SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 21, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7423 In re Isaiah B.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Jeanette Ruiz, J.), entered on or about June 23, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he had committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

Appellant was appropriately adjudicated a juvenile delinquent. The Family Court was in the unique position of having heard appellant's admission to stealing a cellphone from

another child's pocket, and having witnessed appellant's demeanor. The court heard the arguments of counsel at both the fact-finding and dispositional hearings, and reviewed the school records indicating a significant number of suspensions and absences. Accordingly, the determination to order the 12 months' probation requested by the presentment agency, rather than the adjournment in contemplation of dismissal (ACD) requested by the law guardian, was a provident exercise of discretion. The court imposed the least restrictive alternative available consistent with appellant's best interests and the need for protection of the community (*see* Family Court Act § 352.2[2][a]; *Matter of Katherine W.*, 62 NY2d 947 [1984]).

Appellant allocuted to having committed acts that would constitute the crime of fourth-degree grand larceny (an E felony). He also had a history of serious disciplinary issues in school, including attendance problems and numerous suspensions (some involving violent behavior such as fighting, possession of a weapon, and insubordination), which provided added justification for supervision at a higher level and for a longer term than an ACD would have provided (*see e.g. Matter of Christina M*, 92 AD3d 556 [2012] [12 months probation warranted]; *Matter of Lena I.*, 87 AD3d 936 [2011] [same]; *see Matter of*

Florin R., 73 AD3d 533 [2010] [same]).

As the Department of Probation and the court recognized, 12 months of probation were reasonable here in an effort to deter future criminal misconduct, to monitor appellant's education, including ensuring that he is in an appropriate school setting and receives tutoring (if deemed necessary). The court also ordered that when school is not in session, appellant be referred to programs providing structured activities, such as soccer and/or basketball, in which appellant has expressed an interest.

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

ENTERED: AUGUST 21, 2012

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Román, JJ.

6685-
6686-
6687

Fredy Lopez,
Plaintiff-Respondent-Appellant,

-against-

Rafael Dagan, et al.,
Defendants-Appellants-Respondents,

Goldstein & Associates,
Defendant-Respondent,

Olga Bakick Architect,
Defendant.

Index 108754/08

Perez & Varvaro, Uniondale (Joseph Varvaro of counsel), for appellants-respondents.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent-appellant.

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City (Douglas R. Halstrom of counsel), for respondent.

Orders, Supreme Court, New York County (Joan A. Madden, J.), entered on or about April 12, 2011 and April 19, 2011, which, to the extent appealed from as limited by the briefs, in an action for personal injuries sustained by plaintiff when the temporary floor on which he was working collapsed, granted defendants-owners' motion for summary judgment to the extent of dismissing plaintiff's Labor Law § 240(1) and § 241(6) claims as against them, and denied the motion with respect to plaintiff's Labor Law

§ 200 and common-law negligence claims, granted defendant-engineer's motion for summary judgment dismissing the complaint and all cross claims as against it, and denied plaintiff's cross motion for leave to serve an amended bill of particulars, and for partial summary judgment as to liability on his § 240(1) and § 241(6) claims, modified, on the law, to dismiss plaintiff's § 200 and common-law negligence claims as against the owners, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against defendant owners Rafael Dagan and Jacklin Dagan.

The owners made a prima facie showing of their entitlement to judgment as a matter of law under the homeowner's exemption of Labor Law § 240(1) and § 241(6). It is undisputed that the sole purpose of the construction work was to convert a multiple dwelling into a one-family dwelling for the owners' use (*Stejskal v Simons*, 3 NY3d 628, 629 [2004]). The owners also submitted evidence, including their contract with the general contractor and deposition testimony, showing that they did not direct or control the work at issue (*see Affri v Basch*, 13 NY3d 592, 595-596 [2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 126-127 [2008]). Plaintiff's evidence that the owners hired the contractors and visited the work site regularly failed to raise

an issue of fact as to whether they directed or controlled the work (*see Chowdury*, 57 AD3d at 127; *Jenkins v Jones*, 255 AD2d 805, 806 [1998]).

The engineer made a prima facie showing that it did not have the authority to direct, supervise or control the injury-producing work, and thus was not liable as an agent of the owners under Labor Law § 240(1) and § 241(6). Indeed, the engineer's contract with the owners provided that it did not have control over, and was not responsible for, "any construction means, methods, procedures, temporary structures or work . . . ." In response, plaintiff failed to raise a triable issue of fact. The engineer's contractual duty to visit the site "at periodic intervals" to determine if construction was in accordance with plans and specifications, is insufficient by itself to hold the engineer liable under Labor Law § 240(1) and §241(6), and there is no evidence otherwise to indicate that the engineer had the authority to direct or control the work at issue (*see Carter v Vollmer Assoc.*, 196 AD2d 754 [1993]; *Sikorski v Springbrook Fire Dist. of Town of Elma*, 225 AD2d 1041 [1996]).

To support his Labor Law § 241(6) claims, plaintiff cross moved for leave to amend his bill of particulars to add provisions of the Industrial Code and Administrative Code of the

City of New York. Because plaintiff's § 241(6) claims were properly dismissed, the court properly denied leave to amend as moot.

The court, however, should have dismissed plaintiff's Labor Law § 200 and common-law negligence claims as against the owners. With respect to plaintiff's claim pursuant to Labor Law § 200, the owners made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence that plaintiff's accident was caused by the means and methods employed by the general contractor, namely, the improper installation of a temporary floor, and that they had no supervisory control over the operation (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). In response, plaintiff failed to raise an issue of fact. To the extent that plaintiff's injuries arose from a dangerous condition on the premises, which under the common-law the owners were duty-bound to guard against, the owners established prima facie entitlement to summary judgment on plaintiff's common-law negligence claim by proffering evidence that they neither created the accident-causing condition (*Wasserstrom v New York City Tr. Auth.*, 267 AD2d 36, 37 [1999], *lv denied* 94 NY2d 761 [2000]; *Allen v Pearson Publ. Empire*, 256 AD2d 528, 529 [1998]; *Kraemer v*

K-Mart Corp., 226 AD2d 590 [1996]), nor had prior notice, actual or constructive, of it (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v Woolworth Co.*, 24 NY2d 936, 937 [1969]; *Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373 [2005]). In response, plaintiff failed to raise a triable issue of fact, and summary judgment in favor of the owners was thus warranted.

The dissent argues that the record here raises an issue of fact with respect to notice such that the owners should not be granted summary judgment on plaintiff's common-law negligence or Labor Law § 200 claim. We disagree. The pertinent issue here is whether there is any evidence that the owners had actual or constructive notice of any structural deficiency of the temporary floor. The record is bereft of any evidence that prior to this accident the owners were ever actually aware that the floor was improperly installed or structurally deficient. Nothing in the record indicates that the floor, when viewed and stood upon, appeared or felt compromised. Accordingly, there is no evidence that the owners had actual notice. Nor is there any evidence that they had constructive notice. A defendant is charged with constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to

discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]). Here, at best, the portions of the record upon which the dissent relies only establish that the owners had ample opportunity to observe any defective condition which might manifest itself. However, since the defective condition was latent and not visibly apparent, that the owners were frequently present at the accident site even for prolonged periods of time is insufficient to establish constructive notice.

Plaintiff's Labor Law § 200 and common-law negligence claims were properly dismissed as against the engineer; there is no evidence that the engineer had the contractual right to control the injury-producing work or that it failed to use due care in the exercise of its professional services (*see Carter*, 196 AD2d at 754).

All concur except Catterson, J., who dissents in part in a memorandum as follows:

CATTERSON, J. (dissenting in part)

I must respectfully dissent to the extent that I would deny the defendant owners' motion for summary judgment and reinstate the plaintiff's Labor Law § 200 and common-law negligence claims against them insofar as they are based on a dangerous premises condition, and there is an issue of fact as to whether the homeowners had actual or constructive notice of the condition.

The following facts are established in the record: the defendants Rafael and Jacklin Dagan (hereinafter referred to as "the homeowners") are the owners of a five-story building located at 333 East 51st Street in Manhattan (hereinafter referred to as "the premises"). The homeowners hired R & L Construction, Inc. to convert the building to a brick and limestone single-family townhouse. The homeowners also hired an architect and structural engineers to design plans for the renovation. The plaintiff was employed by R & L Construction as a laborer at the site.

According to the plaintiff's complaint and deposition testimony, on the morning of January 9, 2006, he was removing containers filled with dirt, stone, and brick when a section of the plywood floor on which he was standing collapsed. He injured his back, neck, and left knee when he fell approximately eight feet into the basement of the townhouse and a container fell on

top of him. The plaintiff contends that skids of bricks were also stacked on top of the plywood flooring in the area of the collapse.

At deposition, the structural engineer hired by the homeowners testified that the plans for flooring specified that a layer of concrete be poured over metal Q-decking attached to metal joists and that the joists be placed into pockets in the wall. The engineer testified that areas of the underlying metal support joists had not been properly fastened into the walls, and in lieu of concrete, plywood had been laid on top of the metal support joists. Some portions of the plywood deck were fastened to the underlying metal support joists while other portions were merely resting on top the joists unsecured. The engineer and the plaintiff's expert engineer both testified that the utilization of plywood as temporary flooring was a deviation from the engineer's original designs. The accident report filed subsequently by the engineer hired by the homeowners noted both that the temporary plywood flooring was placed on the floor joists in lieu of the permanent concrete floor deck and that the joists had buckled laterally under the load of the bricks stacked on the floor deck.

The plaintiff commenced this action pursuant to Labor Law §§

240(1), 241(6), and § 200, and common-law negligence. Following discovery, the homeowners moved for summary judgment dismissing all of the plaintiff's claims against them. The plaintiff opposed the motion and cross-moved for leave to serve an amended bill of particulars, and for partial summary judgment against the homeowners on the issue of liability under Labor Law § 240(1) and § 241(6). The motion court granted the homeowners' motion to dismiss the plaintiff's Labor Law § 240(1) and § 241(6) claims; however, it denied the summary judgment motion with respect to the plaintiff's claim under Labor Law § 200 and common-law negligence and denied the plaintiff's crossmotion. The homeowners now appeal the denial of their motion for summary dismissal of the plaintiff's Labor Law § 200 and common-law negligence claims.

On appeal, the homeowners argue, inter alia, that the plaintiff's accident was caused by the "means and methods" used by R & L., the subcontractor and the plaintiff's employer. The plaintiff contends that the homeowners are not entitled to summary dismissal of the claim under Labor Law § 200 because they failed to establish that they lacked notice of the allegedly dangerous condition at the work site. The plaintiff submits that the homeowners had prior actual or constructive notice of the

temporary plywood flooring, and thus of the dangerous premises condition. According to the plaintiff, his own testimony, coupled with the testimony of the engineer, raises an issue of fact that precludes summary judgment as a matter of law.

For the reasons set forth below, I agree. Contrary to the majority's equivocal holding, in my opinion the plaintiff's injuries resulted from a dangerous premises condition, and thus the issue to be determined at trial is whether the defendant homeowners had either constructive or actual notice of the condition.

As a threshold matter, there is no difference between asserting a claim based upon the common-law principles of negligence or one which alleges that the defendant violated section 200 of the Labor Law. Section 200 is nothing more than a codification of the common-law duty of an owner or general contractor to provide a safe place to work. Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 352, 670 N.Y.S.2d 816, 821, 693 N.E.2d 1068, 1073 (1998); Rusin v. Jackson Hgts. Shopping Ctr., 27 N.Y.2d 103, 313 N.Y.S.2d 715, 261 N.E.2d 635 (1970). In other words, a claim arising pursuant to the provision is "tantamount to a common-law negligence claim in a workplace context." Mendoza v. Highpoint Assoc., IX, LLC, 83 A.D.3d 1, 9, 919

N.Y.S.2d 129, 135 (1st Dept. 2011). Unlike Labor Law §§ 240 and 241, section 200 does not exempt one and two-family homeowners from its scope.

The relevant portion of Labor Law § 200 states as follows:

> "All *places* to which this chapter applies shall be so contructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein [. . .] All *machinery, equipment and devices* in such places shall be so placed, *operated,* guarded and lighted as to provide reasonable and adequate protection to all such persons." Labor Law § 200(1)(emphasis added).

The plain language of the statute indicates there are two distinct prongs or categories to the provision: one pertains to the work premises and the requirement that they be maintained in a safe condition; the second pertains to work performance and the requirement of using material and tools in a safe manner and providing equipment and tools which are safe to use. The latter category is that part of the common-law duty to maintain a safe work site which was extended by statute to "include the tools and appliances without which the place to work would be incomplete." Hess v. Bernheimer & Schwartz Pilsener Brewing Co., 219 N.Y. 415, 418, 114 N.E. 808, 808 (1916). Over time, this latter category has been characterized as "means and methods" or

"tools and methods" (see Persichilli v. Triborough Bridge & Tunnel Auth., 16 N.Y.2d 136, 145, 262 N.Y.S.2d 476, 480, 209 N.E.2d 802, 805 (1965)), or "methods or materials." Ortega v. Puccia, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323, 330 (2d Dept. 2008).

Further, unlike Labor Law provisions 240 and 241 where absolute liability attaches to an owner or general contractor, a plaintiff seeking recovery under the provision at issue must satisfy the liability standards of common-law negligence. In other words, where the plaintiff's injuries arise out a dangerous premises condition, the plaintiff must show that the owner or general contractor either created the condition, or had actual or constructive notice of it sufficient for corrective action to be taken. See Mitchell v. New York University, 12 A.D.3d 200, 784 N.Y.S.2d 104 (1st Dept. 2004), citing, Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 501 N.Y.S.2d 646, 492 N.E.2d 774 (1986). Where the plaintiff's injuries arise because of an alleged defect or danger in the methods or material of the work, recovery against an owner or general contractor cannot be had "unless it is shown that the party to be charged exercised some supervisory control" over the methods of work or materials supplied. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494,

505, 601 N.Y.S.2d 49, 55, 618 N.E.2d 82, 88 (1993).[1] This is an "outgrowth of the basic common-law principle that 'an owner or general contractor should not be held responsible for the negligent acts of others over whom [the owner or general contractor] had no direction or control.'" Ross, 81 N.Y.2d at 505, 601 N.Y.S.2d at 55, quoting, Allen v. Cloutier Constr. Corp, 44 N.Y.2d 290, 299, 405 N.Y.S.2d 630, 673, 376 N.E.2d 1276, 1279 (1978).

It is generally accepted that claims fall within one of the two categories. Ortega 57 A.D.3d at 61, 866 N.Y.S.2d at 329 (two categories "should be viewed in the disjunctive"). The starting point of any analysis of Labor Law § 200 claims, therefore, should be to ascertain what caused the plaintiff's injury: whether it was caused by a dangerous premises condition, or whether the plaintiff was injured because of the unsafe manner in

[1]Although not an issue here, it should be noted that the Court of Appeals has rejected the idea of any sort of crossover between liability standards such as liability attaching when an owner or general contractor has "notice of the unsafe manner in which the work [is being] performed." Comes v. New York State Electric & Gas Corp., 82 N.Y.2d 876, 878, 609 N.Y.S.2d 168, 169, 631 N.E.2d 110, 111 (1993). Conversely, liability under Labor Law § 200 may be predicated solely on notice of a dangerous condition without any proof of supervision over the work involved. Shipkoski v Watch Case Factory Assoc., 292 A.D.2d 589, 741 N.Y.S.2d 57 (2d Dept. 2002); see also Kerins v. Vassar Coll., 15 A.D.3d 623, 625, 790 N.Y.S.2d 697, 699 (2d Dept. 2005).

which the work was being performed, or because of defective tools and equipment.

The majority concludes that the owners have shown their prima facie entitlement to summary judgment under Labor Law § 200 through evidence indicating that the plaintiff's injuries were caused by the means and methods employed by R & L, notably the improper installation of the temporary flooring. In my opinion, the majority's reliance on Comes v. New York State Elec. & Gas Corp. (82 N.Y.2d 871, 609 N.Y.S.2d 168, 631 N.E.2d 110 (1993)), is misplaced. In Comes, the plaintiff's injury resulted from means and methods when he lifted a steel beam unassisted at the direction of his employer/subcontractor. Thus, it should be noted that where a plaintiff's injury arises directly out of the means and methods, it is generally, as in Comes, the means and methods used by the plaintiff himself in the injury-producing activity, or is a result of the manner in which the plaintiff performs his own work, albeit at the direction of his employer or subcontractor. Comes, 82 N.Y.2d at 877, 609 N.Y.S.2d at 169; see also Wright v. Belt Assoc., 14 N.Y.2d 129, 134, 249 N.Y.S.2d 416, 418, 198 N.E.2d 590, 592 (1964) (negligent act of subcontractor occurring as "detail of the work"); Zuchelli v. City Constr. Co., 4 N.Y.2d 52, 172 N.Y.S.2d 139, 149 N.E.2d 72 (1958) (floor under

construction collapsed because of negligent removal of shoring a few days before at subcontractor's direction).

In this case, the floor did not collapse because of the means or methods used by the plaintiff during its construction. The record reflects the undisputed statement in the plaintiff's affidavit that he did not "help erect or install that floor .... The plywood floor had been put down ... *several months* before my accident" (emphasis added). Further, while reference has been made to the "temporary" nature of plywood flooring, this does not render it a floor under construction or a "work in progress." Rather, according to the testimony of the structural engineer, the use of plywood as temporary flooring was a deviation from the engineer's original designs. However, the fact that its defective condition initially arose from the "means and methods" used by the subcontractor does not end the inquiry.

Well-established precedent indicates that where the means and methods or "negligent act of another" results in a dangerous condition that is sufficiently long-established, it should be viewed as coming within the control of the owner as a dangerous premises condition. Employers Mut. Liab. Ins. Co. of Wis. v. Di Cesare & Monaco Concrete Constr. Corp, 9 A.D.2d 379, 382, 194 N.Y.S.2d 103, 107 (1959)("[t]he duty of providing a safe place to

work is a two-fold duty .... The premises are made safe by the discovery of dangers ascertainable through reasonable diligence and remedying them .... They are kept safe by forbearance from creating new conditions of danger").

Hence, where the manner in which work was performed under another's supervision results in a condition which "exist[s] for such a length of time that the [owner] as a question of fact was bound to have knowledge of [its] presence ... [and] being for a *long time completed*, [it] must be held to be within the control of the owner." Wohlfron v. Brooklyn Edison Co., Inc., 238 App.Div. 463, 466, 265 N.Y.S. 18, 21 (2d Dept. 1933) (emphasis added). Alternatively, where a negligent act or manner in which work is performed by another impacts the "commonly used portions of the work premises" (Cangiano v. Charles LoBosco & Son, Inc., 23 A.D.2d 860, 259 N.Y.S.2d 197 (1965)), or the "ways and approaches to the [worksite]" an owner/general contractor has the duty of making it safe. Di Cesare, 9 A.D.2d at 385, 194 N.Y.S.2d at 109; see also Caspersen v. La Sala Bros., 253 N.Y. 491, 171 N.E. 754 (1930)(Cardozo, Ch. J.), citing Mortensen v. Magoba Constr. Co., 248 N.Y. 577, 162 N.E. 531 (1928) (defendant general contractor liable for the plaintiff worker's injury when concrete floor newly installed by a subcontractor and on which bags of

cement were placed collapsed while the plaintiff was walking across it).

Given the foregoing, in my opinion the only issue to be determined is whether the homeowners had actual or constructive notice of the dangerous premises condition. See Murphy v. Columbia Univ., 4 A.D.3d 200, 773 N.Y.S.2d 10 (1st Dept. 2004). To constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit a defendant owner to discover and remedy it. See Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 501 N.Y.S.2d 646, 492 N.E.2d 774 (1986), supra; Irizarry v. 15 Mosholu Four, LLC, 24 A.D.3d 373, 806 N.Y.2d 534 (1st Dept. 2005); Kraemer v. K-Mart Corp., 226 A.D.2d 590, 641 N.Y.S.2d 130 (2d Dept. 1996).

The record here demonstrates material issues of fact sufficient to defeat the homeowners' motion for summary judgment on the plaintiff's Labor Law § 200 claim. According to testimony at deposition, Jacklin Dagan was present at work site at the time of the accident. She testified that she visited the construction site on average four-to-five days per week, and spent a number of hours there each day. Prior to the collapse, Mrs. Dagan noticed the plywood flooring at the jobsite and could not recall whether

the plywood was attached to the underlying joists or loosely laid upon them. Furthermore, she acknowledged that the debris containers did not belong on the plywood floor. According to her deposition, less than a week prior to the plaintiff's accident, she requested that an R & L supervisor arrange for the containers to be moved to the backyard. She also testified that when she first observed the bricks and debris containers on the floor, Mrs. Dagan asked the R & L supervisor: "Isn't it better you put it in the backyard?"

Accordingly, I conclude that the motion court's determination that the defendant homeowners are not entitled to summary dismissal of the Labor Law § 200 claims was proper.

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

ENTERED: AUGUST 21, 2012

CLERK

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

6741 Karen Brathwaite, et al., Index 105174/11
Plaintiffs-Appellants,

-against-

David F. Frankel, etc., et al.,
Defendants-Respondents.

Brown & Gropper, LLP, New York (James A. Brown of counsel), for appellants.

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

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered August 16, 2011, which granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

The court erred by treating defendants' motion made pursuant to CPLR 3211(a)(7) and (10) as a motion for summary judgment without providing the parties with notice, as required by CPLR 3211(c) (*see Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]). While defendants' notice of motion sought, as alternative relief, summary judgment pursuant to CPLR 3211(c), plaintiffs never indicated that they joined defendants in "deliberately charting a summary judgment course" (*id.* [internal quotation marks omitted]), nor does the case involve a purely legal question

without any disputed issues of fact (*see Wiesen v New York Univ.*, 304 AD2d 459, 460 [2003]).

Treating the motion as one for dismissal pursuant to CPLR 3211(a)(7), we conclude that it should have been denied. Construing the complaint liberally and drawing all reasonable inferences in favor of the pleaders (*see e.g. Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we find that plaintiffs have made allegations that, if true, would carry their "de minimis burden" (*Exxon Shipping Co. v New York State Div. of Human Rights*, 303 AD2d 241, 241 [2003], *lv denied* 100 NY2d 505 [2003]) of establishing a prima facie case of discrimination in violation of the New York City Human Rights Law (Administrative Code of City of NY § 8-101 *et seq.*). Plaintiffs have alleged that they are members of a protected class (the disabled), that they were qualified for their positions, that they suffered an adverse employment action (being laid off), and that the adverse action occurred under circumstances giving rise to an inference of discrimination (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). The inference of discrimination arises from the complaint's allegations that plaintiffs, who performed clerical work, were laid off as a result of the elimination of their job title, under which all the employees were disabled,

while other job titles involving clerical work were not eliminated. After issue has been joined and discovery has been completed, defendants will have an opportunity to attempt to rebut the presumption of discrimination arising from plaintiffs' prima facie case by "setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support [their] employment decision" (*Forrest*, 3 NY3d at 305), to which plaintiffs will be entitled to respond in turn. On defendants' motion addressed to the sufficiency of the pleading, however, the only question properly before the court was whether plaintiffs have alleged a prima facie case.

We note that the motion court did not rest its decision on the branch of defendants' motion seeking dismissal based on "the absence of a person who should be a party" (CPLR 3211[a][10]), and, on appeal, defendants have not argued that the dismissal should be affirmed on that ground.

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

ENTERED: AUGUST 21, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7016 George Nicodene, Index 103238/10
Plaintiff-Appellant,

-against-

Byblos Restaurant, Inc., et al.,
Defendants-Respondents,

Tom Koutros, etc., et al.,
Defendants.

Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for appellant.

Goldberg & Carlton, PLLC, New York (Gray M. Carlton of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 18, 2011, which granted the motion of defendants Byblos Restaurant, Inc., Danny Hasbani and Sabeh K. Kachouh to dismiss the complaint pursuant to CPLR 3211(a)(8), and denied plaintiff's cross motion for an extension of time to effect service pursuant to CPLR 306-b, unanimously modified, on the law and the facts and in the exercise of discretion, defendants' motion granted, unless, within 120 days from the date of entry of this order, plaintiff effects proper service on defendants, plaintiff's cross motion to extend his time to serve granted, as indicated, and otherwise affirmed, without costs.

Although plaintiff failed to properly effect service of process, his cross motion for an order extending his time to serve the summons and complaint should have been granted in the interest of justice (CPLR 306-b). "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105 [2001]). Although defendants cite plaintiff's lack of diligence in commencing this action, diligence or lack thereof is but one of several factors that may be considered by a court under an interest of justice analysis (*id*. at 105-106).

The merit of plaintiff's cause of action was demonstrated by his affidavit in which he stated that he was injured on March 11, 2007 in a restaurant that was owned by all of the defendants when the chair upon which he sat collapsed. The record shows that within six months after the accident, plaintiff's counsel began to exchange correspondence with defendants' carrier. That correspondence included a physician's report as well as the reports of two MRIs. In addition, the record shows that counsel and the carrier engaged in settlement discussions. By letter dated May 20, 2010, the carrier acknowledged that it had been advised of the commencement of this action. Albeit

unsuccessfully, plaintiff attempted to effect service before the statute of limitations expired. In light of plaintiff's prima facie showing of the merit of his claim, his prompt contact with defendant's carrier, the settlement negotiations with the carrier and the absence of prejudice to defendants, an extension of time to effect service is warranted (*see e.g. Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430, 431 [2011]).

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

ENTERED: AUGUST 21, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7452 In re Jordan L.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Avshalom Yotam of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about March 2, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute attempted assault in the third degree, and imposed a conditional discharge, unanimously affirmed, without costs.

The complainant's mother summoned police after she spotted appellant, who she told the dispatcher had robbed her son. According to one of the two officers who arrived at the mother's location, she pointed at a nearby building and said that youths responsible for "something that happened in the past with her son" were inside the lobby. The other officer recalled that the

woman pointed to two boys who were standing in front of the building and stated that the one wearing a gray jacket had robbed her son the previous day. That same officer approached the building, and the two youths began to slowly walk away. He commanded them to stop, and they did. The officer handcuffed appellant, the youth wearing the gray jacket. According to the officer, he did not intend to arrest appellant when he placed the handcuffs on appellant, but rather to restrain him while he and his partner investigated. The officer acknowledged that appellant had not tried to run from the scene, and he did not indicate that there was any other compelling reason to place handcuffs on him.

After the officer placed the handcuffs on appellant, the complainant's mother approached, along with the complainant and his father. It is unclear precisely how much time passed between the detention and the arrival of the complainant at the scene, but a fair reading of the record permits the inference that it was a short period of time, since both officers indicated that the complainant arrived while they were questioning the youths. The officers did not direct the complainant to the scene, nor did they even know that he was in the vicinity. The officer asked the mother whether appellant was the one she had pointed out and

she said he was. When the officer then asked the complainant whether appellant was “the kid that robbed you,” the complainant answered that he was. Shortly thereafter, it was mistakenly determined that the complainant had filed a complaint three days earlier alleging harassment. In reality, he had alleged that he had been robbed. Because harassment is not a charge for which a juvenile can be arrested, appellant was released at the scene to the custody of his older sister. Later that day, after the complainant had spoken to officers at the precinct, appellant was arrested and charged with attempted robbery.

Appellant moved to suppress the complainant’s identification of him. He argued that the identification was the fruit of an unlawful arrest, which was effected when the police officer placed him in handcuffs. Appellant asserted that there was no probable cause for the “arrest” because it was based strictly on the complainant’s mother’s statement that appellant had robbed her son, a statement that the officers made no effort to corroborate. He further argued that there were no exigent circumstances justifying the handcuffing, such as a threat to the officers’ safety or an indication that appellant was going to flee. Finally, appellant claimed that the circumstances surrounding the identification by the complainant, including that

appellant was in handcuffs next to a uniformed officer, and the fact that the officer asked the complainant's mother if appellant was her son's assailant before asking the complainant, made the procedure unduly suggestive. The court denied appellant's motion, finding there to have been nothing untoward about the officer's having placed appellant in handcuffs.

On appeal, appellant has abandoned his argument that the identification procedure used by the officers was unduly suggestive. Instead, he contends that his being handcuffed was tantamount to an arrest, that there was no probable cause underlying the arrest, and that the identification by the complainant was the fruit of that unlawful arrest and must therefore be suppressed.

Appellant is correct that, under the circumstances presented, where there is no evidence that appellant was likely to flee or cause physical harm, the police had no justification for placing him in handcuffs. Nevertheless, appellant relies on the fact that he was handcuffed only to establish that he was arrested. However, whether or not he was actually arrested, and whether the arrest was justified, is not determinative, because the inevitable discovery doctrine applies to the facts here. Under that doctrine, the exclusionary rule is inapplicable where

"the linkage between the police misconduct and [the] evidence is interrupted by intervening events . . . The question is whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint" (*People v Stith*, 69 NY2d 313, 317-318 [1987] [internal quotation marks and citations omitted]).

The doctrine applies here because, whether appellant was under arrest or not, the complainant would have had the same opportunity to point him out. In other words, there is no reason to believe that the "arrest" caused appellant to be in the vicinity when the complainant arrived, where he would not otherwise have been but for the "arrest" (*see People v Serrano*, 231 AD2d 748, 749 [1996] [confirmatory identification of defendant after defendant was arrested and detained at scene was not tainted, even if arrest was illegal, because "[t]here was no significant temporal or spatial difference between the transmitting officer's post-arrest observations and pre-arrest observations"]). Indeed, appellant does not challenge the presentment agency's position that the police had reasonable suspicion upon which to stop appellant and question him.

According to the officers' testimony, questioning appellant and his companion is precisely what they were doing at the moment when the complainant showed up. Because both officers testified that the complainant arrived while they were conducting that questioning, it is evident that the identification was inevitable. Accordingly, suppression of the identification was properly denied.

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

ENTERED: AUGUST 21, 2012

CLERK

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

7531-
7532 The People of the State of New York,
Respondent,

-against-

Felix Hernandez,
Defendant-Appellant.

Ind. 1165/07

Steven Banks, The Legal Aid Society, New York (Bonnie C. Brennan of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 29, 2007, as amended December 17, 2007, convicting defendant, upon his plea of guilty, of sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to a term of five years, and order, same court and Justice, entered on or about July 8, 2011, which denied defendant's CPL 440.10 motion to vacate the judgment, affirmed.

All concur except Saxe, J.P. and Sweeny J. who concur in a separate memorandum by Sweeny, J., Manzanet-Daniels, J. who concurs in a separate memorandum, and Moskowitz and Freedman, JJ. who dissent in a memorandum by Freedman, J.

SWEENY, J. (concurring)

The "long-standing test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant" (*Hill v Lockhart*, 474 US 52, 56 [1985] [internal quotation marks omitted). A defendant challenging the propriety of his guilty plea on the ground of ineffective assistance of counsel must meet the two-prong test set out in *Strickland v Washington* (466 US 668 [1984]). Under *Strickland*, the "defendant must show that counsel's performance was deficient," and "that the deficient performance prejudiced the defense" (*Strickland*, 466 US at 687).

In *Padilla v Kentucky*, (__ US __, 130 S Ct 1473 [2010]), the Supreme Court held that, in connection with a plea, effective assistance requires the defense counsel to advise a defendant of the immigration consequences of his plea. This was plainly not properly done in this case and the hearing court correctly determined that the first prong of the *Strickland* test had been met.

However, contrary to the dissent's contention, defendant did not establish that he was prejudiced by his counsel's inadequate advice on the deportation consequences of his guilty plea (*see*

id.) After an evidentiary hearing, the court properly determined that defendant did not demonstrate a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (*Hill v Lockhart*, at 59). The dissent accepts defendant's testimony on its face that, had he been advised that he would be deported, he would have rejected the promised sentence of five years and insisted on going to trial, knowing that his sentence exposure would be 14 years. However, the hearing court, which observed all the witnesses, found defendant's testimony, not only in this regard, but overall, to be incredible. Defendant's statements to the immigration authorities that he was unjustly convicted and that he did not commit the crime to which he pleaded guilty were found by the hearing court to undermine defendant's truthfulness. His claims that he did not understand the terms "trial," "sexual contact" or "oath" were found to be additional examples of defendant's lack of candor. The record amply supports the hearing court's conclusion that defendant decided to accept the plea, not because he was defectively advised on the immigration issue, but rather because pleading guilty was the course most advantageous to him. It has been a long-established rule that "great deference must be paid to the findings of fact and

determinations of credibility by a hearing court" (*People v Rivera*, 213 AD2d 281, 281-281 [1995], *lv denied* 86 NY2d 740 [1995], citing *People v Prochilo*, 41 NY2d 759, 761 [1977]; *see also People v Hickson*, 165 AD2d 777 [1990]). We find no reason on the record before us for disturbing the court's credibility determinations. We find it unnecessary to decide any issues relating to the retroactivity of *Padilla v Kentucky*.

MANZANET-DANIELS, J. (concurring)

The motion court's assessment that defendant was not prejudiced by counsel's *Strickland* violation was eminently sound and amply supported by the record evidence, which showed defendant to be utterly disingenuous and dishonest when discussing both this case and his prior convictions.

The defense's assertion that there were "clear gaps in [defendant's] understanding" of the charges against him is refuted by the record before us. Defendant admitted that he understood the accusation against him was that he had tried to rape his sister-in-law, yet nonetheless claims that when he pleaded guilty he was operating under the erroneous belief that merely grabbing the victim and pushing her out of the door constituted "sexual contact."

Defendant's claim that he did not understand the meaning of sexual contact, and that he was under a misapprehension that "sexual contact" encompassed any contact with a woman, defies common sense and the record evidence. The motion court astutely observed that defendant's definition of sexual contact was "positively Clintonesque" in the "redefining for self-interest of commonly understood human and sexual and legal principles." At the time of the assault, defendant had lived in the United States

for 16 years. His claim that "just touching a woman" amounted to sexual conduct punishable by a five-year sentence is palpably ridiculous. If this were the case, just shaking a woman's hand, without her consent, would consign the offender to a state prison sentence.[1]

The dissent points to defendant's testimony that he was motivated by anger, not sexual desire. However, one motivated solely by anger generally does not "grab[] [someone] between her pants and her blouse" in order to eject her from the premises.

Defendant was not prejudiced for the further reason that he had been adjudicated a violent predicate felon for a second-degree assault conviction in connection with an attack upon his brother-in-law, as a result of which he was eligible for deportation regardless of the disposition of the instant case. During the course of the prior assault, he pushed his brother-in-law into a stove, punched him in the face, choked him and smashed his head into the wall. He claimed that he "had" to plead guilty in the prior case, despite the fact that he was purportedly

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[1] The term "sexual abuse" would have been translated in Spanish by the Official Court Interpreter as "abuso sexual," so no plausible argument can be made that defendant was under a misapprehension as to the meaning of the terms or its connotations.

defending himself and had a defense to the crime with which he had been charged. I would accordingly affirm the order appealed from.

FREEDMAN, J. (dissenting)

I would vacate defendant's plea and thus his conviction because he was deprived of his constitutional right to the effective assistance of counsel. Contrary to the majority, I believe defendant demonstrated that he was prejudiced by his attorney's failure to advise him that a guilty plea would automatically cause him to be deported (*see Padilla v Kentucky*, __ US __, 130 S Ct 1473 [2010]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant Felix Hernandez was born in the Dominican Republic in 1969. He attended a technical school in that country and graduated as an electrician. In 1990, defendant moved to Puerto Rico and, three years later, married his first wife. The couple had two sons, born in 1993 and 1994, but defendant's wife died giving birth to the second child. Defendant and his sons thereafter moved to New York, and in 1997 he obtained permanent residency (green card status) in the United States. Defendant married Virginia Hernandez, with whom he had four more children, born in 1996, 1999, 2001, and 2003.

On December 19, 2006, defendant's sister-in-law, Celeste Hernandez, reported to the police that, while she was sleeping on the couch in defendant's apartment on the previous night, she was

awakened by defendant's non-consensual sexual contact with her. In February 2007, police officers investigating the incident contacted defendant and brought him with his consent to a precinct station for questioning. After defendant received *Miranda* warnings, he gave oral and written statements to the police about the incident. Thereafter the police arrested defendant. In March 2007, he was indicted for attempted rape in the first degree, two counts of sexual abuse in the first degree, and attempted sexual abuse in the first degree. The attempted rape charge carried a minimum prison term of seven years and a maximum term of 15 years.

Defendant moved to suppress his pre-arrest statements, and Supreme Court held a *Huntley* hearing on November 7, 2007. Defendant was provided a Spanish language interpreter. In the morning session, the People questioned police officer John Savino of the Manhattan Special Victims Squad about the circumstances surrounding defendant's oral statement and its substance. According to Savino, defendant acknowledged that, before the December 2006 incident, he had become "annoyed" with Celeste Hernandez when he learned that, while he was visiting Puerto Rico earlier in the month, she had brought a man to the apartment and left him alone with his wife. After learning that, defendant

did not see Celeste until he came home on the evening of December 18 and found her asleep on his couch. Defendant admitted to shaking Celeste to wake her because he wanted to talk to her, but otherwise his statement was exculpatory.

The court recessed for lunch, after which the examination of Savino was to continue. However, when the hearing resumed, defendant's attorney Mr. Schioppi informed the court that defendant wished to plead guilty to sexual abuse in the first degree in full satisfaction of the indictment. The court then questioned defendant with the aid of the Spanish interpreter. When defendant was asked whether he had "committed the crime of sexual abuse, in that you subjected Celeste Hernandez to what's known as sexual contact as New York defines that," defendant answered "[y]es." The court also asked defendant whether his attorney had "explained to you your various legal rights and your options with regards to this case," to which the defendant also answered "[y]es," but the court did not specifically ask defendant if counsel had advised him about the immigration consequences of his plea. Finally, the court stated, "I have no idea what any federal immigration situation would be as a result, if any, of this conviction, but I am suppose[d] to tell you that as well."

On November 29, 2007, the court sentenced defendant to a determinate prison sentence of five years, followed by five years of postrelease supervision. Thereafter, federal immigration authorities initiated deportation proceedings against defendant while he was incarcerated. Following a hearing on July 18, 2008, at which defendant appeared pro se by video, the United States Immigration Court ordered that defendant be deported to the Dominican Republic because of his conviction for first-degree sexual abuse, which the Immigration Court found was an aggravated felony that mandated removal. During the hearing, defendant proclaimed his innocence and protested that he didn't want to leave the United States because he wanted to be with his children.

In March 2011, defendant moved pursuant to CPL 440.10 to vacate the judgment of conviction, claiming his Sixth Amendment right to counsel had been violated by his attorney's failure to apprise him that a plea to first-degree sexual abuse would cause his deportation. In an affidavit, defendant stated that he neither knew nor had been advised of the immigration consequences of his plea. Defendant further stated that he would not have pleaded guilty if he had known he would be deported because his motive for taking the plea was to reunite with his children as

soon as possible. Since defendant's incarceration, his two oldest children had been living with his sister, but the remaining four had been removed from their mother's care and placed in separate foster homes. Defendant stated that his paramount concern was to reunite his family under a single roof and resume his role as his children's father.

In June 2011, a hearing was held on defendant's motion. Mr. Schioppi, who defendant called as his first witness, testified that he remembered representing defendant but did not recall whether he had advised defendant about the consequences that his guilty plea could have on his immigration status. Mr. Schioppi added that he believed that he had not advised defendant about the matter because he had never practiced immigration law and it was not his practice to discuss immigration consequences with a client "[u]nless the issue arose at some point during the proceedings." Defense counsel on the CPL 440.10 motion, however, stipulated that Mr. Schioppi had previously told her that his practice at the time was to inform non-citizens with "green cards" that pleading guilty to a felony "could be used for deportation purposes."

Defendant, testifying with the aid of the interpreter, recounted his family history. He acknowledged that, before his

guilty plea in 2007, he had pleaded guilty to assault in the second degree in connection with a fight with his brother-in-law, Christopher Hernandez, in 2001. Defendant contended that Christopher had started the fight and that he had acted in self-defense. He had pleaded guilty and not claimed self-defense because his attorney had advised him he would not have to go to jail and would only receive probation.

Defendant then described the encounter with Celeste Hernandez on the evening of December 18, 2006. His account at the hearing largely agreed with his pre-arrest statement to the police, except that he testified that Celeste was already awake when he first saw her in his apartment. Defendant acknowledged physical contact with Celeste but stated that he was motivated by anger, not sexual desire. Defendant testified that he was angry with Celeste for taking a man to his apartment and leaving him alone there with his wife, and after he told her to leave and she "talked back" to him, he grabbed her "between her pants and her blouse" and forcibly moved her towards the front door to eject her. When defendant let go, Celeste left the apartment. Defendant denied Celeste's allegations that he had touched her vagina and breasts, pulled down her pants, and tried to rape her. He denied that he touched Celeste for sexual gratification.

When defendant pleaded guilty, he continued, he mistakenly thought that any physical contact with a person of the opposite sex without consent was "sexual contact," and accordingly he stated during the allocution that he had made sexual contact. After he was incarcerated, however, other inmates explained to him what the court had meant by the term. Defendant further testified that he accepted the plea bargain of five years' imprisonment because he thought the court had told him he would be definitely be sentenced to 15 years if he was convicted after a trial. Since the immigration authorities had not taken any action against him after his assault conviction, defendant wrongly believed that his status as a permanent resident insulated him from deportation. Defendant maintained that, had he known his guilty plea would lead to his deportation, he would not have pleaded guilty and would have gone to trial even though he risked a 15-year sentence if convicted.

Defendant averred that some of the things he had said during the allocution were untrue, but stated that Mr. Schioppi had instructed him to respond affirmatively to all of the court's questions. He did not understand the rights he was giving up because his attorney failed to explain those rights. When he pleaded, defendant did not understand that he was giving up his

right to a trial because he understood "trial" to mean "the judge's order was going to be executed."

Defendant's eldest son, Felix Hernandez, Jr., also testified on his behalf. Felix, Jr. verified that his father was very involved and caring, and attended his school activities, took him shopping, and took him to church. While defendant was incarcerated, he corresponded with Felix, Jr. and periodically telephoned him.

In July 2011, the hearing court denied the CPL 440.10 motion in a decision on the record that was supplemented by a brief written decision. The court applied the two-prong standard for ineffective assistance of counsel established in *Strickland v Washington* (466 US 668 [1984], *supra*), which requires a defendant to show both attorney error and prejudice flowing from that error (*id.* at 687). The court held that defendant satisfied the first prong by showing that he was inadequately warned during plea bargaining that his conviction for first-degree sexual abuse would automatically cause his deportation. The court found that Mr. Schioppi spoke to defendant about whether the immigration consequences of his plea could affect his immigration status but counsel did not clearly inform defendant that he would certainly be deported. Further, the hearing court did not believe that its

own warning corrected the problem that Mr. Schioppi's vague advice created.

However, the hearing court found that defendant had failed to satisfy the second prong of *Strickland* by showing a reasonable probability that if he had been properly warned, he would not have pleaded guilty (*see Padilla v Kentucky*, __ US __, 130 S Ct 1473 [2010], *supra*; *Hill v Lockhart*, 474 US 52, 59 [1985]). The court rejected defendant's testimony as incredible in the context of what the court viewed as "all of the false statements that defendant made during this hearing." According to the court, the rationale for defendant's plea was that he believed that if he went to trial "[c]onviction . . . was a certainty" and he would be sentenced to "significantly" more than five years' imprisonment.

The court found that the timing of the plea was significant because, in its opinion, "something clearly changed" during the lunchtime break at the *Huntley* hearing. The court speculated that, until the hearing began, defendant hoped that Celeste Hernandez would not appear to testify against him at trial. It further speculated that defendant knew he would be deported "irrespective of anything else" and that his choice was limited to either going to trial, being convicted, and serving "about 14

years" before he was deported, or pleading guilty and serving five years before he was deported. According to the court, defendant realized that his children were "not going to be in his life as he would [have liked] them to be." After observing defendant and his son testify, the court did not believe that "family fealty" would lead defendant to choose incarceration for 14 years so he could have "periodic interactions" with his children before he was deported. Despite defendant's testimony that the federal government did not take any action against him after his assault conviction, the court rejected as incredible defendant's claim that he believed he was immune from deportation because of his permanent residence status.

When deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel under the Sixth Amendment (*Strickland v Washington*, 466 at 686; *McMann v Richardson*, 397 US 759, 771 [1970]). To establish ineffective assistance, a defendant must first show that counsel's performance fell below "an objective standard of reasonableness" (*Strickland*, 466 US at 688). Where deportation is a clear consequence of a guilty plea, an attorney's failure to advise his or her client of that consequence satisfies the first *Strickland* prong (*Padilla v Kentucky*, __ US at __, 130 S Ct at 1484).

The second *Strickland* prong requires a defendant to show that he or she was prejudiced by the ineffective assistance of counsel by demonstrating a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" (*Strickland*, 466 US at 694). In the case of plea bargains, the central issue is "whether counsel's constitutionally ineffective performance affected the outcome of the plea process" (*Hill v Lockhart*, 474 US at 59).

Unlike the majority, I would find that defendant's testimony demonstrated that he was prejudiced, thus satisfying the second prong of the *Strickland* test. Defendant maintained that he was unaware of the immigration consequences when he pleaded guilty, and he took the plea because he thought doing so was the best way to minimize his separation from his six children. Defendant further testified that, if he had known that his plea would automatically cause him to be deported and indefinitely separated from his family, he would have proceeded to trial.

The hearing court's rejection of defendant's testimony about his motive for pleading guilty was not supported by the evidence adduced at the motion hearing. Instead, the hearing court

constructed a scenario that was premised on unwarranted speculation that the timing of defendant's plea was highly significant, that defendant thought he was sure to be convicted if he went to trial, and that defendant knew he would be deported if he were convicted. As for the timing, the court surmised that defendant pleaded after the lunch break for the *Huntley* hearing because he somehow learned during the break that, despite family pressure, Celeste Hernandez would testify against him. In fact, the People had provided defendant with a list of witnesses that included Celeste before the hearing, and no evidence supports the court's belief that it was ever in doubt that Celeste would testify or that anyone had ever pressured her not to testify.

The court further surmised that, when defendant learned that Celeste would testify, defendant reassessed his chances at trial and concluded that he was certain to be convicted. However, the court's finding that defendant believed he would be convicted is not based on the record, and seemingly reflected the court's own, unsubstantiated evaluation of the strength of the case against him. The court assumed that defendant would have been convicted if he had gone to trial, but the evidence against him was not overwhelming. Celeste Hernandez, the complainant, was the People's main witness, and the outcome of the case would largely

have depended on the jury's evaluation of the complainant's and defendant's credibility. Virginia Hernandez, defendant's wife, was listed on the People's witness list, but she did not observe the incident leading to the charges. Defendant's eight-year-old daughter, who was sleeping on the couch next to Celeste during the incident, was also listed as a witness, but the substance of her testimony was uncertain, as was the weight that a jury would accord to it. There was no corroborating physical evidence.

Finally, the court surmised that, when defendant pleaded guilty during the *Huntley* hearing, he already knew he would be automatically deported although his counsel had not advised him of that fact. In reaching that conclusion, the court rejected defendant's testimony that he wrongly believed that he could not be deported because of his permanent resident status. However, defendant's testimony is supported by the authorities' failure to bring deportation proceedings against him after he pleaded guilty to a felony assault. Based on defendant's personal experience, it was entirely plausible that he would wrongly believe that he was immune from deportation and that his guilty plea would not have immigration consequences. Moreover, defendant, who was proceeding as a poor person, had a limited education, and was not proficient in English, could not be expected to be familiar with

immigration law or to have sought advice from an immigration attorney.

In sum, defendant adduced evidence at the hearing that he was the sole provider for and primary caretaker of his six children. He further maintained that, out of concern for his children, he would not have pleaded guilty had he known that he would be automatically deported. Instead, defendant would have risked a 15-year sentence rather than face being separated from them indefinitely. Since defendant demonstrated that there was a reasonable probability that his counsel's ineffective assistance affected his decision to plead guilty (*see Hill*, 474 US at 59), his plea should be vacated and this case should be remanded for trial.

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

ENTERED: AUGUST 21, 2012

CLERK

Friedman, J.P., Degrasse, Freedman, Abdus-Salaam, JJ.

7267N Gentry T. Beach, et al., Index 603611/08
Plaintiffs-Respondents

-against-

Touradji Capital Management, LP, et al.,
Defendants/Counterclaim Plaintiffs-Appellants,

-against-

Gentry T. Beach, et al.,
Counterclaim Defendants-Respondents.
- - - - -
Touradji Capital Management, LP, et al.,
Counterclaim Plaintiffs-Appellants,

-against-

Vollero Beach Capital Partners, LLC, et al.,
Counterclaim Defendants-Respondents.

_____

O'Brien LLP, New York (Sean O'Brien of counsel), for appellants.

Liddle & Robinson, L.L.P., New York (David I. Greenberger of counsel), for respondents.

_____

Order Supreme Court, New York County (Richard B. Lowe III, J.), entered September 29, 2011, reversed, on the law, with costs, the order vacated, and the matter remanded for an in camera inspection of the reports to determine what portion, if any, are subject to privilege.

Opinion by Abdus-Salaam, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Leland G. DeGrasse
Helen E. Freedman
Sheila Abdus-Salaam, JJ.

7267N
Index 603611/08

_____x

Gentry T. Beach, et al.,
Plaintiffs-Respondents

-against-

Touradji Capital Management, LP, et al.,
Defendants/Counterclaim Plaintiffs-Appellants,

-against-

Gentry T. Beach, et al.,
Counterclaim Defendants-Respondents.

- - - - -

Touradji Capital Management, LP, et al.,
Counterclaim Plaintiffs-Appellants,

-against-

Vollero Beach Capital Partners, LLC, et al.,
Counterclaim Defendants-Respondents.

_____x

Defendants/counterclaim plaintiffs Touradji Capital Management, LP and Paul Touradji and counterclaim plaintiff Deeprock Venture Partners, LP appeal from the order of the Supreme Court, New York County (Richard B. Lowe III, J.),

entered September 29, 2011, which denied their motion for review of the Special Referee's ruling and to obtain discovery of forensic reports.

O'Brien LLP, New York (Sean O'Brien and Sara A. Welch of counsel), and Gibbons, P.C., New York (Elizabeth Ann Fitzwater of counsel), for appellants.

Liddle & Robinson, L.L.P., New York (David I. Greenberger, Jeffrey L. Liddle, James R. Hubbard and Jennifer Rodriguez of counsel), for respondents.

ABDUS-SALAAM, J.

At issue in this appeal is whether reports prepared by a computer forensic analyst retained by plaintiff's counsel in connection with a discovery demand by defendants for production of plaintiff's computers are privileged. The motion court held that the reports are privileged and that the privilege was not waived when the analyst read his reports to refresh his recollection prior to testifying. We reverse, and remand the matter to the motion court for an in camera inspection to determine what portions, if any, of the reports are privileged attorney work product, as the remaining portions are discoverable pursuant to CPLR 3101(d)(2).

Plaintiffs Gentry Beach and Robert Vollero were employed as portfolio managers by defendant-counterclaim plaintiff Touradji Capital Management LP (Touradji) from 2005 through 2008. After their departure, plaintiffs commenced this action seeking more than $50 million in compensation they claimed was owed to them. Defendants filed counterclaims against plaintiffs and their new business, Vollero Beach Capital Funds, including a claim that plaintiffs had stolen its proprietary information in order to form their new venture, which directly competes with defendants.

During discovery, in response to a demand by defendants, Vollero produced a CD containing electronic files related to his

work at Touradji. Defendants sought to obtain Vollero's personal laptop computers for a forensic examination, believing they contained stolen proprietary information. The Special Master denied that request, instead ordering Vollero to be deposed concerning the electronic files he had produced. At deposition, Vollero testified that he believed the files he had produced on the CD had been transferred from his personal Sony Vaio computer. He also testified that he owned an IBM Thinkpad, but did not recall putting any Touradji data on that computer. In response to this testimony, Touradji requested that it be permitted to examine both of the personal computers, or that the computers be analyzed by a third-party forensic examiner. Vollero did not comply with that request, but his counsel arranged for a forensic examination of the computers, and Touradji identified specific areas of inquiry for the examiner.

The forensic computer analyst retained by Vollero's counsel performed an examination which revealed that none of the electronic files produced by Vollero had been located on the Sony Vaio, but instead had been on the IBM Thinkpad. Additionally, the forensic analyst identified hundreds of deleted files related to Touradji on the IBM Thinkpad and restored them. He also found other files on both the Sony Vaio and the IBM Thinkpad that were responsive to Touradji's discovery demands. Those files were

produced to Touradji. A subsequent application by defendants for an order compelling Vollero to turn over the two computers to their own vendor for inspection and analysis was denied; instead the Special Referee ordered a four-hour deposition of the forensic analyst.

The forensic analyst testified about the searches, software, and methods he used to examine the computers, although he could not recall all the specifics of his findings. Touradji's counsel asked the forensic analyst whether he had prepared a "written report" of his findings concerning the Vollero computers. Plaintiffs' counsel objected to the question on the grounds of privilege. The Special Referee permitted the question to be asked, as it simply called for a yes or no answer, and the forensic analyst responded, "yes." Touradji's counsel then asked the forensic analyst if he had reviewed the reports prior to his deposition and the analyst replied that he had reviewed his reports. Touradji made an application to the Referee seeking production of those reports, asserting that the reports were not privileged, and that even if they were, the privilege was waived when the forensic analyst used the reports to refresh his recollection prior to his deposition. The Referee denied the application, noting that the reports were privileged or material prepared for litigation and not subject to discovery.

In moving to review the Referee's ruling and obtain discovery of the forensic analyst's reports, Touradji argued that this Court's decision in *Herrmann v General Tile & Rubber Co.* (79 AD2d 955 [1981]), held that once a witness has reviewed a document to refresh his recollection for a deposition, the adverse party is entitled to it, even if it is otherwise privileged. Plaintiffs opposed the motion, arguing that although the *Herrmann* case seemed to direct release of the report, *Herrmann* is not followed by the other Departments. The motion court held that the reports are privileged and denied the motion.

The work product of an attorney is privileged, and that privilege "extends to experts retained as consultants to assist in analyzing or preparing the case . . . (*Hudson Ins. Co. v Oppenheim,* 72 AD3d 489 [2010]). However,

> "that doctrine affords protection only to facts and observations disclosed by the attorney. Thus, it is the information and observations of the attorney that are conveyed to the expert which may thus be subject to trial exclusion. The work product doctrine does not operate to insulate other disclosed information from public exposure" (*People v Edney, 39 NY2d 620, 625 [1976]; see also Central Buffalo Project Corp. v Rainbow Salads, Inc.*, 140 AD2d 943 [1988] [the concept of attorney work product is narrowly construed and "embraces 'interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs' that were held, prepared or conducted by the attorney"]; *Zimmerman v*

> *Nassau Hospital*, 76 AD2d 921, 922 [1980] [only the information and observations disclosed *by the attorney* and conveyed to the expert[ ] are subject to exclusion"]).

In this case, the reports were prepared at the request of plaintiff's counsel in response to defendants' demand that they be permitted to examine plaintiff's computers. Instead of permitting defendants to conduct their own examination, plaintiff's counsel retained a forensic analyst to ostensibly perform the same search that would have been conducted by defendants if they had been given access to the computers. The only portion of the analyst's reports that could be attorney work product would be impressions, directions, etc., of counsel.

The court should have conducted an in camera review to ascertain whether any portion of the reports is attorney work product (*see Hudson Ins. Co. v Oppenheim,* 72 AD3d 489 [2010], *supra* [court conducted in camera review of the withheld documents before concluding that they were privileged]). The information in the reports as to how the search was conducted, what was found, what was deleted, when it was deleted, etc., is material prepared for litigation, and defendants have demonstrated a substantial need for the reports and are unable to obtain the information by any other means (CPLR 3101[d][2]); *see Drizin v Sprint Corp*., 3 AD3d 388, 390 [2004]). Additionally, the

conditional privilege that attaches to material prepared for litigation is waived when used by a witness to refresh a recollection prior to testimony (*see Merrill Lynch Realty Commercial Servs. v Rudin Mgt. Co.,* 94 AD2d 617 [1983]; *compare Maisch v Millard Fillmore Hosps*., 278 AD2d 838 [2000]).

To the extent that any portion of the reports prepared by the forensic analyst is attorney work product, the privilege protects the reports notwithstanding that the analyst reviewed the reports prior to his deposition (*see generally Fernekes v Catskill Regional Med. Ctr.*, 75 AD3d 959, 961 [2010]; *Geffers v Canisteo Cent. School Dist. No. 463201*, 105 AD2d 1062 [1984]). While *Herrmann* (79 AD2d 955) has been cited for the contrary result, requiring production of a report on the ground that the attorney work product privilege has been waived by the witness's review of a work product document prior to testimony (*see e.g. Crawford v Lahiri*, 250 AD2d 722 [1998]), the issue in *Herrmann* involved a tape recording of a witness interview that had been made by an insurance company, not by or for an attorney. Thus, it was material prepared for litigation, and whatever conditional privilege attached to the tape was waived when it was used to refresh the witness's recollection prior to testimony (*see Rouse v County of Greene*, 115 AD2d 162 [1985], *supra*, [citing *Herrmann*, and holding that any conditional privilege that may have attached

to a diary kept of medical treatment was waived when witness used diary to refresh recollection prior to testimony]; *see also Merrill Lynch Realty Commercial Servs. v Rudin Mgt. Co.,* 94 AD2d 617 [1983], *supra* [citing *Herrmann* and holding that any privilege for a chronology that had been kept was waived when used to prepare for deposition]). Because an inartful reference to attorney work product in *Herrmann* may indicate that the ruling in *Herrmann* applies to a waiver of attorney work product privilege, we clarify that the attorney work product privilege is not waived when a privileged document is used to refresh the recollection of a witness prior to testimony.

Accordingly, the order of the Supreme Court, New York County (Richard B. Lowe III, J.) entered September 29, 2011 which denied the motion by defendants and counterclaim plaintiffs for review of the Special Referee's ruling and to obtain discovery of forensic reports, unanimously reversed, on the law, with costs, the order vacated, and the matter remanded for an in camera

inspection of the reports to determine what portion, if any, are subject to privilege.

All concur.

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

ENTERED: AUGUST 21, 2012

CLERK