SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 28, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15072 Miranda Ganaj, et al., Index 303203/08
Plaintiffs-Appellants,

-against-

New York City Health and Hospitals Corporation,
Defendant-Respondent.

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Norman A. Olch, New York, for appellants.

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

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Judgment, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about March 25, 2013, upon a jury verdict, in favor of defendant, unanimously affirmed, without costs.

Plaintiffs failed to preserve their challenges on appeal regarding the charges and the supplemental charge to the jury and the verdict sheet interrogatories, as they never made their objections before the jury returned its verdict (CPLR 4110-b, 4111[b]; *Barry v Manglass*, 55 NY2d 803, 805-806 [1981]). In any event, the court's instructions to the jury and the verdict sheet

were proper.

Furthermore, the jury's verdict is supported by a fair interpretation of the evidence and therefore is not against the weight of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]).

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

ENTERED: JULY 28, 2015

CLERK

Gonzalez, P.J., Mazzarelli, DeGrasse, Kapnick, JJ.

15080 Chaudry Noor, Index 102899/07
Plaintiff-Respondent,

-against-

The City of New York, et al.,
Defendants-Appellants.

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Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Steven DiSiervi of counsel), for appellants.

Kelner and Kelner, New York (Gail S. Kelner and Ronald C. Burke of counsel), for respondent.

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered November 22, 2013, after a jury trial, awarding plaintiff damages, modified, on the law, to the extent of vacating the award of damages and remanding for a new trial on damages, and otherwise affirmed, without costs.

Plaintiff, a welder, was injured when a closed A-frame ladder, which he had leaned against a recently-installed water tank on which he was welding a seam, slipped, causing him to fall from it. The tank was 18 feet long, 14 feet wide, and approximately 8 feet tall. It was situated on a platform that was three feet wide. Because of that narrow width, plaintiff was unable to fully open the ladder with the rungs parallel to the tank, which would have permitted him to directly face the area he

needed to weld. While the ladder could have been opened on the platform with the rungs perpendicular to the tank, plaintiff testified that this would have been very difficult. He explained that he would have had to twist his entire body to perform the work and that he would have tired out every five minutes while trying to weld a seam that would have taken him one hour under ordinary circumstances. Plaintiff, and two coworkers who were in the same room with him when the accident occurred, testified that the type of welding they were doing was always done with an A-Frame ladder. By all accounts the ladder was in good working condition. Plaintiff testified that no one ever gave him any instructions on how to perform his work on the project. Plaintiff and his coworkers all testified that they had used a pipe scaffold to erect the tank, but, according to all three workers, the scaffold had been removed from the room when they began welding. The project manager for plaintiff's employer testified that he was on the site at most every other day, and that the pipe scaffold remained in the room until the project was complete.

Plaintiff explained that, after he completed his work, he began to descend the ladder, but before he could finish taking the first step, the ladder "shook." While he was trying to grab

the top of the tank, the ladder "knocked" him onto the floor below the platform. He had not previously felt the ladder move. After he fell, he saw that the bottom of the ladder had slid slightly away from the tank, but the ladder was still leaning against the tank. Plaintiff testified that the ladder moved because he had placed it on top of electrical wires and pipes that were arrayed on the platform. Plaintiff acknowledged that he had testified in a General Municipal Law § 50-h hearing that he did not know what caused the ladder to move.

Following the close of evidence in the liability phase of this bifurcated trial, plaintiff moved for a directed verdict on his Labor Law § 240(1) claim. The court granted the motion, stating that the workers believed they were expected to work with an A-frame ladder in the closed position, since that is how they had always worked. The court further found that the ladder was the only equipment with which plaintiff had been provided, that it was inadequate for the task at hand, and that the lack of an adequate safety device proximately caused the accident. The court noted that the pipe scaffold was provided to erect the tank, but that the workers were not expected to use it for welding.

The jury found that defendant Aspro Mechanical Contracting, Inc., the general contractor, but not defendant City, the owner, was negligent and had violated Labor Law § 200, but that such negligence and violation did not proximately cause the accident. As to the Labor Law § 241(6) claim, the jury found that there was no violation of Industrial Code (12 NYCRR) § 23-1.21(e)(3), since "the platform where plaintiff placed the A-frame ladder at the time of the accident provide[d] firm level footing." The jury found that "plaintiff's negligence [was] a substantial factor in causing his accident." It determined that plaintiff was 55% at fault; the general contractor was 35% at fault; and the City 10% at fault. However, the court deemed the verdict to have found plaintiff 100% liable, since it found that neither the City's nor Astro's actions substantially contributed to the accident.

Plaintiff's only medical expert during the damages phase was his treating physician, Shahid Mian, M.D. Prior to the trial, defendants had served Dr. Mian with a subpoena duces tecum demanding the production of "certified complete copies of all office notes, reports, tests, test results, diagnostic tests, documents and medical records ... with respect to the evaluation, diagnosis and treatment of [plaintiff]." Dr. Mian's office disclosed records in response to the subpoena, and certified that

"the copies produced represent all the documents described in the subpoena duces tecum." On the day Dr. Mian appeared to testify, defense counsel noticed that the records brought by him to court that day were much more voluminous than those produced in response to the subpoena, and that they included previously undisclosed handwritten notes, physical therapy notes, and reports from physicians. Counsel objected on the basis that defendants had no way of knowing if they were in a sufficient position to challenge Dr. Mian's testimony. Plaintiff's counsel did not dispute that defense counsel received less than the complete medical file compiled by Dr. Mian, but noted that counsel had been provided with authorizations for all of plaintiff's medical providers.

The court asked defense counsel to clarify which records were not previously provided, but counsel stated that he "need[ed] time to go through everything," and was only able to do a "cursory review" in the 10 minutes available. Rather than affording any time for a further review, the court ruled that plaintiff's medical records would be admitted, with the exception of the handwritten notes. The court further ruled that defense counsel would be permitted to cross-examine Dr. Mian on the fact of the discrepancy of the records produced pursuant to subpoena

and those brought to court. Finally, the court also indicated that it would instruct the jury to draw "any inference from the fact that what ... is included in his records [is] not in the records that he submitted into court," including an inference of "his bias or his willingness not to divulge all of the information to the defense counsel."

A verdict may be directed only if the "court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). The benefit of all inferences is afforded to the non moving party, and the facts are viewed in a light most favorable to it (*id.*). Here, plaintiff argued that there was no issue of fact necessary for a jury to resolve regarding whether defendants violated their obligation under Labor Law § 240(1) to provide him with an appropriate safety device to guard against the elevation-related risk. That is because, he asserts, there was no alternative safety device readily available to him, and he had no choice but to place the ladder in the closed position given the way the tank was situated. Defendants do not dispute that an unsecured ladder, even one in good condition, can give rise to Labor Law section 240(1) liability if the worker falls from it

(*see Fanning v Rockefeller Univ.*, 106 AD3d 484 [1st Dept 2013]). However, they argue that plaintiff should have used the pipe scaffold that his foreman testified was in the room where he was working. Alternatively, they contend that he could have used the ladder in question in an open position had he merely turned it 90 degrees, and that his decision not to was the sole proximate cause of the accident.

A party charged under Labor Law section 240(1) with the duty to provide enumerated safety devices will be absolved of liability where a worker attempts to perform a task at elevation without proper protection, if the proper safety device was "readily available" and it would have been the worker's "normal and logical response" to get it (*Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005] [internal quotation marks omitted]; *Rice v West 37th Group, LLC*, 78 AD3d 492, 495 [1st Dept 2010]). Defendants argue that the pipe scaffold used to erect the tank was readily available because, according to the project manager for plaintiff's employer, it was in the very room where plaintiff and his coworkers were welding. Although plaintiff and his coworkers all testified that the scaffold was not in the room, the court was not in a position to rule as a matter of law that the scaffold was not there. That would have been a question for

the jury.

Nevertheless, defendants failed to establish that the scaffold would have been a suitable safety device. The burden was on them to elicit evidence that the scaffold would have permitted plaintiff to carry out the welding he was performing at the time of the accident (*see Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374, 375-376 [1st Dept 2008], *lv denied* 14 NY3d 709 [2010]). However, the project manager described the pipe scaffold in insufficient detail for the jury to have been able to envision how it would have been set up and to conclude that it would have been practical for plaintiff to use it. Moreover, defendants offered no evidence that it would have been plaintiff's "normal and logical response" to use the scaffold (*Montgomery*, 4 NY3d at 806 [internal quotation marks omitted]). After all, plaintiff and his coworkers testified that they had always used an A-frame ladder to get close enough to a water tank to perform the necessary welding. Defendants did not offer any evidence to suggest that plaintiff would have viewed a pipe scaffold as a suitable alternative means to conduct the work. Nor did they establish that he was a recalcitrant worker, since they did not offer any evidence showing that he was actually instructed to use the pipe scaffold (*see Dwyer v Central Park*

Studios, Inc., 98 AD3d 882, 884 [1st Dept 2012]).

A worker's decision to use an A-frame ladder in the closed position is not a per se reason to declare him the sole proximate cause of an accident (*see Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749 [2d Dept 2009]). To be sure, we do not disagree with the dissent that, in principle, placement of an A-frame ladder in the closed position "*can* constitute misuse of a safety device" (emphasis added). However, the cases cited by the dissent in support of that notion do not dictate a different result here. In *Nalepa v South Hill Bus. Campus, LLC* (123 AD3d 1190 [3d Dept 2014], *lv denied* 25 NY3d 909 [2015]), the plaintiff admitted that there was no reason why he could not open the ladder and that his placement of the ladder was contrary to his safety training. In *Santiago v Fred-Doug 117 L.L.C.* (68 AD3d 555 [1st Dept 2009]), the only evidence concerning the plaintiff's use of the ladder in the closed position was that he was warned that it was not safe, but responded that he knew what he was doing.

Here, plaintiff gave a specific reason why he used the ladder in the closed position. Plaintiff testified that using the ladder in an open position and twisting his body to face the tank would have been exhausting, requiring him to take frequent

breaks, which defendants did not dispute. Indeed, defendants' assertion that turning the ladder would have presented an issue of "[m]ere expediency or inconvenience" mischaracterizes the record. In any event, we are hesitant to adopt a rule that, in order to permit a worker to enjoy the protection of Labor Law section 240(1), would require him to take extraordinary measures to perform his work, when he has a good faith belief that doing so would cause him acute discomfort while drastically slowing his pace.

The dissent's comparison of this case to *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494 [1993]) falls flat. There, the Court of Appeals held that Labor Law section 240(1) did not apply where the plaintiff, also a welder, injured his back as a result of having worked in a contorted position on a scaffold. The Court acknowledged that the scaffold, which was otherwise safe, may have been rendered unsafe, in the colloquial sense, by the fact that the plaintiff could only use it in the position which caused his injury. However, the Court held that a device can only be unsafe for purposes of section 240(1) if a person's injury is caused by the direct application of gravity (81 NY2d at 501). Plaintiff's claim may very well have been barred by *Ross* if he had used the scaffold in the open position, rungs

perpendicular to the tank, and strained his back while contorting his body. But that, of course, is not what happened. Rather, plaintiff concluded that he could not, as a practical matter, use the ladder in that way, a point not disputed by defendants, and opted instead to use it in the closed position, which led to his fall. Once gravity became implicated, the purposes underlying section 240(1) did as well.

Nor do we find apt the dissent's analogy to *Weber v 1111 Park Ave. Realty Corp.* (253 AD2d 376 [1st Dept 1998]). In that case there is no indication that the A-frame ladder from which the plaintiff fell was, as here, closed and leaned against a wall, which is unquestionably a dangerous way to use such a ladder. Our disagreement with the dissent stems from our view that defendants violated the Labor Law by giving plaintiff no option but to use the ladder in that dangerous position to perform the task at hand. The evidence was clear on this point, and sufficient to permit the court to find that Labor Law section 240(1) was violated as a matter of law.

Plaintiff's failure to ask his coworkers to hold the ladder while he worked also did not constitute the sole proximate cause of the accident, since a coworker "is not a safety device contemplated by the statute" (*McCarthy v Turner Constr., Inc.*, 52

AD3d 333, 334 [1st Dept 2008]). If anything, failure to ask a coworker for support amounts to comparative negligence (*see Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004]).

The issue of whether plaintiff was negligent in placing the ladder on electrical wires that he claimed (and defendants denied) were snaked across the tank platform is irrelevant to our analysis. That is because "[u]nder Labor Law § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake v Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 290 [2003]). By the same reasoning, because plaintiff established that defendants violated Labor Law section 240(1), the fact that the jury, which did not even have the question of 240(1) liability before it, found that he was comparatively negligent for purposes of section 200, is immaterial.

Similarly, the fact that plaintiff claimed at his 50-h hearing that he did not recall what caused the accident is irrelevant, since the very fact that he fell as a result of defendants' failure to provide an adequate safety device was

sufficient for the court to find that the statute was violated as a matter of law. Nor did the fact that plaintiff's description of his position on the ladder seemed implausible raise a credibility issue that is material to the analysis of this case. It was undisputed that plaintiff suffered the accident in the manner in which he described it, as his coworkers heard him shout out immediately before they heard him hit the floor, and noticed the ladder in a position indicating that it had slipped.

We do agree with defendants that a new trial on damages is required. The withholding of undisputedly relevant documents requested by defendants' subpoena deprived defendants of their right to a fair trial (*see Sansevere v United Parcel Serv.*, 181 AD2d 521, 522 [1st Dept 1992] [holding that "the trial court deprived the defendant of a fair trial" by precluding it from seeking to impeach the plaintiff's witness by presenting evidence of the criminal history of the sole witness to a hit-and-run accident]). This error was not harmless, in light of the voluminous nature of the documents and defendants' diminished ability to impeach plaintiff's sole medical expert, whose credibility was central to the case (*id.*).

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

DEGRASSE, J. (dissenting in part)

I dissent because I disagree with the part of the majority's opinion that affirms the trial court's grant of plaintiff's CPLR 4401 motion for judgment as a matter of law with respect to his Labor Law § 240 (1) cause of action. Plaintiff, a welder, was injured when he fell to the ground as he descended a closed A-frame ladder that was leaning against an eight foot tall water tank. Plaintiff was welding seams on the water tank at the time of the accident. According to testimony at trial, the ladder was sturdy, equipped with rubber feet and had no defects. The water tank sat atop a platform that was three feet wide on the side where plaintiff had leaned the ladder. The ladder was two feet wide at the bottom. Therefore, the platform was wide enough to enable plaintiff to use the ladder in a secure open position.

In granting plaintiff's motion for judgment as a matter of law, the court found the ladder to be unsuitable for the work plaintiff was performing. The court's reasoning, which the majority adopts, is based on plaintiff's testimony that use of the ladder on the platform in an open position would have exhausted plaintiff by requiring him to twist his body into uncomfortable positions. The majority's reasoning misconstrues the purpose underlying Labor Law § 240 (1). The statute "was

designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person"* (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY 2d 494, 501 [1993] [emphasis in original]). The key phrase is "directly flowing." Based upon the trial evidence and the parties' arguments, there is at least a factual issue as to whether Labor Law § 240 (1) was violated because the claimed inadequacy of the ladder does not implicate the effects of gravity. Instead, it relates to plaintiff's ability to weld the water tank without discomfort. Although not completely analogous, *Ross* illustrates the distinction. *Ross* involved a plaintiff who injured his back while welding a seam at the top of a shaft that was 40 to 50 feet deep (*id.* at 498). The injury occurred because the plaintiff in *Ross* had to strain and contort his upper torso "[i]n order to complete his welding job without falling from his perch ... " (*id.*). The Court in *Ross* found Labor Law § 240 (1) inapplicable because the injuries in that case "allegedly flowed from a deficiency in the [safety] device that was wholly unrelated to the hazard which brought about its need in the first instance" (*id.* at 501 [internal quotation marks omitted]). In keeping with

the holding in *Ross*, the record before us warrants a factual determination as to whether the claimed defect in the ladder was related or unrelated to plaintiff's protection "from the application of the force of gravity" (*id.* at 501).

Plaintiff's burden was to show that a violation of Labor Law § 240 (1) was a contributing cause of the accident (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]). The only evidence regarding causation came in the form of plaintiff's testimony. In his trial testimony, plaintiff stated that the accident was caused by the ladder's placement on debris that was on the platform. Plaintiff was impeached however by his General Municipal Law § 50-h hearing testimony that he did not know what caused the ladder to move. In light of the impeachment, it would have been within the jury's province to reject plaintiff's trial testimony and find that the cause of the accident was undetermined. The resulting evidentiary gap would have been consequential because, as noted above, the ladder had no defects. "'Where a plaintiff is injured in a fall from a ladder, which is not otherwise shown to be defective, the issue of whether the ladder provided the plaintiff with the 'proper protection' required under [Labor Law § 240 (1)] is a question of fact for

the jury'" (*Weber v 1111 Park Ave. Realty Corp.*, 253 AD2d 376, 377 [1st Dept 1998] quoting *Rice v PCM Dev. Agency Co.*, 230 AD2d 898, 899 [2d Dept 1996]).

There is also an issue as to whether plaintiff's actions were the sole proximate cause of the accident. If that had been the case, liability under Labor Law § 240 (1) would not attach (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). A plaintiff's misuse of a safety device can constitute the sole proximate cause of an injury otherwise actionable under Labor Law § 240 (1) (*see Blake v Neighborhood Hous. Serv. of N. Y. City, Inc.*, 1 NY3d 280, 290-291 [2003]). The issue of sole proximate cause should have also been submitted to the jury based upon the undisputed testimony that plaintiff fell from a closed, unsecured A-frame ladder that he himself had leaned against the water tank. Such placement of an A-frame ladder can constitute misuse of a safety device (*see Nalepa v South Hill Bus. Campus, LLC*, 123 AD3d 1190 [3d Dept 2014], *lv denied 25* NY3d 909 [2015]; *Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555 [1st Dept 2009]). The majority concedes this principle but unconvincingly attempts to distinguish *Nalepa* and *Santiago* on the ground that plaintiff "gave a specific reason why he used the ladder in the closed position," that reason being the alleged discomfort that working

with the ladder in an open position would have caused him. I disagree with the majority's reasoning on this point because plaintiff's proffered excuse is insufficient to support the necessary finding that "there is no rational process by which the fact trier could base a finding [on the issue] in favor of the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Moreover, plaintiff's excuse is simply one factor that the jury should have been allowed to consider along with the other trial evidence in order to determine whether plaintiff's actions were the sole proximate cause of the accident.

The majority correctly cites *Rico-Castro v Do & Co N. Y. Catering, Inc.* (60 AD3d 749 [2d Dept 2009]) for the proposition that "[a] worker's decision to use an A-frame ladder in the closed position is not a per se reason to declare him the sole proximate cause of an accident." I do not take a contrary position because it is not my argument that defendants should necessarily be granted judgment as a matter of law. Significantly, defendants did not move below for judgment pursuant to CPLR 4401. Accordingly, *Rico-Castro* is distinguishable because it involved an appeal from the denial of a defendant's cross motion for summary judgment dismissing a Labor Law § 240 (1) cause of action (*id.* at 749). Consistent

with *Nalepa* and *Santiago*, my position is simply that the issue should have been submitted to the jury.

I also note that the trial court granted plaintiff's CPLR 4401 motion for judgment although the subject Labor Law § 240 (1) cause of action was never considered by the jury. The better practice would have been to submit the claim to the jury from the standpoint of judicial economy. If the jury is prevented from passing on the issues, an appellate court that disagrees with a verdict directed by the trial court under CPLR 4401 has no jury verdict to reinstate, wasting the time spent on trial (*see Matter of Austin v Consilvio*, 295 AD2d 244, 246 [1st Dept 2002]). Nonetheless, I agree that a new trial on damages is required for the reasons stated by the majority. I would reverse the order entered below and direct a new trial on the Labor Law § 240 (1) cause of action as well.

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

ENTERED: JULY 28, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Clark, Kapnick, JJ.

15339 Tower Insurance Company of New York, Index 153797/12
Plaintiff-Appellant,

-against-

Densil Brown,
Defendant,

Nicole Caruth,
Defendant-Respondent.

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Brown & Associates, New York (James J. Croteau of counsel), for appellant.

Mullaney & Gjelaj, PLLC, New York (Arnold E. DiJoseph, III of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 22, 2013, which denied plaintiff insurer's (Tower) motion for default and summary judgment declaring that it has no obligation to defend or indemnify its insured, defendant Densil Brown, in the underlying personal injury action, unanimously reversed, on the law, without costs, the motion granted, and it is declared that Tower has no obligation to defend or indemnify Brown in the underlying personal injury action. The Clerk is directed to enter judgment accordingly.

Tower made a prima facie showing that it is entitled to summary judgment based on the affidavit of its claim adjuster

stating that he spoke with Brown, who admitted that he did not reside at the premises when the incident occurred, as required by the policy (*see Schaaf v Pork Chop, Inc.*, 24 AD3d 1277, 1278 [4th Dept 2005] [admissions attributed to insured in plaintiff's investigator's affidavit constituted admissible evidence sufficient to defeat defendants' motion for summary judgment]).

Moreover, based on Brown's default in appearing in this action, Brown has admitted the allegations in the complaint that he did not reside in the premises when the incident occurred (*see Port Parties, Ltd. v Merchandise Mart Props., Inc.*, 102 AD3d 539, 540 [1st Dept 2013]). The conclusory affirmation of the underlying plaintiff's (defendant Nicole Caruth) counsel, which did nothing more than attack the veracity of Tower's investigator's affidavit, and contained no evidence that at the time of Caruth's fall, Brown actually resided at the insured location where Caruth was a tenant in one of the three units, was

insufficient to raise issues of material fact or to warrant further discovery (*see Worldcom, Inc. v Dialing Loving Care*, 269 AD2d 159 [1st Dept 2000]).

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

ENTERED: JULY 28, 2015

CLERK

Corrected Order - July 28, 2015

Sweeny, J.P., Renwick, Andrias, Moskowitz, Gische, JJ.

15140 Garrison Special Opportunities Fund LP, et al., Plaintiffs-Appellants, Index **603081/08**

-against-

Fidelity National Card Services, Inc., Defendant-Respondent.

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Bracewell & Giuliani LLP, New York (Michael C. Hefter of counsel), for appellants.

Venable LLP, New York (Edward P. Boyle of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 22, 2013, which denied plaintiffs' motion for partial summary judgment, and granted defendant's cross motion for partial summary judgment dismissing plaintiffs' conversion claim, unanimously affirmed, with costs.

Defendant Fidelity National Card Services, Inc. (Fidelity), provides banking and payment processing services for credit card companies. In 2004, defendant and nonparty Credit Management Group, LLC (CMG) entered into a series of related agreements to provide processing services for a Visa credit card program. By agreement dated December 17, 2004 (the processing agreement), defendant and CMG agreed, among other things, that defendant

would receive and process payments from the program cardholders in exchange for monthly fees. Before remitting the balance to CMG, defendant had the right to deduct from the cardholder payments any fees that CMG owed defendant. The processing agreement was governed by Florida law.

In 2007, defendant and CMG entered into an Electronic Bill Payment/Bill Presentment Agreement (the presentment agreement), also governed by Florida Law. The presentment agreement contained language requiring that fees be settled each banking day; this language is nearly identical to the language in the processing agreement. Also in 2007, defendant and CMG entered into a Master Services Agreement, effective December 17, 2007, under which Fidelity would perform additional functions with respect to the credit card accounts, in exchange for additional fees (the services agreement).

In February 2008, plaintiffs extended about $15 million in financing to CMG's subsidiary, Credit Management Group-Two, LLC (CMG-Two) for its acquisition of the credit card program from CMG (the financing transaction). To effectuate the financing transaction, a credit agreement, dated February 8, 2008 (the 2008 credit agreement), was entered into among plaintiffs, as lender/agent; CMG-Two, as borrower; and CMG, as servicer. The

2008 credit agreement provided for the payment of servicing and other fees to defendant and contained a "waterfall" provision listing the priority for the monthly distribution of the net collections for the prior monthly period. Specifically, after paying monthly fees to Visa, CMG-Two was to distribute funds to CMG for the payment of "[c]ard [p]rocessing [f]ees, [s]ervicing [f]ees, and subservicing fees" before paying plaintiffs. The "Card Processing Fee" is defined in the 2008 credit agreement as the fee payable to defendant under the processing agreement.

CMG-Two agreed to pay defendant's servicing and processing fees even though defendant was not a party to the agreements. CMG-Two also granted plaintiffs a security interest in the program receivables. In May 2008, defendant orally agreed with CMG to defer the collection of its fees due under the services agreement and the processing agreement for 90 days. They thereafter, extended the deferral indefinitely.

By September, 2008, CMG owed defendant more than $1.5 million in fees under the processing agreement and more than $2.8 million under the services agreement. CMG had also failed to fund the account from which defendant was entitled to withdraw its fees. Defendant informed CMG that it was in breach of the agreements and thereafter defendant exercised its set-off and

recoupment rights under the agreements by withholding incoming cardholder payments, eventually totaling $828,723.88.

Plaintiffs sued and obtained a default judgment against CMG and CMG-Two for the full amount outstanding under the 2008 credit agreement, foreclosed on the collateral and, at a public sale on October 27, 2008, became the owner of the collateral, including the program receivables.

Plaintiffs then sued defendant for conversion based on plaintiffs' alleged right of possession of the funds contained in CMG's account and defendant's alleged improper removal of $828,723.88 from the account. Plaintiffs moved for partial summary judgment on their conversion claim, and defendant cross-moved for partial summary judgment to dismiss the same claim. The motion court denied plaintiffs' motion and granted defendant's motion, and we now affirm.

Florida law applies to the conversion claim because the payment processing agreements between defendant and non-party CMG contain Florida choice of law provisions, the funds at issue are located in Florida, and some of the cardholder payments at issue were held in a Florida lockbox account (*see K.T. v Dash*, 37 AD3d 107, 111 [1st Dept 2006]). Thus, Florida has the greater interest in this dispute.

Defendant had express set-off and recoupment rights under its agreements with CMG that permitted defendant to deduct its own fees from the cardholder payments it received on CMG's behalf before remitting the balance to CMG. The record indicates that defendant did not waive its rights to collect these processing fees; rather, it agreed with CMG to defer payment. Thus, under UCC § 9-404(a), codified in Florida Statutes § 679.4041, upon entering into the financing transaction under which plaintiff financed CMG's subsidiary's acquisition of the credit card program, plaintiffs' interest in the credit card receivables is subject to defendant's contractual set-off and recoupment rights.

UCC § 9-404(a), codified in Florida as Florida Statutes § 679.4041, provides:

> "Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:
>
> > "(1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and
> >
> > "(2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee."

Thus, defendant is "an account debtor" whose contractual set-off rights have priority, and plaintiffs' secured interests are subject to defendant's preexisting contractual rights. CMG's interest in the receivables was subject to defendant's contractual rights, and assignees, such as plaintiffs, cannot acquire property rights greater than those possessed by the assignors CMG and CMG-Two (*see Foster v Foster*, 703 So.2d 1107, 1109 [Fla. Dist. Ct. App. 1997]; *Prestress Erectors, Inc v James Talcott, Inc.*, 213 So.2d 296, 298 [Fla Dist Ct App 1968, *cert denied* 219 So2d 702 [1968]; *see also Matter of International Ribbon Mills [Arjan Ribbons]*, 36 NY2d 121, 126 [1975]).

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

ENTERED: JULY 28, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15399 David Amacio, Claim No. 98546
Claimant-Appellant,

-against-

The State of New York,
Defendant,

PMA Management Corp.,
Nonparty Respondent.

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Thomas Torto, New York (Jason Levine of counsel), for appellant.

Bond Schoeneck & King PLLC, Syracuse (J.P. Wright of counsel), for respondent.

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Order of the Court of Claims of the State of New York (David A. Weinstein, J.), entered April 2, 2014, which denied claimant David Amacio' s motion for an order approving the settlement of a claim nunc pro tunc under Workers' Compensation Law § 29(5), unanimously reversed, on the law and the facts, without costs, and the petition granted.

In 1998, claimant sustained serious back injuries during the course of his employment, eventually requiring spinal fusion surgery. The work-related accident occurred on property owned by the State of New York. In March 1999, claimant began receiving worker's compensation benefits from his employer's insurance carrier, Reliance Insurance, Inc. (Reliance). Claimant also

commenced a third-party tort action against the State of New York.

On June 19, 2000, the tort action was settled for $800,000. During their discussion of the settlement with the court, counsel for both parties revealed that they agreed that the settlement included a waiver of a lien for accrued workers' compensation benefits that totaled $71,000, and that claimant would continue to receive worker's compensation benefits for his work-related disability. However, the insurance carrier, Reliance, which was not present at the settlement conference, had not been informed of the settlement.

Upon learning of the settlement in or about August 2000, Reliance informed the Worker's Compensation Law Judge (WCLJ) that nobody had procured its consent to the settlement of the third-party tort action. By a decision dated October 12, 2000, the WCLJ directed Reliance to continue the worker's compensation benefits, upon a finding that claimant was permanently partially disabled as a result of the work-related accident. Thereafter, Reliance continued making payments without objection including after the workers' compensation hearings in February 2002, July 2002, October 2005, and May 2006. Reliance eventually went bankrupt, and claimant continued receiving benefits through a

third-party administrator on behalf of New York State's Liquidation Bureau.

In April 2008, after nearly eight years of ongoing workers' compensation benefits, the Liquidation Bureau sought to offset the workers' compensation benefits against claimant's net proceeds from the settlement of the third-party tort action with the State. In October 2008, the WCLJ issued a decision finding that the insurance carrier waived its right to an offset of claimant's third-party recovery against the continuing workers' compensation award. In the same month, however, the Workers' Compensation Board Panel (Board Panel) reversed the WCLJ's waiver determination. The Board also suspended claimant's benefits. In March 2011, the Appellate Division, Third Department affirmed the Board Panel's determination (*Matter of Amacio v Tully Constr.*, 82 AD3d 1371 [3rd Dept. 2011]).

On January 25, 2012, about 10 months after the Third Department's decision, claimant submitted a petition in Kings County Supreme Court, seeking an order approving nunc pro tunc the settlement of the third-party tort action. The application was denied on procedural grounds, having being filed in the incorrect court. In October, 2013, claimant moved before the Court of Claims to approve nunc pro tunc the settlement of the

third-party tort action. The Court of Claims denied the application solely on the ground that claimant failed to provide a reasonable excuse for the delay in submitting the application. Claimant appealed.

We now reverse. The Court of Claims erroneously denied claimant's request for the application for a nunc pro tunc order. "'A judicial order may be obtained nunc pro tunc approving a previously agreed-upon settlement, even in cases where the approval is sought more than three months after the date of the settlement, provided that the petitioner can establish that (1) the amount of the settlement is reasonable, (2) the delay in applying for a judicial order of approval was not caused by the petitioner's fault or neglect, and (3) the carrier was not prejudiced by the delay'" (*Medina v Phillips*, 88 AD3d 524 [1st Dept 2011] quoting *Matter of Stiffen v CNA Ins. Cos.*, 282 AD2d 991, 992 [2001], *lv denied* 97 NY2d 612 [2002]; *see also Matter of Cosgrove v County of Ulster*, 51 AD3d 1326 [3rd Dept 2008]).

In our view, claimant satisfied all three requirements. The record does not show that the delay in obtaining approval was attributable solely to the fault or neglect of claimant; indeed, the record supports the conclusion that the carrier "unwittingly lulled [claimant] into believing that it was willing to waive

[claimant's] failure to obtain timely consent or court approval of the settlement" (*Stiffen*, 282 AD2d at 993). In fact, the carrier made payments to claimant for eight years without objection, after it was made aware of the facts and circumstances surrounding the settlement and claimant's medical condition.

Moreover, respondent, the Liquidation Bureau, suffered no demonstrable prejudice as a result of any delay attributable to claimant. Insofar as claimant delayed in seeking judicial approval after the Third Department's decision, compensation payments were suspended by the Board Panel, and the Liquidation Bureau still would be entitled to offset any future compensation by the amount of claimant's net recovery (*Neblett v Davis,* 260 AD2d 559 [2d Dept 1999]).

Finally, we find that the amount of the settlement is fair and reasonable in light of claimant's injuries. Contrary to respondent's contention, the documentary evidence submitted in support of the application permits a determination that the $800,000 settlement was reasonable. Specifically, the medical records and the Workers' Compensation Board's decisions show that claimant was standing on a divider protector next to a water hose pouring cement when a motor vehicle struck the hose running under his legs and pulled him up, causing him to land four or five feet

down on his back on hard concrete, resulting in the need for spinal fusion surgery and permanent and partial disability. Jury awards in cases with similar injuries show that the $800,000 settlement was not unreasonable (*see e.g. Lewis v Port Auth. of N.Y. and N.J.*, 8 AD3d 205 [1st Dept 2004] [$500,000 for past pain and suffering and $1,000,000 for future pain and suffering was reasonable, where plaintiff underwent fusion surgery, experienced and continues to experience pain, and has suffered lifestyle limitations*); Diaz v West 197th St. Realty Corp.*, 290 AD2d 310, 312 [1st Dept 2002] [$900,000 for past pain and suffering and $450,000 for future pain and suffering reasonable for a herniated disc, fracture, and spinal fusion surgery] *lv denied* 98 NY2d 603 [2002]).

Under the circumstances, we conclude that the Court of Claims abused its discretion in denying the application (*see*

Medina v Phillips, 88 AD3d at 525-526; Matter of Stiffen v CNA Ins. Cos., 282 AD2d at 993). The Liquidation Bureau's remaining contentions have been considered and found to be unavailing.

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

ENTERED: JULY 28, 2015

CLERK

Tom, J.P., Friedman, Renwick, Moskowitz, DeGrasse, JJ.

14872 Seung Won Lee, et al., Index 154157/14
Plaintiffs-Respondents,

-against-

Woori Bank, etc.,
Defendant-Appellant.

_____

Sheppard, Mullin, Richter & Hampton LLP, New York (Jonathan Stoler of counsel), for appellant.

Kim & Bae, P.C., New York (Alan L. Poliner of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 4, 2014, affirmed, without costs.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Dianne T. Renwick
Karla Moskowitz
Leland G. DeGrasse, JJ.

14872
Index 154157/14

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Seung Won Lee, et al.,
Plaintiffs-Respondents,

-against-

Woori Bank, etc.,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, New York County (Cynthia S. Kern, J.), entered September 4, 2014, which, to the extent appealed from, denied its motion to dismiss plaintiffs' negligence and sexual harassment claims.

Sheppard, Mullin, Richter & Hampton LLP, New York (Jonathan Stoler and Sean J. Kirby of counsel), for appellant.

Kim & Bae, P.C., New York (Alan L. Poliner and Peter Melamed of counsel), for respondents.

TOM, J.P.

This Court is asked to decide the extent to which the commencement of an action under New York's whistleblower statute (Labor Law § 740) bars the maintenance of other claims to redress the wrongful conduct that prompted the report of abuse resulting in retaliatory action by the employer. We conclude that the purpose of the statute and the relief it affords make it clear that claims predicated on the statute are distinct from claims predicated upon the underlying tortious conduct identified by plaintiffs, and that their causes of action for sexual harassment and negligence may go forward.

Plaintiff Min Chul Shin began his employment with defendant Woori Bank, New York Agency, as a member of the accounting staff at its New York City office in May 2011. Plaintiff Seung Won Lee commenced his employment as a staff member in the Wire Transfer Department in the same office in April 2012. Woori, a Korean bank, rotates senior executives and managers from its home office to the New York office for three-year periods and transferred senior manager Shin Hyng Yoo to New York in January 2012. The complaint alleges that Yoo and four other senior transferees consistently made sexual comments to the New York staff and that Yoo, in particular, made unwelcome sexual advances and comments to both female and male staff members, including Shin, whom Yoo

slapped on his buttocks and tried to kiss.

When senior management failed to take action to resolve the situation, Lee anonymously reported the misconduct to senior management in the Korea office using an unassigned Woori Bank email account. The bank dispatched three people from its Korea office to investigate, but it is alleged that they sought merely to learn who had sent the email message, not to conduct a thorough investigation or address any sexual harassment. However, shortly after their visit, Woori Bank considered closing its New York office, ostensibly due to the reported misconduct. Lee was then asked by local managers to again email the Korea office, using the same unassigned account, to request that the New York office remain open so that its staff members would not lose their employment. As a result, Yoo was recalled to Woori Bank's Korea office in April 2013, and staff in Korea learned what was known by staff in New York – that the emails had been authored by Lee. Plaintiffs were then ignored and ostracized, and did not receive their normal work assignments.

The bank is alleged to have begun retaliating against plaintiffs by transferring Shin, shortly after the sexual harassment issues became known in Korea in March 2013, to a department where, he had specifically stated before he was hired, he did not want to work. It is alleged that he was

constructively fired the following month for refusing the transfer.

As to Lee, in February 2014, he was transferred to the Reimbursement Department as an input data clerk, a position well beneath the one for which he was hired. On approximately April 7, 2014, his employment was terminated. Lee was instructed to sign a release agreement absolving the Bank of any liability but refused to comply.

The complaint alleges retaliation pursuant to Labor Law § 740 and the New York City Human Rights Law (Administrative Code of City of NY §§ 8-101 *et seq.*); battery as to Shin only; negligence in hiring, training and discharging employees; and sexual harassment and a sexually hostile work environment under the State Human Rights Law (Executive Law §§ 290 *et seq.*) and the City Human Rights Law (Administrative Code §§ 8-101 *et seq.*). With the exception of Shin's battery claim, the causes of action each seek $1 million, plus punitive damages.

In response to the filing of the complaint, Woori Bank brought the subject motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7). The bank argued, in relevant part, that plaintiffs waived their sexual harassment and negligence claims upon filing the claim under Labor Law § 740, which, the bank asserted, bars all claims arising out of

the same acts as those underlying the § 740 claim or that relate to the retaliatory actions on which the § 740 claim is based (citing Labor Law § 740 [7]).

In opposition, plaintiffs argued that the waiver provision of Labor Law § 740 should be narrowly construed. They noted that the sexual harassment and the work environment that it created preceded any retaliatory measures. Thus, these claims cannot possibly arise from the wrongful termination and do not bar plaintiffs' other claims.

As pertinent to this appeal, the motion court denied dismissal of the negligence and sexual harassment claims, finding that they are not deemed waived by Labor Law § 740 (7). Rather, the court held that they are "separate and independent from plaintiffs' retaliation claim, and the conduct underlying such claims does not arise out of defendant's alleged retaliatory personnel action." The court dismissed the Labor Law § 740 claim alleging retaliation because it fails to allege the requisite effect on the health and safety of the public at large. The court also dismissed the retaliation claim under the City Human Rights Law as waived by plaintiffs' pursuit of the state law remedy (Labor Law § 740 [7]). While finding that Shin's battery claim was not similarly waived, the court dismissed it as time-barred. These rulings are not contested on appeal.

Woori Bank contends that this Court should adopt a transactional approach to deem the sexual harassment and negligence claims waived because they "arise out of the same acts" as those giving rise to the Labor Law § 740 retaliation claim and "relate to" the allegedly retaliatory terminations (citing *Owitz v Beth Israel Med. Ctr.*, 1 Misc 3d 912 [A], ***3 [Sup Ct, NY County 2004]). Plaintiffs counter that Woori's proposal would impose a standard barring claims arising out of the same acts, together with those related to, though not necessarily arising out of, those same acts, an interpretation they assert to be far too encompassing. Further, they argue that the mere incorporation of allegations from one cause of action in the complaint to another does not warrant the conclusion that the respective claims arise out of the same acts.

In dispute is the scope of Labor Law § 740 (7), which provides:

> "Existing rights. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law."

This provision makes clear that the terminated employee is neither compelled to bring an action under the statute nor limited to the relief it affords but may pursue any other available remedy. However, if the employee chooses to institute an action pursuant to the statute, any alternative means of redress is thereby waived.

Central to the assessment of the scope of this waiver is the purpose of the statute, both with respect to the abuse it is intended to remedy and the relief it provides. It prohibits "retaliatory personnel action" against an employee who undertakes to disclose conduct in violation of any law or regulation, who furnishes information to an investigatory body in regard to such activity or who refuses to participate in such activity (Labor Law § 740 [2]). Notably, statutory relief is confined to wrongful termination; no redress is provided to the victims of the underlying misconduct. The statute specifically addresses the termination of an employee who witnesses and reports misconduct. It is not so broad as to encompass the circumstances at bar, in which plaintiffs were not only terminated for revealing abuse by senior managers but were also targeted and victimized by that abuse. This distinction has been recognized elsewhere (*Bordan v North Shore Univ. Hosp.*, 275 AD2d 335 [2d Dept 2000] [finding a claim of tortious interference with the

plaintiff's employment contract "separate and independent from" the barred claim that his termination breached the employment contract]; *see also Knighton v Municipal Credit Union*, 71 AD3d 604, 605 [1st Dept 2010]; *Kraus v Brandstetter*, 185 AD2d 302, 303 [2d Dept 1992]). It has been observed that the purpose of the waiver is to prevent duplicative recovery (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 89 [2008]), a policy that is not offended when redress is sought for injury under a claim that is distinct from a statutory cause of action predicated on wrongful termination (*see Collette v St. Luke's Roosevelt Hosp.*, 132 F Supp 2d 256, 267-268 [SD NY 2001]).

Here, the claims for sexual harassment and negligence in the training and supervision of the managers who engaged in such misconduct by Woori Bank are "legitimately independent claims" (*id.* at 274) from those that are deemed to be waived because they "duplicate or overlap the statutory remedies for retaliation on account of whistleblowing activity alone" (*id.*). Plaintiffs' sexual harassment claim is based on a senior executive's alleged physical and verbal sexual harassment of subordinate staff, the other managers' alleged encouragement of that conduct, and the creation of a hostile work environment. Meanwhile, their negligence claim alleges that Woori Bank negligently hired and trained defendant senior executive Yoo and continued to retain

him, even after learning of his alleged sexual harassment of subordinate employees. These claims concern injury sustained as a result of the reported misconduct, not simply the statutorily protected loss of employment as a consequence of complaining to management about such misconduct. We further agree with plaintiffs that the mere incorporation by reference of various allegations in the complaint alleging retaliation in the sexual harassment and negligence causes of action does not warrant a contrary conclusion.

Accordingly, the order of the Supreme Court, New York County (Cynthia S. Kern, J.), entered September 4, 2014, which, to the extent appealed from, denied defendant's motion to dismiss plaintiffs' negligence and sexual harassment claims, should be affirmed, without costs.

All concur.

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

ENTERED: JULY 28, 2015

CLERK