SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JANUARY 16, 2014**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Saxe, Moskowitz, Manzanet-Daniels, JJ.

10075 Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., etc., Plaintiff-Appellant, Index 651437/12

-against-

Francisco Javier Herrera Navarro, Defendant-Respondent,

The Estate of Eduardo Guzman Solis, Defendant.

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Haynes and Boone LLP, New York (Jonathan D. Pressment of counsel), for appellant.

Curtis, Mallet-Prevost, Colt & Mosle LLP, New York (T. Barry Kingham of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 12, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment in lieu of a complaint, reversed, on the law, without costs, and the motion for summary judgment granted. The Clerk is directed to enter judgment accordingly.

Nonparty Agra Services of Canada, Inc. (Agra Canada), a

Canadian corporation, was in the business of trading agricultural commodities between Mexico and Canada. The company was the sole shareholder of nonparty Agra USA, a Delaware corporation. Defendant Francisco Javier Herrera Navarro (Herrera) was a director of both Agra Canada and Agra USA but was largely uninvolved in either company's business operations. Eduardo Guzman Solis, a former defendant in this action, operated both companies.

In September 2004, Agra Canada and plaintiff Cooperatieve Centrale Raiffeisen Boerenleenbank, B.A., Rabobank International, New York Branch (Rabobank) entered into a Receivables Purchase Agreement (RPA). Under that agreement, Rabobank was to buy certain receivables belonging to Agra Canada in exchange for regularly scheduled payments to Rabobank. Guzman was responsible for managing Agra Canada's and Agra USA's relationship with Rabobank under the RPA.

In September 2005, in connection with the RPA, both Herrera and Guzman executed personal guaranties in Rabobank's favor. In section 1(a) of the guaranty, Herrera unconditionally guaranteed the amounts due on the receivables that Agra Canada sold to Rabobank, and in section 1(b), he unconditionally guaranteed the obligations of Agra USA. The definition of "obligations"

comprised "all obligations and liabilities of [Agra USA] to [Rabobank] now or hereafter existing . . . whether for principal, interest, fees, expenses or otherwise." Herrera's guaranty also contained a paragraph stating that his agreement to pay the obligations was "absolute and unconditional irrespective of any lack of validity or enforceability of such agreement [or] any other circumstance which might otherwise constitute a defense available to, or a discharge of, [Agra Canada] or a guarantor." Agra USA also entered into a guaranty in Rabobank's favor; as had Herrera, Agra USA unconditionally guaranteed Agra Canada's payment obligations arising under article 9.02(a)(iii) of the RPA.

Guzman died in December 2011.[1] Soon afterward, Rabobank told Herrera that Agra Canada had failed to remit its regularly scheduled quarterly payment under the RPA. When Herrera retained an independent accounting firm to investigate, he discovered that Guzman had been running a Ponzi scheme and that the receivables were, in fact, nonexistent. By then, Agra Canada owed Rabobank approximately $42 million under the RPA.

Rabobank sought to enforce Herrera's and Guzman's guaranties

[1] Guzman's estate was eventually added as a codefendant.

of Agra Canada's obligations. To that end, in January and February 2012, Rabobank obtained control over Agra Canada, placed it into receivership in Canada, and arranged the appointment of Deloitte & Touche Inc. as receiver and trustee.

On March 2, 2012, Rabobank commenced a federal action against Agra Canada, Agra USA, Herrera, and Guzman's estate in the United States District Court for the Southern District of New York, seeking to recover the receivables allegedly due under the guaranties. Agra USA did not respond to the complaint. Accordingly, on April 3, 2012, Rabobank filed a request under Fed. R. Civ. P. 55(a) for entry of a default against Agra USA, and the Clerk issued a certificate of default.

On April 11, 2012, Agra Canada, as sole shareholder of Agra USA, voted to remove all officers and directors of Agra USA, including Herrera. Agra Canada then elected an employee of Deloitte to serve as sole officer and director of Agra USA.

On April 16, 2012, Rabobank filed an order to show cause in federal court requesting the entry of a default judgment against Agra USA (*see* Fed. R. Civ. P. 55[b][2]). Three days later, on April 19, 2012, Rabobank voluntarily discontinued the federal action as against Herrera and Guzman's estate, and filed a declaration in support of its order to show cause.

By letter dated April 25, 2012, Hayes and Boone, LLP, counsel for both Rabobank and Deloitte, instructed a lawyer for Herrera to secure and return to Deloitte any assets belonging to Agra USA. Counsel also noted in that letter that Deloitte's representative held "*exclusive* corporate authority" over Agra USA. Finally, on April 30, 2012, the federal court entered a default judgment against Agra USA in the amount of $41,991,980. Rabobank commenced this State action on the same day, seeking to recover the amount of the default judgment from Herrera. In its motion for summary judgment in lieu of a complaint, Rabobank asserts that Herrera is liable under sections 1(a) and (b) of the guaranty.

Herrera argues that plaintiff Rabobank, which controlled Agra Canada, also controlled Agra USA. What is more, Herrera asserts, by the time the federal court granted entry of the default judgment, he was only nominally a director of Agra USA. As a result of these circumstances, Herrera concludes, Rabobank engineered the default judgment by collusion, and the judgment therefore does not actually constitute an "obligation" of Agra USA under section 1(b) of the guaranty. Thus, Herrera concludes, because no obligation came into existence, his guaranty was never triggered at all.

This argument has no merit. As noted above, Herrera's guaranty stated that it was "absolute and unconditional" despite any circumstances that might constitute a defense. Because Herrera's guaranty clearly provides that he waives all defenses, his position depends on his framing the collusion argument as something other than a "defense." Thus, Herrera's argument is merely a semantic one, meant to force the issue into a framework more favorable to his position by, in essence, reframing a defense as the failure of a condition precedent.

However, no valid basis for this argument exists. On the contrary, no matter how labeled, Herrera's assertion of collusion is, in fact, a defense to his guaranty inasmuch as he offers it in an effort to avoid performance under the guaranty (*see e.g. Preferred Capital, Inc. v PBK, Inc.*, 309 AD2d 1168, 1168-1169 [4th Dept 2003] [noting that defendants opposed a summary judgment motion on the basis of "an unpleaded affirmative defense of fraud and collusion"]; 23 NY Jur 2d, Contribution, Indemnity, and Subrogation § 155 [in indemnity context, noting that an indemnitor "may always set up the defense that the judgment in the prior action against the indemnitee was procured by collusion or fraud"]).

Herrera cannot avoid his agreement simply by declaring that

a defense is not really a defense because it actually calls into question the validity of the obligation. This exception would swallow the rule whole, since many defenses – including, for example, fraudulent inducement – could be said to call an entire obligation into question. Indeed, courts have rejected similar arguments (*see e.g. Citibank v Plapinger*, 66 NY2d 90, 94-95 [1985] [guarantor foreclosed as a matter of law from raising any defense, including one that he was fraudulently induced to execute the guaranty]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008] [waiver language upheld to preclude discharge of guaranty even though guarantor alleged that obligee had wrongly interfered with refinancing and sale efforts and thus had deliberately triggered foreclosure]).

Even if the issue of control were relevant, the record presents no material issues of fact on that issue. Although the record shows that Deloitte began taking control of Agra USA as early as February 2012, the record also shows that Herrera was still a director of Agra USA until April 11, 2012, when Agra Canada voted to remove him. Indeed, neither party disputes that on March 7, 2012, when Rabobank served the complaint on Agra USA in the federal action, Herrera was still a director of that company. Nonetheless, he did not cause an answer or other

response to the complaint to be interposed on behalf of that company, and he did not attempt to do so despite the fact that he was still a director of the company. Nor does Herrera allege in his papers that anyone prevented him from doing so (*cf. Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank*, 135 AD2d 102, 107 [3d Dept 1988] ["'(a) promisee who prevents the promisor from being able to perform the promise cannot maintain a suit for nonperformance; he discharges the promisor from duty'"; quoting 6 Corbin, Contracts § 1265 at 52]). Likewise, Herrera was still a director of Agra USA on April 4, 2012, when Rabobank filed a request in the federal action for entry of default judgment against Agra USA.

The dissent places much reliance on *Canterbury*. That reliance, however, is misplaced. In *Canterbury*, the defendant bank provided financing to Canterbury Realty and Equipment Corporation, one of the corporate plaintiffs (*Canterbury*, 135 AD2d at 103). Among the financing instruments was a revolving credit agreement giving Canterbury a credit line, secured by its accounts receivable, against which it could draw checks to pay operating expenses (*id.*). Two of Canterbury's officers signed instruments making them guarantors of Canterbury's obligation; the guaranty agreement allowed the bank to accelerate the total

amount due under the loan and to demand payment from the guarantors upon the occurrence of certain events – for example, if Canterbury suspended its business (*id.* at 104).

Canterbury eventually began to exceed the credit line, although evidence suggested it was forced to do so because of the bank's actions. As a result, the bank decided that it would no longer honor Canterbury's checks, and would retain incoming funds from Canterbury's accounts receivable. The plaintiffs commenced an action against the bank, asserting that the bank's wrongful conduct had forced Canterbury to lose its accounts receivable and therefore to cease its business operations. The bank then accelerated the debt and demanded payment in full (*id.* at 105). Under those circumstances, the Third Department found that the record presented an issue of fact as to whether the bank "brought about the very condition precedent . . . upon which it relied to accelerate the loan against the guarantors" (*id.* at 107).

The issue in this case, however, is different from the one presented to the *Canterbury* Court. First of all, the Third Department's holding, in which it characterizes the cessation of Canterbury's business as a "condition precedent," spells out precisely the issue that the dissent fails to analyze – namely, whether the purported collusion should be characterized as a

defense or as the failure of a condition precedent. As noted above, Herrera frames the issue as the failure of a condition precedent only because he cannot prevail otherwise. Collusion is, and remains, a defense, and Herrera unconditionally waived all defenses when he signed the guarantor agreement. The dissent skirts this issue, instead simply accepting Herrera's characterization.

At any rate, the dissent does not acknowledge that the collusion, even if it existed, goes to the question of how and when the default judgment was entered, not to the question of the underlying indebtedness. Herrera has never alleged that any party colluded with Guzman to engage in a fraudulent scheme leading to a $42 million indebtedness. Rather, Herrera alleges that Rabobank colluded with Agra Canada to force entry of the default judgment. Therefore, the situation here is fundamentally different from the one presented in *Canterbury*, where the evidence suggested that the defendant bank forced the events leading up to the acceleration and the guarantors' indebtedness.

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

MANZANET-DANIELS, J. (dissenting)

Defendant agreed to guarantee all obligations of Agra USA. However, the "obligation" plaintiff seeks to enforce – a federal court default judgment of more than $41 million that plaintiff arguably obtained by collusion – would not, if the collusion is ultimately proven, constitute a valid obligation of Agra USA under defendant's guarantee. An issue of fact exists as to whether plaintiff unfairly brought about the very condition upon which it relies to trigger defendant's guarantee. The waiver of defenses contained in the guarantee does not apply under the circumstances.

After discovering that Eduardo Guzman Solis had been engaged in a Ponzi scheme, plaintiff took steps to assume control of both Agra USA and Agra Canada. On or about January 18, 2012, plaintiff filed an application for a bankruptcy order as against Agra Canada in Alberta, Canada. Plaintiff, as the senior secured creditor of Agra Canada, nominated the accounting firm of Deloitte & Touche to be the receiver and trustee of Agra Canada's bankrupt estate. By order dated January 20, 2012, Deloitte & Touche was appointed interim receiver with the powers, inter alia, to take possession and control of Agra Canada and all proceeds, receipts and disbursements arising out of its property;

to receive and collect all monies owed or thereafter owing to Agra Canada; and to take any reasonable steps incidental to the exercise of its powers. Plaintiff funded Deloitte's efforts through Haynes & Boone, LLP, their shared attorney and counsel for plaintiff on the appeal.

On January 18, 2012, plaintiff commenced proceedings in Texas state court seeking a garnishment order against certain property of Agra Canada and its wholly-owned subsidiary, Agra USA, resulting in the issuance of writs of garnishment on January 18, 2012. Deloitte allowed plaintiff to assume control over the recovery of assets of Agra, USA, the wholly-owned subsidiary of Agra Canada.[1]

On March 2, 2012, as the majority notes, plaintiff commenced an action against Agra USA, Herrera, and Guzman's estate in the United States District Court for the Southern District of New York.

On April 11, 2012, plaintiff caused Agra Canada to formally remove defendant Herrera as the director and officer of Agra USA and to replace him with the Deloitte receiver. As a result, Mr.

[1]Plaintiff voluntarily discontinued the Texas action on June 6, 2012, when defendant guarantor cross-moved to dismiss the within action on the ground of a prior action pending.

Bruce Beggs held exclusive corporate authority over Agra USA.

By order to show cause dated April 16th, plaintiff sought entry of a default judgment against Agra USA in the amount of $41,991,980 plus interest.[2] Agra USA was directed to appear on April 24, 2012 to show cause as to why a default judgment ought not to be entered. Agra USA did not appear on April 24th, and on April 30th, the federal court entered a default judgment against Agra USA.

Plaintiff commenced this action by motion for summary judgment in lieu of complaint pursuant to CPLR 3213. The court denied the motion, noting, inter alia, that a showing of collusion would invalidate the very existence of any "obligation" owing under the guarantee.

I am compelled to agree. If the judgment was obtained as a result of collusion, it cannot constitute a valid "obligation" of Agra USA covered by the terms of the guarantee (*see Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank*, 135 AD2d 102, 107

[2]Because plaintiff sought entry of a default judgment as to only one of the named defendants, it could not obtain a default judgment from the clerk but was required to file a motion. Insofar as the federal court lacked subject matter jurisdiction over an action by a Dutch plaintiff against two Mexican citizens (Guzman and Herrera), plaintiff, on April 19, 2012, filed a notice of voluntary dismissal of the complaint as against Guzman and Herrera.

[3d Dept 1988]).

A lawsuit is collusive where it is "not in any real sense adversary" (*United States v Johnson*, 319 US 302, 305 [1943] [case brought at defendant's behest and expense dismissed as collusive]). Defendant Herrera asserts that plaintiff exercised de facto and de jure control over Agra USA and therefore Agra USA was in no position to contest the entry of the default judgment. As discussed above, in the wake of Guzman's fraud, in January 2012, plaintiff obtained control over Agra Canada, the parent corporation of Agra USA, and placed it into receivership. The receiver and trustee of Agra Canada, Deloitte & Touche, was represented by plaintiff's own lawyers, Haynes and Boone. Through Deloitte, plaintiff asserted de facto control over Agra USA as early as February 2012, when it took steps to secure its assets.

Plaintiff argues that Herrera, who remained a director until April 11, 2012, could have opposed entry of the default judgment on behalf of Agra USA, and thus, cannot assert that the federal judgment was obtained by collusion.

This argument misses the mark. To begin with, although plaintiff requested that the clerk "enter" a default on April 3, 2012 (which, incidentally, was little over a week before

Herrera's removal), it is undisputed that no such judgment was entered on that date and that plaintiff was directed to move, via formal motion, for entry of a default judgment against Agra USA, which it did by order to show cause dated April 16, 2012, five days after Herrera's removal. The actual judgment of default was not entered until April 30, 2012.

Plaintiff's argument, moreover, ignores the evidence of plaintiff's de facto control of Agra USA prior to Herrera's removal. Due to the accelerated nature of this proceeding under CPLR 3213, there has been no discovery. In all likelihood, discovery will reveal additional evidence as to the extent of the authority exercised by plaintiff over Agra USA.

Furthermore, once Beggs was installed by Deloitte on April 11th – at which time even the majority agrees Herrera was without any power to act on behalf of Agra USA – Agra USA lost the ability to make a motion to set aside the default judgment.

Plaintiff is entitled to recover on the guarantee only if it meets its prima facie burden of establishing that the guarantee by its terms is applicable. The waiver of defenses provision cannot confer on plaintiff the absolute right to recover what it has unilaterally deemed to be an "obligation," if in fact no such obligation exists.

As defendant Herrera notes, he does not raise a defense to the enforcement of the guarantee. He does not assert that the guarantee was procured by fraud or otherwise challenge its terms; rather, he asks that the guarantee be enforced in accordance with its terms, i.e., that he agreed to guarantee only "obligations" of Agra USA. The majority's reliance on *Citibank v Plapinger* (66 NY2d 90 [1985]), which stands for the proposition that fraud in the inducement is not a defense to the enforcement of an unconditional guarantee, is thus misplaced.

This case, rather, is akin to *Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank* (135 AD2d 102 [3d Dept 1988]). In *Canterbury*, the liability of the guarantors was "intertwined with and predicated" upon whether the defendant bank had a right to accelerate the underlying indebtedness against the plaintiff, whose liability on a revolving loan the guarantors had absolutely and unconditionally agreed to guarantee (*id.* at 106). The Third Department reasoned that the unconditional guarantees did not "preclude each of the guarantors from holding the Bank to the terms of th[e] instrument itself regarding the triggering events" permitting the bank to accelerate the loan (*id.*). Because issues of fact existed as to whether the bank had "unfairly brought about the occurrence of the very condition precedent [i.e., the

plaintiff's suspension of business] upon which it relied to accelerate the loan against the guarantors," the appellate court held that the motion court had correctly denied the bank's motion for summary judgment on its counterclaims seeking to enforce the guarantees (*id.* at 107)

Similarly, in *Barclays Bank of N.Y. v Heady Elec. Co.* (174 AD2d 963 [3d Dept 1991]), a case involving defendants who executed a secured note and guarantees in respect of an underlying debt, the appellate court held that a trial was necessary because "th[e] proof sufficiently raised questions of fact concerning the reasonableness of plaintiff's declaration of default" in connection with the underlying loan transaction (*id.*; *see also Manufacturers & Traders Trust Co. v Sullivan*, 188 AD2d 1023 [4th Dept 1992] [reversal of judgment warranted due to the existence of factual issues as to "whether plaintiff interfered with or prevented the occurrence of conditions which would have terminated defendants' liability under the guaranties and whether, as a result, defendants are relieved of their obligations under those guarantees"]).[3]

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[3]Compare *Red Tulip, LLC v Nelva* (44 AD3d 204 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]), upon which the majority relies, in which the record did not "support a finding that [plaintiff] wrongfully caused [defendant's] default or some other

The majority's attempts to distinguish *Canterbury* are entirely unavailing. *Canterbury* and its progeny stand for the proposition that a party seeking to enforce a guarantee cannot wrongfully cause a default or the occurrence of some other condition precedent that will have the effect of triggering the guarantee it is seeking to enforce. Plaintiff is alleged to have engineered the entry of a default judgment in the federal action on the underlying receivables purchases agreement expressly for the purpose of triggering an "obligation" under section 1(b) of Herrera's guarantee, executed in connection with that very same agreement. This case is therefore not in any meaningful way distinguishable from *Canterbury*.

Herrera seeks only to "hold the bank to the terms" of the guarantee. He obligated himself unconditionally to pay only the "obligations" of Agra USA. As in *Canterbury*, plaintiff's alleged wrongful conduct in procuring the default could potentially "serve to discharge the guarantors' obligation." Plaintiff's argument that the waiver of defenses in the guarantee precludes

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condition precedent that led to acceleration of the debt" (*id*. at 211).

Herrera from raising questions as to the collusive nature of the federal default judgment, i.e., from raising questions regarding the very "obligation" plaintiff seeks to enforce, is without merit.

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

ENTERED: JANUARY 16, 2014

CLERK

Tom, J.P., Friedman, Freedman, Feinman, JJ.

10359 Cassandra Tompa, Index 104287/10
Plaintiff-Appellant,

-against-

767 Fifth Partners, LLC,
Defendant-Respondent.

[And A Third-Party Action]

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Rappaport, Glass, Levine & Zullo, LLP, New York (James L. Forde of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 22, 2012, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on the issue of liability, affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law in this action in which plaintiff alleges that she slipped and fell on a thin sheet of ice on the plaza in front of defendant's building. Defendant submitted evidence – including testimony from the building's security director and from the operations manager of third-party defendant Temco Service Industries, Inc., which provided cleaning and janitorial services

– showing that defendant neither created nor had notice of the icy condition of the plaza.

Additionally, there is no evidence that defendant had actual or constructive notice of the icy condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). The evidence submitted by defendant, including security logs, establishes that defendant's employees routinely inspected the area where plaintiff fell, had conducted an inspection one hour prior to her accident, and did not observe any ice. In opposition and in support of her cross motion, plaintiff failed to provide evidence showing that the ice was discernable.

On appeal, plaintiff does not dispute defendant's lack of actual notice of ice on the plaza, having conceded, at her examination before trial, that it was not visible. She testified that although conditions at about 9:30 A.M. were bright and clear, it "looked like a thin layer of ice that wasn't noticeable enough for me to see it before I fell." Thus, the record establishes that the hazardous condition was not "visible and apparent" so as to enable defendant's employees to discover it and take remedial measures (*Gordon*, 67 NY2d 836, 837; *see Harrison v New York City Tr. Auth.*, 94 AD3d 512 [1st Dept 2012]).

Plaintiff argues that the only possible source of the water

that froze on the plaza was a fountain situated in the area where she fell. She advances two theories: (1) that defendant created the icy condition by running its fountains in windy weather and notice need not be established or (2) that icing was a "recurrent condition" as a result of water being blown onto the plaza from the fountains so that defendant is properly chargeable with constructive notice of each subsequent recurrence of the condition. Plaintiff posits that the ice was the result of an "overspray condition" from the nearby fountain and submitted weather records reflecting an average wind speed of 13.5 miles an hour and wind gusts of up to 37 miles an hour during the course of the day on which the accident occurred (without indicating the specific time of the measured gusts). In addition, the weather records indicate that a trace of snow fell during each hourly interval between 4:00 A.M. and 8:00 A.M.

While there is a reflecting pool with a fountain located in the vicinity of the area where plaintiff fell, there is no evidence that the fountain was running. At her deposition, plaintiff stated, "I believe it was off," and recalled only that the fountain basins had some water in them. Thus, plaintiff has failed to demonstrate that defendant caused the icy condition.

As to plaintiff's alternative theory, nothing in the record

establishes that water from the fountains was routinely deposited on the plaza to support her claim that this was a recurring condition. Nor does she establish the particular weather necessary to create the alleged icy condition. As depicted in the record, the reflecting pools are recessed below the level of the plaza. Each fountain consists of an array of sixteen water outlets, situated in the center of the pool, which elevate water to a modest height of perhaps one foot. Plaintiff's opposing papers fail to describe the mechanism by which water would be propelled from the fountain onto the plaza's surface, even assuming that the fountain was running. Specifically, there is no proof of the wind speed required. Thus, her theory presents an intriguing problem in fluid dynamics (windage) well beyond the knowledge and experience of the average jurist, requiring expert testimony to support such a hypothesis (*see Carter v Metro N. Assoc.*, 255 AD2d 251 [1st Dept 1998]; *Ecco High Frequency Corp. v Amtorg Trading Corp.*, 81 NYS2d 610, 617). In sum, even assuming that "overspray" from the fountains was a recurring condition, as plaintiff contends, there is no evidence regarding the weather conditions that might cause this effect and, arguably, put defendant on notice that icing was likely to occur.

Finally, plaintiff's assertion that the fountain must have

been the source of the water on the plaza ignores the evidence contained in the weather records for the date – a trace of snow fell during each hour between 4:00 A.M. and 8:00 A.M. that morning. Plaintiff's claim is based on sheer surmise – that defendant's fountain was operating, that certain weather conditions can cause water to be blown onto the plaza, that conditions on the morning of her accident were sufficient to cause water to accumulate on the plaza, where it froze, and that defendant should have known that the weather conditions that morning would cause an icy condition requiring it to take preventive action (*Bernstein v City of New York*, 69 NY2d 1020, 1021-1022 [1987]).

Since defendant's purported knowledge of the hazardous condition is supported only by speculation, summary judgment is warranted (*see Acevedo v York Intl. Corp.*, 31 AD3d 255, 256 [1st Dept 2006], *lv denied* 8 NY3d 803 [2007]).

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

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

FEINMAN, J. (dissenting in part)

I respectfully dissent in part because defendant failed to establish a prima facie entitlement to summary judgment. Although I agree with the majority that the branch of plaintiff's cross motion which sought summary judgment was properly denied, I do so because the cross motion was untimely filed and should not have been considered (*see Brill v City of New York*, 2 NY3d 648 [2004]; *Kershaw v Hospital for Special Surgery*, ___ AD3d ___, 2013 NY Slip Op 8548 [1st Dept 2013]).

Plaintiff alleges that she was injured on Saturday, February 6, 2010, at about 9:30 a.m., when, after taking three or four steps on the plaza in front of defendant's building known as the GM building at 767 Fifth Avenue,[1] she slipped and fell on a thin sheet of ice about 10 feet from the plaza's south fountain. She then realized that the "area closest to the fountain," consisting of approximately four to six large granite squares, was one "continuous glaze of ice." There were no warning signs or protective barricades. She did not recall whether the fountain was running but thought it was not; she remembered that the fountain's pool was "full." The weather that morning was dry,

[1] The building currently houses a large Apple store where the GM showroom was formerly located.

cold and very windy.

Defendant's witness, Kevin Buell, the building manager's security director, and a witness from the third-party defendant cleaning and janitorial services company, Temco Service Industries, Inc., testified that there was 24-hour security, hourly checks of the building's perimeters, daily sweeping of the plaza and sidewalks, and at least one maintenance and cleaning employee assigned to the plaza area; the day staff "policed" the plaza to keep it clean and hazard-free. Buell testified that as to the two fountains, one on the north side of the plaza and the other at the south end, there were occasions when they were shut down due to extreme cold or high winds. Although Buell further testified that either he or one of the building engineers would make the decision to turn off the fountains, he was not asked the reasoning behind this decision.

Buell also testified that he had, on occasion, observed that the plaza near the fountains was wet solely because of the spray from the fountains, but was unable to say with certainty whether he had ever observed ice on the plaza resulting from the fountains' spray. The Temco witness stated that he was unaware that the waters in the fountains ever blew onto the plaza and formed ice, and that there was never a need to barricade the

fountain areas because of spraying water.

On the morning of February 6, Buell heard the predictions of high winds and the imminent arrival of a heavy snow storm. He checked in by telephone with building staff at 8:21 a.m. to give last minute reminders and instructions. The maintenance and cleaning staff was put on alert. Buell does not remember if he instructed that the fountains be turned off.

Notations from the building's security log for February 6, included that the plaza was "dry" at 2:30 a.m. and that perimeter checks - where a security guard walked the sidewalks surrounding the building – were conducted at 1:00 a.m., 5:00 a.m., and 8:35 a.m.. At 6:55 a.m., "it started snowing already." The 8:35 a.m. notation indicates that the Madison Avenue retail stores were also checked, as was an area "leading to [the] plaza"; everything was "locked & secure." There is no mention of the fountains or the area near the fountains prior to 9:30 a.m. A notation made at 9:52 a.m., shortly after plaintiff's accident, indicates that the wind had "picked up to 45 mph," and referred to "fountains water," with no further explanation.

The climatological data for New York, New York, as recorded in Central Park by the NOAA, National Climatic Data Center in February 2010, show that the highest average temperature on the

first 5 days in February ranged from 30 degrees (February 1) to 34 degrees (February 3). The temperature averaged 27 degrees on February 6, 6 degrees below normal. The winds averaged 13.7 miles an hour, but there were three-second gusts up to 37 miles per hour, and two-minute winds up to 29 miles per hour. No snow or ice was recorded on the ground, but there were traces of precipitation throughout the morning.

The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). If the moving party fails to make a prima facie showing, the court must deny the motion, "*regardless of the sufficiency of the opposing papers*" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], *rearg denied* 10 NY3d 885 [2008] [internal quotation marks and citation omitted]).

Negligence cases, by their nature, do not normally lend themselves to summary dismissal since the question of negligence, even where the parties agree as to the underlying facts, is a question for jury determination (*Villoch v Lindgren*, 269 AD2d 271, 272-273 [1st Dept 2000], citing *McCummings v New York City*

*Tr. Auth.*, 81 NY2d 923, 926 [1993], *cert denied* 510 US 991 [1993]). Defendant argues that plaintiff cannot establish that the ice on which plaintiff fell was formed from the fountain's water; additionally it argues there is nothing to show that it had sufficient notice of the icy condition in time to have remedied it before plaintiff fell.

Buell explicitly stated that he had seen water spray from the fountains wet the plaza in the warmer months, and had, at times, seen ice on the plaza in the winter, but he hedged in answering whether any of the ice had come from the fountains' water. Defendant offers no evidence of when the fountains were turned off prior to plaintiff's accident. Given the general level of detail recorded in the building's security log, it is curious that there is no notation concerning the fountains' status in the hours prior to plaintiff's accident, and no indication that the plaza itself was checked between 2:30 a.m. and the time of plaintiff's accident. Notably, her testimony that she slipped on a sheet of ice that had formed nearest the fountain is also evidence that *areas of the plaza further away from the fountain were dry*. There is sufficient circumstantial evidence to find that plaintiff fell on ice created from the fountain's spray. Defendant has not sufficiently established

that the ice on which plaintiff fell came from somewhere other than the fountain water; a jury should determine its source (*see San Marco v Village/Town of Mount Kisco*, 16 NY3d 111, 118 [2010], *rearg denied* 16 NY3d 796 [2010]). Moreover, plaintiff is not required to establish with absolute certainty where the water came from; she will ultimately be required "to show facts and conditions from which the negligence of defendant may be reasonably inferred" (*Bernstein v City of New York*, 69 NY2d 1020, 1022 [1987]).

While there is no evidence that defendant had knowledge of this particular ice patch in time to have remedied it before plaintiff's accident, defendant has not shown that it had no actual or constructive knowledge that when conditions were right, water from the fountains would blow onto the plaza and form ice, a hazardous condition (*see e.g. Roca v Gerardi*, 243 AD2d 616, 617 [2d Dept 1997] [the plaintiffs were not required to prove that the building owners had actual or constructive notice that ice had formed after shoveled snow melted and refroze; it was sufficient to show that the defendants had notice of the condition which caused the ice to form, and the time and opportunity to correct the dangerous condition]). Knowledge of a condition that causes ice to form is sufficient to establish at

least constructive notice (*id.*).

The facts here are somewhat analogous to those in *Signorelli v Great Atl. & Pac. Tea Co., Inc.* (70 AD3d 439, 439-440 [1st Dept 2010]), in which this Court reversed the motion court's summary dismissal of the complaint, finding a question of fact as to whether the defendant had constructive notice that when there is constant heavy rain, the vestibule floor becomes wet with the tracked-in rainwater, creating a hazardous condition. In *Loguidice v Fiorito* (254 AD2d 714, 714 [4th Dept 1998]), this Court held that there could be an inference that because the roof was designed so that water would run from it onto the overhang above the door and down to the sidewalk where it would freeze, the defendant had actual knowledge of a recurrent dangerous condition and "could be charged with constructive notice of each specific reoccurrence of the condition [citations omitted]"); *see also Schmidt v DiPerno* (25 AD3d 545, 546 [2d Dept 2006] [although the defendants established they neither created nor had actual or constructive notice of the driveway's icy condition, there was a question as to whether they had knowledge that water always exited the drainpipe and pooled in the driveway where it would freeze in winter, causing a dangerous condition]).

The facts as alleged here do not fall under *Gordon v Museum*

*of Natural History* (67 NY2d 836 [1986]) or *Harrison v New York City Tr. Auth.* (94 AD3d 512 [1st Dept 2012]), both of which hold that a general knowledge by the defendants that a litter condition could occur at the areas where the plaintiffs fell does not establish that the defendants had actual or constructive notice of the specific litter that caused the plaintiffs' accidents, which may have been there for only moments before it was stepped on (*Gordon*, 67 NY2d at 838; *Harrison*, 94 AD3d at 513). Their teaching is that because litter is transient and random in nature, and the presence and timing of any particular piece of litter is generally unpredictable, this alone will not establish constructive notice.

Here, the issue is ice, a hazardous condition which predictably forms when water is present and the temperature is below freezing. Even if plaintiff may not be able to establish that defendant had constructive knowledge and sufficient time to remedy or barricade the ice patch before she fell, defendant certainly has knowledge that on windy days, the fountains spray water onto the plaza, and also that water freezes in the cold. There is no need for an expert to explain to the jury how or why the wind sometimes blows water onto the plaza. "If as a matter of ordinary experience a particular act or omission might be

expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists. Circumstantial evidence or common knowledge may provide a basis from which the causal sequence may be inferred" (*Vitanza v Growth Realties,* 91 AD2d 917, 917 [1st Dept 1983] [internal quotation marks and citation omitted]).

There is sufficient evidence, including the climatological data, plaintiff's observation that she fell on a discrete-sized patch of ice near the fountain, and that defendant had knowledge that the fountains spray water onto the plaza on windy days, to require a jury to determine whether, on February 6, 2010, plaintiff slipped on ice caused by the fountain's spray, and that defendant knew or should have known that the icy condition would occur in below-freezing weather but failed to take protective measures (*see Roca v Gerardi*, 243 AD2d at 617). Defendant's motion for summary judgment should have been denied, without

consideration of the sufficiency of plaintiff's papers (*Smalls v AJI Indus., Inc.*, 10 NY3d at 735).

Accordingly, I would modify the order of the Supreme Court to deny defendant's motion for summary judgment.

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

ENTERED: JANUARY 16, 2014

CLERK

Friedman, J.P., Freedman, Richter, Feinman, Gische, JJ.

10555 Antoinette Harrison, Index 6509/06
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Sciretta & Venterina, LLP, Staten Island (Marilyn Venterina of counsel), for appellant.

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

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Amended judgment, Supreme Court, Bronx County (John A. Barone, J.), entered October 12, 2011, after a jury trial, awarding plaintiff $200,000 and $300,000, for past and future (25 years) pain and suffering, respectively, reversed, on the law, without costs, the amended judgment vacated, and the matter remanded for a new trial on the issue of liability.

Plaintiff Antoinette Harrison slipped and fell on a patch of ice on the yellow tactile warning strip at the edge of the Pelham Bay Park subway station platform in the Bronx, fracturing her left ankle. While we believe that there was sufficient evidence presented for the jury to consider whether defendant had constructive notice of the icy condition, we find that the instruction to the jury on this issue was in error.

A common carrier is required to exercise ordinary care in maintaining a subway platform (*see Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 248 [1st Dept 1984], *affd* 64 NY2d 670 [1984]). Thus, except where the defendant created the condition, a plaintiff must prove actual or constructive notice of the dangerous or defective condition and that the defendant had "a sufficient opportunity, within the exercise of reasonable care, to remedy the situation" after receiving such notice (*id.* at 250; *Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 219 [1st Dept 2007]). In this case, plaintiff was required to show on its prima facie case that the icy condition was dangerous, that such condition was visible and apparent, and had existed for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Over objection and despite defendant's request for the correct instruction, the trial court instructed the jury that it had to find that "defendant either knew about the dangerous conditions or circumstances and that would be actual notice or a reasonable person would conclude that such a condition existed, and that would be called constructive notice." This instruction does not make it clear that in order to find constructive notice,

the jury must conclude that the condition was visible and apparent, and that it existed for a sufficient length of time for defendant to have discovered it and taken curative action (*see* PJI 2:90; 2:11 A, *Lesser v Manhattan & Bronx Surface Tr. Operating Auth.*, 157 AD2d 352, 357 [1st Dept 1991]). While the court later instructed the jury that it also needed to find that defendant failed to use reasonable care "or had a reasonable time to remove the snow or ice but failed to do so," this element of the instruction is not related to the court's instructions on notice.

We agree with defendant that plaintiff did not present evidence of actual notice in this case. Plaintiff did, however, present evidence on the issue of constructive notice sufficient to warrant the jury's consideration of this issue. For that reason we remand the case to the Supreme Court for a new trial on liability.

The accident occurred on January 18, 2005 at approximately 7:45 a.m. Plaintiff testified that the icy condition was visible and apparent, and that she noticed it immediately after the accident. She stated that there was ice on the yellow dotted strip in front of the train door which caused her foot to slip. She described the icy condition as "irregular[ly] shape[d],"

"dirty" and "black," albeit "small." Plaintiff explained that immediately after she fell she was carried by the train conductor and a passenger to a nearby bench, about six to eight feet away, from which she readily observed the ice formation on the yellow dotted strip. She also generally described the concrete platform itself as having a slushy mixture of water, ice and snow. Although defendant points to testimony that when its employees later viewed the area of the accident there was no snow or ice on the platform, these divergent accounts of whether there was a visible and apparent dangerous condition are for a jury to decide. As to whether the icy condition existed long enough for defendant to have discovered it and taken curative action, there is sufficient evidence from which a jury could reasonably reach that conclusion. While the evidence on the issue of constructive notice cannot be speculative (*see Solazzo v New York City Tr. Auth.*, 6 NY3d 734 [2005]), it can be based upon circumstantial evidence. If the evidence permits a reasonable inference that the condition existed long enough for a defendant to have remedied it, then the issue of constructive notice should be presented to the jury (*see Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412 [1st Dept 2013]).

The subway platform was elevated, outdoors, and covered only

by a slanted concrete canopy, which, as depicted in photographs, did not extend over the entire width of the platform. It nearly reached, but did not cover, the platform edge where the yellow strip on which plaintiff fell was located. At the time of the accident, plaintiff reported seeing water dripping off the canopy. Anthony Aguago, the station cleaner, testified that he had observed water dripping off the canopy onto the yellow strip "lots of times." He affirmed that it was routine for water to drip on the platform edge whenever it rained. Although a general awareness that subway platforms become wet in inclement weather is not sufficient to establish notice of a specific condition (*see Solazzo at 735*), a recurring known water condition will suffice (*Talavera v New York City Tr. Auth.*, 41 AD3d 135 [1st Dept 2007]). Here there was additional evidence, including climatological data, recurrent dripping conditions and freezing temperatures on the day that immediately preceded plaintiff's accident, supporting a conclusion that the source of the icy condition was the earlier snowstorm (*see Reynolds v. Masonville Rod & Gun Club*, 247 AD2d 682 [3d Dept 1998] ["(l)acking any climatological data" the court concluded that the icy condition had not formed in time for the defendant to have remedied it]).

There are weather reports from the National Climatic Data

Center, in evidence, showing that it snowed the day before the accident, on January 17, 2005, between the hours of 2:00 a.m and 11:00 a.m. and that, thereafter, the temperatures ranged from 9 degrees to 27 degrees Fahrenheit. There was no other precipitation after that snowfall up through the time of the accident. The climatological data also showed that the weather was dry on January 15 and 16, 2005 and that the temperature for the first half of January was considerably warmer than freezing. This evidence is sufficient to raise an inference that the source of the slushy ice condition testified to by plaintiff was the snowstorm that occurred approximately 21 hours before.

The weather reports further confirm an accumulation of three tenths of an inch of snow on January 17, 2005. According to the National Climatic Data Center records, this measurable amount is more than a "trace precipitation amount" which would otherwise be denoted a "T" in the records. Although defendant urges us to conclude, as a matter of law, that there was not enough snow to have created the claimed condition, there is no scientific evidence, or any other basis in the trial record, supporting this conclusion.

Further, Mr. Augago, whose shift began within minutes of the accident, testified that when he went to the site of the accident

he observed that snow melt had already been scattered about the platform. Mr. Burgos, the Transit Authority cleaner on duty before and through the time of the accident, and who presumably had direct knowledge of the platform conditions, was never produced by defendant. Snow melt is the defendant's response to wet, cold and icy conditions on the platform. Defendant's witness testified that there are three shifts of maintenance workers, who are assigned to clean the station within a 24-hour period. These workers' duties include snow removal and applying snow melt. Each worker is assigned and travels to multiple stations during each of their shifts. No records or testimony was produced by defendant showing what maintenance activities were actually performed by the workers assigned after the snowfall. Nor is there any record of when the defendant's employees may have last inspected that subway platform (*see Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422 [1st Dept 2011]). Given defendant's awareness of a recurring condition, the climatological data, and the existence of snow melt put by the Transit Authority on the platform at or about the time of the accident, a jury could reasonably conclude that the earlier snowfall and resultant dripping watery conditions, and freezing temperatures, created an icy condition on the platform and had existed for a long enough

period of time to have been discovered and addressed during defendant's routine maintenance activities (*see Tamhane v. Citibank N.A.*, 61 AD3d 571 [1st Dept 2009]).

There is no need, however, for a retrial on the issue of damages. If on retrial the new jury finds liability, then the award of damages made by this jury should stand. Plaintiff, who was 22 at the time of the accident, was awarded $200,000 for past and $300,000 for future pain and suffering. Her injuries consisted of a comminuted bimalleolar fracture to her left ankle, resulting in two orthopedic surgeries. An award of damages should only be set aside when it deviates materially from what would be reasonable compensation (*see* CPLR 5501; *Donlon v City of New York*, 284 AD2d 13, 14 [1st Dept 2001]). The evidence adduced as to the nature, extent and permanency of plaintiff's injuries was sufficient to support the verdict reached and was not excessive (*see Alicea v City of New York*, 85 AD3d 585 [1st Dept 2011]; *Keating v SS&R Mgt. Co.*, 59 AD3d 176 [1st Dept 2009]; *Rydell v Pan Am Equities*, 262 AD2d 213 [1st Dept 1999]).

Finally we reject defendant's contention that plaintiff's counsel's summation was so inflammatory and prejudicial as to deprive it of a fair trial.

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

FREEDMAN, J. (dissenting)

Although I agree with the majority that the jury instruction about constructive notice misstated the law, in my opinion, plaintiff failed to establish that defendant had actual or constructive notice of the ice on which she slipped and fell and therefore, I would dismiss the case in its entirety.

At trial, plaintiff testified that, between 7:30 and 7:45 a.m. on January 18, 2005, she slipped on a small, shallow patch of ice between the raised bumps on the yellow safety strip running along the edge of defendant's outdoor subway platform. Plaintiff did not see the ice before she fell but testified that she observed it when sitting nearby after the accident. Although she stated that there was a "mushy" mixture of water, ice, and snow on the platform, and that water and ice dripped from the station's concrete canopy, a station supervisor who arrived shortly after the accident testified that there was no ice or slush on the platform for defendant to remove.

Weather records put into evidence indicate that, on the day before plaintiff's accident, the temperature ranged from 18 to 27 degrees Fahrenheit, and the next day it ranged from 9 to 19 degrees. The records also show that three tenths of an inch of snow fell on January 17 from about 2:00 a.m. to 11:00 a.m. and

that there was no further precipitation of any kind until the accident.

Based on this record, defendant cannot be charged with notice of a small patch of ice on a relatively clean outdoor platform. While a common carrier like the Transit Authority must use ordinary care to keep its station platforms free from dangerous conditions (*see Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 248 [1st Dept 1984], *affd* 64 NY2d 670 [1984]), unless the defendant carrier created the danger, a plaintiff claiming negligence must prove that the carrier had actual or constructive notice of it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). General awareness of below-freezing temperatures and the possibility that ice might form, without more, is insufficient to charge defendant with notice of the particular patch of ice on which plaintiff slipped (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994] [notice of liquid on the defendants' stairs was not established where nothing in record established stairs were negligently maintained or otherwise dangerous]; *Harrison v New York City Tr. Auth.*, 94 AD3d 512, 513 [1st Dept 2012] [the defendant's knowledge that subway riders dropped MetroCards on floor did not constitute notice of the particular card on which the plaintiff slipped]).

Since plaintiff proffered no evidence that defendant knew about the particular ice patch on which she slipped, she had to set forth sufficient evidence of defendant's constructive knowledge of the presence of ice patches. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon*, 67 NY2d at 837-838).

Here, plaintiff's evidence with respect to either element of constructive notice was lacking. A small, irregular patch of ice lying between the bumps on the surface of the safety stripe on a subway platform shortly after dawn cannot be deemed "visible and apparent." Plaintiff herself did not notice the patch until after she slipped.

Moreover, there was no evidence that defendant had a reasonable time to discover the ice patch and remedy it because it is unclear how and when the particular ice patch was formed. The ice could well have formed shortly before plaintiff slipped on it, and none of the evidence supports the claim that it formed any earlier. I disagree with the majority's finding that circumstantial evidence supports plaintiff's theory that the patch was created when snow that fell on January 17 melted into

water that dripped from the canopy onto the platform and then refroze. While plaintiff testified that she saw ice and snow dripping from the canopy on the day she slipped, contrary to the majority's assertion, she did not state that the ice and snow dripped onto the area where she fell. The majority cites "recurrent dripping conditions" at the station as circumstantial evidence of constructive notice; however, the only evidence of recurrence was the station cleaner's testimony that water frequently dripped from the canopy when it rained. It did not rain on either the day of the accident or the day before.

Moreover, a snow accumulation of three-tenths of an inch would not furnish enough water to create an ice patch, and, given that the temperature remained well below freezing during the course of the snowfall on January 17 through plaintiff's accident early the next morning, snow would not have melted during that period. Accordingly, it is unlikely that the snowfall was the source of the dripping water (*see Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972, 973-974 [1994]).

Under these circumstances, the jury could only guess as to when the ice patch formed or the source of the ice, and its conclusion that defendant had time to discover and remedy it was purely speculative (*see Disla v City of New York*, 65 AD3d 949

[1st Dept 2009]; *Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006]; *Steo v New York Univ.*, 285 AD2d 420. [1st Dept 2001]).

The failure to establish notice warrants the dismissal of the complaint.

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

ENTERED: JANUARY 16, 2014

CLERK

Sweeny, J.P., Acosta, Andrias, Saxe, Clark, JJ.

10640- SCI 1853/04
10641-
10642 The People of the State of New York,
Appellant,

-against-

Anthony Gathor, also known
as Antwane McLeod,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Elon Harpaz of counsel), for respondent.

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Judgment of resentence, Supreme Court, Bronx County (Patricia Anne Williams, J.), rendered August 14, 2012, resentencing defendant to a term of 5 years, and bringing up for review an order, same court and Justice, entered June 13, 2012, which granted defendant's CPL 440.20 motion to set aside his sentence as a second violent felony offender and directed that defendant be resentenced as a first violent felony offender, and order, same court and Justice, entered on or about July 11, 2012, which, upon reargument, adhered to the June 13, 2012 order, unanimously reversed, on the law, the judgment of resentence vacated, and the matter remanded for resentencing.

In light of the Court of Appeals' recent decision in *People*

*v Boyer* (22 NY3d 15 [2013]), we find that defendant was not entitled to relief under CPL 440.20 from his original sentencing as a second violent felony offender since the resentencing proceeding to correct the failure to impose postrelease supervision does not alter the original date of sentence. Here, defendant was sentenced to a term of 3½ years on February 20, 2001 upon a plea of guilty to robbery in the second degree. No term of postrelease supervision was imposed, and none was indicated in the sentence and commitment sheet. On May 26, 2004, defendant pleaded guilty to attempted robbery in the second degree. He was sentenced on June 22, 2004, and adjudicated a second violent felony offender based on the 2001 conviction for robbery in the second degree. On December 14, 2009, defendant was resentenced on his 2001 felony conviction.

In *Boyer*, the Court of Appeals explained as follows: "a resentencing to correct the flawed imposition of PRS does not vacate the original sentence and replace it with an entirely new sentence, but instead merely corrects a clerical error and leaves the original sentence, along with the date of that sentence, undisturbed" (*id.* at 24). Given this determination, we find that, notwithstanding the resentencing on December 14, 2009, defendant's 2001 violent felony conviction qualifies as a

predicate felony conviction at the time of his sentencing on June 22, 2004, which requires the imposition of second felony offender status. Accordingly, we vacate the judgment of resentence and remand for resentencing in accordance with this decision.

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

ENTERED: JANUARY 16, 2014

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11368 Croxton Collaborative Architects, P.C., Plaintiff-Respondent, Index 101548/12

-against-

T-C 475 Fifth Avenue, LLC, Defendant-Appellant.

Jaffe, Ross & Light LLP, New York (Burton R. Ross of counsel), for appellant.

Ellenoff Grossman & Schole, LLP, New York (Ted Poretz of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered December 24, 2012, which, insofar as appealed from, denied defendant's motion to dismiss the complaint to the extent it is based upon events that occurred before defendant purchased the subject premises, unanimously reversed, without costs, and the complaint dismissed to the extent it seeks to hold defendant liable for the acts of predecessor landlords that took place prior to defendant's purchase of the building.

Plaintiff commenced the action less than five months after defendant purchased the premises and assumed the lease, alleging that defendant has failed to remediate the "derelict" and "war-torn appearance" of the premises, in breach of various provisions

of the lease. The complaint alleges, inter alia, that "more than four years" after a gut-level renovation was commenced in 2007, the lobby "continues to appear derelict, forbidding and abandoned," the walls "continue to be raw," and "[m]ost of the elevators do not work." Plaintiff seeks $2 million in compensatory damages, as well as punitive damages and "full prospective and retroactive rent abatement."

To the extent plaintiff seeks damages relative to the period of time predating defendant's ownership, its claim is "flatly contradicted" by the documentary evidence (*see Baystone Equities v Gerel Corp.*, 305 AD2d 260 [1st Dept 2003]). Section 25.03 of the lease unequivocally provides that "under no circumstances shall the [lessor] . . . be (a) liable for any act, omission or default of any prior landlord; or (b) subject to any offsets, claims or defenses which [t]enant might have against the prior landlord." This interpretation of Section 25.03 of the lease is supported by other documentary evidence, including the assumption and assignment, which provides that defendant "hereby accepts the foregoing assignment of the Leases *and assumes the obligations with respect thereto arising or first becoming due and payable on or after the date hereof*."

There is no conflict between section 25.03 and section

22.01, which provides that in the event of a transfer of title, the lease shall be deemed to run with the land and the transferee agrees to "assume" and "carry out any and all such covenants, obligations and liabilities of Landlord hereunder." By its explicit language, Section 25.03 – which is prefaced by the statement "[a]nything herein contained to the contrary notwithstanding" – trumps Section 22.01. Plaintiff's attempts to limit the applicability of Section 25.03 to lessors under a ground lease, or successors via an acquisition under a mortgage foreclosure, ignore key disjunctive language that Section 25.03 encompasses any "purchaser, assignee or lessee, as the case may be."

We accordingly reverse and dismiss the complaint to the extent indicated.

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

ENTERED: JANUARY 16, 2014

CLERK

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

11487 The People of the State of New York, Ind. 5892/10
Respondent,

-against-

Keith Manzi,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered April 19, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to a term of four years, unanimously reversed, on the law, and the matter remanded for a new trial.

The trial court improvidently exercised its discretion when it denied defendant a one-day adjournment to bring in a witness, while also granting the People's request for a missing witness charge concerning that witness.

Defendant, the last witness to testify, made reference to a friend who had been with him at certain relevant junctures.

After defendant completed his testimony, the People requested a missing witness charge concerning the friend. Defense counsel argued that there was insufficient basis for the charge, and alternatively requested a one-day adjournment to secure the presence of the witness. The court denied the adjournment, proceeded directly to summations and charge, and delivered a missing witness instruction.

Having granted the People's request for the instruction, the court should have granted defendant a short adjournment. A missing witness issue "must be raised as soon as practicable so that the court can appropriately exercise its discretion and the parties can tailor their trial strategy" (*People v Gonzalez*, 68 NY2d 424, 428 [1986]). Here, the moving party raised the issue after defendant's testimony, when the issue became apparent. The court should have then accorded the nonmoving party the opportunity to avoid the missing witness charge by calling the witness. Although defendant was willing to call the witness, the court effectively rendered the witness unavailable, thus negating the availability requirement for a missing witness charge.

The court apparently denied the adjournment on the ground that defendant should have anticipated the missing witness issue. However, an adjournment to the next day would have been

reasonable under the circumstances.

We do not find the error to be harmless. The case required the jury to make a credibility determination regarding conflicting testimony given by police witnesses and by defendant, who was unfairly burdened by a missing witness charge.

In light of the foregoing, we do not reach defendant's remaining contentions, including whether the missing witness charge was proper, except that we find that the verdict was not against the weight of the evidence.

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

ENTERED: JANUARY 16, 2014

CLERK

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

11488-
11489 Carol Sayre, et al.,
Plaintiffs-Respondents,

-against-

Thomas J. Hoey, Jr.,
Defendant-Appellant,

Kitano Arms Corporation, etc.,
Defendant-Respondent.

Index 118231/09

_____

Kelly, Rode and Kelly, LLP, Mineola (Donna Geoghan of counsel), for appellant.

Law Offices of Michael S. Lamonsoff, PLLC, New York (Ryan Lawlor of counsel), for Carol Sayre and James Sayre, respondents.

Mound, Cotton Wollan & Greengrass, New York (George H. Buermann of counsel), for Kitano Arms Corporation, respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered on or about August 15, 2012, which granted plaintiff's motion to vacate a stay of the action, and order, same court and Justice, entered March 4, 2013, which denied defendant Thomas J. Hoey, Jr.'s motion to renew plaintiff's motion, unanimously affirmed, without costs.

The court properly lifted the stay of this action, which had been imposed pending the conclusion of the related criminal proceedings (*see* CPLR 2201; *Britt v International Bus Servs.*, 255

AD2d 143, 144 [1st Dept 1998]). As the court observed, there is no indication in the record that there are any criminal proceedings pending against Hoey (*see Stuart v Tomasino*, 148 AD2d 370, 373 [1st Dept 1989] ["Even if a criminal prosecution had been pending, however, the motion court was not obligated to stay the civil matter"]; *see also Fortress Credit Opportunities I LP v Netschi*, 59 AD3d 250 [1st Dept 2009]). The mere possibility that Hoey may be indicted in the future is an insufficient basis for an open-ended stay, especially where four years have elapsed since decedent's death and no criminal proceeding has been commenced against defendant Hoey.

Contrary to defendant's argument, notwithstanding that the stay order provided that the parties could move to lift the stay after criminal proceedings against Hoey had concluded, the court was fully empowered to vacate or modify its own order (*see Haenel v November & November*, 144 AD2d 298 [1st Dept 1988]).

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

ENTERED: JANUARY 16, 2014

CLERK

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

11490 In re Ana Liza Bay,
Petitioner-Respondent,

-against-

Pedro Solla,
Respondent-Appellant.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Karen Freedman, Lawyers For Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about August 30, 2012, after a fact-finding hearing, awarding custody of the parties' two children to respondent mother, unanimously affirmed, without costs.

In determining this custody matter, the court properly considered the best interests of the children (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). The court should have analyzed the matter under the standard applicable to relocation cases (*see Matter of Tropea v Tropea*, 87 NY2d 727 [1996]), and the record shows that, even under the *Tropea* standard, it is in the children's best interests to remain in New Jersey with their mother.

In seeking the Referee's recusal, the children's father

failed to identify "an actual ruling which demonstrates bias" (*Yannitelli v Yannitelli & Sons Constr. Corp.*, 247 AD2d 271 [1st Dept 1998], *lv denied* 92 NY2d 875 [1998]). Indeed, his claim of bias is based entirely on the Referee's failure to order, before a hearing, that the children be returned to New York.

The father cites no authority that would permit him, based on an unsubstantiated claim of bias, to revoke his consent to a referee's hearing and determining the parties' custody petitions (*see* CPLR 4317[a]). Nor does he offer a basis for such a revocation (*see generally Matter of Carlos G. [Bernadette M.]*, 96 AD3d 632 [1st Dept 2012]).

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

ENTERED: JANUARY 16, 2014

CLERK

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

11491 Jose Rodriguez, et al., Index 303180/09
Plaintiffs-Appellants,

-against-

Weinstein Enterprises, Inc.,
Defendant-Respondent.

_____

Law Offices of Annette G. Hasapidis, South Salem (Annette G. Hasapidis of counsel), for appellants.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Mari Grace Sacro of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 18, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law, in this action where plaintiff Jose Rodriguez was injured when he slipped and fell on a patch of ice while he was working on property owned by defendant and leased by his employer, an automobile dealership. Defendant demonstrated that pursuant to the subject lease agreement, plaintiff's employer was required to repair and maintain the property (*see Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010]). Defendant also showed that it did not create the icy condition, which plaintiff

alleges was due to an inadequate drain in a parking lot. Defendant submitted the deposition testimony of its treasurer, who stated that the tenant before plaintiff's employer had converted the property from a supermarket to an auto dealership and that in the time that he has acted as defendant's treasurer, he did not recall paying a bill for a contractor to make a structural repair to the premises.

In opposition, plaintiff failed to raise a triable issue of fact. The affidavit from his expert did not raise an issue as to constructive notice, because the expert did not set forth how the drain at issue was structurally defective, and did not identify any specific statutory provision that was purportedly violated, or that such a violation was a proximate cause of the accident (*see Torres v West St. Realty Co.*, 21 AD3d 718, 721 [1st Dept 2005], *lv denied* 7 NY3d 703 [2006]). Moreover, the expert's affidavit fails to indicate what methods were used to arrive at the conclusions reached, and he appears to rely solely on his status as a civil engineer, which is not sufficient to show negligence in the design or construction of the grate (*id.*).

Contrary to plaintiff's contention, the arguments raised in defendant's reply papers were properly made. The deposition testimony of its treasurer was attached to its motion for summary

judgment and the arguments addressed plaintiff's contentions made in opposition to the motion (*see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993]).

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

ENTERED: JANUARY 16, 2014

CLERK

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

11493 The People of the State of New York, Ind. 5285/11
Respondent,

-against-

John Sanders,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about June 28, 2012,

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

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

ENTERED: JANUARY 16, 2014

CLERK

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

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

11494-
11495 In re Jocelyn L., and Another,

Children Under the Age of
Eighteen Years, etc.,

Elizabeth T., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

_____

Anne Reiniger, New York, for Elizabeth T., appellant.

Michael S. Bromberg, Sag Harbor, for Oscar N., appellant.

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

Karen Freedman, Lawyers For Children, Inc., New York and Mayer Brown LLP, New York (Allison Levine Stillman of counsel), attorney for the child Jocelyn L.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the child Jennice L.

_____

Order of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 9, 2012, which, to the extent appealed from, after a hearing, determined that respondent mother had neglected the child Jocelyn L., and derivatively neglected the child Jennice L., unanimously affirmed, without costs. Order of disposition, same court and Judge, entered on or about August 1, 2012, which, to the extent

appealed from as limited by the briefs, upon the aforementioned fact-finding order, found that respondent Oscar N. had abused the child Jocelyn L., and derivatively abused the child Jennice L., unanimously affirmed, without costs.

The court's respective findings of sexual abuse by respondent Oscar N. and of neglect as a result of excessive corporal punishment by respondent mother were supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]; *see Matter of Dayanara V. [Carlos V.]*, 101 AD3d 411, 412 [1st Dept 2012]; *see also Matter of Joshua J.P. [Deborah P.]*, 105 AD3d 552 [1st Dept 2013]; *Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]). There is no basis to disturb the court's credibility determinations crediting the testimony given by Jocelyn, and discrediting the testimony given by the mother (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]; *Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]; *Matter of Aaron C. [Grace C.]*, 105 AD3d 548 [1st Dept 2013]). The court was also entitled to draw a negative inference from respondent Oscar N.'s failure to testify or present evidence (*see Matter of Eugene L. [Julianna H.]*, 83 AD3d 490 [1st Dept 2011]). Based on the social worker's opinion that Jocelyn's well-being would be severely compromised if she were required to testify in the

respondents' presence, the court appropriately permitted Jocelyn to testify by closed circuit television (*see Matter of Giannis F. [Vilma C.-Manny M.]*, 95 AD3d 618 [1st Dept 2012]).

Moreover, the court's respective findings of derivative abuse and neglect with respect to Jennice were warranted under the circumstances (*see Matter of Amerriah S. [Kadiatou Y.]*, 100 AD3d 1006, 1007 [2d Dept 2012], *lv dismissed* 21 NY3d 884 [2013]).

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

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

ENTERED: JANUARY 16, 2014

CLERK

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

11496 Mark D. Weinberg, Index 652222/10
Plaintiff-Appellant,

-against-

Steven Mendelow,
Defendant,

Konigsberg, Wolf & Co. et al.,
Defendants-Respondents.

_____

Hoffman Polland & Furman PLLC, New York (Russell Bogart of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Fred N. Knopf of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 31, 2012, which, insofar as appealed from as limited by the briefs, granted defendants Konigsberg, Wolf & Co. and Paul Konigsberg's (defendants) motion to dismiss as against them the fraud, aiding and abetting fraud, and negligent retention and supervision claims, unanimously modified, on the law, to deny the motion as to the fraud and aiding and abetting claims, and to deny as to the negligent retention and supervision claims against defendant Konigsberg, Wolf & Co., and otherwise affirmed, without costs.

With respect to the fraud claim, the complaint adequately

alleges, on its agency theory, that defendant Steven Mendelow's acts can be attributed to defendant Konigsberg, Wolf & Co. (KW), but not to defendant Paul Konigsberg (Konigsberg). It sufficiently pleads that Mendelow was KW's agent by alleging that KW held Mendelow out as a "principal," which was akin to a partner. "A legal entity [such as KW] ... necessarily functions through human actors" such as Mendelow (*Prudential-Bache Sec. v Citibank*, 73 NY2d 263, 276 [1989]). "[T]he acts of agents [e.g. Mendelow], and the knowledge they acquire while acting within the scope of their authority[,] are presumptively imputed to their principals," such as KW (*Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]). Contrary to Konigsberg's and KW's contention, Mendelow could not have been acting on behalf of FGLS Equity, LLC (a Bernard Madoff feeder fund), rather than KW, when he advised plaintiff to invest with Madoff in the summer of 2002, because FGLS was not formed until March 2003. The allegations that Mendelow was acting on behalf of Konigsberg, however, are conclusory (*see Perl v Smith Barney*, 230 AD2d 664, 665 [1st Dept 1996], *lv denied* 89 NY2d 803 [1996]).

In addition to agency, the complaint sufficiently pleads that KW – but, again, not Konigsberg – should be liable for Mendelow's acts under the doctrine of respondeat superior by

alleging that KW – not Konigsberg personally – employed Mendelow (*see Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932 [1999]). The complaint alleges that Konigsberg is the sole owner of KW, but even the sole owner of a corporation is entitled to the presumption that he is separate from his corporation (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 [2d Dept 2009], *affd* 16 NY3d 775 [2011]). Plaintiff does not contend that KW's corporate veil should be pierced to reach Konigsberg.

Konigsberg and KW contend that Mendelow was not acting within the scope of his employment when he advised plaintiff. However, the allegations in the complaint are sufficient to withstand a motion to dismiss the respondeat superior claim (*see Riviello v Waldron*, 47 NY2d 297, 303 [1979]; *Burns v City of New York*, 6 AD2d 30, 33, 35, 37 [1st Dept 1958]).

Even if Konigsberg is not liable on an agency theory, he is on the pleaded conspiracy theory. The complaint sufficiently pleads that both Konigsberg and KW should be liable for Mendelow's fraud because all three defendants conspired to defraud plaintiff (*see Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968 [1986]). The complaint expressly alleges "a corrupt agreement" among all three defendants, their "intentional

participation in the furtherance of the plan or purpose," and "resulting damages or injury" (*Williams v Sidley Austin Brown & Wood, L.L.P.*, 13 Misc 3d 1213[A], 2006 NY Slip Op 51810[U], *3 [Sup Ct, NY County], *affd* 38 AD3d 219 [1st Dept 2007]). As for the "overt act in furtherance of the agreement, which constitutes an independent tort or wrongful act" (*id.*), the complaint alleges that KW made misrepresentations in the form of the monthly account statements it sent to plaintiff. It is not necessary that the complaint allege an overt act by Konigsberg (*see Kuo Feng Corp. v Ma*, 248 AD2d 168 [1st Dept 1998], *appeal dismissed* 92 NY2d 845 [1998], *lv denied* 92 NY2d 809 [1998]).

The complaint sufficiently pleads a cause of action for negligent retention against KW by alleging that Mendelow had been a principal of KW since 1982, that Konigsberg was KW's president, that Mendelow was sanctioned by the Securities and Exchange Commission (SEC) in 1993 for Madoff-related fraud, and that Konigsberg "looked the other way with respect to Mendelow being sanctioned by the SEC" (*see Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]). Konigsberg's knowledge of the SEC sanction can be imputed to KW because Konigsberg was its president (*see Kirschner*, 15 NY3d at 465). At this stage of the proceedings, we also find that these factual allegations support a claim for

negligent supervision.

Originally, the fifth cause of action alleged that all three defendants aided and abetted Madoff's fraud and that Konigsberg and KW aided and abetted Mendelow's fraud on plaintiff. On appeal, plaintiff presses only the latter point. Since we find that Konigsberg and KW can be sued for fraud, the aiding and abetting claim appears to be unnecessary; nevertheless, plaintiff may plead alternate causes of action (*see* CPLR 3014).

The complaint sufficiently pleads that Konigsberg and KW aided and abetted Mendelow's fraud (*see Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]; *see also Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]). Contrary to their contention that the complaint does not allege actual knowledge of the fraud, the complaint alleges that "Konigsberg knew, or certainly should have known, that KW and Mendelow fraudulently induced Plaintiff's investments" and that KW "knew that [the monthly] statements [for FGLS, which Mendelow and KW forwarded to plaintiff,] were false." Contrary to their contention that the complaint does not allege that Konigsberg and KW rendered substantial assistance in the achievement of the fraud, the complaint alleges that plaintiff relied on the

representations on KW's website about Mendelow's qualifications when deciding to invest in FGLS. It also alleges that, at Mendelow's and Konigsberg's direction, KW (FGLS's accountant) ignored irregularities in FGLS's books and records; that, if KW had reviewed such books and records, it would have discovered Madoff's fraud; and that plaintiff "would have redeemed his investment [in FGLS] if Defendants had informed him of the numerous warning signs of [Madoff's] fraud."

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

ENTERED: JANUARY 16, 2014

CLERK

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

11497 Susan Gass, Index 302536/08
Defendant-Appellant,

-against-

Thomas Gass,
Plaintiff-Respondent.

_____

Susan Gass, appellant pro se.

Thomas Gass, respondent pro se.

_____

Appeal from order, Supreme Court, New York County (Lancelot B. Hewitt, Special Referee), entered June 4, 2012, which granted defendant "permanent maintenance in the amount of $1,500 per month" and denied her equitable distribution, deemed an appeal from judgment of divorce, same court (Matthew F. Cooper, J.), entered October 25, 2012 (CPLR 5520[c]), which, inter alia, ordered and adjudged, "pursuant to the Decision and Order of the Special Referee," that plaintiff pay defendant $1,500 per month until she reached the age of 55 as a "final" award of maintenance and denied both parties equitable distribution of marital property, and, as so considered, unanimously modified, on the facts, to vacate the award of maintenance and remand the matter for further proceedings on that issue, and otherwise affirmed, without costs.

It is unclear what the Special Referee intended when he ordered an award to the wife of "permanent maintenance in the amount of $1,500 per month," with no time limit.

The assigned trial judge interpreted the Special Referee's order to award maintenance only until the wife turned 55 years of age, which was the age limit in the temporary maintenance award. Given the discrepancy between the Special Referee's order and the subsequent judgment, which clearly had intended to impose relief identical to that in the Special Referee's order, further proceedings are necessary to clarify the duration of the maintenance award. The record does not provide a sufficient basis for us to decide the merits of a permanent maintenance award.

Contrary to the wife's assertions, the Special Referee properly denied the equitable distribution award based on the evidence in the record. While she contends that further discovery is warranted, she apparently did not seek further discovery at the hearing. The Special Referee was not obligated to advise her of various procedures, such as issuance of subpoenas or the filing of a motion to compel, to obtain additional information from the husband. The record makes clear that the wife, albeit pro se, is well experienced in litigating

this matter and seeking additional discovery. The fact that an appeal was pending from a prior order denying discovery did not warrant an adjournment and further delay in these proceedings. The wife was specifically cautioned that there would be no further adjournments in light of the many years that had passed and extensive litigation in this divorce matter, commenced in 2008, yet she was not prepared to proceed at the hearing. Moreover, the Special Referee properly noted and considered this Court's prior decision holding that "resolution of this matter is long overdue" (91 AD3d 557, 558 [1st Dept 2012]).

Similarly, her remaining challenges to prior court orders denying her further discovery are not properly before this Court.

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

ENTERED: JANUARY 16, 2014

CLERK

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

11501 The People of the State of New York, Ind. 128/12
Respondent,

-against-

Joseph Pineras,
Defendant-Appellant.

_____

Law Offices of Guy Oksenhendler, New York (Guy Oksenhendler of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered November 13, 2012, convicting defendant, after a jury trial, of grand larceny in the first degree and falsifying business records in the first degree, and sentencing him to concurrent terms of 1⅓ to 4 years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations. There was nonaccomplice testimony and documentary evidence that satisfied the standards for corroboration of accomplice testimony (*see People v Reome*, 15 NY3d 188, 192-193 [2010]). Furthermore, defendant's behavior

after the theft evinced a consciousness of guilt, and provided further assurances of the reliability of the accomplice testimony.

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

ENTERED: JANUARY 16, 2014

CLERK

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

11506 Helen Quinn, Index 304848/10
Plaintiff-Appellant,

-against-

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

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for the City of New York, respondent.

Crafa & Sofield, P.C., Rockville Centre (Thomas Sofield of counsel), for River House in Riverdale, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 30, 2013, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

By submitting evidence including the affidavit and attached area survey of its licensed surveyor, defendant River House made a prima facie showing of its entitlement to summary judgment by establishing that plaintiff's accident did not occur on or adjacent to its property (*see Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]; *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988], *lv dismissed in part, denied in part*,

73 NY2d 783 [1988]). Plaintiff's submissions in opposition to River House's motion did not suffice to raise a triable issue of fact that the accident occurred on or adjacent to River House's property.

As against defendant City of New York, plaintiff is restricted to prosecuting her claim based on her original theory that she fell on the sidewalk adjacent to River House's property, and precluded from asserting a new theory, not advanced in her notice of claim, complaint, or bill of particulars, that she fell on or adjacent to another property (*see Johnson v City of New York*, 106 AD3d 664, 664 [1st Dept 2013]). Since River House is a large, multi-unit condominium, the City is exempt from liability (*see* Administrative Code of City of NY § 7-210; *Johnson*, 106 AD3d at 664).

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

ENTERED: JANUARY 16, 2014

CLERK

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

11507N Bari Yunis Schorr, Index 305587/11
Plaintiff-Respondent,

-against-

David Evan Schorr,
Defendant-Appellant.

_____

David E. Schorr, appellant pro se.

Newman & Denney P.C., New York (Louis I. Newman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered on or about July 16, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to quash nonparty subpoenas, for a protective order requiring defendant to seek leave of the court before issuing any further subpoenas or deposition demands, and for interim counsel fees, and awarded plaintiff $20,000 in such fees, unanimously affirmed, with costs.

In this matrimonial action, which has been the subject of numerous motions and has been before this Court on two occasions (*see* 96 AD3d 583 [1st Dept 2012]; 106 AD3d 544 [1st Dept 2013]), the court again properly awarded plaintiff counsel fees after considering the financial positions of the parties and the

circumstances of the case (*see* Domestic Relations Law § 237; *see also* 96 AD3d at 584). The record shows that defendant has continued to engage in extensive motion practice, including bringing motions that have little merit, and his claim that he is the non-monied spouse also continues to lack support (*id.*).

The court providently exercised its discretion in granting the motion to quash the subpoenas. Defendant failed to show that he could not obtain the information sought in the course of depositions of plaintiff or other sources (*see Financial Structures Ltd. v UBS AG*, 96 AD3d 433 [1st Dept 2012]; *Menkes v Beth Abraham Servs.*, 89 AD3d 647 [1st Dept 2011]). Moreover, plaintiff has explicitly stated that she would provide all relevant information to defendant. The court also exercised its discretion in a provident manner in issuing the protective order based on defendant's issuance of harassing and unnecessary subpoenas (*see* CPLR 3103[a]; *Matter of U. S. Pioneer Elecs. Corp.*

*[Nikko Elec. Corp. of Am.]*, 47 NY2d 914, 916 [1979]).

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

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

ENTERED: JANUARY 16, 2014

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9584 The People of the State of New York, Ind. 5845/10
Respondent,

-against-

William Brown,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J. at dismissal motion; Michael R. Sonberg, J. at suppression hearing; Cassandra M. Mullen, J. at jury trial and sentencing), rendered June 22, 2011, reversed, on the law, the motion to suppress the out-of-court identification granted, and the matter remanded for a new trial preceded by an independent source hearing.

Opinion by Manzanet-Daniels, J. All concur except Tom, J.P. and Saxe, J. who dissent in an Opinion by Saxe, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
David B. Saxe
Karla Moskowitz
Sallie Manzanet-Daniels, JJ.

9584
Ind. 5845/10

_____x

The People of the State of New York,
Respondent,

-against-

William Brown,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Thomas Farber, J. at dismissal motion; Michael R. Sonberg, J. at suppression hearing; Cassandra M. Mullen, J. at jury trial and sentencing), rendered June 22, 2011, convicting him of grand larceny in the third and fourth degrees and fraudulent accosting and imposing sentence.

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

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

MANZANET-DANIELS, J.

Police officers observed defendant and his companion, Patrick Thomas (*see People v Thomas*, __AD3d__, appeal no. 10828 [decided simultaneously herewith]), running across Broadway, in the Times Square area, at approximately 4:40 a.m., "looking over their shoulder[s]." No crime had been reported, the officers did not see anyone chasing the two men, and no apparent contraband was visible.[1]

The motion court denied defendant's motion to suppress the showup identification, finding that the police had reasonable suspicion to stop defendant when they observed defendant and Thomas "moving at a significant pace . . . looking over their shoulders . . . as if to see if they were being followed." The court noted that "[b]oth Officer Carey and Sergeant Monahan knew from prior contacts that Mr. Brown engaged in fraudulent accosting in that area," and reasoned that "someone knowing of Mr. Brown and his prior criminal activities [would] believe that he had engaged in some sort of scam, and was fleeing a scene." We now reverse.

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[1] I am in substantial agreement with the more detailed recitation of facts in the dissent.

A level three forcible stop is constitutional only if the police have a "reasonable suspicion that a particular person was involved in a felony or misdemeanor" (*People v Hollman*, 79 NY2d 181, 185 [1992]). In determining whether the police officers had the requisite reasonable suspicion, only the information known to the officers prior to the forcible stop is relevant (*see People v Cantor*, 36 NY2d 106, 111 [1975]).

The officers' knowledge of defendant's prior criminality in the same neighborhood was not sufficient to give rise to reasonable suspicion justifying a level three intrusion.

"[A] stop based on no more than that a suspect has previously been arrested . . . is premature and unlawful and cannot be justified by subsequently acquired information resulting from the stop" (*People v Johnson*, 64 NY2d 617, 619 [1984]). In *Johnson*, the defendant, a known burglar, was stopped by officers who observed him walking around and looking at houses in an area where previous burglaries had occurred. The Court of Appeals held the stop unlawful, reversed, and granted the motion to suppress.

Likewise, in *People v McCullough* (31 AD3d 812 [3rd Dept 2006], *lv denied* 7 NY3d 850 [2006]), the defendant, who was known to the officer as a result of previous arrests for trespass and

possession of a controlled substance, was observed coming from the backyard of a building known for narcotics dealing. Upon seeing the police, the defendant stopped, turned, and ran. The Third Department held that the police lacked reasonable suspicion to pursue the defendant, and granted the motion to suppress.

This Court, in *People v Boulware* (130 AD2d 370 [1st Dept 1987], *appeal dismissed* 70 NY2d 994 [1988]), stated that an officer's belief that the defendant has had previous arrests is an insufficient basis on which to find an objective suspicion of criminal activity, reasoning that "[t]o hold otherwise would be to exclude all persons with arrest records from the protection of the Fourth Amendment and render them subject to arbitrary stops and inquiries" (*id.* at 373). An officer's surmise as to a person's propensity to commit crime, in the absence of objective indicia that a crime has taken or will be taking place, is an insufficient constitutional predicate (*id.*).

As *Johnson* and *Boulware* make clear, the officers' knowledge of defendant's criminal past is not tantamount to an "indication of criminal activity."[2]

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[2]The cases relied on by the People for the proposition that a defendant's criminal history is relevant to the reasonable suspicion calculus are distinguishable (*see e.g. People v Teasley*, 88 AD3d 490 [1st Dept 2011] [officer recognized

The fact that the officers observed defendant and Thomas running does not elevate the level of suspicion. Flight, accompanied by equivocal circumstances, does not supply the requisite reasonable suspicion (*see People v Holmes*, 81 NY2d 1056 [1993]). The police did not observe conduct indicative of criminality, nor did they even possess information that a crime had occurred in the area. The cases relied on by the People are readily distinguishable insofar as they involve flight coupled with other factors (*see e.g. People v Poh Wong*, 204 AD2d 111 [1st Dept 1994] [defendant running through the streets of Chinatown, looking over his shoulder, along with man holding a revolver], *lv denied* 84 NY2d 835 [1994]).

Accordingly, the judgment of the Supreme Court, New York County (Thomas Farber, J. at dismissal motion; Michael R. Sonberg, J. at suppression hearing; Cassandra M. Mullen, J. at jury trial and sentencing), rendered June 22, 2011, convicting

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defendant from wanted poster], *lv denied* 19 NY3d 977 [2012]; *People v Lynah*, 56 AD3d 375 [1st Dept 2008] [defendant, whom officer recognized from recent drug investigation, observed holding a plastic bag and counting something], *lv denied* 12 NY3d 760 [2009]; *People v Rivera*, 50 AD3d 458 [1st Dept 2008] [recognizing defendant's vehicle from a previous narcotics surveillance operation, officers followed defendant, stopping him only after observing a drug transaction], *lv denied* 11 NY3d 740 [2008]).

defendant of grand larceny in the third and fourth degrees and fraudulent accosting, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, should be reversed, on the law, the motion to suppress the out-of-court identification granted, and the matter remanded for a new trial preceded by an independent source hearing.

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

SAXE, J. (dissenting)

The majority's decision goes far beyond protecting against unreasonable searches and seizures. By disapproving of the stop of defendant, in which officers took reasonable steps based on the combination of facts known to them, this Court is discouraging police work that is not only constitutionally proper but also laudable. Such a precedent will serve to impede effective law enforcement and interfere with the protection and safety of the public.

While this appeal and the appeal of codefendant Patrick Thomas (*see People v Patrick Thomas*, appeal no. 10828) have been heard separately, the question of whether the police were justified in stopping and detaining each of the two men requires consideration of what the police officers knew at the time with regard to both men. In both appeals, based on the testimony at the suppression hearing, the police were fully justified in detaining the two men based on all the information known to the officers at the time. I would therefore uphold the denial of both defendants' suppression motions and affirm their convictions.

Facts

At the suppression hearing, Police Officer Edward Carey

testified that in the early morning hours of December 9, 2010, he was on uniformed patrol with Sergeant Kenneth Monahan and Police Officer Thomas Donovan near Times Square in an unmarked police van. The officers were assigned to the Cabaret Unit, which specialized in identifying crimes committed around bars and nightclubs. Officer Carey had seen defendant numerous times on prior occasions while patrolling the Times Square area; in fact, Officer Carey had arrested defendant on two previous occasions for fraudulent accosting -- that is, engaging in scams, usually targeting single men coming out of so-called gentlemen's clubs, such as Lace or Flashdancers. Sergeant Monahan testified that he had previously seen both defendant and codefendant Patrick Thomas "numerous times" in front of the Lace nightclub, located on Seventh Avenue near 49th Street. Monahan knew defendant by name and Thomas by face. He knew the two men to associate with the same individuals, and although he had never seen defendant and Thomas together, he knew that they both "victimized" people at that location.

Importantly, at around 1:00 or 1:30 a.m. that night, Officer Carey observed defendant in front of Lace, and got out of the police vehicle to speak directly to him, directing him to leave the area.

A few hours later, at around 4:30 a.m., the three officers were driving south on Broadway between 49th and 48th Streets when they observed defendant and Thomas running diagonally across Broadway, through the middle of the street, crossing directly in front of the officers' unmarked van, and looking over their shoulders, back toward the corner of 49th Street and Seventh Avenue, where the Lace nightclub was located. Officer Carey testified, "I looked at the sergeant and said I believe, and he had the same feeling I had, that some type of crime had occurred. And I said, do you know what, we'll stop them." Officer Carey also testified that he observed aloud to his fellow officers that one of the men was Willie Brown, and that it looked like the men had done something.

Sergeant Monahan promptly stopped the van; Carey and Donovan exited, and stopped the two men in front of a hotel located at 1605 Broadway. Meanwhile, Sergeant Monahan drove around the corner toward Lace, where he saw a man standing in front of 723 Seventh Avenue, next door to the club. Sergeant Monahan drove up to the man and asked if anything had been taken from him; the man replied, "[T]hey took my watch." Sergeant Monahan then drove the victim to 1605 Broadway, where defendant and Thomas were being held, arriving only a minute or two after the two men were

detained. Upon viewing defendant and Thomas from the van, the victim stated, "[T]here they are." One of the officers asked defendant and Thomas, "[W]here's the watch?" and in response, Thomas reached into his pants pocket and produced a silver Rolex watch.

Discussion

To forcibly detain a defendant, the police must have "reasonable suspicion" that a crime has been committed; reasonable suspicion is defined as the "quantum of knowledge [sufficient] to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*see People v Brannon*, 16 NY3d 596, 602-603 [2011] [internal quotation marks omitted]; *People v Martinez*, 80 NY2d 444, 447 [1992]; *People v DeBour*, 40 NY2d 210, 216, 223 [1976]). "A stop based on reasonable suspicion will be upheld so long as the intruding officer can point to 'specific and articulable facts which, along with any logical deductions, reasonably prompted th[e] intrusion'" (*Brannon*, 16 NY3d at 602).

The majority relies on cases holding that certain types of knowledge, absent more, fail to rise to the level of reasonable suspicion. One of those lines of cases stands for the well established proposition that the officers' mere knowledge of the

defendant's prior criminality does not give rise to reasonable suspicion justifying a stop (*see People v Johnson*, 64 NY2d 617, 619 [1984]). Another line of cases holds that "[f]light alone, ... or even in conjunction with equivocal circumstances that might justify a police request for information, is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to policy inquiry" (*People v Holmes*, 81 NY2d 1056, 1058 [1993]; *see also People v May*, 81 NY2d 725, 727-728 [1992]).

However, each of those factors, prior criminality and flight, *may* serve as components of the total quantum of knowledge that would lead a reasonable person under the circumstances to believe that "criminal activity is at hand." A defendant's criminal history, or even an officer's recognition of a defendant from an earlier investigation, may be a factor in assessing reasonable suspicion (*see e.g. People v Lynah*, 56 AD3d 375 [1st Dept 2008], *lv denied* 12 NY3d 760 [2009]). Similarly, "[f]light, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity," may provide the necessary predicate to stop and detain a defendant (*People v Holmes*, 81 NY2d at 1058).

The majority suggests that this matter is comparable to

*People v Boulware* (130 AD2d 370 [1st Dept 1987], *appeal dismissed* 70 NY2d 994 [1988]) and *People v McCullough* (31 AD3d 812 [3d Dept 2006], *lv denied* 7 NY3d 850 [2006]), where the police lacked reasonable suspicion to pursue or stop the defendants. I disagree; in both those cases, the conduct of the defendant was innocuous, a description that cannot reasonably be applied here.

In *People v Boulware*, police officers noticed a group of 10 to 15 people on a corner, at 11:15 p.m., in an area that had a high incidence of drug-related and weapons arrests; two of the officers attempted to disperse the crowd, while one officer began to approach one of those individuals, the defendant, whom he knew to have a lengthy arrest record for gun possession offenses, intending to question him. However, when the officer called out that he wished to speak to the defendant, the defendant placed his right hand into his right coat pocket as he turned to face the officer. The officer ordered the defendant to remove his hand from his pocket, but the defendant refused, and when the officer took a step toward him, the defendant fled. This Court explained that the police had lacked even a common-law right of inquiry, because "[t]here was a total absence of specific objective indicia of criminality. Defendant's conduct was totally innocuous. He was simply standing on a street corner

with others" (130 AD2d at 373).

In *People v McCullough*, the officer observed the defendant coming from the backyard of premises where the officer had previously arrested the defendant for trespass and possession of a controlled substance, and had numerous times ordered him off the premises without arresting him. When the defendant saw the police, he stopped, turned, and ran, and the officer pursued and arrested him. The arrest was held to have been made without sufficient justification. The Court explained that while pursuit was justified where the police have "observed specific conduct indicating that the suspect may be engaged in criminal activity," the police had observed no such conduct (31 AD3d at 813). Rather, the defendant had engaged only in "[f]light alone," or, at most, flight "in conjunction with equivocal circumstances" (*id.*). While the police knew that the defendant had sold drugs in the past, all they observed on the day in question, at most, was a possible violation of Penal Law 140.05, a violation rather than a criminal offense; they had neither information nor any other basis on which to infer that the defendant had just been engaging, or was about to engage, in any form of criminality.

The case of *People v Johnson* (64 NY2d 617) also involved police observations of innocuous behavior by the defendant. The

defendant was a known burglar who the police saw walking and looking at houses in an area that had experienced a rash of burglaries; the Court held that his act of looking at houses, even combined with the knowledge of his previous burglary arrests, "provide[d] no sufficient bases to infer criminal activity had been or was about to be undertaken" (64 NY2d at 619).

The conduct of the defendant standing in a crowd in *Boulware* was innocuous, as was the conduct of the defendant merely walking through a building's yard in *McCullough*, and the conduct of the defendant looking at houses in *Johnson*. Here, in contrast, the conduct of the two men was far from innocuous, and the circumstances far from equivocal. Rather, the officers' observations here were of conduct by defendant and Thomas that was inherently suspicious, which, in light of the officers' prior knowledge of them, justified the reasonable belief that the two men were probably running from the area near the Lace nightclub, and that they had just engaged in criminal activity there.

Had Sergeant Monahan and Officer Carey merely seen two people whom they did not recognize running across Broadway at around 4:30 a.m., darting through traffic and looking back over their shoulders in the direction of 7th Avenue and 49th Street as

if fearful of being chased, the officers would have been justified in having some suspicions that the two people might have been running from the site of a recent commission of a crime, although those observations alone would not have given the police reasonable suspicion to stop and frisk the men (*see People v Velasquez*, 217 AD2d 510, 511 [1st Dept 1995], *lv denied* 87 NY2d 852 [1995]). However, the information possessed by the officers here at the time they observed the two men running elevated any mere suspicions into reasonable suspicion that these two men were running away from the scene of a crime they had just committed in the vicinity of the Lace nightclub.

The officers recognized the two men. They knew that defendant had a history of operating scams and victimizing tourists in the vicinity of the Lace nightclub, and they knew Thomas to associate with other people who engaged in such scams. This knowledge made it more reasonable for the officers to conclude that the two men were running away from the scene of a crime they had just committed in the vicinity of Lace, rather than to conclude that they were running for some other, innocuous or non-criminal reason. Adding to the reasonableness of the conclusion that the two men were running away from the scene of a crime they had just committed in the vicinity of Lace is Officer

Carey's observation, earlier that night, of defendant loitering near the Lace nightclub. Knowing defendant's criminal history, Officer Carey had directed him to leave. So, when the officer observed defendant running away from the very area where he had been loitering earlier, near the Lace nightclub, the officer had substantial additional reason to conclude that defendant had been in the area of Lace, all along, to engage in another scam that night, and that he had in fact just committed such a scam.

Admittedly, the quantum of information in reasonable suspicion cases often includes observations by the police of some physical indicia of crime. For example, in *People v Martinez* (80 NY2d 444), the police saw the defendant, at night, in an area known for a large amount of drug activity, removing a Hide-a-Key box known to be used as a drug stash from the steel grate of a store window. The Court held that the police had a reasonable suspicion of criminal activity, considering the defendant's flight from the police in conjunction with the "other attendant circumstances, namely, the time, the location, and the fact that [the] defendant was seen removing an instrument known to the police to be used in concealing drugs" (*id.* at 448).

Nevertheless, observation of a physical object generally associated with a crime is not a sine qua non of reasonable

suspicion. That the police here did not observe defendant or his codefendant holding any proceeds of a crime does not preclude a finding of reasonable suspicion under these circumstances.

I would therefore conclude that the police acted properly in forcibly stopping the two men while they ensured that a crime had been committed and arranged for a showup identification by the victim, a process that took mere minutes to complete. The brevity of the detention is another factor demonstrating that the officers acted reasonably (*see People v Hicks*, 68 NY2d 234, 241-244 [1986]; *People v Encarnacion*, 191 AD2d 374 [1st Dept 1993], *lv denied* 81 NY2d 1072 [1993]). Notably, too, the officers had no reasonable alternative course of action. They were confronted with a fast-moving situation that required immediate action; these experienced officers made a reasonable, split-second decision, choosing the only plausible way to investigate highly suspicious circumstances.

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

ENTERED: JANUARY 16, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10828 The People of the State of New York, Ind. 5845/10
Respondent,

-against-

Patrick Thomas,
Defendant-Appellant.

_____

Matthew J. Delude, Manchester, NH, of the bar of the State of Connecticut, admitted pro hac vice, of counsel, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Judgment, Supreme Court, New York Court (Thomas Farber, J. at dismissal motion; Michael R. Sonberg, J. at suppression hearing; Cassandra M. Mullen, J. at jury trial and sentencing), rendered June 22, 2011, as amended July 20, 2011, reversed, on the law, the motion to suppress the out-of-court identification and property seized from defendant granted, and the matter remanded for a new trial preceded by an independent source hearing.

Opinion by Manzanet-Daniels, J. All concur except Tom, J.P. and Saxe, J. who dissent in an Opinion by Saxe, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
David B. Saxe
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

10828
Ind. 5845/10

_____x

The People of the State of New York,
Respondent,

-against-

Patrick Thomas,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Thomas Farber, J.), at dismissal motion; Michael R. Sonberg, J. at suppression hearing; Cassandra M. Mullen, J. at jury trial and sentencing), rendered June 22, 2011, as amended July 20, 2011, convicting him of grand larceny in the third and fourth degrees and fraudulent accosting, and imposing sentence.

The Legal Aid Society, New York (Steven Banks of counsel), and Primmer Piper Eggleston & Cramer, Manchester, NH (Matthew J. Delude, of the bar of the State of Connecticut, admitted pro hac vice, of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi and David M. Cohn of counsel), for respondent.

MANZANET-DANIELS, J.

Police officers observed defendant and his companion, William Brown (*see People v Brown*, __AD3d__, appeal no. 9584 [decided simultaneously herewith]), running across Broadway, in the Times Square area, at approximately 4:40 a.m., "looking over their shoulder[s]." No crime had been reported, the officers did not see anyone chasing the two men, and no apparent contraband was visible.[1]

The motion court denied defendant's motion to suppress the identification and property seized from him incident to arrest, finding that the police had reasonable suspicion to stop defendant and Brown when they observed them "moving at a significant pace . . . looking over their shoulders . . . as if to see if they were being followed." The court noted that "[b]oth Officer Carey and Sergeant Monahan knew from prior contacts that Mr. Brown engaged in fraudulent accosting in that area," and reasoned that "someone knowing of Mr. Brown and his prior criminal activities [would] believe that he had engaged in some sort of scam, and was fleeing a scene." The court found that "[t]he fact that [defendant Thomas] was with Mr. Brown and

[1] I am in substantial agreement with the more detailed recitation of facts in the dissent.

mimicking his conduct provided reasonable susp[icion] that he had engaged in whatever conduct Mr. Brown had committed." We now reverse.

A level three forcible stop is constitutional only if the police have a "reasonable suspicion that a particular person was involved in a felony or misdemeanor" (*People v Hollman*, 79 NY2d 181, 185 [1992]). In determining whether the police officers had the requisite reasonable suspicion, only the information known to the officers prior to the forcible stop is relevant (*see People v Cantor*, 36 NY2d 106, 111 [1975]).

The officers' knowledge of defendant Brown's prior criminality in the same neighborhood was not sufficient to give rise to reasonable suspicion justifying a level three intrusion as to Brown; perforce, knowledge of Brown's prior criminality was insufficient to justify a level three intrusion as to *defendant*, who was merely in Brown's company and was not even known by the officers to have a criminal record. The police sergeant only knew defendant by face, and the officer did not know defendant personally and had never arrested him. Contrary to what is asserted by the dissent, there is no evidence that the police officers knew defendant to have victimized people in the area. The motion court, in denying defendant's motion to suppress,

appears to have endorsed a theory of "guilt by association," which must vigorously be rejected.

"[A] stop based on no more than that a suspect has previously been arrested . . . is premature and unlawful and cannot be justified by subsequently acquired information resulting from the stop" (*People v Johnson*, 64 NY2d 617, 619 [1984]). In *Johnson*, the defendant, a known burglar, was stopped by officers who observed him walking around and looking at houses in an area where previous burglaries had occurred. The Court of Appeals held the stop unlawful, reversed, and granted the motion to suppress.

Likewise, in *People v McCullough* (31 AD3d 812 [3rd Dept 2006], *lv denied* 7 NY3d 850 [2006]), the defendant, who was known to the officer as a result of previous arrests for trespass and possession of a controlled substance, was observed coming from the backyard of a building known for narcotics dealing. Upon seeing the police, the defendant stopped, turned and ran. The Third Department held that the police lacked reasonable suspicion to pursue the defendant, and granted the motion to suppress.

This Court, in *People v Boulware* (130 AD2d 370 [1st Dept 1987], *appeal dismissed* 70 NY2d 994 [1988]), stated that an officer's belief that the defendant has had previous arrests is

an insufficient basis on which to find an objective suspicion of criminal activity, reasoning that "[t]o hold otherwise would be to exclude all persons with arrest records from the protection of the Fourth Amendment and render them subject to arbitrary stops and inquiries" (*id.* at 373). An officer's surmise as to a person's propensity to commit crime, in the absence of objective indicia that a crime has taken or will be taking place, is an insufficient constitutional predicate (*id.*).

As *Johnson* and *Boulware* make clear, the officers' knowledge of Brown's criminal past is not tantamount to an "indication of criminal activity."[2] This logic is even more compelling as to defendant, who was not even known to have a criminal past, and was assumed guilty by mere association with Brown.

The fact that the officers observed defendant and Brown

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[2]The cases relied on by the People for the proposition that a defendant's criminal history is relevant to the reasonable suspicion calculus are distinguishable (*see e.g. People v Teasley*, 88 AD3d 490 [1st Dept 2011] [officer recognized defendant from wanted poster], *lv denied* 19 NY3d 977 [2012]; *People v Lynah*, 56 AD3d 375 [1st Dept 2008] [defendant, whom officer recognized from recent drug investigation, observed holding a plastic bag and counting something], *lv denied* 12 NY3d 760 [2009]; *People v Rivera*, 50 AD3d 458 [1st Dept 2008] [recognizing defendant's vehicle from a previous narcotics surveillance operation, officers followed defendant, stopping him only after observing a drug transaction], *lv denied* 11 NY3d 740 [2008]).

running does not elevate the level of suspicion. Flight, accompanied by equivocal circumstances, does not supply the requisite reasonable suspicion (*see People v Holmes*, 81 NY2d 1056 [1993]). The police did not observe conduct indicative of criminality, nor did they even possess information that a crime had occurred in the area. The cases relied on by the People are readily distinguishable insofar as they involve flight coupled with other factors (*see e.g. People v Poh Wong*, 204 AD2d 111 [1st Dept 1994] [defendant running through the streets of Chinatown, looking over his shoulder, along with man holding a revolver], *lv denied* 84 NY2d 835 [1994]).

Accordingly, the judgment of the Supreme Court, New York County (Thomas Farber, J. at dismissal motion; Michael R. Sonberg, J. at suppression hearing; Cassandra M. Mullen, J. at jury trial and sentencing), rendered June 22, 2011, as amended July 20, 2011, convicting defendant of grand larceny in the third and fourth degrees and fraudulent accosting, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, should be reversed, on the law, the motion to suppress the out-of-court identification and property seized from defendant

granted, and the matter remanded for a new trial preceded by an independent source hearing.

All concur except Tom and Saxe, JJ. who dissent in an Opinion by Saxe, J.

SAXE, J. (dissenting)

The majority's decision goes far beyond protecting against unreasonable searches and seizures. By disapproving of the stop of defendant, in which officers took reasonable steps based on the combination of facts known to them, this Court is discouraging police work that is not only constitutionally proper but also laudable. Such a precedent will serve to impede effective law enforcement and interfere with the protection and safety of the public.

While this appeal and the appeal of codefendant William Brown (*see People v William Brown*, appeal no. 9584) have been heard separately, the question of whether the police were justified in stopping and detaining each of the two men requires consideration of what the police officers knew at the time with regard to both men. In both appeals, based on the testimony at the suppression hearing, the police were justified in detaining the two men based on all the information known to the officers at the time. Although the officers had less prior knowledge regarding *this* defendant, Patrick Thomas, and had not observed him, as they had Brown, lingering in front of the gentlemen's club earlier that night, they were justified in their stop of *both* men by their observations of the two combined with the

information then in their possession. Moreover, I would reject, as unreasonable and illogical, any suggestion that the police could properly entertain a reasonable suspicion that William Brown had just committed a crime in front of the Lace nightclub, based on their aggregate knowledge of his criminal history, his presence and conduct in the area that night, and his apparent flight from the location of Lace at a suspiciously late hour, but could not properly extend that suspicion to the man running next to Brown at 4:30 a.m., similarly looking back over his shoulder, when the second man was known to one of the officers -- by face, if not by name -- as an associate of other individuals who, like Brown, were known to victimize people at that location. I would therefore uphold the denial of both defendants' suppression motions and affirm their convictions.

Facts

At the suppression hearing, Police Officer Edward Carey testified that in the early morning hours of December 9, 2010, he was on uniformed patrol with Sergeant Kenneth Monahan and Police Officer Thomas Donovan near Times Square in an unmarked police van. The officers were assigned to the Cabaret Unit, which specialized in identifying crimes committed around bars and nightclubs. Officer Carey had seen codefendant William Brown

numerous times on prior occasions while patrolling the Times Square area; in fact, Officer Carey had arrested Brown on two previous occasions for fraudulent accosting -- that is, engaging in scams, usually targeting single men coming out of so-called gentlemen's clubs, such as Lace or Flashdancers. Sergeant Monahan testified that he had previously seen both defendant and Brown "numerous times" in front of the Lace nightclub, located on Seventh Avenue near 49th Street. Monahan knew defendant by face and Brown by name. He knew the two men to associate with the same individuals, and although he had never seen defendant and Brown together, he knew that they both "victimized" people at that location.

Importantly, at around 1:00 or 1:30 a.m. that night, Officer Carey observed Brown in front of Lace, and got out of the police vehicle to speak directly to him, instructing him to leave the area.

A few hours later, at around 4:30 a.m., the three officers were driving south on Broadway between 49th and 48th Streets when they observed defendant and Brown running diagonally across Broadway, through the middle of the street, crossing directly in front of the officers' unmarked van, and looking over their shoulders, back toward the corner of 49th Street and Seventh

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Sergeant Monahan promptly stopped the van; Carey and Donovan exited, and stopped the two men in front of a hotel located at 1605 Broadway. Meanwhile, Sergeant Monahan drove around the corner toward Lace, where he saw a man standing in front of 723 Seventh Avenue, next door to the club. Sergeant Monahan drove up to the man and asked if anything had been taken from him; the man replied, "[T]hey took my watch." Sergeant Monahan then drove the victim to 1605 Broadway, where defendant and Brown were being held, arriving only a minute or two after the two men were detained. Upon viewing defendant and Brown from the van, the victim stated, "[T]here they are." One of the officers asked defendant and Brown, "[W]here's the watch?" and in response, defendant reached into his pants pocket and produced a silver Rolex watch.

Discussion

To forcibly detain a defendant, the police must have "reasonable suspicion" that a crime has been committed; reasonable suspicion is defined as the "quantum of knowledge [sufficient] to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*see People v Brannon*, 16 NY3d 596, 602-603 [2011] [internal quotation marks omitted]; *People v Martinez*, 80 NY2d 444, 447 [1992]; *People v DeBour*, 40 NY2d 210, 216, 223 [1976]). "A stop based on reasonable suspicion will be upheld so long as the intruding officer can point to 'specific and articulable facts which, along with any logical deductions, reasonably prompted th[e] intrusion'" (*Brannon*, 16 NY3d at 602).

The majority relies on cases holding that certain types of knowledge, absent more, fail to rise to the level of reasonable suspicion. One of those lines of cases stands for the well established proposition that the officers' mere knowledge of the defendant's prior criminality does not give rise to reasonable suspicion justifying a stop (*see People v Johnson*, 64 NY2d 617, 619 [1984]). Another line of cases holds that "[f]light alone, . . . or even in conjunction with equivocal circumstances that might justify a police request for information, is insufficient

to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to policy inquiry" (*People v Holmes*, 81 NY2d 1056, 1058 [1993]; *see also People v May*, 81 NY2d 725, 727-728 [1992]).

However, each of those factors, prior criminality and flight, *may* serve as components of the total quantum of knowledge that would lead a reasonable person under the circumstances to believe that "criminal activity is at hand." A defendant's criminal history, or even an officer's recognition of a defendant from an earlier investigation, may be a factor in assessing reasonable suspicion (*see e.g. People v Lynah*, 56 AD3d 375 [1st Dept 2008], *lv denied* 12 NY3d 760 [2009]). Similarly, "[f]light, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity," may provide the necessary predicate to stop and detain a defendant (*People v Holmes*, 81 NY2d at 1058).

The majority suggests that this matter is comparable to *People v Boulware* (130 AD2d 370 [1st Dept 1987], *appeal dismissed* 70 NY2d 994 [1988]) and *People v McCullough* (31 AD3d 812 [3d Dept 2006], *lv denied* 7 NY3d 850 [2006]), where the police lacked reasonable suspicion to pursue or stop the defendants. I disagree; in both those cases, the conduct of the defendant was

innocuous, a description that cannot reasonably be applied here.

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the premises without arresting him. When the defendant saw the police, he stopped, turned, and ran, and the officer pursued and arrested him. The arrest was held to have been made without sufficient justification. The Court explained that while pursuit was justified where the police have "observed specific conduct indicating that the suspect may be engaged in criminal activity," the police had observed no such conduct (31 AD3d at 813). Rather, the defendant had engaged only in "[f]light alone," or, at most, flight "in conjunction with equivocal circumstances" (*id.*). While the police knew that the defendant had sold drugs in the past, all they observed on the day in question, at most, was a possible violation of Penal Law 140.05, a violation rather than a criminal offense; they had neither information nor any other basis on which to infer that the defendant had just been engaging, or was about to engage, in any form of criminality.

The case of *People v Johnson* (64 NY2d 617) also involved police observations of innocuous behavior by the defendant. The defendant was a known burglar who the police saw walking and looking at houses in an area that had experienced a rash of burglaries; the Court held that his act of looking at houses, even combined with the knowledge of his previous burglary arrests, "provide[d] no sufficient bases to infer criminal

activity had been or was about to be undertaken" (64 NY2d at 619).

The conduct of the defendant standing in a crowd in *Boulware* was innocuous, as was the conduct of the defendant merely walking through a building's yard in *McCullough*, and the conduct of the defendant looking at houses in *Johnson*. Here, in contrast, the conduct of the two men was far from innocuous, and the circumstances far from equivocal. Rather, the officers' observations here were of conduct by defendant and codefendant that was inherently suspicious, which, in light of the officers' prior knowledge of them, justified the reasonable belief that the two men were probably running from a scene at which they had just engaged in criminal activity.

Had Sergeant Monahan and Officer Carey merely seen two people whom they did not recognize running across Broadway at around 4:30 a.m., darting through traffic and looking back over their shoulders in the direction of 7th Avenue and 49th Street as if fearful of being chased, the officers would have been justified in having some suspicions that the two people might have been running from the site of a recent commission of a crime; but they would not have had reasonable suspicion to forcibly stop the men (*see People v Velasquez*, 217 AD2d 510, 511

[1st Dept 1995], *lv denied* 87 NY2d 852 [1995]). Here, however, the information possessed by the officers at the time they observed the two men running elevated any mere suspicions into reasonable suspicion that these two men were running away from the scene of a crime they had just committed in the vicinity of the Lace nightclub.

The officers recognized the two men. They knew that Brown had a history of operating scams and victimizing tourists in the vicinity of the Lace nightclub, and they knew defendant to associate with other people who engaged in such scams. This knowledge made it more reasonable for the officers to conclude that the two men were running away from the scene of a crime they had just committed in the vicinity of Lace, rather than to conclude that they were running for some other, innocuous or noncriminal reason. Also, importantly, since Officer Carey had observed Brown near the Lace nightclub earlier that night, and, knowing his history, had directed him to leave, the officer's observation of Brown running away from the area where he had been loitering earlier, near the Lace nightclub, gave him further reason to conclude that Brown had been in the area, all along, to engage in another scam that night, and that he had just committed such a scam.

Admittedly, the quantum of information in reasonable suspicion cases often includes observations by the police of some physical indicia of crime. For example, in *People v Martinez* (80 NY2d 444), the police saw the defendant, at night, in an area known for a large amount of drug activity, removing a Hide-a-Key box known to be used as a drug stash from the steel grate of a store window. The Court held that the police had a reasonable suspicion of criminal activity, considering the defendant's flight from the police in conjunction with the "other attendant circumstances, namely, the time, the location, and the fact that [the] defendant was seen removing an instrument known to the police to be used in concealing drugs" (*id.* at 448).

Nevertheless, observation of a physical object generally associated with a crime is not a sine qua non of reasonable suspicion. That the police here did not observe defendant or his codefendant holding any proceeds of a crime does not preclude a finding of reasonable suspicion under these circumstances.

Finally, the stop and detention of defendant along with Brown is not the equivalent of detaining defendant based on "guilt by association." Defendant was not merely standing innocently beside a person of whom the police had reasonable suspicion; he was running alongside Brown, similarly checking

back over his shoulder in the direction of the Lace nightclub. Accepting that the police had sufficient grounds for reasonable suspicion that Brown had just committed a crime, it was equally reasonable for the police to conclude that defendant had participated in that crime with Brown. This would be so even if they had no other knowledge of defendant, but here, Sergeant Monahan also knew that defendant associated with others who perpetrated scams like Brown's, giving the officers additional reason to stop both men.

I would therefore conclude that the police acted properly in forcibly stopping the two men while they ensured that a crime had indeed been committed and arranged for a show-up identification by the victim, a process that took mere minutes to complete. The brevity of the detention is yet another factor demonstrating that the officers acted reasonably (*see People v Hicks*, 68 NY2d 234, 241-244 [1986]; *People v Encarnacion*, 191 AD2d 374 [1st Dept 1993], *lv denied* 81 NY2d 1072 [1993]). Notably, too, the officers had no reasonable alternative course of action. They

were confronted with a fast-moving situation that required immediate action; these experienced officers made a reasonable, split-second decision, choosing the only plausible way to investigate inherently suspicious circumstances.

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

ENTERED: JANUARY 16, 2014

CLERK