

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**APRIL 19, 2011**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3851 Lesly Lopez, Index 18168/06  
Plaintiff-Appellant,

-against-

Allied Amusement Shows, Inc.,  
Defendant-Respondent,

ABC Corporations (1-10), et al.,  
Defendants.

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Lawrence M. Simon, Goshen, for appellant.

Siler & Ingber, LLP, Mineola (Isaac J. Burker of counsel), for  
respondent.

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Order, Supreme Court, Bronx County (Nelson S. Roman, J.),  
entered on or about October 6, 2009, which granted defendant  
Allied Amusement Show Inc.'s motion for summary judgment  
dismissing the complaint, unanimously affirmed, without costs.

Defendant contracted with a local organization to provide  
amusement rides for a street fair. Defendant hired a  
subcontractor, who provided a slide and workers to operate the

ride. Plaintiff was injured when she came to the end of the slide and put her feet down on the concrete to stop the momentum. She alleges that the workers placed a slippery substance on the slide just prior to her descent and failed to provide a buffer or cushion at the end of the ride to bring riders to a safe stop.

Liability for a dangerous condition is generally predicated on either ownership, control or a special use of the property (see *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1998]). The evidence presented by defendant indicated that it did not own or control the slide. Nor may defendant be held liable for any alleged negligence on the part of the company that provided and operated the slide since there is no evidence that defendant had any control over that entity.

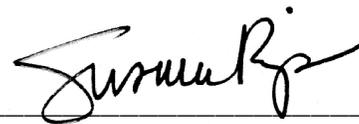
Control of the method and means by which the work is to be performed is a critical factor in determining whether a party is an independent contractor or an employee for the purposes of tort liability (see *Goodwin v Comcast Corp.*, 42 AD3d 322, 322-323 [2007]). The mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal (*id.*). However, if the employer assumes control over the details of the work or some part of it, then the general rule will not apply, and the

employer may be liable (*id.*).

Plaintiff asserts that defendant violated a nondelegable duty to "provide amusement rides" for the local group. A nondelegable duty may be imposed by regulation or statute, or when the responsibility is so important to the community that the employer should not be permitted to transfer it to another (see *Kleeman v Rheingold*, 81 NY2d 270, 274-275 [1993]). Plaintiff cites no regulation, statute or case which makes the "duty" to provide amusement rides nondelegable, and it does not appear that this contractual responsibility is so important to the community as to impose that requirement.

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

ENTERED: APRIL 19, 2011

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Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4559            Greenman-Pedersen, Inc., et al.,            Index 403085/09  
                 Plaintiffs-Appellants,

-against-

Berryman & Henigar, Inc., et al.,  
Defendants-Respondents.

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Howard R. Birnbach, Great Neck, for appellants.

Bracewell & Giuliani LLP, New York (Michael C. Hefter of  
counsel), for respondents.

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Order, Supreme Court, New York County (Ira Gammerman,  
J.H.O.), entered October 6, 2010, which, insofar as appealed from  
as limited by the briefs, granted defendants' motion to dismiss  
the complaint's first cause of action alleging fraud, unanimously  
reversed, on the law, with costs, and the motion denied.

The motion court erred by dismissing the claim sounding in  
fraud, as it was independent of the breach of contract claim (see  
*Freedman v Pearlman*, 271 AD2d 301, 304 [2000]; *First Bank of Ams.*  
*v Motor Car Funding*, 257 AD2d 287, 291-292 [1999]). At this  
early stage, it cannot be said, as a matter of law, that  
defendants did not have a duty to disclose such matters as the  
alleged adverse contract information and information about their  
pre-closing billing practices. The facts, as they develop, may

demonstrate that defendants had a duty to speak regarding the above matters due to their superior knowledge of those facts (see *DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 444-445 [2010]; *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373 [2003]; *Swersky v Dreyer & Traub*, 219 AD2d 321 [1996]).

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of their motion failed to establish the unavailability of other assets to pay their attorney's fees (see CPLR 1312[4]; *Morgenthau v Vinarsky*, 72 AD3d 499 [2010]).

In view of the foregoing, we need not address defendants' remaining contentions.

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

ENTERED: APRIL 19, 2011

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CLERK

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

4317 Michael Small, Index 304218/08  
Plaintiff-Respondent,

-against-

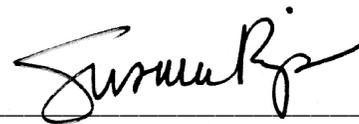
Pathe Diop, et al.,  
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about June 30, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 5, 2011,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: APRIL 19, 2011

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CLERK



the otherwise unavailable services at extra cost to themselves. As the primary purpose of the Act is to protect the public health by addressing the overpopulation of "unwanted dogs and cats" (Administrative Code § 17-801), and not to alleviate the burdens voluntarily assumed by animal rescue organizations, petitioner's asserted injury does not constitute "injury in fact" that falls within the "zone of interests or concerns sought to be promoted or protected by" the Animal Shelters and Sterilization Act (see *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). Nor does this case involve exceptional circumstances that would warrant a finding of standing, such as a class of individuals who have suffered injuries the Act is intended to guard against and cannot seek relief on their own behalf (see e.g. *Mixon v Grinker*, 157 AD2d 423 [1990]; *Grant v Cuomo*, 130 AD2d 154 [1987], *affd* 73 NY2d 820 [1988]; see also *Henry v Isaac*, 228 AD2d 558 [1996]).

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

ENTERED: APRIL 19, 2011



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Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4541-

Index 102079/09

4541A Joy Barbosa Chaves, et al.,  
Plaintiffs-Respondents,

-against-

Stephen Kornfeld, et al.,  
Defendants-Appellants.

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Kobre & Kim LLP, New York (Steven Gary Kobre and David H. McGill of counsel), for appellants.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (John G. Nicolich of counsel), for respondents.

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Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered December 28, 2009, declaring that defendants, as purchasers, had breached the contract for the sale of certain cooperative property, and that plaintiff sellers were entitled to retain the down payment as liquidated damages, and entering judgment in the sum of \$393,350.48, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about October 8, 2009, which granted plaintiffs' motion for summary judgment in their declaratory judgment action, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court properly found that defendants purchasers had

breached the contract for sale of the cooperative apartment and that plaintiffs sellers were entitled to retain the down payment as liquidated damages. Defendants' counsel admits in his letter of August 2, 2008, purporting to cancel the contract, and in his affidavit below, that defendants expressly waived enforcement of the July 2, 2008 time-of-the-essence closing date contained in the contract and addendum, which mandated closing within 30 days of the cooperative board approval of the sale. The additional language stating "but not extending beyond the expiration of Purchaser's Loan Commitment Letter" did not create a second time-of-the-essence closing deadline, but merely further circumscribed the 30-day limit from the time of board approval. Any other reading would render the 30-day limit meaningless. In any event, even assuming that the expiration of the Loan Commitment Letter (July 30, 2008) was a new time-of-the-essence deadline, defendants clearly waived such deadline by their conduct (see *Kistela v Ahlers*, 22 AD3d 641, 643 [2005]; *Stefanelli v Vitale*, 223 AD2d 361, 362 [1996]). Defendants expressly asserted that they could not close until October 1<sup>st</sup> at the earliest, and then waited more than two weeks, three days after the Loan Commitment Letter expired, to respond to plaintiffs' counsels' letter of July 17<sup>th</sup> setting a time-of-the-essence closing date for August

19<sup>th</sup>. Thus, defendants allowed plaintiffs to believe that the August 19<sup>th</sup> closing was in effect, until after the Loan Commitment Letter had expired, and cannot now seek to hold plaintiffs to that purported deadline. Since the contract otherwise expressly disavowed that it was contingent on any financing, the Loan Commitment Letter held no further significance. Moreover, at no time did defendants ever assert that the expiration of the Loan Commitment Letter constituted a breach.

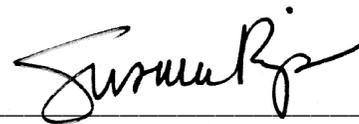
Once the contractual time-of-the-essence closing date was waived, and no other such date existed, plaintiffs were within their rights to unilaterally set a time-of-the-essence closing date (see *Liba Estates v Edryn Corp.*, 178 AD2d 152 [1991]; *Mohen v Mooney*, 162 AD2d 664, 665 [1990]). From the time of the plaintiffs' notice of the closing date, defendants had 33 days to prepare for closing. In the absence of any demonstrated prejudice from this closing date, the time set was reasonable (see e.g. *Liba Estates* at 152; *Mohen* at 665). Defendants' assertion that August was "not good" for them is insufficient to raise a triable issue as to whether the closing date set by plaintiffs was reasonable.

Defendants' assertions of bad faith on the part of

plaintiffs, and the need for discovery on this issue, are without merit, as defendants raise no material issue as to any such bad faith. It is immaterial that plaintiff husband expressed a lack of desire to sell; that prior negotiations were abruptly halted before the execution of the instant contract; that plaintiffs were involved in a divorce which made communications difficult; or that plaintiff husband never called defendant husband back, since their counsel were in communication regarding closing dates. Therefore, defendants' attempt to cancel the contract was ineffective and their failure to close on August 19<sup>th</sup> constituted a breach, entitling plaintiffs to retain the down payment.

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after the shooting, which required him to testify against defendant in exchange for a lenient sentence in his own drug case. The prior consistent statements clearly predated that particular motive to falsify. Defendant's trial strategy also included a theory that the victim had deliberately misidentified defendant at the outset of the case, in order to avoid revealing that the shooting involved the victim's own drug trafficking. However, there is no requirement that, to be admissible, a prior consistent statement predate all possible motives to falsify (see *People v McClean*, 69 NY2d 426, 430 [1987]; *People v Baker*, 23 NY2d 307, 322-323 [1968]). We also note that the court's limiting instructions were sufficient to prevent any undue prejudice. In any event, any error in receipt of this testimony was harmless in view of the overwhelming evidence against defendant. Among other things, there were recorded conversations in which defendant not only displayed a consciousness of guilt but virtually admitted the crime.

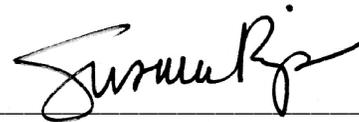
The court also properly exercised its discretion in receiving evidence that while the victim was incarcerated on his own case, an unnamed inmate threatened him with harm if he testified against defendant. The jury could have reasonably inferred, from all the circumstances, that it was unlikely that

such a threat would have been made without defendant's instigation or authorization (see *People v Cotto*, 222 AD2d 345, 345 [1995], *lv denied* 88 NY2d 846 [1996]). The court provided appropriate limiting instructions. Any error was harmless both because the evidence of guilt was overwhelming, and because the testimony at issue was cumulative to other consciousness-of-guilt evidence that was much more damaging.

Defendant's challenge to the constitutionality of his sentencing as a persistent felony offender is unavailing (see *People v Battles*, 16 NY3d 54 [2010]; *People v Quinones*, 12 NY3d 116 [2009]).

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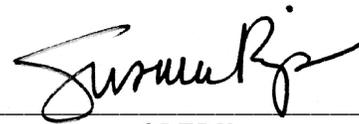


actually relied on any misrepresentations by plaintiff as to his qualifications. Rather, it is undisputed that they executed the note in exchange for rescinding their pre-existing agreement because they were dissatisfied with the results of their business venture with plaintiff.

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

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

ENTERED: APRIL 19, 2011

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Tom, J.P., Mazzairelli, Acosta, Renwick, Freedman, JJ.

4815-

4815A 1701 Restaurant on Second, Inc., etc., Index 110983/06  
Plaintiff-Respondent,

-against-

Armato Properties, Inc.,  
Defendant-Appellant.

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Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York  
(Paul N. Gruber of counsel), for appellant.

David A. Kaminsky & Associates, P.C., New York (James A. English  
of counsel), for respondent.

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Orders, Supreme Court, New York County (Milton A. Tingling,  
J.), entered February 17, 2010, which, to the extent appealed  
from as limited by the briefs, denied defendant landlord's motion  
to discontinue its counterclaim for a declaration that the  
subject lease expired on August 31, 2009 and that no further  
right to exercise the lease renewal option remained, and declared  
that tenant was entitled to exercise the lease renewal option and  
that tenant did so properly, unanimously affirmed, with costs.

The parties agree that this Court need look no further than  
the "clear language" contained in the "four corners" of the  
agreement, but differ on their interpretation of the asserted  
clear language. Under the "clear language" rule of contract

interpretation, we disregard extrinsic evidence if there is, as the parties agree, no ambiguity, and look only to the language of the agreement (see *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 33 [2002]). Tenant correctly points to language in the 2001 Lease Extension and Modification Agreement stating that, other than as modified by such document, the terms of the 1994 lease "remain in full force and effect." Thus, the clear language of the rider to the 1994 lease directly supports tenant's contention that the renewal option was still in effect and had not been "subsumed" as defendant landlord argues. Landlord fails to direct the court to any clear language in support of its position.

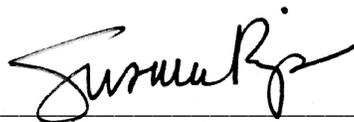
"Ordinarily, a party cannot be compelled to litigate and, absent special circumstances, leave to discontinue a cause of action should be granted [unless] the party opposing the motion can demonstrate prejudice if the discontinuance is granted" (see *St. James Plaza v Notey*, 166 AD2d 439, 439 [1990]). Under the circumstances of this case, Supreme Court correctly denied landlord's motion. Landlord sought to discontinue its counterclaim for declaratory judgment in Supreme Court and then pursue similar relief in Civil Court, notwithstanding that tenant had cross-moved for leave to amend its complaint, which should be

freely granted (CPLR 3025[b]), seeking to add a cause of action for declaratory relief related to the same subject matter. Moreover considerable discovery had already occurred in relation to landlord's counterclaim. Thus, it would have been inequitable to allow landlord to discontinue its counterclaim at this point in the litigation (see *St James Plaza v Notey* at 440).

We have reviewed landlord's remaining contentions and find them unavailing.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 19, 2011



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Tom, J.P., Mazzarelli, Acosta, Renwick, Freedman, JJ.

4816            In re Jessica R.,  
  
                  A Child Under the Age of  
                  Eighteen Years, etc.,  
  
                  Nelson R.,  
                             Respondent-Appellant,  
  
                  The Commissioner of Social Services  
                  of the City of New York,  
                             Petitioner-Respondent.

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Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for respondent.

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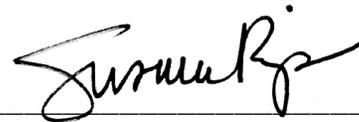
Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about March 25, 2010, which, after a fact-finding hearing, granted petitioner's motion for summary judgment finding that respondent father had severely abused his biological daughter, and released the child to the custody of her non-party mother without supervision, unanimously affirmed, without costs.

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

the record and agree with the father's assigned counsel that there are no nonfrivolous issues which could be raised on this appeal.

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ENTERED: APRIL 19, 2011

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Tom, J.P., Mazzairelli, Acosta, Renwick, Freedman, JJ.

4817-

4818 Sandra Piedrabuena Abrams,  
Plaintiff-Appellant,

Index 110329/09

-against-

Danielle Pecile,  
Defendant-Respondent.

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Jaffe & Asher, LLP, New York (Ira N. Glauber of counsel), for  
appellant.

Thompson Wigdor & Gilly LLP, New York (Douglas H. Wigdor of  
counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower,  
J.), entered June 7, 2010, which, to the extent appealed from,  
granted defendant's motion to compel certain discovery to the  
extent of directing plaintiff to comply with any outstanding  
discovery demands, unanimously reversed, on the law and the  
facts, without costs, and the motion denied.

In this action for, among other things, conversion and  
intentional infliction of emotional distress, plaintiff alleges  
that defendant, a former employee of plaintiff's husband,  
retained, without permission, a copy of a CD containing seminude  
photographs of plaintiff taken by her husband during their  
honeymoon. Plaintiff further alleges that defendant refused to

return the CD and photographs unless plaintiff's husband paid defendant \$2.5 million to settle her sexual harassment claims brought against plaintiff's husband and his brother.

Supreme Court improvidently exercised its discretion in ordering plaintiff to comply with the outstanding discovery demands. With respect to defendant's demand for access to plaintiff's social networking accounts, no showing has been made that "the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Vyas v Campbell*, 4 AD3d 417, 418 [2004][internal quotation marks and citation omitted]; see also *McCann v Harleystown Ins. Co. of N.Y.*, 78 AD3d 1524, 1525 [2010]). Because plaintiff admits that she has copies of the photographs contained on the subject CD, defendant has also failed to show that she needs access to plaintiff's hard drive in order to defeat plaintiff's conversion claim. Nor has defendant shown that broad discovery concerning plaintiff's finances, education, immigration status, and educational background is "material and necessary" (CPLR 3101[a]).

With respect to defendant's demand for materials prepared in anticipation of litigation, defendant has failed to show

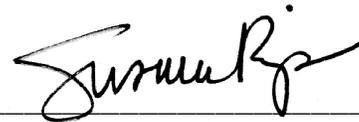
"substantial need" for the materials or that she is "unable without undue hardship to obtain the substantial equivalent of the materials by other means" (*Santariga v McCann*, 161 AD2d 320, 321-322 [1990]; see CPLR 3101[d][2]). Further, defendant is not entitled to privileged communications between plaintiff and her prior counsel (see CPLR 4503[a]).

Discovery of materials concerning plaintiff's family and her husband's business should be obtained through nonparty discovery pursuant to CPLR 3101(a)(4).

Defendant's remaining discovery demands are either overbroad or irrelevant.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 19, 2011

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Tom, J.P., Mazzarelli, Acosta, Renwick, Freedman, JJ.

4821            The United States Life Insurance            Index 600550/07  
                 Company in the City of New York,  
                 Plaintiff-Respondent,

-against-

Lazar Grunhut, etc., et al.,  
Defendants-Appellants.

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Schindel, Framan, Lipsius, Gardner & Rabinovich LLP, New York  
(Ira S. Lipsius of counsel), for appellants.

Edison, McDowell & Hetherington LLP, Houston, TX (David T.  
McDowell, of the Texas Bar, admitted pro hac vice, of counsel),  
for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.),  
entered September 29, 2009, which denied defendants' motion for  
summary judgment dismissing the complaint, unanimously reversed,  
on the law, with costs, and the motion granted. The Clerk is  
directed to enter judgment in defendants' favor dismissing the  
complaint.

By accepting premium payments for three months after  
commencing this action to rescind the insurance policies, and

doing so apparently intentionally (to "protect" the insured pending a determination of the action), plaintiff waived its right to rescind the policies (*Security Mut. Life Ins. Co. of N.Y. v Rodriguez*, 65 AD3d 1, 7-11 [2009]).

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Tom, J.P., Mazzarelli, Acosta, Renwick, Freedman, JJ.

4822 Chesney Carty, Index 307553/08  
Plaintiff-Appellant,

-against-

East 175<sup>th</sup> Street Housing  
Development Fund Corporation,  
Defendant-Respondent.

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

Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP, Hauppauge  
(Scott G. Christesen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-  
Hughes, J.), entered March 12, 2010, which granted defendant's  
motion for summary judgment dismissing the complaint, unanimously  
affirmed, without costs.

Since plaintiff's employer and defendant functioned as one  
company, plaintiff's claims against defendant are barred by  
Workers' Compensation Law § 11 (see *Hernandez v Sanchez*, 40 AD3d  
446 [2007]; *Ramnarine v Memorial Ctr. for Cancer & Allied  
Diseases*, 281 AD2d 218 [2001]; *Anduaga v AHRC NYC New Projects,  
Inc.*, 57 AD3d 925 [2008], *lv denied* 12 NY3d 707 [2009]). The  
record demonstrates that, while the two entities have separate  
certificates of incorporation, they share a president and

director of finance, financial management, administrative headquarters, an insurance policy, and a common purpose. Moreover, plaintiff's employer is a permanent member of defendant, defendant owns the building in which plaintiff was injured, and has no employees, while plaintiff's employer pays all the building's operating expenses and has employees to operate the facility.

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

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Tom, J.P., Mazzairelli, Acosta, Renwick, Freedman, JJ.

4823           The People of the State of New York,           Ind. 5162/04  
                                          Respondent,

-against-

Zahira Matos,  
                  Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York  
(Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Vincent  
Rivellese of counsel), for respondent.

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Judgment, Supreme Court, New York County (Maxwell Wiley,  
J.), rendered September 15, 2008, convicting defendant, after a  
jury trial, of murder in the second degree and two counts of  
endangering the welfare of a child, and sentencing her to an  
aggregate term of 20 years to life, 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]). Defendant was convicted of depraved  
indifference murder of a child (Penal Law § 125.25[4]) in  
connection with the death of her approximately two-year-old son,  
who was beaten to death by the codefendant, defendant's domestic  
partner.

It is undisputed that only the codefendant inflicted the

fatal injuries, and that she did so solely on the particular night the child died. There is no claim that defendant inflicted any of the injuries either personally or while acting as an accessory under Penal Law § 20.00, or that any prior child abuse contributed to the child's death. Defendant's liability was based entirely on her failure to perform the duty of obtaining medical attention for her injured child. In this extraordinary case, that omission satisfied the requirements of depraved indifference murder under *People v Suarez* (6 NY3d 202 [2005]) and *People v Feingold* (7 NY3d 288 [2006]).

Both the sufficiency (see *People v Sala*, 95 NY2d 254, 260 [2000]) and the weight (see *People v Noble*, 86 NY2d 814, 815 [1995]) of the evidence are evaluated according to the court's jury instructions. Here, the court instructed the jury, without objection, that the risk-creating conduct may include an omission to perform a legally required act. In any event, that instruction was appropriate in the context of this case, because depraved indifference may be based on a parent's egregious failure to prevent harm to his or her child (see *People v Gratton*, 51 AD3d 1219, 1221 [2008], *lv denied* 11 NY3d 736 [2008]).

The evidence overwhelmingly established that defendant knew

her son had sustained devastating, life-threatening injuries and was in severe pain. Nevertheless, she did not call an ambulance or take her son to the hospital. Instead, she and the codefendant made worthless efforts to treat the child with home remedies. Defendant otherwise ignored her child's injuries over a period of seven hours. During this time, defendant made casual telephone calls without mentioning the child's injuries, drank beer and smoked, and then went to sleep. She finally called 911 at or around the time the child died. Even then, she took the time to dispose of potentially incriminating evidence before making the call. Furthermore, she admitted that she did not seek medical attention earlier because she was afraid of being blamed for the injuries. The fact that she deliberately placed her own interests ahead of her son's need for emergency treatment is strong evidence that her omission evinced depraved indifference rather than mere recklessness or negligence.

Turning to defendant's other claims, we find that the court properly declined to receive expert testimony on abusive domestic relationships, including social and psychological factors relating thereto. Defendant offered this evidence solely to explain why she did not end her relationship with the codefendant during the months leading up to the homicide, a period in which

the codefendant was abusing both defendant and the child. The indictment set forth a time frame for the depraved indifference murder that included the two months leading up to the child's death. However, by the time of the trial the People had expressly limited themselves to the theory that defendant's liability was based solely on her failure to obtain medical attention for the child on the particular night he died, rather than anything she did or omitted to do in the two preceding months. Accordingly, evidence explaining why she remained with the codefendant would have been irrelevant and potentially misleading (*cf. People v Bryant*, 278 AD2d 7 [2000], *lv denied* 96 NY2d 757 [2001]).

The proffered evidence was not rendered relevant by anything that occurred during the trial. While there were brief, peripheral background references to the events leading up to the child's death, the prosecution never made any kind of a claim that defendant should have ended her relationship with the codefendant.

To the extent that defendant is claiming that the expert testimony was relevant to any issue other than her failure to end the relationship, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding,

we find that defendant has similarly failed to establish any relevance for this evidence. In any event, regardless of whether the expert testimony was admissible on the proffered basis or any other basis, we find that such evidence could not have affected the verdict. We also find no violation of defendant's constitutional right to present a defense.

The court properly denied defendant's suppression motion in all respects. Defendant's statements made prior to *Miranda* warnings were not the product of custodial interrogation, because a reasonable innocent person in defendant's position would not have thought she was in custody (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]; *see also Stansbury v California*, 511 US 318 [1994]). Throughout the pre-warnings period, the police did not restrain defendant in any way or do anything to convey that they had decided to make an arrest (*see People v Dillhunt*, 41 AD3d 216 [2007], *lv denied* 10 NY3d 764 [2008]). While there were times that officers asked or instructed defendant to go or remain somewhere, these statements reasonably appeared, in context, to be the kind of requests that would be made to a mother of an injured child who is cooperating in an investigation, rather than directions given to a person in custody. The hearing evidence also established that all of

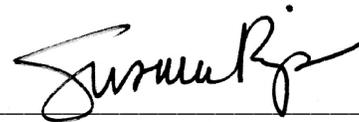
defendant's statements were voluntary, as well as that defendant voluntarily consented to the search of her apartment.

We have considered and rejected defendant's claims that she received ineffective assistance of counsel regarding the proffer of expert testimony, that the grand jury was improperly instructed, and that she did not receive proper notice of the theory of prosecution.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 19, 2011



CLERK



279 AD2d 403, 404 [2001]). While the superintendent asserted that he inspected the premises periodically, he failed to provide a time for the last inspection preceding plaintiff's fall (see *Porco v Marshalls Dept. Stores*, 30 AD3d 284 [2006]).

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

ENTERED: APRIL 19, 2011

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CLERK

Tom, J.P., Mazzairelli, Acosta, Renwick, Freedman, JJ.

4825            Stewart Title Insurance Company,            Index 601162/09  
                 Plaintiff-Appellant,

-against-

Liberty Title Agency, LLC, et al.,  
Defendants,

Albert Yorio,  
Defendant-Respondent.

- - - - -

Extell Development Company, et al.,  
Intervenor-Defendants.

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Thomas G. Sherwood, LLC, Garden City (James P. Truitt III of  
counsel), for appellant.

Silvia L. Serpe, LLC, New York (Silvia L. Serpe of counsel), for  
respondent.

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Judgment, Supreme Court, New York County (Richard B. Lowe  
III, J.), entered October 20, 2009, dismissing the complaint as  
against defendant Yorio, unanimously reversed, on the law, with  
costs, the judgment vacated, and the complaint reinstated as  
against Yorio.

Plaintiff alleges that defendant Liberty Title Agency, LLC,  
and its three members, including Yorio, who was also Liberty's  
executive vice president and general counsel, failed to record  
deeds and mortgages after closings and, instead, misappropriated  
for their personal benefit the escrow funds entrusted to them.

The fact that the complaint refers to the owners and officers of Liberty as the "Individual Defendants" does not render the causes of action insufficiently stated as to any one of the individual defendants, since "Individual Defendants" refers not to a diverse group of defendants to which entirely different acts giving rise to the action may be attributed, but to the three members of a single corporate defendant, who all are alleged to have engaged in the same acts. Thus, the complaint gave Yorio notice of the transactions and occurrences alleged to give rise to liability on his part (see CPLR 3013; compare *Deep v Urbach, Kahn & Werlin LLP*, 19 Misc 3d 1142[A], 2008 NY Slip Op 51139[U] [2008]).

Viewed in the light most favorable to plaintiff, the complaint alleges fraud with sufficient particularity to satisfy the heightened pleading requirements of CPLR 3016(b), since the facts alleged permit the "reasonable inference" that Yorio participated in the alleged wrongful conduct (see *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492 [2008]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 55 [2001]). The complaint states the cause of action for breach of fiduciary duty with sufficient particularity, since the parties are alleged to have created a relationship of higher trust than that which arose from the underwriting agreement alone (see *EBC I, Inc. v Goldman,*

*Sachs & Co.*, 5 NY3d 11, 19-20 [2005]; see also *Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158 [1993]). The complaint also states facts sufficient to support piercing the corporate veil, since it alleges that Yorio used his domination and control over the corporation to divert escrow funds for his personal benefit and perpetuate a fraud against plaintiff (see *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993])).

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

ENTERED: APRIL 19, 2011



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CLERK

Tom, J.P., Mazzarelli, Acosta, Renwick, Freedman, JJ.

4826           The People of the State of New York,                 Ind. 6129/08  
                                                                          Respondent,

-against-

Paul Mitchell,  
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross  
of counsel), for appellant.

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Judgment, Supreme Court, New York County (Carol Berkman,  
J.), rendered on or about January 28, 2009, unanimously affirmed.

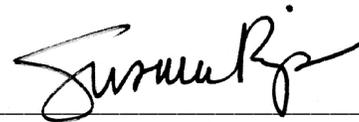
Application by appellant's counsel to withdraw as counsel is  
granted (*see Anders v California*, 386 US 738 [1967]; *People v  
Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and  
agree with appellant's assigned counsel that there are no  
non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may  
apply for leave to appeal to the Court of Appeals by making  
application to the Chief Judge of that Court and by submitting  
such application to the Clerk of that Court or to a Justice of  
the Appellate Division of the Supreme Court of this Department on  
reasonable notice to the respondent within thirty (30) days after  
service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 19, 2011

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CLERK

Tom, J.P., Mazzarelli, Acosta, Renwick, Freedman, JJ.

4827-

4827A Eastern Consolidated Properties, Inc., Index 601529/09  
Plaintiff-Appellant,

-against-

The Morrie Golick Living Trust, et al.,  
Defendants-Respondents.

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Goetz Fitzpatrick LLP, New York (Bernard Kobroff of counsel), for  
appellant.

Proskauer Rose LLP, New York (Leonard S. Baum of counsel), for  
respondents.

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Judgment, Supreme Court, New York County (Ira Gammerman,  
J.H.O.), entered March 11, 2010, dismissing the complaint, and  
bringing up for review an order, same court and J.H.O., entered  
February 18, 2010, which granted defendants' motion for summary  
judgment, unanimously affirmed, without costs. Appeal from the  
aforesaid order unanimously dismissed, without costs, as subsumed  
in the appeal from the judgment.

Plaintiff failed to raise a triable issue of fact whether it  
produced a buyer who was ready, willing and able to purchase the  
subject property on the terms offered by defendants (see  
*Lane-Real Estate Dept Store v Lawlet Corp.*, 28 NY2d 36, 42  
[1971]). The deal memorandum entered into by the parties, which

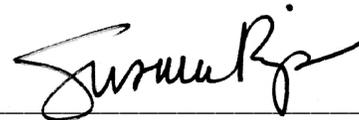
expressly stated, "This memo shall memorialize the terms of the deal that have been accepted, subject to the signing of a mutually acceptable Contract of Sale," is a classic example of an "agreement to agree," and therefore was insufficient to trigger the duty of good faith (see *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 297 [2003]; *RAJ Acquisition Corp. v Atamanuk*, 272 AD2d 164 [2000]). The "marked-up" contract returned by defendants' attorney to the potential buyer's attorney was a counteroffer to the contract originally proposed by the buyer (see *Helmsley-Spear, Inc. v Kupferschmid*, 301 AD2d 442 [2003]). The potential buyer's attorney responded with concerns about inspection, zoning, air rights, parking and artist certification for "Joint Living Working Quarters." These negotiations demonstrate that there never was a meeting of the minds on all essential terms (*Spier v Southgate Owners Corp.*, 39 AD3d 277, 278 [2007]; *Ross v Wu*, 27 AD3d 237 [2006], *lv denied* 7 NY3d 713 [2006]; *David Day Realty v Farkas*, 75 AD2d 783 [1980]). Nor is there any evidence that defendants deliberately attempted to destroy a potential transaction to avoid paying a brokerage commission (see *Thoens v J.A. Kennedy Realty Corp.*, 279 App Div 216, 220 [1951], *affd* 304 NY 753 [1952]). To the contrary, even

after they entered into a lease with another party, defendants attempted to complete a sale with plaintiff's potential buyer, but were unable to do so in a timely fashion.

The documentary evidence in the record obviates the need for additional discovery.

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

ENTERED: APRIL 19, 2011

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CLERK



basis for the determination, that defendant was ready to settle this action in early March 2009, and that plaintiff's attorneys, in refusing to provide defendant with a copy of their billings, held out for a greater amount of fees and thereby continued needlessly to incur further amounts.

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

ENTERED: APRIL 19, 2011

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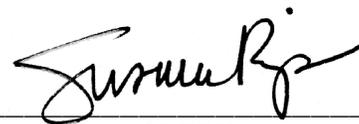


other evidence showing that plaintiff had been involved in two earlier accidents, the second one just four months before the instant accident, in which she sustained identical injuries to her cervical and lumbar spine (see *Becerril v Sol Cab Corp.*, 50 AD3d 261, 261 [2008]). In opposition, however, plaintiff presented evidence that her cervical injuries were causally related to the instant accident, and were different from the injuries that predated the instant accident (see *Linton v Nawaz*, 62 AD3d 434, 443 [2009], *affd* 14 NY3d 821 [2010]).

Defendants failed to meet their burden on plaintiff's 90/180-day claim, since their experts' reports were based on examinations of plaintiff conducted nearly two years after the instant accident (see e.g. *Quinones v Ksieniewicz*, 80 AD3d 506, 506-507 [2011]; *Feaster v Boulabat*, 77 AD3d 440, 441 [2010]).

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

ENTERED: APRIL 19, 2011

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CLERK

Tom, J.P., Mazzarelli, Acosta, Renwick, Freedman, JJ.

4830            Mohammad Mohsin,                                Index 304803/08  
                     Plaintiff-Appellant,

-against-

Port Authority of New York  
and New Jersey, et al.,  
Defendants-Respondents.

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A. Ali Yusaf, Richmond Hill, (Stephen A. Skor of counsel), for  
appellant.

Brown Gavalas & Fromm LLP, New York (David H. Fromm of counsel),  
for respondents.

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Order, Supreme Court, Bronx County (John A. Barone, J.),  
entered on or about December 23, 2009, which, in an action for  
personal injuries, granted defendants' motion to change venue  
from Bronx County to Queens County pursuant to CPLR 510(3),  
unanimously reversed, on the law, without costs, and the motion  
denied.

Defendants' moving papers were deficient inasmuch as they  
failed to provide the names, addresses and occupation of  
prospective non-party witnesses, the proposed testimony, the  
witnesses' willingness to testify, and that the witnesses will be  
inconvenienced by the present venue (*see Jacobs v Banks Shapiro  
Gettinger Waldinger & Brennan, LLP*, 9 AD3d 299 [2004]); the

convenience of party witnesses is not a factor (see *Gissen v Boy Scouts of Am.*, 26 AD3d 289 [2006]). The affidavits submitted for the first time in defendants' reply papers should not have been considered by the court, as they improperly raised new facts not directly responsive to plaintiff's opposition, which merely highlighted the deficiency of defendants' initial papers (see *Root v Brotmann*, 41 AD3d 247 [2007]; *Job v Subaru Leasing Corp.*, 30 AD3d 159 [2006]).

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

ENTERED: APRIL 19, 2011

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CLERK





Furthermore, plaintiff and her husband pursued their interest in the property as a joint interest. Accordingly, because plaintiffs' interest is joint, and because the matter does not involve special circumstances or highly complex litigation, the court properly determined that plaintiff is not entitled to separate representation (see *Stinnett v Sears Roebuck & Co.*, 201 AD2d 362, 364 [1994]; cf. *Chemprene, Inc. v X-Tyal Intl. Corp.*, 55 NY2d 900, 901 [1982]).

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: APRIL 19, 2011

  
CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4834           The People of the State of New York,                           Ind. 100/06  
                                                          Respondent,

-against-

Richard Chimilio,  
                  Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York  
(Thomas M. Nosewicz of counsel), for appellant.

Robert T. Johnson, District Attorney, New York (Jason S.  
Whitehead of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John N. Byrne, J.),  
rendered May 9, 2006, convicting defendant, upon his plea of  
guilty, of attempted robbery in the first degree, and sentencing  
him to a term of 3½ years, unanimously affirmed.

The court properly exercised its discretion in denying  
defendant’s motion to withdraw his guilty plea, without granting  
a hearing (*see People v Frederick*, 45 NY2d 520 [1978]). “When a  
defendant moves to withdraw a guilty plea, the nature and extent  
of the fact-finding inquiry rest[s] largely in the discretion of  
the Judge to whom the motion is made and a hearing will be  
granted only in rare instances” (*People v Brown*, 14 NY3d 113, 116  
[2010] [internal quotation marks omitted]).

The transcript of the plea proceeding demonstrates that the

plea was knowingly, voluntarily and intelligently made. In his original and supplementary plea withdrawal motions, defendant alleged he was innocent and had been coerced by prior counsel, with particular reference to counsel's statement that defendant had "no choice" but to plead guilty. Despite ample opportunity to elaborate on his claims, and the assistance of new counsel, defendant did not establish any basis for vacating the plea or conducting a hearing. He did not give the court any reason to believe the allegedly coercive conduct amounted to anything more than frank advice, based on the strength of the People's case and defendant's predicted sentencing exposure, to accept the favorable plea offer.

We have considered and rejected defendant's remaining challenges to his plea.

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

ENTERED: APRIL 19, 2011



CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4835 Bill Bouzas, et al., Index 111940/07  
Plaintiffs-Appellants,

-against-

Kosher Deluxe Restaurant, et al.,  
Defendants-Respondents.

---

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Stephen C. Glasser of counsel), for appellants.

Thomas D. Hughes, New York (David D. Hess of counsel), for respondents.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 22, 2010, insofar as appealed from, upon a jury verdict, awarding plaintiffs the principal amount of \$10,000 for past pain and suffering and \$0 for future pain and suffering, unanimously modified, on the facts, to vacate the award for past pain and suffering and direct a new trial on the issue of such damages only, and otherwise affirmed, without costs, unless defendants, within 30 days of service of a copy of this order with notice of entry, stipulates to increase the award for past pain and suffering to \$100,000.

Plaintiff Bill Bouzas sustained injuries when he slipped and fell on a wet floor inside defendants' restaurant. Following the accident, plaintiff was taken to the hospital where X-rays showed

that he suffered an acute dislocation of the right shoulder, which through closed reduction, was put back in place.

Plaintiff's arm remained immobilized for some time, and he began physical therapy. Plaintiff alleged that he made scant progress in his recovery, and sought further medical attention. Several months after the accident, he underwent surgery which, inter alia, repaired a torn rotator cuff.

The determination that plaintiff did not sustain a permanent injury as a result of the accident was supported by the weight of the evidence (*see generally McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). Due to his fall, plaintiff sustained a dislocated shoulder, and the evidence demonstrated that his residual rotator cuff injury was preexisting and not caused by the dislocation.

However, we find that the award of \$10,000 for past pain and suffering deviates materially from what would be reasonable compensation under the circumstances (CPLR 5501[c]; *see e.g.*

*Shifrel v Singh*, 61 AD3d 401 [2009]; *Miller v Tocopina*, 34 AD3d 254 [2006]).

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

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

ENTERED: APRIL 19, 2011

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CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4836           In re Basil Dalrymple,  
                  Petitioner-Appellant,

-against-

                  Wanda Dalrymple,  
                  Respondent-Respondent.

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Neal D. Futerfas, White Plains, for appellant.

Elisa Barnes, New York, for respondent.

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                  Order, Family Court, Bronx County (Alma Cordova, J.),  
entered on or about February 18, 2009, which, after a fact-  
finding hearing in a proceeding brought pursuant to article 8 of  
the Family Court Act, dismissed the petition for an order of  
protection, unanimously affirmed, without costs.

                  Petitioner failed to establish by a fair preponderance of  
the evidence that respondent committed acts warranting an order  
of protection in his favor (see Family Court Act § 832; *Matter of  
Everett C. v Oneida P.*, 61 AD3d 489 [2009]). Petitioner's claim  
that respondent attempted to poison him was unsubstantiated, and  
his assertion that he was fearful that respondent would harm him  
was not objectively reasonable (see *Matter of Tyrone T. v*

*Katherine M.*, 78 AD3d 545 [2010]). Furthermore, the police report did not indicate that respondent had a knife or weapons of any kind in her possession when the police responded to the parties' home.

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

ENTERED: APRIL 19, 2011

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4837 Carmen Tejada, Index 25459/02  
Plaintiff-Appellant,

-against-

Cherise M. Dyal, M.D., et al.,  
Defendants-Respondents.

---

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of  
counsel), for appellant.

Bartlett, McDonough & Monaghan, LLP, White Plains (Edward J.  
Guardaro, Jr. of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Edgar G. Walker, J.),  
entered October 6, 2009, dismissing the complaint alleging  
medical malpractice, and bringing up for review an order, same  
court and Justice, entered July 15, 2009, which granted  
defendants' motion to dismiss the complaint pursuant to CPLR  
3404, unanimously reversed, on the law, without costs, the  
judgment vacated, and the motion denied.

Dismissal of this action pursuant to CPLR 3404 was improper.  
Here, when the note of issue was previously vacated, the case  
reverted to its pre-note of issue status, thereby rendering CPLR  
3404 inapplicable (see *Sellitto v Women's Health Care  
Specialists*, 58 AD3d 828 [2009]; *Johnson v Minskoff & Sons*, 287  
AD2d 233 [2001]). Defendants' avenues to dismiss this pre-note

of issue case are limited to CPLR 3216 and 22 NYCRR 202.27. The latter is inapplicable to the facts herein, and defendants failed to comply with the preconditions of the former (see *Johnson* at 237-238).

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

ENTERED: APRIL 19, 2011

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", is written over a horizontal line.

CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4838 Irving Jochehman, Index 103533/07  
Plaintiff-Respondent,

-against-

The New York State Banking Department,  
Defendant-Appellant,

Diana Taylor, etc., et al.,  
Defendants.

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Eric T. Schneiderman, Attorney General, New York (Richard Dearing of counsel), for appellant.

Allegaert Berger & Vogel LLP, New York (Robert F. Finkelstein of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered October 5, 2010, which, to the extent appealed from as limited by the briefs, denied defendant-appellant employer's motion for summary judgment insofar it sought dismissal of plaintiff employee's cause of action alleging a violation of Executive Law § 296(3) as against it, unanimously affirmed, without costs.

Defendant asserts that it investigated plaintiff's claimed disability and request for a reasonable accommodation, and that plaintiff caused the process to break down by refusing to supply requested medical information. However, the record contains

evidence that plaintiff made an effort to substantiate his claim with medical documentation, made two requests for a reasonable accommodation, and suggested possible accommodations. According to plaintiff, defendant failed to consider his requests. Based on the conflicting evidence, Supreme Court properly determined that genuine issues of fact exist as to whether defendant engaged in the good faith interactive process required by the New York State Human Rights Law (see Executive Law § 296[3]; see also *Phillips v City of New York*, 66 AD3d 170, 176 [2009]).

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

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

ENTERED: APRIL 19, 2011

A handwritten signature in black ink, appearing to read 'Susan R. Jones', written over a horizontal line.

CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4839- Joseph Rendino, et al., Index 13852/07  
4840 Plaintiffs-Appellants,

-against-

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

---

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

Cartafalsa, Slattery, Turpin & Lenoff, New York (B. Jennifer Jaffee of counsel), for respondents.

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about May 19, 2010, which denied plaintiffs' motion for partial summary judgment on the issue of liability on their Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted. Appeal from order, same court and Justice, entered on or about August 12, 2010, which, upon reargument, adhered to the prior determination, unanimously dismissed, without costs, as academic.

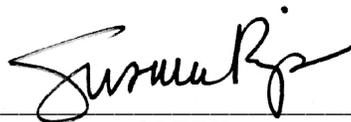
Plaintiff, an employee of the general contractor on a renovation project, was assigned to caulk windows on the sixth floor of the outside of a building owned by defendant City of New York. To perform this work, plaintiff stood in a basket, which was attached by a cable to the boom of a crane. While the basket

was in the process of being lowered, it suddenly dropped several feet causing plaintiff to fall within the basket and sustain injuries.

The record demonstrates that plaintiffs established their entitlement to judgment as a matter of law and that defendants failed to raise a triable issue of fact as to causation. Even if the basket merely descended at a faster rate of speed than intended due to a mechanical defect, as claimed by defendants, defendants have still failed to show that the basket's descent and plaintiff's resulting injury were not related to the application of the force of gravity on the basket (see *Hill v Stahl*, 49 AD3d 438 [2008]).

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

ENTERED: APRIL 19, 2011



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CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4841            277 Mott Street LLC,                                 Index 603168/08  
                        Plaintiff-Appellant,

-against-

Fountainhead Construction LLC, et al.,  
Defendants-Respondents.

---

Jaffe, Ross & Light, LLP, New York (Steven R. Miller of counsel),  
for appellant.

Rivelis, Pawa & Blum, LLC, New York (Howard Blum of counsel), for  
respondents.

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Order, Supreme Court, New York County (Judith J. Gische,  
J.), entered July 2, 2009, which granted defendants' motion to  
dismiss the first, fourth, and fifth through ninth causes of  
action, unanimously modified, on the law, to deny the motion as  
to the first and fifth through ninth causes of action, and  
otherwise affirmed, with costs.

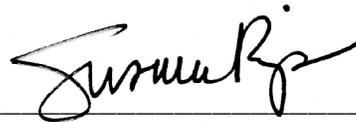
The complaint alleges that defendant Abrams, the principal  
of defendant Fountainhead Construction LLC, induced plaintiff to  
make a \$1.5 million "down payment" to Fountainhead against a "to  
be negotiated" construction contract, "always intend[ing]" to  
divert the funds for purposes other than the construction on  
plaintiff's property. These allegations state a cause of action  
for fraud (see *Shisgal v Brown*, 21 AD3d 845, 846-847 [2005]).

Limited Liability Company Law § 609 does not insulate Abrams from a fraud in which he personally participated (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). By alleging in pertinent detail that Fountainhead was insolvent and that Abrams transferred plaintiff's down payment out of Fountainhead to pay his personal debts and those of his other businesses, the complaint states a cause of action for fraudulent conveyance under Debtor and Creditor Law §§ 273-276-a.

The motion to dismiss was correctly granted as to the fourth cause of action, which, *inter alia*, does not specify the section of the Business Corporation Law that allegedly was violated.

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

ENTERED: APRIL 19, 2011

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CLERK





violation of *Brady v Maryland* (373 US 83 [1963]) with regard to their disclosure, during the trial, of certain information relating to calls made from the victim's cell phone. The People had attempted to link defendant and the jointly tried codefendant with the crime through evidence tending to show that the codefendant used the phone. The alleged *Brady* material tended to suggest that this linkage was actually weaker than it appeared. Even assuming the information in question could be considered *Brady* material, it was disclosed at a time that permitted the defense to effectively use the evidence (see *People v Cortijo*, 70 NY2d 868, 870 [1987]). The court offered an extensive series of remedies in order to ensure a full opportunity to expose the alleged weakness in the People's theory concerning the cell phone. There was no reasonable possibility that earlier disclosure would have affected the outcome of the trial. Defendant made only conclusory assertions of prejudice, and the People's case was overwhelming.

The trial court properly exercised its discretion by excusing a juror who was admitted to the hospital for heart pain, was kept in the hospital overnight for observation, and was unable to return to court the following day. It was clear that waiting for the absent juror would delay the trial for at least a

full day, which was well beyond the statutory two-hour period (see CPL 270.35[1]; *People v Jeanty*, 94 NY2d 507 [2000]).

Defendant did not preserve her claims requiring the court's colloquy with an individual juror during deliberations, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. Although the court should not have given the individual juror any legal instruction in the absence of the other jurors and without consulting with counsel in advance, defendant was not prejudiced by the court's handling of the matter especially because the instruction was correct and the entire jury was later instructed on the need for a unanimous verdict.

Defendant's aggregate sentence of 40 years was lawful (see Penal Law § 70.25[2]; *People v Laureano*, 87 NY2d 640, 643 [1996]; *People v Lopez*, 15 AD3d 232 [2005], *lv denied* 4 NY3d 888 [2005]), and we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 19, 2011



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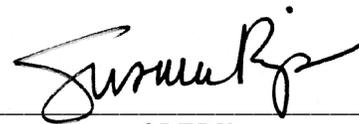


that petitioner claims to be "conflicting" was determined to be incredible, a determination that is entitled to deference (see *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 568 [2008]).

Considering petitioner's lack of remorse and failure to take responsibility for her actions, as well as the harm caused by petitioner's actions, the penalty of dismissal, even if there was an otherwise adequate performance record, cannot be said to shock the conscience (compare *Matter of Winters v Board of Educ. of Lakeland Cent. School Dist.*, 99 NY2d 549, 550 [2002], with *Lewandowski v Port Auth. of N.Y. & N.J.*, 229 AD2d 360, 361 [1996]).

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

ENTERED: APRIL 19, 2011



CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4848           Sentina Brown,                                               Index 303618/08  
                  Plaintiff-Respondent,

-against-

                Simone Development Company, L.L.C.,  
                  Defendant,

                ABM Industries, Inc.,  
                  Defendant-Appellant.

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Gallo Vitucci & Klar, LLP, New York (Kimberly A. Ricciardi of counsel), for appellant.

Silverman Bikkal & Sandberg LLP, White Plains (Alicia K. Sandberg of counsel), for respondent.

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                Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered September 16, 2010, which, to the extent appealed from, in this action for personal injuries sustained when plaintiff slipped on water and fell in the lobby of a building owned by defendant Simone Development Company, L.L.C., denied defendant ABM Industries, Inc.'s (ABM) motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

                Dismissal of the complaint as against ABM, the maintenance company charged with providing cleaning services for the subject building, was not warranted. Although ABM presented evidence

about its general cleaning practices and the schedule of its employee indicating that he did not mop the lobby until three hours after the accident, plaintiff and her coworker testified that plaintiff slipped in water, that no warning signs were set out, that it was not raining and no leaks came from the ceiling, and that an ABM employee was standing nearby with a mop and bucket. Plaintiff's coworker further testified that he had previously seen an ABM employee mop the lobby at around the time of night the accident occurred as opposed to when mopping should have be done pursuant to ABM's general practices. Such evidence presents triable issues as to whether ABM created the condition upon which plaintiff slipped (*see Healy v ARP Cable*, 299 AD2d 152, 154-155 [2002]).

Regarding ABM's argument that it did not owe plaintiff a duty of care, the complaint cannot be dismissed on that ground in light of the evidence that ABM launched a force or instrument of harm by negligently mopping or leaving a puddle of water right

next to the elevators in the lobby. Furthermore, ABM's contract displaced the property owner's duty to maintain the premises safely (see *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]).

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

ENTERED: APRIL 19, 2011

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CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4849 The People of the State of New York, Ind. 4735/03  
Respondent,

-against-

David Lineberger,  
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Bonnie Wittner,  
J.), rendered on or about December 19, 2008, unanimously  
affirmed.

Application by appellant's counsel to withdraw as counsel is  
granted (see *Anders v California*, 386 US 738 [1967]; *People v  
Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and  
agree with appellant's assigned counsel that there are no  
non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may  
apply for leave to appeal to the Court of Appeals by making  
application to the Chief Judge of that Court and by submitting  
such application to the Clerk of that Court or to a Justice of  
the Appellate Division of the Supreme Court of this Department on  
reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 19, 2011

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CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4851 Kitty Lee, et al., Index 111681/09  
Plaintiffs,

-against-

Ana Development Corp.,  
Defendant-Appellant,

The Hecht Group Corp.,  
Defendant-Respondent,

1133 Lexington Avenue Realty Corp., et al.,  
Defendants.

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Gannon, Lawrence & Rosenfarb, New York (Lisa L. Gokhulsingh of counsel), for appellant.

Stephen I. Feder, Forest Hills, for respondent.

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered December 1, 2010, which, in an action for personal injuries, granted the motion of defendant The Hecht Group Corp. (Hecht) for summary judgment dismissing the complaint as against it and sua sponte dismissed the cross claims asserted against it by defendant Ana Development Corp. (ADC), unanimously modified, on the law, to the extent of reinstating the second and third cross claims asserted by ADC against Hecht, and otherwise affirmed, without costs.

Plaintiff Lee alleged that she was injured on the stairway

leading to defendant commercial tenant Hecht's office due to the negligence of Hecht and the other defendants. Dismissal of the complaint as against Hecht was appropriate since no triable issues of fact were raised in response to Hecht's prima facie showing that it did not have a duty to maintain the stairway in safe condition and that it did not create a defective condition (see e.g. *Smith v Costco Wholesale Corp.*, 50 AD3d 499 [2008]). The court did not act prematurely in granting summary judgment before any discovery inasmuch as "[a] grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [2000]).

However, the court improperly dismissed two of the four cross claims asserted by ADC (the owner of the building) against Hecht. While two of the cross claims (first and fourth) are void as a matter of law based on the dismissal of the complaint, in that they are premised on claims that Hecht acted negligently and had a duty with regard to the stairway, the second and third cross claims, which allege that Hecht had contractual obligations to purchase insurance in favor of ADC and to defend and indemnify

ADC, are not necessarily precluded. In view of the fact that Hecht neither sought dismissal of these claims nor made a prima facie showing of entitlement to such relief, we modify to the extent indicated (see *Sadkin v Raskin & Rappoport*, 271 AD2d 272 [2000]).

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

ENTERED: APRIL 19, 2011

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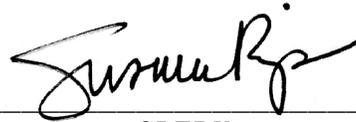
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As the People concede, since defendant committed the crime before the effective dates of legislation increasing the mandatory surcharge and crime victim assistance fees, defendant's sentence is unlawful to the extent indicated.

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

ENTERED: APRIL 19, 2011

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CLERK



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

**M-2674 - *People v Douglas Latta***

**M-2757 - *People v Angela Perez, a/k/a Anna Ciano***

Motions to dismiss appeal denied.

**M-2986 - *People v John Washington, etc.***

Motion to dismiss appeal granted.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias,	J.P.
David B. Saxe	
Rolando T. Acosta	
Sheila Abdus-Salaam	
Sallie Manzanet-Daniels,	JJ.

3170-  
3180&  
M-2674  
M-2757  
M-2986  
Ind. 3782/07

x

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The People of the State of New York,  
Appellant,

-against-

Western Express International, Inc.,  
et al.,  
Defendants-Respondents.

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x

The People appeal from orders of the Supreme Court, New York County (Bruce Allen, J.), entered on or about July 25, 2008, which dismissed the enterprise corruption count against each defendant. Appeals from orders, same court and Justice, entered on or about March 3, 2009, which denied the People's motion to reargue.

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn and Mark Dwyer of counsel), for appellant.

Michele Hauser, New York, for John Washington, respondent.

Marianne Karas, Armonk, for Vadim Vassilenko, respondent.

Theodore M. Herlich, New York, for Douglas Latta, respondent.

Steven Banks, The Legal Aid Society, New York (Allen Fallek of counsel), for Lyndon Roach, respondent.

Galluzzo & Johnson LLP, New York (Matthew J. Galluzzo of counsel), for Angela Perez, respondent.

SAXE, J.

These appeals concern the intended scope of the enterprise corruption provision (Penal Law § 460.20) of New York's Organized Crime Control Act (OCCA) (Penal Law title X). The question presented for our consideration is whether the proof presented to the grand jury sufficed to show that defendants' combined activities constituted the type of "ascertainable structure" needed to satisfy the definition of enterprise corruption under Penal Law § 460.10(3). We conclude that the evidence is sufficient to establish the type of criminal enterprise covered by the statute, and, accordingly, we reverse and reinstate those counts of the indictment.

Before the advent of widespread use of the Internet, organized criminal organizations were always tangible entities whose location could be pinpointed and whose members could generally be found in relatively close proximity to each other and their victims. The Internet has provided an extraordinarily useful new tool for criminals to perpetrate crimes in entirely new ways. Not only does the Internet permit individuals to commit traditional criminal offenses in cyberspace through the use of computers (see Goodman and Brenner, *The Emerging Consensus on Criminal Conduct in Cyberspace*, 2002 UCLA J L Tech 3 [2002]; Katyal, *Criminal Law in Cyberspace*, 149 U Pa L Rev 1003 [2001]),

but it created the opportunity for loosely organized networks to coordinate large-scale criminal operations such as thefts of millions of dollars in funds from banks worldwide, or the penetration of telephone network computer systems and theft of phone card information (see Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S Cal Interdis LJ 63 [2001]).

The groups, or networks, that commit such large-scale criminal operations do not resemble traditional organized crime models. As one commentator has remarked, the Internet allows criminals to commit crimes "without formal organization" since there is no need for physical contact or geographical control; contacts and co-conspirators can remain faceless, and participation in a scheme need not involve the giving and following of orders, but may be carried out after general discussion in a virtual chat room (see Lauren L. Sullins, Comment, "*Phishing*" for a Solution: Domestic and International Approaches to Decreasing Online Identity Theft, 20 Emory Intl L Rev 397, 418 [Spring 2006]). It has been observed that the structure of these criminal enterprises using the Internet may be fundamentally different than the hierarchical model typical of traditional organized crime; in the context of the Internet, traditional hierarchies are replaced by networks, and a hallmark

of the network-style structure is decentralized power and authority (see Brenner, *Toward a Criminal Law for Cyberspace: Distributed Security*, 10 BU J Sci & Tech L 1 [2004]).

One new form of crime made possible by the Internet involves the theft and resale of computerized information, such as credit card data, for subsequent fraudulent use by others (see Peretti, *Data Breaches: What the Underground World of "Carding" Reveals*, 25 Santa Clara Computer & High Tech LJ 375 [2009]). A particular type of criminal enterprise has emerged from this new form of crime: "websites known as 'carding forums' that facilitate the sale of, among other contraband, stolen credit and debit card numbers," which offer participants a variety of forms of assistance in perpetrating their crimes (*id.* at 381).

Since the time that cybercrime first emerged, prosecution of its various forms has involved the use of both long-established criminal statutes and new legislation. That is, some longstanding criminal prohibitions have been found to cover crimes committed with the use of computers, including the various criminal acts falling within the category of "carding." Federal law enforcement has targeted and prosecuted some of these acts by charging a number of individuals with such crimes as conspiracy, identity theft, trafficking in illegal information, credit card

fraud, and money laundering (see Peretti, at 395-403; Hsu, "French Arrest Cyber-Crime Suspect for U.S.," Washington Post 8/12/10 at B04). However, in some respects, new criminal legislation such as the federal Computer Fraud and Abuse Act (18 USC § 1030) has been determined to be necessary to effectively combat such crime (see Sinrod and Reilly, *Cyber Crimes: A Practical Approach to the Application of Federal Computer Crime Laws*, 16 Santa Clara Computer & High Tech LJ 177, 179, 180-181 [2000]; Heymann, *Legislating Computer Crime*, 34 Harv J on Legis 373 [1997]). Beginning in the 1980s, a wave of computer-crime-related criminal laws began to be enacted world-wide,

"precipitated by the inadequacy of the existing traditional criminal provisions, which protect exclusively physical, tangible and visible objects against traditional crimes, in the advent of cybercrime. The new laws addressed the new capabilities of computer related crimes to violate traditional objects through new media (such as stealing money by manipulating bank accounts), to involve intangible objects (such as computer programs), and to employ new methods of committing crimes made possible by increasing use and reliance on computer systems and networks."

(Goodman and Brenner, *The Emerging Consensus on Criminal Conduct in Cyberspace*, 2002 UCLA J L Tech 3 [2002]).

During this same period, specifically, in 1986, New York enacted the OCCA (Penal Law article X, § 460.00 *et seq.*), having

concluded that "new penal prohibitions and enhanced sanctions, and new civil and criminal remedies are necessary to deal with the unlawful activities of persons and enterprises engaged in organized crime" (*id.* at § 460). Since the intended scope of the OCCA is central to this appeal, it is fortunate that that scope may be discerned primarily from the legislative findings that introduce the Act, making it unnecessary to rely on the remarks of members of the Legislature found in the statute's bill jacket. These statutory legislative findings explain how organized crime now involves "highly sophisticated, complex" criminal activity, and describes how "legitimate enterprises [are] being employed as instrumentalities, injured as victims, or taken as prizes" (*id.*). The findings relate that the Act was considered necessary because "[e]xisting penal law provisions are primarily concerned with the commission of specific and limited criminal acts without regard to the relationships of particular criminal acts or the illegal profits derived therefrom, to legitimate or illicit enterprises operated or controlled by organized crime" (*id.*). These findings also recognize that sometimes, a series of criminal acts, even if they arguably form a pattern, may be fully and properly prosecuted under existing criminal laws. The Act attempts to carefully define the terms "pattern of criminal activity" and "criminal enterprise" so as to give the prosecutor, the grand

jury, and the judiciary the means by which to determine when a group's pattern of criminal acts may fairly be said to constitute part of a larger "criminal enterprise," while allowing for their exercise of discretion (*id.*).

Therefore, when a business enterprise takes what would otherwise be a series of individual criminal acts by various participants, and attempts to incorporate those participants, and their criminal transactions, into a larger, ongoing criminal enterprise, the OCCA prompts us to look for a broader structure beyond the individual crimes perpetrated, and authorizes the prosecution of the larger organization as a whole, "because their sophistication and organization make them more effective at their criminal purposes and because their structure and insulation protect their leadership from detection and prosecution" (*id.*).

Although the forms of Internet crime have been evolving and becoming far more sophisticated over the decades since the OCCA was first enacted, the question is not whether the Legislature had this particular type of criminal enterprise in mind when it formulated the language of the statute. Rather, we need only decide whether the structure of the enterprise at issue falls within its definition of enterprise corruption.

The type of enterprise corruption charged here, under Penal Law § 460.20, occurs when a defendant, "having knowledge of the

existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, . . . (a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity." The "criminal enterprise" with which the defendant must be associated is defined in Penal Law § 460.10(3) as "a group of persons sharing a common purpose of engaging in criminal conduct, associated in *an ascertainable structure distinct from a pattern of criminal activity*, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents" (emphasis added). Therefore, while a charge of enterprise corruption under section 460.20 requires that the defendants participated in a "pattern of criminal activity," that is not sufficient; the element most critical here is the requirement that the criminal enterprise must have "an ascertainable structure *distinct from* [that] pattern of criminal activity" (Penal Law § 460.10[3] [emphasis added]).

The motion court concluded that the evidence failed to show the requisite "structure" of the charged enterprise, observing that "courts have consistently required some evidence of a system of authority or hierarchy binding the defendants together." In our view, however, the criminal operation created by Western

Express, in which the individual defendants participated, had the requisite "ascertainable structure distinct from [its] pattern of criminal activity" so as to qualify as a "criminal enterprise" as defined by the statute. The statute does not require any particular structure for the enterprise, and nowhere does it indicate that it contemplates a traditional hierarchical organized crime model; I see no reason to preclude its application to a non-traditionally arranged, non-hierarchically structured criminal enterprise.

The indictment here charges that Western Express International, its president, Vadim Vassilenko, and the four other individual defendants appealing here, as well as various other individuals not parties to this appeal, formed and participated in an operation of this type. Defendants are charged with a wide variety of crimes, including scheme to defraud (Penal Law § 190.65), money laundering (Penal Law §§ 470.15, 470.20), and grand larceny (Penal Law § 155.40), as well as enterprise corruption. However, the only counts at issue on appeal are those charging each of the defendants with enterprise corruption under the OCCA (Penal Law § 460.20).

The indictment alleges that defendants comprised a "cyber crime" enterprise that used the structure and facilities of Western Express to systematically traffic in stolen credit card

data, using money laundering processes made possible by Western Express in order to avoid detection. The evidence presented to the grand jury, including information retrieved from computers seized at Western Express's headquarters and Vassilenko's residences, as well as money orders, forged credit cards, and defendants' e-mail containing lists of stolen credit card account numbers, established the existence of a criminal enterprise in which the individual defendants participated to varying extents. The witnesses, including a United States Secret Service Special Agent and an investigator from the Manhattan District Attorney's office, explained that while Western Express offered a variety of legitimate services, such as check-cashing, mail receiving, money orders, digital currency exchange, and Russian/English translation services, it also acted as an intermediary, or "money mover," providing credit and facilitating transactions for buyers and sellers of stolen credit card data, while earning a commission for each such transaction. The credit card data was obtained by hackers or by other illegal methods, and was then sold through Western Express to buyers such as defendants Latta, Perez, Roach, and Washington, who in turn used that data for such illegal purposes as manufacturing counterfeit credit cards or making fraudulent on-line purchases.

The evidence reflects that Vassilenko, as president of

Western Express, made concerted efforts to position Western Express as a preferred agency for "carders," that is, vendors and buyers of stolen credit card data. He did so by making Western Express more than a neutral site for transacting sales; he provided services that would help these individuals successfully carry out their illegal transactions undetected by law enforcement. Vassilenko created and maintained websites and Internet forums containing postings about the sale of stolen account information, advertised Western Express's money-moving services, posted messages on pre-existing "carder" websites and looked into advertising on the website Carder Planet. Then, Western Express employees actively assisted those customers buying and selling stolen credit card data by providing them with credit using unregulated digital currencies such as Egold and Webmoney, arranging exchanges of these digital currencies so that the transactions could be conducted without disclosure of the identities of the parties taking part.

More specifically, the evidence presented to the grand jury showed that Western Express provided Egold (in exchange for other currency) to buyers of stolen credit card data, including defendants Latta, Perez, Roach and Washington, which digital currency helped them anonymously purchase the stolen data; then Western Express would redeem from the sellers of the stolen data,

such as defendants Egor Shevelev and Dzimitry Burak, the Egold that the buyers had paid to them, exchanging it for Webmoney or United States currency. On each transaction, Western Express earned a commission of between two and five percent. By arranging for these transactions to be conducted in unregulated digital currencies, which were then exchanged for other unregulated currencies, and by knowingly permitting the transactions to be conducted using aliases, Western Express helped the participants avoid detection by governmental regulatory authorities, while itself profiting at each stage of the illegal process.

Western Express employees also helped the vendors and buyers avoid triggering federal reporting requirements by advising them to make wire transfers in small amounts under a variety of fictitious names. In these ways, Western Express not only failed to combat money laundering and detect suspicious or clearly illegal activity, it actively encouraged, assisted and participated in those activities. Indeed, defendant Vassilenko admitted to an investigator that five percent of his business involved "dirty" money.

In sum, the presented evidence shows that Vassilenko began with a legitimate business enterprise engaged in such services as check-cashing, mail receiving, money orders, and digital currency

exchange, which he then perverted both by attracting buyers and sellers of stolen credit card data to transact their business on his site, and by not only failing to enforce anti-money laundering protections, but affirmatively providing specialized assistance to these criminals to protect them from detection and encourage their continued use of the site for additional transactions in the future. While the individual defendants acting as either buyers or sellers of stolen credit card data could conduct such illegal transactions in the absence of Western Express -- indeed, they continued to conduct such illegal transactions even after Western Express ceased operations -- the evidence before the grand jury permitted the conclusion that all the defendants had found it to be to their mutual advantage to utilize and participate in the larger organizational forum and structure provided by Western Express.

This Court is divided on the question of whether the nature of this organization, as indicated by the evidence presented to the grand jury, constitutes a "criminal enterprise" having an "ascertainable structure" as contemplated by the OCCA. It must be acknowledged that the structure of Vassilenko's enterprise, used by the buying and selling defendants, differs greatly from the way in which the very word "structure" is ordinarily used in the context of organized crime. The "structure" at issue here

is, essentially, a web site; there is no social club or office, no hierarchy of appointed positions. Nevertheless, the criminal enterprise that was formed from the legitimate business known as Western Express served as far more than merely a site at which information thieves could fence stolen goods. Rather, it was molded into a full-service clearinghouse devoted to optimizing illegal transactions involving stolen credit card information.

Examination of cases in which charges of enterprise corruption were upheld, and others in which they were not, helps illustrate how to determine whether criminal activity falls within the OCCA.

Enterprise corruption charges were dismissed in *People v Nappo* (261 AD2d 558, 559 [1999], *revd on other grounds* 94 NY2d 564 [2000]), where the defendants' scheme to import motor fuel from New Jersey to New York without filing reports or paying taxes did not constitute a "structure, business, activity, or continuity of criminal purpose beyond the scope of the criminal incidents alleged in the indictment." Similarly, charges of enterprise corruption were dismissed in *People v Moscatiello* (149 Misc 2d 752 [Sup Ct, NY County 1990]), where it was alleged that the defendants were engaged in a bribery scheme in which each participant played a different role: one defendant directed the enterprise, one was his assistant, and another the "instrument."

The court observed that the structure of the individuals' association was "not one with a scope of existence beyond their criminal acts" (*id.* at 756).

The same absence of an association that went beyond the scope of the component criminal incidents was apparent in *People v Yarmy* (171 Misc 2d 13 [Sup Ct, NY County 1996]), where the count of the indictment charging enterprise corruption was dismissed because the alleged criminal activity consisted of a firearms dealer arranging for an unlicensed co-conspirator to illegally sell weapons and ammunition, sometimes with the assistance of family members, and the division of the proceeds from the sales. Although the District Attorney's office had argued in *Yarmy* that the enterprise consisted of the illegal sales and recruitment of new customers aided by an unlicensed co-conspirator and others, the court observed that there were actually only two roles in the enterprise: the supplier and the distributor, acting together to their mutual financial benefit, so the scope of the enterprise was no larger than the conduct of the illegal sales themselves. So, although the court in *Yarmy* remarked on the lack of a "hierarchical organization" which it considered "critical to establishing an enterprise" (171 Misc 2d at 17-18), the charged conspiracy also failed by the standard applied by the cases discussed above, in that the scope of its

existence did not extend beyond the participants' criminal acts.

In contrast, the requirements of the enterprise corruption statute were held to be satisfied by the business operations considered in *People v Forson* (NYLJ, May 12, 1994 at 29, col 3 [Sup Ct, NY County]). There, the defendants had formed what appeared to function as a legitimate securities dealer operation, but which actually conducted a variety of fraudulent schemes in which the participants stole investors' funds. In denying dismissal of the enterprise corruption charges, the court observed that the defendants shared a common purpose of using their business, Oxford Capital Securities, to defraud members of the investing public, and, importantly, that the "enterprise" went beyond what was necessary to commit the series of acts charged. Rather, one defendant directed the enterprise and set goals, policies, and strategies, with an inner circle to convey his plans and strategies to others, and to fraudulently obtain funds from unsuspecting investors.

The definition of enterprise corruption was also found to be satisfied in *People v Conigliaro* (290 AD2d 87 [2002], lv denied 98 NY2d 650 [2002]), where the defendants were members of a gambling organization that ran a sports betting operation, which included a bookmaker who oversaw the operation, a controller who conducted its day-to-day business and maintained bettors' account

information, clerks who accepted bets over the telephone, and runners who met with bettors to settle their weekly accounts.

Finally, while *Boyle v United States* (\_\_\_ US \_\_\_, 129 S Ct 2237 [2009]) is not controlling here, because it concerned the issue of whether a particular criminal enterprise was covered by the federal Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC 1962), its discussion is informative. The defendant in *Boyle*, one of the participants in a series of bank thefts, was convicted of participation in a criminal enterprise under RICO. The group who took part in these thefts was "loosely and informally organized," with no "long-term master plan or agreement," and no particular leader or hierarchy; there was a "core group" which was assisted by "others who were recruited from time to time" (129 S Ct at 2241). The United States Supreme Court upheld the trial court's instruction to the jury that an "enterprise" under RICO could consist of an "association of individuals, without structural hierarchy, form[ed] solely for the purpose of carrying out a pattern of racketeering acts" (*id.* at 2242), and need not "have any particular or formal structure, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise" (*id.* at 2242 n 1). The Supreme Court held that the structure of

the enterprise need not be hierarchical, and that to show the necessary structure, the prosecution need only show that the group functioned as a "continuing unit" with a "common purpose" and that it "remain[ed] in existence long enough to pursue a course of conduct" (*id.* at 2244-2245). Importantly, while the Supreme Court observed that the "existence of an enterprise" is a separate element, distinct from the requirement of a pattern of criminal conduct, the existence of an enterprise may sometimes "be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity" (*id.* at 2245).

Unquestionably, the definition of a criminal enterprise to which the OCCA applies does not match that of RICO, and expressly requires that the group's "ascertainable structure" be "distinct from a pattern of criminal activity" (Penal Law § 460.10[3]). However, the logic behind the *Boyle* Court's observation that RICO does not require the structure to be hierarchical ought to be similarly applicable to the OCCA. There is nothing in the language of the statute that requires the structure of the targeted enterprise to "be so rigid as to resemble the formalistic corporate flow chart" (*People v Wakefield Fin. Corp.*, 155 Misc 2d 775, 785 [Sup Ct, NY County 1992]). Notably, nothing in the statute requires that the "structure" of the enterprise

incorporate a "chain of command," let alone "profit sharing," as my colleague suggests. Given that the statute merely requires an "ascertainable structure," there is no reason to engraft on it that the structure be of the old-fashioned, hierarchical nature. Notwithstanding references to the OCCA's intent "to prosecute organized crime activities on a similar - but more limited - basis than [RICO]" (see *People v Yarmy*, 171 Misc 2d at 16, citing Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law art 460, at 552-559), the question here is not whether the OCCA is as expansive as RICO, but rather, whether the showing made to the grand jury here satisfies the specific definitional language of the OCCA.

Although the criminal enterprise here was not of a traditional hierarchical sort, the participants worked together, employing a repeating pattern in their transactions that served to maximize the profits of each while minimizing their exposure, with each participant playing a different role: buyers, sellers, and money movers.

While the evidence certainly establishes a series of crimes by individual defendants comprised of purchases and sales of stolen credit card data, along with other related crimes such as money laundering, the business was shown to be more than simply the site at which a series of criminal transactions occur.

Rather, Western Express may be said to have built a broader criminal structure, in which each of the defendants played a role. The structure of the criminal enterprise created by Vassilenko, using the framework of Western Express, amounted to more than a series of those individual crimes. Moreover, it was driven by a larger criminal purpose. Western Express positioned itself to serve as much more than an on-line site at which buyers and sellers could conduct their illegal transactions and pay a commission to Western Express. Specifically, there was the overall planning and communications spearheaded by Vassilenko, with the assistance of other company employees, to transform what had been Western Express's initially legitimate business into a hub for criminal activity geared toward maximizing its own and its participants' profits from the theft and use of stolen credit card information and its protection from law enforcement. This creation of a sophisticated, multi-faceted criminal enterprise formed to encourage and expand on the criminal transactions upon which it is built, is analogous to the gambling organization discussed in *People v Conigliaro* (290 AD2d 87 [2002], *supra*), which operated a sports betting concern that included a variety of participants who together conducted an enormous business.

While the more traditional form of organized crime, such as the gambling operation considered in *Conigliaro*, makes it easy to

infer that the individual participants in the operation necessarily knew of the parts played by the other participants and the structure of the overall enterprise, such an inference may be made even where many of the participants never meet any other participants. The evidence here permits the inference that the individual participants understood the overall criminal structure, and that other individuals -- albeit individuals never seen or personally known by each defendant -- played other roles in the operation. The evidence points to the conclusion that the organization Vassilenko created out of the original financial services business of Western Express became more than merely a location at which individual criminal transactions occurred; it became a framework that existed to actively encourage more and larger criminal transactions by its participants on an ongoing basis. Recognizing this framework as an ascertainable structure to which the OCCA is applicable does not constitute an expansion of the definition of criminal enterprise so as to, in effect, eliminate the "ascertainable structure" element of the crime.

In enacting the OCCA, the Legislature made a point of remarking that the answer to "the question whether to prosecute under those [already existing] statutes or for the pattern itself . . . will depend on the particular situation, and is best addressed by those institutions of government which have

traditionally exercised that function: the grand jury, the public prosecutor, and an independent judiciary" (Penal Law § 460.00). Particularly in view of the findings' reference to the need for discretion (*id.*), and the statute's particular concern for legitimate businesses being overtaken by criminal enterprises, the showing made by the prosecutor and the findings of the grand jury here should be permitted to stand. The People should be permitted to attempt to prove at trial that each of the defendants took part in the ongoing criminal enterprise that Western Express had become, in violation of the OCCA's enterprise corruption statute. We therefore reverse the dismissal.

Accordingly, the orders of the Supreme Court, New York County (Bruce Allen, J.), entered on or about July 25, 2008, which dismissed the enterprise corruption count against each defendant, should be reversed, on the law, and the counts reinstated. Appeals from orders, same court and Justice, entered on or about March 3, 2009, which denied the People's motion to reargue, should be dismissed, without costs, as taken from nonappealable papers.

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

ANDRIAS, J.P. (dissenting)

The 173-count indictment charges multiple defendants with enterprise corruption in violation of Penal Law § 460.20 (the Organized Crime Control Act [OCCA]) and other crimes which are not at issue in this appeal.<sup>1</sup> The enterprise corruption charge is based on allegations that defendants comprised an international cybercrime group in which defendant-respondent Western Express, with the knowledge and participation of its president, defendant-respondent Vassilenko, facilitated the internet sale of stolen credit card data in anonymous transactions between defendant vendors and defendant buyers, including respondents Latta, Perez, Roach and Washington, by advertising on Web sites, buying and selling unregulated digital currencies and directing wire transfers to shell accounts.

Finding that the proof presented to the grand jury would establish that defendants were associated with a criminal enterprise that had "an ascertainable structure distinct from a pattern of criminal activity," as required by Penal Law §

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<sup>1</sup> These include conspiracy in the fifth degree (Penal Law § 105.05[1]); scheme to defraud in the first and second degree (Penal Law § 190.65[1][a] & [b]); grand larceny in the second and third degree (Penal Law § 155.40[1] & § 155.35); attempted grand larceny in the third degree (Penal Law § 110.00/155.35); criminal possession of a forged instrument in the second degree (Penal Law § 170.25); and criminal possession of stolen property in the second and fourth degree (Penal Law § 165.52; § 165.45[2]).

460.10(3), the majority would reverse Supreme Court's dismissal of the enterprise corruption charge against each defendant-respondent. Because I believe that defendants' combined activities, undertaken for their individual benefit, without any chain of command, profit sharing, or continuity of criminal purpose beyond the scope of the criminal incidents alleged in the indictment, are insufficient to show that they engaged in the type of criminal enterprise covered by the statute, I dissent.

In 1986, the Legislature enacted the OCCA for "the purpose of creating the separate crime [of enterprise corruption] . . . to address the particular and cumulative harm posed by persons who band together in complex criminal organizations" (see *People v Besser*, 96 NY2d 136, 142 [2001]). The statute "focuses upon criminal enterprises because their sophistication and organization make them more effective at their criminal purposes and because their structure and insulation protect their leadership from detection and prosecution" (Penal Law § 460.00 [Legislative findings]).

"A person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he: (a) intentionally conducts or participates in the affairs of an enterprise by participating in

a pattern of criminal activity" (Penal Law § 460.20([1][a])). A "pattern of criminal activity" is defined as "conduct engaged in by persons charged in an enterprise corruption count constituting three or more criminal acts" committed within a specified time frame (Penal Law § 460.10[4][a] and [b]). A "criminal act" includes the felonies specified in the statute and conduct constituting a "conspiracy or attempt to commit any of [those] felonies," even if the conspiracy or attempt is a misdemeanor (Penal Law § 460.10[1][a] and [b]). The criminal acts must be either part of a common scheme or plan or have been "committed, solicited, requested, importuned, or intentionally aided by persons acting with the mental culpability required for the commission thereof and associated with or in the criminal enterprise" (Penal Law § 460.10[4][c]). The People must also prove that the defendant committed the three eligible "pattern acts," either as a principal or an accomplice pursuant to section 20.00 of the Penal Law (Penal Law § 460.20[2]; see *People v Newspaper & Mail Deliverers Union of N.Y. & Vicinity*, 250 AD2d 207, 212 [1998], *lv denied* 93 NY2d 877 [1999], *cert denied* 528 US 1081 [2000]).

Penal Law § 460.10[3] defines "criminal enterprise" as "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a

pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents." As stated by one of the statute's authors, Assembly Member Melvin H. Miller, then Chair of the Committee on Codes:

"[t]he members of the Codes Committee felt that the extraordinary sanctions allowed under the Act should be reserved for those who not only commit crimes but do so as part of an organized criminal enterprise . . . For that reason, it was not the sponsors' intent to redefine or sanction anew conduct already punishable under current law . . . Rather, the bill now requires association with an ascertainably distinct criminal enterprise in addition to corruption of a legitimate enterprise by criminal activity." (July 16, 1986 letter from Melvin H. Miller, Chair, Bill Jacket, L 1986, ch 516.)

While the association need not "be so rigid as to resemble the formalistic corporate flow chart" (*People v Wakefield Fin. Corp.*, 155 Misc 2d 775, 785 [Sup Ct, NY County 1992]), an ascertainable structure does not exist where multiple people commit multiple acts, but do not engage in "any structure, business, activity, or continuity of criminal purpose beyond the scope of the criminal incidents alleged in the indictment" (*People v Nappo*, 261 AD2d 558, 559 [1999], *revd on other grounds* 94 NY2d 564 [2000]; *see also People v Besser*, 96 NY2d 136, 143 [2001]; Donnino, Practice Commentaries, McKinney's Cons Laws of

NY, Book 39, Penal Law § 460.20, at 175). An ascertainable structure will be found where there are "planners and managers at the top, and middle and lower level participants executing the scheme -- 'a system of authority beyond what is minimally necessary to effectuate individual substantive criminal offenses'" (*id.* at 176, citing *Wakefield* at 785; see also *People v D.H. Blair & Co.*, 2002 NY Slip Op 50152[U], \*22 [Sup Ct, NY County 2002] ["hierarchical structure with the common purpose" of criminal activity satisfies the requirement]; *People v Cantarella*, 160 Misc 2d 8, 19 [Sup Ct, NY County 1993] ["[t]he structure consisted of a chain of command and profit sharing").

Thus, as explained in *People v Pustilnik* (14 Misc 3d 1237[A], 2007 NY Slip Op 50407[U] [Sup Ct, NY County 2007]), an ascertainable structure requires "'[a] system of authority beyond what is minimally necessary to effectuate individual substantive criminal offenses' (*People v Wakefield*, 155 Misc 2d at 785)," something more than and "distinct from any ad hoc association entered into for the purpose of carrying out one or more of the criminal incidents relied upon to establish its existence" (*People v Cantarella*, 160 Misc 2d at 14). Although "'a distinct ascertainable structure does not necessarily require the presence of an organization that is functionally independent of the criminal activity[,] [w]hat is significant is the existence of an

enterprise "beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses'" (*People v D.H. Blair*, 2002 NY Slip Op 50152[U], \*22, quoting *People v Forson*, NYLJ May 12, 1994, at 29 col 3, [Sup Ct, NY County]).

The proof before the grand jury was that Western Express acted as a "money mover," providing credit and facilitating transactions for buyers and sellers of credit card data stolen by hackers or by other methods. Western Express did so by buying and selling large sums of unregulated digital currencies, such as Egold and Webmoney, which they exchanged for each other and for United States currency. The digital currency provided by Western Express made it possible for buyer defendants, who used aliases, to purchase credit card data anonymously from vendor defendants, and allowed for the laundering of the illegal income. Vassilenko knew that Western Express's clients used aliases, which violated standard anti-money laundering practices, but made no effort to ascertain their true identities. Western Express employees also used aliases and hid their identities.

Western Express helped the vendors and buyers structure transactions to evade federal reporting requirements by advising that wire transfers be made in small amounts under various names. Vassilenko admitted to an investigator that five percent of his business involved "dirty" money, and that Western Express wired

money to dozens of "shell accounts" in Baltic states. Western Express sought to encourage the market for its services by maintaining Web sites that included postings about the sale of stolen account information and advertised its money moving services.

The buyer defendants purchased stolen credit card data from vendors, by sending Egold via Western Express. Buyer defendants Latta, Perez, and Washington, along with various vendors, made use of online "carding" forums, which advertised the sale of stolen credit card account information. In addition, buyer defendants Latta and Perez committed credit card fraud together, as did Washington and another defendant. When Western Express ceased its operations, buyer defendants Latta, Perez, and Washington continued to purchase stolen credit card information from one of the vendor defendants herein, who continued to accept Egold as payment for the stolen data.

This evidence only established that, by sophisticated means, some of the defendants, in arm's-length transactions, sold stolen information and illegitimate services to the other defendants, who acted independently in using the information and services to commit their individual crimes. While the People assert that the "Western Express Cybercrime Group" was "comprised of Buyers, Vendors, Cybercrime Services Providers, and Money Movers, all of

whom made decisions and shared authority over distinct aspects of the enterprise's activities," there is no evidence of any collective decision-making or coordination with respect to the purported enterprise's activities or of any overarching structure of authority or hierarchy in which defendants participated. Accordingly, even when viewed in the light most favorable to the People (see *People v Jensen*, 86 NY2d 248, 251 [1995]), the evidence before the grand jury was insufficient to establish an ascertainable structure (see *People v Nappo*, 261 AD2d at 559; *People v Yarmy*, 171 Misc 2d 13, 19 [Sup Ct, NY County 1996]; *People v Moscatiello*, 149 Misc 2d 752, 756 [Sup Ct, New York County 1990]).

In *Nappo*, the Nappo defendants formed a corporation for the purpose of importing motor fuel oil and conspired to evade payment of State sales taxes. In finding that the defendants were not engaged in a criminal enterprise within the meaning of the OCCA, the Second Department found that "[t]he Grand Jury evidence is insufficient to establish that the respondents engaged in any structure, business, activity or continuity of criminal purpose beyond the scope of the criminal incidents alleged in the indictment." In *People v Conigliaro* (290 AD2d 87, 89 [2002]), the Second Department explained that in *Nappo*, "the People failed to establish either an 'existing organized crime

entity' or any continuity of existence wherein the said entity was capable of continuing without the participation of [the Nappos]." Here too, even after Western Express ceased its participation, certain vendor and buyer defendants continued on their own to traffic in stolen credit card data, using Egold as payment.

In *Yarmy*, the People alleged that the criminal enterprise included the customers to whom Yarmy unlawfully sold firearms. In rejecting the claim, the court found that the customers' "only concern was to obtain firearms illegally, with no intent to further the enterprise. Such a position, if accepted by the court, would be the equivalent of an addict on a street corner who purchased a vial of crack being held accountable for a criminal enterprise that reached to the highest echelon of the Colombian cartels. This clearly was not the intent of the OCCA statute" (*Yarmy* at 19). Here too, each participant, whether it be a vendor defendant, buyer defendant, or Western Express, was concerned with furthering their interests alone, not with generating profits to be shared by the other participants.

In *Moscatiello*, which involved a bribery scheme, the court held that:

"[t]he evidence as presented to the Grand Jury shows three individuals engaged in giving or taking bribes and related

activities. Beyond the various criminal acts these three people were associated in no structure and certainly not one with a scope of existence beyond their criminal acts. The People have sought, with some imagination and ingenuity, to show the existence of an organization by showing that Moscatiello was the 'director' of the enterprise, Shepis, his 'assistant' and Eckhaus the 'instrument' of the criminal activity. However, this shows little more than that the three people played different roles . . . for the purpose of this activity was to bribe Eckhaus to allow violations of the union rules" (*Moscatiello* at 756).

Similarly, in the matter before us, as Supreme Court found:

"In essence, the People have described an illegal industry rather than a corrupt enterprise, the criminal parallel of a typical legitimate industry consisting of producers, wholesalers, distributors, retail outlets, and credit suppliers, each of which has a unique but independent role in the industry. Despite the People's great creativity in attempting to describe the defendants' activities, the People's theory of the case (and the evidence) never points beyond long-term, repeated illegal business transactions among parties who stand on equal footing, and who operate independently of each other."

(*People v Latta*, 2008 NY Misc LEXIS 4967, 240 NYLJ 23 [Sup Ct, New York County 2008]).

In seeking to expand the definition of a criminal enterprise, the majority goes to great lengths to describe how the Internet has provided an extraordinarily useful new tool for criminals to perpetrate crimes in an entirely new way. While

this may be true, "[t]he governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory 'language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of [the] words' used. Equally settled is the principle that courts are not to legislate under the guise of interpretation." (*People v Finnegan*, 85 NY2d 53, 58 [1995], *cert denied* 516 US 919 [1995] [internal citations omitted]). Thus, as stated in McKinney's Consolidated Laws of NY, Book 1, Statutes § 73,

"A statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all of the problems and complications which might arise in the course of its administration; and no matter what disastrous consequences may result from following the expressed intent of the Legislature, the Judiciary cannot avoid its duty." (Comment at 148; *see also Matter of Tina Marie W.*, 87 AD2d 988 [1982]).

Accordingly, if there is a need to address the unique dangers posed by Internet crime, and the new ways in which individuals or entities interact with each other to commit those crimes, it is for the Legislature to do so. It is not for the courts to expand the definition of criminal enterprise beyond its clearly defined parameters in a manner that would for all intents and purposes eliminate the ascertainable structure required to establish a criminal enterprise under Penal Law § 460.10[3]).

Indeed, as the majority notes, while federal law enforcement has prosecuted "carding" by charging a number of individuals with existing crimes such as "conspiracy, identity theft, trafficking in illegal information, credit card fraud, and money laundering . . . in some respects, new criminal legislation such as the federal Computer Fraud and Abuse Act (18 USC § 1030) has been determined to be necessary to effectively combat such crime . . . ."

Contrary to the majority's position, the United States Supreme Court decision in *Boyle v United States* (\_\_\_ US \_\_\_, 129 S Ct 2237 [2009]), does not mandate a different conclusion. In *Boyle*, the Supreme Court considered "whether [under the Racketeer Influenced and Corrupt Organizations Act (18 USC § 1962 et seq. [RICO])] an association-in-fact enterprise . . . must have an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages" (*Boyle* at 2241 [internal quotation marks omitted]). While agreeing that "an association-in-fact enterprise must have a structure," the Supreme Court held that "[f]rom the terms of RICO" this requires evidence of (1) a purpose, (2) relationships among those associated with the enterprise and (3) longevity sufficient to permit the associates to pursue the purpose of the enterprise (*id.* at 2244), but does not require a hierarchical structure or,

fixed roles for its members, a name, regular meetings, dues, established rules and regulations, disciplinary procedures and induction or initiation ceremonies (*id.*).

However, under RICO an "'enterprise'" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity" (18 USC § 1961[4]). The Supreme Court has stated that this language is expansive and should be interpreted liberally (*Boyle*, 129 S Ct at 2243). Accordingly, the Supreme Court has found that "an enterprise includes any union or group of individuals associated in fact" (*United States v Turkette*, 452 US 576, 580-581 [1981]) and that RICO reaches "a group of persons associated together for a common purpose of engaging in a course of conduct" (*id.* at 583).

In contrast, Penal Law § 460.10(3)'s definition of criminal enterprise expressly includes the requirement that the group be "associated in an ascertainable structure distinct from a pattern of criminal activity." The New York Legislature has cautioned that the definitions of the statute's terms "should be given their plain meaning, and should not be construed either liberally or strictly, but in the context of the legislative purposes set forth in these findings" (Penal Law § 460.00; *People v Yarmy*, 171 Misc 2d at 16) and that "[b]ecause of its more rigorous

definitions, this act will not apply to some situations encompassed within comparable statutes in other jurisdictions" (Penal Law § 460.00). Thus, the purpose of the OCCA is "to arm State prosecutors with the ability to prosecute organized crime activities on a similar - but more limited - basis than [RICO]." (*People v Yarmy*, 171 Misc 2d at 16]). Accordingly, *Boyle*, where the Supreme Court stated that "[w]e see no basis in the language of RICO for the structural requirements that petitioner asks us to recognize" (*Boyle*, 129 S Ct at 2245), is not dispositive of the issues before us.

In any event, even under the relatively undemanding standard of *Boyle*, there are "situations in which proof that individuals engaged in a pattern of racketeering activity would not establish the existence of an enterprise" (*Boyle*, 129 S Ct at 2245 n 4) and the requisite structure cannot be found without some evidence of relationships among those associated with the enterprise that includes some form of concerted, coordinated, decision-making regarding the common purpose of the criminal enterprise. Here, the evidence before the grand jury did not satisfy this burden.

In asserting that an ascertainable structure may be found, the majority maintains that Vassilenko began with a legitimate business enterprise which he perverted by attracting buyers and sellers of stolen credit card data to transact business on his

Web site by providing affirmative assistance in the form of a full service clearing house devoted to optimizing illegal transactions involving stolen credit card information. However, the majority acknowledges that defendant vendors and buyers could have conducted their illegal activities without Western Express. While these defendants may have found it to be beneficial to utilize Western Express' Web site and services, it does not alter the fact that there has been no showing other than they acted independently, without a broader structure beyond the individual crimes perpetrated.

In sum, the fact that Western Express may have acted as an intermediary or "money mover" providing credit and facilitating transactions for buyers and sellers of stolen credit card data, earning a commission for each transaction, or aspired to be "carders'" facilitator of preference, did not in and of itself create an ascertainable structure as required by Penal Law § 460.10(3). Western Express was in essence no more than the equivalent of a common fence, taking stolen property from independent thieves and selling it to buyers looking for an illicit deal. Although defendants may all have been in the same industry, the vendors, buyers and Western Express each operated at arm's length for their own benefit, not as an enterprise with a shared purpose. Vendors and buyers could conduct their

transactions without Western Express and in fact certain of them continued to do so after Western Express ceased operation.

Accordingly, I would affirm the orders of the Supreme Court, New York County that dismissed the enterprise corruption count against each defendant-respondent, and that granted the People's motion to reargue and adhered to the original decision.

**M-2674 - *People v Douglas Latta***

**M-2757 - *People v Angela Perez, a/k/a Anna Ciano***

Motions to dismiss appeal denied.

**M-2986 - *People v John Washington, etc.***

Motion to dismiss appeal granted.

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

ENTERED: APRIL 19, 2011



A handwritten signature in cursive script, appearing to read 'Susan R. [unclear]', is written above a horizontal line.

CLERK