SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 10, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, DeGrasse, Manzanet-Daniels, Román, JJ.

2849-
2850-
2850A Abetta Boiler & Welding Service, Inc., Index 600660/06
Plaintiff-Respondent,

-against-

American International Specialty
Lines Insurance Company, et al.,
Defendants,

The Amerisc Corp. Insurance and Financial Services,
Defendant-Respondent-Appellant,

Program Brokerage Corp.,
Defendant-Appellant-Respondent.

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Ohrenstein & Brown, LLP, Garden City (Matthew Bryant of counsel), for appellant-respondent.

Keidel, Weldon & Cunningham, LLP, White Plains (April Forbes of counsel), for respondent-appellant.

Silver and Silver, LLP, Somerset, NJ (Nancy J. Silver of counsel), for respondent.

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Orders, Supreme Court, New York County (Marcy S. Friedman, J.), entered February 13, 2009 and March 12, 2009, respectively, which, to the extent appealed from, denied wholesale insurance broker defendant Program Brokerage Corp.'s motion for summary judgment dismissing retail broker defendant Amerisc Corp. Insurance and Financial Services' cross claim against it for

contribution arising out of Program's and Amerisc's alleged failure to give notice of the underlying personal injury and wrongful death actions to plaintiff Abetta Boiler & Welding Service, Inc.'s excess insurance carrier, defendant American International Specialty Lines Insurance Company (AISLIC), denied Amerisc's motion for summary judgment dismissing Abetta's complaint and Program's cross claim for contribution against it, and granted Program's motion for summary judgment dismissing Amerisc's cross claim against it for indemnification, unanimously modified, on the law, Program's motion for summary judgment dismissing Amerisc's cross claim against it for contribution granted and Program's cross claim against Amerisc dismissed in its entirety as moot, and otherwise affirmed, with costs to Abetta and Program. The clerk is directed to enter judgment in favor of Program dismissing the complaint and all cross claims as against it. Appeal from order, same court and Justice, entered June 4, 2009, which denied Program's motion for reargument and renewal, unanimously dismissed, without costs, as taken from a nonappealable paper.

The evidence that as a matter of routine Abetta referred all questions regarding its insurance claims to Amerisc and Amerisc handled all Abetta's insurance needs, including referring its claims to insurers, establishes a special relationship between the two that imposed upon Amerisc a duty to Abetta to exercise a

reasonable degree of care in notifying the appropriate primary or excess insurer of any claim reported to it by Abetta (*see Murphy v Kuhn*, 90 NY2d 266 [1997]; *Martini v Lafayette Studio Corp.*, 273 AD2d 112 [2000]; *Stevens v Hickey-Finn & Co.*, 261 AD2d 300 [1999]). The evidence further establishes that, although Amerisc forwarded to Program, the wholesale broker, the information in its possession concerning the personal injury claim, it failed to follow up either with Program or with AISLIC, the excess insurer, to ascertain that AISLIC actually received notice of the claim and the action, as required by the policy to invoke coverage. Amerisc thereby breached its duty to Abetta, and its attempt to shift the blame onto Program on the ground that ultimately it was Program that failed to pass the claim on to the insurer is unavailing. As a matter of law, Amerisc is liable to Abetta for any amount above the limits of the primary policy that Abetta may be required to pay to the personal injury plaintiffs up to the limits of the excess coverage.

The record does not permit a determination as a matter of law that Amerisc is liable to Abetta for its failure to give AISLIC notice of the wrongful death action. The AISLIC policy required timely notice to the insurer of occurrences, claims, *and lawsuits* to trigger coverage. Amerisc provided Program with all the information in its possession concerning the wrongful death *claim*. However, it never received notice of the *action* from

Abetta or any other source. The issue of fact presented by the record is whether, in addition to the duty to transmit all the information in its possession concerning Abetta's claims, Amerisc had a duty to monitor Abetta's pending claims to ascertain whether they had given rise to lawsuits to be reported to the insurer.

Program was properly granted summary judgment dismissing Amerisc's cross claim against it for indemnification, since the determination that Amerisc is liable to Abetta for its own negligence precludes Amerisc from seeking indemnification for such liability (*see Bleecker St. Health & Beauty Aids, Inc. v Granite State Ins. Co.*, 38 AD3d 231, 233 [2007]). However, Amerisc's claim against Program for contribution also should have been dismissed because it seeks recovery for economic loss resulting exclusively from breach of contract (CPLR 1401; *see Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21 [1987]; *Bleecker St. Health & Beauty Aids*, 38 AD3d at 233). Since Abetta has not appealed the granting of Program's motion for summary judgment dismissing the complaint as against it, our modification to dismiss Amerisc's cross claim against Program in its entirety terminates Program's involvement in this action and renders moot Program's cross claim against Amerisc and Amerisc's appeal from the denial of its motion for summary judgment dismissing that cross claim.

Although the foregoing renders the matter academic, Program concedes that its motion for renewal was in fact a nonappealable motion for reargument (*see Parker v Marglin*, 56 AD3d 374, 374-375 [2008]).

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

ENTERED: AUGUST 10, 2010

Elba Iris Castro
DEPUTY CLERK

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

1973 The People of the State of New York, Respondent, Ind. 1656/06

-against-

Jorge Pagan, Defendant-Appellant.

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The Legal Aid Society, New York (Steven B. Wasserman of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Denis J. Boyle, J.), entered on or about January 29, 2009, which enlarged the conditions of defendant's sentence of probation to permit searches of his home, concomitant with home visits by the Department of Probation (DOP), affirmed.

Defendant pleaded guilty to one count of criminal possession of a weapon in the third degree. Pursuant to the plea agreement, he was sentenced on June 5, 2008 to six months in jail and five years' probation. Approximately three months after sentence was imposed, DOP applied to the court for an enlargement of the conditions of defendant's probation pursuant to CPL 410.20. By the application, which defendant opposed through counsel, DOP sought permission to search defendant's home during his probationary term.

In considering the application, the court weighed the following factors: (a) defendant's violation of the conditions of a probationary sentence imposed on a prior conviction, resulting in the revocation of probation and the imposition of a jail sentence; (b) defendant's possession of a firearm during a confrontation with another man as the backdrop of the instant prosecution; (c) defendant's report to DOP of "psychological problems" for which he had been medicated three years prior to sentencing; and (d) the presence of a young child in defendant's household. The court granted the application to the extent of enlarging the conditions of defendant's probation so as to permit DOP to conduct sporadic, nondestructive, "knock-and-announce" searches of defendant's home at reasonable hours when defendant is at home. The court found the enlarged conditions to be consistent with the rehabilitative ends of probation and the safety of defendant's household. Upon consideration of the nature and purpose of probation, as set forth in the relevant statutory framework discussed below, we hold that a sentencing court is not precluded from imposing search conditions in a sentence of probation without a defendant's consent. Accordingly, the court properly enlarged the conditions of defendant's probation.

Defendant does not challenge the court's factual findings. He argues instead that absent a probationer's consent, his or her

place of residence may only be searched by court order issued pursuant to CPL 410.50(3). This statute provides for the issuance of an order for the search of the person, residence or real property of a probationer "[i]f at any time during the period of probation the court has reasonable cause to believe that the defendant has violated a condition of the sentence." We find this argument unavailing. The intention of the Legislature is first to be gleaned from a literal reading of the act, and may also be ascertained from all of the statutes relating to the same general subject matter, i.e., probation in this case (*see* McKinney's Statutes § 92[b]). In this regard, we note that CPL 410.50(3) does not purport to be the only vehicle for a probation officer's search of a probationer's person, residence or real property.

The purpose of probation is "to insure that the defendant will lead a law-abiding life or to assist him to do so" (*see* Penal Law § 65.10[1]). To this end, a probationer is required to satisfy, where applicable, 14 specific conditions enumerated by § 65.10 as well as "any other conditions reasonably related to his rehabilitation" (§ 65.10[2][l]). In addition, a sentencing court may "require that the defendant comply with any other reasonable condition as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant" (§

65.10[5]). The policy reason for giving a court this supervisory discretion is that a state's probation system, like a school, government office or prison, presents "special needs" beyond normal law enforcement that may justify departures from the usual probable-cause and warrant requirements (*Griffin v Wisconsin*, 483 US 868, 873-874 [1987]). In this State, courts exercise their supervisory authority over probationers pursuant to CPL 410.50[1], which provides that "[a] person who is under a sentence of probation is in the legal custody of the court that imposed it pending expiration or termination of the period of the sentence."

CPL 410.20 gives a court the power to modify or enlarge the conditions of a sentence of probation. The statute does not require an evidentiary hearing or a finding of a violation of previously imposed conditions as a prerequisite to enlarging the conditions imposed at the time of sentence; all that is required is a personal appearance by the defendant to assure that the defendant has properly been made aware of the additional requirement or restriction (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 410.20). Article 65 of the Penal Law and Article 410 of the CPL are statutes in pari materia insofar as they both address the subject of probation. As such, they must be construed together as though forming part of the same statute (*see* McKinney's Statutes § 221[b]).

Therefore, as a matter of statutory interpretation, the conditions of a sentence of probation may be enlarged pursuant to CPL 410.20, in keeping with the rehabilitative purposes of Penal Law § 65.10.

In *Griffin,* the Supreme Court upheld the warrantless search of a probationer's home because it was conducted pursuant to an administrative provision that satisfied the Fourth Amendment's reasonableness requirement (483 US at 873). To be sure, the *Griffin* majority held that the search of Griffin's residence was "reasonable" within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers. This conclusion makes it unnecessary to consider whether, as the court below held and the State urges, *any* search of a probationer's home by a probation officer is lawful when there are "reasonable grounds" to believe contraband is present (*id.* at 880, *emphasis in original*). In this case, the court's authorization of searches of defendant's residence meets the reasonableness test articulated by the *Griffin* court in light of (a) the rehabilitative purpose of probation, (b) the statutory scheme created by the Penal Law and the CPL, and (c) the factors considered by the court in enlarging the conditions of defendant's probation.

People v Hale (93 NY2d 454 [1999]) and *People v Jackson* (46 NY2d 171 [1978]) also warrant discussion. In *Hale,* the court

held that the search order provision of CPL 410.50(3) did not preempt the lawfulness of the search of the residence of a probationer who consented to such searches at the time of his plea (93 NY2d at 463). In *Jackson*, the Court reversed an order denying the suppression of the fruits of a summary vehicle search by a probation officer conducted without the probationer's consent or a court-ordered search condition of probation.

Finally, while the *Hale* court did not decide whether a sentencing court may unilaterally impose search conditions in a sentence of probation, it did cite with approval cases in which search conditions were imposed (*e.g.*, *United States v Germosen*, 139 F3d 120 [2d Cir 1998], *cert denied* 525 US 1083 [1999] [defendant convicted of conspiracy to commit wire fraud sentenced to supervised release subjecting him to searches of his person and property, limited to those searches that probation department finds necessary to secure information about defendant's finances]; *People v Schoenrock*, 868 F2d 289 [8th Cir 1989] [sentence for defendant who pleaded guilty to conspiracy to distribute cocaine imposed special conditions of probation for three years, including that he submit to chemical testing at request of probation officer and submit to search and seizure of premises, vehicle or person, day or night, with or without warrant, at request of probation officer, to determine presence

of alcoholic beverages or controlled substances]; *People v Bravo*, 43 Cal 3d 600, 738 P2d 336 [1987], *cert denied* 485 US 904 [1988] [defendant convicted of possessing concentrated cannabis sentenced to probation with condition that he agree to submit his person and property to search and seizure at any time, by any law enforcement officer with or without a warrant), agreeing with this line of authority "insofar as the court-ordered provision and consent were circumscribed to specified types of searches by probation officers acting within the scope of their supervisory duty and in the context of the probationary goal of rehabilitation" (93 NY2d at 460). As in those cases, the trial court's search condition here is "tailored to suit the probationer" (*id.* at 461) and circumscribed to meet the goals of probation with respect to this particular individual.

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

MOSKOWITZ J. (dissenting)

I agree with the majority that the issue in this case is one that the Court of Appeals left open in *People v Hale* (93 NY2d 454, 460 n 4 [1999]), "whether, when and to what extent a sentencing court may unilaterally impose search conditions in a sentence of probation." However, I cannot agree that any legal precedent authorizes warrantless searches under the facts of this case. Therefore, I dissent.

On May 20, 2008, defendant pleaded guilty to criminal possession of a weapon in the third degree, agreeing to a sentence of six months' imprisonment and five years' probation. On June 5, the court imposed the promised sentence that did not include any provision for warrantless searches during probation.[1] On October 20, 2008, DOP orally applied for an enlargement of the conditions of defendant's probation to allow it to conduct warrantless searches of defendant's home. There is no dispute that defendant was in compliance with his probation. However, DOP believed that because of defendant's criminal history, he was

[1]According to the sentencing court, it had not ordered a pre-pleading investigation and thus the Department of Probation (DOP) did not submit a probation report prior to defendant's plea. Consequently, the court did not consider including warrantless searches of defendant's home as a condition of probation at the time of sentence. DOP mentioned a "Pre-Sentence Investigation Report" that "strongly recommended incarceration for this defendant, who committed a serious offense by possessing, with intent to use, a gun loaded with six bullets," but the report is not included in the record on appeal.

likely to possess a gun while on probation. According to DOP, defendant's criminal history included the crime at issue, namely, possessing a gun and intending to use it, as well as prior events, including auto stripping in the third degree for which he was sentenced to three years probation, that was subsequently revoked for a violation.

Defendant opposed the motion to enlarge his probation conditions to include warrantless searches without "reasonable cause."

The sentencing court enlarged the conditions of defendant's probation, purportedly pursuant to CPL 410.20, to permit searches of defendant's home by probation officers concomitant with home visits and subject to certain conditions. The court reasoned that CPL 410.50(3), requiring "reasonable cause" as a condition to judicial approval of a home search, serves a distinct function from CPL 410.20, that permits modification of probation conditions.

The court did, however, impose limitations on the search. DOP could only conduct its search "when the defendant is at home and at a reasonable hour," searches were to be sporadic rather than at every home visit, DOP was not allowed to damage anything in the home and the probation officer was required to knock and announce his presence before entering on any occasion when that officer was to conduct a home search. Finally, the court limited

searches to locations where a firearm could be placed or secreted.

On appeal, defendant contends that the sentencing court exceeded its statutory authority when it granted DOP's request to enlarge the conditions of his probation to include warrantless searches of his home for firearms during DOP home visits. I agree.

A person on probation, although legally in custody and subject to supervision, is nonetheless constitutionally entitled to protection against unreasonable searches and seizures, although perhaps not to the same extent as persons whose activities are not subject to this scrutiny (*People v Jackson*, 46 NY2d 171, 174 [1978] [where defendant had not previously demonstrated that he was an "unreliable probation risk," search of defendant's locker and car required a search order]).

The court here did not require at sentencing that defendant consent to routine home searches as a condition of probation that would have brought this case within the ambit of *People v Hale* (93 NY2d 454 [1999]). Nor was there statutory authority for the court's decision to enlarge the conditions of probation to include home searches. CPL 410.20, upon which the sentencing court relied, addresses modifications or enlargements to conditions of probation. It authorizes the court to enlarge the conditions of probation so long as the defendant is personally

present.

However, home searches are not simply a condition of probation. A home search implicates the Fourth Amendment to the Constitution of the United States that protects the rights of citizens against unreasonable searches and seizures. A probationer "loses some privacy expectations and some part of the protections of the Fourth Amendment, but not all of both" (*Hale*, 93 NY2d at 459). When thus imposed as a condition of probation, a home search must receive "special scrutiny" (*United States v Consuelo-Gonzalez*, 521 F2d 259, 265 [9th Cir 1975]).

CPL 410.20 simply does not address whether a probationer can be subject to *home searches* when there is no basis for the search, much less without a warrant. Therefore, the sentencing court should not have relied upon this section to justify its decision to enlarge the conditions of probation to allow warrantless home searches without reasonable cause.

Although CPL 410.20 is silent on the issue of home searches, a different section of the CPL does address them. Section 410.50(3) authorizes a judicial search order of a probationer upon "reasonable cause to believe that the defendant has violated a condition of the sentence." Subdivision 4 delineates circumstances where a warrant is not required, but reasonable cause still is: "When a probation officer has reasonable cause to believe that a person under his supervision pursuant to a

sentence of probation has violated a condition of the sentence, such officer may, without a warrant, take the probationer into custody and search his person." Accordingly, the only time a probation officer can search a supervised person without a warrant is when that officer has *reasonable cause* to believe there has been a probation violation, and even then, the search is limited to the probationer's person. If a probationer were legally subject to a warrantless search of his home without reasonable cause, there would be no need for subdivisions 3 and 4 in CPL 410.50.

The People recognize that CPL 410.20 is silent on the propriety of home searches, but extrapolate that "any enlargement of conditions is governed solely by Penal Law § 65.10, that enumerates the permissible conditions of probation." This is a non sequitur. Just because Penal Law § 65.10 allows for enlargement of the conditions of probation to advance public safety or aid in the prevention of a similar crime does not mean it authorizes a search where there is not even a suspicion of a violation. Nor does the language from CPL 410.20, stating that the conditions of probation may be enlarged "at any time," mean that a court, subsequent to sentencing, can impose a condition to allow for home searches without reasonable cause.

Simply, there is no statutory authority for the court's expansion of the conditions of defendant's probation to include

warrantless searches in this case. The majority's reliance upon *Griffin v Wisconsin* (483 US 868 [1987]) is curious. At least in *Griffin*, the regulation at issue permitted a search as long as there were reasonable grounds to believe the presence of contraband and there was information from a police officer that there might have been guns in the defendant's apartment. The majority's analysis represents an end run around the holding in *People v Jackson* (46 NY2d 171 [1978]), that emphasizes the imperative of applying for search orders based upon a probable violation of probation. The Court of Appeals' citation to *Jackson* in its more recent decision in *Hale* demonstrates that it did not intend to circumscribe the necessity of reasonable cause. *Hale* goes no further than to create an advance exception on consent to the statutory requirement of a search order. Here, there was no consent as there was in *Hale*, no statute authorizing warrantless home searches without reasonable cause and absolutely nothing to suggest that defendant had violated the conditions of his parole. Under these circumstances, the majority's decision

has eviscerated whatever limited Fourth Amendment rights defendant retained.

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

ENTERED: AUGUST 10, 2010

Elba Iris Castro
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DEPUTY CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, Román, JJ.

2243 The People of the State of New York, Respondent, Ind. 2658/04

-against-

Rafael Castro, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Andrew C. Fine of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered May 17, 2006, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree, and two counts of endangering the welfare of a child, and sentencing him to an aggregate term of 50 years to life, unanimously affirmed.

Defendant was convicted of the murder of his fiancée, Vanessa Reynosa, and the attempted murder of her mother, Miriam Rivas. He attacked both victims with a machete. According to the uncontradicted trial testimony of a medical examiner, defendant inflicted six sharp-force wounds to Reynosa's head, neck and shoulders, and perforated her spine, and delivered a single blow to Rivas that penetrated her brain.

The evidence of defendant's murderous attacks is

overwhelming. Among other things, after fleeing to the Dominican Republic and then surrendering to Dominican authorities, defendant confessed orally to New York detectives in the presence of the Dominican counsel obtained by his father after waiving his *Miranda* rights. He also signed a written statement, which was essentially consistent with his testimony at trial.

On appeal, defendant argues that he was denied his due process right to a fair trial when the trial court refused his counsel's request to submit to the jury the charge of second-degree manslaughter as a lesser included offense of second-degree murder. Defendant also argues that he was denied his constitutional right to effective assistance of counsel when his attorney failed to request a charge of extreme emotional disturbance as an affirmative defense, which defendant contends could have reduced his culpability for murder and attempted murder to culpability for manslaughter offenses (*see* Penal Law § 125.25[1][a]; § 125.20[2]; *People v White*, 125 AD2d 932, 933 [1986], *lv denied* 69 NY2d 956 [1987]).

We summarize the trial testimony that is relevant to the issues on appeal. On behalf of the People, Rivas testified that Reynosa met defendant in the Dominican Republic as a teenager and bore him two daughters, Brenda and Caroline. After immigrating to the United States in April 2004, defendant moved into Rivas's one-bedroom apartment in the Bronx, where Reynosa, age 21,

Caroline, age 7, and Brenda, age 2, were already living. To Rivas's knowledge, her daughter had no other boyfriends.

On May 12, 2004, defendant and Reynosa obtained a marriage license. On May 13, Rivas testified, Reynosa left the apartment at 8 A.M. to shop for a wedding dress, and Caroline left for school. At 10 A.M., Rivas left to visit her sister, leaving defendant alone in the apartment with Brenda. At about noon, Rivas returned to the apartment, where she saw defendant, who appeared tense and nervous, pacing in the living room, and a machete, which she had never seen before, lying under her sofa. Rivas found Reynosa dead on the floor of the bedroom, her head covered with blood. Brenda was also in the bedroom, covered with blood and crying for her mother.

Rivas testified that she lifted Brenda up and, hoping for an opportunity to call the police, pleaded with defendant to go pick up Caroline from school, but defendant remained in the apartment, talking to himself. When Caroline came home around 4:30 P.M., defendant gave her money and sent her to a store, then entered the bedroom. Rivas held Brenda in her arms and pleaded, "Kill me, don't kill the girl." At that point, Rivas testified, defendant struck her on the head with the machete, and she lost consciousness.

On his own behalf, defendant testified that on May 13 he left the apartment around 11:30 A.M., returned to it about 90

minutes later, passed through the living room where Brenda was watching television, and opened the bedroom door to find Reynosa naked in bed with a naked man on top of her. According to defendant, he then "lost control" and "lost his mind." The man fled from the bedroom. Defendant took a machete that was under the bed, grabbed Reynosa, and hit her with it. Then Rivas suddenly entered the apartment[1] and jumped on defendant, he testified, and he used the machete on Rivas while "crazy," "bad," and "out of control." Defendant testified that he had not intended to kill or seriously injure Reynosa or Rivas.

Defendant put Reynosa's body in the bathtub and put Rivas on a bed in the bedroom, where she apparently remained until the police found her two days later, miraculously breathing but unable to speak. The next morning, after leaving the children with relatives, defendant took money from Rivas's purse and fled to the Dominican Republic, where he hid for several days before surrendering to the authorities. While in the presence of his counsel in the Dominican Republic, defendant waived his *Miranda* rights and gave a statement that essentially conformed to his trial testimony. On June 2, 2004, defendant was extradited to New York and arrested.

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[1]Rivas's testimony offered a conflicting chronology. She stated that defendant attacked her about five hours after she had returned to the apartment on May 13 and discovered her daughter's body.

At the charge conference, the court denied the request by defendant's counsel that it submit the second-degree reckless manslaughter of Reynosa as a lesser included offense of second-degree murder, on the ground that defendant's conduct was "either intentional or not but [it's] certainly not reckless." Thereafter, counsel and the court discussed a possible extreme emotional disturbance charge, but defense counsel declined to request it.

On summation, defendant's counsel argued, as he had in his opening, that defendant had lacked the intent to harm Reynosa and Rivas. The prosecution contended both that defendant had intended to kill and that he had fabricated the story that he discovered Reynosa in bed with another man. In particular, the prosecution questioned whether Reynosa, knowing that defendant had keys to the apartment and could return at any time, would have sex with another man while her daughter was in the next room, and how that man could have escaped from the apartment when defendant arrived.

Challenging the trial court's refusal to submit a reckless manslaughter instruction, defendant argues that, based on his testimony that he lost his mind when he found Reynosa having sex, the jury could have reasonably concluded that he had swung the machete at her without intending to kill her, but while nonetheless aware of and consciously disregarding a substantial

and unjustifiable risk that he would kill her.

The claim lacks merit.[2] A person is guilty of second-degree murder when, with intent to cause the death of another person, he or she causes the death of that person (Penal Law § 125.25[1]), and a person is guilty of second-degree manslaughter when he or she "recklessly causes the death of another person" (Penal Law § 125.15[1]). For purposes of the murder statute, a person acts "intentionally" when his or her conscious objective is to cause death (Penal Law § 15.05[1]), and, for purposes of the manslaughter statute, a person acts "recklessly" when he or she "is aware of and consciously disregards a substantial and unjustifiable risk that [death] will occur" (Penal Law § 15.05[3]).

A defendant is entitled to have the jury consider a lesser included offense of a charged count by showing first that the offense is a "lesser included offense" of the charged crime as defined in CPL 1.20(37),[3] and second that a reasonable view of the evidence supports a finding that the defendant committed the

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[2]Defendant's argument based on constitutional grounds is unpreserved because defendant did not assert it to the trial court (*see e.g. People v Kello*, 96 NY2d 740, 743-744 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

[3] Under the statute, an offense is a "lesser included offense" of a greater offense only when "it is theoretically impossible to commit the greater crime without at the same time committing the lesser" (*People v Glover*, 57 NY2d 61, 64 [1982]).

lesser crime but not the greater (CPL 300.50[1]; *People v Glover*, 57 NY2d 61, 63-64 [1982]).

No reasonable view of the evidence supports a finding that defendant committed second-degree manslaughter but did not commit second-degree murder (*cf. People v Fernandez*, 64 AD3d 307 [2009]). As noted in the medical examiner's uncontradicted testimony, defendant slashed Reynosa multiple times about the head, neck, and shoulders with a machete. Thus, he could not have acted merely recklessly (*see e.g. People v Vega*, 68 AD3d 665 [2009], *lv denied* 14 NY3d 806 [2010]; *People v Dickerson*, 67 AD3d 700 [2009], *lv denied* 14 NY3d 799 [2010]; *People v De Jesus*, 244 AD2d 244 [1997], *lv denied* 91 NY2d 925 [1998]).

The cases that defendant relies on are inapposite. For example, in *People v Navarette* (131 AD2d 326 [1987], *lv denied* 70 NY2d 705 [1987]), where the defendant stabbed his wife to death after he had allegedly found her in bed with another man, this Court held that the trial court improperly declined to submit second-degree manslaughter as a lesser included offense of second-degree murder. But in *Navarette*, an argument between defendant and his wife escalated into a struggle resulting in her death.

Defendant's second claim on appeal is that he was denied effective assistance of counsel when his attorney declined the suggestion of a jury instruction on extreme emotional disturbance

as an affirmative defense and instead relied exclusively on the theory that defendant lacked the intent to murder. According to defendant, counsel did not forgo an extreme emotional disturbance defense for any strategic reason, but because he misunderstood the law and the facts. Defendant argues that counsel did not request the charge because he wrongfully believed that the evidence failed to establish all of the elements of the defense.

The test for effectiveness in a case is whether counsel provided meaningful representation under the circumstances of that case, viewed in their totality (*see People v Henry*, 95 NY2d 563, 565 [2000]). While a defendant need not show actual prejudice to make out an ineffective assistance of counsel claim, he or she must show that "the attorney's conduct constituted 'egregious and prejudicial' error such that defendant did not receive a fair trial" (*People v Benevento*, 91 NY2d 708, 713 [1998], quoting *People v Flores*, 84 NY2d 184, 188 [1994]).

Courts will not readily second-guess trial strategy (*see People v Pacheco*, 135 AD2d 744, 745 [1987], *lv denied* 71 NY2d 900 [1988]). If the defense reflects a reasonable strategy in light of the circumstances of the case and the evidence presented, it will not be considered ineffective assistance even if it proves unsuccessful (*People v Rote*, 28 AD3d 868, 870 [2006]). It is the defendant's burden on appeal to show that counsel's alleged

shortcomings lack a legitimate explanation (*People v Johnson*, 37 AD3d 363 [2007], *appeal decided by* 46 AD3d 276 [2007], *lv denied* 10 NY3d 865 [2008]).

A review of defense counsel's conduct during the trial, from opening through summation, reveals his consistent strategy of arguing to the jury that defendant lacked criminal intent. After the People withdrew the count of depraved indifference murder and the court rejected defense counsel's request for a charge of reckless manslaughter, defendant was left with the choice of either accepting the course that the court seemed to urge (arguing the affirmative defense of extreme emotional disturbance) or adhering to the strategic course that he had pursued since his opening: arguing to the jury that the defendant lacked the culpable state of mind to have intentionally killed his fiancee and gravely injure her mother, and that therefore he should be acquitted of murder and attempted murder, the most serious crimes.

Regardless of whether defense counsel was correct in stating that his client's testimony undermined one of the elements of the affirmative defense, counsel's decision to argue that defendant lacked criminal intent was hardly devoid of legal insight or strategic sense. First, defendant would have had the burden of proving the affirmative defense of extreme emotional disturbance. Second, it is only a partial defense that would still have

exposed defendant to a sentence of up to 25 years on the "reduced" manslaughter count and up to 15 years on the "reduced" attempted manslaughter count, especially given the viciousness of the acts. Counsel would have argued extreme emotional disturbance on essentially the same facts as those on which he argued lack of culpable intent. Finally, submitting the defense to the jury would have allowed it to reach a compromise verdict, thereby reducing defendant's chances of a complete acquittal (*see People v Lopez*, 36 AD3d 431, 432 [2007], *lv denied* 8 NY3d 947 [2007]). By arguing lack of intent, counsel adopted an "all-or-nothing" defense that was reasonable under the circumstances (*see People v Clarke*, 55 AD3d 370 [2008], *lv denied* 11 NY3d 923 [2009]; *see also People v Syphrett*, 57 AD3d 286, 286-287 [2008], *lv denied* 12 NY3d 788 [2009]; *Lopez*, 36 AD3d at 432). Thus, on this record, we see no error in counsel's performance that warrants reversal (*see People v Alford*, 33 AD3d 1014 [2006]).

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

ENTERED: AUGUST 10, 2010

Elba Iris Castro

DEPUTY CLERK

Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3210 Vivian Storper, Index 112445/07
Plaintiff-Appellant,

-against-

Kobe Club, et al.,
Defendants-Respondents,

Green 1414 Property LLC, et al.,
Defendants.

_____

Werner, Zaroff, Slotnick, Stern & Ashkenazy, LLP, Lynbrook (Howard J. Stern of counsel), for appellant.

Cartafalsa, Slattery Turpin & Lenoff, New York (David R. Beyda of counsel), for Kobe Club, Red Square (NY) LLC and Mix in New York, respondents.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Angela Lurie Milch of counsel), for 1414 APF LLC and APF Properties LLC, respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 26, 2009, which, to the extent appealed from as limited by the briefs, granted the APF defendants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

At issue on this appeal is whether a sidewalk metal grating owned by the MTA is part of the "sidewalk" for purposes of Administrative Code of the City of New York § 7-210, which requires owners of real property to maintain abutting sidewalks in a reasonably safe condition.

Plaintiff's testimony establishes that she tripped and fell on a raised and broken portion of the public sidewalk surrounding a vault cover owned by the MTA. The vault was adjacent to the premises owned by defendants 1414 APF LLC and APF Properties LLC.

Rules of City of New York Department of Transportation [34 RCNY] § 2-07(b)(1) provides that "[t]he owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware" (*see Cruz v New York City Tr. Auth.*, 19 AD3d 130, 130-31 [2005]). 34 RCNY 2-07(b)(2) requires that "[t]he owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating."

Administrative Code § 7-210 generally imposes liability for injuries resulting from negligent sidewalk maintenance on the abutting property owners. 34 RCNY 2-07, however, imposes the duty of maintenance and repair of a sidewalk grate on the owner of the grate, which in this case is the MTA. There is no doubt that the defective area of the sidewalk where plaintiff fell was inside the 12-inch zone that the MTA was required to repair pursuant to 34 RCNY 2-07.

We do not agree that the MTA and the abutting property owner

could be concurrently liable in this case. There is nothing in Administrative Code § 7-210 to show that the City Council intended to supplant the provisions of 34 RCNY 2-07 and to allow a plaintiff to shift the statutory obligation of the MTA to the abutting property owner. "In reaching this result, we are guided by the principle that 'legislative enactments in derogation of common law, and especially those creating liability where none previously existed,' must be strictly construed" (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008] quoting *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 206 [2004]).

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

ENTERED: AUGUST 10, 2010

Elba Iris Castro
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DEPUTY CLERK

Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3227-
3228 In re Eustace B.,

A Dependent Child Under The
Age of Eighteen Years, etc.,

Shondella M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Daniel M. Gonen, New York for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Tamara A. Steckler, Legal Aid Society, New York (Judith Stern of counsel), Law Guardian.

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Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about June 5, 2009, which, insofar as appealed from, denied, sub silentio, respondent mother's motion to vacate her default at the fact-finding hearing on April 14, 2009, and to dismiss the petition, unanimously reversed, on the law, without costs, the motion granted, and the petition dismissed. Appeal from order of fact-finding, same court and Judge, entered on or about June 24, 2009, following an inquest on April 14, 2009 upon respondent's default, unanimously dismissed, without costs, as taken from a non-appealable order.

Respondent persuasively argues that the neglect petition

should have been dismissed pursuant to Family Court Act § 1051(c) because the court's "aid" was not needed here, inasmuch as, in releasing the child to respondent's custody, the court in effect determined that there was no basis for supervision or for respondent's participation in referrals made by the agency. It was established that the child was being raised as a model person and student and wished to continue residing in the security of his mother's custody. Furthermore, the domestic violence incident between respondent and her boyfriend was isolated (*see Matter of Kayla B.*, 262 AD2d 137 [1999]), and, in any event, that relationship had ended (*see Matter of Kirk V.*, 60 AD3d 427 [2009]).

As to respondent's motion to vacate her default in appearing at the fact-finding hearing, we find that there is both an absence of evidence that respondent's failure to appear was willful, and a demonstration of a meritorious defense to the neglect petition, warranting reversal of the trial court's denial of the motion (*see Matter of Taina M.*, 32 AD3d 210, 211 [2006]). While "we are cognizant that family courts in many counties across the state have crushing case loads, extremely difficult family issues to decide, and limited time to make fair and informed determinations in what are often chaotic and highly charged emotional cases" (*Alix A. v Erika H.*, 45 AD3d 394, 394-395 [2007]), we find that the court's decision to deny

respondent's counsel's request for a second call and to proceed to the fact-finding hearing by inquest was ill considered, given the fact that the court scheduled the case for 4:00 P.M. to accommodate respondent's work schedule and respondent's counsel informed the court that respondent was "on her way," and the fact that respondent had attended the other scheduled court dates without incident (*see Matter of Mursol B.*, 266 AD2d 76,76 [1999]). Moreover, all these facts, as well as the positive relationship between respondent and the child, were brought to the court's attention again when respondent moved to vacate. Inexplicably, the court denied the motion.

Were it not for our dismissal of the petition pursuant to Family Court Act § 1051(c), we would further find that the agency's evidence at the hearing failed to establish neglect (*see* Section 1012[f][I]; Section 1046[a][viii]) by a preponderance of the evidence (*see* Section 1046[b][i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). The agency's proof that the child felt "scared and nervous" during the isolated domestic violence incident did not establish that respondent had failed to exercise a minimum degree of care, or that the child's mental or emotional

condition was impaired or in imminent danger of being impaired as a result of the altercation (*see id.; Kayla B.*, 262 AD2d at 137).

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

ENTERED: AUGUST 10, 2010

Elba Iris Castro
_____
DEPUTY CLERK

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1811N Brad H., et al., Index 117882/99
Plaintiffs-Respondents,

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Jeffrey S. Dantowitz of counsel), for appellants.

Debevoise & Plimpton, LLP, New York (Emily O'Neill Slater of counsel), for respondents.

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Order, Supreme Court, New York County (Marilyn Shafer, J.), entered July 16, 2009, reversed, on the facts, defendants' cross motion granted, and the action declared terminated in the absence of jurisdiction over the dispute.

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

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
David B. Saxe
James M. McGuire
Sallie Manzanet-Daniels, JJ.

Index 117882/99
1811N

_____x

Brad H., et al.,
Plaintiffs-Respondents,

-against-

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

_____x

Defendants appeal from an order of the Supreme Court, New York County (Marilyn Shafer, J.), entered July 16, 2009, which granted plaintiffs' motion for a preliminary injunction requiring them to continue to abide by the terms of the parties' Stipulation of Settlement entered into on January 8, 2003 and approved in an Amended Final Order and Judgment dated April 2, 2003, and denied their cross motion for an order declaring the action terminated pursuant to the terms of the stipulation.

Michael A. Cardozo, Corporation Counsel, New York (Jeffrey S. Dantowitz, Edward F.X. Hart and Drake A. Colley of counsel), for appellants.

Debevoise & Plimpton, LLP, New York (Emily O'Neill Slater, Christopher K. Tahbaz, Julie M. Calderon and Matthew Hackell of counsel), and New York Lawyers for the Public Interest, Inc., New York (Roberta Mueller of counsel), and Urban Justice Center, New York (Jennifer J. Parish and Douglas Lasdon of counsel), for respondents.

SAXE, J.

In August 1999, the named plaintiffs commenced this action on behalf of themselves and other similarly situated mentally ill inmates in New York City jails, seeking injunctive and declaratory relief requiring the City to provide adequate discharge planning services for all members of the class, pursuant to the New York State Constitution, Mental Hygiene Law § 29.15 and 14 NYCRR 587.1 *et seq.* The parties entered into a settlement agreement on January 8, 2003, pursuant to which the City agreed to provide discharge planning services to all members of the Class certified by the court. The agreement specified that the court would have continuing jurisdiction over the action only "for the term of this Agreement" and that "[t]he provisions of this Agreement shall terminate at the end of five years after monitoring by the Compliance Monitors begins pursuant to § IV of this Agreement."

On May 22, 2009, plaintiffs moved by order to show cause for injunctive relief, seeking an order compelling compliance by defendants with the settlement agreement; defendants cross-moved for an order declaring that the action is terminated and that the court no longer has jurisdiction over the dispute, in that the five-year period contemplated by the agreement came to an end before the motion was brought.

Therefore, this appeal requires determination of a single issue: the point in time at which monitoring by the compliance monitors may be said to have begun, in order to determine the point at which the court's jurisdiction came to an end.

As provided in the agreement, each side would designate one compliance monitor, and both sides would then jointly move for an order appointing the two monitors "so that they can begin the performance of their duties pursuant to this Settlement Agreement no later than the Implementation Date." The settlement defined the plan's "Implementation Date," by which the City was to have in place all aspects of the settlement, including adoption of all manuals and other documents required to implement the settlement, as 60 days after final entry of the order and judgment. Since the final judgment was entered on April 4, 2003, the Implementation Date was June 3, 2003.

The order appointing the proposed monitors was issued on May 6, 2003. According to their first report, dated September 3, 2003, the monitors "began to engage in some limited reviews of draft policies and procedures" on May 19, 2003, met with the City's attorney to discuss the City's draft policies on May 22, 2003, and observed a training session on May 28, 2003. However, their report expressed their view that "monitoring activities did not commence in earnest until June 25, 2003," and that even as of

the report date, the monitors were disinclined to offer an opinion whether there had been "substantial compliance or lack thereof" by the City in implementing the terms of the settlement.

Plaintiffs contend that the monitoring began on June 25, 2003, the date on which the monitors said that monitoring activities began "in earnest." Adding 5 years plus 356 agreed-upon days of tolling pursuant to the parties' stipulations, plaintiffs conclude that the "sunset" date for the settlement was June 15, 2009, and therefore that the court still had jurisdiction to enforce the settlement when the motion was brought on May 22, 2009.

Defendants contend that monitoring began on May 6, 2003, the date on which the monitors were appointed and were provided with the required access to people, places, and things relevant to the discharge planning contemplated by the settlement. Adding 5 years plus 356 days to that date would make the "sunset" date April 26, 2009, which would require denial of the enforcement motion and dismissal of the action.

For its part, the motion court concluded that the settlement's sunset provision should be calculated from the plan's "Implementation Date," that is, June 3, 2003, 60 days after entry of the final order and judgment in this action. The court remarked that while "some action" by the monitors occurred

in the drafting, hiring and preparing for implementation of the discharge plan, "there could be no monitoring of substantive [*sic*] compliance" preceding the Implementation Date. It noted that the settlement did not require the City to be in substantial compliance with the settlement terms before that date, and that the City itself, in paying the monitors and negotiating the toll periods, had relied upon the Implementation Date as a point of reference in determining the parties' rights and obligations under the settlement's discharge plan. The court therefore granted plaintiffs' motion for a preliminary injunction requiring the City to continue to abide by the terms of the settlement, and denied the City's cross motion for an order declaring the action to be terminated.

We begin by observing that while monitoring could not have begun before May 6, 2003, it does not follow that monitoring in fact began that early, as defendants suggest. Indeed, the settlement does not say that it will terminate five years after the date on which the monitors were appointed, or on the date on which defendants were *subject to* monitoring. It refers to the date on which monitoring *actually begins*.

We also reject the conclusion of the motion court that the settlement's sunset provision should be calculated from the plan's "Implementation Date," that is, June 3, 2003, 60 days

after entry of the final order and judgment in this action. The Implementation Date was merely an outside date by which the monitors were required to have begun the performance of their duties. While, as the court noted, the City relied upon the Implementation Date as a point of reference in paying the monitors and negotiating the toll periods, an attorney's personal view as to when monitoring began is not controlling; this Court must determine for itself on what date monitoring must be said to have commenced for purposes of the settlement agreement.

Nor do we accept plaintiffs' proposal that because the monitors themselves, in their first report, dated September 3, 2003, asserted that "monitoring activities did not commence in earnest until June 25, 2003," we should consider June 25, 2003 as the date on which that monitoring began. The monitors' assessment of when monitoring began "in earnest" is not relevant, since the phrase "in earnest" creates an element not contained in the settlement itself, which merely refers to when monitoring "begins."

To arrive at our own assessment of when the monitoring actually began, we examine the agreement itself. We keep in mind that the task the monitors were charged with monitoring was the contemplated discharge planning for the defined class of inmates, and that "discharge planning" was defined as "the process of

formulating and implementing the Discharge Plan." The section of the settlement that describes the "Scope and Method of Monitoring" provides:

> "The principal means of monitoring shall be access to documents and records, including those stored electronically; access to Class Members; and observation of training sessions; *provided, however*, the Compliance Monitors shall also have access to facilities and staff described below as the Compliance Monitors deem reasonably necessary to determine whether Defendants are complying with the terms of this Settlement Agreement."

In the absence of any provision specifying which of the monitors' duties constitute "monitoring," we conclude that any affirmative act on the part of the monitors in furtherance of carrying out the described tasks would suffice. There is no basis to conclude that such tasks must be "significant," "earnest" or "non-limited" in nature or scope to qualify as beginning the process.

According to their report, the monitors "began to engage in some limited reviews of draft policies and procedures" on May 19, 2003. In our view, such reviews of draft procedures must qualify as beginning the process of monitoring the formulation of a discharge plan. Even if that were not so, both the monitors' meeting with the City's attorney to discuss the City's draft policies on May 22, 2003 and their observation of a training session on May 28, 2003 would qualify as monitoring, since they were tasks required for overseeing the formulation of discharge

plans.

If monitoring began on May 19, 2003, then the "sunset date" on which the settlement terminated was May 10, 2009; if it began on May 28, 2003, the termination date was May 19, 2009. No matter which of the three events cited above is considered the commencement of monitoring, however, the agreement by its terms terminated before the date on which plaintiffs moved for injunctive relief against the City, May 22, 2009. Because the settlement was already terminated by that time, the court was left without jurisdiction to rule on the application.

Finally, plaintiffs' estoppel argument is without merit. Estoppel is generally unavailable against a governmental agency (*see Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 130 [1990]), except in rare instances where the government's actions "would operate to defeat a right legally and rightfully obtained," not where the actions would operate "to create a right" (*Matter of McLaughlin v Berle*, 71 AD2d 707, 708 [1979], *affd* 51 NY2d 917 [1980]).

We do not rule on the dissent's proposal that in the alternative we should allow the reformation of the tolling agreements on the basis of mutual mistake, because no request was made for such relief.

Accordingly, the order of the Supreme Court, New York County

(Marilyn Shafer, J.), entered July 16, 2009, which granted plaintiffs' motion for a preliminary injunction requiring defendants to continue to abide by the terms of the parties' Stipulation of Settlement entered into on January 8, 2003 and approved in an Amended Final Order and Judgment dated April 2, 2003, and denied defendants' cross motion for an order declaring the action terminated pursuant to the terms of the stipulation, should be reversed, on the facts, defendants' cross motion granted, and the action declared terminated in the absence of jurisdiction over the dispute.

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

TOM, J.P. (dissenting)

I see no reason to engage in speculation with respect to when monitoring of the City's discharge planning services commenced under the terms of the parties' stipulated settlement of January 8, 2003.

The interpretation of an agreement is governed by straightforward rules. The best indication of what the parties intended by their agreement is to be found in its language (*see Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). The objective of a court "in searching for the probable intent of the parties . . . is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations" (*Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 555 [1982] [internal quotation marks and citations omitted]; *see also Reape v New York News*, 122 AD2d 29, 30 [1986], *lv denied* 68 NY2d 610 [1986] ["the intent of the parties in entering an agreement is a paramount consideration when construing a contract"]; *Greenwich Vil. Assoc. v Salle*, 110 AD2d 111, 114 [1985] ["In construing the terms of a contract, the judicial function is to give effect to the parties' intentions"]).

Where, as here, the terms of an agreement are susceptible to alternative constructions, the interpretation to be applied is the meaning ascribed to such terms by the parties. As the United

States Supreme Court observed, "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence" (O*ld Colony Trust Co. v City of Omaha*, 230 US 100, 118 [1913]). This Court has applied the principle to circumstances not contemplated by a contract, stating that "the most persuasive evidence of the agreed intention of the parties in those circumstances is what the parties did when the circumstances arose" (*Webster's Red Seal Publs. v Gilberton World-Wide Publs.*, 67 AD2d 339, 341 [1979], *affd* 53 NY2d 643 [1981]). In *Federal Ins. Co. v Americas Ins. Co.* (258 AD2d 39, 44 [1999]), we noted that "the parties' course of performance under the contract is considered to be the 'most persuasive evidence of the agreed intention of the parties'" (quoting *Webster's Red Seal Publs.*, 67 AD2d at 341). We adhere to the principle (*see e.g. Waverly Corp. v City of New York*, 48 AD3d 261, 265 [2008] ["The best evidence of the intent of parties to a contract is their conduct after the contract is formed"]), as do other Departments (*see e.g. T.L.C. W., LLC v Fashion Outlets of Niagara, LLC*, 60 AD3d 1422, 1424 [2009]) and the federal courts (*see e.g. Croce v Kurnit*, 737 F2d 229, 235 [2d Cir 1984]).

Under the parties' stipulated settlement agreement, Supreme

Court's jurisdiction over the City's performance of its obligations is coextensive with the agreement's duration, which concludes five years after its "Implementation Date." In negotiating the first of a series of stipulations tolling the expiration of the settlement agreement in July 2007, the parties disagreed about the precise implementation date, but only as to whether it was June 2, 2008, as computed by plaintiffs, or June 25, 2008, as determined by defendants. At plaintiffs' suggestion, the term "sunset date" was employed in the tolling agreements rather than a specific date; however, it is clear that during the several years preceeding the commencement of this proceeding, neither party considered the implementation date to have been before June 2, 2008. The parties having agreed to toll the expiration of the settlement agreement in reliance on an expiration date between June 2 and June 25, 2008, the courts are obligated to interpret the agreement in accordance with the parties' performance under it. Given an implementation date of June 2, 2008, the settlement agreement remained in effect when plaintiffs' motion was filed, and Supreme Court retained jurisdiction to issue the preliminary injunction at issue.

Accordingly, the order should be affirmed. Alternatively, plaintiffs are entitled to reformation of the tolling agreements

on the basis of mutual mistake as to the expiration date of the settlement agreement, and their filing of the motion for injunctive relief should be deemed timely.

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

ENTERED: AUGUST 10, 2010

Elba Iris Castro

DEPUTY CLERK