

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 7, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3729 Carby Bruce, Index 7778/06
Plaintiff-Respondent,

-against-

182 Main St. Realty Corp.,
Defendant-Appellant.

- - - - -

3730 Carby Bruce,
Plaintiff-Appellant,

-against-

182 Main St. Realty Corp.,
Defendant-Respondent.

Simon, Eisenberg & Baum, New York (Robert F. Moraco of counsel),
for 182 Main Street Realty Corp., appellant/respondent.

Law Offices of Andrea G. Sawyers, Melville (David R. Holland of
counsel), for respondent/appellant.

Order, Supreme Court, Bronx County (Lucy Billings, J.),
entered October 2, 2009, which granted so much of defendant's
motion for summary judgment as sought to dismiss the Labor Law §§
200, 240(1) and 241(6) causes of action, unanimously modified, on
the law, to deny the motion as to the Labor Law §§ 240(1) and

241(6) causes of action, and otherwise affirmed, without costs. Order, same court and Justice, entered April 27, 2010, which, upon reargument of the motion to the extent it sought to dismiss the common-law negligence claim, adhered to the original determination, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff Carby Bruce claims that he was injured as the result of a fall from a fiberglass A-frame ladder while engaged in construction or renovation work at a warehouse in the Bronx owned by defendant 182 Main St. Realty Corp. The complaint asserts claims under Labor Law §§ 200, 240(1) and 241(6) and for common-law negligence. Defendant's motion for summary judgment was based on the contention that it cannot be held liable because neither it, nor any agent or contractor hired by it, asked or arranged for any work to be performed on the premises, nor did it know of any such work being done.

Plaintiff testified at his deposition that a man named Barry called him and said he had some work to be done. Plaintiff agreed to do it, although Barry did not specify the type of work until they arrived at the premises. Nor did Barry ever specify on whose behalf plaintiff was being hired. When plaintiff arrived at the premises, a one-story building that appeared to

contain a car repair business to which they gained access by an open garage door, he observed engines and car parts all over the floor. The only people present with plaintiff were Barry and another man named Mario. Barry instructed plaintiff to remove old pipes and other items hanging from the ceiling, and plaintiff was furnished with two tools, "a hand-held grinder type of saw [that] cuts through metal" and "[l]arge scissor snips, ... bow cutters," and an A-frame, 10- to 12-foot fiberglass ladder. To set up the ladder to gain access to the pipes to be removed, plaintiff said, he had to maneuver it to fit between two car engines on pallets just below the area where he was to perform the work. Consequently, plaintiff positioned the ladder in a way that seemed most stable, between the pallets, with part of the ladder "touching the cement [floor]" and the other portion "on this pallet." Plaintiff determined that the ladder "was stable," that is, "[g]ood enough," and he took the tools and ascended the ladder. No one held the ladder steady while he was on it.

Plaintiff had been working for less than five minutes when he tumbled off the ladder. He was unable to recall whether he felt the ladder move or shift before he toppled off, although he asserted that the ladder was "shaking or wobbling." Plaintiff explained that he was not sure what caused him to lose his

balance and fall, and that as he fell he focused on how he could avoid landing on top of the car engines on the floor. Following the incident, Barry and Mario helped him up and took him in a van to Jacobi Hospital, where several surgeries were ultimately performed on him.

Plaintiff's sister, Carrol Burnett, who was employed at the time at Jacobi Hospital, stated in an affidavit that "[o]n January 31, 2005, at about 5:00 p.m., after I had just left my job for the day, I received a telephone call from my brother, the plaintiff, in which he told me he had been in an accident. He said he was on his way to Jacobi Hospital and was being driven there in a van. I could hear him screaming out in pain as the vehicle in which he was traveling hit bumps. I turned back to wait for him in the emergency room ... He was brought in by two gentlemen, one of whom introduced himself to me as 'Barry'. I now know that his full name is Barry Montgomery." Burnett also stated that she observed Barry Montgomery not only drive plaintiff to the emergency room but also help plaintiff during the admission process.

Defendant relies primarily on the deposition testimony of Angelo Koutsavlis, a principal of 182 Main Street Realty Corp., and of Barry Montgomery. Koutsavlis asserted that there was a

total of four tenants on the premises on January 31, 2005, one of which was an auto repair business, and that it was his practice to visit the building monthly to collect the rent and whenever a tenant called him with a problem. In response to the question of whether he was aware of any construction or renovation work inside the building at any time prior to January 31, 2005, he said, "I don't think so."

Koutsavlis admitted that he was acquainted with an individual named Barry Montgomery since at least a decade earlier when he sold cars in the Bronx, and Montgomery "was a customer." However, Koutsavlis insisted that he had not had any business dealings with Montgomery in either 2004 or 2005, and said he believed he had last encountered Montgomery "back in the car business, a couple of years [earlier]." He said he had not seen or spoken with Montgomery in the building where plaintiff's accident took place, nor had he had "any business dealings with him for any other reasons" except for his "dealings with him in the [automobile] salvage business." He said Montgomery had never performed any work on behalf of Koutsavlis at the building.

Koutsavlis asserted that he did not learn of plaintiff's accident until about one year later when he received "some paperwork," at which point he called his tenants "and asked them

if they knew of any accident that may have occurred." He was not given any information by the tenants. He had no recollection of any construction or renovation work being done in the premises during his visit to the property in January of 2005.

Barry Montgomery testified at deposition that he was acquainted with Angelo through the automobile salvage business that Angelo operated, that he understood Angelo, whose last name he did not know, to be the owner of the building. Montgomery contradicted Koutsavlis's assertion that the two men had not had any business dealings in either 2004 or 2005. Montgomery testified that Angelo had asked him for an estimate on a repair of the building's roof, although Angelo did not ultimately hire him for the job. Montgomery also denied any awareness of any work taking place on those premises. Indeed, he testified that he had never hired plaintiff to do any kind of work, and denied any knowledge of plaintiff's injury on January 31, 2005 "until all of this."

However, Montgomery acknowledged having some limited acquaintance with plaintiff. He said plaintiff was generally known as Bruce, and that Bruce used to come to a garage Montgomery rented on 221st Street and ask for work. Montgomery said he had seen him painting outside, and believed that "he just

does little handyman special things.”

Issues of fact preclude summary judgment dismissing plaintiff’s Labor Law claims.

Labor Law § 240(1) imposes a nondelegable duty on owners, even when the job is performed by a contractor the owner did not hire and of which it was unaware, and therefore over which it exercised no supervision or control (see *Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 339 [2008]). In *Sanatass*, the Court held that “a property owner is liable for a violation of Labor Law § 240(1) that proximately caused injury to a worker even though a tenant of the building contracted for the work without the owner’s knowledge” (*id.* at 335). There, the commercial tenant had, without the knowledge or consent of the landlord, hired a company to install a commercial air conditioning unit, and an employee of the installer was injured when the unit fell as it was being hoisted to the ceiling. The building owner, named as a defendant, sought summary judgment on the ground that it had neither notice nor control of the work, and that, indeed, the work violated a lease provision requiring its consent to any such alterations by contractors.

The *Sanatass* court held that the landlord was not entitled to summary judgment, despite its lack of notice or knowledge of

or consent to the work. It explained that "so long as a violation of the statute proximately results in injury, the owner's lack of notice or control over the work is not conclusive -- this is precisely what is meant by absolute or strict liability in this context ... [E]ven the lack of 'any ability' on the owner's part to ensure compliance with the statute is legally irrelevant" (*id.* at 340 [citations omitted]). Accordingly, defendant's assertion here that it neither arranged for nor knew about plaintiff's being hired to work on its premises does not entitle it to summary judgment.

Moreover, the evidence creates a question of fact as to who hired plaintiff and on whose behalf. While plaintiff conceded that he did not know who had retained Montgomery to do the work, Koutsavlis's assertion that he knew nothing about any such work was undercut by Montgomery's assertion that Koutsavlis had solicited an estimate for certain work. Montgomery's assertion that he did not get the job and did not hire plaintiff was contradicted by evidence that Montgomery brought plaintiff to the hospital after his fall.

Nor can defendant prevail on its motion by asserting that the incident did not occur on its premises. While plaintiff was initially unclear at deposition as to the premises' address, he

was subsequently able to pin down the exact location of the building. His initial difficulty and his subsequent clarification do not constitute the creation of a feigned factual issue; rather, the question of whether the accident occurred on premises owned by defendant is a fact issue that may be addressed at trial.

We also reject defendant's contention that there was no evidence that the ladder was unstable so as to establish a violation of Labor Law § 240(1). Contrary to defendant's assertion, plaintiff expressly testified that the ladder shook and wobbled. Moreover, "failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)" (*Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 [1996]). In view of plaintiff's testimony that the presence of the pallets and engines prevented him from placing the ladder squarely on the cement floor, forcing him to situate it with one part touching the cement floor and the other portion on a pallet, there is a question as to whether some additional steps should have been taken to secure the ladder.

Nor is defendant entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim, based on an asserted

violation of 12 NYCRR 23-1.21(e) (3).

However, defendant is entitled to summary judgment dismissing both the common-law negligence and Labor Law § 200 claims. The accident was not caused by a dangerous condition of which defendant had actual or constructive notice (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]), and defendant is not even alleged to have directed or controlled plaintiff's work on the site (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

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

ENTERED: APRIL 7, 2011

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CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

4023- W&W Glass, LLC, Index 101723/09
4024 Plaintiff-Respondent,

-against-

1113 York Avenue Realty Company LLC, et al.,
Defendants-Appellants,

Pacific Lawn Sprinklers, et al.,
Defendants.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of
counsel), for appellants.

Schnader Harrison Segal & Lewis LLP, New York (Theodore L. Hecht
of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles E. Ramos,
J.), entered June 29, 2010, awarding plaintiff the principal sum
of \$7,965,164.30 against defendant 1113 York Realty Company LLC
and the total sum of \$521,050 against 1113 York and defendant
60th Street Development LLC as costs for the storage of material
during the pendency of the action, and bringing up for review an
order, same court and Justice, entered June 18, 2010, which
granted plaintiff's motion to strike defendants' answer,
affirmative defenses and counterclaims and to foreclose
mechanic's liens, unanimously reversed, on the law and the facts,
without costs, the judgment vacated and plaintiff's motion

denied.

The record fails to support the motion court's determination that defendants' failure to comply with discovery obligations was willful, or in bad faith (see *Fish & Richardson, P.C. v Schindler*, 75 AD3d 219 [2010]; *Banner v New York City Hous. Auth.*, 73 AD3d 502 [2010]). Absent such showing, the motion court erred in imposing the "harshest available penalty" against defendants (see *Basset v Bando Sangsa Co.*, 103 AD2d 728, 728 [1984]).

Finally, we note that the record discloses no evidence of defendants' repeated failures to comply with the court's discovery orders. Indeed, there appear to be no prior motions by plaintiff to compel disclosure, rendering any motion to strike the answer pursuant to CPLR 3126 premature in this case.

ENTERED: APRIL 7, 2011

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CLERK

stop work order in connection with defendant's construction project on the adjacent property. The settlement agreement provided that defendant would require access to plaintiff's roof until May 24, 2008 and that it would pay plaintiff \$400 for each additional day that the protection remained affixed to plaintiff's property after that date. Defendant failed to complete its work and remove the protection by May 24, 2008. Defendant thereafter paid the daily \$400 until January 2009, when, although defendant had not removed the protection from plaintiff's property, it ceased making any payments under the settlement agreement.

We reject defendant's argument that the contractual provision for the payment of \$400 per day after May 24, 2008 is a liquidated damages clause and that, since plaintiff suffered no damages, the payment is an unenforceable penalty (*see Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 425 [1977]). The provision does not set forth liquidated damages in the event of a breach but rather clearly constitutes a fee to plaintiff for extending defendant's license to enter and encumber plaintiff's property beyond May 24, 2008.

Moreover, even were we to accept defendant's contention that the provision was a liquidated damages clause, defendant would

still not prevail. As the party seeking to avoid payment of liquidated damages, defendant must demonstrate that "the amount fixed is plainly or grossly disproportionate to the probable loss" (*Truck Rent-A-Ctr.*, 41 NY2d at 425). Defendant failed to pay the contract price for physically encumbering plaintiff's realty and also failed to remove the protection. Thus, defendant became a trespasser, and "the proper measure of the damages for trespass is the gain the trespasser has derived from its wrongful conduct" (*Sakele Bros. v Safdie*, 302 AD2d 20, 27 [2002]). Defendant was required to show that the \$400-per-day amount was disproportionate to the benefit it realized from being permitted to proceed with its multi-million dollar construction project. Defendant has not even attempted to carry its burden.

We also reject defendant's argument that it already had a license granted by plaintiff when the parties entered into the settlement agreement. That purported initial license agreement is not in the record on appeal, and plaintiff asserts that the initial license was limited to separate protection work on the roof. Plaintiff's position is supported by the fact that, after the Department of Buildings had notified defendant that the additional fire-escape protection was required, defendant sought a license to erect that protection. Even assuming the initial

license covered the new fire-escape construction on plaintiff's realty, there is no evidence that plaintiff was barred from withdrawing the initial permission. Moreover, the settlement agreement superseded any license previously granted.

We have reviewed defendant's remaining contentions, including its "public policy" argument, and find them to be without merit (see *Matter of 155 West 21st St., LLC v McMullan*, 61 AD3d 497 [2009]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4289 Robin Lloyd, as Executor of the Estate of Eliza L. Moore,
Plaintiff-Appellant, Index 124120/02

-against-

St. Vincent's Manhattan
Hospital, etc., et al.,
Defendants,

Ahmed A. Rawanduzy, M.D.,
Defendant-Respondent.

Clark, Gagliardi & Miller, P.C., White Plains (Henry G. Miller of
counsel), for appellant.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner
of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger,
J.), entered July 23, 2009, which, in an action for medical
malpractice, granted defendant Ahmed A. Rawanduzy's motion for
judgment notwithstanding the verdict, unanimously reversed, on
the law, without costs, and the motion denied.

Plaintiff's decedent sustained severe head trauma in a motor
vehicle accident. She was taken to St. Vincent's Hospital for
treatment of life-threatening injuries and came under the care of
Kraig Moore, M.D., the chief resident of neurosurgery, who
diagnosed massive brain herniation. Dr. Moore conferred with Dr.

Rawanduzy, the attending neurosurgeon on call, and a decision was made against surgical intervention. The family sought a second opinion, and the decedent was transferred to New York Hospital, where neurosurgery was performed.

The jury found defendant doctors equally responsible for the injury found to have resulted from the decision to withhold surgical treatment. Supreme Court set aside the verdict as to Dr. Rawanduzy, finding that he was entitled to rely on the information communicated by Dr. Moore that the decedent "had no meaningful brain stem function."

Viewing the evidence in the light most favorable to plaintiff and affording him the benefit of every favorable inference (*see Pol v Our Lady of Mercy Med. Ctr.*, 51 AD3d 430, 431 [2008]), there is evidence from which the jury reasonably could have concluded that Dr. Rawanduzy took part in the decedent's treatment and if not made, at least participated in, the decision not to perform surgery. The hospital record includes an entry by Dr. Rawanduzy that, Dr. Moore testified, was made when they spent "at least an hour" with the patient. In addition, Dr. Moore stated (not entirely consistently), first, that surgical intervention was not a decision he was authorized to make alone and, later, that "it was his [Dr. Rawanduzy's]

decision but I concurred." Dr. Rawanduzy testified that he had no recollection of the decedent or anything about her case, and that reviewing her chart did not refresh his recollection.

It cannot be said that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Thus, there is no basis upon which to disturb the jury verdict. We note that Dr. Rawanduzy concedes that "Dr. Moore was not authorized to decide on his own questions of surgical intervention" and does not argue that he acted exclusively in a consulting capacity (see *Sawh v Schoen*, 215 AD2d 291 [1995]).

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ENTERED: APRIL 7, 2011



CLERK

57 NY2d 136, 141 [1982])). Defendant was present throughout the trial, but when the jury sent a note that it had reached a verdict, defendant could not be located. The court placed the jury's completed verdict sheet in a sealed envelope and adjourned the case until the next day. On the following morning, defendant was still absent, and his counsel had no explanation for the absence or information about defendant's whereabouts. After hearing from the parties and making detailed findings, the court accepted the verdict in defendant's absence.

Initially, we reject defendant's argument that the court's actions regarding the verdict sheet constituted acceptance of the verdict. A verdict sheet is not a verdict, and the jury did not render a verdict until it did so in open court on the morning after defendant disappeared (*see* CPL 310.40; *People v McBride*, 203 AD2d 86, 87 [1994], *lv denied* 83 NY2d 912 [1994])).

By the time the court accepted the verdict, it had ample basis on which to conclude that defendant had deliberately absconded (*see e.g. People v Pagon*, 48 AD3d 486 [2008], *lv denied* 10 NY3d 843 [2008]), and it properly exercised its discretion when it determined that a hearing was unnecessary. Moreover, defense counsel's admission during sentencing that the reason defendant absconded was "out of fear" confirmed the deliberate

nature of defendant's absence (see *People v Mejia*, 268 AD2d 286 [2000], *lv denied* 95 NY2d 837 [2000]).

Defendant claims that the court improperly closed the courtroom during the testimony of an undercover officer. Although the record shows that the officer identified herself by her shield number rather than her name, there is no discussion in the record regarding closing the courtroom, or anything to indicate that it was closed to any spectators at any time. This Court previously denied defendant's motion for a reconstruction hearing to determine whether the courtroom was closed, and, if so, the circumstances leading to the closure (2010 NY Slip Op 77914[U]). That order is dispositive of defendant's present request for such a hearing (see *People v Alvarado*, 269 AD2d 104 2000], *lv denied* 94 NY2d 916 [2000]).

Defendant did not preserve his argument that the court improperly permitted the undercover officer to testify anonymously, and we decline to review it in the interest of justice. "Contrary to defendant's argument, a Confrontation Clause argument requires a specific contemporaneous objection . . . In this case, as a result of the lack of objection, the People were never called upon to establish a need for anonymity" (*People v Alvarado*, 3 AD3d 320, 320 [2004], *lv denied* 2 NY3d 737

[2004][citations omitted]). As an alternative holding, we find that defendant has not established that he was prejudiced by the fact that the officer testified under her shield number.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 7, 2011

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CLERK

Andrias, J.P., Friedman, Catterson, Moskowitz, Román, JJ.

4713 ACC Construction Corporation., et al., Index 603713/06
Plaintiffs-Appellants-Respondents, 590793/08

-against-

Tower Insurance Company of New York,
Defendant-Respondent-Appellant,

Breen Electrical Contractors, Inc.,
Defendant.

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Tower Insurance Company of New York,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Nilly Tammy Perner Kasza, etc.,
Third-Party Defendant-Respondent.

Rafter & Associates PLLC, New York (Howard K. Fishman of
counsel), for appellants-respondents.

Law Office of Max W. Gershweir, New York, (Joshua L. Seltzer of
counsel), for respondent-appellants.

O'Leary & Spero, Staten Island (Maria D. Spero of counsel), for
respondent.

Order and judgment (one paper), Supreme Court, New York
County (Edward H. Lehner, J.), entered August 25, 2009, which
denied plaintiffs' motion for summary judgment, granted defendant
Tower Insurance Company's cross motion for summary judgment
declaring that it has no duty to indemnify plaintiffs in

connection with the underlying wrongful death action, and so declared, and granted third-party defendant's motion to dismiss the third-party complaint, unanimously affirmed, without costs.

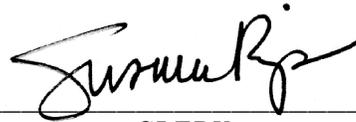
It is undisputed that the commercial general liability insurance policy issued by Tower provided additional insured coverage to plaintiff ACC Construction Corp., as limited by the terms of the policy. The policy contains an independent contractors exclusion, which excludes from coverage "'personal injury' arising out of operations performed for any insured by independent contractors." As the record demonstrates that the decedent was an employee of an independent contractor of ACC Construction and that his death arose out of his employer's operations, the exclusion applies as a matter of law (see *Carriage Dev. v U.S. Underwriters Ins. Co.*, 4 AD3d 305 [2004]).

In the third-party action, Tower seeks, inter alia, a defense and indemnity for costs incurred in connection with its defense of this declaratory judgment action from the decedent's wife, based on an indemnification provision contained in its settlement agreement with her in the underlying action. To interpret the provision in the manner urged by Tower would "produce a result that is absurd" and "contrary to the reasonable expectations of the parties," and we decline to do so (see *Matter*

of Lipper Holdings v Trident Holdings, 1 AD3d 170, 171 [2003]).

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CLERK

Andrias, J.P., Friedman, Catterson, Moskowitz, Román, JJ.

4714- In re Commissioner of Social Services, etc.,
4714A Petitioner-Respondent,

-against-
Tyrone B.,
Respondent-Appellant.

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

Purported appeal from order, Family Court, New York County (Helen Sturm, J.), entered on or about September 20, 2009, which dismissed respondent father's objections to a final order of child support, same court (Support Magistrate Karen D. Kolomechuk), entered on or about May 13, 2009, directing respondent, inter alia, to pay \$518.00 biweekly for the support of his children, Tyrone B., Jr. and Jayden B., unanimously dismissed, without costs. Appeal from order, same court (Support Magistrate Sudeep Kaur), entered on or about March 25, 2009, which directed respondent to pay temporary child support, unanimously dismissed, without costs, as academic.

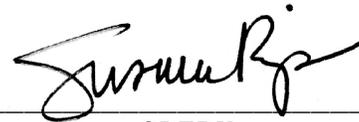
Respondent's appeal from the temporary order of support was rendered academic by the final order of support and, therefore, must be dismissed (see *Matter of Ciotti v Butera*, 24 AD2d 983

[1965]). Since respondent never filed a notice of appeal from the Family Court's order dismissing his objections, which was appealable as of right, pursuant to FCA 1112(a), this Court lacks jurisdiction to review that order or the final support order. Respondent cites no authority for the proposition that an appellate court's grant of leave to appeal from an interlocutory order may be deemed to provide jurisdiction to review a superseding order, appealable as of right, from which no appeal has been taken. Thus, respondent's appeal, to the extent that he seeks review of those orders, should also be dismissed.

In light of the foregoing, respondent's arguments on the merits need not be considered.

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eviction was based on uncured lease violations alone and had no connection to the wrongs it alleges against defendants in this action.

We find that plaintiff's conduct in commencing this action was frivolous within the meaning of 22 NYCRR 130-1.1.

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Andrias, J.P., Friedman, Catterson, Moskowitz, Román, JJ.

4721 In re Bonnie S.L.,
 Petitioner-Appellant,

-against-

 Joseph P.L.,
 Respondent-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

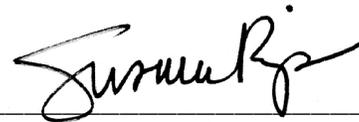
 Appeal from order, Family Court, Bronx County (Annette L. Guarino, Referee), entered on or about June 9, 2010, which directed that the subject children not be removed from the jurisdiction pending further proceedings in this matter concerning petitioner's application for modification of a custody order to permit relocation of the children to Arkansas, unanimously dismissed as moot, without costs.

 Application by petitioner's assigned counsel to be relieved as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed

the record and agree with counsel that there are no nonfrivolous issues which could be raised on this appeal, which was rendered moot when petitioner subsequently withdrew the petition.

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any claims arising from defendants' alleged misrepresentations that the building did not have a bedbug problem (see *Danann Realty Corp. v Harris*, 5 NY2d 317 [1959]; *1166 EJM LLC v Marsh & McLennan Cos., Inc.*, 50 AD3d 424 [2008]). A bug infestation is not a matter peculiarly within a seller's knowledge that requires disclosure by the seller. An infestation could be discovered with reasonable diligence and an inspection of the premises (see *McPherson v Husbands*, 54 AD3d 735 [2008]; *Long v Fitzgerald*, 240 AD2d 971, 973 [1997]).

We have considered plaintiff's remaining contentions, including that the causes of action should not have been dismissed as against the individual defendants, and find them unavailing.

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determined that the accounts of petitioner's threatening behavior in violation of respondent's workplace violence policy was more credible than petitioner's version of the events. There exists no basis to disturb the arbitrator's finding because "unless there is no proof whatever to justify the award so as to render it entirely irrational. . .the arbitrator's finding is not subject to judicial oversight" (*Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 [1991]; see *Matter of McMahan & Co. [Dunn New-Fund I]*, 230 AD2d 1, 4-5 [1997], *lv denied* 90 NY2d 806 [1997]).

Furthermore, contrary to petitioner's contention, the arbitrator did not engage in misconduct by failing to enforce a discovery order. The record shows that respondent complied with the discovery order and, in any event, petitioner did not raise this argument before the arbitrator and proceeded with the arbitration (see *Matter of Sims v Siegelson*, 246 AD2d 374, 377 [1998] ["(p)etitioner's claims that the award should be vacated due to (respondent's) non-compliance with the procedures of CPLR article 75 was waived by his participation in the arbitration proceeding without objection"]; CPLR 7511[b][1][iv]).

We have considered petitioner's remaining arguments,

including that the arbitrator was biased in favor of respondent,
and find them unavailing.

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CLERK

Andrias, J.P., Friedman, Catterson, Moskowitz, Román, JJ.

4726- Joan Hansen & Company, Inc., Index 107793/08
4726A Plaintiff-Respondent,

-against-

Nygaard International, etc.,
Defendant-Appellant.

Eaton & Van Winkle LLP, New York (Robert K. Gross of counsel),
for appellant.

Phillips Nizer LLP, New York (George Berger of counsel), for
respondent.

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered April 30, 2010, directing an accounting of all royalty payments received by defendant during the term of plaintiff's exclusive representation and payment to plaintiff of 15% of such royalty payments, and bringing up for review an order, same court and Justice, entered March 19, 2010, which granted plaintiff's motion for summary judgment, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The appointment of plaintiff as defendant's "exclusive" licensing consultant did not, by itself, entitle plaintiff to commissions based on royalties from licensees procured by

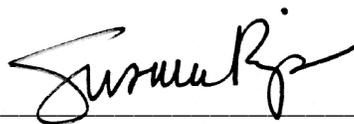
defendant (see *Carnes Communications v Dello Russo*, 305 AD2d 332 [2003]; *Interactive Props. v Doyle Dane Bernbach*, 125 AD2d 265, 272-273 [1986], *lv denied* 70 NY2d 613 [1987]). However, the requirement in the representation agreement that defendant pay plaintiff commissions based on royalties from "all" licensing agreements executed during the period of plaintiff's retention, and the definition of royalties as those received from "all" such licensing agreements, unambiguously gave plaintiff the right to royalty commissions from licensees procured by defendant. When the parties wished to restrict plaintiff's entitlement to commissions to those resulting from licensees it had procured, they knew how to do so. Given the lack of ambiguity, defendant's extrinsic evidence was inadmissible as an aid in interpretation (see *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Contrary to defendant's contention, this interpretation does not render meaningless the requirement that plaintiff perform certain services. The lack of clear conditional language indicates that the performance of services was a contractual duty but not an express condition precedent to plaintiff's right to remuneration (see *Roan/Meyers Assoc, L.P. v CT Holdings, Inc.*, 26 AD3d 295, 296 [2006]). Even if plaintiff's performance of the services required by the representation agreement was an implied

constructive condition to its right to remuneration, the parties' course of performance during a 10-year period demonstrated that any failure to perform such services was considered insubstantial (see *Moore v Kopel*, 237 AD2d 124, 125 [1997]).

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

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

ENTERED: APRIL 7, 2011

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NY3d711[2009]). Defendant's argument that he poses a diminished threat of reoffense is without merit (see *People v Rodriguez*, 67 AD3d 596, 597 [2009], lv denied 14 NY3d 706 [2010]).

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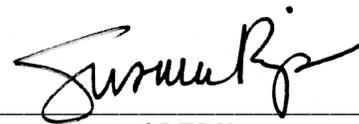
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establishes that defendant's plea was knowing, intelligent and voluntary, and there was nothing in the plea allocution that cast significant doubt on his guilt (see *People v Toxey*, 86 NY2d 725 [1995]). There is no suggestion in the record to suggest that defendant's ability to make a valid plea was impaired in any way by his mental condition or psychiatric medications, and defendant's assertions in this regard rest on speculation.

The court was not obligated to make a sua sponte inquiry into defendant's postplea assertion of innocence, which was reflected in the presentence report (see e.g. *People v Pantoja*, 281 AD2d 245 [2001], *lv denied* 96 NY2d 905 [2001]; *People v Negrón*, 222 AD2d 327 [1995], *lv denied* 88 NY2d 882 [1996]).

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who admittedly represented plaintiff in connection with the application and who plaintiff had met with prior to issuing the subject payment (see *Wei Cheng Chang v Pi*, 288 AD2d 378 [2001], *lv denied* 99 NY2d 501 [2002]).

The record further demonstrates that, other than forwarding the retainer payment to defendant Chin, Choi was not involved in submitting the application, and had no knowledge as to whether Chin had filed the application and the necessary documents on plaintiff's behalf. The record establishes that there was no attorney-client relationship between plaintiff and Choi and accordingly, the complaint is dismissed as against him (see *Wei Cheng Chang*, 288 AD2d at 381; *D'Amico v First Union Natl. Bank*, 285 AD2d 166, 172 [2001], *lv denied* 99 NY2d 501 [2002]).

In any event, plaintiff's claim is barred by the statute of limitations.

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

ENTERED: APRIL 7, 2011



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Tom, J.P., Saxe, DeGrasse, Freedman, Abdus-Salaam, JJ.

4732- In re Jasmine Courtney C., and Another
4732A

Dependent Children Under the
Age of Eighteen Years, etc.,

Sonia J.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

Richard L. Herzfeld, P.C., New York, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for
respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia
Colella of counsel), attorney for the children.

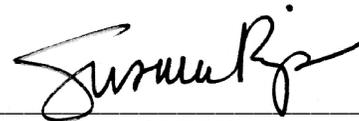
Orders of disposition, Family Court, New York County
(Douglas Hoffman, J.), entered on or about December 1, 2009,
which, upon a finding of permanent neglect, terminated respondent
mother's parental rights to the subject children and committed
the custody and guardianship of the children to petitioner agency
and the Commissioner of the Administration for Children's
Services for the purpose of adoption, unanimously affirmed,
without costs.

Family Court's determination that the mother permanently neglected the children was supported by clear and convincing evidence. The record establishes that the agency exercised diligent efforts to encourage and strengthen the mother's relationship with the children (see Social Services Law § 384-b[7][a]). Those efforts included meeting with the mother to review her service plan and discuss the importance of compliance, scheduling visitation, and changing the visitation date and time to accommodate the mother (see *Matter of Aisha C.*, 58 AD3d 471, 471-472 [2009], *lv denied* 12 NY3d 706 [2009]). Notwithstanding the agency's diligent efforts, the mother failed "substantially and continuously or repeatedly to maintain contact with or plan for the future of the" children (§ 384-b[7][a]). During the relevant time period, the mother attended only 5 of the 52 scheduled visitations. The mother's failure to maintain contact with the children through consistent visitation constitutes permanent neglect (see *Aisha C.*, 58 AD3d at 472).

Given that it was undisputed that the mother had been abused by the children's father, the court properly deemed irrelevant the details of a single altercation and the contents of a letter regarding same.

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test articulated by the United States Supreme Court in *Central Hudson Gas & Elec. Corp. v Public Serv. Commn.* (447 US 557 [1980]) to restrictions on commercial speech (see *Matter of von Wiegen*, 63 NY2d 163, 172-173 [1984], *cert denied sub nom. Committee on Professional Stds. v Von Weigen*, 472 US 1007 [1985]; *Willow Media, LLC v City of New York*, 78 AD3d 596, 596 [2010]). Applying the *Central Hudson* test, we hold that the subject regulations are constitutional because they directly advance the stated governmental interests of promoting traffic safety and preserving aesthetics, and are narrowly tailored to achieve those interests.

We further hold that the subject regulations and penalty schedule do not violate plaintiff's right to equal protection (see NY Const, art I, §11). The record is bereft of evidence that the City selectively enforces the regulations and penalty schedule against plaintiff and other similarly-situated outdoor advertising companies (OACs), but refrains from enforcing them against governmental and quasi-governmental entities such as the Metropolitan Transportation Authority, the Port Authority, and Amtrak. While the City concedes that it formerly exempted these entities from enforcement, it did so based on a mistaken belief that it did not have the legal authority to enforce the

regulations and penalty schedule against them. The City's assertion that it fully intends to enforce the regulation is entitled to deference (see *Clear Channel Outdoor, Inc. v City of New York*, 594 F3d 94, 111 [2d Cir 2010], *cert denied sub nom. Metro Fuel LLC v City of New York, N.Y.*, __US__, 131 S Ct 414 [2010]). In any event, plaintiff is not similarly situated to any of these entities for purposes of equal protection analysis (see *Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 632 [2004]). Moreover, as noted above, the City has substantial interests in promoting traffic safety and preserving aesthetics, and the subject regulations are finely tailored to serve those interests (see generally *General Media Communications, Inc. v Cohen*, 131 F3d 273, 285 [2d Cir 1997], *cert denied* 524 US 951 [1998], and *Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344, 360 n 6 [1985]).

We also find no merit to plaintiff's contention that the penalty schedule set forth in Administrative Code of the City of New York § 28-502.6 is discriminatory because it subjects OACs and non-OACs to different fines for the same conduct. Equal treatment of the two categories of business is not required because OACs and non-OACs are not similarly situated. Indeed, in contrast to OACs, non-OACs do not engage in, or hold themselves

out as engaging in, the outdoor advertising business (see Administrative Code § 28-502.1). Furthermore, because the penalty schedule differentiates based on the type of entity that violates the regulations, rather than on the content of the advertisements, rational basis review, as opposed to strict scrutiny, applies (see *Willow*, 78 AD3d at 596). Here, it cannot be said that the disparate treatment is “so unrelated to the achievement of any combination of legitimate purposes” as to be irrational (*Affronti v Crosson*, 95 NY2d 713, 719 [2001], cert denied 534 US 826 [2001], quoting *Kimel v Florida Bd. of Regents*, 528 US 62, 84 [2000]). Indeed, the record clearly establishes that increased penalties were necessary to deter violations by OACs in particular.

Equally unavailing is plaintiff’s claim that the penalty schedule violates the Excessive Fines Clause of the New York State Constitution (see NY Const, art I, § 5). Because the penalties serve only a remedial purpose and are intended to secure compliance, the Excessive Fines Clause is inapplicable (see *United States v Mongelli*, 2 F3d 29, 30 [2d Cir 1993]). Even if the clause applied, the penalty schedule would not be deemed unconstitutional on its face. Indeed, the schedule does not impose fines that are “grossly disproportionate to the gravity of

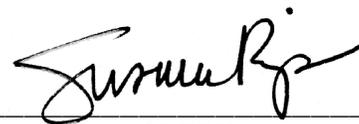
[the] offense" (*County of Nassau v Canavan*, 1 NY3d 134, 140 [2003], quoting *United States v Bajakajian*, 524 US 321, 334 [1998]), and the alleged violators have the ability to mitigate the accrual of the fines (see *Matter of Seril v New York State Div. of Hous. & Community Renewal*, 205 AD2d 347, 347 [1994], *lv withdrawn* 84 NY2d 1008 [1994]).

Contrary to plaintiff's contention, the New York City Charter does not prohibit the Environmental Control Board (ECB) from imposing fines that are greater than \$25,000. Rather, it limits the ECB's authority to enforce final orders of more than \$25,000 without court proceedings (see NY City Charter §1049-a[d][1][g]).

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

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 7, 2011



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defendant included testimony that he was arrested immediately after the sale, with prerecorded buy money on his person.

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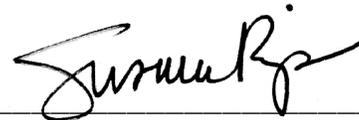
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stated (see CPLR 3212 [f]; *Miller v Icon Group LLC*, 77 AD3d 586 [2010]; *A & E Stores, Inc. v U.S. Team, Inc.*, 63 AD3d 486 [2009]). Indeed, defendant failed to make any evidentiary showing that the completion of outstanding discovery will yield material and relevant evidence.

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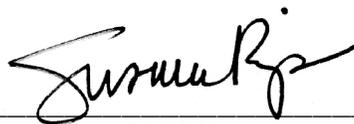
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victim's testimony, which was corroborated by three eyewitnesses,
clearly disproved defendant's justification defense.

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Local Law 1 of 1982 placed the duty of abating lead paint upon "[t]he owner of a multiple dwelling" (former Administrative Code of City of New York § 27-2013 [h]), a term which the regulation did not define. Contrary to the parties' contentions, the manner in which "owner" is construed under the Multiple Dwelling Law, the Rent Stabilization Code, or the Housing and Maintenance Code is neither controlling nor instructive. "The owner of a multiple dwelling" contemplates ownership as it relates to a building in its entirety. An owner of shares of a cooperative which entitle that entity to possession of a particular unit is distinct from an owner of a multiple dwelling (see *Frisch v Bellmarc Mgt.*, 190 AD2d 383, 387 [1993]), and Local Law 1 of 1982 only places the duty to abate lead paint upon the latter (see generally *Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 638 [1996]). Thus, the cooperative corporation was responsible for the lead based paint hazard in the subject apartment.

The reliance placed upon the proprietary lease by the parties and the motion court was in error. The lease may define the scope and extent of responsibility within the unit, which, in turn, may speak to practical ownership of the unit, but Local Law 1 of 1982 only concerns itself with ownership of the "multiple dwelling" which is distinct.

We also reject the cooperative corporation's contention that there was insufficient evidence to support a finding of notice or that such a finding was against the weight of the evidence. The finding of notice was amply supported by the evidence, and the cooperative corporation's contentions pertaining to the credibility of the testimony are unpersuasive inasmuch as such determinations are within the exclusive province of the jury.

We have considered the remaining contentions and find them unpersuasive.

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the risk assessment instrument. Moreover, defendant also has a conviction for first-degree manslaughter.

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Petitioners are comprised of three unions representing employees of the New York City Housing Authority (NYCHA) and three individuals who lost their jobs with NYCHA after layoffs were implemented in early 2009. In 2009, petitioners sent a request to arbitrate to respondents and to the Board of Collective Bargaining (BCB), and, pursuant to Administrative Code of the City of New York § 12-312(d), filed a written waiver in which they agreed to "waive the right, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award." In the arbitration proceeding, petitioners claimed that the layoffs and related actions violated section 11 of the parties' Memorandum of Economic Agreement (MEA). At around the same time, petitioners commenced this article 78 proceeding, asserting that respondents' actions violated Local Law 35 (New York City Charter § 312[a]) and article V, section 6 of the New York State Constitution.

Supreme Court properly determined that this proceeding is barred by the waiver petitioners filed. When construing Administrative Code § 12-312(d) in accordance with its plain meaning, as one must, where, as here, the statute is unambiguous (*see Patrolmen's Benevolent Assn. of City of N.Y. v City of New*

York, 41 NY2d 205, 208 [1976]), it is clear that petitioners agreed to arbitrate the entire dispute, not just contractual claims. Indeed, there is nothing in the statute or its legislative history to support petitioners' position that statutory or constitutional claims are exempt from the waiver.

Petitioners' reliance on *14 Penn Plaza, LLC v Pyett* (_ US _, 129 S Ct 1456 [2009]), *Wright v Universal Maritime Service Corp.* (525 US 70 [1998]), *Shipkevich v Staten Island University Hosp.* (2009 WL 1706590 [ED NY 2009]) and *Crespo v 160 W. End Ave. Owners Corp.* (253 AD2d 28 [1999]) is misplaced. Those cases, unlike here, involved individual discrimination claims and the interpretation of collective bargaining agreements. Equally misplaced is the New York City Board of Collective Bargaining's (BCB) reliance, in its amicus brief, on *Scheiner v New York City Health and Hospitals* (152 F Supp 2d 487 [SD NY 2001]). That case involved an individual employee's right to bring a federal civil rights claim. Here, petitioners seek to enforce collective, not individual, rights. Moreover, the contractual and statutory claims at issue in this case are virtually identical.

Supreme Court properly declined to follow BCB's decisions interpreting Administrative Code § 12-312(d). As the court noted, agency determinations that completely conflict with the

clear wording of a statutory provision should not be upheld (see *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 103 [1997]).

We have considered petitioners' remaining contentions and find them unavailing.

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

ENTERED: APRIL 7, 2011



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Tom, J.P., Saxe, DeGrasse, Freedman, Abdus-Salaam, JJ.

4744 Rev., Dr. Bill Akpinar, Index 150204/09
Plaintiff-Appellant-Respondent,

-against-

William Moran, et al.,
Defendants-Respondents-Appellants.

Moore International Law PLLC, New York (Scott Michael Moore of
counsel), for appellant-respondent.

Lynch Daskal Emery LLP, New York (Scott R. Emery of counsel), for
respondents-appellants.

Order, Supreme Court, New York County (Judith J. Gishe, J.),
entered April 2, 2010, which granted the part of defendants'
motion that sought to dismiss the complaint and denied the part
that sought an award of reasonable attorneys' fees and costs,
unanimously affirmed, with costs.

Plaintiff commenced this action against William Moran, an
attorney, Moran's law firm, and the firm's client, Wachovia
Mortgage, FSB, alleging that Moran made defamatory statements
about him in a newspaper article about a pending criminal
investigation into a mortgage fraud and a lawsuit brought by
Wachovia in connection with the fraud in which plaintiff was
named as a defendant. Plaintiff's complaint identifies the
allegedly defamatory statements as: "I'm looking forward to

getting him under oath," and "I want to get to the bottom of many questions myself."

Even in the context in which these statements were made, which plaintiff urges must be considered, "a reasonable reader would understand the statements defendant made about plaintiff as mere *allegations* to be investigated rather than as *facts*" (*Brian v Richardson*, 87 NY2d 46, 53 [1995]). The statements neither impute to him the commission of a serious crime nor tend to injure him in his trade, occupation or profession, and therefore do not constitute slander per se (see *Harris v Hirsh*, 228 AD2d 206, 208 [1996], *lv denied* 89 NY2d 805 [1996]). Nor is plaintiff's reference to the pending criminal investigation and pending civil complaint sufficient to establish the extrinsic facts requisite to a claim for defamation by innuendo (see *Cole Fischer Rogow, Inc. v Carl Ally, Inc.*, 29 AD2d 423, 427 [1968], *affd* 25 NY2d 943 [1969]). His allegation that he lost \$17 million in venture funding from unspecified individuals who read the statements fails to adequately plead special damages (see *Drug Research Corp. v Curtis Publ. Co.*, 7 NY2d 435, 441 [1960]; see also *Galasso v Saltzman*, 42 AD3d 310, 311 [2007]). The statements are also protected under Civil Rights Law § 74, as a "fair and true" report of a judicial proceeding (see *Holy Spirit*

Assn. for Unification of World Christianity v New York Times Co., 49 NY2d 63, 67-68 [1979]; see also *Ford v Levinson*, 90 AD2d 464, 465 [1982]; *Lacher v Engel*, 33 AD3d 10, 17 [2006]).

Plaintiff's cause of action for intentional infliction of emotional distress is duplicative of his defamation cause of action (*Hirschfeld v Daily News*, 269 AD2d 248, 249 [2000]). In any event, the statements are not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" (*Howell v New York Post Co.*, 81 NY2d 115, 122 [1993] [internal quotation marks and citations omitted]; see e.g. *Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421, 422 [2006]).

The court properly found that plaintiff's arguments were not frivolous within the meaning of 22 NYCRR 130-1.1.

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

ENTERED: APRIL 7, 2011



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the garnishee, the judgment debtor had defaulted on several construction contracts it had entered with the garnishee by diverting progress payments instead of paying subcontractors. Under the circumstances, the garnishee also demonstrated its entitlement to an offset pursuant to Debtor and Creditor Law § 151, since there was no uncertainty as to whether the judgment debtor's obligations for defaulting would arise (*see Matter of Trojan Hardware Co. v Bonacquisti Constr. Corp.*, 141 AD2d 278, 282 [1988]).

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

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

ENTERED: APRIL 7, 2011

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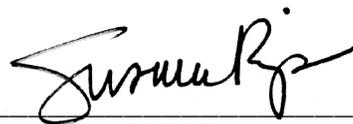
wet and it was raining and dark, respondent's finding that petitioner violated Vehicle and Traffic Law § 1180(a) was supported by substantial evidence (see *Pinkow v Herfield*, 264 AD2d 356, 357-358 [1999]). The fact that petitioner claimed to have not been speeding and the absence of physical evidence as to his speed does not warrant a different finding (see *People v Lewis*, 13 NY2d 180, 184 [1963]).

Furthermore, there was substantial evidence that petitioner violated Vehicle and Traffic Law § 1129(a). Petitioner admitted that he swerved out of the right lane of traffic and hit the disabled vehicle parked in the breakdown lane in the rear of the vehicle. The fact that the disabled vehicle was not moving does not render the statute inapplicable (see *Guzman v Schiavone Constr. Co.*, 4 AD3d 150 [2004], *lv dismissed and denied* 3 NY3d 694 [2004]). Rather, it "imposes. . .a duty to be aware of traffic conditions, including vehicle stoppages" (*Johnson v Phillips*, 261 AD2d 269, 271 [1999]). Had petitioner been driving with the required attention to the condition of the highway and the fact that the vehicle was disabled, the accident could have been avoided.

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

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

ENTERED: APRIL 7, 2011



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Tom, J.P., Saxe, DeGrasse, Freedman, Abdus-Salaam, JJ.

4747N Chaya Weiss, Index 106054/08
Plaintiff-Respondent,

-against-

Wal-Mart Stores East, L.P.,
Defendant-Appellant.

Brody, O'Connor & O'Connor, Northport (Patricia A. O'Connor of
counsel), for appellant.

Order, Supreme Court, New York County (Paul Wooten, J.),
entered August 18, 2010, which, in an action for personal
injuries, denied defendant's motion to change venue from New York
County to Suffolk County, unanimously reversed, on the law,
without costs, and the motion granted.

Defendant met its initial burden of establishing that the
venue chosen by plaintiff was improper (*see Hernandez v
Seminatore*, 48 AD3d 260 [2008]; CPLR 510[a]). Defendant
submitted proof indicating that plaintiff's claimed residence in
New York County was an office building, not an apartment
building. Defendant also submitted motor vehicle records showing
that plaintiff resided in Orange County at all relevant times
(*see Collins v Glenwood Mgt. Cor.*, 25 AD3d 447, 448 [2006]).
Plaintiff's conclusory affidavit attesting to her New York County

residence was insufficient to rebut defendant's proof (see *Furlow v Braeubrun*, 259 AD2d 417 [1999]). Furthermore, since plaintiff forfeited the right to select the venue by choosing an improper venue in the first instance (see *Roman v Brereton*, 182 AD2d 556 [1992]), venue is properly placed in Suffolk County, defendant's designated residence for venue purposes.

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

ENTERED: APRIL 7, 2011



CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Abdus-Salaam, JJ.

4748 In re Robert Parris,
[M-808] Petitioner,

Ind. 905/09
4285/09

-against-

Hon. Ralph Fabrizio, et al.,
Respondents.

Robert Parris, petitioner pro se

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Honorable Ralph A. Fabrizio, respondent.

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for Robert T. Johnson, respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: APRIL 7, 2011



CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3847 For The People Theatres of Index 121080/02
N.Y. Inc., doing business
as Fair Theater,
Plaintiff,

JGJ Merchandise Corp., doing business
as Vishans Video, etc.,
Plaintiff-Appellant,

-against-

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

- - - - -

3848 Ten's Cabaret, Ltd., etc., et al., Index 121197/02
Plaintiffs-Appellants,

-against-

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

Fahringer & Dubno, New York (Herald Price Fahringer of counsel),
for JGJ Merchandise Corp., appellant.

Zane & Rudofsky, New York (Edward s. Rudofsky of counsel) for
Ten's Cabaret, Ltd., Pussycat Lounge Inc., Church Street Café,
Inc., and 62-20 Queens Blvd., Inc., appellants.

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

Judgment, Supreme Court, New York County (Louis B. York,
J.), entered May 19, 2010, reversed, on the law, without costs,
the finding of constitutionality vacated, and the matter remanded
for further proceedings consistent with this opinion. Judgment
and order (one paper), same court and Justice, entered April 23,
2010, reversed, on the law, without costs, the finding of

constitutionality vacated, and the matter remanded for further proceedings consistent with this opinion.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David B. Saxe
James M. Catterson
Rolando T. Acosta
Sallie Manzanet-Daniels, JJ.

3847-3848
Index 121080/02
121197/02

x

For The People Theatres of
N.Y. Inc., doing business
as Fair Theater,
Plaintiff,

JGJ Merchandise Corp., doing business
as Vishans Video, etc.,
Plaintiff-Appellant,

-against-

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

- - - - -

Ten's Cabaret, Inc., etc., et al.,
Plaintiffs-Appellants,

-against-

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

x

Plaintiff JGJ Merchandise Corp., appeals from the judgment of the
Supreme Court, New York County (Louis B.
York, J.), entered May 19, 2010, insofar as
appealed from, finding that the 2001
Amendments to the Zoning Resolution of the
City of New York are constitutional with

regard to bookstores and video stores. Plaintiffs Ten's Cabaret Ltd., Pussycat Lounge Inc., Church Street Café, Inc. and 62-20 Queens Blvd., Inc. appeal from the order and judgment (one paper), same court and Justice, entered April 23, 2010, finding that the 2001 Amendments to the Zoning Resolution are constitutional with regard to topless night clubs and bars.

Fahringer & Dubno, New York (Herald Price Fahringer, Erica L. Dubno and Nicole Neckles of counsel), for JGJ Merchandise Corp., appellant.

Zane & Rudofsky, New York (Edward S. Rudofsky of counsel) for Ten's Cabaret, Ltd., Pussycat Lounge Inc., Church Street Café, Inc., and 62-20 Queens Blvd., Inc., appellants.

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ACOSTA, J.

This challenge to the constitutionality of the 2001 amendments to ZR 12-10, which placed certain restrictions on adult establishments, presents two significant issues. The first is whether the City established that certain nightclubs fitting the technical definition of "60/40" establishments retained a predominant focus on sexually explicit activity, and thus, that the amendments were constitutional. If this first issue is resolved in the affirmative, then the second must be addressed – whether the 2001 amendments to the Zoning Resolution were constitutional on an as-applied basis.

Background

Before 1995, New York City made no distinction between adult entertainment and nonadult entertainment, as the Zoning Regulation (ZR) of December 15, 1961 allowed adult entertainment businesses to coexist with other uses. In 1993, the New York City Department of City Planning (DCP) began a comprehensive assessment of the impact of adult establishments. That effort culminated with the release of the "Adult Entertainment Study" in 1994 (DCP Study). Based on the material before it, the DCP concluded that adult entertainment establishments, particularly those concentrated in specific areas, tended to produce negative secondary effects such as increased crime, decreased property

values, reduced commercial activities, and erosion of community character.

In response to the DCP Study, the City adopted an Amended Zoning Resolution in 1995 (1995 Resolution), which barred adult businesses from all residential zones and most commercial and manufacturing districts (ZR §§ 32-01[a], 42-01[b]). The 1995 Resolution defined an "adult establishment" as a commercial establishment in which a "substantial portion" of the establishment includes "an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof" (Text Amendment N 950384 ZRY [No. 1322]).¹ Notably, the 1995 Resolution placed particular emphasis on the presence of "specified sexual activities" and/or "specified anatomical areas" in determining whether an establishment was of an adult character.²

¹The 1995 Resolution survived a facial challenge brought by adult establishments (*see Stringfellow's of N.Y., Ltd. v City of New York*, 91 NY2d 382 [1998] [holding that the 1995 Resolution was not "purposefully directed at controlling the content of the message conveyed through adult businesses," but was aimed at the separate societal goal of ameliorating the adverse social consequences of proliferating adult uses]).

²Section 12-10 of the Zoning Resolution also further defined the terms used in the above section as follows:

"[S]pecified sexual activities" are "(1) human genitals in a state of sexual stimulation or arousal; (2) actual or simulated acts of human masturbation, sexual intercourse or

Some time thereafter, the City Planning Commission (CPC) determined "substantial portion" to be defined as 40 percent, and made it clear that any commercial establishment with "at least 40 percent of its accessible floor area used for adult purposes qualifies as an 'adult establishment' or 'adult bookstore.'" After the 60/40 formula became the governing standard, adult businesses altered their character to ensure that they did not qualify as "adult establishments" within the meaning of the City's zoning law. Following unsuccessful claims against adult businesses for "sham compliance" on the basis of the Nuisance Abatement Law,³ the New York City Council adopted and ratified Text Amendment N 010508 ZRY to the Zoning Resolution in 2001 (the 2001 Amendments). To include those establishments that had superficially complied with the 60/40 formula but remained essentially adult establishments, the amended definition included a provision clarifying that

sodomy; or (3) fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast.

"Specified anatomical areas" are (1) less than completely and opaquely concealed: (I) human genitals, pubic region, (ii) human buttock, anus, or (iii) female breast below a point immediately above the top of the areola; or (2) human male genitals in a discernibly turgid state, even if completely and opaquely concealed (*City of New York v Stringfellow's of N.Y., Ltd.*, 96 NY2d 51, 55 n 2 [2001]).

³See *City of New York v Les Hommes*, 94 NY2d 267, 273 (1999).

non-adult material shall not be considered stock-in-trade for the purpose of the "substantial portion" analysis where one or more of the following features were present: (1) customers had to pass through adult material to reach the non-adult section; (2) any material exposed one to adult material; (3) non-adult material was only for sale, while adult material was for sale or rent; (4) more adult printed materials were available than non-adult ones; (5) minors were restricted from the entire store or from any section offering non-adult material; (6) signs or window displays of adult matter were disproportionate to signs and window displays featuring non-adult matter; (7) "[o]ne or more individual enclosures" were available for viewing adult movies or live performances; and (8) purchasing non-adult material exposed the buyer to adult material.

On or about October 1, 2002, Ten's Cabaret commenced an action against the City, seeking, among other things, a declaratory judgment declaring the 2001 Amendments to be unconstitutional and invalid and also seeking a permanent injunction against their enforcement. At the same time, the plaintiff moved for a preliminary injunction preventing the City from enforcing the Amendments. On October 1, 2002, Supreme Court (Faviola Soto, J.) granted a temporary restraining order against enforcement of the Amendments against Ten's Cabaret. On

October 18, 2002, three other 60/40 establishments - Pussycat Lounge, Inc., doing business as Pussycat Lounge; Church Street Café, doing business as BabyDoll; and 62-20 Queens Boulevard, doing business as Nickels - commenced an action similar to the one Ten's had commenced. The three plaintiffs moved by order to show cause for a temporary restraining order, which Supreme Court (Faviola Soto, J.) granted, and to consolidate their action with Ten's, on the ground that the two actions were substantively identical. The two actions were consolidated by stipulation on May 12, 2003.

Additionally, two other 60/40 establishments - For the People Theatres of NY, doing business as Fair Theater and JGJ Merchandise Corp., doing business as Vishans Video, also known as Mixed Emotions - also brought similar actions. Both plaintiffs sought a judgment declaring the 2001 Amendments unconstitutional and unenforceable as well as a preliminary injunction. By order entered October 30, 2002, Supreme Court (Louis B. York, J.) enjoined the enforcement of the 2001 Amendments "to the same extent as the temporary restraining order issued in *Pussycat Lounge v City of New York*."

In a decision dated September 9, 2003, Supreme Court summary judgment in favor of the plaintiffs in the Ten's Cabaret action (*Ten's Cabaret v City of New York*, 1 Misc 3d 399 [Sup Ct

NY County 2003])). In so doing, the court concluded that defendants did not meet their burden under the First Amendment, or show that the 2001 Amendments were justified by concerns unrelated to speech. On the same date, Supreme Court issued a decision in *For the People*, finding, as it had in *Ten's Cabaret*, that the City had failed to meet its constitutional burden to permit the court to uphold the Amendments (*For the People Theatres of N.Y. v City of New York*, 1 Misc 3d 394 [Sup Ct NY County 2003])).

Ten's Cabaret and *For the People* were consolidated for the purposes of appeal to this Court, which reversed the Supreme Court's judgments (20 AD3d 1 [2005]). In its decision, this Court found that no new "secondary impacts" study was required absent a showing that the essential nature of the 60/40 businesses had changed (*id.* at 17-18).

On appeal, the Court of Appeals modified this Court's decision, finding that the action should be remitted for a hearing (*For the People Theatres v City of New York*, 6 NY3d 63 [2005]). In so doing, it held that the plaintiffs had disputed the factual findings underlying the City's 2001 Amendments, and had submitted expert affidavits, along with other documents, supporting their arguments (*id.* at 82-83). The Court explained that "[b]ecause plaintiffs have thus 'furnish[ed] evidence that

disputes the [City's] factual findings,' the burden shifted back to the City 'to supplement the record with evidence renewing support for a theory that justifies its ordinance'" (*id.* at 83, quoting *City of Los Angeles v Alameda Books, Inc.*, 535 US 425 [2002]). It noted, however, that "[t]he City was not required . . . to relitigate the secondary effects of adult uses, or to produce empirical studies connecting 60/40 businesses to adverse secondary effects" (*id.*). Rather, the court held, "a triable question of fact has been presented as to whether 60/40 businesses are so transformed in character that they no longer resemble the kinds of adult uses found, both in the 1994 DCP Study and in studies and court decisions around the country, to create negative secondary effects - as plaintiffs contend - or whether these businesses' technical compliance with the 60/40 formula is merely a sham - as the City contends" (*id.* at 83-84). The Court explained that:

"In addressing this factual dispute, we anticipate that the City will produce evidence relating to the purportedly sham character of self-identified 60/40 book and video stores, theaters and eating and drinking establishments or other commercial establishments located in the city. This does not mean that the City has to perform a formal study or a statistical analysis, or to establish that it has looked at a representative sample of 60/40 businesses in the city. If the trier of fact determines, after review of this evidence, that the City has fairly supported its position on sham compliance - i.e., despite formal compliance with the 60/40 formula,

these businesses display a predominant, ongoing focus on sexually explicit materials or activities, and thus their essential nature has not changed - the City will have satisfied its burden to justify strengthening the 1995 Ordinance by enacting the 2001 Amendments, and will be entitled to judgment in its favor. If not, plaintiffs will prevail on their claim that the 2001 Amendments are insufficiently narrow and therefore violate their free speech rights. In that event, plaintiffs will be entitled to judgment and a declaration that the 2001 Amendments are unconstitutional."

(*Id.* at 84).

On remittitur, both the *Ten's Cabaret* and the *For the People* plaintiffs moved for a preliminary injunction; Justice York granted both those motions. The cases were then tried separately, with the *For the People* trial taking place on January 12 through 22, 2009 and the *Ten's Cabaret* trial taking place February 23 through March 2, 2009.

In *For the People*, Supreme Court, by a decision dated March 29, 2010, later amended on April 8, 2010, upheld the amended definition of "adult establishment" as constitutional insofar as it concerned "adult bookstores," but declared it invalid insofar as it concerns "adult theaters" (27 Misc 3d 1079 [2010]). In so doing, the court undertook "the task of determining whether . . . the City substantially showed that the conversion to 60/40 status is a sham because the ongoing predominant focus o[f] these self-identified 60/40 entities is on sexually explicit materials" (*id.* at 1085). Supreme Court then detailed the

evidence at trial, noting that the City "inspected 15 self-identified 60/40 businesses," and described the evidence in "shortened" form. The court then denied plaintiffs' motion to dismiss for failure to prove a prima facie case, given the City's alleged failure to show that the "60/40" entities for which it presented evidence were "in fact" 60/40 compliant (*id.* at 1088). Supreme Court found that the Court of Appeals had used the term "self-identified" establishments, and that these establishments would not be located in these particular areas were they not actual 60/40 businesses. The court stated that:

"[T]his decision is not being made against a blank slate . . . Keeping in mind that the City's burden was a 'light' one[,] [i]t had only to establish that the conversion of 100% adult entities to '60/40' status from 100% adult entities was a sham because their continuing ongoing focus is on adult material. Thus, their essential nature as adult establishments has not changed and no new study had to be undertaken to determine whether '60/40' entities had a deleterious effect on their surrounding environs.

"Moreover, the City was directed to show that substantial evidence was all that was necessary to satisfy its burden. This burden is consistent with prior high-court determinations in adjudicating the standard by which the constitutionality of statutes and regulations regulating speech has been decided While the content of speech cannot be regulated, the time, place and manner can be as a legitimate exercise of the state's police power.

While the plaintiff[] may have introduced evidence that the essential nature of these entities has changed, it is also true that the defendants have provided substantial

evidence that their dominant, ongoing focus is on adult matters. Therefore, the defendants have satisfied their 'light' burden with regard to bookstores and video stores." (*Id.* at 1088-1089).

However, Supreme Court was "not convinced that the same holding applie[d] to the two adult movie theaters in [the] action. The admittedly large number of peep shows in one theater and the payment of one admission in both theat[er]s [that] allows a patron to see all of the movies, both adult and non-adult, do not rise even to the low level of substantial evidence" (*id.* at 1089). On May 19, 2010, Supreme Court entered judgment in the City's favor upholding the 2001 definition of "adult bookstore" as constitutional, but striking the definition of "adult theater." The City does not challenge the "adult theater" portion of the ruling on appeal.

In *Ten's Cabaret*, Supreme Court awarded judgment to the City upholding the 2001 Amendments. The court framed the issue as, "have these 60/40 establishments so changed in nature that they no longer resemble the pre-1995 100% entities that prevailed in the City before the 1995 amendments were enacted?" Supreme Court then stated:

"To make out a prima facie case, the Court of Appeals held, the City did not have to conduct any further surveys or inspections of 60/40 clubs. Its 'light burden' was to show that the essential character of these clubs and bars has not changed, to wit, that their predominant focus

continues to be on topless dancing, even though the topless dancing may take in less than 40% of the club's accessible floor space.

"Merely because defendants have introduced evidence that some topless clubs may not have an ongoing focus on adult activities, does not defeat the pattern established by defendant of topless clubs having an ongoing focus of adult activities.

"Although the plaintiffs have devoted quite a substantial portion of their brief to proving that these reconstituted 60/40 clubs no longer resemble their pre-1995 forbears, this argument is entirely irrelevant and will be accorded no weight. The [remittitur] to the trial court posed the question: did these 60/40 clubs so change that their dominant ongoing focus was no longer on sexual matters so that the studies establishing the 1995 amendments no longer applied to them? The Court of Appeals held that the City did not have to engage in empirical studies or to establish the secondary effects of 60/40 clubs and bars to satisfy its burden."

(*Ten's Cabaret v City of New York*, Sup Ct, NY County, April 22, 2010, [internal citations omitted] York, J., Index No. 121197/02, at 3-4).

The plaintiffs appealed the judgments in *For the People* and *Ten's Cabaret*. We now reverse and remit the matter for further proceedings consistent with this opinion.

Facial Challenge

In assessing the constitutionality of the City's ordinance, the Court of Appeals adopted the analytical structure of *City of*

Los Angeles v Alameda Books, Inc. (535 US 425 [2002]).⁴ In so doing, the Court established the DCP Study, as well as other studies and court decisions from across the country, as the basis for assessing the plaintiff's claim that 60/40 businesses no longer continue to resemble the kinds of adult uses that were shown to cause negative secondary effects (see *For the People Theatres*, 6 NY3d 63.⁵ In relying upon the DCP Study as well as other studies and court decisions from across the country, the City is not required to relitigate the issue of secondary effects of adult uses or produce additional empirical studies on 60/40 businesses (see *id.* at 80-81) To prevail, however, the City needs to show that "the evidence relied upon is reasonably believed to be relevant to the problem that the city addresses"

⁴In *Los Angeles v Alameda Books, Inc.*, the Supreme Court voted 5-4 to uphold the Los Angeles ordinance, with Justice O'Connor writing for a plurality of four Justices, Justice Kennedy concurring in the result only, and Justice Souter writing for the dissent.

As a result of this divided ruling, "Justice Kennedy's opinion, and the relevant parts of the plurality opinion with which he agreed, are controlling on the issue of what a municipality must demonstrate in order to sustain a zoning ordinance regulating adult businesses in the face of a First Amendment challenge" (*For the People Theatres*, 6 NY3d at 79).

⁵In dispensing with the need for additional formal studies and statistical analysis, the Court of Appeals simplified the nature of the proof that the City could use to defend the constitutionality of the 2001 Amendment.

(6A McQuillin Municipal Corporations § 24:127, at 456 [3rd rev ed]). That is, it must establish that the essential characteristics or features of the 60/40 uses are very similar to those adult uses that were previously found to cause secondary effects. In order to find the ordinance constitutional, a court must have "more conviction of the connection between legislative ends and means than [is required by the] rational basis standard, but only in the sense of evidence . . . [that] is reasonably believed to be relevant to the secondary effects in question" (*For the People Theatres*, 6 NY3d at 81 [internal citations and quotation marks omitted]).⁶

In its extremely terse decision, Supreme Court did not elaborate on the criteria by which it determined that the plaintiff's essential nature was similar or dissimilar to the sexually explicit adult uses that were analyzed in the DCP Study or other studies and case law from across the country. Moreover, it failed to state the particular facts on which it based its judgment. Supreme Court simply detailed the City's

⁶In other words, the City's evidence is subject to intermediate scrutiny (see *Los Angeles v Alameda Books, Inc.*, 535 US at 440 ["Our deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. . . . We are also guided by the fact that *Renton [v Playtime Theater, Inc.]*, 475 US 41, 48-50 (1986) requires that municipal ordinances receive only intermediate scrutiny if they are content neutral"]).

evidence and arrived at legal conclusions. This was insufficient to answer the question posed on remittitur from the Court of Appeals – namely, whether the 60/40 establishments are similar in nature to adult establishments that have been shown by means of empirical data to cause negative “secondary effects.” As Supreme Court did not provide any direction for the parties or this Court to adequately review, analyze, or understand the ruling, its decision is “manifestly inadequate” and violates the dictates of CPLR 4213(b).

Pursuant to CPLR 4213(b), a trial court “should set forth those ultimate or essential facts relied upon in reaching its decision” (*General Instrument Corp. v Consolidated Edison Co. of N.Y.*, 99 AD2d 460, 461 [1984]; see also *IBE Trade Corp. v Litvinenko*, 16 AD3d 132 [2005] [holding that a trial court should make findings of fact essential to support its determination on the issue]). “Mere conclusions” are insufficient as a matter of law; the facts upon which the conclusions rest must be stated (see *Davin v Isman*, 228 NY 1, 10 [1920] [“Facts justifying such conclusion should be found to the end that this court . . . should be able to ascertain whether such conclusion is supported by facts found”]). Otherwise, “intelligent appellate review is impossible if the appellate court cannot ascertain on what facts and conclusions of law the

lower court rested its decision" (*Weckstein v Breitbart*, 111 AD2d 6, 8 [1985]). Indeed, given the scale of the trial record below, which runs into the hundreds of pages, it is impossible for this Court to properly review Supreme Court's conclusions of law without the benefit of established findings of fact (*id.* ["Without the benefit of established findings of fact and given the poor shape of the trial record below, which includes hundreds of pages of documents, it is impossible for this court to (make a determination as to one of the causes of action)"]). This Court will therefore remit the matter to Supreme Court for a decision setting forth its findings of fact as to the plaintiffs' facial challenge. In so doing, we briefly outline the standard that Supreme Court must follow on remittitur in considering the plaintiffs' challenge to the 2001 Amendments.

Nature of the Proof

Criteria

In assessing the validity of the 2001 Amendments, Supreme Court needed to compare "self-identified" 60/40 businesses with the adult businesses discussed in the DCP study, other studies and case law so as to determine whether the 60/40 businesses retained a predominant focus on sexually explicit materials. In so doing, Supreme Court needed to determine the particular characteristics associated with the promotion of sexually

explicit materials.⁷ The negative characteristics identified by the Supreme Court would serve as baseline against which the “so transformed” issue could be adjudicated. Using that baseline, Supreme Court would then need to determine whether the 60/40 businesses had a similar predominant focus on sexually explicit materials.

In establishing the criteria by which the current uses can be compared to the uses studied in 1994, the DCP Study is a helpful starting point.⁸ Though that study focused on the consequences of significant concentrations of adult businesses emphasizing sexually explicit materials and not the particular attributes that caused secondary effects, it did highlight some of the attributes that define an adult business. Specifically, it noted that establishments might qualify as being of an adult nature if they 1) exclude minors by reason of age or 2) sold

⁷The uses studied in the DCP Study as well as other studies and case law have been shown to cause negative secondary effects. If similar uses are found to be present in 60/40 establishments, then the City will not be required to offer a new study to establish the presence of secondary effects because it can point to the findings contained in the DCP Study as well as other studies and case law to establish such effects.

⁸Of course, the City also has the prerogative of proffering surveys and case law from around the country discussing establishments with a predominant focus on sexually explicit materials to establish some other baseline upon which the “so transformed” issue can be adjudicated.

materials emphasizing "specified sexual activities" or "specified anatomical areas."⁹ In addition to those salient characteristics, the study placed special emphasis on the presence of adult signs that were larger than those of nearby non-adult businesses.

Based on the DCP Study, it is possible to discern the relevant characteristics of adult uses that can be linked to a focus on sexually explicit materials. For example, the presence of large signs advertising adult content may indicate a predominant focus on promoting sexually explicit materials. The same is true of a significant emphasis on the promotion of materials exhibiting "specified sexual activities" or "specified anatomical areas," as evidenced by a large quantity of peep

⁹The study referred to the Planning and Zoning Code of Los Angeles, which defined "specified anatomical areas" as including: "[l]ess than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolae" or "[h]uman male genitals in a discernibly turgid state, even if completely and opaquely covered" (DCP Study at 2). This language was echoed in the 1995 Resolution.

The study also referred to the Los Angeles code's definition of "specified sexual activities" as including "(a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus or female breasts; (b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; (c) masturbation, actual or simulated; or (d) Excretory functions as part of or in connection with any activities set forth in (a) through (c) above" (DCP Study at 2).

booths featuring adult films.¹⁰ Other indicators of a predominant focus on sexually explicit materials might be the exclusion of minors from the premises on the basis of age or difficulties in accessing non-adult materials.¹¹ In using the DCP Study to assess the constitutionality of the 2001 Amendments, Supreme Court should consider the extent to which 60/40 businesses have such attributes in determining whether they have a predominant focus on sexually explicit materials.

City's Burden

The City has proffered evidence in support of its claim that 60/40 businesses displayed a predominant, ongoing focus on sexually explicit materials or activities. On remittitur, Supreme Court is to assess whether that evidence, and any additional evidence that the City wishes to adduce, entitle it to a judgment in its favor on the basis of the criteria outlined above. In so doing, it is necessary to recall that "very little evidence is required" to uphold the constitutionality of the

¹⁰ Notably, the 1995 Resolution, which was largely based on the DCP Study and upheld by the Court of Appeals as a constitutionally valid enactment (see *Stringfellow's of N.Y., Ltd.*, 91 NY2d 382), was directed against uses that exhibited such characteristics.

¹¹ *Id.*

2001 Amendments¹² (*For the People Theatres*, 6 NY3d at 80 ["On the question of how much evidence was required to support an ordinance regulating adult businesses, Justice Kennedy agreed with the plurality that '[a]s to this, we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required,'" quoting *City of Los Angeles v Alameda Books*, 535 US at 451 [Kennedy, J., concurring])). Nonetheless, the City's evidence must be relevant to the "so transformed" issue. That is, it must also establish that materials that form the basis of its justification for the 2001 Amendments are indeed of an adult character.¹³ The evidence presented by the City must also present a fair snapshot of the

¹²For example, a consistent finding by Supreme Court that most, though not necessarily all, 60/40 establishments 1) exclude minors, 2) have large signs advertising sexually explicit adult materials and/or 3) emphasize the promotion of materials exhibiting "specified sexual activities" or "specified anatomical areas" over non-adult materials will be more than enough evidence to justify the City's 2001 ordinances on the basis of the DCP Study.

¹³For example, the City cannot simply point to the presence of peep booths as establishing that there is an ongoing sexually explicit use. It must show that the peep booths are being used to promote sexually explicit adult materials. To do otherwise could potentially restrain the exercise of legitimate speech (see, e.g. *City of New York v S & H Book Shop*, 41 AD2d 637, 637 [1973] ["The exhibition of motion pictures by means of coin-operated projection machines is encompassed within the First Amendment of the United States Constitution"].)

businesses that are the object of its claim.

Plaintiffs' Rebuttal

Supreme Court erred in finding that "[a]lthough the plaintiffs have devoted quite a substantial portion of their brief to proving that these reconstituted 60/40 clubs no longer resemble their pre-1995 forbears, this argument is entirely irrelevant and will be accorded no weight" (*Ten's Cabaret*, Sup Ct, NY County, April 22, 2010, York, J., Index No 121197/02, at 3). In so doing, it deprived plaintiffs of their opportunity to be heard (see *Matter of Quinton A.*, 49 NY2d 328, 334 n [1980] ["The essence of procedural due process is that a person must be afforded notice and an opportunity to be heard before government may deprive him of liberty or a recognized property interest"]). Specifically, it deprived them of their ability to cast doubt on the City's rationale for its ordinance (see *For the People Theatres*, 6 NY3d 63).

On remittitur, Supreme Court must therefore address any relevant evidence proffered by the plaintiffs to show that there has been a significant change in the character of 60/40 businesses.¹⁴ Nonetheless, Supreme Court is not to consider

¹⁴For example, if Supreme Court relies upon the DCP Study to establish the criteria by which it evaluates the 2001 Amendments, it should address plaintiff's claims that the signs have been significantly modified to eliminate any emphasis on adult

evidence that is irrelevant to the question of whether those establishments continue to have a predominant focus on sexually explicit materials.¹⁵

Quantum of Evidence - Intermediate Scrutiny

Notwithstanding the simplified nature of proof required of municipalities by the US Supreme Court and the Court of Appeals, “[i]mposing a level of intermediate scrutiny requires more conviction of the connection between legislative ends and means than does the rational basis standard, but only in the sense of ‘evidence . . . [that] is reasonably believed to be relevant’ to the secondary effects in question” (*For the People Theaters*, 6 NY3d at 81 [citations and internal quotation marks omitted]). On remittitur, Supreme Court should therefore assess the City’s evidence in light of this somewhat heightened standard.

As-Applied Challenge

The plaintiffs in *Ten’s Cabaret* also mounted an as-applied challenge to the 2001 Amendments. Although the plaintiffs concede that the as-applied challenge was “inartfully pleaded” the law is, of course, well settled that pleadings are to be

material and that customers are not confronted with predominantly adult materials when they first enter the stores.

¹⁵Notably, any evidence proffered with the intention of relitigating the secondary effects issue should be excluded.

construed liberally (CPLR 3026 ["Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced"])¹⁶. To be sure, during a colloquy, Supreme Court itself posed the question of what might happen if it "decide[d] that several clubs don't have a dominant sexual purpose in their activities, but other clubs do[;] suppose half of them do and half of them don't," and the plaintiffs specifically raised the issue of an as-applied challenge during the same colloquy.¹⁷ Thus, there is no merit to the City's contention that the issue was neither raised nor preserved.

The City notes that in *Stringfellow's of N.Y., Ltd.*, the Court of Appeals stated that the 1995 Resolution was applicable even to establishments that "may legitimately claim that their facilities do not contribute to urban blight" (91 NY2d at 401).

¹⁶The relevant paragraph of the pleadings by Ten's Cabaret read: "The [2001] Amendments seek to close Ten's and other similarly-situated establishments, even though there is no evidence that Ten's present configuration causes any adverse secondary effects and, in particular, causes crime or lowers property values").

¹⁷ In response to the Court's question, plaintiff's counsel observed that "[T]he very first cause of action I believe is an as applied challenge. The plaintiffs contend that the 2002 amendments are invalid, unconstitutional, and an illegal restriction and denial of plaintiff's constitutional right inter alia to express sell, present and disseminate protected forms of speech. So the very first cause of action focuses on the plaintiff's own constitutional rights. *There is also a facial challenge.* So there are both challenges" (emphasis added).

Significantly, the challenge in *Stringfellow's* was a facial challenge, not an as-applied challenge. Thus, the Court found it acceptable that some of the businesses not contributing to urban blight were necessarily swept up in the law (see *id.* quoting *City of Rochester v Gutberlett*, 211 NY 309, 316 [1914] ["To the extent that certain individual establishments may legitimately claim that their facilities do not contribute to urban blight, their argument does not impair the constitutionality of the challenged legislation, since '[t]he validity of a statute . . . is not to be determined from its effect in a particular case, but upon its general purpose and its effect to that end"])). Nothing in the Court's decision forecloses an "as-applied" challenge to the ordinance, however.

Indeed, while the 2001 Amendments might be constitutional in most situations, there may be instances where the application of the ordinance might be an unconstitutional abridgment of First Amendment protections. In *Ferber v New York* (458 US 747 [1982]) the United States Supreme Court addressed how a legislative enactment should be treated when the number of potentially unconstitutional applications of a statute is small compared to the number of legitimate applications. After upholding a child pornography statute against a facial overbreadth challenge, the Court permitted an "as-applied"

challenge against the constitutionality of the statute (*id.* at 773-774 ["whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied," quoting *Broadrick v Oklahoma*, 413 US 601, 615-616 [1973])). Given the possibility that the 2001 Amendments could curtail legitimate free speech, an as-applied challenge would be an appropriate means to challenge the application of the 2001 Amendments if the facial challenge against the ordinance fails.

Supreme Court's decision states very few, if any, facts that can be used by this Court to resolve plaintiff's as-applied challenge. Instead, Supreme Court simply stated that "[m]erely because [plaintiff] [has] introduced evidence that some topless clubs may not have an ongoing focus on adult activities, does not defeat the pattern established by [the City] of "topless clubs having an ongoing focus of adult activities" (*Ten's Cabaret*, Sup Ct, NY County, April 22, 2010, Index No 121197/02, at 3).

Thus, Supreme Court gives no indication of any facts it took into account in arriving at its decision on the as-applied challenge, or whether it even considered them. Indeed, neither the decision nor the judgment makes any factual findings to help resolve the question of whether only some of the clubs were

found to have a predominantly sexual focus or whether all of them were. This is particularly significant inasmuch as Supreme Court itself raised the question of differences between the clubs, and then requested briefing on the as-applied issue.

The result of Supreme Court's decision is that some of the non-sham clubs could be put out of business by a law that, in fairness, may not apply to them. As the plaintiffs in *Ten's Cabaret* preserved an "as applied" challenge, this Court will therefore remit the matter to Supreme Court for a decision setting forth its findings of fact as to the plaintiff's as-applied challenge (*General Instrument Corp.*, 99 AD2d at 461; see also *IBE Trade Corp.*, 16 AD3d 132).

Accordingly, the judgment of the Supreme Court, New York County (Louis B. York, J.), entered May 19, 2010, insofar as appealed from, finding that the 2001 Amendments to the Zoning Resolution of the City of New York are constitutional with regard to bookstores and video stores should be reversed, on the law, without costs, the finding of constitutionality vacated, and the matter remanded for further proceedings consistent with this opinion. The order and judgment (one paper) of the same court and Justice, entered April 23, 2010, finding that the 2001 Amendments to the Zoning Resolution are constitutional with regard to topless night clubs and bars should be reversed, on

the law, without costs, the finding of constitutionality vacated, and the matter remanded for further proceedings consistent with this opinion.

All concur.

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

ENTERED: APRIL 7, 2011


CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, JJ.

4146-4146A
Ind. 2466/06

x

The People of the State of New York,
Respondent,

-against-

Lina Sinha,
Defendant-Appellant.

Defendant appeals from the judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered April 19, 2007, convicting her, after a jury trial, of sodomy in the second and third degrees, bribing a witness and four counts each of criminal impersonation in the second degree and falsely reporting an incident in the third degree, and from the order, same court and Justice, entered on or about September 8, 2009, which denied her CPL 440.10 motion to vacate the judgment.

Joel B. Rudin, New York, and Gerald L. Shargel, New York, for appellant.

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

McGUIRE, J.

In criminal appeals, we often are asked to invoke our interest of justice jurisdiction, but for good reasons we seldom do. We exercise that authority in this case and reverse defendant's conviction for bribing a witness (Penal Law § 215.00), one of the three felony crimes for which the jury returned a guilty verdict, because the prosecution failed to fulfill basic disclosure obligations that are essential to a fair trial. We do so without regard to whether those failures affected the jury's verdict on that charge, because the prosecution failed in three separate respects to meet these constitutional obligations. Under these circumstances, we cannot leave the jury's verdict wholly undisturbed and will not endeavor to determine whether the prosecution is correct that these failures played no role in the jury's determination to convict defendant of bribing a witness.

Defendant was convicted after a jury trial of one count of second-degree sodomy (Penal Law § 130.45) and one count of third-degree sodomy (Penal Law § 130.40) for committing acts of fellatio on a minor, whom we will refer to as John Jones. In addition, the jury found defendant guilty of eight misdemeanors, four counts each of criminal impersonation in the second degree (Penal Law § 190.25[1]) and falsely reporting an incident in the third degree (Penal Law § 240.50[3][a]), based on her

impersonating another person and making a series of false allegations against Jones after he, no longer a minor, ended their relationship. Although defendant also was charged with having had a sexual relationship with another minor, whom we will refer to as John Smith, the jury was unable to reach a verdict on the six counts of first- and second-degree rape relating to that alleged relationship. The jury, however, convicted defendant of bribing a witness (Penal Law § 215.00), based on her giving Smith cash and other benefits to influence his testimony when she learned, after being arrested and charged with crimes relating to her relationship with Jones, that the authorities were investigating her relationship with Smith. The court imposed the maximum sentence for the bribing a witness conviction, an indeterminate sentence with a minimum term of $2\frac{1}{3}$ years and a maximum term of 7 years, and directed that the sentence run consecutively to the maximum prison terms the court imposed for the second- and third-degree sodomy convictions, concurrent sentences of, respectively, $2\frac{1}{3}$ to 7 and $1\frac{1}{3}$ to 4 years.

On these consolidated appeals, defendant argues that certain of the prosecutors involved in this case committed numerous acts of prosecutorial misconduct. Other than the undisputed prosecutorial failures discussed below and a claim the merits of which we need not determine (the claim that the prosecutor misled the jury by arguing in summation that Smith had "no axe to grind"

against defendant), we reject all the misconduct claims the merits of which were before the trial court on the CPL 440.10 motion, essentially for the reasons stated by the trial court in its comprehensive and closely reasoned written decision denying the motion (25 Misc 3d 1206[A], 2009 NY Slip Op 51988U [2009]). The record supports the detailed findings of fact set forth in that opinion, and there is no basis for disturbing the court's credibility determinations.

Because it bears on the sodomy convictions relating to Jones, we briefly address the merits of one of the claims of misconduct that was not before the court on the CPL 440.10 motion, the claim arising from the admission into evidence of a printout of an e-mail sent by defendant that had been recovered from the hard drive of the laptop computer belonging to her that the police seized from her apartment. In the e-mail, defendant stated that she and a person she identified only as "Alex," which is not Jones's actual first name, had "called it quits" and that "8 ½ years is a long time - especially if u thought it'd be forever." The printout itself is not a "written report or document . . . concerning a . . . scientific test or experiment" (CPL 240.20[1][c]) that the People were required to disclose and make available to the defense prior to trial. Defendant's real claim is unfair surprise, premised on a report by a detective who analyzed the hard drive. That report and a mirror image of the

hard drive were turned over to the defense prior to trial. In the report, the detective stated that he had "identified four relevant e-mails to the case" and attached those four e-mails; the "Alex" e-mail was not one of them.

The detective's inclusion of four e-mails he considered relevant cannot be deemed a representation by the prosecution that it did not regard any other e-mails as relevant. The better practice for the prosecution would have been to make clear either prior to or earlier in the trial that the People intended to offer into evidence the "Alex" e-mail. But especially because the better practice for the defense would have been to ask prior to or earlier in the trial which e-mails the People intended to offer into evidence, we reject defendant's claim of misconduct. We do not address the related claim concerning the "Alex" e-mail that defendant advances for the first time in her reply brief, both because it could have been raised in her main brief (*People v Adams*, 50 AD3d 433, 434 [2008], *lv denied* 10 NY3d 955 [2008]) and because it cannot in any event be reviewed on the existing record.

Of course, the prosecution is obligated by the federal and state constitutions to disclose any exculpatory information within its control that is material to guilt or punishment (*Brady v Maryland*, 373 US 83 [1963]; *People v Bryce*, 88 NY2d 124 [1996]) and any evidence material to the impeachment of prosecution

witnesses, including the existence of any agreement with a witness made to induce the witness's testimony (*Giglio v United States*, 405 US 150 [1972]; *People v Novoa*, 70 NY2d 490 [1987])). Here, the prosecution timely disclosed Smith's conviction in Connecticut for possession of narcotics, the violation of probation charge against him, and the promise of the District Attorney's Office to apprise Connecticut prosecutors of his cooperation with the investigation and prosecution of this case. In addition, the prosecution timely disclosed Smith's commission of numerous criminal acts for which he had not been arrested: drug sales in New York, North Carolina and Connecticut, his use of drugs, theft and extensive misuse of a credit card belonging to his mother's boyfriend, his involvement in a robbery in which he tied to a chair someone who owed him money for drugs, and an incident involving graffiti.

It is undisputed, however, that the People failed to disclose, until after Smith testified, certain e-mails to his mother from one or both of two assistant district attorneys involved in the prosecution. In one of the e-mails, one of the prosecutors told the mother she would "do everything in [her] power" to make Connecticut prosecutors who were prosecuting him on probation violation charges "see that [Smith] deserved a break because of what had happened to him when he was younger." In another e-mail, the prosecutors told the mother that they had

arranged for Smith to receive phone privileges at the youth institution at which he was incarcerated so that he could call her. In a third e-mail, one of the prosecutors informed the mother that she had arranged to stop Smith from being transferred to an adult facility.

Preceding the belated disclosure of these e-mails, the prosecutors had apprised the defense only that the District Attorney's Office had promised to inform Connecticut prosecutors that Smith was cooperating with the investigation and prosecution of the case against defendant and that, after initially declining to take that cooperation into account, the Connecticut prosecutor had agreed to at least consider it when making the sentencing recommendation to the judge. Moreover, it also is undisputed that the People wholly failed to disclose to the defense both that Smith believed that defendant had caused him to be charged with violating probation in Connecticut and that Smith's prior criminal activities included having acted as a courier for someone by transporting guns or drugs in a paper bag.

After the e-mails to Smith's mother were belatedly disclosed, Smith was recalled to the witness stand for further cross-examination. Both Smith and his mother, who had not testified before the e-mails were disclosed, were cross-examined extensively about this impeachment evidence. Before Smith's cross-examination resumed, the court informed the jury that the

prosecution had, without legal excuse, delayed disclosure of certain materials that were relevant to Smith's cross-examination. In its final charge, the court reminded the jury of the untimely disclosure of the e-mails, informed the jury that the late disclosure was "inexcusable," noted defense counsel's argument that the e-mails showed Smith's motive to lie, and instructed the jury that "in evaluating [Smith's] motive, you may consider the fact that the disclosure was untimely and you may, but are not required to, draw an adverse inference on the motive issue against the prosecution."

We agree with the trial court that there is no reasonable possibility that these serious disclosure failures by the prosecution affected the verdict convicting defendant of the sodomy charges relating to Jones or the misdemeanor charges of criminal impersonation and falsely reporting an incident (see *People v Vilaridi*, 76 NY2d 67, 77 [1990]). With respect to the misdemeanors, the evidence of defendant's guilt was so overwhelming that at trial the defense acknowledged defendant's commission of the alleged acts, thereby virtually conceding her guilt of these crimes. With respect to both the sodomy and misdemeanor convictions, the evidence, summarized as follows, fully supports the trial court's conclusion that "[Smith's] testimony was almost entirely irrelevant with respect to the[se] convictions" (2009 NY Slip Op 51988U, *16, *supra*): Jones, who had

become a police officer by the time of trial, testified consistently and in detail to a relationship with defendant that began when he was 13 years old. The trial evidence included evidence that the two had traveled together to Jamaica, when Jones was 18 years old and defendant was 34. Given Jones's testimony that the first sodomy offense occurred in the summer of 1996 and the relationship ended in December 2004, the jury had a strong reason to conclude that Jones and the "Alex" with whom defendant said she had had an 8½ year relationship were one and the same. Jones was not impeached in any significant respect and a wealth of other evidence corroborated his testimony. Although no single item of corroboration provided compelling proof that a sexual relationship existed when Jones was a minor, as opposed to an 18-year-old, the cumulative effect of the corroboration is significant, especially because of the bizarre and criminal acts defendant committed in reaction to Jones's efforts to end their relationship. On the question of whether the jury could consider the testimony of Smith when deciding whether the People had proved defendant's guilt of the sodomy charges relating to Jones, the trial court's instructions were exhaustive and clear. The court charged the jury that each count must be considered separately, that it could not "use one crime as showing a propensity or predisposition to commit another," and that if "defendant had an improper sexual relationship with one of the

complainants, that is no evidence that she had such a relationship with the other.”

Finally, even with respect to Smith’s credibility, the impeachment value of the belatedly disclosed e-mails and the undisclosed evidence (Smith’s belief that defendant had instigated the probation violation charge and his involvement as a courier) was minimal. Indeed, defendant may have been in a better position as a result of the tardy disclosure of the e-mails: there is no evidence that Smith’s belief preceded his first accusation of defendant, and cross examination about that belief could have damaged more than aided defendant; the evidence that Smith had acted as a courier was cumulative with ample other evidence reflecting poorly on his credibility; Smith had already been effectively impeached by a wealth of other evidence; and the court gave the instructions favorable to the defense noted above.

With respect to the bribing a witness conviction, however, we need not determine whether we disagree with the trial court’s conclusion that there is no reasonable possibility that these disclosure failures by the prosecution affected the verdict. We need not make that determination because we, unlike the trial court, have interest of justice jurisdiction. The trial court correctly characterized the tardy disclosure of the e-mails as “inexcusable.” We add that for the prosecution to fail in three distinct respects to fulfill its disclosure obligations is

intolerable. Exercising our interest of justice jurisdiction, we reverse that conviction without regard to whether there is such a reasonable possibility. The interests of justice, however, would not be served by reversing the remaining convictions. In this regard, we accept the trial court's determination that this failure was not willful.

As defendant's conviction for bribing a witness was supported by legally sufficient evidence, we remand for a new trial on that charge. Although Smith was an accomplice as a matter of law, his testimony about the gifts and money defendant gave him in exchange for lying about their relationship was adequately corroborated (see CPL 60.22[1]). The corroboration consisted of evidence of conduct by defendant that, while subject to innocent interpretations, supported a reasonable inference, given the surrounding circumstances, that she was seeking to persuade Smith to deny that he had any sexual relationship with her, and that she was conferring benefits upon this witness for that purpose.

Defendant's contention that the trial evidence rendered duplicitous what was then count nine of the indictment, the count under which she was convicted of sodomy in the second degree, is not preserved for appellate review. During oral argument before the trial court, defendant objected that other counts of the indictment relating to Jones were duplicitous and advanced a

different argument ("because of the matter of the grand jury presentation") in support of dismissing count nine. A close reading of the memorandum of law defendant submitted in support of her motion for a trial order of dismissal makes clear that defendant did not object that count nine was duplicitous (see e.g., "every oral sodomy count *after* count 9 is defective for duplicity" [emphasis added]). That memorandum, moreover, expressly states that defendant was renewing her earlier motion to dismiss "Counts 10 through 63 based upon the grand jury testimony." The memorandum of law submitted in support of the earlier motion argues that counts 10 through 63, and only those counts, are duplicitous and expressly excepts count 9 from the assertedly duplicitous sex-offense counts relating to Jones. Accordingly, defendant's appellate challenge in this regard is unpreserved for review and we decline to review it in the interest of justice.

As an alternative holding, we reject it on the merits. As defendant essentially conceded at trial, the count was not duplicitous as pleaded. Nor was it rendered duplicitous by Jones's testimony or by the court's charge. The first act of oral sodomy occurred under specific circumstances, about which Jones testified consistently before the grand jury and at trial. Although Jones testified to a course of sexual conduct by defendant, he made it clear that the "first" incident of oral

sodomy was a specific event and was not just the beginning of a course of conduct. Similarly, when the court instructed the jury that the count at issue referred to the "first" incident, the jury could only have interpreted the instruction as referring to this particular instance (*compare People v Faux*, 99 AD2d 654 [1984], *lv denied* 62 NY2d 649 [1984]).

The court did not impermissibly enlarge the time frame for this count. The indictment charged that the incident occurred on or about the month of June of 1996. At trial, over 10 years later, Jones was unable to say whether it was in June, July or August of 1996. He knew it was after the regular school year had ended, and he was in summer school. Given that Jones was 13 years old at the time of the incident, and did not report the crime for many years, the three-month period was not an unreasonably large time frame, and there is no reason to believe the People could have further narrowed it (*see People v Keindl*, 68 NY2d 418, 418-420 [1986]). This amendment, purely as to date, did not change the People's theory or cause any prejudice to defendant (*see CPL 200.70[1]*). The fact that the indictment contained other counts relating to sex acts in July and August, which were never submitted to the jury, is of no consequence.

Nor was the count of the indictment under which defendant was convicted of third-degree sodomy duplicitous. This count charged defendant with committing an act of oral sodomy in

November 1996 (see *People v Schwartz*, 7 AD3d 445, 445 [2004], lv denied 3 NY3d 662 [2004] [indictment not defective where each count alleged a single incident falling within a specific one-month period]). Jones testified that during a longer period of time that included November 1996 (i.e., when he was in ninth grade), defendant performed oral sex on him "every month, at least one time every month, more than that." In addition, he answered "yes" when asked whether defendant's mouth was on his penis "during those occasions" in November 1996. Consistent with the instructions given to the grand jury¹ on this count, the trial court instructed the jury that it was "to consider only the first time the act is alleged to have occurred in the month of November of 1996." Thus, unlike the jury in *People v Beauchamp* (74 NY2d 639, 641 [1989]), a case upon which defendant relies, the jury here could not have found defendant guilty based on a "continuous course of conduct."

Moreover, because Jones did not testify to any specific act of oral sodomy in November 1996, the guilty verdict could not have violated the requirement of a unanimous verdict (see *Keindl*, 68 NY2d at 418) by creating a risk that some jurors concluded that a particular act of oral sodomy that month had been proven beyond a reasonable doubt while others concluded that a different

¹Although the grand jury minutes were, of course, before the trial court, the People nonetheless have moved (M-4038) to enlarge the record on appeal to include them.

act of oral sodomy that month had been so proven. Defendant argues that "the jury could not find there was a 'first time' without finding there was more than one time" and thus that she was "tried for an ongoing course of conduct, not for any discrete act." The premise, however, is incorrect: if an act is committed for the first time, it does not follow that it necessarily must have been committed a second time. In any event, given the court's instructions and Jones's non-specific testimony that defendant had committed at least one act of oral sodomy every month, the possibility that defendant may be guilty of having committed two or more acts of oral sodomy in November 1996 does not render duplicitous the count charging him with one such act for which the jury found him guilty.

The court responded meaningfully to a jury note, and there is nothing in the note or the circumstances of the case to suggest that the court was obligated to go beyond the note and provide an instruction on the law that the jury never requested (see *People v Almodovar*, 62 NY2d 126, 131-132 [1984]; *People v Garcia*, 309 AD2d 514 [2003], *lv denied* 1 NY3d 572 [2003]).

The court properly denied defendant's mistrial motion made when the deliberating jury accidentally received an unredacted tape recording containing excluded evidence. The court provided a suitable curative instruction, which the jury is presumed to have followed (see *People v Davis*, 58 NY2d 1102, 1104 [1983];

People v Santiago, 52 NY2d 865 [1981]). Furthermore, the excluded material was insignificant, as well as cumulative to other evidence, and there is no reasonable possibility that it affected the verdict.

All of defendant's arguments raised on the direct appeal relating to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. Putting aside the issue of whether there is any merit to defendant's argument that the prosecution misled the jury by arguing in summation that Smith had "no axe to grind" against her, the evidence developed at the CPL 440.10 hearing does not establish that anything else in the summation was false or misleading. We need not determine whether there is any merit to the one argument since defendant would not be entitled to any additional relief in any event.

As for defendant's arguments that the sentences imposed are excessive, our reversal of the bribing a witness conviction renders moot the argument premised on the court's determination to direct the sentence for that count to run consecutively with the concurrent sentences for the sodomy counts. We perceive no basis for reducing the sentences for the sodomy and misdemeanor convictions; defendant's argument that she should in any event be resentenced before a different judge is without merit.

To the extent not addressed, defendant's remaining arguments either are meritless or warrant no relief.

Accordingly, the judgment of Supreme Court, New York County (Carol Berkman, J.), rendered April 19, 2007, convicting defendant, after a jury trial, of sodomy in the second and third degrees, bribing a witness and four counts each of criminal impersonation in the second degree and falsely reporting an incident in the third degree, and sentencing her to an aggregate term of 4 $\frac{2}{3}$ to 14 years, should be modified, in the interest of justice, to the extent of vacating the conviction of bribing a witness, the matter remanded for a new trial on that charge, and otherwise affirmed, and the matter remanded for further proceedings pursuant to CPL 460.50(5). The order of the same court and Justice, entered on or about September 8, 2009, which denied defendant's CPL 440.10 motion to vacate the judgment, should be modified, in the interest of justice, to the extent of

vacating the conviction of bribing a witness, and the matter remanded for a new trial on that charge, and otherwise affirmed.

M-4038 - *People v Sinha*

Motion to enlarge the record on appeal granted.

All concur.

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

ENTERED: APRIL 7, 2011



A handwritten signature in black ink, appearing to read "Sumana R. Ghosh", is written over a horizontal line.

CLERK