SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 17, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6595 The People of the State of New York, Respondent, Ind. 50/08

-against-

Robert McCoy,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Micki A. Scherer, J. at dismissal motion; Edward J. McLaughlin, J. at jury trial and sentencing), rendered November 5, 2008, convicting defendant of attempted assault in the first degree (two counts), burglary in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a persistent felony offender, to an aggregate term of 16 years to life, unanimously reversed, on the law, the indictment dismissed, and leave granted to the People to apply for an order permitting resubmission of

the charges to another grand jury.

In previously affirming defendant's conviction (91 AD3d 537 [1st Dept 2012]), we rejected as unpreserved his argument that the People had violated CPL 190.75(3) by re-presenting the attempted assault charges to a new grand jury, without court authorization, after a previous grand jury had adjourned without taking affirmative action on those charges (91 AD3d at 537). Thereafter, in a different case, we held that a claim of error under CPL 190.75(3) implicates the court's jurisdiction and, therefore, is not forfeited by a guilty plea (*see People v Smith*, 103 AD3d 430, 432-433 [1st Dept 2013], *appeal withdrawn* 21 NY3d 914 [2013], citing *People v Hansen*, 95 NY2d 227, 230-232 [2000], and *People v Jackson*, 212 AD2d 732 [2d Dept 1995], *affd* 87 NY2d 782 [1996]). In two subsequent cases, we held that, given the jurisdictional nature of a claim of error under CPL 190.75(3) as recognized in *Smith*, such a claim need not be preserved for appellate review (*see People v Miller*, 106 AD3d 670, 671 [1st Dept 2013]; *People v Dinkins*, 104 AD3d 413 [1st Dept 2013]).

After we decided *Smith*, defendant moved for reargument of the instant appeal, urging that (as subsequently confirmed in *Dinkins* and *Miller*) the jurisdictional implications of the claim of error under CPL 190.75(3) entitled him to appellate review of

that claim even though it had not been preserved in the trial court. Although the application was made well beyond the 30-day limit for such motions (22 NYCRR 600.14[a]), this Court's precedent recognizes that such an otherwise untimely motion, when based on an interim change in the law, may be entertained when the moving defendant has timely sought leave to appeal to the Court of Appeals and the leave application remains pending at the time the reargument motion comes before this Court (*see People v Jones*, 128 AD2d 405, 407 [1st Dept 1987], *affd* 70 NY2d 547 [1987]). Since it is undisputed that defendant made a timely application to the Court of Appeals for leave to appeal from our previous decision, and we are advised that the leave application is being held in abeyance pending disposition of this motion, we may consider this motion on the merits.

Turning to the merits of the motion, we conclude that reargument should be granted and that, upon reargument, our previous decision should be recalled and vacated, the conviction reversed and the indictment dismissed. As noted, our decisions in *Smith*, *Dinkins* and *Miller* establish that a claim of error under CPL 190.75(3), being jurisdictional, need not be preserved for appellate review. To the extent the People urge us to reconsider whether any of these cases were correctly decided, we

decline to do so under the principle of stare decisis. We note that, in opposing the motion, the People do not dispute that, under *People v Credle* (17 NY3d 556 [2011]) and our decision in *Smith*, the failure of the earlier grand jury in this case to take affirmative action on the attempted assault charges before adjournment constituted a dismissal of those charges for purposes of CPL 190.75(3). On constraint of *People v Miller* (106 AD3d 670 [1st Dept 2013], *supra*), we reverse the burglary and weapon possession convictions, and dismiss the indictments thereon, although the earlier grand jury voted to indict on those charges. As in *Smith*, *Dinkins* and *Miller*, however, the People are granted leave to seek an order, pursuant to CPL 190.75(3), permitting them to re-present all of the charges to another grand jury.

For the guidance of the court and parties in the event defendant is retried and the new trial results in a conviction, we note that the court properly exercised its discretion in adjudicating defendant a persistent felony offender. Moreover, the persistent felony offender statute (Penal Law § 70.10) is constitutional (*People v Quinones*, 12 NY3d 116 [2009], *cert denied* 558 US 821 [2009]). Finally, to the extent defendant's pro se claims are not rendered moot by the foregoing, those claims have been considered and rejected.

The Decision and Order of this Court entered herein on January 24, 2012 is hereby recalled and vacated (*see* M-815 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 17, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9746 In re Narvanda S.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Elana E. Roffman of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Allen G. Alpert, J.), entered on or about January 17, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute two counts each of the crimes of sexual abuse in the second and third degree and forcible touching, and placed him on probation for a period of 12 months, reversed, on the law, the facts and as an exercise of discretion in the interest of justice, without costs, the first, third, and fifth counts of the petition dismissed, the delinquency finding and dispositional order vacated, and the matter remanded to Family Court with a direction to order an adjournment in contemplation of dismissal pursuant to Family Court Act § 315.3(1) nunc pro

tunc to January 17, 2012.

Although the trial court made no specific findings of fact, the record reveals that the complaining witness testified that on October 18, 2010 at approximately 11:45 a.m., she went to the main office where she and appellant attended school. She saw appellant inside. On the day of the occurrence, the complaining witness was 13 years old and appellant was 12 years old. Although she and appellant had mutual friends, they had not previously talked to each other until that day when, in the school office, he asked her to be his girlfriend. The complaining witness testified she ignored his request and then left the office by herself. Another witness, a paraprofessional assigned to the complaining witness, testified that she observed the two children talking casually in the office and that they left the office together, still engaged in conversation.

It is not disputed that while the complaining witness and appellant were in the public hallway, appellant grabbed her from behind. No one else was in the hallway at the time. The other students were expected to return shortly to their classrooms from the lunch break. The complaining witness testified that appellant "dragged" her down the hallway, explaining that he had grabbed her backpack which stayed between them and that she

struggled to shrug it off her back, but was held back by his tugging down on it. Her feet never left the ground. As she tried to get away, appellant reached around and "touched" and "squeezed" both of her breasts and the right side of her buttocks. He also attempted to kiss her and ignored her as she told him, "I need to go to class. I don't like you. No." It was then that appellant asked the complaining witness for "a hug or anything and I'll let you go." She hugged appellant just to get away from him and then went directly to her math class down the hall, where she sat, upset. When her paraprofessional entered the room, she explained what had happened in the hallway. The entire incident in the hallway lasted no more than five minutes.

As the presentment agency concedes, there was no basis for the trial court to have made separate factual findings as to six separate misdemeanor offenses based on appellant's contact with the complaining witness's breasts and buttocks, because the offending conduct involved "a single, uninterrupted occurrence" (*People v Alonzo*, 16 NY3d 267, 270 [2011]). Accordingly, we dismiss one count each of sexual abuse in the second and third degrees and forcible touching. Nonetheless, the totality of appellant's course of conduct, and his statements to the

complaining witness, support the inference that he acted for the purpose of sexual gratification (*see e.g. Matter of Najee A.*, 26 AD3d 258 [1st Dept 2006], *lv denied* 7 NY3d 703 [2006]; *Matter of Kenny O.*, 276 AD2d 271 [1st Dept 2000], *lv denied* 96 NY2d 701 [2001]). The court's findings that appellant committed an act, that, if committed by an adult, would constitute a crime, was, therefore, based on legally sufficient evidence and not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

A juvenile delinquency adjudication, however, requires both a determination that the juvenile committed an act, that, if committed by an adult, would constitute a crime and a showing, by the preponderance of the evidence, that the juvenile needs supervision, treatment or confinement (Family Ct Act §§ 345.1, 350.3, 352.1). Although the seriousness of the juvenile's acts is an extremely important factor in determining an appropriate disposition (*see Matter of Alberto R.*, 84 AD3d 593 [1st Dept 2011]), it is not the only factor. The disposition is not supposed to punish a child as an adult, but provide effective intervention to "positively impact the lives of troubled young people while protecting the public" (*Matter of Robert J.*, 2 NY3d 339, 346 [2004]).

While the trial court properly found that appellant committed a delinquent act, there was insufficient support for its decision that appellant needed supervision, treatment or confinement (Family Ct Act §§ 352.1, 350.3). In addition, 12 months probation was not the least restrictive available alternative that would have adequately served the needs of appellant and society (Family Ct Act § 352.2; *Matter of Justin Charles H.*, 9 AD3d 316 [1st Dept 2004]).

This was appellant's first and only contact with the juvenile justice system both before and after the incident. Although appellant had 24 absences during the 2010-2011 school year, by the fall of 2011, when the hearing took place, his academic performance had improved and he only had four absences, two of which were attributable to court appearances in connection with the underlying petition. The November 2011 probation report indicates that prior to the incident, appellant had also been associating with some "negative peers" at school, but after the petition was brought, he stopped contact with them. Appellant had no reported history of illegal drug or alcohol use, he was not involved with a gang, and his mother reported that although he sometimes failed do his chores, he adhered to his curfew. She described him as being nice and respectful towards the people in

his community which he enjoys. Letters from appellant's school social worker and two of his teachers confirmed his progress in school (80 average) and his regular attendance.

Appellant has been compliant with all court orders and requirements, including the temporary order of protection issued in favor of the complaining witness who attends school with him. He has kept all scheduled court appearances and been cooperative with the probation officer and psychologist. Appellant's mother was present at all court appearances with appellant and she too has been fully cooperative with the probation officer and the psychologist.

Dr. Ables of the Bronx Psychiatric Center reported to the court that appellant's mother agreed that her son would benefit from a program, although she was unsure what had actually transpired at school. Dr. Ables also reported that both appellant and his mother "indicated they would make certain [appellant] attends all scheduled treatment appointments." Dr. Ables recommended a "minimum of 18 months probation supervision" for proper assessment and completion of the program that he offered.

Prior to adjudicating appellant a juvenile delinquent, appellant's counsel moved for an adjournment in contemplation of

dismissal with conditions, as well as other less restrictive alternatives to probation. That application was denied, and the court subsequently adjudicated appellant a juvenile delinquent, imposing a disposition of 12 months probation. The court stated that appellant needs the "services provided by probation and the supervision provided by Dr. Ables," without any explanation why, if the court believed this to be so, it then deviated from Dr. Ables' recommended probation period. The dissent's conclusion, that Dr. Ables' program can be completed in 12 months, is contrary to what Dr. Ables actually reported.[1] The 12 months of probation is not related to anything in this record. In any event, given appellant and his mother's willingness to voluntarily participate in a recommended program, a lengthy period of court supervision is unnecessary. Monitoring appellant's voluntary compliance could have been accomplished under an adjournment in contemplation of dismissal (see *Matter of*

[1] Twelve months could not have accommodated the assessment process which could take up to three months to complete, and the treatment itself, which is a group setting meeting once a week for nine months. According to Dr. Ables, it is necessary to factor in school schedules and holidays, and the doctor's own responsibilities of conducting interviews and preparing reports to the court. Thus, based on the doctor's own experience, he estimated that the entire process would take a "minimum" of 18 months.

Tyttus D., 107 AD3d 404 [1st Dept 2013]).

In deciding the least restrictive alternative, the court must also consider the child's background, the stability of the child's home life, the adult supervision available in the home, the child's age at the time of the incident and the progress the child has made since the incident (see *Matter of Besjon B.*, 99 AD3d 526 [1st Dept 2012]; *Matter of Tyvan B.*, 84 AD3d 462 [1st Dept 2011]; *Matter of Julian O.*, 80 AD3d 525 [1st Dept 2011]).

Here, it is conceded by all parties that the trial court, in weighing the seriousness of the acts committed, improperly multiplied them in a manner that was contrary to law (*People v Alonzo,* 16 NY3d at 270). Taking into consideration the serious nature of the remaining charges, and balancing them against this child's stable home life, appropriate parental support and guidance, lack of any prior or subsequent history of contact with the juvenile justice system, and great strides in school performance in the almost 14-month period since the underlying offense, coupled with his full compliance with all court orders and proceedings, and his very young age at the time of the incident, the trial court's disposition was not the least restrictive that could have been ordered (*see Matter of Jonnevin B.,* 93 AD3d 572 [1st Dept 2012]).

An adjournment in contemplation of dismissal, conditioned on appellant's participation in an appropriate program, school attendance and compliance with a permanent order of protection in favor of the complainant, would have sufficed to serve the needs of appellant and society (*see e.g.* Family Ct Act § 352.2[2][a]; *Matter of Osriel L.*, 94 AD3d 523 [1st Dept 2012]).

All concur except Mazzarelli, J.P. and Richter, J. who dissent in a memorandum by Richter, J. as follows:

RICHTER, J. (dissenting)

Although the majority takes no issue with the sufficiency of the evidence, it nonetheless vacates the juvenile delinquency finding and remands with a direction to order an adjournment in contemplation of dismissal (ACD). There is no reason to interfere with the trial court's disposition, and therefore I dissent.

On the day of the instant offense, the complainant, a 13-year old girl, went into the main office of her school to wait until it was time to go to her next class. While she waited, appellant, who was 12 at the time, entered the office and approached her. He began talking to her, asking her to go out with him and to be his girlfriend. The complainant ignored him, until appellant finally left the office. A few minutes later, the complainant also left to go to class. Appellant, however, was waiting for her in the hallway and grabbed the strap of her book bag and began pulling her down the hall. While the complainant attempted to free herself of the book bag so she could get away, appellant reached around and squeezed her breasts. He also touched her buttocks. The complainant told appellant to "get off" her, but he did not let go. At one point, he grabbed her by the neck and tried to pull her towards him for

a kiss. The complainant continued to tell appellant "no."

Appellant held onto her, telling her that if she gave him "a hug or anything," he would let her go. Stating that she felt the only way she could get away would be to do what he asked, the complainant gave him a quick hug and then rushed to class. Frightened, she sat in class trembling, so much so that a teacher's assistant asked her what was wrong. The complainant reported the entire incident to the teacher's assistant.

The Family Court has broad discretion in fashioning a disposition and its determination should be accorded a great amount of deference (*Matter of Donovan E.*, 92 AD3d 881, 882 [2d Dept 2012]). Here, the Family Court determined, after considering the nature of the instant offense and reviewing the reports provided, that an ACD was not appropriate. Rather, the court found appellant required supervision and that 12 months of probation, with the requirement that appellant participate in a sexual offender treatment program, was the least restrictive alternative in light of the needs of appellant and the safety of the community (*see* Family Ct Act § 352.2 [2]). In vacating the juvenile delinquency finding, the majority minimizes the seriousness of the incident, which traumatized the 13-year-old complaining witness. The fact that the complainant and appellant

were engaged "in conversation" before the incident does not, as the majority implies, make the incident less serious, but rather makes it more disturbing because the complainant's testimony inexorably leads to the conclusion that appellant's decision to wait outside the office and then to grab her was a direct response to her rejection of his request for a date during this conversation.

The details of the incident raise many questions about appellant's judgment and his ability to control his behavior. Appellant waited in the hall for the complainant to leave the office and then took hold of the complainant's book bag and dragged her down an empty hall. Appellant then squeezed the complainant's buttocks and breast and grabbed her around the neck. Of note, he grabbed her and tried to kiss her even though she said no. In her written deposition, the complainant explained she told appellant "to get off me several times, but he just laughed and kept dragging me down the hallway backwards." This was neither a quick, unplanned action nor some type of horseplay between adolescents. Rather, it was a forceful act that left the complainant frightened and shaking.

Appellant's truancy history further supported the Family Court's determination that he required greater supervision (*see*

Matter of Yonathan A., 70 AD3d 602, 603 [1st Dept 2010]; *Matter of Jonaivy Q.*, 286 AD2d 645, 646 [1st Dept 2001]). Here, the appellant missed 13 days of school during the 2009-2010 school year and 24 days during the 2010-2011 school year. Appellant's mother also stated that he had been friends with kids who had negative attitudes and would fight in school. His mother noted he had been previously suspended from school for fighting.

The majority points to the fact that between the incident and the disposition date, appellant's attendance had improved and he no longer affiliated with the same friends. The mere fact that appellant did not get into further trouble while his case was under the court's jurisdiction does not establish that he would not misbehave once he no longer had any mandated oversight.[1] In any event, the Family Court's conclusion that 12 months of probation supervision was warranted was not an abuse of discretion in light of the seriousness of the offense and appellant's history of associating with negative peers (*see Matter of Jesus S.*, 104 AD3d 694, 695 [2d Dept 2013] [although this was a first offense, probation was appropriate in light of

[1] Although the majority says appellant has not gotten into trouble since the incident, the record only provides information up to January 17, 2012, the date of the Family Court disposition.

the recommendation in the probation report]). The Family Court appropriately determined that further supervision was necessary to ensure appellant's behavior did not escalate and he attended the mandated program (*see Yonathan A.*, 70 AD3d at 603 [appellant was already receiving therapy, and probation supervision was found necessary to ensure that he continued to attend treatment]).

The record establishes that appellant refused to take responsibility for his actions. In fact, appellant insisted that he did not do anything wrong and expressed anger for being accused. His failure to admit responsibility and take ownership of his behavior, especially considering the seriousness of the instant offense, supports the Family Court's determination that the greater supervision provided by probation was the appropriate alternative (*see Matter of Zion F.*, 92 AD3d 589, 590 [1st Dept 2012]).

An ACD is an inadequate disposition because Dr. Ables, the clinical psychologist who interviewed appellant, recommended he be required to attend a sexual offender treatment program designed for children and adolescents. The psychologist stated that the assessment and treatment process would assist appellant in learning how to take full responsibility for his actions. The

program takes place after school and lasts about nine months, but usually lasts longer depending on how much time it takes to evaluate a participant prior to the beginning of treatment. Evaluation can take up to three months. To facilitate his attendance in the program, the psychologist recommended appellant be placed on probation. The majority offers no convincing reason why the Family Court judge should not have relied on this professional opinion in crafting an appropriate disposition. In fact, the Family Court imposed a term of 12 months probation, which was slightly less than the 18-month term the psychologist proposed. The six-month ACD proposed by the majority is insufficient to provide the necessary supervision during appellant's participation in this lengthy program (*see Matter of Mia R.*, 102 AD3d 627 [lst Dept 2013]; *Matter of Florin R.*, 73 AD3d 533 [lst Dept 2010]).

The majority unfairly suggests that the trial court's decision cannot be reconciled with Dr. Ables's assessment because it imposed 12 months probation and not the 18 months recommended by the doctor. Here, the court showed some leniency in imposing a one year probationary term, further supporting our conclusion that the trial court considered all the necessary facts in crafting an appropriate disposition for this sex offense case.

Matter of Jonnevin B. (93 AD3d 572 [1st Dept 2012]), cited by the majority, in support of the conclusion that an ACD is warranted, is readily distinguishable. That case did not involve a sexual offense, and this Court found that the appellant only required supervision for less than six months, making an ACD appropriate (*id.* at 572; *see* Family Ct Act § 315.3). Here, given the need for a program, and the limited duration of an ACD, an ACD would be inadequate, "in both scope and duration," to ensure that appellant actually attends the program (*Yonathan A.*, 70 AD3d at 603; *see* Family Ct Act § 315.3; *Matter of Bryant M.*, 82 AD3d 509, 510 [1st Dept 2011]). *Matter of Tyttus D.* (107 AD3d 404 [lst Dept 2013]), also cited by the majority, does not involve an offense of the type at issue here, and the appellant in that case, unlike appellant here, accepted full responsibility for his actions and as the opinion notes, showed "insight into his misconduct."

In concluding that the disposition of probation was impermissible punishment, the majority substitutes its judgment for that of the trial court, which had an opportunity to see the complainant and appellant. The majority's focus on appellant's claimed willingness to voluntarily attend the program cannot be reconciled with Dr. Ables's conclusion that appellant needed

mandated treatment. Appellant never proffered any mental health professional who offered a different conclusion. Further, appellant refused to accept responsibility for his actions even after the court's fact finding, a factor the majority does not give any weight. It was entirely reasonable for the court to decline appellant's request for an ACD, which vacates the juvenile delinquency adjudication, when appellant himself refused to admit that he had done anything wrong.

Accordingly, we would modify, vacating the findings on the first, third and fifth counts of the petition, and otherwise affirm.

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

ENTERED: SEPTEMBER 17, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9747 Castlepoint Insurance Company, as subrogee of Linda Trager, Plaintiff-Respondent-Appellant, Index 110915/09

-against-

Wendy Moore, et al., Defendants-Appellants,

B & P Chimney Cleaning and Repair Company, Inc., Defendant-Respondent-Respondent.

_____

Devitt Spellman Barrett, LLP, Smithtown (John M. Denby of counsel), for appellants.

Law Office of Steven G. Fauth, LLC, New York (Steven G. Fauth of counsel), for respondent-appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Gerard Benvenuto of counsel), for respondent-respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered January 10, 2012, which denied defendants Wendy Moore and Justin Moore's motion for summary judgment seeking to dismiss the complaint as against them, granted defendant B & P Chimney Cleaning and Repair Co. Inc.'s motion for summary judgment dismissing the complaint as against it, and, upon a search of the record, dismissed the Moore defendants' and B & P's cross claims against each other, unanimously modified, on the law, to deny B & P's motion, to reinstate the Moore defendants'

and B & P's cross claims against each other, and otherwise affirmed, without costs.

The complaint should not have been dismissed as against B & P because a question of fact exists as to whether B & P launched an instrument of harm or exacerbated a dangerous condition by either failing to inspect or inadequately inspecting the Moore defendants' firebox, or "certif[ying]" to the Moore defendants that the fireplace was safe to use by stating that it was "good to go," especially since the Moore defendants testified that once their neighbor told them that smoke entered into her home, they had stopped using the fireplace and only resumed use thereof after B & P completed its work (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140-141 [2002]) *Ocampo v Abetta Boiler & Welding Serv., Inc.*, 33 AD3d 332 [1st Dept 2006]).

In light of the foregoing, Supreme Court should not have searched the record and dismissed the Moore defendants' cross claims against B & P and B & P's cross claims against the Moore defendants, because their negligence and apportioned share of liability, if any, is a question of fact for the jury to resolve (*see Cabrera v Hirth*, 8 AD3d 196, 197 [1st Dept 2004], *lv dismissed* 4 NY3d 794 [2005]). Moreover, the issue of B & P's

liability for common-law contribution and/or indemnification and contractual indemnification as between it and the Moore defendants was not raised by either B & P's motion for summary judgment nor the Moore defendants' motion for summary judgment and, therefore, Supreme Court did not have the authority to search the record on that issue and award summary judgment to B & P dismissing the Moore defendants' cross claims (*see* CPLR 3212[b]; *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]; *Quizhpe v Luvin Constr.*, 70 AD3d 912 [2d Dept 2010]; *Filannino v Triborough Bridge and Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]).[1]

The Moore defendants' motion seeking to dismiss the complaint as against them was properly denied. Questions of fact exist as to whether they had notice of the dangerous condition, and whether, under the circumstances, they exercised reasonable care in attempting to remedy it. The Moore defendants concede that in August 2008, they received a home inspection report from

[1] While B & P correctly contends that plaintiff lacks standing to appeal from that portion of the subject order which dismissed the Moore defendants' cross claims against B & P (*see D'Ambrosio v City of New York*, 55 NY2d 454, 459-460 [1982]; *11 Essex St. Corp. v Tower Ins. Co. of N.Y.*, 96 AD3d 699, 699-700 [1st Dept 2012]; *Mixon v TBV, Inc.*, 76 AD3d 144, 154-155 [2d Dept 2010]), we reach this issue because the Moore defendants also appealed therefrom.

Safe Haven Inspections which stated that their chimney/brick/ mortar was deteriorated, recommended evaluation and repairs by a licensed contractor, stated that the interior of the flue was not inspected, and recommended that they "retain a qualified chimney sweep to clean and evaluate the flue." The report also stated that their fireplaces "need a full evaluation by a fireplace specialist before any operation," recommended evaluation and repairs by a licensed contractor, explicitly noted that this "is a safety hazard - correction is needed," recommended installing a "safety spacer on damper when gas logs are present," and recommended "cleaning the debris and further evaluation." Considering this in conjunction with the undisputed testimony that the Moore defendants' neighbor told them that smoke entered her daughter's bedroom when the Moore's lit a fire, and that Trager told them that "there is something about smoke kicking back into the house," questions of fact as to notice abound (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]; *Toner v National R.R. Passenger Corp.*, 71 AD3d 454, 455 [1st Dept 2010]). Contrary to the Moore defendants' contention, the foregoing certainly constitutes more than a mere "general awareness" that a hazardous condition "may be present" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]).

Finally, since the scope and breadth of B & P's engagement is unclear on this record, and its employee who inspected and repaired the Moore's fireplace testified that the Moore defendants never gave him a copy of the Safe Haven report, and that the only issue they discussed with him was that smoke would go into the neighbor's residence when they lit the fireplace, so he "didn't really focus on the firebox because" of what the Moore defendants told him, a question of fact exists as to whether the Moore defendants acted reasonably in attempting to remedy the dangerous condition (*see Brown v New York Marriot Marquis Hotel*, 95 AD3d 585 [1st Dept 2012]; *Boderick v RY Mgt. Co., Inc.*, 71 AD3d 144 [1st Dept 2009]).

Trager did not assert below that she was entitled to relief against B & P as a third-party beneficiary to the contract, and accordingly should not be granted relief on this basis on appeal.

The Decision and Order of this Court entered herein on April 9, 2013 is hereby recalled and vacated (*see* M-2886 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 17, 2013

CLERK

Andrias, J.P., Friedman, Acosta, Freedman, Clark, JJ.

9441 Central Laborers' Pension Fund, etc., Plaintiff-Appellant, Index 600036/10

-against-

Lloyd C. Blankfein, et al., Defendants-Respondents,

Claes Dahlbäck, et al., Defendants,

The Goldman Sachs Group, Inc., Nominal Defendant-Respondent.

_____

Grant & Eisenhofer, P.A., Wilmington, DE (Michael J. Barry of the bar of the State of Minnesota, admitted pro hac vice, of counsel), for Central Laborers' Pension Fund, Security Police and Fire Professionals of America Retirement Fund, Judith A. Miller, and Robert Brown, appellants.

Sullivan & Cromwell LLP, New York (David M.J. Rein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered September 26, 2011, affirmed, with costs.

Opinion by Friedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
Rolando T. Acosta
Helen E. Freedman
Darcel D. Clark, JJ.

9441
Index 600036/10

_____x

Central Laborers' Pension Fund,
etc.,
Plaintiff-Appellant,

-against-

Lloyd C. Blankfein, et al.,
Defendants-Respondents,

Claes Dahlbäck, et al.,
Defendants,

The Goldman Sachs Group, Inc.,
Nominal Defendant-Respondent.

_____x

In this consolidated action, plaintiffs Central Laborers' Pension Fund, The Security Police and Fire Professionals of America Retirement Fund, Judith A. Miller and Robert Brown, appeal from the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered September 26, 2011, which, insofar as appealed from as limited by the briefs, denied their motion for an award of attorneys' fees and reimbursement of litigation expenses.

Grant & Eisenhofer, P.A., Wilmington, DE (Michael J. Barry of the bar of the State of Minnesota, admitted pro hac vice, of counsel), Grant & Eisenhofer P.A., New York (Jay W. Eisenhofer of counsel), and The Grant Law Firm, PLLC, New York (Lynda J. Grant of counsel), for appellants.

Sullivan & Cromwell LLP, New York (David M.J. Rein and Matthew A. Peller of counsel), for respondents.

FRIEDMAN, J.

This putative shareholder derivative action — which plaintiffs commenced without making a pre-suit demand for a reduction in employee compensation on the board of nominal defendant The Goldman Sachs Group, Inc. (GSG), a Delaware corporation — was based on plaintiffs' prediction that GSG would announce excessive employee compensation for 2009. The first of the three consolidated complaints was filed on December 14, 2009. Exactly six weeks later, on January 25, 2010, plaintiffs declared that, with GSG's January 21 announcement that 2009 compensation would be at a lesser level than plaintiffs had forecast, the action had attained its objective, and stated their intention to move for a voluntary dismissal of the matter and, at the same time, for an award of legal fees pursuant to Business Corporation Law § 626(e).[1]

The primary question on this appeal is whether an award of attorneys' fees pursuant to Business Corporation Law § 626(e) is available to the plaintiff in a putative shareholder derivative action even though the plaintiff did not satisfy the threshold requirement of § 626(c) of making a pre-suit demand upon the

[1]Thus, although this matter was litigated on the merits for less than a month and a half, the litigation of the application for attorneys' fees had lasted for more than three years as of the date on which this appeal was argued.

board for the desired action and did not show that such a demand would have been futile. Supreme Court held that, where the demand requirement of § 626(c) is neither satisfied nor excused by futility, the plaintiff in a putative shareholder derivative suit is not entitled to recover the "reasonable expenses" of the suit pursuant to § 626(e), regardless of any contention that the action nonetheless resulted in a substantial benefit to the corporation. Accordingly, the court denied plaintiffs' application for an award of attorneys' fees and reimbursement of litigation expenses, based on its determination (not challenged by plaintiffs on appeal) that the demand requirement was neither satisfied nor excused as futile in this case. We affirm.

As noted, this action was based on the claim that GSG's announcement of employee compensation for 2009 — which was imminent when the three consolidated complaints were filed in December 2009 and January 2010 — was likely to earmark around 50% of the firm's net revenues for that purpose, as had been done in previous years.[2] Plaintiffs contended that such a level of

[2]This action is a consolidation of three suits against the directors of GSG (and nominally against GSG) that were originally filed separately in Supreme Court, New York County: (i) *Security Police & Fire Professionals of Am. Ret. Fund v Blankfein*, Index No. 650740/2009 (filed December 14, 2009); (ii) *Brown v Blankfein*, Index No. 650003/2010 (filed January 5, 2010); and (iii) *Central Laborers' Pension Fund v Blankfein*, Index No. 600036/2010 (filed January 7, 2010). The actions were

compensation would be excessive, given their view that GSG's 2009 revenues were due, not to the performance of its employees, but to "accounting trickery" and government intervention in the wake of the 2008 financial meltdown. Regarding the pre-suit demand requirement, plaintiffs alleged that they did not make a demand upon GSG's board because the anticipated compensation announcement would "not [be] a product of a valid exercise of the business judgment of the Defendants [the GSG directors], who participated in, approved, and/or permitted the wrongs." Plaintiffs further alleged that, "because the Board is beholden to [GSG] and its executives, the Board is not disinterested and lacks sufficient independence to exercise its business judgment in setting a compensation policy."[3]

By letter dated January 12, 2010, defendants informed the court and plaintiffs that they intended to move to dismiss the actions on the ground, among others, that plaintiffs "ha[d] not made a pre-suit demand on the [GSG] Board, and ha[d] not adequately pleaded that demand is excused." On January 21, 2010,

---

consolidated under the *Central Laborers'* caption and index number by order dated March 9, 2010. On appeal, the parties treat the *Central Laborers'* complaint as the operative pleading.

[3]It is undisputed that plaintiffs were holders of GSG shares at the time the action was brought and at the time of the transaction complained of, as required by subsections (a) and (b) of Business Corporation Law § 626.

before defendants made any motion to dismiss, GSG issued a press release discussing its 2009 financial performance and announcing its compensation and benefits expenses for that year. The press release revealed that GSG's ratio of compensation and benefits to net revenues for 2009 was 35.8%, as compared to 48% for 2008. Four days later, on January 25, plaintiffs filed papers with Supreme Court in which they asserted that the actions were moot because the announcement of the employee compensation that GSG's board had set for 2009 "essentially conceded the merits of Plaintiffs' claims," and stated their intention to move to dismiss the actions voluntarily.[4]

On April 8, 2010, plaintiffs moved for a voluntary dismissal of the action (the three actions by then having been consolidated) and, at the same time, for an award of attorneys' fees in the amount of $5 million pursuant to Business Corporation

[4]Defendants strenuously deny that the filing of this action had any causal connection with the level at which the board ultimately set 2009 compensation for GSG employees. Defendants contend that the evidence on this issue in the record (both plaintiffs' and their own) establishes that the determination, although not announced until January 21, 2010, had been made in principle before December 14, 2009, the date of the filing of the earliest of the three complaints consolidated in this matter. As clarified at the oral argument of this appeal, plaintiffs take the position that an issue of fact exists as to whether the filing of this action caused the board to set 2009 compensation at a level substantially lower than that at which it otherwise would have been set.

Law § 626(e).[5] The basis for the fee application was plaintiffs' contention that the action was "successful" within the meaning of § 626(e) because its filing had induced the GSG board to approve $5 billion less in employee compensation than otherwise would have been the case. Defendants opposed the motion, arguing that the demand requirement had been neither satisfied nor excused, that the complaint otherwise failed to state a cause of action, and that the record established that the litigation was not the cause of any "substantial benefit" to GSG.

In the order appealed from, Supreme Court granted plaintiffs' motion only to the extent of dismissing the consolidated action; the application for an award of attorneys' fees and reimbursement of litigation expenses was denied. The fee application was denied on the ground that plaintiffs had not complied with Business Corporation Law § 626(c), which requires the complaint in a shareholder derivative action to "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." Noting plaintiffs' admission that they had

[5]In pertinent part, Business Corporation Law § 626(e) provides: "If the action on behalf of the corporation was successful, in whole or in part, . . . the court may award the plaintiff or plaintiffs . . . reasonable expenses, including reasonable attorney's fees . . . ."

not made a pre-suit demand, the court determined that plaintiffs had not made particularized allegations that, if true, would have established the futility of demanding action by the board under Delaware law (applicable on matters of substance because GSG is a Delaware corporation). Specifically, the court found that plaintiffs did not make any allegations from which it could be inferred that the setting of employee compensation at the level plaintiffs had anticipated would have constituted a waste of corporate assets or would otherwise have been outside the protection of the business judgment rule, nor did plaintiff's allegations place in doubt the disinterest or independence of the 10 non-employee directors of GSG.[6] Accordingly, because the court held that, under New York law, "the fee award provision of [Business Corporation Law §] 626(e) is not available to a plaintiff who has not satisfied the pleading requirements of section 626(c)," it denied plaintiffs' application for attorneys' fees.[7]

---

[6]Two defendants (Lloyd C. Blankfein and Gary D. Cohn) are both directors and employees of GSG. Defendants do not dispute that Blankfein and Cohn, as employees, may be considered interested in the board action at issue.

[7]Having concluded that plaintiffs' failure to satisfy the demand requirement necessitated the denial of their fee application, the court found it unnecessary to address whether the filing of the action had caused GSG to realize a substantial benefit. Nor did the court find it necessary to determine

We are in substantial agreement with Supreme Court's analysis. At the outset, we note that, in their appellate briefs, plaintiffs have not taken issue with Supreme Court's determination that they failed to plead particularized facts that would have established the futility of demanding action by the board so as to excuse the demand prerequisite to a derivative suit under Delaware law (*see* Delaware Court of Chancery Rule 23.1).[8] Accordingly, plaintiffs have abandoned any challenge on appeal to that determination (*see e.g. Edelman v Emigrant Bank Fine Art Fin., LLC*, 89 AD3d 632 [1st Dept 2011]), and it is established, for purposes of this appeal, that plaintiffs had no excuse for their admitted failure to make a pre-suit demand for

---

whether New York would follow Delaware in making it a prerequisite to an award of attorneys' fees that a derivative action have been "meritorious when filed," or whether, apart from the failure to satisfy the demand requirement, the complaint had sufficient merit to withstand a motion to dismiss.

[8]Because GSG is incorporated under the law of Delaware, we look to Delaware for the substantive law governing this dispute concerning GSG's internal corporate governance, including the issue of whether the demand requirement was excused so as to confer standing on plaintiffs to pursue this action (*see David Shaev Profit Sharing Account v Cayne*, 24 AD3d 154 [1st Dept 2005]). The law of the forum (New York), however, governs the procedural issue of whether attorneys' fees under Business Corporation Law § 626(e) may be awarded to the plaintiff in a derivative action that allegedly resulted in a substantial benefit to the corporation (as plaintiffs claim this action did) before the action could be dismissed based on the plaintiff's failure either to satisfy the pre-suit demand requirement or to establish that the requirement was excused by futility.

the corporate action they desired.

Plaintiffs argue that Business Corporation Law § 626(e) (quoted in pertinent part at footnote 5, *supra*) does not expressly require a showing that the demand requirement was complied with or excused as a prerequisite to an award of attorneys' fees for bringing an action that brought a substantial benefit to the corporation (as plaintiffs claim — and defendants deny — that this action did). Plaintiffs further argue that there is no reason to construe the statute to imply such a requirement. We disagree.

To begin, plaintiffs' analysis is internally inconsistent. They concede that a derivative plaintiff cannot recover attorneys' fees under § 626(e), regardless of any benefit the action may have caused the corporation to realize, if the plaintiff was not a shareholder at the time of the challenged transaction and at the time the action was commenced, as required by subsections (a) and (b) of § 626. Thus, plaintiffs concede that standing to bring a derivative action has some relevance to the fee determination under § 626(e). But subsection (e) no more refers to the shareholding requirements of subsections (a) and (b) than it does to the demand requirement of subsection (c). In this regard, we agree with defendants that the phrase "on behalf of the corporation" in the opening clause of § 626(e) ("If the

action *on behalf of the corporation* was successful" [emphasis added]) implies that the plaintiff, to be entitled to a fee award, must meet all requirements for standing to bring a derivative action "on behalf of the corporation" — both the requirements relating to shareholding (subsections [a] and [b]) and the requirement of a pre-suit demand or excuse thereof (subsection [c]).[9]

We reject plaintiffs' attempt to justify treating subsection (c) differently from subsections (a) and (b) for these purposes on the ground that § 626(c) is phrased in terms of a pleading requirement ("In any such action, the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort"). The demand requirement, which determines a shareholder's right to prosecute the claim, is universally held to be a substantive requirement (*see e.g. Kamen v Kemper Fin.*

---

[9]The New York appellate authority on which plaintiffs rely does not support their position that the demand requirement is irrelevant to the attorneys' fee issue, since those cases involved derivative suits in which fees were awarded after settlement, in which the issue of standing was necessarily resolved in favor of the plaintiffs (*see Gusinksy v Bailey*, 66 AD3d 614 [1st Dept 2009]; *Seinfeld v Robinson*, 246 AD2d 291 [1st Dept 1998]). To reiterate, this action was not settled. Rather, plaintiffs made a self-serving declaration of victory upon the GSG board's determination of the relevant matter within weeks after the complaints were filed.

Servs., Inc., 500 US 90, 96-97 [1991]) — a point plaintiffs do not dispute. It is no answer to say that, had the litigation gone forward, plaintiffs could have amended their complaint to make sufficiently particularized allegations of demand futility. If plaintiffs believed that they had a basis for such an amendment, they should have submitted that evidence to Supreme Court in support of their fee application.

There are substantial policy reasons to construe § 626(e) to incorporate all of the standing requirements set forth in the remainder of the statute, including the requirement of pre-suit demand on the board. As the Court of Appeals has recognized, "derivative actions are not favored in the law because they ask courts to second-guess the business judgment of the individuals charged with managing the company" (*Bansbach v Zinn*, 1 NY3d 1, 8 [2003]). The demand requirement, far from being a meaningless formality,

> "rests on basic principles of corporate control — that the management of the corporation is entrusted to its board of directors, who have primary responsibility for acting in the name of the corporation and who are often in a position to correct alleged abuses without resort to the courts. The demand requirement thus relieves the courts of unduly intruding into matters of corporate governance by first allowing the directors themselves to address the alleged abuses. The requirement also provides boards with reasonable protection from harassment on

> matters clearly within their discretion, and it discourages strike suits commenced by shareholders for personal rather than corporate benefit" (*id.* at 8-9 [citations and internal quotation marks omitted]).

To award fees to a derivative plaintiff who has neither made a demand nor alleged demand futility, upon the mooting of the suit by board action promptly after it was filed, would reward that plaintiff for unjustifiably wresting the management of the corporation from those to whom it is entrusted by law and by the rest of the shareholders. But the basis for awarding attorneys' fees to a derivative plaintiff under the substantial benefit doctrine is the avoidance of unjust enrichment (*see Seinfeld v Robinson*, 246 AD2d 291, 295 [1st Dept 1998] ["'To allow others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense'"], quoting *Mills v Electric Auto-Lite Co.*, 396 US 375, 392 [1970]). On the other hand, an officious intermeddler who gratuitously foists an unrequested benefit upon another is not entitled to compensation from the recipient because the other party's receipt of the benefit without compensation does not constitute unjust enrichment (*see* 22A NY Jur 2d, Contracts § 538 ["(A) person who officiously confers a benefit upon another is not entitled to restitution for that benefit"]; Restatement of Restitution § 2

and Comment *a* [same]). Absent a showing that the demand requirement has been complied with or excused, a derivative plaintiff has no justification for acting on behalf of the corporation. Under such circumstances, denying that plaintiff compensation from the corporation for any benefit allegedly conferred by the litigation does not constitute unjust enrichment, and the denial of fees fully accords with the doctrine of substantial benefit.

Further, plaintiffs overlook that, if their main concern was saving money for GSG's shareholders by reducing excessive employee compensation, they might well have accomplished the same result (assuming for the sake of argument that their actions had any influence on the board) by presenting the board with a formal demand, as the law contemplates. If plaintiffs had made such a demand, and the board had set compensation at the level it ultimately did (which plaintiffs deem satisfactory), GSG shareholders would have benefitted from the corporation's reduced compensation expense as well as from avoiding having to pay plaintiffs' attorneys' fees (and avoiding having to oppose or defend their fee application), since attorneys' fees are not payable pursuant to § 626(e) where no lawsuit has been initiated (*see Kaufman Malchman & Kirby, P.C. v Hasbro, Inc.*, 897 F Supp 719, 723-724 [SD NY 1995]). Rather than risk achieving a

positive result for the shareholders without bringing a lawsuit that might result in the imposition of fee liability on the corporation, plaintiffs commenced a lawsuit against the board without first making a demand (without excuse, as previously discussed). In other words, by going straight to court rather than making a pre-suit demand as the law requires, plaintiffs seem to be trying to achieve the same result at greater cost to the corporation. We do not believe that the law should afford them this option.

To the extent that considerations of judicial efficiency enter into this analysis, those considerations support requiring a derivative plaintiff to show compliance with, or excuse of, the demand requirement as a prerequisite to recovering legal fees under § 626(e). We are not persuaded by plaintiffs' suggestion that making a fee award dependent on a showing of demand futility "creates a situation that could require courts to address novel and complex legal issues where the actual merits of the dispute are not at issue." Given the frequency with which demand futility is litigated, and the fact patterns that recur on that issue from case to case, it seems to us that causation of a substantial benefit is by far the more complex issue, and the issue more likely to lead to protracted litigation. Moreover, in our judgment, requiring a derivative plaintiff to demonstrate

satisfaction or excuse of the demand requirement (in addition to demonstrating that the action has caused a substantial benefit) will more effectively deter unwarranted litigation in this area than would the rule advocated by plaintiffs, under which a litigant seeking fees under § 626(e) would be required to make a showing only on the far less predictable substantial benefit issue.

In sum, Supreme Court correctly determined that plaintiffs are precluded from recovering attorneys' fees or other litigation costs pursuant to Business Corporation Law § 626(e) by their failure — as found by Supreme Court and not challenged on appeal — either to make a pre-suit demand or to make particularized allegations establishing that such a demand would have been futile. Since this determination disposes of the appeal, we need not consider the parties' remaining arguments.[10]

Accordingly, the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered September 26, 2011, which,

[10]Thus, we do not address the question of whether New York should adopt the Delaware rule that a derivative plaintiff cannot obtain attorneys' fees unless it is established that, apart from issues of standing, the complaint was meritorious when filed. Nor need we consider whether the filing of plaintiffs' action actually caused GSG to realize any substantial benefit.

insofar as appealed from as limited by the briefs, denied plaintiffs' motion for an award of attorneys' fees and reimbursement of litigation expenses, should be affirmed, with costs.

All concur.

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

ENTERED: SEPTEMBER 17, 2013

CLERK

Sweeny, J.P., Moskowitz, Richter, Feinman, JJ.

9474 Keren Elmaliach, etc., et al., Index 102026/09
Plaintiffs-Respondents-Appellants,

-against-

Bank of China Limited, etc.,
Defendant-Appellant-Respondent.

_____

Patton Boggs LLP, New York (Mitchell R. Berger of counsel), for appellant-respondent.

The Berkman Law Office, LLC, Brooklyn (Robert J. Tolchin of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 8, 2011, affirmed, without costs. Plaintiffs' appeal from the aforesaid order, dismissed, without costs.

Opinion by Feinman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Karla Moskowitz
Rosalyn H. Richter
Paul G. Feinman, JJ.

9474
Index 102026/09

_____x

Keren Elmaliach, etc., et al.,
Plaintiffs-Respondents-Appellants,

-against-

Bank of China Limited, etc.,
Defendant-Appellant-Respondent.

_____x

Cross appeals from the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 8, 2011, which denied defendant's motion to dismiss the complaint.

Patton Boggs LLP, New York (Mitchell R. Berger, Daniel R. Murdock and James E. Tyrrell, Jr. of counsel), for appellant-respondent.

The Berkman Law Office, LLC, Brooklyn (Robert J. Tolchin, and Meir Katz, Jr. of the bar of the State of Maryland and District of Columbia, admitted pro hac vice, of counsel), for respondents-appellants.

FEINMAN, J.

Plaintiffs are 50 citizens and domiciliaries of Israel who were either injured in terrorist bombings and rocket attacks carried out by Palestine Islamic Jihad (PIJ) and Hamas in Israel between 2005 and 2007, or are family members or estates of persons killed in the attacks.[1] They allege that the acts of Bank of China Limited (BOC) were a proximate cause of their injuries in that BOC helped facilitate the transfer of millions of dollars between PIJ and Hamas leadership outside Israel and their operatives inside Israel, enabling the two organizations to plan, prepare, and undertake acts of terrorism in Israel. Defendant moved to dismiss on the alternative grounds of failure to state a claim (CPLR 3211[a][7]) and forum non conveniens (CPLR 327[a]). The parties disagreed as to whether the motion court should apply the substantive law of New York or Israel. The Supreme Court denied the motion, and implicitly applied New York substantive law. Defendant appeals from the denial of the motion to dismiss, and plaintiffs cross-appeal to the extent the motion court implicitly determined that their claims are governed by New York substantive law. We affirm the Supreme Court's order

[1] The bomb attacks allegedly occurred in Sderot, Israel on January 15, 2005, November 16, 2006, and December 26, 2006; in Tel Aviv, Israel on April 17, 2006; in Shaar HaNegev, Israel on November 21, 2006; and in Eilat, Israel on January 29, 2007.

although we arrive at the same conclusion by a different analysis, and determine that Israeli law should govern.

According to the pleadings,[2] the United States has designated both PJI and Hamas as Foreign Terrorist Organizations since 1997 and as Specially Designated Global Terrorists since 2001. The United States has imposed worldwide economic sanctions intended to prevent the two organizations from conducting banking activities that would help finance their attacks. BOC is allegedly one of a few banks worldwide that does not enforce the U.S. sanctions. Between 2003 and 2007, dozens of wire transfers initiated by Hamas and PIJ leadership located outside Israel were executed through the New York-based branches of BOC and deposited into two BOC accounts in China. These two accounts were allegedly owned by a senior operative of both terrorist organizations named Said al-Shurafa; he allegedly transferred the dollars to PIJ and Hamas leadership inside Israel for the purpose of planning, preparing, and executing terrorist attacks within Israel, including those at issue here.

BOC allegedly had actual knowledge since about April 2005

---

[2] This litigation consists of two actions, *Keren Elmaliach, et al. v Bank of China*, and *Janet Zamalloa, et al. v Bank of China*, which the Supreme Court consolidated under the *Elmaliach* index number. Unless otherwise specified, references to the pleadings means the allegations of both complaints.

that the wire transfers were being used to facilitate terrorist attacks. According to the pleadings, officials from the Israeli Prime Minister's office met with officials from the Chinese Ministry of Public Security and the People's Republic of China's (PRC) central bank in April 2005 to warn the Chinese officials that the wire transfers were being made by the PIJ and Hamas for the purpose of carrying out terrorist attacks. The Israeli officials demanded that the PRC officials take action to stop BOC from facilitating further transfers. The PRC officials allegedly communicated this information to BOC in April 2005, including the demand by Israeli officials that BOC stop the wire transfers in an effort to thwart terrorist funding. BOC continued to carry out these wire transfers at least through January 2007.

The first cause of action alleges negligence under sections 35 and 36 of Israel's Civil Wrongs Ordinance (CWO). The second cause of action alleges breach of statutory duty under section 63 of Israel's CWO, which provides a civil remedy for breaches of obligations including those under section 4 of Israel's Prevention of Terrorism Ordinance, sections 145 and 148 of Israel's Penal Law, and section 85 of Israel's Defense Regulations (Emergency Period), all prohibiting the provision of material support or services to terrorist organizations.

BOC moved pre-answer to dismiss the complaint for failure to

state a cause of action (CPLR 3211[a][7]), and alternatively, based on the doctrine of forum non conveniens (CPLR 327[a]). It argued, in sum, that the elements of a claim of negligence are the same in both New York and Israeli law, and in New York, a bank does not owe a duty to protect non-customers from the intentional torts of its customers, nor does it proximately cause injury by providing conventional banking services to a person allegedly affiliated with an entity that ultimately commits an intentional tort. BOC also argued that New York is not a proper forum in that the action may likely involve the application of Chinese law, the parties are all foreign, the majority of relevant evidence is in China, and China has a substantial interest in adjudicating the action because the alleged conduct primarily took place in China.

BOC's motion was denied in its entirety in a considered decision discussing at length several federal cases raising similar issues. In particular, the motion court's reasoning was based, in part, on then-recent holdings in two federal district court lawsuits brought by plaintiffs' counsel on behalf of other victims of terrorist attacks in Israel against banks allegedly used on behalf of terrorist groups: *Licci v American Express Bank Ltd.*, 704 F Supp 2d 403 (SD NY 2010) (*Licci I*) and *Wultz v Islamic Republic of Iran*, 755 F Supp 2d 1 (D DC 2010) (*Wultz I*).

In both actions, the complaints contained causes of action brought under American and Israeli law; the federal district courts examined whether there were actual conflicts in the laws at issue, which jurisdiction's law was to be applied, and whether the complaints stated a cause of action under the relevant law.

Licci was brought on behalf of several Israeli residents injured or killed in Israel. It alleged that American Express Bank failed to comply with banking regulations and laws including monitoring, reporting, and refusing to execute suspicious or irregular banking transactions when it acted as a correspondent bank for the Lebanese Canadian Bank. The bank allegedly executed dozens of wire transfers in U.S. dollars for accounts on behalf of the Shahid Foundation, which facilitated funds reaching Hizbollah members and enabling Hizbollah to carry out terrorist attacks in Israel, including the ones that harmed those plaintiffs (*Licci I*, 704 F Supp 2d at 405). The federal district court in *Licci I* found no "appreciable material difference" between the relevant laws of Israel and New York (*id.* at 410). Applying New York law, *Licci I* found no showing that the bank owed a duty of care to the plaintiffs or, if there was a duty, that its breach was a substantial cause of the events that resulted in the plaintiffs' injuries (*id.*). In particular, the complaint did not include allegations that would tend to show

that the bank had any ties to Hizbollah, or that it knew or had reason to believe that the monies at issue would be used to carry out terrorist attacks on civilian targets (*id.*). The allegations insufficiently showed that it was foreseeable that the bank's "routine banking services" would result in terrorist attacks (*id.*). The district court dismissed the complaint in *Licci I* for failure to state a cause of action.

Wultz was brought on behalf of an American father who was injured and his son who was killed in a suicide bombing in Tel Aviv, and their family. The complaint alleges in part that the defendant bank -- also BOC -- had actual knowledge that dozens of wire transfers were initiated by the PIJ in Middle Eastern countries outside of Israel, executed by BOC branches in the United States and then transferred into accounts of officers and agents of the PIJ, and used to plan and execute acts of terrorism.[3] The district court found that under Israeli law, these allegations were sufficient to deny the bank's motion to dismiss as the bank could have reasonably anticipated the plaintiffs' resulting injuries (*Wultz I* at 60). Reargument was granted on the issue of jurisdiction. The district court

[3] *Wultz* alleged breaches of the federal Antiterrorism Act (18 USC § 2331 *et seq.*) and negligence and breach of statutory duty under Israeli law.

reaffirmed its previous holding as to the sufficiency of the claims against BOC, but severed those claims and, upon the plaintiffs' request, ordered them transferred to the Federal District Court of the Southern District of New York (*Wultz v Islamic Republic of Iran*, 762 F Supp 2d 18 [D DC 2011]) (*Wultz II*). Upon reassignment, the Southern District judge declined to readdress the question of legal sufficiency, but directed the parties to brief the choice of law issue (*see Wultz v Bank of China*, 811 F Supp 2d 841, 845 [SD NY 2011]) (*Wultz III*).

In addressing BOC's motion to dismiss in the case at bar, the motion court held that, as in *Wultz*, the "unique factual allegations" regarding BOC's knowledge of its customer's terrorist activities, "takes [the claim] outside the usual rule that '[b]anks do not owe non-customers a duty to protect them from the intentional torts committed by their customers.'" It also rejected BOC's arguments that New York was an inconvenient forum because, among other reasons, BOC is currently undertaking discovery in the *Wultz* matter in the Southern District of New York.

On appeal, BOC contends that while the motion court was correct to de facto apply New York law, it erred in finding that plaintiffs had sufficiently pleaded that it breached a duty of care to them, as required under New York's negligence principles.

It cites several state and federal decisions that hold, as summarized by *Lerner v Fleet Bank, N.A.*, that "[a]s a general matter, banks do not owe non-customers a duty to protect them from the intentional torts of their customers" (459 F3d 273, 286 [2d Cir 2006] [internal quotation marks omitted]; *see also Century Bus. Credit Corp. v North Fork Bank,* 246 AD2d 395, 396 [1st Dept 1998]). BOC argues that the motion court failed to analyze whether it owed plaintiffs a duty of care, and instead concluded that a claim of negligence had been sufficiently alleged because BOC allegedly knew of its customer's wrongdoings and it was foreseeable that injury might occur.

BOC also argues that if there exists a conflict in the law, New York or Chinese law should govern as both jurisdictions have a greater interest in their banks' conduct than does Israel. Additionally, it argues that the breach of the Israeli statutory duty was improperly pleaded, and that the complaint should have been dismissed on forum non conveniens grounds because neither New York nor Israel has a sufficient nexus with the litigation, while China does, and provides an adequate alternative forum.

At the outset, we note that since plaintiffs are not aggrieved by the denial of defendant's motion to dismiss, their appeal must be dismissed (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545 [1983]; CPLR 5511).

Plaintiffs argue that Israeli law should govern, not Chinese law, and argue in the alternative that their claim is sufficient under New York negligence law.[4] They contend that they properly pleaded the elements of the Israeli statute allegedly violated by BOC and that the statute has no equivalent in New York law. They further argue that New York is a suitable forum because at least some of the wire transfers were allegedly executed through BOC's New York branches.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Richbell Info. Servs. v Jupiter Partners, LP*, 309 AD2d 288, 289 [1st Dept 2003]).

To establish a prima facie case of negligence under New York law, a plaintiff must demonstrate that the defendant owed him or her a duty of reasonable care, a breach of that duty, and a

---

[4] Although plaintiffs have no right to appeal, they may nevertheless raise this issue for our review on defendant's appeal (*see Parochial Bus Sys.*, 60 NY2d at 545-546; *Kraham v Mathews*, 305 AD2d 746, 746-747 [3d Dept 2003], *lv denied* 100 NY2d 512 [2003]).

resulting injury proximately caused by the breach (*see Boltax v Joy Day Camp*, 67 NY2d 617 [1986]; *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218 [1st Dept 2005] ["traditional common-law elements of negligence: duty, breach, damages, causation and foreseeability"]). The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *see Asante v JPMorgan Chase & Co.*, 93 AD3d 429, 430 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]). The scope of any such duty of care varies with the foreseeability of the possible harm and takes into consideration the reasonable expectations of the parties and society in general (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]; *see Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 344 [1928]). Although foreseeability has been called "a critical factor" in defining an alleged tortfeasor's duty, it will not create a duty which does not otherwise exist (*Blye v Manhattan & Bronx Surface Tr. Operating Auth.*, 124 AD2d 106, 109 [1st Dept 1987], *affd* 72 NY2d 888 [1988], citing *Pulka v Edelman*, 40 NY2d 781, 785-786 [1976]). In order to demonstrate this threshold element, the injured party must show not only that the defendant owed a general duty to society but a specific duty to the plaintiff; without a duty running directly to the injured person there is no liability in damages, however foreseeable the harm

(*Lauer v City of New York*, 95 NY2d 95, 100 [2000]).

Because the parties disagree as to which jurisdiction's law should apply to the negligence claim, the court is required first, using New York conflict of laws principles, to determine whether there is an actual conflict (*Matter of Allstate Ins. Co. [Stolarz--New Jersey Mfrs. Ins. Co.*, 81 NY2d 219, 223 [1993]; *see Mann v Cooper Tire Co.*, 306 AD2d 23 [1st Dept 2003]).[5] To find that there is an "actual conflict," the laws in question must provide different substantive rules in each jurisdiction that are "relevant" to the issue at hand and have a "significant possible effect on the outcome of the trial" (*Finance One Pub. Co. v Lehman Bros. Special Fin., Inc.*, 414 F3d 325, 331 [2d Cir 2005] [citations omitted], *cert denied* 548 US 904 [2006]; *see e.g. Caribbean Constr. Servs. & Assoc. v Zurich Ins. Co.*, 267 AD2d 81, 82-83 [1st Dept 1999] [choice of law analysis required where the claim of bad faith differed between New York and Virgin Islands law; Virgin Islands law did not require a showing that the egregious conduct was "aimed at the public generally," in order to seek punitive damages]; *compare Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528 [1st Dept 2002], *affd* 99 NY2d 647 [2003] [no

[5] The motion court should have explicitly conducted a choice of law analysis (*see Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]; *Schultz v Boy Scouts of Am.*, 65 NY2d 189, 196, 197 [1985]).

choice of law analysis required where there was no relevant conflict between New York and New Jersey law with respect to the sufficiency of a plaintiff's showing of product identification and exposure in an asbestos case]).

As discussed most fully in *Wultz I*, the Israeli law of negligence "differs slightly" from New York law in that duty is divided into fact and notional duty and depends on foreseeability (755 F Supp 2d at 58). Under Israel's CWO, the analysis of whether a duty is owed involves an inquiry into whether a reasonable person could have foreseen the occurrence of the damage under the particular circumstances alleged; whether as a matter of policy, a reasonable person ought to have foreseen the occurrence of the particular damage; and whether the occurrence causing the damage was foreseeable (*id*. at 58-59). This differs from New York law, where the foreseeability of harm does not define duty and, absent a duty running directly to the injured person, there is no liability in damages, however careless the conduct or foreseeable the harm (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 289 [2001]).

In addition, the claim of breach of statutory duty, section 63 of Israel's CWO, has no equivalent in New York law. As summarized in *Wultz I* (755 F Supp 2d at 67), Israel's tort of breach of a statutory duty "acts as a civil private right of

action for the violation of any enactment" issued by the Knesset, the Israeli parliament. The plaintiff must be able to show that the defendant was under a duty imposed by an enactment, the enactment was created for the benefit of the plaintiff, the defendant breached that duty, and the breach caused an injury to the plaintiff of the type that the enactment was intended to prevent (*id.; see also Licci v Lebanese Can. Bank, SAL,* 20 NY3d 327, 331 n 5 [2012]). As stated above, the enactments at issue are section 4 of the Prevention of Terrorism Ordinance, sections 145 and 148 of the Penal Law, and section 85 of the Defense Regulations (Emergency Period), all of which prohibit aiding and abetting terrorism, specifically by the giving of money to any terrorist organization, the payment of any contribution to any unlawful association including terrorist groups, and the performance of any service for or holding of funds of any unlawful organization (*see discussion in Wultz I,* 755 F Supp 2d at 67 *et seq*.).

We agree with the district court's analysis in *Wultz I* and conclude that the differences between the New York and Israeli laws of negligence could affect the trial's outcome, perhaps significantly. It is therefore necessary to undertake an interest analysis to identify the jurisdiction with the greatest interest in the litigation (*see Schultz v Boy Scouts of Am.,* 65

NY2d 189 at 197). We also find that the Israeli tort of a violation of statutory duty is "unique" to Israel, and also requires a choice of law analysis (*see Wultz III*, 811 F Supp 2d at 850).

"In the context of tort law, New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation" (*Padula v Lilarn Props. Corp.*, 84 NY2d at 521). New York aims to give "'controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation'" (*Cooney v Osgood Mach.*, 81 NY2d 66, 72 [1993], quoting *Babcock v Jackson*, 12 NY2d 473, 481 [1963]).

The interest analysis addresses two inquiries: "(1) what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law [at issue] is to regulate conduct or allocate loss" (*Padula v Lilarn Props.*, 84 NY2d at 521). A state's interest is defined solely based on the facts or contacts "which relate to the purpose of the particular law in conflict" (*Schultz v Boy Scouts*, 65 NY2d at 197). The significant contacts in such an analysis are, "almost exclusively, the parties' domiciles and the locus of the tort" (*id.*).

A distinction is made, when analyzing choice of law, between laws the purpose of which is to regulate conduct and those which allocate loss. The duty of care owed by a bank to third parties is a conduct-regulating rule[7] (*see Licci v Lebanese Canadian Bank*, 672 F3d 155, 158 [2d Cir 2012] [*Licci II*]; *Wultz v Bank of China Ltd.*, 865 F Supp 2d 425, 426-427 [SD NY 2012] [*Wultz IV*]). It has long been held that when the conflict pertains to a conduct-regulating rule, the law of the place where the tort occurs will generally apply, with the locus of the tort generally defined as the place of the injury (*see Devore v Pfizer, Inc.*, 58 AD3d 138, 141 [1st Dept 2008], *lv denied* 12 NY3d 703 [2009], citing *Schultz v Boy Scouts* at 198). This is because the jurisdiction where the tort occurred, the *lex loci delicti*, will almost always have the greatest interest in regulating conduct within its borders (*see Padula v Lilarn Props. Corp.*, 84 NY2d at 522; *Schultz v Boy Scouts,* 65 NY2d at 198). Where a defendant's negligent conduct occurs in one jurisdiction and the plaintiff suffers injuries in another, "the place of the wrong is considered to be the place where the last event necessary to make

[7] Plaintiffs make the intriguing but unpersuasive argument that if, as BOC argues, banks are entirely immune from liability to non-customers, then the purpose of any law addressing a bank's duty of care to third parties would not be to regulate conduct, but to provide a post-event remedial rule designed to determine cost allocation.

the actor liable occurred," that is, "where the plaintiffs' injuries occurred" (*Schultz v Boy Scouts*, at 195; *see Devore v Pfizer, supra*, 58 AD3d at 141).

In this case, the three jurisdictions with significant contacts are New York, Israel, and China. New York has a very strong interest as a world financial center in overseeing financial institutions operating in the United States. In addition, having been the target of several terrorist attacks, New York has a great interest in combating terrorism, including its financial aspects. Israel is the domicile of plaintiffs as well as the location where they were injured or killed. Israel has a very strong interest in protecting its citizens and residents, who were the intended targets of the terrorist attacks inside Israeli territory (*see Wultz III*, 811 F Supp 2d at 847-848, 852). Defendant BOC is domiciled in China; its transactions occurred in New York and China. China has a great interest in overseeing its financial institutions.

The parties direct this Court's attention to subsequent federal court decisions in both *Wultz* and *Licci* which they argue are dispositive or at least persuasive on this issue. In the *Wultz* matter, the choice of law analysis undertaken by the Southern District Court found that there was a conflict in the pertinent conduct-regulating laws of Israel and New York, as well

as competing interests among the parties for applying the laws of their jurisdiction (*Wultz III*, 811 F Supp 2d 841, 852). After weighing the parties' interests--New York's in regulating financial institutions; Florida's as the domicile of the decedent, the injured, and their family; and Israel's in combating terrorism and protecting its citizens and territory--the district court was unable to find "conclusively" that either New York or Israel had the greater interest (*id.* at 851, 852). It therefore deferred to the "weight of the particular precedent that suggests that when conduct-regulating rules are at issue, and when the suit arises out of personal injury, the locus of the tort controls," and thus that Israeli law would apply (*id.* at 852).

Following publication of *Wultz III*, the Second Circuit affirmed the dismissal of the *Licci* litigation as against American Express Bank but changed the analysis (672 F3d 155 [2d Cir 2012]) (*Licci II*). It acknowledged the rule that, for conduct-regulating rules, "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders" (*Licci* II at 158 [internal quotation marks omitted]). However, it then reasoned that as the conduct-regulating rule in question was the scope of a bank's duty toward non-customers for acts of

its customers and, because the challenged conduct of AmEx Bank took place in New York, AmEx Bank is headquartered in New York and it administered its correspondent banking services in New York, therefore New York had the greatest interest in the litigation (*id.*). The Second Circuit recognized that the plaintiffs were injured and domiciled in Israel, but "those factors did not govern where . . . the conflict pertains to a conduct-regulating rule" (*id.*, comparing *GlobalNet Financial.com, Inc. v Frank Crystal & Co.*, 449 F3d 377, 384-385 [2d Cir 2006]). The Second Circuit thus did not address the rule that when the conduct takes place in one jurisdiction and the plaintiff suffers injury in another, the locus of the plaintiff's injury will have the greater interest.

Because of the outcome in *Licci II*, a case with similar facts to *Wultz* but a different analysis, the Southern District Court withdrew its opinion in *Wultz III*, and subsequently issued a reconsidered decision (*Wultz IV, supra* 865 F Supp 2d 425). *Wultz IV* reasoned that "in this context," the law of the locale of the defendant's conduct is what governs (*id.* at 429). *Wultz IV* concluded that based on the location where BOC's tortious conduct allegedly occurred, including its failure to comply with the Israeli demand, China has the greater interest as to the non-federal claims in regulating bank conduct within its borders (*id.*

at 428-249).[8]

Of course, this court is not bound by the Second Circuit decision or that of the district court as concerns New York law. We respectfully disagree with the Second Circuit's reasoning in *Licci II,* in particular because it did not address the rule that when the plaintiff and defendant are in different jurisdictions, it is the place of the last event necessary to cause the injury, here the rocket attacks and bombings, that is considered to have the greater interest. We see no reason to deviate from this well-settled principle in the circumstances alleged. Indeed, this case's posture is similar to that in *Devore v Pfizer, supra* (58 AD3d 138), involving three Michigan residents injured in Michigan by taking a drug manufactured by the New York-based defendant. In *Devore*, we declined to follow the reasoning of the district court in *Carlenstolpe v Merck & Co., Inc.* (638 F Supp 901 [SD NY 1986], *app dismissed* 819 F2d 33 [2d Cir 1987]). Although acknowledging the generally controlling New York law that when the place of the alleged tort diff ers from the place of injury, the latter locale is defined as the place of the

[8] More recently, the district court granted BOC's motion to dismiss two of the non-federal claims, including the negligence claim, based on Chinese law principles. It denied dismissal of the claim of vicarious liability and breach of statutory duty (2012 WL 5431013, *5-6), 2012 US Dist LEXIS 161399, *18-21, 26 [Nov. 5, 2012]) (*Wultz V*).

injury, *Carlenstolpe,* a products liability case, held the place of the wrong was where the defendant developed and manufactured the allegedly defective vaccine (*Devore* at 141, 142, citing *Carlenstolpe* at 910). We held in *Devore* that *Carlenstolpe*'s reasoning was unsupported in the case law, as well as based on a different set of circumstances (58 AD3d at 141-142).

Applying the principles of *Devore* to the case at bar, we hold that Israel, the location of the plaintiffs' injuries, has the greater interest in seeing its laws enforced, and Israeli law should govern this action.

However, BOC argues that if Israel's laws are applied and the claims go forward, this would run against U.S. policy and law that banks in general do not have a duty to non-customers for the torts of its customers, other than for trust and fiduciary accounts (*see Lerner v Fleet Bank, supra,* 459 F3d at 286-288). Where the choice of law analysis leads to the application of foreign law, a court may only refuse to apply that law if its application would violate public policy, "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal," and would be "truly obnoxious" (*Cooney v Osgood Mach.*, 81 NY2d at 78, 79 [internal quotation marks omitted]; *Hugh O'Kane Elec. Co., LLC v MasTec N. Am., Inc.*, 19 AD3d 126, 127 [1st Dept 2005]). "The

public policy doctrine is an exception to implementing an otherwise applicable choice of law in which the forum refuses to apply a portion of foreign law because it is contrary or repugnant to its State's own public policy" (*Schultz v Boy Scouts, supra*, 65 NY2d at 202 [citation omitted]).

A party seeking to invoke the public policy doctrine has the "heavy burden" of proving that the foreign law is contrary to New York public policy (*Cooney*, 81 NY2d at 78, citing *Schultz v Boy Scouts* at 202). Public policy "is not measured by individual notions of expediency and fairness or by a showing that the foreign law is unreasonable or unwise" (*Schultz* at 202 [citation omitted]). Public policy can be found in the State's Constitution, statutes and judicial decisions (*Cooney* at 78; *Schultz* at 202). The proponent must also establish that there are "enough important contacts between the parties, the occurrence and the New York forum" that would implicate New York public policy and "thus preclude enforcement of the foreign law" (*Schultz* at 202).

BOC rests its argument on longstanding precedents that shield banks from third-party tort liability (*see e.g. Lerner v Fleet Bank*, 459 F3d at 286; *Century Bus. Credit Corp. v North Fork Bank*, 246 AD2d at 396).

We do not find case law to support the argument that except

for trusts and fiduciary accounts, a bank can *never* be held liable to non-customers and particularly when addressing allegations such as those before us in this action. We certainly acknowledge the general rule that "[b]anks do not owe non-customers a duty to protect them from the intentional torts of their customers" (*In re Terrorist Attacks of September 11, 2001*, 349 F Supp 2d 765, 830 [SD NY 2005]). However, a tortfeasor's compliance with relevant laws and regulations will not insulate it from liability if it fails to act objectively reasonably (*see Lerner*, 459 F3d at 289, citing Restatement [Second] of Torts § 288C [1965] ["Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable (person) would take additional precautions."]).

The district court's analysis in *In re Terrorist Attacks* of the allegations brought against three banks reflects a more nuanced consideration of whether claims like those here should be dismissed. The rule, as articulated by the district court in that litigation, is that "[p]roviding routine banking services, without having knowledge of the terrorist activities, cannot subject [a bank] to liability" (*In re Terrorist Attacks* at 832, 835). Clearly outside the scope of "routine" banking services would be allegations that a bank knew or had reason to know that

it was providing material support to terrorists, or that the bank was involved in, had knowledge of, or participated in any wrongful conduct, or ignored any regulations regarding a customer's account (*id.*; *see also Licci I*, at 410 [absent allegations that Amex Bank had ties to Hizbollah, or knew or had reason to believe that the monies at issue would be used to carry out terrorist attacks on civilian targets, "noncompliance with banking laws and industry standards alone will not render a bank negligently liable for the violent attacks committed by a terrorist organization who benefitted, in some general, nondescript manner, from monies passing through the bank during the performance of routine banking services."]).

BOC argues that this public policy recognizes that banks deal with countless customers and transactions and would become subject to limitless liability if they had a duty to protect the general public from their customers' torts. We find that BOC overstates the rule in this instance. Here, it is alleged that BOC knowingly facilitated acts of terrorism against innocent civilians, and did so after being put on notice by officials of PRC's central bank at the insistence of Israeli government officials. BOC's argument that it was doing nothing more than "routine" banking services is unpersuasive. Although New York does not generally recognize a duty on the part of banks to non-

customers, that does not mean that New York policy would prohibit recovery under the alleged facts, if proven.

Accordingly, we find that there is nothing repugnant to New York public policy in holding that Israeli law applies to this action. We also find that the complaint has sufficiently alleged negligence under Israeli law.[9] As to the claim of breach of a statutory duty, at this juncture, this court will rely upon the detailed analysis provided in *Wultz I* of Israel's section 63 of the CWO. *Wultz I* concluded that the tort is civil in nature, contrary to defendant's argument; that the specific Israeli penal enactments at issue can be applied extraterritorially; that the complaint sufficiently alleged a duty that the bank owed to the plaintiffs, who were of the class intended to be protected by the enactments; and that the duty was breached (755 F Supp 2d at 67-69). Although a straightforward reading of the Israeli enactments would lead to the conclusion that they concern conduct that is broader in scope than most of what BOC is alleged to have done, the record contains opinions written by experts in Israeli law; plaintiffs' expert explains that BOC's alleged transmission

[9] This court is well aware that certain other terrorism-related litigations have been dismissed based on the perceived failure of those plaintiffs to adequately plead causation (*see e.g. Rothstein v UBS AGI,* 708 F3d 82 [2d Cir 2013]). Because Israeli law governs, the issue of causation, as well as duty, can be fleshed out during discovery and the trial.

of funds is sufficient to bring it under the enactment forbidding the "giving" or "payment" of funds to terrorist groups. Since we must accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]), we conclude that this cause of action sounding in breach of Section 63 of the Israeli COW is sufficiently pleaded for the purposes of defeating defendant's pre-answer motion to dismiss.

We turn to BOC's alternative argument, that the court should have dismissed the claims on forum non conveniens grounds. We affirm the motion court's denial of that branch of the motion.

"The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that 'in the interest of substantial justice the action should be heard in another forum'" (*National Bank & Trust Co. of N. Am. v Banco de Vizcaya*, 72 NY2d 1005, 1007 [1988], *cert denied* 489 US 1067 [1989]; CPLR 327). The movant seeking dismissal has a "heavy burden" of establishing that New York is an inconvenient forum and that a substantial nexus between New York and the action is lacking (*see Kuwaiti Eng'g Group v Consortium of Intl. Consultants, LLC*, 50 AD3d 599, 600 [1st Dept 2008]; *Creditanstalt Inv. Bank AG v Chadbourne & Parke*

LLP, 14 AD3d 414, 415 [1st Dept 2005]).

The factors in weighing such a motion to dismiss include the burden on New York courts, potential hardship to the defendant, the unavailability of an alternate forum, the residence of the parties, and the location of the events giving rise to the transaction at issue in the litigation, with no one factor controlling (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]; *Ghose v CNA Reins. Co. Ltd.*, 43 AD3d 656, 660 [1st Dept 2007], *lv denied* 10 NY3d 712 [2008]). Other factors may include the location of potential witnesses and documents and the potential applicability of foreign law (*see Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 176-177 [1st Dept 2004]). "Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Anagnostou v Stifel*, 204 AD2d 61, 61 [1st Dept 1994]), even where the plaintiff is not a resident of New York (*see OrthoTec, LLC v Healthpoint Capital, LLC*, 84 AD3d 702, 703 [1st Dept 2011]).

BOC argues that China has a substantial nexus with the claims because of its interest in regulating its banks, in that the majority of the alleged tortious conduct occurred in China and much of the relevant evidence is there. In addition, these reasons are why, according to BOC, the claims should not be

litigated in New York.

We do not find in the interest of substantial justice that the action should be heard in China rather than New York, or that the balance of factors point in favor of dismissal. "That another forum may have a substantial interest in adjudicating an action is but one factor to be weighed" in deciding a motion to dismiss based on forum non conveniens (*Aon Risk Servs. v Cusack*, 102 AD3d 461, 463 [1st Dept 2013]). Although we hold that New York's interest is not sufficient to require the application of New York law herein, nonetheless New York has a sufficient interest and nexus with the claims, because New York banking facilities were allegedly used to process the wire transfers (*see Georgia-Pacific Corp. v Multimark's Intl.*, 265 AD2d 109, 112 [1st Dept 2000]; *cf. Chawafaty v Chase Manhattan Bank*, 288 AD2d 58 [1st Dept 2001], *lv denied* 98 NY2d 607 [2002] [incidental use of a New York bank insufficient to create a nexus]; *and see Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 340 [2012] [holding that repeated use of a New York bank account establishes "an articulable nexus" between the transaction and the alleged breach]).

The motion court properly found that BOC failed to meet its burden, given that it is currently litigating and engaged in discovery in the *Wultz* case in federal court in New York, after

failing to be granted dismissal on forum non conveniens grounds. As the motion court aptly noted, such dismissal would actually increase the burden on the parties by requiring dual litigations in distant fora (*see Bank Hapoalim [Switzerland] Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 288 [1st Dept 2006]). Therefore, we agree with the motion court that dismissal based on forum non conveniens is unwarranted.

Accordingly, the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 8, 2011, which denied defendant's motion to dismiss the complaint, should be affirmed, without costs. Plaintiffs' appeal from the aforesaid order should be dismissed, without costs.

All concur.

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

ENTERED: SEPTEMBER 17, 2013

CLERK