished to explore were remote from the officer's credibility. Anonymous 911 calls proffered by defendant had minimal relevance or probative value on the issue of whether an officer correctly identified defendant as the person who fired the shot. Finally, as to the matter for which defendant sought to call an additional police witness, the evidence was cumulative to undisputed facts already in evidence.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Sweeny, Kahn, Singh, Moulton, JJ.

5808 VFP Investments I LLC, Index 152153/15
Plaintiff-Appellant,

-against-

Robert Rainier,
Defendant-Respondent,

Foot Locker, Inc, et al.,
Defendants.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about March 2, 2016,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 5, 2018,

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Tom, Webber, Kern, JJ.

5913N Almah LLC, Index 652117/14
Plaintiff-Appellant,

-against-

AIG Employee Services, Inc., et al.,
Defendants-Respondents.

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Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Jennifer J. Barrett of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered October 4, 2016, which granted defendants' motion to join certain Goldman Sachs entities (Goldman Sachs) as necessary parties, unanimously reversed, on the law and the facts, without costs and the motion denied.

Pursuant to section 7.1(a) of the lease, which is the basis for plaintiff's "take good care" claim against defendant AIG, AIG may only be held liable for "the cost of making good any injury, damage or breakage to the Building or the Premises done by *Tenant*" (emphasis added). As such, AIG's liability, if any, will be limited to any damage that it caused during its tenancy; it will not be liable for damage that Goldman Sachs may have caused

during its earlier tenancy. This raises factual questions as to the respective liability of AIG and Goldman Sachs for the allegedly negligently installed and maintained electrical busways; these issues may be developed in discovery. Therefore, we find that complete relief can be accorded between plaintiff and AIG, without joining Goldman Sachs as a necessary party (*see* CPLR 1001[a]).

Under the circumstances, it cannot be said that Goldman Sachs will be inequitably affected by a judgment in this action (id.; *Matter of 27th St. Block Assn. v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 160 [1st Dept 2002]), or that any outcome here will bind its rights or interests without it having had an opportunity to be heard (Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc., 19 NY3d 543, 551 [2012]).

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6029 & M-861 The People of the State of New York, Respondent, Ind. 29/00

-against-

Ralph Alicea,
Defendant-Appellant.

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Joseph W. Murray, Kew Gardens, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

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Judgment, Supreme Court, New York County (Leslie Crocker Snyder, J. at jury trial; Charles H. Solomon, J. at sentencing), rendered February 20, 2004, convicting defendant of conspiracy in the second degree, and sentencing him, as a persistent felony offender, to a term of 19 years to life, unanimously affirmed.

The court properly denied defendant's CPL 30.30 speedy trial motion. The contested periods were properly excluded as reasonable delays resulting from pretrial motions, adjournments on consent of defendant and/or his codefendants and the ongoing litigation of defendant's other indictments. Contrary to defendant's arguments, the record adequately demonstrates the reason for excluding each of these periods, and supports the court's findings.

The court providently exercised its discretion when it interrupted defense counsel's summation to preclude an argument that was misleading and not a fair inference from the evidence (*see People v Smith*, 16 NY3d 786, 787-788 [2011]). In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's claims concerning the court's alleged interference with the trial and purported bias do not warrant reversal. In its remarks and questioning of witnesses, the court did not take on either the function or appearance of an advocate or suggest to the jury that it had any opinion, and its interventions did not deprive defendant of a fair trial (*see People v Arnold*, 98 NY2d 63, 67 [2002]; *People v Moulton*, 43 NY2d 944 [1978])

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The testimony of a large number of defendant's accomplices, along with extensive corroborating evidence, established that defendant was a major drug trafficker who conspired to sell very large amounts of drugs, well in excess of the statutory threshold for second-

degree conspiracy and its underlying felony, on a regular basis.

The court properly denied defendant's request to submit the lesser included offense of conspiracy in the fourth degree, because there was no reasonable view of the evidence, viewed in the light most favorable to the defense, that he committed the lesser but not the greater crime (*see People v Rivera*, 23 NY3d 112, 120-21 [2014]). There was no reasonable view that the conspiracy involved the smaller amounts of drugs corresponding to the fourth-degree charge.

Defendant's remaining claims of trial error are unpreserved, waived or otherwise procedurally defective, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

Defendant was lawfully sentenced as a persistent felony offender (*see People v Garvin*, 30 NY3d 174, 189 [2017]; *People v Prindle*, 29 NY3d 463 [2017]), and that determination was a

provident exercise of discretion. We perceive no basis for reducing the sentence or running it concurrently with other sentences defendant is serving.

M-861 - *People v Ralph Alicea*

Motion for enlargement denied.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6030 & M-457 — In re The People of the State of New York, ex rel. Allen Farbman, etc., Petitioner-Appellant,

-against-

Dina Simon, etc. Respondent-Respondent.

Index 45147/17
Ind. 5044/17

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

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

Judgment (denominated an order), Supreme Court, New York County (Daniel P. FitzGerald, J.), entered May 26, 2017, denying the petition for a writ of habeas corpus, unanimously modified, on the law, and the writ granted to the extent of waiving the surety inspection, and otherwise affirmed, without costs.

Upon our review of the record, and considering the factors set forth in CPL 510.30(2)(a), we find that the court did not abuse its discretion in setting bail of $50,000 secured surety bond or cash. However, we waive the surety inspection since the requirements for ordering a surety inspection were not met (*see* CPL 520.30[1]).

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

M-457 - People ex rel. Farbman v Simon

Motion for leave to amend the caption, seal the briefs, and replace petitioner's name with initials denied.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6031 In re Isaiah D., and Another,

Children Under Eighteen Years of Age, etc.,

Mark D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office of Thomas R. Villeco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for Administration for Children's Services, respondent.

Law Office of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), attorney for the child Isaiah D.

Andrew J. Baer, New York, attorney for the child Tru L.

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Order of fact-finding and disposition (one paper) of the Family Court, New York County (Stewart H. Weinstein, J.), entered on or about November 19, 2014, to the extent that it determined that respondent was a person legally responsible for the younger subject child and the father of the older subject child, and that he neglected both children by committing acts of domestic violence upon the mother while in the children's presence and neglected the older child by inflicting excessive corporal

punishment upon him, unanimously affirmed, without costs.

A preponderance of the evidence supports the Family Court's determination that respondent neglected the older child by subjecting him to excessive corporal punishment, because the child's out-of-court statement that respondent caused the mark on his back was sufficiently corroborated by the caseworker's testimony that she saw the mark on his back and partly corroborated by the mother's testimony that she saw marks on the child's back after respondent disciplined the child (*see Matter of Antonio S. [Antonio S., Sr.]*, 154 AD3d 420, 420 [1st Dept 2017]; *Matter of Naomi J. [Damon R.]*, 84 AD3d 594 [1st Dept 2011]).

In addition, a preponderance of the evidence supports the court's determination that respondent neglected the children by committing acts of domestic violence against the nonrespondent mother while the children were present (Family Ct Act §§ 1012[f][i][B], 1046[b][i]). The mother's testimony that the younger child was present during the April 2013 incident was supported by respondent's testimony (*see Matter of Jayline R. [Jose M.]*, 110 AD3d 419, 420 [1st Dept 2013]). The older child's out-of-court statement that he had witnessed respondent commit acts of domestic violence against the mother was supported by the

mother's testimony that sometimes when respondent was abusing her the child would get him to stop (*see Matter of Darren S. [Darren S.]*, 133 AD3d 534, 535 [1st Dept 2015]).

Contrary to respondent's contention, the record shows that the children were in danger of becoming emotionally or physically impaired by the domestic violence he was inflicting upon the mother while they were present. The mother's testimony that during the April 2013 incident the younger child was scared, "cried a little bit" and appeared "stunned" is sufficient to demonstrate that her emotional well-being had been impaired by the altercation she had just witnessed (*see Matter of Nia J. [Janet Jordan P.]*, 107 AD3d 566, 567 [1st Dept 2013]).

In addition, the mother's testimony that the older child was receiving therapy as a result of the domestic abuse he witnessed, and the caseworker's testimony that the child told her that he had an anger problem as a result of the violence he had seen in the home, demonstrate that the child had been impaired or was at imminent risk of emotional or physical impairment (*see Matter of Zelda McM. [Patrick L.-O. McM.]*, 154 AD3d 573, 573-574 [1st Dept 2017]; *Matter of Krystopher D'A. [Amakoe D'A.]*, 121 AD3d 484, 485 [1st Dept 2014]). Any inconsistencies with the mother's testimony given at a previous housing hearing raised issues of

credibility that were properly resolved by the Family Court (*see Matter of Jasmine M.*, 301 AD2d 479 [1st Dept 2003]; *Matter of Salma M.*, 294 AD2d 198, 199 [1st Dept 2002]).

Last, we decline to enter a finding that respondent derivatively neglected the younger child by inflicting excessive corporal punishment upon the older child as requested by that child's counsel because the petitions do not set forth an allegation of derivative neglect.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6032 Duncanwood Properties, LLC, Index 655746/16
Plaintiff-Appellant,

-against-

Midtown Funding LLC,
Defendant-Respondent.

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Becker, Glynn, Muffly, Chassin & Hosinski LLP, New York (Zeb Landsman of counsel), for appellant.

Lazarus & Lazarus, P.C., New York (Harlan M. Lazarus of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about September 22, 2017, which denied plaintiff's motion for summary judgment on the complaint, unanimously reversed, on the law, with costs, the motion granted, and the matter remanded for further proceedings.

Plaintiff seller established prima facie entitlement to summary judgment with evidence that defendant purchaser breached the parties' real estate contract of sale when it declined to close on the property due to an alleged "title problem" - encroachments reflected in a survey for a contiguous property that defendant was also purchasing in order to construct a new building on a multiple lot site. Plaintiff submitted evidence that in a prior, related action, the court determined that

defendant, also a defendant in that case, had "agreed" to accept the encroachments, by failing to object to them during the due diligence period of the contract, and was obligated to close on the contiguous property in "as is" condition. Thus defendant was collaterally estopped from arguing in this case that it was unable to close on the contiguous property for that reason (*see generally Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343 [1999]).

The burden shifted to defendant, which failed to offer any alternative theory or assert any other "title problem" in support of its claim that it was unable to purchase the contiguous property due to the alleged encroachments, thus failing to raise a triable issue of fact.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6033 & M-698 James Frank, et al., Plaintiffs, Index 156632/13

-against-

1100 Avenue of the Americas Associates, et al., Defendants-Respondents,

Statewide Demolition Corp., Defendant-Appellant.

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Cascone & Kluepfel, LLP, Garden City (Olympia Rubino of counsel), for appellant.

Smith, Mazure, Director, Wilkins, Young & Yagerman, P.C., New York (Stacy I. Malinow of counsel), for respondents.

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Order, Supreme Court, New York County (Jennifer G. Schechter, J.), entered on or about February 3, 2017, which, insofar as appealed from, granted the motion of defendants 1100 Avenue of the Americas Associates (1100 Associates), JT Magen & Co., Inc. (JT Magen), and Home Box Office Inc. (HBO) (together movants) for summary judgment on their cross claim against Statewide Demolition Corp. for contractual indemnification, unanimously affirmed, without costs.

The record shows that, pursuant to its contract with HBO, JT Magen was generally responsible for coordinating and scheduling subcontractors' work, and for site safety. Standing alone, this

is not enough to impose liability in negligence on JT Magen for the injuries allegedly sustained by plaintiff, who was an employee of Hugh O'Kane Electric Co., one of JT Magen's subcontractors. Nor is there any evidence that JT Magen directly controlled the work of Statewide, the demolition contractor, or of any other basis for a finding that JT Magen was negligent (*see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]; *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]).

Statewide's argument that the indemnity clause contained in the purchase order issued to it by JT Magen violates the General Obligations Law's proscription against exempting owners and contractors from liability for their own negligence (*see* General Obligation Law § 5-322.1) is unpreserved and without merit. The indemnity clause expressly limits its own scope "[t]o the fullest extent permitted by law." Such qualifying language "limit[s] [a party's] contractual indemnity obligation solely to [the party's] own negligence" (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]), and redeems an otherwise facially violative indemnity provision (*see Johnson v Chelsea Grand E., LLC*, 124 AD3d 542, 543

[1st Dept 2015]). Indeed, the indemnity provision at issue here goes beyond pro forma limiting language and expressly restricts the indemnitees' right to recover to be coextensive with their own lack of fault. Since the accident arose from the covered work and movants established themselves to be free from fault in causing plaintiff's alleged injuries, the motion court properly granted movants' motion for summary judgment on their cross claim against Statewide for contractual indemnification.

Also without merit is Statewide's argument that movants failed to show that 1100 Associates and HBO are designated as indemnitees under the purchase order. The purchase order on its face identifies the "Building Owner" and "Landlord" as an indemnitee; there is no question that 1100 Associates owns the subject building. The purchase order also identifies the "Owner" as an indemnitee. While the identity of the "Owner" is not clear from the face of the purchase order, that document incorporates by reference JT Magen's prime contract with the "Owner." JT Magen's prime contract, in turn, is with HBO as net lessee of the building and "Owner." Hence, Statewide's assumption of a duty to indemnify, as well as movants' identities as indemnitees, is clear on the face of the purchase order and the governing prime

contract incorporated therein by reference (*see BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 852 [1st Dept 1985]).

M—698 - *James Frank v Avenue of the Ams. Assocs.*

Motion for stay of trial pending appeal denied as moot.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6034 The People of the State of New York, Ind. 3783/08
Respondent,

-against-

Shariff Harris,
Defendant-Appellant,

Khalil Harris, et al.,
Defendants.

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Steven R. Kartagener, New York, for appellant.

Darcel D. Clark, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Steven L. Barrett, J. at severance motion; Barbara F. Newman, J. at jury trial and sentencing), rendered January 27, 2012, convicting defendant of robbery in the first degree, assault in the second degree, criminal sale of a controlled substance in the third degree (three counts) and conspiracy in the fourth degree, and sentencing him to an aggregate term of 19 years, unanimously affirmed.

We reject defendant's claim that his robbery conviction was 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. There was overwhelming

circumstantial evidence, including evidence obtained by wiretapping, of defendant's accessorial liability for this crime. Although a person separately convicted of the robbery testified, as a defense witness, that he acted alone, the jury had ample grounds to discredit this testimony, and the record supports its finding that the two men acted in concert.

Defendant forfeited his right to confront a witness who refused to testify. The court properly admitted the witness's grand jury testimony, because the People met their burden of showing by clear and convincing evidence that "the witness's unavailability was procured by misconduct on the part of the defendant" (*People v Geraci*, 85 NY2d 359, 365 [1995]). Defendant learned the identity of the witness at issue when his counsel provided him a copy of grand jury minutes with the witness's name handwritten on the first page. Shortly thereafter, defendant's younger brother posted on Facebook a copy of the first page of the transcript of the witness's grand jury testimony, along with denunciations of the witness as a "snitch." The post garnered numerous threatening comments, and the witness was assaulted within days of its appearance by unknown persons, one of whom called the witness a "rat." The inference of defendant's involvement in witness-tampering was inescapable. The record

fails to support defendant's claim that, at the *Sirois* hearing (*Matter of Holtzman v Hellenbrand*, 92 AD2d 405 [2d Dept 1983]), the court precluded defendant from calling a witness.

Because defendant made a completely different severance motion, he failed to preserve his claim that he was entitled to a separate trial from one of his codefendants due to the allegedly prejudicial effect of a murder charge against that codefendant, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6035 Prince Oparaji, et al., Index 102264/15
Plaintiffs-Appellants,

-against-

Lawrence T. Yablon, et al.,
Defendants-Respondents.

_____

Prince Oparaji, appellant pro se.

Maurice Oparaji, appellant pro se.

Rivkin Radler LLP, New York (Jonathan B. Bruno of counsel), for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered December 20, 2016, which denied plaintiffs' motion to renew and reargue their motion for a default judgment and defendants' motion to dismiss the complaint, unanimously affirmed, without costs. Plaintiffs are enjoined from commencing any further litigation relating to this matter without permission of this Court. The Clerk of this Court is directed to accept no filings from plaintiffs as to this matter without prior leave of the Court.

Since the court addressed the merits of plaintiffs' motion for reargument, it effectively granted the motion, and we treat the order that decided the motion as appealable (*see Jones v City*

of New York, 146 AD3d 690 [1st Dept 2017]).

Plaintiffs failed to show that the court overlooked or misapprehended any matters of fact or law in determining the prior motion (CPLR 2221[d]), and failed to offer any new facts or show any change in the law that would change the prior determination (CPLR 2221[e]).

As we explained in a prior appeal, "defendants, by their service of a motion to dismiss the action, made within the time extension granted by the court, did not default" (*Oparaji v Yablon*, 151 AD3d 415, 415 [1st Dept 2017]).

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

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6037-
6038-
6038A Index 162666/15

Randy Genet, et al.,
Plaintiffs-Appellants,

-against-

Andrew Scott Buzin, et al.,
Defendants-Respondents,

Allen Victor Koss, et al.,
Defendants.

_____

Randy S. Genet, appellant pro se.

Gerald H. Genet, appellant pro se.

Kennedys CMK, New York (Sean T. Burns of counsel), for respondents.

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Judgment, Supreme Court, New York County (Joan M. Kenney, J.), entered September 29, 2016, dismissing the complaint as against defendants Andrew Scott Buzin, Buzin Law, P.C., Leslie L. Lewis, and Carly Marie Jannetty, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 14, 2016, which granted defendants' motion to dismiss the complaint as against them, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered January 20, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion

to renew so much of defendants' motion to dismiss as was based on lack of personal jurisdiction, and for leave to serve an amended complaint, unanimously affirmed, without costs.

Plaintiffs' proposed amendment is "palpably insufficient" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]). The allegations underlying the legal malpractice claim merely "reflect plaintiff[s'] dissatisfaction with defendants' strategic choices and tactics; there is no showing that those choices and tactics were unreasonable" (*Kassel v Donohue*, 127 AD3d 674, 674 [1st Dept 2015], *lv dismissed* 26 NY3d 940 [2015]; *see also Rosner v Paley*, 65 NY2d 736, 738 [1985]). The breach of contract claim is duplicative of the legal malpractice claim, since it arises from the same facts and alleges similar damages (*see Rivas v Raymond Schwartzberg & Assoc., PLLC*, 52 AD3d 401 [1st Dept 2008]).

In view of the foregoing, we need not reach plaintiffs' argument about personal jurisdiction.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6039 The People of the State of New York, Ind. 4899N/15
Respondent,

-against-

Jean Carlos Henriquez,
Defendant-Appellant.

_____

Koch Law, New York (Lee Koch of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Anthony J. Ferrara, J.), rendered December 9, 2016, as amended March 15, 2017, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the first and third degrees, and sentencing him to concurrent terms of eight years, unanimously affirmed.

The court properly denied defendant's suppression motion in all respects. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

The People met their burden of proving that defendant was sufficiently proficient in English to understand the rights he

was waiving. Both during the drug transaction at issue, and after his arrest, defendant amply demonstrated his ability to converse in English. Viewed in context, his nods of his head sufficed to waive his *Miranda* rights (*see People v Smith*, 197 AD2d 352 [1st Dept 1993], *lv denied* 82 NY2d 853 [1993).

Defendant failed to preserve his argument that his second statement required renewed *Miranda* warnings, and we decline to review it in the interest of justice. As an alternative holding, we find that renewed warnings were unnecessary, because the second interview was within a reasonable time after the initial warnings, and custody remained continuous, regardless of whether defendant was in handcuffs throughout (*see e.g. People v Holmes*, 82 AD3d 441 [1st Dept 2011], *lv denied* 16 NY3d 895 [2011]).

Regarding the seizure of defendant's cell phone, the People established that it was obtained from defendant's person after a search incident to a lawful arrest, notwithstanding that the officer who actually recovered the phone did not testify. Regarding the search of its contents, the People proved by clear and convincing evidence that defendant consented to the search (*see People v Gonzalez*, 39 NY2d 122, 128-131 [1976]). Defendant readily provided his passcode to unlock the phone on two occasions, he remained cooperative, he was not threatened or

coerced, and, as noted, there was ample evidence of his knowledge of English.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The fact that the jury acquitted defendant of other charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6040 In re MaryBeth D.,
Petitioner-Respondent,

-against-

Herbert C.,
Respondent-Appellant.

_____

Petroske Riezenman & Meyers, PC, Hauppauge (Michael W. Meyers of counsel), for appellant.

Stein & Ott LLP, New York (Lara P. Ott of counsel), for respondent.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about January 7, 2017, which, to the extent appealed from as limited by the briefs, confirmed orders, same court (Serena Rosario, Support Magistrate), entered on or about November 10, 2016 and on or about October 18, 2016, denying respondent's motion to vacate a default, and directing entry of a money judgment in petitioner's favor, for child support arrears, unanimously affirmed, without costs.

Respondent failed to offer a reasonable excuse for wilfully absenting himself from the hearing on September 28, 2016 (CPLR 5015[a]; *see Goncalves v Stuyvesant Dev. Assoc.*, 232 AD2d 275 [1st Dept 1996]). His status as a pro se litigant does not change this determination. Respondent claims that he believed

that the court would entertain the request he made on September 28 for an adjournment and that petitioner would consent to it. The transcript of the September 27 hearing shows that his request had already been denied by the court and objected to by petitioner's counsel. He claims that he attempted to contact the court all morning on September 28 and that he faxed an adjournment request to the court. The transcript shows that the court informed the parties on September 27 that the part would be closed the next morning.

We note that respondent also failed to establish a meritorious defense to the enforcement proceedings (*see id.* at 276).

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

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6041 The People of the State of New York, Ind. 4315/15
Respondent,

-against-

Samuel Barreto,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward McLaughlin, J. at plea and sentencing; Ellen Biben, J., at resentencing), rendered June 22, 2016, as modified December 13, 2016,

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

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

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

ENTERED: MARCH 20, 2018

CLERK

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

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6042 The People of the State of New York, Ind. 5609/14
Respondent,

-against-

Niquay Alhuqdah,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered June 10, 2015, 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 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6043 Arkadiusz Plywacz, et al., Index 158748/12
Plaintiffs-Respondents,

-against-

85 Broad Street LLC, et al.,
Defendants-Appellants.

_____

Barry McTiernan & Moore LLC, New York (David H. Schultz of counsel), for appellants.

Jaroslawicz & Jaros PLLC, New York (Norman Frowley of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered January 20, 2017, which granted plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim, and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, the cross motion granted to the extent of dismissing the Labor Law §§ 200, 241(6) and common-law negligence claims, and otherwise affirmed, without costs.

Partial summary judgment on the issue of liability on the Labor Law § 240(1) claim was properly granted in this action where plaintiff Arkadiusz Plywacz was injured when he fell from an unsecured ladder while installing steel wall panels in the lobby of a building (*see Hill v City of New York*, 140 AD3d 568,

570 [1st Dept 2016]). "It is well settled that failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)" (*Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 [1st Dept 1996]). It is irrelevant whether plaintiff initially lost his balance before or after the ladder wobbled because it is uncontested that the precipitating cause of both was that the suction cup that he had affixed to the panel and gripped to pull the panel into place came loose (*see Messina v City of New York*, 148 AD3d 493, 494 [1st Dept 2017]). Under either scenario, the ladder failed to remain steady under plaintiff's weight as he performed his work. Furthermore, even if plaintiff gripped the suction cup incorrectly, causing it to come loose, any such misuse of the suction cup was not the sole proximate cause of the accident where the unsecured ladder moved (*id.* at 494).

We modify to the extent indicated as plaintiffs do not contest that the Labor Law §§ 200, 241(6) and common-law negligence claims should have been dismissed.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6044 & M-605 Joseph Hobbs, et al., Plaintiffs-Appellants, Index No. 155382/15

-against-

MTA Capital Construction, et al., Defendants-Respondents.

_____

Foulke Law Firm, Goshen (Evan M. Foulke of counsel), for appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for respondents.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered March 28, 2017, which denied plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiffs established entitlement to judgment as a matter of law on the issue of liability on the section 240(1) claim. The injured plaintiff testified that he fell from a fixed, job-made access ladder when the edge of the rung on which he was stepping suddenly splintered and he fell (*see Lizama v 1801 Univ. Assoc., LLC*, 100 AD3d 497 [1st Dept 2012]; *Stallone v Plaza Constr. Corp.*, 95 AD3d 633 [1st Dept 2012]).

In opposition, defendants raised triable issues of fact through the affidavits of other workers on the site who stated

that they observed the ladder after the accident and found that no rungs were damaged or broken. They also averred that, shortly after the accident, the injured plaintiff, inter alia, told them that he fell because his hand missed the handhold, causing him to lose his balance and fall. These conflicting accounts of how the accident occurred raise an issue of fact that precludes the granting of summary judgment.

M-605 — *Hobbs v MTA Capital Construction*

Motion to strike reply brief and for related relief granted to the extent of striking the footnote on page 14 of the reply brief referring to facts dehors the record, and otherwise denied.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6045 The People of the State of New York, Ind. 5422/14
Respondent,

-against-

Francisco Ortiz,
Defendant-Appellant.

_____

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

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

_____

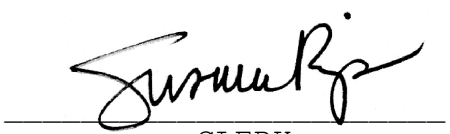
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J. at plea; A. Kirke Bartley, Jr., J. at sentencing), rendered July 21, 2016,

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

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

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

ENTERED: MARCH 20, 2018



CLERK

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

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6046-
6047 Index 654253/16

Karl Mann,
Plaintiff-Appellant,

-against-

Nancye Green,
Defendant-Respondent.

_____

Maurice A. Reichman, New York, for appellant.

Sullivan & Worcester LLP, New York (Gerry Silver of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about May 5, 2017 and May 8, 2017, which, to the extent appealed from, denied plaintiff's motions for summary judgment in lieu of complaint and to dismiss defendant's counterclaims for money had and received and unjust enrichment, unanimously affirmed, without costs.

Plaintiff made a prima facie showing of his entitlement to summary judgment on a promissory note by submitting the executed note and his uncontested affidavit stating that he demanded payment after defendant had defaulted on the note and that defendant failed to pay (*see Quadrant Mgt. Inc. v Hecker*, 102 AD3d 410 [1st Dept 2013]). In opposition, defendant raised a triable issue as to whether the note was supported by

consideration (*see Manufacturers Hanover Trust Co. v L.N. Props.*, 174 AD2d 383, 383 [1st Dept 1991]).

Plaintiff argues that his release of an antecedent $1.2 million obligation on defendant's part constitutes consideration for the note. However, this past consideration is not expressed in the note, and therefore does not fall within the exception to the general rule that "past consideration is no consideration" (*Korff v Corbett*, 155 AD3d 405, 408 [1st Dept 2017] [internal quotation marks omitted]; General Obligations Law § 5-1105). As recited in the release, which was contained in a buyout agreement, plaintiff executed the release in exchange for $2.2 million. The $250,000 note, a wholly separate agreement, is not mentioned in the buyout agreement, and provides no details about consideration, stating merely that the promise is "for value received."

Plaintiff failed to demonstrate conclusively that defendant waived her counterclaims for money had and received and unjust enrichment by making payments under the note. In support of the counterclaims, defendant alleges that she made the payments in

the mistaken belief that the note was enforceable (*see generally King v Fox*, 7 NY3d 181, 190 [2006]; *Baldwin v Burrows*, 47 NY 199, 212 [1872]). Nor does plaintiff's documentary evidence conclusively demonstrate that the note is enforceable.

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

ENTERED: MARCH 20, 2018

CLERK

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6048 The People of the State of New York, Ind. 2542/15
Respondent,

-against-

Terrence Lloyd,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Caitlin Glass of counsel), for appellant.

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

_____

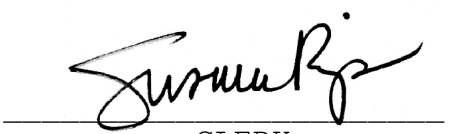
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered February 23, 2016,

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

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

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

ENTERED: MARCH 20, 2018



CLERK

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

Friedman, J.P., Richter, Mazzarelli, Kapnick, Gesmer, JJ.

6050N In re Sharon Mahn, Index 653048/14
Petitioner-Appellant, 155645/14

-against-

Major, Lindsey, and Africa, LLC,
Respondent-Respondent.

_____

Finkelstein Filler LLP, Staten Island (Edward R. Finkelstein of counsel), for appellant.

Littler Mendelson P.C., New York (David S. Warner of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Manual J. Mendez, J.), entered June 19, 2015, inter alia, denying the petition to vacate the arbitration award in respondent's favor, and granting respondent's motion to confirm the award, unanimously affirmed, without costs.

The matter involved interstate commerce, and was thus governed by the terms of the Federal Arbitration Act (FAA) (9 USC §§ 2 & 10; *Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]), not the standard set forth in CPLR 7511(b). Nevertheless, since the requirements for vacatur of an arbitration award are nearly identical under the FAA and CPLR 7511, the result remains the same and the award was properly confirmed (*see Hall St. Assoc., L.L.C. v Mattel,*

Inc., 552 US 576, 589 n 7 [2008]). That the agreement to arbitrate between the parties provided for a different standard of review than that set forth in the FAA does not warrant a different result (*see id.* at 586-587).

The arbitrator did not exceed her power in finding that petitioner was a faithless servant (*see Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138 [1936]; *Visual Arts Found., Inc. v Egnasko*, 91 AD3d 578, 579 [1st Dept 2012]). Nor was the award itself, which included disgorgement of petitioner's past salary and commissions, violative of public policy (*see Soam Corp. v Trane Co.*, 202 AD2d 162 [1st Dept 1994], *lv denied* 83 NY2d 758 [1994]), or punitive in nature *(see Matter of Blumenthal [Kingsford]*, 32 AD3d 767 [1st Dept 2006], *lv denied* 7 NY3d 718 [2006]). There is also no evidence the arbitrator's findings should be vacated based upon conflicts or bias (*see Kolel Beth Yechiel Mechil of Tartikov, Inc. v YLL Irrevocable Trust*, 729 F3d 99, 105-106 [2d Cir 2013]).

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

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

ENTERED: MARCH 20, 2018

CLERK

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

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

-against-

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

Jonathan Bloomer, et al.,
Defendants.

_____

Boies, Schiller & Flexner LLP, New York (Eric Brenner 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, Larry Port and Raymond Wechsler, respondents.

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

Quinn Emanuel Urquhart & Sullivan LLP, New York (Jennifer J. Barrett of counsel), for Massachusetts Mutual Life Insurance Company, respondent.

_____

Order Supreme Court, New York County, (O. Peter Sherwood, J.), as amended, entered on or about October 15, 2014, affirmed, without costs.

Opinion by Acosta, P.J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

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

On remittitur from the Court of Appeals (30 NY3d 247 [2017]), plaintiff appeals from the order of the Supreme Court, New York County (O. Peter Sherwood, J.), as amended, entered on or about October 15, 2014, to the extent it dismissed the seventh, ninth and tenth causes of action for lack of standing.

Boies, Schiller & Flexner LLP, New York (Eric Brenner and Matthew Tripolitsiotis of counsel), Guzov, LLC, New York (Debra J. Guzov and David J. Kaplan of counsel), and Bolatti & Associates, New York (Silvia Bolatti of counsel), for appellant.

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

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, Larry Port and Raymond Wechsler, respondents.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Jennifer J. Barrett and Joshua S. Margolin of counsel), for Massachusetts Mutual Life Insurance Company, respondent.

ACOSTA, P.J.

This matter was remitted to this Court by the Court of Appeals to determine whether plaintiff, an owner of ordinary shares in defendant Scottish Re Group, Limited (Scottish Re), a Cayman Island company, has standing to assert derivative claims against the company's directors and investors under *Foss v Harbottle* ([1843] 67 Eng Rep 189, 2 Hare 461) (*Davis v Scottish Re Group Ltd.*, 30 NY3d 247 [2017]). Supreme Court dismissed the derivative causes of action on the ground that plaintiff did not establish standing under Cayman Islands law because he did not seek leave of court to commence a derivative action as required by Rule 12A of the Rules of the Grand Court of the Cayman Islands; the Court also found that plaintiff did not have standing because Cayman Islands common law does not allow derivative claims by individuals, with certain exceptions, as set forth in *Foss*. This Court modified on unrelated grounds. We agreed with Supreme Court that plaintiff's noncompliance with Rule 12A mandated the dismissal of the derivative claims (138 AD3d 230 [1st Dept 2016]).[1] The Court of Appeals, however, held that Rule 12A is a procedural rule and therefore does not apply in New York courts (30 NY3d at 253-254). We now conclude that

[1]The facts are recited in full in our 2016 decision.

plaintiff does not have standing under *Foss*, and we affirm the dismissal of the derivative causes of action on that ground.

Under Cayman Islands law interpreting *Foss*, "derivative claims are owned and controlled by the company, not its shareholders" *Winn v Schafer*, 499 F Supp 2d 390, 396 [SD NY 2007]). Thus, "a shareholder is not permitted to bring a derivative action on behalf of that company" (*id.*; *see also Shenwick v HM Ruby Fund, L.P.*, 106 AD3d 638, 639 [1st Dept 2013]).

Cayman Islands law recognizes only four narrow exceptions to the *Foss* rule: "(1) if the conduct infringed on the shareholder's personal rights; (2) if the conduct would require a special majority to ratify; (3) if the conduct qualifies as a fraud on the minority; or (4) if the conduct consists of *ultra vires* acts (*Winn*, 499 F Supp 2d at 396). Here, the only exception at issue is the "fraud on the minority" exception. In order to invoke that exception, plaintiff must plead and prove that the alleged wrongdoers controlled a majority of the stock with voting rights and that those wrongdoers committed fraud (*id.*). Control may be sufficiently pleaded by showing that the wrongdoers own a majority of the corporation's voting shares or have acquired de facto control of those voting shares (*id.* at 396-397).

We agree with the motion court that the complaint is devoid

of any allegations establishing either form of control. As an initial matter, the court noted that "the Complaint does *not* allege that the Scottish Re directors individually held a controlling share of voting rights in Scottish Re." The court noted further that plaintiff admits in the complaint that the Investors (not the directors of Scottish Re) collectively acquired a majority of Scottish Re's voting shares in 2007 and held these shares until April 2011 when they acquired complete ownership of Scottish Re's ordinary shares in the merger.[2] In fact, each of the directors beneficially owned less than 1% of Scottish Re's ordinary shares as of May 11, 2011, and all of the directors and officers of the company collectively owned a grand total of 3.6% of Scottish Re's ordinary shares as of that date. As the court concluded, "These facts necessarily imply that the Scottish Re's Directors did not have '"[control"' over a majority

[2]On January 28, 2011, the Investors proposed to acquire all outstanding Scottish Re ordinary shares in a merger under Cayman law for $0.21 a share. After receiving the offer, the board of directors of Scottish Re formed a special committee comprised of directors Chapman, Butler, Hughes, and Joyal to review the offer. The special committee retained legal and financial professionals and as a result of negotiations with the Investors obtained a 43% increase in the offer price to $0.30 per ordinary share. After Scottish Re circulated an information statement, the merger was approved by a majority of the unaffiliated ordinary shareholders, and closed on August 24, 2011 in New York. Plaintiff did not exercise his right under Cayman law to dissent and obtain an appraisal.

of the stock with voting rights during this period."[3]

On appeal, plaintiff argues that the directors and Investors acted in concert, which allowed the directors to obtain de facto control over a majority of voting shares. However, plaintiff does not identify a single factual allegation in the complaint that supports his position that the Scottish Re directors controlled the company's voting shares.

That some of the directors were nominees of the Investors is of no moment inasmuch as it does not establish that the directors influenced or directed the Investors in voting their shares. As Supreme Court held, these facts are legally irrelevant. Indeed, a director does not obtain control of a majority shareholder's

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[3]By letter dated February 13, 2018 plaintiff submitted a copy of *Top Jet Enterprises Ltd. v Sino Jet Holding Ltd*, a January 2018 Caymen Island decision issued by a lower court, in support of his argument that he sufficiently pleaded the element of control. We find *Top Jet* to be inapposite inasmuch as the wrongdoers (brother and sister) controlled the shares and board of directors of *Sino Jet*. Specifically, 50% of Sino Jet's shares were owned by Skyblueocean Ltd (Skyblue), which was owned by the siblings. The brother was also the sole director of Skyblue, and Skyblue appointed three members of Sino Jet's six-member board of directors, including the brother. Moreover, an affirmative vote by a majority of Sino Jet's board was required before Sino Jet could commence a lawsuit against Jet Midwest, a company fully owned and controlled by the siblings, for breaching a contract that Jet Midwest had with Sino Jet. Under these circumstances, an inference could be drawn that since the brother controlled 50% of Sino Jet, and Sino Jet needed an affirmative vote of the majority of its board to sue Jet Midwest (fully controlled by the siblings), Sino Jet would never sue Midwest for breach of a consignment agreement.

voting shares merely because the majority shareholder employs him or her or appoints him or her to the company's board of directors (*see Winn*, 499 F Supp 2d at 398).

Plaintiff also failed to allege facts sufficient to satisfy the second prong of the *Foss* rule, that is, that any of the directors engaged in fraud. Fraud is not present unless the alleged wrongdoer benefitted at the expense of the company (*id.* at 396; *Shenwick v HM Ruby Fund, L.P.*, 106 AD3d 638, 639 [1st Dept 2013], *supra*).

The motion court correctly found the fraud on the minority exception inapplicable here because "[t]here are no allegations that the Scottish Re Directors 'benefit[ed] themselves at the expense' of Scottish Re."

With respect to count 7, plaintiff alleges in conclusory fashion that the directors "wasted" corporate assets in connection with their evaluation of . . . two transactions (i.e., the merger and the Orkney Unwind).[4] However, there are no

[4]In 2005, to raise funds, Orkney Holdings, LLC was formed as a subsidiary of SRUS. Orkney entities issued and sold to unaffiliated third parties a series of floating rate notes in a private offering, and a block of policies was transferred from SRUS to Orkney Re (the Orkney Block). In 2011, Scottish Re entered into agreements to unwind the Orkney structure through a recapture of the Orkney Block for $590 million, the sale of the Orkney Block to a third party, and the contemporaneous discounted repurchase and cancellation by Orkney of the notes, including those held by Cerberus affiliates (the Orkney Unwind). Scottish

factual allegations that this conduct was undertaken by the directors to divert corporate assets or secure any financial profit for their personal benefit (*Feiner Family Trust v VBI Corp*, 2007 WL 2615448, *6, 2007 US Dist LEXIS 66916, *19-20).

With respect to counts 9 and 10, plaintiff alleges that the directors breached their fiduciary duties by allowing the Orkney Unwind to occur. However, Cerberus purchased the notes on the secondary market, not from Scottish Re. Thus, the purchase and subsequent sale of these notes was not at the expense of Scottish Re. Nor is there any allegation that any of the directors benefitted from the repurchase of the notes.

Given the lack of factual allegations that the directors engaged in any self-dealing, plaintiff argues that the directors benefitted by conspiracy. Absent factual support, however, this claim also fails. Plaintiff's reliance on *Daniels v Daniels* ([1978] C. 406, 408 [Eng Ch 1977]), is also unavailing. That case did not address, let alone endorse, plaintiff's "benefit-by-conspiracy" theory. In *Daniels*, the court merely

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Re claimed that, while this transaction would result in a decline in its book value by roughly $150 million, other benefits to Scottish Re and the Orkney entities, such as improvements in their regulatory capital structure, would offset the decline. Scottish Re disclosed the Orkney Unwind in the same information statement in which it disclosed the Merger, and the special committee evaluated and approved the Orkney Unwind.

refused to conclude prior to discovery that one director had not benefitted from an egregious case of self-dealing where it was alleged that he and his wife were the sole directors and controlling shareholders of a company and he had approved the sale of the company's land to his wife at a discount which she subsequently sold for a large profit. Here, however, there are no factual allegations that support a conspiracy.

Plaintiff also points to the fact that 6 of the 10 Scottish Re directors were employed by or served as directors of Cerberus or Mass Mutual affiliated entities. Based on these facts, which were disclosed to all unaffiliated ordinary shareholders in the 2011 information statement issued by the company, plaintiff suggests that an inference should be drawn that these directors, who implemented safeguards for the benefit of ordinary shareholders, stood to benefit at the expense of Scottish Re with respect to these transactions. However, these unsupported suggestions are insufficient.

Plaintiff also argues that if the control requirement produced an unconscionable result, the European Convention on Human Rights would operate to require Cayman courts to allow the claim to go forward under the so-called fifth exception based on interest of justice. Plaintiff, however, has offered no Cayman Island case in support of this position (*see City of Harper Woods*

Empls. Retirement Sys. v Oliver, 589 F3d 1293, 1304 [DC Cir 2009] ["Finally, Harper Woods has not proven the existence of an 'interest of justice' exception to the *Foss* rule"]; *In re Tyco Intl., Ltd.*, 340 F Supp 2d 94 [D NH 2004 Barbadoro, Ch.J.] [the court "share[d] the skepticism . . . about the viability of a distinct interests of justice exception"]).

Accordingly, upon remttitur from the Court of Appeals (30 NY3d 247 [2017]), the order of the Supreme Court, New York County (O. Peter Sherwood, J), as amended, entered on or about October 15, 2014, to the extent it dismissed the seventh, ninth and tenth causes of action for lack of standing, should be affirmed, without costs.

All concur.

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

ENTERED: MARCH 20, 2018

CLERK