SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 8, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2285N Gene Ann Criscenti, Index 104729/06
Plaintiff-Appellant,

-against-

Verizon, et al.,
Defendants,

Channell Commercial Corp.,
Defendant-Respondent.

Gary E. Rosenberg, P.C., Forest Hills (Gary E. Rosenberg of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered November 13, 2009, which granted defendant-respondent's motion to allow its deposition to be conducted in California by video conference, unanimously reversed, on the law, the facts and in the exercise of discretion, with costs, and the motion denied.

Respondent, a publicly traded corporation, with over 600 employees, has failed to meet its burden of demonstrating that appearing in New York City for deposition would cause it

substantial hardship (*see Fortress Credit Opportunities I LP v Netschi*, 59 AD3d 250 [2009]; *Kenney, Becker, LLP v Kenney*, 34 AD3d 351 [2006]; *Swiss Bank Corp. v Geccee Exportaciones*, 260 AD2d 254 [1999]). Respondent merely asserts, without more, that its chief executive officer, who respondent acknowledges travels throughout the world almost six months out of the year, will be unable to be deposed in New York. Nor has respondent proffered any reason why none of its other 600 plus employees are appropriate witnesses.

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

ENTERED: APRIL 8, 2010

David Spolony

CLERK

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2105 Ashly Garcia, an infant by her Mother and Natural Guardian Denis Diaz, et al., Plaintiffs, Index 102548/07

-against-

Prana Growth Fund I, L.P., et al., Defendants-Respondents,

Broadway Towers Associates, LLC, et al., Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Louis B. York, J.), entered on or about May 20, 2009,

And said appeal having been argued by counsel for the respective parties,

It is unanimously ordered that said appeal be and the same is hereby deemed withdrawn in accordance with M-431 decided simultaneously herewith.

ENTERED: APRIL 8, 2010

CLERK

Saxe, J.P., Nardelli, Buckley, Acosta, Freedman, JJ.

1168 The People of the State of New York, Ind. 3811/99
Respondent,

-against-

Lawrence White,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered July 2, 2008, resentencing defendant to a term of 5 years with 5 years' postrelease supervision, unanimously reversed, on the law, defendant's resentence vacated and the original 5 year term reinstated.

Defendant is entitled to relief based on *People v Williams* (____ NY3d ____, 2010 WL 605257, 2010 NY LEXIS 40), which invalidated imposition of postrelease supervision upon individuals who had completed serving determinate sentences of

incarceration before they were resentenced pursuant to *Garner v New York State Dept. of Correctional* Servs. (10 NY3d 358 [2008]).

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

ENTERED: APRIL 8, 2010

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Román, JJ.

1620 In re 47 Ave. B East Inc., Index 101299/09
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

Mehler & Buscemi, New York (Martin P. Mehler of counsel), for petitioner.

Thomas J. Donohue, New York (Scott A. Weiner of counsel), for respondent.

In this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Nicholas Figueroa, J.], entered on or about June 30, 2009), the petition granted, the determination of respondent, dated October 15, 2008, which canceled petitioner's off-premises liquor license and imposed a $1,000 bond forfeiture, unanimously annulled, on the law, and the underlying administrative complaint dismissed, without costs.

Respondent's finding that petitioner unlawfully transferred alcoholic beverages to another entity did not establish that petitioner sold such beverages, a key element in proving a violation of Alcoholic Beverage Control Law § 100(1) (*see Matter of Henry St. Liqs. v New York State Liq. Auth.*, 227 AD2d 258 [1996]; *see also Matter of Domin v New York State Liq. Auth.*, 216

AD2d 297 [1995]; *Matter of CVS Discount Liq. v New York State Liq. Auth.*, 207 AD2d 891 [1994]). Contrary to the dissent's contention, the record is bereft of any evidence that petitioner transferred the alcohol for consideration, as required by Section 3(28) of the Alcoholic Beverage Control Law.

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

SWEENY, J. (dissenting)

I dissent. The issue before the court is whether respondent sustained its burden by the minimal standard of substantial evidence. It clearly did.

Petitioner 47 Ave B. East, Inc., d/b/a Le Souk, and Carthage Palace Inc. (Carthage), d/b/a Carne Vale, are both liquor licensees whose establishments are located across the street from each other. Carthage is owned by Marcus Yacob while petitioner is owned by Sameh Yacob, Marcus' brother.

Respondent opened an inquiry after receiving allegations from an undisclosed source that Carthage was improperly obtaining its liquor from an unauthorized entity; specifically, that bottles of liquor were being carried from Le Souk by its employees to Carthage. This source also claimed that Sameh, the sole principal of Le Souk, was running Carthage with his brother Marcus.

As part of that inquiry, on November 14, 2006, Investigators Englander and Cruz went to Charmer Industries, Inc., the exclusive distributor of certain brands of liquor, where they learned that Charmer made four deliveries to Carthage, in the total approximate amount of $2,500. The last delivery occurred on December 3, 2004. As Carthage had not paid its bill, no subsequent deliveries were made by Charmer to Carthage.

The investigators then went to Carthage where they observed, behind the bar counter, 8 different brands of liquor totaling 20 one-liter bottles that were distributed exclusively by Charmer. Seven of those bottles had been opened and appeared partially consumed. These bottles were placed on the bar and photographed by the investigators, who then asked an employee of Carthage to speak with the person in charge. One of the employees went across the street and returned with Sameh.

The investigators pointed out the liquor bottles in question and asked Sameh if he had the wholesaler's invoices for them. When Sameh said he would have to ask his brother Marcus for those documents, Investigator Englander told Sameh that he knew no deliveries had been made from Charmer to Carthage since December 2004, and that he suspected the liquor had come from Le Souk. Englander testified at the license revocation hearing that Sameh "confirmed that that's what had happened, and when I asked him how the bottles had gotten there, he just kind of curtly said, 'they're here.'" Because Englander believed this statement to be an admission, he did not conduct any follow up investigation.

Sameh Yacob testified at the hearing that he was the owner of Le Souk and his brother Marcus was the manager/partner of Carthage. He acknowledged having a conversation with

Investigator Englander but claimed he told Englander, "The alcohol is here. I don't know where it came from," and that Marcus had the invoices for the alcohol in question. He denied that he told Englander that the alcohol came from Le Souk and stated Le Souk never gave or sold any alcoholic beverages to Carthage.

When asked if he spoke to Marcus about these charges, Sameh testified that Marcus told him some of the alcohol came from previous owners and some from auctions. No documentation regarding the source of the liquor was produced at the hearing.

The ALJ found substantial evidence supporting the charge, finding that "the licensee transferred bottles of liquor from Le Souk to a restaurant owned by his brother and that he admitted this to the investigator." Finding also that Carthage had not had deliveries from Charmer for over two years, the ALJ determined that Sameh's testimony that the bottles were at Carthage from the previous owner was not credible, as the brands in question are "popular" and "would be expected to be rapidly consumed."

Respondent confirmed the ALJ's decision at its October 2, 2008 meeting. It cancelled petitioner's license, effective as of April 14, 2008, the date of a previous cancellation and imposed a $1,000 bond forfeiture.

In reviewing an administrative action, "the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious" (*Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]). Thus, the court's role is limited to a determination of whether the administrative agency's findings are supported by substantial evidence (*see Matter of 330 Rest. Corp. v State Liq. Auth.*, 26 NY2d 375, 378 [1970]; CPLR 7803[4]). Unless an administrative agency's determination is irrational or shocks the conscience, it should be upheld (*see Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 241 [1974]).

The standard of review we are obligated to follow was succinctly enunciated in Justice Tom's dissent in *Matter of 47 Ave. B. E., Inc. v New York State Liq. Auth.* (65 AD3d 33, 44-45 [2009], *revd* 13 NY3d 820 [2009]):

> "[R]eview of an administrative determination is governed by the rather low threshold of substantial evidence, which is less than even a preponderance of the evidence, and may be predicated on both hearsay and circumstantial evidence (*see generally Matter of Cafe La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 280-281. . . [2007]. The findings of an Administrative

> Law Judge (ALJ) involve the assessment of credibility and the drawing of reasonable inferences, 'and the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists' (*id.* at 281)."

Petitioner is alleged to have violated Section 100(1) of the Alcoholic Beverage Control Law, which states in pertinent part: "No person shall . . . sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license." "Sale" is defined by Section 3(28) as "any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. To sell includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

Petitioner transferred alcoholic beverages from its establishment to Carthage. A relationship between the two establishments clearly exists. Moreover, it is apparent that the liquor which was transferred from Le Souk to Carthage was for resale, as evidenced by the fact that the bottles were located on the bar and some of the bottles were opened and obviously had

been partially consumed. Certainly, since Carthage could not have purchased this liquor from Charmer because of its outstanding bill, there was a transfer for consideration between the two brothers within the definition of Alcohol Beverage Control Law § 3[28] and was clearly done to evade the requirements of section 100(1).

The cases cited by the majority are distinguishable on their facts.

Matter of Domin v New York State Liq. Auth. (216 AD2d 297 [1995]) involved alleged violations of Alcoholic Beverage Control Law § 102 (3-b). Rick Tarkin, a supervisor at Charmer Industries asked one of his employees, Sara Einsidler, who had a solicitor's license, to find the best prices for Absolut Vodka and pick up some cases for delivery to a long time friend, Dr. Gary Lubov. She purchased three cases from another distributor and placed them in her car. She drove to a liquor store in the vicinity of Lubov's residence where she stopped to call for directions to his home. As he was getting to ready to leave his home, Lubov suggested that the cases be left at that local liquor store and he would pick them up at a later time. Einsidler made arrangements with the liquor store manager to leave the boxes of vodka there. Both were charged with improper sales of alcoholic beverages under Alcoholic Beverage Control Law § 102 (3-b).

These charges were sustained by the ALJ.

In overturning the determination, the court found that respondent State Liquor Authority did not establish that there was a sale as defined by statute. Of note, however, is the fact that at no time were the boxes of vodka opened, put on display for sale, or in fact sold to the liquor store in question. The undisputed facts in *Domin* clearly demonstrated that the liquor in question was to be delivered to a private residence for personal use or for gifts and was not purchased for resale.

Nor does *Matter of CVS Discount Liq. v New York State Liq. Auth.* (207 AD2d 891 [1994]) or *Matter of Henry St. Liqs. v New York State Liq. Auth.* (227 AD2d 258 [1996]) support the majority's conclusion.

CVS also involved charges brought under Alcoholic Beverage Control Law § 102(b-3). There, an independent truck driver picked up from a warehouse and delivered to CVS numerous cases of liquor. This liquor had previously been purchased by the manager of CVS from various distributors and stored in its warehouse for delivery to the store as needed. The ALJ found that since CVS had received the liquor from the driver of the delivery truck, who was not licensed to sell such liquor, the "sale" violated the applicable sections of law. In reversing, the court held that the agency's interpretation of the statute was unreasonable, in

that "the statute pertains only to the sale of liquor and not to the simple delivery of alcoholic beverages" (207 AD2d at 893). The liquor was purchased by CVS, to be sold by CVS, not a third party. The truck driver had no interest in the resale of the liquor and was not paid based upon that resale. That is clearly not the same situation before us.[1]

Henry Street did involve violations of Alcoholic Beverage Control Law § 100(1). Petitioner there was a retail liquor store. Investigators observed over 25 cases of liquor being loaded into a van which made various stops, where some cases were unloaded on each stop. The investigators did not see the contents of the boxes and never contacted the persons to whom those deliveries were made. At the hearing, petitioner testified that he operated a high volume discount store and did a lot of business with commercial establishments. The owners of some of the establishments testified at the hearing, supported in some cases with invoices and cancelled checks, that they purchased the liquor in question to give as holiday gifts or for personal consumption, not for resale.

Subsequently, these same investigators noted a series of other deliveries to various bars from Henry Street via private

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[1]*CVS* was also not a substantial evidence question but was reviewed as an error of law (*CVS*, at 892).

vehicles. However, in each instance, the investigators were told that no one at Henry Street knew the purchases were made for resale at those bars. In fact, some of the bar owners did not know their employees had purchased the liquor from Henry Street and not from a distributor as required by law.

The ALJ sustained all the charges. In reversing the determination of respondent liquor authority that petitioner had violated Alcoholic Beverage Control Law § 100(1), we noted that the ALJ made no analysis of the evidence presented at the hearing. We found that "[s]ales by a discount liquor store in case or multi-case lots are by no means unusual. The destination of 10 cases of alcoholic beverage . . . is insufficient evidence of petitioner's involvement in an illegal scheme to sell its merchandise at wholesale" (227 AD2d at 260).

These facts are clearly distinguishable from those before us. Once again, the cases of alcohol in *Henry Street* had not been opened. Even where the purchases were made for resale, as in the situations where the ultimate delivery of the liquor was a bar, there was no proof whatsoever that the proprietor of Henry Street knew that to be the case.

In our case, the evidence showed that the liquor was transported to Carthage *from* Le Souk *by employees of* Le Souk. Petitioner clearly knew that the liquor was going to be used for

resale. Further, unlike *Domin, CVS and Henry Street*, there was a mutually supportive business relationship between the two establishments here (owned by brothers), so much so that when the investigators asked to speak to the person in charge of Carthage, the employee went across the street to get Sameh.

Regarding the penalty, our function in reviewing an administratively-imposed sanction is limited to reviewing whether the penalty is so disproportionate to the offense, in light of all the circumstances, as to be irrational or an abuse of discretion (*Pell* at 240). Petitioner has a lengthy history of sustained violations, including two prior violations related to overcrowding and three violations for disorderly premises. Penalties included (1) $12,000 and a 10 day suspension which was upheld after an article 78 proceeding; (2) $12,500 and a 7 day license suspension also upheld after an article 78 proceeding; and (3) a penalty of cancellation upheld by the Court of Appeals (*Matter of 47 Ave. B E. Inc. v New York State Liq. Auth.*, 13 NY3d 820 [2009]). While severe, in light of all the circumstances, the penalty is not excessive (*see Matter of Monessar v New York State Liq. Auth.*, 266 AD2d 123 [1999]).

I would therefore dismiss the petition and confirm the determination.

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

ENTERED: APRIL 8, 2010

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Saxe, J.P., Catterson, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

1971-
1971A

Index 650117/09

In re Lawrence A. Cline, etc.,
Petitioner-Respondent,

PCM Interest Holding, LLC, etc.,
Petitioner,

-against-

Thomas B. Donovan,
Respondent-Appellant.

Schlam Stone & Dolan LLP, New York (David J. Katz of counsel), for appellant.

Greenberg Freeman LLP, New York (Sanford H. Greenberg of counsel), for respondent.

Orders, Supreme Court, New York County (Bernard J. Fried, J.), entered May 29, 2009, which granted the petition for dissolution of Private Capital Management, LLC (PCM) pursuant to New York Limited Liability Company Law § 702 and denied respondent's motion to dismiss the petition for failure to state a cause of action, unanimously modified, on the law, to deny the petition and permit respondent to serve an answer, and otherwise affirmed, without costs.

The petition alleges that the two equal managing members of PCM, petitioner Cline and respondent Donovan, no longer speak to each other and have taken antagonistic positions in ongoing, intractable litigation, which has resulted in the deadlock of PCM.

There is a related action entitled *Ficus Invs., Inc. v Private Capital Mgt. LLC* (61 AD3d 1[2009]). Ficus, a Florida corporation, is the managing member and 80% owner of Private Capital Group, LLC (PCG), which is in the business of buying, managing and selling nonperforming real estate mortgages. PCM is the minority member, holding 20% of PCG. Ficus and PCG allege that respondent Donovan and petitioner Cline misappropriated and diverted over $50 million from PCG to PCM.

In July 2007, Cline entered into a settlement agreement with Ficus and PCG, pursuant to which he returned assets worth millions of dollars to PCG and agreed to cooperate with Ficus's investigation. The settlement agreement is under seal, and it is characterized differently by Cline and Donovan, the former representing that he conveyed to PCM Interest Holding, LLC (PCMIH), an entity wholly owned by Ficus, his economic interest in PCM, and the latter explaining that Cline conveyed his ownership interest in PCM Corp., the entity that owns PCM, to an affiliate of PCG and resigned as a manager of PCM.

This Court affirmed the trial court's order granting Donovan's motion for reimbursement and advancement of legal expenses related to the litigation based upon a provision of PCG's operating agreement allowing the company to advance expenses, and further directed that other defendants in the Ficus

action (PCG's former CFO and vice-president) were also entitled to advancement of legal expenses (*id.* at 10-11).

In this petition, Cline alleges that he is a managing member and the former president of PCM and that he holds 50% of the membership interest in PCM. It is also alleged that in 2007 Cline conveyed his economic interest in PCM to petitioner PCMIH. Donovan moved to dismiss pursuant to CPLR 404 and 406(a), arguing that assuming all of the facts alleged in the petition were true, it should be dismissed for failure to state a claim. Donovan argued that PCMIH lacked standing to seek dissolution because it was admittedly not a member of PCM, but instead allegedly an assignee of Cline's economic interest in PCM. He also argued that the statutory ground on which dissolution was sought -- that it was no longer "reasonably practicable to carry on [PCM's] business in conformity with the articles of organization or operating agreement" (Limited Liability Company Law § 702)-- could not be established. Donovan requested leave to serve an answer in the event that the motion to dismiss was denied, expressly stating that he denies many of the factual allegations contained in the petition and seeks to assert affirmative defenses based on facts "that will no doubt be in dispute (e.g. [that] Cline is not a member of PCM and lacks standing to bring this special proceeding."

The motion court found that PCMIH lacked standing to bring the proceeding, but denied the motion to dismiss and granted the petition on the ground that Cline had established that dissolution was warranted pursuant to Limited Liability Law § 702. However, under the circumstances here, the motion court erred in not permitting Donovan to file an answer and instead summarily granting the petition.

Before deciding the motion, the court asked the parties to submit PCM's organizational documents and to explain whether there were any disputes regarding these documents. Donovan submitted PCM's articles of organization dated November 16, 2005, PCM's statement of organization dated 2005, a filing receipt from the New York State Department of State acknowledging the filing of PCM's articles of organization and an operating agreement for PCM dated February 6, 2006. The only document in dispute was the operating agreement, which provides that the initial member of PCM is PCM Corp., (neither of which are petitioners here) and that Donovan and Cline are the managers. The operating agreement purportedly was signed by both Cline and Donovan, although Cline maintained that he had never signed it and that it was a fraudulent document. The operating agreement states that PCM was formed "for the purpose of managing the purchase, and resolution of non-performing mortgage [*sic*] as agreed from time to time by

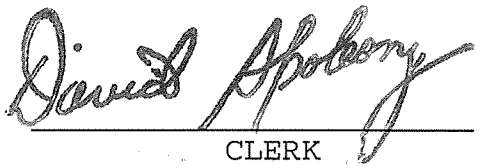
the Managers."

On the basis of this submission alone, Donovan should have been permitted to file an answer, because it raises a factual issue as to whether Cline is a member of PCM and thus has standing to maintain this proceeding. The motion court acknowledged the factual dispute regarding the authenticity of the PCM operating agreement submitted by Donovan, noting that Cline's assertion that the agreement is fraudulent "is indicative of the litigious nature of their relationship" and that the stated purpose of the agreement militates in favor of dissolution because it would "entail even more cooperation between the members" than would be the case if PCM was formed merely as a passive investment entity, as alleged by Cline. Significantly, the disputed operating agreement specifically addressed by the motion court was not a proper basis for summary adjudication of the petition, but instead, a sound reason to grant Donovan leave to serve an answer. Under such circumstances, where a "factual issue exists which may be raised by answer" (*Matter of Lefkowitz v Therapeutic Hypnosis,* 52 AD2d 1017, 1018 [1976]), it was improvident for the motion court to deny Donovan's application for leave to serve an answer (*compare Matter of Dodge*, 25 NY2d

273, 286-287 [1969] *and Matter of Cunningham & Kaming*, 75 AD2d 521, 522 [1980] [where permitting respondent to file an answer would have served no useful purpose]).

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

ENTERED: APRIL 8, 2010



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Tom, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

2043 In re Robert Thomas Woods, Index 100156/09
Petitioner-Appellant,

-against-

New York City Department of Citywide Administrative Services,
Respondent-Respondent.

Brown & Gropper, LLP, New York (James A. Brown of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered May 14, 2009, denying the petition for a declaration that respondent acted arbitrarily and capriciously in determining that petitioner was not qualified to be placed on a "special eligible list" pursuant to Military Law § 243(7) and § 243(7-b), and to annul the determination and direct respondent to place petitioner on such a list, and dismissing the proceeding brought pursuant to CPLR article 78, affirmed, without costs.

Military Law § 243(7) "preserv[es] the rights of potential employees on eligible lists while they are in military service" (*Matter of DeFrancis v D'Ambrose*, 57 AD2d 804, 805 [1977], *affd* 44 NY2d 889 [1978]); it does not extend the time to satisfy the minimum requirements for eligibility. While we acknowledge

petitioner's service to his country, in denying him eligibility for a position with the New York City Fire Department, respondent did no more than abide by the rules governing appointment to civil service, without resort to "extraordinary efforts," as perceived by the dissent.

Petitioner took and passed an open competitive civil service exam, exam No. 2043, to become a New York City firefighter. To be placed on a special eligible list, Military Law § 243(7) requires that a person in military service be "reached for certification," which means that the candidate must be among those "eligibles from which selection for appointment may be made" (Rules and Regulations of the Department of Civil Service [4 NYCRR] § 4.1[a]). The notice of examination for exam No. 2043 clearly provides that "By the date of appointment, you must have . . . 30 semester credits from an accredited college or university, or . . . two years of honorable full-time U.S. military service." Nowhere in the notice does it state that "an applicant must only have two years military service at the time he is available for appointment" as urged by the dissent.

As of January 18, 2008, when petitioner was reached for certification, and January 21, 2008, when final appointments were

made from the certified list of eligible candidates generated by exam No. 2043, petitioner had completed neither of the alternative minimum requirements of the position. In January 2008, petitioner had approximately 20 months of the required 24 months of military service and no college credits. The list of names certified for appointment from exam No. 2043 (which did not include petitioner) expired on May 5, 2008. Subsequent appointments came from the eligible list generated by exam No. 6019, which was certified in June 2008.

In January 2008, petitioner could not have been certified, not because he was in military service, but because he had failed at that time to meet the minimum eligibility requirements. Thus, he was not qualified for placement on a special eligible list from which selection for the position of firefighter could be made, and respondent's determination was not arbitrary and capricious. Further, we reject the dissent's unfair characterization of respondent's action as "go[ing] to extraordinary lengths to prevent" petitioner, who served in the military, from obtaining a position with the Fire Department, which is utterly unsupported by the record.

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

All concur except Saxe and Nardelli, JJ. who dissent in a memorandum by Nardelli, J. as follows:

NARDELLI, J. (dissenting)

I respectfully dissent, because I believe that the interpretation of Military Law § 243(7) and § 243(7-b) presently espoused by respondent New York City Department of Citywide Administrative Services (DCAS) is arbitrary and without support in the statute. Furthermore, this interpretation conflicts with its own prior interpretation of the sections provided in a letter sent to petitioner on September 23, 2008. Indeed, respondent has undertaken extraordinary efforts to deny a military combat veteran a position with the Fire Department, when even the Fire Department wants to employ him.

At the outset, I cannot help but to take note of the irony presented in respondent's position. It has gone to extraordinary lengths to prevent petitioner, an Iraq war veteran, and member of a firefighting family, from becoming a firefighter, in the very city where not 10 years ago hundreds of firefighters perished as the result of a despicable attack on American soil. Petitioner has served his country honorably in its military service, and now seeks to continue his public service by joining the service which produced so many heroes on that infamous day.

On or about December 14, 2002, petitioner took an open competitive civil service exam, Exam No. 2043, to become a firefighter with the City's Fire Department. The Notice of

Examination for the test, prepared by DCAS, is a comprehensive four-page document which outlines, inter alia, the nature of a firefighter's job, and the various requirements that have to be met in order to qualify successfully for the position. As relevant to this appeal, the following language is contained in the Notice of Examination:

> "**Education and Experience Requirements:**
> By the **date of appointment**, you must have
>
> . . .
>
> "(2) a four year high school diploma or its educational equivalent and **have completed two years of honorable full time U.S. military service**" (additional emphasis added).

It is undisputed that petitioner has met the educational requirement. It is also undisputed that before the list expired, he met the military service requirement.

Petitioner passed the examination and was placed on the list, which was established on May 5, 2004, and which expired on May 5, 2008. His ranking was 4694. On April 28, 2006, while the list was still active, petitioner enlisted in the United States Army, and subsequently served in Iraq. He was honorably discharged from the military on September 5, 2008, approximately 28 months after his enlistment.

On or about April 16, 2007, the Fire Department issued petitioner a notice that it intended to appoint him, but that he

needed to submit to medical and psychological testing and have a background investigation. Since petitioner was in Iraq, his mother contacted the Fire Department, which informed her that he could complete those requirements following his discharge, as is authorized by Military Law § 243 (7-b).

On January 18, 2008, petitioner's list number was reached for possible certification. He was at that point still in the military, and thus entitled to be placed on a special eligible list, pursuant to Military Law § 243(7), until after he was discharged. At that time petitioner had served 20 months in the Army, a significant portion of it in combat in Iraq. After January 21, 2008, no further appointments were made from the list generated from Examination No. 2043. Subsequent appointments came from the eligible list generated by Examination No. 6019, which was certified in June 2008. Petitioner, however, was in Iraq serving his country when Examination No. 6019 was given.

Within 90 days of his July 28, 2008 release from military duty, petitioner contacted the Fire Department to arrange to take the remaining tests (which he passed), and to formally request placement on a special eligible list, as permitted by statute. DCAS reactivated his Examination List number on August 8, 2008.

By letter dated September 23, 2008, however, DCAS advised petitioner that the provisions of section 243 of the Military Law

as to his being placed on a special eligibility list were inapplicable for the following reasons:

> "A review indicates that the notice of examination for this subject list requires that the candidate must have completed 30 college credits or two years of honorable full-time U.S. military service. Since you did not have any college credits, and based upon your DD-214, *completed the alternative two years of military service after termination of this list on May 5, 2008*, the provisions of Section 243 do not apply to you" (emphasis added).

The letter from DCAS was clearly erroneous. Petitioner had, in fact, completed his two years of military service on April 28, 2008, before the list expired. Furthermore, by the time he was discharged from the military, and before he could be actually "appointed" to the Fire Department, he had, as noted above, completed approximately 28 months of military service.

Petitioner challenged this determination in a letter dated September 28, 2008. He pointed out the error in respondent's reasoning. Equally importantly, he referred to the Notice of Examination, and its requirement that two years of military service must be achieved by the "DATE OF APPOINTMENT."

The following poignant excerpt was also contained in the letter:

> "This was my dream to be a NYC Firefighter and to follow in my father and brothers footsteps to become a part of the brotherhood

> of the FDNY, a life long dream denied. You see part of the reason I joined the army was a ways to my means. I knew I was not cut out for school so I needed 2 years of military service. I served our country proudly and for great reasons, you see my father was a firefighter during 9/11, and our family remembers well the waiting and wondering of if and when we would hear from my father. I decided this was part of the reason we were fighting this war. **Unfortunately while I was in Iraq the next test was given so now I will have to wait 4 more years to take the test again**" (emphasis added).

DCAS, faced with the recognition that its rationale for opposing appointment could not withstand scrutiny, and displaying a tenacity worthy of the infamous character from Les Miserables, Inspector Javert, replied with a letter dated December 11, 2008 invoking new grounds for denying the application:

> "On January 21, 2008, the date upon which your list number could have been considered for appointment, you would have needed, on that day, either 30 college credits or two years of military service as specified in the Notice of Examination announcing Firefighter Exam No. 2043. However, according to the records you submitted, you did not meet either qualifying option on January 21, 2008. The records indicate that, in January 2008, you had only about 20 months of the required 24 months, and no college credits. Consequently, being on Ordered Military Duty on January 21st did not prevent you from being considered for a possible appointment that day; what prevented you from being considered for appointment that day was the fact that you did not fully meet either of the qualifying options."

This explanation, which obviously was not given in the first letter, finds no basis in the statute, and, as well, ignores the language in the Notice of Examination that any applicant must have two years of military service by the "time of appointment." The Notice of Examination does not state that the two years of military service must be completed by the time the applicant's number is reached on the list. It recites only that the applicant must have two years of military service by the time of appointment.

In opposing the petition, DCAS takes the position that because it is the agency charged with administration of the statute, this Court must yield to its interpretation, based upon its expertise. Yet, its original grounds for declination of the application were easily proven to be erroneous by petitioner himself. It now relies on a new interpretation of the statute. In relevant part, Military Law § 243(7) provides:

> "Any person whose name is on any eligible list shall, while in military duty, retain his rights and status on such list. If the name of any such person is reached for **certification** during his military duty, it shall be placed on a special eligible list in the order of his original standing, provided he makes request therefor following termination of his military duty and during the period of his eligibility on such list" (emphasis added).

The statute makes clear that an individual whose list number

is reached while he is in the military is to be placed on a special eligible list, and is to remain there "for a period of two years after the termination of such military duty." Nothing in the statute requires that the applicant have two years of military service as of the date his or her name is eligible for certification, in order to be placed on the special eligible list. It is thus consistent with the Notice of Examination, which requires that the applicant have two years of military service as of the date of appointment, i.e., the date he actually is appointed to the Fire Department. Clearly, the date of certification is different from the date of appointment.

In *Matter of Scanlan v Buffalo Pub. School Sys.* (90 NY2d 662 [1997]), the Court of Appeals wrestled with the issue of whether four teachers could obtain retroactive membership in the New York State Teachers' Retirement System (TRS), based upon periods they spent as part-time or substitute teachers in the school districts. The Court's discussion of the issues surrounding one of the teachers, Harriet Kaufman, is of relevance here.

Kaufman had been a part-time teacher from 1973 through 1977 in Jericho Union Free School District, and became a full-time teacher in 1981 when she became employed by another school district. When she sought to obtain credit for her years as a part-time teacher, under the ameliorative provisions of

Retirement and Social Security Law § 803(b), Jericho rejected her application. Kaufman stated at the administrative hearing "that she had never been told that part-time teaching staff had the option to join TRS and that she had never participated in any procedure that described the option to join" (*id.* at 674). The Court of Appeals found that the school district's refusal to give her retroactive credit was arbitrary. It found that nothing in the forms that were provided to Kaufman at the time she became a part-time teacher gave her notice of the opportunity to join. The court specifically stated, "We conclude that these documents were not sufficient to put Kaufman, a new teacher who had no prior experience with TRS, on notice of an opportunity to join" (*id.* at 679).

In this case, the only form provided to petitioner at the time he took the test, stated that he needed two years of military service at the "date of appointment" - not when his name was reached on the list. Taking the notice at face value, he joined the Army, put his life in jeopardy, and obtained his necessary military experience.

There is no justification for treating petitioner, a high school graduate, differently from the college graduate in *Scanlan*, with regard to instructions one received and the other did not receive. Indeed, petitioner's case is more compelling,

since he was given erroneous information, at least as can be discerned from the position that DCAS now takes. Kaufman was not given any misleading information.

The majority's reliance on 4 NYCRR 4.1[a] is perplexing. Throughout respondent's efforts to deny petitioner appointment to the Fire Department, including the December 11, 2008 letter, and the briefs submitted on this appeal, it has never invoked the section. In any event, as discussed above, nothing in the section undermines the fundamental concept at issue here - that the announcement for the position (which was prepared by respondent) stated only that an applicant must only have two years military service at the time he is available for *appointment*, and that the language of Military Law § 243(7) does not provide otherwise.

The majority "acknowledge[s]" petitioner's military service, but finds his position unavailing because of a rule interpretation that is not supported by the statute. To paraphrase Justice Alito in his concurring opinion in *Ricci v DeStefano* (557 US __, 129 S Ct 2658, 2689 [2009]), petitioner does not demand our acknowledgment of his military record. His service is self-evident. What he has a right to demand, however, is that he not be deprived of an appointment by an arbitrary determination from an agency which has confused even itself in

coming up with a reason to reject his application.

In sum, since the Notice of Examination advised all applicants only that they needed two years of military service by the date of appointment, since a fair reading of the statute finds that nothing contained in it contradicts the language of the notice, and since petitioner had well over two years of military service at the time he was finally eligible for appointment - i.e., at the time he completed his military obligations in the service of his country, the position taken by DCAS is arbitrary and irrational.

Such mean-spiritedness to a military veteran in the City of New York, a port where millions of soldiers have debarked as they went to place themselves in harm's way, and where the Statue of Liberty stands in the harbor, is an affront to any notion of decency and compassion that is at the bedrock of our country's ideals.

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

ENTERED: APRIL 8, 2010

David Spolony

CLERK

Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2127 Sumintra Raghu, Index 115837/07
Plaintiff-Respondent,

-against-

The New York City Housing Authority,
Defendant-Appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

Zalman & Schnurman, New York (Norman E. Frowley of counsel), for respondent.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered August 25, 2009, which, in an action for personal injuries, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

On July 10, 2007, at about 8:30 A.M., plaintiff, a home health care worker, slipped and fell on a stairway in a building owned and operated by defendant, and sustained several fractures. At her General Municipal Law § 50-H hearing, plaintiff testified that she fell while ascending the stairs between the second and third floors. Before she fell, she noticed that there was some "[w]hite, powdery stuff" on the steps, "all over the place." She had put her right foot on the step, then fell forward onto her

knees.

Lorenzo Brown, the building janitor, testified that on the day in question he had swept the entire staircase of the building and the building next door, each of which has five stories, between 8:00 A.M. and 8:30 A.M. When asked if he had a specific memory of doing these things on the day in question, he stated that he did, because he does the same routine every day. When asked what made him remember that particular day, he responded that it was because he did not change his routine, and had found an efficient way of getting the job done. He further testified that he did not remember ever seeing powder on the steps.

On or about November 18, 2008, plaintiff served an expert witness response stating that she intended to call Dr. William Marletta, a certified safety professional. The gist of the opinion he would offer was that the maintenance of the building departed from safe practice in that the accumulation of powder made the staircase more slippery. He noted further that the stair treads were not maintained in a clean and safe condition, that the stair risers varied in height from 7½ to 8 inches high, rather than being uniform, and that the handrail was blocked and obstructed, with hand clearance of only one-eighth of an inch at step five, while regulations required clearance of one inch.

On or about April 24, 2009, defendant moved for summary

judgment on the ground that plaintiff could not make out a prima facie case of negligence because there was no evidence that defendant either created or had actual or constructive notice of the alleged defects which plaintiff claims to have caused her injuries. The motion court found that there was an issue as to constructive notice, arising from the janitor's credibility. The court found that Brown's recollection was equivocal, since he stated both that he had a specific memory of cleaning the stairs that day, and that he was basing his recollection on his routine.

We conclude that defendant, in moving for summary judgment, met its initial burden of demonstrating that it neither created the hazardous condition, nor had actual or constructive notice of its existence (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [2008]). The janitor's testimony that his regular routine included cleaning the stairwell between 8:00 A.M. and 8:30 A.M., and that he did not observe any powder, was sufficient to shift the burden to plaintiff of demonstrating the existence of questions of fact (*see Vilomar v 490 E. 181st St. Hous. Dev. Fund Corp.*, 50 AD3d 469, 470 [2008]).

Plaintiff's deposition testimony, offered in opposition, did not even attribute her fall to the powder. She simply stated that she slipped, and observed that there was white powder at various locations in the stairwell. She did not testify that she

actually slipped on the powder, and, in the absence of such definitive testimony, the expert's conclusion that the accumulation of powder led to her fall is purely speculative. Evidence of the existence of the powdery substance, "simply does not, in isolation, suffice to support a reasonable inference that the injury was sustained wholly or in part by a cause for which the defendant was responsible" (*Zanki v Cahill*, 2 AD3d 197, 199 [2003], *affd* 2 NY3d 783 [2004] [internal quotation marks and citations omitted]).

Plaintiff's contentions that the purported defects in either the risers or the handrails were the proximate cause of the accident are also unavailing. As noted, plaintiff simply stated that she slipped. She did not attribute her fall to the unevenness of the risers, and there is thus no evidence which would allow the expert to connect plaintiff's fall to any purported defects in the risers (*see Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [2004]). Finally, the claim of inadequacy of the

handrail cannot avail plaintiff, inasmuch as her testimony was that she was not using the handrail at the time of the accident (*see Ridolfi v Williams*, 49 AD3d 295 [2008]).

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

ENTERED: APRIL 8, 2010

CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Abdus-Salaam, JJ.

2170 Norma White, Index 6364/05
Plaintiff-Respondent,

-against-

Carlos A. Diaz, et al.,
Defendants,

Manuel A. Nunez, et al.,
Defendants-Appellants.

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

The Law Office of Alan A. Tarzy, New York (Alan A. Tarzy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic Massaro, J., and a jury), entered August 7, 2008, awarding plaintiff $471,937.15, unanimously reversed, on the law, and the matter remanded for a new trial.

On a prior appeal, we affirmed the denial of defendants' motion for summary judgment, finding issues of fact as to (1) whether plaintiff's injuries, which were sustained when defendants-appellants' (defendants) Access-A-Ride van was hit in the rear by a vehicle whose driver had admittedly fallen asleep at the wheel, were proximately caused by the double parking of the van, and (2) "whether plaintiff was unable to put on her seat belt because it was stuck, as plaintiff claimed, or because the

accident occurred too quickly to allow [the driver] time to help plaintiff with her seat belt, or due to some other reason" (49 AD3d 134, 140 [2008]).

The court's refusal to give a balanced jury instruction based on this Court's statement that "a reasonable jury could find that a rear-end collision is a reasonably foreseeable consequence of double parking for five minutes on a busy Manhattan street" (49 AD3d at 139) was error. While foreseeability in these circumstances was an issue for the jury which precluded summary judgment, defendants were entitled to a more balanced charge that indicated to the jury that they may conclude that the accident was not a foreseeable consequence of the bus being double parked. Furthermore, on the evidence adduced at trial, defendants were entitled to the requested intervening cause charge. In light of these errors, retrial is necessary and we need not consider defendants' remaining arguments.

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

ENTERED: APRIL 8, 2010

CLERK

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

2389 Atinsola Martins, et al., Index 123051/02
Plaintiffs, 591095/04

-against-

Little 40 Worth Associates, Inc., et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

-against-

Partners Cleaning, LLC,
Third-Party Defendant-Respondent.

- - - - -

Partners Cleaning, LLC,
Second Third-Party Plaintiff-Respondent,

-against-

Twi-Laq Industries, Inc.,
Second Third-Party Defendant-Respondent,

Chemical Specialties
Manufacturing Corporation,
Second Third-Party Defendant-Appellant.

MacKay, Wrynn & Brady, LLP, Douglaston (James Gilroy of counsel), for Little 40 Worth Associates, Inc., and Newmark & Co., Real Estates, Inc., appellants.

Herzfeld & Rubin, P.C., New York (Michael B. Sena of counsel), for Chemical Specialties Manufacturing Corporation, appellant.

Martin Clearwater & Bell LLP, New York (Ellen B. Fishman of counsel), for Partners Cleaning, LLC, respondent.

Bivona & Cohen, P.C., New York (Anthony J. McNulty of counsel), for Twi-Laq Industries, Inc., respondent.

Order, Supreme Court, New York County (Emily Jane Goodman,

J.), entered December 8, 2008, which, to the extent appealed from, denied the motion of third-party plaintiffs Little 40 Worth and Newmark for summary judgment against third-party defendant Partners Cleaning for breach of contract and indemnification, denied the cross motion of second third-party defendant Chemical Specialties for summary judgment dismissing the second third-party complaint and all cross claims against it, and granted the motion of second third-party defendant Twi-Laq Industries for summary judgment to the extent of awarding it conditional indemnification against Chemical Specialties, affirmed, without costs.

Plaintiff claimed to have sustained asthma and exposure to hazardous chemical fumes from the shampoo used to clean carpets at his place of employment. The product, Formula 161, was manufactured by Chem Spec and distributed by Twi-Laq.

To establish a relationship between an individual's illness and a toxin suspected of causing such illness, a plaintiff must establish (1) his level of exposure to the toxin; (2) general causation -- that the toxin could in fact cause the illness, and the level of exposure that would engender such illness (the dose-response relationship); and (3) specific causation -- the likelihood that this specific toxin did cause the plaintiff's injury (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 446 n 2 [2006]).

The analysis and calculations of Chem Spec's expert were based on assumptions not supported by the record, namely, the size of the room, the percentage of floor shampooed, and the degree of dilution of Formula 161 used at the time.

Entitlement to full contractual indemnification requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). Here, the building owner and manager failed to establish the terms of the purchase order for carpet-cleaning services.

Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1999]). Here, the building owner and manager did not establish their own freedom from negligence, since there was no evidence that they did not supervise, direct or control the work of the contractor (*see e.g. Uribe v Fairfax, L.L.C.*, 48 AD3d 336 [2008]).

However, a "distributor of a defective product has an implied right of indemnification as against the manufacturer of the product" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 62 [2003],

lv dismissed 100 NY2d 614 [2003]). Accordingly, Twi-Laq was entitled to conditional indemnification from Chem Spec (*see German v Morales*, 24 AD3d 246 [2005]).

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

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

NARDELLI, J. (dissenting in part)

I agree with the majority that the motion court did not err in denying the summary judgment motion by the owner and managing agent of the building seeking contractual indemnification against the carpet cleaning contractor, and the cross motion by the chemical manufacturer for summary judgment dismissing the second-third party claim asserted against it by the cleaning contractor. As the majority notes, there are questions of fact concerning the extent of, or lack of, supervision by the building owner and its agent in the cleaning process, and, as well, as to whether the cleaning contractor was negligent in applying the cleaning fluids. Additionally, the record does not support, as the majority notes, any conclusions as to "the size of the room, the percentage of floor shampooed, and the degree of dilution of Formula 161 used [when the carpeting was cleaned]."

Due to the existence of such questions, and, thus, because there is nothing in this record which conclusively establishes the proximate cause of plaintiff's injuries, I submit that it was premature to grant the cleaning contractor conditional indemnification against Chemical Specialties Manufacturing Corp., the manufacturer of the cleaning solution.

Until such time as it is established that the product as manufactured (or as labeled) was defective, there is no reason to

grant conditional indemnification. As this Court has noted, "[when] it has not yet been determined whether any party's negligence contributed to [an] accident, a finding of common-law indemnity is premature" (*Barraco v First Lenox Terrace Assoc.*, 25 AD3d 427, 429 [2006]).

I believe that the majority's reliance upon *Godoy v Abamaster of Miami* (302 AD2d 57 [2003], *lv dismissed* 100 NY2d 614 [2003]), is misplaced, since that case involved a situation where there had been a jury finding that a retail distributor, as well as a wholesale distributor, bore strict liability for selling an unsafe product manufactured by a foreign company over which jurisdiction could not be obtained. Since there was a finding that the product, a meat grinder, was itself defective, the court concluded that the distributor in closest privity with the manufacturer should indemnify the more remote distributor, i.e., the retail seller. In this case, however, there has not been any determination by a factfinder that the cleaning solution was defective. Thus, there cannot presently be any allocation of liability.

The majority also relies upon *German v Morales* (24 AD3d 246 [2005]). There, this Court, in vacating the dismissal of the complaint, as well as the cross claim for indemnification asserted by the distributor against the manufacturer, made a

specific finding, with regard to only one defendant, that there was a question of fact as to whether a can of lacquer thinner was improperly labeled, and that such improper labeling was the proximate cause of the plaintiff's injuries. I submit that *German* is inapposite to this case because, as the majority finds, there are questions of fact as to whether more than one party, including the landlord (for failure to supervise) and the cleaning contractor (for, inter alia, using too much solution), may also be held responsible.

Consequently, until such time as it is determined which party, if any, proximately caused plaintiff's injuries, or, at least, the field of potentially responsible parties is narrowed to one, the grant of conditional indemnification against any party is premature.

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

ENTERED: APRIL 8, 2010

CLERK

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

2514 In re Victor Valentin, Index 401849/08
Petitioner-Appellant,

-against-

New York City Housing Authority, et al.,
Respondents-Respondents.

Manhattan Legal Services, New York (Simon Heller of counsel), for appellant.

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 13, 2009, which denied petitioner's Article 78 petition and dismissed the proceeding in which he sought to annul a determination of respondent NYCHA, dated March 19, 2008, denying his Remaining Family Member ("RFM") grievance, unanimously affirmed, without costs.

Petitioner, having undisputedly lived with his grandmother in the subject apartment for many years, albeit without authorization, has standing to bring this Article 78 proceeding (*Via v Franco*, 223 AD2d 479 [1996]). Nonetheless, NYCHA's finding that petitioner did not qualify for RFM status is supported by substantial evidence and has a rational basis in the record (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). The record supports the agency's finding that

petitioner did not become an authorized occupant of his grandmother's apartment prior to her death in 2004. Petitioner's arguments notwithstanding, the agency's denial of his grandmother's 1995 application to add him as an authorized occupant was final and the applicable four-month statute of limitations has long since expired. As to the agency's denial of his grandmother's second application in 1998, even assuming that neither petitioner nor his grandmother received notice of that denial, petitioner makes no challenge to the substance of that determination, which was based on his ineligibility due to a prior criminal conviction.

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

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

ENTERED: APRIL 8, 2010

CLERK

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

2515-
2515A Index 114188/05

Nadia Jamal Eddine,
Plaintiff,

-against-

Federated Department Stores, Inc., et al.,
Defendants-Respondents,

Certified Interiors, Inc.,
Defendant.

- - - - -

Federated Department Stores, Inc., et al.,
Third-Party Plaintiffs-Respondents,

Certified Interiors, Inc.,
Third-Party Plaintiff,

-against-

Richemont North America, Inc.,
Third-Party Defendant-Appellant.

Hoey, King, Toker & Epstein, New York (Angela P. Pensabene of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for Federated Department Stores, Inc. and Bloomingdale's, Inc., respondents.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for Seaboard Construction Group, respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 17, 2008, which, to the extent appealed from, denied that portion of then-defendant Richemont's motion for summary judgment dismissing all cross claims against

it and granted the cross motions of the remaining defendants to convert those cross claims into third-party claims against Richemont, and order, same court and Justice, entered January 16, 2009, which denied Richemont's motion to renew that portion of its prior motion, unanimously affirmed, without costs.

Plaintiff was injured when struck by a sign that fell while she was working behind the Cartier counter at Bloomingdale's in Manhattan. Richemont is the owner of Cartier. With the dismissal of the complaint as against Richemont, the court properly converted the other defendants' cross claims for indemnification into a third-party action against Richemont (*see e.g. Jones v New York City Hous. Auth.*, 293 AD2d 371 [2002]). Richemont offered no evidence, either on its motion to dismiss or in opposition to the cross motions to file third-party actions, to contradict plaintiff's allegations of gravely disabling injury under Workers' Compensation Law § 11 (*see Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 415 [2004]).

A motion to renew is intended to bring to the court's attention new or additional facts that -- although in existence at the time the original motion was made -- were unknown to the movant at that time. The rule is not inflexible, and renewal may be granted in the court's discretion, in the interest of justice, even on facts that were known to the movant at the time of the

original motion (*see e.g. Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [2007]). However, Richemont failed to exercise due diligence in obtaining the expert reports, and also failed to provide a reasonable explanation for not presenting such facts on its prior motion (CPLR 2221[e][3]). Under these circumstances, renewal was properly denied.

"Injuries qualifying as grave are narrowly defined" in § 11, and the words in the statute should "be given their plain meaning without resort to forced or unnatural interpretations" (*Castro v United Container Mach. Group*, 96 NY2d 398, 401 [2001]). Plaintiff's examining neuropsychologist concluded that the patient had suffered "a mild traumatic brain injury," and exhibited no evidence of malingering. By contrast, defendant's examiner found no disability due to any neurological disorder, instead concluding that plaintiff's symptoms were "typical of a

somatization[1] disorder related to her desperate quest for financial compensation." These starkly contradictory conclusions presented an issue of fact for a jury.

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

ENTERED: APRIL 8, 2010

CLERK

[1]Stedman's Medical Dictionary (27th ed. 2000) defines this word as the expression of psychological need or the conversion of anxiety into physical symptoms or "a wish for material gain associated with a legal action following an injury."

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

2520 The People of the State of New York, Ind. 553/08
Respondent,

-against-

Anthony English,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jaime Bachrach 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 (Robert Stolz, J.), rendered on or about January 14, 2009,

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

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

ENTERED: APRIL 8, 2010

CLERK

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

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

2521 The People of the State of New York, Ind. 1410/03
Respondent,

-against-

Victor Rondon,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered April 4, 2008, convicting defendant, after a jury trial, of burglary in the first degree, robbery in the first degree and two counts each of rape in the first degree, sodomy in the first degree and sexual abuse in the first degree, and sentencing him to an aggregate term of 44 to 107 years, unanimously modified, on the law, to the extent of directing that the sentences for the sexual abuse convictions be served concurrently with the sentences for the rape and sodomy convictions, and otherwise affirmed.

The court properly exercised its discretion in permitting a police witness to demonstrate for the jury the loading, chambering and firing mechanism of a semiautomatic pistol, which was relevant to an issue in the case. We do not find that the

demonstration was so lengthy or repetitious as to be unduly prejudicial. There is no reason to believe that the extent of the demonstration affected the verdict.

The court properly imposed consecutive sentences for the burglary and robbery counts since the burglary was complete once defendant entered the premises with the intent to commit a crime, notwithstanding that the display of his weapon was an element of both the burglary and robbery charges (*see People v Yong Yun Lee*, 92 NY2d 987, 989 [1998]). However, the sentences for the sexual abuse convictions should have been concurrent with the sentences for the other sex offenses (*see* Penal Law § 70.25[2]). The evidence showed that defendant's acts of sexual abuse occurring throughout the attack were an integral part of the rape and sodomy (*see People v Jones*, 295 AD2d 243, 244 [2002] *lv denied* 98 NY2d 769 [2002]).

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

ENTERED: APRIL 8, 2010

CLERK

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

2524N Hudson Insurance Company, et al., Index 604411/05
Plaintiffs-Appellants,

-against-

M.J. Oppenheim, etc.,
Defendant-Respondent.

Katten Muchin Rosenman LLP, New York (Philip A. Nemecek of counsel), for appellants.

Lazare Potter & Giacovas LLP, New York (David E. Potter of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 27, 2008, which, in an insurance coverage dispute, denied plaintiffs' motion to compel discovery, unanimously affirmed, with costs.

Defendants responded to plaintiffs' discovery demands by providing a supplemental privilege log identifying each of the documents withheld on the grounds they were privileged as work performed by its counsel's consultant from the inception of and during the course of a prior action in Arizona arising out of the same facts. The motion court conducted an in camera review of the withheld documents and concluded that they were protected by the attorney-client privilege.

There is no basis to disturb the motion court's ruling that the documents are subject to the attorney-client privilege. The

privilege extends to communications of "one serving as an agent of either attorney or client" (*Robert V. Straus Prods. v Pollard*, 289 AD2d 130, 131 [2001] [internal quotation marks and citation omitted]), and here, the documents were generated by defense counsel's consultant retained to assist in handling forensic accounting in relation to the Arizona matter. Furthermore, the documents are subject to the attorney work product privilege (*see* CPLR 3101[c]). Such privilege extends to experts retained as consultants to assist in analyzing or preparing the case, "as adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure" (*Santariga v McCann*, 161 AD2d 320, 321 [1990] [internal quotation marks and citation omitted]; *see Oakwood Realty Corp. v HRH Constr. Corp.*, 51 AD3d 747, 749 [2008]).

We have considered plaintiffs' remaining contentions, including that defendants waived the ability to assert that the documents were privileged, and find them unavailing.

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

ENTERED: APRIL 8, 2010

CLERK

APR 8 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
John W. Sweeny, Jr.
Karla Moskowitz
Sheila Abdus-Salaam, JJ.

1688

In re Tatiana N.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency.

Respondent agency appeals from the order of disposition of the Family Court, Bronx County (Robert R. Reed, J.), entered on or about September 11, 2008, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of assault in the second and third degrees, attempted assault in the second and third degrees, menacing in the second and third degrees, criminal possession of a weapon in the fourth degree, reckless endangerment in the second degree, and endangering the welfare of a child, and placed her on probation.

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers, Steven Banks and Briana Fedele of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner and Barry P. Schwartz of counsel), for presentment agency.

SAXE, J.

This juvenile delinquency proceeding arose from events that occurred at a movie theater on East 161st Street in the Bronx, in which a family was subjected to a moviegoer's worst nightmare: a group of rowdy, uncontrolled teenagers sat near them and disrupted their enjoyment of the movie, and then, having ignored or mocked requests to behave properly and been ejected from the movie theater, lay in wait for the family outside the theater in order to surround, threaten and attack them when they emerged from the theater.

On November 24, 2007, appellant Tatiana N. and her co-respondent Terrence M., accompanied by a number of other youths, arrived at the theater at approximately 10 P.M. Complainants J.F. and R.W., along with J.F.'s 24-year-old daughter and her two-year-old son, were watching a movie that was about two-thirds under way. The youths sat near the family and began making crude remarks, using their cell phones, and being noisy and disruptive. J.F. and then R.W. asked them "to please keep the noise down." Some unpleasant remarks were offered in response, which J.F. and R.W. initially disregarded, until, after a subsequent request to keep the noise down, the group responded by becoming aggressive and cursing, saying "[t]he [h]ell with you," "[f]___ you," and "[s]hut up." R.W. then left his seat to go to the lobby to

complain, brushing Terrence's arm or cell phone in the process. The teenagers followed him out. J.F., concerned for R.W.'s safety, followed as well.

When the group reached the lobby, an argument ensued in front of a theater security guard. After about three minutes R.W. and J.F. were permitted to return to the movie; the teenagers were not. A few minutes after they had returned to their seats, however, one of the theater staff asked them to return to the lobby. The group of teens was still there, cursing and threatening to "kick your ass," and the guard informed R.W. that Terrence had alleged that R.W. punched him in the face. R.W. denied the charge, and he and J.F. were again permitted to return to the theater. During this interchange, Terrence looked at R.W. and pointed his left hand at R.W. in the shape of a gun.

At the end of the movie, J.F. called for a cab to pick the family up outside the theater, but they had to cross the theater parking lot to meet it. They exited the building and had begun walking across the parking lot, J.F. taking the lead in an effort to look out for the rest, when the group was surrounded from behind by the teenagers, including Terrence and Tatiana, threatening and taunting them with such remarks as "Oh, what[,] you be tough now," and "I'm going to kick your ass." J.F. gave his daughter his cell phone, telling her to call the police.

R.W. turned and headed back to the theater to seek assistance from theater security staff, and several of the teenagers, including Terrence and Tatiana, followed and attacked him, with Terrence and another teenager hitting him from behind. J.F. ran toward R.W. to assist him, and the group then focused on J.F., trying to hit him. When R.W. returned, he tried to help J.F., and both men testified that they saw Terrence swinging at J.F. with a knife in his hand. According to J.F., Terrence had also tried to punch him, but he was able to block the blow and kick Terrence in the chest. J.F. testified that he sustained injury to the area around his ribs in the process of jerking around to avoid the attack.

The teenagers regrouped, and Tatiana turned to threaten J.F.'s daughter, who was holding her two-year-old son. Tatiana taunted, "I'm going to kick your ass, come on let's fight," and told the young woman to "put the kid in the car" so they could fight. R.W. stepped in between the two women, and Tatiana swung at R.W. and pulled his hair, her fist grazing his forehead but not causing any injury. When J.F., in turn, warned Tatiana not to hit the others, Tatiana chest-bumped him.

J.F. kept yelling that the police were on the way, and eventually the teens headed east on 161st Street. The police arrived shortly thereafter.

Based upon this testimony, which the Family Court properly accepted as credible, the adjudication against Tatiana must be affirmed. When we view the evidence, as we must, in the light most favorable to the presentment agency (*see Matter of Denzel F.*, 44 AD3d 389 [2007]), the court's findings were sufficiently supported by the evidence. Furthermore, they were not against the weight of the evidence.

The charges against Tatiana fall into two categories: those for which she incurred principal liability for her own actions -- attempted assault in the third degree against two individuals, third-degree menacing, and endangering the welfare of a child -- and those for which she incurred accomplice liability, based upon her shared intent with Terrence for his actions -- second-degree assault, second-degree menacing, third-degree assault, criminal possession of a weapon, and reckless endangerment. We are unanimous that the evidence sufficiently supports the findings against Tatiana based on her personal conduct.

We disagree with regard to whether the evidence supports those findings against Tatiana that are based on her accessorial liability for Terrence's use of a knife: assault in the second degree, attempted assault in the second degree, menacing in the second degree, criminal possession of a weapon, and reckless endangerment. Our colleague would vacate those findings,

apparently on the ground that Tatiana neither possessed nor exercised control over the knife used by Terrence, nor importuned its use. In our view, the factual issue of whether Tatiana was aware that Terrence possessed the knife and intended that it be used during the group's attack was correctly resolved here.

Accessorial liability does not require that the person charged either possess or have control over the dangerous instrument or deadly weapon, or that she give it to the person who uses it, or even that she importunes its use aloud. While mere presence at the scene of a crime, even with knowledge that the crime is taking place, or mere association with a perpetrator of a crime, is not enough for accessorial liability, the necessary knowledge and intent need not be admitted directly or verbally acknowledged. They may be established through the actions of the accused, based on the entire series of events. Tatiana's actions here support the inference that she was aware of her companion's possession of and intent to use the knife and that she shared the state of mind required for the commission of that offense, intentionally aiding him in such conduct and sharing a "community of purpose" with him (*see* Penal Law § 20.00; *People v Allah*, 71 NY2d 830, 832 [1988]).

Where an individual continues to participate in a criminal activity after a companion pulls out a previously concealed

weapon, the factfinder may rationally conclude that the individual shared the requisite intent for the crime (*see id.*). Indeed, even the mere act of blocking a victim's path of retreat has been found to support a finding of accessorial liability (*see e.g. People v Linen*, 307 AD2d 855, 855-856 [2003], *lv denied* 1 NY3d 575 [2003]). Had Tatiana merely helped surround the family during Terrence's attack, a finding of accessorial liability would have been proper. But she did much more than that. While Terrence attacked J.F. with a knife, Tatiana was present, shouting threats and throwing her own punches, and she continued to participate in the attack on the family long past the moment when Terrence began using the knife. Tatiana's taking part in chasing, surrounding, threatening and attacking the entire party of victims, and more particularly chest-bumping J.F. in the course of threatening his daughter after Terrence had attacked with the knife, justifies the conclusion that she and Terrence were working together to menace and attack J.F. and his family, which involved the use of Terrence's knife, and that she shared in Terrence's intent to use the knife as part of the attack (*see e.g. Matter of Tiffany D.*, 29 AD3d 693 [2006]).

Nor is the second-degree assault finding rendered invalid by the failure to demonstrate that the use of a knife directly caused J.F.'s injuries. It was demonstrated that J.F. suffered

physical injury, and his testimony supports the finding that he sustained injury from the process of struggling to avoid Terrence's attack with both knife and fist. It would be unreasonable to require that the complainant identify the particular blow he was blocking at the moment he felt a snap in his ribs as that of Terrence's knife, rather than his fist, before we permit a finding that the use of the knife was a cause of his injury.

The charge of reckless endangerment was also properly sustained. "A person is guilty of reckless endangerment in the second degree when [s]he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person" (Penal Law § 120.20). "A person acts . . . recklessly when [s]he is aware of and consciously disregards a substantial and unjustifiable risk that [a] result [such as injury] will occur" (Penal Law § 15.05[3]). Here, the evidence demonstrates that Tatiana recklessly disregarded the substantial risk that the infant could be seriously injured in the ruckus, in which a knife was being swung around in his vicinity (*see People v Saunders*, 54 AD3d 612 [2008], *lv denied* 11 NY3d 900 [2008]); notably, R.W. testified that J.F.'s two-year-old grandson was "right there" and that "at no point" was he "out of this incident."

Finally, we reject the suggestion, contained in a footnote in appellant's brief, that several of the offenses should have been dismissed as lesser included offenses. The lower-level offenses were not included in the petition for use in the event that one of the elements of the higher-level offenses was found to be lacking; rather, they apply to different victims or different primary actors. For example, the charge of third-degree menacing for which Tatiana was charged with principal liability was not a lesser included offense of the charge of second-degree menacing, for which she was charged with accessorial liability. Similarly, the charges of attempted third-degree assault were applicable to Tatiana's own acts against J.F. and R.W.; they were not lesser included offenses of the charges of second-degree and third-degree assault based on Terrence's actions.

Accordingly, the order of disposition of the Family Court, Bronx County (Robert R. Reed, J.), entered on or about September 11, 2008, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of assault in the second and third degrees, attempted assault in the second and third degrees, menacing in the second and third degrees, criminal possession of a weapon in the fourth degree, reckless

endangerment in the second degree, and endangering the welfare of a child, and placed her on probation for a period of 12 months, should be affirmed.

All concur except Andrias, J.P. who dissents in part in an Opinion:

ANDRIAS, J.P. (dissenting in part)

Although I agree with the majority that there is legally sufficient evidence to support a finding that appellant was guilty of committing acts that, if committed by an adult, would constitute the crimes of assault in the third degree, attempted assault in the third degree, menacing in the third degree and endangering the welfare of a child, I believe that, viewing the record in the light most favorable to the presentment agency (*see Matter of David H.*, 69 NY2d 792, 793 [1987]), the evidence is legally insufficient to support a finding that the appellant, based on accessorial liability, was guilty of committing acts, that, if committed by an adult, would constitute the crimes of assault in the second degree, attempted assault in the second degree, menacing in the second degree, criminal possession of a weapon in the fourth degree and reckless endangerment in the second degree. I therefore respectfully dissent.

The Family Court found that appellant, her co-respondent, Terrence M., and four or five unidentified teenagers, in retaliation for a complaint that they had been disruptive in a movie theater, came out of the shadows in a parking lot to attack the complainant's party, which included his partner, his daughter and his two-year-old grandson. The Family Court further found that when the complainant tried to defend his party, the

"evidence suggest[s] [Terrence] pulled out a knife and waived it at [the complainant]," who injured his ribs in blocking or avoiding Terrence's blows, and that this was sufficient to prove his injury was caused by the assault. As to appellant's individual conduct, the Family Court found it "despicable" that appellant approached the complainant's daughter and told her to "put the f-----g kid in the car now[,] I'm going to kick your f-----g ass," which compelled the complainant to intervene, whereupon appellant bumped his chest.

A person is guilty of assault in the second degree when "[w]ith intent to cause physical injury to another person, he [or she] causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument" (Penal Law § 120.05[2]). To prove an attempted crime, the conduct of the accused must come "dangerously near" to an act that would constitute the crime (*see* Penal Law § 110.00; *People v Acosta*, 80 NY2d 665, 670 [1993] [internal quotation marks and citation omitted]).

A person is guilty of menacing in the second degree when "[h]e or she intentionally places or attempts to place another person in reasonable fear of physical injury . . . by displaying a deadly weapon [or a], dangerous instrument" (Penal Law § 120.14[1]). A person is guilty of criminal possession of a

weapon in the fourth degree when "he [or she] possesses any . . . dangerous knife . . ., or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another" (Penal Law § 265.01[2]).

"To sustain a determination based upon accessorial liability, the presentment agency must prove, beyond a reasonable doubt, that the accused acted with the mental culpability necessary to commit the crimes charged and that, in furtherance thereof, she solicited, requested, commanded, importuned, or intentionally aided the principal to commit such crimes" (*Matter of Julissa R.*, 30 AD3d 526, 527 [2006][citing Penal Law § 20.00]).

There is no evidence whatsoever that appellant possessed or exercised control over the knife, gave the knife to Terrence, or knew that Terrence possessed the knife and intended to use it during the attack. Neither the complainant nor his partner knew where Terrence got the knife and neither saw appellant with a knife at any point.

Nor can it be determined whether appellant ever saw the knife in Terrence's hand during the course of the attack and supported its continued use thereafter. The complainant testified that he could not see very clearly, and neither he nor his partner was able to describe the knife in detail. The

complainant's partner only saw Terrence "flash[]" a knife, but did not see Terrence swing the knife. While the teenagers may have taunted that they would "kick your ass" at various moments during the encounter, there was no testimony that appellant or any other of the teenagers ever importuned the use of a knife.

The complainant also testified that appellant was standing to the side of Terrence at the point when the teenagers surrounded him. The complainant's partner testified that he did not see appellant hit the complainant and that the complainant was hit when he was surrounded by Terrence and "other guys." Thus, it cannot be determined on the record before us when appellant separated from Terrence and the other teenagers to confront the complainant's daughter, who was standing a number of yards away, or whether appellant was still with the group of teenagers confronting the complainant when Terrence allegedly flashed or swung the knife.

Accordingly, the foregoing counts requiring that appellant share Terrence's specific intent to possess, display or use a dangerous instrument should have been dismissed *(compare People v McLean*, 307 AD2d 586 [2003], *lv denied* 100 NY2d 643 [2003]).

The evidence was also legally insufficient to support a finding that appellant committed acts that, if committed by an adult, would constitute the crime of reckless endangerment in the

second degree. "A person is guilty of reckless endangerment in the second degree when he [or she] recklessly engages in conduct which creates a substantial risk of serious injury to another person" (Penal Law § 120.20). "A person acts recklessly . . . when he [or she] is aware of and consciously disregards a substantial and unjustifiable risk that [a certain] result will occur or that [a certain] circumstance exists" (Penal Law §15.05[3]).

The presentment agency contends that even though appellant acted intentionally towards the complainant, his partner and his daughter, she simultaneously disregarded the substantial risk of serious physical injury to the complainant's two-year-old grandson that was created when Terrence thrust a knife in close proximity to the infant. As set forth above, there is insufficient evidence of appellant's accessorial liability with respect to Terrence's use of the knife. Further, the record demonstrates that at the time Terrence allegedly swung the knife, he was confronting the complainant, who had moved back towards the theater to aid his partner and was anywhere from a couple to 20 or 30 yards away from his daughter and grandson.

In this regard, the complainant's partner testified that the complainant had come to protect him when he was surrounded by a group of teenagers and that Terrence flashed the knife when the

complainant "was more by himself." The complainant testified that Terrence was not there when the appellant confronted his daughter and that he was not aware of the group's location at that point.

This testimony amply demonstrates that the child was not in Terrence's vicinity when he allegedly displayed or swung the knife, and therefore no legally sufficient evidence exists that a risk was posed that Terrence would swing the knife at the complainant and strike the infant. Indeed, during summation, the presentment agency conceded that "the daughter took the grand child [*sic*] to the side and was not involved in the incident. For his safety they took the grand child to the side. Even doing this [appellant] walked to the daughter, got in her face, cursed at her to drop the child so that she can - so that they could fight."

I agree with the majority that there is legally sufficient evidence that appellant, acting in concert with Terrence and the other teenagers, committed acts which, if committed by an adult would constitute the crime of third degree assault. A person is guilty of assault in the third degree when "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person" (Penal Law §120.00[1]). Although there is no legally sufficient evidence to connect

appellant to the knife, the record shows that appellant was a member of the group of teenagers who engaged in the dispute in the movie theater, that she and the rest of the group were lying in wait for complainant's party in order to retaliate, and that punches were thrown that caused the complainant to suffer "substantial pain" and, therefore, "[p]hysical injury", in blocking or avoiding them (Penal Law § 10.00[9]; *see People v Chiddick*, 8 NY3d 445, 447-448 [2007]; *People v Gordon*, 47 AD3d 833 [2008], *lv denied* 10 NY3d 811 [2008]). However, the count of attempted third-degree assault based on the attack on the complainant should have been dismissed as a lesser included offense of the third-degree assault count.

The count of attempted third-degree assault based on the attack on the complainant's partner is supported by legally sufficient evidence that appellant punched him and pulled his hair, intending to cause physical injury (*see generally Matter of Myacutta A.*, 75 AD2d 774 [1980]).

I also agree that the evidence was legally sufficient to support the finding that appellant committed acts that, if committed by an adult, would constitute the crime of endangering the welfare of a child. A person endangers the welfare of a child when he or she "knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child"

less than [17] years old (Penal Law § 260.10[1]). Actual harm need not result. A person who physically attacks a child's caretaker in the presence of the child commits child endangerment (*see e.g. People v Reyes*, 284 AD2d 119, 120 [2001], *lv denied* 96 NY2d 923 [2001]). The record shows that the complainant's daughter was holding the two-year-old infant when appellant physically and verbally challenged her to a fight and chest-bumped the complainant.

Accordingly, I would modify to the extent of vacating the findings of assault in the second degree, attempted assault in the second degree, attempted assault in the third degree (one count), menacing in the second degree, criminal possession of a weapon in the fourth degree, and reckless endangerment in the second degree, and otherwise affirm.

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

ENTERED: APRIL 8, 2010

CLERK