SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 26, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

158 Coast Equities, LLC, Index 603942/06
Plaintiff-Respondent,

-against-

JCC Ventures, Inc., et al.,
Defendants-Appellants,

Young White Broke, LLC,
Defendant.

Davidoff Malito & Hutcher, LLP, Garden City (David I. Lieser of counsel), for appellants.

Altschul & Altschul, New York (Cory S. Dworken of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 11, 2008, which, in an action to recover unpaid rent and related legal fees, insofar as appealed from, granted plaintiff landlord's motion for summary judgment as against defendants-appellants tenant and guarantor, unanimously affirmed, with costs.

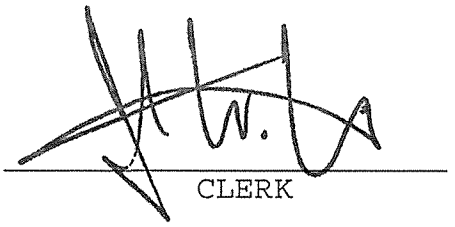
Defendants assert that the primary purpose of the subject July 2002 lease, as contemplated by them and plaintiff's predecessor landlord, was the operation of a cabaret; that defendant and its assignee, against whom summary judgment was

also granted but who does not appear on the appeal, continuously operated the premises as a cabaret until August 2005; and that on August 1, 2005, the Department of Buildings informed defendants of its intent to presently revoke the cabaret permit pursuant to Administrative Code § 27-197 on the ground that the permit had been issued in error. For present purposes, it further appears that the rent due plaintiff was fully paid through September 2005 and that the assignee vacated the premises in October 2006 after failed attempts to obtain a cabaret license. We reject defendants' argument that because the intended use of the leased space as a cabaret was illegal from the beginning, although nobody realized it until the August 2005 revocation notice from DOB, the lease is unenforceable as against public policy. Unlike *Hart v City Theatres Co.* (215 NY 322 [1915]), the lease contemplated other possible uses besides a cabaret, and defendants do not claim that these other permitted uses, as a restaurant, bar or lounge, were also illegal. On the issue of illegality, the burden should be on defendant tenant, whom the lease made entirely responsible for obtaining all licenses and permits needed by it to conduct its business on the premises, and who, after expiration of an option to cancel by October 2002, was to remain responsible under the lease regardless of any failure to obtain or maintain any needed licenses or permits. Nor does it avail defendants to argue that the lease was induced by fraud,

assuming that any fraud by plaintiff's predecessor can be imputed to plaintiff, where there is no evidence of the circumstances surrounding the fraud (CPLR 3016[b]) -- there is only an attorneys' affirmation, a verified answer conclusorily alleging fraud, and the August 2005 DOB notice (*see Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]). While plaintiff's predecessor represented in the lease that it had no actual knowledge of any condition that would prohibit the uses permitted in the lease, absent some reason based on fact that plaintiff's predecessor had such knowledge, it does not avail defendants to argue that there should be disclosure on the issue (*see Orix Credit Alliance v R.E. Hable* Co., 256 AD2d 114, 116 [1998]). We have considered defendants' other arguments and find them unavailing.

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

ENTERED: MARCH 26, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 26, 2009.

Present - Hon. Richard T. Andrias, Justice Presiding
Luis A. Gonzalez
John T. Buckley
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 5982/07
Respondent,

-against- 157

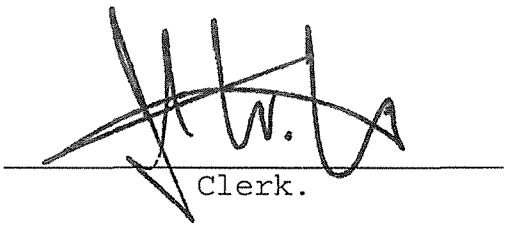
Abram McDonald,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 7, 2008,

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

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

ENTER:



Clerk.

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

Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

159 In re Afortunado S.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for presentment agency.

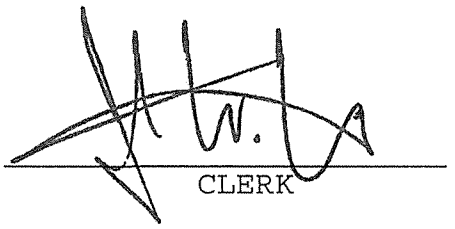
Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about August 5, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts, which, if committed by an adult, would constitute the crimes of robbery in the second degree, criminal possession of stolen property in the fifth degree and obstructing governmental administration, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). The evidence included the victim's identification of appellant

and the recovery of the victim's property from appellant immediately after the crime. We have considered and rejected appellant's remaining claims, including those relating to the obstructing governmental administration charge.

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

ENTERED: MARCH 26, 2009



CLERK

Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

160 Beatrice O'Brien, et al., Index 102026/08
Plaintiffs-Respondents,

-against-

Robert Jackson Miller III, et al.,
Defendants-Appellants.

Skoloff & Wolfe, P.C., Livingston, NJ (Jonathan W. Wolfe of counsel), for Robert Jackson Miller III, appellant, and Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Peter Kreymer of counsel) for appellants.

Berman and Sable LLC, Hartford, CT (Michael P. Berman of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered June 24, 2008, which, in an action for, inter alia, breach of contract arising out of architectural plans prepared by defendant Miller that were allegedly defective, denied defendants' motion to dismiss 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.

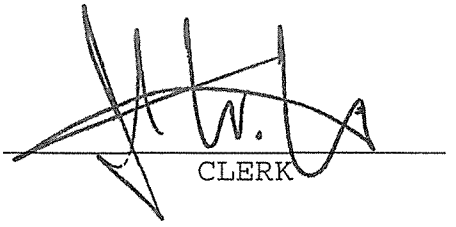
New York's long-arm statute does not support the exercise of personal jurisdiction over defendant Miller (CPLR 302). "Essential to the maintenance of this action against [Miller] are some purposeful activities within the State and a substantial relationship between those activities and the transaction out of

which the cause of action arose" (*Talbot v Johnson Newspaper Corp.*, 71 NY2d 827, 829 [1988] [internal quotation marks and citation omitted]). Here, the record shows that while Miller is employed in New York, his employment here is unrelated to the contract between himself and plaintiffs, which he entered into personally in New Jersey, and not on behalf of his employer.

Plaintiffs' claims against defendant architectural firm also fail, since there is no evidence that Miller was acting as the firm's agent when he entered into the agreement with plaintiffs (*see e.g. Hallock v State of New York*, 64 NY2d 224, 231 [1984]). Nor is there evidence that the firm engaged in any conduct which misled plaintiffs into relying upon any alleged misrepresentations made by Miller (*see Ford v Unity Hosp.*, 32 NY2d 464, 473 [1973]).

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

ENTERED: MARCH 26, 2009



Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

161 Rohan Tinson, Index 119257/06
Plaintiff-Respondent,

-against-

512 West 29th Street, LLC also known as Stereo Club,
Defendant-Appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Carmen A. Nicolaou of counsel), for appellant.

LeBow & Associates, PLLC, New York (James B. LeBow of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 1, 2008, which, to the extent appealed from, denied defendant's motion to dismiss the action, unanimously affirmed, with costs.

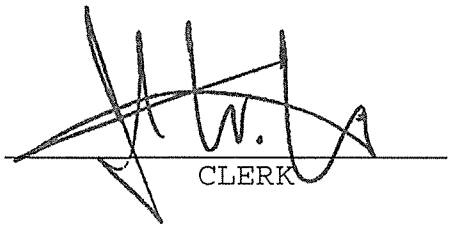
The summons and complaint were filed on December 29, 2006, giving plaintiff until April 28, 2007, to effect service (CPLR 306-b). Proper service was made on the Secretary of State on March 30, after working out some procedural defects in the papers. On April 4, plaintiff's counsel consented to a 30-day extension for defendant to answer the complaint. Instead, defendant moved on May 2 to dismiss for failure to serve within the statute of limitations, which had expired on December 31, 2006.

Plaintiff demonstrated diligent efforts to serve defendant in a timely fashion. But for the courtesy extension to opposing

counsel, he would have effectuated service within 120 days of the timely filing of the complaint. The court's ruling was a proper exercise of discretion in the interest of justice (*see de Vries v Metropolitan Tr. Auth.*, 11 AD3d 312 [2004]).

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

ENTERED: MARCH 26, 2009



Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

162 Catherine Crowley, Index 350300/04
Plaintiff-Respondent,

-against-

Daniel Ruderman,
Defendant-Appellant.

Arnold Davis, New York, for appellant.

Teitler & Teitler, LLP, New York (Nicholas W. Lobenthal of counsel), for respondent.

Judgment, Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered on or about January 29, 2008, which, to the extent appealed from as limited by the brief, valued the marital apartment at $1,050,000, ordered defendant to pay $927 per month in basic child support and 40% of the child's add-on expenses, including private school tuition, summer camp, voice and tennis lessons, and medical expenses, and awarded plaintiff one-half of the sums paid by her during the pendency of the action for the maintenance on the marital apartment and the parties' joint income taxes for 2003 and 2004, unanimously affirmed, without costs.

The trial court's rejection of defendant's expert's testimony as to the value of the marital residence is entitled to substantial deference (*see Hale v Hale*, 16 AD3d 231, 233 [2005]). Most significantly, in contrast to the work done by plaintiff's expert in reaching his conclusion, defendant's expert did not

visit comparable apartments or view photographs of them, was unaware of the extent or cost of the bathroom and kitchen renovations in those apartments, and admitted on cross-examination that he should have made adjustments for those differences.

The court properly distributed the parties' marital debt paid solely by plaintiff during the pendency of the action, including maintenance on the marital apartment and their joint income taxes, in the same proportion as that of their marital assets (*see Savage v Savage*, 155 AD2d 336 [1989]; *Capasso v Capasso*, 129 AD2d 267, 293 [1987], *lv denied and dismissed* 70 NY2d 988 [1988]).

The award of basic child support, based on the child's actual needs and the amount required for an appropriate lifestyle, is supported by the record (*see Matter of Vladlena B. v Mathias G.*, 52 AD3d 431 [2008]).

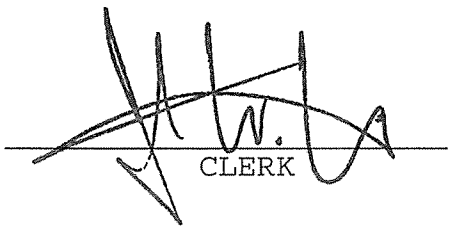
The court properly allocated the award for the child's add-on expenses according to the proportion of the combined parental income that each parent's income represents. We note that defendant never objected to the child's continued attendance at private school or continued participation in various extracurricular activities. The court properly relied on plaintiff's financial expert for an analysis of defendant's cash flow. In contrast to defendant's expert, plaintiff's expert took

into account the investment income defendant could expect from his equitable distribution award. The court fairly and reasonably limited its application of that expected investment income to the award of add-on expenses.

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

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

ENTERED: MARCH 26, 2009



Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

163 The People of the State of New York, Ind. 5636/05
Respondent,

-against-

Enrique Batista,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Charlotte E. Fishman of counsel), for respondent.

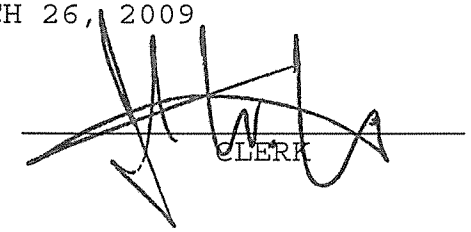
Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 25, 2006, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification. The victim had an ample opportunity to observe defendant during the robbery, and he gave a detective a detailed and accurate description.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 26, 2009



Gonzalez, P.J., Andrias, Acosta, Renwick, JJ.

164-
164A Index 109573/05

Margaret R. Schorsch, et al.,
Plaintiffs-Appellants,

-against-

Moses & Singer LLP,
Defendant-Respondent.

Bennett, Giuliano, McDonnell & Perrone LLP, New York (Nicholas P. Giuliano of counsel), for appellants.

Landman Corsi Ballaine & Ford P.C., New York (Louis G. Corsi of counsel), for respondent.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered July 10, 2008, dismissing the complaint, and bringing up for review an order, same court and Justice, entered June 20, 2008, which granted defendant's motion to dismiss, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as superseded by appeal from the judgment.

To prevail in a legal malpractice suit, the client must prove negligence on the part of her attorneys, and that she would have prevailed on the merits but for that negligence (*see e.g. Davis v Klein*, 88 NY2d 1008 [1996]). Defendant made a prima facie showing of entitlement to summary judgment through sworn statements and documentary evidence that the underlying defendant insurer had properly denied plaintiffs' claim pursuant to the dishonest acts exclusion, thus rendering any subsequent claim

against the insurer futile. In response, plaintiffs failed to present any admissible evidence to raise a disputed issue of material fact as to the futility of the underlying insurance claim.

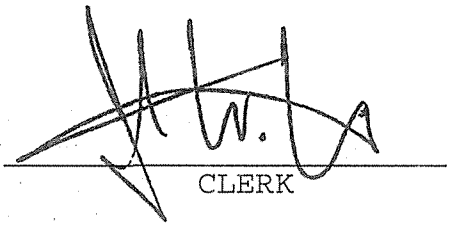
The court properly found that Margaret Schorsch's affidavit failed to create an issue of material fact as to whether her brother David was responsible for the 1995 inventory loss, or whether he was an "authorized representative" of M.R.S. Antiques so as to defeat coverage under the "dishonest acts" exclusion in the policy. Her affidavit contradicts detailed statements she previously made under oath in a 1995 case she brought against David wherein she alleged that he, as an integral member of the family business, had stolen company inventory and was thus responsible for the loss. This contradiction negated the authority of her affidavit as a basis for defeating defendant's motion for summary judgment (*see Sugarman v Malone*, 48 AD3d 281 [2008]).

Plaintiffs' assertion that the insurance policy did not contain an exclusion for dishonest acts is contrary to the record evidence. It is true that the insurer's counsel, in the February 14, 1997 letter denying coverage, mistakenly cited to a different policy it had issued to M.R.S. Antiques. However, the slight differences between the language of the Fine Arts Coverage dishonest acts exclusion and the one incorrectly cited by counsel

in the letter do not affect the material terms of the applicable exclusion. The basic scope is the same: coverage is excluded for dishonest acts by "you" or the insured's "employees" or "authorized representatives" or "anyone entrusted with the property." Since the inventory loss was caused by the dishonest acts of David, who qualified as an authorized representative of M.R.S. Antiques or a person otherwise entrusted with the missing property, coverage was properly denied.

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

ENTERED: MARCH 26, 2009



CLERK

Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

165 Eileen Burke, et al., Index 8421/06
Plaintiffs-Appellants,

-against-

Canyon Road Restaurant, et al.,
Defendants-Respondents.

The Saftler Law Firm, New York (Tatia D. Barnes of counsel), for appellants.

Eustace & Marquez, White Plains (Kenneth L. Gresham of counsel), for Canyon Road Restaurant and Ark Restaurants Corp., respondents.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for GP Associates, respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered June 13, 2008, which, in this action for personal injuries sustained when plaintiff Eileen Burke fell while exiting defendants' restaurant, granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The entranceway at issue included a step leading to a door that led into the restaurant, and the accident occurred when plaintiff fell when she missed the step while leaving the restaurant. Although landowners have a duty to maintain their property in a reasonably safe condition, and to warn of latent hazards of which they are aware (*see Basso v Miller*, 40 NY2d 233, 241 [1976]), a court is not "precluded from granting summary

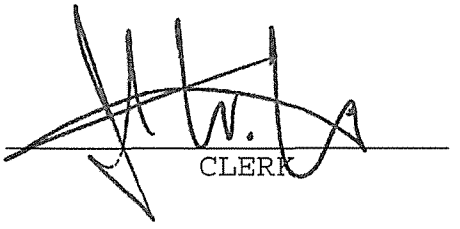
judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous" (*Cupo v Karfunkel*, 1 AD3d 48, 52 [2003]). Based on the deposition testimony that there was no debris or water on the ground where plaintiff fell, that she did not trip or slip on anything, that the area of the accident was illuminated, and that the general manager of the restaurant for the last several years was not aware of any complaints or accidents, or code violations or repairs of the front step, defendants demonstrated their prima facie entitlement to summary judgment (*see Jones v Presbyterian Hosp. in City of N.Y.*, 3 AD3d 225, 226 [2004]).

In opposition, plaintiff failed to raise a triable issue of fact. Her expert referred to the general provisions of Administrative Code of the City of New York § 27-127 and § 27-128, and opined that the entranceway was defectively maintained, but he failed to set forth any violations of industry-wide standards or accepted practices in the field (*see Jones v City of New York*, 32 AD3d 706, 707 [2006]). Furthermore, although an expert affidavit can nonetheless raise questions as to common-law negligence (*see Wilson v Proctors Theater & Arts Ctr. & Theater of Schenectady*, 223 AD2d 826, 828-29 [1996]), the evidence here fails to establish that the subject step was inherently dangerous

or that it constituted a "hidden trap" (*see Schreiber v Philip & Morris Rest. Corp.*, 25 AD2d 262, 263 [1966], *affd* 19 NY2d 786 [1967]; *compare Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207 [1988]).

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

ENTERED: MARCH 26, 2009



Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

166 Hector Nunez, Index 24664/06
Plaintiff-Respondent,

-against-

Luis R. Zhagui,
Defendant-Appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Holly E. Peck and Stacy R. Seldin of counsel), for appellant.

Friedman & Moses, LLP, Garden City (Lisa M. Comeau of counsel), for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered August 8, 2008, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

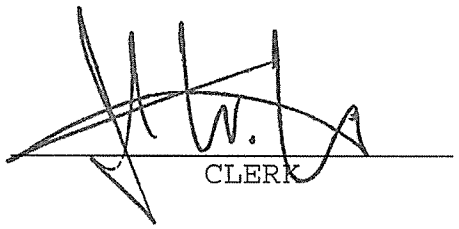
After defendant's showing of prima facie entitlement to summary judgment, the court properly found that plaintiff raised a triable issue of fact through his treating doctor's affirmation, which, when considered in connection with MRIs taken within weeks of the accident, found objective medical findings of range of motion limitations contemporaneous with the accident and upon recent examination (*see Thompson v Abbasi*, 15 AD3d 95, 97 [2005]). The existence of a serious injury is also supported by the affirmed report of the orthopedic surgeon who performed surgery on plaintiff's left knee 2½ years after the accident, and found, among other things, a crack on the lateral facet of the

patella (*see Morris v Cisse*, __ AD3d __, 2009 NY Slip Op 95 [1st Dept 2009]).

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

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

ENTERED: MARCH 26, 2009



Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

168 The People of the State of New York, Respondent, Ind. 6600/03

-against-

Timoteo Ramirez, Defendant-Appellant.

Norman A. Olch, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered December 16, 2004, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first and third degrees, and three counts of criminally using drug paraphernalia in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 15 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the conclusion that defendant was a participant in a drug-selling operation and a joint possessor of the contraband at issue. Police executing a search warrant found, throughout the apartment, indicia of a large-scale operation, including, among other things, a large quantity of drugs along with equipment for manufacturing

kilogram-sized drug packages. Although nothing was in open view, this was the type of premises where "a reasonable jury could conclude that only trusted members of the operation would be permitted to enter" (*People v Bundy*, 90 NY2d 918, 920 [1997]), and where the presence of casual visitors or social guests would be unlikely. Defendant and his codefendant were the only persons present, and when the police entered defendant attempted to flee and tried to destroy his own cell phone, the records of which ultimately provided evidence of his connection to the codefendant. Defendant was carrying nearly one thousand dollars in cash and a pager. Although only the codefendant admitted to living in the apartment, there was extensive circumstantial evidence connecting defendant to the apartment, to the codefendant, and to documents that appeared to reflect drug transactions. This evidence, viewed in its entirety, warranted the inference defendant and the codefendant jointly exercised dominion and control over the premises and the contraband (*see e.g. People v Marte*, 14 AD3d 408 [2005], *lv denied* 4 NY3d 888 [2005]).

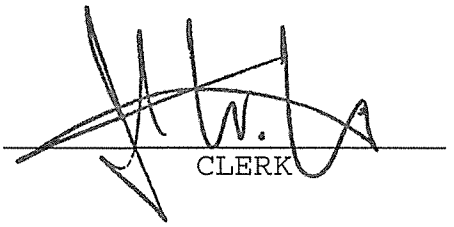
Defendant failed to make a record that is sufficient to permit review (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]; *People v Johnson*, 46 AD3d 415 [2007], *lv denied* 10 NY3d 812 [2008]) of his claim that the court did not provide defense

counsel with notice of a jury note and an opportunity to be heard regarding the court's response (*see People v O'Rama*, 78 NY2d 270 [1991]). Viewed in light of the presumption of regularity that attaches to judicial proceedings (*see People v Velasquez*, 1 NY3d 44, 48 [2003]), the existing record, to the extent it permits review, demonstrates that the court satisfied its "core responsibility" under *People v Kisoon* (8 NY3d 129, 135 [2007]) to disclose jury notes and permit comment by counsel. The record warrants an inference that the court discussed the note with counsel during a luncheon recess in the absence of the court reporter (*see People v Fishon*, 47 AD3d 591 [2008], *lv denied* 10 NY3d 958 [2008]). Furthermore, in delivering its response to the jury, the court read the note into the record almost verbatim. Accordingly, counsel's failure to object to the procedure employed by the court or to its response to the note renders the claim that the court violated CPL 310.30 unpreserved (*see e.g. People v Salas*, 47 AD3d 513 [2008], *lv denied* 10 NY3d 883 [2008]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court's response to the note was completely favorable to defendant, which indicates either that counsel did have input into the response, or that no such input was necessary. Defendant's remaining contentions are unpreserved and we decline

to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: MARCH 26, 2009



Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

170 Robert McCully, Index 604416/06
Plaintiff-Appellant,

-against-

Jersey Partners, Inc.,
Defendant-Respondent.

Goodwin Procter LLP, New York (Jay Todd Hahn of counsel), for appellant.

Greenberg Traurig, LLP, New York (Simon Miller of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 8, 2008, which granted defendant's motion to dismiss the complaint, unanimously modified, on law, the motion denied with respect to the claim for an additional tax dividend for 2000 resulting from defendant's filing of an amended return for that year, that claim reinstated, and otherwise affirmed, without costs.

Plaintiff's claim for a tax dividend for 2001 was properly dismissed because, by exercising his right to a fair-value appraisal of his shares in defendant upon consummation of the corporate reorganization on November 30, 2001, plaintiff ceased to have any rights as a shareholder except the right to the fair value of his shares (Business Corporation Law § 623(e),(k); *Breed v Barton*, 54 NY2d 82, 85 [1981]). Any contractual right to

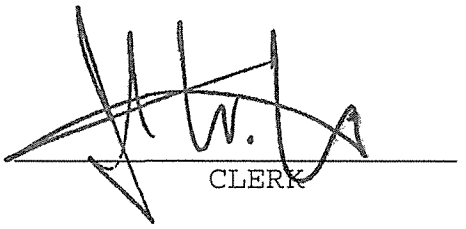
payment of that dividend pursuant to the Stockholders Agreement was dependent on his status as a shareholder, which he renounced. The sole exception to plaintiff's exclusive remedy of an appraisal of the fair value of his shares is the right to assert a claim for equitable relief grounded in allegations of unlawful or fraudulent conduct by the corporation as to him (Business Corporation Law § 623(k); *Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 568 [1984]), which is not what plaintiff alleges here.

The court erred, however, in dismissing the claim for the additional tax dividend for 2000. A dismissal motion based on documentary evidence (CPLR 3211[a][1]) "may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff's factual allegations, *conclusively establishing* a defense as a matter of law" (*Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002, emphasis added]; *accord 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152-153 [2002]). The tax returns and schedules submitted by defendant, which showed no decrease in either defendant's overall tax liability or plaintiff's proportionate share of that liability, still failed to establish conclusively that plaintiff's 2000 tax liability did not increase as a result of defendant's filing of its amended 2000 tax return.

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: MARCH 26, 2009



CLERK

Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

171-
172 The People of the State of New York, Ind. 3499/88
Respondent,

-against-

Carlos Ortiz,
Defendant-Appellant.

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

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

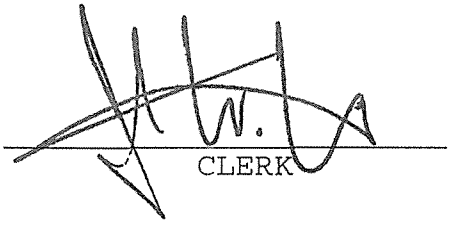
Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered August 1, 2007, as amended June 19, 2008, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment, made on the ground of delay in sentencing (*see* CPL 380.30[1]; *People v Drake*, 61 NY2d 359, 366 [1984]). Defendant failed to appear for sentencing as the result of being arrested on another charge, at which time he gave false pedigree information. After he was released from custody on the new charge, he failed to return to court for sentencing on this case, and he then evaded being returned for sentencing by giving various aliases and false pedigree information in connection with

his many subsequent arrests and incarcerations in New York. As the 18-year delay in sentencing was attributable to defendant's conduct, his claim that the delay was unreasonable is unavailing (*see e.g. People v Allen*, 309 AD2d 624 [2003], *lv denied* 1 NY3d 567 [2003]; *People v Chase*, 306 AD2d 167 [2003], *lv denied* 100 NY2d 619 [2003]; *People v McQuilken*, 249 AD2d 35 [1998], *lv denied* 92 NY2d 901 [1998]; *cf. People v Sigismundi*, 89 NY2d 587 [1997]). There is no merit to defendant's suggestion that even if a defendant schemes to avoid detection, law enforcement authorities are still responsible for the delay if more efficient methods would have foiled the scheme at an earlier date; such an argument is akin to an escapee contending that the pursuing officer should have run faster.

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

ENTERED: MARCH 26, 2009



Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

175N Sabre, Inc., Index 600677/07
Plaintiff-Appellant,

-against-

Paras Exims, Inc. doing business as Arrow Travel & Tours doing business as Elder Travel Club,
Defendant-Respondent.

Salon Marrow Dyckman Newman & Broudy LLP, New York (Marc Jonas Block of counsel), for appellant.

Law Offices of Victor A. Worms, New York (Victor A. Worms of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered May 22, 2008, which conditionally granted defendant's motion to vacate a default judgment, unanimously affirmed, with costs.

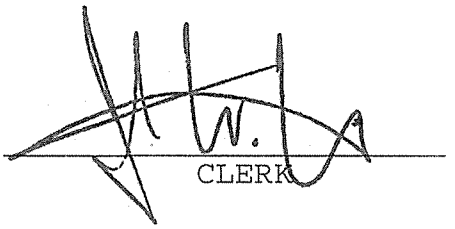
A court is expressly authorized to vacate judgment "upon such terms as may be just" (CPLR 5015[a]), possessing "an inherent power, not limited by statute, to relieve the party from a judgment or order entered on default" (*Town of Greenburgh v Schroer*, 55 AD2d 602 [1976]). Such terms may include conditioning that a bond be posted in the amount of all or part of the judgment (*see Rawson v Austin*, 49 AD2d 803 [1975]). The court did not improvidently exercise its discretion in ordering that the money in defendant's bank account, which had been levied upon and held in escrow by plaintiff's attorney, be posted as

security pending trial on the merits.

Defendant demonstrated an excuse for its default and a meritorious defense (*see Di Lorenzo v Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]); its business manager, who had firsthand knowledge of the terms, services and costs under the contract, explained the reason for default in an affidavit of merit. Nor does the record reveal any pattern of willful neglect on defendant's part that would warrant denial of the motion.

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

ENTERED: MARCH 26, 2009



Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4905N In re Local 832 Terminal Employees of the City of New York, etc., Petitioner-Respondent, Index 106968/06

-against-

The Department of Education of the City of New York, Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for appellant.

Law Offices of Stuart Salles, New York (Stuart Salles of counsel), for respondent.

Order, Supreme Court, New York County (Charles J. Tejada, J.), entered September 19, 2007, which granted the petition to compel arbitration and denied respondent's cross motion to dismiss the petition, unanimously modified, on the law, to vacate the granting of the petition to compel arbitration, the matter remanded for an evidentiary hearing to determine whether respondent is estopped to invoke as a bar to arbitration petitioner's failure to comply with the collective bargaining agreement's 30-day limitation period for the presentment of a formal grievance, and otherwise affirmed, without costs.

Petitioner Local 832 Terminal Employees of the City of New York (Local 832) is the union that represents school lunch managers and school food service managers employed by respondent Department of Education of the City of New York (DOE). DOE

required certain members of Local 832 to work on Monday, January 3, 2005. Local 832 contends that, under the applicable collective bargaining agreement (CBA), its members are entitled to a 50% cash premium for work on that date, since it was the first Monday following a weekend New Year's Day. However, the paychecks for the period including January 3, 2005 (which were issued on January 14, 2005) did not include such extra pay.

According to the affidavit of Local 832's president, when he informally raised with DOE management the issue of extra pay for January 3, 2005, he was told to "hold off" on filing a formal grievance in the hope that the matter could be resolved informally. After months went by without a substantive response from DOE, Local 832 filed a formal grievance on June 15, 2005. Ultimately, Local 832 commenced this proceeding pursuant to CPLR 7503(a) to compel arbitration of the matter in accordance with the grievance resolution provisions of the CBA.

DOE opposed the petition on the ground, inter alia, that Local 832 failed to comply with the requirement of Article XXIII of the CBA that "a complaint concerning any condition of employment within the authority of [DOE]" be presented as a formal grievance "within a reasonable period, *not to exceed 30 days*, of time *following the action complained of*" (emphasis

added).[1] Supreme Court granted the petition, finding that Local 832 "satisfactorily complied" with the CBA by attempting to resolve the dispute informally before presenting a formal grievance, as the CBA contemplates. We now set aside the grant of the petition and remand for an evidentiary hearing to determine whether DOE's conduct estops it from invoking, as a bar to arbitration, Local 832's failure to comply with the CBA's 30-day limitation period for presenting a formal grievance.

We agree with DOE that Local 832 did not formally present its grievance within the 30-day time frame required by the CBA, and that compliance with this time frame is, under the CBA, a "condition precedent to access to the arbitration forum" (*see Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 5 [1980]). Contrary to Local 832's argument, the phrase "the action complained of" in the CBA provision at issue unambiguously refers to the action of DOE that is the subject of the underlying complaint (i.e, the "complaint concerning any condition of employment" referenced earlier in the same sentence). Local 832's assertion that the provision at issue should be interpreted to require only that a grievance be presented "within a

---

[1]The relevant sentence of Article XXIII of the CBA states in full: "If the matter has not been disposed of informally, an employee having a complaint concerning any condition of employment within the authority of [DOE] may, within a reasonable period, not to exceed 30 days, of time following the action complained of, present such complaint as a grievance in accordance with the provisions of this grievance procedure."

reasonable time after the informal complaint process fails" is untenable, since the failure to resolve an issue informally is not itself grounds for complaint. Further, since the informal complaint procedure, by virtue of its very informality, will not necessarily have any clearly defined point of termination, Local 832's reading of the CBA would essentially render nugatory the contractual 30-day time frame for filing a formal grievance. Local 832 correctly points out that the CBA "contemplates that time be given to permit the parties to resolve matters informally before initiating a formal grievance." This is still consistent with the requirement that the formal grievance process be initiated within 30 days. Local 832's concern that 30 days is not sufficient time for the informal complaint procedure to work does not allow us to reach a different result. It is not this Court's role to rewrite the contractual terms that the parties have freely negotiated and agreed upon through the collective bargaining process.

We further note that Article XXIII of the CBA provides that, in the event a grievance goes to arbitration, the arbitrators "shall be without power or authority to make any decision . . . [c]ontrary to, or inconsistent with, or modifying or varying in any way, the terms of [the CBA]." It has been held that a contractual limitation of this sort on the power of the arbitrators mandates vacatur of an arbitration award granting

relief based on a grievance that was presented after expiration of the limitation period set forth in the governing collective bargaining agreement (*see Nassau Health Care Corp. v Civil Serv. Empls. Assn., Inc.*, 20 AD3d 401, 402 [2005]; *Matter of Rockland County Bd. of Coop. Educ. Servs. v BOCES Staff Assn.*, 308 AD2d 452, 454 [2003]; *Matter of Hill v Chancellor of Bd. of Educ. of City School Dist. of N.Y.*, 258 AD2d 462, 463 [1999]).

Although Local 832 failed to commence the formal grievance process within the time frame mandated by the CBA, a factual issue exists on this record as to whether DOE is estopped to oppose arbitration based on the untimely presentment of the grievance. As previously noted, the president of Local 832 asserts that, when he raised the matter in oral conversation with DOE management personnel, they told him to "hold off" on presenting a formal grievance so that DOE could "look into it and see if we can accomplish what you are requesting." In response to the president's later calls, DOE repeatedly stated that it was still "looking into it." Local 832 contends that it was in reliance on these assurances by DOE that it refrained from initiating the formal grievance procedure for approximately five months after the issue arose. These allegations, which DOE has not controverted, raise a factual issue as to whether DOE is estopped to invoke as a bar to arbitration Local 832's failure to

present a formal grievance within the 30-day period (*cf. Baron v Lombard*, 71 AD2d 823, 824 [1979], *affd* 50 NY2d 896 [1980] [employee's conduct, on which employer reasonably relied in scheduling disciplinary hearing, estopped employee to claim that he had not waived the right to such a hearing within the time frame mandated by the collective bargaining agreement]). Accordingly, we remand for a hearing to determine whether DOE is estopped as Local 832 claims, with the petition to be granted if DOE is found to be estopped or, alternatively, to be denied if DOE is found not to be estopped.

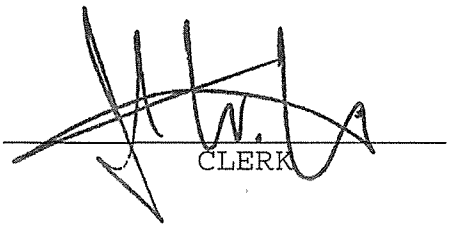
We reject DOE's argument that the petition is barred by Local 832's failure to comply with Education Law § 3813(1), which requires, as a precondition to commencement of an action or special proceeding against DOE, that "a written verified claim" be presented to DOE "within three months after the accrual of such claim." In view of the CBA's specification of "detailed [grievance] procedures which are 'plainly inconsistent with those contained in [the statute]'" (*Matter of Geneseo Cent. School [Perfetto & Whalen Constr. Corp.]*, 53 NY2d 306, 311 [1981], quoting *Matter of Guilderland Cent. School Dist. [Guilderland Cent. Teachers Assn.]*, 45 AD2d 85, 86 [1974]), it is evident that the parties intended to make the statutory notice-of-claim

provision inapplicable (*see Civil Serv. Empls. Assn. v Board of Educ. of Lakeland Cent. School Dist. of Shrub Oak*, 230 AD2d 703 [1996]; *Matter of South Colonie Cent. School Dist. [South Colonie Teachers' Local 3014]*, 86 AD2d 686 [1982]).

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

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

ENTERED: MARCH 26, 2009



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

5177 Fernando Charlie, Index 17647/05
Plaintiff-Appellant,

-against-

Carlos Guerrero,
Defendant,

Henry Contreras, et al.,
Defendants-Respondents.

Arnold E. DiJoseph, III, New York, for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

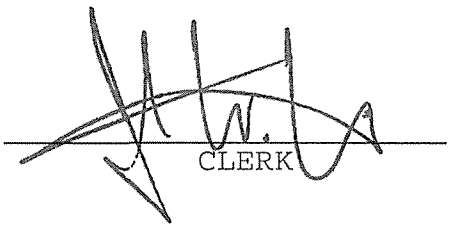
Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered August 27, 2007, which granted the motion by defendants Contreras and Jimenez for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated as against these defendants.

In opposition to the motion, plaintiff raised a triable issue of fact as to serious injury of a nondegenerative nature by reason of a permanent limitation of the use of a body member as a consequence of this accident (Insurance Law § 5102[d]). Objective evidence of this limitation was presented in the form of an affidavit by plaintiff's orthopaedic surgeon that plaintiff's right shoulder range of motion remained "limited and/or restricted" even after corrective surgery. Specifically,

significant restrictions were noted in both the forward flexion and abduction of the shoulder, as well as the internal and external rotation of the arm. Plaintiff's surgeon concluded that this significant limitation of the use and range of motion in the right shoulder would be permanent. Therefore, despite plaintiff's failure to meet the 90/180-day test of curtailment of activities, his claim of serious injury did raise a triable issue under the statute's test of a "permanent consequential limitation of use of a body . . . member" (*see generally Prestol v McKissock*, 50 AD3d 600 [2008]; *Rienzo v La Greco*, 11 AD3d 1038 [2004]).

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

ENTERED: MARCH 26, 2009



Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5309 The People of the State of New York, Ind. 16971C/05
Respondent,

-against-

Steven Bosa,
Defendant-Appellant.

Stanley Neustadter, New York, for appellant.

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

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered May 31, 2006, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second felony offender, to a term of 15 years, unanimously affirmed.

After two prospective jurors, Ms. Brooks-Divers and Ms. Ortiz, indicated in response to questions by the prosecutor that they could not convict defendant unless at least two witnesses testify, the transcript of the voir dire reflects the following:

> [The prosecutor]: Need two witnesses.
>
> Anybody else agree with that by a show of hands, that you would need two witnesses? Okay.
>
> Now, Miss Brooks-Divers and Miss Ortiz, the judge is gonna tell ya', he's gonna - where did he go?
>
> I think he's gonna tell ya', he's gonna instruct you on the law. He's gonna tell you what the law is.
>
> The Clerk: He'll be right back.

[The prosecutor]: One of the things he's gonna tell ya' is that I have to prove the elements of the crime beyond a reasonable doubt, and you will hear that there are certain elements for what constitutes a burglary.

And you're also gonna hear that I have to prove that Mr. Bosa was the one who committed the burglary.

The judge is gonna tell you that there is no formula for how I could do that.

Miss Brooks-Divers, are you shaking your head? You're kind of thinking?

Prospective Juror: I don't know about that.

[The prosecutor]: Does anyone else agree with them? Okay?

Who here said that their house was robbed or that they've been a victim of burglary by a show of hands? Okay.

Those of you who were the victim of burglary, by a show of hands, how many of you were at home when your house was burglarized?

Prospective juror: I wasn't home, but I was at the hotel room.

[The prosecutor]: You were in the hotel room. For those of you who weren't at home at the time the burglary was committed, how do you know it was committed?

[Defense counsel]: Judge, I'm going to object to this.

The Court: Overruled.

Although the Judge certainly had returned to the courtroom by the time of defense counsel's objection, the record provides no indication at all regarding precisely when he left and when he returned. For all that appears in the record, the Judge may have returned before the prosecutor completed the sentence that

followed the Clerk's statement that the Judge would be "right back." Similarly, for all that appears in the record, the Judge may have left the courtroom just before the prosecutor completed the sentence that ended with his question, "where did he go?" Nor does the record shed any light on the question of whether the Judge, despite his physical absence, was able to hear what transpired in the courtroom.

As the Court of Appeals has made clear, "[t]he presence of and supervision by a Judge constitutes an integral component of the right to a jury trial" (*People v Toliver*, 89 NY2d 843, 844 [1996]), "the selection of the jury is part of the criminal trial" (*id.*) and "a defendant has a fundamental right to have a Judge preside over and supervise the voir dire proceedings while prospective jurors are being questioned regarding their qualifications" (*id.*). In *Toliver*, the Court reversed the defendant's conviction because the Judge violated these "fundamental precepts" when he was "absen[t] from portions of the actual voir dire examination of jurors by counsel" (*id.* at 845). The Court held as well that the Judge's absence could not "be excused on the ground that this record does not reflect any objectionable conduct or practice by counsel in the relevant time period when, in fact, the record reflects that the Judge absented himself while the prosecutor was questioning prospective jurors" (*id.*).

This Court had upheld the conviction in *Toliver*, reasoning that "[s]ince the Trial Justice's absence for a part of unobjectionable voir dire and routine answering of a background questionnaire was de minimis and there is not the slightest suggestion that defendant had been prejudiced thereby, he is not entitled to a reversal and a new trial" (212 AD2d 346, 350 [1995]). The Court of Appeals clearly rejected so much of that reasoning that was predicated on the absence of any prejudice to the defendant. The Court's opinion, however, does not address the issue of whether a de minimis exception to the fundamental precepts it reaffirmed can or should be recognized. Nor is the Court's opinion inconsistent with such an exception. As the judge was absent from the courtroom "while five prospective jurors ... recited their questionnaire answers" (212 AD2d at 349), the Court may have concluded that there was no need to reach the issue of a de minimis exception as the Judge's absence under these circumstances would not in any event fall within such an exception.

We need not ground our affirmance on a de minimis exception. Because we cannot determine on this record when the Judge physically left the courtroom and when he physically returned, or whether he was able to hear what transpired in the courtroom, defendant has failed to meet his burden of providing a factual record sufficient to permit appellate review of his claim that

the Judge "relinquishe[d] control over the proceedings" (*People v Toliver*, 89 NY2d at 844; *see People v Kinchen*, 60 NY2d 772, 773-774 [1983]; *see also People v Velasquez*, 1 NY3d 44, 48 [2003] "[defendant alleging ... [a] violation [of his right to be present during sidebar questioning of prospective jurors] must ... present an adequate record for appellate review"]). Nothing in the record, moreover, suggests that defendant somehow was prevented at any time from making an appropriate record regarding when the Judge left and returned or regarding the nature of his absence. For this reason, defendant is not entitled to a new trial.

A related matter merits brief discussion. In *People v Foster*, one of the two appeals decided in *People v Velasquez*, the Court held that "[w]ithout more, failure to record a defendant's presence is insufficient to meet the defendant's burden of rebutting the presumption of regularity" (*id.* at 48). For the same reason, the Court also concluded that a reconstruction hearing was not required (*id.* at 49). In this regard, the Court stated that a reconstruction hearing "may be appropriate" when, among other things, "there is significant ambiguity in the record" (*id.*) Here, by contrast, the record affirmatively indicates that the Judge was absent, albeit for an uncertain period of time, and there is "significant ambiguity in the record" concerning both the temporal extent of the Judge's

absence and whether he was able to hear what transpired in the courtroom. When, as in this case, the ambiguity results from a defendant's unexplained failure to make an appropriate record, we doubt that a reconstruction hearing is appropriate. As defendant does not seek such a hearing, however, we have no occasion to decide the point.

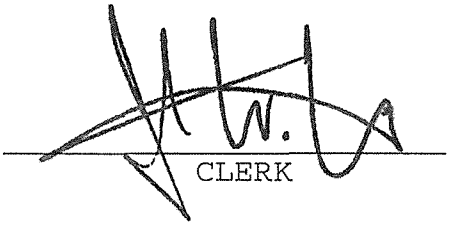
As an additional and alternative ground for affirmance, we conclude that there is a de minimis exception and that, on this record, this case falls within the exception. Because the Court of Appeals did not rule on the issue of whether there is a de minimis exception, we think it appropriate to follow our precedent in *Toliver* recognizing such an exception. Doing so is consistent with, although not compelled by, *People v Roman* (88 NY2d 18 [1996]), decided less than nine months before *Toliver*, which recognized a de minimis exception (*id.* at 26) to the statutory requirement that a defendant be accorded a right to be "personally present" during the jury selection process and "every ancillary proceeding that is a material stage of the trial" (*id.* at 25 [internal quotation marks omitted]). Following our precedent in *Toliver*, moreover, is consistent as well with the decisions in other jurisdictions this Court cited in support of its statement that when the trial judge has absented himself during voir dire proceedings, "not every absence, no matter how brief, requires reversal" (212 AD2d at 348).

On this record, we can infer no more than that the Judge was physically absent for moments before and moments after the prosecutor asked, "where did he go?" Nor can we infer that the Judge was unable to hear what transpired in the courtroom. Thus, we conclude that this case falls within the de minimis exception we again recognize. Nonetheless, we emphasize that, regardless of how the Court of Appeals eventually may rule on the issue of a de minimis exception, for a trial judge to absent himself from the courtroom while prospective jurors are being questioned is inexcusable.

Defendant's challenge to the sufficiency of the evidence is not preserved for review as defendant did not raise it at trial or even move to dismiss on the ground of the insufficiency of the evidence (*People v Gray*, 86 NY2d 10 [1995]). As an alternative holding we reject it on the merits, and we reject as well defendant's claim that the verdict was against the weight of the evidence. Defendant's other claims of error also are meritless.

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

ENTERED: MARCH 26, 2009



Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

5403 In re 2132-38 Wallace Avenue Corp., et al., Petitioners, Index 260507/07

-against-

Kumiki Gibson, as Commissioner of the New York State Division of Human Rights, et al., Respondents.

Susan C. Warnock, New York, for petitioners.

Caroline J. Downey, Bronx (Peter G. Buchenholz of counsel), for respondents.

Determination of respondent Commissioner of the New York State Division of Human Rights (DHR), dated July 11, 2007, brought up for review in a proceeding pursuant to Executive Law § 298 (transferred to this Court by order of the Supreme Court, Bronx County [Alexander W. Hunter, Jr., J.], entered December 27, 2007), which, after a hearing, found that petitioners had discriminated against respondent Dominick DiNapoli on the basis of disability and awarded DiNapoli $10,000 in compensatory damages and $10,000 in punitive damages, unanimously modified, on the facts, the petition granted to the extent of reducing the award of compensatory damages to $2,500 and vacating the award of punitive damages, and otherwise confirmed, without costs.

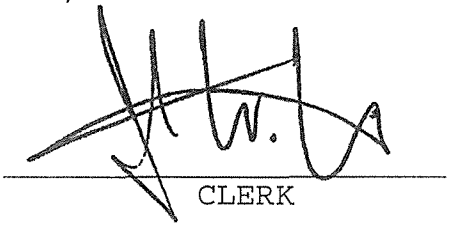
The Commissioner's findings that DiNapoli was disabled within the meaning of the Human Rights Law (Executive Law § 292.21) and that petitioners (DiNapoli's landlord and its

managing agent) failed to provide reasonable accommodations requested by him to facilitate his access to his apartment are "supported by sufficient evidence on the record considered as a whole" and are therefore "conclusive" (Executive Law § 298; *see City of Schenectady v State Div. of Human Rights*, 37 NY2d 421, 424 [1975]) insofar as petitioners failed to explain their almost year-long delay in providing DiNapoli, at his reasonable request, with keys to the building's rear entrance, which does not have steps and is closer than the front entrance to available parking spaces. The evidence does not support a finding that petitioners otherwise failed to provide reasonable accommodations.

The award of compensatory damages, reduced as indicated, is supported by DiNapoli's testimony as to the anxiety and distress he was caused by petitioners' failure to accommodate, which continued for more than a year (*see Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207 [1991]). We find that the record does not support an award of punitive damages.

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

ENTERED: MARCH 26, 2009



CLERK

Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Freedman, JJ.

27-
27A

The People of the State of New York,
Respondent,

Ind. 4557/04
6753/05

-against-

Diatra Hesterbay, also known
as Diatra Hester-Bey,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgments, Supreme Court, New York County (Lewis Bart Stone, J. at suppression hearing, Robert M. Stoltz, J. at first trial and sentence; Edward McLaughlin, J. at second trial and sentence), rendered April 12, 2006, convicting defendant, after a jury trial, of welfare fraud in the third degree, grand larceny in the third degree and four counts of offering a false instrument for filing in the first degree, and sentencing her to an aggregate term of 2 to 6 years, and also convicting her, after a jury trial, of criminally negligent homicide, and sentencing her to a consecutive term of 1⅓ to 4 years, unanimously affirmed.

Defendant was convicted of smothering her 14-month-old son in an effort to get him to lie still and take a nap, as well as collecting welfare benefits for her son for four years after his death. At her first trial, defendant was convicted of the

welfare fraud-related charges, but the jury was unable to reach a verdict on the criminally negligent homicide charge, which was the subject of the second trial.

The hearing court properly denied defendant's motion to suppress statements. The police were not required to give *Miranda* warnings prior to the first statement at issue, because a reasonable person in defendant's position, innocent of any crime, would have believed that the police were investigating a child's disappearance, and that she was free to leave (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]). Defendant voluntarily accompanied the officers to the police station, where they did not restrain her or do anything to convey that the interview had become custodial or that they had decided to make an arrest (*see e.g. People v Dillhunt*, 41 AD3d 216 [2007], *lv denied* 10 NY3d 764 [2008]). Moreover, her expectation of being free to leave was enhanced by the fact that, earlier in the same investigation, police questioned her at the precinct and then brought her home.

After defendant admitted that her son was dead, an officer administered *Miranda* warnings, and police investigation into the circumstances of the death continued. The totality of the circumstances establishes that the statements defendant gave the following day, in which she admitted to having smothered her son,

were voluntarily made (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]). The circumstances were not unduly coercive, and the delay in defendant's arraignment was satisfactorily explained, was not excessive, and did not render the confession involuntary (*see People v Ramos*, 99 NY2d 27, 35 [2002]; *People v Irons*, 285 AD2d 383, [2001], *lv denied* 97 NY2d 641 [2001]).

At the first trial, although no issue of venue in New York County had been litigated, and no instruction on that subject had been requested or delivered, a note from the deliberating jury appeared to inquire about that subject with respect to the offering a false instrument for filing charges. Since defendant's only suggestion was that the court respond to the note by rereading the elements of the crimes, the only argument she has preserved is an argument that the court should have responded in that manner (*see People v Hoke*, 62 NY2d 1022 [1984]), and we find that argument without merit. Thus, defendant failed to preserve her remaining arguments concerning the court's response (*see id.*), including her claim that the court improperly removed the issue of venue from the jury's consideration, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The court responded to the note by stating, in substance, that venue was not an issue. This was entirely correct, because defendant had waived the issue by failing to

request a jury charge on venue (*see People v Greenberg*, 89 NY2d 553, 556 [1997]), and the jury's note did not obligate the court to instruct the jury on a matter that had not been at issue during the trial (*see People v Medor*, 39 AD3d 362 [2007], *lv denied* 9 NY3d 867 [2007]; *People v Vigay*, 200 AD2d 360 [1994], *lv denied* 83 NY2d 877 [1994]). We have considered and rejected defendant's argument that her attorney rendered ineffective assistance on this issue, and her procedural claims concerning the position taken by the trial prosecutor regarding the note.

At the second trial, a principal issue was the voluntariness of defendant's statements. Defense counsel's extensive cross-examination of police witnesses about the circumstances under which the statements were made raised complex and technical legal issues, and some of these inquiries tended, by implication, to mislead the jury as to the applicable law. Accordingly, the court properly exercised its discretion (*see People v Moulton*, 43 NY2d 944 [1978]) when it gave the jury brief clarifying instructions on particular matters relating to voluntariness at several junctures during defendant's cross-examination, generally in response to the People's objections (*cf. People v Crispino*, 298 AD2d 220, 221-222 [2002], *lv denied* 99 NY2d 627 [2003]). We do not find that defendant was prejudiced by either the content or the timing of any of these instructions.

Viewed as a whole, the court's responses to notes from the

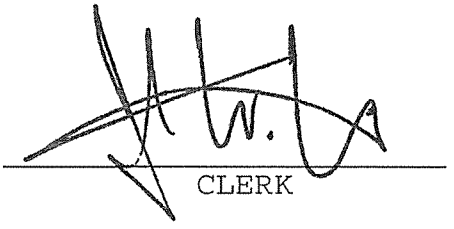
deliberating jury at the second trial on the subject of voluntariness conveyed the applicable standards and did not cause defendant any prejudice (*see* CPL 60.45[2]; *People v Tarsia*, 50 NY2d 1, 11 [1980]). We do not find that the court signaled to the jury that it held any particular opinion on the issue of voluntariness, either in these responses or at any other point in the trial. Defendant's challenge to a portion of the court's main charge on voluntariness is unpreserved and without merit.

While we find it was error for the Court and the prosecution not to redact irrelevant matter contained in defendant's confession and for the prosecutor to refer to such matter in her summation, in view of the totality of evidence, the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

We have considered and rejected defendant's argument that her confession was not corroborated by additional proof that a crime was committed (*see* CPL 60.50).

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

ENTERED: MARCH 26, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Karla Moskowitz
Rolando T. Acosta
Helen E. Freedman, JJ.

5282
Ind. 4848/00

The People of the State of New York,
Respondent,

-against-

Mazin Assi,
Defendant-Appellant.

- - - - - - - - -

The Anti-Defamation League,
Amicus Curiae.

Defendant appeals from a judgment of the Supreme Court, Bronx County (Steven Lloyd Barrett, J.), rendered May 1, 2003, convicting him, after a jury trial, of attempted arson in the third degree as a hate crime, criminal mischief in the third degree as a hate crime, criminal possession of a weapon in the third degree (two counts) and aggravated harassment in the first degree, and imposing sentence.

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

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

Chadbourne & Parke LLP, New York (David M. Raim, Deborah R. Cohen and Steven M. Freeman of counsel), for amicus curiae.

ACOSTA, J.

In this appeal we are required to examine the Hate Crimes Act of 2000,[1] including the effective date of the legislation and whether to limit prosecutions under the Act to crimes committed against an actual person rather than against a building, such as a synagogue.

At about 10 o'clock on Saturday night, October 7, 2000 (the day before the start of Yom Kippur, the holiest day on the Jewish calendar, the live-in custodian of the Conservative Cong. Adath Israel of Riverdale, in the Bronx, checked the synagogue's door before retiring for the night. The door was intact and undamaged.

At about 3:00 A.M. on October 8, the night patrol supervisor for the 50th precinct and his driver noticed a red Honda parked on the northbound service road of the Henry Hudson Parkway, approximately 250 feet from the synagogue entrance. Prominently displaced in front of the synagogue was a 6-foot-by-6-foot Star of David, visible from the service road.

---

[1] Recognizing the particularly devastating impact of crimes motivated by bias and prejudice, this enactment provides for enhanced sentencing for certain crimes perpetrated on the basis of race, color, national origin, ancestry, gender, religion, religious practice, age disability or sexual orientation.

The instincts of the officers were piqued because the Honda was parked in an area that was desolate, with no commercial establishments nearby, and because Hondas were frequently stolen in that area. The officers watched the Honda from a concealed location, and a few minutes later it drove off southbound on the Parkway service road. The officers resumed patrol, and approximately six minutes later returned to the area where they again saw the Honda parked near the synagogue, this time discharging passengers who walked toward the synagogue. The Honda left and the officers followed it across the parkway, while running its license plate number through the police car's computer.

At a stop light, the Honda's driver, Mohammed Alfaqih, waved the police over and asked for directions to Manhattan. That question further aroused the officers' suspicions, since the driver had been heading south toward Manhattan just minutes earlier. When the computer indicated the car was legally registered to Ida Alfaqih with a Yonkers address, the police sent the driver on his way. About 10 minutes later, the officers saw the three passengers walking away from the synagogue, but did not stop them; from all appearances, they had committed no crime.

At 7:45 that morning, a congregant of the synagogue arrived and discovered the left glass panel of the entrance door

shattered in a web pattern. Two flame-charred bottles of Devil's Spring vodka lay outside the door - one shattered and the other intact containing a purplish liquid - as well as several small rocks. Both bottles had charred wicks protruding from their necks. The congregant awoke the live-in custodian and they called the police.

Police officers arrived shortly thereafter and secured the crime scene. Detectives removed the charred bottles and wicks, the rocks, a number of purple-stained latex gloves, and purple towels.[2] That night, after retrieving the license plate number of the Honda and the owner's address from the police computer data bank, officers viewed a surveillance tape of the Honda and its passengers. The police culled 40 still photographs. The sergeant and his driver on patrol that night identified Alfaqih as the driver.

Later that day detectives went to the liquor store nearest to Alfaqih's home in Yonkers and showed the still photographs to the sales clerk. The clerk could not identify Alfaqih, but recognized defendant from the neighborhood, and was reasonably

---

[2] The police crime lab determined that the wick from the vodka bottle had been soaked in 160 proof vodka, i.e., 80% ethyl alcohol and 20% water, and the purple liquid ignited easily at room temperature. The purple liquid was sent to the ATF lab in Maryland, where it was identified as PVC pipe cleaner, a highly flammable substance.

certain that defendant had purchased two bottles of Devil's Spring vodka on the evening of October 7, 2000.

Alfaqih was arrested the following day, and a search of the Honda produced a purple towel and more latex gloves, which were submitted for laboratory analysis. The analysis determined that one of the wicks had been torn from the purple towel. Shortly after Alfaqih's arrest, defendant was spotted in Yonkers and was also arrested. Defendant was read his *Miranda* rights, which he waived. At the precinct, after he was again read his *Miranda* rights, defendant first orally and then in writing gave an account of his actions on the night in question without any references to the synagogue. One of the interviewing detectives threw the written statement into the garbage, declaring that it was "bullshit," and told defendant the police had seen him near the synagogue, had found the vodka bottles, Alfaqih had been arrested and had given a statement, and that they did not need defendant to prove their case.

In response, defendant stated that he and his companions did not know anyone was inside the synagogue that night. He then explained that the local Arab community had been outraged by news that the Israeli army had shot a Palestinian infant, and he had attended a rally to protest the killing. Defendant expressed his outrage that "the f***ing rich Jews in Riverdale send money over

there and they buy guns and they are killing people." After defendant calmed down, he began to give a more detailed account of his actions that night, first orally and then in a written statement.

According to defendant, he and his three friends (Alfaqih, Samir El Khairy and Medre Medre) wanted to make a "statement" that would stop the violence in the Middle East. Defendant stated that after he purchased the vodka, Alfaqih drove him, El Khairy and Medre to the service road next to the synagogue. Defendant wore gloves while he put a towel or cloth into one of the bottles. El Khairy and Medre put the wick in the second bottle. Alfaqih drove off as the other three walked to the synagogue. As defendant struggled to light his wick at the front door of the synagogue, either Medre or El Khairy threw the lit bottle and cracked the door. That bottle fell and broke, and defendant lit his wick and placed his bottle by the door. They left, discarding their gloves near the service road, and Alfaqih picked them up in the Honda. Defendant added that had he known that someone lived there, he would not have tried to set fire to the synagogue.

Defendant prevented the officers from writing certain details he provided in his oral statement. Specifically omitted from the statement was his comment about "rich Jews in

Riverdale," and that defendant needed to ignite the wick in his bottle several times before it stayed lit. At about 5:30 A.M., after *Miranda* warnings were given for a third time, defendant gave a videotaped statement to an Assistant District Attorney. That statement was essentially the same as his written statement.

Defendant was convicted after a jury trial of attempted arson in the third degree and criminal mischief in the third degree as hate crimes, two counts of criminal possession of a weapon in the third degree, and aggravated harassment in the first degree.

On appeal, defendant claims, among other things, that the hate crimes statute was not yet effective on the date of the incident, Sunday, October 8, 2000; that he could not be found guilty of a hate crime where his conduct was directed against a building rather than against a person; and that the trial court improperly permitted the prosecution's expert to provide an opinion that a bottle had broken the synagogue's glass door, based solely on photographs, without conducting a *Frye* hearing (*Frye v United States*, 293 F 1013 [DC Cir 1923]) to determine whether an opinion based on photographs was accepted within the scientific community. We disagree with each of defendant's claims.

Defendant's claim regarding the effective date of the law

(Penal Law art 485) is without merit. The Hate Crimes Act of 2000 (L 2000, ch 107, enacting Penal Law pt 4, tit Y) was signed into law by Governor Pataki on July 10, 2000. Section 9 of the act provided that it "shall take effect 90 days after it shall become law," thus the effective date commenced at midnight on Sunday, October 8, 2000 - the date of defendant's criminal conduct (*People v Floyd J.*, 61 NY2d 895, 896 [1984] [courts must give effect to the plain meaning of a statute's words]). That the effective date of the statute fell on a Sunday is of no moment. There is simply no functional reason not to enforce a provision specifying conduct as criminal on a Sunday. Certainly, a crime committed on a weekend or holiday is no less serious than one committed during the week. Indeed, the Legislature "may cause statutes to take effect on holidays or Sundays, for it has full power to regulate what shall and shall not be done on such day" (McKinney's Statutes § 41, at 81), citing *Bloomingdale v Seligman*, 3 NYS 243 [Ct of Common Pleas, 1888], (where the assignment-of-debt law, to go in effect on July 1, 1888, became operative on that date even though it was a Sunday).

General Construction Law § 25-a does not support defendant's position that the effective date must be on a business day rather than a Sunday. That statute provides:

> When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day.

This is intended to apply in calculating a deadline such as, for example, when a claim must be filed or an obligation discharged. Such a reading is consistent with the objectives of a rule extending a deadline that falls on a Sunday. Although historically emanating from a reluctance to require that an act relating to a business or legal transaction be undertaken on a Sunday, a Sunday deadline also potentially conflicts with long-standing business and legal practices and may impose an obligation that cannot be met, such as filing a legal document on a date on which the court is closed. The Sunday rule is thus a legislative response to legitimate practical concerns bearing on the deadline by which an affirmative act must be accomplished (*see also* General Construction Law § 20).

Had the Legislature intended to apply § 25-a to the Hate Crimes Act, we believe it would have said so explicitly. "A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as

an indication that its exclusion was intended" (Mckinney's Statutes § 74).[3] The purpose of the 90-day period before the act became effective was simply to give notice of a new criminal statute, and that purpose is fully served by calculating the 90th day without regard to the day of the week on which it falls.

Defendant's argument that the Hate Crimes Act does not criminalize actions directed against a building, such as a synagogue, rests on a misreading of the Act, and we reject it. Penal Law § 485.05(1) provides that

> A person commits a hate crime when he or she commits a specified offense [which includes arson in the third degree and criminal mischief in the third degree: *see* § 485.05(3)] and . . . (b) intentionally commits the act or acts constituting the offense in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.

---

[3]Indeed, Penal Law statutes that become effective on Sunday are not uncommon. *See e.g.* the amendments to Penal Law § 120.15 (menacing in the third degree) and § 125.12 (vehicular manslaughter in the second degree), both effective November 1, 1992, a Sunday; § 460.10 (expanding the definition of the crime of enterprise corruption), effective Sunday, October 19, 2008, "the ninetieth day after it shall have become a law" Penal Law § 120.05 (expanding assault in the second degree to include elder abuse), effective Sunday, June 29, 2008; § 120.70 (adding the crime of luring a child), effective Saturday, October 4, 2008 "the sixtieth dat after it shall have become a law."

Clearly the Legislature intended to include crimes against buildings within the purview of the Hate Crimes Act.

Subsection (1)(b) extends the statute to intentional acts motivated, inter alia, by the religion or religious practice of a "person," which is defined as "a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality" (§ 10.00[7]). The synagogue was incorporated under the Religious Corporations Law and thus, falls squarely under the definition of a "person." Moreover, the synagogue proclaimed itself as a center for Jewish religious practice by displaying a large Star of David outside its entrance. There is no question that defendant chose the synagogue because of the religion or religious practice it represents. To be sure, the synagogue itself only has significance because congregants use it as a center of religious practice. Defendant's actions, although literally directed at the building, were in fact directed at those who utilize the synagogue and attend religious services there (*See People v Uthman*, 31 AD3d 1179 [2006], *lv denied* 7 NY3d 852 [2006]).

A review of the legislative history leaves no doubt that the Legislature intended to include the § 10.00(7) definition of "person" in drafting the Hate Crimes Act, and further intended to

include crimes directed against property within the statute's scope. The legislative findings, set forth in § 485.00, note that criminal acts involving violence, intimidation and "destruction of property" based upon bias and prejudice have recently become more prevalent in this State, and are commonly and justly referred to as "hate crimes" specifically because they are directed at victims based on their religion or religious practice, inter alia. Similarly, the memorandum in support of the bill by the Legislative Representative of the City of New York specifically referred to defacing a synagogue as an example of the type of criminal conduct that would, under this statute, merit the more stringent punishment as a hate crime.

Defendant's argument that the People did not prove his acts were directed at a person because there was no showing that he knew the synagogue was occupied when he lit his Molotov cocktail is meritless. The People proved that defendant attempted to set fire to the synagogue in order to tell the "rich Jews in Riverdale" to stop sending money to the Israeli army. Regardless of whether defendant was aware that a person was in the synagogue at the time, the proof established that he chose as his victim this corporate "person" because of his belief regarding its congregants' race, national origin, ancestry, religion and religious practice. Indeed, defendant is correct in arguing that

he did not perpetrate the crime against a specific individual. His targeting of the synagogue was directed toward an entire community.

With respect to the alleged trial errors, we hold that a *Frye* hearing was unnecessary before allowing Dr. Whitney to give opinion testimony that a bottle hit the synagogue's door. Dr. Whitney testified as an expert in the fracture analysis of glass and ceramics. Although the broken synagogue door was not available for inspection, Dr. Whitney testified that this was not unusual in his field, where experts frequently opine in products liability cases about the cause of breakage of items that have been discarded.

Dr. Whitney determined, to a reasonable degree of scientific certainty, that the synagogue door had been struck from the outside, and the damage was caused by a bottle, not the rocks found in front of the door. Whitney examined all the pieces of broken rock and reassembled them into their original form as a single rock. His examination of a full, one-liter bottle of Devil's Spring vodka as an exemplar and the crime scene photos revealed two points of nearly simultaneous impact on the door, the geometry of which was consistent with the vodka bottle rather than a smaller, rock-shaped object. Dr. Whitney had no doubt,

based on the evidence, that the bottle, not the rock, had hit the door.

Defendant argues that the trial court erred in admitting Dr. Whitney's testimony based on the photographs, rather than an examination of the broken glass, and that absent that tainted expert testimony, the evidence was insufficient to establish his guilt. Defendant's argument is meritless for several reasons.

Dr. Whitney's expert opinion was not based solely on his review of the photographs, as defendant claims. Apart from reviewing the photographs, Dr. Whitney reassembled the pieces of broken rock and also examined the broken and intact vodka bottles. If the rock had broken the door, glass residue would have adhered to its surface, but Dr. Whitney saw none. He also examined the pieces of broken bottle, which revealed that the cracks that caused the break the bottle originated at the bottom, confirming his opinion that the bottle's bottom hit the door first. In addition, Dr. Whitney explained that a fractographic examination was useful only to determine which side of the door received the impact, but the fact that the door had been hit on the outside was independently established by the detectives who arrived at the crime scene.

New York courts allow expert testimony when it is based on a scientific principle or procedure that is sufficiently established to have gained general acceptance in its specified field (*See People v Wesley*, 83 NY2d 417, 423 [1994], *quoting Frye*). Dr. Whitney testified that experts in his field of fractology commonly testify in product liability cases where the broken product had been discarded, and the trial court actually reviewed scientific literature in the fractology field and concluded that experts rely on photographic evidence. Dr. Whitney's testimony was thus properly admitted, and his reliance, in part, on the photographic evidence to form his opinion went to the weight to be accorded his opinion by the jury rather than its admissibility (*People v Hess*, 140 AD2d 895, 897 [1988], *lv denied* 72 NY2d 957 [1988]; *see also Nurik v Ollstein*, 231 AD2d 458 [1996]). Here, the trial court properly exercised its discretion in admitting the testimony without a *Frye* hearing. Dr. Whitney's expertise was able to offer "something significant that jurors would not ordinarily be expected to know already[]" (*People v Young*, 7 NY3d 40, 45 [2006]).

There was also sufficient evidence apart from Dr. Whitney's testimony to support the conclusion that defendant intended to burn the synagogue. Defendant told detectives that he intended to send a message to the rich Jews in Riverdale, and in a

detailed confession he recounted his actions that night, which included purchasing the highest proof vodka available. He admitted wearing gloves as he and his companions put wicks in the vodka bottles, that one of his friends threw a flaming bottle at the synagogue, and that he placed his bottle with the lit wick in front of the door. Indeed, his admission that one of his cohorts hurled a bottle at the synagogue's door bolsters Dr. Whitney's testimony rather than refuting it.

Finally, defendant's claim regarding his *Batson* challenge is without merit. Potential jurors challenged because of their age do not constitute a cognizable group for *Batson* purposes (*People v Ortiz*, 302 AD2d 257 [2003], *lv denied* 100 NY2d 541 [2003]; *People v Lebron*, 294 AD2d 105 [2002], *lv denied* 98 NY2d 698 [2002]); see also *People v Manigo*, 165 AD2d 660, 662 [1990][age is an acceptable basis for a peremptory challenge]). Nor do we find defendant's sentence to be excessive.

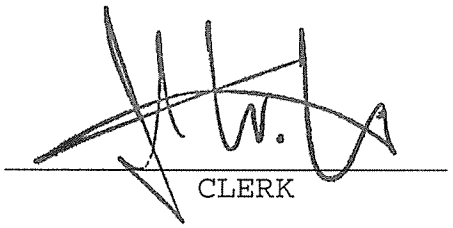
Accordingly, the judgment of the Supreme Court, Bronx County (Steven Lloyd Barrett, J.), rendered May 1, 2003, convicting defendant, after a jury trial, of attempted arson in the third degree as a hate crime, criminal mischief in the third degree as a hate crime, criminal possession of a weapon in the third degree (two counts) and aggravated harassment in the first degree, and

sentencing him to an aggregate term of 5 to 15 years, should be affirmed.

All concur.

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

ENTERED: MARCH 26, 2009



CLERK