SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 27, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Saxe, Friedman, Sweeny, McGuire, JJ.

1984 The People of the State of New York, Respondent, Ind. 3208/03

-against-

Juwanna Wrotten,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Daniel A. Warshawsky of counsel), for appellant.

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

Upon remittitur from the Court of Appeals (14 NY3d 33 [2009]) for consideration of the facts and issues raised on the appeal but not yet determined, judgment, Supreme Court, Bronx County (Harold Silverman, J.), rendered November 23, 2004, convicting defendant, after a jury trial, of assault in the second degree, and sentencing her to a term of 5 years, affirmed.

At the conclusion of the evidentiary hearing, Supreme Court expressly found "by clear and convincing evidence that [the complainant] is unavailable to travel to New York without seriously endangering his health." Supreme Court went on to find

that the complainant "would be in serious danger of suffering serious health problems or possibly death by his traveling and testifying." On our review of the facts, we conclude that Supreme Court did not err in making these findings. We recognize that the medical risk the complainant would incur by traveling can be "serious" without being more likely than not to come to fruition. As defendant never contended that a "serious" risk was insufficient to warrant a finding that the complainant was unable to travel, we need not and do not decide whether any greater degree of risk is required. Indisputably, moreover, the complainant was a key witness. For these reasons, the use of live, two-way video was necessary to further the "public policy of justly resolving criminal cases while at the same time protecting the well-being of a witness" (14 NY3d at 40).

The court properly declined to deliver a justification charge to the jury, because no reasonable view of the evidence, viewed in a light most favorable to defendant, supported such a charge (*see People v Cox*, 92 NY2d 1002, 1004 [1998]). In particular, there was no reasonable view of the evidence under which defendant reasonably could have believed that the extent of the force she admittedly used against the aged, frail and unarmed victim was necessary, regardless of whether the force she used is deemed to have been deadly or non-deadly (*see* Penal Law § 35.15 [1]).

The record does not establish that defendant's sentence was based on any improper criteria, and we perceive no basis for reducing it.

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

As the Court of Appeals stated in its opinion, "the United States Supreme Court held that live testimony via one-way closed-circuit television is permissible under the Federal Constitution, provided there is an individualized determination that denial of 'physical, face-to-face confrontation' is '*necessary* to further an important public policy' and 'the reliability of the testimony is otherwise assured'" (*People v Wrotten*, 14 N.Y.3d 33, 38-39 [2009] [quoting *Maryland v Craig*, 497 US 836, 850 [1990] [emphasis added]). Supreme Court did not purport to make any finding that permitting the complainant to testify via live, two-way video was "necessary." Rather, as the majority notes, Supreme Court stated that it found by clear and convincing evidence that traveling to New York would expose the complainant to a serious danger of serious health problems. But in its opinion, the Court of Appeals stated that it did not need to decide "whether Supreme Court's finding of *necessity* rested on clear and convincing evidence" because this Court had not addressed the question (14 NY3d at 40 [emphasis added]).

Accordingly, I think it reasonable to conclude that the Court of Appeals regarded the finding that Supreme Court actually made as tantamount to a finding of "necessity." On that assumption, I agree we should uphold such a finding of "necessity" by Supreme Court. There was a substantial

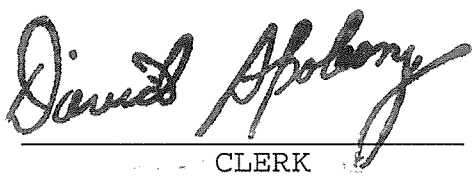
evidentiary basis for the actual findings Supreme Court made and we have no basis for concluding that Supreme Court erred in accepting the testimony of the People's expert witness. I note, however, that the meaning of the word "necessary" in this context is apparently not the conventional one of logically unavoidable. After all, as I read the opinion of the Court of Appeals, a finding that denial of the right to physical, face-to-face confrontation is "necessary" is unaffected by the unavailability under New York law of procedures that would permit the defendant to be brought to the complainant.

With these qualifications, I join in the majority's memorandum.

The Decision and Order of this Court entered herein on December 30, 2008 is hereby recalled and vacated.

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

ENTERED: MAY 27, 2010



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Tom, J.P., Friedman, McGuire, Freedman, JJ.

4090 The People of the State of New York, Ind. 3629/04
Respondent,

-against-

James Kadarko,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert E. Torres, J.), rendered November 2, 2006, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of 12 years, followed by 5 years of postrelease supervision, unanimously affirmed.

This matter was remitted by the Court of Appeals (__ NY3d __, 2010 NY Slip Op 2834 [2010]) for consideration of issues raised but not decided on a prior appeal (56 AD3d 102 [2008]). Defendant was charged with the knifepoint robberies of three men making deliveries for Chinese restaurants. He was indicted for robbery in the first degree (five counts) and robbery in the third degree (five counts) in connection with the robbery of (1) Xun-Zheng Wang on August 3 and 9, 2004; (2) Xing-Wu Dong on July 20, 2004; and (3) Lisheng Huang on July 14 and 26, 2004. A jury convicted defendant of the first degree robbery of Wang on August

9, 2004, and was unable to reach a verdict on all other charges.

At trial, Huang testified that upon seeing defendant after making a delivery on July 14, 2004, he turned and ran because he recognized defendant from an earlier encounter. On cross-examination, the witness testified that he was able to identify defendant because he had been robbed by him previously. On re-direct, Huang clarified that defendant had robbed him on two prior occasions and that those crimes had not been reported to police. Although defendant requested a supplemental instruction limiting the testimony concerning uncharged crimes to identification, the court did not give a limiting instruction to the jury.

Defendant argues that this testimony only served to indicate that he had a propensity to commit robberies, and its prejudicial impact thus outweighed any probative value (*People v Foster*, 295 AD2d 110, 113 [2002], *lv denied* 98 NY2d 710 [2002]), violating his right to due process. However, as defendant failed to raise this contention before the trial court, it is not preserved for our review, and we decline to review it in the interest of justice (*People v Lyons*, 81 NY2d 753, 754 [1992]). As an alternative ground, we reject it on the merits. Uncharged crimes are admissible to establish a defendant's identity (*see People v Allweiss*, 48 NY2d 40, 47-49 [1979]), or as necessary background material or to complete the narrative of events (*see e.g. People*

v Alvino, 71 NY2d 233 [1987]; *People v Vails*, 43 NY2d 364, 368 [1977]; *People v Casanova*, 160 AD2d 394 [1990], *lv denied* 76 NY2d 786 [1990]). Huang's testimony explained why he was able to identify defendant and why he fled, even though he had not seen a knife at the time.

As to the prosecutor's reference on summation to the uncharged crimes evidence, defendant again raised no objection at trial, so this argument is likewise unpreserved, and we decline to review it in the interest of justice (*People v Cochran*, 29 AD3d 365, 366 [2006], *lv denied* 7 NY3d 787 [2006]). As an alternative ground, we reject this argument on the merits because the prosecutor's comments were limited to Huang's ability to identify defendant as a result of the earlier robberies and were made in response to defense counsel's summation argument that his client was the victim of mistaken identity (*see People v Dominguez*, 257 AD2d 511, 512 [1999], *lv denied* 93 NY2d 872 [1999]).

Regarding the court's failure to give a limiting instruction despite granting defendant's application, the requesting party is obliged to bring such omission to the court's attention or the issue is deemed waived on appeal (*People v Whalen*, 59 NY2d 273, 280 [1983]; *People v Leary*, 45 AD3d 449, 450 [2007], *lv denied* 10 NY3d 813 [2008]). Hence, this issue is also unpreserved, and we decline to review it in the interest of justice. As an

alternative ground, we reject it on the merits. While the better practice is to give the instruction, the jury convicted defendant only of the August 9, 2004 robbery of Wang, indicating that it was able to distinguish the evidence put forth in support of the individual robberies and to discriminate between the separate charges (*see People v Santana*, 27 AD3d 308, 310 [2006], *lv denied* 7 NY3d 794 [2006]; *People v Dela Cruz*, 162 AD2d 312, 313 [1990], *lv denied* 76 NY2d 892 [1990]).

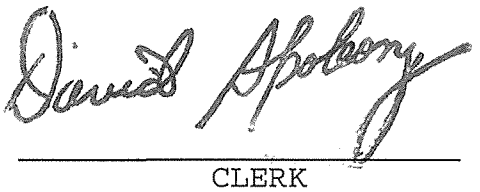
With respect to the contention that the sentence is unduly harsh, we note that defendant, who was 27 years old at the time of sentencing, had 11 prior nonfelony convictions, including two for assault and one for unlawful imprisonment. Inasmuch as the relatively light sentences received for those prior convictions were ineffective in deterring criminal behavior, it was within the exercise of the court's discretion to impose a sentence higher than the minimum (*see People v Smith*, 227 AD2d 197, 198 [1996], *lv denied* 88 NY2d 969 [1996]; *People v Durham*, 188 AD2d

404, 405 [1992], *lv denied* 81 NY2d 885 [1993]) although, significantly, still within the lower half of the statutory range of 5 to 25 years (CPL 70.02[3][a]).

The Decision and Order of this Court entered herein on October 9, 2008 is hereby recalled and vacated.

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

ENTERED: MAY 27, 2010



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Mazzarelli, J.P., Sweeny, Catterson, Freedman, Román, JJ.

1619 Minerva Vega, Index 13154/04
Plaintiff-Respondent,

-against-

Restani Construction Corp., et al.,
Defendants,

General Fence Corporation,
Defendant-Appellant.

O'Connor Redd, LLP, White Plains (Alak Shah of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered February 27, 2009, which, in an action for personal injuries allegedly sustained when plaintiff maintenance worker attempted to move a garbage can containing improperly discarded concrete blocks, denied the motion of defendant General Fence Corporation (GFC) for summary judgment dismissing the complaint and all cross claims as against it, affirmed, without costs.

GFC, the fencing subcontractor on a project to renovate the park where plaintiff worked, established prima facie entitlement to summary judgment through an affidavit from its principal, who averred that GFC, hired by the park's owner, did not create the

condition alleged to have caused plaintiff's accident (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]; *Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 140 [2002]). Plaintiff however, raises a triable issue of fact with regard to whether GFC created the overloading condition alleged, insofar as the evidence proffered shows that prior to the date of the accident GFC and the general contractor had exclusive control over the park, including the area where the subject garbage can was located, and that GFC's work may have involved the breaking-up and removal of concrete. Accordingly, the existence of triable issues of fact, albeit circumstantially, precludes the dismissal of the complaint as against GFC (*see Koeppel v City of New York*, 205 AD2d 402, 403 [1994]).

Any claim that, even if proven, GFC's conduct in overloading the garbage can not be tantamount to negligence is without merit (12 NYCRR 23-2.1[b]; *Palladino v United States Lines*, 111 AD2d 656 [1985] [cause of action for the overloading of containers, allegedly causing injury to the plaintiff was viable predicate mandating defense by insurance company]; *Keating v Cookingham*, 223 AD2d 997 [1996] [court recognized cause of action for injury to the plaintiff resulting from the overloading of garbage cans but dismissed action for other grounds]).

In support of its position, the dissent conflates two distinct points of law, neither of which, on the record here, mandates summary judgment in GFC's favor. It is true that generally an employee cannot sue for injuries caused by conditions inherent in the work he is tasked to perform (*Imtanios v Goldman Sachs*, 44 AD3d 383, 385-386 [2007], *lv dismissed* 9 NY3d 1028 [2008]). It is also true that "[w]hen a workman confronts the ordinary and obvious hazards of his employment, and has at his disposal the time and other resources (e.g., a co-worker) to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself" (*Abbadessa v Ulrik Holding*, 244 AD2d 517, 518 [1997], *lv denied* 91 NY2d 814 [1998]; *see also Marin v San Martin Rest.*, 287 AD2d 441, 442 [2001]; *Keating* at 998). However, contrary to the dissent's finding, on this record, there is no evidence supporting the conclusion that plaintiff's job entailed the handling of very heavy garbage cans so as to conclude that the accident was caused by a condition inherent in her work. Moreover, the evidence demonstrates that the condition alleged, namely heavy chunks of cement in the garbage can plaintiff attempted to move, was obscured, and thus not obvious or visible.

Accordingly, since there is no evidence that she confronted an *obvious* hazard and nevertheless chose to perform her job without the aid of resources available to her, there is no support for the dissent's position that this action warrants dismissal pursuant to *Abbadessa*, *Marin*, or *Keating*.

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

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

CATTERSON, J. (dissenting)

I would reverse and dismiss the complaint against General Fence Corporation (hereinafter referred to as "GFC") primarily on the grounds that precedent mandates dismissal of a complaint where the hazard of the injury sustained is inherent in a plaintiff's employment. Furthermore, in my opinion, GFC is entitled to summary judgment, as a matter of law, as the plaintiff failed to produce evidentiary proof sufficient to establish the existence of a triable issue of fact. Indeed, as GFC asserts, the plaintiff did not provide any factual basis for her allegation that a cement block was in the garbage can on the day of the accident, much less that it was placed there by GFC. Therefore, for the reasons set forth below, I must respectfully dissent.

The plaintiff, Minerva Vega, a maintenance worker employed by the New York City Parks Department at Loreto Park, in the Bronx, claims she injured her shoulder when she attempted to move a garbage can allegedly containing a cement block. The plaintiff's duties included sweeping, taking out garbage and moving garbage cans to the front of the park for pickup by the Sanitation Department.

The defendant Restani Construction Corp. was the general contractor retained by the Parks Department to perform renovation work at the park in May 2002. GFC was the fencing subcontractor,

and defendant Excellent Asphalt Paving was the painting and sealing subcontractor on the project.

The plaintiff worked inside the park until construction started. Before she was injured, she saw workers in the park breaking up concrete to fix the benches in the handball court and by the main entrance fence. After construction was completed, the plaintiff resumed her duties inside the park on May 26, 2002. Two days later, on May 28, 2002, the plaintiff was working with two coworkers when she attempted to move a garbage can and felt a tear in her left shoulder. One to two weeks later, the plaintiff went to the park with an investigator from her attorney's office. The investigator took photographs of a concrete block in one of the garbage cans at the entrance to the park.

The plaintiff commenced this action alleging that her injury was proximately caused by the defendants' negligence in improperly disposing of construction debris. GFC denied the allegations, and cross-claimed against Restani and Excellent Asphalt. Subsequently, GFC moved for summary judgment dismissing the complaint and all cross claims against it.

In support of the motion, GFC submitted, inter alia, the deposition testimony of the plaintiff, and of Restani's project manager, and an affidavit of GFC's principal, Dalton Johnson. GFC argued that according to the plaintiff's testimony, and upon presentation of photos of the cement block in the garbage can,

taken approximately two weeks after the accident, the plaintiff was unable to provide any factual basis for the allegation against it.

In opposition to the motion, the plaintiff submitted, inter alia, the affidavits of her coworkers in which they swore, in direct contradiction of the plaintiff's testimony, that each had looked in the garbage can on the day of the accident and had seen "pieces" or "chunks" of concrete. Both speculated in their affidavits that the concrete "had to have come" from the construction work.

The court denied GFC's motion for summary judgment. The court held that GFC had failed to address the affidavit of plaintiff's coworker, Jackie Diaz, who stated that until the date of the accident, the defendants had exclusive possession and access to the park and area where the garbage can was found. The court stated that this affidavit "perhaps" raised res ipsa issues that could only be answered at trial.

On appeal, GFC argues that the motion court's reliance on res ipsa loquitur was in error; that the plaintiff did not have a factual basis to meet her burden of proof; and that the plaintiff does not have a viable cause of action in negligence.

I agree. As a threshold matter, I believe precedent mandates the dismissal of the complaint as against GFC. The plaintiff alleges that she sustained her injury as a result of

the weight of the garbage can. In my opinion, this was an "ordinary and obvious" hazard of the plaintiff's duties, and thus, in accordance with case law, the cause of action is not viable because the hazard of injury was inherent in the plaintiff's employment. See Anderson v. Bush Indus., 280 A.D.2d 949, 720 N.Y.S.2d 699 (4th Dept. 2001) (hazard of injury from repeatedly lifting heavy boxes and loading them onto truck inherent in the work of a UPS driver). Specifically, it is well established that workers involved in trash or garbage removal and/or cleanup have no cause of action for confronting an ordinary and obvious hazard of employment such as falling or slipping on debris or injury from lifting a heavy garbage bag. See Jackson v. Board of Educ. of City of N.Y., 30 A.D.3d 57, 812 N.Y.S.2d 91 (1st Dept. 2006) (Sullivan, J.) (complaint dismissed where the plaintiff slipped on lettuce leaf on floor he was hired to sweep and clean); Imtanios v. Goldman Sachs, 44 A.D.3d 383, 843 N.Y.S.2d 569 (1st Dept. 2007), lv. dismissed, 9 N.Y.3d 1028, 852 N.Y.S.2d 11, 881 N.E.2d 1198 (2008) (porter carrying trash to freight elevator had to walk through area of discarded computer parts, so hazard of falling on such debris was inherent to job), citing Marin v. San Martin Rest., 287 A.D.2d 441, 731 N.Y.S.2d 70 (2d Dept. 2001) (hazard of injury from lifting a heavy garbage bag and loading it into truck inherent in the work of a sanitation worker); Abbadessa v. Ulrik Holding, 244 A.D.2d 517,

664 N.Y.S.2d 620 (2d Dept. 1997), lv. denied, 91 N.Y.2d 814, 676 N.Y.S.2d 127, 698 N.E.2d 956 (1998) (complaint dismissed where plaintiff sanitation worker was injured while hoisting refrigerator into truck).

Indeed, in Abbadessa, the Second Department found no cause of action "[w]hen a workman confronts the ordinary and obvious hazards of his employment." The court relied on Keating v. Cookingham (223 A.D.2d 997, 636 N.Y.S.2d 903 (3rd Dept. 1996)), which is cited by the majority as standing for the proposition that a cause of action exists for a sanitation worker's injury resulting from the overloading of a garbage can. That is a misreading of the decision. The Court in Keating dismissed plaintiff's complaint on the grounds, inter alia, that in confronting an ordinary hazard of his employment, that is, an overloaded garbage can, his injury was solely a result of proceeding incautiously. 223 at 998, 636 N.Y.S.2d at 904.

In my opinion, the instant case is entirely analogous with the foregoing line of cases. The plaintiff's duty included moving garbage cans outside the park where they were then emptied into trucks by City sanitation workers. The garbage cans by definition, and according to the plaintiff's testimony, contained unspecified discarded items, each contributing to the overall weight of the can depending on what type of garbage was placed in the can.

This is not a case where the garbage at issue was broken glass, or toxic waste or used syringes, and where anyone placing such trash in a can accessible to the general public might possibly breach a duty given the forseeability of harm arising out of such discarded objects. The alleged injury-causing element of the concrete block, or the "pieces" or "chunks" of concrete which the plaintiff's two co-workers swore they saw in the can right after the accident, was the weight of the concrete and not its inherent nature.

However, the hazard of being injured as a result of moving a heavy garbage can was the "ordinary and obvious" hazard the plaintiff faced in her employment which required her to move the cans from one location to another. I believe the majority has completely misconstrued the very use of the word "obvious" in its analysis. The majority has improperly adopted the narrowest definition of the adjective "obvious" as simply meaning *visible* as if it ends the analysis. Random House Webster's Unabridged Dictionary (2d ed 2001) defines obvious as "1. Easily seen, recognized or understood; 2. Open to view or knowledge; evident." Hence, the adjective "obvious" is not in reference to objects that can be seen. It is properly applied in the analysis of concepts that are easily understood by the workers. When the adjective has been used in the case law cited above, it has *only* qualified the term "hazards of employment." See Marin, 287

A.D.2d at 442, 731 N.Y.S.2d at 71, quoting Abbadessa, 244 A.D.2d at 518, 664 N.Y.S.2d at 621. In Marin and Abbadessa, workers confront the "ordinary and obvious" hazards of employment by understanding there is a risk of injury arising from the handling of garbage. "Obvious" in those cases is not used in the sense that an item in that garbage must be visible to the worker in order for that worker to grasp the concept that there is a risk of injury from lifting garbage bags, some of which may be heavier than others. While the distinction is subtle, it is nonetheless critical as the focus on the English definition of a particular word does not elucidate the legal concept contained herein.

The record is devoid of any suggestion that there were any notices posted in the park restricting the type of garbage that could be placed in the cans, either by item description or by weight. Moreover, the plaintiff's testimony indicates that the cans were big.

The plaintiff, who had been working for the Parks Department for several months in this particular position knew, or should have known, that big garbage cans in a public park can contain almost any type of trash from old appliances to old bedding or clothes. Also, that garbage in an open can could easily increase the can's weight if, for example, it rained and water soaked into the garbage as well as being deposited in the bottom of the can itself. Moreover, there was nothing preventing the plaintiff

from glancing inside the garbage can since according to her own testimony, it was open.

Moreover, for the foregoing reasons, the doctrine of res ipsa loquitur is entirely inapplicable. The submission of a case on a theory of res ipsa loquitur is warranted only when a plaintiff can establish that (1) the event is of the kind which ordinarily does not occur in the absence of someone's negligence; (2) the event must have been caused by an agency or instrumentality within the exclusive control of defendant; and (3) the event must not have been due to any voluntary action or contribution on the part of the plaintiff. See Ebanks v. New York City Tr. Auth., 70 N.Y.2d 621, 623, 518 N.Y.S2d 776, 777, 512 N.E.2d 297, 298 (1987); Dermatossian v. New York City Tr. Auth., 67 N.Y.2d 219, 226, 501 N.Y.S.2d 784, 788, 492 N.E.2d 1200, 1204 (1986).

Here, as GFC argues, even assuming it discarded pieces of concrete in the garbage can, disposing of such garbage in such a can is not a negligent action. Second, there is no evidence that GFC had exclusive control of the park or the specific garbage can. The evidence shows that work was completed on May 20, 2002, eight days before the accident, and the concrete block was first seen by the plaintiff one to two weeks after the accident after the park became accessible again to the public.

In my opinion, GFC should be granted summary judgment. It

is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925, 501 N.E.2d 572, 574 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317-318, 476 N.E.2d 642, 643 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597-598, 404 N.E.2d 718, 720 (1980).

The plaintiff's deposition testimony was that she did not look in the can before attempting to move it, that she did not look in the can after she hurt her shoulder, and that neither of her coworkers looked in the can.

> "Q: Once you realized that you were hurt did you look into the garbage pail at all?
> "A: No. I just called [my coworker], and they sat me down, and I told them I had hurt my shoulder, and then she went and she started to move the garbage can and she said there has to be some debris in there, something heavy in the garbage can, but she didn't look inside."

The plaintiff further testified that the reason no one looked inside the can was because "[e]veryone was busy calling the ambulance" and that she obtained the photograph of the

"really big block of cement" in a garbage can when she returned to the park a week or two later. The plaintiff offered a photograph of the cement block in support of her claim, but at deposition she was not sure that the garbage can from which the photographed cement block came was the same one that she had attempted to move on the day of the accident. Her testimony further adduced that she did not know if anyone had thrown anything into the garbage can during the one-to-two week period between the date of the accident and the date she returned with the investigator.

Restani's project manager testified that the project was completed on May 20, 2002, eight days before the accident; he testified that Restani "may have" broken up the old concrete footing and taken it away in a truck, but he did not remember and had no records which would reflect whether this job was performed by Restani.

Dalton Johnson, a principal of GFC, by affidavit swore that the company was hired by Restani to take down a mesh fence, paint the posts, rails and poles, and to reinstall new mesh. Johnson did not remember removing any posts or working with concrete. Johnson had a truck on the job to haul away fence materials. He swore that it was the custom and practice of GFC to physically remove all debris it created, and any concrete debris would have been taken away from the park by truck.

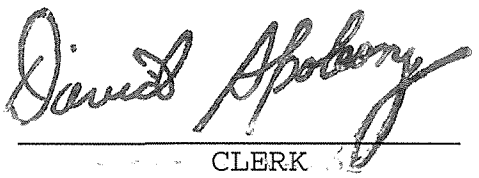
In my opinion, GFC met its burden of making a prima facie showing that it did not create the alleged condition. Moreover, the plaintiff failed subsequently to come forward with any proof, in admissible form, of the existence of genuine issues of material fact. Specifically, the affidavits of her coworkers, which she offered in opposition to the motion for summary judgment, were in contradiction to her testimony. Both coworkers testified that they looked in the garbage can directly after the accident and saw "chunks" or "pieces" of concrete at the bottom of the can. Even if we accepted as true that the coworkers did look in the garbage can directly after the alleged injury occurred, their affidavits do not help the plaintiff. Neither coworker saw anyone place the pieces or chunks in the garbage can, and both, using the same phrase, speculated that the chunks or pieces of concrete "had to have come from" the construction workers. One of them surmised that, "[t]hese pieces of cement *had to have* come from the construction work that was going on inside the park." Meanwhile, the other surmised "[t]he concrete *had to have* come from the people who were fixing that part of the park." However, speculation is insufficient to raise a triable issue of fact in order to overcome a motion for summary judgment. See Segretti v. Shorenstein Co. E., 256 A.D.2d 234, 235, 682 N.Y.S.2d 176, 178 (1st Dept. 1998) (complaint dismissed because while "*surmising*" that the oily substance causing his fall might

have come from garbage room located near the defendant, "plaintiff testified that he never saw any substance emanating from that source").

Accordingly, I would reverse and dismiss the complaint as against GFC.

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

ENTERED: MAY 27, 2010



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Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2630 Malcolm Ferguson, etc., et al., Index 18951/01
Plaintiffs-Appellants-Respondents,

-against-

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

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

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered July 15, 2008, which, to the extent appealed from, granted so much of defendants' motion as to set aside the jury's verdict on damages and ordered a new trial on punitive damages unless plaintiff stipulated to a reduced award of $36,000 for past loss of financial support and services and $186,000 for future loss of financial support and services, unanimously modified, on the law and the facts, the awards for past economic support, past and future loss of services and punitive damages reinstated in the amounts of $55,920, $261,094 and $2.7 million, respectively, and otherwise affirmed, without costs.

The trial court properly set aside the award of $3 million for conscious pain and suffering because plaintiff failed to show

the decedent's consciousness for at least some period of time following the accident (*Cummins v County of Onondaga*, 84 NY2d 322 [1994]). Specifically, plaintiff failed to present any evidence that the decedent was conscious or had any cognitive awareness after he was shot in the head, which caused his nearly instantaneous death (*see Martin v Reedy*, 194 AD2d 255, 259 [1994]). A record that shows practically instantaneous death will not support an award for conscious pain and suffering (*see Shatkin v McDonnell Douglas Corp.*, 727 F2d 202 [2d Cir 1984]). In *Merzon v County of Suffolk* (767 F Supp 432, 444 [ED NY 1991]), the court found that the death of a suspect shot and killed by police was almost instantaneous; he never regained consciousness. Under such circumstances, the plaintiff "failed to establish any conscious pain and suffering." Plaintiff's conjecture, surmise and speculation that the decedent was consciously suffering is not enough to sustain the claim (*Fiederlein v New York City Health & Hosps. Corp.*, 56 NY2d 573 [1982]). Moreover, plaintiff is wrong to assert that the award can be sustained on the theory that the decedent experienced fear of impending death when Officer Rivera first grabbed him (*see Martin*, 194 AD2d at 259). Indeed, there was no evidence that the decedent was aware that Rivera had drawn his weapon, or that the gun was only inches from his head before he was shot.

It was error for the court to vacate the jury's award for past economic support. Plaintiff, the decedent's mother, testified that her son contributed the sum of $50 per week to the household from money he earned through employment. In misplaced reliance on *Papa v City of New York* (194 AD2d 527 [1993], *lv dismissed* 82 NY2d 918 [1994]), the trial court erroneously dismissed this testimony as speculative. *Papa* stands for the proposition that proof of past lost earnings must be established with "reasonable certainty" (*id.*, 194 AD2d at 531). Such proof can consist of testimony (*cf. Kane v Coundorous*, 11 AD3d 304 [2004]). Those awards for lost services and economic support should be reinstated, as indicated above.

Regarding punitive damages, the court incorrectly determined that the jury's award was based in part on its finding that Rivera had negligently handled his weapon. Indeed, there was no evidence that the negligence finding played a part in this award, especially since the verdict sheet specified that punitive damages were based on the jury's finding that Rivera used excessive force during the fatal encounter. Furthermore, the jury was properly charged that punitive damages could only be awarded if it found Officer Rivera's conduct to be wanton, reckless or malicious (*see Rivera v City of New York*, 40 AD3d 334, 344 [2007]).

On appeal, defendants no longer seek a new trial on punitive damages in order to assess Officer Rivera's net worth. They also concede that the evidence supported an award of punitive damages, but assert that the $7 million award was excessive. When reviewing a punitive damage award for excessiveness, we must examine whether it deviated materially from what is considered reasonable compensation (CPLR 5501[c]). However, "[w]hether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of . . . the jury, and such an award is not lightly to be disturbed" (*Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]).

Rivera's conduct, which was in complete disregard of police procedure, to say nothing of the decedent's rights (including deprivation of his right to life without due process of law), resulted in the latter's death. Defendants mistakenly rely on cases like *Papa*, which did not involve a scenario where someone was shot and killed. On this record, an award of $2.7 million would be "reasonably related to the harm done and the flagrancy of the conduct" (*see e.g. Liberman v Riverside Mem. Chapel*, 225 AD2d 283, 292 [1996]), and consistent with the purpose of

punishing a defendant for wanton and reckless acts, thereby discouraging similar conduct in the future (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]).

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

ENTERED: MAY 27, 2010

CLERK

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

2716 Francisco Del Villar, Index 105131/06
Plaintiff-Appellant,

-against-

Rafaela Del Villar, also known as Rafaela Kavanagh,
Defendant-Respondent.

Ruiz Law Group, Jackson Heights (Frances Yetta Ruiz of counsel), for appellant.

Benjamin R. Kaplan, New York, for respondent.

Order, Supreme Court, New York County (Laura E. Drager, J.), entered on or about January 20, 2009, which, to the extent appealed from as limited by the briefs, confirmed the report of the Special Referee awarding plaintiff husband the sum of $5,300 as his distributive share of the value of the marital apartment, unanimously modified, on the law and the facts, to increase plaintiff's distributive share to $53,000, and otherwise affirmed, without costs.

The Domestic Relations Law requires that marital property be distributed equitably "considering the circumstances of the case and of the respective parties" (Domestic Relations Law § 236[B][5][c]), and directs the trial court to consider the statutory factors listed in Domestic Relations Law § 236(B)(5)(d) (*see generally Holterman v Holterman*, 3 NY3d 1, 7-8 [2004]). Based on

the concept that marriage "is an economic partnership" (*Hartog v Hartog*, 85 NY2d 36, 47 [1995]), whose success depends both on direct contributions, such as earnings of an employed spouse, and indirect contributions, such as efforts of a spouse as a primary caretaker of the parties' children, companion and homemaker, there is a presumption that all property acquired by either spouse during the marriage is marital property (*see DeJesus v DeJesus*, 90 NY2d 643, 648 [1997]; *Price v Price*, 69 NY2d 8 [1986]; *see also* Domestic Relations Law § 236[B][5][d][7]). Still, equitable does not necessarily mean equal (*see Arvantides v Arvantides*, 64 NY2d 1033 [1985]), and an unequal distribution is appropriate when a party has not contributed to the marital asset in question (*see Sade v Sade*, 251 AD2d 646 [1998]).

Considering these principles of law and the factors set forth in Domestic Relations Law § 236(B)(5)(d), we find that although an unequal distribution of the marital apartment in favor of defendant is appropriate, it was an improvident exercise of discretion to limit plaintiff's distributive share to a mere 1% of its net value of $553,000 (after credits to the wife which are not in dispute). While we are mindful of plaintiff's minimal financial contribution throughout the marriage, including his failure to contribute to the apartment after his 1991 incarceration, the record also establishes that the parties were married in 1979 and lived together as husband and wife for over

10 years, during which time plaintiff performed menial tasks in the various businesses operated by the wife; the parties purchased a one-bedroom apartment in their joint names in 1987 and transferred their interests therein to the two-bedroom apartment purchased in their joint names in 1990 that is the subject of the litigation; the significant increase in the value of that apartment since 1991 was primarily the result of market forces; and plaintiff began paying child support for the parties' son in 1999. Accordingly, we increase plaintiff's distributive share from 1% to 10% and award plaintiff the sum of $55,300.

There is no merit to plaintiff's argument that the Special Referee and the court used the 1989 value of the apartment in making the equitable distribution award. As both the Special Referee's report and the order make clear, the apartment was valued as of 2005.

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

ENTERED: MAY 27, 2010

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2731 The People of the State of New York, Ind. 6148/06
Respondent,

-against-

Fayola McIntosh,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Michael J. Obus, J. at dismissal motion; Laura A. Ward, J. at jury trial and sentence), rendered October 16, 2008, convicting defendant of assault in the second degree and sentencing her, as a second felony offender, to a term of 5 years, unanimously reversed, on the law, and the indictment dismissed, with leave to the People to apply for an order permitting resubmission of the charges to another grand jury.

We determined on the codefendant's appeal (*People v Davis*,__ AD3d__, 892 NYS2d 359 [2010]), the indictment was unauthorized because the prosecutor did not obtain permission to present the case to a second grand jury. The People have not shown any basis

for reaching a different result here. As we noted in *Davis* (892 NYS2d at 366), the victim's testimony at the first grand jury presentation that the codefendant "swiped an object in front of her face, hit her while holding the object in her hand, and 'cut' her hair causing her to bleed, as well as the display of her 'cuts' to the jury," was legally sufficient to establish that the victim was assaulted with a dangerous instrument. The further testimony that defendant joined in the attack by "striking" and "hitting" the victim in the head and back was sufficient to establish defendant's liability as an accomplice. The fact that the testimony did not specifically place a weapon in defendant's hands is of no consequence.

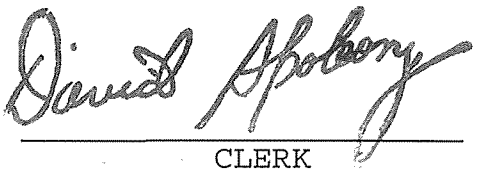
We reject defendant's argument that the People should be precluded from presenting the case to a third grand jury. The rule against third presentations (*see* CPL 190.75[3]) does not apply where there has been a dismissal by a court (*People v Morris*, 93 NY2d 908 [1999]; *see also People v Wilkins*, 68 NY2d 269, 277 [1986]).

In view of this disposition, we find it unnecessary to

address defendant's remaining claims, except that we find the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

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

ENTERED: MAY 27, 2010



CLERK

Saxe, J.P., Friedman, Nardelli, Freedman, Abdus-Salaam, JJ.

2743-
2744 — Index 105566/05
601098/06

The Dermot Company, Inc.,
Plaintiff-Appellant-Respondent,

-against-

200 Haven Company, et al.,
Defendants-Respondents-Appellants.

- - - - -

The Dermot Company, Inc.,
Plaintiff-Appellant-Respondent,

-against-

200 Haven Company,
Defendant-Respondent-Appellant.

Hartman & Craven, LLP, New York (Stephen W. O'Connell of counsel), for appellant-respondent/appellant-respondent.

Sonnenschein, Sherman & Deutsch, LLP, New York (Peter Schillinger of counsel), for 200 Haven Company, respondent-appellant/respondent-appellant.

Pryor Cashman, LLP, New York (Todd E. Soloway of counsel), for 200 Haven LLC, respondent-appellant.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered September 24, 2009, which granted defendants' cross motion for costs and fees incurred in defending the action and damages allegedly resulting from plaintiff's filing and continuation of a notice of pendency only to the extent of awarding reasonable attorney's fees, costs and expenses incurred in defending the action from the date of this Court's order of June 14, 2007 until the date of plaintiff's discontinuance of the action, provided that such fees shall not include fees in

connection with defendant Haven LLC's motion to amend its answer or the appeal from the court's denial of such motion, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered May 23, 2008, which denied plaintiff's motion to continue a preliminary injunction and granted defendant 200 Haven Company's cross motion to convert the preliminary injunction bond to a notice of pendency bond, unanimously dismissed, without costs, as academic.

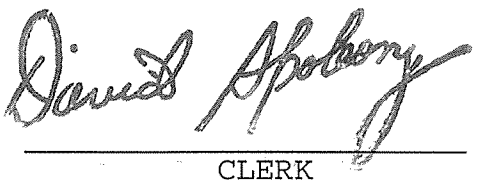
The court did not abuse its discretion in directing plaintiff to pay defendants' attorney's fees (*see* CPLR 6514[c]). While there was no showing that plaintiff had improperly or maliciously filed the notice of pendency or prosecuted the action in bad faith, the court properly held that plaintiff was nonetheless liable for costs based on its continuation of the notice of pendency (*see Chain Locations of Am. v T.I.M.E.-DC*, 99 AD2d 111, 113 [1984]).

The court also properly held that defendants were not entitled to lost profits, inter alia, as such were not contemplated at the time the contracts were entered into and were not capable of measurement with reasonable certainty (*see Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993]). Plaintiff's argument

that it should not have been required to post a notice of pendency bond under CPLR 6515 has been rendered academic by its discontinuance of the action with prejudice.

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

ENTERED: MAY 27, 2010



CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2797 Stuart Sugarman, Index 108044/08
Plaintiff-Appellant,

-against-

Equinox Holding, Inc., etc., et al.,
Defendants-Respondents,

Christopher Carter, et al.,
Defendants.

Gentile & Associates, New York (Laura Gentile of counsel), for appellant.

LaRocca Hornik Rosen Greenberg & Blaha LLP, New York (David N. Kittredge of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 16, 2008, which granted the Equinox defendants' motion to dismiss for failure to state a cause of action, unanimously affirmed, without costs.

The complaint alleged that defendant Carter became increasingly hostile and enraged over the refusal by plaintiff, a fellow customer, to discontinue his shouting and cheering during a spin class at defendant health club. Indeed, Carter complained to the class instructor about plaintiff's behavior. The instructor did not intercede in the dispute, and plaintiff alleged that he was in fear of imminent harm. Nonetheless, plaintiff continued in his shouting and cheering. Ultimately, Carter abruptly pushed plaintiff and his spin cycle backward into

a wall, resulting in plaintiff's neck and head injuries, allegedly warranting his hospitalization and surgery.

Plaintiff failed to state a claim for negligence predicated upon Equinox's alleged breach of its duty to control the conduct of a customer on its premises under these circumstances. Plaintiff failed to allege any facts that put defendant Equinox on notice that any criminal activity had occurred on the premises or that it would occur. The unforseeable and unexpected assault by patron at a fitness club, without more, does not establish a basis for liability (*Djurkovic v Three Goodfellows, Inc.*, 1 AD2d 310 (1st Dept. 2003).

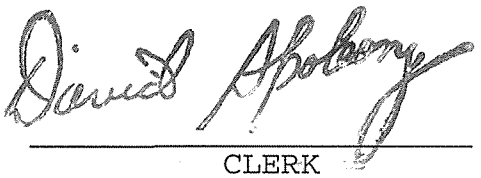
That aspect of the claim for negligent hiring and retention was properly dismissed where the complaint alleged Equinox's liability under the theory of respondeat superior, but with no allegation that the witness employee had acted outside the scope of his employment; nor was the employee even named as a party defendant (*see Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1997]).

Plaintiff has not adequately established that Equinox owed plaintiff a common-law duty to summon emergency responders to its premises on his behalf. To the extent plaintiff claimed Equinox breached a duty of care by preventing emergency responders from

reaching him at the health club, nowhere was it alleged that such nonaction aggravated or exacerbated his injuries.

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

ENTERED: MAY 27, 2010



CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2798 The People of the State of New York, Ind. 6270/08
Respondent,

-against-

Dirk Braithwaite,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered May 18, 2009, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to concurrent terms of two years for each of the three counts, to be followed by three years of postrelease supervision for third-degree possession and drug sale, and two years of postrelease supervision for fifth degree drug possession, unanimously affirmed.

We perceive no basis for reducing the sentence. However, defendant's purported waiver of his right to appeal was invalid. At the plea proceeding, defendant agreed to plead guilty to the three charges contained in the indictment in exchange for the

promised sentence. After defendant acknowledged the various trial rights he was giving up by pleading guilty, the court stated:

> "You also give up your right to appeal. Had you gone to trial in this case and been convicted, you could have appealed the sentence as well as the conviction, by pleading guilty you give up that right too. Understood?"

The defendant answered, "Yes." No mention was made of the appeal waiver at sentencing, and there was no written waiver executed.

The purported appeal waiver was invalid because defendant "may have erroneously believed that the right to appeal is automatically extinguished upon entry of a guilty plea" (*People v Moyett*, 7 NY3d 892, 893 [2006] [invalid waiver of appeal where court advised defendant that "by pleading guilty you give up your right to appeal the conviction"]). In this circumstance, and in the absence of a written waiver, there is no indication in the record that defendant understood the distinction between the right to appeal and the trial rights that are automatically forfeited as a result of a guilty plea (*id.*).

We previously have pointed out the problem with "the recurrent fusing, during allocution, of the defendant's right to appeal . . . with those rights waived by a guilty plea in cases where waiving the right to appeal is a condition of the plea bargain" (*People v Williams*, 59 AD3d 339, 340 [2009], *lv denied* 12 NY3d 861 [2009]). Although "[a] court need not engage in any

particular litany" to find a valid appeal waiver (*People v Burney*, 306 AD2d 173, 173 [2003] [internal quotation marks and citation omitted], *lv denied* 100 NY2d 641 [2003]), the better practice is for the court to secure a written waiver, along with a colloquy to ensure the defendant's understanding of its contents, or, at a minimum, to specifically articulate that the right to appeal is separate and distinct from the "panoply of trial rights automatically forfeited upon pleading guilty" (*People v Lopez*, 6 NY3d 248, 257 [2006]). A separate allocution on the waiver of the right to appeal is critical because "[b]y waiving the right to appeal in connection with a negotiated plea and sentence, a defendant agrees to end the proceedings entirely at the time of sentencing and to accept as reasonable the sentence imposed" (*id.* at 255).

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

ENTERED: MAY 27, 2010

CLERK

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

2892 The People of the State of New York, Ind. 2879/07
Respondent,

-against-

Ibrahima Kane,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Steven W. Paynter, J.), rendered July 10, 2008, convicting defendant, after a jury trial, of robbery in the first degree (two counts), assault in the second degree (two counts), and grand larceny in the fourth degree, and sentencing him to an aggregate term of 9 years, unanimously affirmed.

Defendant did not preserve his claim that the court should have charged third-degree robbery as a lesser included offense (*see People v Alvarez*, 51 AD3d 167, 180 [2008], *lv denied* 11 NY3d 785 [2008]), and we decline to review it in the interest of justice. As an alternative holding, we find there was no reasonable view of the evidence, viewed most favorably to defendant, to support that charge. Nothing in the People's case supported a reasonable view that defendant was guilty of only third-degree robbery (*see People v Negron*, 91 NY2d 788 [1998];

People v Camara, 44 AD3d 492 [2007], *lv denied* 9 NY3d 1031 [2008]), and under the version of the incident presented in his own testimony, defendant was not guilty of any degree of robbery (*see People v Ruiz*, 216 AD2d 63 [1995], *affd* 87 NY2d 1027 [1996]).

The basis of defendant's claim on appeal that the court improperly amended a count of the indictment is also unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that defendant was not prejudiced by the amendment.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 27, 2010

CLERK

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

2893 In re Clermont Tenants Association, et al., Petitioners-Respondents, Index 100734/09

-against-

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

Clermont York Associates, Intervenor-Respondent-Appellant.

Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for appellant.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (David S. Hershey-Webb of counsel), for Clermont Tenants Association and Michael Kaye, respondents.

Gary R. Connor, New York (Jack Kuttner of counsel), for NYSDHCR respondent.

Appeal from order (denominated decision and judgment), Supreme Court, New York County (Walter B. Tolub, J.), entered August 10, 2009, which, in an article 78 proceeding by a tenants' association challenging respondent DHCR's award of a major capital improvement rent increase to intervenor-respondent-appellant landlord, granted DHCR's cross motion to remand the matter to itself for further proceedings, unanimously dismissed, without costs.

No appeal lies as of right from an order in an article 78 proceeding remanding a matter to an agency for further

nonministerial proceedings (CPLR 5701[b][1]; *Matter of Leung v Department of Motor Vehs. of State of N.Y.*, 65 AD2d 736 [1978]), and we decline to grant leave to appeal sua sponte.

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

ENTERED: MAY 27, 2010

CLERK

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

2895-
2896-
2897 In re Melissa Marie G.,
Petitioner-Respondent,

-against-

John Christopher W.,
Respondent-Appellant.

- - - - -

2898-
2899 In re Sheryl W.,
Petitioner-Appellant,

-against-

Melissa G.,
Respondent-Respondent,

John Christopher W.,
Respondent.

Anne Reiniger, New York, for John Christopher W., appellant.

George E. Reed, Jr., White Plains, for Sheryl W., appellant.

Steven N. Feinman, White Plains, for respondent/respondent.

Michael S. Bromberg, Sag Harbor, Law Guardian.

Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about July 3, 2008, which, inter alia, granted petitioner mother leave to relocate to Florida with the subject child, and granted the paternal grandmother supervised visitation with the child, unanimously affirmed, without costs.

Relocation requests are evaluated with due consideration of all of the relevant facts and circumstances, and with the

predominant emphasis on the outcome most likely to serve the best interests of the child. The relative rights of the custodial and non-custodial parents are significant factors that must be considered, but the rights and needs of the child must be accorded great weight *(see Matter of Tropea v Tropea,* 87 NY2d 727, 739-741 [1996]).

Here, as a result of the relocation, the mother and child were able to obtain a suitable apartment, as compared to living in a series of homeless shelters in New York. They are able to benefit from supportive relationships with the mother's family members who live nearby, and the child appears happy in her new environment. Although the relocation limits the father's contact with the child and makes visitation more difficult, the court found that he was a "visiting father" and had never lived with the child for any extended period of time. Given his history of domestic violence (*see e.g. Matter of Melissa Marie G. v John Christopher W.*, 57 AD3d 314 [2008]), the mother's stated fear of him appears to be well founded.

The paternal grandmother objects to the court's order that she share supervised visitation with the father. However, this determination has a sound basis in the record *(see Matter of David J.B. v Monique H.*, 52 AD3d 414 [2008]).

We have considered the remaining contentions of the father and grandmother and find them unavailing.

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

ENTERED: MAY 27, 2010

CLERK

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

2900-
2900A-
2900B-
2900C

Index 104260/06

Elvio Taveras, et al.,
Plaintiffs-Appellants,

Ramon Hernandez, et al.,
Plaintiffs,

-against-

General Trading Co., Inc.,
Defendant-Respondent.

Thompson Law Group, P.C., New York (Janese N. Thompson of counsel), for appellants.

Begos Horgan & Brown LLP, Bronxville (Patrick W. Begos of counsel), for respondent.

Judgment, Supreme Court, New York County (Debra A. James, J.), entered November 25, 2009, which, inter alia, found plaintiffs Elvio Taveras and 2927 Eighth Avenue Corp. (2927 Corp.) in civil contempt and imposed a civil fine against plaintiff Taveras payable to defendant in the amount of $2,500,000, unanimously affirmed, with costs. Appeals from order, same court and Justice, entered October 21, 2009, which, inter alia, found plaintiffs Taveras and 2927 Corp. guilty of civil contempt, and from order, same court and Justice, entered November 10, 2009, which enforced the October 21, 2009 order, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid judgment. Appeal from judgment, entered

November 25, 2009 by the County Clerk upon a confession of judgment, unanimously dismissed, without costs, as nonappealable.

An order of reference authorizes "consideration both of matters expressly stated and clearly implied therein" (*Sage Realty Corp. v Proskauer Rose*, 288 AD2d 14, 15 [2001], *lv dismissed* 96 NY2d 937 [2001], *lv denied* 97 NY2d 608 [2002]). Here, the order of reference was issued in response to defendant's motion to cite Taveras and 2927 Corp. for contempt, and expressly directed the special referee to report on the elements necessary to find contempt, including "(1) whether the said plaintiffs have distributed the assets of [2927 Corp.] in violation of [the] court's August 31, 2006 order granting a preliminary injunction and, if so, (2) whether said plaintiffs' conduct was calculated to, or actually did defeat, impair, impede, or prejudice defendant's rights or remedies." To determine whether plaintiffs' misconduct prejudiced defendant's rights, it was necessary for the referee to determine whether plaintiffs were indebted to defendant, and consideration of the amount of plaintiffs' debt to defendant was at least "clearly implied" in the reference. Further, plaintiffs' injection of the issue of the amount of their debts caused the referee to make the specific findings he did. Thus, the referee did not exceed his authority.

The IAS court "was vested with broad power to accept or reject the Special Referee's report" which power was not "improvidently exercised" in confirming the report here (*Sage Realty Corp.* at 15) since "its findings are supported by the record" (*Baker v Kohler* 28 AD3d 375, 376 [2006], *lv denied*, 7 NY3d 885 [2006]). We defer to the referee's determination, particularly where, as here, it "turns upon an assessment of witnesses' credibility" (*Brookman & Brookman, P.C. v Joseph Fleischer Natural Coiffures, Inc.*, 13 AD3d 196, 197 [2004]). The Referee's Report herein contained 130 findings of fact and 50 conclusions of law, with each of the findings supported by a citation to the record. Plaintiffs have failed to show that the referee erred, particularly with respect to violation of the injunction, in finding that plaintiffs had distributed assets belonging to defendant which were calculated to and actually did impair and prejudice defendant's rights.

The IAS court also properly found that based upon the prior dissolution proceeding, 2927 Corp. and Taveras were precluded from relitigating issues as to defendant's ownership of 2927 Corp.'s stock and defendant's officer acting as 2927 Corp.'s sole director.

Since the court properly ruled that defendant was entitled to the books, records and assets of 2927 Corp. and that Taveras

was required to turn over said books, records and assets, when Taveras refused to do so, the court was within its power to direct the Sheriff to enforce the order.

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

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

ENTERED: MAY 27, 2010

CLERK

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

2901 & M-2388 The People of the State of New York, Respondent,

Ind. 4635/01

-against-

Benjamin Rodriguez,
Defendant-Appellant.

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

Appeal from judgment of resentence, Supreme Court, New York County (Thomas Farber, J.), rendered February 5, 2009, resentencing defendant, as a second felony offender, to a term of 8 years, with 5 years' postrelease supervision, unanimously dismissed as moot, in that Supreme Court has granted defendant's motion to set aside the resentence.

M-2388 - Motion to dismiss appeal as moot granted.

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

ENTERED: MAY 27, 2010

CLERK

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

2902 William I. Koch, Index 601220/08
Plaintiff-Respondent,

-against-

Acker, Merrall & Condit Company,
Defendant-Appellant.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellant.

Irell & Manella LLP, Los Angeles, CA (Gregory R. Smith, of the California Bar, admitted pro hac vice, of counsel), for respondent.

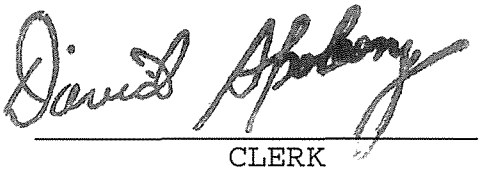
Order, Supreme Court, New York County (Martin Shulman, J.), entered April 9, 2009, which, in an action arising out of plaintiff's purchase of allegedly counterfeit wines from defendant wine auctioneer, insofar as appealed from as limited by the briefs, denied defendant's motion to dismiss plaintiff's causes of action under General Business Law §§ 349 and 350, unanimously reversed, on the law, with costs, the motion granted, and such causes of action dismissed.

The "Conditions of Sale/Purchaser's Agreement" included in each of defendant's auction catalogues contains an "as is" provision alerting prospective purchasers that defendant "makes no express or implied representation, warranty, or guarantee regarding the origin, physical condition, quality, rarity, authenticity, value or estimated value of [the wine]," that any statements made by defendant were "opinion only, and shall not be

relied upon by any bidder," and that "[p]rospective bidders must satisfy themselves by inspection or other means as to all considerations pertinent to any decision to place any bid." A reasonable consumer, alerted by these disclaimers, would not have relied, and thus would not have been misled, by defendant's alleged misrepresentations concerning the vintage and provenance of the wine it sells. Accordingly, plaintiff's claims under General Business Law §§ 349 and 350 lack merit (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324).

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

ENTERED: MAY 27, 2010



CLERK

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

2903 Kelly Anne Breen-Burns, Index 18623/06
Plaintiff-Respondent-Appellant,

-against-

Scarsdale Woods Homeowners' Association Inc., et al.,
Defendants-Appellants-Respondents.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellants-respondents.

Friedman, Levy, Goldfarb & Green, P.C., New York (Ira H. Goldfarb of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered November 30, 2009, which, in this slip and fall personal injury action, granted plaintiff's motion to set aside the verdict to the extent of ordering a new trial on damages, unanimously reversed, on the law, without costs, the motion denied and the verdict reinstated.

Plaintiff moved to set aside the verdict on the ground of alleged clerical error by the jury in reporting its verdict, and, alternatively, on the ground of jury confusion.

Ordinarily, jurors may not impeach their verdict once they are discharged (*see Hersh v New York City Tr. Auth.*, 290 AD2d 258, 259 [2002]). In two limited circumstances, courts have permitted the use of juror affidavits to impeach a verdict (see generally *Moisakis v Allied Bldg. Prods. Corp.*, 265 AD2d 457 [1999], *lv denied* 95 NY2d 752 [2000]; *see also Hersh*, 290 AD2d

258). One instance is where the affidavits demonstrate that a ministerial error occurred in the jury's reporting of the verdict, yet the alleged error may not concern issues of how the jury's verdict was reached (*see generally Moisakis*, 265 AD2d 457). Here, the alleged error in reporting the future damages awards involved an examination into how the jury determined the future damages awards, and thus, the alleged error was not ministerial in nature. The juror affidavits alleged that the jury intended its future damages awards to be paid "per year," notwithstanding that the verdict sheet's special interrogatories had not provided for such interpretation or award basis. Moreover, the two future awards were inexplicably based upon the jury's two disparate life expectancy findings. Additionally, the alleged intended future medical expense award was wholly unsupported by the evidence (*see generally Buggs v Veterans Butter & Eggs Co.*, 120 AD2d 361 [1986]).

The remaining exception to the rule prohibiting juror impeachment of a verdict mandates proof, on the trial record, evidencing a basis for finding juror confusion. Here, there were no objections raised as to the jury charge, jury verdict sheet and jury verdict (*see generally Arizmendi v City of New York*, 56 NY2d 753 [1982]; *Barry v Manglass*, 55 NY2d 803 [1981]). Moreover, the jury was polled and affirmed their verdict. The jury verdict sheet itself, including the jury findings entered

thereon, did not reflect any inconsistent or factually unsupported findings. On the face of the trial record, there was no evidence of jury confusion. As such, given the instant circumstances, the juror affidavits and the juror worksheet notes submitted by plaintiff on her motion, both of which were produced subsequent to the discharge of the jury, could not be relied upon to impeach the verdict (*see Moisakis*, 265 AD2d at 458; *cf. Hersh*, 290 AD2d 258).

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

ENTERED: MAY 27, 2010

CLERK

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

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

-against-

Lester Q. Jones,
Defendant-Appellant.

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

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

Appeal from judgment, Supreme Court, New York County (Maxwell Wiley, J. at motion; Thomas Farber, J. at jury trial and sentence), rendered May 1, 2008, convicting defendant of burglary in the first degree and robbery in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 20 years to life, held in abeyance and the matter remitted for a *Dunaway* hearing.

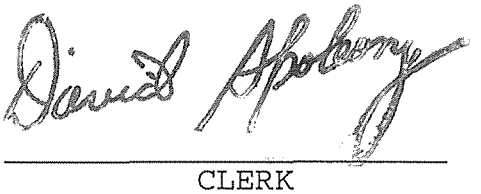
The motion court erred in summarily denying defendant's motion to suppress a lineup identification as the fruit of an illegal arrest or detention. Defendant clearly raised a factual issue as to when and where he was arrested, or otherwise taken into custody, so as to raise a Fourth Amendment issue (*see People v Mendoza*, 82 NY2d 415, 426 [1993]). Although the voluntary disclosure form could be interpreted as stating that defendant was arrested at a police station, immediately after being

identified in a lineup, defendant's motion averred that he was arrested on the street approximately eight hours before the lineup took place and that, at the time of his arrest, he was not engaging in any behavior suggestive of illegal activity. Even if defendant was not formally arrested for the crimes of which he was convicted until after the lineup, this did not explain how he came to be at the station house in the first place. The People did not disclose whether defendant was placed in a lineup based on information linking him to the robbery (and what that information was), or whether he was in custody for some other reason (*see People v Bryant*, 8 NY2d 530, 533-34 [2007]). Under these circumstances, defendant's allegation that the police lacked probable cause or reasonable suspicion to believe that he was involved in any criminal activity was sufficient to warrant a hearing.

There is no merit to defendant's claim that his motion should be summarily granted rather than determined at a hearing.

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

ENTERED: MAY 27, 2010



CLERK

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

2905 First & 91 LLC, Index 108543/08
Plaintiff-Respondent,

-against-

1765 First Associates LLC, et al.,
Defendants,

New York Crane & Equipment Corp.,
Defendant-Appellant.

[And a Third-Party Action]

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

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered April 9, 2009, which, to the extent appealed as limited by the briefs, denied defendant New York Crane's motion to consolidate all pending and any future-filed actions arising out of the May 30, 2008 collapse of a crane, unanimously affirmed, without costs.

According deference to the exercise of discretion by the trial court (*see Geneva Temps, Inc. v New York World Communities, Inc.*, 24 AD3d 332, 334 [2005]), and recognizing the administrative order, issued after New York Crane had made this

motion, we agree with the Supreme Court that consolidation at this point is premature.

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

ENTERED: MAY 27, 2010

CLERK

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

2906 Yacomo Coyago, Index 18749/07
Plaintiff-Appellant-Respondent,

-against-

Mapa Properties, Inc.,
Defendant-Respondent-Appellant.

Samuel J. Lurie, New York (Dennis A. Breen of counsel), for appellant-respondent.

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

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered May 7, 2009, which, in this action seeking damages for personal injuries suffered in a work-related accident, granted defendant's motion for summary judgment dismissing plaintiff's Labor Law claims to the extent of dismissing plaintiff's Labor Law § 241(6) claim, unanimously modified, on the law, to dismiss plaintiff's common law negligence and Labor Law § 200 claims, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff, a torch operator employed by non-party Brookfield Auto Wreckers, was directed to dismantle a boat at a facility, on premises leased to Brookfield by defendant, where assorted items were regularly brought for demolition and sold for their component parts. Plaintiff was using a flame torch to demolish the boat when an explosion occurred, causing him to sustain

injury.

A Labor Law § 241(6) claim requires that there be a violation of some specific safety standard (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502, 505 [1993]), and plaintiff has invoked, in part, 12 NYCRR § 23-1.25(f). However, even assuming the applicability of this Industrial Code regulation, Labor Law § 241(6) only provides protection "to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]), and it is clear that plaintiff was not, at the time of his injury, engaged in construction or excavation. Regarding demolition, which is defined by 12 NYCRR § 23-1.4(b)(16) as "[t]he work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment" (*see also Baranello v Rudin Mgt. Co.*, 13 AD3d 245, 245-246 [2004], *lv denied* 5 NY3d 706 [2005]), the mere act of dismantling a vehicle, whether a boat, a car or otherwise, unrelated to any other project, is not the sort of demolition intended to be covered by Labor Law § 241(6) (*see Caban v Maria Estela Houses I Assoc., L.P.*, 63 AD3d 639, 639-640 [2009]).

As for plaintiff's claim under Labor Law § 200, which "is a codification of the common law duty imposed upon an owner or

general contractor to maintain a safe construction site" (*Rizzuto* at 352), it is "an implicit precondition to this duty . . . that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (*id.* at 352 [citations omitted]). In the instant matter, there is absolutely no allegation that defendant had the authority to direct, control or manage the activity in which plaintiff was engaged and which caused the injury. Thus, the common law negligence and Labor Law § 200 causes of action should also have been dismissed.

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

ENTERED: MAY 27, 2010

CLERK

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

2907 Maija-Leena Remes,
Plaintiff-Respondent-Appellant,

-against-

513 West 26th Realty, LLC,
Defendant-Appellant-Respondent,

Atelier 14 Corp.,
Defendant.

- - - - -

[And a Third-Party Action]

- - - - -

513 West 26th Realty, LLC,
Second Third-Party
Plaintiff-Appellant-Respondent,

-against-

Integrity Contracting, Inc., et al.,
Second Third-Party Defendants,

Murdoch Young Architects,
Second Third-Party
Defendant-Appellant.

[And a Third Third-Party Action]

Index 108902/05
590712/07
590320/08
590877/08

Gannon, Rosenfarb & Moskowitz, New York (Peter J. Gannon of counsel), for 513 West 26th Realty, LLC, appellant-respondent/appellant-respondent.

Menaker & Herrmann LLP, New York (Paul M. Hellegers of counsel), for Murdoch Young Architects, appellant.

David Horowitz, P.C., New York (Steven J. Horowitz of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered December 10, 2009, which, insofar as appealed from as limited by the briefs, in an action for personal injuries, denied

the motions of defendant 513 West 26th Realty, LLC (Owner) and second third-party defendant Murdoch Young Architects (Architect) for summary judgment dismissing the complaint and cross claims as against them, and dismissed the branch of plaintiff's complaint alleging negligence premised on optical confusion, unanimously modified, on the law, the motions of the Owner and Architect granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff was injured when, while waiting for a friend in the lobby of Owner's building, she took a step backward and fell down two steps from the lobby into a smaller room where the building tenants' mailboxes were located. When plaintiff fell, she tried to grab onto something to break her fall, but was unsuccessful, as there were no handrails installed by the stairs.

The court incorrectly concluded that the stairs at issue were "interior stairs" such that Owner and Architect were required to install handrails (Administrative Code of City of NY § 27-232; § 27-375[f]), as the subject stairs do not serve as an exit to the building (*see* Administrative Code § 27-232; *Mansfield v Dolcemascolo*, 34 AD3d 763, 764 [2006]; *Maksuti v Best Italian Pizza*, 27 AD3d 300 [2006], *lv denied* 7 NY3d 715 [2006]; *Union Bank & Trust Co. of Los Angeles v Hattie Carnegie, Inc.*, 1 AD2d 199, 200 [1956]). Even assuming that the stairs constitute a

"vertical exit," the lobby at issue does not meet the requirements of the provisions setting forth the circumstances where "street floor lobbies" could function as "exit passageways" (*see* Administrative Code § 27-370[h][1], [3]).

In light of the photographs, which show an obvious drop in elevation and trimmings against the wall outlining the steps, and the deposition testimony that no prior similar incidents had occurred and that bright lights illuminated the stairway area, Owner made a prima facie showing that the stairway area did not constitute a hazardous condition or hidden trap proximately causing plaintiff's injuries (*see Broodie v Gibco Enters., Ltd.*, 67 AD3d 418 [2009]; *Burke v Canyon Rd. Rest.*, 60 AD3d 558 [2009]). In opposition, plaintiff failed to submit evidence sufficient to show that the stair area created optical confusion so as to defeat Owner's prima facie showing (*see Stillman v Frankel*, 44 AD2d 821, 821-822 [1974], *affd* 36 NY2d 899 [1975]; *Schreiber v Philip & Morris Rest. Corp.*, 25 AD2d 262, 263-264 [1966], *affd* 19 NY2d 786 [1967]; *Brooks v Bergdorf-Goodman Co.*, 5

AD2d 162, 163-164 [1958]; *compare Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 210-212 [1988]).

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

ENTERED: MAY 27, 2010

CLERK

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

2908 In re Peter G. Milazzo, etc., Index 603804/07
Petitioner-Appellant,

-against-

Leslie Hamerschlag,
Respondent-Respondent.

Peter M. Levine, New York, for appellant.

Jack F. Scherer, P.C., New York (Ahmed A. Massoud of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered January 13, 2010, awarding petitioner the total sum of $154,330.46 against respondent Leslie Hamerschlag, and bringing up for review an order, same court and Justice, entered December 31, 2009, which found the value of petitioner's shares in the subject business to be $125,000, unanimously affirmed, without costs.

The evidence of a recent arm's-length offer to purchase the subject business for an amount that petitioner calculated would yield $125,000 for his shares and petitioner's willingness to accept the $125,000 supports the court's determination of the

value of petitioner's shares (*see Matter of Pace Photographers (Rosen)*, 71 NY2d 737, 748 [1988]).

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

ENTERED: MAY 27, 2010

CLERK

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

2909 In re MVAIC, Index 115848/08
Petitioner-Appellant,

-against-

Interboro Medical Care & Diagnostic PC, etc.,
Respondent-Respondent.

Marshall & Marshall, Jericho (Jeffrey Kadushin of counsel), for appellant.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 12, 2009, which denied petitioner MVAIC's application to vacate a no-fault arbitration award, unanimously reversed, on the law, without costs, the motion granted, the award vacated, and the matter remanded for a determination on the merits of the coverage issue.

MVAIC defended the arbitration on the ground that the police accident report showed that the offending vehicle was registered out-of-state and was insured, but the arbitrator refused to consider that defense on the merits on the ground that MVAIC had failed to pay or deny the claim within 30 days of its submission, as required by the no-fault law (Insurance Law § 5106[a]; 11 NYCRR 65-3.8[a][1]; [c]). This was contrary to settled law (*see generally Matter of State Farm Mut. Auto. Ins. Co. v Lumbermens Mut. Cas. Co.*, 18 AD3d 762, 763 [2005]) recognizing a narrow exception to the 30-day deadline for defenses based on lack of

coverage (*Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co.*, 9 NY3d 312, 318 [2007]). *New York Hosp. Med. Ctr. of Queens v MVAIC* (12 AD3d 429 [2d Dept 2004], *lv denied* 4 NY3d 705 [2005]), relied on by the arbitrator, did not involve a lack of coverage issue. We would add that the burden is on MVAIC to prove its lack-of-coverage defense.

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

ENTERED: MAY 27, 2010

CLERK

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

2910 The People of the State of New York, Ind. 1692/01
Respondent,

-against-

Eduardo Medina,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

Order, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about December 13, 2007, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant's point score was far above the threshold for a level three offender, and his successful completion of a treatment program did not warrant a

downward departure, particularly in light of his very serious record of sex offenses against children.

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

ENTERED: MAY 27, 2010

CLERK

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

2912N Paula Watson, Index 25707/00
Plaintiff-Appellant,

-against-

Alliance II Associates,
Defendant-Respondent,

George Kleinman, et al.,
Defendants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

LaSorsa & Beneventano, White Plains (Michelle Dunleavy of counsel), for respondent.

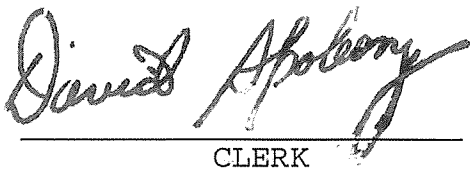
Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 24, 2009, which, in an action for personal injuries that was marked off the calendar as settled, denied plaintiff's motion to restore the case to the trial calendar, unanimously reversed, on the law, without costs, the motion granted, the settlement vacated, and the case restored to the trial calendar.

The motion to restore should have been granted, since defendant failed to come forward with proof that plaintiff's attorney was authorized to settle the case (*see McGuffin v Port of N.Y. Auth.*, 58 AD2d 793 [1977]). The record does not support the court's finding that plaintiff should be bound to the

settlement (*see Mazzella v American Home Constr. Co.*, 12 AD2d 910 [1961]).

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

ENTERED: MAY 27, 2010



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David Friedman
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, JJ.

931-931A
Index 601380/08

The Starr Foundation,
Plaintiff-Appellant,

-against-

American International Group, Inc., et al.,
Defendants-Respondents.

Plaintiff appeals from orders of the Supreme Court, New York County (Charles E. Ramos, J.), entered December 3 and 19, 2008, which granted defendants' motion to dismiss the complaint.

Schindler Cohen & Hochman LLP, New York (Rebecca L. Fine, Steven R. Schindler, Lisa C. Cohen, Scott W. Bulcao and Karen M. Zakrzewski of counsel), for appellant.

Weil, Gotshal & Manges LLP, New York (Joseph S. Allerhand, Stacy Nettleton, Robert F. Carangelo and Brant Duncan Kuehn of counsel), for respondents.

FRIEDMAN, J.

At issue on this appeal is the legal sufficiency under New York law of a claim for fraudulent inducement to continue to hold, rather than sell, a large block of the common stock of defendant American International Group, Inc. (AIG), a publicly traded security. In a nutshell, the theory of the complaint (as amplified by affidavits and testimony offered in response to the motion to dismiss) is that plaintiff Starr Foundation (the Foundation), which was seeking to divest itself of most of the AIG stock that formed its original endowment, was induced to set an excessively high "floor price" ($65 per share) for the sale of the stock by public statements defendants made beginning in August 2007 that allegedly misrepresented (by minimizing) the degree of risk attached to AIG's large credit default swap (CDS) portfolio. Allegedly in reliance on these statements, the Foundation suspended its sales of the stock in October 2007, when AIG's share price fell below $65. But for defendants' misrepresentations, the Foundation claims, it would have set a lower floor price for selling its AIG stock and, as a result, would have accelerated its divestiture plan and sold all of its remaining AIG stock within two weeks.[1] In fact, however, the

[1]The supplemental affidavits and testimony offered in response to the motion to dismiss clarify that the Foundation is

Foundation ceased selling its AIG stock in October 2007, and therefore still held approximately 15.5 million AIG shares in February and March of 2008, when the value of AIG stock declined substantially as AIG reported billions in CDS losses due to the mounting number of defaults on real estate mortgages.

In this action, the Foundation apparently seeks to recover the value it hypothetically would have realized for its 15.5 million shares of AIG stock in the late summer or fall of 2007 had defendants at that time accurately disclosed the risk of AIG's CDS portfolio, less the stock's value after the alleged fraud ceased to be operative in early 2008. If the case were to go to trial, to establish liability and damages the Foundation would be required (in addition to proving the fraudulent nature of the statements complained of) somehow to come forward with a nonspeculative basis for determining how accurate disclosure of the risk of the CDS portfolio beginning in August 2007 -- and

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alleging that accurate disclosure of the risk of the CDS portfolio would have influenced the Foundation to set a lower floor price for selling its AIG stock. Since having a floor price means that sales would have been suspended had the share price hypothetically declined below that level, it is not clear what basis the Foundation has for alleging that accurate disclosure would have caused it to sell all of its remaining AIG stock within two weeks. In this regard, it is notable that, when AIG's share price declined to below $40 in March 2008 after the huge losses of its CDS portfolio were reported, the Foundation continued to hold its AIG stock because, as it now explains, the share price was below book value.

such disclosure's hypothetical effect on the market at that time -- would have affected the Foundation's decision to sell or retain its AIG stock and the amount it would have received for the stock it hypothetically would have sold. However, the Foundation's "holder" claim fails, as a matter of law, because it violates the "out-of-pocket" rule governing damages recoverable for fraud. Accordingly, we affirm the dismissal of the complaint.[2]

As should be evident from the foregoing summary of the allegations on which the claim is based, the Foundation is seeking to recover the value it would have realized by selling its AIG shares before the stock's price sharply declined in early 2008 due to the reporting of its CDS losses. Manifestly, such a recovery would violate New York's longstanding out-of-pocket rule, under which "'[t]he true measure of damages [for fraud] is indemnity for the actual pecuniary loss sustained as the direct result of the wrong'" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996], quoting *Reno v Bull*, 226 NY 546, 553 [1919]).

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[2]We note that the Foundation's claim is legally insufficient whether or not the Foundation has properly asserted it as a direct claim on its own behalf as an individual stockholder rather than as a derivative claim against management on behalf of the corporation. If derivative, the action would be subject to dismissal for failure to allege demand on the board. Accordingly, we need not reach the question of whether the claim is direct or derivative.

Such damages "are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained," and "there can be no recovery of profits which would have been realized in the absence of fraud" (*Lama*, 88 NY2d at 421; *see also Reno v Bull*, 226 NY at 553 ["The purpose of an action for deceit is to indemnify the party injured," and "(a)ll elements of profit are excluded"]).

This action is virtually the paradigm of the kind of claim that is barred by the out-of-pocket rule. As the Court of Appeals noted in *Lama*, under the out-of-pocket rule "the loss of an alternative contractual bargain . . . cannot serve as a basis for fraud or misrepresentation damages because the loss of the bargain was 'undeterminable and speculative'" (88 NY2d at 422, quoting *Dress Shirt Sales v Hotel Martinique Assoc.*, 12 NY2d 339, 344 [1963]; *see also Rather v CBS Corp.*, 68 AD3d 49, 58 [2009], *lv denied* 13 NY3d 715 [2010]; *Geary v Hunton & Williams*, 257 AD2d 482 [1999]; *Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67, 72 [1990]). Here, the Foundation seeks to recover the value it might have realized from selling its shares during a period when it chose to hold, under hypothetical market conditions for AIG stock (assuming disclosures different from those actually made) that never existed. A lost bargain more "undeterminable and

speculative" than this is difficult to imagine.[3]

The inconsistency of the Foundation's claim with the out-of-pocket rule emerges fully when one considers that the measure of damages under the rule is "the difference between the value of what was given up and what was received in exchange" (*Mihalakis v Cabrini Med. Ctr. (CMC)*, 151 AD2d 345, 346 [1989], *lv dismissed in part, denied in part* 75 NY2d 790 [1990], citing *Reno v Bull*, 226 NY at 553). The Foundation does not allege any transaction in which it gave up anything in exchange for anything else. On the contrary, the Foundation complains that it was induced to continue holding its AIG stock for a certain period of time. In holding its stock, the Foundation did not lose or give up any value; rather, it remained in possession of the true value of the stock, whatever that value may have been at any given time. Thus, the Foundation did not suffer any out-of-pocket loss as a result of retaining its AIG stock. Further, the decline in AIG's

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[3]It should be noted, however, that defendants go astray to the extent they may be arguing that a transaction in which a party realizes a profit can never form the basis for a fraud claim by that party. A plaintiff who is fraudulently induced to enter into a transaction in which he accepts something of less value than what he gives up can state a cause of action for fraud, even if that plaintiff happened to make a profit on the deal because what he received was of greater value than his cost basis in what he gave up. In the instant case, however, the Foundation seeks to recover the value it hypothetically might have received in a transaction that never took place.

share price for which recovery is sought was caused by the reporting of the company's massive CDS losses. Since the CDS losses would have been incurred regardless of any earlier misrepresentations AIG made concerning the risk of the CDS portfolio, such alleged misrepresentations could not have been the cause of the decline of AIG's stock price. In other words, the paper "loss" the Foundation seeks to recover in this action was caused by the underlying business decision of AIG's management to build up the CDS portfolio on which the losses reported in early 2008 were sustained, not by the earlier alleged misrepresentations forming the basis of the Foundation's complaint.[4]

As noted, the rationale of the out-of-pocket rule is that the value to the claimant of a hypothetical lost bargain is too "undeterminable and speculative" (*Lama*, 88 NY2d at 422 [internal quotation marks and citation omitted]) to constitute a cognizable

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[4]The reliance of the Foundation and the dissent on *Bernstein v Kelso & Co.* (231 AD2d 314 [1997]) is misplaced. In *Bernstein*, this Court reinstated a fraud claim by a plaintiff who alleged that he had been fraudulently induced to sell his stock for an unfairly low price in a buy-out transaction. The decision simply applied the out-of-pocket rule to a case where the seller of stock claims to have been defrauded, since the *Bernstein* plaintiff "sought to recover the difference between the price he received in the sale of the company and the price he would have received had his employees and Kelso [the buyer] not deceived him" (231 AD2d at 322).

basis for damages. In this regard, the impermissibly speculative nature of the recovery sought in this action emerges from a comparison of the Foundation's holder claim against AIG with a more typical claim for fraud in the inducement of an actual purchase or sale of a publicly traded security. In the latter case, the claim is based on a transaction involving a particular quantity of the security at a particular time, and, to determine damages, the factfinder need determine only the effect of an accurate disclosure on the price of the security at the particular time the transaction actually occurred. In the case of a holder claim seeking damages based on the value that would have been realized in a hypothetical sale, however, the degree of speculation in determining damages is essentially quadrupled, in that the factfinder must determine (1) whether the claimant would have engaged in a transaction at all if there had been accurate disclosure of the relevant information, (2) the time frame within which the hypothetical transaction or series of transactions would have occurred, (3) the quantity of the security the claimant would have sold, and (4) the effect truthful disclosure would have had on the price of the security within the relevant time frame. These cumulative layers of uncertainty amount to a

difference in the quality, not just the quantity, of speculation, and take the claim out of the realm of cognizable damages.

In fact, this case well illustrates the speculative nature of the holder claimant's allegation that it was injured at all. Specifically, after the alleged fraud was exposed upon the reporting of AIG's massive CDS losses in February and March of 2008, the Foundation continued to hold its remaining AIG stock through all the ensuing drops in share price. The speculative nature of the claim is underscored by the following testimony given by the Foundation's president, Florence A. Davis, under questioning by defense counsel at a hearing before the motion court:

> "[DEFENSE COUNSEL]: . . . If the exact same disclosures that were made in February 2008 had been moved up in time and were made in August 2007, would you have sold all of your AIG stock which you now own if the price then had declined into the low forties just as it did in February of '08 when the losses were disclosed?
>
> "You cannot answer that question; isn't that correct?
>
> "[MS. DAVIS]: I can't speculate about that."

As the motion court aptly noted, neither would it be appropriate for a jury to speculate on the answer to this question.

In other cases, plaintiffs asserting holder claims have argued that the price of the stock fell to a lower level after

the exposure of the alleged fraud than it would have reached absent the fraud due to a loss of confidence in management's integrity attributable to the revelation of the inaccuracy of its earlier representations (*see Small v Fritz Cos., Inc.*, 30 Cal 4th 167, 191, 65 P3d 1255, 1270 [2003] [Kennard, J., concurring] ["revelations of false financial statements and management misrepresentations raise a host of concerns that may lead to a decline in stock values beyond that warranted by the financial information itself"]). Although it is not evident to us that the Foundation makes any such argument here, the dissent makes this argument on the Foundation's behalf, relying on Justice Kennard's concurrence in *Small*. We disagree. In our view, such a theory is "too remote and speculative to support cognizable damages" (30 Cal 4th at 206, 65 P3d at 1280 [Brown, J., concurring in part and dissenting in part]). As Justice Brown elaborated in *Small*:

> "[S]uch investor speculation could occur in *every* case in which a company announces bad news or issues a negative correction. Thus, any drop in stock price allegedly caused by investor speculation that earlier company statements were dishonestly or incompetently false will occur *regardless of whether the defendants acted fraudulently*. As such, defendants' alleged misrepresentations could not have caused the drop in stock price resulting from such investor speculation. In any event, any claim that the mere possibility of fraudulent conduct by defendants may have caused a greater drop in investor confidence and a correspondingly greater drop in stock price than would

> have otherwise occurred is highly speculative and should not be cognizable as a matter of law" (30 Cal 4th 206-207, 65 P3d at 1280] [emphasis in original]).

To the extent the Foundation argues that the ultimate drop in AIG's share price was greater than it otherwise would have been because general market conditions had worsened by the time the alleged misrepresentations were corrected, the loss was not related to the subject of the alleged misrepresentations and therefore was not proximately caused by them (*see Laub v Faessel*, 297 AD2d 28, 31 [2002]; Restatement [Second] of Torts § 548A [1977] ["A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance"]).

Notably, a federal district court applying Connecticut law dismissed a holder claim similar to that asserted by the Foundation on the ground that "the claims for damages based on the plaintiffs' failure to sell or hedge their stock are too speculative to be actionable" (*Chanoff v United States Surgical Corp.*, 857 F Supp 1011, 1018 [D Conn 1994], *affd* 31 F3d 66 [2d Cir 1994], *cert denied* 513 US 1058 [1994]). In reaching that determination, the *Chanoff* court rejected arguments bearing a strong resemblance to the Foundation's arguments against application of the out-of-pocket rule here:

> "In addition, the defendants argue, somewhat compellingly, that the plaintiffs have not alleged cognizable loss because plaintiffs cannot claim the right to profit from what they allege was an unlawfully inflated stock value. In rebuttal, the plaintiffs argue that had the disclosures been timely made . . . , the market would not have responded as drastically as it did when the disclosures were made in 1993, thereby characterizing their loss as the difference in the impact of the disclosures on the market, not lost profits. Yet this argument is merely a creative costume for the lost profits claim, which courts have clearly rejected. Moreover, even if the court accepted plaintiffs' attempt to distinguish their claim, the claim would not be actionable as it is not subject to even reasonable estimation; rather, because . . . there is not one precise point at which the defendants' duty to disclose information . . . attached, and in light of the difficulty in quantifying the value of earlier disclosure, the actual calculation of such damages would be intractable at best" (*id.* [footnote omitted]).

In this case, the calculation of damages would be no less intractable than in *Chanoff*. Significantly, the Foundation simply asserts, without meaningful explanation, that some unspecified expert testimony would enable it to establish the effect on the market for AIG stock of earlier disclosure of the true risk of the CDS portfolio. Further, while the Foundation claims that such earlier disclosure would have influenced it to set a lower floor price for the sale of its AIG stock, it offers no description of the methodology that was used to set the floor price, nor does it give even a rough estimate of the floor price that would have been set had AIG accurately represented the risk

of the CDS portfolio in the late summer and fall of 2007. The dissent's contention that we should not require the Foundation "to divulge its methodology" on a pleading motion, if heeded, would eviscerate the dissent's own stated position that the proponent of a holder claim should be required to meet the heightened pleading standard articulated by the California Supreme Court in *Small*. Without giving some hint of the methodology it used to set its floor price, the Foundation cannot allege with particularity that, assuming accurate disclosure of the relevant risk, it "would have sold the [AIG] stock, how many shares [it] would have sold, and when the sale would have taken place" (30 Cal 4th at 184, 65 P3d at 1265). In the absence of even a general explanation of the methodology that was used for this purpose, the complaint fails to "allege actions, as distinguished from unspoken and unrecorded thoughts and decisions, that would indicate that the [Foundation] actually relied on the misrepresentations" (*id.*). Moreover, the Foundation obviously has no need for discovery concerning its own internal actions and deliberations.

In support of its position that the complaint should be reinstated, the dissent chiefly relies on a case this Court

decided more than 80 years ago, *Continental Ins. Co. v Mercadante* (222 App Div 181 [1927]). Assuming the continuing vitality of *Mercadante*, it offers no support for sustaining a fraud cause of action that, like the Foundation's, seeks recovery for the loss of the value that might have been realized in a hypothetical market exchange that never took place. The plaintiffs in *Mercadante* alleged that, as a result of being fraudulently induced to refrain from selling their bonds, they were ultimately left with instruments that were "substantially worthless" (222 App Div at 182). Thus, as defendants correctly observe, the *Mercadante* plaintiffs did suffer an out-of-pocket loss, specifically, the loss of their investment in the bonds. Nothing in *Mercadante* states or implies that the measure of damages in that case would have been the amount for which the bonds could have been sold at some point before they lost their value.[5]

For the foregoing reasons, the out-of-pocket rule requires us to affirm the dismissal of the Foundation's complaint. Since that issue is dispositive of the appeal, we need not reach the

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[5]*Hotaling v A. B. Leach & Co.* (247 NY 84 [1928]), on which the Foundation also relies, is distinguishable along the same lines as *Mercadante*. In this connection, it should be noted that the out-of-pocket rule is not an obstacle to a creditor's claim that it was fraudulently induced to forbear from taking steps to collect a debt (*see Foothill Capital Corp. v Grant Thornton, L.L.P.*, 276 AD2d 437, 438 [2000]).

Foundation's remaining arguments.

Accordingly, the orders of the Supreme Court, New York County (Charles E. Ramos, J.), entered December 3 and 19, 2008, which granted defendants' motion to dismiss the complaint, should be affirmed, with costs.

All concur except Moskowitz, J. who dissents in an Opinion:

MOSKOWITZ, J. (dissenting)

In 1927, in *Continental Ins. Co. v Mercadante* (222 App Div 181 [1927]), this Court held actionable a claim for fraudulent inducement to retain, rather than sell, a security. Today, the majority has effectively eviscerated this holding. Because I believe the better rule is to allow recovery, under certain circumstances, when fraud induces a plaintiff to hold securities, I respectfully dissent. I would also hold that plaintiff can pursue its claim in this direct action.

Plaintiff the Starr Foundation (plaintiff or Starr) is a charitable foundation whose primary asset is shares of American International Group, Inc. (AIG) stock. Starr is the sole residual beneficiary of the estate of Cornelius Vander Starr. In the nearly 30 years since the settlement of Mr. Starr's estate, plaintiff has donated more than $2.3 billion to charities and charitable organizations, many based here in New York. Until 2006, AIG stock comprised most of plaintiff's grants of more than $100,000.

In January 2006, plaintiff held 48 million shares of AIG stock. Its original cost basis was just over 7.4 cents per share. Allegedly out of concern that its assets were not diversified enough, plaintiff's board of directors decided to divest itself gradually of AIG stock. Plaintiff initially set a

sale price floor of $70 per share based upon its assessment of the fair market value of the stock, and sold 13.3% of its AIG stock.

By the summer of 2007, problems in the credit markets began to emerge because of the rapidly rising rate of defaults on subprime mortgages. In response to these market developments, in July 2007, plaintiff decided to lower its sale price floor to $65 per share, and sold an additional 15.7% of its original 48 million shares. However, concerns among AIG investors, plaintiff included, continued to grow about AIG's exposure to loss from investment products comprised of subprime mortgages and the billions of dollars of credit default swaps that AIG had sold. On August 1, 2007, MarketWatch reported that AIG's shares had fallen 8% in July as investors worried about AIG's exposure to subprime debt.

Plaintiff alleges that, in response to investor concerns, AIG undertook a concerted effort to mislead plaintiff and the investing public generally about AIG's subprime exposure to induce plaintiff and other investors not to sell their AIG shares. Plaintiff alleges that defendants deliberately made false statements to investors and concealed material facts about AIG's risk of loss in its credit default swap portfolio, and that, in August of 2007, to quell investors' concerns about AIG,

defendants fraudulently reassured investors that the risk of loss from its credit default swap portfolio was minimal.

Specifically, plaintiff alleges, in an investor conference call on August 9, 2007, defendants told investors:

> "[I]t is hard for us with, and without being flippant, to even see a scenario within any kind of realm of reason that would see us losing $1 in any of those [credit default swap] transactions . . . We wanted to make sure in this presentation, we broke out exactly what everything looked like in order to give everybody the full disclosure. But we see no issues at all emerging. We see no dollar of loss associated with any of that [credit default swap] business."

In the same conference call, defendants further stated that "AIG's Financial Products portfolio of super senior credit default swaps is well structured; undergoes ongoing monitoring, modeling, and analysis; and enjoy[s] significant protection from collateral subordination." Plaintiff claims that in reliance on these statements, it did not further revise its sale price floor and continued its gradual divestiture program into September and October of 2007, selling AIG stock only when it was priced at or above $65 per share. Between August 8, 2007 and October 9, 2007, plaintiff sold an additional 26.6% of its original 48 million shares.

During the second week of October 2007, the price of AIG stock dipped below $65. Plaintiff claims that, in reliance on defendants' reassurances in August 2007, it held fast to its

divestiture program and ceased selling AIG stock, because the price had dipped below the program's floor price.

According to plaintiff, in AIG's third-quarter Form 10-Q, filed on November 7, 2007, AIG further attempted to reassure investors, stating that it "continues to believe that it is highly unlikely" that AIG would have to make payments related to its portfolio of credit default swaps, that AIG's credit default swap portfolio had lost a relatively modest $352 million in value during the third quarter of 2007 and that the estimated losses in October 2007 were only $550 million.

Plaintiff alleges that the next day, November 8, 2007, in a conference call with stockholders, defendants stated that the "ultimate credit risk actually undertaken [on its credit default swap portfolio] is remote and has been structured and managed effectively" and that "[w]hile U.S. residential mortgage and credit market conditions adversely affected our results, our active and strong risk management processes helped contain the exposure." In Power Point slides provided to investors for the conference call, defendants repeated that "AIG does not expect to be required to make any payments from this [subprime-related] exposure." Finally, plaintiff alleges, on December 5, 2007, at a shareholder meeting, defendants told investors: (1) that the possibility that the unit that sold the credit default swaps

would sustain a loss was "close to zero"; (2) that AIG was "confident in [its] marks and the reasonableness of [its] valuation methods"; (3) that AIG's U.S. residential housing exposure was "manageable given [AIG's] size, financial strength and global diversification"; and (4) that the valuation models AIG's subsidiary used "have proven to be very reliable" and "provide AIG with a very high level of comfort."

Plaintiff contends that in reliance on these continued reassurances, it did not revise its floor sale price and consequently did not sell any shares after October 9, 2007. By the end of 2007, plaintiff had sold 55.6% and granted to its charities 12.5% of its original 48 million shares. Thus, it was left with 31.9% of its shares, or 15,472,745 shares.

According to the plaintiff, on February 11, 2008, AIG filed its Form 8-K with the SEC, revealing for the first time that the value of its credit default swap portfolio had actually dropped by $5.96 billion through November 2007 - an amount that was $4 billion more than the figure reported to investors in December 2007. As a result of this disclosure, AIG's stock fell from $50.68 to $44.74 per share in a single day. On February 28, 2008, AIG filed its 2007 Form 10-K, disclosing that the value of its credit default swap portfolio had dropped by $11.5 billion during 2007. In addition, AIG reported that it lost more than $3

billion in its investment portfolio of residential mortgage debt, and that it had engaged in accounting irregularities with respect to its valuations of the credit default swap portfolio. As a result, AIG's stock price dropped from $52.25 per share at the close of the market on February 27, 2008 to $46.86 per share at the close of the market on February 29, 2008.

Plaintiff did not sell any of its AIG shares after the truth came to light, admittedly because, "it was trading at or around book value and it wouldn't be rational to sell stock at that price," and it "had already taken a significant loss at that point, and it just made sense to hold off and see what was going to happen with the stock prices at that point." Plaintiff still holds its remaining 15,472,745 shares, that, at the time of the filing of this lawsuit, were trading at around $3 to $4 per share.

Plaintiff commenced this action in May 2008 alleging a single cause of action for fraud. Plaintiff claims that defendants made intentionally false statements about AIG's losses and risks to induce shareholders, including plaintiff, not to sell their AIG stock, that the misstatements caused it to refrain from lowering its sale price floor below $65 per share and to continue to hold shares once the share price fell below that floor in October 2007. Plaintiff claims that, as a direct result

of AIG's fraudulent and misleading disclosures, plaintiff now holds assets worth substantially less than before and consequently is less able to provide funding to the many charities it has supported throughout the years.

Defendants moved to dismiss and the motion court granted that motion. In a nutshell, the court held that plaintiff had not stated a cause of action because its damages were too speculative and because it could not assert this cause of action as a direct action. The parties profess some confusion as to whether the court dismissed this action on the pleadings or as a matter of summary judgment. It was entirely appropriate for the court to consider the affidavits and testimony that plaintiff submitted to clarify the complaint on a motion to dismiss the pleading (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Moreover, to the extent the court ruled as a matter of summary judgment, defendants agreed the court limited the issue to whether or not plaintiff had sold shares of AIG stock after August 2007, a finding not an issue on this appeal. Accordingly, we review the order of the motion court to the extent it dismissed the case on the face of the complaint and the supplemental evidence plaintiff submitted.

I. Derivative or Direct?

Plaintiff has asserted its claim as a direct action as

opposed to a derivative one that would raise issues about whether demand upon AIG's board of directors was necessary. As an alternative ground for dismissal, the motion court ruled that plaintiff's claims were derivative of the corporation's and that therefore plaintiff could not assert them in a direct action. Plaintiff claims this was error because it was appropriate to raise its fraud claim in a direct action. I address this issue first because, if plaintiff cannot assert its fraud claim directly, there is no need to reach any other issues.

A plaintiff asserting a derivative claim seeks to recover for injury to the corporation. A plaintiff asserting a direct claim seeks redress for injury to him or herself individually. Here, Delaware law governs whether plaintiff's claim is direct or derivative, because AIG is incorporated in Delaware (*see Finkelstein v Warner Music Group Inc.*, 32 AD3d 344, 345 [2006]). Under Delaware law, whether a claim is direct or derivative turns solely on: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" (*Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 [Del 2004]). To state a direct claim, the stockholder's alleged injury must be independent of any injury to the corporation (*id.* at 1039).

Typically, where a claim alleges mismanagement, corporate overpayment or breach of fiduciary duty by managers, it is derivative (*see e.g. Tooley, 845 A2d at 1038; Gentile v Rosette*, 906 A2d 91, 99 [Del 2006]; *Albert v Alex. Brown Mgt. Serv., Inc.*, 2005 WL 2130607, * 13, 2005 Del Ch LEXIS 133, *46-47 [Del Ch 2005]). This is because the injury that a shareholder would experience from this sort of misconduct flows out of the injury to the corporate entity (*see Albert*, 2005 WL 2130607 at * 13, 2005 Del Ch LEXIS 133 at *46). By contrast, a plaintiff asserting a direct claim seeks to recover for injury as an individual shareholder or investor (*Tooley* at 1036). Allegations that a defendant fraudulently induced a plaintiff to invest typically state a direct claim (*see e.g. Case Fin. Inc. v Alden*, 2009 WL 2581873, *5, 2009 Del Ch LEXIS 153, *16-17 [Del Ch 2009] [misrepresentation that induced plaintiff to pay more than assets were worth stated direct claim]). There are also occasions when "the same set of facts can give rise both to a direct claim and a derivative claim" (*Grimes v Donald*, 673 A2d 1207, 1212 [Del 1996]).

When the primary claim alleges valuation fraud due to non disclosure, the claim is usually direct (*see Albert*, 2005 WL 2130607 at *12, 2005 Del Ch LEXIS 133 at *44 [Del Ch 2005]; *Dieterich v Harrer*, 857 A2d 1017, 1029 [Del Ch 2004] ["disclosure

allegations are direct claims, as they are based in rights secured to stockholders by various statutes"); *see also Malone v Brincat*, 722 A2d 5, 14 [Del 1998] ["When the directors . . . deliberately misinform [] shareholders about the business of the corporation, either directly or by public statement, there is a violation of fiduciary duty. That violation may result in a derivative claim on behalf of the corporation or a cause of action for damages"]).

Defendants, relying primarily upon *Lee v Marsh & McLennan Co., Inc.* (17 Misc 3d 1138 [A], (2007 NY Slip Op 52325 [u] [2007]), argue that plaintiff's fraud claim is derivative because it alleges to corporate mismanagement and breach of fiduciary duty that harmed the corporation. While this argument has initial appeal, it is misplaced. In *Lee*, the plaintiffs may have claimed fraud, but the court found that complaint essentially asserted claims for breach of fiduciary duty and corporate mismanagement. It was this mismanagement that reduced the value of the shares.

Depression of the stock price is often a result of corporate mismanagement. However, a decrease in stock price also results when management purposefully conceals negative facts about the company and the truth subsequently comes to light. Here, plaintiff alleges that defendants perpetrated a fraud by

purposefully supplying plaintiff with false information. Plaintiff alleges that defendants intentionally mischaracterized the extent of AIG's losses and exposure in presentations during investor conference calls on August 9, and November 8, 2007. On December 5, 2007, at a shareholder meeting, AIG told investors that the possibility that the unit that sold the credit default swaps would sustain a loss was "close to zero." Defendants also made misrepresentations to plaintiff in numerous written communications. For example, defendants mischaracterized AIG's losses in AIG's third-quarter Form 10-Q filed on November 7, 2007 and in Power Point slides that defendants provided to investors for the November 8, 2007 conference call. Indeed, plaintiff alleges that all AIG's public filings and financial statements before February 2008 consistently reported only modest declines in the value of AIG's credit default swap portfolio. Plaintiff claims it relied on this misinformation and kept its floor price at $65 per share instead of lowering its floor price and selling. At the time plaintiff filed this lawsuit, AIG shares were comparatively worthless.

Although corporate mismanagement may have brought about AIG's overinvolvement in high risk derivative investment products, such as credit default swaps, that is not the issue here. The claim in this case is one of fraud aimed at investors

that injured plaintiff. Plaintiff claims it was fraudulently induced not to lower its floor price and to retain its shares because of purposeful misstatements on the part of AIG's management about AIG's exposure to the risk of loss. Thus, to the extent plaintiff has suffered injury, that injury is peculiar to plaintiff. Accordingly, a direct action is appropriate (*see Case Fin., Inc*, 2009 WL 2581873 at *5, 2009 Del Ch LEXIS 153 at *16-17; *Fraternity Fund Ltd. v Beacon Hill Asset Mgt. LLC*, 376 F Supp 2d 385, 409 [SD NY 2005] [applying New York law]; *see also Pension Comm. of the Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC*, 446 F Supp 2d 163, 205 [SD NY 2006]).

Defendants also argue that the claim is by nature derivative because the decrease in AIG's stock affected all shareholders alike. However, while the stock price may have decreased for all investors once AIG revealed the enormity of its risk exposure, this does not automatically mean plaintiff lacks a direct claim (*see Tooley*, 845 A2d at 1038-1039 [rejecting as "confusing in identifying the nature of the action" a bright-line rule that there is no direct injury "if all shareholders are equally affected or unless the stockholder's injury is separate and distinct from that suffered by other stockholders"]).

II. Plaintiff has Stated A Cause of Action

A. Holder Claims Should Remain Viable under New York Law

Without admitting it, the majority in effect does away with most holder claims. The majority claims it is "evident" that "the Foundation is seeking to recover the value it would have realized by selling its AIG shares before the stock's price sharply declined." The majority then states that such a recovery is not permissible in a fraud action under New York law. However, this rule is irrelevant because, as I discuss later, this plaintiff is not seeking to recover lost profits. More important, though, is the end result of the majority's reasoning. The majority's formulation does away with nearly every holder claim in which the share price increased from the time of original purchase, regardless of the impact of the fraud upon the sale price. However, this court has long recognized a claim for "fraud in inducing, not the purchase of the bonds, but their retention after purchase" (*Continental Ins. Co. v Mercadante*, 222 App Div 181, 183 [1927]). In *Mercadante*, the defendants induced the plaintiffs to buy and retain securities by conveying false financial information as to the earnings and solvency of the underlying obligor. In holding that the plaintiffs could sue despite that "their conduct was inaction rather than action," the court stated:

> "The law should not countenance a standard of business morality which would permit vendors of securities to promote a market by publication of false

> representations and escape the consequence thereof by the contention that the owners of these securities might well have retained them even though the false representations had not been made" (222 App Div at 186).

Mercadante is consistent with the general rule that forbearance from action in reliance upon the intentional misrepresentation of another is actionable fraud *(see Channel Master Corp. v Aluminium Ltd.*, 4 NY2d 403, 407 [1958]; *see also* Restatement Second of Torts §525 ["one who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation"]). And, until today, *Mercadante* was considered good law *(see e.g. In re Countrywide Corp. Shareholders Litig.*, 2009 WL 846019, *5, 2009 Del Ch LEXIS 44, *19 [Del Ch 2009] ["*Mercadante* is still good law despite both its vintage and the extensive intervening developments surrounding securities fraud litigation"]).

Citing *Blue Chip Stamps v Manor Drug Stores* (421 US 723 [1975]), defendants also urge an end to holder claims altogether. *Blue Chip Stamps* limited securities fraud claims under section 10(b) of the Securities Exchange Act of 1934 to those involving the actual purchase or sales of securities, but, in dicta, left

open a home in state court for holder claims involving common-law fraud (421 US at 738 n 9). Defendants discuss "the substantial risk of 'vexatious litigation' where plaintiffs may use unfounded holder claims to exact settlements from defendants wary of engaging in lengthy and expensive discovery" (quoting *Blue Chip Stamps* at 743). Defendants point out that proof in holder cases often turns on self-serving oral testimony about what a shareholder might have done had he or she known the truth. Defendants fear that without a rule barring holder claims "'bystanders to the securities marketing process could await developments on the sidelines without risk, claiming that inaccuracies in disclosure caused nonselling in a falling market" (quoting *Blue Chip Stamps* at 747).

Defendants' fears are not without foundation. However, there is no reason to turn away from holder claims now simply because unsavory plaintiffs might lie about what they would have done with their stock in an effort to extort a favorable settlement. Certainly, in this day and age, when misrepresentations on the part of large conglomerates nearly brought this nation to its knees, the risk of nonmeritorious lawsuits is equal to the risk of reducing the number of persons available to enforce corporate honesty (*see Small v Fritz Co., Inc.*, 30 Cal 4th 167, 182, 65 P 3d 1255, 1264 [2003] ["The

possibility that a shareholder will commit perjury and falsely claim to have read and relied on the report does not differ in kind from the many other credibility issues routinely resolved by triers of fact in civil litigation. It cannot justify a blanket rule of nonliability").

Moreover, New York's requirement of specific pleading in fraud cases, including that plaintiff plead and prove actual reliance, is sufficient to guard against the frivolous lawsuit. To claim fraud under New York law, a plaintiff must plead with particularity: (1) a misrepresentation or omission of material fact; (2) that the defendant knew to be false (scienter); (3) that the defendant made with the intention of inducing reliance; (4) upon which plaintiff reasonably relied and (5) damages *(see e.g. Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1996]). In *Small v Fritz Co., Inc.*, 30 Cal 4th at 184-185, 65 P 3d at 1265-1266, the Supreme Court of California imposed a heightened standard of pleading for the element of reliance in holder actions:

> "[A] plaintiff must allege specific reliance on the defendants' representations: for example, that if the plaintiff had read a truthful account of the corporation's financial status the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place. The plaintiff must allege actions as distinguished from unspoken and unrecorded thoughts and decisions, that would indicate that the plaintiff actually relied on

> the misrepresentations. Plaintiffs who cannot plead with sufficient specificity to show a bona fide claim of actual reliance do not stand out from the mass of stockholders who rely on the market"

(*see also Hunt v Enzo Biochem, Inc.*, 471 F Supp 2d 390, 411-412 [SD NY 2006]). This reasoning is sound. New York's heightened pleading standard for fraud would require no less. Accordingly, to plead reliance in a holder action, a plaintiff should be able to plead with particularity, at the very least, how many shares it would have sold and when it would have sold them. However, given the majority's reasoning, it is unlikely any plaintiff will get the chance to so plead.

Here, in its complaint and affidavits, plaintiff alleges that defendants' campaign of misinformation concerning AIG's risk of loss, starting in August 2007, left plaintiff comfortable with a sales price floor of $65 a share and that plaintiff therefore did not change its divestiture program. Plaintiff alleges that, had it known the truth, it would have sold all its remaining shares within two weeks. Plaintiff supports this claim by pointing to action it did take. Namely, plaintiff continued to sell AIG shares in accordance with its divestiture program to the extent that it was able to achieve a sales price of $65 or greater. Plaintiff also specifies the number of shares (15,472,745) it claims it would have sold had AIG's repeated

false statements not lulled it into complacency. Accordingly, plaintiff has pleaded actual reliance on defendants' misrepresentations with sufficient particularity to support a holder claim.

B. Direct Communication

Defendants are also of the view that New York should not recognize holder actions in which the only statements plaintiff relied upon were communicated to the entire market simultaneously and the allegedly misleading information is presumably assimilated into the price of the stock traded on efficient national exchanges. Defendants argue that *Mercadante* is not applicable because that case involved direct communications about the quality of the bonds and, unlike AIG's shares, those bonds were not available on a national market.

New York law does not generally impose a requirement of face-to-face contact to support a claim for fraud (*see e.g. Houbigant, Inc. v Deloitte & Touche*, 303 AD 2d 92 [2003]). And, in holder cases, courts have routinely upheld claims that did not allege face-to-face communication. For example, allegations that plaintiffs relied on written misstatements are sufficient (*see e.g. Pension Comm. of the Univ. of Montreal Pension Plan* 446 F Supp 2d at 204-205 [allegations that defendants disseminated fraudulent monthly NAV (net asset value) statements directly to

plaintiffs were sufficient to support fraud claim]). Similarly, allegations that defendants disseminated misinformation at investor meetings or in documents filed pursuant to federal law are sufficient (*see Gutman v Howard Savings Bank*, 748 F Supp 254, 258-259 [D NJ 1990] [misrepresentations made at a meeting for analysts, in press releases and in forms filed with the FDIC]; *see also Hunt*, 530 F Supp 2d at 584 [misrepresentations made at annual shareholders' meeting, "in press releases and news articles, and through the dissemination of insider information to stockbrokers and analysts"]).

Here, the allegations describe communication direct enough to support a claim for fraud under New York law. This includes: (1) the investor conference call on August 9, 2007 during which AIG assured investors that AIG's risk of loss from CDS was remote; (2) AIG's November 7, 2007, third-quarter Form 10-Q wherein it stated that it was "highly unlikely" that it would have to make payments related to its portfolio of credit default swaps and severely underestimated the losses that were imminent and (3) the November 8, 2007 investor conference call and accompanying PowerPoint slides in which AIG repeated that it "does not expect to be required to make any payments from this exposure."

C. Loss Causation

Defendants argue, and the majority agrees, that plaintiff has suffered no loss attributable to fraud. Defendants reason that, had AIG revealed the truth in August 2007, as Starr contends AIG should have done, the market would have reacted the same way it did in February 2008. Plaintiff would have suffered the same loss, only a few months earlier. Plaintiff would never have had the opportunity to sell its shares at the allegedly artificially inflated stock price, thereby avoiding the decline in value of its AIG stock. Accordingly, defendants argue, plaintiff cannot ever prove damages. In similar fashion, the majority believes that plaintiff's damages are too speculative to be actionable because the calculation of those damages would be "intractable."

Defendants' theory, that plaintiff sustained no loss because the market would have reacted the same way had AIG revealed the truth earlier, is initially compelling. It is for this perceived inability to prove loss causation that some courts refuse to recognize holder claims altogether (*see e.g. Chanoff v United States Surgical Corp.*, 857 F Supp 1011, 1018 [D Conn 1994], *affd* 31 F3d 66 [2d Cir 1994] *cert denied* 513 US 1058 [1994] [holder claims are not actionable under Connecticut law in part because

damages are "not subject to even reasonable estimation"]; *Arnlund v Deloitte & Touche LLP*, 199 F Supp 2d 461, 488-489 [ED Va 2002] [under Virginia law, plaintiffs could not demonstrate loss causation]).

Nevertheless, despite its surface appeal, a deeper analysis demonstrates that this reasoning falls short. Delayed disclosure resulting from the intentional concealment of unfavorable financial data affects the market in more ways than revealing the true numbers. As Justice Kennard explained in her concurring opinion in *Small v Fritz Co., Inc.*, 65 P3d 30 Cal 4th at 190-191 at 1270:

> "Investors will not only question management's competence but also its integrity. Investors would have reason to wonder whether there were other, yet undisclosed instances of fraud, and to doubt whether management really recognized its duty to protect the interests of stockholders. Investors would be concerned, too, that lenders would doubt the integrity of the management and question their financial data, affecting the company's credit status. They would fear that the company might incur the disruption and expense of defending numerous lawsuits . . ."

Here, AIG painted a rosy picture to investors, only to come clean a couple of months later and admit that its earlier reports were untrue. As we all know, AIG's ultimate disclosure of the truth not only caused its stock price to plummet, but also roiled financial markets around the world to such an extent that the

United States government had to bail out the company. Although undoubtedly there would have been a plunge in the stock price in August 2007 had AIG revealed the true state of affairs at that time, it is certainly reasonable to contemplate that AIG's deliberate falsehood made the situation much worse when it came to light along with the unfavorable financial news.

Thus, I reject defendants' conclusion that, because plaintiff's shares traded on an efficient national market, plaintiff sustained no damages. Defendants fail to consider factors other than the current financial health of a company that investors consider when purchasing securities. While separating the loss in value attributable to the fraud from that attributable to the disclosure of truthful but unfavorable financial data may prove difficult, this difficulty does not prevent plaintiff from stating a claim. It is the fact of damage that plaintiff must clearly allege (*see Richard Silk Co., Inc. v Bernstein*, 82 NYS 2d 647, 649-650 [1948], *affd*, 274 App Div 906 [1948] ["It is not material that plaintiff has failed to demand the precise damages to which it may be entitled in an action for fraud or that it has mistaken its proper rule of damages"]). The majority may eventually be correct in characterizing the calculation of plaintiff's damages as "intractable." But this is a motion to dismiss. Whether plaintiff will ultimately, through

the use of expert evidence or otherwise, be able to prove damages is a question for another day.

Under the majority's reasoning, holder claims could never be viable. However, the majority of states that have addressed the issue recognize a cause of action for fraudulently inducing the retention of securities (*see e.g. Small* 30 Cal 4th at 173, 65 P3d at 1258; *Gordon v Buntrock*, 2004 WL 5565141 (Ill Cir [2004]); *Reisman v KPMG Peat Marwick LLP*, 57 Mass App Ct 100, 112-114, 787 NE2d 1060, 1068-1070 [2003]). Delaware has yet to address the issue. While Delaware does not permit holder claims based on "fraud on the market" (*see Malone v Brincat*, 722 A2d at 13), it presumably might permit holder claims if those claims involved some sort of direct communication. In addition, *Manzo v Rite Aid Corp.* (2002 WL 31926606 *5, 2002 Del Ch LEXIS 147, *15 [Del Ch [2002], *affd* 825 A2d 239 [Del 2003]), does not reject holder claims outright, but dismissed the plaintiff's claims for failure to allege legally cognizable damages. In this case, plaintiff alleges that it refrained from changing its sales floor in reliance on defendants' misrepresentations.

Many federal courts interpreting state law have also held in favor of permitting holder actions (*see e.g. Hunt v Enzo Biochem, Inc.*, 471 F Supp 2d at 414 [predicting that South Carolina would

permit holder claims if defendants made misrepresentations directly to plaintiffs]; *Pension Comm. of the Univ. of Montreal Pension Plan*, 446 F Supp 2d at 204 [New York law]; *Rogers v Cisco Sys., Inc.*, 268 F Supp 2d 1305, 1311 [ND Fla 2003] [Florida law]; *Gutman v Howard Savings Bank*, 748 F Supp at 262-264 [New York and New Jersey law]).

The majority would dismiss this case on the premise that plaintiff's claim fails because it violates the "out-of-pocket rule" that precludes recovery in fraud for lost profits. However, it is improper to characterize the damages plaintiff seeks as "lost profits." Plaintiff seeks to recover the fair market value loss on the stock that it would have sold in the absence of AIG's fraud. Thus, plaintiff merely seeks to restore itself to the position it occupied without the fraud. This is not profit (*see Bernstein v Kelso & Co.*, 231 AD2d 314, 322 [1997]). That plaintiff may have originally had a low cost basis also has no bearing. A decline in the value of a stock affects the net worth of a stockholder. It can affect the ability of a company to borrow money or obtain insurance. In Starr's case, the decline in stock value allegedly affected the charitable donations it was able to make because those donations often took the form of stock grants. Starr held stock in August 2007 because it relied on defendants' false words. Starr is entitled

to try to prove that it suffered a loss because, if defendants had disclosed the truth in August 2007, the value of the stock would not have dropped as much then as it did in February 2008.[1]

Defendants also make much of plaintiff's testimony at the hearing on November 17, 2008, through Ms. Davis, that she could not speculate whether the Foundation would have sold all its AIG stock if AIG had made the February disclosure back in August 2007. Defendants argue that this shows that plaintiff admits its claim is speculative. This interpretation misreads plaintiff's allegations. Plaintiff claims it was fraudulent for AIG not to reveal its exposure to *risk* of loss earlier. The question posed to plaintiff was what plaintiff would have done had an actual loss occurred (and been revealed) earlier. Plaintiff's hearing testimony does nothing to undercut the allegations that it suffered damages because it retained stock that it would have sold by accelerating its divestiture program had it known the

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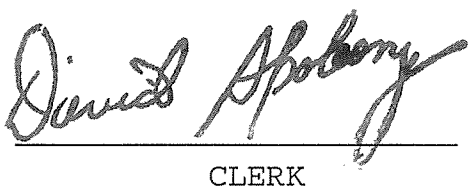
[1] The majority criticizes plaintiff because it did not offer a "description of the methodology that was used to set the floor price, nor does it give even a rough estimate of the floor price that would have been set had AIG accurately represented the risk of the CDS portfolio in the late summer and fall of 2007." However, at this motion to dismiss stage, plaintiff is not required to divulge its methodology or to estimate the floor price. The majority's conclusion that plaintiff cannot allege with particularity how many shares it would have sold and when without revealing its methodology is a non sequitur. Were this case to proceed, undoubtedly plaintiff would reveal in discovery how it set its floor price.

true *risk* of loss earlier.

Finally, defendants and the majority point out that, even after the alleged fraud became public, plaintiff did not sell its shares. They argue that this undercuts plaintiff's allegation that, had it known the truth, it would have sold the remainder of its AIG stock. However, one does not have to sell stock to experience injury. The reduction in value of stock holdings reduces the net worth of the stockholder. In plaintiff's case, this reduction was particularly harmful because plaintiff, a charitable organization, often made its donations in the form of stock grants. Moreover, it is not for the court, but for the fact finder, to second-guess plaintiff's motives and investment strategy once the loss occurred.

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

ENTERED: MAY 27, 2010



CLERK

MAY 27 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Eugene Nardelli
James M. Catterson
Leland G. DeGrasse
Nelson S. Román, JJ.

1577
File 2916/03

David Mirvish,
Petitioner-Respondent,

-against-

Hanno D. Mott, etc., et al.,
Respondents-Appellants.

Respondents appeal from a decree of the Surrogate's Court, New York County (Renee R. Roth, S.), entered on or about December 31, 2008, which granted petitioner's cross motion for summary judgment finding that the decedent's inter vivos gift of certain artwork was valid, and denied respondents' motion for summary judgment dismissing the petition.

Rottenberg Lipman Rich, P.C., New York (Harry W. Lipman of counsel), for appellants.

Carter Ledyard & Milburn LLP, New York (Gary D. Sesser, Ronald D. Spencer, Susan B. Kalib and Judith M. Wallace of counsel), for respondent.

DeGRASSE, J.

The petition's prayer for relief calls for a declaration that petitioner is the owner of a 1,100 pound bronze sculpture, by the noted sculptor Jacques Lipchitz, known as *The Cry*. In addition, the petition sets forth claims sounding in conversion, replevin and constructive trust, and calls for ancillary relief under the Surrogate's Court Procedure Act. Petitioner claims that the sculpture was gifted to his assignee, Biond Fury, by the decedent, Yulla H. Lipchitz. The gift was allegedly effected by way of a handwritten instrument which reads: "I gave this sculpture 'The Cry' to my good friend Biond Fury in appreciation for all he did for me during my long illness. With love and my warm wishes for a Happy Future, Yulla Lipchitz/October 2, 1997, New York." The writing is on the back of a photograph of the sculpture. According to Fury's deposition, the decedent gave him the writing in October 1997. Fury further testified that at that time, the sculpture was being stored at the Michael Leonard Warehouse in New York at his expense. According to Fury, the sculpture remained at the warehouse until 1998 when respondent Mott, the decedent's son and executor of her will, had it removed from the warehouse and placed with Marlborough Gallery, a New York-based art gallery. Fury testified that he did not remember authorizing respondent to remove *The Cry* from the warehouse. The

decedent died on July 20, 2003, and her will was admitted to probate on August 13, 2003.

By letter from counsel dated March 9, 2004, Fury asserted his claim of ownership of the sculpture and demanded its immediate delivery by the decedent's estate. This letter represents Fury's first such demand upon respondent. On September 15, 2005, Fury sold his purported interest in the sculpture to petitioner. By letter dated October 20, 2005, respondent's counsel informed petitioner's counsel that the sculpture had been sold "over a year ago." In July 2006, petitioner brought the instant proceeding. Respondent moved and petitioner cross-moved for summary judgment. Surrogate's Court denied respondent's motion and granted petitioner's cross motion, finding that the decedent intended to and did make a gift of *The Cry* to Fury who accepted it.

The elements of a gift are intent on part of the donor to make a present transfer, actual or constructive delivery to the donee, and acceptance by the donee, and the proponent of a gift has the burden of proving each of these elements by clear and convincing evidence (*Gruen v Gruen*, 68 NY2d 48, 53 [1986]). The requirement of delivery may be satisfied by physical delivery of the gift itself or a constructive or symbolic delivery such as by

an instrument sufficient to divest the donor of dominion and control over the property (*id.* at 56). What is sufficient to constitute delivery "must be tailored to suit the circumstances of the case" (*Matter of Szabo,* 10 NY2d 94, 98 [1961]). Hence, a gift instrument, such as the one alleged in this case, would be an appropriate vehicle for the symbolic delivery of a gift consisting of a monumental work of art such as *The Cry* (*see e.g. Hawkins v Union Trust Co. of N.Y.,* 187 App Div 472 [1919]). For reasons that follow, however, CPLR 4519 stands as a bar to summary judgment in favor of petitioner.

A party moving for summary judgment must sufficiently demonstrate entitlement to judgment, as a matter of law, by tendering evidentiary proof in admissible form (*LaGrega v Farrell Lines,* 156 AD2d 205 [1989]). The record does not support petitioner's assertion that the decedent's delivery of the gift instrument to Fury is undisputed. To be sure, the fact of the gift (which must include delivery) is specifically denied in respondent's answer. Fury's testimony is the only evidence of the decedent's delivery of the gift instrument to him. This testimony, however, is inadmissible under CPLR 4519 because Fury is the person from whom petitioner derives his interest. Evidence that is inadmissible under CPLR 4519 cannot be used to

support a motion for summary judgment (*see Beyer v Melgar*, 16 AD3d 532 [2005]). It was, therefore, error for the court to grant petitioner's cross motion for summary judgment. At the same time, CPLR 4519 may not be asserted in support of respondent's motion for summary judgment (*see Salemo v Geller*, 278 AD2d 104 [2000], *citing Phillips v Kantor & Co.*, 31 NY2d 307, 313 [1972]).

In support of his motion, respondent argues that the gift is invalid because petitioner has proffered no evidence that the decedent ceded dominion and control over the sculpture to Fury. Here, respondent relies upon a November 1998 letter from Marlborough Gallery to the French Minister of Culture and Communication. The letter reflects an arrangement "with the Lipchitz family" whereby Marlborough loaned *The Cry* to the Government of France as an exhibit for a period of three years or until the decedent's death, whichever occurred first. The letter speaks of the possibility of a sale of the sculpture by the Lipchitz family at the end of the loan. It also provides for the return of the sculpture to the family in the event it were not purchased. Respondent testified that at the completion of the exhibit at the Jardin du Palais Royal in Paris, he consented, on behalf of the decedent, to a display of the sculpture at the

Jardin des Tuileries, also in Paris.

Respondent relies upon this Court's decision in *Anagnostou v Stifel* (168 AD2d 256 [1990]) to support his argument that the decedent did not part with dominion and control over the sculpture. The decedent in *Anagnostou* allegedly made a gift of six paintings by a written instrument given to the donees while the paintings were on exhibit in Italy. A subsequent letter from the decedent's manager, purportedly acting on behalf of the decedent and his niece, directed the Italian exhibitor to return the paintings to New York. In denying the parties' motion and cross motion for summary judgment, we found an issue of fact as to "whether decedent continued to exercise personal dominion and control over the paintings, having ordered them to be returned to New York upon the close of the exhibition in Milan, or whether that directive emanated from some other source in contradiction to the claimed earlier expressed declaration that the six paintings in question belonged to plaintiffs, his faithful servants" (*id.* at 257). In keeping with *Anagnostou*, we find under these analogous facts, that Marlborough's letter to the French Minister could have raised a triable factual issue as to whether the decedent would have delivered the gift instrument with the requisite donative intent, if indeed she delivered it at all (*see Gruen,* 68 NY2d at 53). Notwithstanding respondent's

argument, *Anagnostou* is not dispositive of his motion. Nevertheless, petitioner's claims are barred by the statute of limitations.

Although declaratory judgment actions are typically governed by a six-year statute of limitations under CPLR 213(1), if the underlying dispute could have been resolved through an action or proceeding for which a specific, shorter limitations period governs, then such shorter period must be applied (*Trager v Town of Clifton Park,* 303 AD2d 875, 876 [2003]). Here, petitioner not only could have, but in fact did, avail himself of the remedy of claims sounding in conversion and replevin. Accordingly, this proceeding is subject to the three-year statute of limitations for such claims (*see* CPLR 214[3]).

The parties differ as to when petitioner's conversion and replevin claims accrued. Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Employers' Fire Ins. Co. v Cotten,* 245 NY 102, 105 [1927]). The basis of an action for conversion is the denial or violation of the plaintiff's dominion over, rights to, or possession of property (*Sporn v MCA Records,* 58 NY2d 482, 487 [1983]). Hence, a conversion cause of action accrues upon the occurrence of "[s]ome affirmative act - asportation by the defendant or another

person, denial of access to the rightful owner or assertion to the owner of a claim on the goods, sale or other commercial exploitation of the goods by the defendant" (*State of New York v Seventh Regiment Fund*, 98 NY2d 249, 260 [2002]). In *Davidson v Fasanella* (269 AD2d 351 [2000]), the plaintiff purchased a painting from the defendant's decedent and placed it with an art gallery for exhibit in 1973. In 1995, the plaintiff allegedly discovered that the gallery had delivered the painting to the decedent, and brought suit after his demand for its return was refused. The court found the plaintiff's conversion cause of action to have accrued in 1977 when the gallery delivered the painting to the decedent.

Based on the foregoing case law and assuming there was a gift, we find that the affirmative act of asportation required by *Seventh Regiment* would have occurred no later than 1998, when respondent had *The Cry* removed from the Michael Leonard Warehouse without Fury's permission, delivered to Marlborough and then loaned to the French Government, all in the name of the Lipchitz family. Whether petitioner was aware of respondent's acts is immaterial. Accrual runs from the date the conversion takes place, and not from discovery or the exercise of diligence to discover (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d at 26, 44 [1995]). Petitioner's conversion

claim would thus be time-barred. The replevin claim would fare no better. Where replevin is sought against the party who converted the property, the action accrues on the date of conversion (*Matter of Peters v Sotheby's Inc.*, 34 AD3d 29, 36 [2006], *lv denied* 8 NY3d 809 [2007]).[1]

Petitioner next asserts that the statute of limitations was restarted in 2004 when respondent purportedly sold *The Cry* to an affiliate of Marlborough in Liechtenstein. Here, petitioner cites to *Stanley v Morgan Guar. Trust Co. of N.Y.*(173 AD2d 390 [1991]) for the proposition that where there are multiple conversions, the date of the latest conversion is applicable in determining whether the statute of limitations has expired. In *Stanley,* the defendant broker purchased and resold bearer bonds that had been acquired by and stolen from the plaintiff in 1983. In 1987 and 1988, the broker reacquired some of the stolen bonds. We held that the broker failed to demonstrate that the reacquisition of the bonds did not constitute a further act of conversion, thus extending the statute that ran on the original purchase. This case is distinguishable because, notwithstanding

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[1]Although not time-barred, petitioner's constructive trust claim must also be dismissed because there is no allegation of a confidential or fiduciary relationship between the parties, an element of the claim (*see e.g. Panetta v Kelly,* 17 AD3d 163, 165 [2005], *lv dismissed* 5 NY3d 783 [2005]).

the loan of *The Cry* to the French Government, respondent's assumption and exercise of the right of ownership of the sculpture remained unbroken from 1998 until the purported sale in 2004. By contrast, the broker in *Stanley* had no dominion over the bearer bonds between their sale in 1983 and their reacquisition in 1987-1988.

Petitioner's next argument is that the statute of limitations had no bearing on the issue for determination before the Surrogate's Court. In a related action, the parties stipulated that *The Cry* would be held in escrow pending joint instruction from petitioner and respondent or "a final non-appealable judgment of a New York State Court determining ownership of the Sculpture." Based upon the stipulation, petitioner takes the position that the statute of limitations defense is not relevant to the issue of title or ownership. This position is untenable. For reasons discussed above, petitioner's claim for a declaration regarding the ownership of *The Cry* is subject to the three-year statute of limitations applicable to conversion claims (*see Trager*, 303 AD2d at 876). Moreover, respondent did not waive his statute-of-limitations defense by joining in the stipulation. To be valid, a waiver must be explicit (*see Silber v Silber*, 99 NY2d 395, 404 [2003], *cert denied* 540 US 817 [2003]). Here, there was no waiver because the

stipulation does not even mention the statute-of-limitations defense.

It does not avail petitioner to argue that his conversion and replevin claims were no longer before the court by the time it had rendered its decision. Petitioner claims to have discontinued those claims by way of a letter to the court submitted while the motion was sub judice. Except where specifically superseded by the SCPA, the CPLR applies to proceedings in Surrogate's Court (*see* SCPA 102). By operation of CPLR 3217, the conversion and replevin claims could have been discontinued only by stipulation, order or notice served before joinder of issue or within 20 days after service of the petition, whichever is earlier. None of these occurred here. Therefore, petitioner's purported discontinuance of these claims was ineffective. We have considered the parties' remaining contentions and find them to be lacking in merit.

Accordingly, the decree of the Surrogate's Court, New York County (Renee R. Roth, S.), entered on or about December 31, 2008, which granted petitioner's cross motion for summary judgment finding that the decedent's inter vivos gift of certain artwork was valid, and denied respondents' motion for summary judgment dismissing the petition, should be reversed, on the law, with costs, and respondent's motion granted to the extent of

declaring that petitioner's claim of ownership of *The Cry* and his claims for damages are barred by the statute of limitations, and petitioner's cross motion denied.

All concur.

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

ENTERED: MAY 27, 2010

CLERK