SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 3, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4605 The People of the State of New York, Ind. 1682/04
Respondent,

-against-

Norman McBride,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Daniel A. Warshawsky of counsel) and Fried, Frank, Harris, Shriver & Jacobson, LLP, New York (Joshua Roth of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Dana Poole of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at suppression hearing; Daniel P. FitzGerald, J. at plea and sentence), rendered March 31, 2005, convicting defendant of attempted robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 14 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress statements and physical evidence as fruits of a warrantless home arrest that allegedly violated *Payton v New York* (445 US 573 [1980]). Initially, we find no basis to disturb the court's credibility determinations, including its rejection of those

portions of the testimony of a defense witness that did not correspond to the police testimony.

It is undisputed that the police had probable cause to arrest defendant for an armed robbery. When the police went to defendant's residence at about 11:00 PM, after he had been identified as a participant in a restaurant robbery, they knocked, heard noise within, but received no response. After several minutes of knocking, one officer called the apartment on the lobby intercom, and a male voice answered. Meanwhile, other detectives, concerned that defendant might try to flee, climbed the fire escape, and observed defendant lying face down on a bedroom floor. When the officers asked defendant, again, to open the door, the detective at the fire escape window saw someone else run by. Detectives at the apartment's door were greeted by a distraught and hyperventilating young woman who was unable to respond to their inquiries as to what was going on and whether she was all right. As a result, the detectives entered the apartment to ensure that no one was in danger within, and immediately arrested defendant.

We conclude that this warrantless entry was justified by exigent circumstances, including, in particular, the violent nature of the underlying offense, the knowledge of the police that defendant was in the apartment and their reasonable belief that he was armed, and the behavior and demeanor of the woman

that suggested a dangerous and volatile situation (*see People v Pollard*, 304 AD2d 476 [2003], *lv denied* 100 NY2d 585 [2003]). We also reject defendant's argument that the police created any exigency. The evidence properly credited by the hearing court did not show that the police did anything to frighten the woman out of the apartment. On the contrary, the police had every reason to believe she was reacting to some actual or threatened conduct by defendant, who the police knew to be a parolee wanted for armed robbery. We note that at the suppression hearing defendant made no argument concerning the seizure of the hat, gloves and coat, and thus the lawfulness of the seizure is not properly before us.

Given our conclusion that the warrantless entry into the apartment was justified by exigent circumstances, we have no occasion to review the hearing court's finding that defendant's statements at the precinct were sufficiently attenuated from any unlawful entry.

The hearing court properly denied defendant's motion to suppress identification testimony. The lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The participants were reasonably similar to each other and defendant did not stand out. The lineup was not rendered suggestive by the fact that defendant wore a gray sweatshirt in the lineup, which was part of the

clothing description provided by one of the witnesses to the robbery. This unremarkable item of clothing would not reasonably be construed to have drawn attention to defendant, especially since some lineup participants wore sweatshirts of other colors, since the sweatshirt was only a part of a detailed clothing description, and since the passage of several days between the robbery and the lineup reduced the significance of any similarity between the attire of a lineup participant and that of the described suspect (*see People v Santos*, 250 AD2d 413 [1998], *lv denied* 92 NY2d 905 [1998], *cert denied* 525 US 1076 [1999]).

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

ENTERED: FEBRUARY 3, 2009

CLERK

Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4983 The People of the State of New York,
Respondent,

-against-

Desirie Wilson,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

Judgment, Criminal Division of Supreme Court, Bronx County (Michael A. Gross, J.), rendered September 8, 2004, convicting defendant, after a nonjury trial, of attempted aggravated harassment in the second degree, and sentencing her to a conditional discharge for a period of 1 year, affirmed.

The accusatory instrument was facially sufficient. Furthermore, the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The complainant's daughter and defendant's daughter were involved in an altercation outside their high school. Defendant was a school safety officer assigned to the school. Defendant testified that, at the direction of the school's assistant principal for security, she placed a telephone call to the complainant the day after the incident. She stated that she asked the complainant to come to

the school with her daughter to participate in a mediation with defendant's daughter. Defendant claimed that she made the call strictly in her official capacity. The complainant testified that defendant did call her, but stated to her "If [you] cared about [your] daughter's well-being, about [your] daughter's safety, you [will] drop the charges." Although defendant denied making the statement, there is no basis for disturbing the court's determinations concerning credibility.

Defendant's statement constituted a threat that satisfied the aggravated harassment statute because it specifically referred to placing the safety of the complainant's daughter in jeopardy (*see People v Tiffany*, 186 Misc 2d 917, 920-921 [Crim Ct, NY County 2001]). Indeed, defendant had a motive for making the threat. She acknowledged that her daughter "had something to lose" if the complainant pressed criminal charges, since defendant's daughter had a disciplinary record at the school. Additionally, the threat was credible because defendant, in her capacity as a school safety officer, was in a position to jeopardize the well-being of complainant's daughter. Accordingly, the statement can only reasonably be interpreted as presenting a "clear and present danger of some serious substantive evil," sufficient for criminal liability to attach (*see People v Dietze*, 75 NY2d 47, 51 [1989]).

The dissent's focus on the fact that defendant was directed

to make the call by a superior is misplaced, as that fact is without legal import. It appears from the record that defendant simply disregarded the purpose for which she was asked to make the phone call and took the opportunity to threaten the complainant. Similarly irrelevant is the dissent's observation that defendant "deals with thousands of teenagers." Obviously, this situation was unique insofar as defendant's own daughter was involved.

Also unpersuasive is the dissent's position that the statement made in the telephone call is susceptible to more benign interpretations. Tellingly, the dissent does not offer any alternative constructions of the statement. Indeed, the statement cannot possibly be construed as anything other than a threat to the complainant.

Finally, we perceive no basis for modifying the sentence. In fact, defendant actually seeks an adjournment in contemplation of dismissal, and there is no basis for such relief.

All concur except DeGrasse and Freedman, JJ. who dissent in a memorandum by Freedman, J. as follows:

FREEDMAN, J. (dissenting)

I respectfully dissent and would reverse the conviction based on the insufficiency of the evidence. The facts of this case, even when viewed in the light most favorable to the People, are insufficient to warrant a conviction of attempted aggravated harassment in the second degree because it is impossible to glean, from the language allegedly used, any intent to harass, annoy, threaten or alarm.

Defendant, was a school safety agent at DeWitt Clinton High School, a position that she had held for eight years. Her daughter, Ebony J., together with two other girls, was involved in an altercation with another girl, Laura C., known as "Jasmine." That same afternoon, Jasmine called her mother, Maria D., who came to school, and Jasmine pointed defendant out to her mother, indicating that defendant's daughter was one of the girls involved. Jasmine attempted to speak with defendant, but the latter was called away. The following morning, the assistant principal in charge of security at the school, Stan Dubin, directed defendant to call Jasmine's mother for the purpose of setting up a mediation process and furnished her with Ms. D.'s telephone number. Ms. D. testified that when defendant called, she identified herself as Ebony's mother and started out by saying "she understood what I was going through because my daughter [was] assaulted . . .," and that she also "stated that

if I cared about my daughter's well-being, about my daughter's safety, I would drop the charges." Ms. D. testified that she felt threatened by those words, but acknowledged that defendant urged her to come to school and that she and Ebony would be there. When Ms. D. went to the school to meet with the assistant principal, one of the other girls, defendant and Ebony were there as promised. The girls had apparently been arrested but the District Attorney declined to press charges against the girls. Ms. D. then went to the police station and reported that she had received a harassing telephone call from defendant. When defendant was arrested, she stated to the arresting officer, Detective Peter Simon, "I only made a phone call." Detective Simon, who did not know that the assistant principal had instigated the telephone call, acknowledged that when he arrested her he may have told her that she was being charged with the felony of witness tampering and that he told her that they had a tape recording or her making a threat. There was no such recording.

Stan Dubin testified that he had directed or asked defendant, whom he had known for four years, to make the telephone call to urge Ms. D. and Jasmine to participate in mediation because defendant had effectively mediated many disputes at the school and was "a wonderful safety school agent." He testified that "She'[d] handled dozens upon dozens of

difficult cases involving fights, disputes, everything under the sun from a disciplinary point of view; . . . most of the cases she's been involved with, she's taken an interest in and reached good settlement with almost all of them as far as the parties are involved." He also testified that contacting parents was part of her responsibilities and that no improprieties had ever been reported to him. Dwayne White, defendant's supervisor at DeWitt Clinton for six years, and a Level 3 member of the New York Police Department, Safety Division, testified that defendant, with whom he had daily contact, was very professional, very accurate and attentive to details and that he had never received any complaint about her. He also stated that the students found her very trustworthy and respected her. He was familiar with the incident, and had actually diverted Jasmine when she had tried to approach defendant.

Defendant had been charged with "attempted" violations of subdivisions (1) and (2) of Penal Law § 240.30 which state that "[a] person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she:

"1. Either (a) communicates with a person, anonymously or otherwise, by telephone . . . or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm; or

"2. Makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication . . ."

The Court, after a nonjury trial, found defendant guilty of subdivision (1) but not (2) and sentenced her to a conditional discharge.

Thus, the issue is whether the record supports a conviction of attempted aggravated harassment in the second degree by virtue of a communication made in a manner likely to cause annoyance or alarm. It is conceded that the single telephone call at issue was initiated at the instigation of the assistant principal for the purpose of encouraging the complaining witness and her daughter to participate in a mediation program rather than to proceed with criminal charges. Stan Dubin had been an assistant principal for 25 years and had been in charge of safety at DeWitt Clinton for at least 4 years. Presumably, he had some expertise in security maintenance although he conceded that he exercised poor judgment in directing defendant to make this particular call.

Since there can be no doubt that the single communication at issue was initiated for a benign purpose and at the behest of the assistant principal, the court would have had to find that somewhere in the middle of the conversation, defendant decided to threaten, harass, alarm or annoy, or attempt to commit such acts. Assuming as we must that during the course of a telephone

conversation that Ms. D. testified occurred at about 10:15 or 10:45 a.m., but based on school log records occurred at about 8:10 a.m., defendant said something to the effect that if Ms. D. was concerned about her daughter's safety, she should not press charges. That one statement in the context of a single telephone call from a security officer who deals with thousands of teenagers and has been directed to offer a mediation alternative to a parent, does not rise to the level of a communication that is intended to harass, annoy, threaten or alarm another person.

In dealing with the predecessor statute Penal Law § 240.25(2), the Court of Appeals in *People v Dietze* (75 NY2d 47 [1989]), dismissed a case in which a defendant told another that she would "beat the crap out of [the victim] some day or night in the street" (*id.* at 50). The Court held that the statement was constitutionally protected speech because it did not present "a clear and present danger of some serious, substantive evil" (*id.* at 51). In that case the Court found that the vulgar outburst did not constitute such a threat. Similarly, in *People v Silverberg* (1 Misc 3d 62 [App Term 1st Dept 2003]), the majority reversed a conviction of aggravated harassment, holding that a single telephone call by a defendant to a lawyer, who would be a likely witness in a criminal proceeding stemming from the arrest of the defendant's former girlfriend, in which the defendant stated that he had "two letters written to the grievance

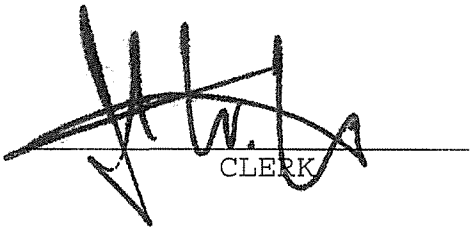
committee . . . and that [he] [could] have [the complainant] arrested based on two witnesses that said that [the complainant] assaulted [defendant] in Southampton" (*id.* at 63 [internal quotation marks omitted]), did not amount to an unequivocal threat.

Similarly, the statement allegedly made here is subject to more than one interpretation. Under the surrounding circumstances, it is neither an unequivocal threat nor does it present a clear and present danger. This is particularly true because defendant was specifically directed to recommend a mediation alternative, and because in a school with 4500 students, it is undoubtedly difficult to assure the safety of any particular student.

For those reasons, I would reverse the conviction.

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

ENTERED: FEBRUARY 3, 2009



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on February 3, 2009.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David B. Saxe
John T. Buckley
James M. Catterson, Justices.

The People of the State of New York,
Respondent,

Ind. 7277/03

3189
[M-5919]

-against-

Hector Coste,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Budd G. Goodman, J.), rendered on or about September 23, 2004,

It is unanimously ordered that said appeal be and the same is hereby dismissed as moot. Motion to discontinue appeal granted to the extent indicated.

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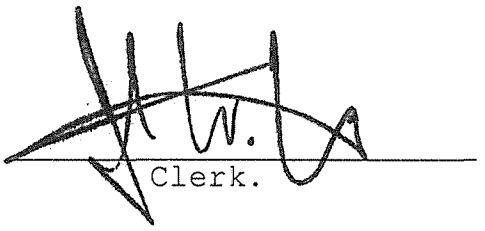


Clerk.

Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5144N Euroway Contracting Corp., Index 25646/02
Plaintiff-Respondent,

-against-

Mastermind Estate Development Corp., et al.,
Defendants-Appellants.

Goodman & Leopold, L.L.P., New York (Howard B. Leopold of counsel), for appellants.

Matarazzo Blumberg & Associates, LLP, New York (Barbara A. Matarazzo of counsel), for respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about June 10, 2008, which, in an action seeking monies allegedly owed for labor and materials in connection with certain construction projects, granted plaintiff's motion pursuant to CPLR 203(f) to amend the complaint to include as defendants parties who either currently own properties subject to this action or to whom the properties were transferred, unanimously affirmed, without costs.

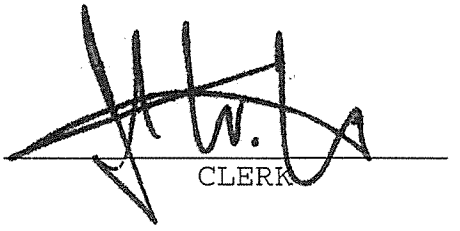
Plaintiff satisfied the three prongs of the relation back doctrine (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]). The court properly concluded that the corporate defendants sought to be added were united in interest with defendant Perez, as he was sole owner, shareholder, principal or agent of each proposed corporate defendant and he acted on their behalf with respect to day-to-day activities. The proposed corporate defendants could

thus be charged with notice of the institution of the action and there would be no prejudice, since Perez should have known that, but for the mistake, the action would have been brought against all corporate defendants (*id.* at 179-81).

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

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

ENTERED: FEBRUARY 3, 2009



CLERK

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

5146 The People of the State of New York, Ind. 3375/99
Respondent,

-against-

Raymond Reid,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Seon Jeong Lee of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Patricia Curran of counsel), for respondent.

Order, Supreme Court, New York County (Carol Berkman, J.), entered on or about July 25, 2007, which adjudicated defendant a level three sex offender and sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

To the extent that the record permits review, we find that defendant received effective assistance of counsel at the SORA hearing notwithstanding counsel's failure to litigate any aspect of the adjudication. Although a sex offender adjudication is not part of a criminal action (*People v Stevens*, 91 NY2d 270, 277 [1998]), for present purposes we assume, without deciding, that the state and federal standards for effective assistance at a criminal trial (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]) would apply. However, given the differences between a SORA hearing and a

criminal trial, we reject defendant's argument that counsel's conduct was the functional equivalent of a guilty plea unconstitutionally entered by the attorney without the client's consent (*compare Brookhart v Janis*, 384 US 1 [1966]; *see also People v Costas*, 46 AD3d 475 [2007], *lv denied* 10 AD3d 716 [2008] [waiver of sex offender hearing does not require allocution of defendant]).

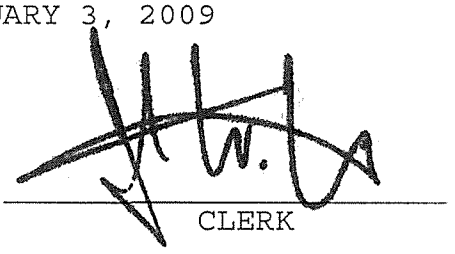
Counsel could have reasonably concluded that there was nothing to litigate at the hearing (*cf. People v DeFreitas*, 213 AD2d 96, 101 [1995], *lv denied* 86 NY2d 872 [1995] [in criminal trial context, "(c)ounsel may not be expected to create a defense when it does not exist"]). The record reveals that counsel, who was undoubtedly familiar with the case based upon his prior representation of defendant on the underlying conviction, had reviewed the case summary and the risk assessment instrument before the hearing, and had consulted with defendant about the assessment. Based upon the detailed justification provided in the case summary for the assessment and, in the absence of any evidence that defendant informed counsel that he disputed any factual details, there was no reason for counsel to challenge the assessment. Defendant's personal complaints at the hearing went to the validity of the underlying conviction, and not to the factual details provided in the case summary. Even, if as argued by defendant on appeal, counsel erred in failing to challenge the

assessment of 10 points for the "Use of Violence" factor, this error would not have contributed to defendant's classification since he was assessed 155 points, well in excess of the 110 points required for a level three adjudication. Furthermore, removing the points for "Use of Violence" would not have affected defendant's adjudication as a sexually violent offender, which was based on the fact that his underlying conviction was for first-degree sodomy. Other than speculation, defendant does not now advance any basis for suspecting that additional point assessments may have been incorrect. Since the facts and circumstances described in the case summary did not remotely justify a request for a downward departure, counsel was not ineffective for not making such a request (*see People v Stultz*, 2 NY3d 277, 283-284 [2004]).

Defendants' arguments regarding prehearing discovery and the sufficiency of the court's findings are unpreserved and without merit.

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

ENTERED: FEBRUARY 3, 2009



CLERK

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

5148-
5149 Judith Nostrom, etc., Index 102120/07
Plaintiff-Appellant,

-against-

A.W. Chesteron Company, et al.,
Defendants,

Central Hudson Gas & Electric
Corporation, et al.,
Defendants-Respondents.

Weitz & Luxenberg, P.C., New York (Jerry Kristal of counsel), for appellant.

Thompson Hine LLP, New York (Joseph B. Koczko of counsel), for Central Hudson Gas & Electric Corporation, respondent.

Office of Richard W. Babinecz, New York (Andrew J. Czerepak of counsel), for Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc., respondents.

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for Sequoia Ventures, Inc., respondent.

Orders, Supreme Court, New York County (Helen E. Freedman, J.), entered January 29, 2008 and February 5, 2008, which, in an action arising out of plaintiff's decedent's alleged exposure to asbestos in the workplace, insofar as appealed from, granted defendants-respondents' motions for summary judgment dismissing as against them plaintiff's Labor Law § 241(6) claims based on 12 NYCRR 12-1.4(b)(3),(4) and 12-1.6(a), unanimously affirmed, without costs.

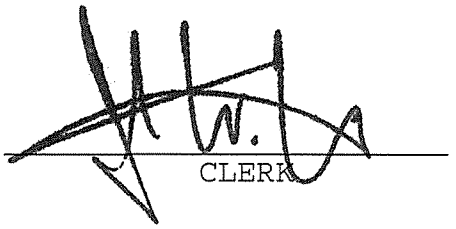
We hold that owner/contractor vicarious liability under

Labor Law § 241(6) cannot be based on the Industrial Code (12 NYCRR) part 12 regulations invoked by plaintiff. The provisions of 12 NYCRR part 23 ("Protection in Construction, Demolition and Excavation Operations"), were promulgated by the commissioner pursuant to the authority conferred by Labor Law § 241[6], regulate construction, demolition and excavation work and expressly apply to, inter alia, "owners, contractors and their agents." By contrast, part 12 ("Control of Air Contaminants") applies without regard to whether construction, demolition or excavation work is performed, and gives no indication either that it was promulgated pursuant to Labor Law § 241(6) or that it contemplates owner/contractor vicarious liability (*see* 12 NYCRR 12-1.2). We note that plaintiff does not invoke 12 NYCRR 23-1.7(g), a part 23 regulation that prohibits work in an "unventilated confined area" where dangerous air contaminants may be present unless the atmosphere of such area is first tested by the employer in accordance with part 12, and makes such areas otherwise subject to part 12 (*see Piazza L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1347-1348 [4th Dept 2003], citing, inter alia, *Mazzocchi v International Bus. Machs.*, 294 AD2d 151, 152 [1st Dept 2002]; *see also Rivera Ambassador Fuel & Oil Burner Corp.*, 45 AD3d 275, 275 [2007]). This specific provision of part 23 reinforces our conclusion that the provisions of part 12 do not -- except to the extent incorporated by part 23 -- support an

action under Labor Law § 241(6). Alternatively, we hold that the two regulations invoked by plaintiff are not sufficiently specific to support a section 241(6) claim for asbestos-related injury (*contra Piazza*). Neither contains specific methods, standards, directives or controls on work processes involving asbestos-containing materials.

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

ENTERED: FEBRUARY 3, 2009



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

5150-
5151 The People of the State of New York, Ind. 1741/04
Respondent,

-against-

Carlos Leiva,
Defendant-Appellant.

Sercarz & Riopelle, LLP, New York (Maurice H. Sercarz of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered May 16, 2005, convicting defendant, after a jury trial, of kidnapping in the second degree and assault in the second degree, and sentencing him to concurrent terms of 15 and 5 years, respectively, and order, same court and Justice, entered on or about August 6, 2007, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant's argument that the kidnapping merged with the assault is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. "[T]he merger doctrine was not designed to merge true kidnappings into other crimes merely because the kidnappings were used to accomplish ultimate crimes . . . Only if the conduct underlying the abduction was incidental to and inseparable from another crime, will the doctrine apply"

(*People v Smith*, 47 NY2d 83, 87 [1979]). In the case at bar, the five- to six-hour restraint was far more extensive than necessary to accomplish the assault (*see People v Romance*, 35 AD3d 201, 203 [2006], *lv denied* 8 NY3d 926 [2007]; *People v Peters*, 1 AD3d 270 [2003], *lv denied* 1 NY3d 632 [2004]). Although defendant assaulted the victim many times over the course of the incident, there were extensive periods when he restrained her without assaulting her. Furthermore, the merger doctrine does not apply "where the manner of detention is egregious" (*People v Gonzalez*, 80 NY2d 146, 153 [1992]). The detention in the instant case was marked by brutal and degrading treatment (*see People v Thomas*, 212 AD2d 474, 475 [1995], *lv denied* 85 NY2d 944 [1995]; *People v Epps*, 160 AD2d 171, 172 [1990], *lv denied* 76 NY2d 734 [1990]). For the foregoing reasons, we likewise reject that branch of defendant's ineffective assistance claim in which he asserts his trial attorney should have raised the merger issue.

Defendant received effective assistance of counsel under both the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]), and his CPL 440.10 motion asserting ineffective assistance was without merit. Defendant, who was represented by a series of attorneys, failed to "demonstrate the absence of strategic or other legitimate explanations" (*People v Rivera*, 71 NY2d 705, 709 [1988]) for the absence of a psychiatric lack-of-

intent defense and alleged deficiencies in the presentation of an intoxication defense. Although the function of a CPL 440.10 motion, in the present context, is to expand the trial record (*see People v Love*, 57 NY2d 998 [1982]), defendant submitted no affidavits from the lawyers who represented him at the relevant times or from anyone else who could shed light on counsel's strategic decisions. That the lawyers who represented defendant in the early stages of the case failed to investigate the feasibility of a psychiatric defense, or chose to employ such a defense but carelessly failed to file a CPL 250.10 notice, can not simply be assumed. That one or more of these lawyers decided that such a defense had little hope of success (*see People v Royster*, 40 AD3d 885, 886 [2007], *lv denied* 9 NY3d 881 [2007]) or might have undermined better defenses also is plausible.

Nor can it be assumed that defendant's trial lawyer never contacted an expert witness about an intoxication defense. We cannot disregard the possibility that this lawyer contacted the two experts whose names he gave to the People and determined that neither of them would be able to offer useful testimony. Similarly, since defendant's trial counsel presented other proof of defendant's intoxication, counsel could have concluded that introducing a notation contained in defendant's medical records would have been cumulative.

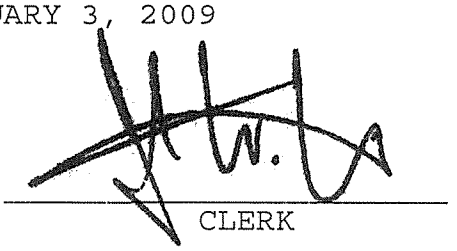
Furthermore, even if defendant's attorneys should have taken

all the steps with regard to psychiatric and intoxication defenses that defendant claims they should have taken, nothing in the trial record or the submissions on the CPL 440.10 motion establishes that such defenses would have had any reasonable chance of success. Accordingly, defendant has not established that any of the alleged deficiencies caused him any prejudice or deprived him of a fair trial.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 3, 2009



CLERK

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

5152 Osvalso Carmenate, etc., et al., Index 18222/05
Plaintiffs-Respondents,

-against-

City of New York, et al.,
Defendants,

Tuscan/Lehigh Dairies, et al.,
Defendants-Appellants.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about January 28, 2008, which, to the extent appealed from, granted the motion by defendants Tuscan/Lehigh Dairies and Robe to dismiss the complaint but without prejudice to commencement of a new action, unanimously affirmed, without costs.

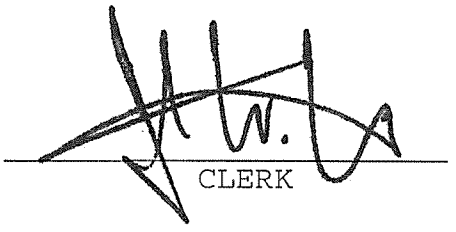
This action, seeking damages for wrongful death and negligence, was timely brought by the decedent's brother, who had not then obtained the required letters of administration to prosecute the matter. Consequently, the motion court granted the motion by Tuscan/Lehigh and Robe to dismiss on the ground that the suit had not been instituted by an appointed administrator, but did so without prejudice to the commencement of a new action

in accordance with CPLR 205(a). Although Tuscan/Lehigh and Robe acknowledge that CPLR 205(a) would permit the bringing of a new action had plaintiff filed for letters of administration prior to the expiration of the statutory period (*see Carrick v Central Gen. Hosp.*, 51 NY2d 242 [1980]), they argue that his failure to apply for such letters until after the expiration of the statute of limitations is fatal to his right to institute another lawsuit.

However, as *Carrick* and its progeny make clear, the only factors necessary for invoking CPLR 205(a) are that there has been a prior timely commenced action, providing the defendants with notice of the claims against them asserted by or on behalf of the injured party, and that the dismissal was not on the merits but for reason of a defect such as the lack of a qualified administrator, all of which elements are present herein. No additional factors are mandated by *Carrick* or the authority derived therefrom (*see e.g. Mendez v Kyung Yoo*, 23 AD3d 354 [2005]; *Vasquez v Wood*, 18 AD3d 645 [2005]).

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

ENTERED: FEBRUARY 3, 2009



CLERK

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

5154 In re John Covington, Index 402779/07
Petitioner-Appellant,

-against-

Sgt. John Sultana, et al.,
Respondents-Respondents.

John Covington, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered June 13, 2008, which, in a proceeding to compel respondents to respond to petitioner's Freedom of Information Law request for "the actual memo books and notes" of certain Police Department personnel regarding certain crimes, denied the application as moot and dismissed the petition, unanimously affirmed, without costs.

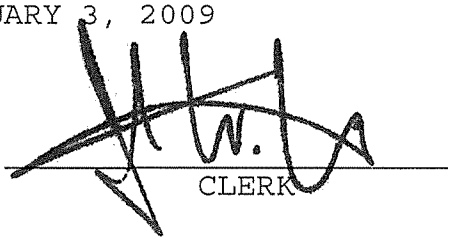
The proceeding was rendered moot by the October 26, 2007 letter from respondents' Records Access Officer certifying that, after a diligent search, all memo book entries responsive to the request had been found and were being turned over (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]; *Matter of Babi v David*, 35 AD3d 266 [2006]). A different result is not required by the fact that, after petitioner appealed the October 26, 2007 determination, more responsive memo book entries were found and turned over, where, before the issuance of the

order on appeal, respondents had turned over the additional entries and certified for the second time that, after a diligent search, no further responsive records were in their possession (*see Matter of Stop the Madrassa Community Coalition v New York City Dept. of Educ.*, 20 Misc 3d 1116(A), 2008 NY Slip Op 51367[U] [2008], *6). To the extent the proceeding can be viewed as a challenge to the responsiveness of the records that were turned over, petitioner is not entitled to the original black memo books actually carried by the police officers at the time of the events in question, but only to copies thereof with appropriate redactions, because redactions of exempt material were necessary (*see* Public Officers Law § 87[2][b], [e]; *see Matter of Brown v Goord*, 45 AD3d 930, 932-933 [2007], *lv dismissed* 10 NY3d 796 [2008]). Petitioner's request for records pertaining to police interviews of all witnesses to the crimes is an expansion of his original FOIL request and was not raised in his article 78 petition. Accordingly, petitioner has not exhausted his administrative remedies with respect to this expanded request

(*see Matter of Carty v New York City Police Dept.*, 41 AD3d 150, 150 [2007]). We have considered petitioner's other arguments and find them unavailing.

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

ENTERED: FEBRUARY 3, 2009



CLERK

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

5155 In re Robert Borrelli, Index 110993/07
Petitioner,

-against-

Raymond W. Kelly, as Police Commissioner, etc., et al,
Respondents.

Quinn & Mellea, L.L.P., White Plains (Philip J. Mellea of counsel), for petitioner.

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

Determination of respondent Police Commissioner, dated April 17, 2007, finding petitioner guilty upon his plea to Specification No. 2 and, insofar as challenged, guilty of Specification No. 1, and imposing a penalty of forfeiture of 15 vacation days, unanimously annulled, without costs, and the petition (transferred to this Court by order of the Supreme Court, New York County [Walter B. Tolub, J.], entered December 19, 2007), granted to the extent of vacating the finding of guilt of Specification No. 1 and the penalty imposed, and the matter remanded for a determination of a new penalty on Specification No. 2.

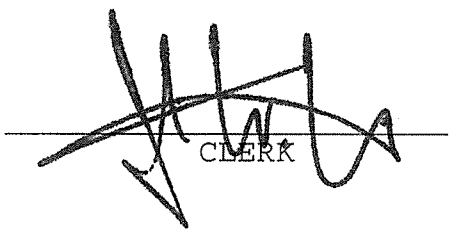
The evidence at the departmental trial was inadequate to support the finding of guilt on Specification No. 1, knowing association with a person or organization reasonably believed to be engaged in, likely to engage in or to have engaged in criminal

activities. The evidence established only that petitioner had infrequent contact with a lifelong friend after the friend was arrested in January 2003 on charges of driving while intoxicated and assault in the third degree, which charges were disposed of by the friend's plea to driving while ability impaired, a traffic infraction. Neither that contact, nor petitioner's appearance at the scene of the friend's subsequent arrest as well as at the precinct at which the friend was being held, in the presence of appropriate police personnel, constituted substantial evidence of petitioner's guilt of Specification No. 1 (*see e.g. 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]; *Matter of Scully v Safir*, 282 AD2d 305, 308 [2001]).

Because one penalty was imposed to cover both specifications, we remand the matter for a determination of a new penalty for Specification No. 2 (failure to properly safeguard his off-duty firearm), to which petitioner pleaded guilty during the departmental trial.

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

ENTERED: FEBRUARY 3, 2009



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

5156 Roy Wildman, Index 22201/05
Plaintiff-Respondent, 23956/05

-against-

Lawrence Jensen, et al.,
Defendants-Appellants.

- - - - -

Lawrence Jensen, et al.,
Third-Party Plaintiffs-Appellants-Respondents,

-against-

Cablevision Systems New York City Corporation, et al.,
Third-Party Defendants-Respondents-Appellants.

Gannon, Rosenfarb & Moskowitz, New York (Jason B. Rosenfarb of counsel), for appellants-respondents.

Cohen, Kuhn & Associates, New York (Gary P. Asher of counsel), for respondents-appellants.

Taub & Marder, New York (C. Michelle Clemmens of counsel), for respondent.

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered on or about July 1, 2008, which, insofar as appealed from, denied defendants' and third-party defendants' motions for summary judgment dismissing the complaint and the third-party complaint, respectively, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment in favor of defendants and third-party defendants dismissing the complaints against them.

Plaintiff, an employee of nonparty Corbel Installations, which connected cable service for customers of third-party

defendant Cablevision Systems New York City Corporation, was sent to defendants' building by Corbel, pursuant to its agreement with Cablevision, to install cable service in an apartment. He allegedly was injured when he fell from a ladder during the course of his work, which was performed without defendants' knowledge or consent. Public Service Law § 228(1)(a) provides, in pertinent part, that "[n]o landlord shall interfere with the installation of cable television facilities upon his property or premises." Since plaintiff "was on the owner's premises not by reason of any action of the owner but by reason of provisions of the Public Service Law," he was not an "employee" or "employed" within the meaning of the Labor Law and therefore is not entitled to its protections (*Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 50-51 [2004]; *Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]). Similarly, he is not entitled to recover on his claim pursuant to the "common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]), since "but for Public Service Law § 228, plaintiff would be a trespasser upon [defendants'] property and [defendants] would neither owe a duty to plaintiff nor incur liability" (*Abbatiello*, 3 NY3d at 52).

We also find that plaintiff's affidavit, which was inconsistent with his deposition testimony, created merely a

feigned issue of fact whether the work he was performing was covered by the Labor Law (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [2007]).

Absent liability on defendants' part, there can be no third-party liability on Cablevision's part.

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

ENTERED: FEBRUARY 3, 2009

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on February 3, 2009.

Present - Hon. Luis A. Gonzalez, Justice Presiding
John T. Buckley
James M. Catterson
James M. McGuire
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 52488C/05
Respondent, 39039C/05

-against- 5158

Wilmen Reyes,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William I. Mogulescu, J.), rendered on or about April 27, 2007,

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

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

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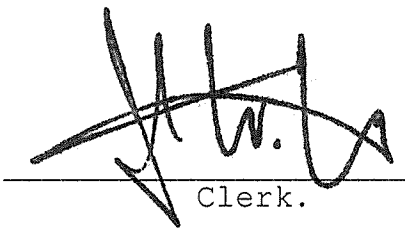


Clerk.

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

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

5159-
5159A-
5159B In re Anthony C., and Others,

Dependent Children Under
the Age of Eighteen Years, etc.,

Bernice C., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

Kenneth M. Tuccillo, Hastings-On-Hudson, for Bernice C., appellant.

Julian A. Hertz, Larchmont, for Anthony C., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Harris of counsel), Law Guardian.

Order, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about September 7, 2007, which, after a fact-finding hearing, determined that respondents had neglected the subject children, unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about October 29, 2007, which, inter alia, placed Anthony and Mia in the custody of the Commissioner of Social Services, unanimously dismissed as moot, without costs.

The finding of neglect is supported by a preponderance of the evidence showing the unsafe and unsanitary conditions of the

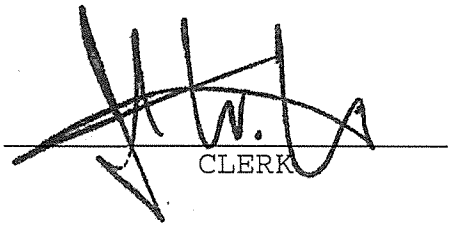
mother's apartment, the mother's refusal to obtain treatment for her mental condition and to accept the agency's assistance in locating alternative housing, and the father's failure to ensure that the mother obtained treatment and that the children had adequate shelter and maintained their benefits (*see* Family Court Act § 1046[b][i]; 1012[f][i]; *see e.g. Matter of Ashante M.*, 19 AD3d 249 [2005]; *Matter of Tia B.*, 257 AD2d 366, 366 [1999]; *Matter of Ayana E.*, 162 AD2d 330 [1990], *lv denied* 76 NY2d 708 [1990]). The mother failed to preserve her arguments that the Family Court improperly admitted psychiatric reports prepared and certified by the Human Resources Administration (HRA) because they contain the doctors' opinions or expert proof and because they contain statements by others with no duty to report to the HRA. In any event, these arguments lack merit because the certified records were properly admitted pursuant to Family Court Act § 1046(a)(iv). Contrary to the mother's contention, testimony was not needed to establish a proper foundation for the admission of the records (*see id.*).

We decline to reach the merits of the dispositional order appealed from, the order having been rendered academic by a

subsequent order, from which no appeal has been taken, that extended the placement of Anthony and Mia (*see Matter of M.-H. Children*, 284 AD2d 188, 189 [2001]).

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

ENTERED: FEBRUARY 3, 2009



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

5160 In re Netsmart Technologies, Inc., Index 600736/08
Petitioner-Respondent-Appellant,

-against-

Edward D. Bright,
Respondent-Appellant-Respondent.

Leventritt Lewittes & Bender, Garden City (Sidney Bender of counsel), for appellant-respondent.

O'Melveny & Myers LLP, New York (William J. Sushon of counsel), for respondent-appellant.

Order and judgment (one paper), Supreme Court, New York County (Helen E. Freedman, J.), entered May 23, 2008, denying a petition to confirm an arbitration award, granting a cross petition to partially vacate the award, and remanding the matter to the same arbitrator for a new determination of the amount of respondent's damages, unanimously modified, on the law, to grant the petition to confirm and deny the cross petition to vacate, and otherwise affirmed, without costs.

Assuming respondent did not waive his objection based on the sole arbitrator's partiality, the arbitrator made sufficient disclosure of the facts that might suggest possible bias, and respondent fails to show bias by clear and convincing evidence (*see Zrake v New York City Dept. of Educ.*, 41 AD3d 118 [2007], *lv denied* 9 NY3d 1001 [2007]). The past relationship between petitioner's general counsel and one of the arbitrator's law

partners, who was located in another city, consisting of a solitary engagement and a relatively minor fee two years earlier for the arbitrator's 600-attorney law firm, was too insignificant, short-lived and remote to warrant the arbitrator's disqualification and vacatur of the award for lack of impartiality (*cf. Tricots Liesse [1983] Inc. v Intrex Indus.*, 284 AD2d 226 [2001], *lv denied* 97 NY2d 606 [2001]). It would be pure speculation to conclude that the general counsel's communication to the arbitrator's partner of a new offer of engagement created any bias, where the new offer was promptly rejected by the partner after a conflict check and reported by him to the arbitrator, who promptly disclosed the offer to the panel administrator and the parties and who himself never met, communicated with or did any business with the general counsel.

In denying dismissal of petitioner's breach of contract counterclaim, the arbitrator rationally interpreted the parties' consulting agreement (*see Matter of National Cash Register Co. [Wilson]*, 8 NY2d 377, 383 [1960]), which, in paragraph 3(g), authorizes a dollar for dollar reduction of respondent's compensation for improper receipt of disability payments while working for petitioner. Inasmuch as the arbitrator rejected respondent's interpretation of the agreement regarding wrongful acceptance of disability payments and every one of his defenses to the counterclaim, and similarly rejected his claim for

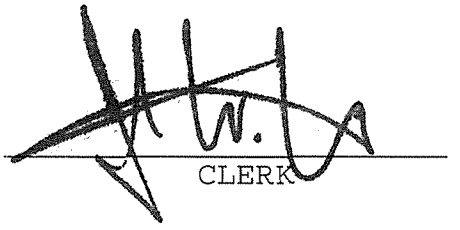
increased severance based on the number of his months of service as an officer or director, respondent was not the prevailing party under the arbitration clause, and it was a provident exercise of discretion to deny him attorneys' fees.

However, contrary to the court's conclusion, the arbitrator did not exceed a specific limitation on his power by determining respondent's severance claim damages at an evidentiary hearing, so there was no basis for vacating the award and remanding for a new determination of the amount of respondent's damages on such claim. The court should have deferred to the arbitrator's rational interpretation of the parties' stipulation (*see Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]). Plainly, the stipulation, which was based on an agreement reached by the parties before the arbitrator at a preliminary hearing, meant that respondent's claim for payment under the consulting agreement would be determined by the language of the consulting agreement without resort to extrinsic evidence or an evidentiary hearing, but it did not intend to bar evidence or a hearing with respect to respondent's proof of damages. This understanding is clear from the hearing's opening colloquy with the arbitrator, so

respondent's counsel could not have been surprised by the need to submit proof of damages.

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

ENTERED: FEBRUARY 3, 2009



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on February 3, 2009.

Present - Hon. Luis A. Gonzalez, Justice Presiding
John T. Buckley
James M. Catterson
James M. McGuire
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 1921/04
Respondent,

-against- 5162

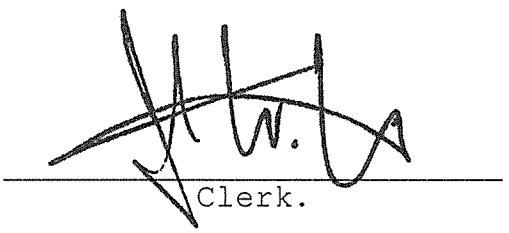
Leonardo Hernandez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about June 8, 2007,

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

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

ENTER:



Clerk.

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

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

5164 The People of the State of New York, Ind. 3264/05
Respondent,

-against-

Tyrone Rolle,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Gina Mignola of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered September 8, 2006, convicting defendant, after a jury trial, of rape in the first degree (three counts), sodomy in the first degree (two counts), burglary in the first degree and attempted robbery in the first and second degrees, and sentencing him, as a second felony offender, to an aggregate term of 50 years, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment as time-barred. The parties' submissions were sufficient to decide the issue, and there was no factual dispute requiring an evidentiary hearing. The applicable five-year statute of limitations was tolled pursuant to CPL 30.10(4)(a)(ii) because defendant's identity and whereabouts were unknown following the attack and were unascertainable by the exercise of reasonable diligence (*see People v Seda*, 93 NY2d 307 [1999]).

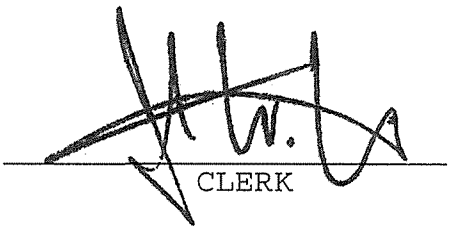
The People met their initial burden of showing reasonable diligence, and defendant did not raise any factual issue to the contrary (*see People v Jones*, 299 AD2d 283 [2002], *lv denied* 99 NY2d 655 [2003]). After this June 1996 crime in which the victim was unable to identify anyone, law enforcement authorities exhausted all reasonable investigative steps. Thus, the statute of limitations was clearly tolled until at least March of 2000, when the authorities acquired the ability to solve the crime by matching DNA. When this capability came into existence, that event cannot be viewed as immediately cutting off the toll, because the case at bar was one of about 18,000 similar "cold cases" awaiting DNA comparison. Under these circumstances, the record warrants the conclusion that the People acted with reasonable diligence in obtaining a DNA match (*see People v Lloyd*, 23 AD3d 296 [2005], *lv denied* 6 NY3d 755 [2005]). Thus, the five-year statute of limitations was tolled from the time of the crime until well past 2000. Accordingly, this August 2005 indictment was timely. Defendant's claim of unconstitutional preindictment delay is also without merit (*see United States v Lovasco*, 431 US 783 [1977]; *People v Singer*, 44 NY2d 241, 252-255 [1978]; *People v Taranovich*, 37 NY2d 442 [1975]).

We reject defendant's right to counsel arguments. Defendant knowingly, intelligently and voluntarily waived his right to counsel during trial after being fully warned by the court of the

consequences of proceeding pro se. There is no merit to defendant's assertion that his midtrial decision to represent himself was coerced by his alleged inability to consult with counsel during the pendency of the case due to his pretrial incarceration in an upstate correctional facility. The record establishes that the court took sufficient action to alleviate the situation, and that it ensured that defendant had ample opportunity to consult with counsel prior to the suppression hearing, prior to jury selection, and prior to and throughout the trial. Moreover, the court made the appropriate searching inquiry to establish that defendant's decision to waive counsel was valid (*see People v Arroyo*, 98 NY2d 101 [2002]).

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

ENTERED: FEBRUARY 3, 2009



CLERK

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

5166 The People of the State of New York, SCI 59734C/05
Respondent,

-against-

Shakeem Hodge,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Maureen A. Lee of counsel), for respondent.

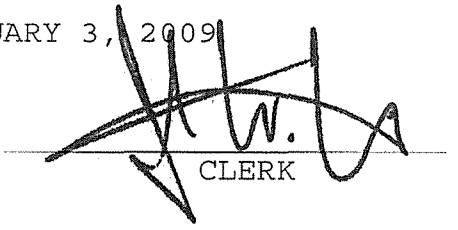
Judgment, Supreme Court, Bronx County (Laura Safer-Espinoza, J.), rendered October 18, 2007, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 2 years, unanimously affirmed.

Regardless of whether defendant made a valid waiver of his right to appeal, we find no basis for reducing the sentence.

The imposition of surcharges and fees by way of court documents, but without mention in the court's oral pronouncement of sentence, was lawful (*see People v Harris*, 51 AD3d 523 [2008], *lv denied* 10 NY3d 935 [2008]).

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

ENTERED: FEBRUARY 3, 2009



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

5167N In re Keymarroo Guiden, Index 92255/07
Petitioner-Appellant,

For the Appointment of a
Guardian for Veronica Wallace,
An Incapacitated Person,

Sallie Floyd, et al.,
Respondents-Respondents.

Barasch McGarry Salzman & Penson, New York (Dana Cutting of counsel), for appellant.

The Turkewitz Law Firm, New York (Eric Turkewitz of counsel), for respondents.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered May 4, 2007, which dismissed petitioner's petition to be appointed the guardian over the person and property of his wife, Veronica Wallace, an alleged incapacitated person (AIP), and granted the cross petition of Corlinda Nicholson to be appointed the guardian over the person and property of her sister, the AIP, unanimously reversed, on the law, without costs, the petition reinstated, the grant of the cross petition vacated, and the matter remanded for a hearing on the petition.

We express no opinion on the merits of petitioner's application. However, we disagree with Supreme Court that petitioner, a paroled convicted felon who had obtained a temporary certificate of relief from disabilities, could not, as

a matter of law, serve as guardian for the AIP. Rules of the Chief Judge [22 NYCRR] § 36.2[c][7] contains no distinction between the rights conferred to an individual issued a temporary certificate of relief from disabilities (one issued while an individual is on parole) (*see* Correction Law § 703[4]) and those same rights which cease being temporary when the individual is released from parole (*id.*).

The court's apparent exclusion of petitioner from the hearing on the cross petition was improper. Although the parties dispute whether petitioner and the AIP were married, the evidence that the couple resided together for several years and had two children together made such exclusion improper.

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

ENTERED: FEBRUARY 3, 2009

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

5168N Violin Entertainment Acquisition Company, Inc., Petitioner-Respondent, Index 601476/08

-against-

Virgin Entertainment Holdings, Inc., Respondent-Appellant.

Kaye Scholer LLP, New York (Aaron Stiefel of counsel), for appellant.

Katsky Korins LLP, New York (Mark Walfish of counsel), and Reed Smith LLP, New York (Jordan W. Siev of counsel), for respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered June 17, 2008, which granted the petition to compel arbitration, unanimously affirmed, with costs.

Petitioner properly sought to invoke the accounting arbitration provision to obtain a purchase price adjustment where respondent's financials contained a long-standing understatement of accounts payable. While this understatement constituted a breach of the seller's representation and warranty in failing to comply with generally accepted accounting principles (GAAP), it is not subject to resolution via the agreement's indemnification provision. The indemnification provision of the stock purchase agreement specifically excludes (at § 11.6[b]) "items . . . considered through the August 4 Net Working Capital [schedule] or for which an Indemnified Party has otherwise been compensated pursuant to the Purchase Price adjustment," and further provides

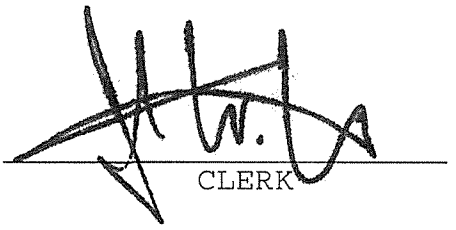
(§ 11.8) that it "will not, however, prevent or limit a cause of action . . . to enforce any decision or determination of the Accounting Arbitrator." This language can only be interpreted, consistent with the accounting arbitration provision, to exclude financial misrepresentations or deviations from GAAP that are contained in the final Net Working Capital schedule, that affect that schedule, and that can be resolved by a purchase price adjustment.

Matter of Westmoreland Coal Co. v Entech, Inc. (100 NY2d 352 [2003]) does not compel a different result, as the Court of Appeals there "merely construed the agreement before it and did not prohibit sophisticated business parties from agreeing to varying means of resolving disputes over adjustments to purchase price" (*McGraw-Hill Cos., Inc. v School Specialty, Inc.*, 42 AD3d 360, 361 [2007]).

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

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

ENTERED: FEBRUARY 3, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, Presiding Justice
Richard T. Andrias
David B. Saxe
John W. Sweeny, Jr.
Leland G. DeGrasse, JJ.

4347-
4347A
Index 103824/07

Mark Hotel LLC,
Plaintiff-Respondent,

-against-

Madison Seventy-Seventh LLC,
Defendant-Appellant.

Defendant appeals from the order of the Supreme Court, New York County (Emily Jane Goodman, J.), entered January 9, 2008, which granted plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment, and order, same court and Justice, entered January 23, 2008, which denied defendant's motion to supplement the record on the previously decided summary judgment motions.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Moses Silverman, Maria H. Keane and Matthew T. Insley-Pruitt of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey L. Braun, Natan M. Hamerman, Jessica J. Glass, Erin E. Oshiro and Jared I. Heller of counsel), for respondent.

DeGRASSE, J.

Plaintiff and defendant are the respective successors of the tenant and the landlord under a 150-year lease executed in 1981. The demised premises are known as the Mark Hotel, located at 25 East 77th Street in Manhattan. Pursuant to the lease and by letter dated December 1, 2006, plaintiff requested defendant's consent to a proposed renovation of the hotel that would encompass the conversion of a portion of the premises into cooperative hotel units. Under the lease, the landlord's consent to structural alterations must be requested but cannot be unreasonably withheld. Plaintiff thus enclosed a set of plans prepared by its architect with the letter. Having received no response, plaintiff again requested defendant's consent by a follow-up letter dated December 20, 2006. A letter the next day to plaintiff from defendant's attorney reads, in part, as follows:

> "Your letters make reference to the conversion of a portion of The Mark Hotel to cooperative hotel units. Please be advised that under the terms of the Lease the tenant thereunder is not permitted to convert any portion of the premises demised thereunder to cooperative hotel units. As soon as you confirm that you have no intention of converting all or any portion of the subject premises to cooperative hotel units, the landlord would be pleased to review any renovation plans that you may submit with respect to The Mark Hotel."

Defendant never commented on, objected to or questioned the architectural plans. Accordingly, on or about January 10, 2007,

plaintiff advised defendant that the attorney's letter was not responsive to its request for consent because the form of ownership of the hotel units is unrelated to the proposed physical renovations set forth in the architect's plans. Plaintiff also disputed defendant's claim that the lease's use clause prohibits cooperative ownership of the hotel's units.

Article Fortieth, section 7 of the lease provides:

> "Whenever the Lessor's consent or approval is requested by the Lessee under this Lease and whenever such consent or approval is not to be unreasonably withheld pursuant to the terms of this Lease and, if the Lessor does not respond to the Lessee's request within 15 days after receipt of such request, then the Lessee shall have the right to send a second request to the Lessor and, if the Lessor fails to respond to such second request within five days after its receipt, the consent or approval of the Lessor so requested shall automatically and conclusively be deemed to have been given."

Plaintiff thereupon closed the hotel and commenced the renovation after obtaining the necessary work permits from the New York City Department of Buildings (DOB). Plaintiff applied for the work permits as an owner of the premises. On or about March 7, 2007, defendant served plaintiff with a notice of default, citing the latter's (a) undertaking of partial conversion of the hotel to cooperative occupancy in alleged violation of Article Fifth of the lease; (b) commencement of alterations to the premises without defendant's consent, in alleged violation of Article Thirty-Fourth of the lease; and (c) filing of an allegedly false application by which plaintiff held itself out to DOB as an owner

of the hotel, in violation of applicable law and Article Ninth of the lease. The three instant causes of action for declaratory relief relate specifically to the claims set forth in defendant's notice of default. The IAS court granted plaintiff's motion for summary judgment, denied defendant's cross motion for the same relief and denied defendant's motion for leave to submit additional papers after the hearing date of the said motions. Defendant appeals and we now affirm.

Article Fifth, the lease's use clause, provides in pertinent part:

> "The Lessee covenants and agrees that it will not use or occupy the leased premises, or permit the said premises to be used or occupied for other than a luxury hotel (including a cooperative or condominium hotel such as the Hotel Caryle [*sic*]) and for all operations and uses incidental to and/or customarily found in connection with such hotel use (including but not limited to restaurants, retail stores, professional offices and transient or permanent residential uses) or for a purpose or in a manner likely to cause structural or other injury to any building erected on the premises, or in a manner which shall violate any certificate of occupancy in force relating to any building thereon situated."

The core issue on this appeal is whether the phrase "cooperative or condominium hotel" in the first parenthetical enumerates examples of permitted or prohibited uses of the premises. We hold that the language quoted above unambiguously permits the use of the premises as a cooperative hotel. In support of its argument for a contrary construction, defendant cites the Condominium Act, which applies to property for which a

condominium declaration is executed and recorded (Real Property Law § 339-f[1]). Subject to exceptions that do not apply here, "property" denotes ownership in fee simple absolute (§ 339-e[11]). "A greater estate or interest does not pass by any grant or conveyance, than the grantor possessed or could lawfully convey, at the time of the delivery of the deed" (§ 245). Hence, the lease is at odds with the Condominium Act insofar as it implicitly provides for the lessee's conveyance of a condominium unit or units in fee simple. A cooperative interest, on the other hand, entails the ownership of stock in a cooperative corporation that grants a proprietary lease (*see Frisch v Bellmarc Mgt.*, 190 AD2d 383, 387 [1993]). Therefore, the use of the premises as a cooperative hotel would not violate the Condominium Act. Defendant urges, however, that the lease should be read to prohibit both uses by reason of the legal impossibility of a condominium hotel. Such a result is unwarranted. "Where an agreement consists in part of an unlawful objective and in part of lawful objectives, a court may sever the illegal aspects of the agreement and enforce the legal ones, so long as the illegal aspects are incidental to the legal aspects and are not the main objective of the agreement" (*Glassman v Pro Health Ambulatory Surgery Ctr., Inc.*, 55 AD3d 538, 539 [2008], *lv dismissed* 2008 NY LEXIS 4009). Indeed, Article Fortieth, Section 6 of the lease provides: "If and to the extent that a provision

of this Lease shall be unlawful or contrary to public policy, the same shall not be deemed to invalidate the other provisions of this Lease." Moreover, as noted above, a residential cooperative interest involves a leasehold as opposed to ownership in fee (*Frisch*, 190 AD2d at 387). Therefore, the use of the premises as a cooperative hotel would be consistent with Article Twenty-Eighth, Section 2 of the lease, which permits the lessee to sublet the hotel's dwelling units and rooms.

The issue of whether plaintiff violated the lease by commencing alterations without defendant's consent was correctly resolved in plaintiff's favor. Defendant did not object to the work set forth in the architectural plans within the 15-day period after it received plaintiff's first request for consent or the five-day period following receipt of the second, and therefore, by operation of Article Fortieth, section 7, is deemed to have consented to the renovation proposed by plaintiff.

While plaintiff's motion and defendant's cross motion for summary judgment were sub judice, defendant moved the IAS court for leave to supplement the record with purported newly discovered proof that the renovation work being performed by plaintiff exceeded the scope of the submitted plans. The court did not abuse its discretion by deciding the summary judgment motions before the hearing date of the motion for leave to

supplement the record, rendering the latter moot.[1]

There is no merit to defendant's claim that plaintiff filed a false application for a work permit by holding itself out to DOB as an owner of the hotel. Pursuant to Administrative Code of the City of New York § 27-151, an application for a permit may be made by the owner or lessee of a building. Administrative Code § 27-232 defines an "owner" as a "person having legal title to premises . . . or any other person having legal ownership or control of premises." Accordingly, plaintiff qualifies as an owner by virtue of its lease of the entire premises. Defendant's remaining arguments have been considered, and they lack merit.

For the foregoing reasons, the order of Supreme Court, New York County (Emily Jane Goodman, J.), entered January 9, 2008, which granted plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment, and the order of the same court and Justice, entered January 23, 2008, which

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[1]Defendant could have moved for leave to renew if its newly discovered proof was dispositive and could not have been submitted to the court upon the hearing of the original motion and cross motion (*see* CPLR 2221[e]).

denied defendant's motion to supplement the record on the previously decided summary judgment motions, should be affirmed, with costs.

All concur.

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

ENTERED: FEBRUARY 3, 2009

CLERK