SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 9, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2276 Claude Williams, Index 117924/04
Plaintiff-Respondent,

-against-

Cindy Hooper, et al.,
Defendants-Appellants.

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Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellants.

Ephrem J. Wertenteil, New York for respondent.

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Judgment, Supreme Court, New York County (Judith J. Gishe, J.), entered April 27, 2009, after a jury trial, awarding plaintiff $1.8 million for past and future pain and suffering, reversed, on the law, without costs, the judgment vacated and the matter remanded for a new trial.

Even assuming that the jury reasonably could find that a bus struck plaintiff after its driver ran a red light at the intersection of Madison Avenue and 125th Street while proceeding north, the evidence unquestionably established that plaintiff was

struck while he was in Madison Avenue itself, not on the sidewalk on the east side of the avenue, some seven feet north of the crosswalk. The jury could not rationally have found fault on the part of the bus driver unless it accepted plaintiff's theory that the bus was traveling "too close" to the curb as it approached the bus stop. The notion that the bus was "too close" however, is founded solely on the testimony of plaintiff's expert, that a bus driver pulling up to a bus stop should "[g]ive [her]self a cushion of space, six [feet] a lane" before pulling over to the curb. The expert's opinion about this safety cushion was supported by nothing (*see Jones v City of New York*, 32 AD3d 706, 707 [2006] [rejecting expert's opinion regarding ostensible safety practice because "no support was offered for th[e] assertion, either in the form of a published industry or professional standard or in the form of evidence that such a practice had been generally accepted in the relevant industry"]). But as defendant Transit Authority failed to object to the expert's testimony, the point must be conceded to plaintiff for purposes of this appeal.[1] It should be stressed, however, that

[1]On appeal, plaintiff's sole argument is that "this 'cushion of space' doctrine is clearly supported" by *Bello v New York City Tr. Auth.*, 50 AD3d 511 (2008). *Bello* does not provide a shred of support for the expert's opinion. In *Bello*, we held that the

there is *no* evidence that the bus was closer than two feet, seven inches from the curb when plaintiff was struck. Even more importantly, plaintiff's own theory of the case, a theory that is compelled by the physical evidence and is consistent with the testimony of independent witnesses, was that plaintiff was hit immediately after he stepped off the sidewalk and into the path of the bus on Madison Avenue. As is discussed below, it is indisputable, moreover, that plaintiff stepped off without looking when he was about seven feet north of the crosswalk.

Although plaintiff points to inconsistencies in the statements given by the driver, those inconsistencies are not affirmative proof of her negligence (*see Barnes v City of New York*, 44 AD3d 39, 47 [1st Dept. 2007] [Sullivan, J.]). In his brief, plaintiff refers to "damning conclusions" regarding the driver's conduct contained in an investigatory report prepared by a Transit Authority supervisor. It is clear, however, that the

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jury could conclude that a bus driver should have been alert to the possibility that "one of the rowdy children on the sidewalk, who were pushing each other, would push another person into the bus" (*id.* at 511). As the Transit Authority observes, "*Bello* and its solicitousness for the limited capacities of a child has nothing to say to a case revolving around the irresponsibility of a mature adult." *Bello* cannot rationally be thought to support the expert's sweeping opinion that such a safety cushion should be observed in all circumstances.

portions of the report to which plaintiff refers were not admitted into evidence. No mention of those conclusions was made by any of the parties during their summations. If the findings were in evidence, it is simply inconceivable that plaintiff's counsel nonetheless made no mention of them.

The first reason we should reverse is that plaintiff should not have received the benefit of a jury charge under the *Noseworthy* doctrine (*Noseworthy v City of New York*, 298 NY 76 [1948]). That instruction, which permits a plaintiff to prevail on a lesser degree of proof, is borne of necessity. It mitigates the unfairness of effectively foreclosing recovery by a plaintiff who is otherwise unable to present a case because of amnesia stemming from the very accident or event for which he seeks to hold the defendant liable. But the potential unfairness to the defendant from a *Noseworthy* charge also is apparent and deserving of the law's solicitude. As we have held, "It is only where the memory loss has effectively prevented a plaintiff from describing the occurrence that invocation of the [*Noseworthy* doctrine] is warranted" (*Jarrett v Madifari*, 67 AD2d 396, 403 [1979]). In ruling that a *Noseworthy* instruction should not have been given, we stated as follows:

> "[O]n this record it is clear that plaintiff

> . . ., although he apparently suffers from a memory defect, is not entitled to application of this [the *Noseworthy*] rule. Patently, said plaintiff testified in some detail at an examination before trial as to the occurrence and in much less detail at the trial. His answers, embodied in his deposition, were read at trial. Thus, in large measure, plaintiff was able to give to the trial court his version of the occurrence . . . Whether that description proceeds by way of trial testimony or testimony at an examination before trial is irrelevant" (*id.*).

Similarly, in *Jarvis v LaFarge N. Am., Inc.* (52 AD3d 1179 [2008]), the Fourth Department held that the trial court properly denied the *Noseworthy* instruction requested by the plaintiff motorcyclist, who "was unable to recall the details of the accident" (*id.* at 1180) because of the retrograde amnesia he sustained (*id.* at 1181). The court stressed that "[a]ny gaps in plaintiff's recollection of the accident could be pieced together from plaintiff's trial testimony and the testimony of nonparty eyewitnesses" (*id.* [internal quotation marks and brackets omitted]).

Given plaintiff's deposition testimony, the *Noseworthy* instruction was a manifest error. He recalled that the weather that day was "[f]air," that the accident occurred at 9:15 and that he had parked his car and crossed the street to call a friend at a telephone booth with two phones right behind a

mailbox on the east side of Madison; in addition to recalling the location of the accident, he recalled that he had been unable to reach his friend, got his money back and turned to the left while he was on the sidewalk; he recalled that when he turned he was on the sidewalk and "[t]hat is when the bus hit me, struck me inside the head." Asked if he saw the bus before it hit him, he answered, "No." Asked where he was looking when he was hit, his recollection enabled him to testify, "I was looking straight. I don't know." Asked again, he was able to testify, "When the bus hit me, I was looking – when it hit me, I was looking straight." By "straight," he meant "across the street." When asked, "did you see what portion of the bus came into contact with you?," he first answered, "The mirror. The mirror struck me." But when asked, "Did you actually see the mirror come into contact with you?," he expressed no uncertainty and answered, "No. When I turned, made one step back to my left, that is when I saw the bus. It struck me on the side of the head." Thus, he even recalled seeing the bus at virtually the moment of impact. He was unequivocal that it was the mirror that hit him; "It struck me, you know, side of the head." Asked if he walked into the side of the bus, his answer was "No." In response to specific questions, he recalled that he did not hear a horn honk before he

was hit and that he had not stepped off the curb.

But although that deposition testimony is alone sufficient to compel the conclusion that plaintiff was not entitled to a *Noseworthy* instruction (*see Jarrett*, 67 AD2d at 403, *supra* [whether the plaintiff's description of the occurrence "proceeds by way of trial testimony or testimony at an examination before trial is irrelevant"]), there is much more. Plaintiff also testified at a General Municipal Law § 50-h hearing at which he gave essentially the same testimony about the accident itself, about where he was (on the sidewalk), what hit him (the mirror) and about not hearing the bus, expressing uncertainty only about whether it was the mirror on the left or the right side of the bus. That plaintiff professed at trial not to recall whether he was completely on the sidewalk or partly on the street is of no moment. It does not negate the fact that his deposition and § 50-h testimony demonstrate that he "was able to give to the trial court his version of the occurrence" (*id.*).

At trial, too, plaintiff was able to present his version of the events. Asked how the accident occurred, he recalled seeing the mirror just before he was struck: "All I saw is just the mirror of the bus when it came back and knocked me down." He was able to recall what he had been doing just before he was hit:

after using the phone, he "stepped back to the curb, close to the curb." Indeed, he recalled that he "was back up close to the curb . . . real close to the curb." Moreover, he recalled that he had been standing between the mailbox and the telephones. In addition, his recollection also was good enough for him to tell the jury that he had not consumed any alcohol that day and had not stopped anywhere to drink alcohol. Thus, plaintiff was not unable to muster any response to the testimony of the triage nurse, consistent with the contemporaneous notes he prepared after plaintiff was taken to the hospital, that plaintiff had told him he was intoxicated.

Although the concurrence cites *Sala v Spallone* (38 AD2d 860 [1972]), that decision only exposes another fatal defect in plaintiff's position. In *Sala*, the Second Department held that a *Noseworthy* instruction should be given "if the jury is satisfied, from the medical and other evidence presented, that [the plaintiff] suffers from a loss of memory that makes it *impossible* for him to recall events at or about the time of the accident and that the injuries he received as a result of the accident were a substantial factor in causing his memory loss" (*id.* [emphasis added]). Here, it plainly was not impossible for plaintiff to recall events at or about the time of the accident. The

neurologist who testified on behalf of plaintiff certainly never so testified. Nor did he offer anything remotely like an opinion that the prior testimony given by plaintiff was unreliable on account of the injuries he sustained. In fact, when asked to explain the diagnosis of "anterio/retrograde amnesia," the neurologist testified only that "anterio/retrograde amnesia is you don't remember things that happened *subsequent* to the accident – *after* the accident" (emphasis added). We might indulge the assumption that the jury nonetheless realized that this testimony mistakenly described only the anteriograde amnesia component of the diagnosis and that plaintiff's retrograde amnesia referred to an inability to remember events occurring before the accident. But even so, the jury heard no evidence that plaintiff's memory had been impaired so as to render unreliable his hearing and deposition testimony about the events prior to the accident. And, of course, when he gave that testimony, plaintiff never testified that he thought that the details that he recalled might be wrong because of his injuries.[2]

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[2]For these additional reasons, the *Noseworthy* instruction was a clear error. We need not consider whether it also was erroneous because of the testimony of the nonparty eyewitnesses (*Jarvis*, 52 AD3d at 1181, *supra* ["Any gaps in plaintiff's recollection of the accident could be pieced together from plaintiff's trial testimony *and* the testimony of nonparty

The trial court concluded that the instruction was proper in significant part because the core of the account plaintiff gave at his deposition and § 50-h testimony was contradicted by the physical evidence. That is, and as plaintiff's counsel acknowledged in his opening statement, plaintiff could not have been struck by the mirror because it was too high up to have come into contact with plaintiff's head. According to the trial court, a *Noseworthy* instruction was warranted because of the "competent medical evidence that plaintiff did have amnesia and his version of the events was at odds with most of the eyewitnesses as well as not detailed." Even putting aside the infirmity noted above in the testimony about plaintiff's amnesia, the trial court erred because plaintiff did testify in detail about the occurrence. The trial court's finding to the contrary is manifestly wrong. As noted, plaintiff's testimony that he was struck by the mirror of the bus is what was at odds with the accounts given by other eyewitnesses (and with the objective fact that he could not have been hit by the mirror). But it scarcely follows that his testimony about this one detail is sufficient to warrant a *Noseworthy* instruction. To the contrary, the

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eyewitnesses"(internal quotation marks and brackets omitted; emphasis added)]).

precedents discussed above make clear that it is not.

Moreover, there certainly are other possible explanations, i.e., ones other than amnesia, for plaintiff's repeated insistence that he was hit by the mirror. If the last thing plaintiff saw was the mirror, his testimony that he was struck by the mirror may have been the result of a simple mistake, rather than a brain injury. Or, as the Transit Authority argues, "[p]laintiff would appear far less blameworthy if he were on the curb and the projecting mirror of a passing bus s[truck] him in the head than if he had walked off the curb . . . and . . . into [the bus'] doors." But in any event, regardless of whether plaintiff was mistaken or lied to avoid admitting he had stepped off the curb and into the street without looking, the crucial fact is that there was *no* medical testimony to the effect that this or any other detail to which plaintiff testified was unreliable because of his head injury.[3]

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[3]Plaintiff is wrong to the extent he contends that the *Noseworthy* instruction was proper because the bus driver had better knowledge than he of what happened. Establishing that the defendant's knowledge of the relevant facts is superior to the plaintiff's is a necessary condition that a plaintiff with retrograde amnesia must satisfy to obtain a *Noseworthy* instruction. But it is not a sufficient condition. Neither *Walsh v Murphy* (267 AD2d 172 [1st Dept. 1999]) nor any other case holds otherwise.

The jury's irrational finding of no comparative negligence is the second and independent reason why a new trial is necessary. Plaintiff's efforts to uphold that finding are meritless. Except in one respect, this case is indistinguishable from *Splain v New York City Tr. Auth.* (180 AD2d 454 [1992], *lv denied* 80 NY2d 759 [1992]). In *Splain*, "[p]laintiff's evidence demonstrated that he was on the sidewalk at the curb in the middle of a block when, without turning his head to look for traffic, he suddenly stepped off, almost instantly colliding with the side of a Transit Authority bus traveling at a speed of from 10 to 15 miles per hour." We held, of course, "that these facts do not establish any actionable negligence" (*id.*). *Splain* is distinguishable only on the ground that the safety-cushion theory of liability was not advanced. But the presence of that theory in this case does not absolve plaintiff of all liability.

The decision of the Court of Appeals in *Rucker v Fifth Ave. Coach Lines,* (15 NY2d 516 [1964], *cert denied* 382 US 815 [1965]), also is instructive. In *Rucker*, the Court of Appeals held, "upon the ground, fully developed in the dissenting opinion at the Appellate Division, that the plaintiff failed, as a matter of law, to establish actionable negligence" (*id.* at 517). As Justice Steuer stated in that dissenting opinion:

> "The claim that the [bus] driver on seeing the plaintiff standing out from the curb should have anticipated that she might at any time have proceeded into the street and hence into the path of his bus, and have slowed down, assumes a rule of conduct utterly at variance with street conditions and, if followed in practice, would undoubtedly so disrupt traffic that the streets would become well nigh unusable for vehicles" (*Rucker*, 19 AD2d 598, 599 [1963]).

If there were such a duty:

> "A driver would be obliged to stop or slow down to the extent that he could stop in time, his progress would be so affected at practically every corner he approached that vehicular traffic would be impeded to an intolerable extent" (*id.*).

But the most critical point is that, even assuming that the bus driver was negligent, plaintiff's own negligence is just indisputable. As noted earlier, plaintiff's own theory of the case is that he stepped off the curb and into the street. Plaintiff's counsel expressly so conceded at oral argument of this appeal. At trial, plaintiff's expert gave his opinion as to how the accident happened: "My opinion is that the bus is traveling adjacent to the curb, very close to the curb, Mr. Williams turns and takes one step and has an accident . . . " Moreover, it is indisputable that plaintiff stepped into Madison Avenue without looking. Apart from plaintiff's own testimony

that he was looking "straight" (i.e., "across the street," to the west and not downtown), there is common sense. Who would step off the curb and into a bus after looking and seeing it coming? Other indisputable facts supportive of a finding of comparative negligence are that plaintiff was some seven feet north of the crosswalk, and that the bus was not closer than two feet, seven inches from the curb, when the bus hit plaintiff.

Although no additional citation of authority is necessary, plaintiff's conduct was manifestly negligent (*see e.g. Pinto v Selinger Ice Cream Corp.*, 47 AD3d 496 [2008]). Albeit very infrequently, juries sometimes make findings that are utterly without foundation in the law or the evidence. This is one such case, and the finding of no comparative negligence is so irrational as to require that we unconditionally direct a new trial (*see e.g. D'Onofrio-Ruden v Town of Hempstead,* 29 AD3d 512 [2006]), rather than order a new trial unless plaintiff agreed to a specific share of culpability (*see e.g.*, *Streich v New York City Tr. Auth.*, 305 AD2d 221 [2003].

Most of the remaining issues may be dealt with more summarily. Even assuming for the moment that the Transit Authority's challenges to the sufficiency of the evidence have been waived by its failure to move under CPLR 4401 for a directed

verdict at the close of plaintiff's case (*but see Siegel, NY Prac.* § 405 [4th ed]), the Transit Authority's weight-of-the-evidence arguments are properly before us. With respect to the theory of liability premised on the claim that the bus driver ran a red light, it is supported only by conjecture. The ambulance driver, who also had been proceeding north on Madison Avenue and saw the accident, gave no such testimony; indeed, *no* witness testified that the bus ran a red light. But in any event, this theory of liability is fatally flawed for another reason. Plaintiff was some seven feet north of the crosswalk -- the evidence on this score is uncontested -- and he stepped off the curb without looking. Thus, the color of the light and the precise speed of the bus are irrelevant[4] (*Sheehan v City of New York*, 40 NY2d 496 [1976]). A finding of liability on the safe-cushion theory advanced by plaintiff's expert, however, is supported by legally sufficient evidence. Accordingly, we need not decide whether it is supported by the weight of the evidence, as the Transit Authority would not be entitled in any event to

[4]At most, based on unpersuasive extrapolations, plaintiff's expert opined that the bus was moving at up to 18 miles per hour when it hit plaintiff (as opposed to 5 to 10 miles per hour estimated by the ambulance driver). The opinion of plaintiff's expert on the speed of the bus, however, is relevant to and supports the safe-cushion theory.

dismissal of the complaint.

The Transit Authority is entitled to no relief on account of its claim that plaintiff unilaterally amended the notice of claim to assert that he was hit not by the mirror but by some other front part of the bus. Contrary to the Transit Authority's claim, plaintiff did not thereby advance a new and distinct theory of liability (*cf. Monmasterio v New York City Hous. Auth.*, 39 AD3d 354, 356 [2007]). As there should be a new trial, we briefly address the Transit Authority's argument that a missing document charge should not have been given with respect to the missing color photographs. Black-and-white versions of the photographs were admitted; the Transit Authority employee who took the photographs acknowledged that he saw blood, that the blood was on the sidewalk and that blood was not visible on the black-and-white photographs but would have been visible in the missing color photographs. To be sure, the Transit Authority provided no explanation at all for the absence. But a missing document charge should not be given unless the document bears on a material issue at trial (*cf. People v Gonzalez*, 68 NY2d 424, 427 [1986]). We need not (and should not, given the sparseness of the record on the question) resolve the question of whether the color photographs bear on a material issue at trial

concerning precisely where the bus hit him. The parties should focus on that question in the event the issue arises at the new trial.

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

SAXE, J. (concurring)

Like my colleagues, I would reverse and remand for a new trial. I write separately, however, because I would reverse on different grounds.

Unlike the majority, I do not view the trial court's use of the *Noseworthy* charge (*see Noseworthy v City of New York*, 298 NY 76 [1948]) as improper. On the contrary, I perceive a sound basis for the court's finding that plaintiff had suffered memory loss (*see Sala v Spallone*, 38 AD2d 860 [1972]) that effectively prevented him from accurately recalling the events (*see Jarrett v Madifari*, 67 AD2d 396 [1979]). As to defendants' contention that plaintiff should have been precluded from presenting for the first time at trial a new description of the accident, based on the assertions in his notice of claim, I join the rest of the bench in rejecting that challenge.

In my view, a new trial is necessary because the jury's liability findings were against the weight of the evidence, both on the issue of the bus driver's negligence and on the issue of the plaintiff's own negligence. As to plaintiff's comparative negligence, there was no dispute that plaintiff stepped onto Madison Avenue north of the crosswalk at 125th Street without first checking for oncoming vehicles, an act that qualifies as

negligent. The driver's various contradictory statements about how the accident happened do nothing to extinguish the undisputed fact that plaintiff stepped out into the roadway without first checking for oncoming vehicles. The jury's decision to attribute no comparative negligence to plaintiff under such circumstances is inexplicable.

As to plaintiff's claim of the driver's negligence, it rested too heavily on assertions unsupported by evidence or law to be permitted to stand. One claimed basis of liability was the assertion by plaintiff's expert that a bus driver ought to maintain a six- to eight-foot "cushion" of space between the bus and the curb until it reaches the bus stop, at which point it should pull in adjacent to the curb. There is no basis in law for the imposition of such a duty on bus drivers; there is no such regulatory or industry standard. Indeed, there are a number of reasons why imposing such a duty on bus drivers would be inadvisable. Even if defendants failed to sufficiently challenge the theory proffered by plaintiff's expert as unfounded, we should rule on the issue in the interest of justice in order to avoid reliance on that reasoning for future liability claims against bus companies and drivers.

Another invalid basis proffered by plaintiff as support for

the claim of negligence against defendants was the assertion that the bus driver ran a red light at 125th Street. There was no testimony either so stating or supporting such an inference. The eyewitness ambulance driver who was also heading northbound on Madison Avenue, but was stopped in the far right lane at a red light on 125th Street, merely stated that defendant's bus had proceeded northbound towards the bus stop just north of where plaintiff was standing, that plaintiff stepped off the sidewalk onto Madison Avenue, and that the bus then struck plaintiff and knocked him back onto the curb. Nothing in what he or any other witness described indicated in any way that the bus had run the red light.

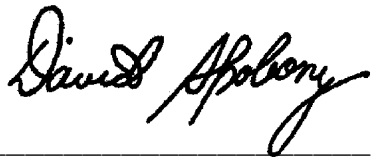
In any event, the assertion that the traffic signal at 125th Street was red when defendant bus driver drove through the intersection is meaningless, since plaintiff was seven feet north of the crosswalk, and stepped into the roadway without checking either the light or the road for oncoming vehicles. The color of the traffic light would have had virtually no bearing on the occurrence of the accident.

Finally, the driver's many contradictory statements may justify a rejection of the driver's credibility, but they cannot substitute for an affirmative showing of negligence.

Although defendants' failure to move for a directed verdict pursuant to CPLR 4401 at the close of evidence precludes the dismissal on appeal (*see Miller v Miller*, 68 NY2d 871 [1986]) to which defendants claim entitlement under *Splain v New York City Tr. Auth.* (180 AD2d 454 [1992], *lv denied* 80 NY2d 759 [1992]), both plaintiff's excessive reliance on unsupported reasoning, and the jury's failure to find any comparative negligence despite plaintiff's undisputed conduct, warrant a reversal and a remand for a new trial on liability.

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

ENTERED: NOVEMBER 9, 2010



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Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3552 The People of the State of New York, Ind. 5698/07
Respondent,

-against-

Elminio Ortiz,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Mary C. Farrington of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered December 23, 2008, as amended January 8, 2009, convicting defendant, after a jury trial, of four counts of burglary in the second degree and four counts of criminal possession of stolen property in the fifth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 16 years to life, unanimously affirmed.

The court properly denied defendant's challenge for cause to a prospective juror. Although the panelist used language such as "try," he gave the requisite assurance that his friendship with a Bronx prosecutor would not affect his ability to be fair (*see People v Rivera*, 33 AD3d 303 [2006], *affd* 9 NY3d 904 [2007]).

Defendant claims that this panelist also made statements about a crime committed against his parents while they were vacationing, and that these statements cast doubt on his impartiality. However, the record, as properly resettled by the court, clearly establishes that these statements were actually made by a different panelist with a very similar name. The comments about the crime where the panelist's parents had been victimized matched background information given by the similarly-named panelist earlier in the voir dire, and the court reporter submitted an affidavit in which she explained her use of a phonetic spelling. The conclusion is inescapable that the court reporter inadvertently transposed the two panelists' similar names. The circumstances did not warrant a reconstruction hearing, and defendant's procedural and substantive arguments regarding the resettlement proceeding are without merit.

Defendant's legal sufficiency argument, addressed to the "dwelling" element of second-degree burglary (*see* Penal Law § 140.00[3]; 140.25[2]) is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

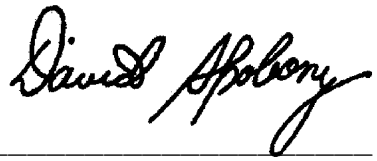
With criminal intent, defendant unlawfully entered four locations in a hospital. Although the hospital was used for overnight lodging, none of these particular spaces was used for that purpose. Defendant concedes that a hospital building may be considered a dwelling (*see People v Harris*, 19 AD3d 171 [2005], *lv denied* 5 NY3d 789 [2005]), but argues that since the indictment, and the court's charge, specified that defendant was accused of entering these four locations, the People were required to prove the particular locations were dwellings. However, each of these units was a dwelling by virtue of being "a part of the main building" (Penal Law § 140.00[2]), which was undisputedly a dwelling (*see People v Rohena*, 186 AD2d 509, 511 [1992], *lv denied* 81 NY2d 794 [1993]). We have considered and rejected defendant's ineffective assistance of counsel argument relating to this issue.

Defendant did not preserve his constitutional challenge to his mandatory minimum sentence as a persistent violent felony offender (*see People v Ingram*, 67 NY2d 897, 899 [1986]), and we decline to review it in the interest of justice. As an

alternative holding, we also reject it on the merits (*see People v Thompson*, 83 NY2d 477, 480 [1994]; *People v Broadie*, 37 NY2d 100 [1975], *cert denied* 423 US 950 [1975]; *see also Ewing v California*, 538 US 11, 29-30 [2003]).

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

ENTERED: NOVEMBER 9, 2010



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Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3553-
3554 14 Bruckner LLC, Index 302591/09
Plaintiff-Appellant,

-against-

14 Bruckner Blvd. Realty Corp.,
Defendant-Respondent.

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Kucker & Bruh, LLP, New York (Marc Jonas Block of counsel), for appellant.

Holland & Knight LLP, New York (Marc L. Antonecchia of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered March 18, 2010, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about January 13, 2010, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff's causes of action for breach of contract, fraud and negligent misrepresentation in the negotiating and signing of the lease agreement are wholly barred by the plain language of the lease providing that plaintiff accepted the premises as is and agreed to perform, at its own expense, any and all repairs to

the premises and that defendant made no representation as to the condition of the premises.

Even if plaintiff's fraud and negligent misrepresentation causes of action were not barred by the language of the lease, they would be barred by the statute of limitations. Plaintiff signed the lease in 2002. It commenced this action one year after the six-year statute of limitations for breach of contract, fraud and negligent misrepresentation expired (*see* CPLR 213[2], [8]). Indeed, plaintiff waited more than two years after its February 2007 discovery of the alleged latent defects to bring the fraud and negligent misrepresentation causes of action (*see* CPLR 213[8]).

Plaintiff's time-barred causes of action are not saved by the relation back doctrine because they are asserted in this context neither as counterclaims nor defenses (*see* CPLR 203[d]).

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 9, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3555 Global Precast, Inc., Index 13388/07
Plaintiff-Appellant,

-against-

Stonewall Contracting Corp., et al.,
Defendants-Respondents.

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Sheats & Associates, PC, Brewerton (Edward J. Sheats of counsel), for appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Mark A. Rosen of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 2, 2009, which, in this action seeking damages for, in part, breach of contract, inter alia, granted the motion by defendant Stonewall Contracting Corp. for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of denying the motion, and otherwise affirmed, without costs.

As a general rule, a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release absent fraudulent inducement, fraudulent concealment, misrepresentation, mutual

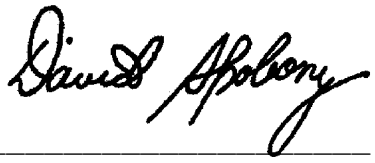
mistake or duress (see *Littman v Magee*, 54 AD3d 14, 17 [2008]; *Global Mins. and Metals Corp. v Holme*, 35 AD3d 93, 98 [2006], *lv denied* 8 NY3d 804 [2007]). However, the record herein reveals that following the execution of the purported release documents, defendant, by its conduct, may have implicitly acknowledged plaintiff's right to obtain additional payment (*see Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 495 [2010]; *E-J Elec. Installation Co. v Brooklyn Historical Socy.*, 43 AD3d 642, 643-644 [2007]). Under these circumstances, there are triable questions of fact as to whether the partial lien waiver and the change order to which plaintiff agreed, were intended to encompass the claims that plaintiff subsequently presented to defendant for work performed by one of its subcontractors, Tr-State Stone Erectors. Indeed, where a waiver form purports to acknowledge that no further payments are owed, but the parties' conduct indicates otherwise, the instrument will not be construed as a release (see *E-J Elec. Installation Co.* at 644).

Defendant argues, however, that its obligation was, at most, simply to pass the subject claims along to the Dormitory Authority of the State of New York (DASNY), the project owner, which agency allegedly caused the delays that occurred herein, and that it was not, without a contractual commitment to the

contrary, responsible for delays incurred by its subcontractor unless those delays were caused by some agency or circumstance under its direction or control (see *Triangle Sheet Metal Works v Merritt and Co.*, 79 NY2d 801, 802 [1991]). Nevertheless, the reason why the invoices submitted by plaintiff on behalf of Tri-State were not paid cannot be said, as a matter of law, to have been the result solely of DASNY's conduct and/or its refusal to pay them. There are, consequently, triable questions of fact as to whether the delays attributable to the DASNY were a substantial contributing cause of the delay and whether it was this agency that declined payment of the subject claims.

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

ENTERED: NOVEMBER 9, 2010



CLERK

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3556 In re Eva A. Perez,
Petitioner-Respondent,

-against-

Victor M. Perez,
Respondent-Appellant.

_____

Carol Lipton, Brooklyn for appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), Law Guardian.

_____

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about September 29, 2008, which, after a hearing, granted petitioner mother's application for a final order of protection in her and her son's favor against respondent father, unanimously affirmed, without costs.

Application by appellant's counsel to withdraw as counsel granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]).

While appellant's counsel seeks to be relieved, the Law Guardian contends that the appeal should be prosecuted and considered on the merits. She also maintains that the order of protection should be resettled to reflect the court's oral

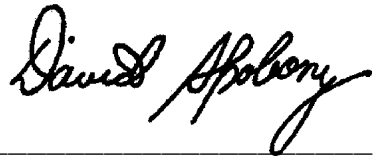
determination that the prohibition against respondent's contacting his son is subject to court-ordered visitation.

We agree with appellant's assigned counsel that there are no non-frivolous issues that can be raised on this appeal. Thus, we grant her application to withdraw and affirm the order. Counsel properly informed appellant of her opinion that the appeal lacked merit and of his right to seek permission to file a pro se brief with this Court. He has not sought that permission. We note that the Law Guardian took no position when petitioner reiterated her request for a final order of protection at the conclusion of the hearing before the Family Court.

Contrary to the Law Guardian's contention, there is no need to conform the court's written order to its oral decision; the former clearly reflects the latter. In any event, any application to modify the order must be made before the Family Court.

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

ENTERED: NOVEMBER 9, 2010



CLERK

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3557 Nicole Benjamin, Index 7464/04
Plaintiff-Appellant,

-against-

Julio Teixeira, M.D., et al.,
Defendants-Respondents,

Elliot Goodman, M.D., et al.,
Defendants.

_____

Stephen D. Chakwin, Jr., New York for appellant.

Widowski & Steinhart, LLP, New York (Esther S. Widowski of counsel), for Julio Teixeira, M.D., and Montefiore Medical Center respondents.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for Rolando Chumaceiro, M.D., respondent.

_____

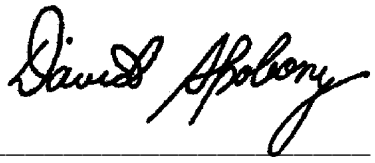
Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered June 29, 2009, which, in this action alleging medical malpractice, denied plaintiff's motion to restore her case to the trial calendar, and dismissed the complaint as abandoned, unanimously affirmed, without costs.

A party seeking to have a case restored to the trial calendar must demonstrate a meritorious cause of action, a reasonable excuse for the delay, a lack of intent to abandon the

action and the absence of prejudice to the opposing party (*see e.g. Kaufman v Bauer*, 36 AD3d 481, 482 [2007]). Here, plaintiff, who brought this motion more than one year after the action had been struck from the trial calendar, failed to make the requisite showing as she offered no excuse for the delay (*see Almanzar v Rye Ridge Realty Co.*, 249 AD2d 128 [1998]). Plaintiff's conclusory claim of law office failure, made for the first time on appeal, is not supported by the record (*cf. Kaufman*, 36 AD3d at 483). Furthermore, the lack of any activity in the action between the time it was struck from the trial calendar and the current motion fails to show a lack of intent to abandon the action (*see Okun v Tanners*, 11 NY3d 762 [2008].

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

ENTERED: NOVEMBER 9, 2010



CLERK

Gonzalez, P.J., Saxe, Richter, Román, JJ.

3558 Larry Ashkinazy, Index 114048/03
Plaintiff-Respondent,

-against-

Consolidated Edison Company of New York, Inc.,
Defendant-Appellant,

The City of New York,
Defendant.

_____

Richard W. Babinecz, New York (Helman R. Brook of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Brian J. Shoot of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Karen Smith J.), entered September 2, 2009, inter alia, awarding plaintiff damages for past medical expenses, future home health care, future lost earnings and past and future pain and suffering, unanimously modified, on the facts, to vacate the award for past and future pain and suffering and remand the matter for a new trial on those issues only, and otherwise affirmed, without costs, unless plaintiff, within 30 days of service of a copy of this order, stipulates to reduce the award for past pain and suffering from

$2,418,000 to $1.5 million and for future pain and suffering from $8,060,000 to $3.5 million, and to the entry of an amended judgment in accordance therewith.

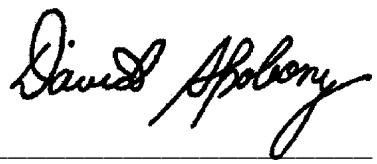
Defendant Con Edison sought to impeach plaintiff's credibility by introducing testimony given by him at the trials of two post-accident malpractice actions against him to show that his memory was not impaired at those trials. The court properly excluded the testimony on the ground that it would not have shed any light on plaintiff's credibility.

We find the amount of damages awarded plaintiff for past and future pain and suffering excessive to the extent indicated (CPLR 5501[c]; *see e.g. Paek v City of New York*, 28 AD3d 207 [2006], *lv denied* 8 NY3d 805 [2007]).

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

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

ENTERED: NOVEMBER 9, 2010



CLERK

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3560-
3561 Costal Nejapa, LTD., Index 600632/07
Plaintiff-Respondent,

-against-

Crystal Power Company, LTD.,
Defendant-Appellant,

Banco Agricola, et al.,
Defendants-Respondents.

_____

McLaughlin & Stern, LLP, New York (Jon Paul Robbins of counsel), for appellant.

Andrews Kurth LLP, New York (Joseph A. Patella of counsel), for Costal Nejapa, LTD., respondent.

Mark C.H. Mandell, Annandale, NJ, for Banco respondents.

_____

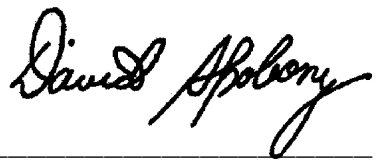
Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 11, 2009, discharging plaintiff from any liability to defendant-appellant Crystal Power Company and defendants-respondents Banco Agricola, Banco Salvadoreno and Banco G & T Continental El Salvador, S. A. in this interpleader action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about May 27, 2009, unanimously dismissed, without costs, as subsumed in the appeal

from the judgment.

Appellant's counsel negotiated and agreed to the order and the precise language that was incorporated into the appealed from judgment. The fact that the language of the judgment to which appellant agreed has had negative consequences for it in another case in Texas state court is not a basis to set aside the judgment (*see Charlop v A.O. Smith Water Prods.*, 64 AD3d 486, 486 [2009] [absent "fraud, mistake, collusion, [or] accident" judgment on consent will not be vacated]).

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

ENTERED: NOVEMBER 9, 2010



CLERK

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3562-
3562A The People of the State of New York, Ind. 4686/03
Respondent,

-against-

Mark Davis,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jennifer Marinaccio of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John A. Barone, J.), rendered on or about May 26, 2005, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 10 years, unanimously modified, on the law, to the extent of vacating the imposition of a DNA databank fee, and otherwise affirmed. Order, same court (Michael R. Sonberg, J.), entered on or about September 30, 2009, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the

jury's determinations concerning identification and credibility, including its evaluation of the differences between the victim's description of his assailant's hairstyle and facial hair and other evidence bearing on defendant's possible appearance around the time of the crime, including the photo taken at his arrest six months afterwards.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). The CPL 440.10 motion court conducted a thorough evidentiary hearing on this issue (*see* 25 Misc 3d 1207[A], 2009 NY Slip Op 51994[U] [2009]), and the record supports its detailed findings of fact, including credibility determinations, and its conclusions of law. To the extent that trial counsel may have erred in opening the door to the admission of a certain photograph or photographs depicting defendant's hairstyle on occasions prior to the crime, defendant has not shown a reasonable probability that such a mistake or mistakes affected the outcome of the trial (*see Strickland*, 466 US at 694). We are not persuaded that the photographs eviscerated defendant's defense or were otherwise so prejudicial as to undermine confidence in the result. The evidence adduced at the hearing

and properly credited by the court establishes that the remaining acts or omissions of counsel that defendant challenges met an "objective standard of reasonableness" (*id.* at 688). In any event, we also conclude that none of these acts or omissions, viewed individually or collectively, had a reasonable probability of affecting the outcome or depriving defendant of a fair trial. In particular, defendant has not shown how different courses of action by counsel would have improved the quality or quantity of the evidence that counsel placed before the jury to impeach the victim's credibility and the reliability of his identification.

None of the trial court's evidentiary rulings warrant reversal. While a detective gave testimony that could be viewed as implicitly bolstering the victim's identification, the court's limiting instruction was sufficient to prevent any prejudice. The court gave defendant ample latitude in which to impeach the victim as to all matters relating to his credibility, and it properly exercised its discretion in limiting impeachment that was contrary to the rules of evidence. Accordingly, there was no violation of defendant's right to confront witnesses and present a defense (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

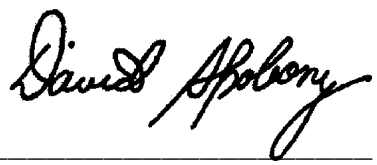
Defendant did not preserve his challenge to the court's

response to the jury's deadlock note, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. The charge contained language that effectively conveyed the concept that it was the jurors' "duty to decide the case if they could conscientiously do so" (*Allen v United States*, 164 US 492, 501 [1896]), and it was not constitutionally deficient (*see Spears v Greiner*, 459 F3d 200 [2d Cir 2006]). We have considered and rejected defendant's additional ineffective assistance of counsel claim relating to this issue.

The DNA databank fee should not have been imposed, as the authorizing legislation (Penal Law § 60.35[1][e]) became effective after the crime was committed.

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

ENTERED: NOVEMBER 9, 2010



CLERK

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3563 In re Brianna R.,

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

Marisol G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Bahn Herzfeld & Multer LLP, New York (Richard L. Herzfeld of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Steven Banks of counsel), Law Guardian.

_____

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 9, 2009, which, upon a fact-finding determination that respondent-appellant mother derivatively neglected her daughter Brianna R., placed the child in the custody of the Commissioner of Social Services of Bronx County until completion of the next permanency hearing, unanimously affirmed, insofar as it brings up for review the fact-finding determination, and the appeal otherwise dismissed as moot,

without costs.

The Family Court properly determined that petitioner proved by a preponderance of the evidence that Brianna was derivatively neglected by the mother. Indeed, the conduct which formed the basis of the prior neglect finding, namely the mother's leaving her nine-month old infant in a bathtub with running water without adequate supervision, resulting in the infant's death, evinced an impaired level of parental judgment so as to create a substantial risk of harm for any child in the mother's care. The 2007 drowning incident, which occurred less than two years before the filing of the petition in this case, was relatively close in time to the derivative proceeding so that it can reasonably be concluded that the mother still lacks parental judgment (*compare Matter of Cruz*, 121 AD2d 901, 903 [1986], *with Matter of Alexis R.*, 62 AD3d 497, 498 [2009]). This single incident of neglect is sufficient to sustain a finding of derivative neglect (*see generally Matter of Kayla W.*, 47 AD3d 571, 572 [2008]). The Family Court also properly found that the mother failed to prove that her lack of judgment does not exist currently or will not exist in the foreseeable future.

The mother's argument that prior neglect findings from 2005 and 2006 were too remote in time and did not relate to the

allegations of the petition in this case, is unavailing. The Family Court specifically based its finding of derivative neglect on the 2007 case, and not on the 2005 and 2006 cases. Accordingly, even if it was improper for the court to admit evidence of the earlier cases, such error was harmless.

Although the mother completed mandated parenting skills classes, continued random drug testing, and voluntarily received bereavement counseling, the ACS caseworker indicated that, at the time the petition was filed, the mother was not willing to exclude the father from the home even though he never completed a parenting skills course. As noted above, the Family Court credited the testimony of the ACS caseworker, and there is no basis for disturbing that credibility determination. The court properly excluded testimony regarding the mother's willingness, post-petition, to exclude the father from the home. Generally, courts may not consider post-petition evidence in an Article 10 fact-finding hearing.

Even if the court improperly excluded a physician's letter regarding the mother's mental health evaluation from evidence, it is submitted that the error was harmless. Indeed, contrary to the mother's contention, the letter was not critical to her case since, as even the mother acknowledges, a mental health

evaluation was never required. Moreover, although the court, in its fact-finding decision, ordered that the mother and father receive mental health evaluations, it did not state that the mother's alleged failure to obtain such an evaluation was evidence of neglect.

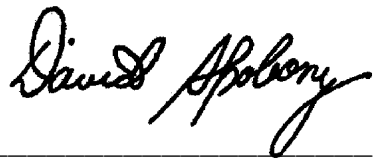
The mother was not deprived of due process or a fair trial when the court noted in its neglect findings the mother's failure to use a proper bathtub for the now-deceased infant. The petition in this case specifically noted the prior finding of neglect against the mother due to the infant's drowning in a bathtub while under the mother's care. Accordingly, the mother was on notice of any claims involving the prior finding. Even if the mother was not given adequate notice or an opportunity to address the claim at the fact-finding hearing, the error was harmless given the other evidence of the mother's neglect which was alleged in the petition and addressed at the fact-finding hearing, namely her leaving the infant child in a bathtub with water running and inadequate supervision.

The appeal from the dispositional order is moot. The terms of the order have expired and subsequent orders finally

discharging the subject child to her mother and father have been entered (*see Matter of Pearl M.*, 44 AD3d 348, 348 [2007]).

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

ENTERED: NOVEMBER 9, 2010



CLERK

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3565 Al G. Hill, III, Index 601639/08
Plaintiff-Appellant,

-against-

Theodate Coates,
Defendant-Respondent.

_____

Michael J. Collins, Dallas, TX, for appellant.

Covington & Burling, LLP, New York (Andrew D. Schau of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 16, 2009, dismissing the complaint, unanimously affirmed, with costs.

New York law was properly applied, once it was determined that the contacts most significant to this dispute took place here (*see Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 317 [1994]). In particular, the court correctly gave greatest weight to the fact that the most valuable assets of the subject trust are located in New York, and many of those assets are managed here. The fact that the alleged oral agreement was negotiated and entered into in Pennsylvania is merely fortuitous, and not significant to this dispute. The trust was actually

formed in Liechtenstein, another factor that is not particularly significant.

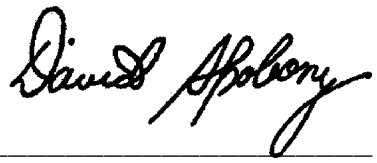
Plaintiff alleged that he had entered into an oral agreement that was to last for his lifetime. An agreement must be in writing if, by its terms, it is incapable of being performed within one year from its making or if its performance cannot be completed before the end of a lifetime (General Obligations Law § 5-701[a][1]). Without demonstrating the existence of a valid and enforceable contract, plaintiff was unable to state a claim for tortious interference with contract (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

The fraud claim was based on plaintiff's alleged contractual right to manage the trust's assets. Since there was no valid agreement, it cannot be said that plaintiff justifiably relied on -- or was caused any injury by -- any statements made by defendant (*see generally Laub v Faessel*, 297 AD2d 28, 31 [2002]). The misappropriation claim was also properly dismissed because plaintiff has no right or authority under the trust, and thus lacked standing to bring a claim on the trust's behalf.

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

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

ENTERED: NOVEMBER 9, 2010



CLERK

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3566 C. Cabrera Construction, LLC, Index 303732/07
Plaintiff-Respondent,

-against-

BCRE/15 Union Square West LLC,
Defendant-Appellant.

_____

Tarter Krinsky & Drogin, LLP, New York (Michael R. Wood of counsel), for appellant.

Law Offices of Edward Weissman, New York (Jan Marcantonio of counsel), for respondent.

_____

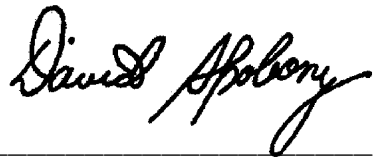
Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered June 16, 2009, which, insofar as appealed from, denied as premature defendant's motion to consolidate this action alleging breach of contract with a lien foreclosure action pending in Supreme Court, New York County, unanimously affirmed, with costs.

Defendant failed to attach a copy of the complaint or any other pleading in the lien foreclosure action to support its contention that that action and this one involve the same questions of law and fact (*see* CPLR 602[a]). To the extent any such pleadings exist, the motion court was not required to take judicial notice of their existence or their contents (*see* CPLR 4511[b]). Nor is it apparent from the record that defendant

served copies of the motion papers on all the parties that would be affected. Indeed, the record shows that the only party on which defendant served a copy of the papers is the plaintiff in this case.

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

ENTERED: NOVEMBER 9, 2010



CLERK

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3568 The People of the State of New York, Ind. 6036/08
Respondent,

-against-

Wilfredo Cruz,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

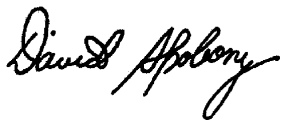
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about March 4, 2009,

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

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

ENTERED: NOVEMBER 9, 2010



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CLERK

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

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3569 225 Fifth Avenue Retail LLC, Index 601659/07
Plaintiff-Respondent,

-against-

225 5th, LLC, et al.,
Defendants-Appellants.

_____

Cohen Tauber Spievack & Wagner P.C., New York (Stephen Wagner of counsel), for appellants.

Shaw & Associates, New York (Martin Shaw of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 20, 2009, which, granted plaintiff summary judgment on liability on the first, fourth and fifth causes of action and denied defendants' cross motion for partial summary judgment, unanimously affirmed, with costs.

This action involves the sale of a commercial condominium unit in a Manhattan building owned by defendant 225 5th, its sponsor. Plaintiff alleges that 225 5th breached its obligation to complete work on an aluminum kitchen flue by the date required, entitling it to recover liquidated damages from 225 5th and its guarantors, defendants El-Ad Group and Industrial Buildings.

In connection with the sale, plaintiff and 225 5th entered into a License Agreement in November 2006, describing certain work to be performed as "Vanilla Box Work," which, if not substantially completed by the date specified, would entitle plaintiff to liquidated damages of $7,000 per day for each day the work was not completed. The agreement provided that substantial completion would be determined by the architect, Gardiner & Theobold, whose determination would be binding.

On the same day these parties executed the License Agreement, they also executed a side agreement by letter, identifying four items of the Vanilla Box Work -- the "Punch List Items" -- that had not yet been completed, to which the liquidated damages provision of the License Agreement would not apply. The letter agreement contained 225 5th's representation that the kitchen exhaust flue "has been completed, is in working order, and is code compliant and available to service any restaurant operation." It further provided that "if such representation and warranty . . . shall be false in any material aspect, then such item of Vanilla Box Work shall be deemed to have . . . not yet been completed as of the closing date under the Purchase Agreement." The letter agreement concluded with the parties' expressed reservation of their rights under the License

Agreement.

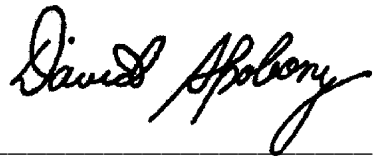
The letter agreement's language is clear and unambiguous, declaring the subject flue work to be an item of Vanilla Box Work, holding 225 5th accountable for misrepresentations concerning its status, and reserving the parties' rights under the License Agreement. Where the parties sought to exclude items of Vanilla Box Work from the penalty provision, they did so. Given the clear language of the agreements, extrinsic evidence as to the parties' intent is inadmissible (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157 [1990]). Accordingly, upon submission of the architect's affidavit attesting to the incomplete condition of the flue work, plaintiff established entitlement to summary judgment on its cause of action for breach of contract against 225 5th, and on the guaranty against the remaining defendants.

225 5th failed to meet its burden of establishing that at the time the License Agreement was entered into, the amount of anticipated damages was easily ascertainable, or that the liquidated amount was grossly disproportionate to the probable

loss (*see Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420 [1977]). We have reviewed defendants' remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 9, 2010



CLERK

Mazzarelli, J.P., Saxe, Friedman, Acosta, DeGrasse, JJ.

4994-
4995 DDJ Management, LLC, et al., Index 601832/07
Plaintiffs-Respondents,

-against-

Rhone Group L.L.C., et al.,
Defendants-Appellants,

Larry A. Pavey, et al.,
Defendants.

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Wachtell, Lipton, Rosen & Katz, New York (Herbert M. Wachtell of counsel), for Rhone Group L.L.C., Rhone Capital I L.L.C., Rhone Offshore Partners L.P., Rhone Partners L.P., CCT Loan Acquisition L.L.C., Car Component Technologies Delaware Holdings, L.L.C., Rhone Capital L.L.C., M. Steven Langman, Robert W. Chambers, III, Alexander Dulac, Three Cities Research, Inc., Three Cities Fund II, L.P., Three Cities Offshore II, C.V., Willem F.P. De Vogel and J. William Uhrig, appellants.

Nixon Peabody LLP, New York (Christopher M. Mason of counsel), for Quilvest S.A., Quilvest American Equity Ltd., and Three Cities Holdings Limited, appellants.

Epstein Becker & Green, P.C., New York (Barry A. Cozler of counsel), for respondents.

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Upon remittitur from the Court of Appeals (15 NY3d 147 [2010]) for consideration of issues raised but not determined in this Court, order, Supreme Court, New York County (Helen E. Freedman, J.), entered April 28, 2008, which denied the motions

of defendants-appellants to dismiss plaintiffs' fraud cause of action, unanimously affirmed, with costs.

The prior decision of this Court (60 AD3d 421[2009]), having dismissed the fraud claim on the ground of lack of reasonable reliance by plaintiffs, did not address the alternative argument by corporate and individual defendants, those other than PriceWaterhoursCoopers (PwC), that plaintiffs failed to otherwise sufficiently plead the elements of fraud, particularly scienter. We now address that issue. As the dismissal of the claims against PwC was affirmed in the prior decision of this Court, and not addressed by the Court of Appeals, that determination is unaffected.

It is alleged that plaintiffs loaned the now-defunct American Remanufacturers Holdings, Inc. (ARI) some $40 million based on the representations made in ARI's 2003 and 2004 financial statements. It is alleged, essentially, that ARI and the remaining defendants concealed from plaintiffs the fact that between 2003 and 2004, defendants had changed the manner in which ARI took reserves on unsold items, taking such reserves only for items unsold for two years, instead of one year as previously done. This resulted in the appearance of a dramatic increase in ARI's earnings before interest, taxes, depreciation and

amortization (EBITDA) between 2003 and 2004. We now hold that the motion court properly denied defendants' motion to dismiss the fraud claim, as the allegations sufficiently plead such claim.

CPLR 3016(b) "imposes a more stringent standard of pleading than the generally applicable notice of transaction rule of CPLR 3013" (*Edison Stone Corp. v 42nd St. Dev. Corp.*, 145 AD2d 249, 257 [1989] [internal quotation marks and citations omitted]). Moreover, where allegations of fraud are based on information and belief, the source of such information must be revealed (*see Kanbar v Aronow*, 260 AD2d 182 [1999]; *Wall St. Transcript Corp. v Ziff Communications Co.*, 225 AD2d 322 [1996]; *Belco Petroleum Corp. v AIG Oil Rig*, 164 AD2d 583, 598-599 [1991]). However, at this early stage of the litigation, plaintiffs are entitled to the most favorable inferences, including inferences arising from the positions and responsibilities of defendants (*see Pludeman v Northern Leasing Sys., Inc.*, 40 AD3d 366, 367-368 [2007], affd 10 NY3d 486 [2008]), and plaintiffs need only set forth sufficient information to apprise defendants of the alleged wrongs (*see Bernstein v Kelso & Co.*, 231 AD2d 314, 320-321 [1997]). Moreover, the pleading requirements should not be narrowly construed, and a plaintiff alleging an aiding-and-abetting fraud

claim may plead actual knowledge generally, particularly at the prediscovery stage, so long as such intent may be inferred from the surrounding circumstances (*see Oster v Kirschner,* 77 AD3d 51 [2010]).

As an initial matter, we reject the argument that, at most, the complaint alleges that Quilvest America, not all Quilvest entities, elected defendants deVogel and Uhrig to the ARI Board of directors. Quilvest also asserts, in a footnote, that, while Three Cities Holdings Limited (now named Quilvest Services Ltd.) is a Quilvest entity, Scott Duncan was an employee of Three Cities Research, Inc., which is not a Quilvest entity. Moreover, the reference to the management agreement in the 2003 audited financial statement refers to a fee paid to defendant Rhone and Three Cities Research, not Three Cities Holdings. Nevertheless, for the proposition that defendant Duncan is not an employee of Quilvest, Quilvest cites Duncan's affidavit, in which he states only "I never expected that my involvement with Three Cities Research, Inc. would subject me to suit as an individual in New York State" (Duncan is an Illinois resident). This is not a statement that he does not work for Three Cities Holdings or Quilvest. Furthermore, Quilvest does not cite any authoritative documentation which affirmatively dissociates it from either

Duncan or Quilvest American.

The complaint also describes the "ARI Control Defendants" as the Rhone defendants and the "Quilvest/Three Cities" defendants, and describes deVogel and Uhrig as agents of both Quilvest America and "Quilvest." It further describes Three Cities Holdings, which is controlled and directed by "Quilvest," as controlling and directing the business of Three Cities Research, Inc. Given these allegations, and nothing definitive to negate them, Quilvest cannot dissociate itself from Quilvest America, Three Cities Research or Scott Duncan for purposes of these pleadings.

Plaintiffs have also sufficiently alleged fraud against the individual and corporate defendants, based, in part, on the corporate positions and titles of the individual defendants with ARI and/or with the corporate defendants (*see Oster v Kirschner*, supra; *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 98 [2003] [complaint only needs to demonstrate some "rational basis" to infer that alleged misrepresentation was knowingly made]; *JP Morgan Chase Bank v Winnick*, 350 F Supp 2d 393, 400 [SDNY, 2004] ["At the pleading stage, it is appropriate to allow the plaintiffs' claims to proceed against these defendants on the assumption that persons occupying such positions in the company

would have knowledge of both the fraud and the substantive terms of the Credit Agreement when they signed the borrowing requests"]; *Pludeman*, 40 AD3d at 367 ["At this early juncture, according plaintiffs' complaint the most favorable inferences, one can readily deduce, given the corporate positions and titles of the individual defendants, that these individuals actually operate the day-to-day business of corporate defendant, and consequently were involved in or knew about the alleged fraudulent concealment"), also raising a reasonable inference that they acted on behalf of their corporate employers, the owners, shareholders and managers of ARI (*see Osipoff v City of New York*, 286 NY 422, 428 [1941] ["a corporation is liable, as an individual, for tort committed by its servants or agents acting within the scope of their service or agency"]). These inferences are supported by the surrounding circumstances, as well as numerous e-mails tending to establish the individual defendants' knowledge of the alleged misrepresentations, coupled with their superior knowledge from which it may reasonably be inferred that

a duty to speak arose on the part of defendants (*see Williams v Sidley Austin Brown & Wood, L.L.P.*, 38 AD3d 219 [2007]; *Kaufman v Cohen*, 307 AD2d 113, 126 [2003]; *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 [2003]).

THIS CONSTITUTES THE DECISION AND ORDER
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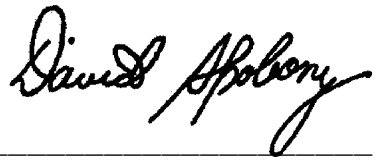
ENTERED: NOVEMBER 9, 2010



CLERK

Saxe, J.P., Friedman, Sweeny, Nardelli, DeGrasse, JJ.

5142-
5142A The People of the State of New York, Docket 9753/07
Respondent, 8375/07

-against-

Donald Pearson,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Jeffrey Dellheim of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Hannah E.C. Moore of counsel), for respondent.

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Judgment, Bronx County (Harold Adler, J., at pleas; John N. Byrne, J. at sentencing), rendered March 26, 2007, convicting defendant of criminal possession of a controlled substance in the seventh degree and menacing in the second degree, and sentencing him to concurrent terms of nine months, unanimously affirmed.

As the People concede, defendant did not expressly waive his right to be prosecuted under an information rather than a criminal complaint. Thus, the legal sufficiency of the accusatory instrument must be evaluated under the standards for an information. While a hearsay defect in an information is nonjurisdictional and is waived by a guilty plea (*see People v*

Casey, 95 NY2d 354, 362-364 [2000]), a "failure to comply with the 'prima facie case' requirement for facial sufficiency in CPL 100.40(1)(c) and 100.15 (3) is a jurisdictional defect" (*People v Alejandro*, 70 NY2d 133, 139 [1987]), which cannot be waived by a guilty plea, and thus we review the issue on the merits.

The supporting deposition stated that an officer observed defendant remove from his waistband a condom containing eight glassines of beige powdery substance, which the officer concluded to be heroin, based on his training and experience, "includ[ing] training in the recognition of controlled substance, and its packaging." Although a laboratory report was not attached, and there was no field test, the observations and consequent allegation reported by the officer in his supporting affidavit

were sufficient to satisfy the prima facie case requirements of the Criminal Procedure Law (*see People v Kalin*, 12 NY3d 225, 231-232 [2009].

The Decision and Order of this Court entered herein on July 6, 2010 is hereby recalled and vacated (*see* M-3436 decided simultaneously herewith).

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

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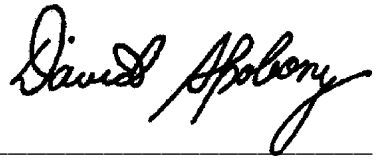

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Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2713 Sebastian Holdings, Inc., Index 603431/08
Plaintiff-Appellant-Respondent,

-against-

Deutsche Bank AG,
Defendant-Respondent-Appellant.

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Zaroff & Zaroff LLP, Garden City (Richard M. Zaroff of counsel), for appellant-respondent.

Cahill Gordon & Reindel LLP, New York (David G. Januszewski of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 14, 2009, which denied plaintiff's motion to enjoin a related commercial action before Queen's Bench in London, granted defendant's motion to dismiss the instant causes of action for breach of fiduciary duty, fraudulent concealment, fraud and negligent misrepresentation, denied the motion with respect to causes of action for conversion, unjust enrichment and money had and received, and denied dismissal of the complaint on grounds of forum non conveniens, affirmed, with costs.

On its motion for preliminary injunctive relief, plaintiff claimed that the London action was brought solely to deprive it of a right to a jury trial, prevent it from taking depositions,

and avoid punitive damages, all assertedly unavailable in the English courts. These conclusory allegations failed to establish that the London action was brought in bad faith, for the purpose of evading New York law, or motivated by fraud or an intent to harass (*Sarepa, S.A. v Pepsico, Inc.*, 225 AD2d 604 [1996], *lv denied* 91 NY2d 801 [1997]).

Plaintiff sued herein for breach of an agreement that provides for disputes to be brought in the New York courts, and the claim for breach thereof seeks damages far in excess of the $1 million threshold set forth in General Obligations Law § 5-1402. Under the circumstances, the parties' choice of forum must be honored, and precludes a challenge on the basis of forum non conveniens as a matter of law (*see* CPLR 327[b]). Defendant's argument that England is a more convenient forum is in any event unpersuasive, since the relevant factors do not favor England over New York (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]).

Turning to the individual causes of action, we agree with the motion court that the lack of a fiduciary relationship between the parties is fatal to plaintiff's claims for breach of

fiduciary duty (*Bailey v Gray, Seifert & Co.*, 300 AD2d 258 [2002]; *see Kurtzman v Bergstol*, 40 AD3d 588, 590 [2007]), fraudulent concealment (*Blake v Ford Motor Co.*, 41 AD3d 150 [2007]) and negligent misrepresentation (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Plaintiff's alleged reliance on defendant's superior knowledge and expertise in connection with its foreign exchange trading account ignores the reality that the parties engaged in arm's-length transactions pursuant to contracts between sophisticated business entities that do not give rise to fiduciary duties (*Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [2006]; *cf. EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19-20 [2005]).

The claim for fraud essentially alleges that defendant failed to monitor and report to plaintiff the extent of its trading exposure, which were duties required under their agreement. The fraud claim cannot be sustained because it is duplicative of the cause of action for breach of contract (*see Ross v DeLorenzo*, 28 AD3d 631, 636 [2006]).

By contrast, the conversion claim does state a cause of action. Plaintiff alleges it held assets in certain accounts at defendant's branches in London and Geneva, to which it had exclusive title and a right to immediate possession upon demand,

and that defendant wrongfully, improperly and in an unauthorized manner intentionally liquidated those accounts and transferred the funds to itself (*see Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1995]). This not a mere restatement of the claims for breach of contract, as plaintiff has not alleged any breach of agreement that directly relates to the allegedly converted funds, and thus the conversion claim stands on its own (*see e.g. Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 112-115 [2009], *lv dismissed* 13 NY3d 900 [2009]).

As with the conversion claim, the claim for unjust enrichment does not depend on the existence of valid and enforceable written contracts between the parties, but rather arises from facts wholly independent of any contract upon which plaintiff sues. Therefore, it cannot be said at this early stage of the proceeding that these claims are duplicative of the breach-of-contract claims, and the rule of *Clark-Fitzpatrick, Inc. v Long Is. R.R.* (70 NY2d 382, 389 [1987]) does not apply.

We have considered the parties' remaining contentions and find them unavailing.

All concur except Catterson, J. who concurs in part and dissents in part in a memorandum as follows:

CATTERSON, J. (concurring in part, dissenting in part)

"The best defense is a good offense."[1]

I must respectfully dissent because I would reinstate the plaintiff's cause of action for fraud. Moreover, notwithstanding the recent judgment of the English Court of Appeal determining that Deutsche Bank is entitled to pursue its claim in the English courts as to monies allegedly owed by Sebastian Holdings, I would enjoin the defendant from proceeding with its London action.

The English judgment, which also declined to stay the English proceedings, does not alter the following undisputed facts: that the alleged debts owed by Sebastian Holdings (hereinafter referred to as "SHI") were accrued solely in connection with a foreign exchange trading account established in New York pursuant to an agreement that provided for New York choice of law and the jurisdiction of New York courts; that two separate agreements (among the numerous agreements signed by the two parties) allow Deutsche Bank (hereinafter referred to as "DB") to pursue claims in the English courts for certain debts owed under those two agreements; that DB relies on the offset

[1]This ubiquitous sports and military cliche is variously attributed to a misquotation of both Carl von Clausewitz and Sun Tsu's maxim of "attack is the best defense," as well as to Vince Lombardi, Mao Tse Tung and Jack Dempsey.

provision in one of the agreements to assert that the alleged New York debt is now a debt owed under the English jurisdiction agreements.[2] However, SHI disputes that it owes any monies to DB. On the contrary, it alleges damages arising from DB's breach of the New York contract, and was the first to commence litigation as to who owes whom. Hence, in my opinion, any court action must first determine that issue, which is squarely before the New York Supreme Court, and should therefore be resolved by it.

Moreover, the doctrine of comity, which suggests that recognition be given to the judicial acts of another nation, nevertheless, as set forth below in greater detail, acknowledges that it does not require the courts to abandon their obligation to "persons protected under its laws." In this case, where the litigation indisputably arises out of a contract providing for New York choice of law and the jurisdiction of New York courts, SHI, which seeks to enforce that bargained-for right, should not be abandoned for the sake of conforming to the somewhat amorphous

[2]The English court's judgment appears to be based on the premise that in agreeing to different jurisdiction clauses, SHI has agreed to litigate a New York contract dispute in England just because an offset provision in an English jurisdiction agreement allows DB to claim that the debt arises out of that agreement.

concept of "international duty."

In this action, SHI, a Turks and Caicos corporation that holds investments, deals in securities and currencies trading, and engages in other financial endeavors is wholly owned and controlled by Norwegian billionaire investor, Alexander Vik. The defendant, DB, is a German corporation with offices and branches in the United States, including in New York. DB provides financial, management, and business services around the globe.

According to SHI's complaint, the corporation became a customer of DB in 2004. Between May 2006 and January 2008, DB and SHI entered into a number of agreements concerning equities trading. These agreements (hereinafter referred to as "the equities agreements") call for the application of English law and contain forum selection clauses in favor of English courts.

Also in 2006, SHI decided to retain Klaus Said as an independent contractor to manage a limited amount of capital for the purpose of engaging in foreign exchange trading on SHI's behalf. To this end, in or about November 2006, SHI opened a foreign exchange prime brokerage account with DB in New York (hereinafter referred to as the "NYFXPB account"). The NYFXPB account was to be used exclusively for Said's foreign exchange trading, and SHI was to allocate a certain sum from a previously

established account in Geneva to support such trading by Said.

In connection with the opening of the account, the parties entered into a NYFXPB agreement drafted by DB. The agreement mandates that it will be "governed by" and "construed in accordance with" the law of New York, and that "[a]ny action or proceeding relating in any way to this Agreement may be brought and enforced in the courts" of New York.

SHI alleges that the NYFXPB account required specialized "prime brokerage" services, which would draw upon DB's "superior knowledge and expertise," and which included, specifically, providing SHI with daily and at times twice-daily calculations and reporting of positions, exposure, valuations, and the like, as well as typical "back office" services. The purpose of these specialized services was, inter alia, to monitor the risks in such account. SHI alleges that DB's reporting obligation was crucial to it so that it could ensure that its collateral limitation, or its exposure, would not exceed $35 million.

DB agreed to set the collateral requirement at 200% of the "value at risk" or "VaR," meaning that SHI would be required to pledge as collateral two times the calculated value at risk of its foreign exchange trades. The NYFXPB agreement dated November 3, 2006, and the pledge and pledgeholder agreement, dated

November 28, 2006 (hereinafter referred to as the "pledge agreement") memorialized these terms.

SHI further alleges that the parties reached an oral understanding that SHI's maximum exposure in connection with its foreign exchange trading in the NYFXPB account would be limited to $35 million. SHI alleges that this agreement was referred to by the parties as the collateral limitation agreement (hereinafter referred to as the "CLA"). DB denies the existence of any such agreement.

In addition to the above-described agreements, SHI and DB also entered into an ISDA master agreement, Schedule, and Credit Support Annex, dated November 22, 2008 (hereinafter referred to as the "FX ISDA master agreement"), which related to the foreign exchange transactions and attendant liabilities.

According to DB, the FX ISDA master agreement provides for the netting and settlement of all covered foreign exchange transactions, sets forth agreement-termination procedures, and outlines extension of credit, including the calculation of VaR, the credit support amounts, and demands for additional collateral. In contrast to the NYFXPB agreement, the FX ISDA master agreement is governed by English law, and the parties agreed to submit to the jurisdiction of the English courts for

the resolution of all disputes relating to it.

In 2007, Said engaged in certain structured transactions in addition to the standard foreign exchange transactions. DB approved these structured transactions, but never requested that SHI pledge additional collateral above and beyond the original $35 million. During most of 2008, a substantial number of these structured transactions were done by Said in the NYFXPB account, and each was approved by DB.

At a hearing before the motion court, counsel for DB summarized the situation thus: "[SHI] engaged in these foreign exchange transactions for a time. They made money and then there came a time when they didn't."

What happened subsequently led to the dispute at the heart of this action. SHI alleges that on the morning of October 6, 2008, DB's Web site stated that the net equity in the NYFXPB account was $27,001,056, but in reality, the account had accumulated losses amounting to hundreds of millions of dollars. Then, according to the complaint, between October 14, 2008 and October 21, 2008, DB made four wrongful margin calls, demanding that SHI increase the collateral held against the mounting risk in the NYFXPB account. SHI alleges that, relying on erroneous information and under duress, it paid the margin calls by

transferring up to $436 million from equities accounts. But then, SHI refused to pay one of the margin calls and asked for documentation on the claimed losses.

SHI alleges that DB then threatened that if SHI did not make payments on the margin calls, other assets of SHI on deposit with DB would be taken by DB, and that DB would insist on liquidating profitable trades and positions held by SHI at the risk of significant loss to SHI to satisfy the outstanding margin calls.

By letter dated October 23, 2008, DB claimed that SHI was in default of the equities agreement and owed it upwards of 2 billion in Norwegian currency. The next day, DB wrote to Said purporting to terminate the NYFXPB agreement. DB then blocked SHI's online access to the NYFXPB account. SHI alleges that, throughout October and November 2008, DB repeatedly promised to give SHI the accurate reports and documentation regarding the NYFXPB account but failed to do so. By letter dated December 4, 2008, DB demanded $120 million in respect of the NYFXPB account.

In light of these events, SHI timely commenced an action against DB in New York County Supreme Court by filing a summons with notice on or about November 24, 2008. SHI alleged that DB essentially increased SHI's line of credit without first notifying SHI or obtaining its consent to do so, allowed SHI to

unwittingly borrow against this increased credit line by failing to supply SHI with the required daily or twice-daily calculations of VaR, and then forced SHI to pay on margin calls in amounts that SHI is not even sure are correct. Finally, DB improperly took the funds to satisfy the margin calls from SHI accounts with DB that were completely unrelated to the NYFXPB account, including forcing liquidations of positions at a substantial loss, without SHI's consent.

The procedural narrative unfolded as follows:

December 4, 2008, DB demanded a complaint in the New York action.

On or about January 20, 2009, SHI served DB with the complaint. SHI asserted 10 causes of action, alleging, inter alia, breach of the NYFXPB agreement, breach of the CLA, breach of fiduciary duty, conversion, unjust enrichment, and fraud.

On January 21, 2009, DB commenced an action in the High Court of Justice, Queen's Bench Division, Commercial Court (hereinafter referred to as the "London action") alleging breach of certain equities agreements by SHI in the failure to pay approximately $250 million that DB contends is due and owing after margin calls on, and the liquidation of, SHI's New York and London accounts. The two actions then proceeded as follows:

- On or about February 23, 2009, SHI moved in the New York action for a TRO and preliminary injunction enjoining DB from proceeding in the action that DB commenced in London.
- On February 24, 2009, DB cross-moved in New York for, inter alia, dismissal on the grounds of forum non conveniens or for a stay. DB opposed SHI's motion for a preliminary injunction.
- In London, on April 2, 2009, DB filed the particulars of claim.
- April 6, 2009, SHI appeared in the London action and challenged the jurisdiction of the English court. SHI also made an application for a stay.
- August 14, 2009, the High Court ruled that it has jurisdiction.
- October 15, 2009, the English Court of Appeal rejected SHI's application for permission to appeal the High Court ruling.
- December 1, 2009, the High Court dismissed SHI's stay application.
- December 3, 2009, the English Court of Appeal reversed itself, granted SHI's application to appeal the jurisdiction ruling of August 14, and stayed the action pending appeal. In New York, on December 14, 2009, the motion court denied

DB's cross motion to dismiss on the basis of forum non conveniens; denied DB's request for a stay; denied SHI's motion for a preliminary injunction; and granted DB's motion to dismiss those claims based on an alleged fiduciary relationship between the parties. The court recognized that simultaneous litigation of the two actions could lead to inconsistent results. However, the motion court also acknowledged that, pursuant to the doctrine of comity, the mere additional expense and trouble of litigating in a foreign court did not justify the issuance of an injunction enjoining the London action. Moreover, because the Court of Appeal in the London action had already voluntarily stayed that action pending the appeal of the High Court's prior ruling that it has jurisdiction over DB's claims against SHI, the motion court decided that the proper course would be to permit the New York action to proceed, and wait and see how the various English courts ultimately ruled on the issue of jurisdiction.

On August 20, 2010, the English Court of Appeal, Civil Division rendered its judgment as detailed above.

Although I concur with the majority in part, for the reasons set forth below, I believe the motion court improvidently exercised its discretion in denying an injunction enjoining the prosecution of DB's London action. I also believe the court

erred in dismissing the cause of action for fraud.

It is well settled that, because of the doctrine of comity, "[t]he use of the injunctive power to prohibit a person from resorting to a foreign court is a power rarely and sparingly employed." Arpels v. Arpels, 8 N.Y.2d 339, 341, 207 N.Y.S.2d 663, 335, 170 N.E.2d 670, 671 (1960). However, such injunctive power may be exercised where the party who seeks to enjoin a proceeding of a sister state or foreign court of competent jurisdiction clearly demonstrates that "the suit sought to be enjoined was brought in bad faith, motivated by fraud or an intent to harass the party seeking the injunction, or [that] its purpose was to evade the law of the domicile of the parties." Chayes v. Chayes, 180 A.D.2d 566, 566-67, 580 N.Y.S.2d 269, 270 (1st Dept. 1992) (internal quotation marks and citation omitted); see Sarepa, S.A. v. Pepsico, Inc., 225 A.D.2d 604, 639 N.Y.S.2d 128 (2d Dept. 1996) lv. denied, 91 N.Y.2d 801, 666 N.Y.S.2d 563, 669 N.E.2d 533 (1997).[3]

[3]Case law on injunctions aimed at foreign proceedings, as sparse as it is, indicates that the traditional standards – irreparable harm, likelihood of success on the merits, and balance of equities – for granting a preliminary injunction directed at parties' actions outside the courthouse rather than the procedure itself are not applicable in an injunction aimed solely at aiding the jurisdiction of the court. Hence, no analysis based on those standards is undertaken here.

The doctrine of comity has generally proved to be a substantial obstacle in enjoining foreign proceedings, but in this case, it need not be an insurmountable one. Comity is

> neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the . . . judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens, or of *other persons who are under the protection of its laws*.

Hilton v. Guyot, 159 U.S. 113, 163-164, 16 S.Ct. 139, 143, 40 L. Ed. 95 (1895)(emphasis added). The recent English judgment is ostensibly a judicial act that requires recognition, but, in essence, the English court's pronouncement that DB is entitled to pursue its claim in England is less equivocal than determining that DB is obliged to pursue its claims in England. Moreover, it is evident that the doctrine of comity does not override all other concerns, and this Court is clearly required to balance "international duty" against its obligation to protect the rights of "persons under the protection of its laws." Id.

In the instant case, in my opinion, the latter obligation outweighs the former duty. SHI entered into a contract that provided for New York choice of law and the jurisdiction of New York courts. The instant dispute between the parties arises solely out of that contract; the allegations of monies owed or

damages accrued arise solely out of that contract.

Moreover, it appears evident on its face that the London action was commenced by DB to evade SHI's choice of a New York forum. First, it was commenced more than six weeks after SHI filed a summons and notice in New York County Supreme Court, and just one day after SHI filed the complaint demanded by DB in the New York action. However, DB's London claim, as evidenced from the particulars, could equally well have been filed as a counterclaim in the New York action.

DB's assertion that the NYFXPB agreement is "but one, relatively minor piece of the parties' dispute," and that "the subject matter of the dispute is governed by written agreements with forum selection clauses in favor of jurisdiction in England" is an intransigently argued, nevertheless incorrectly held, position. In a nutshell, DB asserts that the dispute concerns the accounts from which and the agreements pursuant to which DB may recover monies owed by SHI when, in fact, SHI disputes that it owes any monies to DB at all; that any losses of SHI were accrued by DB's wrongful conduct.

The summons and notice filed in New York clearly stated that the action arises out of

defendant's wrongful conduct relating to the [NYFXPB]

> agreement . . . including without limitation defendant's breaches of its reporting obligations and the parties' agreement as to pledged assets for trading activities in such account, which wrongful conduct resulted in wrongful and improper margin calls of plaintiff by defendant and the wrongful and improper liquidation and taking by defendant of assets in other accounts of plaintiff.

Further, the CPLR 306(b) notice included the information that SHI sought, inter alia, relief in the form of compensatory damages in the amount of $425 million for repayment of wrongful and improper margin calls; an accounting of the losses in SHI's accounts; and for punitive damages. The complaint filed on January 20, 2009, listed 10 causes of action including breach of the agreement, breach of fiduciary duty, conversion and fraud.

In my view, the London action filed by DB under the guise of alleging a breach of contract by SHI is merely a counterclaim existing solely by virtue of the claims asserted by SHI in the New York Supreme Court complaint. Plainly any claim DB asserted in London could have been filed as a counterclaim in the New York action.

DB's assertion, articulated most recently before this Court, that the action commenced in London for monies due of $250 million is based on the FX ISDA master agreement and equities agreements that specify English law and the jurisdiction of the English courts, and so could not be brought in New York, is

refuted by the record. The language in the FX ISDA master agreement and the equities agreements governing the equities accounts from which funds were transferred by DB provides that, "[n]othing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction." Moreover, the English High Court, based on that very language, has already specifically rejected the contention that DB's action could not be brought in New York, or that it must be brought in London. The English Court of Appeal goes no further than to determine that DB is entitled to bring an action to recover the claimed debts in the English courts.

It would be an ironic result if we allow DB to compel SHI to participate in parallel litigation because agreements governing certain accounts fall under non-exclusive forum selection clauses, when the gravamen of SHI's complaint is that DB helped itself unlawfully to funds in those accounts.

The agreements that DB relies on to assert the jurisdiction of the English courts have nothing to do with the issues framed, that is, whether SHI owes or ever owed the monies claimed by DB. SHI's claim that it owes DB nothing implicates only the NYFXPB agreement. If SHI is able to establish that DB breached the NYFXPB agreement, and that there was, in fact, a CLA in existence

which limited SHI's exposure to $35 million, then there would be no reason to examine the contracts or agreements relied upon by DB as a predicate for the application of English law or selection of London as a forum. Conversely, any litigation that establishes the validity of agreements allowing for the transfer of funds from SHI's equities accounts to the NYFXPB account would nevertheless not resolve the issue of whether the transfer was valid.

As SHI asserted at oral argument before the motion court, "the only logical thing . . . is for th[e] [New York] court to first determine if [SHI] is right. If these losses were occasioned and caused by [DB's] wrongdoing . . . [DB's] action in London will go away on its own weight. The converse won't happen."

DB's attempt to evade a New York forum is further evident in its filing of a cross motion to dismiss the New York action on the grounds of forum non conveniens. In the first place, the NYFXPB agreement with the New York forum selection clause was drafted by DB. Moreover, as the motion court correctly held, pursuant to CPLR 327(b) and General Obligations Law § 5-1402, "where a party has consented to the court's jurisdiction prior to litigation," as DB did in the NYFXPB agreement, "that party may

not, as a matter of law, subsequently seek dismissal of the action on the ground of inconvenient forum." See Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc., 35 A.D.3d 222, 223, 826 N.Y.S.2d 235, 237 (1st Dept. 2006); see also, National Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley, 257 A.D.2d 228, 232, 690 N.Y.S.2d 57, 60 (1st Dept. 1999); Arthur Young & Co. v. Leong, 53 A.D.2d 515, 516, 383 N.Y.S.2d 618, 619 (1st Dept. 1976), appeal dismissed, 40 N.Y.2d 984, 390 N.Y.S.2d 927, 359 N.E.2d 435 (1976).

It is also uncontested that New York is the location where SHI opened the NYFXPB account with DB; that every trade took place in New York or New Jersey; that Klaus Said is domiciled in Greenwich, Connecticut; that every trader with whom Said dealt was in New York or New Jersey; that the two affidavits of fact submitted by DB were so submitted by DB's Risk Manager and DB's Global FX trading head, both located in New York.

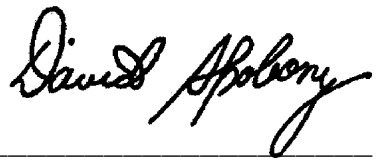
Lastly, as SHI contends, when DB commenced the London action, it was "fully aware" that prosecuting the action in English courts would be prejudicial to SHI. SHI would be entitled to significantly less pretrial discovery; there would be no depositions of the persons involved in the alleged wrongdoing; and there would be minimal documentary disclosure. SHI would not

be entitled to a jury trial, nor could it seek punitive damages.

I would also deny DB's CPLR 3211(a)(7) motion and reinstate the cause of action for fraud. In my opinion, in granting dismissal of this cause of action, the motion court made improper findings of fact. At this stage of the pleadings, the allegations must be accepted as true. In my opinion, the cause of action for fraud was sufficiently and specifically pled in SHI's complaint, wherein SHI alleged that DB withheld the truth about the losses in the NYFXPB account, instead advising SHI that the value of the pledged account was in excess of $67 million.

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

ENTERED: NOVEMBER 9, 2010



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Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3344 The People of the State of New York, Ind. 1794/07
Respondent,

-against-

Larnell Hughes,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew T. Murphy of counsel), for respondent.

_____

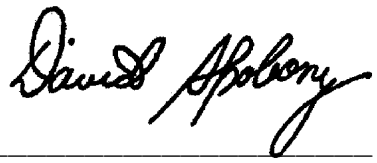
Judgment, Supreme Court, New York County (James A. Yates, J.), rendered June 26, 2008, as amended July 8, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), including its decision to discredit portions of the officer's testimony while crediting other portions that established a

lawful stop of the cab in which defendant was riding. We have considered and rejected defendant's remaining arguments.

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

ENTERED: NOVEMBER 9, 2010



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Sweeny, J.P., Freedman, Richter, Manzanet-Daniels, Román, JJ.

3425 The People of the State of New York, Ind. 5170/08
Respondent,

-against-

Nathan Coleman,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Craig A. Ascher of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered July 10, 2009, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 11 years, unanimously affirmed.

The issue before us is whether the trial court committed reversible error by admitting testimony by two police officers and another witness who identified defendant on a surveillance videotape. Defendant was convicted of shooting his brother, Dwan Williams, in a Manhattan apartment building at about 3:35 a.m. on October 11, 2008. As Williams refused to identify his assailant

and no one else witnessed the shooting, the People based their case on circumstantial evidence. This included the testimony of a building resident that he heard a gunshot in the apartment directly below his between 3:30 and 3:40 a.m., and ballistic evidence that a cartridge that had been recovered from defendant's residence matched a bullet recovered from the crime scene.

In addition, the People introduced cellular telephone records of calls made by defendant and Williams to demonstrate both that their relationship changed after Williams was shot and that defendant was in the vicinity of the shooting when it occurred. The records showed that between October 2 and October 10, 2008, defendant and Williams spoke by cell phone at least 140 times. On October 11, the day of the shooting, the two spoke 17 times between midnight and 3:28 a.m. Between 3:00 and 3:33 a.m., defendant and Williams spoke only to each other, and these calls were transmitted through cell towers located as close as two blocks and no further than four blocks from the apartment building. Defendant's first call after the shooting, to a third party, occurred at 3:42 a.m. in an area located three and one-half blocks from the apartment building, and after the shooting neither Williams nor defendant called each other again.

Finally, the People introduced a videotape recorded by a surveillance camera trained on the apartment building's vestibule, which shows Williams and another man arriving, arguing, and the other man holding what appears to be a gun. The video shows them entering the building together minutes before the incident, and also shows the man leaving the building alone shortly afterwards. Over defendant's objection, the trial court allowed two police detectives and defendant's aunt to identify defendant as the man seen with Williams in the videotape.

In this case, neither the police officers' nor defendant's aunt's testimony should have been admitted. A lay witness may offer an opinion about the identity of a person captured in a photograph or videotape to aid the jury in cases where "the witness is more likely to correctly identify the [person]. . . than is the jury" (*People v Morgan*, 214 AD2d 809, 810 [1995], *lv denied* 86 NY2d 783 [1995]; *see also People v Russell*, 79 NY2d 1024, 1025 [1992]). Such testimony is most commonly allowed in cases where the defendant has changed his or her appearance since being photographed or taped, and the witness knew the defendant before that change of appearance (*see People v Russell*, 79 NY2d at 1025; *People v Steward*, 72 AD3d 524, 524 [2010]). Here, the people never claimed that defendant had altered his appearance,

and no other circumstance suggested that the jury, which had ample opportunity to view defendant, would be any less able than the witnesses to determine whether he was seen in the videotape. The People's contention that the police testimony was necessary because defendant has distinctive mannerisms was not borne out by the video.

Nevertheless, the error in the court's ruling was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). The court mitigated its effect by instructing the jury, both after the opinion testimony and during the final charge, that it was free to accept or reject the opinions and that the ultimate determination as to who was seen in the videotape was the jury's alone. The video and the still photographs were sufficient for the jury to make an independent identification of the defendant, who was present during the entire trial. The videotape, together with the other extensive circumstantial evidence of defendant's guilt, amply supported the conviction.

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

ENTERED: NOVEMBER 9, 2010

CLERK

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

3572 The People of the State of New York, Ind. 4429/08
Respondent,

-against-

Diane Williams,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), and Milbank, Tweed, Hadley & McCloy, LLP, New York (Justin A. Alfano of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered June 3, 2009, convicting defendant, after a jury trial, of four counts of criminal contempt in the first degree, and sentencing her to an aggregate term of 1 year, unanimously affirmed.

On the day after jury deliberations began the victim was arrested for a crime involving a bad check that had allegedly occurred shortly before her trial testimony. The court providently exercised its discretion in denying defendant's motion to reopen the evidence for the purpose of cross-examining the victim about the underlying facts of that arrest, or, in the

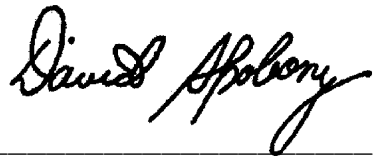
alternative, for a mistrial.

Reopening testimony after the jury has commenced deliberations is an "extraordinary remedy" (*People v Ruine*, 258 AD2d 278 [1999], *lv denied* 93 NY2d 929 [1999]) that was not warranted here. The additional cross-examination was likely to have received undue emphasis from the jury, with a consequent distortion of the evidence as a whole (*see People v Olsen*, 34 NY2d 349, 353 [1974]). Furthermore, the underlying facts of the victim's arrest were collateral to defendant's guilt or innocence and went solely to the victim's credibility (*see People v Behling*, 54 NY2d 995, 996 [1981]). Finally, we reject defendant's argument that the victim's credibility was a central issue. Defendant's guilt was established by recordings of her harassing phone calls, and the victim's testimony was not necessary to identify the person speaking, because their contents

and context rendered them self-authenticating (*see People v Lynes*, 49 NY2d 286, 291-293 [1980]; *see also People v Hamilton*, 3 AD3d 405 [2004], *mod on other grounds* 4 NY3d 654 [2005]).

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

ENTERED: NOVEMBER 9, 2010



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

3573 Gunduz USA, LLC, Index 603148/08
Plaintiff-Appellant,

-against-

Mario Pirolo,
Defendant-Respondent.

_____

Ginsburg & Misk, Queens Village (Hal R. Ginsburg of counsel), for appellant.

Todd A. Gabor, Cedarhurst (Mark H. Miller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 27, 2009, which denied plaintiff's motion for summary judgment in lieu of complaint, and granted defendant's cross motion for summary judgment dismissing the action, unanimously affirmed, with costs.

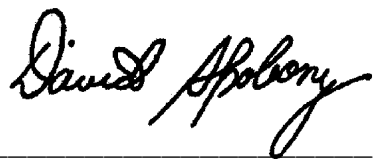
The court providently exercised its discretion in granting defendant's cross motion for summary judgment dismissing the action (*see* CPLR 3213; *Schulz v Barrows*, 94 NY2d 624 [2000]). Defendant established that he was not personally liable for the two post-dated checks pursuant to UCC § 3-403[2], as plaintiff's own affidavit acknowledged that the "checks were given as partial payment of monies owed by [defendant's] company for goods sold

and delivered." In the face of this evidence, plaintiff failed to refute that statement, or assert that defendant actually agreed to personally guarantee the subject corporate debt (*see e.g. Arde Apparel v Matisse Ltd.*, 240 AD2d 328, 330 [1997]).

In light of the foregoing, we need not address plaintiff's contentions.

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

ENTERED: NOVEMBER 9,2010



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

3574 Star One S.A., Index 601723/09
Petitioner-Appellant,

-against-

Andesat S.A. E.M.A., et al.,
Respondents-Respondents.

_____

Mayer Brown LLP, New York (Scott A. Chesin of counsel), for appellant.

Akerman Senterfitt, Miami, FL (Luis M. O'Naghten of the Bar of the State of Florida, admitted pro hac vice, of counsel), for respondents.

_____

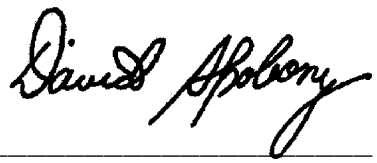
Judgment, Supreme Court, New York County (Richard B. Lowe, III, J.), entered March 11, 2010, dismissing this proceeding to disqualify respondent Akerman law firm as counsel for the corporate respondents, unanimously reversed, on the law and the facts, with costs, and the petition granted.

There is a conflict of interest in the Akerman firm's representation of the Andesat entities in a pending arbitration where they are the claimants, given that one of its partners, Charles Beeman, previously represented the interests of petitioner (respondent in the arbitration) in negotiating a set of agreements substantially related to the subject of the

arbitration (*see Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611 [1999]). Beeman's representation of Andesat may be reasonably perceived as risking disclosure to an adverse party of confidences petitioner entrusted in him during the prior representation (*see Wander v Meier*, 17 AD3d 264 [2005]). Petitioner is "entitled to freedom from apprehension and to certainty that [its] interests will not be [so] prejudiced" (*Cardinale v Golinello*, 43 NY2d 288, 296 [1977]).

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

ENTERED: NOVEMBER 9, 2010



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

3575 In re Carlos R.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elina Druker of counsel), for presentment agency.

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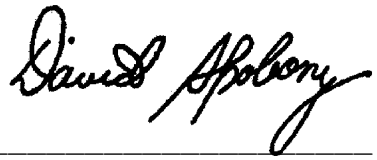
Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about October 14, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of public lewdness, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The allegations in the petition and the evidence were both sufficient to establish the "lewd manner" element of public

lewdness (Penal Law § 245.00) in that appellant did not merely expose his private parts, but did so in an offensive manner (*see Matter of Tyrone G.*, 74 AD3d 671 [2010]).

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

ENTERED: NOVEMBER 9, 2010



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

3577 The People of the State of New York, Ind. 2757/08
Respondent,

-against-

Elvin B. Garcia,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

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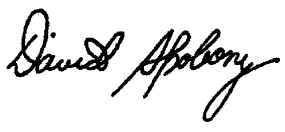
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John Byrne, J.), rendered on or about October 14, 2008,

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

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

ENTERED: NOVEMBER 9, 2010



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

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

3579 Nicholas Palma, Index 8152/06
Plaintiff-Appellant,

-against-

Daniel Rosa,
Defendant-Respondent.

_____

Mitchell Dranow, Mineola for appellant.

Acito, Klein & Candiloros, P.C., New York (William N. Candiloros of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 11, 2009, which granted defendant's motion for summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny so much of defendant's motion as sought dismissal of plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

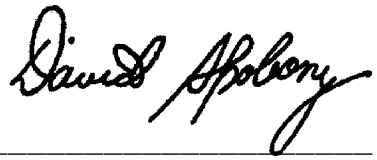
On the issue of permanent injury, defendant's submissions, which included the affirmations of his orthopedist and radiologist, met his prima facie burden (*see Brown v Achy*, 9 AD3d 30, 31 [2004]), and the admissible evidence submitted by

plaintiff in opposition to the motion (*see Grasso v Angerami*, 79 NY2d 813 [1991]) failed to raise an issue of fact. In particular, the findings contained in the August 2008 report and September 2008 affidavit of plaintiff's current chiropractor lack probative value as to any causal relationship between plaintiff's current complaints and the August 2003 accident (*see Lopez v Abdul-Wahab*, 67 AD3d 598, 599 [2009]; *Kurin v Zyuz*, 54 AD3d 902, 903 [2008]); in any event, the chiropractor's diagnosis of residual cervical sprain with underlying herniated discs is, by itself, insufficient to support a claim of serious injury (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45, 51-52 [2005]); and the claim of permanent injury is further undermined by the chiropractor's August 2008 "[g]ood" prognosis and findings that "there is currently no objective evidence of a disability" and that plaintiff "can continue to work." We modify to reinstate

plaintiff's 90/180-day claim because defendant's moving papers do not address that claim (*see Loesburg v Jovanovic*, 264 AD2d 301 [1999]).

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

ENTERED: NOVEMBER 9, 2010



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

3580 Irma Perez, as Administratrix of the Estate of Juan Yanes, Deceased, Plaintiff-Respondent, Index 8166/07

-against-

2305 University Avenue, LLC, Defendant-Appellant.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for appellant.

Alexander J. Wulwick, New York for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered April 14, 2010, which, in an action for personal injuries allegedly sustained by plaintiff's decedent when the ceiling in his bedroom collapsed and fell on him, denied defendant building owner's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

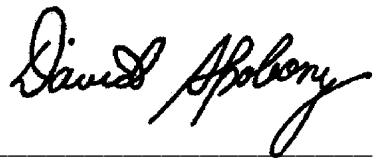
Defendant's motion was based largely on the deposition testimony of its superintendent and building manager denying that the decedent or his daughter, plaintiff herein, had ever complained about the ceilings or walls in the decedent's apartment before the incident, and also denying that repairs had

ever been performed in the apartment relating to the ceiling and walls, including repairs necessitated by water damage. Although defendant's motion acknowledged contradictory portions of plaintiff's deposition asserting previous instances of collapsing ceilings and water damage and repeated complaints to the superintendent and management made by both herself and her father, defendant challenged this testimony as insufficiently specific with respect to both the subject and timing of the complaints, and as irrelevant to the issue of whether it had notice of the particular alleged dangerous condition in the bedroom ceiling. We reject that challenge. The initial burden of demonstrating the absence of triable issues of fact was on defendant, the movant (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]), which offered no logs, work orders or other business records in support of what were essentially conclusory denials of any notice of any dangerous conditions in any portions of the apartment, in the face of evidence tending to the contrary. Such evidence included admissions by defendant's witnesses of prior knowledge of water leaks in the building and of the unlawful use of a washing machine by the tenant in the apartment above the decedent's, raising an issue, unaddressed in defendant's moving papers, whether defendant had breached a duty

to inspect areas of potential damage (*see Hayes v Riverbend Hous. Co., Inc*, 40 AD3d 500, 501 [2007], *lv denied* 9 NY3d 809 [2007]).

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

ENTERED: NOVEMBER 9, 2010



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

3581 Luis Figueroa, etc., et al., Index 21907/95
Plaintiffs-Respondents,

-against-

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

P.O. Luis Rosa, Shield No. 27710,
Defendant-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for appellant.

Pollack Pollack Isaac & DeCicco, New York (Michael H. Zhu of counsel), for respondents.

_____

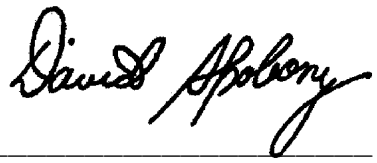
Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered June 23, 2009, after jury trial, to the extent appealed from as limited by the brief, awarding plaintiff $2.5 million in damages for past pain and suffering, unanimously reversed, on the facts, without costs, the award vacated and a new trial directed on this aspect of damages unless, within 30 days after service of a copy of this order with notice of entry, plaintiff stipulates to reduction of the award to $1,250,000, and entry of an amended judgment in accordance therewith.

When plaintiff was 13 years old, a police officer pointed a gun at him, "smacked" him, hit him with the gun, stomped on him,

and arrested him during an investigatory stop. Plaintiff sustained a fractured right hand and developed posttraumatic stress disorder (PTSD), which manifested in the form of nightmares, flashbacks, anxiety, social withdrawal, fear of police officers, and anger, among other things. During the 14 years between the incident and trial, plaintiff had diminished utility of his right hand and experienced problems stemming from his PTSD. We find that the award for past pain and suffering deviated materially from what is reasonable compensation (CPLR 5501[c]; *see Young v City of New York*, 72 AD3d 415 [2010]).

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

ENTERED: NOVEMBER 9, 2010



CLERK

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

3582 Sanford B. Miot, Index 603384/06
Plaintiff-Respondent,

-against-

Harriot Miot,
Defendant-Appellant.

_____

Law Offices of Kevin H. Fabrikant & Associates, P.L., Hollywood, FL (Kevin H. Fabrikant of the Bar of the State of Florida, admitted pro hac vice, of counsel) and Walsh & Walsh, New York (John K. Walsh, Jr. of counsel), for appellant.

Epstein Becker & Green, P.C., New York (Kenneth J. Kelly of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered July 29, 2009, after a nonjury trial, awarding plaintiff the principal sum of $765,709 for misappropriation of corporate funds, unanimously affirmed, with costs.

This action arises from a stock certificate issued to plaintiff in 1985 for 140 shares (representing 70% ownership) of Madcat Realty Corporation (Madcat I), which was incorporated in the 1970s. The certificate was signed by Alvin Miot, president of Madcat, and defendant, as secretary-treasurer. Primarily at issue is whether those shares entitled plaintiff to a portion of proceeds from a 2005 sale of property made on behalf of a later

incarnation of Madcat Realty Corporation (Madcat II), which was incorporated in 1986. There were no creditors, nor anyone else entitled to or claiming the proceeds of this sale.

At some point after March 25, 1985, Madcat I was dissolved by the New York Secretary of State for failure to pay franchise taxes pursuant to Tax Law § 203-a. Madcat I did not pay the back taxes and become reinstated. A certificate of incorporation for Madcat II was filed on February 19, 1986.

The record supports the trial court's finding that Madcat II was primarily a reorganization of Madcat I, and was thus a "mere continuation" of Madcat I and liable for its obligations (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]). The evidence established that as a practical matter, there was no formal transfer of assets from Madcat I to Madcat II because only one corporation existed after the dissolution and reincorporation of Madcat Realty Corporation. Alvin Miot, as president and sole decision-maker of both entities, continued the business of Madcat I through the incorporation of Madcat II, and was the only one benefitting from the assets of both Madcats.

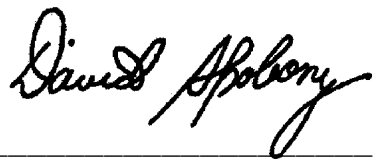
Furthermore, the corporations shared an identical name and were engaged in substantially the same business – owning, managing and collecting rents from New York City properties.

From all outward appearances, there was only one Madcat entity. Therefore, the court correctly concluded that on balance, the evidence supported the finding that Madcat II was a mere continuation of Madcat I, and defendant should be estopped from asserting that the Madcats were distinct and separate entities (*see Burgos v Pulse Combination*, 227 AD2d 295 [1996]).

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

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

ENTERED: NOVEMBER 9, 2010



CLERK

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

3584-
3585-
3586 Debra Weissman, Index 101314/07
Plaintiff-Appellant,

-against-

Ellyn D. Kessler, Esq., et al.,
Defendants-Respondents,

John Does, 1-10,
Defendants.

_____

Debra C. Weissman, appellant pro se.

Law Office of Ellyn D. Kessler, PLLC, New York (Ellyn D. Kessler of counsel), for Ellyn D. Kessler, Larry Hutcher, Esq. and Davidoff Malito & Hutcher LLP, respondents.

Collier, Halpern, Newberg, Nolletti & Bock, LLP, White Plains (Harry J. Nicolay, Jr. of counsel), for James J. Nolletti, Esq. and Collier, Halpern, Newberg, Nolletti & Bock, LLP, respondents.

Furman, Kornfeld & Brennan, LLP, New York (A. Michael Furman of counsel), for Harvey G. Landau, respondent.

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Orders, Supreme Court, New York County (Richard F. Braun, J.), entered November 28, 2008, which, in an action alleging legal malpractice, granted the motion of defendant Harvey G. Landau, Esq. to dismiss the complaint as against him; granted the motion of defendants Ellyn D. Kessler, Esq., Larry Hutcher, Esq.

and Davidoff Malito & Hutcher, LLP to dismiss the first and second causes of action as against them; granted the motion of defendants James J. Nolletti, Esq. and Collier, Halpern, Newberg, Nolletti & Bock, LLP (Nolletti defendants) to dismiss the third and fourth causes of action as against them; and denied plaintiff's motion to consolidate this action with a fee dispute pending in Supreme Court, Westchester County, unanimously affirmed, without costs.

The underlying divorce action in which defendants represented plaintiff was settled by dictation of a settlement agreement in open court. Plaintiff's motion to set aside the settlement on the grounds, inter alia, that she lacked the mental capacity to understand and agree to the terms of the settlement was denied, which denial was affirmed by the Second Department (*Weissman v Weissman*, 42 AD3d 448 [2007], *lv denied* 9 NY3d 813 [2007]). There, the Court held the terms of the stipulation to be enforceable, that plaintiff "failed to carry her burden of demonstrating that she lacked the mental capacity to understand and agree to the terms of the stipulation of settlement," and that she ratified its terms by accepting the benefits thereof for more than one year (*id.* at 450).

Here, the motion court properly dismissed plaintiff's legal

malpractice claims. The evidence shows that with respect to the Nolletti defendants, the retainer agreement signed by plaintiff contained an express waiver relieving the Nolletti defendants from any liability for events occurring in the underlying divorce action prior to their engagement (*see e.g. Matter of Professional Staff Congress-City Univ. of N.Y. v New York State Pub. Empl. Relations Bd.*, 7 NY3d 458, 465 [2006]). Based upon the retainer agreement, the Nolletti defendants would not have been responsible for the claimed malpractice. Moreover, as to all defendants, the evidence establishes that when entering into the settlement of the divorce action, plaintiff acknowledged in open court that she was satisfied with counsels' representation, and that she entered into the settlement agreement with the knowledge that her husband's real estate partnership investments had not yet been valued (*see Katebi v Fink*, 51 AD3d 424 [2008]).

The doctrine of collateral estoppel precludes relitigation of the issues as to plaintiff's distributive award and mental status. Such issues were previously determined in the settlement, the motion to set aside the settlement was denied and the Second Department affirmed the denial of said order (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659 [1990]; *Siegel v Competition Imports*, 296 AD2d 540, 541-542 [2002]).

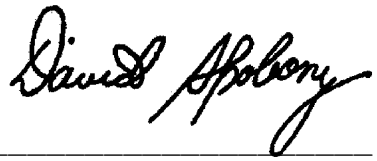
The breach of contract claims were properly dismissed as duplicative of the legal malpractice claims (*see e.g. Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082 [2005], *lv denied* 6 NY3d 701 [2005]).

In view of the foregoing, the court properly denied plaintiff's motion to consolidate this action with a fee dispute in Westchester County as academic.

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

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

ENTERED: NOVEMBER 9, 2010



CLERK

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

3587-
3588-
3589-
3590 Jose Caride, et al., Index 260220/09
Plaintiffs-Respondents, 83959/09

-against-

Alejandro Alonso, et al.,
Defendants-Appellants.

[And A Third-Party Action]

_____

Mitchell Dranow, Mineola, for appellants.

Codelia & Socorro, P.C., Bronx (Peter R. Shipman of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered April 7, 2010, in favor of petitioner Caride in the amount of $325,645, unanimously affirmed, without costs. Order, same court and Justice, entered June 10, 2010, which granted petitioner Caride's motion for a judgment directing him, as the secretary-treasurer of J & A Auto Parts Corp., to turn over to himself, respondent Alonso's share of stock in the business, in satisfaction, in full or in part, of the judgment, unanimously affirmed, without costs. Appeals from order, same court and

Justice, entered March 18, 2010, which, inter alia, granted the part of Caride's petition that sought specific performance of the sale of his share of stock in J & A Auto Parts Corp., and order, same court and Justice, entered May 7, 2010, which, inter alia, granted respondent's motion for renewal and reargument and adhered to the original determination, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The parties' correspondence created a binding contract. Alonso's letter dated February 5, 2009 constituted a firm offer to buy Caride's shares in J & A for $325,000, albeit he indicated he would consider other options. Indeed, the letter "expressly and unambiguously sets forth terms of a proposed resolution which are 'definite and certain' and . . . demonstrates the requisite 'willingness to enter into a bargain'" and thus constitutes an offer (*United States Fid. & Guar. Co. v Delmar Dev. Partners, LLC*, 14 AD3d 836, 838 [2005], quoting *Concilla v May*, 214 AD2d 848, 849 [1995], *lv denied* 86 NY2d 705 [1995]). Caride's letter dated February 6, 2009 constituted a clear, unequivocal and unambiguous acceptance of Alonso's offer. The fact that Caride stated that "[my] offer, notwithstanding [my] acceptance of [your] offer, is still as outlined in [my] letter of February 2, 2009," does not render his acceptance of Alonso's offer ambiguous

or unclear. Indeed, Caride was merely restating the terms of his offer. Moreover, even if Caride's letter dated February 6, 2009 "is construed as containing terms additional to or different from those contained in [Alonso's] offer, [pursuant to UCC § 2-207], an enforceable contract results, with the additional terms deemed proposals for addition to the contract" (*Matter of McManus*, 83 AD2d 553, 555 [1981], *affd* 55 NY2d 855 [1982]).

Contrary to Alonso's contention, there are no issues of fact whether the parties' letters constitute an offer and acceptance. There is nothing outside the letters to "meet or controvert the issues of law and fact tendered"; therefore, "the question [of the parties' intent] is one of law, appropriately decided by an appellate court, or on a motion for summary judgment" (*Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 292, 291 [1973] [citation omitted]).

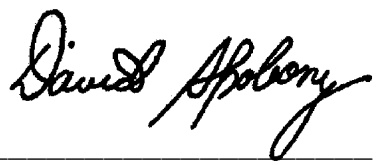
The court properly ordered specific performance of the contract, although Caride did not request that relief in his order to show cause. Specific performance of the contract relating to the dissolution of the parties' corporation is not dramatically unlike the dissolution of the parties' corporation and, in the interim, appointment of a receiver that Caride sought in the order to show cause. In addition, Caride requested

specific performance of the contract in his verified petition and indicated that the basis upon which he was seeking that relief was the "buy-sell agreement" the parties entered into pursuant to Caride's letter dated February 6, 2009. Moreover, Alonso had an opportunity to address Caride's request and did so. Thus, Alonso was not prejudiced by Caride's failure to request specific performance of the contract in the order to show cause (*see Lubov v Berman*, 260 AD2d 236 [1999]; *HCE Assoc. v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774 [1991]).

The court had authority to grant Caride's motion, made on notice to Alonso, to transfer all of Alonso's shares to Caride without compensation in order to satisfy the outstanding money judgment against Alonso (*see* CPLR 5201[b], [c][1]; 5225[a]).

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

ENTERED: NOVEMBER 9, 2010



CLERK

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

3593N Richard Roach, Index 100434/09
Plaintiff-Respondent,

-against-

Elizabeth Benjamin,
Defendant-Appellant.

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Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondent.

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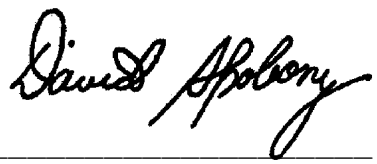
Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 27, 2009, which denied defendant's motion to vacate a default and appoint for her a guardian ad litem, unanimously affirmed, without costs.

When defendant failed to appear at a hearing on June 24, 2009, the court granted judgment of possession and $6,129 in rent arrears to plaintiff landlord, which was entered on September 3. Defendant's submissions herein, on her motion to "nullify[] all proceedings in this action which occurred after the filing of the Complaint," were insufficient to demonstrate that she was incapable of prosecuting or defending her rights (thus necessitating appointment of a guardian), or that plaintiff

actively concealed from the court any possible mental disability with which defendant might have been afflicted at the time this action was commenced (*see Urban Pathways v Lublin*, 227 AD2d 186 [1996]). Moreover, the hearsay affirmation of defendant's counsel did not provide competent evidence of defendant's incapacity claim, and her assertion that she would subpoena her client's doctor should the motion court determine a hearing was necessary did not compel the court to request and review those purported records (*see 400 W. 59th St. Partners, LLC v Edwards*, 28 Misc 3d 93 [App Term 2010]). Declining to appoint a guardian under such circumstances, without a hearing, was a provident exercise of discretion, especially in light of defendant's failure to submit competent medical evidence in support of her assertion, and that decision was consistent with the court's own observations and familiarity with the history of the action.

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

ENTERED: NOVMEBER 9, 2010



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Mazzarelli, J.P., Friedman, Catterson, Abdus-Salaam, JJ.

1142 The People of the State of New York, Ind. 2210/04
Respondent,

-against-

Edgar Morales,
Defendant-Appellant.

_____

Debevoise & Plimpton LLP, New York (Catherine M. Amirfar of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered December 10, 2007, modified, on the law, to reduce the conviction for manslaughter in the first degree as a crime of terrorism to manslaughter in the first degree, the conviction for attempted murder in the second degree as a crime of terrorism to attempted murder in the second degree, and the conviction for criminal possession of a weapon in the second degree as a crime of terrorism to criminal possession of a weapon in the second degree, and, as so modified, affirmed, and the case remitted to Supreme Court with directions to resentence defendant on the reduced counts of the judgment.

Opinion by Friedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
James M. Catterson
Sheila Abdus-Salaam, JJ.

Ind. 2210/04
1142

_____x

The People of the State of New York,
Respondent,

-against-

Edgar Morales,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, Bronx County (Michael A. Gross, J.), rendered December 10, 2007, convicting him, after a jury trial, of manslaughter in the first degree as a crime of terrorism, attempted murder in the second degree as a crime of terrorism, criminal possession of a weapon in the second degree as a crime of terrorism and conspiracy in the second degree, and imposing sentence.

Debevoise & Plimpton LLP, New York (Catherine M. Amirfar, Benjamin Sirota, Ana Frischtak, Poonam Kumar and Naila B. McKenzie of counsel), for appellant.

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

FRIEDMAN, J.

Six days after the devastating attacks of September 11, 2001 (9/11), the Legislature passed the Anti-Terrorism Act of 2001 (L 2001, ch 300), which included, among other measures, article 490 of the Penal Law, entitled "Terrorism," defining various terrorism-related offenses. Penal Law § 490.25(1) provides, in pertinent part, that a person is guilty of a "crime of terrorism" when he or she commits a "specified offense" as defined in Penal Law § 490.05(3)(a) (including any violent felony offense as defined in Penal Law § 70.02) "with intent to intimidate or coerce a civilian population."[1] A person found guilty of a specified offense as a crime of terrorism is subject to substantial enhancement of the penalty, as provided in Penal Law

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[1]Penal Law § 490.25(1) reads in full:

> "A person is guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she commits a specified offense."

The latter two kinds of terroristic intent specified by the statute are not at issue in this case. We note that substantially identical definitions of terroristic intent are set forth in Penal Law § 490.05(1) (defining the term "act of terrorism," which does not appear in § 490.25), in Penal Law § 490.20 ("Making a terroristic threat"), and in certain sections added to article 490 in 2004 (L 2004, ch 1) that define offenses involving chemical or biological weapons (Penal Law §§ 490.40, 490.45, 490.50, 490.55).

§ 490.25(2).

On August 18, 2002, a fight among members of rival gangs broke out following a party in the Bronx. In the course of the fighting, shots were fired, resulting in the death of a 10-year-old girl and the paralysis of a young man. Defendant Edgar Morales, a member of a gang of Mexican-American young adults and teenagers known as the St. James Boys (SJB), was ultimately charged with having committed these shootings. In what appears to have been the first prosecution for a crime of terrorism under Penal Law § 490.25, the People proceeded against defendant on the theory that he committed the charged specified offenses as crimes of terrorism because he acted with the intent to further the alleged purpose of the SJB gang to "intimidate or coerce a civilian population." The People alleged that the "civilian population" defendant and his gang targeted for intimidation comprised Mexican-Americans residing in the area of the Bronx in which the SJB sought to assert its dominance. This area is sometimes described in the record as the general vicinity of St. James Park, although the People's expert witness on gang behavior testified that the area extends (east to west) from Webster Avenue to University Avenue and (north to south) from 204th

Street to 170th Street.[2]

A jury trial resulted in defendant's conviction for three specified offenses as crimes of terrorism (manslaughter in the first degree, attempted murder in the second degree, and criminal possession of a weapon in the second degree) and one non-terrorism offense (conspiracy in the second degree). This appeal -- apparently the first arising from a prosecution under Penal Law § 490.25 -- ensued.[3]

It is the People's position that individuals of a particular ethnicity living in a particular urban neighborhood or group of neighborhoods may constitute "a civilian population" within the

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[2]We note that the area in question can only be loosely described as the vicinity of St. James Park, since the park is about 20 blocks to the north of 170th Street, the southern extremity of the SJB's territory (*see* Hagstrom New York City 5 Borough Atlas [2001], at 19 [showing St. James Park on Jerome Avenue between 190th and 193rd Streets]).

[3]Two prosecutions for the article 490 offense of making a terroristic threat (Penal Law § 490.20, which defines terroristic intent in the same terms as § 490.25) have given rise to reported decisions (*see People v Van Patten*, 48 AD3d 30 [3d Dept 2007], *lv denied* 10 NY3d 845 [2008] [conviction reversed on a *Miranda* issue]; *People v Jenner*, 39 AD3d 1083 [3d Dept 2007], *lv denied* 9 NY3d 845 [2007] [conviction affirmed]); *People v Van Patten*, 8 Misc 3d 224 [2005] [denying motion to dismiss or reduce charges]). In each of those cases, the terroristic intent involved was the intent to "influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping" (*see Van Patten*, 48 AD3d at 33; *Jenner*, 39 AD3d at 1085). Again, it is undisputed that terrorism directed at the government is not at issue in the present case.

meaning of Penal Law § 490.25(1). Defendant argues, to the contrary, that the Anti-Terrorism Act, as a response to 9/11, was intended to address criminal acts carried out for the purpose of creating a mass impact, on the scale of a country, state or city. This standard is not met, according to defendant, by acts that would intimidate only persons of a given ethnicity residing in a particular neighborhood, or group of neighborhoods, within a vastly larger city. Defendant further argues that, even if a community as relatively small as the Mexican-American population of the St. James Park area could constitute "a civilian population" within the meaning of § 490.25, the People's evidence was insufficient to establish that defendant committed specified crimes with the intent to coerce and intimidate the area's Mexican-American population as a whole. Defendant contends that, on this record, the subject incident could not reasonably be found to have been anything more than an act of inter-gang rivalry -- a genuine evil, to be sure, but not the sort of criminality that Article 490 was intended to address.[4]

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[4]Although legislators' postenactment statements generally are not cognizable in determining legislative intent (*see Civil Serv. Empls. Assn., Inc. v County of Oneida*, 78 AD2d 1004, 1005 [1980], *lv denied* 53 NY2d 603 [1981]), defendant points to the reported comments of certain legislators questioning the prosecution of this case under the Anti-Terrorism Act (*see* Williams, *In Bronx Murder Case, Use of New Terrorism Statute Fuels Debate*, New York Times, July 8, 2006, at B1 [reporting that

While we reject defendant's other challenges to his conviction (which are discussed later in this writing), we find that the evidence is not legally sufficient to establish that he acted with the requisite intent to render his offenses crimes of terrorism. Specifically, even assuming in the People's favor that the Mexican-American residents of the St. James Park area may constitute "a civilian population" under Penal Law § 490.25(1), the evidence was insufficient to support a finding

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Senator Michael Balboni, the sponsor of the legislation, "said he had envisioned 'mass effect' cases of terrorism like the World Trade Center attack and the Oklahoma City bombing in 1995 when he submitted the bill," and described the use of the statute in the instant case as an "'unanticipated application'"]); Williams, *Prosecutors Link Suspect in Girl's Killing to Gang in Bronx*, New York Times, Oct. 2, 2007, at B2 [reporting that unidentified "legislators who voted for the bill said they believed it was intended to prosecute members of Al Qaeda"]). Defendant also draws attention to a report that, at the time the Anti-Terrorism Act was passed, Assembly Speaker Sheldon Silver, while hailing the bill as "an important message," expressed doubt that there would ever be a prosecution under it (*see* Caher, *State Legislature Approves Tough Anti-Terrorism Laws*, NYLJ, Sept. 18, 2001, at 1, col 3). In the same vein, commentators have questioned "whether [article 490] is merely a symbolic gesture or an invaluable supplement to Federal law in the fight against terrorism" (Greenberg, et al., New York Criminal Law § 39:1, at 1739 [6 West's NY Prac Series 3d ed 2007]). With reference to this particular case, the same commentators opined: "It is doubtful that the Legislature had in mind an entity or locale as small as a neighborhood in the Bronx when it used the phrase 'intimidate or coerce a civilian population' in . . . Article 490" (*id.*, § 39:2 n 4, at 1741; *see also* Jim, Note, *"Over-Kill": The Ramifications of Applying New York's Anti-Terrorism Statute Too Broadly*, 60 Syracuse L Rev 639 [2010] [discussing the instant case, inter alia]).

that defendant committed his crimes with the intent to intimidate or coerce that "civilian population" generally, as opposed to the much more limited category of members of rival gangs.[5] We therefore reduce the convictions for crimes of terrorism to the corresponding specified crimes as lesser included offenses (*see* CPL 470.15[2][a]), and remit for resentencing on those counts (*see* CPL 470.20[4]).

The shootings with which defendant was charged arose from a confrontation at a christening party between members of defendant's gang, the SJB, and a suspected member of a rival gang. The party was held at a church located at 1891 McGraw Avenue in the Bronx.[6] A number of SJB members, including defendant, appeared at the party uninvited and took to the stage,

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[5]This argument is preserved for review as a matter of law. In moving for dismissal at the close of the People's case, defense counsel argued that it had not been proven that defendant acted with intent to intimidate or coerce a civilian population because "[t]he evidence adduced at the trial was that the activity of the gang was directed at rival gangs, almost exclusively."

[6]It appears that this location was well outside the SJB's territory, the eastern boundary of which was Webster Avenue, according to the People's evidence (*see* Hagstrom New York City 5 Borough Atlas [2001], at 21 [showing the southwestern terminus of McGraw Avenue in or near the Parkchester section, about two miles to the east of Webster Avenue]; Williams, *In Bronx Murder Case, Use of New Terrorism Statute Fuels Debate,* New York Times, July 8, 2006, at B1 [reporting that the christening party was held at "St. Paul's Lutheran Church in the Parkchester neighborhood, a few miles east of where (the SJB) usually hung out"]).

giving "shout-outs" (through the disc jockey) that described the SJB as superior to rival gangs (for example, calling themselves "the kings of the Bronx"). During the party, certain SJB members saw a young man named Miguel, whom they believed to be a member of a rival gang that they held responsible for a friend's death in a prior incident. Two SJB members confronted Miguel and demanded that he leave the party, but Miguel refused. Thereafter, according to the testimony of the People's main witness, a number of SJB members, including defendant, discussed how to respond to Miguel's perceived slight. The group agreed that they would beat up Miguel after the party. Defendant was to observe the proceedings while holding a handgun, which he was instructed to use if his friends were losing the fight. Defendant was provided with a gun, and the other SJB members assaulted Miguel and his companions as they left the party. In the course of the ensuing fighting, one of the SJB members called out for someone to shoot, and defendant pulled out the gun and fired five shots, resulting in the paralysis of one of Miguel's companions and, as stated, the death of a 10-year-old girl.

Nothing in the foregoing scenario -- the heart of the People's case -- suggests that the purpose of defendant's actions was to intimidate or coerce the Mexican-American population residing in the St. James Park area. Rather, the only purposes

of defendant's actions that can be discerned from the facts adduced at trial are those of asserting SJB's dominance over rival gangs in general and pursuing a vendetta against Miguel's gang in particular. This is confirmed by the evidence the People presented concerning the purpose of the SJB. The People's main fact witness (to whom we will refer as "ES"), a former leader of the SJB, testified that the gang's purpose was to "protect ourselves from the other gangs. They are our adversaries." Similarly, the People's expert witness on gang behavior, Detective James Shanahan, agreed in his testimony that the SJB members he had interviewed told him that "their purpose was to confront and assault rival gang members." Shanahan also testified that the SJB would stop and harass any young Mexican-American man observed in St. James Park suspected of being affiliated with a rival gang, but would not give such treatment to Mexican-Americans in the park who were not suspected of having such an affiliation. Even the People, in their appellate brief, acknowledge that "the members of other gangs . . . were SJB's prime adversaries."

In arguing for upholding the convictions for committing the specified offenses as crimes of terrorism, the People rely heavily on evidence that the SJB sometimes preyed on area residents who were not gang members. Specifically, the People

point to evidence that the SJB robbed patrons of a certain restaurant on Jerome Avenue and engaged in extortion of a local house of prostitution. However, the People identify nothing in the record from which it could reasonably be inferred that the actions of defendant and the other SJB members on the night in question were motivated by the desire to intimidate the Mexican-American community of the St. James Park area. Indeed, as previously noted (*see* n 6, *supra*), the incident did not even occur within the SJB's territory, the home of the "civilian population" that, under the People's theory, the SJB intended to intimidate or coerce. Moreover, it should be borne in mind that a "crime of terrorism" within the meaning of Penal Law § 490.25(1) is not established unless the alleged terroristic intent is connected to the particular specified offense underlying the charge. To paraphrase a familiar legal maxim: "'Proof of [terroristic intent] in the air, so to speak, will not do'" (*Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 341 [1928] [citation omitted]). In any event, here, we see no evidence of intent to terrorize the Mexican-American community of the St. James Park area generally, whether connected to or disconnected from the underlying specified offenses.[7]

[7]We note that the fact that the SJB sometimes victimized area residents who were not gang members (for example, by robbing

To the extent the People argue, as they did at trial, that members of other Mexican-American gangs in the SJB's area of the Bronx qualify as "a civilian population" under Penal Law § 490.25(1), we find this argument unavailing. While the term "a civilian population" might be literally susceptible to being applied to gang members of a particular ethnicity in a particular urban neighborhood or group of neighborhoods,[8] the context of the Anti-Terrorism Act weighs against stretching the meaning of the language to cover such a narrowly defined subcategory of

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them) does not equate to an intention to terrorize those victims within the meaning of the statute. If the term "with intent to intimidate or coerce a civilian population" included the intent to intimidate or coerce the direct victims of a particular crime, any specified offense involving intimidation or coercion of a group of people (such as a bank robbery) would constitute a crime of terrorism. We do not believe that the Legislature intended such a result. The People themselves appear to recognize that, to constitute a crime of terrorism, the "civilian population" that the actor intends to intimidate or coerce by committing the underlying specified offense must be some group of people other than the direct victims of the crime.

[8]*See* American Heritage Dictionary 1366 (4th ed 2006) (defining "population" as, inter alia, "[t]he total number of inhabitants constituting a particular race, class, or group in a specified area"); New Oxford American Dictionary 1320 (2d ed 2005) (defining same as, inter alia, "a particular section, group or type of people . . . living in an area or country"); Random House Webster's Dictionary 1505 (2d ed 2001) (defining same as, inter alia, "the number or body of inhabitants of a particular race or class in a place"); Webster's Third New Intl. Dictionary 1766 (2002) (defining same as, inter alia, "a body of persons having some quality or characteristic in common and usu[ally] thought of as occupying a particular area").

individuals. The direct legislative history of the Anti-Terrorism Act does not focus on the meaning of the term "a civilian population" in article 490 (*see* Senate Mem in Support of Senate Bill S70002, 2001 McKinney's Session Laws of NY, at 1492-1494), but it is clear from the legislative findings set out at Penal Law § 490.00 that the Legislature intended to address extraordinary criminal acts perpetrated for the purpose of intimidating a broad range of people, not a narrowly defined group of particular individuals whom the criminal actor happens to regard as adversaries. The first paragraph of Penal Law § 490.00 reads as follows:

> "The devastating consequences of the recent barbaric attack on the World Trade Center and the Pentagon underscore the compelling need for legislation that is specifically designed to combat the evils of terrorism. Indeed, the bombings of American embassies in Kenya and Tanzania in 1998, the federal building in Oklahoma City in 1995, Pan Am Flight number 103 in Lockerbie in 1988, the 1997 shooting atop the Empire State Building, the 1994 murder of Ari Halberstam on the Brooklyn Bridge and the 1993 bombing of the World Trade Center, will forever serve to remind us that terrorism is a serious and deadly problem that disrupts public order and threatens individual safety both at home and around the world. Terrorism is inconsistent with civilized society and cannot be tolerated."[9]

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[9]Although there were relatively few direct victims of the Empire State Building shooting and the murder on the Brooklyn Bridge, the People acknowledge that these crimes were ideologically motivated and presumably were intended by the perpetrators to attract the attention of, and intimidate, a large public audience. It should be noted that, while the terrorist

To decide this appeal, we need not define the minimum size of "a civilian population" that may be the target of terrorism for purposes of Penal Law article 490.[10] Rather, it suffices to observe that the term "to intimidate or coerce a civilian population," in the context of the aforementioned legislative findings, implies an intention to create a pervasively terrorizing effect on people living in a given area, directed either to all residents of the area or to all residents of the area who are members of some broadly defined class, such as a gender, race, nationality, ethnicity, or religion. The intention

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acts enumerated in the legislative findings were all committed out of ideological, political or religious motives, § 490.25(1) does not define the intent required for a crime of terrorism with reference to motivations of these kinds. In the aforementioned *Jenner* case (*see* n 3, *supra*), where the Third Department affirmed a conviction for making a terroristic threat under § 490.20 (which defines the requisite terroristic intent in the same terms as are used by § 490.25), the conduct at issue plainly was not animated by ideological, political or religious motives (*see* 39 AD3d at 1084-1085 [purpose of defendant's threat was to influence the disposition of the custody of his girlfriend's child]). Finding that the *Jenner* defendant's conduct fell within the plain terms of the statute, the Third Department rejected the argument "that his conduct was not what the Legislature had in mind when it enacted this statute after [9/11] and he [therefore] should not be labeled a terrorist" (*id.* at 1086).

[10]The People have not directed our attention to evidence of the size of the "civilian population" that defendant allegedly was attempting to "intimidate or coerce," whether that population is defined as all Mexican-American residents of the SJB's territory or as members of rival gangs.

by a gang member to intimidate members of rival gangs, when not accompanied by an intention to send an intimidating or coercive message to the broader community, does not, in our view, meet the statutory standard (*cf. Muhammad v Commonwealth*, 269 Va 451, 498-499, 619 SE2d 16, 42-43 [2005], *cert denied* 547 US 1136 [2006] [under Va Code § 18.2-46.4, which defines an "act of terrorism" as any of certain crimes "committed with the intent to . . . intimidate the civilian population at large," the term "'population at large' is . . . intended to require a more pervasive intimidation of the community rather than a narrowly defined group of people"]).

The foregoing conclusion is reinforced by the legislative history and judicial construction of similar definitions of terroristic intent in certain earlier-enacted federal statutes from which Penal Law article 490's definition of such intent appears to have been derived in relevant part (*see* Greenberg, *supra*, § 39:1, at 1738 [in enacting article 490 after 9/11, "the Legislature was able to act quickly because of the model provided by existing federal antiterrorism legislation"]; Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 490.10, at 299 [2008] ["The New York definition of an 'act of terrorism' was drawn from the federal definition of

'international terrorism'"]).[11]

Evidently, the "intent" language at issue on this appeal originated with the Foreign Intelligence Surveillance Act (50 USC § 1801 *et seq.* [FISA]) as originally enacted in 1978 (Pub L 95-511, § 101, 92 Stat 1783, 1784 [1978]; *see* Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J Legis 249, 255 [2004] ["The oldest statutory definition of terrorism in federal law is the FISA definition of 'international terrorism'"]). FISA's definitional section provides, in pertinent part, that activities constitute "international terrorism" if, among other things, they "appear to be intended" to accomplish one of the same three goals now delineated in Penal Law § 490.25(1), including the intent "to intimidate or coerce a civilian population" (50 USC § 1801[c][2][A]).[12] The relevant legislative history offers as

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[11]The People seem to argue that federal statutory definitions of terrorism have no relevance to the construction of Penal Law § 490.25(1), even if the very language of § 490.25(1) to be construed is identical to, and presumably derived from, the preexisting federal statutes. If this is the People's position, we reject it. In this regard, contrary to the People's contention, CPL 20.40(1)(a), which merely provides that a county has jurisdiction to prosecute an offense if "[c]onduct occurred within such county sufficient to establish . . . [a]n element of such offense," casts no discernible light on the meaning of the term "civilian population" in Penal Law § 490.25(1).

[12]FISA's definition of "international terrorism" has not been amended since its original enactment in 1978 (*compare* 50 USC

examples of such terrorism "the detonation of bombs in a metropolitan area" and "the deliberate assassination of persons to strike fear into others to deter them from exercising their rights" (Sen Rep 604[I], 95th Cong, 1st Sess, at 29-30, reprinted in 1978 US Code Cong & Admin News, at 3931; Sen Rep 701, 95th Cong, 2d Sess, at 30, reprinted in 1978 US Code Cong & Admin News, at 3999). These examples do not bring to mind violence between rival criminal gangs motivated chiefly by the desire to establish dominance between the gangs themselves rather than by the desire to create an intimidating impression on residents of the area generally.

In 1986, Congress enacted a statute extending federal prosecutorial jurisdiction over certain crimes committed against American nationals abroad, but included a provision limiting

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§ 1801[c] *with* Pub L 95-511, § 101, 92 Stat 1783, 1784 [1978]). We note that one commentator has made the following criticism of FISA's use of the term "civilian population" in this context:

> "What entities . . . would fall within the term 'civilian population' in subparagraph 2(A) [of 50 USC § 1801(c)]? The entire population of a given country? The population of several countries taken together? A particular organized group within a country, such as a church or labor union? A random assortment of civilians, such as the collection of persons who happen to be standing in a bank during an armed robbery? The legislative history is not particularly helpful on this or other potential internal problems of the FISA definition" (Levitt, *Is Terrorism Worth Defining?*, 13 Ohio NU L Rev 97, 104-105 n 31 [1986]).

prosecution of such offenses to cases where the Department of Justice certifies that the offense "was intended to coerce, intimidate, or retaliate against a government or a civilian population" (18 USC § 2332[d], originally enacted as 18 USC § 2331[e] by Pub L 99-399, § 1202[a], 100 Stat 896, 897 [1986]). The conference report on the bill specifically notes that it was not intended that the legislation "reach nonterrorist violence inflicted upon American victims. Simple barroom brawls *or normal street crime*, for example, are not intended to be covered by this provision" (HR Conf Rep 783, 99th Cong, 2d Sess, at 87, reprinted in 1986 US Code Cong & Admin News, at 1960 [emphasis added]). The report further states: "The term 'civilian population' includes a general population as well as other specific identifiable segments of society such as the membership of a religious faith or of a particular nationality, to give but two examples" (*id.* at 88, reprinted in 1986 US Code Cong & Admin News, at 1961). The explanation of the term "civilian population" as referring to "a general population," or to a "segment[] of society" as broad as a religion or nationality, seems inconsistent with applying the term to a category as narrow as gang members in a particular urban neighborhood or group of neighborhoods.

Subsequently, in 1992, Congress enacted current 18 USC §

2331(1) (Pub L 102-572, § 1003[a][3], 106 Stat 4521, 4521 [1992]). This provision defines "international terrorism," as relevant to this case, in substantially the same fashion as FISA defines the term, as discussed above. Like FISA and the subsequently enacted Penal Law § 490.25(1), 18 USC § 2331(1) provides that terroristic intent includes the intent "to intimidate or coerce a civilian population" (18 USC § 2331[1][B][i]). The legislative report on the bill simply notes that § 2331's "definition of international terrorism is drawn from [FISA]" (Sen Rep 342, 102d Cong, 2d Sess, at 45).[13]

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[13]Language referring to an intent "to intimidate or coerce a civilian population" appears in other definitions of terrorism in federal law (*see e.g.* 6 USC § 101[16][B][i] [Homeland Security Act of 2002]; 18 USC § 921[a][22] [Firearms Owners' Protection Act]; 18 USC § 2331[5] [definition of "domestic terrorism" added by USA PATRIOT Act of 2001, Pub L 107-56, § 802(a), 115 Stat 272, 376 (Oct. 26, 2001)]; USSG § 3A1.4(a) cmt n 4 [sentencing guidelines]). Such provisions (some of which, as can be seen from the foregoing references, postdate New York's Anti-Terrorism Act) do not appear to cast much additional light on the meaning of the same language in Penal Law article 490. There are also a number of provisions of federal law defining terrorism without reference to an intent "to intimidate or coerce a civilian population" (*see e.g.* 18 USC § 2332b[g][5][A] [defining a "federal crime of terrorism" as conduct violating specified criminal statutes that "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"]; 22 USC § 2656f[d][2] [statute directing State Department to transmit certain reports on terrorism defines "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents"]). The various definitions of terrorism in federal law are discussed in Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem*

Consistent with the foregoing legislative history, courts construe the term "to intimidate or coerce a civilian population" under federal terrorism laws to refer to attempts to intimidate the general public in a given area, or a broad category of the general public in a given area (*see Boim v Holy Land Found. for Relief & Dev.*, 549 F3d 685, 694 [7th Cir 2008] [en banc], *cert denied* __ US __, 130 S Ct 458 [2009] [donations supporting Hamas attacks in Israel "appear to be intended . . . to intimidate or coerce a civilian population" under 18 USC § 2331(1)(B)(i)]; *United States v Jordi*, 418 F3d 1212, 1216-1217 [11th Cir 2005], *cert denied* 546 US 1067 [2005] [defendant convicted of attempting to bomb abortion clinics acted with motive "to intimidate or coerce a civilian population" so as to warrant upward sentence departure under USSG § 3A1.4(a) cmt n 4]). By contrast, "drive-by shootings and other street crime" and "ordinary violent crimes, for example, robberies or personal vendettas," do not satisfy the intent element of "international terrorism" under 18 USC § 2331(1) (*Linde v Arab Bank, PLC*, 384 F Supp 2d 571, 581 n 7 [ED NY 2005] [noting that plaintiffs would not prevail on their civil claims to recover for international terrorism if they "fail(ed) to prove that these acts were terror attacks, rather

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of Too Many Grails, 30 J Legis 249 (2004), *supra*.

than 'mere' street crime"]).

By no means do we minimize either the heinous nature of the criminal conduct at issue or the stark tragedy of its consequences. We see no evidence, however, that defendant's conduct was motivated by an intention to intimidate or coerce the Mexican-American community in the relevant area of the Bronx. Rather, on this record, all that can be concluded is that defendant acted for the purpose of asserting his gang's dominance over its particular criminal adversaries, namely, members of rival gangs. Such conduct falls within the category of ordinary street crime, not terrorism, even under the broad terms of Penal Law § 490.25.[14]

We reject defendant's argument that the trial evidence was insufficient to support the judgment insofar as he was convicted of the specified offenses (attempted murder, manslaughter and weapon possession) as lesser included offenses underlying the terrorism charges and of conspiracy. The People's chief fact witness was the aforementioned ES, a leader of the SJB and an

[14]Since we find that the evidence was insufficient to sustain the convictions for crimes of terrorism under § 490.25, we need not reach defendant's argument that the statute is unconstitutionally vague as applied to him.

accomplice in the crimes with which defendant was charged.[15] It was permissible for defendant to be convicted based on ES's testimony because that testimony found support in "corroborative evidence tending to connect the defendant with the commission of [the] offense[s]" (CPL 60.22[1]).

In summary, the key points of ES's testimony were as follows: (1) he, defendant and other SJB members attended the party; (2) defendant participated in the meeting at the party where the SJB members planned to attack the aforementioned Miguel as he left the building; (3) defendant agreed at the meeting to hold a gun and, if necessary, shoot during the fight; (4) another SJB leader gave defendant a gun; and (5) during the subsequent fight with Miguel and his companions outside the church, ES saw defendant fire the gun when another SJB member called out for him to do so. The chief evidence generally corroborating ES's account and tending to connect defendant with the commission of the crimes was defendant's own written and videotaped statements, which he gave to the police when they first questioned him three days after the incident. In these statements, defendant claimed

[15]ES testified pursuant to a cooperation agreement with the People, under which, in exchange for his testimony, his guilty plea to murder in the second degree (and his sentence of 15 years to life) would be reduced to a plea to manslaughter in the first degree (and a sentence of 15 years).

that he had attended the party with his fellow SJB members; that he had seen a fight (involving other SJB members, but not him) outside the church after the party; that, during the fight, a female SJB member (GS) gave a male SJB member a gun and the latter fired it and then handed it to defendant; that defendant ran while holding the gun for "a little bit" and then handed the gun back to GS "since [he] did not want to have any type of problems."[16]

Notwithstanding the obvious conflicts between the two accounts, defendant's statements sufficiently corroborate the testimony of ES to satisfy CPL 60.22(1). The statute requires only that the corroborative evidence "'tend[] to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth'" (*People v Reome*, 15 NY3d 188, 192 [2010], quoting *People v Dixon*, 231 NY 111, 116 [1921]). Moreover, "'[t]he role of the additional evidence is only to connect the defendant with the commission of the crime, not to prove that he committed it'" (*Reome*, 15 NY3d at 192, quoting *People v Hudson*, 51 NY2d 233, 238

[16]GS, another accomplice, was also called as a witness by the People. GS testified that she brought a gun to the party at the direction of SJB leaders, that she gave the gun to defendant toward the end of the party, and, as she fled after the shooting (which she said she did not witness), defendant called out her name and handed the gun back to her.

[1980]). Here, although defendant denied having played a role in either the fighting or the shooting (or the planning of such violence), his statements corroborated ES's testimony, and tended to connect defendant with the commission of the crime, in at least three crucial respects. Specifically, in his statements, defendant admitted his membership in the SJB gang, placed himself at the crime scene and admitted having held a gun there. This sufficed to provide the necessary "'slim corroborative linkage'" (*Reome*, 15 NY3d at 192, quoting *People v Breland*, 83 NY2d 286, 294 [1994]) to the accomplice's testimony.

The corroboration requirement having been met, it was the jury's role to determine ES's credibility in light of his criminal background, his motive to cooperate with the prosecution, and the inconsistencies between his testimony and that of other witnesses. We note that, while defendant points to evidence suggesting that another SJB member fired a gun in the incident, the jury was free to reject such evidence and, in any event, was entitled to convict defendant of attempted murder and manslaughter on an "acting in concert" theory (Penal Law § 20.00) even if he did not fire any of the shots. Further, on our review of the facts pursuant to CPL 470.15(5), we find that the judgment

of conviction is not against the weight of the evidence.[17]

Defendant argues that he was deprived of a fair trial by the manner in which the court referred to 9/11 in its remarks to prospective jurors prior to voir dire. The court, seeking to stir the panel members' sense of civic duty, made a standard reference to jury service as a way to "speak back" to the 9/11 terrorists. Shortly thereafter, the court explained that the terrorism charge against defendant "does not mean that [he] is accused of committing a crime aimed at attacking the government or whose purpose is to make a political statement." The court then read the definition of a crime of terrorism under Penal Law § 490.25, and asked the panel whether, "remembering what I said about serving on a jury [being] one of the ways of responding to the terrorists of [9/11], . . . are there any among you . . . who believe it would be impossible to serve fairly and impartially in

[17]We reject defendant's conclusory argument that "spillover prejudice" from the now-dismissed terrorism charges, and from the evidence admitted (without objection) in support thereof, was so great as to render it unfair to sustain the convictions on the lesser included specified offenses. First, we point out that this argument was not made to the trial court and is therefore unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits, as defendant fails to demonstrate that the jury was unable to properly consider the underlying charges. In fact, the jury demonstrated this ability in rendering a verdict acquitting defendant of the highest charge against him (murder in the second degree).

this particular case?"

The claim of error based on the court's remarks to the voir dire panel is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. While it would have been preferable, in a case involving a terrorism charge, for the court to forgo the reference to jury service as a way to "speak back" to the 9/11 terrorists, we think it highly unlikely that the jurors misinterpreted this hortatory rhetoric as an invitation (in the words of defendant's brief) to "vindicate their own rage at the [9/11] terrorists by their treatment of [defendant's] case" that "undermined the impartiality of the proceedings."[18] Nothing in the court's remarks likened defendant to the 9/11 terrorists; on the contrary, the court specifically explained that defendant was *not* being charged with politically motivated terrorism. Significantly, the trial took place a full six years after 9/11,

[18]One panel member asked whether the court was suggesting that 9/11 and defendant's alleged crimes "have something in common," and objected that the way the court was "positioning it" was, in her view, not "fair." The court responded, sua sponte, by immediately excusing that individual. We agree that the court, at that juncture, should have clarified, for the benefit of the remaining panel members, that no connection was being drawn between 9/11 and the charges against defendant. However, the panel member's objection actually shows that she fully understood that 9/11 had nothing to do with the charges against defendant.

and defendant does not claim that anything the jurors learned of his background might have caused them to connect him to the 9/11 terrorists. Further, given the vast scale of the 9/11 catastrophe, the distinction between those attacks and the crimes charged here was unmistakable.

While acknowledging that the claim is unpreserved, defendant asks that he be granted a new trial in the interest of justice on the further ground that the admission into evidence (without objection by defense counsel) of Detective Shanahan's testimony as a purported expert on gang behavior, and of Shanahan's PowerPoint presentation on the SJB's history and criminal activity, incorporated numerous hearsay statements, contrary to the dictates of the Confrontation Clause of the Sixth Amendment as authoritatively construed by *Crawford v Washington* (541 US 36 [2004]). The record establishes, however, that, as the People maintain, defendant not only failed to raise such objections, but also affirmatively waived them and, indeed, sought to use the evidence in question for his own strategic ends. It is evident that this was part of a coherent strategy under which the defense acknowledged defendant's admitted gang membership and gun possession but maintained that he was a lower-tier member who was not implicated in most of the gang's criminal activity, lacked any responsibility for the shootings at issue, and did not share

the terroristic intent attributed to the gang as a whole.[19] Under these circumstances, defendant, through counsel, intelligently and knowingly waived his right to complain about the *Crawford* violation (*see Melendez-Diaz v Massachusetts*, __ US __, 129 S Ct 2527, 2534 n 3 [2009]), and we decline to exercise our power to review the claim in the interest of justice.

We find unavailing defendant's argument that the performance of his lead trial counsel was so deficient as to deny him effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]; *see also Strickland v Washington*, 466 US 668, 687-688 [1984]). To the extent defendant argues that counsel failed to make certain objections or to call certain witnesses, we presume, in the absence of a complete record developed by a motion to vacate the judgment pursuant to CPL 440.10, that counsel exercised professional judgment and strategic discretion in determining how to conduct the defense. In fact, the existing record reflects that counsel followed a coherent strategy that sought to show that defendant committed no crime beyond weapon possession, a charge that he was unlikely to defeat given the denial of his suppression motion. Further, counsel competently attacked the

[19]In fact, Shanahan's testimony concerned the now-dismissed terrorism charge almost exclusively.

credibility of ES, the People's main witness, and brought out the inconsistencies between his testimony and that of other witnesses. Ultimately, counsel obtained an acquittal on the second-degree murder charge, the most serious count of the indictment. While we do not condone counsel's absences and tardiness, defendant fails to establish that these had any impact on the defense.

Defendant also argues for a new trial, or, at a minimum, reversal of the attempted second-degree murder conviction, on the ground that the verdict is irreconcilably inconsistent insofar as he was convicted of attempted second-degree murder with respect to the young man who was paralyzed at the same time he was acquitted of second-degree murder with respect to the girl who was killed. This claim is unpreserved, as defendant failed to raise it before the jury was discharged, when it would have been possible to remedy any defect in the verdict by resubmitting the charges to the jury as provided by CPL 310.50(2) (*see People v Alfaro*, 66 NY2d 985, 987 [1985]; *People v Satloff*, 56 NY2d 745, 746 [1982]; *People v Stahl*, 53 NY2d 1048, 1050 [1981]). We note that the failure to object to the verdict as inconsistent at the appropriate time may well have been a conscious tactical choice by defense counsel, since resubmitting the case to the jury to cure the inconsistency could have resulted in the acquittal on

the murder charge being changed to a conviction (*see People v Alfaro*, 66 NY2d at 987*; People v Maldonado*, 11 AD3d 114, 117 [2004], *lv denied* 3 NY3d 758 [2004]). Under the circumstances, we decline to review this claim in the interest of justice.

We reject defendant's various arguments that his statements to the police should have been suppressed on his pretrial motion. We see no grounds for disturbing the suppression court's determination, based on credible evidence, that the police committed no violation of *Payton v New York* (445 US 573 [1980) in entering defendant's apartment when they first approached him for questioning. As the suppression court properly found, the police entered the apartment with the implicit consent of the elderly man (apparently, defendant's stepfather) who met them at the door (*see People v Pacheco*, 292 AD2d 242 [2002], *lv denied* 98 NY2d 679 [2002]*; People v Brown*, 234 AD2d 211, 212, 214 [1996], *affd* 91 NY2d 854 [1997]). Defendant also urges that the police should have given him *Miranda* warnings when they began to interview him after he voluntarily accompanied them to the precinct. The record, however, fully supports the suppression court's determination that a reasonable innocent person in defendant's situation would have believed, at the inception of the interview, that the police (who never displayed their weapons) "were still in the process of gathering information about the alleged

incident prior to taking any action" (*People v Dillhunt*, 41 AD3d 216 [2007], *lv denied* 10 NY3d 764 [2008]). Accordingly, the suppression court properly concluded that defendant was not in custody when the interview began and that the police were not required to read the *Miranda* warnings at that point (*see People v Bennett*, 70 NY2d 891, 893-894 [1987]).[20] As there was no initial *Miranda* violation, there is no need to consider whether defendant's subsequent statements were tainted. Nor is there any merit to defendant's argument that the conditions of his detention were so excessive and unreasonable as to render his statements involuntary.

Finally, as the case is being remitted for resentencing on the reduced counts of the judgment of conviction, defendant's argument for reduction of his aggregate sentence of 40 years to life is academic.

Accordingly, the judgment of the Supreme Court, Bronx County (Michael A. Gross, J.), rendered December 10, 2007, convicting defendant, after a jury trial, of manslaughter in the first degree as a crime of terrorism, attempted murder in the second degree as a crime of terrorism, criminal possession of a weapon

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[20]During the course of the interview, before defendant gave any written statement, the police did read him the *Miranda* warnings.

in the second degree as a crime of terrorism and conspiracy in the second degree, and sentencing him to consecutive terms of 20 years to life on the manslaughter count and the attempted murder count, and to concurrent terms of 15 years on the weapon possession count and 5 to 15 years on the conspiracy count, should be modified, on the law, to reduce the conviction for manslaughter in the first degree as a crime of terrorism to manslaughter in the first degree, the conviction for attempted murder in the second degree as a crime of terrorism to attempted murder in the second degree, and the conviction for criminal possession of a weapon in the second degree as a crime of terrorism to criminal possession of a weapon in the second degree, and, as so modified, affirmed, and the case remitted to Supreme Court with directions to resentence defendant on the reduced counts of the judgment.

All concur.

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

ENTERED: NOVEMBER 9, 2010

CLERK