SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 4, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6404 Verizon New England Inc., Index 104207/10
Petitioner-Appellant,

-against-

IDT Domestic Telecom, Inc.,
Respondent-Respondent.

Gibson, Dunn & Crutcher LLP, New York (Robert L. Weigel of counsel), for appellant.

Mishcon De Reya, LLP, New York (James J. McGuire and Mark A. Berube of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered September 24, 2010, which dismissed the petition seeking, inter alia, that respondent be directed to turn over to petitioner all monies respondent paid to Global Naps Networks, Inc. after April 2, 2009, unanimously affirmed, without costs.

In this proceeding, judgment creditor Verizon New England Inc., seeks to enforce a restraining notice against a third party, IDT Domestic Telecom, Inc. pursuant to Article 52 of the CPLR, on monies paid by IDT to judgment debtor, Global, a telecommunications vendor. IDT purchased voice-over-Internet

termination services for its customers from Global.

On January 29, 2009, a judgment was entered in Massachusetts in favor of Verizon against Global in the sum of $57,716,714. The judgment was domesticated in New York on March 6, 2009. Verizon sought to enforce its judgment by serving a restraining notice and information subpoena upon Global and its business partners, including IDT, which makes pre-payments to Global for telecommunications services needed the following month. No written contract existed between IDT and Global, and either party could terminate their "at will" relationship at any time without notice. Verizon alleged that documentation provided by IDT established that as of service of the restraining notice and through November 2009, $992,000 had been improperly paid to Global, as these sums were subject to restraint under the restraining notice.

At issue in this turnover proceeding is whether payments made by respondent IDT to the judgment debtor Global constitute debt or property within the meaning of CPLR 5201 and, therefore, are subject to levy by petitioner/judgment creditor Verizon. Verizon's contention that IDT's ongoing business relationship with Global meant that IDT had property of Global in its possession at the time it received the restraining notice is unavailing. At best, this was a month-to-month agreement with

prepaid services. This Court recently held in *Verizon New England Inc. v Transcom Enhanced Servs., Inc*. (__ AD3d __, 2012 NY Slip Op 05269 [2012]) that a similar prepaid arrangement entered into between Verizon and a different vendor was not attachable property pursuant to CPLR 5201.

In *Transcom*, Verizon, the judgment creditor, sought to enforce a restraining notice against a third party pursuant to article 52 of the CPLR, on monies paid by Transcom to judgment debtor, Global. Like IDT here, Transcom purchased voice-over-Internet termination services for its customers from Global. Transcom ordered telecommunications services from Verizon on a weekly basis by weekly prepayment.

In *Transcom*, *supra*, this Court rejected Verizon's argument and found that the agreement between Global and Transcom dispensed with any contractual obligations or "bundle of rights" that could be considered attachable property. This Court reasoned that Global did not have any rights under the prepayment because "there is simply no obligation for Transcom to purchase services from [Global]." Rather, "[t]his . . . was a situation where [Global's] performance depended on Transcom's prepayment for services in any given week" and "therefore involved intangibles that may never ripen into a significant property right as where they depend on a contingency that may never occur"

(*Transcom*, at **6). Thus, Global had no right to payment that it could assign or that could be attached by its judgment creditors.

In this case, the prepayment arrangement between Verizon and IDT is indistinguishable from the prepayment arrangement in *Transcom* that this Court found was not subject to attachment. The arrangement was a month-to-month agreement with prepaid services. Like Transcom, IDT had no continuing obligation or commitment to purchase the services offered by Global. Global did not have any rights under the prepayment because "there [was] simply no obligation for [IDT] to purchase services from [Global]" (*id.*). Thus, "Global had no right to payment that it could assign or that could be attached by its judgment creditors" (*id.*). In light of this economic reality, there is no property pursuant to CPLR 5201(b) or debt pursuant to CPLR 5201(a) that would be subject to a restraining notice under CPLR 5222(b).

Equally unavailing is Verizon's argument that IDT possessed a restrainable debt owed to Global on April 2, 2009, when it was served with the restraining notice, as Global did not cash IDT's prepayment for April 2009 services, mailed overnight on March 27, 2009, until April 8, 2009 (*see* UCC 3-409[1]). IDT owed no debt to Global and Global had no property interest in any prepayment until it fulfilled its obligations and provided a month of telecommunications services to IDT (*cf. Conde v Anton Adj. Co.*,

133 Misc 2d 998 [1986]). That Global did not cash the check for eight days does not alter the fundamental contingent, prepayment nature of the parties' relationship.

In view of the foregoing, we need not address whether Verizon was entitled to CPLR article 52 enforcement proceedings.

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

ENTERED: SEPTEMBER 4, 2012

CLERK

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

7714 Winslow Pakeman, Index 309803/09
Plaintiff-Appellant,

-against-

Venant Karekezia, et al.,
Defendants-Respondents.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Skenderis & Cornacchia P.C., Long Island City (Robert Joshua Yenchman of counsel), for respondents.

Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered May 11, 2011, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion insofar as it is addressed to plaintiff's allegations that he suffered a serious injury comprising a significant limitation of use of a body organ, member, function or system or a permanent consequential limitation of use of a body function or system, and otherwise affirmed, without costs.

By submitting in support of their summary judgment motion the expert medical reports of a neurologist finding normal ranges of motion, as well as the report of a radiologist who opined that changes shown in the MRIs of the then obese 32-year-old plaintiff

were degenerative, defendants made a prima facie showing of entitlement to summary judgment as to plaintiff's claims that he suffered "significant limitation of use" or "permanent consequential limitation of use" of his cervical, thoracic and lumbar spine and right and left knee as a result of a motor vehicle accident that occurred on July 30, 2009 (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [2011]; Insurance Law § 5102[d]). Plaintiff successfully opposed this aspect of the motion, however, by submitting competent expert evidence that raised triable issues of fact as to whether the accident caused a "significant limitation of use" or "permanent consequential limitation of use" of his left knee. In addition to affirmed expert reports concluding that the range of motion in the left knee was significantly limited, Dov J. Berkowitz, M.D., an orthopedic surgeon, opined in his affirmed report that, after he performed arthroscopic surgery on the knee, it continued to manifest hypertrophic synovitis and chondral erosion of the patella-femoral joint. Dr. Berkowitz further opined that the injury to the left knee was permanent and was related to the accident, a view supported by his report that the symptoms of which plaintiff complains did not arise until the accident (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]). Since plaintiff's evidence raised a triable issue as to whether the accident caused

a serious injury to his left knee within the meaning of the statute, it is unnecessary to address whether his proof with respect to other alleged injuries would have been sufficient to withstand defendants' motion for summary judgment (*see Linton v Nawaz*, 14 NY3d 821 [2010]).

While we otherwise reinstate the complaint, we affirm the dismissal of plaintiff's 90/180-day claim on the ground that the claim was refuted by plaintiff's own deposition testimony, inasmuch as he testified that he did not miss any time from work, since his duties at work were "modified." Working "light duty" is fatal to a 90/180–day claim (*see Williams v Perez*, 92 AD3d 528, 529 [2012]; *Tsamos v Diaz*, 81 AD3d 546, 547 [2011]).

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

ENTERED: SEPTEMBER 4, 2012

CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, Acosta, JJ.

7814 Glenford Morris, Index 23980/02
Plaintiff-Appellant,

-against-

Pavarini Construction, et al.,
Defendants-Respondents.

_____

Hill & Moin LLP, New York (Cheryl R. Eisberg Moin of counsel), for appellant.

London Fischer LLP, New York (David B. Franklin of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about February 10, 2011, which granted defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, predicated on a violation of 12 NYCRR 23-2.2(a), reversed, on the law, without costs, and upon a search of the record, summary judgment granted to plaintiff.

Plaintiff was working as a carpenter on the construction of a new building in Manhattan when the back wall of a "form" fell on and injured his hand. In this instance, a "form" refers to a mold used in the fabrication of concrete walls. The form is made of two metal walls with a space between them, into which liquid concrete is poured. Workers remove the form after the concrete hardens.

In an order entered July 2, 2007, the Court of Appeals

directed the motion court to hold a hearing to determine if the words of the regulation at issue here, Industrial Code (12 NYCRR) § 23-2.2(a), "can sensibly be applied to anything but completed forms" (9 NY3d 47, 51 [2007]). This regulation requires that forms used on construction sites "be properly braced or tied together so as to maintain position and shape" (12 NYCRR 23-2.2[a]).

At the framed issue hearing, the testimony of both plaintiff's and defendants' experts showed that the regulation could sensibly be applied to forms as they are being constructed, before they are ready to have liquid concrete poured into them. Both experts referred to the metal wall that fell on plaintiff as a "form." They concurred on the enormity of the structure, a wall, 30 feet high by 30 feet wide, weighing over 2500 pounds, that was hoisted by workers into an upright and vertical position. The experts agreed that the form must be braced to withstand wind loads, vibrations and contact by humans and equipment and that a form wall, once hoisted upright, might be left in that vertical stance for days. Most significantly, they both agreed that once upright, the back form wall must be braced to maintain that position.

The operative language of § 23-2.2(a) is that forms shall be "braced or tied . . . so as to maintain [their] position and

shape." The erection of the back form wall is essentially the first step in this process. It defies common sense to think that the form could be structurally safe and maintain its final position and shape, if the back wall that anchors the structure is prone to falling over and collapsing because there is no requirement that it "be properly braced." The experts all agreed that once upright, the back form wall must be braced to maintain that position. Indeed, that the back wall fell on plaintiff indicates that it did not maintain its position and could not have ultimately maintained its shape, making it clear that it was not "properly braced" as required by the regulation. Moreover, it defies logic to limit the Code's directive where the danger posed to workers from these forms is so great, given that they are often hoisted to upright positions without adequate safety bracing and may remain standing for days prior to completion.

Defendants' and the dissent's argument that 12 NYCRR 23-2.2(a) applies only to completed forms is unavailing. Their interpretation of the expert's testimony at the hearing lacks support in the record.

Moreover, the cases defendants cite in support of this argument are distinguishable. In *Mueller v PSEG Power N.Y., Inc.* (83 AD3d 1274 [2011]), the plaintiff's accident occurred after workers had removed the forms from their vertical position and

stacked them for disassembly and storage on the ground at the same elevation as the plaintiff. The plaintiff was injured when a crane cable inadvertently snagged, lifting and then dropping the forms to the ground, where they fell against the plaintiff's leg (83 AD3d at 1274). The *Mueller* court held that 12 NYCRR 23-2.2(a) did not apply to the forms, where, at the time of the plaintiff's accident, they were in the process of being stored (83 AD3d at 1275-1276). Here, the form wall at issue was not being stored. Rather, workers had set up the back wall in its full upright position to receive concrete. In *McCormick v 257 W. Genesee, LLC* (78 AD3d 1581 [2010]), the plaintiff tripped and fell on a protruding pin workers had stored on a form at the site. Thus, unlike the back wall at issue here, that plaintiff's injury was unrelated to the stability of the structure (*id.* at 1582-1583).

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

TOM, J.P. (dissenting)

The Court of Appeals remanded this matter to the motion court for a framed issue hearing to determine whether the words of regulation 12 NYCRR 23-2.2(a) "can sensibly be applied to anything but completed forms" (9 NY3d 47, 51 [2007]). After the hearing, I find that section 23-2.2(a) applies only to completed forms and has no application in this case where only one wall of a form was erected when it fell on plaintiff.

The provisions of Industrial Code (12 NYCRR) § 23-2.2 are limited in application to completed forms and to ongoing and completed concrete pours. Thus, section 23-2.2(a) can only be read to apply to fully-assembled concrete forms. Section 23-2.2 is entitled "Concrete Work." The provision at issue, subdivision (a), entitled "General requirements," states as follows: "Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape." As defined in the Guide to Formwork for Concrete (defendant's exhibit A) and by defendant's expert, shores are horizontal supports used to bear the dead load of the form and concrete when a floor is poured, while reshores are used to support the poured floor as it cures — before the concrete acquires its full strength — including any load caused by shores or reshores supporting the floors above. Thus, these terms are

not immediately related to the question before us.

The Court of Appeals has already ruled that the phrase "structurally safe" and the term "properly" are too vague to afford a basis for recovery under Labor Law § 241(6), and while the remainder of 12 NYCRR 23-2.2(a) — "braced or tied together so as to maintain position and shape" — is suitably specific (9 NY3d at 50), there remains the question of whether that language "can sensibly be applied to anything but completed forms" (*id.* at 51). The issue is whether the requirement for braces or ties "to maintain position and shape" applies to the period during which forms are being assembled (when plaintiff sustained injury) or whether application of this language is limited to the period during which concrete is actually poured and thereafter (when the form is fully assembled).

The regulation indicates the latter interpretation is correct. Industrial Code (12 NYCRR) § 23-2.2(b), entitled "Inspection," provides: "Designated persons shall continuously inspect the stability of all forms, shores and reshores including all braces and other supports during the placing of concrete. Any unsafe condition shall be remedied immediately." That inspection is required "during the placing of concrete" strongly suggests that the protections provided by subdivisions (a) and (b) of § 23-2.2 are intended to apply to the structural integrity

of concrete forms at such time concrete is being poured. Following subdivisions include requirements for the support of newly poured concrete and the stripping of forms. Thus, section 23-2.2 addresses the need to adequately support concrete during and after its placement, and such matters as the manner in which forms are assembled and their support during assembly are not covered.

The expert testimony is consistent with this interpretation. Asked to define the term "form," plaintiff's expert responded:

> "A form is an assembly of all kinds of components, form panels, wailer [sic] tie[s] and other components, connections, that are put together by the contractor to form the shape of a wall, and make sure that it is -- they are safe during the placement of the concrete until the concrete changes it's [*sic*] strength, increases the strength and changes from being a liquid to solid."

An exhibit submitted by defendant, the American Concrete Institute's Guide to Formwork for Concrete, contains a more concise definition: "A temporary structure or mold for the support of concrete while it is setting and gaining sufficient strength to be self-supporting." Defendant's expert also defined the term "tie," stating: "A tie in our particular case is usually a steel rod, about a quarter of an inch diameter . . . that ties together two vertical wall panels and the reason you have a tie is . . . the wet concrete has a tendency to spread the forms, so

they introduce ties to tie the vertical panels together to hold them in place." Here, only one side of the form was erected when the accident occurred. Thus, the application of a tie would be irrelevant under the facts of this case.

That the focus of Industrial Code (12 NYCRR) § 23-2.2(a) is the structural integrity of the form during the placement of concrete is evident from its language, particularly the provision that the position and shape of the form be maintained by ensuring that it is "braced or tied together." While a requirement to brace a form could be extended to include the support of the single vertical wall panel that fell and injured plaintiff, the alternative to utilize ties to accomplish the same purpose can only be applied to a pair of such panels. Likewise, the requirement to maintain the position of a form could apply to a single vertical panel, but the additional requirement that the shape of the form be maintained clearly anticipates the need to provide sufficient support to withstand the considerable force exerted by wet concrete. Only two panels could provide such support. The testimony of plaintiff's own expert supports this interpretation. Indeed, he explained that ties were placed between the walls of a form "to keep it from blowing out and [to] keep it straight."

The majority attaches undue significance to the experts'

opinions concerning the construction of forms. Their testimony was solicited to obtain "the meaning of specialized terms" used in the regulation; the interpretation of the regulation remains a matter of law for the courts (9 NY3d at 51). That an expert may opine that forms should be braced during assembly to resist wind loads has no bearing on whether the regulation at issue requires as much.

Accordingly, the order should be affirmed and the complaint dismissed.

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

ENTERED: SEPTEMBER 4, 2012

CLERK

Sweeny, J.P., Catterson, Acosta, Freedman, JJ.

7973 James Wood, et al., Index 104534/08
Plaintiffs-Respondents,

-against-

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

East 49th Street Development II, LLC, et al.,
Defendants-appellants.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Jerri A. DeCamp of counsel), for appellants.

Shafran & Mosley, P.C., White Plains (Kevin L. Mosley of counsel), for respondents.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about January 25, 2012, which, to the extent appealed, denied the motion by defendants East 49th Street Development II, LLC, and 250 East Borrower, LLC for summary judgment dismissing the complaint and the cross-claim of codefendant Ocean Avenue Construction, Inc., for contractual indemnification, unanimously reversed, on the law, without costs, and the claims and cross-claim dismissed as to these defendants.

Defendant 250 East Borrower and its indirect member defendant 49th Street Development II, are the owners of property adjacent to where plaintiff allegedly sustained injury when he tripped and fell on a crack in the sidewalk and hit his head on a

muni-meter installed by the City. The record establishes that defendant Ocean Avenue Construction erected a blue, wooden construction fence in connection with a construction project being performed on the owners' lot. Plaintiff was walking in front of a restaurant on the lot just south of defendants' lot and was approaching the area where the sidewalk was narrowed by the construction fence, when he stepped aside toward the curb to allow other pedestrians approaching him to pass. As he stepped toward the curb, but before he reached the construction site, plaintiff tripped on a crack in the sidewalk and fell, striking his head on the muni-meter and sustaining injuries.

Plaintiff sued, *inter alia,* the owners of the abutting property, the restaurant, the construction company, and the owner of the construction site averring that the narrowing of the sidewalk in front of the construction site directed him toward the cracked sidewalk.

Moving to dismiss the claims against them, defendants, as owners of the construction site property, contend they had no duty to plaintiff and that they did not proximately cause plaintiff's injury, as they neither created the alleged defect upon which plaintiff fell nor was it located on their property. In addition, they argue that plaintiffs' claim that the closeness of the muni-meter to the fence created a hazard lacks merit.

Defendants contend that even if the presence of the muni-meter, which was situated south of the construction fence in front of the restaurant, narrowed the area approaching the walkway, it was the crack on the neighboring property that caused plaintiff to trip and strike the meter, not the construction fence. Defendants further aver that Administrative Code of the City of New York § 7-210[b] does not impose liability on them as they are not the abutting owner of the sidewalk on which plaintiff tripped, nor have they violated any provision of 12 NYCRRR 23-1.18 governing the construction of sidewalk sheds and barricades. Defendants proffer an expert attesting to the fact that the fence was installed and maintained in accordance with the applicable Department Of Transportation rules.

Plaintiffs, however, contend that the construction shed was negligently placed because of the location of the muni-meter and because the approach created was too narrow a pathway. They posit that part of the street should have been appropriated to widen the walkway.

The motion court should have granted summary judgment to the moving parties since there are no triable issues of fact as to whether these defendants violated a duty to plaintiff or whether the sidewalk encroachment created by defendants' fence proximately caused plaintiff's harm. Unlike the situation in

Hunter v City of New York, (23 AD3d 223, 223-224 [2005]), where the plaintiff was caused to trip on a grating by a fence that actually encroached on the adjacent property, the sidewalk defect that caused plaintiff's injury in this case was significantly south of the moving defendants' property. Defendants here cannot be found to have had a duty to a pedestrian who fell on a defect on an adjacent sidewalk where no encroachment existed. Moreover, under these facts, the narrowed sidewalk on defendants' property cannot be said to have proximately caused plaintiff's injury (*see Cimino v City of White Plains*, 65 AD3d 1069 [2009]). Plaintiff specifically said that he stepped aside because several other pedestrians were walking toward him. He was not walking on the narrowed path nor was the tripping hazard on the path. Thus, while the narrowed path may have furnished a setting encouraging plaintiff to step aside to avoid oncoming pedestrians, there were too many intervening factors to find that the construction shed proximately caused plaintiff's injury (*see Bonomonte v City of New York*, 79 AD3d 515 [2010], affd 17 NY3d 866[2011]; *Lee v New York City*, 25 AD3d 214 [2005], *lv denied* 6 NY3d 708 [2006]).

In view of the above, we need not address defendant 250 East Borrower's motion to dismiss its cross claim for contractual indemnification.

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

ENTERED: SEPTEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8033 In re The State of New York, Petitioner-Respondent, Index 252260/09

-against-

Enrique Domenech, etc., Respondent-Appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Zea Ishee of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Patrick J. Walsh of counsel), for respondent.

Order, Supreme Court, Bronx County (Cassandra M. Mullen, J.), entered March 8, 2011, which, upon a jury finding that appellant suffers from a mental abnormality and after a dispositional hearing, determined that appellant is a dangerous sex offender requiring confinement and committed him to a secure treatment facility, unanimously affirmed, without costs.

Appellant sought to call his former girlfriend to testify that, during their relationship, he exercised self-control over his sexual desires. This testimony, appellant asserted, would have been relevant on the issue of whether he suffered from a "mental abnormality" within the meaning of Mental Hygiene Law § 10.03(i). The court denied the request to call the former girlfriend on the grounds that the proffered testimony was not relevant, but indicated that appellant's expert would be

permitted to testify about conversations he had with the former girlfriend that affected his diagnosis, if any. Appellant contends that the denial of his request to call the former girlfriend as a witness deprived him of his statutory and constitutional rights to call witnesses.

In rejecting the former girlfriend's testimony as irrelevant, the court did not commit reversible error (*see Matter of State of New York v Rosado*, 94 AD3d 577 [2012]). Under appellant's offer of proof, that he may not have sexually abused one former girlfriend — and there was evidence in the proceeding that he had at least 26 sexual partners — does not tend to disprove that his behavior manifested a pattern of sexually abusing non-consenting women.

Appellant also contends that he was denied a fair trial by the court's interference with the direct and cross-examination of his expert witness. There was no objection to the claimed interference and, therefore, the issue is not preserved for our review (*see Wilson v City of New York*, 65 AD3d 906, 908 [2009]). Nor is review in the interests of justice warranted *(cf. People v Retamozzo*, 25 AD3d 73, 88-89 [2005]). In any event, examination of the entirety of the expert's testimony does not reflect interference so extensive as to deny appellant a fair trial. The court's questioning constituted only a small portion of the

witness's examination and sought only to clarify his testimony, and we see no indication of judicial bias in the record. While we agree with appellant that the court should have refrained from questioning the witness about the plethysmograph test, this unpreserved error does not warrant reversal in the interest of justice.

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

ENTERED: SEPTEMBER 4, 2012

CLERK

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

6801 The People of the State of New York, Ind. 41/07
Respondent,

-against-

Mark Russell,
Defendant-Appellant.

_____

James Layton Koenig, New York, for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered January 15, 2008, reversed, on the facts, the conviction vacated, and the indictment dismissed.

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

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
Karla Moskowitz
Helen E. Freedman
Sallie Manzanet-Daniels, JJ.

6801
Ind. 41/07

_____x

The People of the State of New York,
Respondent,

-against-

Mark Russell,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Richard Lee Price, J.), rendered January 15, 2008, convicting him, after a jury trial, of robbery in the first degree, and imposing sentence.

James Layton Koenig, New York, for appellant.

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

FREEDMAN, J.

Defendant was convicted of robbery in the first degree (Penal Law § 160.15[4]) and sentenced to a nine year determinate sentence and five years postrelease supervision based on a single witness identification made 15 days after the robbery occurred. Upon exercising our independent factual review power (CPL 470.15), we find that the verdict was against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). The videotape depicting the robbery does not corroborate the complaining witness's identification, and, viewed as a whole, the evidence does not establish beyond a reasonable doubt that the identification was accurate.

On November 22, 2006 at approximately 6:00 P.M., the complainant had just closed her store at 256 East Gun Hill Road in the Bronx when two young black men, approached her and asked to enter the shop. She reopened the store and showed the men various items. Shortly thereafter, one of the men (not defendant) opened his jacket, displayed a gun and demanded to know where the money was. The other man, purportedly defendant, went behind the counter with the complainant and told her to put the money in a plastic bag. The gun holder ordered the complainant to the back of the store and tied her up with a wire. The complainant testified that she saw defendant's face at that

time. When she tried to break free, the robbers tied her up tighter. She testified that she feared for her life at that point and throughout the robbery. After the robbers left, the complainant called her husband who immediately called the police. The police officers did not take fingerprints because, as they testified, the complainant stated that the robbers wore gloves. The wire used to tie the complainant's hands was tested for DNA, but nothing was found. The complainant described both robbers as being between 18 and 30 years old, five feet seven inches or five feet eight inches and having Jamaican accents, "a little." She also stated that the unarmed robber had a ponytail under his hat, but definitely not cornrows.

Fifteen days later, on December 7, 2006, the complainant, while a passenger in a car heading west and driven by her husband, passed 374 East Gun Hill Road, where defendant was sweeping the sidewalk in front of his aunt's store. The complainant, looking across four lanes of traffic, spotted defendant and asserted that he was the second (unarmed) robber. The complainant's husband pulled closer so that she could see defendant and she positively identified him. The police were called and, after the complainant spoke with them, defendant was arrested. About four hours later, the complainant identified defendant in a lineup; she was not specifically told that

defendant would be in the lineup, nor did she see any of the fillers prior to her identification.

At trial, the complainant testified that she was certain that her identification was correct and that she saw defendant's face when he entered the store. She further testified that throughout the ordeal she feared for her life. Additionally, she testified that although she passed the store where defendant worked every day, she never saw him before or after the robbery until the day he was apprehended. She insisted that the robber had a ponytail, not cornrows.

Defendant denied any involvement in a robbery, testifying that he had worked at his aunt's store on the day of the robbery, closed it at the usual time, between 6:30 and 7:00 P.M., and had gone home. The videotapes of the robbery were introduced into evidence. Although there are several frontal views of the gun bearing perpetrator (who has not been apprehended), there are no similar views of the second robber, purportedly defendant. All of the views of the second person show him looking down to the side, including the view of the two robbers when they first entered the store. While, according to the police, the complainant reported that the robbers wore gloves, the video shows that they were not wearing gloves and that the second robber was biting his fingernails.

Defendant was 28 years old at the time of the robbery, and about five feet nine inches tall. He had several B misdemeanor convictions for possession of marijuana in a public place, but no other arrests. At the time of his arrest, he wore his hair in cornrows, and both he and his aunt testified that he always wore his hair in cornrows. Defendant, whose parents are from Jamaica, was born in New York City where he was living with his large family in Brooklyn, and had worked in family businesses, earning from $26,000 to $40,000 a year, since finishing high school. He had been working in his aunt's store on Gun Hill Road, and was working there both at the time of the robbery and 15 days later when he was arrested. He and his aunt testified that he was being paid $300 a week. He also testified that he had never bitten his fingernails and demonstrated that to the jury.

In asserting that his conviction stemmed from a misidentification, defendant points to various discrepancies in testimony, including the complainant's statement that the robbers wore gloves and the police officers' reliance on this statement in not looking for fingerprints, although the video plainly shows that this was not the case. The video also shows both robbers looking down when they entered the store, but the complainant testified that she clearly saw defendant's face when she opened the store. Finally, defendant raised the nail biting

inconsistency.

Defendant also avers that, since he had been working steadily in the neighborhood for several months, it is likely that the complainant, who acknowledged passing his aunt's store regularly, saw him either before or after the incident, and during the two week period that ensued after the robbery, engaged in "transference," misidentifying him as the perpetrator of the crime. He cites psychology articles on the transference phenomenon as well as the effects of stress on eyewitness memory (i.e., K.A. Deffenbacher, B.H. Bornstein, S.D. Penrod, & E.K. McGorty, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory,* 28 Law & Human Behavior 687 [2004] [accuracy is negatively affected by high level stress]). However, the prosecutor emphasized that stress increased the complainant's ability to identify the perpetrator of the robbery. Unfortunately, no expert testimony was offered at trial. Defendant further cites studies showing that the greater the lapse of time, the less accurate an identification is likely to be.

An intermediate appellate court is empowered to examine and review the record as a whole to determine whether the weight of the evidence supports the verdict and whether the People have sustained their burden of proof beyond a reasonable doubt *(People*

v Danielson, 9 NY3d at 348-349 [2007]; *People v Bleakley*, 69 NY2d 490 [1987])). "Essentially, the court sits as a thirteenth juror and decides which facts were proven at trial," (*Danielson* at 348; *see People v Chase,* 60 AD3d 1077 [2009]). In *People v Delamota* (18 NY3d 107 [2012]), both the majority and dissent raised concern "about the incidence of wrongful convictions and the prevalence with which they have been discovered in recent years" (*id*. at 116). The majority stated that the intermediate appellate court is empowered to

> "independently assess all of the proof; substitute its own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if the court is not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt" (*id.* at 116-117).

Although, in this case, the trial court gave a comprehensive charge concerning single witness identification, cautioning against inaccuracy and the risk of wrongful conviction and referring to matters such as length of opportunity to view the defendant, lighting conditions, suggestibility, and memory in general, no specific note was made of the 15-day gap or of the possibility of transference. Nor was anything requested or said with respect to "weapon focus" or stress although reference was made to the "mental, physical, and emotional state of the witness

before, during and after the observation."

While no one factor in this case mandates reversal, the combination of factors, namely, the absence of corroborating evidence, apparent lack of a financial motive, the time interval between the event and the identification, the physical discrepancies noted, and the high degree of stress aggravated by the presence of a seemingly lethal weapon, are sufficient to warrant reversal based on the weight of the evidence. For these reasons, we reverse.

Accordingly, the judgment of the Supreme Court, Bronx County (Richard Lee Price, J.), rendered January 15, 2008, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of nine years, should be reversed on the facts, the conviction vacated and the indictment dismissed.

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

MAZZARELLI, J.P. (dissenting)

"[W]eight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable. If so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 348 [2007]).

In this case, the jury's decision to convict was supported by the trial testimony. The complainant testified that she was standing very close to defendant when she allowed him and his accomplice to enter the store where she worked, after closing time. She stated that she looked at defendant's face when he came in and saw it clearly. She further testified that before the robbery began, she spent time walking around the entire store with defendant, showing him and his accomplice the merchandise. She recounted that as defendant tied her up in a back room, she was looking at his face, which she could see clearly. Based on this testimony, there is no reason to question the jury's conclusion that the complainant accurately identified defendant as her assailant, notwithstanding minor discrepancies in her testimony, such as whether defendant and the other robber were

wearing gloves. Certainly, on this record, this Court is in no better position than the jury to determine whether the complainant's testimony was credible, including whether the jury properly resolved inconsistencies in the testimony (*see People v Robinson*, 84 AD3d 590 [2011], *lv denied* 17 NY3d 809 [2011]).

This extends to the surveillance video, which defendant relies on as highlighting some of the complainant's inconsistencies (*see People v Funches*, 4 AD3d 206 [2004], *lv denied* 3 NY3d 640 [2004]). I note, with respect to the video, that it is of far less use to this Court than it was to the jury. The jury, after all, had the opportunity, unavailable to this Court, to compare the images of the robbers on the video to defendant, who was seated in the courtroom. This Court obviously has no basis to determine that the jury was incorrect in determining that defendant was one of the people it saw in the video (*see People v Grady*, 67 AD3d 563, 564 [2009], *lv denied* 14 NY3d 888 [2010]).

Faced with these unassailable facts, defendant now argues that the complainant was psychologically incapable of accurately identifying her assailants. This, he asserts, is because of the stress she experienced during the robbery, much of which, he claims, must have been brought on by the fact that one of the men had a gun trained on her for part of the incident. He also

asserts that the complainant's memory of her assailant must have decayed between the time of the incident and the time she spotted him on the street. In his brief, defendant cites to numerous psychology journals which discuss the current research on the stress-related fallibility of memory in the context of witness identifications. The majority also refers to such scientific theory in holding that the conviction was against the weight of the evidence.

The majority's conclusions are error. First, the complainant's testimony established that she had ample opportunity to observe her assailants before they revealed that they were in the store to rob it. The record shows that there was a significant period of time when she was looking at the perpetrators while not under the type of stress which defendant now asserts renders crime victims incapable of accurately identifying suspects.

Second, any discussion of the science of witness fallibility in the area of identification has no place in this case, because there was no expert testimony concerning it. The purpose of a weight of the evidence review is to determine whether the record supported the jury's verdict. If the jurors were never presented with certain evidence, a reviewing court cannot consider it in determining whether to reverse a verdict.

This fundamental concept of appellate jurisprudence, being bound by the record before us, applies equally to scientific evidence, as it does to any other type of evidence. Where the issue in the case is not one commonly understood by laypersons, expert testimony is necessary to inform the jury. Here, the majority finds fault with the jury for not having considered the corrosive effects of event stress, exposure time, and weapon focus on a person's ability to confidently identify a perpetrator without any evidence before them on these issues. The Court of Appeals has expressly held that these scientific theories are "counterintuitive, which places them beyond the ken of the average juror" (*People v Abney*, 13 NY3d 251, 268 [2009]). Accordingly, expert testimony was indispensable in this case. Simply, there is no basis on this record for reversing the conviction as against the weight of the evidence, notwithstanding defendant's failure to introduce an expert witness.

Again, the evidence which we are required to review is comprised of the trial record only (*see People v Dukes*, 284 AD2d 236 [2001], *lv denied* 97 NY2d 681 [2001]). The trial record contains no psychological evidence from which the jury could have inferred that the complainant's testimony that defendant was her assailant was fallible. Constrained as we are by the record evidence, which amply supports the verdict, it is simply not

reasonable to conclude that the jury had an insufficient basis for finding defendant guilty. Accordingly, I respectfully dissent.

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

ENTERED: SEPTEMBER 4, 2012

CLERK