NEW YORK SUPREME COURT - COUNTY OF BRONX
IAS PART 08

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SOFIO GARCIA PAZ,

Plaintiff,

INDEX No. 8237/2006

-against-

CITY OF NEW YORK; RIVERBAY CORPORATION; REGIONAL SCAFFOLDING & HOISTING, INC.; ANTONUCCI & ASSOCIATES ARCHITECTS & ENGINEERS, LLP; MASSAND ASSOCIATES, INC. and INDEPENDENCE CARTING, INC.,

Defendant,

Present:
HON. BETTY OWEN STINSON
J.S.C.

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The following papers numbered 1 to 5 read on these 2 motions for summary judgment Noticed on 07-15-09 and submitted as Nos. 72 and Add-On on the Calendar of 11-30-09

	PAPERS NUMBERED
Notice of Motion -Exhibits and Affidavits Annexed	1, 3
Order to Show Cause	
Answering Affidavits and Exhibits	2
Replying Affidavits and Exhibits	4, 5
Stipulations – Referee's Report – Minutes	
Memoranda of Law	

Upon the foregoing papers this motion by plaintiff and motion by defendants are consolidated for disposition, deemed a motion and cross-motion, and decided per annexed memorandum decision.

Dated: May 24, 2010
Bronx, New York

Betty Owen Stinson
BETTY OWEN STINSON, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

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SOFIO GARCIA PAZ,

Plaintiff,

INDEX № 8237/2006

-against-

DECISION/ORDER

CITY OF NEW YORK; RIVERBAY CORPORATION; REGIONAL SCAFFOLDING & HOISTING, INC.; ANTONUCCI & ASSOCIATES ARCHITECTS & ENGINEERS, LLP; MASSAND ASSOCIATES, INC., and INDEPENDENCE CARTING, INC.,

Defendants.

----------X

HON. BETTY OWEN STINSON:

This motion by plaintiff for partial summary judgment and another motion for summary judgment by defendants Riverbay Corporation ("Riverbay"), Antonucci & Associates Architects & Engineers, LLP, ("Antonucci") and Massand Associates, Inc., ("Massand") are consolidated for disposition, deemed a motion and cross-motion, and decided as follows: plaintiff's motion for partial summary judgment is denied and defendants' cross-motion for summary judgment dismissing the complaint is granted.

On June 20, 2005, plaintiff was an employee of non-party Proto Construction ("Proto"), the general contractor for a balcony demolition job at a building owned by defendant Riverbay. Plaintiff arrived early at the building the morning of the day in question and began to make preparations for the day's work. He climbed up a sidewalk bridge to access a building ledge at the corner of the building to which a suspended scaffold had been tied with ropes the night before. As plaintiff attempted to put on his safety harness, standing simultaneously with one foot on the

building's ledge and the other foot on the suspended scaffold, his weight shifted and the scaffold moved, causing plaintiff to lose his balance and fall approximately 8 to10 feet to the ground.

Plaintiff commenced this lawsuit against the above-captioned defendants alleging violations of Labor Law §§ 200, 241(6) and 240(1). In the course of the litigation, all defendants except for Riverbay, Antonucci and Massand were dismissed from the action. After discovery was complete. plaintiff made the instant motion for partial summary judgment as to liability under Labor Law § 240(1) against those remaining defendants. Riverbay, Antonucci and Massand (collectively "defendants" hereafter) then moved for summary judgment dismissing the action entirely, arguing that plaintiff was the sole proximate cause of his injuries.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). A party opposing a motion for summary judgment must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

LABOR LAW § 240(1)

Labor Law § 240(1) imposes liability on owners and general contractors for failure to provide proper equipment for gravity-related hazards to covered persons. That statute provides, in relevant part, that "all contractors and owners . . . in the . . . demolition . . . of a building or structure shall furnish . . . scaffolding . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Where the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injury, and that failure is a cause of the injury, negligence of the

injured worker is not relevant (*Orellano v. 29 East 37th Street Realty Corp.*, 292 AD2d 289 [1st Dept 2002]). It is sufficient for purposes of the statute that adequate safety devices to prevent the accident were absent (*see id.* [worker's fall from ladder alone sufficient to demonstrate ladder's inadequacy as safety device]).

An owner or contractor may escape liability only if the plaintiff's injury has been caused, exclusively, as a result of his own willful or intentional acts (*Tate v. Clancy-Cullen Storage Co.*, 171 AD2d 292 [1st Dept 1991]). This is limited to those situations in which the worker has been provided proper protection, but thereafter, through intentional misuse of the safety device or via other egregious misconduct, neutralizes the protections afforded by the safety device (*McMahon v. 42nd Street Development Project*, 188 Misc2d 25 [Sup Ct, NY County 2001]).

Even where a violation of the statute is present, a plaintiff must also show that the violation was a contributing cause of his gravity-related injury (*Blake v. Neighborhood Housing Services of New York*, 1 NY3d 280 [2003][worker who testified his extension ladder was not defective, and who was not sure whether he had locked extension clips in place, was sole proximate cause of his injury when ladder retracted and he fell]; *see also Montgomery v. Federal Express Corp.*, 4 NY3d 805 [2005][where stairs previously available had been removed and ladders were available on job site, plaintiff's choice to use inverted bucket to climb up and then jump down from motor room was sole cause of his injury]).

In support of his motion for partial summary judgment, plaintiff offered a copy of the pleadings; plaintiff's bill of particulars; the deposition testimony of plaintiff and Philip Sansone; the contract for balcony repair between Riverbay and Massand and photographs of the subject scaffold. Plaintiff's attorney argued that the scaffold was unsafe because it "tipped" away from

the building and because its inside railing was lower than the outside railing.

The photographs show the scaffold both at ground level and also elevated some stories above ground level. In the photograph where the scaffold is seen elevated, it extends for a few feet beyond the corner of the building. The ledge or "concrete structure" actually appears to be a balcony floor without its railings, at least 4 to 5 feet deep.

Plaintiff testified that he had been working for Proto for 11 years at the time of the accident (Deposition of Sofio Garcia Paz, September 6, 2007 at 18). He had training and a permit to work on and inspect suspended scaffolds (*Id.* at 51-55). He had assembled scaffolds and inspected the scaffold on which he worked on a daily basis (*Id.* at 54-55, 56). If there was something wrong, he would fix it, unless it had to do with the cables or cords, in which case he would ask the foreman (*Id.* at 57-58). Plaintiff spoke to his Proto foreman, Segundo Vidal, every day about the job they were doing (*Id.* at 48-49). Vidal gave him instructions as to how to do his job and where to work (*id.*). No one else told plaintiff what to do (*id.*). Plaintiff never spoke to Riverbay representatives or representatives from Massand or from Antonucci (*Id.* at 131). There were ladders on site, some "down" and some on top of the sidewalk bridge (*Id.* at 47).

Two people were required for operation of the two motors needed to raise the scaffold up the side of the building (*Id.* at 102). One person could lower the scaffold down one floor with an emergency control, even though the motors were not yet connected to a power source (*Id.* at 97). Plaintiff had never had a problem moving a scaffold (*Id.* at 104-105). Plaintiff's hand tools, hard hat and safety harness were kept in a bucket on the scaffold during non-working hours (*Id.* at 31, 40-42).

The foreman had directed that, at the end of the work day, the scaffold always be

suspended one floor above the ground and left flush with the wide concrete ledge on the building (*Id.* at 70-71). The scaffold was a few feet longer than the concrete ledge to which it was tied, and one end of the scaffold extended 3 to 5 feet past the corner of the ledge (*Id.* at 81, 83). On the day in question, the scaffold was secured with four ropes, two ropes coming down from the roof of the building and tied to the scaffold's outer railing, and two ropes attached to the building at about the same level as the scaffold's platform and tied to its inside railing (*Id.* at 92, 93-94). Plaintiff's partner had tied all four ropes the day before (*Id.* at 95). Plaintiff did not test the ropes when he arrived on the morning of his accident; they were tied, but "maybe" they were loose or badly tied (*Id.* at 85, 92-93). He did not know if they were tied tightly or not (*Id.* at 95). He would have needed to untie them in order to lower the scaffold to the ground (*Id.* at 132-133).

When plaintiff arrived at work the morning of the accident at around 7:00 am, his partner had not yet arrived (*Id.* at 59). Plaintiff thinks he saw Segundo Vidal at that time and the foreman told him to bring the scaffold down to ground level (*Id.* at 64-65). After plaintiff had climbed up to the top of the nearest sidewalk bridge and reached the concrete ledge, plaintiff placed his left foot on the end of the scaffold nearest the corner of the ledge and, keeping his right foot on the concrete, reached down into the bucket containing his harness (*Id.* at 68,120-121). He was in the process of putting the harness on in that position and had a portion of the harness on his right shoulder when the platform started to "wobble", moved away from the concrete and went "back and forth" and "tilted" (*Id.* at 79-80, 86-87). Plaintiff "got scared", moved his feet, "slipped" and fell from the corner of the ledge between the scaffold and the building (*Id.* at 80-81, 87). The scaffold stayed where it was (*Id.* at 82).

Sansone testified that he is an employee of defendant Riverbay working as a liaison

between Riverbay, construction and assigned engineering (Deposition of Philip Sansone, January 8, 2008 at 6-7). The project of balcony replacement and repair began in March 2005 (*Id.* at 7-8). Proto is the general contractor (*Id.* at 11-12). The architect and engineer for the project is Massand (*Id.* at 12). Antonucci was the original architect and engineer before Massand took over (*Id.* at 13). Proto set up the scaffolds (*Id.* at 15). Sansone does daily reports after inspecting the buildings and reports whatever problems he finds (*Id.* at 19, 24). The inspections are done to mark the progress of the work and to insure it is done safely and according to specifications (*Id.* at 19). Sansone makes sure the workers are using harnesses and hard hats (*id.*). Once workers get on the scaffolds, they must put on safety equipment (*Id.* at 20).

Proto does the inspections of scaffolds (*Id.* at 19-20). Scaffolds must be tied up at the first floor level so no one can jump on them and so no kids can play on them at night (*Id.* at 21). Hard hats and harnesses are usually kept on the scaffold (*Id.* at 22). Workers are supposed to get a ladder, climb up to the scaffold and lower it to the ground (*Id.* at 21-22, 37). That is common protocol (*Id.* at 38). Ladders are usually kept in Proto's trailer and are readily available (*Id.* at 22, 44). Workers on scaffolds are required to have permits, issued after taking a safety course (*Id.* at 38).

The work day begins at 8:00 am because the Department of Buildings noise regulations do not allow work before that hour (*Id.* at 22, 31-32). Before 8:00 am, however, workers can get ready by loading scaffolds with tools and materials (*Id.* at 32). Sansone was called at 8:15 on the morning in question and informed of the incident (*Id.* at 27). When he arrived at the location 10 minutes later, the scaffold was on the ground and the injured worker had already gone to the hospital (*Id.* at 29). No one witnessed the accident (*Id.* at 30). As far as he knows, the scaffold

was not defective (*Id.* at 44).

In opposition to the motion, defendants offered affidavits by Leo DeBobes and Segundo Vidal and one of the photographs of the subject scaffold showing it at ground level. Defendants argued there is no evidence the scaffold was defective in any way and, consequently, there is no evidence of a statutory violation of § 240(1).

Leo DeBobes is a New York State board-certified safety professional, consultant and hazard control manager. DeBobes reviewed the plaintiff's bill of particulars; accident investigation report; employer's OSHA report; photographs of the location and deposition testimony by plaintiff, by Philip Sansone and by Nanick Massand. Plaintiff was in the profession since 1994, on the subject site for approximately three months before the accident. Plaintiff testified that ladders were available for climbing to the scaffold, but he did not use one. Plaintiff was familiar with the nature of the work and with the required safety equipment. It was DeBobes' opinion that plaintiff was provided with proper instruction and all the necessary safety equipment; including harness, lanyard and ladders. The scaffold was not defective and was fit for its intended use. The scaffold was tied to the building so that it did not sway. Top rails and intermediate guardrails were the proper height from the platform. The side that was used on the wall or building was equipped with an intermediate guardrail to allow work to be performed off the side as needed. The side farthest from the wall or building had an intermediate guardrail and a top rail. The scaffold also had a sufficient toe board around the platform. Plaintiff fell while straddling the lower guardrail of the suspended scaffold with one foot on the scaffold platform and one foot on the concrete ledge. When the platform shifted, plaintiff fell. He left his harness and lanyard on the scaffold and had to get on the scaffold before putting it on. He did not use the ladder provided

to access the scaffold. Plaintiff was, therefore, the sole proximate cause of his fall and resulting injuries.

Segundo Vidal stated on August 28, 2009 that he was the foreman for Proto on the subject job site at the time of plaintiff's accident. Proto had a motorized suspended scaffold on the subject building so that work could be performed on the building's facade. At the end of the work day, the scaffold was positioned one floor above ground level so pedestrians could not access it after work hours. It was tied to the building with ropes so that it did not move away from the building. The scaffold had one motor on each end and a railing on all four sides. The shorter railing on the inside edge of the scaffold was approximately 1-1/2 feet higher than the platform. At no time prior to the accident did plaintiff come to Vidal to tell him he arrived early, nor did he ask for a ladder. There was no reason for plaintiff to attempt access to the scaffolding at the time of the accident because work did not begin until 8:00 am.

In reply, besides reiterating his claim that the scaffold's "tipping" caused his injuries, plaintiff also argued that the proximate cause of his fall included the defendants' protocol of requiring workers to access the scaffold while it was suspended above the ground floor, to leave harnesses on the scaffold overnight and to permit workers to attach the harnesses after accessing the scaffolds.

Plaintiff did not make a *prima facie* case of his entitlement to partial summary judgment as to his claim under § 240(1). Plaintiff filed his note of issue certifying discovery is complete and, as movant, produced no evidence of a violation of § 240(1). There is no evidence of a defect in the subject scaffold or in any of the protective devices plaintiff was provided. Plaintiff testified that he was trained and certified to assemble, inspect and work on a suspended scaffold and had

done so for years. He assembled the subject scaffold himself and inspected it daily. He was provided with a safety harness and lanyard and a ladder to access the scaffold where it was stored at night one floor above ground level. He did not use the ladder provided him. He did not identify any other safety equipment that might have been employed to prevent his injuries. He did not identify an alternative protocol that might have allowed the scaffold to be lowered to ground level in the absence of access. Plaintiff did not identify the scaffold's lower railing as a factor in his fall. He testified, to the contrary, that the cause of his fall was the movement of the scaffold, followed by his getting "scared", moving his feet and "slipping" from the corner of the ledge. Use of the ladder to access the scaffold, instead of the building's ledge, would have placed plaintiff entirely on the scaffold instead of leaving him with one foot on the scaffold and the other foot on the ledge as he tried to don his harness.

Plaintiff's speculation that "maybe" the ropes were loose is not evidence of a defect, even if he had been able to testify with certainty that the ropes were loose or improperly tied, which he could not. The photographs show all the ropes originating from the building at a considerable distance from the scaffold, at least as far away as the width of a balcony floor, making the scaffold's complete immobility while thus suspended obviously impossible. Plaintiff, who testified he was trained in using the scaffold, offered no suggestion that storing the scaffold above ground level after working hours was improper or unsafe and Sansone testified as to the safety reasons for that industry practice.

The fact the scaffold moved when plaintiff placed one foot on it and then shifted his weight, does not by itself indicate a violation of the statute or a defective condition in the equipment (*cf. Orellano*, 292 AD2d 289 [fall from ladder sufficient to demonstrate violation of

statute]) The subject scaffold was suspended by cables and ropes from the roof and tied to the building by two ropes like a small boat tied to a pier. There would be no more reason to expect the scaffold to be completely immobile under those conditions than to expect a boat of similar size to be utterly still when passengers board. And just as boat passengers put on life jackets, either with both feet on land or both feet on board the boat, and do not generally try to don them with one foot on a corner of the dock and one on the boat, it was entirely unreasonable and unforeseeable that plaintiff would attempt a similar maneuver under almost identical conditions involving the scaffold. In addition, Sansone testified that workers are expected to put on their safety equipment once they get onto the scaffold. Plaintiff, however, never completely accessed the scaffold before trying to put on his harness. Furthermore, a fall due to slipping and loss of balance would have been much less likely with the protection of the scaffold's railings and toe board. The balconies on Building 26 were being repaired precisely because they were no longer considered safe and, therefore, the safest access to the scaffold would have been directly by ladder, immediately after which plaintiff could have put on his harness and connected it to the lifeline overhead. Regardless of how the movement of the scaffold is characterized, the inescapable conclusion, as a matter of law, is that plaintiff was the sole proximate cause of his own injuries.

Finally, even if plaintiff were not the sole proximate cause of his injuries, neither defendant Massand nor defendant Antonucci could be held liable under § 240(1) as neither was a general contractor or an owner of the building in question.

LABOR LAW §§ 200 AND 241(6)

Labor Law § 200 codifies common law and imposes a statutory non-delegable duty on

general contractors and owners of property where work is performed to maintain a safe work place for all persons employed on the premises and all others lawfully frequenting the premises (*Gasperino v. Larsen Ford*, 426 F2d 1151 [2d Cir 1970], *cert. denied* 400 US 941). For liability to apply, an owner or general contractor must have (1) voluntarily assumed and exercised supervision and control over the methods and tools of the worker, and (2) had notice of the defective or unsafe condition (*Comes v. NYS Electric*, 82 NY2d 876 [1993]).

Labor Law § 241(6) requires owners, contractors and their agents involved in construction or demolition to see that the work is performed in compliance with specific safety rules and regulations so as to keep safe all persons employed there or lawfully frequenting the premises. This is a non-delegable duty regardless of whether owners or contractors exercise direct supervision or control over the work performed. A plaintiff who claims under this statute must plead a specific section of the Industrial Code that defendant is alleged to have violated (*Comes*, 82 NY2d 876).

In support of their cross-motion for summary judgment dismissing the action in its entirety, defendants offered all the evidence already set forth above and, in addition, the deposition testimony of Massand by Nanick Massand, the affidavit of Antonucci by Robert Antonucci, and a Police Aided Report of the police response to the accident. The police report stated only that the aided person was "climbing a scaffold to start his work day, when he fell a short distance."

Nanick Massand testified that he is the president of Massand Associates (Deposition of Nanick Massand, January 22, 2009 at 6). Massand Associates are consulting engineers contracted by Riverbay for engineering services, doing inspections and record keeping about the type and

quantity of material and quality of the work performed (*Id.* at 7, 10-11). If unsatisfied with the quality or anything else, Massand would notify the director of construction (*Id.* at 11). Nanick Massand visited the work site once a week to make inspections, to see the daily logs generated by a Massand representative and write monthly reports to Riverbay (*Id.* at 7-8, 12-13). No one from Massand told employees of Proto how to operate the scaffolds (*Id.* at 19). Nanick Massand has been on the scaffolds, but did not operate them (*Id.* at 26). Riverbay did not instruct Proto employees how to do their work (*Id.* at 35). Massand employees arrived at the work site at 8:00 am and finished at 4:00 pm (*Id.* at 20). No Massand employees were present on site at the time of the accident (*Id.* at 23).

Robert Antonucci stated that he is a partner of defendant Antonucci & Associates Architects and Engineers, LLP. Antonucci was contracted by Riverbay to administer the construction contract between Riverbay and Proto. Proto was retained by Riverbay to repair balconies in Co-op City, including Building 26. As a contract administrator, Antonucci determined whether the work being performed was being completed according to specifications in the Riverbay/Proto contract. Antonucci did not instruct Proto employees in how to perform their work or direct or control Proto employees. Antonucci's services regarding Building 26 began on June 13, 2001 and ended July 22, 2002. All Antonucci's services under its contract with Riverbay were concluded as of June 5, 2003. The New York City Department of Buildings signed off on Antonucci's part of the job on November 17, 2003. Thereafter, Antonucci had no further involvement with Building 26. Antonucci was no longer the engineer of record for the project on June 20, 2005, the date of plaintiff's accident, and had no employees on site.

In opposition to the motion, plaintiff argued that there is a question of fact as to whether

Massand supervised and controlled plaintiff's work and had notice of a dangerous condition because its contract with Riverbay required it to "supervise the construction activities", its employees were present on a daily basis and kept logs of the inspections. Furthermore, Massand employees rode the scaffold with Proto employees and would therefore have had notice of the deficiencies in procedure as to where harnesses were to be put on and when and how scaffolds were tied at the end of the work day. Plaintiff argued that Riverbay had a similar supervisory function and would have had notice of a dangerous condition in that Sansone testified it was his job to make sure all employees were wearing hard hats and harnesses at all times. Plaintiff did not oppose the dismissal of Antonucci as a party defendant.

Defendants have demonstrated their entitlement to summary judgment which plaintiff has not refuted with admissible evidence. Antonucci produced an affidavit showing it terminated its contract work for Riverbay long before plaintiff's accident, so that it could not have been involved with supervision or control of the plaintiff or have been responsible for conditions on the work site. Plaintiff did not oppose dismissal as to Antonucci. Plaintiff himself testified that neither Riverbay or Massand employees supervised or controlled his work, but that his foreman was the only person to do so. Therefore, none of the defendants could be held liable under § 200. Plaintiff's argument, that Massand's contract creates an issue of fact as to supervision and control by Massand, is contradicted by plaintiff's testimony that Proto's foreman exclusively directed and controlled his work. Furthermore, plaintiff offered no evidence of a specific defective condition of which the defendants could or should have been aware.

As for § 241(6), Antonucci was no longer involved with the project at the time of plaintiff's fall and could not, therefore, be liable under any Labor Law statute or common law

negligence provision. None of the sections of the Industrial Code, cited by plaintiff as having been violated by defendants, are applicable to this situation, either because they are too general to support a violation under § 241(6) or because there is no evidence that other, more specific requirements were violated. Plaintiff limited his opposition to arguing that Industrial Code §§ 23-1.16(c)(instruction in the proper wear, use and attachment of safety harnesses to the lifelines), 23-3.3(k)(l)(i)(hand demolition materials should not be stored on scaffolds) and 23-5.8(g)(suspended scaffolds should be tied to building at every working level) were violated because proper use of plaintiff's harness should not have included storing it on the scaffold and because the scaffold "tipped" away from the building, thus indicating it was not properly tied. Plaintiff, however, gave detailed testimony as to the manner in which a safety harness should be put on and attached to a lifeline, sufficiently demonstrating that he would have known exactly what to do with the equipment had he not slipped and fallen from the corner of the balcony's ledge before being able to make use of it (Deposition of Sofio Garcia Paz at 38, 40-41). Plaintiff did not fall due to the location of his harness, but because he neither stood entirely on the scaffold, nor entirely on the ledge while attempting to put the harness on. Harness location was not, therefore, the proximate cause of his fall, but rather plaintiff's own actions.

The Industrial Code provides that, where hand demolition is being performed, materials should not be stored on scaffold platforms or floors *unless* the storage is temporary and "any such floor is of such strength as to safely support the load to be imposed" (§ 23-3.3[k][l][i]). There was no suggestion by any witness that the subject scaffold could not support the weight of two harnesses and two hard hats, temporarily stored on it overnight, especially since the scaffold was able to bear the weight of two or more workers, all wearing that same equipment. Nor did the

scaffold fall or collapse due to excessive weight placed on it. Plaintiff testified that it stayed where it was.

Finally, as discussed above, movement of the scaffold when plaintiff applied some of his weight to one end, and then shifted his weight, did not demonstrate by itself that the scaffold was improperly tied. Plaintiff himself was unable to conclude the ropes were improperly tied simply because of the scaffold's movement. The court takes judicial notice of the impossibility of tying a suspended scaffold to a building in such a way as to completely eliminate any movement that could be characterized as "tilting", "wobbling" (plaintiff's terms) or "tipping" (plaintiff's attorney's characterization).

The complaint is, therefore, dismissed in its entirety. Movants are directed to serve a copy on the Clerk of Court who shall enter judgment dismissing the action.

This constitutes the decision and order of the court.

Dated: May 26, 2010
Bronx, New York

Betty Owen Stinson
BETTY OWEN STINSON, J.S.C.