SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 4, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

480N Health Insurance Plan of Greater New York, Plaintiff-Appellant-Respondent, Index 601984/04

-against-

Photobition New York, Inc., Defendant-Respondent-Appellant,

Ferranti International Inc., et al., Defendants.

Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith of counsel), for appellant-respondent.

Seyfarth Shaw LLP, New York (Andrew T. Hahn, Sr. of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Herman Cahn, J.), entered on or about February 6, 2008, after a nonjury trial, finding that, although plaintiff established a breach of the parties' sublease by defendant Photobition New York, Inc., it failed to establish that it sustained damages, unanimously reversed, on the law, without costs, both the finding that defendant breached the sublease and the award of attorneys' fees to plaintiff vacated, defendant, as the "successful party," awarded attorneys' fees, and the matter remanded for a determination of the reasonable amount of those fees.

Pursuant to a lease entered into in 1998, and amended in May 1999, defendant's predecessor rented several floors of an office building, including a portion of the 16th floor, from the landlord, Greeley Acquisition LLC. Thereafter, on April 2, 2002, plaintiff and defendant entered into a sublease, conditioned on Greeley's consent, for the 16th floor space, the term of which was coterminous with the prime lease. Because of market conditions at the time, defendant sublet the 16th floor space for less than the amount of rent it was required to pay under the prime lease. Plaintiff occupied the 16th floor space under the sublease and, pursuant to its own lease with the landlord executed in April 1998, other floors of the building. Section 27(a) of the sublease requires plaintiff's prior written consent before defendant voluntarily terminates the prime lease "or enter[s] into a modification or amendment thereof in a manner that would adversely affect [plaintiff]."

On or about May 13, 2002, Greeley, plaintiff and defendant executed a consent to sublease (the consent). The consent states that "[i]n the event [Greeley] shall come into possession of or acquire the leasehold interest as a result of the termination of the [prime lease] or as a result of any other means," Greeley agrees, subject to a proviso, that plaintiff "shall not be disturbed in its possession of the Sublet Premises, its rights as Subtenant under the Sublease shall not be affected" and "no

action or proceeding shall be commenced to evict or remove Subtenant for any reason." The proviso specifies that plaintiff "assumes all obligations of [defendant] as Tenant under the [prime lease] with respect to the Sublet Premises, including without limitation," defendant's obligation to pay the rent set forth in the prime lease. In addition the consent states that plaintiff "hereby acknowledg[es] that such obligations exceed its obligations under the Sublease."

In December 2002, defendant made a release payment of $1 million to Greeley when it surrendered a portion of its leasehold interest, including the sublet premises. According to defendant, the payment was intended in part to cover the difference between the rent under the prime lease for the surrendered premises and the lower rent specified both in the sublease with plaintiff and in a sublease between defendant and a nonparty to this action for other space in the building. The $1 million payment was made pursuant to a written agreement, denominated the "Fourth Amendment and Partial Surrender of Lease" (the surrender agreement), dated December 12, 2002, which states that Greeley "shall deliver to each of the Subtenants an Attornment Agreement ... confirming the rights and obligations of Greeley and the subtenants" pursuant to, in relevant part, the terms of the consent. The surrender agreement also states that in the event plaintiff failed to execute the attornment agreement, Greeley

could elect to deem the termination of the prime lease with respect to the premises sublet to plaintiff "an assignment in lieu of such termination" pursuant to which Greeley would be granted all of the rights of defendant under the sublease.

Notwithstanding defendant's belief that the $1 million payment operated to extinguish any claim by Greeley for the higher rent specified in the prime lease, but consistent with the terms of the consent and the surrender agreement, the attornment agreement Greeley sent to plaintiff immediately after execution of the surrender agreement required payment of the higher rent. By letter dated January 24, 2003, plaintiff advised Greeley that it was aware of the $1 million payment and asserted that it was "not obligated to pay rent that has been pre-paid [by defendant]." By letter dated February 4, 2003, Greeley reiterated its position that the terms of the consent required plaintiff to pay the greater rent specified in the prime lease.

Thereafter, plaintiff continued to pay the same rent it had paid to defendant as its subtenant. In December 2003, Greeley sold the building and, in turn, the new owner sold the building to another entity, Penn Tower LLC, in July 2004. Neither Greeley nor either of the subsequent purchasers of the building ever commenced an action against plaintiff seeking additional rent. Plaintiff continued to pay the sublease rent until the fall of 2004, when it obtained Penn Tower's consent to sublet all the

space it was occupying so that it could relocate to downtown Manhattan and avail itself of financial incentives offered by local, state and federal agencies. At a meeting in August 2004, Penn Tower took the position that it would not consent to plaintiff subletting the space it was occupying unless plaintiff paid rent "arrearages," i.e., the difference between the sublease rent and the rent payable under the terms of the consent. On October 12, 2004, plaintiff paid Penn Tower nearly $113,000, a payment it viewed as "representing the final rent settlement and additional rent arrears" covering the sublet premises. On October 29, 2004, plaintiff and Penn Tower executed an attornment agreement pursuant to which plaintiff agreed to pay the sublease rent for the 16th floor space on a going-forward basis.

In June 2004, plaintiff commenced this action against, among others, defendant and Greeley. As to defendant, plaintiff asserted that defendant had breached section 27(a) of the sublease by terminating the prime lease with respect to the sublet premises without obtaining its prior written consent. As to Greeley, plaintiff alleged that a portion of the $1 million paid to it by defendant was attributable to the sublet premises and that Greeley wrongfully had refused to credit any portion of the payment as an offset against the higher rent plaintiff allegedly had paid to Greeley. Greeley, however, neither answered the complaint nor appeared in the action.

Following a nonjury trial, Supreme Court issued a written order, dated February 4, 2008, finding that defendant had breached the requirement of prior written consent but that plaintiff had failed to meet its burden of proving damages. In this regard, Supreme Court concluded that "it appears that the owner was not pursuing its rights to claim the higher rent set forth in the Prime Lease," and that "[b]ut for [plaintiff's] need to have the owner consent to its own further subletting [of] its premises, [the owner] might never have pursued its claims under the Prime Lease." After noting that plaintiff had decided to relocate to downtown Manhattan to obtain substantial financial benefits, Supreme Court noted as well that plaintiff "has been collecting rent from its own sublease of the Sublet Premises." For these reasons, Supreme Court found that plaintiff had "failed to sustain its burden that ... it sustained damages" on account of the breach.

Nonetheless, Supreme Court went on to conclude that plaintiff's damages "are limited to attorneys' fees incurred by [plaintiff] in this action." Supreme Court relied in this regard on section 9 of the sublease, which in relevant part provides that defendant shall indemnify plaintiff "from any liability, damage, cost or expenses, including ... reasonable attorneys' ... fees ..., which may be imposed upon or incurred by or asserted against [plaintiff] by any person, corporation or other entity by

reason of any ... acts, omissions or negligence of [defendant] ... in or about the Subleased Premises or the Building ... [and] any injuries to persons or damage to property occurring in, or on or about the Subleased Premises." Supreme Court referred to a Special Referee the issue of the amount of the reasonable attorneys' fees plaintiff was entitled to recover.[1]

Defendant's voluntary surrender of the sublet premises (and other but not all floors it rented under its own lease with the landlord) in December 2002 constituted a "modification" or amendment of the prime lease within the meaning of section 27(a) of the sublease. The requirement of prior written consent under Section 27(a), however, was not breached when defendant modified or altered the prime lease in December 2002, because plaintiff had already stipulated in the May 13, 2002 consent that it would pay the higher rent in the event of a termination or modification of the prime lease. By its specific terms, the sublease was contingent upon the consent of the landlord. The consent, which plaintiff as well as defendant and the landlord signed, provided

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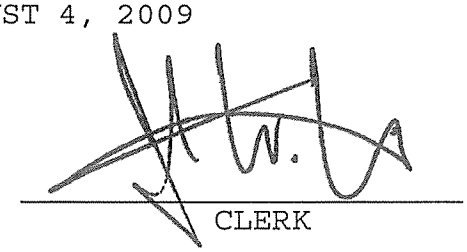
[1]Plaintiff subsequently moved, pursuant to CPLR 4404, for an order modifying the February 6 order with respect to the finding that it had failed to prove damages. Defendant cross-moved, also pursuant to CPLR 4404, seeking to modify the February 6 order to the extent of vacating the award of attorneys' fees to plaintiff and awarding attorneys' fees to it pursuant to section 3(l) of the sublease, which entitles the "successful party" in "any action commence[d] ... under the Sublease" to recover, inter alia, reasonable attorneys' fees. Supreme Court denied both motions. That order is not before us on this appeal.

that plaintiff would assume all of defendant's obligations under the prime lease, including defendant's obligation to pay the higher rent, in the event the landlord "c[a]me into possession of ... the leasehold estate of [defendant] to the Sublease Premises as a result of the termination of the [prime lease] or as a result of any other means." Thus, the consent constitutes the very consent contemplated by section 27(a). Moreover, plaintiff did not and cannot show that it was "adversely affect[ed]" within the meaning of Section 27(a) of the sublease when it consented to pay the higher amount in the document that effectively made the sublease inoperative. We note that the consent contained an integration provision and expressly provided that in the event of a conflict between the consent and the sublease, "th[e] Consent shall prevail in each instance." Thus, plaintiff failed to establish that defendant breached the sublease.

As the "successful party" in this litigation, defendant is entitled to attorneys' fees pursuant to subdivision 1 of section 3 of the sublease. Accordingly, we remand for a determination as to the reasonable amount of those fees.

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

ENTERED: AUGUST 4, 2009



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Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

5061 Concepcion Gil Martinez, et al., Index 6491/06
Plaintiff-Respondents,

-against-

Mayda Valdez,
Defendant-Appellant,

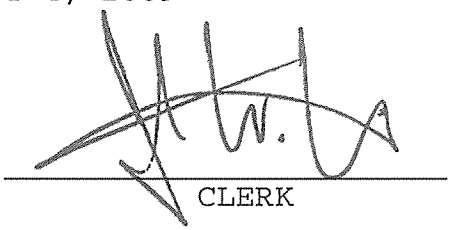
Ines Almonte,
Defendant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Alexander W. Hunter, J.), entered February 26, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 10, 2009,

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

ENTERED: AUGUST 4, 2009



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Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

444N Vanship Holdings Limited, Index 602910/08
Petitioner-Respondent,

-against-

Energy Infrastructure Acquisition Corp.,
Respondent-Appellant,

Continental Stock Transfer
and Trust Company,
Respondent.

Loeb & Loeb LLP, New York (Rachel A. Rappaport of counsel), for appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (John L. Gardiner of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered December 2, 2008, which, to the extent appealed from as limited by the briefs, enjoined respondents from distributing $2.6 million of the funds in an account held by Continental Stock Transfer and Trust Company as trustee for Energy Infrastructure Acquisition Corp. (EIAC), unanimously reversed, on the law, without costs, and the injunction vacated.

Petitioner Vanship Holdings Limited (Vanship) entered into a "Share Purchase Agreement" (the SPA) with respondent Energy Infrastructure Acquisition Corp. (EIAC) and non-party Energy Infrastructure Merger Corp. (Merger Corp.). The SPA provided for EIAC to purchase nine large crude oil carriers from Vanship.

EIAC is a special purpose acquisition company, a shell entity whose raison d'etre is to acquire another company. Before EIAC had identified a target, it held an initial public offering (IPO) which raised $209.25 million. Pursuant to a representation made in the IPO prospectus, the funds were placed in a trust account (the Trust). The prospectus provided that the funds would remain in the Trust until the earlier of an acquisition being completed or two years from the date of the IPO. If no acquisition was consummated, the funds would be returned to the investors, less any debts owed by the entity to third parties. The trustee of the Trust was respondent Continental Stock Transfer and Trust Company.

The parties terminated the SPA by mutual agreement. Shortly thereafter, Vanship submitted a series of invoices to EIAC totaling approximately $3.4 million. These amounts represented costs incurred by Vanship during the negotiation of the SPA. Vanship's claim for reimbursement was based on section 21(i) of the SPA, which provided, in pertinent part:

> "**Expenses.** Each party shall be responsible for its own expenses in connection with the preparation, negotiation, execution, delivery and performance of this Agreement, provided that the costs of preparing the Audited Financial Statements and the Interim Financial Statements and the costs of [Vanship]'s counsel (including securities and general counsel) and reasonable and documented "road show" expenses of [Vanship's] representatives incurred up to and including the Closing Date or earlier

> termination shall be borne initially by [Vanship] and, together with any costs of counsel to EIAC, [Merger Corp.] or the lending parties, and commitment fees and other expenses arising in connection with the Financing or its termination and paid at any time (after consultation with EIAC) by [Vanship] on behalf of EIAC, [Merger Corp.] or any of the SPVs, shall be reimbursed by [Merger Corp.] and/or EIAC to [Vanship] upon (as the case may require) the earlier termination of this Agreement pursuant to Section 20 and the Closing, and the cost of any audited or interim financial statements requested by SEC shall be borne by EIAC."

For reasons that are not germane here, EIAC refused to pay the invoice. Vanship filed for arbitration pursuant to an arbitration clause contained in the SPA. EIAC and Merger Corp. filed their own arbitration claim against Vanship, alleging, among other things, that Vanship breached the SPA and engaged in fraud. Vanship then commenced this special proceeding, pursuant to CPLR 7502(c) and 6301, for a preliminary injunction in aid of arbitration.

Specifically, Vanship asked the court to enjoin the release of the Trust funds to the shareholders and to order EIAC to place $6 million of the Trust funds in escrow to ensure that its claim would be paid in full. In making these requests, Vanship relied in part on Section 16(d) of the SPA. Pursuant to that section, Vanship waived any claims against the Trust "which it may have in the future as a result of, or arising out of, any negotiations, contracts, or agreements with EIAC." However, Section 16(d)

contained an exception for "any expenses which EIAC and/or [Merger Corp.] has agreed to pay under the terms of this Agreement on the earlier of the termination of this Agreement under Section 20 and the Closing Date." Vanship asserted that the "expenses" referred to in Section 16(d) included those covered by Section 21(i). It further claimed as "expenses" covered by Section 16(d) arbitration costs provided in section 21(c) of the SPA. That section, the arbitration clause, stated, in pertinent part, that "[t]he arbitration award shall include attorneys' fees and costs to the prevailing party." The arbitration clause applied to "[a]ny controversy or claim arising out of or in conjunction with [the SPA]."

In opposing the motion, EIAC argued that Vanship was a stranger to the relationship between EIAC and its investors, and had no standing to prevent EIAC from directing that the Trust be disbursed to the investors. It further asserted that Vanship was unlikely to prevail in the arbitration because it had acted in bad faith in its dealings with EIAC. Finally, EIAC stated that it had placed its shareholders on notice that they could be held liable for claims against EIAC. Accordingly, it maintained that Vanship would not be frustrated because EIAC was a shell.

EIAC's counsel repeated these contentions at the oral argument of Vanship's motion. Counsel further maintained that, if the court was inclined to restrain the Trust, it should, at

the very least, limit the amount restrained to Vanship's claimed deal costs of $3.4 million, and not include the anticipated costs of arbitration. The court granted Vanship's application in its entirety, noting that its decision turned primarily on the fact that it perceived no prejudice to EIAC if the Trust was restrained pending arbitration.

On appeal, EIAC abandons the argument it made below that Vanship had no standing to make a claim against the Trust. Instead, it asserts that the plain language of Section 16(d) of the SPA limits any claim by Vanship against the Trust to expenses that EIAC "agreed to pay under the terms of this Agreement on the earlier of the termination of this Agreement under Section 20 and the Closing Date." EIAC argues that, since Section 21(i) of the SPA provided which "expenses" EIAC would pay, and did not expressly mention costs incurred in recovering those expenses, Section 16(d) precludes Vanship from recovering from the Trust any attorneys' fees that might be awarded as a result of the arbitration.

Vanship contends that, because EIAC did not make the foregoing argument below, it is not permitted to make it here. We disagree. Although ordinarily arguments not raised in the trial court may not be asserted on appeal, that is not the case where "a party does not allege new facts, but, rather, raises a legal argument which appeared upon the face of the record and

which could not have been avoided...if brought to [his or her] attention at the proper juncture." (*Gerdowsky v Crain's N.Y. Bus.*, 188 AD2d 93, 97 [1993] [internal quotation marks and citations omitted]). So long as the issue is determinative and the record on appeal is sufficient to permit our review, we may consider a new legal argument raised for the first time in this Court (*see Matter of Allstate Ins. Co. v Perez*, 157 AD2d 521, 523 [1990]). Here, all of the support for EIAC's argument can be found within the four corners of the SPA, which was part of the record below. Indeed, this appeal revolves around the strictly legal issue of how the SPA should be interpreted.

Turning to the merits, Vanship argues that the injunction was properly entered because all it had to do was establish a prima facie showing of a right to proceed against the Trust, and that it did not need to "prove" that point until it was before the arbitrators. However, the procedural question of whether Vanship may make a claim against the Trust will not be before the arbitrators. The only issue for the arbitrators is whether Vanship is entitled to recover its deal costs. Thus, Vanship was required to prove as a matter of law in *this proceeding* that it is entitled to recover its attorneys' fees from the Trust. We hold that it failed to do so.

This Court has held that, when interpreting a contract,

> "the intent of the parties governs. A contract should be construed so as to give

> full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement" (*American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 [1990], *lv denied* 77 NY2d 807 [1991, internal citations omitted]).

We must be guided by these rules. Even Vanship does not contend that the SPA is ambiguous and that extrinsic evidence should be considered to prove the parties' intent. Instead, it argues that the SPA allows Vanship to recover its attorneys' fees from the Trust. However, Section 16(d) clearly limits the claims Vanship may make against the Trust to "expenses which EIAC and/or [Merger Corp.] has agreed to pay under the terms of this Agreement on the earlier of the termination of this Agreement under Section 20 and the Closing Date." The only "expenses" mentioned in the SPA which fit that description are the expenses covered by Section 21(i).

Vanship argues that, even though any attorneys' fees which it might be awarded by the arbitrators are not included in the description of "expenses" contained in Section 21(i), the attorneys' fees provision in Section 21(c) would be rendered illusory were this Court to find that Section 16(d) is limited to deal costs only. It claims that it would have been "nonsensical" for it to have bargained for reimbursement of its deal costs, and the fees expended seeking to recover those deal costs, but at the same time waive its right to recover those fees from the Trust.

It further asserts that attorneys' fees and costs are not stand-alone claims, but are "ancillary" relief awarded when the underlying claim is successful. Accordingly, it claims that EIAC's interpretation would force it to improperly split its fee claim from the underlying claim for its deal costs.

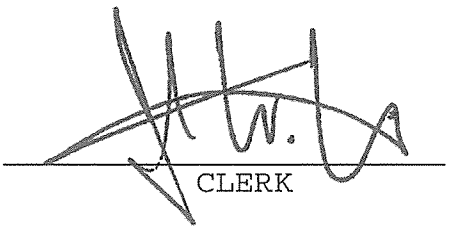
These arguments are unavailing. The plain language of the SPA controls and it does not allow Vanship to recover from the Trust any attorneys' fees it is awarded if it prevails in the arbitration. Section 16(d) clearly precludes any and all claims against the Trust save those for deal costs. No mention is made of attorneys' fees expended in recovering those costs. This interpretation does not render Section 21(c) illusory, because Vanship can still have a claim against EIAC for recovery of its attorneys' fees. While EIAC's sole asset may be the Trust, that did not dissuade Vanship from agreeing in Section 16(d) that it would not assert against the Trust any claim, other than one for its deal costs, that it "may have in the future as a result of, or arising out of, any negotiations, contracts, or agreements with EIAC."

Nor is Vanship's argument that attorneys' fees are "ancillary" to its claim for deal costs persuasive. Even if, as Vanship argues, a particular claim and the fees incurred pursuing that claim are inseparable, it is not being forced to split the two. That is because the claim for deal costs is against EIAC.

Indeed, the Trust is not even a party to the arbitration. In the arbitration against EIAC, Vanship is free to seek its deal costs and related attorneys' fees together. The only question before us is whether Vanship is entitled to an injunction restraining disbursement of the Trust on the basis that, once it has an arbitration award including attorneys' fees, it can satisfy the attorneys' fees portion of the award from the Trust. The plain language of the SPA provides that it cannot recover any such fees from the Trust. Accordingly, the injunction was improperly issued.

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

ENTERED: AUGUST 4, 2009



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Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

496 Kalman Yeger, et al., Index 602589/04
Plaintiffs-Respondents,

-against-

E*Trade Securities LLC,
Defendant-Appellant.

Cooley Godward Kronish LLP, Reston, VA (Douglas P. Lobel of counsel), for appellant.

Sanford Wittels & Heisler LLP, New York (William R. Weinstein of counsel), for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered November 13, 2008, that, *inter alia*, granted plaintiffs' motion for class certification, unanimously reversed, on the law and the facts, without costs, the motion denied, and the class decertified.

Defendant E*Trade is a registered brokerage firm that offers online trading and various other services, such as research. It generates income from accounts primarily through commissions. In 2003, the period relevant to this action, it had approximately 3.5 million brokerage accounts.

The E*Trade customer agreement authorizes the automatic debiting of an account to assess an account maintenance fee (AMF) and refers to a schedule of fees on E*Trade's website. This assessment occurs if the account balance falls below $5000 or if the customer has not executed at least two commissioned trades in

the prior six months. Among exceptions to this rule is the situation where the customer has "linked" brokerage accounts with E*Trade with a total balance over $20,000.

Initially, E*Trade would assess a $15 AMF on the 27th of the last month of each quarter. However, this created practical problems because the 27th was not always a business day. E*Trade therefore changed its policy effective September 2003, raising the AMF to $25 and assessing it "during the last week of the quarter ending month." Accordingly, in September 2003, E*Trade assessed the AMF on September 24, seven days before the end of the quarter.

In December 2003, the seventh day before the end of the quarter (that technically was "during the last week") fell on Christmas. Consequently, E*Trade assessed the AMF on the *prior* business day, the 24th. However, it first sent a "Smart Alert" e-mail to customers it intended to assess and whose balances were below $25, because these accounts would be subject to closure as a result. The alert stated that the AMF assessment would occur on the 24th and encouraged these customers to avoid AMF by depositing $5000 or more into their accounts. The alert also provided an Internet link for transferring funds.

E*Trade again changed its policy beginning the first quarter of 2004, charging the AMF on Wednesday during the last full week of the last month of each quarter.

Plaintiffs Kalman Yeger and Cindy Yeger became E*Trade customers on January 26, 2000. In March, June and September 2001, E*Trade assessed their accounts in accordance with the customer agreement. However, when Mr. Yeger complained, E*Trade refunded the assessments as a courtesy.

In September 2003, E*Trade again assessed plaintiffs' account. Mr. Yeger again requested a refund, stating that he would deposit funds to bring the account balance above the minimum. When he deposited the funds, E*Trade again refunded the assessment as a courtesy.

In December 2003, E*Trade assessed the Yegers a $25 AMF for the fourth quarter of 2003. As noted, this was on December 24 (eight days before the end of the quarter) because, according to E*Trade, the "last week" of the month began on Christmas Day. Plaintiffs had not received the December 19 "Smart Alert" warning because their account contained more than $25.

When Mr. Yeger complained, E*Trade at first declined to offer a courtesy refund because plaintiffs had received four courtesy refunds previously and E*Trade had an internal policy of refunding a properly assessed AMF as a courtesy only on a one-time basis, but after Mr. Yeger continued to complain, E*Trade agreed to refund the AMF. Nevertheless, during the same conversation, Mr. Yeger changed his mind, declined the refund and threatened this lawsuit.

Plaintiffs filed this action on August 11, 2004. They framed the complaint as a class action and focused primarily on the AMFs that E*Trade collected in December 2003. The complaint originally stated claims for breach of contract, violation of General Business Law (GBL) § 349 and unjust enrichment. However, on February 6, 2006, the motion court dismissed the claims under the GBL and for unjust enrichment, leaving only the breach of contract claim. Plaintiffs allege that E*Trade breached the customer agreement by assessing the December 2003 AMF a day early, on December 24, 2003, instead of during "the last seven days" or "the last week" of the quarter. Plaintiffs also contend that the provision in the Customer Agreement describing that the AMF would be charged "during the last week of the quarter ending month" is so vague that it constitutes a breach of contract for defendant to have assessed an AMF prior to the last day of the quarter.

In April 2006, the Yegers moved to certify the action as a class action and to certify them as class representatives. E*Trade opposed. While the motion for class certification was pending, plaintiffs moved to amend the complaint to add the allegation that E*Trade also improperly assessed their account several times in 2001 because the charge would not have been imposed if their "linked" accounts totaled more than $20,000. The motion court denied the motion to amend and this Court

affirmed (52 AD3d 441 [2008]).

In April 2008, Justice Cahn granted class certification and found the Yegers to be proper class representatives. Noting that the "minuscule" nature of the damages sought did not bar the claim, the court found the requisite class action element of commonality based on the allegations that "the same practices were done" to all members of the class. Aware that plaintiffs had accepted a refund, the court stated there were "other deductions from the account for [m]aintenance [f]ees which plaintiffs contend were deducted early and which were not returned or accepted." After motion practice about the proper term of the class period, the parties eventually stipulated, without prejudice to this appeal, to a class period "commencing with the third quarter of 2003 and ending with the fourth quarter of 2003" as to all customers charged an AMF "in violation of their customer agreement."

The Appellate Division may exercise de novo review of a class certification decision, "even when there has been no abuse of discretion as a matter of law by the nisi prius court" *(Small v Lorillard Tobacco Co.*, 94 NY2d 43, 53 [1999]). To determine whether a lawsuit qualifies as a class action, a court applies the five criteria of CPLR 901(a) (numerosity, commonality, typicality, adequacy of representation and superiority) to the

facts (*see Hazelhurst v Brita Prods Co.*, 295 AD2d 240, 242 [2002]).[2] "[T]hat wrongs were committed pursuant to a common plan or pattern does not permit invocation of the class action mechanism where the wrongs done were individual in nature or subject to individual defenses" *(Mitchell v Barrios-Paoli*, 253 AD2d 281, 291 [1999]).

Whether E*Trade's conduct in assessing AMFs a day early caused an individual class member to suffer actual damages depends upon facts so individualized that it is impossible to prove them on a class-wide basis. The motion court concluded that class certification was appropriate because there was a common question as to whether E*Trade collected the AMF too early, i.e., before the date permitted in E*Trade's contracts. However, this is only half the question. A breach of contract claim only exists if E*Trade's common conduct actually damaged a customer. Therefore, to recover, each class member would have to show that he or she would have avoided the fee had E*Trade collected it at the proper time. There were several actions that customers could have taken to avoid the assessment (such as depositing additional funds or executing additional securities

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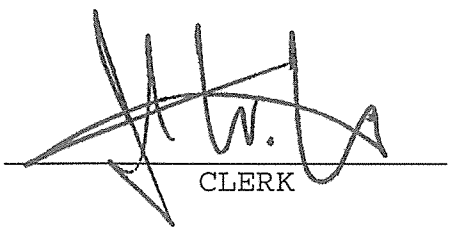
[2] In addition to determining whether a plaintiff has met the requirements of CPLR 901, the court must also consider the factors listed in CPLR 902 that concern the relative propriety of maintaining the action as a class action. However, as plaintiffs here do not satisfy the criteria under CPLR 901, we need not reach this analysis.

trades), as well as other conditions not under their control that could have prevented it, such as when E*Trade, as a courtesy, refunded those customers who paid the AMF. It is this aspect of proof that would be subject to a host of factors peculiar to the individual. This aspect of proof is critical. To allow the Yegers, or any class member, to recover the fee merely because E*Trade collected it early -- without proof that each member of the class would have taken steps to avoid the fee had collection occurred at its proper time -- would result in a windfall to those plaintiffs who would not have taken corrective action. In certain cases, it could also result in writing the AMF, a fee the parties had agreed to freely, out of the agreement entirely. Accordingly, individualized issues, rather than common ones, predominate (CPLR 901[a][2]).

In addition, plaintiffs are not proper class representatives because their rejection of E*Trade's offer to refund the fee renders their claim atypical (CPLR 901[a][3]). We have considered the plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: AUGUST 4, 2009



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Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

648 David Belding, Index 113279/04
Plaintiff-Respondent, 590137/06
590265/06

-against-

Verizon New York, Inc., et al.,
Defendants-Appellants.

[And Other Actions]

Cozen O'Connor, New York (Kevin G. Mescall of counsel), for appellants.

Kelner and Kelner, New York (Gail S. Kelner of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered November 26, 2008, which granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action and denied defendants' cross motion for summary judgment dismissing that cause of action, affirmed, without costs.

Plaintiff, an installer, was injured in a fall from an A-frame ladder on May 25, 2004 in a building owned by defendant Verizon, New York, Inc. Verizon had engaged defendant Tishman Interiors Corporation as the construction manager for a capital improvement that included a site hardening and security project at the building. According to the deposition of Tishman's assistant project manager, the project entailed the reconstruction of the building's main entrance as well as the

installation of a security desk, cameras and card-read systems. Plaintiff's employer, Shatter Guard, was engaged as a subcontractor for the installation of a shatterproofing substance called bomb blast film on windows in the front and rear lobbies of the building. Although the bomb blast film was installed in April 2004, plaintiff had to do a reinstallation on the day of the accident in order to address complaints made by the architect.

Plaintiff made a prima facie showing of proximate cause under section 240(1) with his unrefuted testimony that the ladder collapsed beneath him causing him to fall (*see Panek v County of Albany*, 99 NY2d 452, 458 [2003]).[3] Defendants, however, argue that plaintiff's work on the day of the accident was done purely to correct a cosmetic defect and did not, as plaintiff claims, constitute "altering," an activity enumerated under the statute. "'[A]ltering' within the meaning of Labor law 240(1) requires making a *significant* physical change to the configuration or composition of the building or structure" (*Jablon v Solow*, 91 NY2d 457, 465 [1998]). *Prats v Port Auth. of N.Y. & N.J.* (100 NY2d 878 [2003]), which involved an assistant mechanic who fell from an ladder while readying air conditioning units for

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[3]In this regard, we note that defendants' biomechanical expert, who disputes plaintiff's account of the accident, does not challenge the core assertion that the ladder buckled and fell. For this reason the expert's affidavit is insufficient to raise a triable issue of fact.

inspection, is instructive. In discussing the applicability of section 240(1) to the worker's activity, the Court of Appeals observed:

> "Although at the instant of the injury [plaintiff] was inspecting and putting the finishing touches on what he had altered, he had done heavier alteration work on other days at the same job site on the same project. He was a member of a team that undertook an enumerated activity under a construction contract, and it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (*id.* at 882).

As noted above, the site hardening and security project was part of an overall capital improvement that included plaintiff's work as evidenced by the fact that his company, engaged as a subcontractor, was a member of the team involved in the alteration. Accordingly, we reject the dissent's and defendants' attempt to isolate the specific task plaintiff was engaged in at the time of the injury. Defendants' characterization of plaintiff's work as merely cosmetic is dispelled by the unchallenged evidence that bomb blast film changes the property of glass. Accordingly, plaintiff's employer was engaged to carry out a specific part of the alteration. It is also significant that plaintiff was reinstalling the bomb blast film at the behest of an architect, a professional who would generally be a key player in an alteration project. Construing section 240(1) liberally so as to accomplish its purpose of protecting workers

(*see Greenfield v Macherich Queens Ltd. Partnership*, 3 AD3d 429, 430 [2004], *citing Martinez v City of New York*, 93 NY2d 322, 326 [1999]), we find that plaintiff's reinstallation of the bomb blast film at the time of the accident was a protected activity under section 240(1). *Martinez*, which the dissent also cites, is readily distinguishable. The plaintiff in that case was an environmental inspector not engaged in or employed by a company engaged in an activity enumerated in section 240(1).

Defendants also fail to raise a triable issue of fact as to whether the ladder was "good enough to afford proper protection" and that plaintiff's own negligence was the sole proximate cause of the accident (see *Blake v Neighborhood Hous. Servs. Of N.Y. City*, 1 NY3d 280, 289, n. 8 [2003]).

We have considered defendants' remaining arguments and find them to be without merit.

All concur except Catterson, J.P. and McGuire, J. who dissent in a memorandum by McGuire, J. as follows:

McGUIRE, J. (dissenting)

Defendant Verizon New York, Inc. owns a building in midtown Manhattan and decided to have work performed on it to enhance safety and security. Verizon retained defendant Northern Bay Contractors as the general contractor of the project and defendant Tishman Interiors Corporation as the construction manager. The project, which began in the summer of 2003, included the reconstruction of the building's entranceway, and the installation in the lobby of a new security desk, turnstiles and access card readers, as well as security cameras throughout the building. Additionally, a polyester adhesive film was to be applied to approximately six windows in the building's two lobbies. This film was designed to absorb significant amounts of force (such as from an explosion), so as to both decrease the likelihood of glass shattering from exposure to force and, in the event that the glass should break, to help hold the broken glass within the window frame, thereby preventing shards of glass from injuring people or damaging property. The construction manager retained Shatter Guard, which was plaintiff's employer, to apply the film to the windows.

In April 2004, plaintiff applied the film to the interior portions of the windows in both the north and south lobbies. In each lobby plaintiff applied the film to three windows; each window was several feet from the ground, and the middle window,

which was above the doors to the building, was wider than the windows adjacent to it. To apply the film, plaintiff, with the assistance of a coworker, cleaned the window, cut the film to fit the window, pulled the liner off of the film, wet the back of the film, slid the film into place on the glass and used a squeegee to remove excess water from the film. Plaintiff and his coworker stood on a scaffold to slide the film into place and remove the excess water from the film. In addition to the scaffold, plaintiff used a box cutter to cut the film, a spray bottle containing soap and water to clean the windows, and a squeegee. Plaintiff and his coworker completed their task -- applying the film to each of the six windows -- in one day.

Although the application of the film to the windows was completed in April 2004, the project's architect requested that the film be adjusted on the center window in each lobby. According to plaintiff, "[t]he architect ... didn't like that the seams [of the film] ran through the backs of the numbers of the [address of the building, which was printed on the center windows]." On May 25, 2004, accordingly, plaintiff and a coworker returned to the building to adjust portions of the film. To make the adjustments, plaintiff and the coworker needed to cut and peel away a portion of the film near the numbers of the address and reapply the film in a manner that would not obscure the numbers. The only tools they needed to perform this work

were a box cutter, a squeegee and ladders (or a scaffold) to reach the area on the windows where the numbers of the address were printed.

Plaintiff and his coworker adjusted the film on the center window of the north lobby without incident. In performing that adjustment, plaintiff and his coworker used a pair of ladders, one that belonged to plaintiff and one that was obtained from the job site. The workers then went to the south lobby to adjust the film on the center window of that lobby. After peeling away a portion of the film near the numbers of the address and cutting a piece of film to replace it, plaintiff, standing on a ladder obtained from the job site, and his coworker, standing on the ladder belonging to plaintiff, attempted to test fit the new piece of film they were going to apply to the window. As they were doing so, the legs of the ladder on which plaintiff was standing "buckled" and plaintiff, who was approximately 10 feet above the ground, fell, injuring his right foot and leg.

Plaintiff commenced this action against defendants seeking damages under various provisions of the Labor Law, including section 240(1). Plaintiff moved for summary judgment on the issue of liability on that cause of action, and defendants cross-moved for summary judgment dismissing it. Supreme Court granted plaintiff's motion, denied defendants' cross motion, and this appeal ensued.

Labor Law § 240(1) provides special protection to workers who are both exposed to an elevation-related risk and engaged in certain enumerated activities. One of those activities -- the only one relevant to this appeal -- is "altering" a building or structure. Defendants contend that the application of the film to the windows did not "alter" the building or the windows and therefore plaintiff was not protected under the statute. Defendants also contend that even if plaintiff had "altered" the building in April 2004 when he originally applied the film, he was not "altering" the building or the windows on May 25, 2004 when he returned to the premises to adjust portions of the film. Plaintiff argues that the application of the film to the windows "altered" the "physical properties of the glass" and "the manner in which the glass ... would respond to explosive forces." Plaintiff also argues that the work performed on May 25, 2004 was an integral part of the ongoing security upgrade project -- work that was ancillary to the "alterations" to the building. Thus, plaintiff asserts that he was engaged in "altering" the building on each of the two days he worked there.

The Court of Appeals' principal decision regarding the activity of "altering" a building or structure is *Joblon v Solow* (91 NY2d 457 [1998]). There, the plaintiff, an electrician, was employed by a company that served as the house electrician to a company that leased office space from the owner of the premises.

The plaintiff was directed by his supervisor to install an electric wall clock in a room in the lessee's space. As the room in which the clock was to be installed did not have an electrical outlet, electrical wiring from an adjacent room needed to be extended to the room in which the clock was to be installed. To accomplish this, the plaintiff and his coworker needed to chop a hole through the concrete block wall separating the rooms and run wiring encased in conduit from the existing power source through the wall. The plaintiff and his coworker, working in the room with the existing power source, chiseled through the wall using a hammer and chisel. The coworker then went from that room to the room in which the clock was to be installed to receive from the plaintiff the electrical wire. The plaintiff fell from the unsecured ladder on which he was standing while attempting to pass the wire to his coworker.

The plaintiff brought a federal action against the owner and lessee under, among other provisions, Labor Law § 240(1), and the defendants impleaded the plaintiff's employer. The parties made various summary judgment motions with respect to the main action and the third-party action, but the core issue on those motions was whether the plaintiff was "altering" the building. The District Court concluded that he was not, and the Second Circuit certified to the Court of Appeals the question of whether the plaintiff was engaged in a protected activity.

Before the Court of Appeals, the plaintiff, consistent with the Third Department's decision in *Cox v International Paper Co.* (234 AD2d 757 [1996]), argued that a worker "alters" a building or structure under section 240(1) whenever the activity the worker is performing "changes" the building or structure (*Joblon*, 91 NY2d at 464). Thus, the plaintiff maintained that he "altered" the building because the activity he performed changed the building, i.e., he chopped a hole in the concrete wall (*id.*). The defendants and third-party defendant contended that the context of the work leading to the injury was controlling, and that only when the work was performed as part of a building construction job should Labor Law § 240(1) liability attach (*id.*). Because the work the plaintiff performed was not part of a building construction project, the defendants and third-party defendant argued that the plaintiff did not "alter" the building (*id.*).

The Court rejected both suggested constructions of "altering." With respect to the plaintiff's argument that the controlling inquiry was whether the activities the worker performed "changed" the building, the Court was "concerned that allowing every change in a structure to qualify as an alteration [would] give[] the statute too broad a reach. A task as simple and routine as hammering a nail could, taken literally, be viewed as a change in the structure. Adopting plaintiff's

interpretation of the *Cox* rule if taken to its logical conclusion, would be tantamount to a ruling that all work related falls off ladders will fall within Labor Law Section 240" (*id.* [internal quotation marks omitted]). The Court also observed that defining every change in a building or structure as an alteration would be contrary to the Court's own precedents. Thus, the Court wrote,

> "Although the *Cox* court attempted to distinguish *Smith v Shell Oil Co.* (85 NY2d 1000), a fair application of plaintiff's rule to that case - where we concluded that a worker injured while changing a lightbulb on an illuminated sign was involved only in routine maintenance and stated no claim under Labor Law § 240(1) - would result in liability. To remove and replace a burnt-out bulb, strictly speaking, is to change the sign. Similarly, the minimal cleaning of windows we deemed beyond the reach of the statute in *Brown v Christopher St. Owners Corp.* (87 NY2d 938, *rearg denied* 88 NY2d 875) also might well be an alteration under such a definition. Such routine maintenance and decorative modifications should fall outside the reach of the statute" (*id.* at 465).

Similarly, the Court found that the defendants' proposed rule -- that a worker could only recover under section 240(1) when the work was performed as part of a building construction job -- was contrary to the Court's precedents permitting recovery for work performed outside of construction sites (*id.* at 464).

Instead, the Court determined "that 'altering' within the meaning of Labor Law § 240(1) requires making a *significant* physical change to the configuration or composition of the building or structure" (*id.* at 465 [emphasis in original]).

Finding "the question is close," the Court concluded that the work performed by the plaintiff resulted in a significant physical change to the configuration or composition of the building; the plaintiff (and his coworker) brought an electrical power supply from one room to another, which required both extending wiring from the room with the existing power source and chiseling a hole through a concrete wall so as to reach the room in which the clock was to be installed (*id.*; *see also Panek v County of Albany*, 99 NY2d 452 [2003] [plaintiff engaged in "alteration" of building; plaintiff, using a mechanical lift, removed 2 200-pound air handlers after performing 2 days of preparatory work, including dismantling of electrical and plumbing components of a cooling system]).

Another important Court of Appeals precedent on the issue of whether a worker was engaged in a protected activity under Labor Law § 240(1) is *Martinez v City of New York* (93 NY2d 322 [1999]). The plaintiff in *Martinez* was hired as an environmental inspector by a placement agency and assigned to work for a company that was retained by the defendant to perform asbestos inspection services in public schools. The inspection services were to be performed in phase one of a two-phase asbestos abatement project in public schools. Phase one entailed the inspection of school buildings and the identification of asbestos problem areas; phase two entailed the cleaning and removal work. The plaintiff's duties,

performed solely during phase one, were to determine whether asbestos samples had been previously taken, check areas marked as containing asbestos and measure areas where asbestos was found. On the day he was injured, the plaintiff was in a building attempting to measure a pipe that ran from a ceiling to the top of a closet. The pipe was approximately eight or nine feet above the floor and the plaintiff climbed on a desk to reach it. The plaintiff fell from the desk and was injured.

The plaintiff commenced a Labor Law action against several defendants, claiming that he was entitled to recover under section 240(1). He moved for summary judgment on the issue of liability on that cause of action and some of the defendants cross-moved for summary judgment dismissing it. Supreme Court denied the plaintiff's motion, granted the defendants' cross motion and the Appellate Division affirmed.

The Court of Appeals affirmed, concluding that the plaintiff was not engaged in a protected activity. The Court wrote, in pertinent part, that

> "plaintiff's work as an environmental inspector during phase one was merely investigatory, and was to terminate prior to the actual commencement of any subsequent asbestos removal work. In fact, none of the activities enumerated in the statute was underway, and any future repair work would not even be conducted by ... plaintiff's supervisor, but by some other entity" (*id.* at 326).

Notably, the Court "reject[ed] the analysis employed [by the courts] below which focused on whether plaintiff's work was an

'integral and necessary part' of a larger project within the purview of section 240(1) [, because] [s]uch a test improperly enlarges the reach of the statute beyond its clear terms" (*id.*).

The Court of Appeals next addressed the issue of whether a worker was engaged in "altering" a building or structure in *Prats v Port Auth. of N.Y. & N.J.* (100 NY2d 878 [2003]). In *Prats*, the plaintiff was employed by a company that contracted with the defendant to work on air conditioning systems at the World Trade Center. The contract involved cleaning, repairing and rehabilitating air handling units, and the company "was obligated to ascertain 'the extent of all construction' related to the project" (*id.* at 879-880). Because of the size of some of the air handling units, the company was required to level floors, lay concrete and rebuild walls to replace large air filtering systems. The plaintiff was an assistant mechanic who worked on many facets of the project.

On the day he was injured, the plaintiff and a coworker were assigned to ready air handling units for inspection; part of that task entailed "perform[ing] any work [on the units] that had to be done" (*id.* at 880). This work required wrenches, a welder set and "Craftsman-type" tools (*id.*). A coworker set up a ladder to inspect a piece of machinery that was suspended approximately 20 feet from the floor and used the ladder to climb onto the unit. The coworker then asked the plaintiff to bring him a wrench and

the plaintiff began to climb the ladder with it. As the plaintiff was climbing the ladder, it slid out from under him and he fell to the floor.

The plaintiff commenced an action against the defendant in federal court seeking damages for violations of Labor Law § 240(1). The District Court granted the defendant's motion for summary judgment dismissing that cause of action and the plaintiff appealed to the Second Circuit, which certified the issue of whether the plaintiff was engaged in an enumerated activity to the Court of Appeals.

The Court of Appeals first determined that the plaintiff was engaged in "altering" the building and was therefore covered under § 240(1). The Court then distinguished *Martinez*, observing that

> "the work here did not fall into a separate phase easily distinguishable from other parts of the larger construction project. Plaintiff's inspection was not in anticipation of [his employer's] work, nor did it take place after the work was done. The inspections were ongoing and contemporaneous with the other work that formed part of a single contract. The employees who conducted inspections also performed other, more labor-intense aspects of the project. Moreover, plaintiff worked for a company that was carrying out a contract requiring construction and alteration - activities covered by section 240(1). This contrasts with the asbestos inspector in *Martinez*, who did not work for the company that would actually remove the asbestos" (*id.* at 881).

Next, the Court reviewed *Joblon*, noting that

> "[t]here, we looked to the 'time of injury' to determine whether plaintiff's work fell within section

240(1). Defendant would have us read that phrase in an overly literal manner. In our view, however, the words must be applied in context. At one extreme, a construction worker who, between hammer strokes, pauses to see where to hit the next nail is at that moment 'inspecting.' But this is very different from an inspection conducted by someone carrying a clipboard while surveying a possible construction site long before a contractor puts a spade in the ground. Here, [the plaintiff's employer] employed the plaintiff mechanic substantially to perform work that involved alteration of a building, and, under the facts of this case, he enjoyed the protection of section 240(1) even though he was inspecting, or more precisely, climbing a ladder, at the moment of the accident...

"Although at the instant of the injury he was inspecting and putting the finishing touches on what he had altered, he had done heavier alteration work on other days at the same job site on the same project. He was a member of a team that undertook an enumerated activity under a construction contract, and it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (*id.* at 881-882).

In closing, the Court stated that

"the question whether a particular inspection falls within section 240(1) must be determined on a case-by-case basis, depending on the context of the work. Here, a confluence of factors brings plaintiff's activity within the statute: his position as a mechanic who routinely undertook an enumerated activity, his employment with a company engaged under a contract to carry out an enumerated activity, and his participation in an enumerated activity during the specific project and at the same site where the injury occurred" (*id.* at 883).

Accordingly, under *Prats*,

"[w]hether plaintiff was involved in a protected activity under the statute depends on several factors, including whether plaintiff was employed by a company

> that was carrying out a construction or alteration project, whether plaintiff's work was ongoing and contemporaneous with that work, whether plaintiff was involved in performing alteration or construction work and whether plaintiff's work was part of a separate phase easily distinguishable from the construction and alteration work" (1B PJI3d 2:217, at 1165 [2009]).

Here, plaintiff satisfies none of the *Prats* factors. Plaintiff was not employed by a company that was carrying out a construction or alteration project. The company that employed plaintiff was retained solely to apply the protective film to the six windows in the lobbies. To apply the film, the employees of the company cleaned the windows, cut the film to fit the windows, pulled the liner off of the film, wet the back of the film, slid the film into place on the glass and used a squeegee to remove excess water from the film. To perform their task, the employees needed only a ladder or scaffold, a box cutter to cut the film, a spray bottle containing soap and water to clean the windows, and a squeegee. The employees of the company applied the film to the windows in one day, returning for one day approximately one month later to adjust portions of the film to improve the appearance of the film. The work performed by the employees of the company did not change the size or shape of the windows; the employees neither drilled nor cut any holes in the windows; they did not disturb the frames of the windows; and they did not work on any portion of the building itself. Thus, the company that employed plaintiff did not make a *significant* physical change to the

configuration or composition of the building or structure and thus was not carrying out an alteration project (*see Joblon, supra; see also Munoz v DJZ Realty, LLC*, 5 NY3d 747 [2005], *revg* 15 AD3d 363 [2005] [applying new advertisement to billboard does not change billboard's structure and is more akin to cosmetic maintenance or decorative modification]).

Moreover, plaintiff's work was not ongoing and contemporaneous with the alteration work that was being performed elsewhere on the job site by companies other than his employer. The work on the project began in the summer of 2003 and was, according to a project manager employed by the construction manager, "winding down" in April 2004 when plaintiff and his coworker reported to the job site to apply the film. As noted above, plaintiff was on the job site only two days, one day to apply the film to the windows and one day to adjust portions of the film on two windows to modify the appearance of the film. Plaintiff therefore failed to satisfy the second *Prats* factor.

The third *Prats* factor is whether the plaintiff was involved in performing alteration or construction work. As discussed above, plaintiff was not. His work involved applying polyester film to six windows and adjusting portions of the film on two windows. That work entailed cleaning the windows, cutting the film to fit the windows, pulling the liner off of the film, wetting the back of the film, sliding the film into place on the

glass and using a squeegee to remove excess water from the film. Plaintiff's work required no tools other than a ladder or scaffold, a box cutter to cut the film, a spray bottle containing soap and water to clean the windows, and a squeegee. Plaintiff made no *significant* physical change to the configuration or composition of the building. Rather, his work, both on the first day he was on the job site and the day he returned to it, was akin to cosmetic maintenance or decorative modification (*see Munoz, supra* [applying new advertisement to billboard does not change billboard's structure and is more akin to cosmetic maintenance or decorative modification]; *Czaska v Lenn Lease Ltd.*, 251 AD2d 965 [1998] [insulating windows by stapling sheets of plastic over them did not "alter" the windows within the meaning of the Labor Law]). Moreover, plaintiff returned to the job site solely to adjust portions of the film on two windows to modify the *appearance* of the film.

Lastly, plaintiff failed to satisfy the fourth *Prats* factor because his work was part of a separate phase of the project that is easily distinguishable from the alteration work being performed elsewhere on the job site by companies other than his employer. Plaintiff applied the film to the windows in April 2004 when the project was "winding down," and reported to the job site to adjust the film approximately one month later. Plaintiff did not work on any other aspect of the project, and there is no

evidence, indeed no suggestion, that other work on the site was contingent upon the completion of plaintiff's work.

The majority concludes that plaintiff was engaged in "altering" the building, and writes that

> "the site hardening and security project was part of an overall capital improvement that included plaintiff's work as evidenced by the fact that his company, engaged as a subcontractor, was a member of the team involved in the alteration. Accordingly, we reject the dissent's and defendants' attempt to isolate the specific task plaintiff was engaged in at the time of the injury. Defendants' characterization of plaintiff's work as merely cosmetic is dispelled by the unchallenged evidence that bomb blast film changes the property of glass. Accordingly, plaintiff's employer was engaged to carry out a specific part of the alteration. It is also significant that plaintiff was reinstalling the bomb blast film at the behest of an architect, a professional who would generally be a key player in an alteration project."

As is evident, the majority does not discuss the *Prats* factors. Indeed, it does not even mention them. Whether the security enhancement project was part of a capital improvement project, whether plaintiff's employer was hired as a subcontractor, and whether an architect requested that plaintiff adjust the film plaintiff previously applied are irrelevant to the determinative question on this appeal -- whether plaintiff was engaged in "alteration" of a building or structure under section 240(1).

The majority tacitly concludes that plaintiff was engaged in "alteration" of a building or structure because the "bomb blast film change[d] the property of glass." The majority errs, however, because the relevant test is whether the worker made "a

significant physical change to the configuration or composition of the *building or structure*" (*Joblon*, 91 NY2d at 465 [second emphasis added]). Under the majority's approach, the relevant test becomes whether the worker made "a significant physical change to the configuration or composition of *a component of* the building or structure." Moreover, under the majority's approach, as long as the change to the component of the building is significant, it does not matter at all how insignificant the component is to the building or structure. Thus, if the facts otherwise were the same but plaintiff had been called back to the building to adjust the film on only one small window, the majority's approach requires the conclusion that plaintiff was engaged in an "alteration" within the meaning of the statute. That conclusion is at odds with the concern expressed in *Joblon* that "allowing every change in a structure to qualify as an alteration [would] give[] the statute too broad a reach" (*id.* at 464).[1]

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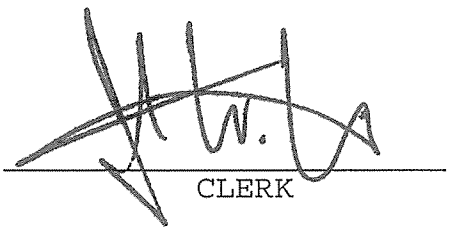
[1]The evidence in the record does not in any event establish that the application of the film to the glass changed the "property" of the glass. An employee of the construction manager testified that the film "would change the property of the glass," and plaintiff similarly testified that when the film is applied to the glass "the physical properties of the glass" are changed. Neither of these individuals was qualified to render an expert opinion as to whether the application of the film to glass changes the physical properties of the glass. This is unsurprising because both of these individuals are merely lay, fact witnesses. Plaintiff's window film safety expert did not aver that the application of the film to glass would change the properties of the glass. Instead, he asserted that the

At bottom, the majority's conclusion rests on two principles that have been rejected: that plaintiff was engaged in a protected activity because his work was an "integral and necessary part" of a larger project within the purview of section 240(1) (*Martinez*, 93 NY2d at 326), and that plaintiff was engaged in a protected activity because he was "working on a building" (*Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 433 [2007]).

Accordingly, I would reverse the order on appeal, deny plaintiff's motion, grant defendants' cross motion and dismiss the Labor Law § 240(1) cause of action.[2]

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

ENTERED: AUGUST 4, 2009



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application of the film to glass "would alter the behavior of glass after impacted by explosive forces." Additionally, the promotional literature for the film states that the film "adheres to the interior side of the window [and the] polyester material acts like an invisible coat of armor, making the glass significantly stronger." No suggestion is made in the product literature that the application of the film to glass changes the physical properties of the glass.

[2]Because I would dismiss the section 240(1) claim on the ground that plaintiff was not engaged in a protected activity, I need not decide whether a triable issue of fact exists regarding whether plaintiff was the sole proximate cause of his injuries.

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

652 Women's Interart Center, Inc., Plaintiff-Appellant, Index 109017/07 113088/07

-against-

New York City Economic Development Corporation (EDC), et al., Defendants-Respondents.

[And Another Action]

Anna Stern, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered March 6, 2008, which, to the extent appealed from as limited by the briefs, granted so much of defendants' dismissal motion as sought to collaterally estop plaintiff from relitigating certain allegations related to its claims for breach of contract, promissory estoppel and tortious interference with contract, unanimously affirmed, without costs.

This action arises out of an alleged breach of contract to acquire certain property to be used for a federally funded rehearsal studio and cultural center. Plaintiff was collaterally estopped from relitigating certain factual issues that are critical to plaintiffs' claims for breach of contract, promissory estoppel and tortious interference with contract because those issues were decided after a full and fair opportunity to contest

them (*see Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1969]) in a prior federal action (*see* 2005 US Dist LEXIS 10027, 2005 WL 1844611 [SD NY, Batts, J.], *affd* 212 Fed Appx 12 [2d Cir 2007]).

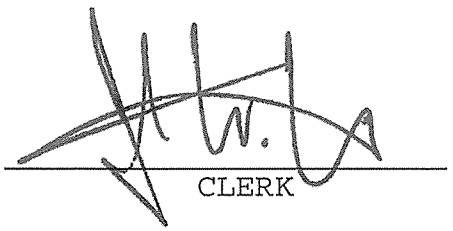
In particular, plaintiff was precluded from relitigating the issue of whether defendant EDC had "willfully, wrongfully, unilaterally and materially breached" its contract with plaintiff by "repeatedly raising the bar" for transfer of certain City property, because the District Court found that EDC had not repeatedly imposed new closing conditions but instead had insisted that plaintiff perform responsibilities assigned to it in the contract. As to the issue of whether defendant Perine had tortiously interfered with the contract by unjustifiably encouraging and inducing EDC to breach it, the District Court found that Perine's negative views of plaintiff stemmed from plaintiff's history of nonpayment of rent, illegal subletting and inability to gain consensus among other tenants in the building in favor of its performing arts project. Finally, whether HPD's refusal to begin eviction proceedings against the building's tenants without a memorandum of understanding was infected by procedural or substantive irregularities is an issue that was addressed specifically by the District Court, which found no such irregularities in HPD's decision.

These unequivocal factual findings were made by the District

Court in the course of deciding a motion to dismiss that was converted to a summary judgment motion, which the District Court decided in a painstaking and comprehensive opinion. Prior to the motion, the parties engaged in comprehensive discovery with respect to plaintiff's claims predicated on federal law; in the course of discovery, defendants turned over to plaintiff thousands of pages of documents and several depositions were conducted of key decision makers (who were employees of the various defendants) on the subject project. As these factual findings were actually litigated, squarely addressed and specifically decided, plaintiffs are collaterally estopped from relitigating them (*see Peterkin v Episcopal Social Servs. of N.Y.*, 24 AD3d 306 [2005]).

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

ENTERED: AUGUST 4, 2009



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Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ.

722 The People of the State of New York, Ind. 5811/99
Respondent,

-against-

Terence G. Jordan,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (James A. Yates, J.), rendered July 5, 2007, resentencing defendant, as a second felony offender, to a term of 3 years with 5 years post release supervision, unanimously affirmed.

On January 27, 2000, defendant pleaded guilty to assault in the second degree for striking and breaking the jaw of his girlfriend's 15-year-old daughter. In exchange for his guilty plea, defendant was promised a determinate sentence of 3 years imprisonment, and on March 6, 2000, the court imposed the promised term. No mention was made, either at the plea allocution or at the sentencing proceeding, that defendant would be subject to any period of post release supervision (PRS). Despite being given written notice of his right to appeal from the judgment, defendant did not do so.

In 2002, defendant was released from prison and began

serving a term of PRS. In 2007, while still under PRS, he moved pursuant to CPL 440.20 to set aside the sentence on the ground that he was not advised at the time of sentencing that his sentence included a period of PRS. The court had defendant produced so it could formally pronounce the PRS component. On July 5, 2007, in open court, the court orally informed defendant, who was represented by counsel, that his sentence included a five-year period of PRS (*see People v Sparber*, 10 NY3d 457, 471 [2008]; *People v Edwards*, 2009 NY Slip Op 3767 [2009]).

Defendant now appeals from the resentencing proceeding and maintains that the court lacked jurisdiction, that he was deprived of due process and that he was subject to double jeopardy.[3] As a remedy, defendant asks that the PRS component of his sentence be excised. Defendant's request is academic because, by the time this appeal was heard, he had already completed his term of PRS. Thus, there is no remaining sentence for defendant to serve and nothing for this Court to excise. In any event, this Court, in other similar PRS appeals, has rejected

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[3] Although the sentencing court indicated that it was denying defendant's 440.20 motion, it granted relief to the extent of pronouncing the PRS portion of the sentence. Defendant did not seek leave to appeal from the denial of his 440.20 motion, and his time to appeal from the original judgment has long expired.

these legal arguments (*see People v Rodriguez*, 60 AD3d 452 [2009]; *People v Lewis*, 60 AD3d 425 [2009]; *People v Hernandez*, 59 AD3d 180 [2009]; *People v Williams*, 59 AD3d 172 [2009]).

Defendant does not contend that the court erred in any other respect during the resentencing proceeding. Rather, he argues that this Court, on an appeal from the resentence, must vacate his January 2000 plea because the court failed to apprise him of the PRS aspect of his sentence when the plea was taken (*see People v Catu*, 4 NY3d 242 [2005]). We conclude that defendant's belated attacks on the plea proceeding are not properly before us. CPL 450.30(3) provides that "[f]or purposes of appeal, the judgment consists of the conviction and the original sentence only, and when a resentence occurs more than thirty days after the original sentence, a defendant who has not previously filed a notice of appeal from the judgment may not appeal from the judgment, but only from the resentence." In *People v DeSpirito* (27 AD3d 479 [2006]), the Second Department applied this statutory provision and rejected a *Catu* claim raised on an appeal from a resentence. The court held that the defendant's challenge to his guilty plea on the ground that he was not advised that he would be subject to PRS is not reviewable on an appeal only from the resentence. We reach the same conclusion here.

In cases outside of the *Catu* context, we have consistently held to the view that a defendant's failure to timely appeal from

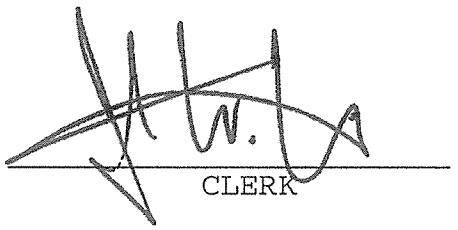
the underlying judgment jurisdictionally forecloses any challenge to the plea proceeding on an appeal from a resentence (*see People v McMillan*, 228 AD2d 166 [1996], *lv denied* 88 NY2d 1070 [1996]; *People v Lugo*, 176 AD2d 177 [1991]; *see also People v Quinones*, 22 AD3d 218 [2005], *lv denied* 6 NY3d 817 [2006]; *People v Ramirez*, 5 AD3d 102 [2004], *lv denied* 2 NY3d 805 [2004]; *People v Williams*, 192 AD2d 322 [1993]). The other three Departments of the Appellate Division have come to the same conclusion (*see People v Ferrufino*, 33 AD3d 623 [2006], *lv denied* 7 NY3d 901 [2006]; *People v Satiro*, 28 AD3d 497 [2006]; *People v Pittman*, 17 AD3d 930 [2008], *lv denied* 5 NY3d 767 [2005]; *People v Main*, 213 AD2d 981 [1995], *lv denied* 85 NY2d 976 [1995]), and we see no reason to depart from these holdings and apply a different rule here.

People v Louree (8 NY3d 541 [2007]), relied on by defendant, does not require a contrary result. In *Louree*, the Court of Appeals held that a defendant may raise a *Catu* violation on direct appeal, even in the absence of a post-allocution motion. However, this is not a direct appeal of the judgment and in fact, defendant never took such an appeal. We do not read *Louree* as requiring this Court to ignore the statutory limits of appellate jurisdiction contained in CPL 450.30(3) and the prior opinions of the Appellate Division construing this statute. Nor are there any other post-*Catu* Court of Appeals cases, or decisions from

this Court, that would require us to grant the relief defendant seeks in the procedural context presented here. To do so would violate the well-settled principle that no appeal lies from an order arising out of a criminal proceeding absent specific statutory authorization in the CPL (*see People v Stevens*, 91 NY2d 270, 277 [1998]; *People v Santos*, 64 NY2d 702, 704 [1984]).

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

ENTERED: AUGUST 4, 2009



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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

799 The People of the State of New York, Ind. 408/02
Respondent,

-against-

Alkim Billip, etc.,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert A. Sackett, J. at jury trial and sentence; Seth L. Marvin, J. at resentence), rendered September 8, 2005, as amended November 20, 2007, convicting defendant of assault in the second degree, and sentencing him, as a second felony offender, to a term of 7 years, unanimously affirmed.

Defendant's current claim that the inmate history record introduced by the People was not admissible as a business record because it contained inadmissible hearsay was not preserved because defense counsel did not raise this specific objection at the time the document was proffered, but rather made generalized objections to the admission of the document (*see People v Piper*, 21 AD3d 816 [2005], *lv denied* 5 NY3d 884 [2005]; *People v Davis*, 290 AD2d 377 [2002], *lv denied* 100 NY2d 560 [2003]; *People v Shaw*, 232 AD2d 174 [1996], *lv denied* 89 NY2d 946 [1997]). The

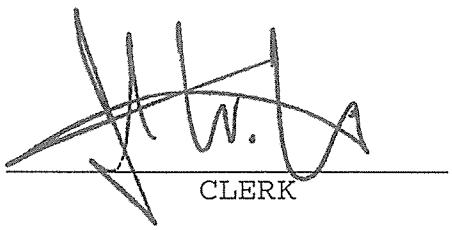
request to entirely preclude the testimony of the custodian of the record, made before the document was offered, did not preserve the issue because the court specifically stated it was denying the motion without prejudice and told counsel she could object during the course of the testimony. Thus, the trial court, in this motion in limine, did not definitively rule on the issues now raised on appeal (*see People v Martinez*, 18 AD3d 343 [2005], *lv denied* 5 NY3d 808 [2005]). We decline to review the claim in the interest of justice.

Similarly, defense counsel did not preserve the claim that the document failed to show that defendant was, in fact, the person whose sentence information appeared in the inmate record because this specific objection was not raised when the document was introduced. Nor were these issues preserved by defense counsel's motion to dismiss at the end of the case, which did not include these specific objections (*see People v Carter*, 46 AD3d 376 [2007], *lv denied* 10 NY3d 839 [2008]), or by the post-verdict motion (*see People v Green*, 46 AD3d 324 [2007], *lv denied* 10 NY3d 840 [2008]). As a result, defendant's contention that his conviction is not supported by legally sufficient evidence is not preserved and we decline to review it in the interest of justice. No basis exists to accept defendant's argument that his conviction was against the weight of the evidence or to disturb the jury's determination to credit the witnesses who identified

defendant as the perpetrator of this assault (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). 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: AUGUST 4, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
James M. McGuire
Karla Moskowitz
Rolando T. Acosta, JJ.

5360
Ind. 98/06

The People of the State of New York,
Respondent,

-against-

Paris Simmons,
Defendant-Appellant.

Defendant appeals from the judgment of the Supreme Court, New York County (Edwin Torres, J.), rendered February 27, 2007, convicting him, after a jury trial, of attempted assault in the first degree, criminal possession of a weapon in the second degree and assault in the second degree, and imposing sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel, and Valerie A. Koffman, of the Bar of the State of Massachusetts, admitted pro hac vice, of counsel), for appellant.

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

SAXE, J.P.

The trial court in this matter correctly instructed the jury as to its task of deciding whether defendant harbored the requisite intent to be convicted of attempted assault in the first degree. We find that when the charge is considered as a whole, the court's supplemental instruction, responding to the request for clarification of whether intent can be formed on the spur of the moment, would not have led the jury to believe that the court was taking the question out of the jury's hands and simply informing it that such intent had been established. We therefore reject defendant's contention that the trial court committed prejudicial error by improperly directing a finding of intent, and we affirm the conviction.

The four-count indictment charged defendant with attempted murder in the second degree, attempted assault in the first degree, assault in the second degree, and criminal possession of a weapon in the second degree, arising out of an altercation between defendant and another young man in which the complainant was ultimately shot. At trial, during the course of its deliberations, the jury sent the court the following note with regard to the element of intent for the charge of attempted assault in the first degree:

"We need further clarification on Count #2, i.e., Does

> a spur of the moment action constitute intent? Please define intent. Did the accused have to come to the fight with the intent to shoot for there to be attempted assault in the 1st degree?"

Although defense counsel requested that the court simply define intent again and not answer either of the jury's questions except to say "it all depends on the circumstances," the court rejected defense counsel's challenge to its proposed response and determined both to provide an expanded charge on intent and to answer the jury's first question by saying "yes . . . depending on the circumstances," and the second question "no."

The court responded to the jury's note asking, "Does a spur of the moment action constitute intent?" with the following supplemental instruction to the jury:

> "First off I'm going to give you the longer version of what constitutes intent and that may very well answer these questions. [¶] [The] [c]rimes with which the defendant is being charged are crimes which require intent. Intent is defined by the penal law of this state as the situation that exists when a person has a conscious objective to cause the act with which he is charged. [¶] The burden is on the People to prove the intent of the defendant beyond a reasonable doubt. If you find from the evidence that the defendant did not have a conscious objective to bring about the violation of law you must find the defendant not guilty of this crime. Intent[,] then[,] is a mental operation that can be determined[,] usually only by an examination of all the facts and circumstances surrounding the commission of a crime and the events leading up to, including and following it.
>
> "Now, science has not yet reached the stage where a man's mind can be x-rayed in order to disclose what thoughts are running through his mind. Intent is the secret and silent operation of the mind[,] and its formation can be

> instantaneous or drawn out . . . [¶] So, [intent's] only visible physical manifestation is an accomplishment or intended accomplishment of the thing decided upon[,] and since intent is, as pointed out, a mental operation[,] it is not always easy to establish. It depends upon the peculiar circumstances of the case, upon the man's spoken words, his actions, and sometimes upon a combination of both.
>
> "Now, going directly into your question does a spur of the moment action constitute intent, in this context I would say yes[,] [d]epending on the peculiar circumstances of the situation. In this instance my answer is yes.
>
> "Perhaps I can throw in an analog, example removed from this particular pattern. Suppose two guys bump one another on the street, one guy says ["]screw you["] to the other guy and this guy pulls out a pistol and shoots him. That intent in that instance was formulated almost instantaneously, spur of the moment. Again[,] that's an example. Here the answer is yes to that question. Could be drawn out, could be instantaneous."

The trial court then turned to the second part of the question, which had merely phrased the same question a different way:

> "'Did the accused have to come to the fight with the intent to shoot for there to be attempted assault in the first degree?' The answer to this is no. The defendant could have arrived at the scene to either confront or talk and then formulated the intent to shoot. So, the answer to question one is yes and the answer to question two is no."

Defense counsel took exception, asserting that "answering the question and giving the example . . . was just too close to the factual pattern here."

Initially, we observe that whatever questions are raised as to the phrasing of the court's response to the jury's questions, the court's answer provided the requisite "meaningful response" (*see People v Kisoon*, 8 NY3d 129, 134 [2007]), which

distinguishes this case from the recent Court of Appeals decision in *People v Aleman* (12 NY3d 806 [2009]), in which a conviction was reversed due to the trial judge's failure to respond to the portion of a jury note stating that the jury was hopelessly deadlocked.

Turning to defendant's claim of prejudicial error, we must keep in mind that in reviewing the adequacy of a trial court's instructions, the challenged portions of the charge should not be examined in a vacuum, but must be assessed in the context of the jury instructions in their entirety. An instruction "may be sufficient, indeed substantially correct, even though it contains phrases which, isolated from their context, seem erroneous. The test is always whether the jury, hearing the whole charge, would gather from its language the correct rules which should be applied in arriving at [a] decision" (*People v Drake*, 7 NY3d 28, 33-34 [2006] [internal quotation marks & citations omitted]; *see also People v Fields*, 87 NY2d 821, 823 [1995]; *People v Coleman*, 70 NY2d 817 [1987]).

In many cases, trial courts have misspoken as to an essential focus of the defense, and yet it has repeatedly been found that these charges, viewed in their entirety, conveyed the correct standards to the jury. For instance, in *People v Drake* (*supra*), in which the central issue was whether eyewitness

identifications of the defendant were accurate, the trial court erroneously charged the jury that it should not use the testimony of the eyewitness reliability expert "to discredit or accredit the reliability of eyewitness testimony in general, or in this case" (7 NY3d at 32). The error did not require reversal, however, since the remainder of the charge correctly instructed that the expert's testimony was offered to provide the jury with factors that studies had shown to be relevant to assessing a person's ability to perceive and remember (*id.* at 34).

In *People v Fields* (*supra*), the trial judge, having provided instruction regarding the presumption of innocence, the burden of proof and the definition of reasonable doubt, then said, "If the evidence in the case reasonably permits a conclusion of either guilt or innocence, you should adopt a conclusion of innocence" (87 NY2d at 822). The Court of Appeals explained that this instruction was improper because a juror might interpret it to authorize a guilty verdict even if guilt was not established beyond a reasonable doubt, but concluded that the charge as a whole sufficiently conveyed the correct standard (*id.* at 823). It rejected the dissenter's view that "[s]ince the offending instruction came at the end of the reasonable doubt charge, there is a very real danger that the jurors regarded it as the 'last word' and the most definitive explanation of the concept" (*id.* at

825).

And, in *People v Umali* (10 NY3d 417 [2008], *cert denied* __ US __, 129 S Ct 1595 [2009]), after the trial court correctly instructed the jury that it was the People's burden to disprove the justification defense beyond a reasonable doubt, it proceeded to explain the objective and subjective standards by which the defense could be disproved. Regarding the subjective test, the court incorrectly instructed:

> "If the evidence convinces you beyond a reasonable doubt that deadly physical force was necessary to prevent the imminent use -- that the defendant believed that deadly physical force was necessary to prevent the imminent use of deadly physical force you still must find the second test, which is the objective test, were defendant's beliefs reasonable under an objective standard" (10 NY3d at 426).

This portion of the charge, the Court of Appeals observed, was erroneous because it instructed the jury to consider whether it was proved beyond a reasonable doubt that the defendant believed deadly force was necessary, rather than whether it was proved beyond a reasonable doubt that the defendant *did not* believe deadly force was necessary. This inversion of the inquiry might lead the jury to consider whether the defendant had proved that he had believed deadly physical force to be necessary, instead of whether the People had proved that he did *not* believe it. However, the Court found that the remainder of the charge properly instructed the jury that it was always the People's

burden to disprove justification, and that the charge as a whole could not have misled the jury (*id.* at 427-428).

In the matter before us, the trial judge fully and properly instructed the jury from the outset in its preliminary instructions, as well as throughout the charge, that the jurors were the sole and exclusive judges of the facts of the case and that the element of intent was one of those facts. Furthermore, the court's charge clearly explained that it was the jury's evaluation of the evidence that controlled, "irrespective of what the attorneys on either side of the case may say regarding the facts and of course regardless of anything I may say to you during the course of this charge regarding the facts."

We are also cognizant that a reading of the judge's words in the trial transcript may be subtly different from what the jury hears. In a transcript, we are unable to discern such elements as the court's emphasis, and, indeed, even small changes in punctuation may alter the exact sense of the words as they were conveyed to the jury. For instance, in the transcript, the first part of the challenged language is divided into separate sentences: "[i]n this context I would say yes. Depending on the peculiar circumstances of the situation." Reading these words divided into separate sentences in this way could create the impression that the words "I would say yes" were intended as

definitive rather than conditional. Had the transcriber used a comma instead of a period before the words "depending on the circumstances," the transcript would have more accurately conveyed the point the court was trying to make to the jury, that, yes, intent *may be* found to have been formed at the spur of the moment, *depending on the circumstances*. The court was not flatly saying "Yes" in answer to the jury's inartfully phrased question, "Does a spur of the moment action constitute intent?" It was saying, "yes, *depending on the circumstances*," thereby leaving it in the jury's hands to consider the circumstances and decide whether the requisite intent had been formed.

Of course, as we examine that portion of the transcript, the court's appropriately conditional response that a spur of the moment action may "constitute intent," "*depending on the circumstances*," seems to be immediately undercut by the coda, "In this instance my answer is yes." These seven words present the nub of the difficulty, since, to the extent they are viewed in a vacuum, removed from the context of the instructions as a whole, these words seem to convey the sense that the court has made its own definitive determination that "in this instance" the defendant's spur of the moment action did, absolutely, "constitute intent."

But trial judges, like everyone else, may on occasion employ

inartful phrasings, "which, isolated from their context, seem erroneous" (*People v Drake*, 7 NY3d at 33 [internal quotation marks & citation omitted]). It is for this reason that we are required to view the court's instruction to the jury in its entirety.

By the time it employed those seven words, the trial court had given the jury an extended charge regarding the element of intent. It had instructed that intent "is a mental operation that can be determined usually only by an examination of all the facts and circumstances surrounding the commission of a crime and the events leading up to, including and following it," that "its formation can be instantaneous or drawn out," and that "since intent is, as pointed out, a mental operation[,] it is not always easy to establish. It depends upon the peculiar circumstances of the case." By giving these additional instructions as to the considerations relevant to finding intent, before answering the jury's direct question, the court was in effect emphasizing its previous instruction that the question of whether the requisite intent was established remained one for the jury, not the judge, to decide.

The court then moved on to the jury's direct question, "Does a spur of the moment action constitute intent?" (which the court properly treated as if it read, "*Can* a spur of the moment action

constitute *an intentional act*?"), and answered with the previously discussed language that ended with the words "In this instance my answer is yes." Since the jury's clear intent was to ask if a spur of the moment action could be intentional, the answer "Yes" meant not, "Yes, defendant harbored such an intent," but "Yes, defendant *could have* formed the necessary intent at the spur of the moment."

Nor did the trial court's subsequent analogy -- which defendant also challenges -- which was provided to illustrate how intent may be formed "almost instantaneously, spur of the moment," serve to misguide the jury. Indeed, the court's conclusion of that illustration, with the words "[c]ould be drawn out, could be instantaneous," further emphasized that the issues of when, how, and whether defendant formed the necessary intent were for the jury to determine.

It is readily apparent from taking all the court's answers together, and in light of the entire charge, that the court was merely providing further instruction to the jury in how to perform its job of determining whether defendant had formed the requisite intent.

What is more, the court's answer to the second part of the jury's question, "Did the accused have to come to the fight with the intent to shoot for there to be attempted assault in the

first degree?" further supports the conclusion that the instruction as a whole conveyed that it always remained the jury's task to determine the issue of intent. The court said, "The answer to this is no. The defendant could have arrived at the scene to either confront or talk and then formulated the intent to shoot." This second answer further acknowledged that it was ultimately up to the jury to make findings as to if and when any intent was formed.

Indeed, even the phrasing of the jury's question itself, and the fact that it was asked, makes it plain that the jury already understood that its assigned task included deciding whether defendant had formed the requisite intent and had simply been uncertain about whether he had to have harbored the intent before the act or could have formed the intent "instantaneously." Moreover, by asking this question about intent, the jury in effect indicated that it had already considered and rejected defendant's claim that the complainant's own gun had simply discharged without defendant's either taking hold of it or pulling the trigger; there is no reason to be concerned that the court's charge prevented the jury from adequately considering defendant's version of the events.

After carefully considering whether the jurors might have viewed the court's instructions as simply informing them that

defendant had, in fact, acted with the requisite intent, we find "no reasonable possibility that the jury could have misunderstood the court's response as a statement that intent had been established" (*People v Watts*, 43 AD3d 256, 259 [2007], *lv denied* 9 NY3d 965 [2007]). The jurors clearly understood the instruction that it was their task to decide whether defendant had committed the crime, including the physical shooting and the mental intent; their understanding is demonstrated by their checking with the court to make sure that intent could be formed at the spur of the moment. We have every reason to conclude that the jurors fully understood and fulfilled their assigned task, and no reason to conclude otherwise. It demeans the obvious abilities of this jury to conclude that it would have relinquished its responsibilities as the finder of facts based on a few words in the middle of a long supplemental charge.

There is no merit to defendant's claim that the hypothetical posited by the court was improper, or prejudiced his case. A trial judge "is not precluded from supplying hypothetical examples in its jury instructions as an aid to understanding the applicable law" (*see People v Wise*, 204 AD2d 133, 134-135 [1994], *lv denied* 83 NY2d 973 [1994]). Hypotheticals similar to the case at hand are proper as long as they are not so "strikingly similar" as to convey the judge's belief in the defendant's guilt

and possibly compel the jury to reach a verdict "in harmony" with the judge's conclusion (*see People v Hommel*, 41 NY2d 427, 430 [1977]). The hypothetical used by the court, about a shooting precipitated by two men bumping into each other, bears little relationship to the fact pattern presented here, in which defendant approached the victim, confronted him about a prior incident, struck him and -- as the jury found -- shot him. The court's analogy was not so similar to the facts of this case as to convey the court's view of the evidence (*compare People v Schenkman*, 46 NY2d 232, 238-239 [1978], *with People v Hommel*, 41 NY2d at 430). In any event, any error in the court's response was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Finally, when considering a court's response to a jury's specific questions, we should recognize the fine line the judge must walk. When a deliberating jury requests additional instructions on an issue, the trial court must "respond meaningfully" (*People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]). So, while trial judges must be careful when providing supplemental instructions beyond the studied language of the CJI, it is necessary that their answers actually be responsive to the particular question. A simple re-reading of the standard CJI instructions, to which cautious judges may prefer to limit themselves, may be insufficient to

provide the clarification needed by the jury on a particular issue when the initial standard charge language failed to explain the point clearly enough. We therefore look to trial judges to exercise judgment and discretion in framing meaningful responses to jury questions. But, in exchange for imposing that responsibility, we must, in turn, allow for a degree of imperfection in the framing of such off-the-cuff answers. When a prejudicial impact is claimed, we should carefully examine the entire charge for its impact as a whole before sending the matter back for a new trial. Upon so doing here, we find that the charge, as a whole, conveyed that it was the jury's task to determine whether defendant harbored the requisite intent at the moment of the assault.

Defendant did not preserve his argument that the court gave counsel insufficient notice of its intended response to the jury's note (*see e.g. People v Cintron*, 273 AD2d 84 [2000], *lv denied* 95 NY2d 889 [2000]), and likewise failed to preserve his evidentiary claims, and we decline to review these claims in the interest of justice. As an alternative holding, we reject these claims on the merits, except that we find that the People's redirect examination of a detective concerning a conversation he had with the victim was improper but harmless.

Accordingly, the judgment of the Supreme Court, New York

County (Edwin Torres, J.), rendered February 27, 2007, convicting defendant, after a jury trial, of attempted assault in the first degree, criminal possession of a weapon in the second degree and assault in the second degree, and sentencing him to an aggregate term of 9 years, should be affirmed.

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

MOSKOWITZ, J. (dissenting)

I would reverse and remand for a new trial because the trial court's response to the jury's note asking whether a spur of the moment action could constitute intent was not balanced. Rather, the court's response, followed by a hypothetical that mirrored the prosecution's version of events, inadvertently answered the jury's ultimate question. Therefore, I dissent.

Defendant and Mark J., both teenagers in September 2004, had known each other for about 10 years during what they agree was a rocky relationship. On the night of September 3, 2004, defendant approached Mark. Earlier in the evening, the two men had had a hostile encounter over defendant's refusal to provide Mark with the number of someone from whom Mark could purchase marijuana. Mark admittedly had made fun of defendant during that encounter.

According to Mark's testimony, defendant rode up on his bicycle and immediately hit Mark in the face with a "metal object." Mark stood up and tried to defend himself by grabbing defendant by the collar with both hands, but defendant hit him in the face again with the metal object. Mark tried to take the object away from defendant, but defendant hit him in the face a third time, causing him to stumble backwards. At this point, defendant raised his arm and Mark heard what sounded like a firecracker.

Defendant testified to a different version of how the shooting occurred. Defendant testified that in the evening he came across Mark and two of Mark's friends sitting in a courtyard celebrating one of the friends' birthday. Despite the earlier angry exchange with Mark, defendant went over to say "Happy Birthday" as he knew the person whose birthday it was. One of the friends invited defendant to have a drink with them at which point Mark became angry, yelling that he did not want to share his Hennessey with defendant.

Defendant testified that he then pulled out a pair of brass knuckles that he was carrying and hit Mark in the face with them. Mark, at 6 feet tall and 215 pounds, was much bigger than defendant. Mark grabbed defendant by the neck. Defendant punched Mark in the face a second time. Defendant then saw Mark reaching for something in his waistband and Mark pulled out a gun with his right hand. Defendant grabbed Mark's right wrist. During the struggle, Mark's gun discharged, shooting Mark. Thus, defendant's version of events was critically different from Mark's, because, according to defendant, Mark pulled out Mark's own gun and it discharged while defendant was struggling with Mark, as opposed to defendant's bringing his own gun to the scene.

After being shot, Mark ran away from defendant. Meanwhile,

according to defendant, after the shot was fired, Mark dropped the gun and held his stomach. Another person who had been with Mark picked up the gun, and both Mark and defendant fled. Defendant hailed a cab, and, after stopping at a friend's home at 118th Street and Lexington Avenue, took a Metro North train back to Connecticut, where he had been living with his cousin. Defendant was eventually arrested in Connecticut.

Defendant was charged with attempted murder in the second degree, attempted assault in the first degree, criminal possession of a weapon in the second degree and assault in the second degree.

In its original charge to the jury regarding attempted assault in the first degree, the court instructed that "intent means conscious objective or purpose." After approximately two hours of deliberations, the jury sent the court the following note:

> "We need further clarification on Count # 2 [Attempted Assault in the First Degree], i.e. Does a spur of the moment action constitute intent? Please define intent. Did the accused have to come to the fight with the intent to shoot for there to be attempted assault in the 1st degree?"

The court read the note into the record and apprised the parties of the response it intended to give to the jury, namely, that it intended to: (1) define intent again; (2) answer "yes . . .,

depending on the circumstances," to the question whether a "spur of the moment action" could constitute intent; and (3) answer "no" to the question whether defendant had to "come to the fight with the intent to *shoot*" in order to be convicted of attempted assault in the first degree.

Defense counsel asked the court to "just define intent for them and not to answer either of [the jury's] questions [except] to say it all depends on the circumstances and they are the finders of the facts." The court reiterated that it intended to define intent and to answer the jury's questions.

Thereafter, the court addressed the jury. The court noted that it would provide the jurors with "the longer version of what constitutes intent," which "may very well answer the[] questions" posed in the jury's note. The court then defined intent as "a conscious objective to cause the act with which [the defendant] is charged." The court noted that the People have the burden "to prove the intent of the defendant beyond a reasonable doubt," and instructed, "If you find from the evidence that the defendant did not have a conscious objective to bring about the violation of the law[,] you must find the defendant not guilty of this crime." The court then expanded on the definition provided in its initial instruction, by adding that the formation of intent "can be instantaneous or drawn out." The court concluded its definition

by commenting that a determination of a defendant's intent "depends upon the peculiar circumstances of the case, upon the man's spoken words, his actions and sometimes upon a combination of both."

The court could have stopped there in answering the jury's question as to whether a "spur of the moment action" could constitute intent. However, the court continued by stating:

> "Now, going directly into your question does a spur of the moment action constitute intent, *in this context I would say yes.* Depending on the peculiar circumstances of the situation. *In this instance my answer is yes.*" (emphasis supplied)

Then, the court related a hypothetical to the jury.

> "Perhaps I can throw in an analog [*sic*], example removed from this particular pattern. Suppose two guys bump one another on the street, one guy says ['] screw you['] to the other guy and this guy pulls out a pistol and shoots him. That intent in that instance was formulated almost instantaneously, spur of the moment. Again, that's an example. Here the answer is yes to that question. Could be drawn out, could be instantaneous. 'Did the accused have to come to the fight with the intent to shoot for there to be attempted assault in the first degree?' The answer to this is no. The defendant could have arrived at the scene to either confront or talk and then formulated the intent to shoot. So, the answer to the question one is yes and the answer to question two is no. You may resume deliberations."

After the jury left the courtroom to resume deliberations, defense counsel objected to the court's response to the jury

note:

> "I have an exception to the example you gave. I have no quarrel with you reading and defining intent, but answering the question and giving the example I think was just too close to the factual pattern here and that really prejudiced the defendant and I have to object to it."

The court noted defendant's exception. Five minutes later, the jury returned its verdict of guilty of attempted assault in the first degree, criminal possession of a weapon in the second degree and assault in the second degree.

In responding to jury requests, the trial court "is vested with some measure of discretion in framing its response and is in the best position to evaluate the jury's request in the first instance" (*People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]). However, the court must issue instructions that are balanced (*see People v Aleman*, 12 NY3d 806 [2009]; *People v Bell*, 38 NY2d 116, 120 [1975] and "avoid even the appearance of bias" (*People v Watkins*, 157 AD2d 301, 306-307 [1990]). Accordingly, it is reversible error for the court to emphasize factors favorable to one side's theory of the case (*see generally People v Brown*, 129 AD2d 450, 451-453 [1987]; *People v Melville*, 90 AD2d 488, 488-489 [1982]).

While the court may provide hypothetical examples in its jury instructions "as an aid to understanding the applicable law"

(*People v Wise*, 204 AD2d 133, 134-135 [1994], *lv denied* 83 NY2d 973 [1994]), the hypothetical should not be so "strikingly similar" to the facts before the jury as to convey the court's view of the evidence (*People v Hommel*, 41 NY2d 427, 430 [1977]). "[T]he crucial question is whether the charge, in its entirety, conveys an appropriate legal standard and does not engender any possible confusion" (*Wise*, 204 AD2d at 135). Thus, in *People v Brown*, this Court reversed a conviction because, to illustrate a situation where intent could be inferred, the trial court used a hypothetical of a person killed by a gunshot wound to the head, "surely an inappropriate illustration in a case in which the deceased died from a stab wound to the chest" (129 AD2d 454).

In the case before us, viewing the trial court's answer to the jury's question in its entirety, we find that the court violated these mandates to respond to jury inquiries in a balanced fashion that "does not engender any possible confusion." The court's response to the jury's note was improper because the court's answer inadvertently directed the jury to find that the prosecution had proven intent to shoot and because the facts of the hypothetical adopted the People's version of events.

The jury had asked whether intent can occur on the spur of the moment. In response, the court stated, "[I]n this context I would say yes. Depending on the peculiar circumstances of the

situation. In this instance my answer is yes." The court then gave the jury a hypothetical example of criminal intent that mirrored Mark's (and therefore the prosecution's) version of how the crime occurred and instructed the jury that the shooter in the hypothetical exhibited criminal intent. Despite defense counsel's objection, the court did not give any curative instruction.

The court's answer to the jury's question about spur of the moment intent prejudiced defendant. In answering the jury's question, the court inadvertently answered the ultimate question in the case, because any reasonable juror could easily have concluded that, the words "in *this* context" referred to the case at hand and that "yes" meant that defendant had acted with intent (see *People v Watkins*, 157 AD2d at 307 ["a court may not suggest its own opinion as to guilt"]).

The court compounded the prejudice by giving the jury a hypothetical involving "two guys" who "bump one another on the street" one says "[']screw you['] to the other guy and this guy pulls out a pistol and shoots him." This hypothetical was prejudicial because it closely resembled the prosecution's version of events: that defendant rode his bicycle into a courtyard where Mark was sitting, hit Mark and shot him. By giving this hypothetical and telling the jury that the criminal

in the example acted with criminal intent, the court essentially instructed the jury that defendant intended to shoot Mark.

The court's instruction was particularly prejudicial given that it was hotly contested whether defendant brought his own gun to the scene or it was Mark's gun that discharged during the struggle with defendant. Which version of events to believe was critical to the determination of whether or not defendant had the requisite intent. The court's instruction took this determination away from the jury (*see e.g. People v Hill*, 52 AD3d 380, 382 [2008] [with respect to gang assault, analogy to orchestra could have led the jury to believe that any person involved in fight was guilty whether or not engaged in conduct intended to aid primary actor]).

That the court may have preceded this erroneous instruction with the standard instruction does not ameliorate this prejudice. It is irrelevant that the question that prompted the prejudicial instruction may have exhibited the jury's understanding that it was supposed to determine whether defendant had formed the requisite intent. The court's instruction essentially directed this jury, that was already struggling with the issue of criminal intent, to find in favor of the prosecution. The court failed to give any curative instruction after defense counsel objected. Thus, in light of the entire charge, I cannot agree with the

majority, that the court was merely providing further instruction on the issue of intent.

The cases the majority cites are vastly different from this case because in each one the charge as a whole conveyed the correct standard to the jury (*see, e.g., People v Umali*, 10 NY3d 417 [2008] [erroneous instruction on justification defense that improperly shifted to defense the prosecution's burden to prove justification beyond a reasonable doubt was harmless where other instructions repeatedly informed the jury that it was the prosecution's burden and court advised jury that defendant never had the burden to prove anything]; *People v Drake*, 7 NY3d 28 [2006] [charge as a whole did not communicate that jurors should disregard expert testimony, but rather that expert testimony was admitted to provide guidance as to evaluating eyewitness testimony]; *People v Fields*, 87 NY2d 821 [1995] [reasonable doubt charge as a whole conveyed correct standard]).

It is a cornerstone of our legal system that the roles of the court and the jury are separate and distinct, particularly regarding the issue of intent:

> "[T]he question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying

the significance of trial by court and jury."
(*People v Flack*, 80 Sickels 324, 334 [1891]; *see also People v Moran*, 246 NY 100, 103 [Cardozo, Ch J 1927] ["Whenever intent becomes material, its quality or persistence - the deranging influence of fear or sudden impulse or feebleness of mind or will - is matter for the jury if such emotions or disabilities can conceivably have affected the thought or purpose of the actor."])

Here, the court did not merely give the jury an erroneous context in which to evaluate the evidence. Rather, the court actually answered the jury's question, and in a way that the jury could easily have interpreted to mean that defendant had the requisite intent. The court immediately followed that answer with a hypothetical that mirrored the prosecution's version of events. The cumulative effect of this charge was to usurp the jury's function to come to its own conclusion about defendant's intent.

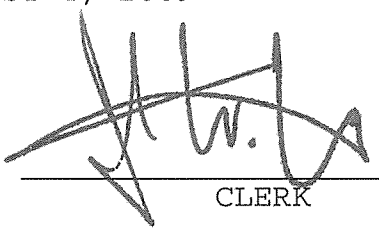
I am not unmindful of the difficulties trial judges face in responding meaningfully to questions from the jury. I recognize, as does the majority, that the standard charge may be insufficient to provide the jury with the information it needs to return a verdict. However, the paramount responsibility of a judge is to ensure a fair trial. Thus, while the majority would allow for "inartful phrasings" or "a degree of imperfection" in a

judge's framing of "off-the-cuff answers," a question from the jury does not mean a judge may suggest his or her own opinion about the guilt of the defendant or offer a hypothetical that favors one side.

Contrary to the majority's position, this error was not harmless. Intent to cause serious physical injury by means of a deadly weapon is a critical element of attempted assault in the first degree (Penal Law § 120.10[1]). The court's instruction took the determination of whether that element was proved away from the jury.

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

ENTERED: AUGUST 4, 2009



CLERK