SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 16, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2103 The People of the State of New York, Respondent, SCI 2221/03

-against-

Luis Mantilla,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about March 18, 2008, which adjudicated defendant a level three sex offender and sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's challenges to his classification as a level three sex offender are improperly raised for the first time on appeal (CPLR 4017, 5501[a][3]; Correction Law § 168-n[3] [SORA appeals governed by applicable CPLR provisions]; *People v Cassano*, 34 AD3d 239 [2006], *lv denied* 8 NY3d 804 [2007]; *compare*

Chateau D'If Corp. v City of New York, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]). As an alternative holding, the aggravating factors relied upon by the hearing court amply supported its discretionary upward departure, and they were not duplicative of the risk assessment instrument.

Departures are warranted where "there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (*People v Johnson*, 11 NY3d 416, 421 [2008], quoting Board of Examiners of Sex Offenders, Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]; *see also People v Inghilleri*, 21 AD3d 404, 405-406 [2005]). Here, there are two aggravating factors supporting the hearing court's departure from the risk level calculation in the risk assessment instrument. First, contrary to defendant's suggestion, his ability and willingness to victimize not only a close family friend but even his own daughter in this way bespeaks a degree of depravity indicative of a complete inability to exercise any self-control. Yet a familial relationship with one of the victims is not specifically listed as a separate factor in the guidelines.

The victims' tender age was also an appropriate aggravating factor here. It is irrelevant that the hearing court mistakenly recited that the guidelines assign the same point value for any victim under 17, when in fact more points are assigned when a

victim is under 11; the risk assessment instrument here assigned the proper point value for victims under the age of 11. Nevertheless, the calculation's use of the guidelines' "under 11" category did not adequately take into account the factor of the victims' age to an appropriate degree. A five-year-old victim has a far more limited ability than a 10-year-old to recognize or identify mistreatment by a trusted adult.

Both the age of his victims and defendant's gross abuse of the familial trust of such young children when they were left home alone with him constituted proper aggravating factors fully supporting the hearing court's departure from the risk level calculation in the risk assessment instrument (*see e.g. People v Ferrer*, 35 AD3d 297 [2006], *lv denied* 8 NY3d 807 [2007]; *People v Hill*, 50 AD3d 990 [2008], *lv denied* 11 NY3d 701 [2008]).

Defendant also argues that his counsel rendered ineffective assistance at the classification hearing. Assuming, without deciding, that the state and federal standards for effective assistance at a criminal trial apply to a sex offender adjudication (*see People v Reid*, 59 AD3d 158 [2009], *lv denied* 12 NY3d 708 [2009]), we conclude that defendant received effective assistance (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). In particular, counsel could have reasonably concluded that there was no defense to the serious aggravating factors that led to the

upward departure (*see People v DeFreitas*, 213 AD2d 96, 101 [1995], *lv denied* 86 NY2d 872 [1995]), and defendant was not prejudiced by the alleged deficiencies in counsel's performance.

M-5788 ***People v Luis Mantilla***

Motion seeking to strike portions of respondent's brief granted.

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

ENTERED: FEBRUARY 16, 2010

David Bolonz
CLERK

Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2148 The People of the State of New York, Ind. 8043C/05
Respondent,

-against-

Maurice Benston,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Darcel D. Clark, J.), rendered June 28, 2006, convicting defendant, after a jury trial, of assault in the second degree, attempted assault in the second degree, criminal possession of a weapon in the fourth degree, criminal contempt in the first degree (four counts), criminal contempt in the second degree (two counts), intimidating a victim or witness in the third degree, aggravated harassment in the second degree and harassment in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 5½ years, unanimously affirmed.

The court properly exercised its discretion in admitting limited references, in medical records and testimony, to the fact that the victim was diagnosed as having been subjected to domestic violence involving a former boyfriend. These circumstances, including the identity of the perpetrator,

directly affected the prescribed treatment, which included having the victim treated by a social worker, providing her with literature about domestic violence, and formulating a safety plan (*see People v Rogers*, 8 AD3d 888, 892 [2004]). In any event, any error in the receipt of this evidence was harmless. Defendant's remaining evidentiary arguments are unpreserved and without merit.

The court's reasonable limitations on defendant's impeachment of the victim did not violate defendant's right of confrontation (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). During re-cross-examination, the court properly directed defense counsel to go on to another subject after he had thoroughly explored the issue of when the victim first reported a death threat made by defendant. Although defendant asserts that the court incorrectly ruled this line of questioning to be improper re-cross-examination, the record reveals that the court permitted extensive questioning on this subject and only terminated it when it became repetitive. The court also properly exercised its discretion in ruling that, if the defense wished to play a recording of a 911 call in order to impeach the victim's account of the precise information she gave the 911 operator, the recording could not be redacted to excise references to defendant's status as a parolee. In light of the victim's testimony that her attempts to relay information to the operator

were repeatedly interrupted, the court providently determined that playing a redacted recording of the call could be misleading to the jury.

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

ENTERED: FEBRUARY 16, 2010

CLERK

Gonzalez, J.P., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2149 Michael Ring, et al., Index 602434/02
Plaintiffs-Appellants,

-against-

The Printmaking Workshop, Inc.,
Defendant-Respondent.

Morrison Cohen LLP, New York (Ethan R. Holtz of counsel), for appellants.

Polly Eustis, New York, for respondent.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered November 25, 2008, which, after a non-jury trial, directed entry of judgment dismissing the complaint, unanimously reversed, on the law, without costs, to direct the entry of judgment in favor of plaintiffs consistent herewith.

Defendant tenant entered into a commercial lease with plaintiffs-landlords to occupy space at plaintiffs' premises. The lease ran from August 1, 1997 through July 31, 2004. After defendant fell substantially behind in rent, pursuant to a stipulation of settlement and subsequent court orders, defendant vacated the premises in July 2001. Plaintiffs subsequently brought a June 28, 2002 action against defendant seeking recovery of past arrears and future rent.

The record herein, as well as the stipulation itself, does not contain any facts to indicate that the parties manifestly intended the stipulation to constitute a surrender and acceptance

of the premises or that it terminated plaintiffs' rights to recover damages under the lease (*see Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689, 691-692 [1986]; *Connaught Tower Corp. v Nagar*, 59 AD3d 218 [2009]; *Gordon v Eshaghoff*, 60 AD3d 807 [2009]). Neither in the stipulation nor in the record is there any clear and unambiguous waiver by plaintiffs of their rights to recover under the terms of the lease, regardless of the termination of the landlord-tenant relationship itself (*see Connaught* at 218; *Santamaria v 1125 Park Ave. Corp.*, 238 AD2d 259, 260-261 [1997]. Inasmuch as the parties clearly contracted to make defendant liable for damages following termination, the lease provides that plaintiff shall be liable for rent after eviction, and that provision is enforceable (*see Holy Props. v Cole Prods.*, 87 NY2d 130, 134 [1995]; *Gallery at Fulton St., LLC v Wendnew LLC*, 30 AD3d 221, 222 [2006]).

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

ENTERED: FEBRUARY 16, 2010

David Spolenz
CLERK

Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2150 Yasha Morgan, an Infant by his Mother and Natural Guardian, Patricia Hunt, et al., Plaintiffs-Respondents,

-against-

A Better Chance, Inc., Defendant,

ABC Glastonbury, Inc., Defendant-Appellant.

Index 17992/07

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Mark J. Volpi of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Maryann Briganti-Hughes, J.), entered on or about October 1, 2009, which denied defendant ABC Glastonbury, Inc.'s motion to dismiss the complaint on the ground of lack of jurisdiction or forum non conveniens, without prejudice to renewal upon presentation of evidence as to its contacts within the State of New York, unanimously affirmed, without costs.

While appellant was properly served pursuant to Not-For-Profit Corporation Law § 307(a) (*see* CPLR 311[a][1]), jurisdiction is established only if plaintiffs sustain their burden of demonstrating long arm jurisdiction pursuant to CPLR 302(a) (*see Stewart v Volkswagen of Am.*, 81 NY2d 203, 207 [1993]).

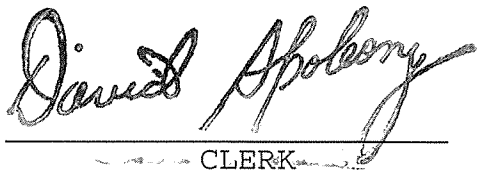
Glastonbury operates a boarding school in Glastonbury, Connecticut. The complaint alleges that the infant plaintiff was assaulted while resident in a program operated by Glastonbury and defendant A Better Chance, Inc. (Chance). Plaintiff submitted an application to Chance in New York and was interviewed by Chance in New York. In moving to dismiss for lack of personal jurisdiction, Glastonbury asserts that it is a non-profit organization located in Connecticut and that it conducts no business within this State to warrant the imposition of personal jurisdiction. Glastonbury admitted, however, that it is one of 29 "Community School Programs" affiliated with Chance and that, through agreement, it works together with Chance to accomplish their shared mission of offering young minority men of demonstrated ability the opportunity to obtain a high quality education. Chance was the sole source of student referrals to Glastonbury, and all but one of its residents were from New York.

The conduct of an agent may be attributed to the principal for jurisdictional purposes where the agent engaged in purposeful activities in this state in relation to the transaction at issue for the benefit of and with the knowledge and consent of the principal and the principal exercised some control over the agent in the matter (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). Plaintiffs provided sufficient evidence to warrant further discovery to determine whether Chance was an agent of

Glastonbury (*see Amigo Foods Corp. v Marine Midland Bank-N.Y.* 39 NY2d 391, 395 [1976]; *Edelman v Taittinger, S.A.*, 298 AD2d 301, 302 [2002]).

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

ENTERED: FEBRUARY 16, 2010



CLERK

Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román JJ.

2151-
2151A David Preminger, Index 116665/04
Plaintiff,

-against-

Jamaica Estates Holding Corp.,
Defendant-Appellant.

- - - - -

Mark Labib, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Jamaica Estates Holding Corp., et al.,
Third-Party Defendants-Appellants,

Schrier, Fiscella & Sussman, LLC,
Third-Party Defendant.

Law Offices of Jay S. Markowitz, P.C., Kew Gardens (Jay S. Markowitz of counsel), for appellants.

Gordon & Johnson, Astoria (Robert L. Gordon of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered May 16, 2008, which, in an action for specific performance of a contract for the sale of real estate, granted the motion of plaintiff purchaser (Preminger) for summary judgment, directed that a closing be held within 60 days of the date of entry of the order, and denied the cross motion of defendant seller (Jamaica Estates) for summary judgment dismissing the complaint, unanimously affirmed, with costs. Order, same court and Justice, entered on or about April 25,

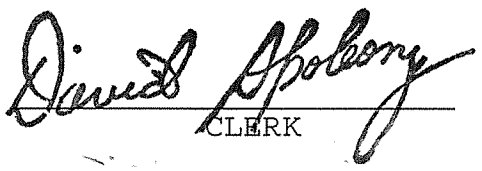
2008, which granted the motion of intervening purchasers (the Labibs) for summary judgment on their claims against Jamaica Estates arising out of a subsequent contract for the sale of the same real estate to the extent of holding that they had a claim for damages, directing that defendant law firm release their escrow deposit, with interest, within 10 days, and further directing that the net proceeds from the closing between Jamaica Estates and Preminger be held in escrow pending further order of the court, unanimously affirmed, with costs.

Documentary evidence submitted by Preminger and the Labibs on their respective motions for summary judgment, including the contracts of sale, copies of negotiated down payment checks, letters from Jamaica Estates' attorney unilaterally terminating the contracts, letters from Preminger's and the Labibs' attorneys objecting to Jamaica Estates' termination notices and asserting their full rights under the contracts, prima facie established Jamaica Estates' breach of both contracts. Contrary to Jamaica Estates' arguments, the contracts of sale did not grant it the right to unilaterally cancel if clouds on the title could not be removed within a reasonable time of the scheduled closing date. Rather, each contract gave the purchaser the option to accept less than free and clear title at the time of closing, and provided that the proceeds of the sale were to be used to satisfy any outstanding obligations against the property. We also reject

Jamaica Estates' argument that Preminger's and the Labibs' motions both required an affidavit from an insurance company representative indicating that title would have been insurable had a closing taken place, where, in both instances, the proceeds of the sale would have been more than adequate to offset all of the obligations that Jamaica Estates claimed were encumbering the property.

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

ENTERED: FEBRUARY 16, 2010



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Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2152-
2153 Essa Realty Corp., Index 105885/09
Plaintiff-Respondent,

-against-

J. Thomas Realty Corp.,
Defendant-Appellant.

Mound Cotton Wollan & Greengrass, New York (Kevin F. Buckley of counsel), for appellant.

Silversmith & Veraja, LLP, New York (Steven L. Schultz of counsel), for respondent.

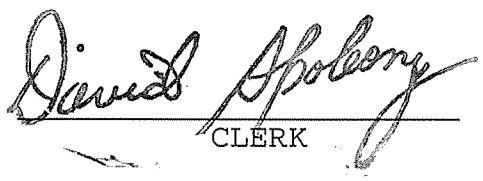
Order, Supreme Court, New York County (Carol Edmead, J.), entered on or about May 14, 2009, which granted plaintiff's motion for a preliminary injunction and directed defendant immediately to "stabilize" the wall of its building and provide plaintiff with drawings and schemata by May 19, 2009, unanimously reversed, on the law and the facts, with costs, and the motion denied. Order (same court and Justice), entered on or about June 1, 2009, which directed defendant to comply with the court's previous order by repairing gaps and/or cracks in the wall within 10 days, unanimously reversed, on the law, without costs, in view of the foregoing.

Plaintiff failed to show a likelihood of success on the merits, as there are disputed issues of fact and dueling expert testimony concerning whether defendant's building was leaning on -- and thus causing damage to -- plaintiff's building (*see*

generally Blueberries Gourmet v Aris Realty Corp., 255 AD2d 348, 349-350 [1998]). Plaintiff also failed to demonstrate any formal notification that the exterior wall of defendant's building presented an "unsafe condition" (*see* the maintenance responsibilities, including inspection and reporting requirements, in 28 NY City Administrative Code [City Construction Codes] art 302). The balancing of the equities favors defendant, which should not be compelled to physically alter its building on the basis of disputed facts.

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

ENTERED: FEBRUARY 16, 2010



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Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2154-
2155 Roberto Romero, Index 28336/02
Plaintiff-Appellant,

-against-

Twin Parks Southeast Houses, Inc., et al.,
Defendants-Respondents.

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

Wilson, Elser, Mokowitz, Edelman & Dicker LLP, White Plains (Michael L. Boulhosa of counsel), for Twin Parks Southeast Houses, Inc. and D.U. Second Realty, Co., respondents.

Fogarty, Felicione & Duffy, P.C., Mineola (Paul J. Felicione of counsel), for John C. Mandel Security Bureau, Inc., respondent.

Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about March 4, 2009, dismissing the complaint, and bringing up for review the order (same court and Justice), entered on or about October 27, 2008, which granted defendants' motion and cross motion for summary dismissal, unanimously reversed, on the law, without costs, the motion and cross motion denied, and the complaint reinstated.

"Landlords have a 'common-law duty to take minimal precautions to protect tenants from foreseeable harm,' including a third party's foreseeable criminal conduct" *(Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998], *quoting Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]). However, an injured tenant may recover damages "only on a showing that the

landlord's negligent conduct was a proximate cause of the injury" (*Burgos*, 92 NY2d at 548). Where the assailant remains unidentified, a plaintiff may meet his proximate cause burden "if the evidence renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance" (*id.* at 551).

The 240-apartment building at issue had a front entrance with a locked door and intercom, and a rear entrance leading to a parking lot through a locked door with no intercom. The building lobby was manned by security guards provided by defendant Mandel 24 hours per day. Mandel also provided a "roving guard" to patrol the building. Plaintiff alleges he was injured when an unknown assailant punched him in the face in the lobby and then ran away.

The security commander testified that the rear door lock was broken "most of the time." His testimony was at least partially corroborated by the security supervisor, who stated that sometimes "a couple days" would pass before a broken door lock was fixed. Plaintiff and the security supervisor, who witnessed the assault, both testified that the assailant was not a tenant, and that they did not recognize him. Plaintiff thus met his burden of raising a triable issue of fact as to whether the assailant was an intruder who entered the building through a negligently maintained entranceway, namely, the rear door (*cf.*

Alvarez v Masaryk Towers Corp., 15 AD3d 428, 429 [2005]).

The security commander and security supervisor both testified that loitering in the building was prohibited. Visitors were required to sign in and were not permitted to "stand around in the lobby," and would be asked to leave if discovered. Notwithstanding this testimony, a written statement given about a month after the incident, which the security supervisor admittedly signed, indicated that the assailant was a "stranger" who had been "standing near the elevators" immediately prior to punching plaintiff in the face. This statement conflicted with the testimony that visitors were not allowed to loiter in the building, and also conflicted with the security supervisor's deposition testimony that plaintiff and the assailant had emerged from the elevator together, embroiled in an argument, immediately prior to the attack. If true, the written statement would be evidence of a breach of the security company's protocol for expelling loiterers. Notwithstanding the supervisor's assertion at his deposition that the statement had been drafted by a building legal representative, and that he was tired and simply signed without reading it, the conflict between the written statement and his deposition testimony goes to the supervisor's credibility, and raises a triable issue of fact as to whether Mandel had negligently permitted the assailant to loiter in the lobby immediately prior to the assault.

The evidence in the record of police reports of numerous crimes against building residents in the five years prior to the attack -- including a number of misdemeanor and felony assaults, at least some of which appear to have occurred on the building premises -- suffices to raise at least a triable issue as to the foreseeability of the attack against plaintiff, particularly as there is no requirement that the evidence of prior criminal activity be "limited to crimes actually occurring in the specific building where the attack took place" or be "at the exact location where plaintiff was harmed" (*Jacqueline S.*, 81 NY2d at 294).

Mandel's argument that regardless of any negligence on its part, it had no duty to plaintiff and cannot be held directly liable to him, is unavailing. Through no fault of plaintiff, the contract specifications that appear in the record are incomplete, and do not fully detail the scope of Mandel's security duties. Nevertheless, it is undisputed that under the contract, Mandel provided the building with around-the-clock security. Given the magnitude of this deployment and the security guard's statutory function of preventing unlawful activity on designated property and protecting individuals from harm (*see* General Business Law § 89-f[6]), there is at least an issue of fact as to whether

Mandel "entirely displaced" or "comprehensively absorbed" Twin Parks' duty to secure the building against crime (*Sprung v Command Sec. Corp.*, 38 AD3d 478, 479 [2007]).

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

ENTERED: FEBRUARY 16, 2010

David Gpolany
CLERK

Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2158 The People of the State of New York, Ind. 34572C/05
Respondent,

-against-

Haynes Jacob,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Michael Gross, J.), rendered March 19, 2007, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The evidence, viewed as a whole, warrants the conclusion that the victim was familiar with defendant's appearance as the result of many encounters with him over a period of years, and we reject defendant's arguments to the contrary.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 16, 2010

CLERK

Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2160 In re Precious W., etc.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Carol R.,
Respondent-Appellant,

Family Support Systems Unlimited, Inc.,
Petitioner-Respondent.

Robin Steinberg, The Bronx Defenders, Bronx (Gertrude Strassburger of counsel), for appellant.

John R. Eyerman, New York, for respondent.

Steven Banks, The Legal Aid Society, New York (Judith Waksberg of counsel), and DLA Piper LLP (US), New York (Cary B. Samowitz of counsel), Law Guardian.

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about May 30, 2008, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). Contrary to respondent's contentions, the record establishes that the agency made diligent efforts to encourage and strengthen the parental relationship, including, inter alia, working with

respondent to formulate a service plan, maintaining frequent contact with her, scheduling visits between respondent and the child, referring respondent for psychiatric treatment and taking steps to assist respondent in obtaining suitable housing (*see Matter of Aisha T.*, 55 AD3d 435 [2008], *lv denied* 11 NY3d 716 [2009]; *Matter of Lady Justice I.*, 50 AD3d 425 [2008]). Despite these diligent efforts, respondent failed to plan for the child's future by failing to obtain the required psychiatric treatment and appropriate housing, and her visits with the child were sporadic (*see Matter of Jonathan Jose T.*, 44 AD3d 508 [2007]).

A preponderance of the evidence supports the determination that termination of parental rights to facilitate the adoptive process is in the child's best interests. The child has resided with her paternal grandmother for most of her life and the two have developed a close relationship (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]).

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

ENTERED: FEBRUARY 16, 2010

CLERK

Saxe, J.P., Moskowitz, Abdus-Salaam, Román, JJ.

2161 Arthur Weber, et al., Index 120164/02
Plaintiffs-Respondents/Appellants,

-against-

Baccarat, Inc.,
Defendant-Appellant,

Baccarat Real Estate, Inc., et al.,
Defendants,

625 Madison Avenue Associates, et al.,
Defendants-Appellants/Respondents,

King Freeze Mechanical Corp.,
Defendant-Respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for Baccarat, Inc., appellant.

Callan, Koster, Brady & Brennan, LLP, New York (Michael P. Kandler of counsel), for 625 Madison Avenue Associates and Related Management Corp., appellants/respondents.

Sheindlin & Sullivan, New York (Gregory Sheindlin of counsel), for Weber, respondents/appellants.

Goldberg Segalla LLP, White Plains (William T. O'Connell of counsel), for King Freeze Mechanical Corp., respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered August 1, 2008, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion to sever defendant IDI Construction Company from the action and granted their motion for summary judgment on the issue of liability under Labor Law § 240(1) as against defendants Baccarat, Inc. and 625 Madison Avenue Associates only, unanimously modified, on the law,

to grant the motion for summary judgment as against defendant King Freeze Mechanical Corp., and otherwise affirmed, without costs.

Plaintiff Arthur Weber was injured in a fall from the fourth or fifth rung of an A-frame ladder on which he was standing while installing a heating, ventilation and air conditioning (HVAC) system in a ceiling. Plaintiff testified that he heard a "pop" and saw the right rear leg of the ladder shift forward and separate from the top plate, causing the ladder to fall. This uncontested testimony that the ladder broke by itself established prima facie a violation of Labor Law § 240(1) and that the violation was a proximate cause of plaintiff's injuries (*Panek v County of Albany*, 99 NY2d 452, 458 [2003]; *Belding v Verizon N.Y., Inc.*, 65 AD3d 414 [2009]; *D'Amico v Manufacturers Hanover Trust Co.*, 177 AD2d 441, 442 [1991]). The fact that plaintiff was the only witness to his accident presents no bar to summary judgment in his favor since defendants failed to present a conflicting theory with supporting evidence or to raise any bona fide credibility issues with respect to his testimony (*see Rodriguez v Forest City Jay St. Assoc.*, 234 AD2d 68, 69-70 [1996]; *Klein v City of New York*, 222 AD2d 351, 352 [1995], *affd* 89 NY2d 833 [1996]).

Summary judgment should have been granted as against defendant King Freeze, as the record shows that King Freeze was a

statutory agent of defendant IDI Construction Company (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). King Freeze had the authority to supervise and control the work being done by plaintiff pursuant to the terms of its subcontract with IDI (*see e.g. McGurk v Turner Constr. Co.*, 127 AD2d 526, 529 [1987]). Moreover, it demonstrated this authority by sub-contracting a portion of the HVAC work to plaintiff's employer (*see Williams v Dover Home Improvement*, 276 AD2d 626, 626 [2000]). The fact that IDI possessed concomitant or overlapping authority to supervise the entire renovation, including the installation of the HVAC system, does not negate King Freeze's authority to supervise and control the installation of the HVAC system (*Nephew v Klewin Bldg. Co., Inc.*, 21 AD3d 1419, 1420-1421 [2005]). Whether King Freeze actually supervised plaintiff is irrelevant (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rizzo v Hellman Elec. Corp.*, 281 AD2d 258 [2001]).

The motion court properly granted plaintiffs' motion to sever defendant IDI from the proceedings, as discovery had been completed and the case was ready to go to trial at the time IDI's

bankruptcy petition was filed (*see Golden v Moscowitz*, 194 AD2d 385 [1993]), and severance does not prejudice the co-defendants (*see Roman v Hudson Tel. Assoc.*, 11 AD3d 346 [2004]).

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

ENTERED: FEBRUARY 16, 2010

CLERK

Gonzales, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2162 Victor Velez, et al., Index 20810/04
Plaintiffs,

-against-

19-27 Orchard Street LLC, et al.,
Defendants.

- - - - -

[And Other Actions]

- - - - -

Avante Building and Consulting Corp.,
Third Third-Party Plaintiff-Respondent,

-against-

Thomas Klein, et al.,
Third Third-Party Defendants-Appellants,

YHT Building Contractors Inc.,
Third Third-Party Defendant.

Scher & Scher, P.C., Great Neck (Robert A. Scher of counsel), for appellants.

Gorton & Gorton LLP, Mineola (John T. Gorton of counsel) for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter Jr., J.), entered December 29, 2008, which denied appellants' motion to dismiss the third third-party complaint, unanimously affirmed, without costs.

In this personal injury action stemming from a construction accident, alleging violations of the Labor Law and Industrial Code, third-party defendant/second third-party defendant/third third-party plaintiff Avante asserts that plaintiff's injuries were proximately caused by third third-party defendant Klein, who

purportedly acted as general contractor at the construction site and allegedly directed plaintiff to perform the work that led to his injury without providing safety equipment. Also named as third third-party defendants were corporate entities that purportedly had significant ties to the construction project and were allegedly owned and operated by Klein without regard to their corporate status.

On a motion to dismiss, a complaint is afforded a liberal construction, the facts as alleged are accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court determines only whether those facts fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Contrary to appellants' argument, the third third-party complaint specifically alleges that Klein was a negligent tortfeasor, both in his personal capacity and as president and sole owner of the other third third-party defendants. Those allegations, if true, would support Avante's claim for judgment over or indemnification from appellants.

There being no indication in the record that appellants ever challenged the third third-party complaint insofar as it sought to pierce the corporate veils of those third third-party

defendants, that particular argument has been waived on appeal (*see Omansky v Whitacre*, 55 AD3d 373 [2008]). Were we to consider the argument, we would find it without merit.

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

ENTERED: FEBRUARY 16, 2010

CLERK

Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2163 In re 450-452 East 81st Street, LLC,
Petitioner-Appellant,

-against-

New York State Division of Housing and Community Renewal, et al.,
Respondents-Respondents.

Index 107201/08

Sidrane & Schwartz-Sidrane, LLP, Hewlett (Steven D. Sidrane of counsel), for appellant.

Gary R. Connor, New York (Caroline M. Sullivan of counsel), for DHCR, respondent.

Kossoff & Unger, New York (Zoe L. Davidson of counsel), for Bruce Sanford, respondent.

Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered December 10, 2008, dismissing a proceeding to challenge an administrative decision that affirmed a Rent Administrator's determination that the apartment in question remained subject to rent stabilization, froze the rent at $1,325, imposed treble damages, and granted the tenant a $495 refund after deducting $7,950 in rent arrears, unanimously affirmed, without costs.

Even considering evidence as to renovations made in the apartment more than four years before the filing of the overcharge complaint, petitioner failed to meet its burden of proving it did not willfully charge excessive rent, or that

DHCR's order was arbitrary or capricious (*see Matter of H.O. Realty Corp. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 103 [2007]). In light of contradictory evidence submitted by petitioner that the work had actually been completed, the determination was appropriately "committed to the discretion of DHCR" (*Matter of Ador Realty, LLC v Division of Hous. & Community Renewal*, 25 AD3d 128, 140 [2005]). Nor was there any evidence that the owner had ever charged rent for this apartment in excess of $2000 (which would have resulted in high-rent vacancy deregulation), or that any of the rents were preferential.

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: FEBRUARY 16, 2010

CLERK

Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2164 The People of the State of New York, Ind. 3432/06
Respondent,

-against-

Federico Ortiz,
Defendant-Appellant.

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

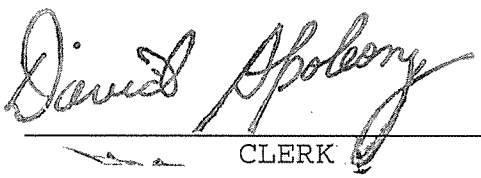
Robert M. Morgenthau, District Attorney, New York (Lindsey M. Kneipper of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about June 14, 2007,

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

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

ENTERED: FEBRUARY 16, 2010



CLERK

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

Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2166 Kevin McDonald,
Plaintiff,

Index 26459/02
83146/03

-against-

450 West Side Partners, LLC, et al.,
Defendants.

- - - - - - -

Safeway Steel Products,
Third-Party Plaintiff-Respondent,

-against-

All-Safe Height Contracting Corp.,
Third-Party Defendant-Appellant.

Melito & Adolfsen P.C., New York (Ignatius John Melito of counsel), for appellant.

Ahmuty Demers & McManus, Alberton (Brendan T. Fitzpatrick of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 8, 2009, awarding judgment to third-party plaintiff (Safeway) in the amount of $8.5 million, and bringing up for review an order, same court and Justice, entered July 8, 2009, which granted Safeway's motion to set aside the jury verdict in third-party defendant's (All-Safe) favor as against the weight of the evidence and directed a verdict in favor of Safeway, unanimously reversed, on the law, without costs, the motion to set aside the verdict denied and the verdict reinstated. The Clerk is directed to enter judgment accordingly.

All-Safe was hired by Safeway, as a subcontractor, to

construct a "sidewalk bridge" in a designated location for a specified price. Safeway previously had been hired by the building owner and manager to perform such work. Safeway's June 2002 purchase order to All-Safe included an indemnification clause, providing that All-Safe would indemnify Safeway for personal injury litigation arising from its performance.

The purchase order, engineer's plans and the related invoice all reference only the construction of the sidewalk bridge, and make no reference to the additional construction of an eight-foot "catchall." The testimony of the parties is generally consistent, except with respect to whether the subject of the construction of the catchall was discussed as part of the job. At trial, Safeway's representative claimed that the need to construct the catchall had been discussed prior to the construction of the sidewalk bridge, and that All-Safe knew that it was part of the contracted-for work. All-Safe's witnesses denied this, explaining that the work was done only as an accommodation to Safeway when Safeway was told by the building owner and manager to construct the catchall, for which All-Safe expected to be subsequently compensated. During construction of the catchall, an employee of All-Safe was injured.

During the resulting litigation, Safeway asserted that it was protected by the indemnification clause, insofar as the construction of the catchall, leading to the injuries, was

undertaken pursuant to the June 2002 purchase order. Subsequent to the accident, Safeway generated another purchase order, accompanied by engineer's drawings, for the construction of a new catchall which All-Safe also constructed. This second purchase order, which contained no indemnification clause, provided for compensation, which All-Safe claimed also incorporated the labor costs associated with the construction of the first catchall. The jury returned a unanimous verdict in favor of All-Safe. The trial court set aside the verdict as against the weight of the evidence and directed a post-trial verdict in favor of Safeway.

Due deference is accorded to the jury's findings of credibility when evaluating conflicting testimony regarding whether a contract has been validly entered (*see Zere Real Estate Servs., Inc. v Adamag Realty Corp.*, 60 AD3d 758 [2009]) and, in reviewing the competing narratives provided by the witnesses, we consider whether the verdict could not be reached under any fair interpretation of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498 [1978]; *Husak v 45th Ave. Hous. Co.*, 52 AD3d 782 [2008]). Moreover, "in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict" (*Nicastro v Park*, 113 AD2d 129, 133 [1985]; *see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]).

Here, we find no basis to conclude that the verdict finding

that the parties did not intend, as demonstrated by their words, writings or conduct that the June 2002 purchase order covered the installation of the catchall, was against the weight of the evidence. The jury was confronted with conflicting testimony on the contested issue and we find no basis to disturb its findings. We further note that even if the verdict had been against the weight of the evidence, the lawful remedy would have been to order a new trial and not enter judgment in favor of Safeway (*Cohen*, 45 NY2d at 498).

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

ENTERED: FEBRUARY 16, 2010

CLERK

Gonzalez, P.J., Saxe, Moskowitz, Abdus-Salaam, Román, JJ.

2167N Edwin Rodriguez, etc., et al., Index 15742/05
Plaintiffs-Appellants,

-against-

United Bronx Parents, Inc.,
Defendant-Respondent.

Reardon & Sclafani, P.C., Tarrytown (Michael V. Scalfani of counsel), for appellants.

Kenny, Stearns & Zonghetti, LLC, New York (Gino A. Zonghetti of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered August 26, 2009, which, to the extent appealed from, granted plaintiff's cross motion pursuant to CPLR 3126 to strike defendant's answer solely to the extent of granting plaintiff a missing witness charge as to Nadia James and Victor Martinez, unanimously modified, on the law and the facts, the cross motion to strike granted and the matter remanded to Supreme Court for a trial on the issue of damages, and otherwise affirmed, without costs.

"Although actions should be resolved on the merits whenever possible (*see Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213 [2002]), a court may strike a pleading as a sanction against a party who refuses to obey an order for disclosure (*see* CPLR 3126[3])" (*Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [2004]). A court may strike an answer only when the moving party establishes

"a clear showing that the failure to comply is willful, contumacious or in bad faith" (*see Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1999]).

Here, plaintiff established that defendant's failure to comply was willful and contumacious, given its repeated and persistent failure to comply with five successive disclosure orders (*see Goldstein v CIBC World Mkts. Corp.* 30 AD3d 217 [2006]; *Min Yoon v Costello*, 29 AD3d 407 [2006]; *compare Pascarelli v City of New York*, 16 AD3d 472 [2005]). Defendant's failure to adequately explain what efforts were made to locate the documents it failed to disclose, or to explain its inability to provide the last known addresses of its former residents or employees, also supports a finding that its failure to comply was willful. Furthermore, defense counsel's "Affirmation of Search" did not indicate whether he was the custodian of defendant's records, what records were searched, who conducted the search, what the search consisted of, and the statement was made upon "information and belief." Accordingly, this statement is devoid of detail and insufficient.

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

ENTERED: FEBRUARY 16, 2010

CLERK

Tom, J.P., Sweeny, McGuire, DeGrasse, Freedman, JJ.

1062
[M-3567] In re Eddy Marte, et al., Ind. 2420/08
Petitioners,

-against-

Hon. Carol Berkman, etc., et al.,
Respondents.

David Segal, New York, for Eddy Marte, petitioner.

Robert Blossner, New York, for Luis Marte, petitioner.

Andrew M. Cuomo, Attorney General, New York (Michael J. Siudzinski of counsel), for Hon. Carol Berkman, respondent.

Robert M. Morgenthau, District Attorney, New York (Nicholas N. Viorst of counsel), for Robert M. Morgenthau, respondent.

Application pursuant to CPLR article 78 in the nature of prohibition seeking, on the ground of double jeopardy, to prevent retrial of petitioners before respondent Justice under New York County Indictment 2420/08, denied, and the proceeding dismissed, without costs.

All concur except DeGrasse and Freedman, JJ. who concur in a separate memorandum by Freedman, J.; Sweeny and McGuire, JJ. who concur in a separate memorandum by McGuire, J. and Tom, J.P. who dissents in a memorandum as follows:

FREEDMAN, J. (concurring)

The original trial court was not compelled by manifest necessity to declare a mistrial and terminate the proceedings after two days of deliberations (*see Matter of Randall v Rothwax*, 78 NY2d 494, 498 [1991], *cert denied sub nom Morgenthau v Randall*, 503 US 972 [1992]), because the court reasonably could have asked the jury to continue deliberating past 5:00 p.m. on the date the trial was terminated, a Friday. Although two of the jurors indicated that they had scheduling problems during the following week, the court had already directed them to report for deliberations on the following Monday. Moreover, the court failed to confirm that the jury was hopelessly deadlocked either by polling the jurors or by asking the foreperson in the presence of the jury whether a unanimous verdict could be reached in a reasonable amount of time (*see People v Duda*, 45 AD3d 1464, 1465 [2007], *lv denied* 10 NY3d 764 [2008]; *Matter of Guido v Berkman*, 116 AD2d 439, 443 [1986]).

However, the need for manifest necessity for the mistrial was obviated by petitioners' consent, which can be implied from the circumstances (*see People v Ferguson*, 67 NY2d 383, 388-389 [1986]). Defense counsel were aware and had discussed with the court that the jury sent a note on Friday morning stating that it was at an impasse on some counts, that later two jurors had claimed that they could not resume deliberations the following

week, and that there were no alternates available for substitution. After receiving a second note on Friday afternoon stating that the jury was at an impasse, the court stated that it was inclined to take a partial verdict and declare a mistrial as to the remaining counts, and asked counsel if they wished to be heard. One of petitioners' counsel said "no" and the other remained silent. Immediately thereafter, the court called in the jury, took a verdict of not guilty on the first two counts, and asked counsel if they had "anything for the record." After defense counsel again remained silent, the court thanked the jury for its service and discharged it. It was only at that point that defense counsel asked that the jury be held, and, after the court stated that it was declaring a mistrial "so[] that the record is clear," counsel first registered their objection. Under the circumstances, the court by its actions was carrying out its previously announced intention to terminate the trial. Defense counsel had been given ample notice of that intention and an opportunity to be heard. Accordingly, counsel's failure to object when the court invited them to speak, or at the latest before the jury was discharged, constituted implied consent sufficient to deny petitoners' application (*see id.* at 386-387, 389).

McGUIRE, J. (concurring)

I agree the petition should be dismissed because petitioners (the defendants in the underlying criminal prosecution) implicitly consented to the mistrial. Additional discussion of the relevant facts and legal principles, however, is warranted. I also agree with Justice Berkman that "[t]he declaration of a mistrial was within the court's discretion, and a retrial of the undecided count would not offend the double jeopardy rule."

After an eight-day trial, the court submitted to the jury the three counts of robbery charged in the indictment (attempted first-degree robbery and two counts of attempted second-degree robbery) and the lesser included offense of attempted third-degree robbery. Deliberations commenced on a Thursday and the jury, throughout the course of that day, requested exhibits, a readback of testimony and additional instruction on the law. The next morning, the jury requested additional exhibits, another readback of testimony and instruction. The jury also reported that it had reached an agreement on one count, was close to an agreement on another and was at an "impasse" on the remaining two counts. The court declined the invitation of defendants to take a partial verdict. Rather, after providing the additional readback and instruction the jury had requested, the court gave the jury a modified *Allen* charge (*Allen v United States*, 164 US 492 [1896]). Early that afternoon, the court responded to

additional requests for readbacks of testimony and legal instruction. In addition, the court substituted an alternate juror for a juror who was traveling out of town and had to make a flight. At that juncture, there were no remaining alternates. However, two other jurors, jurors 3 & 8, asked to be relieved from service due to obligations they had that required them to be out of state; one juror was scheduled to leave on Sunday and the other on Monday morning. Explaining that there were no alternates, the court advised the jurors that they would have to return on Monday if a verdict was not returned by the end of the day. Late that afternoon, at about 5:30 p.m., the jury sent another "impasse" note. That is, although the jury reported that it had reached a verdict on two counts, it declared anew that it remained "at an impasse" on the remaining counts. Another note renewed the request of juror 8 to be released from jury duty.

After the court made the notes available to counsel and reported their contents, the following occurred:

> The Court: My inclination is to take the verdict and declare a mistrial as to the other charges.
>
> [The Prosecutor]: I guess that sounds like where we're going, Judge.
>
> The Court: Do counsel want to be heard?
>
> [Counsel for defendant Eddy Marte]: No.
>
> The Court: Okay. If there is nothing else, we'll bring them in.
>
> Court Officers: Yes, Judge

[Counsel for defendant Eddy Marte]: Judge, you'll take a partial?

The Court: I'll take a partial verdict.

The Court then took the partial verdict. When the Clerk thanked the foreperson and told the foreperson to be seated, the following occurred:

The Court: Counsel, anything for the record?

[The Prosecutor]: Nothing for the record, Your Honor.

The Court: All right. I want to thank you very much. I know we kept you much longer that I originally indicated it would take. I think you've performed an excellent service, clearly by virtue of your notes and your attention that you have truly become involved in this case in its determination. So, thanks very much. Have a good weekend.

Court Officer: Jury exiting.

As is evident, defendants voiced no objection to the declaration of a mistrial before the jury was discharged. Defendants did not voice an objection when the court stated that its "inclination" was to declare a mistrial; or when the court went on to make clear that it would take a partial verdict, which, under the circumstances, further indicated even if it did not confirm that the court was making good on its "inclination"; or when the court expressly asked counsel, after taking the partial verdict, if they had "anything for the record"; or when the court was thanking the jury or telling the jurors to have a good weekend; or when the jury began to exit the courtroom. Only at some point after the jury was discharged -- at a point when,

the record is not definitive on the issue, the jurors may or may not have left the jury room[1] -- did defendants object to the declaration of a mistrial as to the third count of the indictment. At that point, of course, the objection was pointless (*see Warner v New York Cent. R.R. Co.*, 52 NY 437, 443 [1873] ["after the verdict has been received . . . and the jury has been dismissed, they have not the power to be reassembled and alter their verdict"]; *People v Satloff*, 56 NY2d 745, 746 [1982] [after discharge of the jury "it was no longer possible to remedy the defect [in the verdict], if any, by resubmission to the jury for reconsideration of its verdict"]).

I agree with the memorandum decision that defendants implicitly consented to the mistrial. As we have stated, a defendant's "consent need not be express, but may be implied from the totality of circumstances attendant upon the declaration of a mistrial" (*Matter of Guido v Berkman*, 116 AD2d 439, 444 [1986]; *see also People v Ferguson*, 67 NY2d 383, 388-389 [1986]). Although the defendants in *Matter of Guido* "were not on notice of an impending mistrial" (116 AD2d at 444), defendants certainly were here. Defense counsel (1) participated in discussion of the subject of a mistrial, expressly stating that they had nothing to say when the prosecutor acknowledged that a mistrial was "where

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[1]The record reflects only that the court stated "let's hold them," not whether the jurors in fact were held.

we're going," (2) had multiple opportunities to object to a mistrial before the jury was discharged and (3) did not object when the court discharged the jury or as the jury was leaving the courtroom (*see Matter of Matthews v Nicandri*, 252 AD2d 657, 658 [1998], *appeal dismissed* 92 NY2d 945 [1998] [finding implied consent to mistrial and relying on the "well-established principle that, in the absence of any objection, a defense counsel's active participation in a colloquy concerning the grant of a mistrial will give rise to a finding of consent"]; *People v Lilly*, 187 AD2d 674, 675 [1992], *lv denied* 81 NY2d 973 [1993] ["Not only did the defense counsel actively participate in the various colloquies concerning the jury's inability to reach a verdict, he also registered no protest when the court announced that it believed the jury would be unable to overcome the impasse and when it ultimately declared a mistrial"].

A crucial consideration here is that, even indulging the fanciful notion that defense counsel were not on notice before the partial verdict was taken that the court was going to declare a mistrial, it unquestionably was clear that the court was granting a mistrial when it was thanking the jurors for their service and wishing them a good weekend. The silence of counsel even at this crucial juncture requires a finding of consent. Such a finding is all the more reasonable given that counsel pounced with their belated objections only after the jury had

been discharged and left the courtroom. Under these circumstances, it encourages gamesmanship to hold that implicit consent cannot be found when a defendant who believes one of his fundamental constitutional rights is being violated does not register any protest (*cf. People v Dekle*, 56 NY2d 835, 837 [1982]). Especially because of the severe consequences for the People's ability to enforce vitally important criminal laws, permitting defendants to parlay their silence into the windfall of a dismissal of the remaining count of attempted robbery would be an embarrassment to the law.

With respect to the question of manifest necessity, "the declaration of a mistrial due to a deadlocked jury is a matter of discretion for the Trial Judge, who is in the best position to determine whether a mistrial is required under the circumstances of the case, and this decision must be accorded great deference" (*People v Sanders*, 51 AD3d 825, 825 [2008], *lv denied* 11 NY3d 741 [2008] [internal quotation marks omitted]). The weighty substantive concern supporting this requirement of great deference was explained by the Supreme Court in *Arizona v Washington* (434 US 497, 509-510 [1978]):

> If retrial of the defendant were barred whenever an appellate court views the 'necessity' for a mistrial differently then a trial judge, there would be a danger that the latter, cognizant of the serious societal consequence of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the

> public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.

Neither the memorandum decision nor the dissent gives appropriate deference to the trial court's decision. The memorandum states that "the court failed to confirm that the jury was hopelessly deadlocked either by polling the jurors or by asking the foreperson in the presence of the jury whether a unanimous verdict could be reached in a reasonable amount of time." But this hindsight criticism of the court -- neither defendant asked either for the jury to be so polled or the foreperson to be so questioned -- disregards what is most important: the jury reported in its last note, as it had indicated in an earlier note that it was at an impasse on two of the four counts (*see United State v Byrski*, 854 F2d 955, 961 [7th Cir 1988] [of the factors appropriately informing a trial judge's decision whether or not a jury is deadlocked, "the most critical factor is the jury's own statement that it was unable to reach a verdict"] [internal quotation marks omitted]; *see also United States v Salvador*, 740 F2d 752, 755 [9th Cir 1984], *cert denied* 469 US 1196 [1985] [same]). Furthermore, in the course of taking the partial verdict, the foreperson confirmed in response to the court's inquiry that the jury was undecided on all counts other than the two counts as to which it had found each defendant not

guilty. And because the second impasse note had been preceded by a modified *Allen* charge, the court was entitled for this additional reason to conclude that further deliberations were pointless.

The memorandum also states that "the court reasonably could have asked the jury to continue deliberating past 5:00 p.m. on the date the trial was terminated, a Friday." This objection disregards the very danger recognized in *Arizona v Washington* (434 US 497, *supra*) that the jury might hastily return an unjust judgment. That danger certainly was exacerbated by the fact that two of the jurors had requested to be discharged at the end of that day due to travel plans that were important to each of them. The memorandum notes that "the court had already directed [the two jurors] to report for deliberations on the following Monday." But the court had not directed all the jurors to report that Monday and doing so risked coercing a verdict on Friday. This objection, moreover, wrongly assumes that the trial judge could not properly have concluded that further deliberations were pointless.

The dissent is not persuasive. In the first place:

> a judge's mistrial declaration is not subject to attack . . . simply because he failed to find 'manifest necessity' in those words or to articulate on the record all the factors which informed the deliberate exercise of his discretion (*Arizona v Washington*, *supra* 434 US at 517).

Second, the dissent concludes that "[t]he record reflects that the decision to terminate the trial was the result of the court's attempt to accommodate the interests of juror number 8 . . . and juror number 3. . ." Hopefully, the trial court was sympathetic to the plight of these jurors; it certainly is fair to assume it was. But the dissent's conclusion that accommodating these jurors was in fact the reason for the court's decision is just baseless as well as manifestly unfair. Indeed, as Justice Berkman wrote, "it is clear from this record that the court was fully aware that it could not declare a mistrial simply to accommodate the jurors' convenience."

The dissent is no less unfair to the trial judge in asserting that "the trial court failed to consider available alternatives before declaring a mistrial." Nothing in the record comes close to showing that the trial judge committed such an elementary error. The most that fairly can be said is that the trial judge did not discuss the subject on the record. But at the risk of belaboring the point, the double jeopardy rights of the defendants were not thereby violated (*Arizona v Washington*, 434 US at 517 [a trial judge's declaration of a mistrial "is not subject to collateral attack . . . simply because he failed . . . to articulate on the record all the factors which informed the deliberate exercise of his discretion"]).

The possibility that defendants might consent to proceeding with less than 12 jurors was not raised by counsel until after the jury was discharged, when it was too late. In any event, the dissent's criticism of the trial court on this ground assumes that the court erred in concluding that further deliberations were pointless. If the court did not err in concluding that further deliberations were pointless, this criticism also is pointless. Morever, unless a trial judge is informed by defense counsel that the defendant is willing to proceed with 11 jurors, the judge should not be faulted if the record does not reflect consideration or discussion of this extraordinary possibility prior to the discharge of the jury.

Finally, the notion that defendants "were incapable of making a contemporaneous objection" is supported by nothing at all. Indeed, it is refuted by the record. Again, even assuming that counsel somehow had been in the dark previously about the court's intentions, they said nothing as the jurors were being thanked and discharged or as they were leaving the courtroom. The reality is that trial judges, sometimes perhaps to their dismay, are not uncommonly interrupted by counsel. Criminal defense attorneys are not and cannot be a timorous lot. Even assuming without reason that counsel were exceptionally timorous,

that would not excuse their silence. The only reasonable conclusion is that they impliedly consented and should not be permitted to have their cake and eat it, too.

TOM, J.P. (dissenting)

This article 78 proceeding raises the issue of whether petitioners consented to the declaration of a mistrial and whether the court properly considered all relevant circumstances as well as the available alternatives before finding the jury deadlocked. The mistrial declaration followed a brief period of deliberation by a newly constituted jury that never received an *Allen* charge and was immediately met by petitioners' objection. Under these circumstances, petitioners cannot be said to have acquiesced in the ruling. Furthermore, the court failed to consider alternatives to discharging the jury to accommodate the travel plans of two of the jurors. Thus, the declaration of a mistrial was not a matter of manifest necessity and cannot be considered a provident exercise of the court's discretion. Accordingly, retrial is barred by the prohibition against double jeopardy.

Petitioners, brothers, were jointly tried under a three-count indictment charging them, respectively, with attempted robbery in the first degree (display of a weapon), attempted robbery in the second degree (physical injury to the victim) and attempted robbery in the second degree (aided by another person). At a jury trial, they were acquitted of counts one and two, and the court (John Cataldo, J.) directed a mistrial with respect to count three. Petitioners now seek to permanently enjoin their

retrial on count three of the indictment as violative of the constitutional prohibition against double jeopardy.

The trial was conducted over the course of eight days commencing February 18, 2009. On March 5, 2009, the court issued its instructions to the jury, submitting in addition to each count of the indictment the lesser included offense of attempted robbery in the third degree. Prior to the start of jury deliberations, petitioners stipulated that if a verdict were not reached by 1:00 P.M. the following day, the remaining alternate juror would be substituted for juror number 2. On the morning of Friday March 6, the jury sent a note at 11:50 A.M. indicating that they had reached a verdict on count 1, were close to a verdict on another count (count 2) and evenly split and at an impasse on the remaining charges. At that time, counsel stated that their clients would accept a partial verdict; however, the court declined and, in an abbreviated *Allen* charge (*see Allen v United States*, 164 US 492 [1896]), directed the jurors to continue deliberating.

At 12:20 P.M., the jury sent another note and were returned to the courtroom for requested instruction concerning lesser included offenses. At this time (approximately 12:40 P.M.), the court dismissed juror number 2 and directed the jury to begin deliberations anew with the alternate juror substituted in accordance with the stipulated agreement. Counsel for defendant

Eddy Marte expressed the "defense position" that the court was required to take a partial verdict from the original panel that included juror number 2. The court rejected this argument. Shortly thereafter, the court denied a request by juror number 3 to be excused from the jury for one day on the following Monday to be with his family in Philadelphia. The court also denied a request by juror number 8 to be discharged from the jury at the end of the day to attend a conference in San Diego in connection with his job. The juror explained that he had not previously raised the matter with the court because he did not expect the trial to be so protracted.

Late in the afternoon (some time after 4:30 P.M.), the court addressed two more notes received from the jury. In one, juror number 8 reiterated his request to be discharged at the end of the day. In the other, the jury indicated that they were unanimous as to two counts and at an impasse on the other two. The court advised counsel, "My inclination is to take the verdict and declare a mistrial as to the other charges." The prosecutor responded, "I guess that sounds like where we're going, Judge." The court then offered defense counsel the opportunity to be heard, eliciting no response.

The court proceeded to take the jury's verdict of not guilty as to counts 1 and 2 and undecided as to count 3 and the lesser included offense. Asked if the defense had "anything for the

record," neither attorney raised any objection. But immediately after the court officer said "Jury exiting," the transcript shows the court, outside of the jury's presence, directing that the jury be held while it conducted an off-the-record conference with counsel. Immediately after the conference, the court stated, "So that the record is clear, I'm declaring a mistrial as to Count Three." Counsel for Eddy Marte responded, "So, that the record is clear, we're not consenting to a mistrial because they could have stayed until Monday," when the court could have delivered an *Allen* charge. The court stated, "I gave them an abbreviated Allen charge," to which counsel responded that declaring a mistrial "needed a full Allen charge."

Counsel advised the court that it was not obligated to grant the request of juror number 8 to be discharged and could direct the jury to continue deliberations the following Monday. Alternatively, counsel declared their willingness to proceed with only 11 jurors so as to permit juror number 8 to attend his job conference. When the court expressed doubt that the defense could consent to an 11-person jury, counsel replied, "I've done it." The court responded, "Okay. Fine. I still find that it was an impasse; and they're excused, over your objection."

The case was returned to the trial calendar for April 29, 2009. On that date, petitioners made a motion to dismiss the indictment on the ground of double jeopardy. The court (Carol

Berkman, J.) denied the motion, finding that the declaration of a mistrial was within the trial court's discretion. The court observed that while the trial justice had given a "somewhat abbreviated *Allen* charge," an *Allen* charge is not an absolute requirement (citing *Matter of Plummer v Rothwax*, 63 NY2d 243, 253 [1984]), that the trial "court stated repeatedly that it was persuaded that the jurors were at an impasse, even aside from the convenience issue, and that the mistrial was manifestly necessary." The court added, "Moreover, the defense did not timely object to the declaration of a mistrial, as the jury had been discharged before the defense protested, and the defense had plainly been given a chance to be heard on the mistrial issue, but said it did not want to be."

Petitioners brought this article 78 proceeding contending that the trial court failed to conduct the obligatory inquiry before declaring a mistrial. Citing this Court's decision in *Matter of Capellan v Stone* (49 AD3d 121, 126 [2008] *lv denied* 10 NY3d 716 [2003]), they contend that where a mistrial is declared without the consent of the defendant, the protection afforded by the prohibition against double jeopardy bars retrial unless the People meet their "heavy" burden to demonstrate that the declaration was founded upon manifest necessity (*see Arizona v Washington*, 434 US 497, 505 [1978]). The People respond that petitioners "tacitly consented" to the declaration of a mistrial,

thereby obviating the need to find manifest necessity. They further maintain that, in any event, the declaration of a mistrial was a proper exercise of the trial court's discretion.

As to the issue of petitioners' consent, the People argue that defense counsel acquiesced in the court's declaration of a mistrial with respect to count 3 of the indictment by failing to state any objection when the court accepted the partial verdict. They adopt the reasoning of the motion court, which implicitly found that counsel raised no objection until after the jury had been discharged and conclude that this late protest was ineffective. This analysis does not withstand scrutiny.

As a general rule, a defendant in a criminal proceeding is obligated to preserve an asserted error for review by raising a timely objection, thereby apprising the court that the ruling is contrary to law and affording the court an opportunity to remedy the error (*People v Gray*, 86 NY2d 10, 20-21 [1995]). It is axiomatic, however, that a defendant has no obligation to object to a ruling until it is actually made (CPL 470.05[2] ["a question of law with respect to a ruling . . . is presented when a protest thereto was registered by the party claiming error, at the time of such ruling . . ."]).

In the course of jury deliberations in this matter, the trial justice expressed only his "inclination . . . to take the [partial] verdict and declare a mistrial as to the other

charges." The tentative nature of the court's suggested propensity is demonstrated by the equivocation inherent in the prosecutor's response, to wit, "I guess that sounds like where we're going, Judge." Up to this point, the court had not declared a mistrial as to the remaining count and counsel were not obligated to register an objection. The court's "announced intention" is not a ruling. In fact, there was no ruling for counsel to protest. It was not until after the court had actually taken the partial verdict and then after an off-the-record conference that it declared a mistrial on count 3. While the content of the discussion is not known, it is reasonable to assume that counsel took the opportunity to advise the court of its omission to issue a ruling because the very next item in the transcript is the court's statement, "So, that the record is clear, I'm declaring a mistrial as to Count Three." Counsel's objection followed immediately. The court then responded to counsel that the jurors are "excused, over your objection."

The People's argument that the protest was untimely because, "having discharged the jury, the court had no authority to reassemble them and compel that they return to deliberations" is disingenuous. The transcript of the proceedings clearly indicates that, prior to conducting the off-the-record conference, the court directed that the jurors be held. Immediately before conducting the bench conference and outside

the presence of the jury, the court asked counsel if he wanted the jurors held and, after a brief colloquy, stated, "Okay. So, let's hold them." The record is devoid of support for the People's intimation that all 12 jurors, contrary to the court's direction were not being held outside the courtroom and still present and available. The presumption of regularity that attaches to all criminal proceedings warrants the conclusion that the court's direction was implemented, and is not overcome here by the requisite substantial evidence (*see People v Velasquez*, 1 NY3d 44, 48 [2003]; *People v Austin*, 46 AD3d 195, 201 [2007], *lv denied* 9 NY3d 1031 [2008]).

Furthermore, the People's contention that no protest to the court's ruling could be registered because the jury could not be reassembled to resume deliberations runs afoul of due process guarantees. If petitioners were incapable of making a contemporaneous objection, their due process right to make a record was abrogated, and the belated ruling constitutes a mode of proceedings error that required no preservation for review (*see People v Ahmed*, 66 NY2d 307, 310 [1985]; *People v Kisoon*, 8 NY3d 129, 135 [2007]; *People v Agramonte*, 87 NY2d 765, 769-770 [1996]). Finally, it should be noted that the Court expressly acknowledged counsels' protest over its mistrial ruling and then excused the jury. Thus, contrary to the People's rendition of events, it is apparent that the jury was not discharged until

after petitioners' protest of the court's mistrial declaration was placed on the record.

Since petitioners never consented to a mistrial, the question becomes whether termination of the trial was a matter of manifest necessity. As stated in *Randall v Rothwax* (78 NY2d 494, 498 [1991]), "The termination of a trial without a defendant's request or consent triggers the double jeopardy bar against reprosecution except in those exceptional cases where 'manifest necessity' compelled the termination." Thus, the operative criterion is not whether petitioners *objected* to the declaration of a mistrial, as the motion court found and as the People now suggest, but whether petitioners *failed to consent*. In the absence of consent, clearly manifested by contemporaneous objection to the court's mistrial declaration, the question confronting this Court is whether the People have established that termination of the trial was a matter of manifest necessity.

A court may discharge a deliberating jury prior to rendering a verdict if "[t]he jury has deliberated for an extensive period of time without agreeing upon a verdict with respect to any of the charges submitted and the court is satisfied that any such agreement is unlikely within a reasonable time" (CPL 310.60[1][a]). To support a finding of manifest necessity (*see e.g. People v Cook*, 52 AD3d 255, 256 [2008], *lv denied* 11 NY3d 735 [2008]), it must be demonstrated that the court took all

relevant circumstances into account and considered all proper alternatives before declaring the mistrial (*see Matter of Rivera v Firetog*, 11 NY3d 501, 506-507 [2008], *cert denied* __ US __, 129 S Ct 2012 [2009]; *Matter of Enright v Siedlecki*, 59 NY2d 195, 200 [1953]; *Matter of Robles v Bamberger*, 219 AD2d 243, 247, *lv denied* 88 NY2d 809 [1996]). Significantly, "a mistrial founded solely upon the convenience of the court and the jury is certainly not manifestly necessary" (*People v Michael*, 48 NY2d 1, 9 [1979]).

The People are generally "entitled to only one opportunity to compel a defendant to stand trial because the 'defendant possesses a "valued right" to have his trial completed by a particular tribunal on the first presentation of the evidence'" (*Matter of Rivera*, 11 NY3d at 506, quoting *People v Baptiste*, 72 NY2d 356, 359-360 [1988]). However, where a crime charged against the defendant cannot be resolved on the merits, such right is outweighed by the public interest in the finality of criminal proceedings in a verdict. The discharging of a jury that is hopelessly deadlocked is "[t]he classic example of charges that may be retried after the termination of a trial without the defendant's consent" (*id.*).

A trial court is afforded broad discretion to decide whether there is no reasonable probability that a genuinely deadlocked jury can agree on a verdict, and a reviewing court is obliged to

accord its decision great deference (*id.* at 507). However, before exercising its discretion, a trial court is constrained to consider various factors, including "the length and complexity of the trial, the length of the deliberations, the extent and nature of the communications between the court and the jury, and the potential effects of requiring further deliberation" (*id.*, quoting *Matter of Plummer*, 63 NY2d at 251). Moreover, a reviewing court is required to "examine whether the trial court 'properly explored the appropriate alternatives'" (*id.*, quoting *Hall v Potoker*, 49 NY2d 501, 505 [1980]).

The trial of this matter consumed eight days, and at the time the court declared a mistrial, the jury had spent two days deliberating. However, deliberations were newly commenced when the court, upon the parties' agreement, substituted an alternate juror early in the afternoon of Friday, March 6, 2009. The newly constituted panel was never given an *Allen* charge, and at the time the jury was discharged, the panel had deliberated for only a few hours. Thus, the extent of deliberations falls far short of those engaged in by the jury in *Matter of Rivera* (*see* 11 NY3d at 505 [5½ days of deliberations following a 5-day trial]) and far exceeds the limited duration and complexity found to warrant truncated jury deliberation in *Matter of Plummer* (63 NY2d at 251 [4½ hours of deliberations following a trial lasting little more than an afternoon]).

The record reflects that the decision to terminate the trial was the result of the court's attempt to accommodate the interests of juror number 8 in attending the San Diego conference and juror number 3 in spending the following Monday with his family in Philadelphia. As noted, the convenience of jurors is not a valid basis upon which to declare a mistrial (*People v Michael*, 48 NY2d at 9). In any event, a one-day adjournment would have sufficed to accommodate the plans of juror number 3 (*see id.* at 9 [delay of several days reasonable]).

Whatever might be said of the genuineness of the jury deadlock in this matter, it is clear that the trial court failed to consider available alternatives before declaring a mistrial. Defense counsel's observation that the court need not discharge juror number 8, their presentation of the option of proceeding with only 11 jurors, the discussion of that alternative, and the court's discharge of the jury are encompassed within a single page of the transcript. In fact, the ability of a defendant to waive trial by a jury of 12 persons had been endorsed by the Court of Appeals more than a year earlier (*People v Gajadhar*, 9 NY3d 438 [2007], *affg* 38 AD3d 127 [2007]). While the trial court conceded the legitimacy of the procedure, it failed to explore its utility under the circumstances confronting it. Furthermore, while summarily rejecting the defense proposal and finding that the jury was unable to agree on the remaining charges, the court

neither delivered an *Allen* charge to the panel nor discussed with the jurors the genuineness of the deadlock to ascertain that further deliberations would be fruitless (*cf. Matter of Plummer*, 63 NY2d at 252). Finally, since the expressed desires of the two jurors could be readily accommodated, as indicated, there was no potential that coercion or prejudice would result if the court had simply chosen to proceed with 11 jurors and exhorted them to return for further deliberations on the following Tuesday (*cf. id.* at 253).

In sum, the court improvidently exercised its discretion in declaring a mistrial, and retrial is barred by the constitutional protection against double jeopardy (*id.* at 245). Accordingly, the petition should be granted and the remaining count of the indictment dismissed.

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

ENTERED: FEBRUARY 16, 2010

CLERK

Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1739 Elite Technology NY Inc., et al., Index 602883/07
Plaintiffs-Appellants,

-against-

Abraham Thomas, etc., et al.,
Defendants-Respondents,

Universal Business Solutions Inc., et al.,
Defendants.

Law Offices of Allan H. Carlin, New York (Allan H. Carlin of counsel), for appellants.

Bauman Katz & Grill LLP, New York (John M. Giordano of counsel), for Abraham Thomas, respondent.

Allegaert Berger & Vogel LLP, New York (Robert F. Finkelstein of counsel), for Philip John, respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered July 1, 2008, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to dismiss the breach of contract counterclaims of defendants Thomas and John, unanimously reversed, on the law, without costs, the motion granted and the counterclaims dismissed. The Clerk is directed to enter judgment accordingly.

In their identical counterclaims, defendants Thomas and John allege that on or about June 13, 1993, they entered into an agreement with plaintiffs in which the parties memorialized their partnership and plaintiff Elite agreed to employ Thomas and John for a period of five years. Thomas and John allege that

plaintiffs breached this agreement after three years, when, on July 16, 2003, plaintiffs Lu and Fan unlawfully sought to terminate Thomas and John's "partnership interest" by, among other things, cutting off their credit cards, and by terminating their employment the next day.

The issue before us is whether these counterclaims for breach of a five-year "employment contract" are viable. Plaintiffs assert that the counterclaims are not viable because the agreement is for a stock purchase and does not contain all of the essential terms of an employment contract. Supreme Court rejected this argument, finding that "the provision in the Agreement concerning five year dedication by partners, while somewhat unusual, has enough of the aspect of an employment commitment to warrant discovery as to what the parties intended." We reverse and dismiss the counterclaims.

The essential elements of an effective employment contract "consist of the identity of the parties, the terms of employment, which include the commencement date, the duration of the contract and the salary" (*Merschrod v Cornell Univ.*, 139 AD2d 802, 805 [1988]; *see Durso v Baisch*, 37 AD3d 646 [2007]). Thomas and John contend that the agreement contains the required essential terms in that it provides that they would receive, in addition to salary, 49% of Elite stock in return for their sales expertise and five year commitment to work for the company. As to the

five-year employment commitment, Thomas and John rely on paragraph "7" of the agreement which provides:

> "7. Each and every of the parties herein agrees, represents and covenants to and with the other party or parties not to re-establish, re-open, be engaged in, nor in any manner whatsoever become interested, directly or indirectly, either as employee, as owner, as partner, as agent or as stockholder, director or officer of a corporation, or otherwise, in any business, trade or occupation similar to the Corporation, within the New York City Metropolitan area, including New York, New Jersey and Connecticut, for a term of five (5) years from the date he or she is no longer an employee or a shareholder of the Corporation. Also each and every of the parties agree to dedicate at least 5 years from the date of the agreement towards their respective roles as partners in the company."

However, the agreement's recitals reference a sale of stock in Elite from its principals (plaintiffs) to defendants, not an employment agreement. Consistent therewith and in contradiction to Thomas and John's claims, the agreement, which contains a merger clause, expressly provides for a sale of 49% of the stock in Elite to Thomas and John with the purchase price paid by defendants transferring their existing business and good will in their corporation, Quantum Venture, to Elite, along with their customers, expertise and contract rights with customers. While the non-competition clause states that it will apply for five years from the date a party is no longer an "employee or a shareholder" and that each party shall dedicate at least five years from the date of the agreement towards their respective roles as "partners in the company," this language does not in and

of itself create a five year employment contract, and no other material employment terms are set forth. Accordingly, the agreement does not meet the requirements of the statute of frauds because it does not set out all of the material terms of the alleged employment contract (*see Durso*, 37 AD3d at 647), and does not provide any objective method for determining the missing material terms (*see Cooper Sq. Realty v A.R.S. Mgt. Ltd.*, 181 AD2d 551 [1992]).

Defendants' subjective understanding of the agreement does not render its terms ambiguous with respect to the creation of an employment contract. Parol evidence may not be used to prove the parties' intent and establish essential missing terms where the instrument does not satisfy the statute of frauds (*see Henry L. Fox v Kaufman*, 74 NY2d 136, 142-43 [1989]; *Lanzet v Eastern Wholesale Fence Co.*, 213 AD2d 601, 602 [1995]; *Dorman v Cohen*, 66 AD2d 411 [1979]).

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

ENTERED: FEBRUARY 16, 2010

CLERK

Sweeny, J.P., Catterson, Renwick, Freedman, Abdus-Salaam, JJ.

1841
1841A Meridian Management Corporation, Index 110305/07
Plaintiff-Respondent,

-against-

Cristi Cleaning Service Corp.,
Defendant-Appellant.

Putney, Twombly, Hall & Hirson LLP, New York (Philip H. Kalban of counsel), for appellant.

Sonnenschein Nath & Rosenthal LLP, New York (Benito Delfin, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered October 20, 2008, which, insofar as appealable, denied defendant's cross motion for summary judgment on its second counterclaim and severed plaintiff's claim for attorneys' fees and defendant's counterclaims, unanimously modified, on the law, the severance vacated, and otherwise affirmed, without costs. Judgment, same court and Justice, entered February 8, 2009, awarding plaintiff the principal sum of $121,017.88, pursuant to so much of the above order as granted plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, and plaintiff's motion for summary judgment denied. Appeal from so much of the above order as granted plaintiff's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In October 2003, plaintiff entered into an agreement with the Port Authority of New York and New Jersey to provide maintenance and janitorial services at several facilities, including the Airtrain Jamaica Terminal Complex in Queens. Two months later, plaintiff subcontracted the janitorial services at this site to defendant. The subcontract provided, inter alia, that the monthly payments to defendant would include the cost of labor, services, materials and equipment, as well as "all applicable taxes, including sales tax." Yearly lump-sum prices set forth in the specifications were also to include sales tax. Defendant agreed to indemnify plaintiff "against any and all claims or damages" arising from its performance of the subcontract, with the losing party in any litigation to reimburse the prevailing party for legal expenses and costs. Significantly, the detailed payment schedules specifically itemized sales tax on "supplies," "uniforms/radios" and "equipment," but was silent as to sales tax on labor or services.

In May 2006, the New York State Department of Taxation and Finance (DTF) conducted an audit of plaintiff's work for the Port Authority, and after adjustments, assessed a sales tax liability of $132,107.88, including interest, for the Jamaica site. On June 21, plaintiff demanded in writing that defendant pay this tax assessment. When defendant failed to respond, plaintiff allegedly paid the assessment on July 27, and repeated its

demand for payment in December. On January 15, 2007, defendant's counsel advised plaintiff that defendant would not pay the assessment, since an audit of defendant by DTF had determined that all work performed by defendant for plaintiff was "for resale," with no sales tax consequence. Counsel also suggested that plaintiff had been improperly taxed and should seek a refund, since DTF had deemed defendant to be "a vendor for resale services" and thus not subject to sales tax.

Plaintiff commenced this action in July 2007, alleging that defendant breached the contract by failing to pay the sales tax in question. Defendant filed an answer denying the allegations and asserting certain counterclaims.

Plaintiff moved for summary judgment in January 2008. Defendant opposed and cross-moved for summary judgment on its second counterclaim for breach of contract and to dismiss the complaint. Defendant argued that it had no sales tax obligation because the Port Authority is a tax-exempt entity that is not required to pay sales tax on services it performed for it, and the services performed by defendant were for resale and thus not subject to sales tax.

In granting judgment for plaintiff, the court noted that the contract, under the heading "Consideration" and in the annual pricing clearly included sales tax, and thus it did not matter which party was responsible for sales tax in the ordinary course

of business. The court rejected defendant's argument that a DTF audit, purportedly showing no sales tax owed by defendant for the period of September 1998 through August 2006, meant that all of defendant's services performed under this subcontract were - in the words of defendant's accountant - "for resale," and thus not subject to New York State sales tax.

The court also determined there was no evidence to support defendant's argument that plaintiff should have obtained a resale certificate, finding a legal presumption that all receipts for services were subject to sale tax unless established to the contrary. Noting that DTF had determined the services were taxable, the court found, as a matter of law, that both parties were jointly and severally liable unless they could prove that the services were not taxable.

It has long been settled that 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]). Once this burden has been met, the party opposing such motion must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]) "by producing evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court's function on a motion for summary judgment is merely to

determine if any triable issues exist, not to determine the merits of any such issues (*Sheehan v Gong*, 2 AD3d 166, 168 [2003]), or to assess credibility (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

Here, material triable issues of fact exist. Plaintiff did not, in either its submissions or oral argument on appeal, adequately address the DTF audit regarding the taxes at issue. In essence, plaintiff had a letter from DTF assessing sales taxes due, and defendant had a letter from the same agency purportedly stating its services were not taxable, although examination of the letter document reveals it is silent on the question of tax assessment. It is well settled that where the facts of a particular case permit conflicting inferences to be drawn, summary judgment must be denied (*Morris v Lenox Hill Hosp.*, 232 AD2d 184, 185 [1996], *affd* 90 NY2d 953 [1997]). Moreover, there is a question as to whether the subcontract, drafted by plaintiff, when read as a whole, requires defendant to collect sales taxes on its services to a tax exempt customer (Port Authority), rather than on just the items specifically listed in the contract ("supplies," "uniforms/radios" and "equipment").

There is also an issue as to whether plaintiff's employees directed defendant not to collect sale taxes on these services. By granting plaintiff summary judgment, the court improperly assessed the credibility of the claims asserted by the parties

rather than limiting itself to determining whether material issues of fact existed (*see Ferrante v American Lung Assn.*, 90 NY2d 623 [1997]).

The court properly denied defendant's cross motion for summary judgment on its second counterclaim, owing factual issues which cannot be resolved upon the submissions, as to whether the $63,534 deduction taken by plaintiff from defendant's final invoice was justified.

In light of the fact that plaintiff's motion for summary judgment was improperly granted, we need not address the other issues raised by defendant, such as whether the indemnification clause of the contract was improperly interpreted by the motion court.

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

ENTERED: FEBRUARY 16, 2010

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1983 Kathy E. C.,
Petitioner-Respondent,

-against-

Fred T.,
Respondent-Appellant.

Julian A. Hertz, Larchmont, for appellant.

Randall S. Carmel, Syosset, for respondent.

Order of protection, Family Court, Bronx County (Alma Cordova, J.), entered on or about May 29, 2008, which directed respondent, inter alia, to stay away from petitioner for a period of two years, unanimously affirmed, without costs.

Respondent's contention that there was legally insufficient evidence to establish an element of the second-degree harassment charge, namely the commission of either a "course of conduct" or "repeated[] . . . acts" (Penal Law § 240.26[3]), was not preserved for our review by a timely and specific objection and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice. To the extent respondent contends that the incident in June 2007 did not occur, no basis exists to disturb the court's credibility findings (*see Matter of Irene O.*, 38 NY2d 776 [1975]).

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

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

ENTERED: FEBRUARY 16, 2010

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
James M. McGuire
Leland G. DeGrasse
Helen E. Freedman, JJ.

1058
Ind. 40165C/05

The People of the State of New York,
Respondent,

-against-

Freddy Rodriguez,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, Bronx County (Robert Torres, J.), rendered June 30, 2008, convicting him, after jury trial, of manslaughter in the second degree, assault in the second degree (two counts), vehicular manslaughter in the second degree, vehicular assault in the second degree (two counts), and operating a motor vehicle while under the influence of alcohol (two counts), and imposing sentence.

Yalkut & Israel, Bronx, (Arlen S. Yalkut of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan and Joseph N. Ferdenzi of counsel), for respondent.

TOM, J.P.

The prosecution's theory of this case is that defendant entered a delivery truck, without authorization and while intoxicated, and caused it to strike vehicles and pedestrians in the intersection below. Defendant, however, alleges that he entered the vehicle only after it was already in motion, rolling downhill and, without starting the engine, unsuccessfully attempted to stop it. No witness actually saw defendant enter the vehicle, which was poorly maintained and grossly overloaded. Since there is a reasonable view of the evidence that defendant unlawfully entered and operated the vehicle while intoxicated in an attempt to avoid injury while confronting a situation not of his making, he was entitled to a justification charge, and Supreme Court's unexplained omission to so instruct the jury constitutes reversible error.

It is uncontroverted that on the afternoon of August 1, 2005, a box truck being used to make deliveries was parked at the right-hand curb, facing downhill on Mount Eden Avenue in the Bronx, between the Grand Concourse and Walton Avenue. The driver, Francisco Rios, turned off the engine, left the keys in the ignition and went into a store. The vehicle was later observed proceeding downhill along Mount Eden Avenue coming from the direction of Walton Avenue and traveling westbound toward

Townsend Avenue, where it went through the intersection, striking three persons. It was brought to a stop after colliding with oncoming cars approaching the intersection at Jerome Avenue. Defendant was then seen leaving the vehicle through the passenger door. Defendant did not have permission to operate the truck, nor did he possess the appropriate operator's license.

Carlos Montilla recognized the truck that he observed approaching Jerome Avenue as a vehicle that was parked every day on the hill at the corner of Mount Eden and Walton Avenues. He also recognized defendant, whom he had known for about 10 years, as he emerged from the truck's passenger-side door. Montilla testified that defendant told him that he was "joking around" and "had taken the truck to play a trick on the owner." Montilla had also observed defendant drinking beer on the corner.

Following his arrest, defendant was subjected to blood alcohol and narcotics testing, which disclosed a blood alcohol level of 0.09%. The People's expert opined that at the approximate time of the accident, defendant's blood alcohol level would have been between 0.13 and 0.17%.

From Walton Avenue where the truck was parked, westbound to Townsend Avenue, Mount Eden Avenue slopes down at a grade of 10%, which increases to 12% between Townsend and Jerome Avenues. Francisco Rios testified that it was his custom to leave the

truck in reverse gear with the wheels either angled toward the curb or straight and the parking brake set. However, as the People concede, during his grand jury testimony, Rios stated that the truck's parking brake was not operational.

The People's interpretation of events is that "defendant, while intoxicated, got into Francisco Rios's truck to play a 'trick' and recklessly caused the truck to move down Mt. Eden Avenue, hitting and killing Saquan Williams, Jr. and seriously injuring Tasha Gibbs and Giselle Buie."

The justification defense contained in Penal Law § 35.05 provides, in pertinent part:

> "[C]onduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> > "2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue . . . Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense."

Supreme Court refused defendant's request to instruct the jury on justification, stating, "I do not see how a Justification Charge

would be warranted under the particular facts and circumstances." The court did not elaborate on its reasoning.

On appeal, the People adopt the unusual argument asserted by the prosecutor at trial – that by intentionally entering a truck that was *already* endangering the public in an effort to prevent harm, defendant did not *create* a risk of injury. They theorize that Penal Law § 35.05(2) contemplates a situation confronting the defendant with a "choice of evils," where the defendant has engaged in conduct that, because it is criminal, requires justification to avoid criminal liability, and the defendant attempts to demonstrate that he resorted to such criminal behavior to avoid a greater injury. Since defendant denied either being intoxicated or speaking with Montilla, the People contend that "when the defense evidence is viewed in the light most favorable to defendant, defendant did not act recklessly or operate a vehicle while intoxicated." Thus, they conclude, he was not engaged in any statutorily prohibited conduct that would require justification, and the defense is unavailable.

The People advance the untenable argument that a defendant must first present a case that warrants conviction for criminal conduct before the right to assert a defense of justification can be invoked. The extent to which a law requiring a defendant to incriminate himself before putting in a defense might infringe

upon constitutional rights guaranteed to the accused need not be addressed because the position advocated by the People is simply not the law.[1] As stated in *People v Butts* (72 NY2d 746, 748 [1988]), "It is established New York case law that a defendant's entitlement to a charge on a claimed defense is not defeated solely by reason of its inconsistency with some other defense raised or even with the defendant's outright denial that he was involved in the crime."

Nor is consideration of the availability of the justification defense confined to the evidence presented by the defendant, as the People propose. When deciding "whether a particular theory of defense should have been charged to the jury, the evidence must be viewed in the light most favorable to the defendant" (*People v Farnsworth*, 65 NY2d 734, 735 [1985]). The availability of the defense rests on the record as a whole, not merely the evidence produced by the defendant (*People v Steele*, 26 NY2d 526, 529 [1970] [alibi defense does not preclude possibility of justification raised by the People's case]).

People v Huntley (87 AD2d 488, 494 [1982], *affd* 59 NY2d 868 [1983]) is illustrative. There,

> "a defendant charged with murder and

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[1] "No person . . . shall be compelled in any criminal case to be a witness against himself" (US Const Amend V).

> manslaughter had testified, quite in conflict with other witnesses, that the victim of the stabbing death had initiated their encounter by approaching defendant with a knife and demanding his money. When defendant attempted to flee, he was pursued, and in the ensuing scuffle, the knife inadvertently went into the victim's back. The defendant's claimed effort to thwart an attempted armed robbery was held sufficient to require presentation of the justification issue to the jury, even though the defendant never admitted that he had intended to stab the victim" (*People v Padgett*, 60 NY2d 142, 145 [1983], citing *Huntley*, 87 AD2d at 494).

In *Padgett*, the defendant requested that the jury be instructed on the justification defense with respect to the offense of criminal mischief arising out of his breaking a pane of glass in an emergency door. As here, the appeal involved a finding that no reasonable view of the evidence supported the requested instruction (*Padgett*, 60 NY2d at 144), and the People likewise attempted to "limit the availability of the justification defense to cases in which the conduct is admitted to have been intentional, but in avoidance of a greater injury" (*id.* at 146). Noting that "the People have tendered a much too narrow interpretation of the circumstances under which this doctrine may be applicable," the Court of Appeals observed that, "as in *Huntley*, an aspect of the defendant's testimony is inconsistent with the defense," concluding that "it appears well settled that this type of inconsistency should not deprive defendant of the

requested charge" (*id.*). In short, the position advocated by the People has been rejected by the Court of Appeals on more than one occasion (*see e.g. People v Steele*, 26 NY2d 526 [1970], *supra*), as well as by this Court (*see People v Smith*, 62 AD3d 411, 412 [2009], *lv denied* 12 NY3d 929 [2009]; *People v Suarez*, 148 AD2d 367, 368-369 [1989]), and must be rejected here.

There was ample evidence presented at trial to warrant a justification charge. According to defendant, when he left a friend's store in the vicinity of the accident, he observed Rios's truck parked near 103 Mount Eden Avenue. As he watched, the truck began to move. In an attempt to stop the truck, defendant climbed onto the passenger-side step and got into the truck, moving over to the steering wheel and brake. Defendant stated that he grabbed the wheel but was not able to steer the truck. Moreover, he testified that although he stepped on the brake many times, the truck did not stop and began picking up speed as it approached the intersection with Townsend Avenue. The truck then hit a car, taking off its side mirror. According to defendant, he tried to steer the truck but the wheel would not turn, and there was nothing he could do. The truck then struck pedestrians and other cars. Defendant stated that he never touched the ignition key when he was in the truck, nor did he press the gas pedal. The evidence showed that the speed of the

truck, as it proceeded downhill striking vehicles and pedestrians, never exceeded 10 to 20 miles per hour.

After the truck stopped, defendant testified that he got out of the passenger's side and went into a bodega. However, contrary to Montilla's testimony, defendant stated that Montilla was not a friend of his; indeed, defendant asserted that he had never seen Montilla before. Defendant further stated that he did not speak to Montilla after the accident.

In addition to defendant's testimony, an accident investigator testified that the truck was overloaded to almost twice its maximum gross vehicle weight of 8,800 pounds and that the brake fluid reservoir was only two-thirds full. Among other defects noted were lack of proper motor vehicle registration and emissions inspection, missing accelerator pedal, and electrical wiring that was exposed and unsecured in a harness. The investigator acknowledged that the truck could move and roll down the hill if left in a gear other than reverse, that steering and braking would be possible but more difficult without the engine running, and that both the low level of brake fluid and the excess weight of the vehicle (15,800 pounds) would make braking more difficult. The investigator did not test the parking brake.

Whether it is credible that a parked truck should begin moving on its own and whether defendant, although intoxicated,

would have been able to climb into a moving truck from the passenger side are not material to the availability of the justification defense, and the People do not suggest as much. Determinations of credibility are for the trier of fact. It is the function of the court to assure that a defendant's guilt is proven beyond a reasonable doubt (*Steele*, 26 NY2d at 528).

A justification defense would not have required the jury to speculate as to a scenario unsupported by any testimony (*cf. People v Bonilla*, 51 AD3d 585 [2008], *lv denied* 11 NY3d 734 [2008]). The jury could have rejected defendant's denial of being intoxicated, particularly since it was contradicted by ample prosecution evidence, while at the same time crediting the balance of his testimony; this is not a case where "no identifiable record basis exists upon which the jury might reasonably differentiate between segments of a witness' testimony" (*People v Negron*, 91 NY2d 788, 792 [1998]). If it made that distinction, the jury could have inferred that defendant took the otherwise reckless risk of driving the truck while in an intoxicated condition in order to prevent the vehicle from causing imminent injury to others, there being no time to take any other action.

As to the law, justification is defined as a defense, not an affirmative defense (Penal Law § 35.00), and the burden of

disproving it rests upon the People (Penal Law § 25.00[1]; *Steele*, 26 NY2d at 528). Where the jury instruction is warranted, either by the defendant's evidence or from the People's case, viewed independently, the failure to disprove it requires reversal of the judgment of conviction on the ground that the defendant's guilt has not been proved beyond a reasonable doubt (*Steele*).

As to the views expressed by the dissent, the omission to charge a jury on justification is only harmless error if no prejudice to the defendant results. Thus, where a trial court instructed the jury on justification with respect to first-degree manslaughter involving intentional conduct, and the defendant was convicted of that offense, he was not prejudiced by the failure to give the instruction with respect to second-degree manslaughter and third-degree assault (*People v Albino*, 104 AD2d 317 [1984], *affd for reasons stated below* 65 NY2d 843 [1985]). Likewise, it was harmless error to refuse to instruct a jury on justification where the defendant was charged with murder and attempted murder of two police officers since the jury's guilty verdict on the murder charge reflected the implicit finding that the defendant knew or should have known his victims were police officers, and the court's instructions on Penal Law § 35.27 made it clear that the defense of justification was not available

under such circumstances (*People v Degondea*, 269 AD2d 243, 245 [2000], *lv denied* 95 NY2d 834 [2000]). Similarly, a trial court's failure to inform the jury that the victim's prior threats against the defendant could be considered in assessing whether the victim was the initial aggressor, in addition to assessing whether defendant acted reasonably in shooting him, was found to be harmless where the victim, shot in the back of the neck, was unarmed, made no threat toward the defendant and could not have been facing the defendant when shot (*People v Petty*, 7 NY3d 277, 285-286 [2006]). Finally, as previously noted, the People do not suggest that the perceived improbability of defendant's actions is material to the issue of whether it was necessary to instruct the jury on the justification defense. It is for the trier of fact, not this Court, to decide which of the "[t]wo starkly different versions of what happened" is the more credible.

Accordingly, the judgment of the Supreme Court, Bronx County (Robert Torres, J.), rendered June 30, 2008, convicting defendant, after jury trial, of manslaughter in the second degree, assault in the second degree (two counts), vehicular manslaughter in the second degree, vehicular assault in the second degree (two counts), and operating a motor vehicle while under the influence of alcohol (two counts), and sentencing him

to an aggregate term of 6 to 15 years, should be reversed, on the law, and the matter remanded for a new trial.

All concur except Sweeny and McGuire, JJ. who dissent in an Opinion by McGuire, J.

McGUIRE J. (dissenting)

I respectfully dissent. With respect to the counts of second-degree manslaughter and assault, the court's refusal to charge the choice-of-evils defense pursuant to Penal Law § 35.05(2) was correct. With respect to the lesser crimes of which defendant was convicted, operating a motor vehicle while under the influence of alcohol and offenses that have as an element the operation of a motor vehicle while under the influence of alcohol, any error in refusing to give the charge was inconsequential.

Two starkly different versions of what happened on Mt. Eden Avenue in the Bronx on the afternoon of August 1, 2005 were presented to the jury. The People's evidence was that defendant, while intoxicated, got into the truck to play a "trick" on the operator and recklessly caused the truck to careen down a steep slope on Mt. Eden Avenue, hitting and killing a young boy and seriously injuring two adults. The crux of the defense case, consisting principally of defendant's testimony, was that defendant heroically jumped into the already moving truck in an effort to stop it from moving down the hill and the victims were struck by the truck after all his attempts to stop the truck failed. As the prosecutor argued on summation without contradiction from the defense, "there is one central issue in

this case. Everything else flows from the answer to that central issue and [*sic*] as to the guilt of the defendant, and that central issue is how and why the defendant got behind the wheel of that truck."

In opposing defendant's request for an instruction on the choice-of-evils defense, the prosecutor correctly argued, "What the defendant did, according to the defense theory, was not a crime." Stressing that defendant's position was that "the truck was already moving" and "he was getting into it to try to prevent it from moving," the prosecutor went on to point out that:

> "[i]f that is true, if the jury believes that, then it is not a reckless act, and the jury would have to find defendant not guilty. There is no need for a justification charge. That would confuse the issues even more and does not apply in this case."

After taking a short recess, the judge denied the request, stating that he did "not see how a justification charge would be warranted under these particular facts and circumstances." The judge added that he was denying the request "based on [his] reading of the statute, and appropriate case law."[1]

To convict defendant of the second-degree manslaughter count and the second-degree assault counts, the People were required to

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[1]Unfortunately, the majority nonetheless refers to the "unexplained" omission of an instruction on the choice-of-evils defense.

prove that his conduct recklessly caused death and serious physical injury (Penal Law §§ 125.15[1], 120.05[4]). That is, the People were required to prove, inter alia, that defendant's conduct created a "substantial and unjustifiable risk" (Penal Law § 15.05[3]) of death and serious physical injury, and that he was "aware of and consciously disregard[ed]" each risk. But if defendant jumped into an already moving truck, it would be irrational to think that his conduct created a substantial and unjustifiable risk of either death or serious physical injury, let alone that he was aware of and consciously disregarded either risk. If the jury accepted defendant's version, the only rational conclusion it could come to would be that defendant's conduct *reduced* rather than created these risks. Manifestly, the jury could have convicted defendant for committing conduct that created these risks only if it found that the People had proven beyond a reasonable doubt that he entered the parked truck and caused it to start moving.

That defendant was not entitled to an instruction on the choice-of-evils defense also can be seen by supposing that the court had expressly instructed the jury that defendant could be convicted of the second-degree manslaughter and assault counts only if the People proved beyond a reasonable doubt that he got into the truck and caused it to start moving. Had the jury been

given such an instruction (or its equivalent, an instruction that the People were required to disprove beyond a reasonable doubt defendant's testimony that he jumped into an already moving truck), the pointless character of an instruction under Penal Law § 35.05[2] would be all the more evident. To be sure, neither instruction was given -- defendant never asked for either -- but such an instruction was implicit in the court's correct instructions on both the elements of the second-degree manslaughter and assault offenses and the People's burden of proving every element beyond a reasonable doubt.

Although I agree with the majority that defendant need not have admitted that his conduct recklessly caused death or serious physical injury, there had to be some reasonable view of the evidence supporting the choice-of-evils defense (*People v Cox*, 92 NY2d 1002, 1004 [1998]; *People v Hubrecht*, 2 AD3d 289, 290 [2003], *lv denied* 2 NY3d 741 [2004]). Accordingly, there had to be a reasonable view of the evidence that, inter alia, defendant recklessly caused death or serious physical injury even though he jumped into an already moving truck. Indeed, Penal Law § 35.05 presupposes, as its opening sentence expressly provides, "conduct *which would otherwise constitute an offense*" (emphasis added). Similarly, Penal Law § 35.10 specifies when "[t]he use of physical force upon another person *which would otherwise*

constitute an offense is justifiable and not criminal" (emphasis added). When the defendant's commission of an offense is not supported by a reasonable view of the evidence the defense relies upon, a justification charge is unwarranted, pointless and potentially confusing. Here, the notion that defendant jumped into an already moving truck and nonetheless created somehow a grave risk of death or serious physical injury is simply absurd. Not surprisingly, neither defendant nor the majority outlines or suggests a line of reasoning that would support that notion.

By contrast, if the jury concluded that defendant jumped, or may have jumped, into an already moving truck, the jury reasonably could have found defendant guilty of both counts of operating a motor vehicle while under the influence of alcohol (Vehicle and Traffic Law § 1192[2] and [3]). However, if the jury concluded that defendant jumped, or may have jumped, into an already moving truck, whether the jury also reasonably could have found that defendant was guilty of the other lesser crimes with which he was charged is another matter entirely. These crimes, vehicular manslaughter in the second degree (Penal Law § 125.12[1]) and vehicular assault in the second degree (Penal Law § 120.03[1], require proof not only that defendant operated the truck while intoxicated, but that "as a result of such intoxication" (Penal Law §§ 125.12[1], 120.03[1]), he "operate[d]

such motor vehicle ... in a manner that cause[d]" (*id.*) death (vehicular manslaughter) or serious physical injury (vehicular assault). Suffice it to say, it is far from obvious how either result was caused not by whoever or whatever caused the truck to careen down the hill but by the manner in which defendant operated the truck. (Nor, for that matter, is it at all obvious how any such culpable operation of the truck was the "result" of defendant's intoxication.) The point, however, need not be debated. Even assuming that on defendant's version of the facts a reasonable theory of causality can be articulated, the court's refusal to instruct the jury on the choice-of-evils defense as to these lesser crimes was inconsequential. After all, the jury's verdict establishes that it concluded that the People had proven beyond a reasonable doubt that defendant caused the truck to begin moving, i.e., that defendant had not jumped into an already moving truck in an attempt to stop it. We know the jury so concluded because it was correctly instructed on the elements of the counts charging reckless conduct -- second-degree manslaughter (Penal Law § 125.15[1]) and second-degree assault (Penal Law § 120.05[4] -- and the jury could not rationally have convicted defendant of these crimes if it entertained a reasonable doubt about whether he got into an already moving truck.

Moreover, our cases make clear that in light of the particular facts of a case, a jury's verdict can render irrelevant the issue of whether the jury should have been instructed on a defense (*see e.g. People v Degondea*, 269 AD2d 243, 245-246 [1st Dept 2000], *lv denied* 95 NY2d 834 [2008] ["as the jury made findings which precluded the defense of justification, the court's refusal to charge the 'defense of a third person' prong of the justification defense did not prejudice him"]; *cf. People v Ruiz*, 223 AD2d 418, 419 [1st Dept 1996], *lv denied* 88 NY2d 853 [1996] [failure to charge lesser included offense of seventh-degree criminal possession of a controlled substance harmless error as "[i]t would be irrational to find that the jury credited defendant's claim that he had purchased the ... glassines for personal use" and "[t]he verdict itself implies that the error did not affect the result"]). Here, too, for the reasons stated above, the jury's verdict makes clear that defendant was not prejudiced by the court's refusal to instruct the jury on the choice-of-evils defense with respect to the lesser crimes.[2]

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[2]The majority misses the point when it stresses that "[i]t is for the trier of fact, not this Court, to decide which of the '[t]wo starkly different versions of what happened' is the more credible." The point, of course, is that the jury's verdict makes clear which of these two versions it credited.

Returning to the convictions for second-degree manslaughter and assault, if an instruction under Penal Law § 35.05(2) nonetheless should have been given, we should affirm just the same. First, as with the lesser crimes, the verdict makes clear that the jury found that the People had proven beyond a reasonable doubt that defendant caused the truck to start moving. Second, the evidence presented on the People's case proving that defendant entered the parked truck and caused it to start moving was overwhelming, and it included damning admissions defendant made immediately after the accident to a man, Carlos Montilla, who testified that he had played dominos with defendant and had known him for some 10 years. Specifically, after asking Montilla how many people he had killed, defendant said that he had been "joking around with the truck," that he "was making a joke and look what I've done." Moreover, defendant's claim that he jumped into the truck only after it started moving was preposterous, particularly because the evidence that defendant was intoxicated also was overwhelming and unrefuted.[3] To accept defendant's

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[3]Contrary to the majority, defendant did not deny either being intoxicated or having consumed alcohol. Neither subject was broached during direct or cross-examination. In the course of testifying that he never gave his consent to having his blood drawn, however, defendant advanced the remarkable claim that at the hospital one of the police officers, not a nurse or doctor, drew his blood.

story, the jury would have had to believe that the truck inexplicably began moving of its own accord and that, despite his intoxication, defendant had the dexterity to climb the high step to the passenger side of the truck as it moved down the hill, pull up the door latch, open the door by pulling it toward his body while balancing on the step of the moving truck, and then clamber over the gear shift after managing to enter. In addition, the jury also would have had to credit defendant's claim that there was nothing he could do to stop or steer the truck, despite expert testimony to the contrary elicited by the People.[4] Putting aside all these incredible aspects of his testimony, defendant failed to give the jury any explanation for why he would have jumped into the truck in the first place. To the contrary, defendant testified that before he got into the cab of the moving truck he could not see inside the cab. As for the damning testimony from Carlos Montilla, defendant sought to neutralize it only with the confounding claim that he did not

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[4]Although the majority notes the accident investigator's testimony that "the brake fluid reservoir was only two-thirds full," it does not mention the witness' testimony that although the fluid "was a little low," "[t]here was sufficient pressure while the vehicle was running to tell me that there was no problem with the brakes at that particular point." Nor does the majority mention the same witness' testimony that even with the ignition off, "the foot brake would work. It would be a little harder to push, but it would work..."

know and had never seen him before. Defendant offered nothing by way of an explanation for Montilla's willingness to falsely accuse him. In short, if it was error not to charge the jury under Penal Law § 35.05(2) as to the second-degree manslaughter and assault convictions, any error was harmless (*see People v Petty*, 7 NY3d 277, 285-286 [2006] [erroneous omission in justification charge harmless error]). For these same reasons, any error in not charging the jury on the choice-of-evils defense as to the lesser charges also was harmless.

Finally, defendant's challenges to the prosecutor's summation are meritless and warrant no discussion; also meritless is his claim that the concurrent sentences (the longest of which are an indeterminate sentence of 5 to 15 years on the second-degree manslaughter count and determinate terms of six years on each of the second-degree assault counts) are excessive.

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

ENTERED: FEBRUARY 16, 2010

CLERK