SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 25, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

929 The People of the State of New York, Ind. 5633/05
Respondent,

-against-

Marcus Wilson,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (John J. Song of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered January 31, 2007, convicting defendant, after a jury trial, of coercion in the first degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, reversed, on the law, and the matter remanded for a new trial.

Defendant appeals from a conviction of coercion in the first degree stemming from his alleged physical and sexual abuse of his girlfriend. When the case was initially before us, we held that the prosecutor's use of his peremptory challenges (five), at the end of the first round of jury selection, all against men, established a prima facie case of gender discrimination,

requiring the prosecutor to give neutral explanations for those challenges (*People v Wilson*, 65 AD3d 956 [2009]). This Court held the appeal in abeyance, and remanded the matter to Supreme Court to hold an evidentiary hearing concerning whether the prosecutor exercised his peremptory challenges in accordance with *Batson v Kentucky* (476 US 79 [1986]).

Thereafter, on November 20, 2009, Supreme Court held the required *Batson* hearing. After reviewing the notes taken contemporaneously with the exercise of his peremptory challenges, the prosecutor proffered reasons for four of the five prospective male jurors in question. He explained that because he preferred jurors with a college education, he peremptorily challenged two prospective male jurors who "had not progressed beyond high school." He peremptorily challenged a third prospective male juror who had reported being involved in a contentious landlord and tenant dispute. The prosecutor peremptorily challenged a fourth prospective male juror because he had expressed strong animus toward lawyers. The prosecutor, however, had no recollection of the reason he exercised a peremptory challenge against a fifth prospective male juror. Nor did the prosecutor's contemporaneous notes contain any information about this prospective male juror which may have helped him refresh his recollection on the subject.

By a decision and order dated March 10, 2010, Supreme Court found that the prosecutor provided gender neutral reasons for the exercise of peremptory challenges for "three of the four male jurors who [were] the subject of the hearing." However, as fully detailed above, the prosecutor in fact provided explanations for four of the five male prospective jurors in question. The one prospective male juror overlooked by Supreme Court in its decision was peremptorily challenged by the prosecutor because "he had not progressed beyond high school." This is the same explanation proffered by the prosecutor for peremptorily challenging another prospective male juror and which Supreme Court found in its decision to be a gender neutral explanation. Ultimately, Supreme Court did not proceed to step three of the *Batson* analysis because it found that "a failure of memory signifies that the party who struck the juror has not met his or her burden of providing a neutral explanation" for that prospective male juror.

We agree with Supreme Court. When the prosecutor was unable to recall why he had exercised a peremptory challenge against one of the five prospective male jurors in question, he, in essence, failed to provide any justification for this exclusion (*see*

People v Davis, 253 AD2d 634 [1998]; *People v Dove*, 172 AD2d 768 [1991], *lv denied* 78 NY2d 1075 [1991]; *People v Sandy*, 164 AD2d 898 [1990]; *People v Bozella*, 161 AD2d 775, 776 [1990]; *People v Mims*, 149 AD2d 948 [1989], *lv denied* 74 NY2d 744 [1989], *lv dismissed* 76 NY2d 792 [1990]). Unable to offer a gender neutral explanation for challenging the subject prospective male juror, the prosecutor failed to meet his burden of overcoming the presumption of discrimination found by this Court (*People v Allen*, 86 NY2d 101, 109 [1995]).

Contrary to the prosecutor's allegations, it is of no moment that he provided putative gender neutral explanations as to the other four prospective male jurors. Because the exclusion of even a single juror on gender grounds is constitutionally forbidden (*see People v Allen*, 86 NY2d 101 [1995]; *People v Stephens*, 84 NY2d 990 [1994]), defendant has sustained his *Batson* claim and a new trial must be ordered (*see People v Irizarry*, 165 AD2d 715 [1990] [*Batson* violation occurred based upon gender discrimination where the trial court found that the prosecutor satisfactorily explained the challenges to 7 out of 9 prospective women jurors]; *People v Blunt*, 176 AD2d 741 [1991]; *cf. People v Jenkins*, 75 NY2d 550, 558-559 [1990] ["For the purposes of equal protection, the constitutional violation is the exclusion of *any* blacks solely because of their race").

In light of our reversal on this ground and remand for a new trial, we do not address defendant's remaining claims, except that we find the verdict was not against the weight of the evidence.

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

GONZALEZ, P.J. (dissenting)

I dissent. Nothing in the majority's decision alters my position, articulated in the prior appeal of this case (*see People v Wilson*, 65 AD3d 956 [2009]), that the defense did not meet its initial burden of establishing a prima facie case of discriminatory exercise of peremptory challenges pursuant to the dictates of *Batson v Kentucky* (476 US 79, 96-98 [1986]). I recognize that the failure to recall the basis for a challenge does not constitute a neutral explanation therefor. However, I would affirm the conviction on the ground that that there was no record basis to re-open the *Batson* application.

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

ENTERED: MAY 25, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Freedman, Abdus-Salaam, JJ.

1857 & [M-650]

In re Deiby C.,

A Person Alleged to be a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

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

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

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about February 25, 2008, which adjudicated appellant a juvenile delinquent upon his admission he had committed an act that, if committed by an adult, would constitute the crime of possession of a stolen vehicle in violation of Vehicle and Traffic Law § 426, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

Appellant argues that Family Court erred in taking his admission outside his mother's presence because the statutory prescription to include a parent in the allocution provides that it "shall not be waived" (Family Ct Act § 321.3[1]) and his mother's presence at the hearing was required in view of the

court's failure to affirmatively establish that "reasonable and substantial effort ha[d] been made to notify" her of the proceedings (§ 341.2[3]). Appellant's position is without legal merit or factual foundation.

While the court's allocution must extend to a parent, "if present" (Family Ct Act § 321.3[1]; *Matter of Tyler D.*, 64 AD3d 1243, 1244 [2009] [allocution requirements "mandatory and nonwaivable"]), it is undisputed that appellant's mother was *not* present at the plea hearing, and the court fully complied with the statute by conducting its allocution with appellant, his guardian ad litem and the Law Guardian. Appellant does not contend that the court failed to engage in sufficiently rigorous allocution before accepting his admission of guilt (*cf. Matter of Myacutta A.*, 75 AD2d 774, 775 [1980]), and § 321.3(1) is thus inapposite.

Nor did Family Court err in proceeding with the plea hearing in the absence of appellant's mother. Appellant cites no authority for his position that a court is required to make an explicit finding that reasonable and substantial notification efforts have been made before conducting a hearing in a parent's absence (Family Ct Act § 341.2[3]). To the contrary, case law suggests that the adequacy of attempted notification will be

determined from a review of the record (*e.g. Matter of Felicia C.*, 178 AD2d 530 [1991] ["no indication in the record that a 'reasonable and substantial effort' was made to notify the appellant's parents"]; *Myacutta A.*, 75 AD2d at 774 [only record indication was a single remark by Law Guardian concerning attempt to contact parent]). The record indicates that two days before entry of the admission, appellant appeared in Family Court, at which time his Law Guardian requested that a guardian ad litem be appointed because his mother had made it clear that she felt intimidated by her son, did not want him in her household, and would prefer that he remain in custody. At that time, the court appointed an attorney as guardian ad litem and made an express finding that reasonable notification efforts had been made.

Nothing in Family Ct Act § 341.2(3) indicates that a parent cannot waive the right to be present at a hearing, and the appointment of a guardian ad litem to act in loco parentis (literally, "in the place of a parent") as a result of parental animus is as clear an indication of waiver as could be expected. Moreover, the record reflects that on the date appellant entered his admission, his mother was present at the courthouse, but after speaking with appellant's attorney, she did not attend the hearing. In the absence of any objection from appellant, his Law

Guardian or guardian ad litem, proceeding in his parent's absence is not a basis for reversal under the statute (*see Matter of Willie E.*, 88 NY2d 205, 210 [1996]).

The Decision and Order of this Court entered herein on December 22, 2009 (68 AD3d 606), is hereby recalled and vacated (*see* M-650) decided simultaneously herewith).

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

ENTERED: MAY 25, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2610 Kramer Levin Naftalis & Frankel LLP, Index 116300/08
Plaintiff-Appellant,

-against-

Canal Jean Co., Inc., et al.,
Defendants-Respondents.

Kramer Levin Naftalis & Frankel LLP, New York (Ronald S. Greenberg of counsel), for appellant.

Baker, Leshko, Saline & Blosser, LLP, White Plains (Mitchell J. Baker of counsel), for respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered December 1, 2009, which, to the extent appealed from, denied plaintiff's motion for summary judgment on its causes of action for account stated, unanimously reversed, on the law, with costs, and the motion granted as to each such claim against defendants. The Clerk is directed to enter judgment accordingly.

Defendants' statements that they made oral protests about the invoices in question during various meetings with plaintiff in March 2008 are facially insufficient to establish that they protested the invoices (*Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 419 [2009]). Indeed, these statements are contradicted by the fact that defendants made partial payments on the invoices (*see Zanani v Schvimmer*, 50 AD3d 445 [2008]). Nor does plaintiff's failure to provide a written retainer agreement,

as required by 22 NYCRR 1215.1, bar its claims for account stated (*see Miller v Nadler*, 60 AD3d 499, 500 [2009]). Plaintiff's mathematical error in its affidavits on the motion (an error in defendants' favor) is also not fatal to its claims, since the invoices themselves are fully consistent and provide a single total for the various claims (*see Sisters of Charity Hosp. of Buffalo v Riley*, 231 AD2d 272, 282-283 [1997]).

Although no cause of action for account stated is pleaded against R&R in the complaint, this omission is not a bar to summary judgment because we find that the evidence necessary to substantiate the claim is in the record. Further, plaintiff made the argument to the motion court and defendants have not been prejudiced (*see Weinstock v Handler*, 254 AD2d 165, 166 [1998]).

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

ENTERED: MAY 25, 2010

CLERK

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2649 Cheryl William-Torand, Index 350661/06
Plaintiff-Respondent,

-against-

Tibor Torand,
Defendant-Appellant.

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

Order, Supreme Court, New York County (Saralee Evans, J.), entered January 14, 2009, which, to the extent appealed from as limited by the brief, restricted defendant father's access to the parties' children to telephone contact three times a week and supervised visitation once a month subject to the children's wishes as determined by plaintiff mother, unanimously reversed, on the law, without costs, the access provisions vacated and the matter remanded for further proceedings consistent herewith.

After a nonjury trial, the court awarded the mother sole physical and legal custody of the parties' three teenaged children.[1] The court set an access schedule permitting the father to call the children three times a week and have supervised visitation with them once a month for three hours. The court's order provided that "[i]n the event that any of the children refuse to visit with their father, they should not be

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[1] The father did not contest custody at trial and is not raising it on appeal.

forced to do so" and that the mother "is not required to make them visit if they express forceful opposition."

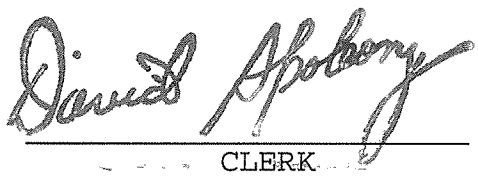
While a child's views should be considered when determining issues of custody or visitation, they should not be determinative (*Obey v Degling*, 37 NY2d 768, 770 [1975]; *Matter of Taylor G.*, 59 AD3d 212 [2009]; *Matter of Hughes v Wiegman*, 150 AD2d 449, 450 [1989]). A court may not delegate its authority to determine visitation to either a parent or a child (*Matter of Leah S.*, 61 AD3d 1402 [2009]; *Matter of William BB. v Susan DD.*, 31 AD3d 907 [2006]). A visitation provision that is conditioned on the desires of the children "tends . . . to defeat the right of visitation" (*Matter of Casolari v Zambuto*, 1 AD3d 1031 [2003] [internal quotation marks and citations omitted]; *Pincus v Pincus*, 138 AD2d 687 [1988]). Here, because the access provisions of the court's order are conditioned on the children's wishes and leave the determination whether visitation will take place to the children, or their mother, they must be set aside.

It is apparent from the record that the trial court neither appointed an attorney for the children nor interviewed them at a *Lincoln* hearing (*see Matter of Lincoln v Lincoln*, 24 NY2d 270 [1969]). In light of the children's ages and the mother's claim that they are reluctant to spend time with their father, on remand, the court should consider, after consultation with counsel, appointing an attorney for the children and holding a

Lincoln hearing (*see Koppenhoefer v Koppenhoefer*, 159 AD2d 113, 117 [1990] [preferred practice in custody/visitation cases is to have an in camera interview with the child on the record in the presence of the attorney for the child]).

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

ENTERED: MAY 25, 2010



CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Román, JJ.

1676 The People of the State of New York, Respondent, Ind. 6677/04

-against-

Dionis Collado, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered March 11, 2009, resentencing defendant, as a second violent felony offender, to an aggregate term of 8 years to be followed by 5 years postrelease supervision (PRS) for his 2005 conviction on two counts of robbery in the second degree, reversed, on the law, and the matter remanded for resentencing, including further proceedings with respect to defendant's predicate felony status.

In 2000, defendant pleaded guilty to attempted robbery in the second degree and was sentenced to a determinate term of two years, which did not include a period of PRS. After his release, the Department of Correctional Services imposed a period of PRS, and defendant then committed the robberies of which he now stands convicted. Based on the 2000 robbery conviction, defendant was adjudicated a second violent felony offender, and in 2005 he was

sentenced to the concurrent terms of 8 years now under review. A five-year period of PRS was noted on the commitment sheet but was not orally pronounced. After our affirmance in 2008 (47 AD3d 547), the Court of Appeals, citing *People v Sparber* (10 NY3d 457 [2008]), modified to the extent of remitting to Supreme Court for resentencing (11 NY3d 888). Thereafter, defendant moved to set aside the sentence in the 2000 case (CPL 440.20). The sentencing court granted that motion and resentenced defendant "nunc pro tunc" for the purpose of correcting the *Sparber* error, imposing the minimum period of PRS and holding that correcting the sentence did not preclude use of the 2000 crime as a predicate felony in connection with sentencing in the instant case. The court then went on to impose the resentence now under review for the 2005 conviction, "whether or not [defendant] is a second felony offender."

Where a defendant receives an enhanced sentence based upon a predicate felony offense and the sentence imposed for the predicate offense is vacated due to the failure to pronounce a term of PRS, the resentencing date controls whether the earlier crime qualifies as a predicate offense under Penal Law § 70.06(1)(b)(ii) (*see People v Acevedo*, __ AD3d __ [Appeal No. 1671], decided simultaneously herewith). Where, as here, resentencing on an earlier crime occurs after the present offense was committed, the earlier crime does "not qualify as a predicate

conviction for purposes of sentencing" in multiple offender status (*People v Wright*, 270 AD2d 213, 215 [2000], *lv denied* 95 NY2d 859 [2000]).

The People argue that under *People v Williams* (14 NY3d 198 [2010]), the sentencing court lacked jurisdiction to resentence defendant on the 2000 case because the modified sentence included a period of PRS. They contend that the resentencing proceedings are thereby rendered a nullity and that the original sentence date controls for purposes of the predicate status of the conviction.

Williams bars the imposition of a period of postrelease supervision after a defendant has been released from incarceration and after his direct appeal has been completed. Because an upward modification of a defendant's sentence at this juncture violates the constitutional protection against double jeopardy, it constitutes a mode of procedural error that does not require the defendant to preserve it for appellate review. The same reasoning does not extend to the People, who are not within the ambit of the protection afforded by the Double Jeopardy Clause. Nor have the People identified any procedure entitling them to contest the resentencing court's jurisdiction at this late date. Notably, they did not object to resentencing on the predicate offense, but actively sought the imposition of a period of PRS. Nor did they appeal from resentencing in the instant

matter. Since this Court's review is restricted to issues "which may have adversely affected the appellant" (CPL 470.15[1]), we cannot consider the People's alternative argument in favor of affirmance (*see People v Karp*, 76 NY2d 1006 [1990]). Moreover, defendant does not object to the modified sentence. Therefore, the issue of the sentencing court's jurisdiction is not before us.

Upon remand, the People may seek to demonstrate that a different prior felony conviction constitutes a predicate felony.

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

NARDELLI, J. (dissenting)

I dissent for the reasons I stated in my dissent in *People v Acevedo* (__ AD3d __ [Appeal No. 1671]), decided herewith.

On June 29, 2000, defendant was convicted, on his plea of guilty, of attempted robbery in the second degree, a violent class D felony (Penal Law § 70.02[1][c]). The court neglected to impose postrelease supervision, which was mandated by Penal Law § 70.45 as then in effect. He was resentenced on March 11, 2009, after he moved pursuant to CPL 440.20 for resentencing, as a result of the Court of Appeals' decision in *People v Sparber* (10 NY3d 457 [2008]). At the resentencing, the court imposed a term of one and one-half years postrelease supervision along with the original term of two years imprisonment, all to run nunc pro tunc to the time of original sentencing. Effectively, as the court noted, the sentences were completed as soon as they were imposed. The conviction itself was never vacated.

Subsequent to June 29, 2000, but prior to March 11, 2009, defendant and three accomplices committed a gunpoint robbery. On September 6, 2005, after a jury trial, he was convicted of robbery in the first degree and two counts of robbery in the second degree, inter alia, and sentenced as a second violent felony offender.

In this appeal defendant challenges the finding of the court which sentenced him for the robbery that he was a second violent

felon, because he was resentenced on the June 29, 2000 conviction after committing the 2005 robbery. The trial court, correctly in my belief, declined to alter his status as a second violent felon.

A second violent felony offender is defined as a person "convicted of a violent felony offense as defined in subdivision one of section 70.02 after having previously been subjected to a predicate violent felony conviction" (Penal Law § 70.04[1][a]). There is no doubt that defendant's two convictions qualify to make him a second violent felony offender, first of all, and that he has been a convicted violent felon since June 29, 2000. There is also no dispute that he was sentenced for the 2000 felony before the commission of the second felony, and that sentence was imposed not more than 10 years before the commission of the second felony. Therefore, defendant has met all the relevant criteria for being sentenced as a second violent felony offender (*see* § 70.04[1][b]).

As I observed in my dissent in *Acevedo*, the resentencing for the 2000 attempted robbery was merely a technicality, and, as is now evident by the decision in *People v Williams* (14 NY3d 198 [2010]), also a nullity. It has no impact on defendant's status as a second violent felon, since he was on full notice in 2005 of his status as a felon, and charged with the knowledge that commission of subsequent crimes would result in enhanced

sentencing. He is not entitled to a windfall. The purpose of the predicate felony scheme, as well as the requirement for postrelease supervision for certain convictions, is to impose greater sanctions on particularly dangerous felons. Defendant is among those whom the statute targets. Abrogating defendant's violent felon status accomplishes nothing in support of these legislative initiatives, and, instead, will foster public cynicism about loopholes and technicalities.

The conviction should be affirmed.

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

ENTERED: MAY 25, 2010

David Friedberg

CLERK

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

2717 Victoria Jones, Index 402878/08
Plaintiff-Respondent,

-against-

Park Front Apartments, LLC,
Defendant-Appellant,

Ricardo Morales, etc., et al.,
Defendants.

Wenig Saltiel LLP, Brooklyn (Meryl L. Wenig of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Sateesh Nori of counsel), for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered May 4, 2009, which granted plaintiff a stay of eviction proceedings pending the outcome of this action; directed defendant landlord Park Front to accept plaintiff's payment of her proportional share of rent, without prejudice; directed Park Front to complete a Housing Assistance Payment contract and thereafter accept payment from defendant Housing Authority on plaintiff's behalf, without prejudice; and directed the Authority to extend the expiration date of plaintiff's Section 8 voucher pending outcome of the case, unanimously modified, on the law and the facts, to vacate the direction that Park Front complete a Housing Assistance Payment contract and thereafter accept payment from defendant Housing Authority on plaintiff's behalf, and otherwise affirmed, without costs.

To be entitled to a preliminary injunction, a plaintiff must show a likelihood of success, the danger of irreparable injury, and that the balance of equities are in his or her favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; CPLR 6301). However, "a mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted only in 'unusual' situations, 'where the granting of the relief is essential to maintain the *status quo* pending trial of the action'" (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264 [2009], quoting *Pizer v Trade Union Serv., Inc.*, 276 App Div 1071, 1071 [1950]; *see also St. Paul Fire & Marine Ins. Co. v York Claims Serv.*, 308 AD2d 347, 349 [2003]).

Here, plaintiff demonstrated a balancing of the equities in her favor, irreparable harm if she were evicted from her long-time home and a likelihood of success on the merits of her claim that Park Front, a recipient of benefits under the City's J-51 tax abatement program, offered pretextual reasons for refusing to accept her proffer of rent payments in the form of a Section 8 housing subsidy (*see* Administrative Code of City of NY §§ 8-102[25], 8-107[5][a][1]; § 11-243[k]; *Kosoglyadov v 3130 Brighton Seventh, LLC*, 54 AD3d 822 [2008]). Although plaintiff's

Section 8 housing voucher indicates a "family unit size" (*see* 24 CFR 982.402[c]) that qualifies her to receive a housing subsidy for a studio apartment, it is undisputed that the subsidy benefits to which she is entitled exceed the amount of the rent for her one-bedroom apartment, and federal regulations provide that Section 8 recipients "may lease an otherwise acceptable dwelling unit with more bedrooms than the family unit size" (§ 982.402[d][2]). Thus, plaintiff established her entitlement to a preliminary injunction. However, to the extent the court directed Park Front to complete a Housing Assistance Payment contract and thereafter accept payment from defendant Housing Authority on plaintiff's behalf, that mandatory directive granted plaintiff a portion of the ultimate relief sought and was not necessary to maintain the status quo pending trial, in that plaintiff is adequately protected by the stay of the eviction proceeding. Accordingly, the order appealed from should be modified to vacate that directive.

The administrative closure of plaintiff's related complaint before the New York City Commission on Human Rights has no preclusive effect here, as that was not a disposition on the merits, made after a full and fair opportunity to be heard on the

issues now before us (*see Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1969]; *see also Kosakow v New Rochelle Radiology Assoc.*, 274 F3d 706, 730 [2d Cir 2001]).

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

ENTERED: MAY 25, 2010

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Manzanet-Daniels, JJ.

2775 Eileen Coogan, Index 117786/06
Plaintiff-Appellant,

-against-

City of New York,
Defendant,

Nicholas Edward Krasno,
Defendant-Respondent.

Stadtmauer & Associates, New York (Roger D. Olson of counsel), for appellant.

Michelle S. Russo, Port Washington, for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered March 2, 2009, which, to the extent appealed from as limited by the briefs, granted defendant Krasno's motion for summary judgment dismissing the complaint against him, unanimously affirmed, without costs.

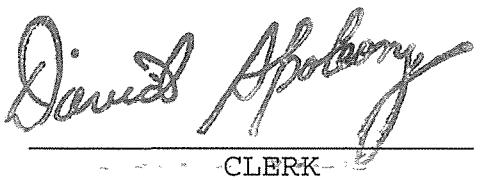
Dismissal of the complaint was justified in light of the exemption afforded to "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (New York City Administrative Code § 7-210[b]). In support of his motion, Krasno submitted a personal affidavit that he had neither used the premises for a "home office" nor claimed any part thereof as an income tax deduction. Assuming, without deciding, that he may occasionally use his laptop computer for research, such use was

merely incidental to his residential use of the property (*see Vargas v Rodriguez*, 2007 NY Misc LEXIS 6397, 2007 WL 2814539).

The purpose of the exception in the Code is to recognize the inappropriateness of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair (*see Gangemi v City of New York*, 13 Misc 3d 1112, 1121 n 2 [2006], citing the Report of the Infrastructure Div, City Council Comm on Transp, in support of enactment of the 2003 amendment to § 7-210). There is no reason to extend the statute's reach to encompass this defendant. Generally, a legislative enactment that is unambiguous and whose purpose is unequivocal should be construed in accordance with the ordinary meaning of its words, and literal and narrow interpretations that would thwart such purpose should be avoided (*see Matter of Town of New Castle v Kaufmann*, 72 NY2d 684, 686 [1988]).

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

ENTERED: MAY 25, 2010



CLERK

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

2856 The People of the State of New York, Ind. 3152/08
Respondent,

-against-

Edison Flores,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered January 29, 2009, as amended March 24, 2009, convicting defendant, after a nonjury trial, of sexual abuse in the first degree (two counts) and endangering the welfare of a child, and sentencing him to an aggregate term of 3½ years, unanimously affirmed.

Defendant's claim of ineffective assistance of counsel is unreviewable on direct appeal because it involves matters outside the record concerning defense counsel's choice of trial strategy (*see People v Love*, 57 NY2d 998 [1982]). Although the present, unexpanded record is not conclusive on the matter, it suggests that defendant agreed with the very actions of counsel about which he now complains. In any event, defendant has not demonstrated "the absence of strategic or other legitimate

explanations" (*People v Rivera*, 71 NY2d 705, 709 [1988]) for the manner in which counsel conducted the trial.

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

ENTERED: MAY 25, 2010

CLERK

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

2858 In re Days Impex Limited, Index 650532/09
Petitioner-Appellant,

-against-

Solomon Blum Heymann & Stich LLP,
Respondent-Respondent.

Loanzon Sheikh LLC, New York (Tristan C. Loanzon of counsel), for appellant.

Solomon Blum Heymann LLP, New York (Ambrose M. Richardson of counsel), for respondent.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered October 28, 2009, which denied the petition for a permanent injunction staying arbitration, unanimously affirmed, with costs.

The arbitration clause in the contract was clear, explicit and unequivocal, and thus should be fully enforced. Petitioner, whose principal reviewed and signed two retainer agreements containing the arbitration clause, did not demonstrate a failure on its part to understand the implications of the provision *(Arrowhead Golf Club, LLC v Bryan Cave, LLP*, 59 AD3d 347 [2009]).

Inasmuch as the agreement to arbitrate is binding and enforceable, petitioner's remaining arguments on enforceability

of the indemnification provision should be raised before the arbitrator.

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

ENTERED: MAY 25, 2010

CLERK

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

2859-
2859A In re Shawntashia Michelle B.,
and Another,

Dependent Children Under
Eighteen Years of Age, etc.

Michelle B.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

Patricia W. Jellen, Eastchester, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

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

Orders, Family Court, New York County (Jody Adams, J.), entered on or about March 23, 2009, which, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

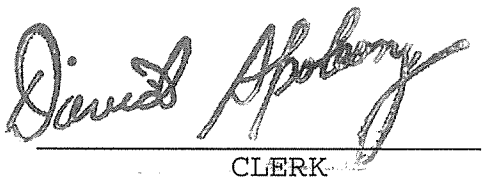
The agency was excused from making diligent efforts to encourage and strengthen the parental relationship, in light of the termination of parental rights of the mother's other children (*see Matter of Evelyse Luz S.*, 57 AD3d 329 [2008]; Family Court Act § 1039-b[b][6]). In any event, the record establishes that

the agency did exercise such diligent efforts and that the findings of permanent neglect were supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). The mother failed to plan for the children's future by failing to secure employment and appropriate housing and failed to gain insight into the conditions that led to the placement of the children (*see Matter of Milan N.*, 45 AD3d 358, 359 [2007], *lv denied* 10 NY3d 703 [2008]).

A preponderance of the evidence supports the determination that the termination of parental rights to facilitate the adoptive process was in the best interests of the children. The children have lived with their foster parents for most of their lives and are provided with a loving and supportive home (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-48 [1984]; *Matter of Tyreese H.*, 4 AD3d 208 [2004]).

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

ENTERED: MAY 25, 2010



CLERK

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

2860 John Landrum Bryant, et al., Index 110233/08
Plaintiffs-Appellants,

-against-

One Beekman Place, Inc., et al.,
Defendants-Respondents.

Wasserman Grubin & Rogers, LLP, New York (Richard Wasserman of counsel), for appellants.

Stroock & Stroock & Lavan LLP, New York (Dale J. Degenshein of counsel), for respondents.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered April 22, 2009, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiffs, upon purchasing their cooperative apartment, voluntarily subjected themselves to the rules, by-laws and policies of defendant cooperative corporation, including the Alteration Agreement, which they signed, governing any renovations in their joined units and waiving any claims they might have against defendants arising from the suspension of renovation work (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 536-537, 539-540 [1990]). The documentary evidence and sworn averments conclusively establish, essentially without dispute, notwithstanding plaintiffs' unsupported allegations of defendants' malicious motives, that plaintiffs'

renovations went beyond the approvals given by the coop board and that plaintiffs failed to submit revised plans for approval. The coop's architect, inter alia, made specific objections to the use of wood in structural elements, and soffits and partition walls, as fire hazards affecting not only plaintiffs' residence but also the building, and imposed additional requirements with respect to plaintiffs' proposed internal elevator so as to minimize vibrations and noise that might affect other residents. Notwithstanding these requirements, plaintiffs continued the construction in a manner that was noncompliant, and unapproved, and only belatedly submitted revised plans that were in several regards inadequate. When it became apparent that plaintiffs remained noncompliant, the coop board directed that work be suspended, as specifically authorized in the Alteration Agreement. When work did not stop, the coop, for three hours on one day, padlocked one of the three points of access to the plaintiffs' residence so as to prevent access that morning by workers, notably when plaintiffs were out of the country and not seeking access. When plaintiffs became substantially compliant, the stop work order was lifted, and the renovations were completed. In short, the record establishes nonmalicious, valid reasons for defendants' actions, and the reasonable, professional manner in which they addressed plaintiffs' proposed renovations and unapproved work.

In view of the foregoing, there is no merit to plaintiffs' claims for breach of contract, unlawful ejectment (*see Silverman v 875 Tenant Corp.*, 16 AD3d 248 [2005], *lv dismissed* 5 NY3d 880 [2005]), prima facie tort and breach of fiduciary duty; the latter claim, moreover, is inadequately pleaded in that it fails to allege facts showing that the board's actions had no legitimate relationship to the welfare of the coop at large (*see Levandusky*, 75 NY2d at 538, 540). The claim for intentional interference with plaintiffs' construction contract fails to allege a breach of that contract; nor does the general contractor's affidavit in opposition to defendants' motion to dismiss the complaint (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

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

ENTERED: MAY 25, 2010

David Spolony

CLERK

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

2862 In re Kevin Weems,
Petitioner-Appellant,

-against-

Administration for Children's Services,
Respondent-Respondent.

Randall S. Carmel, Syosset, for appellant.

Order, Family Court, Bronx County (Carol Ann Stokinger, J.), entered October 2, 2008, unanimously affirmed, without costs or disbursements.

Application by appellant's assigned counsel to withdraw is granted (*see Matter of Louise Wise Servs.*, 131 AD2d 306 [1987]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

ENTERED: MAY 25, 2010

CLERK

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

2867 The Board of Managers of Waterford Association, Inc., etc., Plaintiff-Respondent, Index 114054/04

-against-

Negar Samii, etc., Defendant-Appellant.

Cox Padmore Skolnik & Shakarchy LLP, New York (Sanford Hausler of counsel), for appellant.

Kagan Lubic Lepper Lewis Gold & Colbert, LLP, New York (Jesse P. Schwartz of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 21, 2009, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its third cause of action by declaring plaintiff's right of access to defendant's unit in accordance with the condominium bylaws, dismissed the counterclaim for nuisance, and denied defendant's motion for summary judgment seeking dismissal of the second cause of action for injunctive relief, unanimously affirmed, without costs.

Absent a determination defining the rights and responsibilities of these litigants, it is likely that defendant's conduct will, at some future date, be repeated. Accordingly, the dispute between the parties remains justiciable, and a declaratory judgment defining the parties' rights and

obligations is appropriate (*Sherry v New York State Educ. Dept.*, 479 F Supp 1328, 1335 [WD NY 1979], cited with approval in *Wavertree Corp. v 136 Waverly Assoc.*, 258 AD2d 392 [1999]).

The evidence submitted by plaintiff in support of its motion for summary judgment, which was not contradicted, negates defendant's assertions that plaintiff's challenged acts were made in bad faith or constituted improperly disparate treatment of defendant. Accordingly, the court correctly determined as a matter of law that the challenged acts were protected by the business judgment rule (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-540 [1990]; *Katz v 215 W. 91st St. Corp.*, 215 AD2d 265 [1995]).

On her counterclaim for nuisance, defendant has not pleaded facts sufficient to demonstrate diminution of value or use of the property, which is necessary for a measurement of damages (*see Guzzardi v Perry's Boats*, 92 AD2d 250, 254 [1983]).

We have considered defendant's remaining argument and find it unavailing.

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

ENTERED: MAY 25, 2010

CLERK

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

2870 Robert Sumner, et al., Index 100150/08
Petitioners-Respondents, 100843/08

-against-

Daniel D. Hogan, etc., et al.,
Respondents-Appellants.

- - - - -

Troy Stables, LLC, et al.,
Petitioners-Respondents,

-against-

Daniel D. Hogan, etc., et al.,
Respondents-Appellants.

Andrew M. Cuomo, Attorney General, New York (Steven C. Wu of counsel), for appellants.

Order and judgment (one paper), Supreme Court, New York County (Marilyn Schafer, J.), entered April 1, 2009, which, insofar as appealed, granted horse owners' CPLR article 78 petitions to the extent that they challenged two regulations of respondent New York State Racing and Wagering Board (9 NYCRR §§ 4120.14 and 4121.5) as violative of petitioners' due process rights by requiring pre-race detention, allegedly without notice, hearing, right of appeal or right to seek a stay, of horses not found to exceed total carbon dioxide (TCO2) levels, but whose trainers had two violations within a twelve month period, unanimously reversed, on the law, without costs, the petitions denied and the proceedings dismissed.

These two proceedings challenge regulations of the

respondent New York State Racing and Wagering Board ("Racing Board") governing standardbred (harness) racehorses. The regulations require pre-race detention of horses are designed to detect and prevent the practice of "milkshaking," which is the administering of baking soda combined with other substances to the horse before a race for the purpose of neutralizing lactic acid build-up, slowing the onset of fatigue, and presumably enhancing the horse's performance. Since the substance wears off within four to six hours, milkshaking typically occurs shortly before a horse is raced.

"[O]ne who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law," which rule need not be followed where the action is challenged as unconstitutional (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). However, "[c]ouching an adverse administrative decision in terms of a constitutional violation will not excuse a litigant from pursuing administrative remedies that can provide the requested substantive relief . . . where resolution of the constitutional claim . . . rests on factual issues that are reviewable administratively" (*Siao-Pao v Travis*, 23 AD3d 242, 242-43 [2005]; *see also Matter of Schulz v State of New York*, 86 NY2d 225, 232 [1995], *cert denied*, 516 US 944 [1995]).

Here, an administrative appeal could have granted

petitioners all the relief requested by allowing the Board to determine whether, for these particular owners, notice to their trainers was sufficient notice to the owners, and more broadly, whether the nature of the relationship between trainer and owner supported the agency principle, with knowledge of the trainer to be imputed to the owner, as well as confirming or rebutting the validity of certain TCO2 violations. The failure to exhaust administrative remedies barred their petition for judicial review.

Even if the petitions were valid, the owners failed to state the deprivation of a cognizable property interest (*see Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 627 [2004]). The owners alleged two property deprivations herein: the cost of pre-race detention and the inability to race at racetracks that did not provide pre-race facilities. However, neither interest is protected herein since the Board is not responsible for either. First, the regulations expressly provide that any pre-race detention would be "at the sole expense of the trainer" and not the owner, and racetrack operators are required to "make such pre-race detention available" (9 NYCRR § 4120.14[a], [b]). Any deviation from the regulations is not state action but private conduct, and "private conduct will not invoke the constitutional guarantees of due process" (*Blye v Globe-Wernicke Realty Co.*, 33 NY2d 15, 19 [1973]).

Nor should the court have found a violation of procedural due process since the owners were afforded adequate procedures to challenge the imposition of pre-race detention. While they claim lack of direct notice, notice to the trainer, as agent of the owner, constituted notice to the owner since the trainer's actions were "in furtherance of the [owner's] business and within the scope of employment" (*Parlato v Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 113-114 [2002], *lv denied*, 99 NY2d 508 [2003] [internal quotation marks and citation omitted]). Because even a single TCO2 violation could put a trainer's license in jeopardy (9 NYCRR § 4120.13[d]), and put all of a trainer's owners at risk of having their horses placed under pre-race detention if the trainer were to incur a second violation within a year, any TCO2 violation is material to a trainer's responsibility to all his principles, and thus notice given to a trainer of a TCO2 violation would be properly imputed to his owners.

Further, owners also receive notice of their trainers' violations through widely available public sources, including the Racing Board's website, on which the Board maintains an updated list of TCO2 violations that identifies the names of the trainer and drugged horse and notes whether pre-race detention was imposed (*see* NY Racing & Wagering Bd., TCO2 Pre-Race Detention

List http://www.racing.state.ny.us/racing/tco2.php, and a comprehensive database of violation rulings maintained by The United States Trotting Association.

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

ENTERED: MAY 25, 2010

CLERK

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

2871N Simon Lorne, et al.,
Plaintiffs-Respondents,

-against-

50 Madison Avenue LLC, et al.,
Defendants-Appellants,

Goldstein Properties LLC, et al.,
Defendants.

- - - - -

50 Madison Avenue LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

RCDolner LLC,
Third-Party Defendant-Appellant,

Commodore Construction Corp.,
Third-Party Defendant-Respondent,

G.M. Crocetti, Inc., et al.,
Third-Party Defendants.

- - - - -

RCDolner LLC,
Fourth-Party Plaintiff-Appellant,

-against-

Olympic Plumbing & Heating Corp., et al.,
Fourth-Party Defendants-Respondents,

Whitestone Construction, et al.,
Fourth-Party Defendants.

[And a Third Third-Party Action]

Index 602769/07
590141/09
590265/09
590355/09

Epstein Becker & Green, P.C., New York (Adrian Zuckerman and Ralph Berman of counsel), for 50 Madison Avenue LLC and Samson Management LLC, appellants.

Wasserman Grubin & Rogers, LLP, New York (Suzan Arden of counsel), for RCDolner LLC, appellant.

Zetlin & DeChiara LLP, New York (James H. Rowland of counsel), for Lorne respondents.

Newman Myers Kreines Gross Harris, P.C., New York (Adrienne Yaron of counsel), for Commodore Construction Corp., respondent.

Stalker, Vogrin, Bracken & Frimet, LLP, New York (Konstantinos Katsaros of counsel), for Olympic Plumbing & Heating Corp., respondent.

Babchik & Young LLP, White Plains (Bryan J. Weisburd of counsel), for Thyssen Krupp Elevators, respondent.

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for Service Glass & Store Fronts, Inc., respondent.

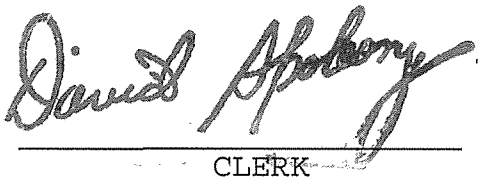
Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered July 6, 2009, which granted plaintiffs' motion as well as motions and a cross motion by certain third- and fourth-party defendants for an order severing the third- and fourth-party actions from the main action, unanimously affirmed, with costs.

Plaintiff purchasers alleged, inter alia, breach of a condominium purchase/sale agreement and its attendant warranties. The third- and fourth-party actions involved sponsor/general contractor claims against contractors and subcontractors for liability/indemnification arising from allegedly defective workmanship and design. Severance of claims (CPLR 603), was a proper exercise of judicial discretion here, since the sponsor and property manager essentially admitted the existence of alleged material defects in the flooring of plaintiffs' unit. We note that a substantial period of delay was occasioned by the

meritless motion to dismiss made by defendants 50 Madison and Samson. Plaintiffs would be prejudiced by burdensome discovery in connection with the 13 additional parties representing the allegedly negligent contractors and subcontractors. While the claims of defective workmanship and design in the main action are shared in the third- and fourth-party actions, there appears to be little likelihood of inconsistent judgments where the sponsor and property manager have effectively acknowledged that these defects were responsible for plaintiffs' displacement.

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

ENTERED: MAY 25, 2010



CLERK

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

2872 The People of the State of New York, Respondent, Ind. 870/07

-against-

Brian Carmichael, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Robert H. Straus, J.), entered December 10, 2007, convicting defendant, after a jury trial, of three counts of criminal sale of a controlled substance in the second degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of 17 years, unanimously affirmed.

After giving due consideration to the possible disruptive effect of permitting both defendant and his attorney to conduct the trial, the court properly exercised its discretion when it declined to permit such hybrid representation, notwithstanding that two judges who presided over the case in pretrial proceedings had agreed to permit such representation. Since the decision whether to allow a defendant to proceed to trial with hybrid representation is a matter of discretion (*see People v Rodriguez*, 95 NY2d 497 [2000]), the law of the case doctrine did

not operate to preclude the trial court from exercising its own discretion on this issue (*see People v Evans*, 94 NY2d 499, 503-04 [2000]). The court also properly exercised its discretion in denying defense counsel's request for a two-week adjournment, made on the ground that the case had been prepared under the assumption of a division of responsibilities between the attorney and his client. Counsel was familiar with the long-pending case and did not establish a need for such an adjournment.

The court properly denied defendant's applications made pursuant to *Batson v Kentucky* (476 US 79 [1986]). Viewing jury selection as a whole, we conclude that defendant did not meet his burden at step one of the inquiry. Defendant did not produce "evidence sufficient to permit the trial judge to draw an inference that discrimination ha[d] occurred" in the exercise of peremptory challenges (*Johnson v California*, 545 US 162, 170 [2005]). While numerical evidence may suffice, in this case it did not warrant an inference of discrimination.

The court properly adjudicated defendant a second felony drug offender previously convicted of a violent felony, based on a 1983 California conviction. The record supports the court's finding that the statutory 10-year limitation period for use of a predicate conviction was tolled by multiple periods of incarceration in California. The adjudication was supported by competent evidence (*see People v Leon*, 10 NY3d 122 [2008]), and

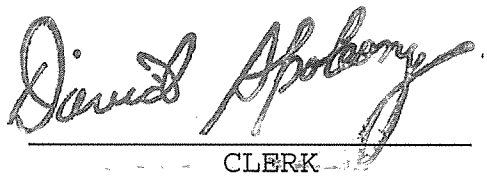
each period of incarceration was properly applied toward the toll of the limitation period (*see* Penal Law 70.04[1][b][v]; *compare People v Dozier*, 78 NY2d 242 [1991]).

The court's preclusion of certain evidence offered by defendant, and its handling of matters occurring during jury deliberations, were proper exercises of discretion that did not cause defendant any prejudice. We have considered and rejected defendant's constitutional arguments regarding these issues.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 25, 2010



CLERK

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

2873 The People of the State of New York, Ind. 2755/07
Respondent,

-against-

Miguel Reyes,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered January 27, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first and second degrees, and sentencing him to an aggregate term of 8 years, unanimously affirmed.

There was no violation of defendant's right to a public trial. The People made a sufficiently particularized showing to justify the exclusion of defendant's family members from the courtroom during testimony by undercover officers (*see People v Nieves*, 90 NY2d 426 [1997]). Defendant's relatives lived within the immediate vicinity of the officers' continued undercover operations, and the court properly determined that the safety of the officers could be compromised if the family members at issue became able to identify them (*see e.g. People v Alvarez*, 51 AD3d 167, 175 [2008], *lv denied* 11 NY3d 785 [2008]). Given the need

for flexibility in determining closure applications (*see id.* at 179), it was appropriate for the court to consider all the relevant circumstances. This included undisputed information that was developed at the colloquy following the taking of testimony at the *Hinton* hearing, as well as the reasonable inferences to be drawn therefrom.

The court properly exercised its discretion when it replaced an unavailable juror with an alternate over defendant's objection, since it was clear that waiting for the absent juror would delay the taking of testimony until at least the following day, which was well beyond the statutory two-hour period (*see* CPL 270.35[2][a]; *People v Jeanty*, 94 n507, 517 [2000]).

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

ENTERED: MAY 25, 2010

David Gproberg

CLERK

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

2874 In re George G.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about June 11, 2009, which adjudicated appellant a juvenile delinquent upon his admission that he committed the act of unlawful possession of a weapon by a person under 16, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The court credited the arresting officer's testimony that at night in a high crime area, the officer saw a bulge in appellant's waistband whose shape was consistent with the grip of a pistol. In addition, as the police approached, appellant adjusted his waistband at the site of the bulge, walked to a nearby pay phone and appeared to be positioning his body in an

effort to conceal the side where the bulge was located. This combination of factors provided reasonable suspicion justifying a stop and frisk (*see People v Benjamin*, 51 NY2d 267, 271 [1980]; *People v De Bour*, 40 NY2d 210, 221 [1976]).

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

ENTERED: MAY 25, 2010

CLERK

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

2875-
2876 681 Chestnut Ridge Road LLC, Index 108868/08
Plaintiff-Appellant,

-against-

Edwin Gould Foundation For Children,
Defendant-Respondent.

Sukenik, Segal & Graff, P.C., New York (Douglas Segal of counsel), for appellant.

Seward & Kissel, LLP, New York (Dale C. Christensen, Jr. of counsel), for respondent.

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered March 23, 2009, in an action to recover the down payment on a contract for the sale of real property, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered March 20, 2009, which, granted defendant's motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The subject contract, while prohibiting plaintiff purchaser from cancelling the contract based on the mere existence of certain easements, the locations of which were not depicted on the survey attached to the contract, does allow plaintiff to cancel based on the locations of those easements if depicted on an updated survey. The motion court correctly held that because the easements in question could not be located, and therefore

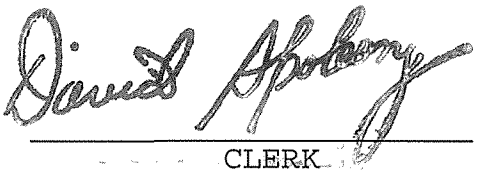
could not be depicted on the updated survey, they do not permit plaintiff to cancel the contract. Under the plain terms of the contract, plaintiff was protected against the easements' locations only if the easements' locations could be determined.

The contract also precludes plaintiff from canceling the contract based on the "state of facts" shown on the survey attached to the contract, which shows a burial ground. It appears that after execution of the contract, defendant disclosed to plaintiff a letter defendant had received before execution from a relative of someone buried in the burial ground requesting permission to inter another relative there. Plaintiff forwarded the letter to its title insurer, and, based on the insurer's ensuing refusal to insure title with respect to the rights of ingress and egress of relatives of persons buried in the burial ground, plaintiff claims the right to cancel. The risk that there might be relatives of persons interred in the burial ground is inherent in the existence of the burial ground, i.e., the state of facts shown on the survey. As the existence of the burial ground was known to, and exception to it waived by, plaintiff, it was on at least inquiry notice as to the risk potential relatives might present (*see Gartner v Lowe*, 299 AD2d 198 [2002], *lv denied* 100 NY2d 501 [2003]).

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

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

ENTERED: MAY 25, 2010



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

2877-
2878 In re Myisha B.,

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

Darryl B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Darryl B., appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

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

Order of fact-finding and disposition (one paper), Family Court, New York County (Rhoda J. Cohen, J.), entered on or about November 13, 2008, to the extent it determined that respondent father neglected the subject child, unanimously affirmed, without costs, and the appeal from the dispositional part of the order, which directed that the child be released to the mother's custody with nine-month supervision and that respondent be placed under supervision of the Commissioner of Social Services until August 12, 2009, unanimously dismissed, without costs, as moot. Appeal from order, same court and Judge, entered on or about June 3, 2008, which denied respondent's motion for recusal, unanimously dismissed, without costs, as taken from a nonappealable paper.

Respondent's challenge to the dispositional part of the order has been rendered moot by the expiration of the terms of the order (*see Matter of Taisha R.*, 14 AD3d 410 [2005]). The denial of his motion for recusal is not appealable as of right (*see* Family Court Act § 1112).

The finding that respondent neglected the child was supported by a preponderance of the evidence (*see* Family Court Act § 1012[f][i]; § 1046[b][i]), including a social work expert's testimony based on independent observations of the child, the child's statements to the expert corroborating her prior, consistent, independently recalled out-of-court statements (*see* Family Court Act § 1046[a][vi]), and the child's statements to an agency caseworker and a family friend (*see Matter of Nicolė V.*, 71 NY2d 112, 124 [1987]; *Matter of Pearl M.*, 44 AD3d 348, 349 [2007]; *Matter of R./B. Children*, 256 AD2d 96 [1998]; *Matter of Najam M.*, 232 AD2d 281, 282 [1996]).

We have considered the respondent father's remaining arguments and find them without merit.

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

ENTERED: MAY 25, 2010

CLERK

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

2879-
2880 Ruth Kassover, etc., et al., Index 602434/05
Plaintiffs-Appellants-Respondents,

-against-

PVP-GCC Holdingco II LLC, et al.,
Defendants,

R. Peyton Gibson, etc.,
Defendant-Respondent-Appellant.

Prism Venture Partners, LLC, et al.,
Nonparty-Respondents.

- - - - - - - - - - -

Ruth Kassover, etc., et al.,
Plaintiffs-Respondents,

-against-

PVP-GCC Holdingco II, LLC, et al.,
Defendants-Appellants,

R. Peyton Gibson, etc.,
Defendant.

Friedman Kaplan Seiler & Adelman LLP, New York (Edward A. Friedman of counsel), for appellants-respondents/respondents.

Windels Marx Lane & Mittendorf, LLP, New York (Delton Vandever of counsel), for respondent-appellant and R. Peyton Gibson, nonparty-respondent.

Kucker & Bruh, LLP, New York (Catherine A. Helwig of counsel), for appellants, and Prism Venture Partners, LLC and Richard Sabella, nonparty-respondents.

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 9, 2009, pursuant to an order, same court (Helen E. Freedman, J.), entered July 2, 2008, inter alia, in favor of plaintiffs and against defendant Gibson in her

capacity as disbursing agent, dismissing all claims against defendants Sabella, Prism Venture Partners, LLC (Prism), and Gibson in her personal capacity, and severing all proceedings with respect to defendants PVP-GCC Holdingco II, LLC (PVP) and The Garden City Company, Inc. (GCC), unanimously modified, on the law, to reinstate plaintiffs' claims for $592 per share as against Prism and Sabella and for breach of contract as against Gibson in her individual capacity, to reduce the total amount awarded to plaintiff Philip Kassover to $293,253.17, and to reduce the total amount awarded to plaintiff Estate to $1,181,564.97, and otherwise affirmed, without costs. Judgment, same court and Justice, entered October 27, 2009, pursuant to an order, same court (Helen E. Freedman, J.), entered July 2, 2008, inter alia, in favor of plaintiffs and against defendants PVP and GCC, unanimously modified, on the law, to reduce the total amount awarded to plaintiff Kassover to $293,606, and to reduce the total amount awarded to plaintiff Estate to $1,181,565, and otherwise affirmed, without costs.

Plaintiffs were properly granted partial summary judgment as against PVP, GCC, and Gibson on their claims for payment of the $2,000 per share merger consideration, there being no dispute that plaintiffs had tendered their shares to Gibson as required by the Merger Agreement, and that plaintiffs were paid only a portion of the $2,000 per share consideration called for in that

agreement. Defendants' claim that they properly withheld payment because plaintiffs had outstanding "monetary obligations" owing to GCC was properly rejected in view of the prior dismissal of defendants' counterclaims based on the same premise (*see* 53 AD3d 444, 445-447, 450 [2008]). We have considered and rejected defendants' other arguments in this regard.

Plaintiffs were properly awarded prejudgment interest at the statutory rate of 9% (CPLR 5001, 5004), even to the extent their claim for the $2,000 per share merger consideration was made pursuant to Business Corporation Law § 501(c). Defendants' reliance on *Matter of Bello v Roswell Park Cancer Inst.* (5 NY3d 170 [2005]) is misplaced, since the claim in that case was made pursuant to a statute (Civil Service Law § 77) that provided a specific remedy that did not include prejudgment interest. In contrast, Business Corporation Law § 501(c) provides no remedy for its violation. Nor is there anything in the Merger Agreement that addresses interest on funds wrongfully withheld. Section 3.2 thereof only specifies how the disbursing agent is to deposit or invest the funds before distribution (*compare Lang v Blumenthal*, 203 AD2d 252, 254 [1994], *overruled on other grounds Vafa v Cramer*, 212 AD2d 593 [1995]).

Because the court expressly directed defendants to pay interest on various sums "representing interest due but not

paid," i.e. improper compound interest (*see Long Playing Sessions v Deluxe Labs.*, 129 AD2d 539, 540 [1987]), we reduce the judgments as above indicated.

In its January 2007 order, not at issue on this appeal, the motion court held that the complaint stated a cause of action as against Gibson for breach of the Merger Agreement in alleging that she breached her duties thereunder as disbursing agent by failing to pay plaintiffs $2,000 per share for their GCC stock. The court also held that plaintiffs stated a cause of action pursuant to Business Corporation Law § 501(c) as against the various defendants, including Sabella and Prism. This Court affirmed those rulings (53 AD3d 448), and specifically with regard to Gibson stated:

> "The merger agreement places on Gibson the obligation to hold all cash 'in trust for the benefit of the Garden City Shareholders.' To the extent that Gibson did not do so in that she failed to disburse to plaintiffs the $2,000 per share for their stock, she can be sued for breach of contract. Defendants' argument based on section 15.15 that Gibson has no personal liability under the Merger Agreement is unavailing because that section refers only to personal liability to the 'Buyer,' i.e. Prism" (*id.* at 449).

In granting the cross motion to dismiss as against Sabella and Prism, the motion court based its decision on a purported concession by plaintiffs that only PVP, GCC, and Gibson (as disbursing agent) were responsible for paying the $2,000 per share to plaintiffs, and its belief that plaintiffs were not

seeking anything else from Sabella and Prism. Overlooked was plaintiffs' separate claims for an additional $592 per share made against all of the defendants, including Sabella and Prism, a claim subsequently sustained by this Court (53 AD3d at 448). The motion court also misread plaintiffs' purported concession, which conceded only that "the parties responsible for paying the $2000 per share to plaintiffs are defendants PVP (as buyer), Garden City as the surviving corporation, and Gibson as Disbursing Agent," and expressly stated that plaintiffs' motion for partial summary judgment on the $2,000 per share claim did not "require a ruling involving Gibson's, Sabella's or [Prism's] 'personal' or corporate liability." We find Prism's and Sabella's arguments on this point unavailing, and accordingly modify to reinstate the claim for $592 per share as against them.

With respect to Gibson's cross motion pursuant to CPLR 3211, this Court's prior order holding that she could be sued for breach of contract in her individual capacity constitutes law of the case that was binding on the motion court (*see Miller v Schreyer*, 257 AD2d 358, 360-361 [1999]). Further, as with Sabella and Prism above, the motion court was mistaken in its belief that plaintiffs had conceded that Gibson could not be held personally liable. While Gibson did not sign the Merger Agreement in her individual capacity, plaintiffs do seek to hold her liable for failure to comply with her obligations as

disbursing agent, and do not seek anything with regard to her position as Trustee, an office that entailed entirely different responsibilities. Nor does the Merger Agreement specifically exempt Gibson from personal liability to plaintiffs. Thus, we reject Gibson's argument that reference to her as "Trustee" in the Merger Agreement precludes her personal liability for failure to comply with her obligations as disbursing agent (*see Societe Generale v U.S. Bank Natl. Assn.*, 325 F Supp 2d 435, 437 [SD NY 2004], *affd* 144 Fed Appx 191 [2d Cir 2005]). Accordingly, we modify to reinstate the breach of contract claim as against Gibson in her individual capacity.

The motion court properly denied leave to amend the answer to assert counterclaims that were merely restatements of the previously dismissed counterclaims or that alleged conclusory, speculative and/or time-barred claims based on misconduct by plaintiff Philip Kassover. Indeed, similar to the initial counterclaims, the proposed new counterclaims seek to assert claims reaching back to when Philip was the Chief Executive of GCC, even though the motion court and this Court have held that such alleged misconduct was protected by the business judgment rule and was not a proper basis for a claim absent nonconclusory allegations of "bad faith, a conflict of interest or the self-dealing necessary to overcome the business judgment rule"

(53 AD3d at 450; *see also Fischbein v Beitzel*, 281 AD2d 167 [2001], *lv denied* 96 NY2d 715 [2001]).

We have considered the appellants' remaining claims and find them unavailing.

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

ENTERED: MAY 25, 2010

CLERK

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

2881 Maddaloni Jewelers, Inc., Index 602457/02
Plaintiff-Respondent,

-against-

Rolex Watch U.S.A., Inc.,
Defendant-Appellant.

Gibney, Anthony & Flaherty, LLP, New York (Wm. Lee Kinnally, Jr. of counsel), for appellant.

Tarter Krinsky & Drogin LLP, New York (Debra Bodian Bernstein of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 20, 2009, which denied defendant's motion for preclusion of plaintiff's substituted damages expert or, in the alternative, for the attorneys' fees and costs attributable to the substitution of the expert, unanimously affirmed, with costs.

The motion court exercised its discretion in a provident manner in denying defendant's motion for preclusion. Although defendant may have incurred expenses in preparing a rebuttal to plaintiff's initial expert's report, there was no indication that plaintiff's substitution of its expert was willful or prejudicial to defendant (*see Gallo v Linkow*, 255 AD2d 113, 117 [1998]). The record demonstrates that the case had been already been delayed due to defense counsel's surgery and was again delayed because of a change of Justices assigned to the case. Plaintiff's service of its substitution of experts was neither done on the eve of

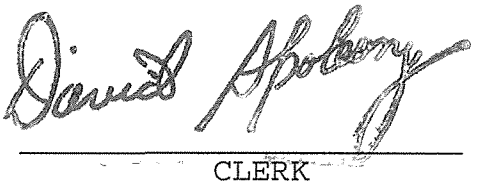
trial nor at the last-minute, as no trial date was set at the time the substituted expert was hired (*see e.g. Mateo v 83 Post Ave. Assoc.*, 12 AD3d 205, 205-206 [2004]). Furthermore, even assuming that plaintiff was required to show "good cause" (CPLR 3101[d][1][i]), its proffered reason for the substitution of experts, namely, the breakdown in its relationship with its former expert, sufficiently established such "good cause" (*compare Lissak v Cerabona*, 10 AD3d 308, 309-310 [2004]).

The motion court providently exercised its discretion in refusing to award legal fees and costs attributable to the substitution of the expert. "An award of attorneys' fees as a direct remedy must be based on contract or statute" or where there is established wrongdoing (*City of New York v Zuckerman, et al.*, 234 AD2d 160 [1st Dept 1996], *app dismissed* 90 NY2d 845 [1997]). While a party may be ordered to bear the cost of his or her adversary's rebuttal expert where a party fails to disclose the substance of the expert's testimony in accordance with CPLR 3101 and where the matter is on for trial (*see St. Hilaire v White*, 305 AD2d 209 [2003]), here, plaintiff's notice of substitution of its expert was offered months before the

action was scheduled for trial, and there is no showing that plaintiff acted improperly in attempting to substitute experts.

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

ENTERED: MAY 25, 2010



CLERK

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

2883 The People of the State of New York, Ind. 5456/06
Respondent,

-against-

Robert Smith,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and O'Melveny & Myers LLP, New York (Sarah B. Hargrove of counsel), for appellant.

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

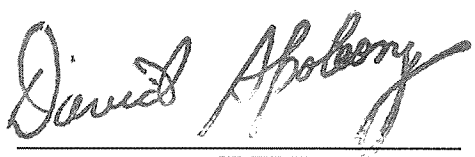
Judgment, Supreme Court, New York County (Arlene D. Goldberg, J. at suppression hearing; Robert Straus, J. at plea and sentence), rendered January 19, 2007, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to a term of 5 years, unanimously affirmed.

The court properly denied defendant's motion to suppress a statement that defendant claimed to be the product of an unlawful detention. The police received an anonymous tip that included detailed clothing descriptions of a man and a woman at a specific location and stated that the man had just given the woman a handgun, which she placed in her purse. The police immediately arrived at that location and saw people running, including defendant and a woman, who met the descriptions of the man and woman referred to in the tip. After the police found a purse

under a nearby parked car that contained the woman's photo identification and a handgun, they arrested defendant and the woman and took them to the station house. About nine hours later, the woman made a statement connecting defendant to the weapon. Shortly thereafter, defendant waived his *Miranda* rights and, after initially denying knowledge of the weapon, he admitted possessing it. Regardless of whether the police had probable cause to take defendant into custody, his statement was sufficiently attenuated from the taint of the unlawful arrest (*see e.g. People v Divine*, 21 AD3d 767 [2005], *affd* 6 NY3d 790 [2006]; *People v Doyle*, 295 AD2d 446, 447 [2002], *lv denied* 98 NY2d 730 [2002]; *People v McCloud*, 247 AD2d 409 [1998], *lv denied* 91 NY2d 975 [1998]). Defendant's confession was "sufficiently an act of free will to purge the primary taint" (*Wong Sun v United States*, 371 US 471, 486 [1963]).

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

ENTERED: MAY 25, 2010



CLERK

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

2884
M-1776 Norman Feldman, Index 102511/02
Plaintiff-Appellant, 591003/05

-against-

A.R.J.S. Realty Corp., et al.,
Defendants-Respondents.

[And a Third-Party Action]

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Louis B. York, J.), entered on or about March 12, 2009,

And upon the stipulation of the parties hereto dated May 5, 2010,

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

M-1776 - Motion to strike respondent's brief denied as academic.

ENTERED: MAY 25, 2010

CLERK

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

2885 Anny C. Dietz, et al., Index 108309/07
Plaintiffs-Appellants-Respondents,

-against-

S.K.V., Inc., Individually and
doing business as La Houppa Ristorante,
Defendant-Respondent,

Madison/64th Properties, LLC,
Defendant-Respondent-Appellant.

Zalman & Schnurman, New York (Marc H. Miner of counsel), for appellants-respondents.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for respondent-appellant.

Gannon, Rosenfarb & Moskowitz, New York (James A. Aldag of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered November 18, 2009, which granted defendants' respective motions for summary judgment dismissing the complaint and denied as moot the part of defendant Madison/64th Properties' motion that sought, in the alternative, summary judgment on its common-law and contractual indemnification claims against the S.K.V. defendants, unanimously affirmed, without costs.

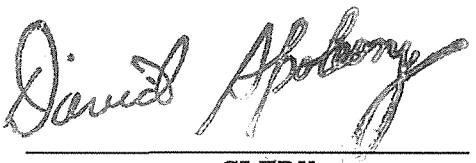
The Building Code provisions relied upon by plaintiffs do not apply to the subject staircase (*see Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 497-498 [2008]; *Gaston v New York City Hous. Auth.*, 258 AD2d 220, 223 [1999]). Nor did defendants have notice of any dangerous condition that

would otherwise give rise to liability on their part (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

We need not address Madison's appeal from the denial of the purely alternative relief of summary judgment on its claims for indemnification.

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

ENTERED: MAY 25, 2010



CLERK

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

2886 In re Sharon Parker, Index 402253/08
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

William E. Leavitt, New York, for appellant.

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 28, 2009, which denied the petition brought pursuant to CPLR article 78 to, among other things, annul the determination of respondent New York City Housing Authority, dated April 30, 2008, terminating petitioner's tenancy, unanimously affirmed, without costs.

There was substantial evidence to sustain the first, fourth, fifth and sixth charges. With respect to the first charge, there was substantial evidence that petitioner violated the stipulation of settlement by misrepresenting information on her affidavit of income during the probationary period. Petitioner failed to preserve her argument that the first charge was untimely because it was issued after the probationary period, and we decline to consider it (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [2007]). As an alternative holding, we also reject it on the merits.

Petitioner also failed to preserve her argument that the fourth and fifth charges only require her to supply requested information to respondent, and that she supplied such information when requested, and we decline to consider it (*id.*). As an alternative holding, we also reject it on the merits. The charges do not allege a failure to cooperate, but rather allege a failure to provide complete income verification. The hearing officer properly sustained these charges based on the evidence that petitioner's affidavits of income were incomplete inasmuch as she failed to disclose the income she and her daughter received. With respect to the sixth charge, because petitioner submitted a document during the hearing indicating that she owed over $9,000 in rent due to her alleged fraud, there was substantial evidence that she violated the lease by failing to pay these arrears.

With respect to the third charge, although there was no evidence supporting the finding that petitioner misrepresented her household income on her affidavit dated January 6, 2003, there was substantial evidence that she misrepresented her household income on affidavits dated October 13, 2003 and January 3, 2005. Accordingly, the hearing officer properly sustained the third charge.

Contrary to petitioner's contention, the hearing officer's determination was not based on uncharged misconduct. Indeed, the

fourth and fifth charges adequately alleged that petitioner, among other things, failed to provide accurate information with respect to the identity, number or composition of the persons in her household. Accordingly, petitioner was not deprived of due process (*compare Matter of Murray v Murphy*, 24 NY2d 150, 157-158 [1969]).

The hearing officer adequately developed the record with respect to whether petitioner misrepresented her family income and failed to pay rent arrears as a result of the alleged fraud (*see Matter of Jackson v Hernandez*, 63 AD3d 64, 68-70 [2009]).

We also find that the penalty of terminating the tenancy does not shock one's sense of fairness where, as here, there is evidence that petitioner misrepresented her household income (*see Matter of Smith v New York City Hous. Auth.*, 40 AD3d 235, 235 [2007], *lv denied* 9 NY3d 816 [2007]). Petitioner failed to provide any evidence at the hearing regarding mitigating factors.

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

ENTERED: MAY 25, 2010

CLERK

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

2887-
2887A Jacqueline Aguilar Taylor, et al., Index 117944/06
Petitioners-Appellants,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

Amalgamated Warbasse Houses, Inc.,
Respondent.

Dina S. Staple, Bayside, for appellants.

Andrew M. Cuomo, Attorney General, New York (Robert C. Weisz of counsel), for DHCR respondent.

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 25, 2008, to the extent appealed from, denying the petition to annul the determination of respondent New York State Division of Housing and Community Renewal (DHCR) which denied petitioner Taylor's application for succession rights to the deceased tenant's apartment, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 14, 2009, unanimously dismissed, without costs, as abandoned.

Petitioners failed to demonstrate that the subject apartment was petitioner Taylor's primary residence, since she was not listed on the deceased tenant's income affidavits and no notice

of a change in family composition had been filed (*see* 9 NYCRR 1727-8.2[a][2]; 9 NYCRR 1700.2[13], formerly 9 NYCRR 1727-8.2[a][5]; *Matter of Greichel v New York State Div. of Hous. & Community Renewal*, 39 AD3d 421 [2007]). Regardless of whether respondent Amalgamated Warbasse Houses, Inc. knew of and acquiesced to Taylor's residency in the apartment, DHCR cannot be estopped from invoking the regulations (*Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776 [2008]).

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

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

ENTERED: MAY 25, 2010

CLERK

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

2888 Jeevan P. Padiyar, Index 116296/06
Plaintiff-Appellant,

-against-

Albert Einstein College of Medicine
of Yeshiva University, et al.,
Defendants-Respondents.

Solotoff & Solotoff, Great Neck (Lawrence Solotoff of counsel), for appellant.

Sive Paget & Riesel, P.C., New York (Steven C. Russo of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 22, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The instant plenary complaint, while couched in terms of unlawful discrimination and breach of contract, is in fact a challenge to a university's academic and administrative decisions and thus is barred by the four-month statute of limitations for a CPLR article 78 proceeding, the appropriate vehicle for such a challenge (*Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999], *Risley v Rubin*, 272 AD2d 198 [2000], *lv denied* 96 NY2d 701 [2001]).

The complaint is also barred by the doctrine of res judicata, since plaintiff had ample opportunity in the article 78 proceeding he commenced in 2005 to set forth all the charges he

raises in this action (*see e.g. Abramova v Albert Einstein Coll. of Medicine of Yeshiva Univ.*, US Dist Ct, SD NY, 06 Civ 00166, Brieant, J., July 26, 2006, *affd* 278 Fed Appx 30 [2008]).

We have considered plaintiff's remaining contentions and find them without merit.

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

ENTERED: MAY 25, 2010

CLERK

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

2889 The People of the State of New York, Ind. 2117/02
M-2046 Respondent,

-against-

John Sierra,
Defendant-Appellant.

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

Appeal from judgment of resentence, Supreme Court, New York County (Arlene Silverman, J.), rendered December 3, 2008, resentencing defendant to a term of 5 years, with 3½ years of postrelease supervision, unanimously dismissed as moot, in that Supreme Court has granted defendant's motion to set aside the resentence.

M-2046 - Motion to dismiss appeal as moot granted.

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

ENTERED: MAY 25, 2010

CLERK

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

2890 Landau, P.C., formerly known as, Index 601131/07
M-2199 Morris J. Eisen, P.C.,
M-2313 Plaintiff-Respondent,

Morris J. Eisen, etc., et al.,
Plaintiffs,

-against-

Oliveri & Schwartz, P.C.,
Defendant-Appellant.

David Seth Michaels, Spencertown, for appellant.

Morton Povman, Forest Hills, for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 16, 2009, which denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Defendant law firm argues that plaintiff law firm, a professional corporation, lacks standing and capacity to bring this action to enforce a fee-sharing agreement either because plaintiff was dissolved by resolution in 1992 or because plaintiff forfeited its certificate of incorporation by failing to enforce Business Corporation Law § 1509 against its disbarred principal. We perceive no pertinent facts in this record bearing on either plaintiff's claimed dissolution or its purported continuing relationship with its disbarred principal that were not before the Court of Appeals in *Landau, P.C. v LaRossa, Mitchell & Ross* (11 NY3d 8 [2008]). That case held that although

plaintiff initially lacked standing and/or capacity to initiate the litigation therein because it had been dissolved in 1997 by proclamation of the Secretary of State for failure to pay franchise taxes, this deficiency was cured when plaintiff paid the required fees (*id.* at 13). By stating that plaintiff had been dissolved in 1997 by proclamation of the Secretary of State, *LaRossa* implicitly rejected that plaintiff had been dissolved earlier in 1992 by the execution of dissolution documents. Although, as the motion court noted, *LaRossa* did not discuss Business Corporation Law § 1509, by allowing the action to proceed on the merits, the Court of Appeals implicitly recognized plaintiff's standing and capacity to sue.

M-2199
M-2313 ***Landau, P.C., etc., et al. v Oliveri & Schwartz, P.C.***

Motion to take judicial notice of certain public documents, and cross motion seeking judicial notice of certain decisions denied as moot.

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

ENTERED: MAY 25, 2010

CLERK

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

2891N-
2891NA Vanessa Walls, etc., et al., Index 108867/07
Plaintiffs-Appellants,

-against-

Prestige Management, Inc., et al.,
Defendants-Respondents.

Michael Mantell, New York, for appellants.

Kardisch, Link & Asociates P.C., Mineola (Matthew M. Frank of counsel), and Dale E. Hibbard, Forest Hills, for respondents.

Orders, Supreme Court, New York County (Louis B. York, J.), entered May 6, 2009 and October 13, 2009, which, insofar as appealed from, denied plaintiffs' motion for leave to amend the complaint to add a cause of action for negligence on behalf of plaintiff Vanessa Walls and denied plaintiffs' motion to renew the prior motion, respectively, unanimously affirmed, without costs.

Plaintiff Vanessa Walls stated that she first discovered her injuries some time in 2001. Therefore, the motion to amend is time-barred because it was made more than three years after the discovery (*see* CPLR 214-c; *Martin v 159 W. 80 St. Corp.*, 3 AD3d 439, 439-440 [2004]). The prior Civil Court action alleged breach of the warranty of habitability, the measure of damages for which is limited to rent abatement (*see Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 329 [1979], *cert denied* 444 US 992 [1970];

Elkman v Southgate Owners Corp., 233 AD2d 104 [1996]), and the mere breach of that warranty does not give rise to a claim for personal injury (*see Martin*, 3 AD3d at 440). Plaintiff's undated Civil Court bill of particulars does not avail her in her claim that her proposed amendment relates back to the Civil Court action, because she has not demonstrated that it was served before the statute of limitations had expired (*see Smith v Bessen*, 161 AD2d 847, 848-849 [1990]). Nor can plaintiff's amendment relate back to the dismissed Housing Court proceeding because the pleading in the Housing Court proceeding is not a "still-valid prior pleading[] in this action" (*see Alharezi v Sharma*, 304 AD2d 414, 414-415 [2003]).

Plaintiffs' motion for renewal failed to present any "new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]).

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

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

ENTERED: MAY 25, 2010

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Eugene Nardelli
Dianne T. Renwick
Helen E. Freedman
Nelson S. Román, JJ.

1671
Ind. 70/06

x

The People of the State of New York,
Respondent,

-against-

Benito Acevedo,
Defendant-Appellant.

x

Defendant appeals from an order of the Supreme Court, New York County (Renee A. White, J.), entered on or about February 26, 2009, which denied his motion, pursuant to CPL 440.20, to set aside his sentence on a judgment rendered November 14, 2006, convicting him of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree and sentencing him as a second felony drug offender previously convicted of a violent felony.

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

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

TOM, J.P.

Defendant appeals from the denial of his CPL 440.20 motion to set aside the sentence imposed upon his adjudication as a second felony drug offender based on a 2001 conviction. Under Penal Law § 70.06(1)(b)(ii), it is the sentence date that determines whether a crime constitutes a predicate offense, not the date of conviction. Since defendant was resentenced for the 2001 crime *after* the instant offense was committed, the second felony adjudication and the sentence entered thereon must be vacated.

In June 2001, defendant pleaded guilty to attempted robbery in the second degree in full satisfaction of the charges against him. He was adjudicated a second felony offender based on a 1993 Massachusetts conviction for distribution of a controlled substance, and on July 19, he received a determinate sentence of 4 years. However, at sentencing the court did not pronounce the mandatory term of postrelease supervision (PRS). Defendant did not appeal his conviction, nor did he argue that his sentence was illegal. Thereafter, the Department of Correctional Services (DOCS) imposed a five-year period of PRS.

In 2006, in the matter on appeal, defendant was convicted of criminal possession and criminal sale of a controlled substance in the third degree. On November 14 of that year he was

adjudicated a second felony drug offender (Penal Law § 70.70[1][b]) based on the 2001 attempted robbery conviction, which was a violent felony (§ 70.02[1][c]). He was sentenced to concurrent terms of six years, to be followed by three years' PRS. On appeal, defendant did not contest his adjudication as a violent predicate felon, and this Court affirmed the conviction (62 AD3d 464 [2009], *lv denied* 13 NY3d 741 [2009]).

In 2008, defendant brought a motion for resentencing on the 2001 attempted robbery conviction (CPL 440.20), contending that the sentence imposed was illegal because the court had failed to pronounce the mandatory term of PRS (see *People v Sparber*, 10 NY3d 457 [2008]; *Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358 [2008]). At a hearing, defendant related that the present drug offense was committed some six months after his release following completion of his four-year sentence on the 2001 crime. The court declared defendant delinquent and remanded him on the basis of the five-year period of PRS imposed by DOCS.

In response to the motion, the People consented to have defendant's original sentence reimposed without PRS (Penal Law § 70.85 [Transitional exception to determinate sentencing laws]). The court then resentenced defendant to the originally imposed determinate term of four years without any term of PRS (Correction Law § 601-d; Penal Law § 70.85), stating that such

sentence was nunc pro tunc to the original sentence date of July 19, 2001.

On the motion at bar, defendant sought to be resentenced on the instant drug offense as a first felony offender, arguing that his 2001 armed robbery conviction no longer qualified as a predicate felony because the original sentence imposed was illegal, requiring that he be resentenced in 2008, after the present offense had been committed. The People opposed, noting that defendant had been resentenced nunc pro tunc pursuant to Penal Law § 70.85. Therefore, they contended, the 2001 conviction retained its original date and properly served as a predicate felony on the instant conviction.

Supreme Court agreed. Construing the defect as "an easily correctable procedural error," as recognized by the Court of Appeals in *Sparber* (10 NY3d at 472), the court held that the imposition of the original four-year determinate sentence on July 19, 2001 had been lawful and proper. The court thus concluded that it remained a viable predicate for sentence enhancement in connection with the instant drug offense.

A Justice of this Court granted leave to appeal. We now reverse.

Where resentencing occurs after the present offense, we have held that the prior crime does "not qualify as a predicate conviction for purposes of sentencing as a persistent violent

felony offender," since "multiple offender status is defined by the plain statutory language, which courts are not free to disregard" (*People v Wright*, 270 AD2d 213, 215 [2000], *lv denied* 95 NY2d 859 [2000]). Adjudication as a second felony drug offender requires a predicate conviction of a felony defined in Penal Law § 70.06 (Penal Law § 70.70[1][b]), which "uses the imposition of sentence, not the date of conviction, as the criterion of predicate status" (*Matter of Murray v Goord*, 298 AD2d 94, 99 [2002], *affd* 1 NY3d 29 [2003]). Under the statute, the predicate sentence "must have been imposed before commission of the present felony" (Penal Law § 70.06[1][b][ii]).

The People contend that the failure to pronounce a period of PRS is not substantive but constitutes only a procedural error, citing *Sparber* (10 NY3d at 472). This view, adopted by Supreme Court, is inconsistent with the Court of Appeals' holding that where a defendant's right to hear sentence pronounced against him is violated, the only available remedy is to vacate the sentence and remand the matter for resentencing (*id.* at 471; *see also People v Stroman*, 36 NY2d 939 [1975]). Such an omission "has a 'substantial' effect on [a defendant] and 'implicate[s] the public interest' in ensuring the regularity of sentencing" (*Garner*, 10 NY3d at 363, quoting *Matter of Pirro v Angiolillo*, 89 NY2d 351, 359 [1996]).

The People ignore these considerations, seeking to confine the effect of vacating the sentence imposed on the predicate robbery conviction to that part of the sentence dealing with PRS. They attempt to distinguish the vacating of a sentence under Penal Law § 70.85 from cases where the underlying judgment of conviction was reversed (*e.g. People v Bell*, 73 NY2d 153 [1989]), or where the predicate sentence was found to be illegal (*e.g. People v Boyer*, 19 AD3d 804 [2005], *lv denied* 5 NY3d 804 [2005]; *People v Robles*, 251 AD2d 20 [1998], *lv denied* 92 NY2d 904 [1998]), contending that pursuant to statute, "resentencing" here left defendant's original conviction and prison sentence intact.

By definition, vacating a sentence has the legal effect of annulling it, i.e., rendering it void. Moreover, in arguing that there was no illegality in the "prison portion" of the sentence on defendant's prior conviction, the People overlook the express language of the provision under which defendant was resentenced. Penal Law § 70.85 provides that where, as here, a case is before the court "for consideration of whether to resentence, the court may, notwithstanding any other provision of law but only on consent of the district attorney, re-impose the originally imposed determinate sentence of imprisonment without any term of post-release supervision, which then shall be deemed a lawful sentence." If, as the People contend, the prison portion of the sentence remained valid, there would be no need for the

Legislature to declare lawful the *reimposition* of the selfsame term of imprisonment.[1]

The distinction the People overlook is that Penal Law § 70.85 obviates the need to vacate a defendant's guilty plea, because it was "a statutory exception to the mandatory imposition of PRS, which was directly aimed at saving guilty pleas" (*People v Boyd*, 12 NY3d 390, 393 [2009]). It does not obviate the need to vacate the original sentence and remit the matter for resentencing. Hence, the statute permits the court to "re-impose the originally imposed determinate sentence of imprisonment." Nothing in the statute detracts from the force of the Court of Appeals' pronouncement that the "sole remedy for a procedural error such as this is to vacate the sentence and remit for a resentencing hearing so that the trial judge can make the required pronouncement" (*Sparber*, 10 NY3d at 471).

In supplemental submissions, the parties contest the effect of *People v Williams* (14 NY3d 198 [2010]), which was decided after this appeal was heard. *Williams* holds that imposing a period of postrelease supervision after a defendant has served

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[1] The People also suggest that our ruling will render defendant's second-degree attempted robbery conviction a predicate felony for 10 years following the resentencing date (Penal Law § 70.06[1][b][iv], [v]; *Bell*, 73 NY2d at 165). It has been observed that the remedy for any harsh result produced by the statute lies with the Legislature (*see People v Dozier*, 78 NY2d 242, 254 [1991, Wachtler, Ch J., dissenting]). In any event, the issue is not before us, and we do not address it.

his or her term of imprisonment and after his or her direct appeal has been completed offends the constitutional protection against double jeopardy. The People contend that the resentencing proceedings are a nullity, arguing that the court lacked jurisdiction to resentence defendant in connection with the predicate attempted robbery conviction because, under *Williams*, the court's power to resentence a defendant ends with his or her release from custody by DOCS. Defendant argues that no period of PRS was included in the sentence imposed upon resentencing; accordingly, due process considerations are not implicated, and *Williams* is inapposite.

Williams bars an *upward* modification of a sentence after a defendant has been released from incarceration. Here, the modified sentence imposes no additional punishment on defendant. Therefore, it does not violate the due process rights under consideration in *Williams*. Rather, it is a valid sentence and determines the date of the offense for the purpose of second felony adjudication. Moreover, the People did not raise any objection at defendant's resentencing but, to the contrary, gave their consent.

Although defendant's 2001 attempted robbery conviction no longer qualifies as a predicate felony, the appropriate remedy is to remand for resentencing to afford the People the opportunity to establish whether his 1993 Massachusetts conviction still

qualifies as a predicate felony when the time he has spent incarcerated is excluded from the 10-year limitation pursuant to Penal Law §§ 70.06(1)(b)(iv) and (v) (*see People v Johnson*, 57 AD3d 323 [2008]; *People v Rodriguez*, 302 AD2d 317 [2003], *lv denied* 99 NY2d 657 [2003]).

Accordingly, the order of Supreme Court, New York County (Renee A. White, J.), entered on or about February 26, 2009, which denied defendant's motion, pursuant to CPL 440.20, to set aside his sentence on a judgment rendered November 14, 2006, convicting him of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree and sentencing him, as a second felony drug offender previously convicted of a violent felony, to concurrent terms of 6 years, to be followed by a 3-year term of PRS, should be reversed, on the law, and the matter remanded for sentencing, including further proceedings with respect to defendant's predicate felony status.

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

NARDELLI, J. (dissenting)

Since 2001, defendant has, at all times, been a convicted felon. His 2001 conviction has never been vacated. CPL 440.20, pursuant to which defendant moved for resentencing, concerns only sentence. The caption of the section reads, "Motion to set aside **sentence**; by defendant" (emphasis added). The first paragraph of Prof. Preiser's McKinney's Practice Commentary immediately following the section recites, "This motion deals solely with the sentence and has no affect (*sic*) upon the underlying conviction." The difference between a sentence and a conviction is significant, and is determinative of this appeal.

On July 19, 2001 defendant was convicted in New York, upon his plea of guilty, of attempted robbery in the second degree, and adjudicated a second felony offender.[1] He received a sentence of four years, but the court, through oversight, did not pronounce the five-year term of postrelease supervision mandated by Penal Law § 70.45 as then in effect. The crime of attempted robbery in the second degree constitutes a violent felony as defined under Penal Law § 70.02(1)(c). That conviction has, as noted above, never been vacated, and therefore, defendant has at

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[1]On February 2, 1993, defendant had been convicted in Massachusetts of distribution of a controlled substance. There is no dispute that the crime for which defendant was convicted constitutes a felony in New York for purposes of New York's predicate felony sentencing scheme. That conviction has never been vacated or modified.

all times since July 19, 2001 been a convicted violent felon.

In 2008, defendant moved, pursuant to CPL 440.20, for resentencing only, on his 2001 conviction, because of the court's failure to pronounce the mandatory term of postrelease supervision. On December 19, 2008, pursuant to Penal Law § 70.85, he was resentenced to the same determinate term of four years without post-release supervision. The sentence was made nunc pro tunc to the original sentence date of July 19, 2001. Therefore, the only difference between the terms of defendant's 2001 sentencing and his 2008 resentencing was that in the former the court neglected to pronounce postrelease supervision, while in the latter it intentionally decided not to impose postrelease supervision, with the People's consent. The conviction itself was not disturbed. As is now evident from the recent decision in *People v Williams* (14 NY3d 198 [2010]), the resentencing was not only a technicality, it was a nullity.

On January 7, 2006, obviously after his sentencing, but prior to his resentencing on the attempted robbery conviction, defendant was arrested during a "buy and bust" drug operation. On November 14, 2006, after a jury trial, he was convicted of criminal possession and criminal sale of a controlled substance in the third degree, and sentenced as a second felony offender (Penal Law § 70.06) whose prior conviction was a violent felony (§ 70.02[1][c]; *see also* CPL 400.21). The basis for his

predicate violent felony status was the 2001 conviction for attempted robbery.

On or about January 5, 2009 defendant moved to vacate his predicate felony sentence on the 2006 drug conviction because he had been resentenced in 2008 on the 2001 attempted robbery conviction, albeit to exactly the same terms he had received in 2001, and despite the fact that his conviction itself, and thus his violent felon status, had remained unchanged since 2001. The trial court rejected the application with the observation, correct in my belief, that the failure to impose postrelease supervision in 2001 was not a substantive illegality, but simply "an easily correctable procedural error" that "did not render that sentence unlawful so as to negate its validity as a prior felony conviction as of that date."

The majority upsets that determination with the observation that "where a defendant's right to hear sentence pronounced against him or her is violated, the only available remedy is to vacate the sentence and remand the matter for resentencing."

While I agree that a defendant has the right to actually hear from the court the sentence that is to be imposed upon him or her, rather than to first read about it in a commitment sheet prepared by a clerk (*see People v Sparber*, 10 NY3d 457 [2008]), I am at a loss to understand why the court's oversight on a ministerial detail precludes a finding that he is a predicate

felon after he committed another felony. It is particularly perplexing in this case since defendant received the same sentence in both 2001 and 2008 (*cf. People v Wright*, 270 AD2d 213 [2000], lv denied 95 NY2d 859 [2000], where the defendant was illegally sentenced originally, and then resentenced to a legal sentence, and the determinative date for purpose of future adjudications was the resentencing date). The failure to impose postrelease supervision in 2001 was concededly "procedurally flawed" (*Sparber*, 10 NY3d at 472 n. 8). It was corrected, however, and the result should not be "a windfall that greatly exceeds any harm" that defendant has purportedly suffered (*id.* at 469). Indeed, as noted above, it is now a nullity.

"The second felony offender statute of necessity addresses past events - previous criminal acts. The statute's goal is to deter recidivism by enhancing the punishments of those who, having been convicted of felonies, violate the norms of civil society and commit felonies again" (*People v Walker*, 81 NY2d 661, 665 [1993]).

A second violent felony offender is a person who stands convicted of a violent felony as prescribed by New York law, was sentenced before commission of a second crime, and received his or her sentence within 10 years before the commission of the second felony (*see generally* Penal Law 70.04). A second felony drug offender previously convicted of a violent felony is one

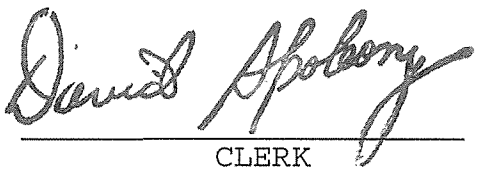
whose conduct satisfies these requirements, and, additionally, has committed a crime denominated a drug felony (*see generally* § 70.70). Defendant's antisocial but voluntary behavior has earned him the privilege of being sentenced as a second felony drug offender with a prior violent felony conviction, since he has met all the conditions.

In 2006, when defendant committed the acts which resulted in his convictions on drug-related charges, he was fully aware that he had a prior felony conviction in 2001. That conviction had never been vacated. He is not entitled to the windfall of abrogating his status as a second felon because of a procedural irregularity, qua nullity. And the people of New York have the right to know that he does not escape the appropriate sanctions because of legalistic legerdemain.

The conviction should be affirmed.

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

ENTERED: MAY 25, 2010



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MAY 25 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
Rolando T. Acosta
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

2599N
Index 601327/07

x

Fish & Richardson, P.C.,
Plaintiff-Respondent,

-against-

Randy Schindler,
Defendant-Appellant.

x

Defendant appeals from an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 24, 2009, which granted plaintiff's motion to strike defendant's answer pursuant to CPLR 3126, awarded plaintiff judgment on liability, and referred the issue of damages to a special referee.

Danzig Fishman & Decea, White Plains (Donald S. Campbell, Donald G. Davis and Jenifer J. Liu of counsel), for appellant.

Brown & Whalen, P.C., New York (Rodney A. Brown and Ryan J. Whalen of counsel), for respondent.

RICHTER, J.

This appeal brings up for review an order of Supreme Court that granted plaintiff's motion to strike defendant's answer for failing to comply with multiple court orders and discovery deadlines. CPLR 3126 provides that if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . ., the court may make such orders . . . as are just." A court may strike an answer as a sanction where the moving party establishes that the failure to comply was "willful, contumacious or in bad faith" (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [2010] [internal quotation marks and citation omitted]). Upon such showing, the burden "shifts to the nonmoving party to demonstrate a reasonable excuse" (*Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [2004]).

"If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). Although actions should be resolved on the merits whenever possible, the efficient disposition of cases is not advanced by hindering the ability of the trial court to supervise the parties who appear before it and to ensure they comply with

the court's directives (*see Arts4all, Ltd. v Hancock*, 54 AD3d 286, 287 [2008], *affd* 12 NY3d 846 [2009], *cert denied* __ US __, 130 S Ct 1301 [2010]). Thus, a penalty imposed pursuant to CPLR 3126 should not be readily disturbed absent a clear abuse of discretion (*id.* at 286; *see Sawh v Bridges*, 120 AD2d 74, 79 [1986], *appeal dismissed* 69 NY2d 852 [1987]).

Here, Supreme Court did not abuse its discretion in striking defendant's answer based on a pattern of disobeying court orders and failing to provide discovery. Defendant's flouting of his disclosure obligations began well before court involvement in this action. In August 2007, shortly after the complaint was filed, plaintiff served defendant with a request for documents, yet defendant failed to respond. At the preliminary conference held on December 20, 2007, the court issued an order directing defendant to answer that document request, and to produce certain insurance information, by January 16, 2008. Although defendant ultimately responded to the document demand, his response came two weeks after the deadline, and he never produced the insurance information. In a compliance conference order dated March 6, 2008, defendant was directed to respond to an interrogatory request and a second demand for documents by March 28 and April 11, 2008, respectively. Again, defendant ignored the court order and failed to provide any responses.

On May 8, 16 and 21, 2008, plaintiff's counsel sent e-mails to defendant's then-counsel, Lester Schwab Katz and Dwyer LLP (LSKD), requesting the outstanding discovery. Once more, no responses were provided. Defendant's recalcitrance resulted in LSKD's filing a motion to be relieved. In that motion, LSKD acknowledged that defendant owed responses to outstanding discovery orders, but stated that defendant had ignored repeated requests to assist the firm in preparing responses. Defendant filed no opposition to that motion and failed to appear in court on the return date. On July 31, 2008, the court granted LSKD's motion, directed defendant to retain new counsel, and ordered the parties to appear for a status conference on September 4, 2008. The order further provided that if defendant did not retain new counsel, he would "be deemed proceeding pro se and must provide plaintiff with his . . . residential address where service may be effected."

Despite having been served multiple times with the July 31 order, by both regular mail and certified mail, defendant failed to appear in court for the September 4 conference and ignored the court's order that he provide plaintiff with his residential address. Plaintiff subsequently moved for a default judgment and to strike the answer based upon defendant's nonappearance at the September 4 conference and his repeated failure to comply with

court-ordered disclosure. In opposition, defendant claimed that he had cooperated fully with his former counsel throughout the litigation, but he still did not provide any of the outstanding discovery.

Upon this record, the motion court appropriately concluded that defendant's pattern of noncompliance with court orders was willful, contumacious and in bad faith (*see e.g. Bryant v New York City Hous. Auth.*, 69 AD3d 488 [2010]). Defendant's failure to offer a reasonable excuse for his dilatory behavior further supported the court's finding of willfulness (*see B.E.N. Trading Corp. v Shirley Import, Inc.*, 68 AD3d 629 [2009]). First, defendant argued that he cooperated fully with discovery throughout the litigation, and blamed any noncompliance on LSKD, his former counsel. However, as the motion court noted, defendant did not file any opposition to LSKD's motion to be relieved and thus did not challenge the firm's claims that defendant had ignored his discovery obligations. Nor did defendant appear before the court on July 31, 2008 to contest the motion. Second, defendant's continued failure to provide the outstanding discovery in response to plaintiff's motion to strike belies any claim that it was his former lawyers who were to blame for his noncompliance with the court's orders.

Defendant's assertion that he did not recall receiving the

July 31, 2008 order requiring his appearance on September 4 is difficult to accept in light of the affidavit of service stating that he was served by regular mail on August 6 and the affidavit of former counsel stating that he was served by certified mail on August 20. Defendant's mere denial of receipt does not rebut the presumption that proper service was effectuated (*see Grieco v Walker*, 8 AD3d 66 [2004]). Finally, defendant's claim that his delay in obtaining new counsel was caused by medications he was taking is unsupported by medical documentation and, in any event, does not explain why he violated multiple court orders throughout this litigation.

Defendant argues that it was an abuse of discretion for the court to strike the answer in the absence of a conditional order or a specific warning by the court that he faced imminent dismissal. Defendant points to no authority holding that a court must issue such a "last chance" warning or order in all cases before exercising its discretion to strike a pleading. CPLR 3126 permits the court to "make such orders . . . as are just," and it may, in an appropriate case, determine that the pattern of noncompliance is so significant that a severe sanction is appropriate. Such a determination should not be set aside absent a clear abuse of discretion (*see Arts4all*, 54 AD3d at 286).

There is no question that defendant was aware that his

failure to comply with discovery orders could lead to the answer being struck. The preliminary conference order plainly stated that "[f]ailure to comply with any of these directives may result in the imposition of costs or sanctions *or other action authorized by law*" (emphasis added). Defendant was further put on notice by the order issued at the September 4, 2008 status conference, which he failed to attend, outlining his discovery failures and specifically permitting plaintiff to move for a default judgment. Defendant can hardly complain about the lack of a warning when he did not show up at all for that conference and he already had been given an extended period to produce the withheld discovery. Finally, there can be no doubt that defendant was aware that his answer could be struck when he was served with plaintiff's motion seeking such relief. At that time, he could have provided the outstanding discovery in response to the motion, but he did not. Under these circumstances, defendant's continuing disregard of his discovery obligations warranted the court's striking the answer, and no further warning was required.

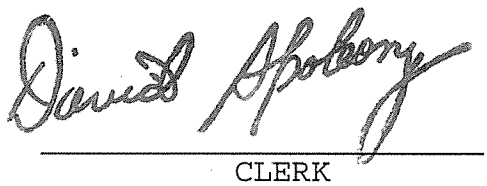
We have considered defendant's remaining contentions and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 24, 2009, which granted plaintiff's motion to strike defendant's answer pursuant to CPLR 3126, awarded plaintiff judgment on liability, and referred the issue of damages to a special referee, should be affirmed, without costs.

All concur.

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

ENTERED: MAY 25, 2010



CLERK