



a participating provider in Oxford's health plan. On August 15, 2001, Scher and two other physicians filed a complaint in Supreme Court asserting claims against Oxford for breach of contract and violations of various statutes. Oxford successfully moved to compel arbitration, and on March 8, 2005, Scher filed a demand for class arbitration with the AAA. In that demand, Scher alleged that Oxford engaged in a scheme to deny and reduce reimbursement amounts to Scher and other similarly situated participating providers.

Under the AAA Supplementary Rules for Class Arbitrations (the Class Rules), the arbitration proceeds in three phases. First, the arbitrator renders a partial award determining whether the applicable arbitration clause permits arbitration on behalf of a class (Class Rule 3). Next, the arbitrator renders a second partial award on whether the arbitration should proceed as a class arbitration, i.e., whether the class should be certified (Class Rules 4, 5). At the end of the arbitration, the arbitrator renders a final award on the merits. Under the Class Rules, after each award is issued, the parties are permitted to move in Supreme Court to confirm or vacate the award.

On March 7, 2006, the arbitration panel rendered an award determining that the parties' arbitration clause permitted class

arbitration (clause construction award). That award was vacated by a prior order of Supreme Court, but on appeal, this Court reversed and reinstated the award (45 AD3d 356 [2007]). On September 25, 2008, the arbitration panel rendered an award certifying the class (class certification award). Oxford moved to vacate that award and in an order entered November 5, 2009, Supreme Court denied the motion and confirmed the award. Oxford now appeals from the November 5 order confirming the class certification award.

Contrary to Oxford's contention, *Stolt-Nielsen S.A. v AnimalFeeds Intl. Corp.* (559 US \_\_\_, 130 S Ct 1758 [2010]) does not control the issues in this particular appeal. In *Stolt-Nielsen*, the Court addressed whether a clause construction award was properly confirmed. Here, however, the order appealed from is the class certification award, not the clause construction award. Neither the arbitrator's class certification award nor the order on appeal made any findings on whether the arbitration clause permitted class arbitration. Oxford is, in effect, seeking further review of the clause construction award. However, the clause construction award, which was previously confirmed by this Court (45 AD3d 356), is not properly before us on this appeal (see *Hecht v City of New York*, 60 NY2d 57, 61

[1983]; *Matter of Lisa Joy J. v Scott Hunter S.*, 77 AD3d 497 [2010]). Oxford did not seek any relief from the court below after *Stolt-Nielsen* was decided. Having failed to do so, it cannot raise this new legal issue in this Court on the appeal from an entirely different order.

We find that the arbitration panel neither exceeded its powers nor manifestly disregarded the law in certifying the class. With respect to typicality, “[t]he requirement is satisfied even if the class representative cannot personally assert all the claims made on behalf of the class” (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1991]). In any event, Scher submitted evidence - his deposition testimony - that he had been subjected to all the practices included in the class action demand, such as downcoding. In addition, the arbitration panel explained why the “balance billing” defense that Oxford claims is unique to Scher would not impermissibly become the focus of the arbitration (see *In re Initial Pub. Offering Sec. Litig.*, 243 FRD 79, 85, 91 [SD NY 2007]).

With respect to predominance, the arbitration panel did not manifestly disregard the law by finding that questions of law or fact common to the class members predominate over questions affecting only individual members (see *Sutter v Oxford Health*

*Plans LLC*, 227 Fed Appx 135, 138 [3d Cir 2007]), at least for the liability phase. Contrary to Oxford's argument, the breach of contract of which the plaintiff class complains is not every individual instance of underpayment. As the panel has not yet decided whether to bifurcate liability and damages, Oxford's argument in reliance on *McLaughlin v American Tobacco Co.* (522 F3d 215, 232 [2d Cir 2008]) is premature.

Oxford's reliance on *Medical Socy. of State of N.Y. v Oxford Health Plans, Inc.* (15 AD3d 206 [2005]) for the proposition that the plaintiff class has no private right of action under Insurance Law § 3224-a and Public Health Law § 4406-c is misplaced. The plaintiff in *Medical Socy.* was a medical association, not individual doctors. We found that the association did not belong to the class intended to benefit from those statutes, but did not reach the question of whether an

individual has a private right of action (15 AD3d at 206).

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

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

ENTERED: MAY 31, 2011

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CLERK

Andrias, J.P., Moskowitz, Renwick, Freedman, JJ.

5014	The People of the State of New York, Respondent,	Ind. 3951/04 4858/04 5665/04
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-against-

Charles Frazier,  
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Eleanor J. Ostrow of counsel), for respondent.

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Upon remittitur from the Court of Appeals (16 NY3d 36 [2010]), judgment, Supreme Court, New York County (Rena K. Uviller, J. at competency hearing; Charles J. Tejada, J. at jury trial and sentencing), rendered April 10, 2008, convicting defendant of burglary in the second degree (three counts), grand larceny in the third degree (two counts) and bail jumping in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 16 years to life for the burglary convictions, consecutive to concurrent terms of 2 to 4 years for the larceny convictions and consecutive to a term of 2 to 4 years for the bail jumping conviction, unanimously affirmed.

When this case was originally before us, defendant argued, inter alia, that the trial court erred in running his sentences

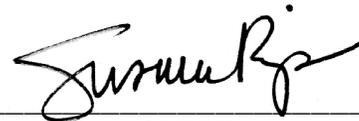
for the burglary convictions consecutively with the sentences for the larceny convictions. Alternatively, defendant argued that the trial court's imposition of consecutive sentences for the burglary and larceny convictions was excessive. We held that the trial court erred as a matter of law in imposing consecutive sentences and modified the judgment to the extent of directing that the sentences for the larceny convictions be served concurrently with the sentences for the burglary convictions (58 AD3d 468 [2009]). The Court of Appeals disagreed (16 NY3d 36 [2010]); it held that consecutive sentences are authorized and remitted the matter to this Court for us to address the issue raised but not resolved on the prior appeal, namely, whether the trial court's imposition of consecutive sentences for the burglary and larceny convictions was appropriate under the facts of this case (16 NY3d at 41).

We find no reason to disturb defendant's sentence. The sentencing court actually imposed a rather lenient sentence by not running the two burglary sentences consecutively, which it

could have done, given that the burglary of one apartment was an entirely separate crime from the burglary of another apartment. Moreover, given defendant's extremely extensive criminal history, it cannot be said that the sentence was excessive.

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

ENTERED: MAY 31, 2011

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CLERK

Andrias, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

2865-  
2866 & Port Parties, Ltd., Index 116257/08  
M-5947 Plaintiff-Respondent, 101979/09

-against-

ENK International LLC, et al.,  
Defendants-Appellants.

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Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of  
counsel), for appellants.

Quinn McCabe LLP, New York (Christopher P. McCabe of counsel),  
for respondent.

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Consolidated appeals from order, Supreme Court, New York  
County (Milton A. Tingling, J.), entered November 12, 2009,  
which, to the extent appealed from, in the "fraud" action (Index  
No. 101979-09, denied defendants' motions to dismiss the amended  
complaint, and in the "invoice" action (Index No. 116257-08),  
denied defendants' motion to dismiss in part the amended  
complaint and granted plaintiff's cross motion to file a second  
amended complaint, unanimously dismissed, without costs, as moot

in light of this Court's decision in *Port Parties, Ltd. v ENK Intl. LLC* [Appeal No. 4868], decided simultaneously herewith.

**M-5947      *Port Parties, Ltd. v ENK Intl., LLC, et al.***

Motion to hold appeal in abeyance dismissed  
as moot.

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

ENTERED:    MAY 31, 2011

  
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prevailing wages for work they had performed at New York City public schools pursuant to public contracts. Following more than five years of litigation, the parties entered into a Stipulation of Class Action Settlement (Stipulation), pursuant to which defendant-appellant was to pay the difference between the wages paid to class members and prevailing wages, provided that the total settlement amount not exceed \$600,000. Also pursuant to the Stipulation, defendant agreed to pay class counsel's attorneys' fees, provided such fees were reasonable and did not exceed \$200,000. Pursuant to procedures outlined in the Stipulation, plaintiffs' total recovery was determined to be \$116,648.66.

The court properly applied the lodestar method to calculate plaintiffs' class counsel's fee rather than the percentage method (see *Nager v Teachers' Retirement Sys. of City of N.Y.*, 57 AD3d 389 [2008], *lv denied* 13 NY3d 702 [2009]; *Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 56 AD3d 162, 165-166 [2008], *affd* 15 NY3d 375 [2010]). However, the record demonstrates that class counsel failed to establish through competent evidence that its fees were consistent with "customary fee[s] charged for similar services by lawyers in the community with like experience and of comparable reputation," or were

reasonable (*Friedman v Miale*, 69 AD3d 789, 791-792 [2010], *lv denied* 16 NY3d 706 [2011] [internal quotation marks and citation omitted]). Class counsel also failed to submit evidence reflecting the training, background, experience and skill of some individual attorneys who performed work in connection with the class actions (see *Matter of Rahmey v Blum*, 95 AD2d 294, 302 [1983]). The record reflects that a great deal of expense on all sides could have been avoided had plaintiffs' claims been appropriately investigated before a lawsuit was filed; concomitantly the number of hours expended was apparently excessive. In our view, the court should have undertaken an analysis as to whether all 1,256 hours expended by class counsel's attorneys, and the 433 hours worked by its paralegals, were useful and reasonable (see *Lunday v City of Albany*, 42 F3d 131, 134 [2d Cir 1994]).

Notwithstanding the motion court's observations that the litigation was "contentious," "heated" and "hard-fought," in light of the fact that the fee far exceeded plaintiffs' recovery, we remand the matter to Supreme Court for an evidentiary hearing to determine an appropriate amount of reasonable attorneys' fees

to be awarded (see *Friar v Vanguard Holding Corp.*, 125 AD2d 444, 447 [1986]).

All concur except Mazzarelli, J.P. and Manzanet-Daniels, J. who dissent in part in a memorandum by Mazzarelli, J.P. as follows:

MAZZARELLI, J.P. (dissenting in part)

I agree with the majority that the motion court properly applied the lodestar method in ascertaining the appropriate fee due to class counsel. However, the record reflects that the court, which was intimately familiar with the contentious nature of a litigation that was aggressively litigated by both sides, gave appropriate consideration to each of the lodestar factors, including the quality of class counsel's representation. Accordingly, a hearing on the application would be a poor allocation of judicial resources.

It is well established that a trial court's fee award in a class action is entitled to broad deference, "and will not be overturned absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding" (*Goldberger v Integrated Resources, Inc.*, 209 F3d 43, 47 [2d Cir 2000]).<sup>1</sup> This is because the trial court "is intimately familiar with the nuances of [a] case, [and] is in a far better position to [rule on a fee application] than is an appellate court, which must work

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<sup>1</sup> Federal jurisprudence is an appropriate guide when analyzing CPLR article 9 issues, because article 9 has much in common with Federal rule 23, the federal class action provision (see *City of New York v Maul*, 14 NY3d 499, 510 [2010]).

from a cold record" (*In re Bolar Pharm. Co., Inc., Sec. Litig.*, 966 F2d 731, 732 [2d Cir 1992]).

Disregarding these principles, the majority would remand this matter, and direct the court to engage in "an analysis as to whether all 1,256 hours expended by class counsel's attorneys, and the 433 hours worked by its paralegals, were useful and reasonable." This, the majority maintains, is necessary because the court did not account for expenses which "could have been avoided had plaintiffs' claims been appropriately investigated before a lawsuit was filed." However, the majority ignores several facts. First, the court has already analyzed the six lodestar factors, one of which is the quality of the representation provided. In addition, as the court expressly noted, the fee awarded to class counsel is 49% less than the amount actually billed. This reduction, it is reasonable to assume, more than embraces any work related to plaintiff's unsuccessful attempt to have subclasses certified in connection with certain projects.

Further, it is unfair for the majority to characterize the amount of fees billed as primarily owing to strategic choices made by class counsel. After all, defendants also litigated the matter aggressively, making strategic choices which drove up

class counsel's fees. In retrospect, some of these choices could be seen as ill-advised, such as prosecuting two unsuccessful appeals to this Court.

The case which the majority relies on in suggesting that a more detailed analysis of the billings is necessary, *Lunday v City of Albany* (42 F3d 131, 134 [2d Cir. 1994]), is readily distinguishable. In that case, a district judge presided over the merits of the litigation, and the fee application was decided by a magistrate judge. Here, of course the same court that oversaw the a matter, which it described as "hard-fought," considered the fee request. Thus, it was in a far better position to assess an appropriate fee.

Furthermore, *Lunday* was decided under a unique set of facts. As in this case, the defendants raised questions about the reasonableness of amount of time expended by counsel, and the Second Circuit properly stated that there was no requirement "that the court set forth item-by-item findings concerning what may be countless objections to individual billing items" (*id.*). Indeed, the court observed that, while the bills submitted by the plaintiff's counsel were "in certain respects eyebrow-raising . . . we cannot conclude that the review conducted by the Magistrate Judge was erroneous, or lacking in care" (*id.*).

However, the sole reason why the court remanded the fee application in *Lunday* was because of the District Court's comment that to engage in a detailed review of the submitted billing would be "to demean counsel's stature as officers of the court (*id.*)."

The Second Circuit, while noting that none of the objections raised by the defendants appeared to be meritorious, remanded to ensure that the magistrate judge's comment did not reflect a level of undue deference afforded the fee request.

Here, there is no indication that the motion court may have improperly abdicated its obligation to review the fee application. Accordingly, it is appropriate to defer to the court's determination that the fees awarded were commensurate with the legal work, in light of all of the circumstances.

I further disagree with the majority that class counsel failed to establish that its fees were consistent with "customary fees charged for similar services by lawyers in the community with like experience and of comparable reputation." The supervising partner swore in his affirmation in support of the application that his hourly rate of \$375, reduced to \$350 for this matter, is consistent "with the hourly rates charged by attorneys of reasonably comparable skill, experience and reputation in New York." In *Friedman v Miale* (69 AD3d 789

[2010], *lv denied* 16 NY3d 706 [2011]), the case cited by the majority, the record was "devoid" of such proof (69 AD3d at 791). It is noted that, in opposing the fee application, defendant did not question the reasonableness of class counsel's hourly rates, raising that objection for the first time on this appeal. Nor, did defendant challenge below the billings by the firm's associates on the basis that they failed to establish their "training, background, experience and skill." In any event, the supervising partner's description of the associates' years of experience as attorneys and the fact that they had assisted him in "numerous" wage-and-hour law cases were certainly sufficient bases for the court to weigh the reasonableness of the relevant portions of the fee request.

Based on the foregoing, it is clear that the motion court acted within its broad discretion. Accordingly, I would leave undisturbed the court's award of fees to plaintiffs.

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

ENTERED: MAY 31, 2011



CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4432-

4432A John Bradbury,  
Plaintiff-Respondent-Appellant,

Index 120839/03

-against-

342 West 30th Street Corp.,  
Defendant-Appellant-Respondent.

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Steven J. Masef, Kew Gardens, for appellant-respondent.

Bierman & Palitz LLP, New York (Mark H. Bierman of counsel), for  
respondent-appellant.

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Order and judgment (denominated an order), Supreme Court, New York County (Emily Jane Goodman, J.), entered May 12, 2009, after a nonjury trial, to the extent appealed from, declaring that the subject apartment was rent stabilized, that the legal monthly rent chargeable to plaintiff in January 2002 was \$1,390.87 per month and that defendant had willfully overcharged plaintiff, and directing the entry of a money judgment in plaintiff's favor in the amount of \$58,476.48, representing rent overcharges and treble damages, plus interest, costs and disbursements, unanimously modified, on the law, to declare that the legal monthly rent chargeable to plaintiff in January 2002 was \$402.43, the amount of the money judgment vacated, and the matter remanded for recalculation of the money judgment consistent with this opinion, and otherwise affirmed,

without costs. Appeal from order, same court and Justice, entered January 18, 2010, which denied plaintiff's motion to resettle or reargue the May 12, 2009 order and judgment, unanimously dismissed, without costs, as taken from a nonappealable paper.

In or about April 2001, Dolce Sosa, the former tenant, moved out of Apartment 5R at 346 West 30th Street in Manhattan. At the time her tenancy ended, she was paying \$402.43 per month under a rent stabilized lease. On December 24, 2001, plaintiff-tenant and defendant-landlord entered into a lease for the apartment. The lease term began on January 1, 2002 and ended on December 31, 2003, and the monthly rent was \$2,000. Plaintiff was not informed that the apartment was rent stabilized, nor did the lease include a rent stabilization rider.

Records from the Division of Housing and Community Renewal (DHCR) show that the rent registration statement for the former tenant, filed in 2001, listed a legal regulated rent of \$402.43 as of April 1 of that year. In 2002 and 2003, plaintiff was sent annual rent registration notices stating that the legal regulated rent for the apartment, as of April 1 of each of those years, was \$2,000 per month. The DHCR records confirm that defendant registered the apartment as rent stabilized in both 2002 and 2003 at a monthly rent of \$2,000. The records do not reflect whether

defendant filed any subsequent rent registration statements.

In December 2003, plaintiff commenced this action alleging that defendant had willfully overcharged him an amount above the legal regulated rent. Plaintiff sought a judgment declaring that the apartment was subject to rent stabilization and that his legal regulated rent was to be calculated on the basis of the previous regulated rent of \$402.43 per month. Plaintiff also sought a judgment for treble damages for a willful overcharge. Defendant claimed that, after the former tenant vacated the apartment and before plaintiff's tenancy began, defendant spent at least \$90,000 to renovate the apartment. Defendant maintained that as a result of these improvements, along with other permissible increases, the lawful monthly rent was in excess of \$2,000, which allowed for luxury decontrol of the apartment and removal from rent stabilization.

The matter went to trial, and in a decision dated November 29, 2007, the court determined that the apartment was subject to the Rent Stabilization Law. The court found that the testimony of defendant's principal, Anthony Argento, was "unbelievable in all material matters" and "unworthy of belief." The court also rejected most of the other defense witnesses' testimony, finding that two of them had lied on the stand. The court concluded that

bills and invoices were fabricated for the litigation and that at least one forged document was submitted to the court. In sum, the court stated that defendant's case was "a sham, filled with perjury, forgery, [and] fabrications all designed not only to raise the rent of the apartment . . . to an unlawful level, but to mislead the plaintiff, counsel and the Court." The court rejected defendant's claimed renovation costs of \$90,000 and found instead that defendant had spent no more than \$34,000. The court also found that plaintiff's unlawful \$2,000 rent was imposed willfully and intentionally.

By order and judgment entered May 12, 2009, the court declared that the last lawful rent was \$402.43 in 2001. The court then calculated that defendant was entitled to an \$80.49 vacancy increase, a \$57.95 longevity increase and a renovations increase of \$850 (1/40 of the \$34,000 renovations cost) and that therefore the legal monthly rent chargeable to plaintiff at the start of his tenancy in January 2002 was \$1,390.87. The court found that, since this amount did not exceed \$2,000, the apartment was still subject to rent stabilization. The court concluded that defendant had overcharged plaintiff by \$609.13 per month (the difference between \$1,390.87, the rent found by the court, and \$2,000, the rent plaintiff had paid) for a total overcharge of \$20,101.29. The

court also concluded that the overcharge was willful and intentional, entitling plaintiff to treble damages, for a total of \$58,476.48. Both parties appeal from the May 12, 2009 order and judgment.

Defendant failed to meet its burden of proving the cost of the renovations made to the apartment to justify the rent it charged plaintiff (see *Matter of Graham Ct. Owners Corp. v Division of Hous. and Community Renewal*, 71 AD3d 515 [2010]). The trial court's determination that defendant spent no more than \$34,000 in renovations is supported by a fair interpretation of the evidence. Defendant's witnesses and documents presented credibility issues, and the record sufficiently supports the trial court's resolution of those issues in plaintiff's favor. Defendant also failed to establish that the rent overcharges were not willful so as to avoid treble damages (9 NYCRR 2526.1[a][1]; *Matter of Riverside Equities, LLC v New York State Div. of Hous. & Community Renewal*, 58 AD3d 534 [2009], *lv denied* 13 NY3d 709 [2009]).

Although the trial court correctly calculated the amount of the vacancy, longevity and renovations increases that defendant would otherwise have been entitled to, we nevertheless conclude that defendant's intentional filing of two knowingly false rent registration statements was not a "proper" filing as required by

§ 26-517[e] of the Rent Stabilization Law of 1969 [Administrative Code of City of NY § 26-517(e)] and bars defendant in this case from collecting any rent in excess of the legal regulated rent in effect as of the date of the last preceding rent registration statement (*id.*).

Owners of rent stabilized apartments are required to file annual rent registration statements with DHCR listing, among other things, the name of the tenant in each regulated apartment along with the current rent on the registration date (see Administrative Code § 26-517[a], [f]; Rent Stabilization Code [9 NYCRR] § 2528.3). An owner's failure to file a "proper and timely" annual rent registration statement bars the owner from collecting "any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement" until such time as a proper registration is filed (Administrative Code § 26-517[e]; see also 9 NYCRR § 2528.4[a]). Where an owner fails to file a "proper and timely" registration, until such registration is filed, the rent is frozen at the legal regulated rent listed in the preceding registration statement (see *Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531 [2010]).

Here, although defendant filed rent registration statements in 2002 and 2003 listing the purported legal regulated rent as \$2,000,

the trial court's findings, which we now affirm, establish that those filings were intentionally false. The trial court concluded that defendant willfully and intentionally charged plaintiff the incorrect rent of \$2,000 and that the maximum allowable rent was \$1,390.87. The court further found that defendant's entire case was "a sham, filled with perjury, forgery, [and] fabrications" and was "designed . . . to raise the rent of the apartment . . . to an unlawful level," a level that would remove the unit from the protections of rent stabilization.

In light of these findings, we conclude that defendant's 2002 and 2003 DHCR filings were not "proper" within the meaning of Administrative Code § 26-517(e). This Court recently upheld the imposition of a rent freeze in a similar situation (*see Jazilek v Abart Holdings, LLC*, 72 AD3d 529 [2010], *supra* [rent registration statement listing a legal rent in excess of the highest possible legal rent was defective and not a "proper" filing]; *see also Thornton v Baron*, 5 NY3d 175, 181 [2005] [rent registration statement listing illegal rent was a nullity]). Because defendant failed to file proper statements in 2002 and 2003, and because the record does not show that any such proper statements were subsequently filed, defendant was barred from collecting any rent in excess of the last properly registered rent, i.e., the \$402.43

rent listed in the 2001 registration. Accordingly, the matter should be remanded for a recalculation of the amount of the money judgment.

The court's order denying plaintiff's motion to resettle or reargue is not appealable (*Parker v Marglin*, 56 AD3d 374, 374-375 [2008]; *Kubick v Kubick*, 261 AD2d 300 [1999]).

We have considered the parties' remaining contentions and find them without merit.

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

ENTERED: MAY 31, 2011

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date. Accordingly, the expiration date of the order of protection need not be modified. The resentencing proceeding imposing a term of PRS was lawful in all respects (see *People v Murrell*, 73 AD3d 598 [2010], *affd* \_\_ NY3d \_\_, 2011 NY Slip Op 03308 [Apr. 28, 2011]).

We perceive no basis for reducing the PRS term. Defendant's request for a reduction of his prison term in the interest of justice is both procedurally improper on the present appeal and without merit (see *People v Lingle*, 66 AD3d 582 [2009], *affd* \_\_ NY3d \_\_, 2011 NY Slip Op 03308 [Apr. 28, 2011]).

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

ENTERED: MAY 31, 2011

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CORRECTED ORDER - SEPTEMBER 28, 2011

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4868 Port Parties, Ltd., Index 101979/09  
Plaintiff-Respondent,

-against-

ENK International LLC, etc., et al.,  
Defendants-Appellants.

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Gibson, Dunn & Crutcher, LLP, New York (Randy M. Mastro of  
counsel), for appellants.

Quinn McCabe, LLP, New York (Christopher P. McCabe of counsel), for  
respondent.

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Order, Supreme Court, New York County (Milton A. Tingling,  
J.), entered November 24, 2010, which denied defendants' motion for  
summary judgment dismissing the amended complaint, unanimously  
reversed, on the law, with costs, and the motion granted. The  
Clerk is directed to enter judgment in defendants' favor dismissing  
the amended complaint.

The amended complaint asserts causes of action for fraud,  
breach of the covenant of good faith and fair dealing, unjust  
enrichment, and conversion. As to the fraud cause of action,  
defendants demonstrated that plaintiff's claimed reliance on their  
alleged misrepresentation was not reasonable or justifiable (see  
*Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1997]).

In opposition, plaintiff failed to raise the inference that the exercise of reasonable diligence would have been fruitless and, under the circumstances of this case, plaintiff was required to try to determine the truth or falsity of the alleged misrepresentation. From 1997 to 2002, defendants never claimed that the commission plaintiff was paying was mandated by the New York City Economic Development Corporation (EDC). Thus, any claim they made in 2002 that the payment was mandated by EDC should have suggested its falsity and prompted plaintiff to make further inquiry (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 [2006], *lv denied* 8 NY3d 804 [2007]; *Abrahami v UPC Constr. Co.*, 224 AD2d 231, 234 [1996]).

Plaintiff's failure to question the newly mandated commission also renders its fraud cause of action time-barred, since it was not brought until seven years after, with reasonable diligence, plaintiff could have discovered the alleged fraud (*Rite Aid Corp. v Grass*, 48 AD3d 363 [2008]).

Plaintiff's remaining causes of action rely on its allegation of fraud and, absent a viable fraud cause of action, must also fail. Other than the allegation of fraud, which plaintiff is unable to establish, plaintiff fails to show how defendants were unjustly enriched by its payment of the commissions (*see Abacus*

*Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [2010]). Absent the alleged fraud, plaintiff fails to show, in support of its cause of action for breach of the covenant of good faith and fair dealing, that defendants "destroy[ed] or injur[ed] the right of [plaintiff] to receive the fruits of the contract" between the parties (see *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]). Absent the alleged fraud, plaintiff fails to show, in support of the cause of action for conversion, that defendants had "an obligation to return or otherwise treat in a particular manner the specific fund in question" (see *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124 [1990], *lv denied* 77 NY2d 803 [1991]).

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

ENTERED: MAY 31, 2011

  
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CLERK

Saxe, J.P., Catterson, Moskowitz, Manzanet-Daniels, JJ.

5123            In re The City of New York, et al.,            Index 464/10  
[M-5826]            Petitioners,

-against-

John C. Liu, etc., et al.,  
Respondents.

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Michael A. Cardozo, Corporation Counsel, New York (Shakera Khandakar of counsel), for petitioner.

Ricardo E. Morales, New York (Robert Palmer of counsel), for John C. Liu, respondent.

Mary J. O'Connell, New York (Steven E. Sykes and Aaron S. Amaral of counsel), for Lillian Roberts, respondent.

Lichten & Bright, P.C., New York (Daniel Bright of counsel), for Local 924 of District Council 37 and Kyle Simmons, respondents.

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

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

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

ENTERED: MAY 31, 2011



CLERK

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

5196 IDT Corporation,  
Plaintiff-Appellant,

Index 603710/04

-against-

Morgan Stanley Dean Witter & Co., et al.,  
Defendants-Respondents.

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Boies, Schiller & Flexner LLP, Armonk (Edward Normand of counsel),  
for appellant.

Davis Polk & Wardwell LLP, New York (Guy Miller Struve of counsel),  
respondents.

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Order, Supreme Court, New York County (James A. Yates, J.),  
entered July 2, 2010, which granted defendants' motion to dismiss  
the first and second causes of action, unanimously affirmed,  
without costs.

Plaintiff did not state in sufficient detail its claim that in  
reasonable reliance on defendants' allegedly misleading  
"reassurances" it altered its conduct to its detriment (see CPLR  
3016[b]). Plaintiff failed to specify the action it refrained from  
taking as a result of its reliance on defendant's assurances.

Plaintiff's claim of damages arising from defendant's  
allegedly misleading reassurances is too attenuated, since it was  
not the false assurances that injured plaintiff but the alleged  
misrepresentations made by defendant to nonparty Telefonica about

plaintiff that injured plaintiff by purportedly causing Telefonica to breach its agreement with plaintiff (see e.g. *Chemical Bank v State of New York*, 64 AD2d 755 [1978], lv denied 45 NY2d 712 [1978]). In any event, to the extent plaintiff seeks damages based on fraud for other than pecuniary loss, such damages are not recoverable (see *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Starr Found. v American Intl. Group, Inc.*, 76 AD3d 25 [2010]). As to the \$10 million fee, according to its own pleadings, plaintiff paid that fee not in reliance on a misrepresentation or omission by defendant but because it was coerced into paying it. Thus, plaintiff's claim as to the \$10 million is not fraudulent inducement but unjust enrichment, and the Court of Appeals has already dismissed that claim for failure to state a cause of action (12 NY3d 132, 138-139 [2009]).

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

ENTERED: MAY 31, 2011



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

CLERK

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

5197           In re Freddy S.,

          A Person Alleged to be  
          a Juvenile Delinquent,  
          Appellant.

          - - - - -

          Presentment Agency

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

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

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          Order of disposition, Family Court, Bronx County (Robert R. Reed, J. at suppression motion; Nancy M. Bannon, J. at disposition), entered on or about February 5, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute possession of an imitation firearm, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

          The court properly denied appellant's suppression motion. There was probable cause for appellant's arrest, based on far more than an anonymous call. The police responded to a radio call stating that shots had just been fired by a described suspect in a park. When the police arrived at the park immediately thereafter,

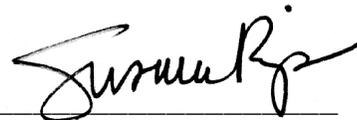
they saw appellant, who met the description. The officers observed that appellant's companions were warning him of the presence of police. At that point, appellant took a series of evasive actions in an obvious effort to hide from the officers, and then fled as the officers approached. The police observations were sufficiently suggestive of the reported criminal activity to provide the requisite corroboration (see *People v Elwell*, 50 NY2d 231, 234-235 [1980]).

The police lawfully searched appellant's backpack as incident to a lawful arrest (see *People v Smith*, 59 NY2d 454 [1983]; *People v Wylie*, 244 AD2d 247 [1997], *lv denied* 91 NY2d 946 [1998]; compare *People v Gokey*, 60 NY2d 309 [1983]). The arrest and search were contemporaneous, the police had information that appellant had just fired shots, the backpack remained in appellant's grabbable area, the backpack had not been reduced to the exclusive control of the

police, and the setting was a crowded park. Under all these circumstances, the police were clearly justified in inspecting the backpack for their own safety and that of the public.

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

ENTERED: MAY 31, 2011

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

CLERK

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

5198 ACE Fire Underwriters Index 600133/06  
Insurance Company, etc., et al.,  
Plaintiffs,

Pacific Employers Insurance Company,  
Plaintiff-Respondent,

-against-

ITT Industries, Inc., etc.,  
Defendant-Appellant,

U.S. Silica Corporation, etc., et al.,  
Defendants.

- - - - -

5199 ACE Fire Underwriters  
Insurance Company, etc., et al.,  
Plaintiffs-Appellants,

-against-

ITT Industries, Inc., etc.,  
Defendant-Respondent,

Affiliated FM Insurance Company, et al.,  
Defendants.

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Morgan, Lewis & Bockius LLP, New York (David A. Luttinger, Jr. of  
counsel), for ITT Industries, Inc., appellant/respondent.

Siegal & Park, Mt. Laurel, NJ (Melvin R. Shuster, of the New Jersey  
Bar, admitted pro hac vice, of counsel), for Pacific Employers  
Insurance Company, respondent, and for ACE appellants.

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Order, Supreme Court, New York County (Herman Cahn, J.),  
entered July 20, 2007, which, to the extent appealed from, granted  
plaintiff Pacific Employers Insurance Company's motion to dismiss

defendant ITT Industries, Inc.'s first, fourth, seventh and eighth counterclaims for failure to state a cause of action, unanimously affirmed, with costs. Order, same court and Justice, entered August 21, 2007, which granted defendant's motion pursuant to CPLR 327 to sever and stay, pending resolution of a California action, plaintiff's remaining claim for a declaration regarding its contractual obligation, under Endorsement 44 of its insurance policy, to indemnify defendant against certain silica-related claims, unanimously affirmed, with costs.

Supreme Court providently exercised its discretion in severing and staying plaintiff's remaining claim on the ground of forum non conveniens, since the claim has already been the subject of both a ruling on summary judgment and a decision on appeal in California (see *Minton v Minton*, 277 AD2d 103 [2000]).

The court properly dismissed defendant's breach of contract claim, since it lacked a description of the essential terms of the alleged "claims handling" agreement - namely, parties, duration, date, and consideration (see *Matter of Sud v Sud*, 211 AD2d 423, 424 [1995]).

Defendant's equitable subrogation claim was also properly dismissed. Defendant was obligated to make payments to nonparty Pacific Coast Resources (PCR), the purchaser of its subsidiary.

PCR has no rights against plaintiff. Accordingly, there were no rights of PCR to which defendant could be equitably subrogated (see *Gerseta Corp. v Equitable Trust Co. of N.Y.*, 241 NY 418, 426 [1926]).

Dismissal of defendant's claim seeking a declaration that it is entitled to coverage in the event it is named as a defendant in any of the underlying silica-injury cases, was also proper since the declaration sought would be merely advisory (see *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]).

Lastly, the court properly dismissed defendant's claim for statutory remedies under Pennsylvania Consolidated Statutes Annotated, title 42, § 8371. Plaintiff's reason for denying coverage, whether ultimately correct or not, was reasonable, as it merely tracked the plain language of its policy endorsement.

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

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

ENTERED: MAY 31, 2011

  
CLERK

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

5206-

5207 Judith Klein,  
Petitioner-Appellant,

Index 400623/09

-against-

New York City Administration  
for Children's Services,  
Respondent-Respondent.

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Judith Klein, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of  
counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Michael D.  
Stallman, J.), entered September 25, 2009, which denied  
petitioner's motion to amend the caption to appear as  
representative of a putative class, and appeal from order and  
judgment (one paper), same court and Justice, entered October 2,  
2009, which denied the petition and granted respondent's cross  
motion to dismiss the proceeding brought pursuant to CPLR article  
78, unanimously dismissed as moot, without costs.

Petitioner commenced this proceeding seeking to set aside  
certain provisions of respondent's policy used in administering  
preventive housing subsidies as contrary to state and local law and  
regulations. Specifically, she challenges Social Services Law

§ 409-a(5)(c), which provides that rental subsidies and other assistance be made available to families separated due to lack of available housing, and 18 NYCRR 423.2(b)(16)(i), which defines "other assistance" as including "essential repairs" to make housing adequate.

However, while these appeals were pending, petitioner's child was released from the foster care system into the custody of an out-of-state relative. Preventive housing subsidies are only available in situations where children are already in the foster care system, or where they may be placed in or returned to foster care (see Social Services Law § 409-a[5][c] and 18 NYCRR 423.2[b]). As such, petitioner is no longer eligible for the subsidy on which her challenge to respondent's policy is based.

Due to this change in circumstances, petitioner's rights will no longer be directly affected by the determination of the appeals and the judgment will not have an immediate consequence for her (see *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).

Accordingly, the matter has been rendered moot and the exception to the mootness doctrine does not apply (see *id.* at 714-715; *Duane Reade Inc. v Local 338, Retail, Wholesale, Dept. Store Union, UFCW, AFL-CIO*, 11 AD3d 406 [2004]).

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

ENTERED: MAY 31, 2011

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unreimbursed expenses reduced to 65%, and otherwise affirmed, without costs.

Although the court properly utilized plaintiff's 2009 income, \$525,000, in determining his child support obligations, the court erred in not attributing income to defendant in calculating her pro-rata share of support obligations (see Domestic Relations Law § 240[1-b][b][5][iv]). Instead, the court should have utilized defendant's 2009 income, which it found to be \$93,400, as well as the maintenance award, \$108,000 per year, in its calculation of the combined parental income and of each party's share of both the basic child support obligations and unreimbursed expenses (see *Nichols v Nichols*, 19 AD3d 775 [2005]). Thus, plaintiff's percentage of the combined parental income is reduced to 65% for the purposes of calculating his share of basic child support and unreimbursed expenses.

Given that plaintiff had a long track record of securing employment with substantial income, and that defendant, who historically earned a fraction of plaintiff's salary, was unemployed at the close of the trial, that defendant supported plaintiff's career choices throughout the marriage, and given their pre-divorce standard of living, the court properly awarded

plaintiff \$9,000 per month in maintenance (see *Hartog v Hartog*, 85 NY2d 36, 51-52 [1995]).

We decline to disturb the trial court's finding that plaintiff dissipated \$300,000 of marital assets. That determination rests largely on the court's assessment of the credibility of the parties (see *Azizo v Azizo*, 51 AD3d 438, 440 [2008]). Plaintiff's financial misconduct, in recklessly engaging in conduct leading to his forced resignation and triggering an obligation to repay a forgivable mortgage, was distinct from his marital fault.

The court providently exercised its discretion by awarding defendant 10% of plaintiff's enhanced earnings capacity. The record on appeal demonstrates defendant's economic and non-economic contributions to plaintiff's license and career during marriage (see *Holterman v Holterman*, 3 NY3d 1, 8-9 [2004]).

The court's award of counsel and expert fees appropriately reflects the parties' economic disparity, the complexity of the litigation, and the evidence of the nature and extent of the legal and appraisal services rendered, and is otherwise a proper exercise

of discretion (*see O'Shea v O'Shea*, 93 NY2d 187, 190 [1999]).

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

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

ENTERED: MAY 31, 2011

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CLERK



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

5210 Robert M. Morgenthau, etc.,  
Plaintiff-Appellant,

Index 402477/09

-against-

Joseph DiNapoli,  
Defendant-Respondent.

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Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for appellant.

Anne Beane Rudman, New York, for respondent.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered January 13, 2011, which, in this CPLR article 13-A forfeiture action, to the extent appealed from, granted defendant's motion for modification of a preliminary injunction and order of attachment, same court and Justice, entered on or about April 14, 2010, to the extent of directing the release of \$258,314.75 of defendant's funds, plus accrued interest, for payment of defendant's attorneys' fees and legal expenses, unanimously reversed, on the law, without costs, and the motion denied.

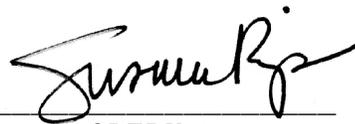
In civil forfeiture actions pursuant to CPLR article 13-A, a claiming authority may seize assets that originated from a legitimate source (see CPLR 1311[1]; 1312[1]; 1313; see also *Morgenthau v Citisource, Inc.*, 68 NY2d 211, 220 [1986]), even if

such assets could not properly be seized pursuant to a search warrant (see CPL 690.10). Accordingly, we find that Supreme Court improperly directed the release of a portion of the restrained funds on the ground that those funds had twice been released by plaintiff after seizure pursuant to a search warrant.

We further find that Supreme Court improperly directed the release of such funds for the payment of defendant's attorneys' fees and legal expenses, since defendant failed to provide "an affidavit establishing the unavailability of other assets . . . for payment of such expenses or fees" (CPLR 1312[4]; see *Morgenthau v W. Express Intl., Inc.*, 2011 WL 1466374, 2011 NY App Div LEXIS 3041 [2011]).

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

ENTERED: MAY 31, 2011

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relationship with plaintiff such as would give rise to an underlying fiduciary duty to plaintiff (see *Kaufman v Cohen*, 307 AD2d 113, 125 [2003]). Plaintiff's creditor-debtor relationship with the SIV-Lites did not give rise to such a fiduciary duty (see *SNS Bank v Citibank*, 7 AD3d 352, 354 [2004]). Even if, as plaintiff urges, a different standard of fiduciary duty were appropriate based on the nature of investments in structured investment vehicles, the result would be the same, since no relationship is alleged to have existed between plaintiff and the Collateral Managers (see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561-562 [2009]).

The causes of action for tortious interference with a contract fail to allege an actual breach of the underlying contract (see *Lama Holding Co. Smith Barney*, 88 NY2d 413, 424-425 [1996]; *Marks v Smith*, 65 AD3d 911, 916 [2009], *lv denied* 15 NY3d 704 [2010]).

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

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

ENTERED: MAY 31, 2011

  
CLERK



petitioner was not working at the World Trade Center site at the times that he claimed. Furthermore, the Board was entitled to find that the affidavits from other officers stating that petitioner worked at the site for 40 or more hours between September 11, 2001 and September 12, 2002 were conclusory, as they failed to specify any times or dates he worked or the nature of his duties (see Retirement and Social Security Law § 2[36]). Consequently, the record demonstrates that petitioner failed to raise the presumption that his disability "was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence" (Administrative Code § 13-252.1[1][a]).

We have considered petitioner's remaining contentions, including that the Medical Board failed to conduct a sufficient inquiry into the matter, and find them unavailing.

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

ENTERED: MAY 31, 2011



CLERK



warranted under CPLR 7503(b). Thus, the order must stand, if at all, as a preliminary injunction issued pursuant to CPLR 7502(c).

Petitioner was not entitled to a preliminary injunction for several reasons. First, petitioner's reliance upon the Fifth Amendment privilege against self incrimination is entirely unavailing. The notion that a corporation could somehow benefit from a personal invocation of the Fifth Amendment privilege has repeatedly been rejected (*Bellis v United States*, 417 US 85, 88 [1974]; *United States v White*, 322 US 694, 699 [1944]; *Grant v United States*, 227 US 74 [1913]; *Big Apple Concrete Corp. v Abrams*, 103 AD2d 609, 612-613 [1984]).

Neither did petitioner demonstrate irreparable harm such that equity ought to intercede. The supposed increased costs of the arbitration are not the type of irreparable injury that warrant injunctive relief because even if they were certain to occur, the damages would be quantifiable (see *Broadway 500 W. Monroe Mezz II LLC v Transwestern Mezzanine Realty Partners II, LLC*, 80 AD3d 483 [2011]). The mere possibility that witnesses would invoke a privilege within the context of the arbitration proceedings also does not constitute irreparable harm because it is speculative and petitioner is entirely free to present evidence other than the testimony of those witnesses to establish its case in a proceeding

which, notably, it commenced (see *Willow Media, LLC v City of New York*, 78 AD3d 596 [2010]; *GFI Sec., LLC v Tradition Asiel Sec., Inc.*, 61 AD3d 586 [2009]).

Most importantly, Supreme Court abused its discretion by not conditioning the granting of the preliminary injunction upon the petitioner posting an undertaking in an amount fixed by the court as required by statute (see CPLR 6312[b][1]).

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

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

ENTERED: MAY 31, 2011

  
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intended crime (see *People v Bess*, 107 AD2d 844, 846 [1985]). In any event, defendant repeatedly announced his intention to sexually assault two girls hiding in the store.

Defendant's conviction of criminal mischief in the third degree was also supported by legally sufficient evidence. The evidence supports the conclusion that the reasonable cost of repairing the damaged property (see *People v Garcia*, 29 AD3d 255, 263 [2006], *lv denied* 7 NY3d 789 [2006]) exceeded \$250.

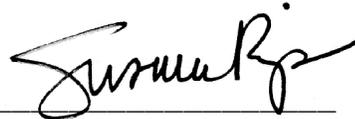
Defendant's argument concerning the element of intent to damage property is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

Defendant requested that the court consider the lesser included offenses of criminal trespass in the second degree and criminal mischief in the fourth degree. However, he did not set forth any basis for those requests. Accordingly, his present arguments are unpreserved (see *e.g. People v Liner*, 262 AD2d 250

[1999], *lv denied* 93 NY2d 1021 [1999]), and we decline to review them in the interest of justice. As an alternative holding, we find that neither request was supported by a reasonable view of the evidence, when viewed in a light most favorable to defendant.

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

ENTERED: MAY 31, 2011

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CLERK

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

5215 Michele Barton, et al., Index 104900/08  
Plaintiffs-Respondents,

-against-

270 St. Nicholas Avenue Housing  
Development Fund Corporation, et al.,  
Defendants-Appellants.

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

Scott & Liburd, New York (Kofi D. Scott of counsel), for  
respondents.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.),  
entered September 1, 2010, which, inter alia, denied defendants'  
motion for summary judgment dismissing the complaint, unanimously  
reversed, on the law, without costs, and the motion granted. The  
Clerk is directed to enter judgment in favor of defendants  
dismissing the complaint.

Defendants established their prima facie entitlement to  
judgment as a matter of law in this action. Defendant St. Nicholas  
is a housing development fund corporation formed in 1992 pursuant  
to Public Housing Finance Law § 573. Plaintiffs, tenants of the  
subject apartment building, sought to exercise a purported option  
to convert the premises into a cooperative corporation pursuant to

paragraph 3 of defendant St. Nicholas' certificate of incorporation. However, defendants failed to authorize such conversion of the residential building, and, in 2008 plaintiffs commenced this action.

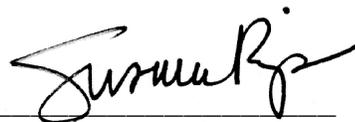
The certificate of incorporation is subject to the usual rules of contract interpretation (see *Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 59 [2005]). The language of the certificate unambiguously "authorized" St. Nicholas to convey title of the building to a cooperative corporation (see *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]), but did not require such conversion. The court erred in considering extrinsic evidence to interpret the certificate of incorporation since the language of the document was unambiguous (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61 [2008] *affd* 13 NY3d 398 [2009]).

While plaintiffs are tenants of the premises, owned and managed by defendants, they have not shown that they have suffered an injury in fact by defendants' failure to authorize the conversion of the residential building pursuant to the certificate of incorporation. Defendants owed no duty or obligation to plaintiffs, other than that resulting from a typical landlord/tenant relationship. Therefore, in the absence of a

contractual agreement between the parties or a duty or obligation by defendants to convert the building into a cooperative housing project, plaintiffs failed to establish injury and thus had no standing to sue (see *Suero v Fort I Group*, 305 AD2d 180 [2003], *lv denied* 1 NY3d 507 [2004]). Further, plaintiffs failed to establish standing as third-party beneficiaries to any agreements entered into with defendants (see *P.A. Bldg. Co. v City of New York*, 217 AD2d 417 [1995], *lv denied* 86 NY2d 708 [1995]).

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

ENTERED: MAY 31, 2011

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DHL, the operator of a global delivery and shipping network. To the extent their claims are based on allegations as to DHL's rates, routes or services, these claims are preempted by the Airline Domestic Act and the Federal Aviation Administration Authorization Act (see *American Airlines, Inc. v Wolens*, 513 US 219 [1995]; *Travel All Over the World, Inc. v Kingdom of Saudi Arabia*, 73 F3d 1423, 1432 [7th Cir 1996]). To the extent their breach of contract claim is based on improper notice of termination of the Reseller Agreement between the franchisor and DHL, it is not preempted by the aforesaid federal statutes (see *Wolens*, 513 US at 219; *Travel All Over the World*, 73 F3d at 1432). In any event, however, plaintiffs have no standing to assert their breach of contract claim as third party beneficiaries, and their remaining claims are either duplicative of their contract claim or fail to state a cause of action.

Plaintiffs cannot establish that the Reseller Agreement was intended for their benefit (see *State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]). While the agreement authorized the use of third-party resellers, "the provisions permitting such use are obviously intended to effectuate [the franchisor's] performance and thereby generate revenues for both [the franchisor] and [DHL]. Any benefit

to those selected as [third-party resellers] is an incidental by-product of the agreement" (*Artwear, Inc. v Hughes*, 202 AD2d 76, 82 [1994]; see *Shearman & Sterling*, 95 NY2d at 434-435).

The third cause of action, for breach of the implied covenant of good faith and fair dealing, is duplicative of the breach of contract cause of action since it is based on the same facts as are alleged in support of that cause of action, i.e., cessation of domestic shipping services, cessation of service to certain zip codes, improper billing and inappropriate rate increases (see *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [2009]).

The fourth cause of action, for misappropriation of confidential information, fails to allege that DHL stole the information or that plaintiffs took steps to maintain the secrecy of the information (see *Fada Intl. Corp. v Cheung*, 57 AD3d 406 [2008], *lv denied* 12 NY3d 706 [2009]).

The fifth cause of action, for fraud, fails to allege that plaintiffs relied on any misrepresentations made by DHL (see *Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 459 [2009], *affd* 16 NY3d 173 [2011]).

The sixth cause of action, for tortious interference with prospective business relations, alleges that DHL's conduct was motivated by economic considerations, i.e., a desire to leave the

domestic shipping market after years of struggling with competition, rather than by the requisite malice or desire to inflict injury (see *Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317 [2007]).

Punitive damages are not recoverable in a breach of contract action in which no public rights are alleged to be involved (see *International Plaza Assoc., L.P. v Lacher*, 63 AD3d 527, 528 [2009]).

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: MAY 31, 2011

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CLERK

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

5217-

5218 Olympic Funding LLC,  
Plaintiff-Appellant,

Index 600596/08

-against-

Ladies Mile, Inc., et al.,  
Defendants-Respondents.

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Tannenbaum Helpert Syracuse & Hirschtritt LLP, New York (Kenneth M. Block of counsel), for appellant.

Cohen Tauber Spievack & Wagner P.C., New York (Sari E. Kolatch of counsel), for respondents.

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Order (denominated a judgment), Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about August 31, 2010, which, after a nonjury trial, dismissed the complaint, and order, same court and Justice, entered December 16, 2010, which denied plaintiff's motion to set aside the verdict, unanimously affirmed, with costs.

The trial court's conclusion that plaintiff failed to prove trespass because it permitted the installations of which it now complains (see *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977]; see also *829 Post, LLC v Town of Eastchester*, 57 AD3d 717, 718 [2008]) was supported by a fair interpretation of the evidence (see *Saperstein v Lewenberg*, 11 AD3d 289 [2004]).

There exists no basis to disturb the trial court's credibility determinations (*see id.*).

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: MAY 31, 2011

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CLERK

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

5219 Brian T. Burry, et al., Index 100755/10  
Plaintiffs-Appellants-Respondents,

-against-

Madison Park Owner LLC,  
Defendant-Respondent-Appellant.

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Moulinos & Associates LLC, New York (Peter Moulinos of counsel),  
for appellants-respondents.

Troutman Sanders LLP, New York (Matthew J. Aaronson and Adam S.  
Libove of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.),  
entered July 14, 2010, which, to the extent appealed, granted  
defendant's motion to dismiss the fourth cause of action, for  
breach of fiduciary duty, pursuant to CPLR 3016(b) and 3211(a)(7),  
and denied defendant's motion to dismiss the first cause of action,  
for breach of contract, pursuant to CPLR 3211(a)(1), unanimously  
affirmed, without costs.

To state a claim for breach of fiduciary duty, plaintiffs must  
allege that (1) defendant owed them a fiduciary duty, (2) defendant  
committed misconduct, and (3) they suffered damages caused by that  
misconduct (see *RNK Capital LLC v Natsource LLC*, 76 AD3d 840, 841-  
842 [2010], *lv denied* 16 NY3d 709 [2011]; *Rut v Young Adult Inst.,  
Inc.*, 74 AD3d 776, 777 [2010]; PJI 3:59, Comment). At least two

essential elements have not been sufficiently pleaded. Plaintiffs have not cited any authority for imposing a fiduciary duty upon defendant, a condominium sponsor, for the benefit of plaintiffs, potential unit purchasers. In addition, plaintiffs' allegations of "misconduct" on the part of defendant are in essence claims of fraud that have not been pleaded with particularity (see CPLR 3016[b]).

Supreme Court properly determined that defendant failed to meet its burden as the movant on its motion to dismiss the first cause of action, for breach of contract, pursuant to CPLR 3211 (a) (1), because the very documentary evidence upon which defendant's motion is premised undermines its entitlement to dismissal. There is no fair construction of paragraph 14 of the purchase agreements that would limit the circumstances under which plaintiffs could seek cancellation. Defendant's argument that paragraph 14 creates a condition precedent to plaintiffs' election of the remedy of

cancellation is untenable and wholly unsupported by its plain language.

We have considered the remaining arguments and find them unpersuasive.

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

ENTERED: MAY 31, 2011

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costs.

Respondents granted petitioner access to all of the records in its possession regarding the Board of Education's multi-decade "anti-Communist" investigation, subject only to the condition that she not publish the names appearing in the "restricted files." Petitioner filed the instant petition, seeking unrestricted access pursuant to the Freedom of Information Law.

The trial court erred with regard to the applicability of the exemption from disclosure for "information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency" (Public Officers Law § 89[2][b][v]). Construing the exemption narrowly (*see Matter of Johnson v New York Police Dept.*, 257 AD2d 343, 346 [1999], *lv dismissed* 94 NY2d 791 [1999]), we find that transcripts of interviews regarding Communist Party membership, which the lead interrogator explicitly reminded schoolteacher-interviewees was sufficient basis for termination of employment, cannot be fairly characterized as "not relevant" to the work of the Board of Education.

Nevertheless, we agree with the trial court's conclusion that the privacy interests of the surviving subjects of the investigation and their relatives (*see Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477 [2005]) outweigh petitioner's

interest in being able to publish the names of teachers contained in the records at issue.

Petitioner also argues that the Rules of City of New York Department of Records and Information Services (49 RCNY) § 3-02, which is specifically addressed to standards for access to the "restricted files" in the anti-Communist records, violates her state and federal constitutional rights to free speech. We decline to rule on that claim. The court below decided the petition purely on FOIL grounds. Therefore, any ruling on petitioner's constitutional claim would be merely advisory (see *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 529-530 [1977]).

Accordingly, the petition was properly denied.

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

ENTERED: MAY 31, 2011

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CLERK



Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

5224 OrthoTec, LLC, Index 601377/08  
Plaintiff-Appellant,

-against-

Healthpoint Capital, LLC, et al.,  
Defendants-Respondents,

Scient'x, S.A.,  
Defendant.

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Browne Woods George LLP, Los Angeles, CA (Peter W. Ross, of the California Bar, admitted pro hac vice, of counsel), for appellant.

Covington & Burling LLP, New York (Andrew A. Ruffino of counsel), for respondents.

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Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered November 27, 2009, dismissing the amended complaint against defendants Healthpoint Capital, LLC, John Foster, Mortimer Berkowitz, III, Healthpoint Capital Partners, LP, and Healthpoint Capital Partners II, LP pursuant to CPLR 3211(a)(5), unanimously reversed, on the law, with costs, and the amended complaint reinstated.

The instant action is not barred by collateral estoppel. "[T]he prior denial of a motion in the underlying case to set aside a default and default judgment has no collateral estoppel effect to bar an independent action in equity directly attacking the prior

judgment" (*Groves v Peterson*, 100 Cal App 4th 659, 661, 123 Cal Rptr 2d 164, 165 [2002] [emphasis omitted]).<sup>1</sup> Although plaintiff cites no case where this principle was applied to a motion to add a judgment debtor and a subsequent plenary action, defendants do not contest plaintiff's extension of the rule. In any event, the rationale for the rule (see *Groves*, 100 Cal App 4th at 667-668, 123 Cal Rptr 2d at 170) applies to a motion to add a judgment debtor.

To be sure, "collateral estoppel will bar the subsequent independent action . . . if . . . the moving party was *in fact given a hearing on the motion that was the equivalent of a trial with oral testimony*" (*id.* at 668, 123 Cal Rptr 2d at 170-171 [emphasis added]). However, plaintiff was not given such a hearing. It was given the *opportunity* for a hearing, but it chose not to exercise that opportunity.

Defendants' reliance on *Barker v Hull* (191 Cal App 3d 221, 226, 236 Cal Rptr 285, 289 [1987]) is unavailing, since the evidence on the motion which led to the decision to which defendants seek to give preclusive effect was indeed restricted.

We do not find that "in the interest of substantial justice

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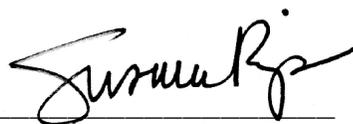
<sup>1</sup> The preclusive effect of a California decision is governed by California law (see *Ionescu v Brancoveanu*, 246 AD2d 414, 416-417 [1998]).

the action should be heard in" France (see CPLR 327[a]).

"Generally, unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Anagnostou v Stifel*, 204 AD2d 61, 61 [1994] [internal quotation marks and citations omitted]). This is true even though plaintiff is not a New York resident (see *Travelers Cas. & Sur. Co. v Honeywell Intl. Inc.*, 48 AD3d 225, 226 [2008]; *Bank Hapoalim [Switzerland] Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 [2006]). The fact that defendants are New York residents weighs against forum non conveniens dismissal (see e.g. *Anagnostou*, 204 AD2d at 62). Even if some documents will have to be translated from French into English, that does not require dismissal (see e.g. *American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [2007]).

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

ENTERED: MAY 31, 2011

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CLERK

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

5225 Steven Rosenfeld, et al., Index 600061/10  
Plaintiffs-Respondents,

-against-

Renika Pty. Ltd., et al.,  
Defendants-Appellants.

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Phillips Nizer LLP, New York (Michael S. Fischman of counsel), for  
appellants.

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Order, Supreme Court, New York County (James A. Yates, J.),  
entered June 11, 2010, which denied defendants' motion to dismiss  
the complaint with prejudice as moot in light of plaintiffs' notice  
of voluntary discontinuance without prejudice, unanimously  
reversed, on the law, with costs and the motion granted. The Clerk  
is directed to enter judgment in defendants' favor dismissing the  
complaint.

Plaintiffs' notice of voluntary discontinuance was untimely  
under CPLR 3217(a), and was apparently served to avoid an adverse  
decision on the pending motion to dismiss the complaint with

prejudice (see *McMahan v McMahan*, 62 AD3d 619, 620 [2009];  
*Citidress II Corp. v Hinshaw & Culbertson LLP*, 59 AD3d 210, 211  
[2009]; *NBN Broadcasting v Sheridan Broadcasting Networks*, 240 AD2d  
319 [1997]).

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

ENTERED: MAY 31, 2011

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

CLERK

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

5226 Hedge Fund Capital Partners, LLC, Index 651268/10  
et al.,  
Plaintiffs-Respondents,

-against-

Thor Asset Management, Inc.,  
Defendant,

Systematic Alpha Management LLC,  
Defendant-Appellant.

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Kramer Levin Naftalis & Frankel LLP, New York (Philip S. Kaufman of counsel), for appellant.

Gersten Savage, LLP, New York (David Lackowitz of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe, III, J.) entered November 15, 2010, which denied defendant-appellant Systematic Alpha Management LLC's motion to dismiss the complaint, unanimously modified, on the law, to dismiss the second cause of action, for fraud, and otherwise affirmed, without costs.

The motion to dismiss was properly denied, as plaintiffs have adequately stated a cause of action to hold defendants liable for certain commissions under a theory of piercing the corporate veil (see *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 145-147 [2009]).

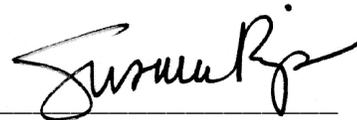
The fraud claim, however, should have been dismissed as

duplicative of the breach of contract claim (see *Stewart v Maitland*, 39 AD3d 319 [2007]; *Glanzer v Keilin & Bloom*, 281 AD2d 371, 372 [2001]).

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

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

ENTERED: MAY 31, 2011

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

CLERK

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

5227 Frank Crystal & Co., Inc., Index 108737/07  
Plaintiff-Appellant,

-against-

Sandra J. Dillmann, et al.,  
Defendants-Respondents.

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London Fischer LLP, New York (James Walsh of counsel), for  
appellant.

DLA Piper LLP (US), New York (Barbara J. Harris of counsel), for  
respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.),  
entered February 18, 2010, which, to the extent appealed from as  
limited by the briefs, granted defendants' motion for summary  
judgment dismissing the fraud in the inducement, breach of  
contract, breach of fiduciary duty, and tortious interference  
claims, unanimously affirmed, without costs.

To maintain a cause of action for fraudulent inducement of  
contract, a plaintiff must show "a material representation, known  
to be false, made with the intention of inducing reliance, upon  
which [it] actually relie[d], consequentially sustaining a  
detriment" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise  
Metals Group, LLC*, 19 AD3d 273, 275 [2005]; see also *Channel Master  
Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406 [1958]). Summary

judgment is warranted if a plaintiff is unable to establish any element of the claim (see *Shea v Hambros PLC*, 244 AD2d 39, 46 [1998]).

Defendant Dillmann stated in her affidavit that she did not knowingly misrepresent that she had no non-compete agreement with her former employer and that she did not have a copy of the non-compete agreement in her possession. In opposition, plaintiff failed to adduce any evidence that Dillmann intentionally misrepresented that fact, or that she never intended to try to achieve the projections in her proposed business plan.

In any event, plaintiff simply cannot satisfy the requirement of demonstrating detrimental reliance, since plaintiff expressly retained Dillmann as an at-will employee with an unfettered right to terminate her employment at any time (see *Abacus*, 66 AD3d at 553; *Meyercord v Curry*, 38 AD3d 315, 316-317 [2007]; *Arias v Women in Need*, 274 AD2d 353 [2000]). There was no familial or fiduciary relationship between the parties that would warrant a different standard (see *Braddock v Braddock*, 60 AD3d 84 [2009]).

Further, plaintiff failed to present evidence sufficient to raise an issue of fact as to any identifiable loss incurred as a result of the alleged fraudulent misrepresentation (see *Apollo H.V.A.C. Corp. v Halpern Constr., Inc.*, 55 AD3d 855, 857-858

[2008]). Plaintiff learned of Dillmann's non-compete just two weeks after she was hired, when it had expended minimal amounts on temporary office space and hired only one other employee in furtherance of its plan to establish a Seattle office. Plaintiff then elected to ratify the employment agreement. Plaintiff paid Dillmann the agreed salary and bonus, leased permanent office space, hired additional employees, and purchased equipment. Plaintiff may not recover damages for a loss resulting from detrimental reliance when the loss occurred after it was put on notice of the alleged false representation (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 97-98 [2006], *lv denied* 8 NY3d 804 [2007]).

Defendants met their burden of demonstrating prima facie that they did not breach Dillmann's non-compete and non-solicitation agreements with plaintiff after Dillmann left plaintiff for a job with defendant Aon (*see generally BDO Seidman v Hirshberg*, 93 NY2d 382 [1999]). Only one administrative employee joined Dillmann at defendant Aon, and plaintiff hired a replacement for her. Defendants submitted evidence that a client, Frank Russell Investments, moved its business to Aon for reasons unrelated to Dillmann's move. Russell chose Aon after soliciting a request for proposals (RFP) because of concerns about plaintiff and a

connection between executives at the two firms. Dillmann provided no assistance to Aon, which responded to the RFP before Dillmann was retained and had prepared its proposal before Dillmann joined the firm. In opposition, plaintiff presented unsubstantiated assertions and speculations, which are insufficient to raise a triable issue of fact. As for one client that Dillmann actively solicited after leaving plaintiff, defendants demonstrated that plaintiff had no legitimate protectable interest in that client. The client was developed by Dillmann independently and without assistance from plaintiff (see *BDO Seidman*, 93 NY2d at 392; *Weiser LLP v Coopersmith*, 74 AD3d 465 [2010]).

Plaintiff's breach of fiduciary duty claim similarly fails. Dillmann, as an at-will employee, had no duty to remain employed by plaintiff, even if she was a key player in ongoing client proposals (see *Gallagher v Lambert*, 74 NY2d 562 [1989]).

Finally, plaintiff's tortious interference with contract or prospective business advantage with Russell fails because plaintiff had no contract with Russell, and there was no certainty that it would have gotten or retained the contract but for defendants'

alleged interference (see *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421, 421-422 [2006]).

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: MAY 31, 2011

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

1142 & The People of the State of New York, Ind. 2210/04  
M-6039 Respondent,

-against-

Edgar Morales,  
Defendant-Appellant.

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

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

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

The Decision and Order of this Court entered  
herein on November 9, 2010 is hereby recalled  
and vacated (see M-6039 decided simultaneously  
herewith).

Opinion by Friedman, J. All concur.

Order filed.

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

3583           In re Alaire K. G.,  
                  Petitioner-Respondent,

-against-

          Anthony P. G.  
                  Respondent-Appellant.

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Law Office of Randall S. Carmel, Syosset (Randall S. Carmel of  
counsel), for appellant.

Anne M. Crawley, Sunnyside, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H.  
Dildine of counsel), attorney for the child.

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Order, Family Court, Bronx County (Annette L. Guarino,  
Referee), entered on or about July 9, 2010, affirmed, without  
costs.

Opinion by Moskowitz, J. All concur except Saxe and DeGrasse,  
JJ. who dissent in an Opinion by Saxe, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

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

J.P.

JJ.

1142 &  
M-6039  
Ind. 2210/04

x

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The People of the State of New York,  
Respondent,

-against-

Edgar Morales,  
Defendant-Appellant.

x

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

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

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

FRIEDMAN, J.

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

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<sup>1</sup>Penal Law § 490.25(1) reads in full:

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

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

penalty, as provided in Penal Law § 490.25(2).

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

Street to 170th Street.<sup>2</sup>

A jury trial resulted in defendant's conviction for three specified offenses as crimes of terrorism (manslaughter in the first degree, attempted murder in the second degree, and criminal possession of a weapon in the second degree) and for conspiracy in the second degree, based on the charge that he agreed with others to commit the crime of assault in the first degree (a specified offense) as a crime of terrorism. This appeal -- apparently the first arising from a prosecution under Penal Law § 490.25 -- ensued.<sup>3</sup>

It is the People's position that individuals of a particular

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

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

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

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<sup>4</sup>Although legislators' postenactment statements generally are not cognizable in determining legislative intent (see *Civil Serv. Empls. Assn., Inc. v County of Oneida*, 78 AD2d 1004, 1005 [1980], *lv denied* 53 NY2d 603 [1981]), defendant points to the

While we reject defendant's other challenges to his conviction (which are discussed later in this writing), we find that the evidence is not legally sufficient to establish that he acted with the requisite intent to render his offenses crimes of terrorism. Specifically, even assuming in the People's favor that the Mexican-American residents of the St. James Park area

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reported comments of certain legislators questioning the prosecution of this case under the Anti-Terrorism Act (see Williams, *In Bronx Murder Case, Use of New Terrorism Statute Fuels Debate*, New York Times, July 8, 2006, at B1 [reporting that Senator Michael Balboni, the sponsor of the legislation, "said he had envisioned 'mass effect' cases of terrorism like the World Trade Center attack and the Oklahoma City bombing in 1995 when he submitted the bill," and described the use of the statute in the instant case as an "'unanticipated application'"]); Williams, *Prosecutors Link Suspect in Girl's Killing to Gang in Bronx*, New York Times, Oct. 2, 2007, at B2 [reporting that unidentified "legislators who voted for the bill said they believed it was intended to prosecute members of Al Qaeda"]); Defendant also draws attention to a report that, at the time the Anti-Terrorism Act was passed, Assembly Speaker Sheldon Silver, while hailing the bill as "an important message," expressed doubt that there would ever be a prosecution under it (see Caher, *State Legislature Approves Tough Anti-Terrorism Laws*, NYLJ, Sept. 18, 2001, at 1, col 3). In the same vein, commentators have questioned "whether [article 490] is merely a symbolic gesture or an invaluable supplement to Federal law in the fight against terrorism" (Greenberg, et al., *New York Criminal Law § 39:1*, at 1739 [6 West's NY Prac Series 3d ed 2007]). With reference to this particular case, the same commentators opined: "It is doubtful that the Legislature had in mind an entity or locale as small as a neighborhood in the Bronx when it used the phrase 'intimidate or coerce a civilian population' in . . . Article 490" (*id.*, § 39:2 n 4, at 1741; see also Jim, Note, "Over-Kill": *The Ramifications of Applying New York's Anti-Terrorism Statute Too Broadly*, 60 Syracuse L Rev 639 [2010] [discussing the instant case, inter alia]).

may constitute "a civilian population" under Penal Law § 490.25(1), the evidence was insufficient to support a finding that defendant committed his crimes with the intent to intimidate or coerce that "civilian population" generally, as opposed to the much more limited category of members of rival gangs.<sup>5</sup> We therefore reduce the convictions for crimes of terrorism to the corresponding specified crimes as lesser included offenses (see CPL 470.15[2][a]), and remit for resentencing (see CPL 470.20[4]).<sup>6</sup>

The shootings with which defendant was charged arose from a confrontation at a christening party between members of defendant's gang, the SJB, and a suspected member of a rival gang. The party was held at a church located at 1891 McGraw

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

<sup>6</sup>Defendant was convicted of conspiracy in the second degree (Penal Law § 105.15) based on the charge that he agreed with others to commit assault in the first degree as a crime of terrorism, a class A felony. Given our finding that the People failed to prove terrorism, it follows that the object of the conspiracy with which defendant was charged was simply assault in the first degree (Penal Law § 120.10), a class B felony. Since agreeing with others to commit a class B felony constitutes the crime of conspiracy in the fourth degree (Penal Law § 105.10), we reduce the conspiracy count accordingly.

Avenue in the Bronx.<sup>7</sup> A number of SJB members, including defendant, appeared at the party uninvited and took to the stage, giving "shout-outs" (through the disc jockey) that described the SJB as superior to rival gangs (for example, calling themselves "the kings of the Bronx"). During the party, certain SJB members saw a young man named Miguel, whom they believed to be a member of a rival gang that they held responsible for a friend's death in a prior incident. Two SJB members confronted Miguel and demanded that he leave the party, but Miguel refused. Thereafter, according to the testimony of the People's main witness, a number of SJB members, including defendant, discussed how to respond to Miguel's perceived slight. The group agreed that they would beat up Miguel after the party. Defendant was to observe the proceedings while holding a handgun, which he was instructed to use if his friends were losing the fight. Defendant was provided with a gun, and the other SJB members assaulted Miguel and his companions as they left the party. In

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<sup>7</sup>It appears that this location was well outside the SJB's territory, the eastern boundary of which was Webster Avenue, according to the People's evidence (see Hagstrom New York City 5 Borough Atlas [2001], at 21 [showing the southwestern terminus of McGraw Avenue in or near the Parkchester section, about two miles to the east of Webster Avenue]; Williams, *In Bronx Murder Case, Use of New Terrorism Statute Fuels Debate*, New York Times, July 8, 2006, at B1 [reporting that the christening party was held at "St. Paul's Lutheran Church in the Parkchester neighborhood, a few miles east of where (the SJB) usually hung out"]).

the course of the ensuing fighting, one of the SJB members called out for someone to shoot, and defendant pulled out the gun and fired five shots, resulting in the paralysis of one of Miguel's companions and, as stated, the death of a 10-year-old girl.

Nothing in the foregoing scenario -- the heart of the People's case -- suggests that the purpose of defendant's actions was to intimidate or coerce the Mexican-American population residing in the St. James Park area. Rather, the only purposes of defendant's actions that can be discerned from the facts adduced at trial are those of asserting SJB's dominance over rival gangs in general and pursuing a vendetta against Miguel's gang in particular. This is confirmed by the evidence the People presented concerning the purpose of the SJB. The People's main fact witness (to whom we will refer as "ES"), a former leader of the SJB, testified that the gang's purpose was to "protect ourselves from the other gangs. They are our adversaries." Similarly, the People's expert witness on gang behavior, Detective James Shanahan, agreed in his testimony that the SJB members he had interviewed told him that "their purpose was to confront and assault rival gang members." Shanahan also testified that the SJB would stop and harass any young Mexican-American man observed in St. James Park suspected of being affiliated with a rival gang, but would not give such treatment

to Mexican-Americans in the park who were not suspected of having such an affiliation. Even the People, in their appellate brief, acknowledge that "the members of other gangs . . . were SJB's prime adversaries" (Resp Brief at 32).

In arguing for upholding the convictions for committing the specified offenses as crimes of terrorism, the People rely heavily on evidence that the SJB sometimes preyed on area residents who were not gang members. Specifically, the People point to evidence that the SJB robbed patrons of a certain restaurant on Jerome Avenue and engaged in extortion of a local house of prostitution. However, the People identify nothing in the record from which it could reasonably be inferred that the actions of defendant and the other SJB members on the night in question were motivated by the desire to intimidate the Mexican-American community of the St. James Park area. Indeed, as previously noted (*see* n 6, *supra*), the incident did not even occur within the SJB's territory, the home of the "civilian population" that, under the People's theory, the SJB intended to intimidate or coerce. Moreover, it should be borne in mind that a "crime of terrorism" within the meaning of Penal Law § 490.25(1) is not established unless the alleged terroristic intent is connected to the particular specified offense underlying the charge. To paraphrase a familiar legal maxim:

“Proof of [terroristic intent] in the air, so to speak, will not do’” (*Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 341 [1928] [citation omitted]). In any event, here, we see no evidence of intent to terrorize the Mexican-American community of the St. James Park area generally, whether connected to or disconnected from the underlying specified offenses.<sup>8</sup>

To the extent the People argue, as they did at trial, that members of other Mexican-American gangs in the SJB’s area of the Bronx qualify as “a civilian population” under Penal Law § 490.25(1), we find this argument unavailing. While the term “a civilian population” might be literally susceptible to being applied to gang members of a particular ethnicity in a particular urban neighborhood or group of neighborhoods,<sup>9</sup> the context of the

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<sup>8</sup>We note that the fact that the SJB sometimes victimized area residents who were not gang members (for example, by robbing them) does not equate to an intention to terrorize those victims within the meaning of the statute. If the term “with intent to intimidate or coerce a civilian population” included the intent to intimidate or coerce the direct victims of a particular crime, any specified offense involving intimidation or coercion of a group of people (such as a bank robbery) would constitute a crime of terrorism. We do not believe that the Legislature intended such a result. The People themselves appear to recognize that, to constitute a crime of terrorism, the “civilian population” that the actor intends to intimidate or coerce by committing the underlying specified offense must be some group of people other than the direct victims of the crime.

<sup>9</sup>See American Heritage Dictionary 1366 (4th ed 2006) (defining “population” as, inter alia, “[t]he total number of inhabitants constituting a particular race, class, or group in a

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

"The devastating consequences of the recent barbaric attack on the World Trade Center and the Pentagon underscore the compelling need for legislation that is specifically designed to combat the evils of terrorism. Indeed, the bombings of American embassies in Kenya and Tanzania in 1998, the federal building in Oklahoma City in 1995, Pan Am Flight number 103 in Lockerbie in 1988, the 1997 shooting atop the Empire

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specified area"); New Oxford American Dictionary 1320 (2d ed 2005) (defining same as, inter alia, "a particular section, group or type of people . . . living in an area or country"); Random House Webster's Dictionary 1505 (2d ed 2001) (defining same as, inter alia, "the number or body of inhabitants of a particular race or class in a place"); Webster's Third New Intl. Dictionary 1766 (2002) (defining same as, inter alia, "a body of persons having some quality or characteristic in common and usu[ally] thought of as occupying a particular area").

State Building, the 1994 murder of Ari Halberstam on the Brooklyn Bridge and the 1993 bombing of the World Trade Center, will forever serve to remind us that terrorism is a serious and deadly problem that disrupts public order and threatens individual safety both at home and around the world. Terrorism is inconsistent with civilized society and cannot be tolerated."<sup>10</sup>

To decide this appeal, we need not define the minimum size of "a civilian population" that may be the target of terrorism for purposes of Penal Law article 490.<sup>11</sup> Rather, it suffices to observe that the term "to intimidate or coerce a civilian

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<sup>10</sup>Although there were relatively few direct victims of the Empire State Building shooting and the murder on the Brooklyn Bridge, the People acknowledge that these crimes were ideologically motivated and presumably were intended by the perpetrators to attract the attention of, and intimidate, a large public audience. It should be noted that, while the terrorist acts enumerated in the legislative findings were all committed out of ideological, political or religious motives, § 490.25(1) does not define the intent required for a crime of terrorism with reference to motivations of these kinds. In the aforementioned *Jenner* case (see n 3, *supra*), where the Third Department affirmed a conviction for making a terroristic threat under § 490.20 (which defines the requisite terroristic intent in the same terms as are used by § 490.25), the conduct at issue plainly was not animated by ideological, political or religious motives (see 39 AD3d at 1084-1085 [purpose of defendant's threat was to influence the disposition of the custody of his girlfriend's child]). Finding that the *Jenner* defendant's conduct fell within the plain terms of the statute, the Third Department rejected the argument "that his conduct was not what the Legislature had in mind when it enacted this statute after [9/11] and he [therefore] should not be labeled a terrorist" (*id.* at 1086).

<sup>11</sup>The People have not directed our attention to evidence of the size of the "civilian population" that defendant allegedly was attempting to "intimidate or coerce," whether that population is defined as all Mexican-American residents of the SJB's territory or as members of rival gangs.

population," in the context of the aforementioned legislative findings, implies an intention to create a pervasively terrorizing effect on people living in a given area, directed either to all residents of the area or to all residents of the area who are members of some broadly defined class, such as a gender, race, nationality, ethnicity, or religion. The intention by a gang member to intimidate members of rival gangs, when not accompanied by an intention to send an intimidating or coercive message to the broader community, does not, in our view, meet the statutory standard (*cf. Muhammad v Commonwealth*, 269 Va 451, 498-499, 619 SE2d 16, 42-43 [2005], *cert denied* 547 US 1136 [2006] [under Va Code § 18.2-46.4, which defines an "act of terrorism" as any of certain crimes "committed with the intent to . . . intimidate the civilian population at large," the term "'population at large' is . . . intended to require a more pervasive intimidation of the community rather than a narrowly defined group of people"]).

The foregoing conclusion is reinforced by the legislative history and judicial construction of similar definitions of terroristic intent in certain earlier-enacted federal statutes from which Penal Law article 490's definition of such intent appears to have been derived in relevant part (see Greenberg, *supra*, § 39:1, at 1738 [in enacting article 490 after 9/11, "the

Legislature was able to act quickly because of the model provided by existing federal antiterrorism legislation"]; Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 490.10, at 299 [2008] ["The New York definition of an 'act of terrorism' was drawn from the federal definition of 'international terrorism'"].<sup>12</sup>

Evidently, the "intent" language at issue on this appeal originated with the Foreign Intelligence Surveillance Act (50 USC § 1801 *et seq.* [FISA]) as originally enacted in 1978 (Pub L 95-511, § 101, 92 Stat 1783, 1784 [1978]; see Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J Legis 249, 255 [2004] ["The oldest statutory definition of terrorism in federal law is the FISA definition of 'international terrorism'"]). FISA's definitional section provides, in pertinent part, that activities constitute "international terrorism" if, among other things, they "appear to

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<sup>12</sup>The People seem to argue that federal statutory definitions of terrorism have no relevance to the construction of Penal Law § 490.25(1), even if the very language of § 490.25(1) to be construed is identical to, and presumably derived from, the preexisting federal statutes. If this is the People's position, we reject it. In this regard, contrary to the People's contention, CPL 20.40(1)(a), which merely provides that a county has jurisdiction to prosecute an offense if "[c]onduct occurred within such county sufficient to establish . . . [a]n element of such offense," casts no discernible light on the meaning of the term "civilian population" in Penal Law § 490.25(1).

be intended" to accomplish one of the same three goals now delineated in Penal Law § 490.25(1), including the intent "to intimidate or coerce a civilian population" (50 USC § 1801[c][2][A]).<sup>13</sup> The relevant legislative history offers as examples of such terrorism "the detonation of bombs in a metropolitan area" and "the deliberate assassination of persons to strike fear into others to deter them from exercising their rights" (Sen Rep 604[I], 95th Cong, 1st Sess, at 29-30, reprinted in 1978 US Code Cong & Admin News, at 3931; Sen Rep 701, 95th Cong, 2d Sess, at 30, reprinted in 1978 US Code Cong & Admin News, at 3999). These examples do not bring to mind violence between rival criminal gangs motivated chiefly by the desire to establish dominance between the gangs themselves rather than by

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<sup>13</sup>FISA's definition of "international terrorism" has not been amended since its original enactment in 1978 (*compare* 50 USC § 1801[c] *with* Pub L 95-511, § 101, 92 Stat 1783, 1784 [1978]). We note that one commentator has made the following criticism of FISA's use of the term "civilian population" in this context:

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

the desire to create an intimidating impression on residents of the area generally.

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

"segment[] of society" as broad as a religion or nationality, seems inconsistent with applying the term to a category as narrow as gang members in a particular urban neighborhood or group of neighborhoods.

Subsequently, in 1992, Congress enacted current 18 USC § 2331(1) (Pub L 102-572, § 1003[a][3], 106 Stat 4521, 4521 [1992]). This provision defines "international terrorism," as relevant to this case, in substantially the same fashion as FISA defines the term, as discussed above. Like FISA and the subsequently enacted Penal Law § 490.25(1), 18 USC § 2331(1) provides that terroristic intent includes the intent "to intimidate or coerce a civilian population" (18 USC § 2331[1][B][I]). The legislative report on the bill simply notes that § 2331's "definition of international terrorism is drawn from [FISA]" (Sen Rep 342, 102d Cong, 2d Sess, at 45).<sup>14</sup>

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<sup>14</sup>Language referring to an intent "to intimidate or coerce a civilian population" appears in other definitions of terrorism in federal law (see e.g. 6 USC § 101[16][B][i] [Homeland Security Act of 2002]; 18 USC § 921[a][22] [Firearms Owners' Protection Act]; 18 USC § 2331[5] [definition of "domestic terrorism" added by USA PATRIOT Act of 2001, Pub L 107-56, § 802(a), 115 Stat 272, 376 (Oct. 26, 2001)]; USSG § 3A1.4(a) cmt n 4 [sentencing guidelines]). Such provisions (some of which, as can be seen from the foregoing references, postdate New York's Anti-Terrorism Act) do not appear to cast much additional light on the meaning of the same language in Penal Law article 490. There are also a number of provisions of federal law defining terrorism without reference to an intent "to intimidate or coerce a civilian population" (see e.g. 18 USC § 2332b[g][5][A] [defining a

Consistent with the foregoing legislative history, courts construe the term “to intimidate or coerce a civilian population” under federal terrorism laws to refer to attempts to intimidate the general public in a given area, or a broad category of the general public in a given area (see *Boim v Holy Land Found. for Relief & Dev.*, 549 F3d 685, 694 [7th Cir 2008] [en banc], cert denied \_\_ US \_\_, 130 S Ct 458 [2009] [donations supporting Hamas attacks in Israel “appear to be intended . . . to intimidate or coerce a civilian population” under 18 USC § 2331(1)(B)(I)]; *United States v Jordi*, 418 F3d 1212, 1216-1217 [11th Cir 2005], cert denied 546 US 1067 [2005] [defendant convicted of attempting to bomb abortion clinics acted with motive “to intimidate or coerce a civilian population” so as to warrant upward sentence departure under USSG § 3A1.4(a) cmt n 4]). By contrast, “drive-by shootings and other street crime” and “ordinary violent crimes, for example, robberies or personal vendettas,” do not

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“federal crime of terrorism” as conduct violating specified criminal statutes that “is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct”]; 22 USC § 2656f(d)[2] [statute directing State Department to transmit certain reports on terrorism defines “terrorism” as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”]). The various definitions of terrorism in federal law are discussed in Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J Legis 249 (2004), *supra*.

satisfy the intent element of "international terrorism" under 18 USC § 2331(1) (*Linde v Arab Bank, PLC*, 384 F Supp 2d 571, 581 n 7 [ED NY 2005] [noting that plaintiffs would not prevail on their civil claims to recover for international terrorism if they "fail(ed) to prove that these acts were terror attacks, rather than 'mere' street crime"])).

By no means do we minimize either the heinous nature of the criminal conduct at issue or the stark tragedy of its consequences. We see no evidence, however, that defendant's conduct was motivated by an intention to intimidate or coerce the Mexican-American community in the relevant area of the Bronx. Rather, on this record, all that can be concluded is that defendant acted for the purpose of asserting his gang's dominance over its particular criminal adversaries, namely, members of rival gangs. Such conduct falls within the category of ordinary street crime, not terrorism, even under the broad terms of Penal Law § 490.25.<sup>15</sup>

We reject defendant's argument that the trial evidence was insufficient to support the judgment insofar as he was convicted of the specified offenses (attempted murder, manslaughter and

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<sup>15</sup>Since we find that the evidence was insufficient to sustain the convictions for crimes of terrorism under § 490.25, we need not reach defendant's argument that the statute is unconstitutionally vague as applied to him.

weapon possession, and conspiracy to commit first-degree assault) as lesser included offenses underlying the terrorism charges. The People's chief fact witness was the aforementioned ES, a leader of the SJB and an accomplice in the crimes with which defendant was charged.<sup>16</sup> It was permissible for defendant to be convicted based on ES's testimony because that testimony found support in "corroborative evidence tending to connect the defendant with the commission of [the] offense[s]" (CPL 60.22[1]).

In summary, the key points of ES's testimony were as follows: (1) he, defendant and other SJB members attended the party; (2) defendant participated in the meeting at the party where the SJB members planned to attack the aforementioned Miguel as he left the building; (3) defendant agreed at the meeting to hold a gun and, if necessary, shoot during the fight; (4) another SJB leader gave defendant a gun; and (5) during the subsequent fight with Miguel and his companions outside the church, ES saw defendant fire the gun when another SJB member called out for him to do so. The chief evidence generally corroborating ES's

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<sup>16</sup>ES testified pursuant to a cooperation agreement with the People, under which, in exchange for his testimony, his guilty plea to murder in the second degree (and his sentence of 15 years to life) would be reduced to a plea to manslaughter in the first degree (and a sentence of 15 years).

account and tending to connect defendant with the commission of the crimes was defendant's own written and videotaped statement, which he gave to the police when they first questioned him three days after the incident. In this statement, defendant claimed that he had attended the party with his fellow SJB members; that he had seen a fight (involving other SJB members, but not him) outside the church after the party; that, during the fight, a female SJB member (GS) gave a male SJB member a gun and the latter fired it and then handed it to defendant; that defendant ran while holding the gun for "a little bit" and then handed the gun back to GS "since [he] did not want to have any type of problems."<sup>17</sup>

Notwithstanding the obvious conflicts between the two accounts, defendant's statement sufficiently corroborates the testimony of ES to satisfy CPL 60.22(1). The statute requires only that the corroborative evidence "'tend[] to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the

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<sup>17</sup>GS, another accomplice, was also called as a witness by the People. GS testified that she brought a gun to the party at the direction of SJB leaders, that she gave the gun to defendant toward the end of the party, and, as she fled after the shooting (which she said she did not witness), defendant called out her name and handed the gun back to her.

truth'" (*People v Reome*, 15 NY3d 188, 192 [2010], quoting *People v Dixon*, 231 NY 111, 116 [1921]). Moreover, "[t]he role of the additional evidence is only to connect the defendant with the commission of the crime, not to prove that he committed it'" (*Reome*, 15 NY3d at 192, quoting *People v Hudson*, 51 NY2d 233, 238 [1980]). Here, although defendant denied having played a role in either the fighting or the shooting (or the planning of such violence), his statement corroborated ES's testimony, and tended to connect defendant with the commission of the crime, in at least three crucial respects. Specifically, in his statement, defendant admitted his membership in the SJB gang, placed himself at the crime scene and admitted having held a gun there. This sufficed to provide the necessary "slim corroborative linkage'" (*Reome*, 15 NY3d at 192, quoting *People v Breland*, 83 NY2d 286, 294 [1994]) to the accomplice's testimony.

The corroboration requirement having been met, it was the jury's role to determine ES's credibility in light of his criminal background, his motive to cooperate with the prosecution, and the inconsistencies between his testimony and that of other witnesses. We note that, while defendant points to evidence suggesting that another SJB member fired a gun in the incident, the jury was free to reject such evidence and, in any event, was entitled to convict defendant of attempted murder and

manslaughter on an "acting in concert" theory (Penal Law § 20.00) even if he did not fire any of the shots. Further, on our review of the facts pursuant to CPL 470.15(5), we find that the judgment of conviction is not against the weight of the evidence.<sup>18</sup>

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

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<sup>18</sup>We reject defendant's conclusory argument that "spillover prejudice" from the now-dismissed terrorism charges, and from the evidence admitted (without objection) in support thereof, was so great as to render it unfair to sustain the convictions on the lesser included specified offenses. First, we point out that this argument was not made to the trial court and is therefore unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits, as defendant fails to demonstrate that the jury was unable to properly consider the underlying charges. In fact, the jury demonstrated this ability in rendering a verdict acquitting defendant of the highest charge against him (murder in the second degree).

about serving on a jury [being] one of the ways of responding to the terrorists of [9/11], . . . are there any among you . . . who believe it would be impossible to serve fairly and impartially in this particular case?"

The claim of error based on the court's remarks to the voir dire panel is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. While it would have been preferable, in a case involving a terrorism charge, for the court to forgo the reference to jury service as a way to "speak back" to the 9/11 terrorists, we think it highly unlikely that the jurors misinterpreted this hortatory rhetoric as an invitation (in the words of defendant's brief) to "vindicate their own rage at the [9/11] terrorists by their treatment of [defendant's] case" that "undermined the impartiality of the proceedings."<sup>19</sup> Nothing in the court's remarks likened defendant to the 9/11 terrorists; on

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<sup>19</sup>One panel member asked whether the court was suggesting that 9/11 and defendant's alleged crimes "have something in common," and objected that the way the court was "positioning it" was, in her view, not "fair." The court responded, *sua sponte*, by immediately excusing that individual. We agree that the court, at that juncture, should have clarified, for the benefit of the remaining panel members, that no connection was being drawn between 9/11 and the charges against defendant. However, the panel member's objection actually shows that she fully understood that 9/11 had nothing to do with the charges against defendant.

the contrary, the court specifically explained that defendant was not being charged with politically motivated terrorism. Significantly, the trial took place a full six years after 9/11, and defendant does not claim that anything the jurors learned of his background might have caused them to connect him to the 9/11 terrorists. Further, given the vast scale of the 9/11 catastrophe, the distinction between those attacks and the crimes charged here was unmistakable.

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

possession but maintained that he was a lower-tier member who was not implicated in most of the gang's criminal activity, lacked any responsibility for the shootings at issue, and did not share the terroristic intent attributed to the gang as a whole.<sup>20</sup> Under these circumstances, defendant, through counsel, intelligently and knowingly waived his right to complain about the *Crawford* violation (see *Melendez-Diaz v Massachusetts*, \_\_\_ US \_\_\_, 129 S Ct 2527, 2534 n 3 [2009]), and we decline to exercise our power to review the claim in the interest of justice.

We find unavailing defendant's argument that the performance of his lead trial counsel was so deficient as to deny him effective assistance of counsel (see *People v Benevento*, 91 NY2d 708, 713 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]; see also *Strickland v Washington*, 466 US 668, 687-688 [1984]). To the extent defendant argues that counsel failed to make certain objections or to call certain witnesses, we presume, in the absence of a complete record developed by a motion to vacate the judgment pursuant to CPL 440.10, that counsel exercised professional judgment and strategic discretion in determining how to conduct the defense. In fact, the existing record reflects that counsel followed a coherent strategy that sought to show

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<sup>20</sup>In fact, Shanahan's testimony concerned the now-dismissed terrorism charge almost exclusively.

that defendant committed no crime beyond weapon possession, a charge that he was unlikely to defeat given the denial of his suppression motion. Further, counsel competently attacked the credibility of ES, the People's main witness, and brought out the inconsistencies between his testimony and that of other witnesses. Ultimately, counsel obtained an acquittal on the second-degree murder charge, the most serious count of the indictment. While we do not condone counsel's absences and tardiness, defendant fails to establish that these had any impact on the defense.

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

appropriate time may well have been a conscious tactical choice by defense counsel, since resubmitting the case to the jury to cure the inconsistency could have resulted in the acquittal on the murder charge being changed to a conviction (see *People v Alfaro*, 66 NY2d at 987; *People v Maldonado*, 11 AD3d 114, 117 [2004], *lv denied* 3 NY3d 758 [2004]). Under the circumstances, we decline to review this claim in the interest of justice.

We reject defendant's various arguments that his statements to the police should have been suppressed on his pretrial motion. We see no grounds for disturbing the suppression court's determination, based on credible evidence, that the police committed no violation of *Payton v New York* (445 US 573 [1980]) in entering defendant's apartment when they first approached him for questioning. As the suppression court properly found, the police entered the apartment with the implicit consent of the elderly man (apparently, defendant's stepfather) who met them at the door (see *People v Pacheco*, 292 AD2d 242 [2002], *lv denied* 98 NY2d 679 [2002]; *People v Brown*, 234 AD2d 211, 212, 214 [1996], *affd* 91 NY2d 854 [1997]). As for defendant's claim that the failure of the police to give him *Miranda* warnings when they began to interview him after he voluntarily accompanied them to the precinct, the record fully supports the suppression court's determination that a reasonable innocent person in defendant's

situation would have believed, at the inception of the interview, that the police (who never displayed their weapons) "were still in the process of gathering information about the alleged incident prior to taking any action" (*People v Dillhunt*, 41 AD3d 216 [2007], *lv denied* 10 NY3d 764 [2008]). Accordingly, the suppression court properly concluded that defendant was not in custody when the interview began and that the police were not required to read the *Miranda* warnings at that point (*see People v Bennett*, 70 NY2d 891, 893-894 [1987]).<sup>21</sup> As there was no initial *Miranda* violation, there is no need to consider whether defendant's subsequent statements were tainted. Nor is there any merit to defendant's argument that the conditions of his detention were so excessive and unreasonable as to render his statements involuntary.

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

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<sup>21</sup>During the course of the interview, before defendant gave any written statement, the police did read him the *Miranda* warnings.

Accordingly, the judgment of the Supreme Court, Bronx County (Michael A. Gross, J.), rendered December 10, 2007, convicting defendant, after a jury trial, of manslaughter in the first degree as a crime of terrorism, attempted murder in the second degree as a crime of terrorism, criminal possession of a weapon in the second degree as a crime of terrorism and conspiracy in the second degree, and sentencing him to consecutive terms of 20 years to life on the manslaughter count and the attempted murder count, and to concurrent terms of 15 years on the weapon possession count and 5 to 15 years on the conspiracy count, should be modified, on the law, to reduce the conviction for manslaughter in the first degree as a crime of terrorism to manslaughter in the first degree, the conviction for attempted murder in the second degree as a crime of terrorism to attempted murder in the second degree, the conviction for criminal possession of a weapon in the second degree as a crime of terrorism to criminal possession of a weapon in the second degree, and the conviction for conspiracy in the second degree to conspiracy in the fourth degree, and, as so modified, affirmed, and the case remitted to Supreme Court with directions to

resentence defendant on the reduced counts of the judgment.

The Decision and Order of this Court entered herein on November 9, 2010 is hereby recalled and vacated (see M-6039 decided simultaneously herewith).

All concur.

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

ENTERED: MAY 31, 2011



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

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom,  
David B. Saxe  
Karla Moskowitz  
Leland G. DeGrasse  
Sheila Abdus-Salaam,

J.P.

JJ.

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In re Alaire K. G.,  
Petitioner-Respondent,

-against-

Anthony P. G.  
Respondent-Appellant.

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x

Respondent appeals from an order of the Family Court, Bronx County (Annette L. Guarino, Referee), entered on or about July 9, 2010, which granted the mother's petition to modify the judgment of divorce, Supreme Court, Bronx County (Ira Globerman, J.), entered on or about July 13, 2006, to permit her to relocate to California with the parties' child.

Law Office of Randall S. Carmel, Syosset  
(Randall S. Carmel of counsel), for  
appellant.

Anne M. Crawley, Sunnyside, for respondent.

Karen P. Simmons, The Children's Law Center,  
Brooklyn (Barbara H. Dildine, Janet  
Neustaetter and LaShonne Watts of counsel),  
attorney for the child.

MOSKOWITZ J.

This appeal, involving a custodial parent's request to relocate with the parties' child, falls within the class of cases that "present some of the knottiest and most disturbing problems that our courts are called upon to resolve" (*Matter of Tropea v Tropea*, 87 NY2d 727, 736 [1996]).

The parties were married in January 2004, separated about a year and a half later and were divorced on July 13, 2006. They are the parents of a now six-year-old boy born on May 17, 2004. The stipulation settling the divorce case granted the mother legal and physical custody of the child. The father had visitation every week from Monday at 8:00 p.m. until Wednesday at 6:00 p.m. The stipulation allowed relocation within 25-miles of the father's house in the Bronx.

The father has had a history of irregular employment and is currently not employed. At the time of trial, the mother, who is remarried, cared for her younger child from her second marriage, full time.

After the parties separated, the mother remained in the marital apartment in the Bronx with the child for two years. In the fall of 2007, she began working as a project administrator in the construction field. In 2007, she moved with the child and her boyfriend to Connecticut. The mother testified that she

always wanted her son to be in a suburban environment. She stated that she was trying "to mirror my own childhood. I had a wonderful suburban upbringing." The relationship in Connecticut ended when the boyfriend returned to his native New Zealand. The mother returned to New York with the child and moved into an apartment in Harlem.

In March 2008, the mother met her future husband, Hugh Bonnar, on Match.com. Bonnar was retired from the Air Force, lived in North Carolina and was then involved in a nation-wide job search. Ultimately, Bonnar took a job with Northrop Grumman in San Diego. He had requested to work at Northrop Grumman's Long Island branch, but the company could not accommodate his request. The mother and Bonnar became engaged in May 2008.

Soon after her engagement, the mother approached the father about moving to California to live with Bonnar. The father was concerned about the distance and the stability of the mother's new relationship. The parties therefore met with a mediator to try to work out an arrangement by which the mother could leave the child with the father temporarily while she settled in California. The mediator sent a letter, dated May 12, 2008, that purported to memorialize the parties' agreement. The letter stated that the parties agreed that the child would stay with the father from June 27, 2008 until December 31, 2008, with the

mother making several long weekend visits to New York. Mother and son were also to participate in a webcam phone call two to three times a week. The letter did not address where the child would live after December 31, 2008. However, the father refused to sign an agreement embodying these terms and instead asked the mother to sign over custody to him. She refused. The mother left for California on June 26, 2008. She claims that she never intended the father to have permanent custody, but arrangements to move to California had become irreversible by the time she learned that the father did not agree.

The mother gave birth to Bonnar's son on April 4, 2009. She and Bonnar were also married in April 2009.

On July 17, 2008, the father filed a petition seeking sole legal and physical custody of the parties' child, claiming that the mother had abandoned the child. On December 1, 2008, the mother filed a petition for relocation. The court consolidated the two petitions. Before the hearing, the father withdrew his petition for sole custody. Accordingly, the court considered only the relocation application.

It was not until August 2009 that a two-day hearing finally took place. The parties were the only witnesses. The court did not issue a decision until almost a year later, on July 19, 2010, granting the mother's relocation petition. During the time the

parties were waiting for the court's decision, the child continued to live with the father. After the court's decision was issued, the child moved to California in compliance with the court's order.

"Each relocation request must be considered on its own merits with due consideration of all relevant facts and circumstances and with the predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (*Tropea v Tropea* 87 NY2d 727, 739 [1996]). Among the factors the court must consider are: (1) "each parent's reasons for seeking or opposing the move," (2) the quality of the child's relationship with each parent, (3) the impact of the move on the child's future contact with the noncustodial parent, (4) the degree to which the move may enhance the custodial parent's and child's life economically, emotionally and educationally, and (5) "the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements" (*id.* at 740-41). The dissent states that *Tropea* dictates that the court's "central concern" should be the impact of the move on the relationship between the child and the noncustodial parent. This interpretation misreads the case. *Tropea* states that "[o]f course, the impact of the move on the relationship between the child and the noncustodial parent will

remain a central concern." However, it is not "the" central concern. Rather, the case makes abundantly clear that "it is the rights and needs of the children that must be accorded the greatest weight" (*id.* at 739). Indeed, the Court of Appeals rejected the "three-tiered" analysis that required a court to determine first "whether the proposed relocation would deprive the noncustodial parent of regular and meaningful access to the child" (*id.* at 736).

Family Court recognized the *Tropea* factors and analyzed this case accordingly:

"While it is true that Mother was young when Aodhan was born, there is no question now that she is in a stable relationship, remarried and that her financial situation dictates that her family live where her husband can make a living. The benefits to the child were demonstrated by testimony and documentary evidence, as a suburban middle class lifestyle, public school with every possible amenity available at no cost, comprehensive health insurance, a stay at home mother, easily available excellent physicians, a positive post-divorce family unit and most importantly, the benefits of the child growing up with his younger brother on a daily basis.

"The Court recognizes and agonized at great length over the impact of the relocation on the child's ability to maintain a consistent, ongoing and meaningful relationship with his Father. The visitation schedule set forth hereinafter is designed to mitigate such impact, given the distance between New York and California."

There is no reason to disturb the findings of the court, that had the opportunity to hear the parents testify and had an in camera meeting with the child (see *Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [2006], *lv denied* 7 NY3d 717 [2006] ["Custody matters are within the sound discretion of the Family Court, and its findings should be accorded great deference on appeal since that court was in the best position to evaluate the testimony, character, and sincerity of the parties"]) [internal quotation marks and citation omitted). There is a sound and substantial basis in the record for the determination granting the mother's request to relocate to California with her son (see *id.*).

First, there is no question that the California home is financially more stable than the father's home. The stepfather has a steady job with Northrop Grumman that provides his family with health insurance. By contrast, the father is not currently working. Although he has been offered a job as a teacher's aide, he has postponed his start date. He is currently on some type of public assistance and receives money from his parents in Ireland. He readily admits that "it's not been easy like money wise." He is not currently in a relationship. Given his bleak financial circumstances, with no career or family in New York, it would appear that there is nothing keeping the father from moving to

San Diego himself to be closer to his son (see *Tropea*, 87 NY2d at 740 ["where the custodial parent's reasons for moving are deemed valid and sound, the court in a proper case might consider the possibility and feasibility of a parallel move by an involved and committed noncustodial parent as an alternative to restricting a custodial parent's mobility"]); *Thompson v Smith*, 277 AD2d 520, 522 [2000] [noting the feasibility of a parallel move where the father's "single lifestyle and his skills as a self-employed machinist and part-time baker are readily transplantable").

Further, living in San Diego ensures that the child will grow up in the same house as his half brother (see *Matter of Smith v Bonvicino*, 50 AD3d 806, 807 [2008] ["the mother demonstrated that the proposed move to Oklahoma will allow the child to benefit from an enhanced relationship with her half brother and the improved economic opportunities for the mother"]). The father agreed that it was very important for the child to have a brother in his life. He even testified that he actually expected the child eventually to move to California so that he could be with his brother, the father was merely opposed to the date of the move. The mother established that the child would have access to an education that was just as good as, if not better than, his school in New York. Moreover, she testified that Bonnar's status as a veteran will allow the child to attend

college within the State of California's university system free of charge.

The record also reflects that the mother went out of her way to facilitate communication between the child and his father. The same could not be said of the father with respect to communication between the child and his mother. Finally, the child's own attorney recommended that the court permit the mother to relocate with the child, a factor that militates in favor of affirming the result the court reached (*see Matter of Caravella v Toale*, 78 AD3d 828, 828 [2010] [determination that it was in the best interests of the children to allow them to relocate to California where their father lived was consistent with "the recommendation of the court-appointed forensic evaluator, and the position of the attorney for the children, which are entitled to some weight";] *see also Matter of Aruty v Mormando*, 70 AD3d 683 [2010]).

The dissent's characterization of the mother as putting her own romantic interests ahead of her son's welfare is rank speculation. It is just as likely that the mother, herself an only child, was pursuing marriage aggressively to produce a sibling for her son, before he became much older, and an intact family. Regardless of the mother's motivations, it is the best interest of the child that must guide our decision. Relocation

ensures that the child will live in a family that is stable financially. He will be with his brother. The amount of time spent with his father will diminish. However, we find that the visitation schedule, that requires the mother to pay for air travel for the child to be with the father on numerous extended weekend visits throughout the year in addition to extended summer and holiday visits, does not deprive the father of the opportunity to maintain a close relationship with his son (see *e.g. Matter of Smith*, 50 AD3d at 807 [2008] ["While the loss of the father's weekend and occasional midweek parenting time [due to move to Oklahoma] is not insignificant, the parenting time provided for by the Family Court allows for the continuation of a meaningful relationship between the father and the child"]).

Accordingly, the order of the Family Court, Bronx County (Annette L. Guarino, Referee), entered on or about July 9, 2010, which granted the mother's petition to modify the judgment of divorce, Supreme Court, Bronx County (Ira Globerman, J.), entered on or about July 13, 2006, to permit her to relocate to California with the parties' child, should be affirmed, without costs.

All concur except Saxe and DeGrasse, JJ. who dissent in an Opinion by Saxe, J.

SAXE, J. (dissenting)

The petitioning mother, who seeks to relocate the parties' child from New York to San Diego, has demonstrated that she puts her own romantic interests ahead of the best interests of her son. A young child is entitled to the stability and security created by the presence, guidance and love of both his parents in his day-to-day life. Yet, by her actions, this mother has shown herself unconcerned with protecting her son's right to the guidance and love of both his parents. Her desire for a romantic partner has taken precedence over the paramount interest of the child in maintaining the vital parent-child bond with both his parents. As a legal matter, the showing made by the mother fails to justify allowing her to relocate the parties' six-year-old son to a home more than 3,000 miles from his father.

From the time of the parties' divorce in 2006, when he was two years old, the child spent three days every week in his father's home; since the mother moved to San Diego in June 2008 for her new romance, the child has lived at his father's home full time. The major damage that the relocation will cause to the relationship between the child and his father cannot be remedied by what is termed "appropriate visitation," namely, a large part of the child's summer vacation and school holiday periods. No matter how positive the move may have proven to be

for the mother, and even accepting that the new home situation offers benefits to the child as well, the relevant factors were wrongly balanced in the trial court's analysis. When the correct weight is accorded to the most important of the factors, namely, the impact on the bond between the child and his noncustodial parent, the conclusion that emerges is that the relocation should not be permitted.

The parties were married on January 26, 2004, and their son was born on May 17, 2004. The mother filed for divorce in June 2005, and a stipulation dated March 14, 2006, which was incorporated into the divorce judgment entered on July 13, 2006, granted the mother primary legal and physical custody of the child and gave the father visitation with the child every Monday morning through Wednesday evening. The stipulation permitted the mother to relocate only within 25 miles of the father's home in the Bronx.

In 2007, the mother moved with the child to live with her then boyfriend in Connecticut (within the 25-mile radius), but that boyfriend soon returned to his native New Zealand to care for his mother, and the mother returned with the child to New York, to find a new apartment and a full-time job.

In January 2008 the mother met her current husband, Hugh Scott Bonnar, on the Internet dating service Match.com; he was

recently retired from the Air Force and residing in North Carolina. The two used video teleconferencing to get to know each other, and first met in person in March 2008, when he spent a week at her home in New York. The mother reports that Bonnar sought employment throughout the United States, but was only offered a position at Northrup Grumman in San Diego, California, which he accepted and began in May 2008. The couple became engaged in May 2008.

At around that time, in late April or early May 2008, the mother approached the father about her desire to move to California to live with Bonnar. The father did not agree to her moving with the child. They then consulted a mediator to arrive at an interim agreement that would enable the mother to leave the child temporarily with the father while she settled in California. On May 8, 2008, the parties met with a mediator selected by the mother. A letter dated May 12, 2008 sent by the mediator to each of the parties, purporting to memorialize their agreement, stated that it was agreed that the child would stay with the father for the period from June 27, 2008 to December 31, 2008, with several long weekend visits to New York by the mother and webcam visits two to three times each week. The letter does not address the issue of custody and visitation after December 31, 2008; indeed, in discussing the terms of the purported

agreement, the letter does not specifically use the word "custody" at all.

Although the mother had an attorney draft a document that she believed formalized the mediated agreement, the father refused to sign the document, and, instead, asked the mother to formally sign over custody of the child to him. The mother testified that although she had never intended to agree that the father would have permanent custody, arrangements for her move had proceeded too far to alter, because she had already quit her job and given up her apartment. She left the child with the father and flew to San Diego on June 26, 2008.

The father filed a custody petition on July 17, 2008, seeking sole legal and physical custody of the child, alleging that a change in circumstances had occurred -- the mother had abandoned the child. Thereafter, on or about December 1, 2008, the mother filed a petition for relocation. The two petitions were consolidated, and before the hearing, the father withdrew his petition for sole custody, leaving only the relocation application for determination.

The hearing took place in August 2009; the parties were the only witnesses. The evidence established that the mother's new husband is employed by defense contractor Northrup Grumman, that he handles the distribution of parts for particular vehicles

manufactured by the company, and that his salary is \$60,000-\$80,000 a year. The mother and her new husband were married in April 2009; their son Ian was born on April 4, 2009. They planned to move soon after the hearing, in September 2009, to a suburb of San Diego, which the mother represented has an excellent public elementary school. The mother asserted that because of her new husband's military status, the parties' son would be eligible to attend any four-year college in California's state university system at no cost. According to the mother, her new husband wants to provide a positive role model in the child's life but does not intend to supplant the father in his paternal role. The mother offered assurances that she was willing to allow visitation for almost the entire summer and alternate school recesses, and would pay for the child's transportation expenses to and from New York.

Until the Family Court issued its decision on July 9, 2010, the child continued to reside with the father, making a number of visits to San Diego. The court then granted the mother's petition to modify the parties' 2006 judgment of divorce so as to permit her to relocate to California with the parties' child.

There is no dispute regarding the legal standard to be applied to this proceeding. As enunciated in *Matter of Tropea v Tropea* (87 NY2d 727, 739 [1996]), the ultimate question is "what

outcome is most likely to serve the best interests of the child.” *Tropea* directs that appropriate consideration be given to all relevant factors, with no presumptions or threshold showings required, and suggests a variety of factors that may be relevant to deciding such an application, including

“the good faith of the parents in requesting or opposing the move, the child’s respective attachments to the custodial and noncustodial parent, the possibility of devising a visitation schedule that will enable the noncustodial parent to maintain a meaningful parent-child relationship, the quality of the life-style that the child would have if the proposed move were permitted or denied, the negative impact, if any, from continued or exacerbated hostility between the custodial and noncustodial parents, and the effect that the move may have on any extended family relationships” (*id.* at 740).

The *Tropea* Court also observed that “the demands of a second marriage and the custodial parent’s opportunity to improve his or her economic situation, may also be valid motives that should not be summarily rejected, at least where the over-all impact on the child would be beneficial,” and that even “the custodial spouse’s remarriage or wish for a ‘fresh start’ [may] suffice to justify a distant move” if it results in “strengthening and stabilizing the new, postdivorce family unit” (*id.* at 739). However, it cannot be over-emphasized that “the impact of the move on the relationship between the child and the noncustodial parent will

remain a central concern" (*id.*).

In permitting the relocation, the Family Court emphasized that the mother is now in what was termed a stable relationship, that her financial situation dictates that her family live where her husband can make a living, and that substantial benefits will inure to the child by the move. The court seemed to look with great favor on the suburban-type lifestyle described by the mother, which included reportedly excellent public schools, comprehensive health insurance, a stay-at-home mother, and a "positive" postdivorce family unit including a younger brother. The court also placed substantial emphasis on a briefly mentioned, undeveloped point in the father's testimony, in which he said that he anticipated that some time in the future his son would go to live with his mother and new brother, in "maybe a year and a half." Yet the court characterized this testimony as his having "essentially consented" to the sought relocation, "except that he sought to control the timing of the move."

When this Court reviews relocation decisions, it generally considers whether there is "a sound and substantial basis in the record" for the determination (*see Yolanda R. v Eugene I. G.*, 38 AD3d 288, 289 [1<sup>st</sup> Dept 2007]). However, this Court will reverse a decision if a preponderance of the evidence, when properly weighed in view of the relative importance of each consideration,

does not support the trial court's determination regarding the child's best interests (see *Salichs v James*, 268 AD2d 168 [1<sup>st</sup> Dept 2000]).

Notwithstanding its reference to "agoniz[ing] at great length over the impact of the relocation on the child's ability to maintain a consistent, ongoing and meaningful relationship with his father," the Family Court gave far too little weight to what should have been a "central concern" of the court's, namely, "the impact of the move on the relationship between the child and the noncustodial parent" (*Tropea*, 87 NY2d at 739). In my opinion, there can be no doubt that the relocation will substantially interfere with the father-son relationship and bond. To expect the father to present evidence establishing exactly how the relocation would interfere with the father-son relationship, as did the Law Guardian, would impose an absurd requirement, and the failure or inability of the father to make such an evidentiary demonstration does not negate the fact of the harm. It is well established that children derive an abundance of benefits from "the mature guiding hand and love of a second parent" (*Weiss v Weiss*, 52 NY2d 170, 175 [1981]) and that generally a child's best interest is protected by ensuring the fullest possible relationship with both parents (see *Nimkoff v Nimkoff*, 18 AD3d 344, 347 [1<sup>st</sup> Dept 2005]). This relocation will

deprive this child of his father's participation in his day-to-day life; any benefits that may be offered by the mother's new home and family cannot compensate for that more fundamental deprivation.

I cannot agree with the suggestion that the strong father-son bond can be sustained through a visitation schedule consisting of longer-than-usual summer visits and some school vacations. An extended visit once a year, with two or three additional week-long visits, cannot create or maintain the depth of the bond created when the child lives with the parent full time or, at least, for a substantial portion of each week. Nor can videoconferencing through computer interfaces fill the gap. As matrimonial law commentator Andrew Schepard has observed, "Parenting plans should not be structured on the assumption that virtual visitation can substitute for personal interaction between parent and child" (Schepard, *Virtual Visitation: Computer Technology Meets Child Custody Law*, NYLJ, September 18, 2002 at 3, col 1).

"Hugs and kisses cannot be transmitted via video screen; nor can a parent wipe away a child's tears, tie a child's shoe, climb a tree with a child or cheer at a child's Little League game over the Internet. These precious moments and memories that are at the core of a parent's relationship with a child require personal contact" (*id.*).

It should be emphasized that the impact of this relocation of more than 3000 miles cannot be compared with the impact of a relocation of, say, 100 or even 200 miles, such as many cases have considered. For example, in *Tropea's* companion case, *Browner v Kenward*, the respondent-father argued that the 130-mile move from Westchester County to Pittsfield, Massachusetts, would eliminate his midweek visitation opportunity, reduce his ability to participate in his son's religious worship, and diminish the quality of the weekend visits he had with his son. The Court concluded that "[w]hile these losses [were] undoubtedly real and [were] certainly far from trivial, it [could not] be said that they operated to deprive respondent of a meaningful opportunity to maintain a close relationship with his son" (87 NY2d at 742). A proposed relocation that, as a practical matter, eliminates midweek visitation, does not necessarily prevent the noncustodial parent from being a regular presence in the child's life, and, importantly, to be present for the unique milestones in the child's life, such as school play or school concert performances. Similarly, in *Matter of Daniel R. v Liza R.* (309 AD2d 714, 714 [1<sup>st</sup> Dept 2003]), this Court modified an order of visitation to give custody to the father, who lived a 1½-hour drive from the mother, observing that "[w]ere this case to be assessed on the basis of relocation, the result would be no different since

petitioner moved solely to obtain viable employment, *respondent has not been denied meaningful access to her son*, and it has been demonstrated that the child will thrive in the new location” (emphasis added).

In contrast, a 3000-mile relocation like the one at issue here virtually precludes the noncustodial parent from maintaining any realistic presence for these types of formative events in the child’s life. Indeed, a review of cases in which relocation of a child to California was sought reflects that such permission is often denied where both parties are good parents and there is a close relationship between the child and the parent residing in New York (see e.g. *Matter of Webb v Aaron*, 79 AD3d 1761 [4<sup>th</sup> Dept 2010]; *Matter of Friedman v Rome*, 46 AD3d 682 [2d Dept 2007]; *Matter of Burr v Emmet*, 249 AD2d 614 [3d Dept 1998]; *Matter of Yelverton v Stokes*, 247 AD2d 719 [3d Dept 1998], *lv denied* 92 NY2d 802 [1998]). In *Matter of Friedman*, the Second Department explained that although the mother’s relocation application was validly motivated “to meet the demands of her second marriage,” the denial of the application was in the children’s best interests because “the mother failed to demonstrate that her reasons justify ‘the uprooting of the children from the only area they have ever known, where they are thriving academically and socially, and where a relocation would qualitatively affect their

*relationship with their father'*" (46 AD3d at 683, quoting *Matter of Confort v Nicolai*, 309 AD2d 861, 861 [2d Dept 2003] and *Matter of Mascola v Mascola*, 251 AD2d 414, 415 [2d Dept 1998] [emphasis added]).

In *Matter of Burr v Emmet*, the mother "planned to move to California to remarry and pursue a career as a lyricist, taking [the parties' child] and his nine-year-old half-sister" (249 AD2d at 614). The Third Department affirmed the denial of the mother's relocation application, emphasizing that "[w]here, as here, a custodial parent seeks to change his or her residence in a manner that would detrimentally affect the other parent's ability to enjoy 'frequent and regular contact with the child' [citation omitted], the relocating party bears the burden of demonstrating that the proposed move is nevertheless in the child's best interest" (*id.*, citing *Matter of Tropea v Tropea*, 87 NY2d at 741). The Court observed that the mother's plans to become a lyricist in California were speculative at best, and failed to justify "uprooting [the child] from familiar surroundings and loving relatives, and disrupting his strong bond with [the father]" (249 AD2d at 615). Interestingly, the Court did not even comment on the impact of the denial of relocation on the mother's plan to remarry in California.

In *Matter of Yelverton v Stokes*, the mother sought

relocation in order to move to San Jose, California, to marry a man already living and employed in a lucrative position there; she asserted that there were no similar positions for him in New York. The Third Department affirmed the denial of relocation, citing, among other reasons, the child's unfamiliarity with the locale and the new husband's lack of experience with children generally and his lack of any prior relationship with the parties' child (247 AD2d at 721).

And in *Matter of Webb v Aaron*, the Fourth Department affirmed the denial of relocation with the parties' child to California because not only had the mother failed to establish that their lives would be sufficiently enhanced by the move, but in addition, the record showed that the child's relationship with her father and other relatives "would be adversely affected by the proposed relocation" (79 AD3d at 1762).

There are, of course, many cases in which the facts and the nature of the family relationships warrant permitting long-distance relocation. For example, in *Matter of Fegadel v Anderson* (40 AD3d 1091 [2d Dept 2007]), the Second Department affirmed an order granting the mother's petition to relocate to Florida. It explained that "[a]lthough both parties were loving parents," the mother was the child's primary caretaker; that while there was extended family in New York, one of the child's

two adult siblings lived in Florida; and that the mother had provided health and economic reasons in support of the move (*id.* at 1093). I note, however, that the decision contains no discussion of whether the relocation would disrupt the bond between the child and her father. Similarly, *Aziz v Aziz* (8 AD3d 596 [2d Dept 2004], *lv dismissed* 7 NY3d 739 [2006]), in which the mother was permitted to move with the parties' child to Texas, has no discussion of whether the relocation would disrupt the child's bond with the father.

In *Matter of Vargas v Dixon* (78 AD3d 1431 [3d Dept 2010]), the mother was permitted to move with the parties' child to Florida. Importantly, however, the Third Department specifically pointed out that contrary to the claim that the child's relationship with her father would be adversely affected by the move, the Family Court had credited the mother's testimony that the father had failed to regularly exercise visitation with the child until 2009, and that the visitation schedule was crafted so as to permit the child to spend more time with the father than she had in the past.

That the relocation to California in this case will necessarily substantially disrupt the father-son bond is a fact, regardless of whether it is acknowledged by the mother, the law guardian, or the majority. Of course, in appropriate

circumstances, that single factor may be outweighed by other considerations. However, this case is like *Matter of Sylvain v Paul* (68 AD3d 883, 884 [2d Dept 2009], *lv denied* 14 NY3d 709 [2010]), where

“[the mother’s] desire to move to Florida to live with her new husband, who resided in Florida where he was employed as a truck driver, was not, under the circumstances of this case, a sufficient justification to warrant relocating the child away from his father and the father’s extended family, with whom the child has strong, loving relationships.”

While the demands and opportunities presented to a custodial parent by a second marriage may, “at least where the over-all impact on the child would be beneficial,” justify a relocation to a distant place” (*Tropea*, 87 NY2d at 739), the mother’s single-minded focus on her own desire for a new romantic partner, with precious little concern for her son’s need for his father, warrants granting relatively little weight to her desires when balancing all the relevant factors.

Indeed, the unusual way in which the mother’s relocation request evolved militates against allowing the relocation of the child such a distance from his father. This is not a case in which the need for relocation arose after the custodial parent became involved with or married to the new stepparent, and the parent’s or stepparent’s employment necessitated the move.

Rather, as the father observes, the mother left New York to pursue a romance, pure and simple. In fact, this was part of a pattern; she had previously relocated to Stamford, Connecticut to move in (with the child) with a boyfriend. That relationship lasted less than a year, ending when her boyfriend moved back to New Zealand. What these acts demonstrate is that the mother's desire for, or need of, a romantic partner is far more compelling to her than her concern for her child's well-being.

It was the mother's act of seeking a new romantic partner on Match.com, heedless of where potential mates might be located, that led directly to her moving to California in the hope that her new relationship would prove to be permanent. Although she would have willingly taken her son with her on her exploratory move to San Diego, as she had when she moved to Stamford, she did not hesitate to leave him behind when the father relied on the divorce judgment's relocation limit to prevent her from taking him. So powerful was her need to find a romantic partner that she was willing to drop everything, particularly her day-to-day presence in the life of her four-year-old son, in pursuit of satisfying it. That she was fortunate enough to have the whirlwind romance turn into an apparently stable marriage should not cause us to overlook her unthinking eagerness to take steps that -- even if everything worked out -- would leave the

youngster with only one of his parents present in his everyday life, while the other slowly became a relative stranger.

Although the majority terms "rank speculation" the assertion that the mother puts her own romantic interests ahead of her child's interests, it is an unassailable fact. By moving to California in June to live with a man that she met in person for the first time in March, she showed that her four-year-old son took a back seat to her need for a romantic partner. The majority's characterization of the mother's hasty move to California as "pursuing marriage aggressively to produce a sibling for her son before he became much older," does not place the mother in a better light. The fact is, her move demonstrates that there was nothing more important to her than beginning a new life with her new boyfriend; her child came second, and she gave no thought to his need to maintain the close day-to-day bond with his father.

While the mother testified that Bonnar had looked for work in this area, and, in particular, that he inquired into the possibility of work at Northrup Grumman's Long Island facility, nothing in her testimony indicates that she explicitly explained to him that remaining in this area was a paramount concern to her, that she was determined that her son would have both his parents in his day-to-day life. She testified, albeit vaguely,

that she had indicated to Bonnar that remaining in this area was important to her (upon learning that Bonnar had been offered the San Diego job, "I asked him - I begged him, I said is there anything that you could do - is there any possible way - anything," in response to which Bonnar told her that it had been very difficult to find any job at all). But there is nothing to reflect that her expressed preference or concern was motivated by the paramount nature of her son's needs. Indeed, there is no indication that she ever broached with Bonnar the subject of making an effort to find other kinds of employment in the New York area, outside the realm of military suppliers if necessary. We have no reason to believe that Bonnar's search for employment was undertaken with any concern about the needs of his new girlfriend's son. On the contrary, we can infer that he knew that his new girlfriend was willing to go wherever he found a job, and would make no demands with regard to what would be best for her child.

Although the mother asserted that she had planned to move because the father led her to believe that he would cooperate with her plan to take the child with her once she established that the relationship with her new paramour was stable, the Family Court *rejected* the mother's testimony on that point, pointing out that the father's insistence on including the 25-

mile relocation limit in the divorce judgment reflected an unwillingness to have the child moved that far from him. Yet, in supporting the move on appeal, the Law Guardian incorrectly treats this assertion by the mother as established fact. As to the Law Guardian's suggestion that the mother's initial move without the child established her respect for the father's concern for stability, in fact, it only reflected her recognition that she lacked the legal right to unilaterally move the child that far. Indeed, the father's consent, in the context of the stipulation of settlement and the divorce judgment, to the mother's serving as custodial parent and primary caretaker of their child was given on the assumption that the child would live within 25 miles of him and would be with him three days each week.

Nor do I view the quality of life the court anticipated for the boy in San Diego as a great improvement over his life in New York. I fail to perceive the "substantial benefits" the Family Court found. It is undisputed that during the two years the father served as the child's de facto custodial parent, the child had a good home, attended a good school and was well cared for. There is no indication that the father failed to provide adequately for the child before he was injured when hit by a car, and every indication that by the time of trial he was on track to

again provide adequately for him. He testified that he had trained for, and obtained, new employment as a teacher's aide, which he had to postpone only to ensure his availability for trial. It is manifestly unfair to hold the father's "physical and financial problems" and receipt of some public assistance benefits against him, since it was his being hit by a car while crossing the street in May 2008 that caused both his physical injuries and his unemployment.

As to the purported benefits of the move, while the mother's living situation in San Diego seems to be adequate, it was not shown to be so much more stable or financially beneficial as to justify the relocation. For one thing, we have no reason to assume that the new job obtained by the child's new stepfather is particularly secure, or that the \$60,000-\$80,000 that he is said to be earning will result in substantial additional benefits for the child. The Law Guardian's implication that the child's new stepfather is the only one of the three adults who can be relied on to support the child, in view of what she termed his long-term, well paid employment, fails to acknowledge that this apparent stability and security are attributable only to his status as a long-time member of the armed forces, not to any success in the job market. Nor should we necessarily be so sanguine about the stability of a new marriage that took place at

the time the new couple's child was born, about a year after they first met in person.

Assuming, as we can here, that each parent has the means to provide a safe and happy upbringing, we should be wary of giving greater consideration to the parent whose income is greater.

There is no reason to view the child's educational opportunities in California as better than those available here. New York has a low-cost city and state university system that is the equal of California's state system; it also has illustrious public high schools such as Hunter High School, Stuyvesant, and Bronx High School of Science, whose superiority is universally recognized.

The emphasis placed by the majority on the benefits of the child's growing up with his half brother fails to recognize that those benefits are gained at the expense of day-to-day contact with his father, a connection far more important to a child's development.

As nice as it is for the mother that her new husband's earnings seem sufficient to afford her the option of staying at home full time and attending to her children, the benefit that her full-time presence might provide to the child does not outweigh the substantial loss of his father's presence in his life.

The majority's suggestion that permitting the relocation is particularly appropriate because the father is free to relocate to San Diego in view of his lack of a "career" or family in New York turns the situation on its head. The father should not have to create a completely new life for himself in an unknown community 3,000 miles from his home in order to maintain a close relationship with his son. He has made his home as an adult in New York City. That he has worked a variety of jobs and has not joined a high-income profession does not make his ties to his chosen home less meaningful.

Lastly, the Family Court's conclusion was founded at least in part on the assertion that the father should not be allowed to control the "timing" of a relocation to which he essentially consented. This was not a sound basis for permitting the relocation. While the father did allude in his testimony to the vague prospect of the child's living with his mother's new family in "maybe a year and a half," he was not asked to explain himself. Presumably, the mother's counsel did not want to give the father the chance to backpedal. However, such an offhand

comment should not be relied on for a finding that the father  
"essentially consented" to a relocation.

For all the foregoing reasons, I believe the mother's  
application should be denied.

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

ENTERED: MAY 31, 2011

  
CLERK