SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 23, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

2481 The People of the State of New York, Ind. 1751/99
Respondent,

-against-

Pavan Ortiz,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Britta Gilmore of counsel), for respondent.

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Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered June 9, 2008, convicting defendant, after a jury trial, of criminal facilitation in the second degree, and sentencing him to a term of 7 ½ to 15 years, reversed, on the law, and the matter remanded for a new trial.

The undisputed evidence was that defendant was with Michael E. when the latter received a pistol from Doreen B., who believed that the victim, whose nickname was “Butterball,” had robbed a drug dealer who worked for her. When Michael E. said that he did

not know who Butterball was, defendant said he would show him who he was. Defendant then accompanied Michael E. to the stairwell of a building where he knew the victim might be and pointed him out to Michael E., who then killed the victim with three shots to the head. As the People correctly contend on appeal, there was ample and strong evidence that defendant knew that Michael E. planned to kill rather than injure or frighten the victim. In this regard, former assistant district attorney Sturm testified that when she and Detective Waithe interviewed defendant in Arthur Kill Correctional Facility, he stated that he knew that Michael E. was going to kill Butterball. Indeed, Ms. Sturm testified that defendant told them during the interview that when Michael E. received the pistol, he stated he was going to kill Butterball.

Detective Waithe, however, did not testify that defendant had stated that he had known Michael E. planned to kill the victim or that Michael E. had said he was going to kill the victim. Rather, he testified on direct examination that defendant had made statements to the effect that Doreen B. had said she "wanted something done about this [the robbery]" and that, after taking the gun, Michael E. "agrees he'll do this."

On cross-examination, Waithe was asked whether defendant had said during the interview that Doreen B. wanted Butterball beaten up. Waithe responded, "Beaten up, hurt." He was then asked, "That's it?", and responded, "That's it." More importantly, for purposes of the principal issue on this appeal, a case summary report prepared either by Ms. Sturm, the lead prosecutor at the time, or the assistant district attorney who was assisting her, Karen Friedman Agnifilo, contains the following statement concerning the jailhouse interview: "[Defendant] claims he didn't know that [Michael E.] was going to kill Butterball." Ms. Sturm did not recall whether she had prepared the case summary but, in addition to testifying that it was "very possible" she had prepared it, testified that either she or Ms. Friedman Agnifilo, had prepared it. In addition, a voluntary disclosure form (VDF) on which Ms. Sturm's name was typed stated that during the interview defendant "made an oral statement the substance of which was that [Doreen B.] had asked him to hurt 'Butterball' for ripping off one of her drug dealers." As with the case summary, Ms. Sturm testified that although she did not remember whether she had prepared it, either she or Ms. Friedman Agnifilo had prepared it.

The trial court concluded that Ms. Sturm's testimony

concerning the statements made by defendant during the interview could not be impeached with the statements in the case summary and VDF. The basis for the court's ruling with respect to the case summary, and apparently with respect as well to the VDF, was that "[i]n the absence of [Ms. Sturm] adopting this statement as her own, given her testimony that she is not certain who authored it and does not recall it, . . . it cannot be used to impeach the testimony here at trial." Because Ms. Sturm had not "affirmatively adopted" the case summary, she could not be impeached with it. As the court went on to state, Ms. Sturm "cannot be properly impeached with this document by virtue of the fact she's indicated that the document was possibly authored by another individual and not herself and therefor not having adopted it[,] it is improper to confront her with a prior inconsistent statement."

On appeal, the People make no attempt to defend the notion that, absent an express admission by a witness that he or she made a prior inconsistent statement, the mere possibility that someone else made the statement precludes impeaching the witness with the statement. However, the People contend that a witness cannot be impeached with a prior inconsistent statement "[i]f the statement cannot be *reliably* attributed to the witness" (emphasis

added). What "reliably" may mean in this context is not clear, particularly because the People also argue that "[s]ince nothing *conclusively* demonstrated that Sturm was the author of the statements contained in the Summary and VDF, they simply could not be shown to be Sturm's statements" (emphasis added). Whatever the precise standard may be, the People set it too high. The inference that Ms. Sturm prepared both the case summary and the VDF is a reasonable one, because Ms. Sturm testified that either she or Ms. Friedman Agnifilo had prepared the documents, that Ms. Friedman Agnifilo was not present during the jailhouse interview, that it was "very possible" she had prepared the case summary and that the VDF bore her typewritten name. Moreover, even assuming that Ms. Sturm did not personally prepare each document, it is entirely unreasonable to think that Ms. Sturm, the lead prosecutor in a serious homicide case, did not well know what each document said about a matter of great import: the statements defendant made during the jailhouse interview. Indeed, it is confounding that the People continue to contend that the defense properly was prevented from impeaching the testimony of the lead prosecutor on such a critically important subject with the accounts of defendant's statements in documents prepared either by the lead prosecutor or by an assistant

district attorney she was supervising.

As noted, the People presented strong evidence that defendant knew that Michael E.'s intent was to kill the victim. Ms. Sturm's testimony that defendant had said that Michael E. had said he was going to kill the victim was extremely damaging testimony. In their brief, the People highlight this testimony, arguing that "[t]his is one of those rare cases in which the defendant *did* explicitly explain what was going on in his head at the time of the crime; specifically, he admitted during his jailhouse interview that he knew [Michael E.] intended to kill [the victim]." We agree and in part for this very reason, we conclude that the erroneous preclusion of evidence which could lead the jury to reject this testimony was not harmless error. Morever, of course, regardless of whether Detective Waithe's testimony regarding the interview contradicted Ms. Sturm's testimony, his testimony certainly did not corroborate Ms. Sturm's.[1]

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[1]We note that the day after the court's ruling, the existence of another document emerged, an "Original Case Report," containing the same statement reportedly made by defendant (i.e., that he "didn't know that [Michael E.] was going to kill Butterball"). This document contains the typewritten recitation that it is "From: Asst. D.A. Helen Sturm/Karen Friedman." Defendant argued that he had not been provided with the document and thus that the prosecution had committed a *Rosario* violation.

Defendant's challenges to the sufficiency of the evidence are unpreserved (*People v Hines,* 97 NY2d 56, 61 [2001]; *People v Abarrategui*, 306 AD2d 20, 21 [2003], *lv denied* 100 NY2d 617 [2003]), and we decline to review them in the interest of justice. As an alternative holding, we conclude that they are meritless in any event. Defendant's challenges to the weight of the evidence are likewise meritless. We need not reach any of defendant's other arguments for reversal.

All concur except Tom and Abdus-Salaam, JJ.
who concur in a separate memorandum by
Tom, J. as follows:

The trial court, however, did not rule on the issue of whether there had been a *Rosario* violation. Rather, it concluded that in the interests of fairness the defense should be permitted the opportunity to recall Ms. Sturm, an opportunity the defense declined. As we are directing a new trial in any event, we need not reach the merits of defendant's *Rosario* claim. Although the concurrence finds that the document had not been turned over and that the prosecution thereby violated its obligations under both *Rosario* and *Brady*, defendant made no *Brady* claim at trial (nor does he on appeal), there is no need to address it and the record is not adequate to resolve it.

TOM, J. (concurring)

This is the second time defendant has been tried and convicted by a jury of criminal facilitation in the second degree in connection with the March 22, 1998 murder-for-hire of William Sharpe, a homeless drug addict, for which the trial court imposed a prison term of 7½ to 15 years. In the first jury trial, defendant was convicted of second-degree murder and second-degree criminal facilitation, and was sentenced to concurrent terms of 20 years to life, and 7½ to 15 years. By decision dated October 17, 2006, this Court reversed because of prosecutorial misconduct, compounded by error in instructing the jury, that cumulatively deprived defendant of a fair trial (33 AD3d 432 [2006]. On the instant appeal, we again vacate the judgment of conviction on the basis of an evidentiary ruling that deprived defendant of the opportunity to impeach the testimony offered by a key witness. We disagree with the majority, though, as to the proposition that we should not address the *Brady* consequences of the People's failure to turn over exculpatory material that unfairly prejudiced his ability to mount a defense.

The indictment charged that the murder of William Sharpe was procured by Doreen B., defendant's cousin, and that she, her son, Ronnie B., and defendant caused Sharpe's death. Additionally, it

charged that the three engaged in conduct providing Michael E., who carried out the shooting, with the means and opportunity to commit the murder, a class A-I felony, constituting criminal facilitation in the second degree. Prior to trial, Michael E. entered into a cooperation agreement, pleading guilty to second-degree murder and receiving the minimum sentence of 15 years to life in exchange for his testimony. The trial of Doreen B. and Ronnie B., at which Michael E. testified, was severed from that of defendant, and a jury acquitted them of all charges.

Essential to a conviction for second-degree criminal facilitation, a class C felony, is the defendant's belief that it is probable the person to whom he renders aid intends to commit a class A felony (Penal Law § 115.05), in this case second-degree murder, as charged in the indictment. It is the People's theory that defendant facilitated the shooting of William Sharpe by identifying him to his killer. If the People cannot establish that defendant had knowledge that it was Michael E.'s intent to kill, not merely injure, Sharpe, defendant lacked the requisite mental state to convict him of second-degree criminal facilitation. In that event, he is subject to conviction of, at most, fourth-degree criminal facilitation, a class A misdemeanor, requiring only the belief that the person to whom aid is rendered

probably intends to commit a crime and that the crime the person ultimately commits is a felony (Penal Law § 115.00[1]).

At trial, the People's evidence of defendant's state of mind immediately prior to the shooting came from two sources. The first was Michael E., who described the meeting during which his services were recruited by Doreen B. in defendant's presence. The second source was the lead prosecutor, who testified that defendant had admitted, during an interview at Arthur Kill Correctional Facility, his knowledge of Michael E.'s murderous intent.

As this Court noted on the first appeal, the People's case was largely dependent on the jury's perception of the credibility of its key witnesses (33 AD3d 432, 433 [2006], *supra*). Michael E.'s testimony had not been effective in securing the conviction of Doreen B. and Ronnie B., and the People concede that he had amassed a substantial criminal history, including robbery and the sale and possession of drugs. By 1998, when Sharpe was murdered, Michael E. had a serious heroin addiction, "doing probably eight bags to ten bags of heroin a day." Michael E. signed a number of inconsistent written statements concerning his participation in the events leading up to the killing, explaining at trial that he

first told lies to "[b]uild up my confidence to build up the truth." In the first statement, signed March 27, 1998, he denied any connection with the crime. In the second, signed on April 1, he stated that he had only been recruited by Doreen B. to beat Sharpe. In his third statement, signed on April 2, he admitted involvement in the crime but alleged that the shooter was a person named "Von," "Deshawn" or "Shawn." Shortly thereafter, he signed a fourth statement admitting that he shot Sharpe at Doreen B.'s request.

With respect to defendant's participation in the crime, the account given by Michael E. at trial contradicted both his final written statement and his two-hour videotaped confession. To justify his disparate prior statements, Michael E. stated that he "wasn't feeling comfortable when I first met the detectives" but felt sufficiently comfortable with the ADA acting as lead prosecutor and "apologized when I cleaned it all up and showed her where the lies were at and eventually told her the truth." With respect to defendant's purported admission, the accounts given by the detective and by the ADA of the statement made by defendant at Arthur Kill Correctional Facility differed significantly in regard to his knowledge of the degree of

violence he expected Michael E. to inflict on Sharpe in accordance with Doreen B.'s instructions.

At trial Michael E. testified that Doreen B. told him that Sharpe had robbed one of her drug dealers, and that she wanted Sharpe “shot and killed.” Michael E. responded, “I don’t do nothing with guns. You know what I do. My hands is my weapons. I fight good.” After further discussions in Doreen B.’s apartment, however Michael E. agreed to do the killing for money. Doreen B. sent Ronnie B. to retrieve a bag which contained a handgun. Michael E. testified that as Doreen B. took the bag from Ronnie B., defendant, who goes by the street name “Von” and “Hollywood,” entered the room. Doreen B. removed a .38 caliber pistol from the bag, and handed it to Michael E., who said that he did not know the intended victim Sharpe. Michael E. testified that defendant said, “Don’t worry, I will show you who he is.”

Defendant and Ronnie B. then led Michael E. to the street, where they questioned a man about Sharpe’s whereabouts, and learned he was inside a building located at on 144th Street. Michael E. testified that he followed defendant into the building and up a flight of stairs, while Ronnie B. remained outside. Michael E. claimed that upon reaching the fifth floor, defendant

gestured toward Sharpe, who was slumped and sleeping on the stairs leading to the roof. Michael E. then fired three shots into Sharpe's head, killing him. According to Michael E., they fled down the stairs, with defendant exiting out the building's back door and Michael E. out the front entrance.

Although Michael E. had told Doreen B. that he did not know Sharpe, upon seeing him asleep on the stairs, Michael E. realized that he and Sharpe had recently exchanged harsh words when he had observed Sharpe sell fake crack cocaine on the street.

At the time of the shooting, Brandon Morgan, Sharpe's cousin, was standing just outside the building's entrance when an upstairs neighbor called down to him that someone had broken a window and was running down the stairs. Morgan testified that he then saw Michael E., who was wearing a denim jacket with a hood, walk out of the building. Morgan confronted Michael E., but Michael E. denied any knowledge of a broken window.

Sharpe's uncle, Clayton Morgan, lived on the first floor of the building on 144th Street. On the morning of January 22, 1998, he heard what sounded like breaking glass. Clayton Morgan assumed that Sharpe, whom he knew was an addict and slept in the stairwell, had broken a window, but did not want to argue with him about it, but decided instead to simply clean up the mess.

Morgan took a broom into the hallway, where he began to sweep. He observed a man sneaking down the stairs, whom he assumed was Sharpe. As he did not wish to speak with Sharpe, Clayton Morgan avoided looking at the man as he passed, although he did notice that he wore a dungaree jacket and a hood.

Five days after the murder, Clayton Morgan recognized Michael E. as the man in the stairway at the corner of 143rd Street and Hamilton Place. Notably, Morgan did not testify that he saw defendant in the stairway, thus casting doubt on Michael E.'s testimony that they fled down the stairs together. Police were summoned and Michael E. was apprehended. In subsequent interviews with NYPD Detective Cecil Waithe and lead prosecutor ADA Sturm (who at the time of both trials was sitting as a Family Court Judge) Michael E. admitted to being the shooter, but said that he had been accompanied by defendant. Michael E. was charged with murder and incarcerated on Riker's Island, where, in January 1999, he encountered defendant, who was being held on an unrelated narcotics charge. Michael E. contacted Sturm and told her that defendant was the man who had led him to Sharpe at the time of the murder.

On the morning of January 22, 1999, Detective Waithe and

Sturm met with defendant at the Arthur Kill correctional facility on Staten Island, where an unrecorded interview took place. Pursuant to Sturm’s direction no contemporaneous notes were recorded and defendant was not asked to sign a statement.

At trial, Detective Waithe testified that in Michael E.’s initial videotaped statement to investigators, he had stated that he went into the building on West 144th Street by himself. Waithe also testified that Michael E. had told him that he (Michael E.) was “good with his hands.” In subsequent interviews, Michael E. said that one of his accomplices in the shooting was nicknamed “Von.” Waithe testified that prior to revealing “Von’s” involvement in the murder, Michael E. had lied to investigators numerous times, and only came forward with the story about “Von” after sitting in jail for some months.

Detective Waithe further testified that during the Arthur Kill interview, defendant had waived his *Miranda* rights, then told the investigators that Doreen B. had wanted Sharpe, known as “Butterball” to be “hurt” or beat up for robbing her drug dealer, and that Michael E. had agreed to “do this.” As a result, "She wanted him hurt. She wanted to teach him a lesson." Asked on cross-examination if Doreen B. wanted him beaten up, the witness responded, "Beaten up, hurt," adding, "That's it." The detective

confirmed that defendant had said only that he led Michael E. to the building where Sharpe was sleeping and "emphatically told me that he did not go into that building with [Michael E.]." Waithe testified that defendant stated that both he and Ronnie B. had agreed to accompany Michael E. in order to identify Sharpe, had made inquiries in order to find out where Sharpe could be found, accompanied Michael E. to the building 557 West 144th Street but did not instruct Michael E. to enter the building, that Michael E. had entered the building alone, and "that was it."

At trial, Sturm gave a materially different account of the interview from that of detective Waithe. She testified that she was the lead prosecutor in defendant's case, and that at the Arthur Kill interview defendant was *Mirandized* and waived his rights. In contrast to the detective's testimony, Sturm claimed that defendant told her and Waithe that he was present in Doreen B.'s apartment when Michael E. agreed to kill Sharpe, and had observed Ronnie B. leave the room briefly, then return and give a handgun to Michael E.. Sturm testified that the conversation "at that point was that [Michael E.] was going to go and kill Butterball." Because Michael E. was not certain he could identify Sharpe, Ronnie B. had agreed to accompany him to make sure that he "got the right person," and defendant had agreed to

accompany the two men in order "to provide back up and muscle." The three then went outside, where Ronnie B. spoke to some people and learned that Sharpe was inside the building on West 144th Street.

Sturm testified that she did not record the Arthur Kill interview because she had believed at the time that recording was not permitted in correctional facilities. Although unable to recall at first, when shown her former testimony, she recalled that she had also told Detective Waithe not to write up a DD5 report following the Arthur Kill interview. She further testified that on the afternoon of the Arthur Kill interview, she had written up a summary of the interview, which she captioned "Abstract of Det. Waithe's Grand Jury Testimony re: 'Von.'" As the investigation developed, an unsigned case summary and Voluntary Disclosure Form (VDF) were also developed.

During cross-examination, defense counsel attempted to question Sturm about the case summary from her office which contained a written statement that defendant "claims that he didn't know (Michael E.) was going to kill [Sharpe]," which contradicted her trial testimony that defendant stated during the Arthur Kill interview that he knew Michael E. intended to kill Sharpe. Sturm recognized the case summary document, but because

10 years had passed, she could not recall whether she had prepared it or whether it had been prepared by her assistant on the case, ADA Karen Agnifilo. Sturm testified that it was very possible that she had in fact created the case summary, and that since ADA Agnifilo was her only assistant, one of them had created the document. When counsel attempted to question her about the contradictory statement contained in the case summary, he was precluded from further inquiry concerning the contents of the document by the prosecutor’s objection.

At the sidebar conference that followed, defense counsel emphasized that what defendant knew or did not know about the extent of the injury intended to be inflicted upon William Sharpe "is the crux of the defense case with regard to this witness . . . given [her] testimony that [defendant] told her that he had knowledge of this. There is a document that was filled out by the District Attorney's office where it clearly says that he never said that." However, the court declined to permit the case summary to be used to impeach Sturm, stating, "She has in some way, in my view, not affirmatively adopted this statement in order for it to be used for impeachment." Due to the uncertainty as to who had prepared the document, the court ruled that unless

Sturm's assistant denied preparing it, the case summary could not be used to impeach her testimony. Since the assistant could not recall, stating that it was simply a document "ordinarily produced in a case," the court did not permit counsel to use the case summary to pursue this line of inquiry.

When counsel resumed questioning the witness about the case summary, Sturm stated, "I always placed one of those in what I refer to as the case file." While she could not recall who drafted the document, she only had one assistant. "So if it wasn't me it was her but I don't remember who it was." She conceded that her assistant had not gone to Arthur Kill to interview defendant. Finally, Sturm testified that the other document, designated "abstract," was prepared upon her return from the interview at Arthur Kill (January 22, 1999), that the case summary, while undated, was prepared following grand jury proceedings (culminating in the indictment filed March 23, 1999), and that the case summary "had to have been completed after the last grand jury day because it reflects those grand jury days."

A similar result ensued when counsel attempted to question Sturm regarding the VDF which was filed by her office, and which was dated March 22, 1999, and, though unsigned, included a typewritten notation, “By: Helen Sturm.” The VDF stated that

defendant had told investigators that he knew Doreen B. wanted Sharpe to be hurt and was present for Michael E.'s receipt of the gun, but did not state that defendant knew Michael E. intended to kill Sharpe. When shown the VDF at trial, Sturm acknowledged that it was possible she had created the document, but she could not state with certainty that she had done so. The court likewise ruled that the witness could not be impeached on the basis of the VDF because she could not recall with certainty that it was she who created it.

The morning after Sturm's testimony, prior to ADA Karen Agnifilo's testimony, the prosecutor informed Supreme Court that he had discovered two different documents entitled "Original Case Report." (The original case report shall be designated as the report which was not produced by the People and the case summary refers to the report received by defendant). The original case report contained the case summary's exculpatory statement that defendant claimed not to have known that Michael E. intended to kill Sharpe, but also contained a typewritten notation - "To: Eugene Porcaro, [Chief of the District Attorney's Trial Bureau] From: Helen Sturm and Karen Friedman [Agnifilo]." The case summary did not contain the above-quoted statement.

The inconsistency concerning what defendant admitted to having known about Michael E.'s intentions towards Sharpe attained even greater significance when ADA Agnifilo testified that she could not recall who prepared the case summary and her inspection of the case summary indicated that the portion of the document containing the exculpatory statement (that defendant had denied knowledge of Michael E.'s intent to kill Sharpe, thereby contradicting Sturm's testimony) may have been copied and pasted from the original case report. Counsel thereupon objected that the typed notation indicating that it was sent to the Chief of the Trial Bureau by *both* Sturm and her assistant was not contained in the version of the case summary that had been provided to him, constituting a *Rosario* violation and warranting the declaration of a mistrial. Upon comparing the undisclosed document to the version furnished to the defense, the trial court observed, "The summary of facts is--I'm not going to go word for word, but suffice it to say it differs." Without ruling whether or not a *Rosario* violation had been made out, the court denied the application for a mistrial, offering only to recall Sturm to the stand, which offer was declined by the defense. The court also denied an alternative defense motion requesting an adverse inference charge.

Defendant's chief appellate contentions concern the inadequacy of the proof adduced by the People to establish his knowledge that Michael E. intended to kill the victim so as to sustain the conviction for second-degree criminal facilitation. Defendant asserts that the credible evidence demonstrates only that he was aware of a plan to injure Sharpe and that the trial court erred (1) in failing to instruct the jury that the evidence offered by Sturm should be scrutinized with care, particularly as it was contradicted, and (2) in denying him the opportunity to impeach the People's witness with contradictory material contained in the prosecution's case file. Additionally, defendant argues that the failure to disclose the material in the original case report and certain misleading comments made by the prosecutor abrogated his right to a fair trial.

We agree with the majority that reversal is required because of the preclusion of the prior inconsistent statement, which can be reliably attributed to Sturm. Denied the ability to examine Sturm about the exculpatory version of defendant's asserted admission contained in the case summary, counsel also was deprived of the opportunity to make effective use of the material inconsistency to impeach Sturm's trial testimony (*People v Fisher*, 201 AD2d 193 [1994], *lv denied* 84 NY2d 935 [1994]). The

error can hardly be considered harmless. Central to defendant's conviction for second-degree criminal facilitation was his alleged knowledge that, when he rendered aid to Michael E. by identifying Sharpe, defendant reasonably expected that Michael E. intended to kill the victim. Given the contradictions between the testimony elicited from the lead detective in the case and the many prior inconsistent statements given by Michael E. concerning defendant's participation in the crime, the strength of the evidence supporting conviction was heavily dependent on the jury's perception of Sturm's credibility.

Moreover, the People's failure to provide the defense with the earlier document, bearing a legend indicating that it was the work product of the ADA as well as her assistant, not only impeded defendant's ability to introduce the case summary for impeachment purposes, violating the prosecution's disclosure obligations under *People v Rosario* (9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]*),* but also violated *Brady v Maryland* (373 US 83 [1963].

The *Brady* rule, reflecting a prosecutor's dual role as advocate but also as a public officer, is rooted in due process and a sense of fairness to the accused, requiring prosecutors to disclose to a defendant all evidence in the prosecutor's

possession that is favorable to him or her (*People v Steadman*, 82 NY2d 1 [1993]). Because the original case report was the work product of Sturm it directly links her to the preparation and recording of defendant's exculpatory statement made at the interview. The People's failure to produce this document before trial deprived defendant of material evidence in his favor and constituted a clear violation of his due process right to a fair trial so as to warrant a finding by this court of a *Brady* violation.

The *Brady* rule applies regardless of the good faith or the bad faith of the prosecutor because "its purpose is not to punish misconduct, but to ensure that the accused receives a fair trial" (*People v Bryce*, 88 NY2d 124, 129 [1996]). Here, we do not impute any bad faith to the trial prosecutor, nor even to Sturm as the witness, but our concern is that defendant did not receive the disclosure to which he was entitled. The nondisclosure had greater import than possible reputational implications for the prosecutor. That the missing documentation also included inculpatory material potentially relevant to a lesser charge would not detract from its *Brady* character (*DiSimone v Phillips*, 461 F3d 181, 195 [2d Cir 2006]). A *Brady* analysis is undertaken

by assessing the omitted evidence in light of the entire record (*United States v Agurs*, 427 US 97, 112 [1976]; *United States v Rivas*, 377 F3d 195 [2d Cir 2004]). We conclude that under the facts of this case, a reversal also would have been warranted for violation of the People's continuing obligation under *Brady* as well as New York's independent due process requirements with respect to the disclosure of exculpatory information to a defendant (*see People v Vilardi*, 76 NY2d 67 [1990]). The exculpatory dimension of *Brady* is present.

Sturm never conceded that she prepared the disclosed documents, the case summary or the VDF, and, in fact, the trial court categorically found that Sturm had not adopted the writings as her own. However, the undisclosed document would show that the original case report was, indeed, the work product of Sturm and her assistant, and was sent to the Chief of the Trial Bureau as such, and that the information used to prepare the case summary most likely came from the original case report. This document would have disclosed what defendant told Sturm at the interview concerning his knowledge of Michael E.'s intent as recorded by Sturm. Because Michael E.'s credibility was unreliable, the only competent evidence to implicate defendant in the charged crimes was Sturm's testimony concerning defendant's

alleged admission of his knowledge of Michael E.'s intent to kill Sharpe. This undisclosed evidence, however, would have significantly undermined Sturm's testimony in this regard. Further, the People's case against defendant, which mainly hinged on Sturm's testimony, would have been drastically compromised by the undisclosed document. Without defendant's purported admission, the People's case would rest primarily on the statement of Michael E. whose testimony was not even sufficiently credible as to convict Doreen B., who actually orchestrated Sharpe's murder.

The original case report which contradicted Sturm's testimony, and substantiated defendant's claim that he did not know of Michael E.'s intent to kill Sharpe, was *Brady* material because it is "inconsistent with a fundamental aspect of the People's case" (*People v Garcia*, 46 AD3d 461, 462 [2007]) and was clearly material evidence in defendant's favor "because it is impeaching" (*DiSimone v Phillips*, 461 F3d at 195). Moreover, the veracity of the undisclosed document is enhanced insofar as it corresponded with Detective Waithe's testimony. Thus, we conclude that the People's failure to produce the report, which was consistent with defendant's claim of innocence with respect

to the charged crimes, and which contradicted Sturm's testimony to the contrary, to the defense before trial violated their *Brady* obligation.

The issue was not preserved. However, it is hardly unprecedented for an appellate court to review it in the interest of justice or to analyze several errors, rather than focusing on only a single reversible error. We address this because as an appellate court we should identify an issue, clearly manifested in the record, which substantially impacted defendant's ability to prepare and present a defense. Our concern is enhanced under the circumstances of this case where the credibility was so centrally in issue, that the outcome at the trial could have been very different if evidence in the People's possession that conceivably undermined the prosecution's case based on defendant's alleged admission had been presented to the jury. We believe that had the jury known that the People's own documentation reflected defendant's exculpatory statement as recorded by Sturm, rather than only a seemingly unchallenged asserted admission, there is a reasonable likelihood it would have reached different conclusions in its judgments on witness credibility, a crucial issue in this case. A defendant's ability to utilize exculpatory information in the People's possession

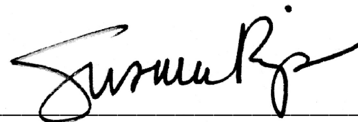
goes to the heart of the *Brady* rule. Hence, our appellate review should be efficiently comprehensive to address, and not ignore or disregard, a *Brady* violation which clearly denied defendant's constitutional right to a fair trial.

Since only Michael E., the admitted shooter who had entered a cooperation agreement with the People (notwithstanding his claim that his testimony was not affected thereby), connected defendant with the crime, the outcome of this case turned in significant part on the nature of defendant's purported admissions and the prosecutor's decision to base the People's case on his admissions. Especially in view of Michael E.'s questionable credibility as a result of his concededly different, inconsistent statements given to the police, and the conflict to which we alluded in our prior decision (33 AD3d 432 [2006], *supra*) between Detective Waithe's testimony and that of Sturm, whose testimony relied on records under her control, regarding the extent of defendant's admissions of culpability, the missing documentation would have provided valid material evidence in a *Brady* context (*Giglio v United States*, 405 US 150, 154-155 [1972]; *People v Colon*, 13 NY3d 343 [2009]) that might have added sufficient doubt to the People's case (*People v Hunter*, 11 NY3d 1 [2008]) so as to create the reasonable possibility of a different

verdict (*People v Colon*, 13 NY3d 343 [2009], *supra*; *People v Vilardi*, 76 NY2d 67 [1990], *supra*). We would reach the same result even under the more stringent reasonable probability standard (*People v Bryce*, 88 NY2d 124 [1996], *supra*).

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

ENTERED: JUNE 23, 2011



CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, Román, JJ.

1925 Florence Shapiro, Index 105318/07
Plaintiff-Respondent,

-against-

350 E. 78th Street Tenants Corp.,
Defendant-Appellant.

Ahmuty, Demers & McManus, Albertson (Deborah A. Del Sordo of counsel), for appellant.

Toback, Bernstein & Reiss, LLP, New York (Brian K. Bernstein of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 24, 2009, which granted plaintiff's motion for partial summary judgment on the issue of liability on her first and second causes of action, enjoined defendant to make repairs or improvements as necessary to restore plaintiff's use of the roof appurtenant to her apartment, and denied defendant's motion to vacate so much of a prior order permitting plaintiff to place three chairs on the roof, affirmed, without costs.

Plaintiff's status as shareholder of the subject unit entitles her to use the roof appurtenant to her apartment. The proprietary lease provides that "the Lessee shall have and enjoy the exclusive use of the . . . roof and/or that portion of the roof appurtenant to the penthouse, subject to the applicable

provisions of this lease . . .” and the offering plan states that the tenant’s roof apartment “will have the exclusive use of the roof of the Front House (and penthouse thereon) . . .”

In 1993, a clogged drainpipe outside plaintiff’s apartment caused a leak to develop in the adjacent apartment, resulting in replacement of the roof. In 2004, after the building again suffered major leaks, investigation revealed that plaintiff had installed wooden decking on the rear roof, on which she had placed furnishings that included iron furniture and planters containing large trees and shrubbery. In the summer of 2005, in response to a February 2005 notice issued by defendant cooperative, plaintiff removed the decks, furniture and planters from the roof to permit inspection by a qualified expert, who advised that wooden decks are not recommended on flat roofs because they encourage penetrations and punctures and obscure both leak prone areas and active leaks. Defendant’s expert also questioned whether a roof deck is even permissible under New York City Buildings and Fire Department codes.

Plaintiff’s first cause of action alleges that, by notice dated October 24, 2005, defendant forbade her to use or even walk on the roof, a proscription that was made permanent by notice dated May 26, 2006. The second cause of action alleges that

defendant failed to maintain the roof in a condition that permits plaintiff to use it or walk on it. These allegations are repeated in the third cause of action as grounds supporting a mandatory injunction requiring defendant to sufficiently improve the roof to permit a weight-bearing deck to be erected thereon.

The court granted expedited judgment as to liability and enjoined defendant only "to make repairs or improvements as necessary to restore Plaintiff to her use of the roof space."

As the dissent concedes, the roof is damaged and requires repair. The current unserviceable condition of the roof is supported by an affirmation of the attorney for the cooperative in support of defendant's motion dated April 30, 2009, which stated that the roof " . . . in its current state is not structurally sound enough to withstand the weight of plaintiff, chairs . . . and/or any other individual or item that may be placed thereon . . ." The court further found, "As recently as April 29, 2009, the Corporation contended that the roof is in a condition of disrepair such that three persons cannot safely sit on chairs placed upon it."

Supreme Court noted that four years had elapsed since plaintiff was ordered to remove the items from the roof, and she complied with the order, but defendant had failed to repair the

roof. Supreme Court properly concluded that defendant's failure to maintain the roof deprived plaintiff of its use, in violation of the offering plan and proprietary lease (*see Dinicu v Groff Studios Corp.*, 257 AD2d 218, 224 [1999]; *Washburn v 166 E. 96th St. Owners Corp.*, 166 AD2d 272 [1990]), warranting injunctive relief directing repairs necessary to render the roof amenable to plaintiff's right of use under the offering plan and proprietary lease, subject to reasonable regulation by defendant (*see Benedict v International Banking Corp.,* 88 App Div 488 [1903]). In that section 7 of the proprietary lease grants plaintiff "the exclusive use of . . . that portion of the roof appurtenant to the penthouse," the injunction does no more than enforce plaintiff's contractual rights, consistent with the court's ruling on the first two causes of action.

The determination of the extent of plaintiff's permissible use, including whether plaintiff transgressed building and fire codes, involves factual questions for resolution at the trial of plaintiff's remaining causes of action, together with defendant's counterclaims, which seek compensation for roof damage alleged to have been caused by plaintiff's use. The dissent points to the affirmation of the attorney for the cooperative, which "reiterates" that "the roof was not built to support the load

that plaintiff has placed upon it in the past" and that "plaintiff's unauthorized use of the roof caused any existing damage." However, this allegation is not supported by the cooperative's own engineer. In his report of the inspection of the roof conducted shortly after plaintiff had removed all structures and items, the engineer found that the rear roof is in "generally adequate condition" and the front roof "is in overall satisfaction condition." In any event this issue can be further explored on the trial of defendant's counterclaims.

The dissent misapprehends the limited scope of the injunction. Although the motion court found the prohibition against any and all use of the roof by plaintiff to constitute a breach of the lease, the injunctive order merely directs defendant to make such repairs as may be necessary to *restore* plaintiff's use of the roof, consistent only with the rights granted to her as the owner of the shares allocated to the penthouse apartment. By withholding the bulk of the injunctive relief demanded in the third cause of action, the motion court recognized that the proprietary lease and offering plan do not grant plaintiff the right to install decking, furniture or planters. As stated by the motion court, "[W]hether [p]laintiff has an absolute right to install whatever decking and furniture

she wishes on the roof -- plainly, she does not . . .” Whether a prior cooperative board validly authorized the installation of such items and whether such installation violated applicable City codes or caused damage to the roof structure are issues to be tried with any other surviving causes of action and the counterclaims.

Finally, should questions arise with respect to the rights and obligations of the parties, they may apply for clarification or modification to Supreme Court which, as the court imposing the injunction, has inherent power to afford appropriate relief (see *People v Scanlon*, 11 NY2d 459, 462 [1962], citing *Dictograph Prods. v Empire State Hearing Aid Bur.*, 4 AD2d 508, 510 [1957]).

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

McGUIRE, J. (dissenting)

I disagree with the majority that defendant cooperative corporation denied plaintiff her right to the use of the roof appurtenant to her apartment and that its "failure to maintain the roof deprived plaintiff of its use, in violation of the offering plan and proprietary lease." I further disagree with the majority's affirmance of the granting of a mandatory injunction requiring defendant to repair or improve the roof to restore plaintiff to her use of the roof space. As discussed below, there is no evidence that the roof requires any repairs or improvements in order to satisfy any legal obligation of defendant to plaintiff. Accordingly, I would deny plaintiff's motion for partial summary judgment and vacate the injunction.

In 1979, plaintiff purchased a cooperative penthouse apartment in a 100-year-old building on Manhattan's Upper East Side. The apartment included an adjoining rooftop space (a front roof and a rear roof) that, pursuant to the proprietary lease, she was to "have and enjoy the exclusive use of . . . subject to the applicable provisions of [the] lease." The lease further provided:

> "The Lessee's use [of the roof] shall be subject to such regulations as may, from time to time, be prescribed by the Directors . . .

> . The Lessee shall keep the . . . roof . . . clean and free from snow, ice, leaves and other debris and shall maintain all screens and drain boxes in good condition. No planting, fences, structures or lattices shall be erected or installed on the . . . roof of the building without the prior written approval of the Lessor . . . . Any planting or other structures erected by the Lessee . . . may be removed and restored by the Lessor at the expense of the Lessee for the purpose of repairs, upkeep or maintenance of the building."

In addition, the offering plan provided that plaintiff's "exclusive use of the roof" is "subject to the right of the Apartment Corporation to have access thereto whenever necessary for the maintenance and operation of the buildings." The lease also required plaintiff to comply with all local codes, permitted defendant's board of directors to determine the manner of maintaining and operating the building, and required plaintiff to indemnify defendant for liability and damage caused by her failure to comply with any of the leases' provisions.

In 1993, a leak developed in plaintiff's neighbor's apartment due to a clogged drainpipe on the roof outside plaintiff's apartment. According to an affidavit submitted by the neighbor, at some time prior to 1993 plaintiff installed large trees, shrubbery and furniture on the roof without notifying or obtaining approval from the cooperative's board of

directors. An inspection of the roof revealed that it needed to be replaced because the membrane had been perforated in spots due to plaintiff’s placement of furniture and plants on the roof and because of “waves” in the membrane. The inspection also revealed that the roof membrane was the wrong type for a deck surface, and that a rubberized membrane was necessary if plants and furniture were to be placed directly on the roof’s surface.

The rear roof was replaced in 1993 or 1994 and again in 2001. In 2004, additional major leaks occurred. An investigation by the board revealed that plaintiff had installed wooden decks on the rear roof and, in addition to furniture, had maintained planters with large trees on the deck. Defendant maintains that plaintiff did so without written approval from the board of directors and that it was unaware of the installation of the deck until its investigation in 2004. Plaintiff maintains that in 1993, the board advised her that in order to continue her use of the roof she had to build a weight-bearing deck and had to use a specified contractor. She further maintains that she did so, and used the deck without complaint for more than 10 years. Plaintiff has not submitted any documentary evidence regarding the board’s approval, written or otherwise, for the alterations she made to the roof.

After several major leaks developed in 2004, plaintiff was directed by defendant to remove all items from the roof so it could be inspected by a qualified expert in February 2005. She complied only partially. As a result of her failure fully to remove the decks and her refusal to permit access to the rear roof, the inspection did not take place until six months later, on September 24, 2005.[1] The licensed engineer who inspected the roof on defendant's behalf prepared a report stating that the rear portion of the roof was in generally adequate condition, but was uneven and ridged as a result of multiple layers of roofing having been applied over many years. He noted that a spigot at the rear of the penthouse (apparently installed by plaintiff without board approval) was leaking, causing both premature aging of the roof and the potential for leakage into the apartment below. Defendant's engineer added that wooden decks are not

[1]While defendant was attempting to gain access to the roof for an inspection, plaintiff sought to sell her apartment. On June 13, 2005, plaintiff advised the board that she received an offer on her apartment and planned to accept it. The board responded that the roof would have to be inspected before any sale so that the new tenants would have the correct information about what was allowed to be on the roof. It noted that once the new buyers moved in, it would consider requests from them to build new decking if the board deemed their proposal safe and appropriate for the roof.

recommended on flat roofs because they encourage penetrations and punctures, obscure leak prone areas and active leaks, entrap debris that accelerates aging, and complicate roof repairs. Nonetheless, he noted that the front roof appurtenant to plaintiff's apartment was in overall satisfactory condition.

An addendum to the engineer's report stated that further investigation into New York City Buildings and Fire Department codes revealed additional concerns. He stated both that a deck is not permitted because it could result in loading that would exceed maximum load levels for flat roof structures. More specifically, he stated that "[t]he live load of people upon the deck combined with the dead load of the deck itself, and any additional loads typically applied to roof structures, could exceed the structural limits of the roof framing system." Additionally, defendant's engineer stated that a roof deck would hinder the ability of the Fire Department to accomplish roof ventilation.

At a shareholders' meeting held on or about October 10, 2005, the board voted to prohibit plaintiff from reinstalling the decks on the roof. At this same meeting, the shareholders ratified the decision of the board. Plaintiff, who did not attend the meeting, was subsequently advised that the

shareholders "have decided that no deck(s) are allowed to be installed on any of the roofs."[2] Thereafter, in May 2006, the board declined to reconsider its determination that decking could not be installed.

In April 2007, plaintiff commenced this action asserting various causes of action related to defendant's alleged interference with her use of the roof. Thereafter, defendant attempted to negotiate a settlement with plaintiff. Sometime in 2008, the board provided plaintiff with an 11-page alteration agreement requiring, among other things, detailed plans, a $20,000 security deposit and evidence of insurance. By letter of October 10, 2008, plaintiff's counsel advised defendant's counsel that he had consulted with an engineering firm regarding proposed installation of non-combustible material to serve as decking, and, before obtaining detailed plans, was providing specifications for the board's review. Specifically, plaintiff's counsel proposed, based on the engineer's recommendation, that rubber pavers be installed on the front and rear roofs above an inorganic drainage mat. Counsel stated both that the pavers

[2]Plaintiff maintains that in February 2006, the prospective buyers cancelled the contract of sale upon hearing of this restriction.

could be easily removed if the roof underneath required repair or replacement and were within the appropriate weight range for the building design and the applicable code requirement. Plaintiff's counsel provided information regarding the rubber pavers but did not submit a report from an engineer to support his statements.

By letter of November 24, 2008, plaintiff's counsel responded to concerns raised by defendant's engineer regarding the material's fire resistance and the roof's maximum load allowance, but still did not submit a report or affidavit from an engineer to support his assertion that defendant's concerns had been addressed. Nonetheless, he asked that the board approve plaintiff's request to install the rubber pavers on the roof.

By letter of December 31, 2008, defendant's engineer advised that the material in question was not intended as a roof surfacing or roofing product, especially on combustible roof decks. He further stated that the pavers do not provide any water or weather resistance, would not be appropriate for the weight bearing capacities of the building, and were not compliant with the New York City Building Code. Specifically, he referenced section 1607.11.2.2 of the code entitled "Special-purpose roofs," which provides that "[r]oofs used for promenade purposes shall be designed for a minimum live load of 60 psf

[pounds per square foot]" and that those "used for roof gardens or assembly purposes shall be designed for a minimum live load of 100 psf" (Building Code of New York City § 1607.11.2.2, reprinted in Administrative Code of the City of New York § 28-1607.11.2.2). Defendant's engineer explained that the roof of the building "was designed and constructed to support a live load of 30 pounds per square foot" and "is highly inadequate to satisfy the code provisions for promenade and assembly areas."

Defendant's engineer also stated that plaintiff's counsel's assertion that the weight of the rubber pavers was within the appropriate range required by the Building Code was incorrect. In this regard, the engineer cited the Building Code, which defines dead loads as "[t]he weight of materials of construction incorporated into the building, including but not limited to walls, floors, roofs, ceilings, stairways . . . and other similarly incorporated architectural and structural items . . ." (Building Code of New York City § 1602.1, reprinted in Administrative Code of the City of New York § 28-1602.1) The code further provides that dead loads are considered permanent loads (*id.*). Live loads, on the other hand, are defined in relevant part as those loads produced "during the life of the structure by movable objects such as planters and by people"

(*id.*). He explained that the assertion that the pavers are live loads "is absolutely invalid" because they "are not 'movable' in a manner that people and planters are movable, and they are intended to lay on the roof in a permanent manner." He also noted that the use of the rubber pavers on a roof is not compliant with the wind resistance and uplift requirements contained in the Building Code (citing Administrative Code § 1609.1.3). Additionally, the engineer noted that even assuming the rubber pavers could be utilized, the Building Code allows only 20% of the roof to be covered by a rubber paving system (citing Administrative Code § 28-1509.9).

In September 2008, plaintiff amended her complaint. The first cause of action for breach of contract alleges that defendant breached the proprietary lease and offering plan by notifying plaintiff in October 2005 that "she could not use the roof" and restricted her "from even walking on the roof." It further alleges that defendant subsequently advised her in May 2006 "that its prohibition of her use of the roof and terraces was permanent and would not be again discussed." Plaintiff maintains that defendant's actions "unilaterally prohibit[ed] [her] use of the roof." The second cause of action, also for breach of contract, alleges that defendant breached the

proprietary lease by failing to maintain the structural integrity of the roof and to keep it in good repair. It also alleges breach of the offering plan, in that defendant failed to maintain the roof in a manner such that plaintiff was able to use it.

In the third cause of action, plaintiff alleges that defendant did not have the authority to rescind unilaterally her right to use the roof, and requests a mandatory injunction requiring defendant "to repair, replace or improve the roof, its membrane and decking sufficient to permit an appropriate weight-bearing deck to be placed thereon" so that she can "use . . . the roof as required under the Offering Plan and Proprietary Lease." Plaintiff subsequently moved for partial summary judgment on these causes of action. The remaining causes of action are not before us on appeal.

Supreme Court granted the motion, ruling that plaintiff is entitled to summary judgment as to liability on her first and second causes of action for breach of contract. It also granted that portion of the motion seeking a mandatory injunction and directed defendant "to make repairs or improvements as necessary to restore [p]laintiff to her use of the roof space."

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of

law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). As discussed below, nothing submitted in support of plaintiff’s motion satisfied this burden. Thus, the motion and the injunction should have been denied.

To begin, and although the parties do not address the issue, the injunction is impermissibly vague. Although plaintiff requested an injunction that would require work on the roof so as “to permit an appropriate weight-bearing deck to be placed thereon,” the injunction does not state that the work it mandates be sufficient to support a weight-bearing deck. Should it nonetheless be interpreted to impose that requirement? What use or uses of the deck are encompassed by the requirement that the work be such as to “restore [p]laintiff to her use of the roof space?” Presumably, although the injunction does not mention the subject of responsibility for the costs of the work, defendant must pay for the work even though it is for plaintiff’s sole benefit.

Under the offering plan and proprietary lease, plaintiff is entitled to the exclusive use of the roof. The documentary evidence allegedly supporting plaintiff’s claim that she was deprived of all use of the roof, however, establishes nothing so

sweeping. Rather, it establishes only that defendant precluded her from reinstalling a deck on the roof. To be sure, in opposing plaintiff’s motion, defendant does not specifically argue that it did not deprive plaintiff of any use of the roof. Fairly read, however, it does so implicitly. In response to plaintiff’s claim that she was not permitted to walk on the roof, defendant asserted that plaintiff did not want merely to walk on the roof but rather sought to have the roof improved and a deck installed for her sole benefit, at its expense. It further asserts that plaintiff made these demands without regard to the rights of the cooperative and the applicable lease provisions.

Neither the affidavits submitted by plaintiff and her counsel nor the accompanying exhibits establish plaintiff’s entitlement to summary judgment. Precluding plaintiff from reinstalling a deck in the absence of any evidence that her proposal was safe and compliant with the applicable building and fire codes does not constitute a breach of contract. The roof is currently composed of the same type of roof material that was present at the time plaintiff purchased the apartment and signed the proprietary lease. Nothing in the lease or the offering plan provides that plaintiff is entitled to a different type of roof or to a deck. To the contrary, the lease provides that plaintiff

must obtain defendant's written consent to make any alterations to the roof and that any alterations would be made at her expense. It also provides that "[a]ny planting or other structures erected by [plaintiff] [] may be removed and restored by [defendant] at the expense of [plaintiff] for the purpose of repairs, upkeep or maintenance of the building." Plaintiff is apparently of the view that her right to the exclusive use of the roof entails the unrestricted right to place a deck and plantings on the roof so that denying her that ostensible right is tantamount to denying her any use of the roof. Neither the lease, the offering plan nor common sense supports that view. Likewise, there is no evidence establishing that defendant failed to maintain the structural integrity of the roof or that it failed to keep the roof in good repair. Thus, plaintiff has not met her burden of demonstrating that defendant breached the lease or the offering plan. Although the burden never switched to defendant, it must be noted that, contrary to plaintiff's allegations, the report submitted by defendant's engineer states that the rear roof is in "generally adequate condition" and that the front roof "is in overall satisfactory condition."

As for the majority's implication that defendant's counsel conceded that the roof is in disrepair, that is a distortion of

the record. According to the majority, defendant's counsel stated that the roof ". . . in its current state is not structurally sound enough to withstand the weight of plaintiff, chairs . . . and/or any other individual or item that may be placed thereon." However, the entire statement made by defendant's counsel is as follows:

> "Based on the plaintiff's prior, illegal use of the roofs adjacent to the penthouse, it follows that the roof as constructed and in its current state is not structurally sound enough to withstand the weight of plaintiff, chairs [(]See prior chairs on the roof annexed as Exh. 'F') and/or any other individual or item that may be placed thereon, in light of its age and the excessive loads it has sustained in the past due to plaintiff's placement of unauthorized installation of decking, furniture and plants."

Exhibit F consists of two photographs depicting the large chairs, furniture and plants placed on the roof by plaintiff. Far from being an admission by defendant's counsel that defendant has failed to keep the roof in good repair, the statement reiterates that the roof was not built to support the load that plaintiff has placed upon it in the past. It also reiterates defendant's position that plaintiff's unauthorized use of the roof caused any existing damage. The extent of the damage allegedly caused by plaintiff and the issue of who should be

required to make or pay for any necessary repairs are additional questions of fact precluding an award of summary judgment.[3] The mere fact that certain repairs may be necessary does not establish a breach by defendant.

Because no breach was established, it follows that plaintiff is not entitled to any injunctive relief. Although the want of a breach is sufficient by itself to require reversal, it also should be stressed that the record is bereft of any evidence that this 100-year-old building can structurally support a deck, furniture and trees. Nor is there any evidence that the installation of such a deck will comply with the building code and the applicable fire laws. If anything, the only record evidence on this latter score is to the contrary.

The majority makes no attempt to answer the obvious questions that arise from the vague terms of the injunction. To the contrary, it only makes matters worse with its curious reference to a grant of "injunctive relief directing repairs necessary to render the roof amenable to plaintiff's right of use

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[3]Although these are highly contested issues in this case -- and the majority does not contend otherwise -- the majority nonetheless does not explain why plaintiff is entitled to summary judgment on its second cause of action alleging breach of contract on the ground that defendant failed to maintain the structural integrity of the roof and to keep it in good repair.

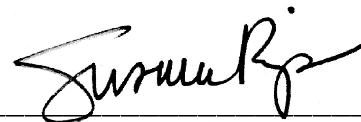
under the offering plan and proprietary lease, subject to reasonable regulation by defendant." It is not at all clear what is signified by the majority's deletion of the words "or improvements" from the injunction; nor is it clear why the majority adds words, i.e., "subject to reasonable regulation by defendant," that do not appear in the injunction. Confoundingly, even as it affirms a grant of partial summary judgment on liability for breach of contract, the majority writes that "determination of the extent of plaintiff's permissible use, including whether plaintiff transgressed building and fire codes involves factual questions" to be decided at trial. The majority puts defendant in an untenable position. A trial in the future will determine what defendant, on pain of contempt, is required by law to do now!

The majority asserts that I "misapprehend[] *the limited scope* of the injunction" (emphasis added). It is the majority that misapprehends the injunction and the circumstances under which it was granted. In addition to its failure to explain how or why an injunction is warranted given plaintiff's obvious failure to meet her burden of proof, a failure the majority does not even address, the majority fails to explain what repairs are necessary pursuant to "the limited scope of the injunction." By

affirming the injunction, the majority implicitly assumes that, contrary to the proprietary lease and the offering plan, plaintiff is entitled to more than the roof as it was at the time she purchased the apartment. This is particularly untenable given the majority's recognition that one of the issues to be determined at trial is "the extent of plaintiff's permissible use [of the roof]." Defendant is being forced to make the roof suitable for a use that has yet to be defined -- an impossible situation that serves only to underscore the vagueness and unenforceability of the injunction.

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

ENTERED: JUNE 23, 2011



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Tom, J.P., Friedman, Acosta, Abdus-Salaam, JJ.

2904 The People of the State of New York, Ind. 2871/06
Respondent,

-against-

Lester Q. Jones,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew L. Mazur of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee of counsel), for respondent.

Judgment, Supreme Court, New York County (Maxwell Wiley, J. at suppression hearing; Thomas Farber, J. at jury trial and sentencing), rendered May 1, 2008, convicting defendant of burglary in the first degree and robbery in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 20 years to life, unanimously affirmed.

Upon defendant's appeal from his conviction, this Court remanded the matter to the Supreme Court for a hearing and held the appeal in abeyance pending a disposition of defendant's suppression motion (73 AD3d 662 [2010]). The court conducted the hearing and denied defendant's motion to suppress lineup identification evidence. We conclude that the court properly determined that the lineup was not the product of an unlawful

detention. We find no basis for disturbing the court's credibility determinations.

The hearing court correctly found that although the police initially lacked probable cause to arrest defendant, the lineup identification by the victim was based on intervening probable cause and was sufficiently attenuated from the illegal arrest (*see e.g. People v Garcia*, 281 AD2d 234 [2001], *lv denied* 96 NY2d 862 [2001]; *People v Brown*, 215 AD2d 333, 334 [1995], *appeal withdrawn*, 86 NY2d 791 [1995]; *see also People v Pleasant*, 54 NY2d 972, 973-974 [1981], *cert denied* 455 US 924 [1982]). Initially, we note that for Fourth Amendment purposes, an arrest requiring probable cause took place when defendant was taken into custody, regardless of whether, for police department purposes, defendant was formally arrested for the robbery only after the victim selected him from the lineup. The sergeant who arrested defendant had information connecting defendant to the robbery, and acted in good faith, but, as the hearing court concluded, that information fell short of probable cause.

At the time of the arrest, the sergeant was unaware of other information possessed by a detective that did satisfy the requirements of probable cause. Shortly after the robbery, which was several weeks before the arrest, the detective who had been

investigating the robbery had obtained a detailed description of the robber from the victim. The detective also spoke to an eyewitness, who was an identified citizen informant speaking from personal knowledge (*see People v Hetrick*, 80 NY2d 344, 348 [1992]; *People v Hicks*, 38 NY2d 90 [1975]). The eyewitness was acquainted with defendant, and provided an even more specific description, including a prominent facial feature and a distinctive nickname. The detective located a photograph of a person who, according to police records, used the same nickname. The detective observed that defendant, who was the person in the photo, closely matched the descriptions given by the victim and eyewitness. Taken together, this evidence was sufficient to give the detective probable cause to arrest defendant (*see People v Cameron*, 268 AD2d 307 [2000], *lv denied* 94 NY2d 917 [2000]). The match between the information provided by the witnesses and the information in police files, including the distinctive facial feature and nickname, provided a reliable basis for concluding that the police record concerning the nickname was correct, and that defendant was the same person referred to by the eyewitness.

Shortly after taking defendant into custody, the sergeant who arrested him was in contact with the investigating detective. Among other things, the detective advised the sergeant about the

existence of a photograph of the suspected robber, and the sergeant compared that photograph with defendant. Under the circumstances, the communication between the detective and the sergeant constituted a direction to arrest defendant. Accordingly, under the fellow-officer rule, the sergeant now had probable cause for defendant's continued detention (*see People v Ramirez-Portoreal*, 88 NY2d 99, 113 [1996]). Accordingly, there is no basis for suppressing the ensuing lineup identification. We have considered and rejected defendant's remaining suppression arguments, including all of his procedural claims.

Turning to the additional arguments raised on defendant's initial appeal, we first conclude that the trial court properly exercised its discretion in receiving evidence of threats made to a witness by third parties. There was sufficient circumstantial evidence to connect the threats to defendant and to warrant an inference as to his consciousness of guilt (*see People v Bonnemere*, 308 AD2d 418 [2003], *lv denied* 1 NY3d 568 [2003]). The court provided a thorough limiting instruction, which the jury presumably followed.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for

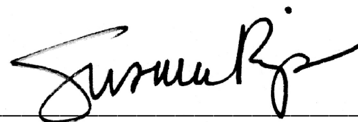
reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

The trial court properly denied defendant's CPL 330.30(3) motion to set aside the verdict on the ground of newly discovered evidence. The evidence at issue was available before and during trial. Accordingly, it did not qualify as newly discovered.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: JUNE 23, 2011



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Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3221-
3222-
3222A Dany Moyal, Index 350058/07
Plaintiff-Respondent-Appellant,

-against-

Marc Moyal,
Defendant-Appellant-Respondent.
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Bender Rosenthal Isaacs & Richter LLP, New York (Susan L. Bender of counsel), for appellant-respondent.

Sheresky Aronson Mayefsky & Sloan, LLP, New York (Lawrence B. Trachtenberg of counsel), for respondent-appellant.
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Judgment, Supreme Court, New York County (Marilyn B. Dershowitz, Special Referee), entered January 6, 2010, valuing and including certain marital assets in the distributive award, awarding plaintiff wife maintenance, counsel fees and expert fees, and holding the wife liable for 50% of the parties' tax liability, unanimously modified, on the law and in the exercise of discretion, to the extent of vacating the valuations of Marcotex and of the parties' condominium in Israel and remanding for a determination of their values, including defendant husband's loan receivable in the marital estate, awarding the husband a credit against the distributive award in the amount of $182,382 for payments he made during the pendency of the action,

and awarding the wife post-decision interest on the distributive award, and otherwise affirmed, without costs. Appeals from orders, same court and Special Referee, entered August 25, 2009 and October 13, 2009, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

While "[t]here is no uniform rule for fixing the value of a business for the purpose of equitable distribution" (*Wasserman v Wasserman*, 66 AD3d 880, 882 [2009]), the Special Referee did not sufficiently explain her basic concurrence in the valuation of the husband's business by the wife's appraiser (*see Capasso v Capasso*, 119 AD2d 268, 272 [1986]) despite the numerous recognized flaws in his report, including, among other things, the insufficient examination and murky explanation of its accounts receivable, the unclear rationale for the particular earnings multiple chosen, the inadequate explanation for the application of a gross profit margin, unsubstantiated assumptions regarding personal use of business credit cards and the consideration of industry trends without adequate basis. The husband's $1.2 million loan receivable should have been included as part of the marital estate, since he did not carry his burden to show that he did not use marital funds to make the loan (*see Sagarin v Sagarin*, 251 AD2d 396 [1998]). We note, however, that

our determination with respect to this receivable, owed to the husband on account of his business, is without prejudice to any arguments the parties may make concerning the effect of the debt on the value of the business. In light of a substantially higher offer and appraisals, it was an improvident exercise of discretion to value the parties' condominium in Israel based on the price of the husband's sale to a childhood friend in a transaction that was not documented in any way (*see Terico v Terico*, 222 AD2d 219 [1995]), the proceeds of which were reduced by the amount of an undocumented loan the husband claimed to have made to the friend. The wife is entitled to post-decision interest on the distributive award, which is mandatory (*see* CPLR 5002; *Wallach v Wallach*, 204 AD2d 211, 212 [1994]).

The wife failed to prove the value of the husband's interests in Merryson and Royal Textiles (*see Davis v Davis*, 128 AD2d 470, 476 [1987]) or rebut his testimony regarding the depressed state and lack of value of these businesses at the time of trial. The marital apartment was properly valued based on the factual testimony of an experienced broker with knowledge of prices in the same building (*see Matter of Semple School for Girls v Boyland*, 308 NY 382, 388 [1955]). The duration and amount of maintenance awarded, to a wife in her 50s in a long-

term marriage, who lacked business experience or a degree and had not been in the work force for years while raising children, was properly based on the relevant factors and evidence (*see Naimollah v De Ugarte*, 18 AD3d 268, 271 [2005]). The wife was properly assessed 50% of the parties' tax liability for underreporting income. She clearly benefitted from the use of the funds and the circumstances of this case are unlike those involving a failure to file returns with an innocent spouse not on notice of any wrongdoing (*cf. Frey v Frey*, 68 AD3d 1052 [2009]; *Costello v Costello*, 304 AD2d 517, 519 [2003]).

The Special Referee clearly and reasonably linked the award of $5,000 in maintenance for 15 years to the distributive award and we reject the husband's claim that he is entitled to a credit against the award because the monthly pendente lite maintenance exceeded the amount ultimately awarded (*see Wechsler v Wechsler*, 58 AD3d 62, 84 [2008], *appeal dismissed* 12 NY3d 883 [2009]). We agree with the husband's claim that he is entitled to such a credit for payments he made during the pendency of the action relating to the marital real estate (i.e., mortgage, maintenance, and real estate taxes) and for tax counsel and accountant fees (*Johnson v Chapin*, 49 AD3d 348, 360 [2008], *affd* 12 NY3d 461 [2009]). The wife argues that no such credit should be awarded

because the husband agreed to make the payments pursuant to a stipulation which did not recite that he could seek a credit against any distributive award on account of the payments. Nor, of course, does the stipulation purport to disavow the right he otherwise would have to seek such a credit. This argument, which essentially asks us to hold that the husband thereby waived that right, is meritless. The stipulation is silent on the subject and we note that acceptance of the wife's argument would discourage parties in matrimonial actions from voluntarily entering into such stipulations.

In a thoughtful, written opinion, the Special Referee awarded the wife an additional $65,000 in counsel fees, substantially less than the total amount requested ($161,972.50, an amount that included a prior award of $25,000). In support of her decision to award less than the amount requested, the Special Referee took into account, inter alia, the substantial equitable distribution award, the $5,000 maintenance award, the fact that the wife "[p]lainly . . . has more liquid assets than the husband," that numerous motions by the wife were "soundly defeated" and that "certain litigation strategy by the wife's counsel was nonproductive." The Special Referee noted the failure of the wife's counsel to comply with 22 NYCRR 1400.2,

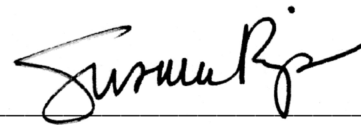
which entitles the client “to receive a written, itemized bill on a regular basis, at least every 60 days.” The Special Referee also noted that counsel had provided a “mere four bills” over a 26-month period of the representation. As the husband argues, the bills “lumped together multiple legal services rendered and [a] total amount for . . . all of those services.” Indeed, one such bill lumped together dozens of separate services counsel provided and stated the total number of hours (136) for all the services. To be sure, a computer printout providing considerably more specificity concerning the number of hours spent on each day that services were provided was admitted into evidence at the hearing. But for that printout and counsel’s testimony that the daily entries were prepared either contemporaneously or shortly thereafter, we would direct an additional reduction in the fee award. Without impugning counsel’s integrity in the slightest, we think it plain that the printout is not an adequate substitute for the itemized bills required by 22 NYCRR 1400.2. We agree with the Special Referee that “where there is a different individual to be charged by the court there should be an available higher level of scrutiny.” Nonetheless, it appears that the Special Referee reduced the award on account of counsel’s failure to comply with this requirement of 22 NYCRR

1400.2, one of the rules "promulgated to address abuses in the practice of matrimonial law" (*Julien v Machson*, 245 AD2d 122, 122 [1997]). Under all the circumstances of this case, we decline to exercise our discretion to further reduce the amount of the award.

We have considered the parties' other claims for affirmative relief and find them unavailing.

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

ENTERED: JUNE 23, 2011



CLERK

Mazzarelli, J.P., Sweeny, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3274 The People of the State of New York, Ind. 6160/00
Respondent,

-against-

Yolanda Harper,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Patricia Curran of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (James A. Yates, J.), rendered February 5, 2009, as amended February 13, 2009, resentencing defendant to a term of 10 years, with 2½ years' postrelease supervision, unanimously affirmed.

The resentencing proceeding held pursuant to *People v Sparber* (10 NY3d 457 [2008]) to correct an error in failing to impose a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving her prison term at the time of the resentencing proceeding, and therefore had no reasonable expectation of finality in her illegal sentence (*see People v Lingle*, _NY3d _, 2011 NY Slip Op 03308 [2011]). Additionally, the *Lingle* court rejected due process arguments such as those raised by the defendant herein (*id.*).

Defendant, who does not seek to withdraw her plea, argues that she was entitled to specific performance of her original plea bargain, which made no mention of PRS (*cf. People v Catu*, 4 NY3d 242 [2005]). A similar claim was rejected in *People v Jordan* (16 NY3d 845 [2011]).

Defendant's remaining challenges to her resentencing are similar to arguments that were rejected in *People v Williams* (14 NY3d 198 [2010], *cert denied*, _ US _, 131 S Ct 125 [2010]; *see also Lingle,* 2011 NY Slip Op 03308).

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

ENTERED: JUNE 23, 2011

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3649 Gina Salamino, Index 109166/08
Petitioner-Appellant,

-against-

Board of Education of the City
School District of the City
of New York, et al.,
Respondents-Respondents.

____

Office of James R. Sandner, New York (Lori M. Smith of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Choi-Hausman of counsel), for respondents.

____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 9, 2009, dismissing this proceeding to annul the termination of petitioner's employment, unanimously affirmed, without costs.

The arbitrator determined that petitioner, a tenured teacher, had engaged in sexual misconduct with a "student" within the meaning of the disciplinary provisions in Article 21(G)(6) of the parties' collective bargaining agreement (CBA). As the relevant provisions of CBA art 21(G)(6) do not define the term "student," the arbitrator was required to give meaning to this term. The arbitrator relied on one of the Chancellor's Regulations determining that a "student" is an individual

required to remain in attendance "until the last day of the session in the school year in which the [individual] becomes seventeen . . . years of age" (Chancellor's Regulation A-101). The individual with whom petitioner had a sexual relationship met that definition, inasmuch as he was required to attend school through the completion of the school year (July 1 through June 30) in which he reached 17 years of age. Here, the individual turned 17 on July 7, 2006, and was obligated to attend school through June 30, 2007. The sexual relationship between petitioner and the individual began in November or December 2006. Although he did not attend school during the 2006-2007 school year and attended only 15 days during the 2005-2006 school year, he was required to attend school by Chancellor's Regulation A-101.

Petitioner correctly maintains that Regulation A-101 does not purport to state a definition of the term "student." In addition, petitioner argues with considerable force that because the relevant provisions of CBA art 21(G)(6) expressly state that the Chancellor's Regulations define the meaning of another term, the only reasonable interpretation of CBA art 21(G)(6) is that the term "student" is not defined by the Chancellor's Regulations. As she argued before the arbitrator, petitioner

maintains that the meaning of the term should be determined by reference to a dictionary.

We need not determine whether petitioner is correct that the meaning of the term "student" should be so determined. Even if she is correct, we cannot conclude that the arbitrator acted arbitrarily and capriciously in using Regulation A-101 to determine its meaning (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223-224 [1996]).

Petitioner argues that she was disciplined without just cause (*see* Education Law § 3020[1]), inasmuch as the CBA gave no indication that Regulation A-101 could be used to determine the meaning of the term "student" in CBA art 21(G)(6). This is unavailing. The Chancellor's Regulations were posted on the Board of Education website, and petitioner was on reasonable notice, under the objective circumstances, of a potential sexual misconduct claim.

Given that the Department of Education agreed at the outset of the proceedings before the arbitrator not to raise the question of whether the individual was a "minor" within the meaning of CBA art 21(G)(6), Supreme Court erred in dismissing the petition on the ground that he was such a "minor." This Court, however, may rely on grounds advanced and determined in

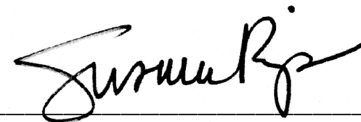
the original proceeding to support resolution of issues raised on the appeal (*see generally Menorah Nursing Home v Zukov*, 153 AD2d 13, 19 [1989]).

The penalty of terminating petitioner from her tenured position could not be construed as disproportionate to the challenged conduct, inasmuch as CBA art 21(G)(6) explicitly called for "mandatory" termination in cases of sexual misconduct.

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

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

ENTERED: JUNE 23, 2011



CLERK

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

4739 Kayla James, etc., et al., Index 16954/02
Plaintiffs-Appellants,

-against-

Loran Realty V Corp.,
Defendant,

Frank Palazzolo, et al.,
Defendants-Respondents.

____

Gregory J. Cannata & Associates, New York (Gregory J. Cannata of counsel), for appellants.

Hass & Gottlieb, Scarsdale (Lawrence M. Gottlieb of counsel), for Frank Palazzolo, respondent.

Daniel G. Heyman, New York, for Carmine Donadio, respondent.

____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 30, 2009, which, after a nonjury trial, in this action for personal injuries sustained by infant plaintiff as a result of exposure to lead-based paint in a building owned by defendant Loran Realty V Corp. (Loran V), dismissed plaintiffs' second cause of action seeking to pierce the corporate veil of Loran V and hold the individual defendants personally liable for plaintiffs' injuries, unanimously affirmed, without costs.

"[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in

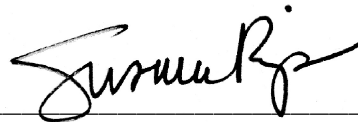
respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Here, while plaintiffs may have demonstrated that defendant Palazzolo exercised complete domination and control over Loran V, they have failed to show that Palazzolo's actions were for the purpose of leaving the corporation judgment proof or that his actions amounted to a wrong against them (*see Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511 [2009]). Although Loran V is now a judgment-proof shell, it was not such at the time the individual defendants turned over control of it, and plaintiffs have offered no evidence showing that Palazzolo, or any other defendant, had any financial interest in, or continued to be involved in the management or control of, Loran V at the time it became judgment

proof (*id.*).

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

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

ENTERED: JUNE 23, 2011



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Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Richter, JJ.

4886-4887 Index 113227/08

Nizam Peter Kettaneh, et al.,
Petitioners-Appellants,

-against-

Board of Standards and Appeals of the City of New York, et al.,
Respondents-Respondents.

\- - - - -

Landmark West! Inc., et al.,
Petitioners-Appellants,

-against-

Board of Standards and Appeals of the City of New York, et al.,
Respondents-Respondents,

Hon. Andrew Cuomo, etc.,
Respondent.

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Law Offices of Alan D. Sugarman, New York (Alan D. Sugarman of counsel), for Nizam Peter Kettaneh and Howard Lepow, appellants.

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of counsel), for Landmark West! Inc., 91 Central Park West Corporation and Thomas Hansen, appellants.

Jeffrey D. Friedlander, Assistant Corporation Counsel, New York (Ronald E. Sternberg of counsel), for municipal respondents.

Proskauer Rose LLP, New York (Claude M. Millman of counsel), for Congregation Shearith Israel, respondent.

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Order and judgment (one paper), Supreme Court, New York County (Joan Lobis, J.), entered July 24, 2009, denying and

dismissing the petition by Kettaneh and Lepow (the Kettaneh petitioners) to annul the determination of respondent Board of Standards and Appeals of the City of New York (BSA), dated August 26, 2008, and confirming the determination, unanimously affirmed, without costs. Order and judgment (one paper), same court and Justice, entered October 6, 2009, denying and dismissing the petition by Landmark West! Inc., 91 Central Park West Corporation and Thomas Hansen (the Landmark petitioners) to annul the aforesaid determination, and confirming the determination, unanimously affirmed, without costs.

In these article 78 proceedings, consolidated on appeal, petitioners challenge a zoning variance granted by BSA to respondent Congregation Shearith Israel (the Congregation), a not-for-profit religious institution. The subject zoning lot is located on Manhattan’s Upper West Side and is currently occupied by the Congregation’s landmarked synagogue, a connected parsonage house and a community house. The Congregation plans to demolish the community house and replace it with a nine-story community facility/residential building. The bottom four floors of the new building would be utilized for community purposes including a lobby/reception space for the synagogue, a toddler program, adult education and Hebrew school classes, a caretaker’s unit and a

Jewish day school; the upper five stories would be occupied by residential market-rate condominium units.

Because the proposed building does not comply with zoning requirements, the Congregation sought a variance from BSA. The Congregation asserted that it needed a new facility so it could better accommodate religious and educational programs for its growing membership. BSA held a series of public hearings at which both proponents and opponents of the variance application testified and made written submissions. In a resolution adopted August 26, 2008, BSA concluded that the Congregation had shown its entitlement to the requested variance. BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing. Petitioners then brought the instant proceedings challenging BSA's resolution. In decisions rendered July 24, 2009 and October 6, 2009, Supreme Court confirmed BSA's determination, finding that it was rationally based. We now affirm.

It is well settled that municipal zoning boards have wide discretion in considering applications for variances, and judicial review is limited to determining whether the board's action was illegal, arbitrary or an abuse of discretion (*Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]*; Matter of SoHo*

Alliance v New York City Bd. of Stds. & Appeals, 95 NY2d 437 [2000]). Thus, a determination by a zoning board should be upheld if it has a rational basis and is supported by substantial evidence (*Matter of Ifrah* at 308). In reviewing such determinations, "courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination" (*Matter of Sasso v Osgood*, 86 NY2d 374, 385 n 2 [1995]).

"In order to issue the variances here, the BSA was required [under § 72-21 of the New York City Zoning Resolution] to find that the proposed development met five specific requirements: that (a) because of 'unique physical conditions' of the property, conforming uses would impose 'practical difficulties or unnecessary hardship;' (b) also due to the unique physical conditions, conforming uses would not 'enable the owner to realize a reasonable return' from the zoned property; (c) the proposed variances would 'not alter the essential character of the neighborhood or district;' (d) the owner did not create the practical difficulties or unnecessary hardship; and (e) only the 'minimum variance necessary to afford relief' is sought" (*Matter of SoHo Alliance*, 95 NY2d at 440; *see* New York City Zoning Resolution § 72-21). "[I]n questions relating to its expertise,

the BSA's interpretation of the [Zoning Resolution's] terms must be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418-419 [1996] [citation and internal quotation marks omitted]).

We conclude that BSA's finding that the proposed building satisfies each of the five criteria for a variance set forth in § 72-21 has a rational basis and is supported by substantial evidence (*see Matter of SoHo Alliance*, 95 NY2d at 440). BSA rationally found that there are "unique physical conditions" peculiar to and inherent in the zoning lot such that strict compliance with the zoning requirements would impose "practical difficulties or unnecessary hardship" (Zoning Resolution § 72-21[a]). Among the physical conditions BSA considered unique was that the zoning lot in question straddles two zoning districts: part of the lot is in the R10A zoning district and the remainder is in zoning district R8B, which has much stricter zoning requirements. BSA rationally concluded that the location of the zoning district boundary in the middle of the development site constrained an as-of-right development by imposing different

height and setback limitations on the two portions of the single zoning lot.

The location of the zoning district boundary, along with other factors, including the Congregation's need to preserve the existing synagogue, provides a rational basis for BSA's finding of unique physical conditions *(see Matter of Elliott v Galvin*, 33 NY2d 594, 596 [1973]). Although four nearby lots are also intersected by a zoning district boundary, it cannot be said that this condition is "common to the whole neighborhood" (*Matter of Vomero v City of New York*, 13 NY3d 840, 841 [2009] [citation and internal quotation marks omitted]; *see also Matter of Douglaston Civic Assn. v Klein*, 51 NY2d 963, 965 [1980] ["Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship"]). There is no merit to the contention that the requirement of unique physical conditions refers only to land and not buildings (*Matter of UOB Realty (USA) Ltd. v. Chin*, 291 AD2d 248 [2002], *lv denied* 98 NY2d 607 [2002]).

Section 72-21(b) of the Zoning Resolution requires a finding that due to the unique physical conditions, conforming uses would not "enable the owner to realize a reasonable return" from the

zoned property. This finding, however, is not required for the granting of a variance to a nonprofit organization (Zoning Resolution § 72-21[b]). Nevertheless, BSA determined that because the planned condominiums were unrelated to the Congregation's mission, the Congregation was required to establish its inability to obtain a reasonable return from the residential portion of the proposed building. BSA then found, based on expert submissions and its own analysis, that the Congregation made the requisite showing.

On appeal, the Congregation contends that as a nonprofit entity, it is exempt from the § 72-21(b) showing despite the fact that residential condominiums are a major part of its planned development. We need not reach this issue because BSA rationally concluded that due to the unique physical conditions, the Congregation could not realize a reasonable return from an as-of-right building. In making that finding, BSA reasonably relied upon "expert testimony submitted by the owners based upon significant documentation, including detailed economic analysis" (*Matter of SoHo Alliance*, 95 NY2d at 441). There was substantial evidence to support the remaining § 72-21 findings.

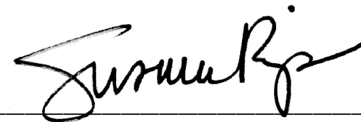
There is no merit to the Landmark petitioners' contention that BSA lacked jurisdiction to grant the variance here. Section 666(6)(a) of the New York City Charter gives BSA the power to hear and decide appeals from determinations made by the commissioner of buildings, or, if properly designated, a deputy commissioner or a borough superintendent of buildings. Here, the Landmark petitioners contend that the objections issued by the Department of Buildings (DOB) after review of the plans were not signed by any of these officials. However, any such failure is of no consequence because § 666(5) of the City Charter provides an independent basis for BSA's jurisdiction. Under that subdivision, BSA has the power to "determine and vary the application of the zoning resolution as may be provided in such resolution and pursuant to [§ 668 of the Charter]" (*see Matter of Highpoint Enters. v Board of Estimate of City of N.Y.*, 67 AD2d 914, 916 [1979], *affd* 47 NY2d 935 [1979]; *William Israel's Farm Coop. v Board of Stds. & Appeals of City of N.Y.*, 22 Misc 3d 1105[A] [2004], *appeal dismissed* 25 AD3d 517 [2006]). Since § 668 does not require a final determination executed by one of the designated officials, BSA properly entertained the instant

variance application.

We have considered petitioners' remaining arguments and find them without merit.

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

ENTERED: JUNE 23, 2011



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Andrias, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

4967 Jahporanae Moore, an Infant by her Father and Natural Guardian, John Hill, et al., Plaintiffs-Respondents, Index 15385/05

-against-

The City of New York, et al.,
Defendants-Appellants.

____

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for appellants.

Alexander J. Wulwick, New York, for respondents.

____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 25, 2010, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Seven-year-old infant plaintiff sustained severe burns when she spilled hot water on herself as she was retrieving a mug from the microwave, which was on top of a refrigerator, while in the kinship foster home of her maternal grandmother. Plaintiffs allege that defendants were negligent in failing to properly investigate the foster home despite the biological parents'

complaints that the foster home was overcrowded and lacked supervision, and in continuing the placement of the infant in the foster home.

The City argues that the complaint should be dismissed because, under *McLean v City of New York* (12 NY3d 194 [2009]), the discretionary immunity doctrine absolutely insulated municipalities from tort liability, and the caseworker here acted in a discretionary capacity in allowing infant plaintiff to remain in the foster home. However, it is unnecessary to decide that issue, as, even assuming that such immunity does not apply, plaintiff's complaint should be dismissed.

The record does not demonstrate that defendants had "sufficiently specific knowledge or notice of the dangerous conduct that caused [the] injury" (*Albino v New York City Hous. Auth.*, 78 AD3d 485, 490 [2010]). Nothing indicates that infant plaintiff's biological parents, or any one else ever complained about the foster children's unsupervised use of the microwave to boil water, or that the microwave was placed too high. Nor is there any evidence that defendants were otherwise aware of such conduct. In any event, even assuming that the biological

parents’ complaints sufficiently alerted defendants to a general lack of supervision in the foster home, the accident was not proximately caused by a lack of supervision, but was the result of the foster mother’s “momentary inattention,” which was not foreseeable by defendants in the exercise of reasonable care (*see id.*; *McCabe v Dutchess County*, 72 AD3d 145, 151 [2010]; *Parker v St. Christopher's Home*, 77 AD2d 921 [1980]).

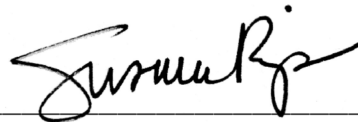
The court below properly declined to consider the affidavits of infant plaintiff’s siblings, as plaintiffs did not disclose those witnesses in response to the City's discovery demands and a prior court order (*see Ravagnan v One Ninety Realty Co.*, 64 AD3d 481 [2009]; *Masucci-Matarazzo v Hoszowski*, 291 AD2d 208 [2002]). In any event, the affidavits do not raise an issue of fact as to proximate causation. Accordingly, the cause of action for negligent supervision should be dismissed.

Plaintiffs’ claim alleging violation of Social Services Law § 420 should also be dismissed because the notice of claim failed to allege any facts from which defendants could have gleaned

plaintiffs' intention to raise such a claim (*see Shmueli v New York City Police Dept.*, 295 AD2d 271 [2002]; *see also O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]).

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

ENTERED: JUNE 23, 2011



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Sweeny J.P., Acosta, Renwick, DeGrasse, JJ.

5082-
5083-
5084-
5085-
5086 Lewis Small, etc., et al.,
Plaintiffs-Appellants,

Index 600869/07

-against-

Arch Capital Group, Ltd., et al.,
Defendants-Respondents.

____

Indik & McNamara, P.C., Philadelphia, PA (Thomas S. McNamara of the Bar of the State of Pennsylvania and the Bar of the State of New Jersey, admitted pro hac vice, of counsel), for appellants.

Foley & Lardner LLP, New York (Peter N. Wang of counsel), for Arch Capital Group, Ltd. and American Independent Companies, Inc., respondents.

Pepper Hamilton LLP, Philadelphia, PA (M. Duncan Grant of the Bar of the State of Pennsylvania and the State of Delaware, admitted pro hac vice, of counsel), for TDH Capital Partners and TDH III, L.P., respondents.

____

Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered April 19, 2010, dismissing the complaint and bringing up for review orders, same court and Justice, entered on or about March 15, 2010, which granted defendants’ motions for summary judgment, unanimously affirmed, with costs. Appeal from the aforesaid orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs failed to raise a triable issue of fact whether defendants breached section 9.10 of the parties' agreement by preventing plaintiff Lewis Small from managing the Lawsuits (as defined in the agreement) and a directors' and officers' liability claim (the D&O claim) under the insurance policies of American Independent Insurance Holding Company, the predecessor to defendant American Independent Companies, Inc.

With respect to the D&O claim, section 9.10 states, in pertinent part, that "Small will continue to assist and manage the Lawsuits." "Lawsuits" are defined in the agreement as "the State Lawsuits together with the Lederman Lawsuits and any other lawsuits or other actions which may arise out of or be in relation to or in connection with such lawsuits." A claim submitted to an insurance company is not a "lawsuit[]," nor is the D&O Claim an "action," within the meaning of the agreement (*see Peterson v Continental Cas. Co.*, 282 F3d 112, 119-120 [2d Cir 2002]).

With respect to the Lawsuits, the only concrete management issues about which plaintiffs complain are that defendants took a long time to agree with Small's decision to replace American's lead counsel in the Lederman Lawsuit and did not agree that

certain witnesses should be listed in that lawsuit. However, section 9.10(ii) states, in pertinent part, that "the prior written approval of [American] and [defendants TDH Capital Partners and TDH III, L.P.] will be required for any strategic decisions relating to the Lawsuits, including without limitation . . . the selection or removal of legal counsel." Thus, the plain language of the agreement forecloses plaintiffs' claim about lead counsel. On appeal, plaintiffs concede that listing witnesses is a strategic decision. Accordingly, their claim about listing witnesses is also precluded by the language of the agreement.

Plaintiffs failed to raise a triable issue of fact whether defendants breached section 9.10(iv) of the parties' agreement, which states that American "will continue to fund reasonable fees and reasonable expenses of the Lawsuits (based on appropriate supporting written invoices) up to a maximum of $500,000." Plaintiffs' theory of damages is that, because the funding for the Lederman Lawsuit dried up, they lost the opportunity to recover damages in that lawsuit. However, the plain language of section 9.10(iv) shows that the TDH defendants had no funding obligation, and we disagree with the District Court that section

9.10 does not make clear what it means for American to "continue to fund reasonable fees and reasonable expenses of the Lawsuits (based on appropriate supporting written invoices) up to a maximum of $500,000" (*see Small v Arch Capital Group, Ltd.*, 2006 WL 2708448, *13, 2006 US Dist LEXIS 67910, *39 [SD NY 2006]). It is true, as the District Court noted, that the parties dispute the contractual language of Section 9.10. The plain language of the section, however, warrants dismissal of plaintiffs' breach of contract cause of action. With respect to American and defendant Arch, which acquired 100% of American's shares pursuant to the parties' agreement, plaintiffs concede in paragraph 216 of their complaint that "the loss of the value of their respective shares of the proceeds from the Lederman Lawsuit" constitutes "consequential damages." Even if there were a triable issue of fact whether American and/or Arch fulfilled the funding obligation, it would not avail plaintiffs because they have not satisfied the requirements for consequential damages (*see Kenford Co. v County of Erie*, 73 NY2d 312, 320 [1989]).

Plaintiffs failed to raise a triable issue of fact whether defendants breached the implied covenant of good faith and fair dealing by bad-faith exercise of their contractual right to

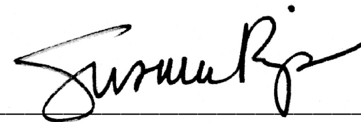
approve strategic decisions. Plaintiffs' theory is that Arch caused American to abandon the Lederman Lawsuit because Rockwood Casualty Insurance Co. (one of the defendants in that lawsuit) was part of Argonaut Insurance Group, Inc., and Arch wanted to do reinsurance business with Argonaut. However, plaintiffs have presented no evidence as to why TDH would fail to prosecute the Lederman Lawsuit. Unlike plaintiffs, who got at least some cash from the sale of their American shares to Arch, TDH's contractual right to be compensated came solely from the proceeds of the Lawsuits. Thus, TDH had every incentive to prosecute the Lederman Lawsuit vigorously (*see Fremont v E.I. DuPont DeNemours & Co.*, 988 F Supp 870, 877 [ED Pa 1997]).

As for Arch, the facts do not support plaintiffs' theory. When Arch and American learned that Argonaut had purchased Rockwood's parent, they both deemed it a positive development because it might mean that Lederman had some money that American could pursue. Moreover, the facts do not support plaintiffs' chronology. According to plaintiffs, Arch caused American to abandon the Lederman Lawsuit from late April 2001. However, Arch did not begin its efforts to acquire reinsurance business in

general until late October or November 2001, and it did not know about the specific possibility of underwriting reinsurance for Argonaut until late 2001.

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

ENTERED: JUNE 23, 2011



CLERK

Tom, J.P., Friedman, Acosta, Renwick, DeGrasse, JJ.

5398 Rene J. Bourjolly, Index 307730/09
Plaintiff-Appellant,

-against-

Amanda Mouscardy,
Defendant-Respondent.

____

Cohen Rabin Stine Schumann LLP, New York (Harriet Newman Cohen of counsel), for appellant.

Cheng & Fasanya LLP, Rosedale (Ade Fasanya of counsel), for respondent.

____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about January 10, 2011, which, after a hearing, granted defendant's motion to dismiss the complaint on the ground that the residency requirement of Domestic Relations Law § 230(5) had not been satisfied, unanimously affirmed, without costs.

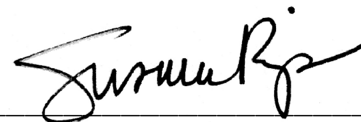
Dismissal of this divorce action for failure to satisfy the two-year residency requirement of Domestic Relations Law § 230(5) is warranted. Although the residency requirement of the statute is not jurisdictional in nature (*see Lacks v Lacks*, 41 NY2d 71, 73 [1976]; *see also Casey v Casey*, 39 AD3d 579, 579-580 [2007]), and is a substantive element of the cause of action to be proven at trial (*see Rubin v Rubin*, 73 AD2d 148, 150 [1980]), the issue may be resolved at a pre-trial hearing "in the interest of

economy of effort and sound judicial management" (*Wilson v Wilson*, 176 AD2d 115, 116 [1991]).

Although the parties' entered into a stipulation providing, inter alia, that defendant would file any motion to dismiss by a certain date and the instant motion was filed after said date, the failure to file a timely motion did not constitute a waiver of the residence issue or an admission of the allegations in the complaint. Indeed, the record shows that following the deadline for a motion to dismiss, plaintiff continued to seek documentation establishing defendant's address.

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

ENTERED: JUNE 23, 2011



CLERK

Tom, J.P., Friedman, Acosta, Renwick, DeGrasse, JJ.

5399 Ibrahim Diallo, Index 15044/04
Plaintiff-Appellant,

-against-

Grand Bay Associates
Enterprises, Inc., et al.,
Defendants-Respondents.

____

Calman Greenberg, Bronx, for appellant.

____

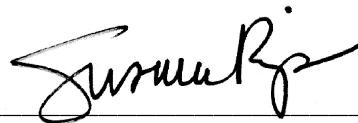
Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered February 18, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on his claim for declaratory relief, unanimously reversed, on the law, with costs, and the motion granted to the extent of declaring that the deed, dated June 28, 2001, purportedly conveying the subject premises from plaintiff to defendant Grand Bay Associates Enterprises, Inc. is null and void.

It is undisputed that Grand Bay, which did not oppose plaintiff's motion, is a nonexistent entity, having never attained corporate status. An entity that has neither de facto nor de jure status cannot take title to real property, notwithstanding that the instrument purports to convey the real

property to it (*see Matter of Hausman*, 13 NY3d 408, 413 [2009]). Accordingly, the purported conveyance is void (*id.*).

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

ENTERED: JUNE 23, 2011



CLERK

Tom, J.P., Friedman, Acosta, Richter, DeGrasse, JJ.

5400-
5400A In re Carlos Santiago, Petitioner-Appellant, Index 260559/08

-against-

New York City Transit Authority,
Respondent-Respondent.

Alexander J. Wulwick, New York, for appellant.

Wallace D. Gossett, Brooklyn (Jane Shufer of counsel), for respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered July 30, 2009, which, to the extent appealed from, denied petitioner's motion for leave to file a late notice of claim, and order, same court and Justice, entered May 14, 2010, which, to the extent appealed from as limited by the briefs, denied petitioner's motion to renew the prior motion, unanimously affirmed, without costs.

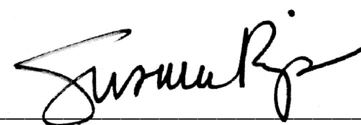
Petitioner's proffered excuse of law office failure does not adequately excuse the delay in serving a notice of claim (*see Ordillas v MTA N.Y. City Tr.*, 50 AD3d 391 [2008]). In addition, respondent did not acquire actual notice of the essential facts constituting the claim within the statutorily prescribed 90-day period or within a reasonable time thereafter (*see* General

Municipal Law § 50-e[5]; *see also Ordillas*, 50 AD3d at 391-392). Lastly, petitioner's unsupported assertion that the condition of the subway staircase upon which he allegedly tripped remained unchanged seven months after his accident is insufficient to demonstrate the lack of any prejudice to respondent from his delay (*see Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 828-829 [2010]; *Ordillas*, 50 AD3d at 392).

Supreme Court properly denied petitioner's motion to renew. The color photographs of the alleged defect do not constitute new facts not offered on the prior motion that would change the prior determination (*see* CPLR 2221[e][2]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]).

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

ENTERED: JUNE 23, 2011



CLERK

Tom, J.P., Friedman, Acosta, Renwick, DeGrasse, JJ.

5401 320 West 13th Street, LLC, Index 603730/07
Plaintiff-Respondent,

-against-

Wolf Shevack, Inc., et al.,
Defendants,

Mary Wolf, et al.,
Defendants-Appellants.

____

Bragar Wexler Eagel & Squire P.C., New York (Raymond A. Bragar of counsel), for Mary Wolf, Jay A. Wolf, David J. Wolf, Amalgamated Technologies, Inc. and Optio Software Inc., appellants.

Greenberg Freeman LLP, New York (Michael A. Freeman of counsel), for Trinad Management LLC, Trinad Advisors GP, LLC and Atlantis Equities, Inc., appellants.

Kucker & Bruh, LLP, New York (Marc Jonas Block of counsel), for respondent.

____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 30, 2010, which, insofar as appealed from, denied defendants-appellants' motions to dismiss the complaint, unanimously modified, on the law, to dismiss the fifth cause of action brought under CPLR 5225(b), and otherwise affirmed, without costs.

Plaintiff alleges that defendant Lawrence Wolf fraudulently transferred assets from plaintiff's judgment debtors to defendant family members and defendant corporations, which were allegedly

under the exclusive control of Wolf and defendant Jay Wolf. The record supports Supreme Court's finding that the complaint states facts sufficient to support the causes of action brought pursuant to New York Debtor and Creditor Law §§ 273-a, 273 and 278. Given the allegations that those transfers rendered the judgment debtors insolvent and were undertaken with the intent to hinder plaintiff's rights as a judgment creditor, the causes of action brought pursuant to New York Debtor and Creditor Law §§ 274 and 276 were also properly stated against all defendants.

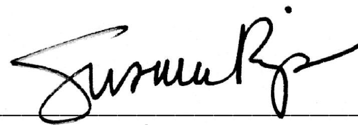
The order is modified to the extent indicated because although CPLR 5225(b) authorizes a judgment creditor to commence a special proceeding directly against a third party that receives money or property belonging to a judgment debtor without requiring the creditor to commence a plenary action (*see* CPLR 5225[b]; *Matter of Hotel 71 Mezz Lender, LLC v Rosenblatt*, 64 AD3d 431, 432 [2009]), it does not create an independent cause of action in favor a judgment creditor within the context of a

fraudulent conveyance action.

We have considered appellants' remaining contentions and find them unavailing.

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

ENTERED: JUNE 23, 2011



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Tom, J.P., Friedman, Acosta, Renwick, DeGrasse, JJ.

5402 The People of the State of New York, Ind. 5455/07
Respondent,

-against-

Victor Perez,
Defendant-Appellant.

____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Cravath, Swaine & Moore LLP, New York (Jason B. Sherry of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Susan Axelrod of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at suppression hearing; Edward J. McLaughlin, J. at jury trial and sentencing), rendered September 17, 2008, convicting defendant of robbery in the first degree (two counts) and robbery in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

The court properly exercised its discretion when it denied defendant's application to present expert testimony on eyewitness identification (*see People v Abney*, 13 NY3d 251, 266 [2009]). The case did not turn on the accuracy of an eyewitness identification, and there was extensive corroborating evidence

(*see People v LeGrand,* 8 NY3d 449, 452 [2007]). One of the two identifying witnesses was acquainted with defendant. As to this witness, the issue was credibility, not mistaken identity. Furthermore, there was additional corroborating evidence (*see People v Zohri*, 82 AD3d 493, 494 [2011]).

Defendant was not entitled to have the victim testify at the *Wade* hearing. The hearing evidence did not raise a substantial issue about the constitutionality of the lineup that could only be resolved by the testimony of the identifying witness (*see People v Chipp*, 75 NY2d 327, 338 [1990], *cert denied* 498 US 833 [1990]). Defendant and a detective gave opposing testimony about events leading up to the lineup that were allegedly suggestive. The hearing court credited the detective's version, and we find no basis for disturbing that determination. This was a straightforward credibility issue, and it did not present a gap that only the victim's testimony could fill.

The trial court properly exercised its discretion when it denied, without a hearing, defendant's motion to set aside the verdict on the ground of newly discovered evidence. Defendant presented nothing more than an attorney's affirmation quoting an incredible voicemail message left by a person who never spoke to the attorney directly and who provided a nonworking phone number

as his only contact information. A defendant who moves to set aside a verdict is “not entitled to a hearing based on expressions of hope that a hearing might reveal the essential facts” (*People v Johnson*, 54 AD3d 636, 636 [2008], *lv denied* 11 NY3d 898 [2008]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 23, 2011

CLERK

Tom, J.P., Friedman, Acosta, Renwick, DeGrasse, JJ.

5403 Eldene C. King, Index 107231/06
Plaintiff-Appellant,

-against-

New York City Health and
Hospitals Corporation,
Defendant-Respondent.

____

Noah A. Kinigstein, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondent.

____

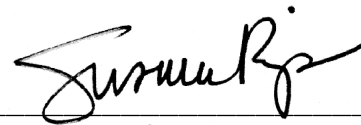
Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about May 3, 2010, which granted defendant's motion for summary judgment dismissing the amended complaint, unanimously affirmed, without costs.

Plaintiff's failure to cite "any law, rule, regulation or declaratory ruling adopted pursuant to law" (Labor Law § 741[1][d]), which she, "in good faith, reasonably believe[d]" (Labor Law § 741[2][a]) to have been violated, is fatal to her cause of action alleging retaliation (*see Deshpande v Medisys Health Network, Inc.*, 70 AD3d 760, 762 [2010], *lv denied* 14 NY3d 713 [2010]; *see also Pipia v Nassau County*, 34 AD3d 664, 666 [2006]).

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

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

ENTERED: JUNE 23, 2011



CLERK

Tom, J.P., Friedman, Acosta, Renwick, DeGrasse, JJ.

5405 The People of the State of New York, Ind. 355/05
Respondent,

-against-

Joseph Fisher,
Defendant-Appellant.

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

Joseph M. Fisher, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 23, 2010, convicting defendant, upon his plea of guilty, of burglary in the first degree and attempted rape in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 13 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses his claim that his sentence is excessive. As an alternative holding, we perceive no basis for reducing the sentence.

Defendant's pro se claims are unreviewable on the present record, and are without merit in any event.

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

ENTERED: JUNE 23, 2011

CLERK

Tom, J.P., Friedman, Acosta, Renwick, DeGrasse, JJ.

5409-
5410-
5411-
5412 Index 305801/08

Clemencia Paulino,
Plaintiff-Respondent,

-against-

Jorge A. Guzman,
Defendant-Respondent,

Skurta Shabaj, et al.,
Defendants-Appellants,

Joanne deLeon, et al.,
Defendants.

____

Cohen, Kuhn & Associates, New York (Michael V. DiMartini of counsel), for appellants.

____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered November 8, 2010, which, to the extent appealed from as limited by the brief, denied defendants Shabaj and Salihaj's motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against said defendants.

The record establishes that after the car driven by Salihaj (and owned by Shabaj), which was traveling in the center lane of the Bronx River Parkway, passed a disabled vehicle in the right

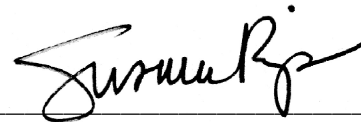
lane, it was struck by a car that had pulled up behind the disabled vehicle, come nearly to a stop, and then darted into the center lane. The unidentified car continued driving and left the scene. However, the collision propelled Salihaj's car partly into the left lane, where it came to rest, disabled. Two cars traveling in the left lane, driven by defendants DeLeon and Johnson, respectively, were able to stop safely behind Shabaj's car. However, defendant Guzman, in whose car plaintiff was a passenger, struck the rear of Johnson's car, which in turn struck the rear of DeLeon's car. Guzman admitted that the first time he saw the cars in front of him, they were already stopped. He testified that he applied his brakes but could not stop because the road was wet.

Nothing in the record raises the inference either that Salihaj could have avoided the accident with the unidentified car or that he chose to stop his car in the middle of the Parkway, rather than becoming disabled there through no fault of his own (*compare Tutrani v County of Suffolk*, 10 NY3d 906 [2008] [driver deliberately slowed vehicle to near stop in busy travel lane, creating foreseeable danger]). Moreover, as he drove past the disabled vehicle in the right lane and saw the unidentified car, Salihaj was entitled to assume that the driver of that car would

obey the traffic laws and not move into the center lane before it was safe to do so (*see Jordan v City of New York*, 12 AD3d 326 [2004]; Vehicle and Law § 1128(a).

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

ENTERED: JUNE 23, 2011



CLERK

Tom, J.P., Friedman, Acosta, Renwick, DeGrasse, JJ.

5413 The People of the State of New York, Respondent, Ind. 3030/09

-against-

Christopher Halls, also known as Christopher Nalls, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

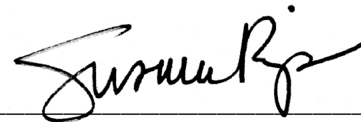
Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 1, 2010, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 2½ years, unanimously affirmed.

The court properly sentenced defendant in his absence. The record establishes that defendant, who was in the court pens, deliberately refused to be produced in the courtroom for his scheduled sentencing. Accordingly, defendant waived and/or forfeited his right to be present, regardless of whether he had been warned that sentencing would proceed in his absence (*see*

People v Sanchez, 65 NY2d 436, 443-444 [1985]). In any event, the record indicates that defendant’s attorney had warned his client to that effect.

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

ENTERED: JUNE 23, 2011



CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, JJ.

5415N Carl Andrews & Associates, Inc., Index 105396/10
Petitioner-Appellant,

-against-

Office of the Inspector General
of the State of New York, et al.,
Respondents-Respondents.

____

Dorsey & Whitney LLP, New York (G. Michael Bellinger of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Jodi A. Danzig of counsel), for respondents.

____

Order and judgment (one paper), Supreme Court, New York County (Saliann Scarpulla, J.), entered October 4, 2010, inter alia, denying the petition to quash the subpoena duces tecum served on petitioner by respondent Office of the Inspector General, unanimously affirmed, without costs.

We reject petitioner's contention that because the Inspector General's jurisdiction is limited to the activities of executive branch agencies (*see* Executive Law § 51), his subpoena power over non-executive-branch agencies is limited to documents that on their face show a connection to the activities of executive branch agencies. Pursuant to Executive Law § 54(3), the Inspector General has the power to "require the production of any

books and papers deemed relevant or material to any investigation, examination or review." The statute imposes no limitation other than relevancy and materiality on the books and papers the Inspector General may require to be produced.

The subject subpoena was issued to petitioner, a lobbying company, by the Inspector General in the course of his investigation of the executive agencies and officials involved in evaluating and selecting the Video Lottery Terminal (VLT) franchise for the Aqueduct racetrack, colloquially known as the "racino." The relevance and materiality of the subpoenaed documents to that investigation is demonstrated by the record. The selection process involved the Division of Lottery, the Division of the Budget, the Office of General Services, the New York Racing and Wagering Board, and the Empire State Development Corporation; the selection was to be made by the Governor, the Speaker of the Assembly, and the Temporary President of the Senate. Petitioner was retained by the Aqueduct Entertainment Group (AEG) in connection with AEG's bid to operate the VLT at Aqueduct; on January 29, 2010, AEG was selected, despite questions regarding, among other things, its ability to secure a license from the Division of Lottery. Thus, the record establishes the Inspector General's authority to conduct the

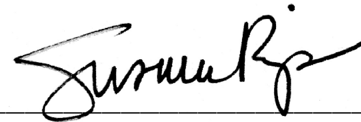
investigation, the relevance of the documents he seeks, and "some basis for inquisitorial action" (*see Matter of A'Hearn v Committee on Unlawful Practice of Law of N.Y. County Lawyers' Assn.*, 23 NY2d 916, 918 [1969], *cert denied* 395 US 959 [1969]).

Petitioner's argument that it had no contact with any executive branch agency or employee regarding the "racino" process and therefore would have no documents responsive to the subpoena "is a matter to be stated in response to the subpoena, not a basis for quashing it" (*Matter of Goldin v Greenberg*, 49 NY2d 566, 572 [1980]).

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

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

ENTERED: JUNE 23, 2011



CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5416 The People of the State of New York, Ind. 4409/00
Respondent,

-against-

Francisco Camacho,
Defendant-Appellant.

____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew I. Fleischman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

____

Judgment of resentence, Supreme Court, Bronx County (John P. Collins, J.), rendered July 8, 2010, resentencing defendant to an aggregate term of 9 years, with 3 years' postrelease supervision, unanimously reversed, on the law, the resentence vacated and the original sentence without postrelease supervision reinstated.

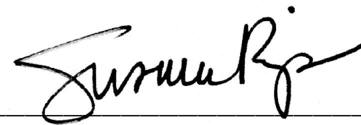
Defendant is entitled to relief under *People v Williams* (14 NY3d 198 [2010]), which invalidates the imposition of postrelease supervision upon resentencing of defendants who have been released after completing their original sentences. Only those defendants who are still in custody or are on conditional release may be thus resentenced (*see also People v Lingle*, __NY3d__, 2011 NY Slip Op 03308 [April 28, 2011]).

The resentencing proceeding was commenced shortly before

defendant's scheduled release from custody. While the proceeding was pending, he was released after serving his full sentence; no conditional release was involved. The People assert that defendant was primarily responsible for the fact that he was resentenced after completing his original sentence. However, the record does not support that claim (*see People v Deuras*, 82 AD3d 528 [2011]).

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

ENTERED: JUNE 23, 2011



CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5417 Jeffrey Hoffeld, et al., Index 650613/09
Plaintiffs-Appellants,

-against-

Kerstin Lindholm,
Defendant-Respondent,

Proskauer Rose LLP,
Defendant.

____

Andrew Rotstein, Brooklyn, for appellants.

Junge & Mele, LLP, New York (Armand P. Mele of counsel), for respondent.

____

Appeal from order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 13, 2010, which denied plaintiffs' motion for leave to reargue the denial of summary judgment on their claims for breach of contract and account stated, unanimously dismissed, without costs, as nonappealable.

We conclude that despite plaintiffs' denomination in their notice of motion, the motion at issue was one for reargument (see *Fontanez v St. Barnabas Hosp.*, 24 AD3d 218, 218 [2005]). The denial of a motion for reargument is not appealable (*Rosen v Rosenholc*, 303 AD2d 230, 230 [2003]).

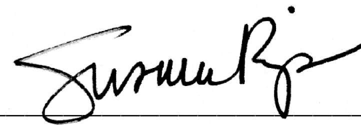
Were we to consider the merits of plaintiffs' underlying motion, we would find that plaintiffs have violated the rule

against successive summary judgment motions *(Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [2010]). Furthermore, denial of summary judgment on all claims would be appropriate due to remaining material issues of fact requiring trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

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

ENTERED: JUNE 23, 2011



CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5418 Falguni P.,
Petitioner-Respondent,

-against-

Pinakin P.,
Respondent-Appellant.

Steven N. Feinman, White Plains, for appellant.

Order, Family Court, New York County (Jody Adams, J.), entered on or about April 5, 2010, which, in this matrimonial action, denied respondent father's objection to the Support Magistrate's order directing him to pay fifty percent of the health insurance premiums for the parties' child for the period December 1, 2004 through July 1, 2009, unanimously affirmed, without costs.

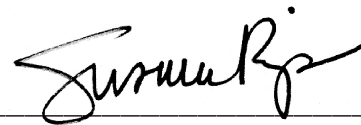
The father's objection to the Support Magistrate's order was properly denied. The parties' stipulation of settlement provided, inter alia, that petitioner mother had the responsibility of enrolling the child in a medical plan with notice to the father of that plan, and the parties would "share 50/50, any unreimbursed medical expenses." At the time the stipulation was entered, the mother was enrolled in dental school, and obtained health coverage for the child at no cost.

However, once the mother completed school and became employed, health coverage was no longer free. Under the circumstances, the Support Magistrate properly determined that the parties intended that "unreimbursed medical expenses" included the payment of health insurance premiums for their child.

The father's objection to the absence of a full hearing before the Support Magistrate was waived. He never raised this argument before the Family Court (*see Matter of Brian QQ.*, 166 AD2d 749 [1990]; *see also Weiner v Weiner*, 56 AD3d 293 [2008]). In any event, the record demonstrates that a hearing was held before the Support Magistrate at which the father had a full and fair opportunity to present his arguments.

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

ENTERED: JUNE 23, 2011



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Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5419 John M. Ferolito, etc., et al. Index 600396/08
Plaintiffs-Respondents, 590967/08

Arizona Beverage Acquisition, LLC,
Plaintiff,

-against-

Domenick J. Vultaggio, et al.,
Defendants-Appellants.

[And a Third-Party Action]

____

Cadwalader, Wickersham & Taft LLP, New York (Louis M. Solomon of counsel), for appellants.

Boies, Schiller & Flexner, LLP, New York (David A. Barrett of counsel), for respondents.

____

Order and judgment (one paper), New York County (Martin Shulman, J.), entered November 10, 2010, inter alia, declaring that no "Employment Separation Event" has occurred with respect to plaintiff Ferolito, unanimously affirmed, with costs.

The Owners' Agreement defines Employment Separation Event (ESE) as "[t]he voluntary agreement of an Executive to deem himself subject to an [ESE]." The motion court correctly found that this definition presents "a totally subjective standard, to

be defined only by [the executive]" (*see e.g. Ghanem v Upchurch*, 481 F3d 222, 225 [5th Cir 2007] ["We interpret the phrase 'for what he deems (to be good and sufficient cause)' as vesting complete discretion in (him) to determine what constitutes good and sufficient cause."]). Ferolito established that no ESE has occurred for him by stating in an affidavit that he had never entered into any voluntary agreement to deem himself subject to an ESE. None of the voluminous evidence the Vultaggio defendants submitted controverts this statement.

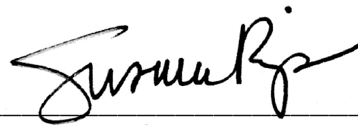
Moreover, nothing in the disputed clause connotes an obligation on the part of an executive to participate in management on a daily basis or risk being subject to an ESE. Thus, the evidence of Ferolito's involvement in the company before and after the execution of the agreement does not avail defendants.

Nor did defendants demonstrate that further discovery is warranted (*see* CPLR 3212[f]; *Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [2007]).

We have considered defendants’ remaining contentions and find them unavailing.

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

ENTERED: JUNE 23, 2011



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Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5423 The People of the State of New York, Ind. 3998/09
Respondent,

-against-

Felix Tapia,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J. at plea; Laura Ward, J. at sentencing), rendered on or about March 10, 2010,

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.

ENTERED: JUNE 23, 2011

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CLERK

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

Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5429 In re Mable James, Index 105722/10
Petitioner,

-against-

New York City Department of Housing
Preservation and Development, et al.,
Respondents.

____

Thomas S. Fleishell & Associates, P.C., New York (Susan C. Stanley of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for municipal respondent.

____

In this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Martin Schoenfeld, J.], entered August 13, 2010), to annul the determination of respondent New York City Department of Housing Preservation and Development, dated January 13, 2010, which, following a hearing, terminated petitioner's Section 8 rent subsidy effective February 28, 2010, the petition is unanimously granted, without costs, the determination of respondent is annulled and vacated, and petitioner's Section 8 rent subsidy is reinstated retroactive to February 28, 2010.

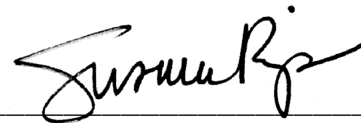
Respondent's determination was not supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human*

Rights, 45 NY2d 176, 179-182 [1978]). The Hearing Officer's credibility determination is not entitled to deference in this case. The substitute Hearing Officer was not present at the original informal hearing. The decision was rendered based on, inter alia, an incomplete audio recording and not on the Hearing Officer's observations of the petitioner's demeanor as she testified. Furthermore, the Hearing Officer did not even have a copy of the hearing transcript at the time he made his decision because it was prepared months afterwards (*cf. Matter of Melendez v Cestero*, 79 AD3d 603, 604 [2010]). Finally, we note that the determination of the substitute Hearing Officer was issued almost two years after the informal hearing.

In view of the foregoing, we need not reach petitioner's remaining contention.

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

ENTERED: JUNE 23, 2011



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Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5430 The People of the State of New York, Ind. 4421/07
Respondent,

-against-

Kenneth Stanley,
Defendant-Appellant.

____

Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

____

Judgment, Supreme Court, New York County (James A. Yates, J. at suppression hearing; A. Kirke Bartley, Jr., J. at jury trial and sentencing), rendered October 30, 2008, convicting defendant of robbery in the first degree (two counts), robbery in the second degree and criminal possession of a weapon in the second degree (two counts), and sentencing him to an aggregate term of 17 years, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress identification testimony. The lineup identification was not the fruit of an unlawful arrest. The hearing evidence establishes that the police had a reasonable suspicion of criminality. This justified their pursuit of defendant and his companions. It appeared that a codefendant discarded a pistol

during the pursuit. When police officers recovered the pistol immediately after defendant was detained, the police had probable cause to arrest defendant.

We note that defendant's challenges to the legality of his arrest are similar to arguments raised on a codefendant's appeal (*People v Jones*, 75 AD3d 415 [2010], *lv denied* 15 NY3d 853 [2010]). On that appeal, we found that the codefendant's claims were unpreserved, but we also rejected them on the merits as an alternative holding. We find no reason to reach a different result here. Finally, we also find that, because of intervening events, the lineup identification was attenuated from any initial illegality (*see People v Garcia*, 281 AD2d 234 [2004], *lv denied* 96 NY2d 862 [2001]).

The lineup photograph reveals that the lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The difference in age between defendant and the fillers was not so noticeable as to single defendant out (*see People v Rodriguez*, 52 AD3d 399 [2008], *lv denied* 11 NY3d 834 [2008]).

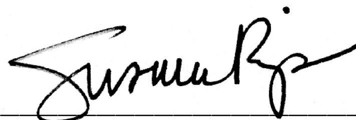
Defendant did not preserve his contention that the lineup was unduly suggestive because of a disparity in skin complexion between himself and the fillers, and we decline to review it in

the interest of justice. As an alternative holding, we find that defendant's skin tone was reasonably similar to that of most of the fillers, and that defendant did not stand out from the others.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 23, 2011



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Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5433 The People of the State of New York, Ind. 794/07
Respondent,

-against-

Terriel Smith,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 29, 2009, convicting defendant, after a jury trial, of burglary in the first degree, unlawful imprisonment in the second degree, assault in the third degree and menacing in the third degree, and sentencing him, as a persistent felony offender, to an aggregate term of 15 years to life, unanimously affirmed.

Defendant asserts that the People failed to prove that he knowingly and unlawfully entered a building, a necessary element of his burglary conviction. However, the evidence warrants the inference that defendant knew he was not permitted to enter a locked residential building with a no-trespassing sign. While defendant testified he entered as an invitee of a resident, the

jury was free to reject that testimony. There is no basis for disturbing the jury's credibility determinations.

Defendant did not preserve his challenge to the sufficiency of the evidence supporting the element of physical injury, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]).

We also find that the verdict was not against the weight of the evidence with regard to either of the above-discussed issues (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

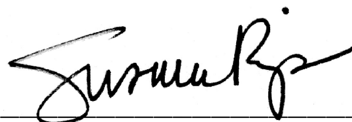
By failing to object, or by objecting on different grounds from those raised on appeal, defendant did not preserve his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The remarks at issue properly asked the jury to draw reasonable inferences from the evidence and were responsive to defense counsel's summation which characterized the victim as a drug courier masked as an innocent-appearing college student (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]).

The court properly exercised its discretion in sentencing

defendant as a persistent felony offender. Defendant's challenge to the constitutionality of that adjudication is unavailing (*see People v Battles*, 16 NY3d 54 [2010]; *People v Quinones*, 12 NY3d 116 [2009]).

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

ENTERED: JUNE 23, 2011



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Saxe, P.J., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5434 Michael James, et al., Index 102596/09
Petitioners-Appellants,

-against-

John J. Doherty, as Commissioner of
the Department of Sanitation of
the City of New York, et al.,
Defendants-Respondents.

____

Kirshner & Cohen, P.C., Great Neck (Allen Cohen of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

____

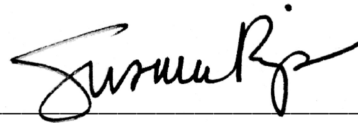
Order and judgment (one paper), Supreme Court, New York County (Carol Edmead, J.), entered May 6, 2010, which, upon granting respondent's motion to reargue an order, same court and Justice, entered July 31, 2009, vacated the order entered July 31, 2009, granted respondent's cross motion to dismiss the petition brought pursuant to CPLR article 78, and dismissed the petition, unanimously affirmed, without costs.

In this article 78 proceeding, the motion court properly concluded that the administrative law judge's determination was not arbitrary, capricious or an abuse of discretion (*see* CPLR 7803 [3]; *Matter of Windsor Place Corp. v State Div. of Hous. & Community Renewal, Off. Of Rent Admin.*, 161 AD2d 279 [1990]).

Pursuant to the rules and regulations of the Department of Sanitation (*see* New York City Charter § 2604[b][2]; *see also* 53 RCNY § 1-13[a], [b]), the alleged prohibited conduct, i.e., the removal of trade waste, could be considered a crime (*see* New York City Charter § 2606[c]; *see also* Penal Law § 10.00[6]), and therefore, the complaints at issue are not time barred (*cf.* Civil Service Law § 75[4]).

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

ENTERED: JUNE 23, 2011



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Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5435N Brian Tuitt, Index 403017/09
Petitioner-Appellant,

-against-

The City of New York, et al.,
Respondents-Respondents.

____

Brian Tuitt, appellant pro se.

____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 16, 2010, which denied petitioner's application for leave to serve a late notice of claim, unanimously affirmed, without costs.

Petitioner, a former police detective, alleges that he sustained personal injury as a result of the work he performed from September 11, 2001 until April 2002, at the World Trade Center site, following the terrorist attack. He claims that in November or December 2008, he was diagnosed with post-traumatic stress disorder (PTSD). On or about September 23, 2009, he moved for leave to serve a late notice of claim upon the municipal respondents.

We note initially that any error by the court clerk in refusing to allow petitioner to submit certain exhibits in

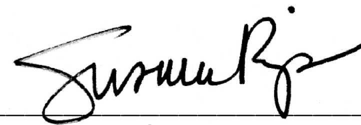
support of his application is inconsequential, since the date of petitioner's PTSD diagnosis is not the determinative factor. Even were we to give petitioner the benefit of assuming that his injury accrued on the last date he worked at the WTC site, April 2002, the statute of limitations expired on his claim in July 2003 (*see* General Municipal Law § 50-I [one year and 90 days for tort claims]). Since the statute of limitations on petitioner's underlying claim had expired at the time he made his application, the motion court lacked the discretion to grant him an extension of time to serve a late notice of claim (General Municipal Law § 50-e[1], [5]; *see Matter of McGillick v City of New York*, 13 AD3d 195 [2004]).

The statutory tolling provision set forth in CPLR 214-c, which provides that a claim for latent exposure to a toxic substance accrues when the petitioner discovered or reasonably could have discovered the injury, is inapplicable. Petitioner's claimed injury is psychological. It is not the type of physical injury caused by latent exposure to a toxic substance required by 214-c (*compare Matter of Taha v City of New York*, 192 Misc 2d 244 [2002] [lung damage]).

We have considered petitioner’s remaining contentions and find them without merit.

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

ENTERED: JUNE 23, 2011



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ADDENDUM TO THE DECISION LIST OF JUNE 23, 2011

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3660 John Raniola, Bronx Public Administrator of the Estate of Osvaldo Quinones, deceased, Plaintiff-Respondent, Index 24537/98

-against-

Montefiore Medical Center, Defendant-Appellant,

Luis A. Sanchez, M.D., et al., Defendants.

Edward J. Guardaro, Jr., White Plains, for appellant.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondent.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered August 21, 2009, which denied defendant Montefiore Medical Center's motion for judgment notwithstanding the verdict and granted the alternative relief of setting aside the jury verdict awarding plaintiff $3 million for four years of past pain and suffering, unless the parties, within 30 days, filed a stipulation settling the case for $750,000, modified, on the facts, to direct a new trial on the issue of damages for past pain and suffering, unless plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to an

award of $500,000 and to entry of a judgment in accordance therewith, and otherwise affirmed, without costs.

In late October 1998, plaintiff's decedent underwent surgery at Montefiore to amputate his right leg below the knee, a procedure necessitated by his diabetes. Some eight hours after the procedure, for which he had been given local anesthesia and sedatives, the decedent fell from his hospital bed and fractured his left hip. In deposition testimony read to the jury, the decedent's wife, who visited him in the hospital in the days following the fall, testified that the decedent did not remember how he fell. Notwithstanding this testimony and the decedent's initial deposition testimony that he did not know how the fall occurred and that "maybe" a nurse had failed to raise a side rail of the bed, the jury's finding that Montefiore negligently caused the decedent's injury was supported by sufficient evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Nor can we conclude that the verdict was against the weight of the evidence (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). Given the testimony of the decedent's expert, the jury could reasonably have rejected the testimony of the attending nurse and found that she failed to raise the guard rails flanking the bed when she left the room to change the decedent's bedpan, in

violation of hospital protocol, and that the decedent fell to the floor as he attempted to reach the call button. The decedent's hip was surgically repaired with internal screws, which later caused what the decedent characterized as severe pain whenever he attempted to walk using a prosthetic limb.

The decedent, who was 63 years old at the time of the fall, also suffered from chronic kidney failure, which was treated with dialysis, and heart disease. Before his fall from the hospital bed, in two earlier surgical procedures also necessitated by his diabetes, the decedent's right big toe and half of his right foot were amputated. In December 2001, the decedent's left leg was amputated because of his diabetes. The next year, four years after the fall, the decedent died of a heart attack.

The damages in question were awarded for the decedent's past pain and suffering during the four years between his hospital accident and his death. There is no indication in the record that the parties ever stipulated to reduce the jury's award to $750,000, as called for by the trial judge. In the absence of such a stipulation, we have the authority to review and determine whether the award deviates materially from what would be reasonable compensation (CPLR 5501[c]). The trial judge's finding that the award should be reduced was appropriate (*see*

Kahl v MHZ Operating Corp., 270 AD2d 623 [2000]), but, in our view, the reduced award still deviates materially from the reasonable standard to the extent indicated (*see Caldas v City of New York*, 284 AD2d 192 [2001] [as reflected in the record, award of $375,000 for past pain and suffering over six years for two hip fractures]).

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

SAXE, J. (dissenting)

Eight hours after plaintiff's 63-year-old decedent, Osvaldo Quinones, had his right leg amputated below the knee, he fell out of his hospital bed, fracturing his hip. The jury's finding of liability against defendant hospital was based on the failure of a nurse to raise the bed's side rail after removing a bedpan, leaving Quinones unprotected from the fall, which occurred when he tried to push himself up in the bed so that he could reach the call button. The hip fracture required the internal fixation of screws, which caused the decedent severe pain whenever he attempted to walk with the use of a prosthetic leg, discouraging him from walking and causing him to use a wheelchair instead.

This panel is unanimous in finding that the liability verdict was supported by sufficient evidence as well as the weight of the evidence. We differ only on the issue of reasonable compensation for the injury. The jury awarded $3 million for the decedent's pain and suffering during the four years between his accident and his death. The trial court granted defendant's motion to set aside the verdict to the extent of finding the award excessive, and found the sum of $750,000 to be more appropriate.

This Court has the authority to review and determine whether

a damages award deviates materially from what would be reasonable compensation (CPLR 5501[c]). In my view, the trial judge's assessment of the reasonable compensation for the injury in this case was appropriate, and since it does not deviate materially from what would be reasonable compensation, it does not warrant further reduction.

It is true that the pain and suffering of the amputation itself are not properly part of the injury for which plaintiff is entitled to damages (*see e.g. Knight v Loubeau*, 309 AD2d 579, 580 [2003]). However, it is likewise true that the pain and suffering experienced by plaintiff's decedent was not merely the physical distress arising directly from the hip fracture. Another aspect of Quinones's pain and suffering was that which resulted from his inability to use a prosthesis as had been expected, because the hip fracture caused such a degree of pain when he attempted to walk that he had to rely instead on a wheelchair to get around (*see Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 29 [2008], *lv denied* 11 NY3d 705 [2008]). Contrary to defendant's contention, there was sufficient evidence to establish that Quinones's hip fracture led to his inability to walk and his reliance on a wheelchair, and prevented him from performing ordinary activities of daily life that he previously

could perform. Indeed, while Quinones testified at his deposition that he could no longer work in the yard or play with his children, the testimony of his wife indicated that when he returned home after the accident, and for the remaining years of his life, he needed her to help him with even basic tasks, such as toileting, bathing and getting into bed.

It should be noted that, contrary to defendant's contention, even if some of Quinones's pain and suffering was attributable to his underlying medical conditions, specifically, heart disease, hypertension, kidney disease, and diabetes, no reduction in his pain and suffering award is warranted. On the contrary, to the extent those preexisting conditions caused Quinones additional difficulties and complications in the repair and healing of his hip fracture, that additional impact constitutes a component of his compensable pain and suffering.

In locating comparable cases for purposes of assessing the reasonableness of the award (*see Kahl v MHZ Operating Corp.*, 270 AD2d 623, 624 [2000]), we may find that cases in which the plaintiffs suffered hip fractures are not truly comparable. A useful point of comparison will be found only where a plaintiff's hip fracture caused pain severe enough to prevent the plaintiff from walking and force him to rely on a wheelchair instead.

To illustrate: A case bearing a marked resemblance to the present matter is *Lukas v Trump* (281 AD2d 400 [2001]), in which the Second Department upheld an award of $600,000 for past pain and suffering (for an unstated number of years) and $700,000 for future pain and suffering in favor of a 60-year-old man with polio who used crutches and leg braces, who, after suffering a fractured hip, was unable to resume using crutches, and became confined to a wheelchair. In contrast, in *Caldas v City of New York* (284 AD2d 192 [2001]), in which this Court upheld an award of $375,000 for past pain and suffering (as reflected in the record on appeal), where the plaintiff suffered two displaced hip fractures, although the plaintiff was permanently disabled from doing manual labor and unable to perform household repairs as he had before, he was not disabled from performing the ordinary functions of daily life.

In *Clotter v New York City Tr. Auth.* (68 AD3d 518 [2009]), in which the 46-year-old plaintiff was left unable to walk without crutches or a cane, due to a ruptured quadriceps tendon and an avulsion fracture, this Court reduced the award for past pain and suffering from $1.2 million to $800,000. The fact that the plaintiff in *Clotter* was a formerly healthy 46-year-old prevents us from reasonably comparing her future pain and

suffering to that of Quinones, had he lived. However, the past pain and suffering resulting from the need for previously unnecessary surgery, followed by substantial disability in daily activities, makes her award for *past* pain and suffering relevant for comparison here.

While it is difficult to equate one person's pain and suffering with that of another, with the foregoing cases in mind, the trial court's reduced award for past pain and suffering cannot be said to deviate *materially* from what would be reasonable compensation, and, accordingly, I would affirm.

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

ENTERED: JUNE 23, 2011

CLERK

Andrias, J.P., Friedman, Catterson, McGuire, Román, JJ.

2715 The People of the State of New York, Ind. 4268C/05
Respondent,

-against-

Samuel Encarnacion,
Defendant-Appellant.

____

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

Robert T. Johnson, District Attorney, Bronx (Rither Alabre of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Elizabeth A. Foley, J.), rendered December 19, 2007, affirmed.

Opinion by Román, J. All concur except Catterson and McGuire, JJ. who concur in a separate Opinion by McGuire, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
James M. Catterson
James M. McGuire
Nelson S. Román, JJ.

2715
Ind. 4268C/05

_______________________________________x

The People of the State of New York,
Respondent,

-against-

Samuel Encarnacion,
Defendant-Appellant.

_______________________________________x

Defendant appeals from a judgment of the Supreme Court, Bronx County (Elizabeth A. Foley, J.), rendered December 19, 2007, convicting him, after a jury trial, of murder in the second degree, attempted murder in the second degree, and two counts of assault in the second degree.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey and Alexis Agathocleous of counsel), for appellant.

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

ROMÁN, J.

The salient issue on this appeal concerns the United States Constitution's Confrontation Clause and whether the trial court, in allowing the prosecution to use a witness's grand jury testimony in its case-in-chief, without producing the witness, violated defendant's right of confrontation. Additionally, we are called upon to decide whether in allowing the prosecution to present DNA evidence through a witness who did not personally perform all of the DNA testing about which she testified, the trial court further violated defendant's constitutional right of confrontation. After a review of the record, we hold that under the circumstances, defendant's right of confrontation was not violated when the prosecution used grand jury minutes in its case in chief. Notwithstanding that defendant failed to preserve the DNA issue, as an alternative holding we conclude that the prosecution's use of the DNA evidence did not violate his constitutional right of confrontation.

On January 20, 2005, in response to a 911 call, the police and Emergency Medical Technicians (EMTs) arrived at premises located at 1235 Harrod Avenue, Bronx, NY. Defendant met both the police and the EMTs in the lobby and told them that while he was out getting food someone stabbed his girlfriend and her cousin, killing the cousin. Defendant told the police that he had been

told by his girlfriend that this crime had been committed by "some black guy." Defendant led the police and the EMTs to apartment 8J, where they discovered a woman, later identified as Ofelia Torres[1] (Ofelia), who was defendant's girlfriend, lying on the ground with multiple stab wounds. A man, dead and with multiple stab wounds, later identified as Johnny Torres (Johnny) and Ofelia's cousin, was lying in a pool of blood in the hallway. Blood was found at multiple locations in the apartment, including the hallway and the bedroom.

Inspection of the premises led to the discovery of a garbage bag in the compactor room. The bag was consistent with bags also found in the apartment and contained bloody clothing, namely a pair of sweat pants, a white t-shirt, a pair of jeans, and a pair of sneakers. The bag also contained several bloody knives. These items were ultimately tested for DNA, yielding DNA profiles matching defendant, Johnny and an unidentified female.

Ofelia was transported to the hospital, where, upon examination, it was noted that she had numerous stab wounds throughout her body. When asked by a doctor to identify her attacker, Ofelia verbally identified defendant. An autopsy

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[1] To the extent that there are three persons involved in this case who share the last name Torres, we hereinafter respectfully refer to these witnesses by their first names.

revealed that Johnny died from stab wounds to his neck and torso.

The police interviewed defendant, who, upon being told that Ofelia was still alive, broke down and gave an altogether different account from that which he had given to the police at the scene. In a written statement, defendant stated that on the night in question he arrived at his apartment after visiting a friend. Ofelia was already home with Johnny. Upon his arrival, defendant started to play with the dog when Ofelia became upset, contending that defendant was "no good" because he had not left her any money to purchase food. Johnny then also stated that defendant was "no good" and that Ofelia should end their relationship. Defendant and Johnny got into a verbal altercation and thereafter Johnny hit him. While in the kitchen, a fight ensued, Ofelia tried to intervene and defendant "blacked out." Defendant was unsure how he got hold of a knife, only recalling that he "lost [his] sense and everything happened." Thereafter, defendant noticed that both Johnny and Ofelia were on the floor. Scared, defendant went to a neighbor's apartment and asked him to call an ambulance. In a panic, defendant took off his pants, and put "everything" in a bag, including the knife, thereafter throwing the bag in the garbage. Defendant also gave the police a videotaped statement, largely consistent with his written statement, adding that while he did in fact stab Ofelia and

Johnny, he could not recall how, remembering only that "everybody's bleeding and I got a knife in my hand." While in police custody, defendant also wrote Ofelia a letter, wherein he apologized for the instant event and pleaded for forgiveness.

Prior to trial, Ofelia testified before the grand jury about the foregoing events. Ofelia stated that when defendant came home that night, she was with her dog and her cousin Johnny. While in the bedroom, she and defendant proceeded to have a discussion regarding their relationship. Ofelia told defendant that she wanted to end their relationship and defendant responded by insulting her prior boyfriends. Thereafter, defendant went to the kitchen and got a knife. Telling Ofelia that "[i]f I can't have you, nobody can have you," he stabbed her repeatedly, ultimately stabbing her 20 times throughout her chest and back and nearly severing a finger. Johnny who had been elsewhere in the apartment tried to intervene and defendant stabbed him to death. Defendant, acknowledging that he had killed Johnny, stated, "Johnny's dead. Look what I did. How am I gonna get away with this. . ." Defendant stabbed Ofelia again, carried her to the living room, and told her he was going to let her die. Changing his mind, however, defendant went to a neighbor's apartment and called an ambulance.

Defendant was tried and on the foregoing evidence convicted

of all charges in the indictment, namely second degree murder (Penal Law § 125.25[1]), attempted second-degree murder (Penal Law § 110/125.25[1]), and two counts of first degree assault (Penal Law § 120.10[1] and [2]). Defendant was sentenced to an indeterminate prison term of 20 years to life for the murder, to run consecutively with three concurrent determinate 20 year prison terms. He was also sentenced to five years of post-release supervision.

Confrontation Clause and the Use of Grand Jury Minutes

Defendant contends that in allowing the prosecution to use Ofelia’s grand jury testimony in its case-in-chief, the trial court violated his constitutional right of confrontation because the prosecution failed to establish that defendant’s misconduct induced Ofelia’s refusal to testify, thereby rendering her unavailable. We disagree.

The Confrontation Clause of the Sixth Amendment to the United States Constitution requires that in all criminal prosecutions a defendant is entitled to confront all witnesses who testify against him or her (US Const Sixth Amend; *Melendez-Diaz v Massachusetts*, _ US _, 129 S Ct 2527, 2531 [2009]; *Davis v Washington*, 547 US 813, 821 [2006]; *Crawford v Washington*, 541 US 36, 50 [2004]). Generally, out of court statements, such as grand jury testimony, cannot be used as evidence in-chief against

a defendant in a criminal action, as such evidence would in fact run afoul of a defendant's constitutional right of confrontation (*People v Cotto*, 92 NY2d 68, 77 [1998]; *People v Geraci*, 85 NY2d 359, 365 [1995]; *People v Byrd*, 51 AD3d 267, 272-273 [2008], *lv denied* 10 NY3d 956 [2008]). However, the right to confront witnesses is not absolute and there are of course exceptions.

The United States Supreme Court has repeatedly held that the right of confrontation can be waived or forfeited not only by consent but also by misconduct (*Illinois v Allen*, 397 US 337, 343 [1970]; *Snyder v Commonwealth of Massachusetts*, 291 US 97, 106 [1934]; *Diaz v United States*, 223 US 442, 452-453 [1912]). Thus, when a witness's "silence is procured by the defendant himself, whether by chicanery, or by actual violence or murder, the defendant cannot then assert his confrontation clause rights" (*United States v Mastrangelo*, 693 F2d 269, 272-273 [2d Cir 1982] [internal citations omitted]), because through his or her misconduct, defendant has forfeited both the constitutional right to confront a witness and the right to assert otherwise viable evidentiary rules barring the use of hearsay as evidence-in-chief (*Cotto* at 75-76; *Geraci* at 365-366).

Whereas the court in *Mastrangelo* limited forfeiture to instances where a defendant procures a witness's silence by trickery, murder or violence (*Mastrangelo* at 272), in this State

we define misconduct much more broadly to include intimidation and bribery (*Geraci* at 369-370), threats (*Cotto* at 76), and the use of a relationship to improperly procure a witness's silence (*People v Johnson*, 93 NY2d 254, 259 [1999]; *Byrd* at 273; *People v Jernigan*, 41 AD3d 331, 332 [2007], *lv denied* 9 NY3d 923 [2007]; *People v Major*, 251 AD2d 999, 999-1000 [1998], *lv denied* 92 NY2d 927 [1998]).

When the prosecution alleges "specific facts which demonstrate a distinct possibility that a criminal defendant's conduct has induced a witness' unlawful refusal to testify at trial or has caused the witness' disappearance or demise" (*Matter of Holtzman v Hellenbrand*, 92 AD2d 405, 415 [1983] [internal quotation marks and citations omitted]; *Cotto* at 72), before allowing the use of any out of court statements in its case-in-chief, the trial court is required to conduct a *Sirois* hearing (*Johnson* at 258). At a *Sirois* hearing, the prosecution must prove the defendant's misconduct by clear and convincing evidence and, if successful, the defendant is deemed to have waived or forfeited his right to confront the witness whose absence or silence he procured and the witness's out-of-court statements may then be used by the prosecution in its case-in-chief (*Cotto* at 75-76; *Geraci* at *365-368; Byrd* at 273; *Major* at 999; *Holtzman* at 415).

Recognizing the surreptitious nature of witness tampering and that a defendant engaging in such conduct will rarely do so openly, resorting instead to subterfuge, the court can rely on and the prosecution can use circumstantial evidence in making the requisite determination (*Cotto* at 76-77; *Geraci* at 369). Indeed, at times the prosecution will be able to rely on nothing more than circumstantial proof and the logical inferences that can be drawn therefrom (*Geraci* at 369-370; *see also People v Alston*, 27 AD3d 311, 312 [2006], *lv denied* 7 NY3d 751 [2006]).

Here, the prosecution alerted the court of its intention to use Ofelia's grand jury testimony in its case-in-chief. The prosecution averred that based on defendant's misconduct, Ofelia had stopped cooperating with them and was refusing to testify at trial. The trial court then correctly held a *Sirois* hearing. Nancy Torres (Nancy), Ofelia's mother, testified that in January 2005, after the instant crimes, defendant began to call her home several times a day, requesting to speak to Ofelia. Thereafter defendant began to call Ofelia on her cell phone. Specifically, Nancy testified that defendant called her home in excess of 1,000 times. Telephone records received in evidence corroborated Nancy's testimony, establishing that defendant called Ofelia's residence from jail in excess of 150 times. On one occasion, Nancy overheard a telephone conversation between Ofelia and

defendant where Ofelia discussed tailoring her testimony to lessen defendant's prison time. Nancy testified that while on the telephone with defendant, Ofelia stated that if "she [Ofelia] says what he [the defendant] wants her to say, that he ain't going to do no time at all." Thereafter, Ofelia's original version of the events, the version she had already testified to before the grand jury, changed, and she now contended that it was Johnny, rather than defendant, who stabbed her. Later and after a brief hospitalization, Ofelia admitted that she had lied, changing her original story only because defendant so demanded. Nancy testified that Ofelia stated "that Sammy [defendant] wants her to say that Johnny did the stabbing and he [defendant] will come out of jail faster." Additionally, Ofelia told Nancy that she would no longer cooperate with the prosecution or testify at trial because defendant, through his friends, told her that if she "comes in" he would "get her." On direct examination, Nancy testified that Ofelia told her that defendant's friends told Ofelia that if she didn't "cooperate with him [defendant], that he [defendant] is going to get her." When cross-examined on this issue, Nancy reiterated that Ofelia told her that "she was being threatened by one of the friends from the defendant."

After the hearing, the court in a written decision granted the prosecution's application to use Ofelia's grand jury

testimony in its case-in-chief, concluding that defendant's misconduct, namely his improper influence on Ofelia, induced her refusal to testify.

We agree that the evidence presented at the hearing circumstantially established that defendant engaged in misconduct which induced Ofelia's refusal to testify at trial by threatening her with violence if in fact she chose to testify.

Here, the evidence clearly and convincingly established that Ofelia's refusal to testify was the product of fear, precipitated by defendant's threats that if Ophelia testified against him, harm would certainly befall her. Nancy not only testified that defendant relentlessly called her home over 1,000 times, but that Ofelia told her that defendant, through his friends, told Ofelia that if she "comes in," defendant would "get her." Implicit in that statement is that defendant threatened to harm Ofelia if she cooperated with the prosecution; thus, defendant induced her silence through the use of threats.

Accordingly, to the extent that defendant's misconduct procured Ofelia's refusal to testify, he forfeited his right to confront her and the admission of her grand jury minutes as evidence in the prosecution's case-in-chief was proper (*Cotto* at 75-76). As an alternative holding, even if it was error to admit Ofelia's grand jury testimony on the People's direct case, given

the overwhelming evidence of defendant's guilt, namely his confession and the physical evidence linking him to the crime scene, such error was nevertheless harmless.

Contrary to the position taken by Justice McGuire, the record, portions of which have been extensively quoted above, establishes that defendant did in fact procure Ofelia's refusal to testify at trial. While Justice McGuire argues that there is no evidence linking the threats made against Ofelia directly to defendant, his assertion is simply belied by the record. The very friends who were threatening Ofelia if "she didn't cooperate with defendant" were the same "friends [of defendant's] from the streets," with whom Ofelia had a conversation and who told Ofelia that "Sammy [defendant] keeps saying if she doesn't stay with him, that he was going to hurt her." Thus, it is clear that defendant was conveying threats directly against Ofelia through his friends, such that these threats can be imputed directly to him.

In finding that defendant procured Ofelia's unavailability at trial, it was not necessary, and indeed would have been improper, to come to the antecedent conclusion, as urged by Justice McGuire, that defendant was guilty of the crimes charged. A defendant waives his right to confront a witness by procuring the witness's unavailability through misconduct notwithstanding

the defendant's belief, or for that matter, the court's belief as to defendant's guilt or innocence of the crimes charged. Dissuading a witness from testifying, by threat, is sanctionable misconduct irrespective of the nature and perceived veracity of the testimony sought to be prevented. A defendant who seeks to obstruct untruthful testimony is no less guilty of misconduct than one who seeks to obstruct truthful testimony.

Confrontation Clause and DNA Evidence

Defendant contends that his right to confrontation was also violated when the trial court allowed a prosecution witness to testify regarding DNA testing linking him to the crime scene even though the witness had not personally tested all the items about which she testified.

Preliminarily, insofar as defense counsel never specifically objected to the DNA testimony on the grounds he now presses on appeal, namely that the testimony violated his right of confrontation, defendant failed to preserve this issue for our review (*People v Gray*, 86 NY2d 10, 19 [1995]; *People v Ford*, 69 NY2d 775, 776 [1987]), and we decline to review this issue on appeal in the interest of justice. As an alternative holding, however, we also reject it on the merits.

The Confrontation Clause is implicated anytime a witness offers testimony against the defendant (*Melendez-Diaz*, _ US at _,

129 S Ct at 2531; *Crawford*, 541 US at 51; *People v* Brown, 13 NY3d 332, 338 [2009]; *People v Rawlins*, 10 NY3d 136, 146 [2008]). Testimony is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" (*id*. at 146 [internal quotation marks and citations omitted]). Testimony includes depositions, affidavits, and pre-trial statements (*id*. at 146-147). The salient issue in determining whether the Confrontation Clause is invoked by the introduction of an out-of-court statement is not whether the statement sought to be used is admissible under the prevailing rules of evidence, but whether the same is testimonial in nature (*Crawford* at 51). Generally, if the statement is testimonial it cannot be used unless the declarant is unavailable at trial and the defendant has had an opportunity to cross-examine the same prior to trial (*id*. at 59; *Melendez-Diaz* at 2531; *Brown* at 338).

The admission in evidence of documents evincing the results of laboratory testing performed on narcotics recovered from a criminal defendant, without concomitantly producing those who performed the testing at trial, violates the Confrontation Clause (*Melendez-Diaz* at 2531). Similarly, the admission in evidence of reports evincing the results of fingerprint analysis performed on a defendant's fingerprints and those recovered at the scene of a crime, without producing the person who performed the analysis,

both invokes and violates the Confrontation Clause (*Rawlins* at 157). However, the admission in evidence of reports evincing the results of DNA testing performed on DNA samples recovered from a defendant and other sources, without producing the person who performed the analysis, does not violate the Confrontation Clause (*Brown* at 340; *Rawlins* at 158-159; *People v Thompson*, 70 AD3d 866, 866 [2010], *lv denied* 15 NY3d 757 [2010]).

The relevant inquiry is the nature of the out-of-court statement. If the out-of-court statement is testimonial in nature, and seeks to establish facts essential to the elements of the crime, then the Confrontation Clause is invoked (*Melendez-Diaz* at 2532). For example, in *Melendez-Diaz*, the court found that certificates admitted in evidence by the prosecution, evincing the results of tests performed on narcotics seized from the defendant, were akin to affidavits establishing essential elements of the crime for which defendant stood accused (*id.*). The certificates were deemed equivalent to live testimony seeking to establish that what was seized from defendant was in fact a narcotic (*id.*). Absent evidence that the analyst who performed the test described in the certificates was unavailable and that defendant had an opportunity to cross-examine the same, admission of the certificates in evidence violated the Confrontation Clause (*id.*). In *Rawlins,* the Court of Appeals came to the same

conclusion regarding a report establishing that the defendant's fingerprints matched those at several crime scenes (*Rawlins* at 157). Noting that the test, on constitutional admissibility, would almost always be fact-specific, the Court stated that the inquiry is "whether a[n out-of-court] statement is properly viewed as a surrogate for accusatory in court testimony" (*id.* at 151). The Court went on to hold that "[l]atent fingerprint reports - which compare unknown latent fingerprints from the crime with fingerprints from a known individual - fit the classic definition of a 'weaker substitute for live testimony' at trial" (*id.* at 157, quoting *Davis*, 577 US at 828).

With respect to reports describing the results of DNA testing, our courts have reached an altogether different result, noting that testimony regarding such testing is allowed even when the analyst who performed the test is not produced at trial (*Brown* at 340; *Rawlins* at 158-159; *Thompson* at 866). Specifically, in *Rawlins*, a case decided before *Melendez-Diaz*, in *Brown*, and more recently in *Thompson*, it was held that reports evincing the results of DNA testing, when admitted in evidence and testified to, do not invoke the Confrontation Clause and thus can be used against a defendant without production of the analyst who performed the DNA testing (*Rawlins* at 158-159). Typically such reports are not accusatory and merely contain non-

identifying raw data in the form of a DNA profile and thus, standing alone, and in the absence of expert opinion linking the results to the defendant, shed no light on the guilt of the accused (*Brown* at 340; R*awlins* at 158-159; *Thompson* at 866-867).

Here, at the trial, the prosecution offered testimony from Danielle Coye, a forensic scientist employed by the Office of the Chief Medical Examiner. Coye, testifying from her notes and exhibits in evidence, testified that her office received items from the crime scene, namely, clothing, knives, and swabs. With the exception of a pair of jeans, sneakers and socks, she personally performed DNA testing on all other items about which she testified. Several of the items she tested contained DNA matching Johnny, defendant and an unidentified female. The same was true with regard to a pair of defendant's jeans, which Coye did not personally test.

Clearly, with regard to the portion of Coye's testimony that defendant challenges on appeal - that concerning the pair of jeans she did not personally test - the same did not violate his right of confrontation. The DNA evidence about which Coye testified is the same kind that our courts have found do not violate the Confrontation Clause, namely DNA testing performed by the non-testifying analyst yielding non-accusatory raw data (*Brown* at 340; R*awlins* at 158-159; *Thompson* at 866). Thus, the

trial court properly allowed Coye’s testimony.

Notwithstanding the foregoing, assuming it was in fact error to admit the DNA evidence at issue, given the overwhelming evidence of defendant’s guilt, such error was nevertheless harmless.

Defendant contends that the trial court erred in failing to instruct the jury regarding the affirmative defense of extreme emotional disturbance. Insofar as defense counsel never objected to the trial court’s failure to submit this instruction to the jury, this issue was abandoned and unpreserved (*People v Dockery*, 272 AD2d 247 [2000], *lv denied* 95 NY2d 934 [2000]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

We also reject defendant’s claim that he was deprived of effective assistance of counsel because his attorney failed to follow up on his initial request for the extreme emotional distress instruction. The ineffective assistance of counsel claim is unreviewable on direct appeal (*see People v Love*, 57 NY2d 998 [1982]), because it cannot be determined on the existing record whether counsel’s abandonment of the issue was an oversight or a deliberate strategic choice, made on reconsideration of his initial position. Moreover, defendant has not “demonstrate[d] the absence of strategic or other legitimate

explanations" for counsel's actions (*People v Rivera*, 71 NY2d 705, 709 [1988]). Counsel could have concluded not only that this defense had little chance of success on this issue, but that placing defendant's mental condition in issue would have opened the door to very damaging evidence, namely that defendant feigned mental illness when he was previously examined under CPL article 730. In any event, an extreme emotional disturbance charge was unwarranted.

We perceive no basis for reducing defendant's sentence.

Accordingly, the judgment of the Supreme Court, Bronx County (Elizabeth A. Foley, J.), rendered December 19, 2007, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree, and two counts of assault in the second degree, and sentencing him to a term of 20 years to life, consecutive to three concurrent terms of 20 years, should be affirmed.

All concur except Catterson and McGuire, JJ. who concur in a separate Opinion by McGuire, J.

McGUIRE, J. (concurring)

The principal issue discussed and resolved by the majority is whether the People proved that defendant committed misconduct that caused the unavailability of a witness. That issue is a difficult one if, as I maintain, there is no competent evidence that defendant can be held responsible for a threat allegedly made by an unidentified "friend" of his. My disagreement with the majority is not about how it resolves the issue. I express no opinion on it. Rather, I disagree with the majority about whether we should resolve it at all. At least implicitly, the majority recognizes that it need not resolve it, but does so nonetheless and without explaining why. As discussed below, because we need not resolve the issue, we should not.

At a *Sirois* hearing, "the People must demonstrate by clear and convincing evidence that the defendant, by violence, threats or chicanery, caused a witness's unavailability" (*People v Cotto*, 92 NY2d 68, 75-76 [1998]). If the defendant thus has waived his constitutional right of confrontation, testimonial statements by the witness, such as the grand jury testimony of the witness, are admissible at trial despite the witness's absence. Violence, threats and chicanery are instances of the kinds of misconduct that will support a finding of waiver (*see People v Geraci*, 85 NY2d 359, 366 [1995] ["the principle is often characterized as

involving waiver by misconduct"] [internal quotation marks and citation omitted]).

The People rely in part on authorities standing for the proposition that the requisite misconduct can be established by a showing that the defendant exercised a domineering influence over the witness and exploited that relationship to secure the witness's unavailability (*see People v Johnson*, 93 NY2d 254 [1999]; *People v Byrd*, 51 AD3d 267 [2008], *lv denied* 10 NY3d 956 [2008]; *People v Jernigan*, 41 AD3d 331 [2007], *lv denied* 9 NY3d 923 [2007]). But in these cases, either the witness was a child (*Johnson*, 93 NY2d at 257) or the evidence established a history of physical or mental abuse (*Byrd*, 51 AD3d at 273 [summarizing evidence of acts by the defendant and his relatives and noting that "[a]ll this occurred in the context of a relationship with a long history of physical and mental abuse"]; *Jernigan*, 41 AD3d at 332 [concluding that evidence at *Sirois* hearing was sufficient "especially when viewed in a backdrop of his several acts of violence going back to the 1980s"]). In this case, Ofelia, the witness, was not a minor, and there was no evidence of a history of abuse. The majority does not address the People's arguments based on these precedents, and I express no opinion on those arguments. In my view, suffice it to say, those arguments also raise difficult questions that need not be resolved to decide

this appeal.

Two witnesses testified at the mid-trial *Sirois* hearing, Ofelia's mother and Detective Robert Martin. The detective's testimony added little if anything, as he testified to not much more than that Ofelia told him prior to trial that she "still loved" defendant, was not going to testify and hoped he "gets out."

Ofelia's mother, Nancy Torres, testified that she never heard defendant threaten her daughter. The court asked her, "[D]id your daughter ever say to you that I have been threatened?" She responded, "Nope." Indeed, she went further and, after stating that defendant had never threatened her, testified in response to another question from the court that defendant "never threatened [Ofelia]." At one point on cross-examination of Ms. Torres, she testified that Ofelia had said that a friend, not friends, of defendant had made such a statement to her. There was no testimony at all identifying this friend, a "person from the street," and no testimony describing the nature of his relationship with defendant. Notably, in its written opinion the trial court made no mention of Ms. Torres's hearsay testimony regarding what Ofelia had said an unidentified person had said; nor did the court make any finding that defendant knew about, condoned or encouraged the alleged threat.

Nonetheless, the majority writes that "Ofelia told Nancy that she would no longer cooperate . . . or testify at trial because defendant, through his friends, told her that if she 'comes in' he would 'get her.'" Similarly, the majority writes both that "defendant engaged in misconduct which induced Ofelia's refusal to testify . . . by threatening her with violence" and that her "refusal to testify was the product of fear, precipitated by defendant's threats." The additional, essentially identical statements the majority makes need not be catalogued. To repeat, there is no credible evidence that defendant knew about, condoned or encouraged the alleged threat.

The only evidence to which the majority can point is Ms. Torres's testimony that "[defendant's] friends from the street were telling her that Sammy keeps saying if she doesn't stay with him, that he was going to hurt her." Even putting aside that on cross-examination Ms. Torres repeatedly stated that her daughter had told her that an alleged friend, not friends, of defendant had made such a statement, this seems too slender a reed to support the conclusion that the People proved defendant's responsibility for such a threat by clear and convincing evidence. After all, this testimony boils down to an in-court statement by Ms. Torres about an out-of-court statement her daughter assertedly made about an out-of-court statement

assertedly made by unidentified persons about an out-of-court statement assertedly made by defendant. Any conclusion that this is competent evidence would be at least a controversial one. On this critical issue, the majority cites no precedent supporting its implicit position that such an extended chain of out-of-court statements originating with out-of-court statements by unidentified persons is not only competent evidence but evidence that can play a decisive role in satisfying the prosecution's burden to prove its case by clear and convincing evidence. To repeat, the trial court did not make any finding that defendant knew about, condoned or encouraged the alleged threat. And, of course, the trial court, not the majority, was able to see Ms. Torres and assess her demeanor. The majority does not explain why it nonetheless believes it appropriate to make such a finding.

The majority incorrectly writes that Ofelia "admitted that she had lied, changing her original story only because defendant so demanded." The majority's sole support for its assertion that Ofelia "admitted that she had lied," is Ms. Torres' testimony that Ofelia had told her that defendant "wants her to say that Johnny did the stabbing and he [defendant] will come out of jail faster." The problem, however, is that the majority simply assumes that the truth is the account Ofelia gave in the grand

jury rather than the out-of-court statements that Johnny did the stabbing. There was no evidence at the *Sirois* hearing that substantiates that assumption. As noted, only Ms. Torres and Detective Martin testified, and neither witness gave any testimony, let alone competent testimony, concerning who had done what to whom in the apartment. The majority has nothing to say by way of a response to this point. Ironically, however, the majority writes that "[i]n finding that defendant procured Ofelia's unavailability at trial, it . . . would have been improper to come to the antecedent conclusion . . . that defendant was guilty of the crimes charged."[2] Although the majority writes that Ms. Torres "overheard a telephone conversation between Ofelia and defendant where Ofelia discussed *tailoring* her testimony to lessen defendant's prison time" (emphasis added), the record does not support this statement. Not only does that loaded verb not appear in Ms. Torres' testimony, nothing in her testimony otherwise provides fair support for the majority's statement. At most, a snippet of her

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[2]I do not mean to suggest that if there had been clear and convincing evidence at the *Sirois* hearing that defendant was guilty of the crimes charged, it would be impermissible to infer that the evidence established that defendant had induced Ofelia to lie. I note, too, that the People do not contend that the evidence at the *Sirois* hearing includes the evidence received at the trial prior to the hearing.

testimony suggests only that Ms. Torres drew the conclusion that Ofelia and defendant were having such a discussion, but Ms. Torres made clear she only heard her daughter's side of certain of the phone conversations. The trial court's written opinion does not mention such a discussion let alone find that it occurred. Again, moreover, the majority is simply assuming that what defendant wanted Ofelia to say was not the truth.

Two final points. First, it is not clear whether the majority believes I disagree with its statement that a "defendant waives his right to confront a witness by procuring the same's unavailability through misconduct notwithstanding his belief, or . . . the court's belief as to defendant's guilt or innocence of the crimes charged." I agree. Second, the evidence of the number of phone calls defendant made to Ofelia – the number corroborated by telephone records or the vastly greater number to which, according to the majority, Ms. Torres testified – has little or no probative value on the critical question of whether defendant threatened Ofelia or otherwise committed misconduct that induced her not to testify.

In sum, whether the People met their burden of showing that defendant engaged in "misconduct" causing Ofelia's absence is a difficult question I would not decide. We should not decide this question if we need not decide it (*see Matter of Clara C. v*

William L., 96 NY2d 244, 250 [2001] ["We are bound by principles of judicial restraint not to decide constitutional questions unless their disposition is necessary to the appeal"] [internal quotation marks and citation omitted]). On this point, the majority is silent. We need not decide it, and the majority agrees, because the evidence of defendant's guilt is utterly overwhelming without regard to Ofelia's grand jury testimony. Defendant sealed his own fate with the exculpatory (and highly implausible) statement that he first made to the police and, most importantly, the damaging written and videotaped admissions he subsequently made after learning that Ofelia had survived despite the more than 20 stab wounds she had suffered. Those admissions constituted a virtual confession, as defendant admitted getting a knife and being responsible for the wounds inflicted on both victims. In fact, the evidence established that defendant used three knives, two of which were broken, in attacking the victims.

Another key consideration is that in his summation defense counsel raised only the question of defendant's intent. But defendant's attack on the decedent was as savage as his attack on Ofelia. The decedent suffered 15 incised stab wounds and 16 stab wounds. Counsel's summation was just five pages only because he had nothing to say on the issue of intent given the ferocity of the attacks. Accordingly, I would hold that any

error in the admission of Ofelia's grand jury testimony was harmless (*People v Crimmins*, 36 NY2d 230, 242 [1975]).

For two reasons, I would not decide the *Crawford* issue defendant raises with respect to one aspect of the testimony given by the forensic biologist, Danielle Coye, called by the prosecution. Without objection, Coye testified, inter alia, that DNA profiles were collected from the evidence, that she determined them to be that of defendant, the decedent and an unknown female, that scrapings from defendant's sweat pants had a mixture of DNA consistent with defendant and an unknown female and that scrapings from defendant's denim jacket were consistent with a mixture of decedent, defendant and the unknown female. After this testimony, Coye was asked if she also examined jeans and sneakers that had been recovered. Coye answered and, after testifying that human blood had been found on the jeans, the prosecutor asked where the blood on the jeans had been found. Defense counsel then objected as follows: "Judge, I must object unless this witness personally examined these items and performed the DNA."

The People reasonably argue that having raised no objection to Coye's testimony regarding her conclusions with respect to DNA results, this sole objection was but a foundational, evidentiary objection. In any event, it is enough to note that to preserve a

claim for review, a defendant must make a specific objection that alerts the trial court to the same claim that is pressed on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Ford*, 69 NY2d 775, 776 [1987]). No different rule applies when the appellate claim is couched in constitutional terms (*see People v Rivera*, 33 AD3d 450, 450-451 [2006], *lv denied* 7 NY3d 928 [2006] [failure to specify grounds for objection rendered unpreserved defendant's claims that the evidence admitted "violated the hearsay rule and the Confrontation Clause"]). As the objection defendant voiced did not alert the trial court to any constitutional claim, especially given the context of the unobjected to testimony that preceded the objection, it is unpreserved. The objection may have been based on hearsay grounds, but the erroneous admission of hearsay does not establish a violation of the Confrontation Clause. Like the majority, I would not review defendant's current claim in the interest of justice. The second reason I would not decide the *Crawford* issue is that any error in the admission of the testimony that was objected to was harmless for the same reason any error in the admission of Ofelia's grand jury testimony was harmless.

The majority is correct that defendant's claim that the trial court should have charged the defense of extreme emotional

disturbance is unpreserved. Like the majority, I would decline to review the claim in the interest of justice, but unlike the majority I would leave it at that, particularly because the record suggests defendant abandoned this claim after the charge conference and never pressed during the conference the arguments he now advances. As for defendant's claim that his trial counsel denied him the effective assistance of counsel by not pressing the initial request for an instruction on extreme emotional disturbance, I agree with the majority that it is not reviewable on direct appeal (*People v Love*, 57 NY2d 998 [1982]). I also agree that there is no basis for reducing the sentence.

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

ENTERED: JUNE 23, 2011

CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3550N Elissavet Gogos, et al., Index 103697/07
Plaintiffs-Respondents,

-against-

Modell's Sporting Goods, Inc.,
Defendant-Appellant.

____

Baker Greenspan & Bernstein, Bellmore (Lisa M. Browne of counsel), for appellant.

Steven C. Rauchberg, P.C., New York (Steven C. Rauchberg of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about November 2, 2009, affirmed, without costs.

Opinion by Tom, J.P. All concur except McGuire, J. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
James M. McGuire
Rolando T. Acosta
Dianne T. Renwick
Helen E. Freedman, JJ.

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Elissavet Gogos, et al.,
Plaintiffs-Respondents,

-against-

Modell's Sporting Goods, Inc.,
Defendant-Appellant.

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Defendant appeals from an order of the Supreme Court, New York County (Carol R. Edmead, J.), entered on or about November 2, 2009, which granted plaintiffs' motion to strike defendant's answer on the ground of spoliation of evidence to the extent of directing that an adverse inference charge be given to the jury.

Baker Greenspan & Bernstein, Bellmore (Lisa M. Browne of counsel), for appellant.

Steven C. Rauchberg, P.C., New York (Steven C. Rauchberg of counsel), for respondents.

TOM, J.P.

The issue raised on this appeal is whether Supreme Court appropriately directed a negative inference charge be given against defendant at trial, for alleged spoliation of evidence, under the circumstances of this case.

The complaint alleges that, on September 16, 2006, Elissavet Gogos fell on the second floor of defendant's store due to a slippery condition on the tile floor located near a row of four cash registers. Upon defendants' failure to respond to plaintiffs' December 10, 2007 demand for copies of all relevant surveillance videos (CPLR 3101[i]), plaintiffs obtained a court order in January 2008 directing production of the videotapes within 30 days. Defendants failed to comply. During an August 26, 2008 deposition, defendant's general manager testified that the videotape for the date of the accident was placed in a safe in the store. However, vice president of defendant's subsidiary, Modell's II, thereafter submitted an affidavit, dated April 13, 2009, stating that defendant no longer retained the tapes and that "[n]o videotapes were created . . . by [defendant] that would depict this area of the store or the plaintiff's accident . . ."

The motion court properly exercised its discretion in granting plaintiffs' motion, which sought to strike the answer

for spoliation of evidence, to the extent of directing that an adverse inference charge be given against defendant at trial (CPLR 3126).[1] In finding that "no adverse inference charge is warranted," the dissent misses two essential points: that violation of a court order is subject to sanction and that the adverse inference, if any, to be drawn against defendant for failure to produce evidence, as directed by the order, is a question for the trier of fact, not the court.

Defendant was put on notice to preserve and produce the surveillance tapes, both by plaintiffs' notice to produce and by the ensuing court order. The subsequent destruction of the tapes was a direct violation of the mandate of the court and deprived plaintiffs of the opportunity to view possible material evidence. To adopt the dissent's position would invite parties to destroy trial evidence — and permit them to ignore court orders with impunity — merely by employing the expedient of claiming that the evidence is immaterial and unnecessary (CPLR 3101[a]).

Plaintiffs were entitled to inspect the tapes to determine

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[1] The dissent mistakenly asserts that all reasonable inferences must be drawn in favor of defendant, which is the standard to be applied in favor of plaintiff upon a motion to dismiss the complaint (CPLR 3211[a][7]; *Sanders v Winship*, 57 NY2d 391, 394 [1982]). Rather, the sanction for failure to comply with a discovery order, as in the present case, is entrusted to the court's discretion (*see Couri v Siebert*, 48 AD3d 370 [2008]).

for themselves whether the area of the accident was depicted. They should not be compelled to accept defendant's self-serving statement concerning the contents of the destroyed tapes, particularly in view of the conflicting evidence in this case. Though "not 100 percent sure," defendant's manager testified that the area of plaintiff Elissavet's accident was within view of the surveillance cameras. Without the video recording, plaintiffs may be unable to establish that defendant had the requisite notice of the piece of mango on the floor that is alleged to have caused the fall (*see Minaya v Duane Reade Intl., Inc.*, 66 AD3d 402, 403 [2009]).

The dissent in an attempt to find support for defendant's position, that the surveillance tape made on any particular day is effectively destroyed in the ordinary case by being reused 30 days later and, thus, the tapes were destroyed long before the court order was issued, has completely distorted the record. During his examination before trial on August 26, 2008, defendant's general manager, Cesar Abreu, responded to a question concerning defendant's surveillance system, particularly, under normal circumstances, how long a computer file is kept. Abreu answered, "Basically it's a basic program that runs for 30 days it keeps it on file." However, it is clear from the totality of Abreu's testimony that the procedures for compiling and retaining

videotapes on uneventful days differed from the procedures on those days when there were accidents on the premises involving patrons. The dissent seizes on Abreu's general response and completely disregards his detailed and specific testimony concerning the compilation and storage of the videotapes of Elissavet's accident to conclude that they had been routinely destroyed. In fact, Abreu testified as to the retention of the subject videotapes as follows:

> "Q: Did anyone ask you for a copy of the videotapes that day?
>
> "A: You just make sure you keep it inside a safe.
>
> "Q: There's a safe?
>
> "A: Inside the office.
>
> "Q: Is the camera-the views that we're talking about the video-
>
> "A: It's kept for that day.
>
> "Q: That's put on a CD or any type of storage device?
>
> "A: Or a videotape, we keep the video for that day.
>
> "Q: Was that done for this incident?
>
> "A: Yes."

It is significant that Abreu was deposed more than six months *after* the court had issued the order directing production

of the tapes. According to his testimony, defendant was in possession of the tapes at the time of his deposition. When asked where that video was, he responded succinctly, “It has to be back in the store.” Plaintiffs’ counsel then demanded a copy of the video. Had the tapes already been destroyed at that time, counsel for defendant could have so stated on the record. Instead, he told plaintiffs’ counsel to “serve a demand and I’ll have to make a search.” Nowhere in Abreu’s deposition does he state that the videotapes taken on the day of the accident were destroyed. It is only in the affidavit of Michael Feeley, “current” vice president of Modell’s II, a subsidiary of defendant, submitted by defendant 16 months *after* the court ordered the production of the tapes, that the self-serving statement, that no videotapes were created by defendant appears.

In its tortuous reasoning that the tapes were destroyed before the court issued the order directing their production, the dissent not only distorts the unambiguous testimony of defendant’s own store manager, who has personal knowledge of the facts but also conveniently disregards the applicable case law concerning the submission of defective, belated and contradictory affidavits in response to a dispositive motion.

The dissent refers extensively to a second affidavit by Michael Feeley, dated August 31, 2009, submitted in opposition to

plaintiffs' motion dated July 8, 2009, to strike defendant's answer for failure to preserve evidence. This affidavit, which was submitted 20 months after the court ordered defendant to produce the tapes and approximately 36 months after the accident, states, inter alia, "Each tape would be recycled and taped over on a constant thirty day basis. It appears that this is what happened to the videotapes from the store on the date of the plaintiff's accident." This affidavit completely contradicts the deposition testimony of defendant's store manager, Cesar Abreu, who testified more than a year earlier that a videotape was made on the day of the accident and was kept in a safe in the office of the store. Abreu also testified at his deposition, taken six months after the court order has issued, that the tapes made at that time were in the store. Despite the glaring inconsistencies between Feeley's testimony and that of manager Abreu, the dissent continues to argue, by selective reading of Abreu's testimony, that Feeley's testimony is not inconsistent with that of Abreu, an indefensible position.

The Feeley affidavit is nothing more than a last-minute attempt by defendant to tailor the facts and present a feigned factual issue to avoid the consequences of the admission by manager Abreu, six months after the court order was issued, that the subject tapes were retained on defendant's premises, and is,

thus, without probative value (*Capraro v Staten Is. Univ. Hosp.*, 245 AD2d 256, 257 [1997]). Further, a self-serving affidavit by the vice president of a subsidiary of defendant offered to contradict the deposition testimony – here, the testimony of defendant's own general manager – or to retract a previous admission does not raise a bona fide issue of fact and will be disregarded (see *Lupinsky v Windham Constr. Corp.*, 293 AD2d 317, 318 [2002]).

It appears that Feeley was not the vice president of defendant's Modell's II subsidiary at the time of plaintiff's accident, nor did he work at the premises where the accident occurred. On the other hand, Cesar Abreu was defendant's general manager at the subject store, interviewed the injured plaintiff immediately after the accident, called an ambulance for her, investigated the accident, and prepared the accident report. As opposed to Feeley, Abreu is a witness with actual personal knowledge of the facts, and he testified as to how the videotapes on the date of the accident were prepared and retained by defendant.

The affidavit by Michael Feeley is deficient. Throughout its writing, the dissent at times refers to Feeley as "defendant's vice president," a misidentification conveying the false and misleading impression that Feeley was employed in a

capacity giving him personal knowledge of the facts of this case. Once again, Michael Feeley is not the vice president or even an employee of defendant corporation. In both of his affidavits, he avers that he is the current "Vice President of Modell's II, Inc., a subsidiary of [defendant corporation]." Nowhere in his affidavits does he state whether there was any operational connection between Modell's II and defendant corporation, two separate and distinct entities, a fact that the dissent does not want to acknowledge. In any event, the dissent misses the point. Feeley, who is not an employee of defendant corporation, makes the conclusory allegation that he is "fully familiar with the operations of this store, including the surveillance cameras located in certain parts of the store," without any explanation of the source of his knowledge (*see Peacock v Kalikow*, 239 AD2d 188, 190 [1997]). He does not state the nature of his duties, if any, with respect to defendant, a corporation he apparently has no connection with, so as to shed light on the manner in which he allegedly obtained knowledge of the facts of this case. Thus, his affidavit is without probative value (*id.*). This Court is empowered to decide, sua sponte, that an affiant is without personal knowledge of the facts in a case by simply reviewing the substance of the affidavit (*see e.g. Adam v Cutner & Rathkopf*, 238 AD2d 234, 238 [1997]). We are not required to accept

Feeley's testimony as competent evidence merely because he "swore to the fact . . .," as the dissent urges. It is the burden of the proponent of an affidavit to demonstrate the basis of the affiant's knowledge (*see id.* at 239-240), and here, defendant failed to meet that burden. It appears that the dissent is placing the burden of proof on the wrong party when it states that "[p]laintiffs' counsel offered no factual basis for his assertion that the vice president had no personal knowledge of the facts . . ." It further appears that the dissent is advancing a legal concept that anyone remotely related to a party to an action can claim to have personal knowledge of the facts of the internal workings of that party by merely reciting, without more, his or her remote connection, to that party. That is not the law. Thus, the dissent's conclusion that Feeley has personal knowledge of the facts based solely on Feeley's statement that he is the current vice president of defendant's subsidiary corporation is without factual or legal basis and must be rejected as untenable.

The dissent is incorrect when it states that "at no time have plaintiffs ever argued that the vice president's position as an officer of the subsidiary was at all relevant, let alone that it provided a ground for disregarding his affidavit." In the reply affirmation dated September 10, 2009, plaintiffs' attorney

stated that "the Court should not be misled by the improper self-serving and speculative affidavits from defendant's two off-site executives with no personal knowledge of the facts." Because the dissent's arguments are premised on the self-serving statements by Michael Feeley, its entire position falls along with the affidavits, which lack merit and probative value.

Under the circumstances, the motion court properly directed that an adverse inference charge be given against defendant at trial. It is not the function of this Court to micromanage discovery proceedings in the trial parts, particularly where, as here, the remedy for nondisclosure is entrusted to the discretion of the motion court (CPLR 3126), and the order issued was well within the province of the court's discretion. Here, the dissent unnecessarily intrudes upon the discretion of the trial court to control its pretrial discovery calendar.

The dissent's reliance on *Marcano v Calvary Hosp., Inc.* (13 AD3d 109 [2004]) in support of its position is misplaced. There, the defendant similarly erased a videotape, alleging that the security camera did not film any of the plaintiff's accident. However, the motion court sua sponte sanctioned the defendant by precluding it from offering evidence at trial regarding the manner in which the plaintiff's accident occurred. This Court reversed on the ground that it is for the jury to determine

whether the defendant’s employee was credible when he testified that the videotape was erased because the camera did not cover the area of the plaintiff’s accident and, if not, to determine the inference to be drawn.

Here, the motion court directed that the trial court “shall issue a negative inference charge” against defendant. A reading of the adverse inference charge simply shows that it is permissive (*Baez v City of New York*, 278 AD2d 83, 84 [2000]), and conflicting inferences as to whether a video surveillance camera recorded the incident are appropriately deferred for resolution by a jury upon suitable instruction. As noted in *Marcano*, the charge provides that the jury shall determine whether there was a reasonable explanation for the destruction of evidence and, if not, the inference to be drawn from its destruction (*see* PJI § 1:77.1; *Tawedros v St. Vincent's Hosp. of N.Y.*, 281 AD2d 184 [2001]).

We note that in *Marcano*, in further contrast to the instant matter, it appears that no court order directing the defendant to produce the tape had been issued prior to its destruction.

The sanction herein was "appropriately tailored to achieve a fair result" (*Balaskonis v HRH Constr. Corp.*, 1 AD3d 120, 121 [2003][internal quotation marks and citation omitted]). Defendant will not be able to use the absence of the videotape to

its advantage (*Minaya v Duane Reade Intl, Inc.*, 66 AD3d 402, 403 [2009], *supra*).

Accordingly, the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered on or about November 2, 2009, which granted plaintiffs’ motion to strike defendant's answer on the ground of spoliation of evidence to the extent of directing that an adverse inference charge be given to the jury, should be affirmed, without costs.

All concur except McGuire, J. who dissents in an Opinion.

McGUIRE, J. (dissenting)

I dissent. The motion court granted the motion "to the extent that plaintiff is entitled to a negative inference charge at trial with respect to what was on the subject videotape. The Trial Court shall issue a negative inference charge at trial regarding what was on the videotape." Like the motion court, the majority improperly resolves disputed and critical issues of fact against the party opposing the motion.

The order directing that an adverse inference be charged assumes that the area in the store where plaintiff Elissavet Gogos fell was covered by a video camera. At his deposition, defendant's manager answered "[n]o" when asked if "[t]he area where she said she fell, is that covered by a video?" On the other hand, asked essentially the same question shortly thereafter ("The area where [plaintiff] said that she fell, is that within the view of the surveillance tapes that you viewed?"), the manager responded, "Yes, you could see there because there's a thing right there, yes." Just before his last answer, however, the manager was asked, "The spot that she said that she fell, is that a spot where the surveillance cameras would see someone?" He answered, "To be honest with you I'm not 100 percent sure on that."

Ostensibly in support of the motion to strike the answer,

plaintiffs submitted the affidavit of defendant's vice president,[1] who swore that there were no "surveillance cameras[] which were focused on the area at or near the top of the escalator on the second floor. No video tapes were created or retained by [defendant] that would depict this area of the store or the plaintiff's accident." Although the vice president's affidavit may not be a model of clarity, a fair reading of it is that the area where plaintiff fell was not covered by any video camera.

In any event, no adverse inference charge is warranted because Modell's at the very least asserted facts that, if true, would establish that it did nothing wrong in "destroying" the videotape.[2] After all, absent notice to Modell's that plaintiffs

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[1]Although the vice president is the vice president of a subsidiary of defendant, largely for the sake of convenience I will refer to him sometimes as Modell's vice president. I note, too, that plaintiffs also sometimes so refer to him. Nonetheless, the majority writes that my occasional references to him as Modell's vice president is a "misidentification conveying [a] false and misleading impression." Presumably, the majority does not approve of defendant's identical references to the vice president. Oddly, the majority writes that the separate and distinct status of the two entities is "a fact that the dissent does not want to acknowledge." Why the majority makes this statement is unexplained. The statement is all the odder because, as discussed below, plaintiffs make no argument based on the fact that he is a vice president of the subsidiary.

[2]For some reason it does not even mention, the majority writes that "[t]o adopt the dissent's position would invite parties to destroy trial evidence . . . merely by employing the

intended to commence litigation, Modell's was free to "destroy" the videotape (*see Greater N.Y. Mut. Ins. Co. v Curbeon*, 300 AD2d 182 [2002]; *Conderman v Rochester Gas & Elec. Corp.*, 262 AD2d 1068, 1070 [1999]["In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices"]).

In another affidavit, submitted in opposition to the motion to strike the answer, the vice president again swore that no surveillance camera focused on the area where plaintiff fell. More importantly, he swore as well that "Modell's did not learn of a claim or lawsuit by the plaintiff for at least six (6) months following this incident." Additionally, he stated:

> "Moreover, I wish to advise the Court that even if a videotape did exist depicting the plaintiff's accident, that videotape was not destroyed or discarded intentionally by Modell's. At the time, Modell's recycled its videotapes on a monthly basis. In other words, there were approximately thirty videotapes in the store at the time. One tape would be used for each day. At the end of each day, the tape would be placed aside for a thirty day time period until each of the other tapes were then used. Each tape

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expedient of claiming that the evidence is immaterial and unnecessary." Of course, however, no such invitation can be found in my position, which rests solely on the contention that Modell's asserted facts that, if true, would establish that it did nothing wrong in "destroying" the videotape.

> would be recycled and taped over on a constant thirty day basis. It appears that this is what happened to the videotapes from the store on the date of the plaintiff's accident. Again, this was just Modell's normal procedure. The tape was not intentionally destroyed in order to avoid providing evidence in this action."[3]

Finally, the last paragraph of the affidavit expressly stated what was implicit in the paragraph quoted above: "I wish to stress to the Court that the tape was recycled within thirty days of the accident and was not discarded intentionally."

Accordingly, this case is indistinguishable from *Marcano v Calvary Hosp., Inc.* (13 AD3d 109 [2004]), in which the plaintiff moved to sanction the defendant for destroying a surveillance tape of the area where he had fallen from a lift at the defendant's loading dock. An employee of the defendant testified that the security camera monitoring the loading dock had captured "'some of'" the incident (*id.* at 110). This employee subsequently submitted an affidavit changing this deposition

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[3]Curiously, the vice president also stated that he "realized that [the manager] testified that he believed that he reviewed a surveillance tape of the plaintiff's accident." In fact, the manager did not so testify. Rather, he testified only that he reviewed videotape "with regard to that incident," not that he reviewed tape of the actual fall. In any event, the vice president immediately went on to swear that the manager "is mistaken and must be thinking about some other accident which occurred at a subsequent time or in a different location in the store."

testimony to a denial that the security camera would have filmed any portion of the plaintiff's fall, asserting that he had "incorrectly testified" (*id.*). As we held in reversing the trial court's order granting a motion to sanction the defendant for alleged spoliation, "It is for the jury to determine, after being appropriately instructed, whether [the witness's] correction of his testimony (which does not appear to be patently false) is credible, and, if the correction is found not credible, to determine the inferences to be drawn from that finding" (*id.* at 111).

A linchpin in the majority's argument is the following two sentences: "Defendant was put on notice to preserve and produce the surveillance tapes, both by plaintiffs' notice to produce and by the ensuing court order. The subsequent destruction of the tapes was a direct violation of the mandate of the court and deprived plaintiffs of the opportunity to view possible material evidence." As discussed above, however, defendant's vice president swore both that the surveillance tape made on any particular day is effectively destroyed in the ordinary case by being reused 30 days later and that the videotape at issue was recycled within 30 days of plaintiff's fall.[4] For some reason it

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[4]Nonetheless, after quoting this sentence, the majority writes that it is a "complete[] distort[ion]" of the record.

does not explain, the majority apparently believes that all reasonable inferences should be drawn against the party opposing the motion -- defendant -- and that all evidence supporting defendant's position should be disregarded. The majority thus gets it backwards, since the law unambiguously places the burden on plaintiffs to show that Modell's improperly destroyed the videotape *(see Robertson v New York City Hous. Auth.*, 58 AD3d 535, 536 [2009]; *Kirschen v Marino*, 16 AD3d 555, 555-556 [2005]; *cf. Leon v Martinez*, 84 NY2d 83, 87 [1994][in context of CPLR 3211 motion to dismiss, we "accord plaintiffs the benefit of every possible favorable inference"]); Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:17, at 27 ["The court will accept as true on a summary judgment motion the opposing party's evidence and any evidence of the movant that favors the opposing party."]).[5] Accordingly, because

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[5]Although my limited research has not found any case directly on point, it seems clear that the principle that the party opposing a CPLR 3211 or 3212 motion must get the benefit of every favorable inference should apply here as well. After all, granting motions for sanctions also takes issues of fact away from the jury. *Couri v Siebert* (48 AD3d 370 [2008]), cited by the majority, has nothing to do with this case. At most, it perhaps can be cited for the proposition that the court has discretion with respect to the appropriate sanction to impose when a party fails to comply with a discovery order. It certainly does not support the proposition that the court has discretion to determine whether the party in fact failed to comply with such an order or improperly destroyed evidence.

plaintiffs have not met their burden of showing that the tapes were “destroyed” long before the court order was issued, the adverse inference instruction cannot be defended on the ground that the recycling of the videotape was “a direct violation of the mandate of the court.”

Contrary to the majority’s assertion, the testimony of defendant’s manager is not to the contrary. Rather, the manager’s testimony, taken out of context by the majority, was that the videotape for any given day is retained in a safe at the store. This testimony does not contradict the manager’s own testimony, let alone the vice president’s sworn statement, that the videotapes are recycled after 30 days. Read as a whole, the manager’s testimony conveys that the surveillance tapes are kept in a safe in the office of the store for 30 days and are then recycled in the ordinary course. Indeed, asked how long the videotapes are kept, the manager testified as follows: “Basically it’s a basic program that runs for 30 days it keeps it on file.” The majority gives this testimony the back of its hand, disregarding it on the basis of an argument that plaintiffs do not make, i.e., that this testimony applies only to uneventful days. Notably, the fact that plaintiffs do not make this argument is a point the majority does not dispute.

The majority misapprehends the “yes” answer given by the

manager when he was asked whether the videotape from the day of the accident was "kept for that day." Contrary to the majority's apparent position, that answer simply does not negate the manager's prior testimony or the vice president's sworn statement that the tapes are recycled after 30 days. Notably, in their motion papers, plaintiffs never disputed the factual assertions that the tapes are recycled after 30 days.

The majority quotes a snippet of the manager's testimony in which he states, when asked where the video was from the day in question, "It has to be back in the store." This answer can be read to be at odds with the manager's prior testimony that the videotapes are recycled every 30 days. Of course, the manager may have meant only that the videotape that was used on the day in question was back in the store, not that it was back in the store in the same condition it was in when it was put into the safe on the day plaintiff fell. But despite the fact that plaintiffs bear the burden of proof and despite the majority's obligation to draw all reasonable inferences in favor of Modell's, the majority chooses to read the manager's answer to contradict the vice president's affidavit. In any event, even if the answer could be read as unambiguously inconsistent with the manager's prior testimony, it would establish only an inconsistency between the testimony of the manager and the

affidavit of the vice president.[6] Presumably, the last two sentences above constitute or are a key part of what the majority regards as my "tortuous reasoning" that, along with other sins, "distorts the unambiguous testimony" of the manager.

Of course, the more fundamental point is that the vice president unequivocally swore that, in accordance with routine practice, the videotape was recycled months before Modell's learned of a claim or lawsuit by plaintiffs. Nothing in the record comes close to conclusively refuting his sworn statements; nothing in the law comes close to permitting the majority to ignore those sworn statements.

The majority's efforts to justify disregarding the vice president's sworn statements are manifestly inadequate. As this Court said in *Branham v Loews Orpheum Cinemas, Inc*. (31 AD3d 319, 324 [2006], *affd* 8 NY3d 931 [2007]), "[C]ourts have occasionally disregarded affidavits or other evidence submitted in opposition

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[6]The majority goes on to note that plaintiffs' counsel demanded a copy of the video after the manager stated that "[i]t has to be back in the store." The majority then states as follows: "Had the tapes already been destroyed at that time, counsel for defendant could have so stated on the record." Obviously, however, that is true if and only if counsel knew at the time that it had been "destroyed." Not a shred of support in the record exists for the suggestion that he did, and plaintiffs have never argued or suggested that counsel knew, let alone that he tellingly failed so to state, when the manager was deposed. The majority sheds no light on why it makes this perplexing and insupportable statement.

to [a motion for summary judgment] where they directly contradict the [party's] own version of the accident and are plainly tailored to avoid dismissal of the action." The majority cites one such case (*Capraro v Staten Is. Univ. Hosp.*, 245 AD2d 256 [1997]) and argues that the vice president's affidavit "is nothing more than a last-minute attempt by defendant to tailor the facts and present a feigned factual issue to avoid the consequences of the earlier admission by manager Abreu . . . and is, thus, without probative value." Plaintiffs, however, do not cite any of these cases (several are cited in *Branham*), and that is unsurprising because they do not even argue that the vice president's affidavit was so tailored and for that reason can be disregarded. The majority does not and cannot dispute that plaintiffs make no such argument.

Thus, this is an argument that the majority improperly "winkle[s] out wholly on [its] own" (*Misicki v Caradonna*, 12 NY3d 511, 519 [2009]), and it should be disregarded. Even though it does not dispute that plaintiffs do not make that argument, and it has no response to *Misicki v Caradonna*, the majority writes that I "conveniently disregard[]" the case law supporting this argument. In any event, the argument the majority has devised is unpersuasive. As discussed above, on the crucial issue of whether the videotape from the day of the accident had been

recycled in the ordinary course or improperly "destroyed," there is nothing like an unequivocal contradiction between the vice president's affidavit and the manager's testimony. To the contrary, they can be harmonized and, in the procedural posture of this case, should be harmonized.[7] And even if there were an unequivocal contradiction, we can consider subsequent affidavits that correct an earlier version of the relevant facts (*see e.g. Marcano*, 13 AD3d at 110-111).

The majority asserts that the manager was in a better position than the vice president to know the specific facts regarding the store's video recordings and the accident. (The majority inexplicably ignores testimony that at least undercuts this finding: the manager's testimony that he was "not 100 percent sure" whether the spot where plaintiff fell was covered by a surveillance camera). The majority's arguments in support of its conclusion that the manager was in a position superior to that of the vice president are fatally flawed.

In the first place, its contention based on the status of the vice president as a vice president of a subsidiary of defendant improperly ambushes Modell's by minting yet another

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[7]For this same reason, the majority's reliance on *Lupinsky v Windham Constr. Corp.*, 293 AD2d 317 [2002]) also is misplaced. I note, too, that this is in any event another argument improperly winkled out by the majority.

argument. The majority suggests, without a shred of record support, that for this reason he is less likely to have personal knowledge of the matters to which he swore. The majority also faults his two affidavits for not setting forth "any operational connection between [the subsidiary] and defendant corporation." Again, the critical point is that at no time have plaintiffs ever argued that the vice president's position as an officer of the subsidiary was at all relevant, let alone that it provided a ground for disregarding his affidavit. Nor did plaintiffs ever argue that the vice president's affidavit was defective because it did not detail his "connection" to Modell's. In short, the majority ambushes Modell's (*see Misicki*, 12 NY3d at 519 ["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made"].

Second, in seeking to rebut this point, the majority unwittingly supports it with its quotation from the reply affirmation of plaintiffs' counsel. After all, the vice president unquestionably is one of the two executives referred to by plaintiffs' own counsel as one of "*defendant's* . . . executives" (emphasis added). As is evident, far from arguing the relevance of the vice president's status as an officer of the subsidiary, plaintiffs' counsel refers to him as an officer of

Modell's (the same sin that, according to the majority, I commit). The improper and prejudicial character of the majority's argument based on that status is clear: Modell's had no opportunity to present any facts in response. For all the majority knows, plaintiffs knew that the facts would not support such an argument. Ironically, moreover, in their initial submissions in support of their motion, plaintiffs included the vice president's first affidavit. Needless to say, they did not attack it on this ground. In any event, the decisive point is that this is yet another argument the majority impermissibly winkles out on its own (*Misicki*, 12 NY3d at 519).

The majority also asserts that the vice president's affidavit is deficient because he does not have "actual personal knowledge of the facts" and does not state how he obtained the information contained in his affidavit. In addition, the majority characterizes the statements contained in the affidavit as "self-serving," a characterization that adds nothing to the analysis; any affidavit a party submits in support of its position can be so characterized. Here, the majority at least builds on an argument plaintiffs did make to the motion court. In his reply affirmation, plaintiffs' counsel referred to the "improper self serving and speculative affidavits from defendant's . . . executives with no personal knowledge of the

facts." Plaintiffs' counsel offered no factual basis for his assertion that the vice president had no personal knowledge of the facts to which he swore.[8] Apparently, he regarded the absence of an express statement by the vice president that he had personal knowledge to be conclusive proof that he did not; it appears, too, that the majority agrees. Neither plaintiffs nor the majority cite any precedent in support of that position.

The point need not be discussed, because plaintiff's counsel ignored a crucial statement in the first affidavit by the vice president in which he expressly swore: "I am fully familiar with the operations of this store, including the surveillance cameras located in certain parts of the store." This sworn statement cannot meaningfully be distinguished from an assertion of personal knowledge of the facts. As discussed below, the majority's effort to come to grips with this sworn statement is unpersuasive.[9]

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[8]The majority faults me for pointing out that plaintiffs' counsel offered no factual basis for that assertion. And it finds fault even though it relies on a case, *Adam v Cutner & Rathkopf* (238 AD2d 234 [1997]), that reiterates the familiar precept that such affirmations by a party's attorney are entitled to no weight. Suffice it to say the majority thus brings to mind Juvenal's jest that, "it is difficult not to write satire."

[9]Nor do plaintiffs come to grips with it. Rather, in their brief plaintiffs do little more than repeat the unsubstantiated assertion by their attorney that the vice president has no personal knowledge of the facts to which he swore. Plaintiffs'

The majority can wring no support for its position that the affidavit must be disregarded from the only case it does cite, *Adam v Cutner & Rathkopf* (238 AD2d 234 [1997], *supra*). That case is not remotely analogous to this one since it deals with affirmations or affidavits submitted by attorneys. Specifically, the plaintiffs, in support of their cross motion for summary judgment, submitted in relevant part only the affirmation of an attorney. Moreover, in his affirmation, the attorney did not provide any explanation of his relationship to the entity regarding which he made conclusory assertions of fact and the attorney neither stated the basis of his knowledge nor professed to have personal knowledge of the alleged facts.

By contrast, the affidavit in this case is not that of a party's attorney, someone who typically has no personal knowledge of the underlying facts, and is not an affidavit by someone whose "relationship to the [entity in question] is not revealed in the moving papers" (*id.* at 236). The vice president's relationship to Modell's is explained in the affidavit. To be sure, it is not elaborated upon, but it is reasonable to infer that an officer of a business entity is knowledgeable about the entity's business

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only other effort to support their position is a citation to *Matott v Ward* (48 NY2d 455 [1979]), which is manifestly inapplicable since it deals with the "predicate for the admission of expert testimony" (*id.* at 459).

and practices. That inference, coupled with the explanation of the vice president's relationship to Modell's, is sufficient to refute the majority's position that the vice president's affidavit is defective. In any event, however, as noted above, the vice president swore to the fact that he is "fully familiar with the operations of this store, including the surveillance cameras located in certain parts of the store." The majority does not cite any authority in support of the proposition that he was required to say more. The one case the majority cites, *Peacock v Kalikow* (239 AD2d 188 [1997]), states only that to demonstrate a meritorious defense on a motion to vacate a default judgment, "a party must submit an affidavit from an individual with knowledge of the facts" and that the affidavit "must make sufficient factual allegations; it must do more than merely make conclusory allegations or vague assertion[s]" (*id.* at 190 [internal quotation marks and citations omitted]). Thus, nothing in *Peacock v Kalikow* supports the majority's position that the vice president's affidavit is "conclusory" or otherwise defective because he swore that he was "fully familiar with the operations of this store, including the surveillance cameras," rather than that he had "personal knowledge" of those operations. The sworn statement by the vice president is no more conclusory than a statement by him that he "had personal knowledge of the

operations of this store, including the surveillance cameras." If the former statement is conclusory because he does not explain how he became fully familiar, the latter is conclusory because he does not explain how he came to have personal knowledge.

Although the majority sweepingly asserts that it "is empowered to decide, sua sponte, that an affiant is without personal knowledge of the facts . . . by simply reviewing the substance of the affidavit," nothing in *Adam v Cutner & Rathkopf* provides the slightest bit of support for the power the majority claims. I respectfully submit that this Court does not have that extraordinary power and that, even if it did, nothing in the vice president's affidavits warrants the conclusion that he does not have either personal knowledge of the store's practices and procedures concerning the retention of surveillance videos or another adequate basis for his factual assertions on those subjects.

The majority's efforts to distinguish *Marcano* are meritless. The majority first argues that *Marcano* is distinguishable in that "the motion court sua sponte sanctioned the defendant by precluding it from offering evidence at trial regarding the manner in which the plaintiff's accident occurred." The ostensible sua sponte character of the motion court's sanction order, however, played no role in this Court's reasoning. That

is unsurprising because the trial court's order cannot reasonably be so characterized. Rather, as the decretal paragraph of this Court's order makes clear, the order under review granted the "plaintiff's motion . . . to sanction defendant for alleged spoliation of evidence . . . to the extent of precluding defendant from offering evidence at trial regarding the manner in which the plaintiff's accident occurred, and to the further extent of resolving the issue of liability in favor of plaintiff" (13 AD3d at 110). The fact that order granted a lesser sanction than the one the plaintiff apparently sought does not mean that the order was issued sua sponte.

The majority goes on to argue that this Court "reversed on the ground that it is for the jury to determine whether the defendant's employee was credible when he testified that the videotape was erased because the camera did not cover the area of the plaintiff's accident and, if not, to determine the inference to be drawn." Whether this ground for reversal can be considered "procedural" is a matter I need not discuss. The critical point is that this Court held that the issue of whether the employee was credible should not have been taken from the jury. That is precisely my point with respect to defendant's vice president here. Thus, this effort to distinguish *Marcano* founders because it assumes the correctness of the majority's other findings and

arguments, most notably that: (1) the manager testified that the unrecycled tape from the day of the accident was in the store at the time of his deposition, and (2) the affidavit of the vice president must be disregarded.

The majority then offers the following paragraph:

> "Here, the motion court directed that the trial court 'shall issue a negative inference charge' against defendant. A reading of the adverse inference charge simply shows that it is permissive (*Baez v City of New York*, 278 AD2d 83, 84 [2000]), and conflicting inferences as to whether a video surveillance camera recorded the incident are appropriately deferred for resolution by a jury upon suitable instruction. As noted in *Marcano*, the charge provides that the jury shall determine whether there was a reasonable explanation for the destruction of evidence and, if not, the inference to be drawn from its destruction (PJI 1:77.1; *Tawedros v St. Vincent's Hosp. of N.Y.*, 281 AD2d 184 [2001])."

True, the PJI charge is permissive in several respects. The jury is permitted to determine if the evidence in question was destroyed; if so, it is permitted to determine whether a reasonable explanation for its destruction was offered; and the jury is permitted, if it finds the evidence was destroyed and no such reasonable explanation was offered, either to come to various conclusions adverse to the party who destroyed the evidence or to ignore it altogether.

What the majority is saying in the above-quoted paragraph,

however, is unclear. If the majority means to say that the jury in this case will be free to determine whether the videotape taken on the day of the accident was recycled in the normal course long before Modell's had notice of plaintiff's claim, it should say so. If that is all the motion court's order means, then Modell's has needlessly prosecuted and plaintiffs have needlessly defended this appeal. Indeed, in that case, it is hard to see how Modell's is even aggrieved by the order. The order simply declares undisputed legal principles.

But I very much doubt that that is what the majority means to say. After all, if that is what the majority means to say, its critical finding of fact – that the tapes were destroyed after plaintiffs' notice to produce was served and in "direct violation of the mandate of the court" – is wholly gratuitous. I am quite sure, moreover, that at trial plaintiffs will advance a very different reading of the paragraph and will contend that this Court has conclusively resolved this critical issue. Whatever the majority means to say in this paragraph, it should clarify it in fairness to the parties and the trial court, which will struggle to understand it. Unfortunately, the majority has nothing to say on the subject.

In sum, here, as in *Marcano*, "[t]he existing record presents a triable issue as to whether any spoliation of evidence actually

occurred, and that issue should be submitted to the jury at trial" (13 AD3d at 110).

Finally, I note that plaintiffs' argument that the tape was destroyed in violation of instructions given by defendant's legal department is not supported by the testimony of defendant's manager.

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

ENTERED: JUNE 23, 2011

CLERK

Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3224 & M-2590 Crane, A.G., Plaintiff-Appellant, Index 115023/09

-against-

206 West 41st Street Hotel Associates, L.P.,
Defendant-Respondent,

New York State Department of Taxation and Finance, et al.,
Defendants.

Herrick, Feinstein LLP, New York (Raymond N. Hannigan of counsel), for appellant.

Mark D. Mermel, Great Neck, for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 23, 2010, modified, on the law, the cross motion denied, and otherwise affirmed, without costs.

Motion to dismiss appeal and for related relief denied.

Opinion by McGuire, J. All concur except Andrias, J.P. and Acosta, J. who dissent in an Opinion by Acosta, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse, JJ.

3224 &
M-2590
Index 115023/09

____x

Crane, A.G.,
Plaintiff-Appellant,

-against-

206 West 41st Street Hotel
Associates, L.P.,
Defendant-Respondent,

New York State Department of
Taxation and Finance, et al.,
Defendants.
____x

Plaintiff appeals from an order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered February 23, 2010, which, insofar as appealed from, denied its motion for a default judgment and granted defendant's cross motion for leave to interpose an answer.

Herrick, Feinstein LLP, New York (Raymond N. Hannigan, Ross L. Hirsch and Matthew D. Sobolewski of counsel), for appellant.

Mark D. Mermel, Great Neck, for respondent.

McGUIRE, J.

The plaintiff in this foreclosure action, Crane, A.G., is owned by John Lucas, one of the 50% owners of the defendant, 206 West 41st Street Hotel Associates, L.P. (the Hotel). Specifically, Lucas owns Carroll Hotel 206 West 41st Street, LLC (Carroll), one of the two limited partners of the Hotel. The other limited partner, Morgan 206 W. 41st Corporation (Morgan), is owned by Benjamin Soleimani. Carroll and Morgan each own 49.5% of the limited partnership interests of the Hotel and 50% of the shares in the general partner, Clifton Place Development Corporation (Clifton), the owner of the remaining 1% interest in the Hotel. Although the stockholders agreement between Carroll and Morgan provides for a board of directors consisting of Lucas and two designees of Morgan, section 2(c) specifies that any action of the board requires unanimous approval of the directors. Section 2(c) also specifies that "[a]ll action by the Stockholders shall require the unanimous approval of the Stockholders." The Hotel acquired the real property it owns by borrowing the purchase price from Crane, executing and delivering to Crane a note and leasehold mortgage. The partnership agreement called for the loan and section 2.4, "Permitted Transactions," broadly authorizes transactions between the partnership and a partner or an affiliate of a partner.

Sterling Indus. v Ball Bearing Pen Corp. (298 NY 483 [1949]) is controlling in this case. Under *Sterling*, the deadlock between Lucas and Soleimani over whether Clifton should defend the foreclosure action against the Hotel requires the conclusion that Clifton had no authority to cross-move to vacate the alleged default and seek leave to file an answer (*see also Stone v Frederick,* 245 AD2d 742 [1997]; *L.W. Kent & Co. v Wolf,* 143 AD2d 813 [1988]; *Tidy-House Paper Corp. OF N.Y. v Adlman*, 4 AD2d 619 [1957]). Any other conclusion simply vitiates section 2(c) of the stockholders agreement. *1800 Postcards, Inc. v Morel* (153 F Supp 2d 359 [SD NY 2001]) is not to the contrary as the shareholders agreement granted the 50% stockholder bringing suit full control over all aspects of the corporation and specified that the other 50% stockholder had "no control whatsoever" (153 F Supp 2d at 361).

To be sure, in *Sterling,* one of the two disagreeing shareholder groups sought to commence rather than defend an action on behalf of the deadlocked corporation and the Court's rationale included the "availab[ility] to the group in favor of instituting suit . . . the more appropriate remedy of a stockholder's derivative action" (298 NY at 491-492). The same is true in *Stone v Frederick*, *L.W. Kent* and *Tidy-House*. However, the unavailability to a shareholder of the remedy of mounting a

defense in the right of the corporation does not require a different conclusion. After all, if the Lucas/Carroll decision that the foreclosure action should not be defended constitutes a breach of fiduciary duty, an action for a breach of that duty is a remedy available to Soleimani/Morgan (*Brunetti v Musallam*, 11 AD3d 280, 281 [2004]). Of course, a showing that the decision is unwise or inexpedient is not sufficient to establish a breach of that duty (*cf. Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). The inadequacy of that remedy is not thereby demonstrated. Obviously, the Hotel will be out of business if Crane succeeds in this action. But even assuming that the demise of the Hotel as a viable entity is a necessitous prospect that ordinarily would warrant disregarding shareholder deadlock even when the underlying action is not one against "outsiders" (*Stone v Frederick*, 245 AD2d at 745), it should be of no moment here given that Soleimani, through Morgan, agreed to the provisions of section 2.4 of the partnership agreement.[1]

Defendant (through Soleimani, purporting to act on its behalf) advances a formidable argument that the power of attorney presented at the stockholders' meeting by the attorney for Lucas was a limited one that did not authorize the attorney to vote on

[1]As the dissent relies on an ostensible need to protect the existence of the Hotel, I will return to this subject below.

the resolution proposing that the foreclosure action be defended. As the deadlock between Lucas/Carroll and Soleimani/Morgan is obvious, however, any defect in the power of attorney should be disregarded (*cf. Tidy-House*, 4 AD2d at 621 *supra*; *Schillinger & Albert v Myral Hats*, 55 Misc 2d 178, 179 [Civ Ct, NY County 1967]).

The dissent's arguments are unpersuasive. It devotes a paragraph to an account of efforts by Lucas and Soleimani, after Lucas threatened to commence a foreclosure proceeding, to buy out Soleimani's interest. I do not know whether the dissent's account is correct or whether the facts are disputed because I have not checked the record. And I have not checked because that account is plainly irrelevant to the issue of whether Soleimani has the authority to engage counsel and defend the foreclosure action.

The dissent's effort to distinguish *Sterling* begins with a paragraph reciting provisions of the limited partnership agreement and by-laws of Clifton. As the majority appears to acknowledge, these provisions do not distinguish this case from *Sterling*. The dissent then plays its trump card, paragraph 3(b) of the stockholders agreement between Carrol and Morgan. It states as follows: "Notwithstanding anything to the contrary contained in the By-Laws of the Corporation, the officers of the

corporation, *other than Ben Soleimani*, shall not take any action except as approved by the Board of Directors" (emphasis added).[2]

This is an unremarkable provision in a stockholders' agreement. Absent such a provision, the day-to-day management of Clifton would be a nightmare; to do anything would require the unanimous approval of the board. But because Soleimani can act without the approval of the board, it scarcely follows that he can act against the wishes of the other co-owner so as to override the immediately ensuing provision, paragraph 3(c), stating that "[a]ll action by the Stockholders shall require the unanimous approval of the Stockholders." To the contrary, the majority's trump card is easily overruffed for the reason given in *Sterling*. That is, just as "[a]ny actual or implied authority [the president of the corporation] may have had as president to commence this action was terminated when a majority of the board of directors . . . refused to sanction it" (*Sterling*, 298 NY at 490), so, too, Soleimani's actual authority to defend the foreclosure action was terminated when the stockholders refused unanimously to sanction it. The Court underscored this point at the end of its opinion when, quoting the dissenting opinion in the Appellate Division, it wrote that "'[o]ne side should not be

[2]In the immediately following sentence the dissent quotes a plainly irrelevant provision of the by-laws.

able to maintain an action in the name and at the expense of the corporation simply because the president happens to be allied with its interests'" (*id.* at 493, quoting 273 App Div 460, 469 [1948]).

The dissent's next argument is based on the obvious fact that Soleimani's authority to exercise his veto power as one of the two owners is not unlimited but is circumscribed by fiduciary duties. After a paragraph that makes this point, the dissent writes as follows:

> "Here, issues of fact exist as to the exact nature of the affiliation between plaintiff and Lucas, the shareholder opposed to defending the action, i.e., whether plaintiff is an affiliate of Lucas or simply his alter ego, and whether Lucas seeks to block the [Hotel] from defending the foreclosure to serve his own interests, rather than the [Hotel's] ... Issues also exist as to the use made of loan proceeds that had been obtained to satisfy arrears on the subject mortgage and to buy out Soleimani's interest in the [Hotel]."

One fatal problem with the argument is that no argument based on these ostensible issues of fact is raised on appeal by respondent (i.e., Soleimani, purporting to act on behalf of the

Hotel).[3] Thus, the dissent improperly relies on an argument of its own invention (*see Misicki v Caradonna,* 12 NY3d 511, 519 [2009] ["[w]e are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made"]).

A second fatal problem with this argument emerges more clearly when the dissent builds on it, stressing that the broad authority conferred by section 2.4 is not so unlimited as to license Lucas to breach his fiduciary duties. The dissent then writes that section 2.4 "does not permit [Lucas]... to breach his fiduciary duty to the partnership by taking an action in favor of the entity in which he holds an interest, to the detriment of the [Hotel]."[4] Lucas, of course, is seeking to advance his own interests in refusing to authorize Clifton to defend the foreclosure. It does not follow, however, that he is for that reason breaching his fiduciary duties. But the precise parameters of his fiduciary duties need not detain us. As we

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[3]Unquestionably, Crane, the plaintiff, is the lender, and Lucas unquestionably owns both Crane and Carroll. Thus, it is unclear why the dissent wonders, sua sponte, whether Crane is an affiliate or alter ego of Lucas.

[4]To the extent the dissent believes the analogous provisions it quotes from the corporate charter in *Sterling* purported to authorize the directors of the corporation to breach their fiduciary duties to the corporation, we disagree.

maintain -- the dissent has no response -- if he is breaching his fiduciary duties, Soleimani/Morgan have a remedy.

Furthermore, the dissent ignores the possibility that Soleimani is breaching his fiduciary duties in seeking to defend the foreclosure action, inexplicably focusing only on the possibility that Lucas is breaching his fiduciary duties by refusing to authorize a defense. For all the dissent knows, Soleimani might know that the Hotel does not have a viable or even a non-frivolous defense to the foreclosure action. If so, the assets of the Hotel, Clifton or both will be wasted by defending against the action.

The dissent's final argument –- that Soleimani is authorized to defend the foreclosure action to protect the existence of the Hotel –- finds some support in *Sterling*. The Court both rejected the argument that maintaining the action was proper because "the litigation presents an emergency or a critical situation" (298 NY at 492) and went on to note that the complaint alleged no facts "to indicate that its corporate existence is threatened or that its business will not continue normally" (*id.* at 493). But the Court did no more than suggest that, despite a disagreement between co-owners of an entity about whether an action should be commenced or defended, one owner's views might prevail in the event of "an emergency or a critical situation" in which the

entity's existence is threatened. Even assuming there are cases in which it might be sensible to conclude that such an owner's views should prevail, this is not one of them.

Here, two sophisticated parties formed the Hotel pursuant to agreements that called for Lucas to provide all the financing and expressly authorized the financing to be provided by an affiliate (i.e., Crane) of a Lucas-controlled entity. Obviously, these sophisticated parties knew that there was a risk that the Hotel would not be a success and they agreed that "[a]ll action by the Stockholders [of Clifton] shall require the unanimous approval of the Stockholders." As the Court of Appeals has stated, "[f]reedom of contract prevails in an arm's length transaction between sophisticated parties . . ., and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995]). Neither Soleimani nor the dissent point to any such countervailing public policy concern and none exists.

For these reasons, the cross motion should have been denied in its entirety. With respect to the motion for a default judgment, it properly was denied. Even when the motion is unopposed, the motion court must satisfy itself that the movant has satisfied the requirements of CPLR 3215. Here, the moving

papers were defective (*see Beltre v Babu*, 32 AD3d 722 [2006]).

Accordingly, the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered February 23, 2010, which, insofar as appealed from, denied plaintiff's motion for a default judgment and granted defendant's cross motion for leave to interpose an answer, should be modified, on the law, the cross motion denied, and otherwise affirmed, without costs.

All concur except Andrias, J.P. and Acosta, J. who dissent in an Opinion by Acosta, J.

ACOSTA, J. (dissenting)

Because I believe that under the facts of this case, the president of the hotel corporation had the authority to engage counsel to defend the foreclosure action, I respectfully dissent.

In 2001, John Lucas (Lucas) and Benjamin Soleimani (Soleimani) partnered to acquire the long-term lease to real property located at 206 West 41st Street, New York, New York, for the purpose of developing, owning and operating a hotel known as "Hotel 41." Towards this end, they formed defendant 206 West 41st Street Associates, L.P. (the LP), which has two limited partners, Carroll Hotel 206 West 41st Street, LLC (Carroll), owned by Lucas, and Morgan 206 West 41st Street Corporation (Morgan), owned by Soleimani, each of which own 49.5% of the partnership interests of the LP. The general partner, Clifton Place Development Corporation (General Partner), owns the remaining 1% of the limited partnership interests of the LP. Lucas and Soleimani each own half the shares of the General Partner.

Plaintiff, Crane, A.G., which is owned by Lucas, provided all the financing for the LP. The LP defaulted on the note by failing to pay for interest that accrued in 2007. Crane demanded payment of the interest and advised that it would commence a foreclosure proceeding if payment was not made. In response,

Soleimani offered to sell his interest in the LP to Lucas, and Lucas agreed.

The parties agreed to obtain financing from the RiverSource Life Insurance Company in the amount of $2,225,000 (RiverSource Loan), the proceeds of which would be used to pay Soleimani's buy-out amount, plus the interest due on the mortgage. The RiverSource Loan closed on November 14, 2008. However, as a condition of closing, RiverSource required an undertaking letter from the LP that a certificate of occupancy (CO) for Hotel 41 would be put in place in 90 days (Undertaking Letter). Neither a temporary certificate of occupancy (TCO) or a CO was ever obtained, the Buy Sell Agreement was not consummated, and the proceeds of the RiverSource Loan purportedly remained in escrow. Accordingly, monies owed to Crane were never paid.

Thereafter, Crane commenced a foreclosure action against the LP. The LP failed to answer the complaint or otherwise appear in the action, and Crane moved for a default judgment. Soleimani opposed, arguing that at a meeting of the two stockholders, Lucas voted against defending the action while Soleimani voted in favor of defending the action. Moreover, Soleimani argued that the default judgment was made prematurely. Plaintiff argues that the president of defendant's corporate general partner lacked the authority to engage counsel and defend the instant mortgage

foreclosure action in disregard of a deadlocked vote of the General Partner's two shareholders, one of whom is the president and the other of whom is affiliated with plaintiff.

While the majority is correct that any actual or presumptive authority that a president of a corporation may have to undertake or defend litigation is generally terminated by such a deadlock *(see Sterling Indus. v Ball Bearing Pen Corp.*, 298 NY 483, 487 [1949]), the rule is inapplicable to the facts before us. "While the principles of law are clear with respect to maintenance of a suit by or on behalf of a corporation, the facts which bring those principles into play are not so evident on this record as to call for their automatic application" (*see 328 E. 56 St. Rest. v Polldon Rest.*, 39 AD2d 689, 691 [1972]).

First, Section 2.1 (Authority of the General Partner) of the Amended and Restated Agreement of Limited Partnership, dated as of September 2001 (the LPA), provides that the General Partner shall have the exclusive right to manage the LP, including the right to defend any litigation (§2.1[b][vii]). The by-laws of the General Partner provide in Article III, Section 2 that the "Board of Directors shall be responsible for the control and management of the business affairs, property and interests of the Corporation, and may exercise all powers of the Corporation, except as are in the Certificate of Incorporation or as expressly

conferred upon or reserved to the shareholders." Article IV, Section 5 thereof provides:

> "Officers of the Corporation shall, unless otherwise provided by the Board of Directors, each have such powers and duties as generally pertain to their respective offices as well as such powers and duties as may be set forth in these by-Laws, or may from time to time be specifically conferred or imposed by the Board of Directors. The President shall be the chief executive officer of the Corporation."

However, in contrast to *Sterling*, where the "circumstances of the organization of plaintiff corporation indicate[d] that the parties intended that the corporation should be managed by its board of directors and that the board should take no affirmative action if not sanctioned by a majority” (*Sterling* at 491), the Stockholders Agreement among Carroll, Morgan and the General Partner dated as the 6th day of September 2001, provides in paragraph 3(b) in relevant part that "[n]otwithstanding anything to the contrary contained in the By-Laws of the Corporation, the officers of the corporation, *other than Ben Soleimani*, shall not take any action except as approved by the Board of Directors (emphasis added). Paragraph 10 (Certificate of Incorporation: By-Laws) thereof provides that:

> "[e]ach of the Stockholder [*sic*] agrees to consent to and approve any amendment of the Certificate of Incorporation or By-Laws of the Corporation which may from time to time

> be necessary or advisable in order to make any of the provisions of this Agreement, or any of the amendments thereto, valid and enforceable under the applicable laws of the State of New York . . . "

Accordingly, unlike *Sterling*, where there was nothing to confer any authority on the part of the president to institute litigation without the consent of the board of directors, here under the express provisions of the Stockholders Agreement, Soleimani had the power to act in his capacity as president without a resolution from the board of directors. Thus, the LPA when taken together with the Stockholders Agreement and by-laws, give Soleimani, as President of the General Partner, the right and authority to engage counsel to defend the foreclosure action. Second, even were I to accept the majority’s position that Soleimani’s authority, as president, to sue could have been rebutted by the board of directors or stockholders pursuant to the provisions of the Stockholders Agreement requiring unanimous consent for actions taken by either, that power must be used to serve the corporation's interests, not that of the individual stockholders. The "relationship between shareholders in a close corporation, vis-a-vis each other, is akin to that between partners and imposes a high degree of fidelity and good faith" which “may not be so easily circumvented" (*Brunetti v Musallam*, 11 AD3d 280, 281 ([2004] [internal quotation marks and citations

omitted]; *see also Sager Spuck Statewide Supply Co. v Meyer*, 273 AD2d 745, 748 [2000]). Similarly, "[n]either the board of directors nor any individual member or members thereof may exercise such authority in violation of, inter alia, fiduciary duties owed the corporation" (*TJI Realty v Harris*, 250 AD2d 596, 598 [1998]; *see also* Business Corporation Law § 717, § 720).

Here, issues of fact exist as to the exact nature of the affiliation between plaintiff and Lucas, the shareholder opposed to defending the action, i.e. whether plaintiff is an affiliate of Lucas or simply his alter ego, and whether Lucas seeks to block the LP from defending the foreclosure to serve his own interests, rather than the LPs. I find it curious that the majority asserts that I am inventing arguments not advanced by the parties while unabashedly proclaiming that a derivative action can be instituted, an argument never put forth by the parties. Unlike the majority, my arguments are in fact based on the record. The majority asserts that the issue of whether plaintiff is an affiliate of Lucas or simply his alter ego is an argument of my own invention, never advanced by respondent. This is incorrect. In respondent's affirmation in support of its cross-motion for leave to file an answer, the LP specifically asserts that plaintiff Crane is Lucas' alter ego. Issues also exist as to the use made of loan proceeds that had been obtained

to satisfy arrears on the subject mortgage and to buy out Soleimani's interest in the LP.

The majority believes that Lucas' potential conflict of interest is of no moment because Soleimani agreed to the provisions of Section 2.4 (Permitted Transactions) of the LPA. True, Section 2.4(b) provides that

> "[t]he fact that a Partner . . . is directly . . . interested in or connected with, any firm or corporation employed by the Partnership . . . from which the Partnership may borrow . . ., shall not prohibit the Partnership from engaging in any transaction with such person, firm or corporation, and neither the Partnership nor the other Partner shall have any rights in or to any income or profits derived from such transaction by the Partner, person, firm or corporation . . . "

However, the majority ignores that this authority is limited, requiring that "the terms of such transaction are not less advantageous to the Partnership than those obtainable from non-affiliated third parties." Thus, it is clear that while the LPA permits a partner to have a conflict of interest, it does not permit the partner, as a stockholder or director, to breach his fiduciary duty to the partnership by taking an action in favor of the entity in which he holds an interest, to the detriment of the LP. In contrast, the agreement in *Sterling* provided:

> "'No contract or other transaction between the corporation and any other corporation shall be affected or invalidated by the fact

> that one or more of the Directors of this corporation is or are interested in or is a Director or officer or are Directors or officers of such other corporations, and any Director or Directors, individually or jointly may be a party to or parties to, or may be interested in any contract or transaction of this corporation, or in which this corporation is interested, and no contract, act or transaction of this corporation with any person or persons, firms or corporations, shall be affected or invalidated by the fact that any director or directors of the corporation is a party to or are parties to, or interested in such contract, act or transaction, or in any way connected with such person or persons, firm or association; *and each and every person who may become a director of this corporation is hereby relieved from any liability that may otherwise exist from contracting with the corporation for the benefit of himself or any firm, association, or corporation in which he may be in any wise interested'"* (*Sterling* at 487-488 [emphasis added]).

Lastly, I believe the motion court properly allowed Soleimani, as president of the General Partner to interpose an answer on behalf of the LP to protect its existence and interest. That is, the facts allege that the corporate existence of the subject hotel is threatened and that its business will not continue normally. In contrast, in *Sterling*, the court held that "[n]o evidentiary facts are alleged to indicate that a crisis is at hand or that immediate or vital injury threatens plaintiff" (*Sterling* at 492) in that the complaint stated that plaintiff "'*was and still is* engaged in the business of selling and

distributing articles of general merchandise,'" and that "while it allege[d] an exclusive agency to sell the pens of the corporate defendant, and that the contract has been breached, no *facts* [were] alleged to indicate that its corporate existence is threatened or that its business will not continue normally" (*Sterling*, at 493).

These same issues of fact show a meritorious defense warranting denial of plaintiff's motion for a default judgment, and I would affirm Supreme Court's order denying plaintiff's motion for a default judgment, and granting defendant's motion for leave to interpose an answer.

M-2590 - *Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*

Motion to dismiss appeal and for related relief denied.

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

ENTERED: JUNE 23, 2011

CLERK