SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 14, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, McGuire, Richter, JJ.

3406 East Midtown Plaza Housing Company, Inc., Index 401278/09
Petitioner-Appellant,

-against-

Andrew M. Cuomo, etc., et al.,
Respondents-Respondents.

East Midtown Plaza Tenant-Cooperator Association,
Intervenor-Appellant,

-against-

East Midtown Plaza Mitchell-Lama Organization,
Intervenor-Respondent.

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Sullivan & Worcester LLP, New York (George O. Richardson III of counsel), for East Midtown Plaza Housing Company, Inc., appellant.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (Kevin R. McConnell of counsel), for East Midtown Plaza Tenant-Cooperator Association, appellant.

Andrew M. Cuomo, Attorney General, New York (David Lawrence III of counsel), for State respondent.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for municipal respondent.

Barry Mallin & Associates, P.C., New York (Barry Mallin of counsel), for East Midtown Plaza Mitchell-Lama Organization, respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered March 16, 2010, which denied East Midtown Plaza Housing Company, Inc.'s petition to compel, among other things, the New York City Department of Housing Preservation and Development to approve its plan to privatize a Mitchell-Lama development and to compel Andrew Cuomo, Attorney General of the State of New York, to accept for filing, its second amendment to a cooperative offering plan, and dismissed this article 78 proceeding, affirmed, without costs.

Supreme Court properly determined that Article 23-A of the General Business Law, commonly referred to as the Martin Act, applies in this case, and that the Attorney General therefore has jurisdiction over this matter. Given that current shareholders of petitioner are being offered shares in a new private entity, with different rights and liabilities, petitioner's plan to dissolve and/or reconstitute is a "public offering or sale . . . of securities" within the meaning of General Business Law § 352-e.

The court correctly determined that the Attorney General properly rejected petitioner's second amendment to the offering plan. The second amendment inaccurately stated that petitioner's privatization plan had passed, based on a per-share vote counting method, when, in fact, it had not passed in accordance with the New York City Department of Housing Preservation and Development's (HPD) required per-apartment method. It is within the Attorney General's discretion under General Business Law § 352-e to reject an offering plan amendment on the basis that it makes an untrue or misleading statement (*see* General Business Law § 352-e[1][b]; *see also Academy St. Assoc. v Spitzer*, 50 AD3d 271 [2008]). Moreover, petitioner is not entitled to an order directing the Attorney General to accept its second amendment for filing. Since such a request is in the nature of mandamus, petitioner "must come forward with proof that the Attorney-General's action was not discretionary" (*88 Assoc. v Abrams*, 159 AD2d 412, 414 [1990], *lv denied* 76 NY2d 702 [1990]). Such a showing has not been made in this case.

The court properly determined that HPD's method for counting dissolution votes, i.e., one vote per shareholder, was rational and lawful. Petitioner's Certificate of Incorporation specifies that each shareholder shall be entitled to one vote, regardless

of the number of shares held by such holder, "except as otherwise provided by statute." The court properly concluded that no statute, including Business Law § 612 and § 1001, provides otherwise. Contrary to petitioner's contention, HPD's rule regarding dissolution, 28 RCNY 3-14(i)(7), is not a statute and, in any event, does not provide that dissolution votes should be counted per share.

Contrary to intervenor-appellant's contention, HPD did not change its policy or rule regarding dissolution in 2008, prior to the shareholder vote on dissolution and/or reconstitution of petitioner. HPD merely clarified its rule. After the shareholders' vote, HPD properly amended the rule pursuant to the City Administrative Procedure Act in order to eliminate any ambiguity created by the wording of the original rule.

Petitioner's challenge to HPD's determination not to accept petitioner's plan to privatize is not time-barred. The four-month statute of limitations pursuant to CPLR 217 began to run when the Attorney General, based on HPD's interpretation of its own rules and the Business Corporation Law, refused to accept petitioner's second amendment to the offering plan (*see Academy*

St. Assoc., Inc. v Spitzer, 44 AD3d 592, 593 [2007]). Petitioner commenced this action 15 days prior to the Attorney General's refusal. Accordingly, petitioner's action was timely.

All concur except McGuire, J. who dissents in a memorandum as follows:

McGUIRE, J. (dissenting)

I respectfully dissent. Petitioner's plan to exit the Mitchell-Lama program does not entail a "public offering or sale . . . of securities" within the meaning of the relevant section of the Martin Act (General Business Law § 352-e[1][a]). The Attorney General's arguments based on precedents construing federal statutes governing the sale of securities are unpersuasive and petitioner is not estopped or otherwise precluded from disputing the applicability of § 352-e(1)(a) (*see Matter of Walker*, 136 NY 20, 29-30 [1892]; *Cutting Room Appliances Corp. v Finkelstein*, 33 AD2d 674 [1969]). Accordingly, the petition seeking a declaration that the Attorney General lacks jurisdiction should be granted.

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

ENTERED: JUNE 14, 2011

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, JJ.

3310 The People of the State of New York, Ind. 4560/07
Respondent,

-against-

Rafael Lora,
Defendant-Appellant.

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Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered June 11, 2009, convicting defendant, after a nonjury trial, of manslaughter in the second degree, and sentencing him to a term of 1 to 3 years, reversed, on the law and on the facts, and the indictment dismissed.

Defendant was charged in a one count indictment with manslaughter in the first degree (Penal Law § 125.20) based on the allegation that "with intent to cause serious physical injury to Fermin Arzu, [defendant] did cause the death of Fermin Arzu by shooting him with a handgun." At the time of the shooting, defendant was an off-duty police officer.

At trial, defendant testified that on May 17, 2007, at 11:30 pm, after hearing a loud noise that sounded like a shotgun blast,

he exited his home to investigate the commotion. Seeing that a van had hit two parked cars, defendant approached it with the primary intent of aiding its driver. Nevertheless, "for precautionary reasons," he kept his weapon out and carried it in a “bladed” position (pointed toward the ground and concealed near his right leg, so as to not alarm the public), a tactic he learned in the military and the police academy.

Defendant further testified that he opened the driver's-side door with his left hand and was inside the triangle-shaped area between the open door and the van's B pillar, the area between the front and back section of the van. Since the airbags had been deployed, he did not have a good view of the van’s interior. Defendant identified himself as a police officer and asked Mr. Arzu, who was not verbally responsive, for his license and registration. Mr. Arzu leaned towards the glove box, but returned to his slouched position with nothing in his hands. At that point, a bystander came around the front of the van and distracted defendant, at which time Mr. Arzu threw something that hit defendant's mouth, chipping his tooth, and started to pull the door closed. The van then started to move ahead slowly with defendant trapped between the door and the frame. Defendant then commanded Mr. Arzu to stop. When the van, which was picking up

speed, continued to drag him, defendant, fearing for his life, intentionally fired his weapon repeatedly in an effort to extricate himself, stopping when he was freed. As a result, defendant suffered injuries to his right elbow and arm, which was put into a sling and iced by an emergency medical technician (EMT).

Defendant's testimony that he was dragged was corroborated by one of the People's witnesses, Damaris Marrero. Ms. Marrero was at defendant's house when she heard a loud crashing sound and an alarm. She went out and saw that a red minivan had hit two cars and was stopped in a dark area near a stop sign. The van was smoking, and she heard a "vroom" sound, the kind of sound produced when someone hits the gas pedal. Ms. Marrero said that defendant approached the van with his gun pointing down the back of his right thigh and opened the driver's door with his left hand. Standing between the door and the driver's seat, defendant appeared to be talking to the driver when the "car moves and [defendant] is snapped and caught, jerked to left along with car." "[I]t looks like he's being dragged by the car and then he's trying to regain his footing, and he's trying to move back." Defendant then lunged forward, and Ms. Marrero heard three shots fired.

Other witnesses called by the People also provided partial corroboration of defendant's account.

Myra Carreno looked out of her window and saw the van near a stop sign, with a man running toward it from behind. The man had a conversation with the driver, but she could not hear the words. She saw that the door of the minivan was open and the man was inside the door, so that if the van door were to be shut, it would hit the man. When Ms. Carreno saw that the man had a gun in his right hand, she got scared and moved away, and only heard the shots.

Oscar Carreno saw the damaged and smoking van near the stop sign with its horn blaring. He was under the impression that whoever was in the van wanted to keep going. Mr. Carreno saw a man stop by the van and disappear from view. As he moved to another window to get a better view of the van, which was jerking forward, Mr. Carrero heard four shots in about 1½ seconds. He never saw a man with hands out pointing towards the back of the van.

Ernesto Cervantes was hanging out with his friends when he heard the crash. He walked to the scene and stopped right in front of the van and saw a man talking to the driver. As he walked away, he heard about five gunshots and saw a man running

after the van. He did not see the shooting and never saw the man in a shooting position.

In contrast to his trial testimony, at one point during his grand jury testimony, defendant had testified that "somehow I broke loose, and I fired the weapon." In his statements to first responders at the scene, defendant indicated that he was struck by the van, without any mention of being dragged. One EMT testified that defendant told him he had not been dragged. However, nothing in the EMT's report indicated that defendant had been asked if he had been dragged, and the EMT did not recall if he had been asked about defendant's being dragged when he testified before the grand jury and Internal Affairs. Another report indicated "elbow pain caused by being hit by automobile's B post of car."

George Vargas, who viewed the incident from a window in his apartment, testified that he saw the man go to the driver's side of the van and talk to the driver. He could not see if the man had a weapon in his hands or if the man got into or put his hands in the van, because it was dark. He could not tell if the van door was open or closed. Mr. Vargas left the window momentarily and, after hearing shots, saw the man in a firing position at least two car lengths away from the van, which had moved into the

intersection. He did not see the shooting itself and could not say what the man, who may have been nicked by the van because he was so close to it, was doing at the time the shots were fired.

Juana Fernandez heard a horn and looked out of a 1½-inch opening in her bathroom window. She saw the van stopped at the corner and a man behind it. The van suddenly started to move quickly, and the man, who was standing behind it, raised his hands forward, and about two to three seconds later fired three to four times very fast.

Dr. Margaret Prial performed the autopsy. She opined that the cause of Mr. Arzu's death was "gunshot wound of trunk with perforation of heart, left lung, & aorta." A single bullet entered his left middle-upper back, passed downward through his left lung, perforated his heart and aorta, and lodged in his chest wall. Since there was no bullet hole in the seat, Dr. Prial suggested that Mr. Arzu's back would have been exposed if he was leaning forward in the seat at the time he was shot. She could not rule out defendant's explanation of the shooting, which she said, with a reasonable degree of scientific certainty, could have occurred as Mr. Arzu was leaning forward to close the open door with his left hand at the time the shots were fired.

The People's expert, Dr. Peter DeForest, opined that since

the five shell casings at the scene were found close together, the gun was "comparatively stationary" when the shots were fired and the shooter was very close to the car. According to Dr. DeForest, the testimony that the weapon was not fired until the vehicle was 15 feet away would not be consistent with the physical evidence, and that it was clear that the fatal shot did not come from someone running behind the car.

Dr. DeForest said that defendant's story was not inconsistent with the physical evidence. Since there were no bullet holes in the seat, Mr. Arzu was not flush with the seat at the time he was shot, and could have been leaning forward to close the door with his left hand. Although Dr. DeForest said that defendant could have been trapped in the vehicle when the door was shut and could have fired the first shots while in the van and the later shots as the van passed him, the evidence did not indicate whether or not the shooter was being dragged by the van when he fired the shots.

Emanuel Kapelsohn, a firearms and shooting reconstruction expert, testified for the defense that defendant's approach to the van with his weapon drawn and pointed downward was not improper, because defendant thought the initial sound of the collision between the van and the cars could be a gunshot. He

agreed with the People's expert that the forensic evidence showed that the first two shots hit Mr. Arzu or the B pillar and that the others were fired as the van drove away. The fatal shot was fired very close to the van, probably from within the doorway, and Mr. Arzu may have been leaning forward when he was shot. Mr. Kapelsohn said that the forensic evidence was consistent with defendant's being inside the front door, being dragged by the van, and discharging his weapon "in an attempt to extricate himself from the vehicle." The fatal shot could not have been fired from 20 to 30 feet away.

After the defense rested, the People asked the court to consider the lesser included offenses of manslaughter in the second degree (Penal Law § 125.15[1]) and criminally negligent homicide (Penal Law § 125.10). The People argued that by pulling his weapon after he had learned that this was an accident scene, defendant put himself "in a reckless position" where he could fire the weapon either intentionally or inadvertently. The People further argued that defendant testified that he fired after something was thrown at him but did not testify that he deliberately fired the shots. Defense counsel countered that defendant testified that he fired intentionally to extricate himself from the van as it dragged him, and stopped shooting when

the threat was extinguished, and that there was no expert evidence that any of his tactics were negligent or reckless. The court granted the People's request.

The court found defendant guilty of manslaughter in the second degree, and on June 11, 2009 sentenced him to an indeterminate term of 1 to 3 years. However, the court stayed execution of the sentence and permitted defendant to remain out on bail, stating it "is aware of the issues in the case, even the issues presented on sentencing for the Appellate Division."

By order entered on or about June 17, 2009, the court denied defendant's motion to vacate the conviction. The court found that second-degree manslaughter was properly charged in that "the trier of fact could find, depending on which testimony the court credited regarding the circumstances of the shooting, that although the defendant intentionally pulled the trigger, he either intended to cause serious physical injury, was aware of and consciously disregarded the substantial and unjustifiable risk of death, or failed to perceive that risk." The court found that the verdict was not against the weight of the evidence because, "[v]iewing the evidence in the light most favorable to the People, the court could have rejected defendant's trial testimony that he was dragged by the car and, instead, credited

his post-shooting on-the-scene statements that the car hit him and he fired his weapon." The court found that this, along with other evidence, was legally sufficient to support a finding that defendant acted with a reckless mental state, i.e., "that his conscious objective was not to cause serious physical injury, but that he fired his weapon under circumstances which showed that he, as a police officer, was aware of but consciously disregarded the substantial and unjustifiable risk that death would occur."

We now reverse.

"A person is guilty of manslaughter in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he causes the death of such person" (Penal Law § 125.20[1]). "A person acts intentionally [with respect to first degree manslaughter] when his [or her] conscious objective is to cause [serious injury or death]" (Penal Law § 15.05[1]). "A person is guilty of manslaughter in the second degree when . . . [h]e [or she] recklessly causes the death of another person" (Penal Law § 125.15[1]). "A person acts recklessly [with respect to second degree manslaughter] when he [or she] is aware of and consciously disregards a substantial and unjustifiable risk that [death will occur]." The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the

standard of conduct that a reasonable person would observe in the situation" (Penal Law § 15.05[3]).

A party requesting the submission of a lesser included offense must demonstrate that "it is impossible to commit the greater crime without concomitantly . . . committing the lesser offense," and that "the [fact finder] would be warranted in finding that the defendant committed the lesser but not the greater crime" (*People v Glover*, 57 NY2d 61, 63, 64 [1982]). A lesser included offense may not be submitted unless there appears on the whole record "some identifiable, rational basis" for the fact finder to reject evidence indispensable to establishing the greater crime yet accept so much of the evidence as would establish the lesser (*People v Scarborough*, 49 NY2d 364, 369 [1980]). Submission of reckless manslaughter as a lesser included offense of intentional manslaughter is inappropriate where there is no reasonable view of the evidence that would support a finding that the defendant was unaware of the substantial and unjustifiable risk of death caused by his actions (*see People v Heide*, 84 NY2d 943 [1994]), such as when the defendant admits that he acted intentionally (*see People v Roman*, 183 AD2d 925 [1992] *lv denied* 80 NY2d 909 [1992]) or shoots the victim repeatedly at close range (*People v Etienne*, 250 AD2d 776

[1998], *lv denied* 92 NY2d 896 [1998]).

Applying these standards, the trial court erred in considering the lesser included offense of manslaughter in the second degree, over defendant's objection, because there is no reasonable view of the evidence that defendant did not intend to cause serious physical injury. No witness testified that defendant accidently discharged his weapon. The only version of the incident that was discredited by the physical evidence was the testimony of Vargas and Fernandez implying that defendant assumed a shooting position and fired from a distance behind the van. Whether defendant was dragged or merely struck by the van when he was partially inside it, the evidence shows that he shot Mr. Arzu at very close range, from mere inches to a couple of feet away. While it is true that the fact that an act was deliberate does not necessarily preclude a finding of recklessness (*see People v Heide*, 84 NY2d at 943), "[n]othing in the evidence undermine[s] the inference that, when defendant deliberately [fired four or five shots in 1.5 seconds or less at Mr. Arzu at close range], he did so with intent to cause, at least, serious physical injury, a natural consequence of such act" (*People v Barnes*, 265 AD2d 169, 169 [1999], *lv denied* 94 NY2d 877 [2000]; *see also People v Cesario*, 71 AD3d 587, 587

[2010], *lv denied* 15 NY3d 803 [2010], *cert denied* __ US __, 131 S Ct 670 [2010] ["The court properly declined to submit manslaughter in the second degree as a lesser included offense . . . Since defendant had to squeeze the trigger of his semiautomatic weapon nine separate times, there is no reasonable possibility that the weapon was discharged through careless handling. Furthermore, nothing in the prosecution or defense case tended to explain why defendant would fire nine shots, other than to hit his victims"]; *People v Rodriguez*, 262 AD2d 140, 141 [1999], *lv denied* 93 NY2d 1026 [1999] ["The court properly declined to charge manslaughter in the second degree as a lesser included offense, since there was no reasonable view of the evidence which would support a finding that defendant fired eight shots into his unarmed victim without, at least, the intent to cause serious physical injury"]).

In finding that the second-degree manslaughter charge was appropriate, the dissent states that defendant "denied that he had the intent to cause serious physical injury to the driver." In support, the dissent cites defendant's testimony that when he first approached the vehicle his primary intent was to render aid, not to arrest the driver. However, taken in context, defendant's testimony that he wanted "to get [Mr. Arzu] the aid

that he needed as quick as possible," referred to his intention at the time of his approach to the van, not his intention at the time of the actual shooting (*cf. People v Abreu-Guzman*, 39 AD3d 413 [2007] *lv denied* 9 NY3d 872 [2007]). In that regard, defendant testified that he intentionally fired to extricate himself from the vehicle as it dragged him. Even if that testimony was properly discredited by the trial court, that would impact on defendant's justification defense, but would not alter the fact that all versions of the shooting support the inference that defendant intentionally fired four or five shots in 1.5 seconds or less at Mr. Arzu at close range, intending to cause, at a minimum, serious physical injury -- which negates any theory of recklessness (*see People v Barnes*, 265 AD2d at 169; *People v Frazier*, 156 AD2d 583 [1989], *lv denied* 75 NY2d 868 [1990] [trial court correctly refused to charge second-degree manslaughter where "[t]he evidence at trial established that the victim was shot at close range with two blasts from a shotgun which the defendant had taken to the scene of the shooting. Additionally, the defendant's statement indicated that he had intentionally fired the weapon at the victim"]). Nor, as discussed below, was there evidence that established beyond a reasonable doubt that defendant acted recklessly when he approached the van with his

weapon drawn. The People provided no proof as to what a reasonable police officer would have done in defendant's position or that applicable police rules or regulations were violated.

Accordingly, because the evidence at trial, including defendant's own testimony, in which he admitted intentional conduct, negated any theory of recklessness, the trial court should have refused to consider second-degree manslaughter as a lesser included offense (*see People v Smith*, 87 AD2d 640 [1982], *lv denied* 56 NY2d 814 [1982]; *People v Solano*, 52 AD3d 848 [2008], *lv denied* 11 NY3d 795 [2008]). Since the sole charge of which defendant was convicted was the improperly considered charge of manslaughter in the second degree, the indictment must be dismissed (*People v Strawder*, 78 AD2d 810 [1980]).

Alternatively, even had it been proper to consider the lesser included offense of manslaughter in the second degree, we would find that the verdict was against the weight of the evidence, which did not establish the element of recklessness.

"Weight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable" (*People v Danielson*, 9 NY3d 342, 348 [2007]). "If so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of

such conclusions. Based on the weight of the credible evidence, the court then decides whether the [trier of fact] was justified in finding the defendant guilty beyond a reasonable doubt" (*id.*). "If it appears that the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict" (*People v Bleakley*, 69 NY2d 490, 495 [1987]).

As set forth above, in support of their request for consideration of the lesser included offense of manslaughter in the second degree, the People advanced the theory that by pulling his weapon at a point when he knew it was an accident scene, defendant put himself in a reckless position where he could fire the weapon either intentionally or inadvertently. Thus, the People had to prove beyond a reasonable doubt that defendant, by approaching the crash scene with his weapon drawn, was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" and that to disregard that risk constituted "a gross deviation from the standard of conduct that a reasonable [police officer] would observe in the situation" (Penal Law § 15.05[3]). However, the evidence presented at trial was consistent with the People's original theory that defendant consciously decided to fire his weapon, with the intention, at a minimum, to cause

serious physical injury to Mr. Arzu, and there was no evidence to support the People's revised theory that he acted recklessly or negligently in drawing his weapon in the first instance. Again, even if defendant fired after being hit by the van, rather than after being dragged by it, that would go to the merits of his justification defense, but would not in and of itself convert his act of firing five shots in 1.5 seconds or less at Mr. Arzu at close range from an intentional attempt to cause at least serious injury into a reckless act.

The People's belated reliance on NYPD Patrol Guide § 203-12[g] ["Police officers shall not discharge their firearms at or from a moving vehicle unless deadly physical force is being used against the police officer or another person present, by means other than a moving vehicle"] does not alter this conclusion. The People made a calculated decision not to present at trial evidence as to police rules and procedures regarding the circumstances under which an officer may approach an accident scene with his or her gun drawn, and to raise that issue for the first time on appeal. Although rules of police procedure need not be offered into evidence for a court to take judicial notice of it, "a description of what the procedure requires must be

proffered," and that was not done here (*see People v Gomez*, 13 NY3d 6, 11 [2009]]; *see also Arias v City of New York*, 22 AD3d 436, 437 [2005] [summary judgment for City warranted in absence of evidence that officers' actions were inconsistent with proper police practice]).

Citing *People v Colecchia* (251 AD2d 5 [1998], *lv denied* 92 NY2d 895 [1998]), the dissent maintains that the fact that no expert testimony was offered by the People as to whether it was proper for a police officer to approach the car with his weapon out and to leave it unholstered, is inconsequential. In *Colecchia*, this Court found that expert testimony on police training and guidelines was not essential to establish the police officer's recklessness. However, unlike in *Colecchia*, here there is no "overwhelming evidence" that defendant acted recklessly in unholstering his weapon in the first instance and in keeping it at his side as he approached the crash site.

"In evaluating the propriety and reasonableness of the actions by the police, we must take cognizance of the realities of urban life in relation to the dangers to which officers are exposed daily, which often require split-second decisions, with life or death consequences" (*People v Reyes*, 91 AD2d 935, 936 [1983]). Defendant testified that he thought the noise he heard

at 11:00 pm was a gunshot. This belief was not unreasonable. Indeed, other witnesses testified that they were familiar with the sound of gunfire because they had heard it before in the neighborhood. There were people in the vicinity of the van, which was in a dark area, and defendant, who approached without backup, did not have a good view of the van's interior.

Given these circumstances, it cannot be said that defendant's approach to the van was not inherently dangerous (*compare Pennsylvania v Mimms*, 434 US 106, 110 [1977] [routine stops for traffic violations are inherently dangerous to police officers]; *People v Rodriguez*, 81 AD3d 404 [2011][same]). Thus, absent proof of the proper police procedures for approaching any situation with a gun, there is an insufficient basis in the record to determine, under the particular circumstances of this case, that the risk created by defendant's actions in unholstering his weapon when responding to the accident scene was unjustifiable and constituted a gross deviation from the standard of conduct that a reasonable officer would have observed.

Indeed, to the extent that there was evidence by which to evaluate the reasonableness of defendant's police tactics, the evidence did not support the guilty verdict for reckless manslaughter (*see People v Conway*, 40 AD3d 455 [2007]). The

defense expert, Mr. Kapelsohn, testified that defendant's approach to the van with his weapon drawn and pointed downward was not improper because defendant thought the initial sound of the van colliding with the cars could be a gunshot. Defendant explained that he kept his weapon in the "bladed" position, even after he observed that the van had been in an accident, because he still did not know what he would walk into or what would come up, since the van was in a shaded area, its windows were dark, and the cause of the accident and number of the van's occupants were unknown. Further, defendant had no radio, cell phone, partner or Kevlar vest; his weapon was his only line of defense. Neither Mr. Kapelsohn's nor defendant's testimony was rebutted.

Contrary to the dissent's contention, this analysis is not contingent on a rejection of the trial court's credibility findings, or the acceptance of defendant's contention that he was dragged by the van. Rather, it is based on the fact that without guidance from the relevant NYPD procedures, it is not evident that defendant, in his particular situation, acted unreasonably when he drew his weapon, let alone that he "grossly deviated" from the standard of conduct of a reasonable police officer, which was the theory on which the People based its request for the second-degree manslaughter charge. Accordingly, the weight

of the evidence, as to culpability, to the extent there was any evidence at all, was that defendant's conduct in drawing his weapon when he first approached the van was "not so culpable as to warrant a finding that any such negligence rose to the level of criminality" (*see Conway*, 40 AD3d at 456).

We have considered and rejected the People's remaining arguments.

All concur except Richter, J. who dissents in a memorandum as follows:

RICHTER, J. (dissenting)

The trial court, in this nonjury trial, properly considered the lesser included offense of manslaughter in the second degree and its verdict was fully supported by the credible evidence. There is no dispute that manslaughter in the second degree (Penal Law § 125.15[1]) is a lesser included offense of manslaughter in the first degree (Penal Law § 125.20[1]), which is the crime charged. The critical question on this appeal is whether there is a reasonable view of the evidence to support a finding that defendant committed the lesser included offense but not the greater. That analysis turns on whether defendant's actions can only be viewed as evidencing an intent to cause serious injury or whether the evidence also supports a finding that defendant acted recklessly in firing his weapon.

"[A] refusal to charge a lesser included crime is warranted only where every possible hypothesis but guilt of the higher crime [is] excluded" (*People v Johnson*, 45 NY2d 546, 549 [1978] [internal quotation marks and citation omitted]). In deciding whether, under any reasonable view of the evidence, the trier of fact could acquit defendant of the higher count and still find him guilty of the lesser one, the court must be guided by the principle that the trier of fact is free to accept or reject all

or any part of the evidence (*People v Henderson*, 41 NY2d 233, 236 [1976]; *People v Fernandez*, 64 AD3d 307 [2009]).

Although defendant, in his direct testimony, sought to establish that he intentionally shot the victim to extricate himself from the victim's van, the record, including defendant's statements immediately following the shooting, supports a finding of recklessness. "A person acts recklessly" with respect to second degree manslaughter "when he is aware of and consciously disregards a substantial and unjustifiable risk that [death] will occur" (Penal Law § 15.05[3]). Here, defendant explained that he approached the van, which had been involved in an automobile accident outside his home, and opened the door to see if the driver was okay. The airbag had been deployed, and the driver was nonresponsive. Defendant asked the driver for his license, registration, and insurance card, but the driver was still nonresponsive. Defendant, who had positioned himself in the open door on the driver's side of the van, claims that the driver pulled the door shut, trapping defendant in the door. The driver then started the car, but it did not catch the gear properly. According to defendant, he remained trapped in the door as the driver ultimately moved the vehicle forward. He claimed that he was running alongside the vehicle, with his body still trapped in

the door. Somehow, defendant got "jerked," he fired his weapon, which was in his right hand, and the door was released. The record establishes that defendant fired five shots in 1.2 seconds.

Although defendant testified that he fired the gun to extricate himself from the car, he denied that he had the intent to cause serious physical injury to the driver. He confirmed that when he first approached the vehicle, his intent was to render aid and not to arrest the driver. Yet, even after he determined that the driver was nonresponsive and dazed, he did not put his gun away. The medical evidence presented at trial showed that the fatal bullet was fired from behind, entering the victim through his upper left back. Based on this testimony, the court could have found that defendant, an experienced police officer and a Marine Corps veteran, acted recklessly when he fired his gun in the victim's direction by consciously disregarding the risk of firing at such close range (*see People v Abreu-Guzman*, 39 AD3d 413 [2007], *lv denied* 9 NY3d 872 [2007]). Thus, the court, as the trier of fact, properly considered the lesser included offense.

The court's decision to consider and to convict on the lesser offense also can be supported by the statements defendant

made to other police officers and to medical personnel at the scene immediately following the shooting. These statements establish that defendant was standing next to the car, which brushed his elbow, and that he fired the gun at the car in response. Defendant never told any of the emergency responders that he was dragged by the vehicle. In fact, one paramedic specifically asked defendant if he had been dragged, and defendant said he had not. Before the grand jury, defendant testified that he broke loose and then fired his weapon. These statements are inconsistent with defendant's trial testimony in which he sought to establish that he intentionally fired the gun so that he would be released from the vehicle. If, as defendant's statements at the scene indicate, defendant was firing from outside the vehicle at close range but did not intend to seriously injure the driver, his actions provide a basis for a finding of recklessness.

The majority concludes, with no convincing explanation, that the verdict was against the weight of the evidence. "[A]ppellate courts have been careful not to substitute themselves for the [trier of fact]," and "[g]reat deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v Bleakley*, 69 NY2d 490, 495

[1987]). This Court recently emphasized these principles in *People v Griffin* (63 AD3d 635, 638 [2009], *lv denied* 13 NY3d 835 [2009]), stating that "[u]nder a weight-of-evidence analysis, a court does not take the place of the [trier of fact] in passing on questions of the reliability of witnesses and the credibility of testimony, instead it gives great deference to the [trier of fact's] findings." The trial court explicitly rejected defendant's testimony that he was trapped in the door of the victim's car and dragged. Instead, consistent with the statements made by defendant to the emergency personnel at the scene, the court concluded that defendant acted recklessly by shooting at the victim's vehicle as it drove away after it struck defendant on his side.

Although the majority states that it is not rejecting the trial court's credibility findings, it appears that the majority is doing exactly that. The opinion recounts, in detail, defendant's trial testimony about being dragged by the car, and concludes that defendant could have been trapped in the vehicle. The majority also notes the testimony of Damaris Marrero, a friend of defendant, who claimed at trial that she saw defendant being dragged by the car. Furthermore, the majority seeks to explain away the testimony of the paramedic who recalled that

defendant told him he was not dragged. That paramedic documented in a written report, prepared on the night of the shooting, that defendant said he was "struck by car as he was standing next to it as the car sped off." The majority cannot have it both ways; either it is substituting its own credibility findings for that of the trial court and accepting defendant's version of the incident or it must reject defendant's claim, as the trial court did, that he was trapped in the door when he repeatedly fired his weapon at close range.

The trial court's decision to reject defendant's trial testimony, particularly his claim about being dragged by the car, was warranted in light of the evidence and was well within its province as the trier of fact. There is no question that the airbag was deployed when defendant first approached the vehicle. Defendant acknowledged that the driver, who weighed close to 300 pounds, was dazed and unresponsive. Yet, according to defendant's trial testimony, the driver was somehow able to reach behind defendant, an experienced police officer, and exert sufficient pressure on the car door, while the car was moving, to trap defendant with his left arm squeezed into the door frame and his legs sticking out of the car. Even more implausible was defendant's claim that he would allow himself to be put in this

position while he still had his gun unholstered in his right hand.

Defendant's story also makes little sense when one carefully examines the sequence of events that led to the firing of the weapon. Defendant never logically explained how his right hand was released and how he managed to raise it up so that a shot could be fired into the back left side of the victim. Although defendant testified at one point that he was "jerked" by the moving car, he did not adequately explain why, once the car moved, he did not fall to the ground. Nor did he address why he did not push on the door with his arms so that he could safely free himself. Instead, he sought to convince the court that the only way he could extricate himself was by shooting the driver in the back. His testimony about shooting while being trapped in the door of a moving car also was impossible to reconcile with the testimony of the People's expert, who explained that the shots had to have been fired from a muzzle that was comparatively stationary.

Rather than credit this ludicrous story, the court was entitled to accept the far more believable statements defendant made at the scene as to how the incident occurred. These statements were made close in time to the shooting, before

defendant had the opportunity to reflect and to tailor his testimony in any way. The statements also were made at a time when defendant was trying to obtain treatment for his alleged injuries, rather than later when he was trying to avoid legal liability. According to the paramedic who testified at trial, the only injury defendant mentioned was related to his right shoulder and right elbow. It is impossible to understand how defendant's right elbow could have been injured, given his description of how he was trapped in the car door, particularly because it was his left arm that was bent in what he describes as a "chicken wing" position and his right hand that was used to shoot the victim.

Despite the fact that defendant's testimony was at odds with that of other disinterested witnesses, and ignoring his obvious motive to lie, the majority seems to accept defendant's far-fetched account of the events prior to the shooting. The majority focuses on the number of shots defendant fired, suggesting that this proves that defendant acted intentionally rather than recklessly. Yet, it proves no such thing because the rapid firing of several shots could just as easily establish reckless conduct. Defendant told a police officer at the scene that the victim threw something at him and he fired the gun.

Whether the firing was in response to this, or to the car's briefly hitting him, the trial court's conclusion that he acted recklessly by repeatedly firing in the car's direction was supported by the record.

On appeal, defendant makes much of the fact that no expert testimony was offered as to whether it was proper for him to approach the car with his gun out and to leave it unholstered throughout the incident. This Court, in *People v Colecchia* (251 AD2d 5 [1998], *lv denied* 92 NY2d 895 [1998]), concluded that expert testimony was not required for the court to determine whether the police officer's conduct in firing a fatal shot into the victim's back was reckless and unjustified. Here, no expert testimony was necessary for the court to find reckless conduct, based on defendant's statements made at the scene, which showed that he was not in any danger when he fired his weapon. Contrary to the majority's analysis, the trial court's decision to convict did not turn on whether defendant failed to follow patrol guide procedures, but on the fact that, facing no danger at the time, he recklessly fired at a moving vehicle, killing its occupant.

The majority tries to make this case into a referendum on the dangers faced by police officers investigating gunshots or making car stops. I do not question the difficulties faced by

officers who come upon what may be a crime scene, especially before any back-up arrives. But defendant acknowledged that the area outside his home was well lit, and the record establishes that he quickly realized that this was a car accident, not a potential crime scene. Defendant admitted that by the time he approached the car, he knew it was less likely that the sound he heard was a gunshot, and that it actually was a car crash. He further testified that he did not anticipate placing the driver of the car under arrest. Finally, neither defendant nor the majority adequately explains how defendant could have felt endangered when he saw the victim in the car dazed and unresponsive.[1]

On appeal, defendant argues that his sentence of one to three years of imprisonment was unduly harsh and should be modified in the interest of justice to a non-jail sentence. The majority, which concludes that the conviction should be reversed, does not address the question of sentence. I would also affirm defendant's sentence. At sentencing, the court considered

[1] The majority's reference to the justification defense makes little sense. If defendant was not being dragged, then he would have had no reasonable belief that deadly physical force was being used against him, and the justification defense would not be applicable.

defendant's service as a police officer, his service to his country as a Marine, and the devastation his conviction caused to his family. In fashioning a sentence, the court also appropriately considered the nature of the crime, which resulted in the loss of a life, and considered the plea of the victim's family that a jail sentence be imposed. It is obvious from reading the sentencing minutes that the decision to impose a prison sentence on defendant was a difficult one for the sentencing court. The court acknowledged the split-second decisions that police officers must make when confronted with dangerous situations on the streets of this city. But the court further noted that at the time defendant fired his weapon, there was no danger confronting him. The court exercised leniency by imposing the minimum jail sentence permissible for this offense. In this tragic case, the lower court's decision to convict and its sound exercise of discretion at sentencing should be left undisturbed.

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

ENTERED: JUNE 14, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4373N Paul Kocourek, Index 602224/08
Plaintiff-Appellant,

-against-

Booz Allen Hamilton Inc., et al.,
Defendants-Respondents.

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Outten & Golden LLP, New York (Rachel Bien of counsel), for appellant.

Latham & Watkins LLP, Washington, DC (James Christian Word, of the District of Columbia Bar, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered May 20, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to amend the complaint, unanimously reversed, on the law and the facts, with costs, and the motion granted.

Plaintiff was employed as an officer of defendant Booz Allen Hamilton, Inc.[1] from 1987 until his retirement in 2007. Prior to March 1992, plaintiff was a participant in a traditional stock rights plan. The plan provided that each year, at defendants' discretion, plaintiff would be given the option of purchasing

[1] According to plaintiff, defendant Booz & Company, Inc. is a successor-in-interest to Booz Allen Hamilton, Inc.

common shares and Class B shares, the latter of which could be exchanged for Class A shares. Upon his retirement, plaintiff was entitled to hold the accumulated shares for two years and then sell them back to defendant at a valuation determined in accordance with the stock rights plan.

In March 1992, plaintiff was transferred to an office in Australia. At that time, defendants terminated his right to participate in the stock rights plan and enrolled him in a "shadow stock" program. According to plaintiff, the "shadow stock" rights that this new program entitled him to were designed to mimic the benefits of the stock rights plan without his actually purchasing or selling any shares. In other words, plaintiff claims that he was assured that the economic benefit of the shadow stock would be the equivalent of the benefit he would have realized had he actually had the right to purchase shares. Plaintiff asserts that the Class A stock he had already accumulated was not affected by the shadow stock plan. However, he had to exchange all of his Class B shares for "shadow shares." This he alleges was done with the understanding that he would still be able to defer the sale of that shadow stock for two years after his retirement, along with any shadow shares he may have continued to be offered before his retirement.

In his original complaint, plaintiff alleged that the purpose of the shadow stock plan was to enable defendants to avoid certain tax and other legal consequences attendant to stock purchase plans in Australia. Accordingly, he asserted, there was no written agreement or other writing memorializing the shadow stock plan, and defendants generally avoided generating any documents referring to the shadow stock plan. However, plaintiff maintained that several people in the company, including the general counsel, the head of human resources and the controller, orally represented to him that he would be compensated through the shadow stock program no differently from those employees receiving common shares. Plaintiff asserted that defendants breached this oral agreement when, upon his retirement, they refused to permit him to defer redemption of any of his shadow shares.

Defendants moved to dismiss the original complaint pursuant to CPLR 3211(a)(7). They claimed, inter alia, that any award related to defendants' stock, whether of common shares or in the form of shadow stock, was in the nature of a discretionary bonus, so there could be no breach of contract cause of action for not

awarding such benefits. The motion court dismissed that claim, holding that

> "[a]s alleged by [plaintiff], the misrepresentation was one of present fact (i.e., that the shadow stock plan would provide the same economic benefit as the common stock plan), which was collateral to his employment contract, and therefore involved a separate breach of duty, even though it may have induced [plaintiff] to agree to his compensation package. The misrepresentation therefore does not support a claim for breach of contract, but rather, may support a fraud claim" (citations omitted).

Plaintiff appealed, and also moved the motion court for reargument or, in the alternative, leave to replead. This Court affirmed, but for a different reason than given by the motion court. Without commenting on the merits of plaintiff's claim, we found that the alleged oral promise to treat shadow stock as equivalent to common shares violated the statute of frauds because it could not be performed within one year (71 AD3d 511 [2010]). This Court also rejected plaintiff's request that he be allowed to replead his breach of oral contract claim, because the request had been raised for the first time on appeal and, in any event, was "unsupported by facts that would correct deficiencies in the pleadings and thereby render his claims actionable" (*id.* at 512). The motion court also denied plaintiff's motion to

reargue or replead, stating that plaintiff had failed to demonstrate how any amended pleading would cure the deficiencies in the existing complaint.

One month after the motion court ruled on plaintiff's request to replead his cause of action for breach of an oral contract, plaintiff moved for leave to amend his complaint to assert a claim for breach of a *written* contract, or, in the alternative, for reargument or renewal of his previous motion to reargue. The motion was based on documents that plaintiff alleged he first received during discovery, while the motion to dismiss was pending. One of the documents was a memorandum to plaintiff, signed by defendant's general counsel, that confirmed discussions between them in which it was agreed that plaintiff would become a participant in the shadow stock program. Plaintiff also alleged the existence of minutes of meetings of defendant's board of directors and of its personnel committee that could be construed to support his claim that the shadow stock program was supposed to confer benefits substantially similar to those of the stock purchase program.

In opposition to the motion, defendants contended, inter alia, that the court was powerless to grant leave because this Court had already denied leave to replead. They also argued that

the documents upon which plaintiff was relying to support his breach of written contract claim had been produced a year earlier or were in plaintiff's possession even before he filed the original complaint. Thus, they contended, the new claim was "untimely" and prejudicial. The court denied leave to replead. Without addressing the merits of the motion, it stated that it was bound by this Court's decision denying leave to replead.

It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party (*see* CPLR 3025[b]; *Solomon Holding Corp. v Golia*, 55 AD3d 507 [2008]). Mere delay is insufficient to defeat a motion for leave to amend (*Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 [2001]). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'" *(Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [2007], quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]).

Before considering whether plaintiff's delay in seeking amendment of his complaint is prejudicially late, we must first address defendants' contention that, as the motion court found, this Court's refusal to grant plaintiff leave to replead is law

of the case. The issue previously before the motion court, and then this Court, was whether plaintiff had stated, or could state upon repleading, sufficient facts to support a claim for breach of an oral contract. This Court found that he could not, because the statute of frauds barred the claim, and none of the new allegations that plaintiff proposed to introduce changed that fact. However, until the instant motion, plaintiff never alleged the existence of a *written* agreement. Accordingly, neither the motion court nor this Court has had the opportunity to consider the merits of that claim, which, necessarily, cures the statute of frauds violation.

Defendants have not identified any way in which they would be prejudiced were plaintiff granted leave to interpose a breach of written contract claim. They contend that they produced the documents plaintiff now relies on as early as one year before the instant motion to amend. However, again, mere tardiness is insufficient to defeat a motion to amend (*Sheppard*, 288 AD2d at 34). Moreover, defendants cannot dispute that plaintiff had already filed his original complaint by the time they produced the documents, and, more importantly, that they produced some of the documents while their motion to dismiss that complaint was still sub judice. Plaintiff was certainly entitled to wait to

move until the motion was decided and he had exhausted his efforts to appeal the decision and seek to reargue the motion. Further, there is no indication that plaintiff was attempting to gain a tactical advantage by delaying the making of the motion. To the contrary, he waited only one month to move after his final effort to limit his claim to breach of oral contract had been rejected.

Additionally, there is no prejudice to defendants because the litigation is still in its initial phase. The breach of written contract claim is substantively identical to the breach of oral contract claim; only now there is documentation to support plaintiff's allegations. Defendants had notice of the claim from the inception and should not have to change their strategy in any significant way to defend the new claim (*see Castle v Gaseteria Oil Corp.*, 263 AD2d 523 [1999] [no prejudice resulted from defendants' delay in seeking to amend answer to interpose defense of release, where plaintiffs knew of existence of written release and had prior notice that defendants contended that the release was enforceable]).

Finally, we note that defendants do not question the merit of the proposed amendment. In any event, we find that the complaint, as amended, is not "palpably insufficient or patently

devoid of merit" so that denial of leave would be warranted (see *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [2010]). Accordingly, the motion court should have granted plaintiff leave to amend his complaint.

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4938 PPF Safeguard, LLC, et al., Index 603565/09
Plaintiffs-Appellants,

-against-

BCR Safeguard Holding, LLC, et al.,
Defendants-Respondents.

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

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Jeffrey T. Golenbock of counsel), for respondents.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered September 19, 2010, which, insofar as appealed from, denied plaintiffs' motion for partial summary judgment on their first cause of action for breach of an indemnity agreement and their fourth cause of action for a declaration that defendants must honor their obligations to indemnify plaintiffs for any covered payments due to any employees under the employment agreements and the side letter agreements, unanimously reversed, on the law, without costs, the motion granted, and it is declared that defendants must honor their obligations to indemnify plaintiffs for any covered payments due to any employees under the employment and side letter agreements.

The issue before us is whether defendants raise a viable

"frustration of purpose" defense to plaintiffs' contractual indemnification claims. We hold that the defense is insufficient to defeat summary judgment.

On May 31, 2005, the parties consummated a transaction under which plaintiff PPF Safeguard, LLC (PPF) purchased a 94% interest in plaintiff Safeguard Storage Properties, LLC (Safeguard), a self-storage business which at the time was headquartered in New Orleans. After the PPF acquisition, the remaining six-percent interest in Safeguard was held by the three defendant limited liability companies (the LLC defendants), all of which were controlled by individual defendants Bruce Roch and Jack Chaney. In connection with the transaction, Safeguard, PPF, and the LLC defendants entered into a Securities Purchase Agreement, and PPF and the LLC defendants entered into an Amended & Restated LLC Agreement setting forth Safeguard's governance and operation. Pursuant to the LLC Agreement, Roch remained the company's chief executive officer and Chaney remained its chief operations officer. PPF's management role in Safeguard was limited.

Also on May 31, 2005, the LLC defendants, Safeguard and PPF entered into the indemnity agreement at issue in this appeal. The "Recitals" section of the agreement states that, before the PPF acquisition, Safeguard had entered into agreements with

current and former Safeguard employees (the employment agreements) which provided them with the right under certain circumstances to receive extra compensation which the employment agreements variously describe as incentive compensation, bonus payments, and participation payments (collectively, bonuses). The indemnity agreement further recites that, "[a]s a condition of PPF entering into the Securities Purchase Agreement and the [Amended & Restated LLC Agreement]," the LLC defendants agree to indemnify Safeguard from liabilities arising from the bonus provisions in the employment agreements and "make good faith efforts to negotiate a termination of the [bonus] provisions of the [e]mployment [a]greements and replace them with alternative bonus arrangements paid for by [the LLC defendants] and acceptable to PPF."

Article II of the indemnity agreement specifically requires the LLC defendants to pay any obligations owed by Safeguard for bonuses under the employment agreements and to indemnify Safeguard and PPF from all claims in connection with the bonuses. The indemnity provision also holds the LLC defendants responsible for interest on the indemnified amounts and PPF's legal fees, costs, and expenses with respect to enforcing the agreement.

In section 3.1 of the indemnity agreement, the LLC

defendants agree that they shall use good faith efforts to terminate the bonus arrangements with two former Safeguard employees, with any settlement amount to be paid by the LLC defendants. With respect to the three current employees, the LLC defendants agree to renegotiate their present bonus arrangements and substitute alternative arrangements for which the LLC defendants and not Safeguard would be responsible.

In August 2005, Hurricane Katrina struck the Gulf Coast and disrupted Safeguard's operations in New Orleans. By that time, the LLC defendants had attempted but were unable to renegotiate the existing bonus arrangements. Between 2006 and 2009, multiple bonus payments to two employees, Jeff Ottmar and Jim Goonan, became due under their employment agreements, and as defendants admit, rather than have the LLC defendants pay the bonuses, Roch and Chaney caused Safeguard to pay Ottmar and Goonan without PPF's knowledge.

In July 2009, PPF acquired the LLC defendants' remaining interests in Safeguard and installed its own management. At that point, PPF learned of the payments to Ottmar and Goonan, and in October 2009 Safeguard's new President and Chief Executive Officer wrote to Roch and Chaney, individually and in their capacities as the sole members of the LLC defendants, demanding

reimbursement of the bonuses plus interest, an amount which Safeguard calculated at about $ 382,000. When defendants failed to make any payments, plaintiffs filed this lawsuit in November 2009 seeking damages for the amount due under the indemnity agreement, along with a declaration that the LLC defendants remained liable for any future bonuses paid under the employment agreements.

Thereafter, plaintiffs moved for an order granting partial summary judgment as against the LLC defendants, who argued in opposition that they were only obliged to indemnify plaintiffs if they failed to make good-faith efforts to renegotiate the bonus arrangements in the employment agreements, that their obligations ended when they sold all their remaining interest in Safeguard to PPF, and that their obligations under the indemnity agreement should be excused because Hurricane Katrina frustrated the purpose of the contract.

The motion court properly rejected the first two arguments. It found that the indemnity agreement unambiguously provided that the LLC defendants' obligation to indemnify was independent of its separate obligation to attempt to renegotiate the employment agreements. The court also concluded that whether the LLC defendants still owned an interest in Safeguard had no bearing on

whether they were contractually obligated to indemnify plaintiffs.

However, the motion court denied plaintiffs summary judgment on the ground that the LLC defendants had raised a factual issue as to whether their performance was excused because Hurricane Katrina frustrated the purpose of the indemnity agreement. The court accepted extrinsic evidence, in the form of the affidavit of Bruce Roch, that the hurricane made it impossible for the LLC defendants to renegotiate the employment agreements successfully, which Roch contended was the parties' purpose in entering into the indemnity agreement.

Summary judgment should have been granted because the frustration of purpose defense is unavailing. For a party to a contract to invoke frustration of purpose as a defense for nonperformance, "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (*Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 265 [2004]; *see also* Restatement [Second] of Contracts § 265). The doctrine applies "when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract" (Restatement [Second] of Contracts § 265,

Comment *a*).

The purpose of the indemnity agreement is evident from the plain language of the contract: to induce PPF to purchase an interest in Safeguard, the LLC defendants agreed to be responsible for bonus payments under the employment agreements. Given the purpose of the indemnity agreement, Hurricane Katrina had no effect on the value to the LLC defendants of PPF's performance under the contract, namely PPF's execution of the Securities Purchase Agreement and the Amended & Restated LLC Agreement and its completion of the acquisition.

Since the parties' intent was clearly expressed within the four corners of their writing, Roch's self-serving affidavit should not have been considered (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Accordingly, we reverse.

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

ENTERED: JUNE 14, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5003 The People of the State of New York, Ind. 1605/01
Respondent,

-against-

Adrian Jackson,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Arlene R. Silverman, J.), rendered June 25, 2008, resentencing defendant to a term of 9 years with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving his prison term at that time, and therefore had no reasonable expectation of finality in his illegal sentence

(*see People v Lingle*, __ NY3d __, 2011 NY Slip Op 3308 [2011; *compare People v Williams*, 14 NY3d 198 [2010], *cert denied* __ US __, 131 S Ct 125 [2010]). We have considered and rejected defendant's due process argument.

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

ENTERED: JUNE 14, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5138 Lydia Roman, Index 101291/09
Plaintiff-Appellant,

-against-

Met-Paca II Associates, L.P.,
Defendant-Respondent.

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Harris/Law, New York (Matthew Gaisi of counsel), for appellant.

Gannon, Lawrence & Rosenfarb, New York (Lisa L. Gokhulsingh of counsel), for respondent.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered June 28, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

To establish liability for an icy condition, a plaintiff must establish that a defendant had either actual or constructive notice of the particular condition (*Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972, 973-974 [1994]; *Slates v New York City Hous. Auth.*, 79 AD3d 435, 435 [2010], *lv denied* 16 NY3d 708 [2011]; *Grillo v New York City Trans. Auth.*, 214 AD2d 648, 648-649 [1995], *lv denied* 87 NY2d 801 [1995]). Here, defendant established prima facie entitlement to summary judgment insofar as it tendered evidence establishing the absence of both actual

and constructive notice. Specifically, defendant's superintendent testified that at 9:30A.M., approximately two hours prior to plaintiff's alleged accident he did not see any ice on the ramp where plaintiff claims she fell thereby establishing the absence of actual notice (*Anderson v Central Val. Realty*, 300 AD2d 422, 422-423 [2002], *lv denied* 99 NY2d 509 [2003]). Moreover, since plaintiff testified that prior to falling, she had not seen any ice on the ramp, defendant also established the absence of constructive notice (*McDuffie v Fleet Fin. Group,* 269 AD2d 575, 575 [2000]; *Scirica v Ariola Pastry Shop*, 171 AD2d 859, 859 [1991]).

Plaintiff's opposition fails to raise an issue of fact with respect to notice. In particular, we find unavailing her claim that the icy condition on the ramp was a recurrent one. A defendant may be charged with constructive notice of a hazardous condition if it is proven that there was a recurring condition of which the defendant has actual notice (*Chianese v Meier*, 98 NY2d 270, 278 [2002]; *Uhlich v Canada Dry Bottling Co. Of N.Y.*, 305 AD2d 107, 107 [2003]). While plaintiff points to evidence that it had snowed a day or two prior to her fall and to the superintendent's testimony that when it snowed, the snow on the roof would melt and water would fall onto the ramp, this does not

establish a recurring icy condition, especially in light of the superintendent's testimony that "this [was] the first time that ice accumulated like that."

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

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5318 The People of the State of New York, Ind. 1786/08
Respondent,

-against-

Donald McLeod,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered July 21, 2009, convicting defendant, after a jury trial, of assault in the first degree, attempted assault in the first degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 18 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of to reducing the prison term for the assault conviction to 15 years, and otherwise 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 credibility determinations. The evidence established that defendant acted intentionally, rather than recklessly.

Since each of the charges submitted to the jury required intent, the court properly exercised its discretion in declining to instruct the jury on the difference between intent and recklessness (*see generally People v Samuels*, 99 NY2d 20, 25-26 [2002]). The court permitted counsel to argue in summation that defendant's conduct was reckless in the general sense of that term, and the court correctly observed that an instruction on the legal definition of recklessness would only complicate that argument.

We find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5319 East 115th Street Realty Corp., Index 604164/07
Plaintiff, 590610/08

-against-

Focus & Struga Building Developers LLC, et al.,
Defendants,

Great American Insurance Company of New York,
Defendant-Respondent,

Abad Consulting (a Corporation),
Defendant-Appellant.

[And a Third-Party Action]

_____

Ropers Majeski Kohn Bentley PC, New York (Anthony D. Grande of counsel), for appellant.

Mound Cotton Wollan & Greengrass, New York (Kevin F. Buckley of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 12, 2010, which, insofar as appealed from, granted the motion of defendant Great American Insurance Company of New York (GAIC) for summary judgment dismissing plaintiff's third cause of action alleging breach of an insurance contract, unanimously affirmed, with costs.

The motion court determined that the policy was void ab initio due to material misrepresentations on the insurance application submitted by defendant-appellant Abad Consulting

(broker).

Insurance Law § 3105 permits an insurer to rescind a policy where the application contains a material misrepresentation (*see American Sur. Co. of N.Y. v Patriotic Assur. Co., Ltd.,* 242 NY 54, 64 [1926]). Here, the application stated that no structural alterations to the subject building would be done, which plaintiff's principal admitted was untrue. Although other documents submitted with the initial application had some indication that there would be structural work, in response to GAIC's request for "clarification," it received an e-mail stating that "the broker advises there will be no structural changes."

GAIC submitted an affidavit of its underwriter, along with the relevant underwriting guidelines, establishing that it would not have issued the policy in this form had it known the true state of affairs. This was sufficient to establish GAIC's entitlement to judgment as a matter of law *(see Dwyer v First Unum Life Ins. Co.*, 41 AD3d 115 [2007]).

We have considered the broker's remaining contentions, including that further discovery should have been conducted before the motion was decided, and find them unavailing.

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5320 In re Shareef S.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

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

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about August 3, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and imposed a term of probation. That disposition, which provided a full year of supervision, was the least restrictive alternative consistent with the needs of appellant and the community (*see*

Matter of Katherine W., 62 NY2d 947 [1984]). Appellant committed a violent act that injured another boy. Since appellant entered an admission, there was no fact-finding hearing. However, the court was under no obligation to credit the version of the incident that appellant gave a probation interviewer, which was very different from the account given in the victim's supporting deposition. Appellant also had a pattern of school and behavioral problems.

We have considered and rejected appellant's remaining claims.

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5323 Carmen Santos-Lopez, etc., Index 22296/05
Plaintiff-Respondent,

-against-

The Metropolitan Transit Authority, et al.,
Defendants-Appellants.

_____

Gruvman Giordano & Glaws, LLP, New York (Paul S. Gruvman of counsel), for appellants.

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

_____

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered on or about May 10, 2010, upon a jury verdict finding defendants 100% liable for the infant plaintiff's injuries, unanimously affirmed, without costs.

The jury's finding that defendants were 100% responsible for the accident was not against the weight of the evidence (*see Gilliam v Vasilis*, 225 AD2d 509 [1996]). Although the bus driver's testimony that he had a green light was supported by his contemporaneous accident reports and the police officer's testimony that the infant plaintiff said he jumped in front of the bus, thinking it would stop, the jury was free to reject the driver's testimony, in part or in whole (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 210 [2004] [Saxe, J., concurring]; PJI

1:37). Both the infant plaintiff and a nonparty witness, another pedestrian in the same crosswalk, testified that the infant plaintiff had the right of way.

The trial court properly refused to charge the emergency doctrine since a pedestrian's appearance in a crosswalk is a situation that a driver should anticipate and be prepared to deal with (*Hart v Town of N. Castle*, 305 AD2d 543 [2003]).

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels JJ.

5324 Kenneth Negron, etc., et al., Index 23194/05
Plaintiffs-Respondents, 13981/06
24933/06
Kathryne E. Schroeder, et al., 308564/08
Plaintiffs,

-against-

Jeffrey Garcia, et al.,
Defendants-Respondents,

Super Trans N.Y., Inc., et al.,
Defendants-Appellants.

[And Other Actions]

_____

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for appellants.

Susan M. Karten & Associates, LLP, New York (Craig H. Snyder of counsel), for Negron and Balecha respondents.

Law Offices of Brian J. McGovern, LLC, New York (Michael J. Liloia of counsel), for Jeffrey Garcia and Juan Nunez, respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 18, 2010, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants failed to establish their entitlement to judgment as a matter of law on the basis that the emergency doctrine

applied. The subject motor vehicle accident occurred when a vehicle, traveling to the right of defendants' bus, after sustaining mechanical difficulties, struck the bus's rear. Following this first impact, defendant bus driver, in an effort to keep the bus straight, applied the brakes and turned the wheel, but the bus spun around and eventually landed on its side, resulting in injuries to a number of the passengers. The record demonstrates that even assuming the applicability of the emergency doctrine, the bus driver's actions "may still be found to be negligent if, notwithstanding the emergency, the acts are found to be unreasonable" (*Ferrer v Harris,* 55 NY2d 285, 293 [1982] [internal quotation marks and citation omitted]).

Here, there is conflicting testimony regarding, inter alia, whether there were one or two impacts, the force of the impact, and how the accident initially occurred. Accordingly, there are questions presented that warrant resolution by a trier of fact.

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5325 In re Elizabeth Guzman, Index 401797/09
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Elizabeth Guzman, petitioner pro se.

Sonya M. Kaloyanides, New York (Melissa R. Renwick of counsel), for respondent.

_____

Determination of respondent, dated March 25, 2009, approving the decision of the hearing officer, which denied petitioner's remaining-family-member grievance, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Marcy S. Friedman, J.], entered February 24, 2010), dismissed, without costs.

The determination has a rational basis and is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Petitioner admits that she never received written consent to reside in her father's apartment and did not live there for more than one year prior to his death. Petitioner's admissions were corroborated by her

father's most recent annual income affidavit and his data summary sheet, each of which list the father as the sole occupant of the apartment (*see Matter of Abreu v New York City Hous. Auth. E. Riv. Houses*, 52 AD3d 432 [2008]). Any mitigating factors and hardship to petitioner do not provide a basis for annulling respondent's determination (*Matter of Fermin v New York City Hous. Auth.*, 67 AD3d 433, 433 [2009]).

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5326 The People of the State of New York, Ind. 95050/05
Respondent,

-against-

Jisun Allah,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew I. Fleischman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (John P. Collins, J.), rendered January 22, 2009, resentencing defendant to a term of 5 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving the conditional release portion of his original

sentence, and therefore had no reasonable expectation of finality in his illegal sentence (*see People v Lingle*, __ NY3d __, 2011 NY Slip Op 03308 [2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.
ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5327 Kinney & Kinsella, Inc., Index 117791/09
Plaintiff-Appellant,

-against-

NEI Fashions, LLC,
Defendant-Respondent.

_____

Law Offices of Bart J. Eagle, PLLC, New York (Bart J. Eagle of counsel), for appellant.

Zeichner Ellman & Krause, LLP, New York (Nathan Schwed of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 1, 2010, which, in an action alleging unjust enrichment, conversion and prima facie tort, granted defendant's motion to dismiss the complaint due to lack of subject matter jurisdiction, and denied plaintiff's cross motion to compel discovery, unanimously affirmed, with costs.

The Bankruptcy Court's order approving the sale to defendant of the debtor's assets, which appear to include the materials at issue here, provides that "[a]ll persons and entities . . . holding claims of any kind and nature arising before the entry of this Sale Order or relating to acts occurring prior to [its] entry . . . are permanently enjoined from asserting such claims against the Buyer, its successors or assigns, its property, or

the Assets." The order further provides that the Bankruptcy Court "retains exclusive jurisdiction to interpret, construe and enforce the provisions of the [letter of intent governing the sale] and [the] Sale Order." Accordingly, contrary to plaintiff's contention, even if there is a factual dispute as to whether the events giving rise to its claims, namely defendant's alleged improper use of advertising and marketing material prepared by plaintiff for use by the debtor, arose before or after entry of the sale order, resolution of the dispute is squarely within the purview of the provision reserving exclusive jurisdiction to interpret such documents with the Bankruptcy Court.

We reject plaintiff's argument that the Bankruptcy Court impermissibly purported to expand its jurisdiction. Bankruptcy courts have original jurisdiction over civil proceedings "related to" cases under title 11 of the Bankruptcy Code, which includes claims whose outcomes "could *conceivably* have any effect on the estate being administered in bankruptcy" (*Drexel Burnham Lambert Group, Inc. v Vigilant Ins. Co.*, 130 BR 405, 407 [SD NY 1991] [internal quotation marks and citations omitted]).

In view of the foregoing, plaintiff's cross motion to compel

discovery was properly denied as moot.

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

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

5328- Board of Managers of the Index 111102/07
5328A 25 Charles Street Condominium, et al.,
Plaintiffs-Respondents,

-against-

Celia Seligson,
Defendant-Appellant.

_____

Michael T. Sucher, Brooklyn, for appellant.

Ganfer & Shore, LLP, New York (Ira Brad Matetsky of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 13, 2010, which, inter alia, granted plaintiffs' motion for summary judgment to the extent of declaring that the resolutions adopted by plaintiff Board of Managers of the 25 Charles Street Condominium were proper and valid, except to the extent of referring the issue of charges to defendant's unit to a referee to hear and report, and resolved all other issues in favor of plaintiffs and, order, same court and Justice, entered February 24, 2011, which, upon reargument, adhered to its original determination, unanimously affirmed, without costs.

This action involves a dispute between the owners of the two units of the 25 Charles Street Condominium as to the condominium's governance. Plaintiff 25 Charles Owners Corp.

(coop), a cooperative corporation, owns the residential unit, which is comprised of 30 residential apartments. Defendant owns the commercial unit, which consists of two commercial spaces.

Defendant's central argument is that a meeting that she and representatives of the coop attended on December 1, 2009, pursuant to the court's direction that plaintiffs schedule a meeting of the Board of Managers "pursuant to [the condominium's] bylaws" and that defendant "attend same and affect a quorum," was not a proper meeting of the board. This position is based on defendant's insistence that the board must first be "elected" at a meeting of unit owners in order to be properly constituted. However, the bylaws contain no such requirement, providing, instead, for the designation by unit owners of their respective representatives on the board, so long as the designated members meet certain qualifications. The bylaws also allow for the removal of board members "for cause," in which event the removed member's replacement would again be designated by the respective unit owner. This method of selecting board members is consistent with the intent behind Real Property Law § 339-v(1)(a), which requires that a condominium's bylaws provide for "[t]he nomination and election of a board of managers."

Supreme Court correctly determined that the board meeting

was properly held, and accordingly, the actions of the board are protected by a rule analogous to the business judgment rule (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]; *Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Pursuant to this rule, "absent a showing of discrimination, self-dealing or misconduct by board members, corporate directors are presumed to be acting in good faith" and judicial inquiry into the board's actions will be prohibited (*Jones v Surrey Coop. Apts.*, 263 AD2d 33, 36 [1999] [internal quotation marks and citation omitted]). The nature of the actions taken by the board in operating the property, such as hiring a managing agent and preparing an annual budget, were within the board's broad authority under the bylaws. However, inasmuch as defendant's challenges to the individual expenditures created questions of fact as to the legitimacy of the individual actions, the court appropriately referred the matter to a referee to hear and report

on the issue of whether defendant owed plaintiffs any money, and if so, the amounts owed (*see* CPLR 3212[c]).

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

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5329 The People of the State of New York, Respondent, Ind. 44714C/05 3892/06

-against-

Kwame Hoden, Defendant-Appellant.

_____

Franzblau Dratch, P.C., New York (Stephen N. Dratch of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered September 5, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to a term of 17 years to life, unanimously affirmed.

Because defendant's specific claim of evidentiary deficiency was not presented to the trial court, his argument that the verdict was based on legally insufficient evidence is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). The evidence clearly warrants the conclusion that

defendant possessed a firearm.

Defendant's motion to suppress identification evidence was properly denied. The showup procedure was conducted in close geographic and temporal proximity to the underlying crime, and it was not unduly suggestive (*see e.g. People v Reyes*, 272 AD2d 244, 245 [2000], *lv denied* 95 NY2d 907 [2000]). Defendant's claim that a police officer made an improper comment to an identifying witness improperly relies on trial testimony (*see People v Abrew*, 95 NY2d 806, 808 [2000]), and is unsubstantiated in any event.

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5331 In re Manny E. Duell, File 4835/77
Deceased.
- - - - - -
Andrew J. Duell,
Petitioner-Appellant,

-against-

Thea Duell, et al.,
Respondents-Respondents.

Chadbourne & Parke LLP, New York (Thomas E. Butler of counsel), for appellant.

Kaye Scholer LLP, New York (Arlene Harris of counsel), for Thea Duell, respondent.

Law Office of Laraine Pacheco, Tucson, AZ (Laraine Pacheco of counsel), for Irene Duell, respondent.

Seth Rubenstein, P.C., Brooklyn (Seth Rubenstein of counsel), for Administrator CTA.

An appeal having been taken to this Court by the above-named appellant from an order of the Surrogate's Court, New York County (Kristin Booth Glen, S.), entered November 12, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed for the reasons stated by Glen, S., with costs and disbursements.

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5332 Nilda Rivera, Index 302448/07
Plaintiff-Appellant,

-against-

Bilynn Realty Corp.,
Defendant-Respondent.

_____

Nichols & Cane LLP, Syosset (Regina C. Nichols of counsel), for appellant.

Jeffrey Samel & Partners, New York (Judah Z. Cohen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered November 24, 2009, which, in this action for personal injuries, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law by demonstrating the absence of an actionable defect in the subject stairs (*see e.g. Cintron v New York City Tr. Auth.*, 77 AD3d 410, 411 [2010]; *Gonzalez v Board of Educ. of City of Yonkers*, 298 AD2d 358 [2002]). Defendant also submitted evidence showing that the building was constructed in 1921 and was governed by the provisions of the Tenement House Law and not the Administrative Code of the City of New York or the Building Code (*see Erlicht v Boser*, 259 App Div 269 [1940]; *see also*

Pappalardo v New York Health & Racquet Club, 279 AD2d 134, 140 [2000]; *Hunter v G.W.H.W. Realty Co., Inc.*, 247 App Div 385 [1936]).

Plaintiff's opposition failed to raise a triable issue of fact concerning defendant's failure to maintain the step in a reasonably safe condition. Her expert's affidavit cited violations of the Administrative Code and Building Code, but plaintiff did not dispute defendant's showing that the Building Code does not apply, and the claimed violation of the Tenement House Law governing the height of the step risers is not shown to be causally related to the accident (*see Telfeyan v City of New York*, 40 AD3d 372, 373 [2007]). Furthermore, the opinion of plaintiff's expert regarding the coefficient of friction and the requirement of a non-skid strip on the step was unsupported by evidence of a published industry or professional standard upon which it was based (*see Jenkins v New York City Hous. Auth.*, 11 AD3d 358, 360 [2004]).

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5334-
5335 Sofio Garcia Paz, Index 8237/06
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendants,

Riverbay Corporation, et al.,
Defendants-Respondents.

_____

Sacco & Fillas, LLP, Whitestone (Luigi Brandimarte of counsel), for appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Megan E. Bronk of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered September 7, 2010, granting defendants-respondents' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 1, 2010, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

It is well settled that while Labor Law § 240[1] imposes nondelegable, absolute liability upon an owner and/or contractor for any breach thereof which was proximately responsible for the plaintiff's injury (*see Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 50 [2004]), liability does not attach where a

plaintiff's actions are the sole proximate cause of his injuries (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). Specifically, if adequate safety devices are provided and the worker either chooses for no good reason not to use them, or misuses them, then liability under § 240[1] does not attach (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). Here, the record established that plaintiff knew that he was expected to use a ladder to climb onto the elevated scaffold, untie it, and lower it to the ground, but chose for no good reason not to do so. The record further demonstrates that the scaffold was tied to an elevated concrete ledge for the purpose of preventing pedestrians from gaining access to it overnight, not to support the weight of a worker balancing between the ledge and the scaffold as he put on his safety harness. Hence, the court correctly denied plaintiff's motion for summary judgment as to this cause of action and granted defendants-respondents' cross motion for summary judgment dismissal.

The court correctly dismissed plaintiff's cause of action under Labor Law § 200 on the ground that defendants had no supervisory control over this injury-producing work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). There is no evidence that the owner or site engineer gave anything more than general instructions on what needed to be done, not how to do it, and monitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200 (*see Dalanna v City of New York*, 308 AD2d 400 [2003]). Nor is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons enough to impose such liability (*id.*).

The Industrial Code provisions cited by plaintiff in support of his cause of action under section 241[6] - 12 NYCRR 23-1.16[c], requiring instructions in the use of safety belts, harnesses, tail lines and lifelines, 23-3.3[k][1][i], prohibiting

storage of materials on scaffold platforms that cannot be safely supported, and 23-5.8[g], mandating that scaffolds shall be tied in to the building or other structure at every working level - are inapplicable to the alleged facts.

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5336N Koppell River Realty, Inc., Index 306810/08
Plaintiff-Respondent,

-against-

Elaine Rodriguez,
Defendant,

Christopher E. Finger, et al.,
Defendants-Appellants.

_____

Darrell L. Paster, New York, for appellants.

Law Offices of G. Oliver Koppell & Associates, New York (G. Oliver Koppell of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered April 9, 2010, which, in this action seeking to recover broker commissions relating to the sale of certain real property, granted plaintiff's motion for a default judgment against defendants-appellants Finger and Gutierrez and denied appellants' cross motion to dismiss the complaint as against them, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in finding that appellants' tactical choice not to answer the complaint was not an excusable mistake (*see 114 W. 26th St. Assoc. LP v Fortunak*, 22 AD3d 346 [2005]; *see also 300 W. 46th St. Corp. v Clinton Hous. W. 46th St. Partners L.P.*, 19 AD3d 136

[2005]). Furthermore, since liability against appellants has been effectively decided by their default, it is appropriate to sever the inquest as against them from the action against the remaining defendant (*see* CPLR 3215[a]).

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

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5337N Cheneise E. Carey, Index 303897/10
Plaintiff-Appellant,

-against-

Empire Paratransit Corp., et al.,
Defendants-Respondents.

_____

Levine & Slavit, New York (Ira S. Slavit of counsel), for appellant.

Law Offices of Jeffrey S. Shein & Associates P.C., Syosset (Charles R. Strugatz of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about September 15, 2010, which, in an action for personal injuries, granted defendants' motion to transfer venue from Bronx County to New York County, unanimously affirmed, without costs.

CPLR 502 governs the instant case and not McKinney's Consolidated Laws of NY, Book 1, Statutes § 238, since CPLR 502 directly address the situation herein, namely, conflicting venue provisions "because of joinder of claims or parties" (CPLR 502). Accordingly, the motion court was well within its discretion "to lay venue in a location appropriate 'to at least one of the

parties or claims'" (*Bennett v Bennett*, 49 AD3d 949, 950 [2008], quoting CPLR 502; *see Lawyers' Fund for Client Protection of State of N.Y. v Gateway State Bank*, 239 AD2d 826, 828 [1997], *lv dismissed* 91 NY2d 848 [1997]; CPLR 505[a]).

Although defendants did not explicitly reference CPLR 502 in their submissions to the motion court, that does not preclude its application on appeal. Defendants noted the conflict between CPLR 505(a) and 505(b), and the application of CPLR 502 is a purely legal determination involving no new facts. Its applicability is apparent and it could not have been avoided if raised at the proper juncture (*see Chateau D' If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]).

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

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

ENTERED: JUNE 14, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4100 One Step Up, Ltd., Index 601807/09
Plaintiff-Appellant,

-against-

Webster Business Credit Corporation,
Defendant-Respondent.

_____

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

Kravet & Vogel, LLP, New York (Joseph A. Vogel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered December 22, 2009, affirmed, without costs.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Karla Moskowitz
Rosalyn H. Richter
Sallie Manzanet-Daniels
Nelson S. Román, JJ.

4100
Ind. 601807/09

_____x

One Step Up, Ltd.,
Plaintiff-Appellant,

-against-

Webster Business Credit Corporation,
Defendant-Respondent.
_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Bernard J. Fried, J.), entered December 22, 2009, which granted defendant's motion to dismiss the complaint.

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

Kravet & Vogel, LLP, New York (Joseph A. Vogel of counsel), for respondent.

MOSKOWITZ, J.

Plaintiff brought this action seeking the return of $250,000 that defendant obtained when it drew on a standby letter of credit. Plaintiff had opened the letter of credit with HSBC, naming defendant as beneficiary, to provide additional collateral for defendant's extension of further financing to nonparty Luxury Ventures, LLC d/b/a Henricks Jewelers (Henricks). Despite plaintiff's creative theories, the plain wording of the letter of credit and underlying documents precludes recovery. In particular, plaintiff cannot use breach of warranty under Uniform Commercial Code § 5-110 to convert the legitimate exercise of contractual rights into a cause of action. Indeed, defendant's actions were permissible, even expected, under the financing documents involved in this case. Plaintiff, a sophisticated business entity and an affiliate of the company that borrowed money from defendant, should have understood the risks when it applied for the letter of credit and took a subordinated junior participation interest in advances that defendant made to the borrower. Accordingly, it was appropriate to dismiss this case at the pre-answer stage.

Defendant provides secured loans and cash management services in the form of revolving credit and asset-based financing. One of its borrowers was Henricks, a retail jewelry

business that operated in Florida. Defendant and Henricks entered into a secured revolving credit agreement with a $5 million limit on February 28, 2005. In 2007, Henricks filed a Chapter 11 bankruptcy petition with the United States Bankruptcy Court for the Middle District of Florida. As part of Henricks's confirmed plan of reorganization, defendant agreed to provide exit financing to Henricks. Accordingly, defendant and Henricks entered into an Amended and Restated Loan and Security Agreement, dated August 1, 2008 (the Loan Agreement).

As the Loan Agreement was in the nature of a *secured* revolving credit agreement, the amount Henricks could borrow depended on a formula tied to underlying collateral:

> "Lender agrees to make advances ('Advances') to Borrower in an amount at any one time outstanding not to exceed an amount equal *to the lesser of* (i) the Maximum Revolver Amount *less* the Letter of Credit Usage, or (ii) the Borrowing Base *less* the Letter of Credit Usage."

Henricks's Borrowing Base was calculated according to the following formula:

> "90% of the Eligible Accounts Receivable, *plus* 40% of the Cost value of Eligible Inventory [if before December 31, 2008] *or* 85% of the Net Liquidation Value of Eligible Inventory as set forth in the daily collateral reports delivered to Lender, *[minus]* the aggregate amount of Availability Reserves, if any, established by Lender under Section 2.1(a)(ii)."

Thus, the calculations underlying the Borrowing Base tied Henricks's assets to the amount Henricks could borrow.

Section 2.1(a)(ii) of the Loan Agreement regarding "Availability Reserves" provided that:

> "during the period commencing on January 1, 2009, through the Maturity Date, Lender shall have the right to establish reserves in such amounts, and with respect to such matters, as Lender in its Permitted Discretion shall deem necessary or appropriate . . ."

The Loan Agreement defined "Availability Reserves" as "such reserves as the Lender from time to time determines in its Permitted Discretion as being appropriate to reflect the impediments to the Lender's ability to realize upon the Collateral." The Loan Agreement defined "Permitted Discretion" as "a determination made in good faith and in the exercise of reasonable (from the perspective of a secured asset-based lender) business judgment."

The Loan Agreement also anticipated deviation from the formula set forth in section 2.1(a)(ii). Section 2.4 anticipated "Overadvances":

> "If at any time or for any reason, the amount of Obligations (other than Bank Product Obligations) owed by Borrower to Lender pursuant to Sections 2.1 and 2.11 [dealing with letters of credit] is greater than either the Dollar or percentage limitations set forth in Sections 2.1 or 2.11, (an "Overadvance"), Borrower immediately shall

> pay to Lender, in cash, the amount of such excess . . .”

Nevertheless, the Loan Agreement capped the amount Henricks could borrow regardless of its underlying assets. This amount, that the parties termed the “Maximum Revolver Amount,” “for the period commencing on the Closing Date through December 31, 2008 ” was $1.5 million. “[F]or the period commencing on January 1, 2009, through the Maturity Date [April 30, 2012],” the Maximum Revolver Amount increased to $2.5 million.

In October 2008, three months after Henricks and defendant entered into the Loan Agreement, Henricks foresaw that it might experience seasonal cash flow problems during the upcoming holiday selling season. It therefore requested defendant’s consent to fund its cash shortfall through the end of the year. However, because this would result in a section 2.4 Overadvance, that would trigger certain immediate repayment obligations on Henricks’s part, the parties executed Amendment No. 1 to the Loan Agreement on October 31, 2008. Amendment No. 1 added new section 4.9 to the Loan Agreement. That section called for the letter of credit that Henricks arranged through plaintiff to provide additional collateral for defendant (the Kairos L/C). The Kairos L/C was in the principal amount of not less than $250,000 and was set to expire on January 31, 2009, a date shortly after the

holiday selling season ended. Section 4.9 provided that defendant could draw on the Kairos L/C in an amount that would be "equal to any Overadvance then existing, calculated as if the Seasonal Amount was $0) (the "Determined Overadvance")." Amendment No. 1 defined "Seasonal Amount" as "a sum equal to the outstanding undrawn principal amount of the Kairos L/C" (i.e., $250,000). Thus, a Determined Overadvance meant the amount of the existing Overadvance (Loan Agreement section 2.4), with the collateral value of the Kairos L/C set at $0. This meant that the Kairos L/C could not count as an asset to reduce the amount of the Determined Overadvance. The parties do not dispute that defendant could draw upon the Kairos L/C any time after January 15, 2009 and before the Kairos L/C expired on January 31, 2009, provided that a Determined Overadvance existed on that date.

In October 2008, simultaneously with its entry into Amendment No. 1 with Henricks, defendant entered into a letter agreement with plaintiff whereby plaintiff took a subordinated junior participation in the right to collateral for the advance under the Loan Agreements in the maximum amount of $250,000 (the Junior Participation Agreement). Plaintiff's rights under this agreement were expressly without recourse to defendant. Moreover, defendant's liability to plaintiff was expressly limited to its own willful misconduct or gross negligence.

On November 3, 2008, as planned in Amendment No. 1 and upon plaintiff's application, HSBC Bank issued a $250,000 irrevocable standby letter of credit with defendant as beneficiary. The letter of credit was payable upon defendant's certification that: (1) a "draw event" had occurred under section 4.9 of Amendment No. 1 and (2) the amount of the drawing did not exceed the Determined Overadvance.

On December 31, 2008, Henricks failed to make a scheduled $100,000 payment to defendant. On January 1, 2009, by the terms of the Loan Agreement, the Maximum Revolver Amount automatically increased, by $1 million, to $2.5 million. By notice dated January 9, 2009, defendant advised Henricks of various defaults under the Loan Agreement, including: (1) Henricks's failure to make the $100,000 installment payment that was due on December 31, 2008; (2) Henricks's failure to turn credit card payments from Henricks's customers over to defendant; (3) Henricks's failure to provide a copy of its current business plan; (4) Henricks's failure "to have caused each depository of Borrower to be subject to a Control Agreement by November 7, 2008"; and that actual sales were "less favorable" than Henricks had projected. The notice further advised that, although defendant had not taken action to stop the Maximum Revolver Amount from increasing to $2.5 million, it had established an initial $900,000 reserve

against the Borrowing Base pursuant to section 2.1(a)(ii) of the Loan Agreement (giving defendant "the right to establish reserves in such amounts, and with respect to such matters, as Lender in its Permitted Discretion shall deem necessary or appropriate"). In addition, defendant offered to enter into a "forbearance agreement" whereby "Lender and Borrower could agree to Lender's forbearance on other than a day-to-day basis," provided that Henricks cured the defaults, including by making the $100,000 payment immediately.

On January 20, 2009, defendant certified to HSBC that a draw event had occurred and that the amount Henricks sought to draw on the Kairos L/C did not exceed the Determined Overadvance. The "Borrowing Base Certificate" that Henricks subsequently certified on January 22, 2009 confirmed Henricks's financial situation as of January 20, 2009. It is undisputed that this Borrowing Base Certificate reported that Henricks was in an Overadvance position of $183,880 on January 20, 2009, including the value of the Kairos L/C. When the Kairos L/C was valued at $0, as section 4.9 of Amendment No. 1 to the Loan Agreement required, Henricks's Determined Overadvance grew to $433,880 ($183,880 + $250,000).

On January 27, 2009, defendant received payment from HSBC under the Kairos L/C. As a result, plaintiff received its $250,000 junior subordinated participation interest in the Loan

Agreement pursuant to its Junior Participation Agreement with defendant.

Because plaintiff believed that defendant had unfairly drawn on the Kairos L/C, plaintiff commenced this lawsuit alleging breach of the Junior Participation Agreement between defendant and plaintiff, breach of warranty under UCC 5-110(a)(2), breach of the covenant of good faith and fair dealing, unjust enrichment, and money had and received. Defendant moved to dismiss the complaint and the motion court granted the motion in its entirety.

Because the Kairos L/C was a letter of credit, plaintiff alleges that defendant breached the warranty it owed to plaintiff by virtue of UCC 5-110(a)(2), that provides:

> "(a) If its presentation [of a letter of credit] is honored, the beneficiary [here, defendant] warrants: . . .
>
> (2) to the applicant [plaintiff] that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit."

Plaintiff concedes that it is not relying on the Junior Participation Agreement to support its breach of warranty claim. However, there is no other contract between the parties, and plaintiff does not identify the "other agreement" that the parties intended to augment with the letter of credit.

Accordingly, it is not at all clear that UCC 5-110 applies in the first instance.

However, assuming that the Loan Agreement and Amendment No. 1 would qualify as an "other agreement intended by them to be augmented by the letter of credit," plaintiff alleges that defendant breached this warranty by wrongfully certifying to HSBC that a draw event involving an "Event of Default" under the Loan Agreement had occurred. However, the documentary evidence demonstrates that defendant's draw request was well within defendant's contractual rights. The Borrowing Base Certificate shows that the Determined Overadvance at the time of defendant's draw request was $483,880 (the Overadvance of $183,880 + $250,000 [taking the value of the L/C down to $0 removed it as an asset and therefore added $250,000 to the Overadvance amount]). Thus, the draw request of $250,000 did not exceed the Determined Overadvance.

Unable to demonstrate that the draw request itself was improper, plaintiff invokes UCC 5-110(a)(2), that prohibits a drawing that violates "any other agreement intended by them to be augmented by the letter of credit." Plaintiff takes issue with defendant's setting a $900,000 Availability Reserve under its Loan Agreement with Henricks. Plaintiff fails to explain how defendant's draw request under the Kairos L/C could ever

constitute a violation of the manner in which defendant set the Availability Reserve under the Loan Agreement. Nevertheless, assuming that the drawing could somehow be a violation of the Loan Agreement, plaintiff contends that defendant failed to exercise good faith in the context of its Permitted Discretion when it set an Availability Reserve in the amount of $900,000. Plaintiff alleges that defendant set the Availability Reserve "for the sole purpose of creating an Overadvance, so as to afford [defendant] a pretext upon which to draw upon the Kairos L/C."[1]

Plaintiff is incorrect. Again, defendant acted well within its contractual rights in setting the Availability Reserve at $900,000. Plaintiff does not contest that numerous Events of Default occurred under the Loan Agreement, including that Henricks failed to make a $100,000 payment on December 31, 2008, that sales were far below projections and that Henricks had failed to turn over credit card payments from its customers to defendant. Permitted Discretion was defined as the exercise of reasonable business judgment from the perspective of a secured asset-based lender. Henricks's numerous Events of Default all

[1] Although plaintiff provides no explanation, I presume plaintiff means that by setting an Availability Reserve of $900,000, defendant reduced the amount that Henricks could borrow and that that amount should have been $2.5 million because the Maximum Revolver Amount had increased to that amount on January 1, 2009.

point to its becoming a serious loan risk. Moreover, it had recently emerged from bankruptcy. Still, defendant honored the $1 million increase in the Maximum Revolver Amount under the Loan Agreement. By allowing the increase in the Maximum Revolver Amount to go through, defendant kept the Loan Agreement, and with it Henricks's exit financing, in place. Setting the reserve at or below the $1 million increase was not only within defendant's contractual rights, but was also expected, considering the bad shape in which Henricks appeared to be. By setting an Availability Reserve of $900,000, defendant prevented Henricks's borrowing ability from increasing, thereby reducing its own risk and Henricks's potential for greater debt.

Plaintiff claims that defendant's establishment of the reserve at $900,000 looks extremely suspicious because it more or less equals the increase in the Maximum Revolver Amount (it is actually off by $100,000, the same amount that Henricks had to pay immediately or defendant would cancel its financing altogether).[2] That the amounts were nearly the same is actually indicative of good faith. Defendant set a reserve at no more and

[2] Plaintiff alleges in the complaint that defendant "created an Availability Reserve under the Loan Agreement in an amount *exactly* equal to the amount available under the Kairos L/C." However, defendant set the Availability Reserve at $900,000. The amount available under the Kairos L/C was $250,000.

no less than its increased risk. Under the terms of the Loan Agreement, defendant was perfectly entitled to do this. Notably, Henricks, the real party in interest, never challenged the reserve amount.

Plaintiff claims that the Borrowing Base Certificate is not admissible because it is a document that Henricks created and therefore defendant cannot certify it as a business record. We disagree. A business record will be admissible if that record "was made in the regular course of any business and . . . it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR 4518[a]). Documents that are prepared in connection with or in contemplation of litigation are not admissible (*National States Elec. Corp. v LFO Constr. Corp.*, 203 AD2d 49, 50 [1994]).

Section 2.2 of the Loan Agreement contemplated that Henricks would send a Borrowing Base Certificate to defendant every time Henricks requested an advance. Indeed, the Loan Agreement sets forth the form of the Borrowing Base Certificate in Exhibit B-1 and the Borrowing Base Certificate at issue conforms to it. According to the Loan Agreement, defendant would rely on these Borrowing Base Certificates in determining whether to make proceeds available. Thus, the Borrowing Base Certificate was

made in the regular course of business, it was the regular course of business for Henricks to create these records, Henricks had a duty under the Loan Agreement to create these records and the Borrowing Base Certificate was made contemporaneously with the transactions or within a reasonable time thereafter. Further, Henricks certified at the bottom of the Borrowing Base Certificate at issue that "the information set forth is true and complete." This certification, along with Henricks's contemporaneous business duty to create the Borrowing Base Certificate, "gave the records in question sufficient indicia of reliability to qualify as business records" (*Pencom Sys. v Shapiro*, 237 AD2d 144, 144 [1997]; *see also People v Cratsley,* 86 NY2d 81, 88-91 [1995] [third-party psychologist's report was a business record where report was prepared for program and state agency, in accordance with agency's program requirements, and counselor for agency was familiar with report]; *Corsi v Town of Bedford*, 58 AD3d 225, 230 [2008], *lv denied* 12 NY3d 714 [2009] [company that produced photograph was under a contractual duty to produce photographs according to certain specifications and on a regular basis]; *People v DiSalvo*, 284 AD2d 547, 548 [2001] [court properly admitted "dump tickets" that third party generated and Westchester county routinely relied upon in creating its invoices]; *Plymouth Rock Fuel Corp. v Leucadia, Inc.*, 117 AD2d

727, 728 [1986] [where plaintiff used information on delivery tickets to prepare its invoices, delivery tickets were properly admitted as business records although nonparty contract truckers supplied the information on them]). I note that plaintiff has never disputed the accuracy of the amounts in the Borrowing Base Certificate. Nor does it dispute that the documents defendant interposed were prepared other than in the ordinary course of business.

Nevertheless, even if the Borrowing Base Certificate does not qualify as a business record and is therefore hearsay, defendant submitted it not for the accuracy and truth of the inventory, receivables and debt it reflects, but to show that it acted in good faith in that defendant relied on the numbers from the Borrowing Base Certificate. There is therefore no need to qualify the document as a business record. All that is necessary is to show that defendant received it, a fact that plaintiff does not contest. Moreover, according to the Official Comment to UCC 5-110, the accuracy of the Borrowing Base Certificate is irrelevant to the cause of action for breach of warranty:

> "It is not a warranty that the statements made on the presentation of the documents presented are truthful nor is it a warranty that the documents strictly comply under Section 5-108(a). It is a warranty that the beneficiary has performed all the acts expressly and implicitly necessary under any

> underlying agreement to entitle the beneficiary to honor . . . In many cases, therefore, the documents presented to the issuer will contain inaccurate statements (concerning the good delivered or concerning default or other matters), but the breach of warranty arises not because the statements are untrue but because the beneficiary's drawing violated its express or implied obligations in the underlying transaction."

However, the Second Department appears to disagree with the Official Comment (*see Ocwen Fed. Bank v DeLuxe Bldg. Sys.*, 304 AD2d 805, 807 [2003] [by submitting drawing certificate to issuer, beneficiary of letter of credit warranted that all statements in the documents were true]). Regardless, the truthfulness of the Borrowing Base Certificate is not an issue in this case, because plaintiff does not dispute that the amounts it reflects are accurate. It only disputes the certificate's admissibility.

Plaintiff also argues that the date of the Borrowing Base Certificate was January 22, 2009 and therefore could not justify defendant's draw request two days earlier on January 20, 2009. However, by January 20, 2009, Henricks already had numerous instances of default, such as the failure to make the December 31, 2008 installment payment. Moreover, the UCC only requires the beneficiary [defendant] to warrant that "the *drawing* does not violate any agreement between the applicant and beneficiary

. . .” Although defendant’s draw request occurred on January 20, 2009, the actual transfer of funds (i.e., the drawing) did not occur until January 27, 2009, after defendant had received the Borrowing Base Certificate.

The letter of credit that plaintiff guaranteed was collateral for the seasonal Overadvances. Otherwise, defendant would never have agreed to additional financing and Henricks would have had to shut down in October 2008 when it began experiencing cash flow problems. In exchange for the letter of credit, plaintiff received the Junior Participation Agreement. By virtue of that arrangement, it now has an interest in the Loan Agreement on a subordinated basis. From the face of the documents, plaintiff knew or should have known that defendant could cash in on the letter of credit if Henricks ran into further financial difficulty. Moreover, plaintiff does not dispute that it is an affiliate of Henricks. It was therefore in a better position than most to assess the underlying risk. Plaintiff went into this financing arrangement with its eyes wide open and cannot now complain that the wool was pulled over them.

As for the remaining causes of action, the breach of contract claim fails for lack of a contract between the parties. There is no contractual relationship between the applicant and the beneficiary of a letter of credit (*see Fertico Belgium, S.A.*

v Phosphate Chems. Export Assn., 100 AD2d 165, 173-174 [1984], *appeal dismissed* 62 NY2d 802 [1984]). Meanwhile, plaintiff does not allege that defendant breached the only agreement that does exist between them, i.e., the Junior Participation Agreement. The claim for breach of the covenant of good faith and fair dealing is not viable because defendant did not deprive plaintiff of the benefits of any contract to which plaintiff was a party (*see Moran v Erk*, 11 NY3d 452, 456 [2008] ["the implied covenant of good faith and fair dealing between the parties to a contract embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"] [internal quotation marks and citations omitted]). Pursuant to the Junior Participation Agreement, plaintiff received the exact result for which it had bargained, its junior subordinated interest in Henricks's debt.

The claims for unjust enrichment and money had and received are not viable because express contracts govern the same subject matter (*see Vitale v Steinberg*, 307 AD2d 107, 111 [2003]). The loan agreements covered defendant's right to impose reserves, the Kairos L/C covered defendant's right to draw upon the credit, and the Junior Participation Agreement covered plaintiff's right to receive its junior interest in the loans to Henricks up to the

amount of defendant's draw on the Kairos L/C. Moreover, defendant was in no way unjustly enriched. It merely received what it was entitled to under the express contracts at issue, while plaintiff received the benefit of its bargain.

Accordingly, the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered December 22, 2009, that granted defendant's motion to dismiss the complaint, should be affirmed, without costs.

All concur.

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

ENTERED: JUNE 14, 2011

CLERK