SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 11, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4767-
4767A Ricardo Cuervo, Index 106641/09
Plaintiff-Appellant,

-against-

Opera Solutions LLC, et al.,
Defendants-Respondents.

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Gallet Dreyer & Berkey, LLP, New York (David T. Azrin of counsel), for appellant.

McCarter & English, LLP, New York (Patrick M. Collins of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 23, 2010, which, upon reargument, granted defendants' motion for partial dismissal of plaintiff's verified amended complaint for failure to state a cause of action to the extent of dismissing plaintiff's first cause of action as against all of the defendants, affirmed, without costs. Appeal from order, same court and Justice, entered January 14, 2010, which, to the extent appealed from as limited by the briefs, granted

defendants' motion for partial dismissal of plaintiff's verified amended complaint for failure to state a cause of action to the extent of dismissing with prejudice plaintiff's first cause of action as against defendants Arnab K. Gupta and Robert J. Bothe, unanimously dismissed, without costs, as superseded by the appeal from the July 23, 2010 order.

The court properly dismissed plaintiff's first cause of action alleging violations of Labor Law §§ 191 and 193. While plaintiff was entitled to be paid commissions pursuant to the Offer Letter, the letter expressly reserved to Opera Solutions the right to modify the commission structure at any time. Accordingly, the reduction of plaintiff's commissions did not violate the letter contract or Labor Law §§ 191 and 193 (*see Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 618 [2008]*; see also Arbeeny v Kennedy Exec. Search, Inc.*, 71 AD3d 177, 180 [2010]).

Neither plaintiff's factual allegations nor the documentary evidence support plaintiff's assertion that the individual defendants, as opposed to Opera Solutions, were plaintiff's employer within the meaning of Labor Law § 190(3) (*cf. Wing Wong v King Sun Yee*, 262 AD2d 254, 255 [1999]).

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

All concur except Moskowitz, J. who concurs in part and dissents in part in a memorandum as follows:

MOSKOWITZ, J. (concurring in part and dissenting in part)

Because I disagree with the majority with respect to plaintiff's Labor Law § 191 claim, I respectfully dissent in part. I agree with the majority's decision in all other respects.

In the written offer of employment that defendant Bothe sent to plaintiff on behalf of defendant Opera Solutions, plaintiff was invited to become an "Associate Principal" in the New York office and receive an annual base salary of $200,000. In addition, plaintiff was to receive commissions "payable as a percentage of project margins" at the end of each year. The commission rate was to be 10 percent for "cumulative [gross margins] between $0 and $2,000,000" and 20% for "cumulative [gross margins] between $2,000,000 and above." The offer letter provided that the commission rates were those "reasonably expected to be paid," but that they "may be modified at any time by Opera Solutions." The Offer Letter also explicitly provided that plaintiff was an "at will" employee.

On April 6, 2009, plaintiff resigned from Opera Solutions. Plaintiff claims that defendants "unilaterally, retroactively, and illegally changed the agreed commission/bonus schedule, and claimed that he was only entitled to $304,613 under a new illegal

schedule." Plaintiff asserts causes of action for, inter alia, breach of contract and violation of Labor Law §§ 191 and 193. Defendants moved for partial dismissal. On October 14, 2009, the motion court dismissed plaintiff's first cause of action for violations of the Labor Law in its entirety. It also dismissed plaintiff's fifth cause of action for fraud in the inducement. Plaintiff's breach of contract claim against defendant Opera Solutions remained. Plaintiff appealed from the partial dismissal.

I agree with the majority that it was appropriate to dismiss the first cause of action against the individual defendants. I also agree with the majority that the motion court was correct to dismiss plaintiff's claim under Labor Law § 193, but not for the reasons the majority stated. To state a claim under Labor Law § 193, plaintiff must allege a specific deduction from wages (*see Miles A. Kletter, D.M.D. & Andrew S. Levine, D.D.S., P.C. v Fleming*, 32 AD3d 566, 567 [2006]). Here, plaintiff contends that defendant reduced the commission percentage to which he was entitled. He does not allege that defendants made deductions from those commissions. Thus, this is merely a dispute over the calculation of commissions, to which Labor Law § 193 does not apply (*id.*).

However, plaintiff has stated a valid claim under Labor Law § 191. This section provides that an employer cannot withhold wages after the termination of employment. This section applies to commissioned salespersons, but does not apply to persons serving in an executive, managerial or administrative capacity (*Pachter v Bernard Hodes Group, Inc*, 10 NY3d 609, 615 [2008]). Defendants insist that plaintiff falls within this exclusion for executives, pointing out that plaintiff served as the second highest level executive, "only one step below the Principals, and was paid more than $450,000 in his first eight months of employment." However, plaintiff claims he was merely a management consultant employee who only performed services and that he did not perform any activities of a supervisory, executive or administrative nature. Thus, at this prediscovery juncture, whether plaintiff was the type of employee that § 191 protects remains a question of fact, precluding dismissal.

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

ENTERED: AUGUST 11, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5173 Myrtle Bryant, Index 301724/08
Plaintiff-Appellant-Respondent,

-against-

Boulevard Story, LLC,
Defendant-Respondent-Appellant,

Uplift Elevator, Inc.,
Defendant-Respondent.

_____

Ernest W. Kaufmann, Jr., New York, for appellant-respondent.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for respondent-appellant.

Faust Goetz Schenker & Blee LLP, New York (Lisa De Lindsay of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about July 14, 2010, which granted defendants' motions for summary judgment dismissing the complaint, and denied defendant Boulevard Story's motion for summary judgment on its claim for common-law indemnification against defendant Uplift Elevator, modified, on the law, to deny defendants' motions for summary judgment dismissing the complaint, and otherwise affirmed, without costs.

Plaintiff's submissions in opposition to defendants' motions, including her deposition testimony and her affidavit

estimating that the subject elevator misleveled by approximately 1½ to 2½ inches, were sufficient to raise a triable issue of fact as to whether defendant Uplift Elevator, Inc. (Uplift) was negligent in failing "to discover and correct a [misleveling problem] which it ought to have found" (*Oettinger v Montgomery Kone, Inc.*, 34 AD3d 969, 970 [2006], quoting *Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *see also Dickman v Stewart Tenants Corp.*, 221 AD2d 158 [1995]). Moreover, at this juncture, it cannot be concluded as a matter of law that the doctrine of res ipsa loquitur will not be available to plaintiff at trial, given that the alleged misleveling of the elevator was not an event that ordinarily occurs in the absence of negligence; the evidence shows that defendant Uplift was exclusively responsible for maintenance and repair of the elevator; and the record is devoid of any evidence that plaintiff contributed to the misleveling of the elevator (*see Dickman* at 158; *Burgess v Otis El. Co.*, 114 AD2d 784, 785-787 [1985], *affd* 69 NY2d 623 [1986]).

Boulevard Story did not meet its burden of establishing entitlement to common law indemnification against defendant Uplift. The parties' contract provided that "management and control" over the elevator and its supplies remained exclusively with Boulevard when Uplift was not working on the elevator

equipment (*Dorfman v Mid-Town Realty Corp.*, 309 AD2d 538 [2003]). As this language is inconclusive as to Boulevard Story's right to look to Uplift for performance of its entire duty to plaintiff, summary resolution of its claim for common-law indemnification is presently premature.

We have considered the parties' additional contentions and find them without merit.

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

ROMÁN, J. (dissenting)

Inasmuch as the record evinces that plaintiff failed to establish that the elevator misleveled to an actionable degree, defendants were properly granted summary judgment. Accordingly, I dissent.

Plaintiff alleges that she tripped and fell while exiting an elevator within premises owned by Boulevard Story, LLC because the elevator misleveled. At her deposition, plaintiff was asked to describe the degree of misleveling which caused her to fall, and while she initially gestured the degree of the misleveling, when specifically asked how much lower than the landing the elevator stopped as she tripped and fell, she stated, "Ma'am I can't tell you. I can't tell you because, as I said, I was outside, you know, and I just looked to see why I fell." Asked whether she could approximate the degree of misleveling, without guessing, plaintiff stated, "I have to guess."

A little over a year after plaintiff was deposed, defendants moved for summary judgment, arguing, inter alia, that there was no proof that the misleveling alleged by plaintiff was actionable in that it exceeded the acceptable degree of misleveling for this type of elevator. In support of its motion for summary judgment, Boulevard Story, LLC submitted an affidavit from an elevator

expert who stated, inter alia, that given the type of elevator at issue here, any misleveling not exceeding half an inch was an acceptable degree of misleveling. Plaintiff's elevator expert, in an affidavit submitted in opposition to defendants' motion, gave the same opinion. Plaintiff also submitted an affidavit where she stated that the degree of misleveling existing at the time of her accident and contributing to her fall was 1½ to 2½ inches. Plaintiff further stated that she had indicated the degree of misleveling, through gesture, at her deposition.

While a property owner has a nondelegable duty to passengers to maintain its building's elevator in a reasonably safe manner (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 565 [1973]), liability can only be premised on the existence of a malfunction or a defect that causes injury to a plaintiff (*Isaac v 1515 Macombs, LLC*, 84 AD3d 457 [2011]). Similarly, an elevator company that agrees to maintain an elevator in safe operating condition may be liable to a passenger if it fails to correct a condition about which it has knowledge or when it fails to use reasonable care to discover and correct the same (*id.*). Here, since it is undisputed that only misleveling exceeding one half inch constitutes an actionable degree of misleveling, defendants cannot be liable for the misleveling at issue unless it is

established that on the date of plaintiff's accident the elevator misleveled in excess of one half inch.

Here, the only evidence as to the degree of misleveling on the date of plaintiff's accident is plaintiff's affidavit submitted in opposition to defendants' motions for summary judgment wherein she states, for the first time and in contradiction to her deposition testimony, that the elevator misleveled by 1½ to 2½ inches. The majority apparently chooses to ignore this issue, giving credence to plaintiff's argument that she did in fact indicate the degree of misleveling at her deposition such that her affidavit is not inconsistent. A review of plaintiff's deposition transcript, however, belies any such assertion since not only did she not give any such testimony at her deposition, she went further, averring that she could not state the degree of misleveling without venturing to guess. In fact, even if, as urged, plaintiff did in fact gesture the degree of misleveling at her deposition and the attorneys simply failed to memorialize the same, given her testimony, any such gesture, would have been nothing less than speculation. Accordingly, her affidavit, containing her epiphanic recall of the level of misleveling, is inconsistent with her deposition, where she literally testified that she had no clue, and creates a feigned

issue of fact that must be disregarded (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [2007]; *Lupinsky v Windham Constr. Corp.*, 293 AD2d 317, 318 [2002]; *Joe v Orbit Indus., Ltd.*, 269 AD2d 121, 122 [2000]; *Kistoo v City of New York*, 195 AD2d 403, 404 [1993]). Based on the foregoing, summary judgment was properly granted to defendants, since the record is bereft of any competent evidence that the elevator misleveled to an actionable degree.

In light of the foregoing, Boulevard's appeal from the denial of its motion for common-law indemnification against defendant Uplift Elevator should have been dismissed as academic.

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

ENTERED: AUGUST 11, 2011

CLERK

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

4330 Jonathan Weiner, Index 14199/07
Plaintiff-Appellant,

-against-

4601 Owners Corporation,
Defendant-Respondent.

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Vandenberg & Feliu, LLP, New York (Raymond L. Vandenberg of counsel), for appellant.

Marin Goodman, LLP, Harrison (Richard P. Marin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered November 2, 2009, which denied plaintiff's motion for summary judgment on his claims for breach of contract and breach of the covenant of quiet enjoyment, unanimously affirmed, without costs.

Plaintiff failed to establish his entitlement to judgment as a matter of law on his causes of action for breach of contract and breach of the covenant of quiet enjoyment, or any clear entitlement to a cease and desist order. The question of whether

the business judgment rule precludes these claims must await determination of the facts (*see Whalen v 50 Sutton Place S. Owners*, 276 AD2d 356, 357 [2000]).

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

ENTERED: AUGUST 11, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4362 The People of the State of New York, Respondent, Ind. 1773/07

-against-

Heath Strothers, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Andrew Fine of counsel), and Kramer Levin Naftalis & Frankel LLP, New York (Amy Weiner of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone of counsel), for respondent.

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Appeal from judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered December 9, 2008, convicting defendant, after a jury trial, of conspiracy in the second degree and criminal possession of a controlled substance in the first and third degrees, and sentencing him, as a second felony offender, to an aggregate term of 12 years, held in abeyance, and the matter remanded to the Supreme Court for a de novo combined *Wade/Mapp/Huntley* hearing.

At the time of his arrest, defendant was the driver of a black Jeep. The two passengers in the vehicle were codefendants Jose Concepcion and Edwin Reyes. For the previous two months, Concepcion had been under surveillance by a 14-member team of the

New York Drug Enforcement Task Force, which had secured wiretaps on several cell phones used by Concepcion. Reyes was one of the people identified through the wiretaps, but defendant was not. The Task Force had concluded that the people on the cell phone conversations were members of a large-scale drug-trafficking operation. Indeed, approximately two months prior to defendant's arrest, based on information procured from the wiretap, the team stopped a tractor trailer in Rockland County, New York, and seized $1,355,860 in cash.

In the hours prior to defendant's arrest, the Task Force listened to cell phone conversations between Concepcion and others and realized that a transaction was planned for 12:30 a.m. the next morning in the Hunts Point section of the Bronx. Based on this, the agents anticipated that a tractor trailer containing 50 kilos of cocaine would exit I-87 at Exit One and that Concepcion would be there to meet it. The Task Force staked out the Hunts Point neighborhood, and, continuing to monitor calls made from Concepcion's cell phone, spotted the tractor trailer and the Jeep, both of which they pulled over. Defendant and his passengers were immediately arrested. The agents seized five cell phones from the Jeep, including the one that they had been monitoring. They also seized $2,220 in cash from defendant, as

well as automobile insurance and registration in the name of defendant's wife.

Defendant moved to suppress the evidence seized from him based on what he contended was lack of probable cause to arrest him. The court conducted a joint *Mapp/Dunaway/Huntley* hearing which also addressed the suppression motions of Reyes and another codefendant, Elvin Concepcion. The hearing commenced with the testimony of Special Agent Jared Forget of the Drug Enforcement Agency, who led the Task Force that had arrested defendant. At the moment Forget began testifying, defendant's counsel was not present. Instead, he was covering an appearance in another county. Although the court was aware of counsel's absence, and that defendant would be unrepresented, it ordered the hearing to proceed. More than halfway through Agent Forget's direct testimony, defendant's counsel appeared and apologized for his tardiness. To that point, Agent Forget's direct testimony had covered personal background information, general information concerning how wiretap surveillance is conducted, and some specific information regarding the events in question. Defendant's counsel was able to conduct a cross-examination of Agent Forget, and he was present for the testimony of both of the People's other witnesses, who were also on the scene at the time

of defendant's arrest.

The court denied the suppression motion. It found that all three of the witnesses were credible and that they established probable cause for defendant's arrest. Defendant proceeded to trial. In addition to the items seized from the Jeep, the People introduced evidence discovered during the investigation subsequent to the arrests. This included an American Express bill belonging to Concepcion which revealed that, after the task force had seized cash from the tractor trailer in Rockland County, Concepcion had paid for two round-trip airline tickets for himself and defendant from New York to Orlando, Florida. The bill further led the agents to learn that Concepcion rented a car in Orlando, and drove it 2,130 miles in three days. Furthermore, telephone records showed that one of the cell phones found in the Jeep, which was owned by Concepcion but had not been tapped, established that defendant and Concepcion had called one another over 330 times.

The right to counsel for an accused person is constitutionally guaranteed at trial and at other critical proceedings such as a pretrial suppression hearing (*see People v Carracedo*, 214 AD2d 404 [1995]). The deprivation of counsel has

been described as absolute and harmful per se (*see People v Margan*, 157 AD2d 64, 65-66 [1990]). Because of the sanctity of the right to counsel, we need not engage in an analysis as to what transpired in the case during counsel's absence and whether the evidence received, or matters discussed with the court, were material to the defense. "'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial'" (*id.* at 66, quoting *Glasser v United States*, 315 US 60, 76 [1942]). Thus, we reject the People's argument that the deprivation here can be overlooked because defendant was unrepresented for only a small portion of the cumulative testimony and that the portion counsel missed covered only background and general information.

The fact that the right to counsel is absolute also renders baseless several of the other arguments advanced by the People. For instance, it is of no moment that counsel, once he did arrive for the hearing, did not preserve the objection that it began without him. Where counsel is not present when the deprivation occurs and so cannot lodge an objection, the issue can be raised for the first time on appeal (*Margan* at 70). The People offer no support for their position that the presence of codefendants'

counsel, whose clients' interests they allege were aligned with defendant's, was an adequate substitute. Evidence that defendant expressly agreed to the representation and waived any conflict, as would be required, is completely absent from this record (*cf. People v Torres*, 224 AD2d 269, 270 [1996], *lv denied* 88 NY2d 943 [1996]).

We also reject the People's contention that the deprivation of counsel here was harmless. The Court of Appeals has held that, where a defendant is deprived of counsel at a suppression hearing, the error cannot be deemed harmless even if one can conclude that the outcome of the hearing would have been the same had counsel been present (*see People v Wardlaw,* 6 NY3d 556, 559 [2006]). In *Wardlaw*, the Court of Appeals did state that it is relevant to consider "what impact, if any, the tainted proceeding had on the case *as a whole*" (*id.*) (emphasis added). However, in holding that the deprivation of counsel in *Wardlaw* was harmless, the Court emphasized the "truly overwhelming" evidence of the defendant's guilt of a rape charge, which was DNA recovered from semen found in the victim's vagina (*id.* at 560). Here, evidence of defendant's guilt is much more equivocal. Assuming that defendant would have prevailed at the suppression hearing, the evidence recovered from Concepcion after defendant's arrest

linking defendant to the drug transaction at issue would be circumstantial. The facts that defendant traveled with Concepcion and had multiple telephone conversations with him do not, by themselves, establish his participation, much less constitute "truly overwhelming" evidence of guilt (*id.*)

The dissent asserts that we "conflate[]" the deprivation of counsel at a pretrial hearing with the deprivation of counsel at trial. We do no such thing. The result reached here is consistent with how the Court of Appeals has treated the former situation in that we have not reversed defendant's conviction, as is done in the latter, but merely ordered a new suppression hearing. The dissent acknowledges that this is the appropriate remedy, and we do not disagree that there is an exception for cases in which there is "truly overwhelming" evidence of guilt (*id.*) However, we strongly disagree with the dissent's view that, even without the seized evidence which was the subject of the suppression hearing, "it is beyond reasonable doubt" that defendant would have been convicted, to say nothing of whether the evidence reaches the *Wardlaw* standard. While it may be possible to infer from the remaining evidence that defendant and Concepcion had a business relationship, it cannot be said, as it must in a case involving circumstantial evidence only, that the

evidence would have "exclude[d] to a moral certainty" the possibility that defendant was not a participant in the drug transaction at issue here (*People v Barnes*, 50 NY2d 375, 380 [1980] [internal quotation marks and citations omitted]).

The dissent's arguments that defendant's failure to preserve his objection to the absence of counsel is fatal, or alternatively, that he was not deprived of counsel at all, also fall flat. Regarding the former issue, the dissent relies on *People v Narayan* (54 NY2d 106 [1981]). In that case, the Court of Appeals held that the defendant failed to preserve an objection to the trial court's having prohibited defense counsel from conferring with his client concerning the testimony the defendant had offered that day in court. However, that was because, as the Court stated, "[A]n objection voiced by counsel . . . *when the trial court first uttered its prohibition against consultation between attorney and client*, might well have resulted in a change of the Trial Judge's ruling and total avoidance of interference with defendant's constitutional claim" (54 NY2d 113 [emphasis added]). Here, defense counsel was obviously not in a position to voice an objection when the trial court decided to proceed without him. Moreover, even if, as the dissent theorizes, *Narayan* could be read to require a lawyer who

has missed part of a proceeding to object when he finally arrives in court, such a rule would not apply under the circumstances of this case. The dissent's surmise that the court may have restarted the hearing or allowed readback of the testimony is not consistent with the court's refusal to wait for defense counsel to begin the hearing, even after the prosecutor asked the court, "[D]on't we need to wait for [counsel] . . . [b]ecause the Dunaway does pertain to him?"

Further, the dissent's position that defendant "was not unrepresented for testimony appertaining to him" is simply inaccurate. *All* of the testimony that counsel missed related to defendant because it was elicited by the People for the purpose of establishing that, even if only in general terms, the police employed proper procedures and techniques in developing probable cause to arrest defendants. Again, given the fundamental nature of the right to counsel, it is not for us to separate out the testimony that was truly pertinent to defendant from that which one could argue was not important enough to require that counsel be there to hear it *(see People v Margan*, 157 AD2d at 66). In addition, it is impossible for us to determine whether testimony elicited before counsel arrived could have been used by him as fodder for effective cross-examination that would have changed

the outcome of the proceeding for his client.

For all of the foregoing reasons, the court's decision to proceed with the suppression hearing in the absence of defendant's counsel was a fundamental error that entitles defendant to a new hearing.

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

CATTERSON, J. (dissenting)

I must respectfully dissent. In my opinion, remanding for a de novo suppression hearing is unwarranted because (a) the defendant did not preserve the issue of the alleged pretrial violation of his right to counsel; (b) he effectively was accorded a de novo hearing when his attorney eventually arrived in the courtroom; and c) the alleged deprivation was harmless error. In my view, suppression of the evidence recovered from the stop could not have prevented the jury from reaching a guilty verdict.

The defendant was arrested after driving his black Jeep to a drug transaction at Hunt's Point Market in the Bronx in April 2007. The transaction involved 50 kilos of cocaine for a purchase price of approximately $1.2 million. Two passengers in the Jeep were codefendants, Jose Concepcion and Edwin Reyes who were the subjects of a wiretap investigation by a drug enforcement task force. As a result of intercepted communications and surveillance which led the task force to the location of a drug transaction, the task force arrested the defendant, his two passengers, the driver of a tractor trailer carrying the cocaine, and the driver of a white van carrying more than $1 million in cash.

The defendant was charged, inter alia, with conspiracy in the second degree (Penal Law § 105.15) and criminal possession of a controlled substance in the first and third degrees (Penal Law § 220.21[1] and § 220.16[1]. He moved to challenge the probable cause for the stop of his Jeep, and to suppress property owned by him and recovered from his person and from the Jeep at a joint hearing with codefendant Reyes. The challenged property included cell phones, $2,200 in cash, and the registration and auto insurance documents in the name of defendant's wife. He also moved to suppress a statement he made to the lead investigator of the task force.

When the defendant's attorney disobeyed the court's order to appear for the hearing at 9:30 A.M., the court allowed the hearing to start without defense counsel. Codefendant Reyes was present with two attorneys when the prosecutor called the first witness, Jarod Forget, a special agent and the lead investigator on the case. Subsequently, the court denied the defendants' motions for suppression, Reyes and Concepcion pleaded guilty, and the defendant was convicted after a jury trial. He now appeals on the grounds that inter alia his fundamental right to counsel at the suppression hearing was violated, and he is therefore entitled to a de novo suppression hearing.

As a threshold matter, I believe the majority's holding is based on an analysis that conflates two distinct concepts in criminal law: a defendant's fundamental right to a fair trial and a defendant's right to counsel at pretrial proceedings. Thus, the majority reaches the conclusion that a "fundamental error" occurred. The majority's references to the "sanctity" of the right to counsel rely on Second Department case law (People v. Margan, 157 A.D.2d 64, 554 N.Y.S.2d 676 (1990)), which in turn cites to the legal authority of the United States Supreme Court (Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942)). The majority therefore reiterates that the right to counsel is "constitutionally guaranteed;" that deprivation of counsel is "harmful per se;" and thus, that the right is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser, 315 U.S. at 76.

These observations, however, have nothing to do with the issue before us. In its seminal cases on a defendant's right to counsel, the Court of Appeals has drawn a clear distinction between those instances where deprivation of counsel is an error "so serious" that it operates to deny a defendant's fundamental

right to a fair trial (People v. Hilliard, 73 N.Y.2d 584, 586-587, 542 N.Y.S.2d 507, 508, 540 N.E.2d 702, 703 (1982)), and those cases where a defendant is denied the assistance of counsel in a pretrial proceeding, specifically a suppression hearing. See People v. Wardlaw, 6 N.Y.3d 556, 816 N.Y.S.2d 399, 849 N.E.2d 258 (2006); People v. Carracedo, 89 N.Y.2d 1059, 659 N.Y.S.2d 830, 681 N.E.2d 1276 (1997); People v. Slaughter, 78 N.Y.2d 485, 577 N.Y.S.2d 206, 583 N.E.2d 919 (1991). In the former line of cases, convictions are reversed and new trials granted without a court enunciating whether the error contributed to conviction. See Hilliard, 73 N.Y.2d at 586, 542 N.Y.S.2d at 508, citing People v. Crimmins, 36 N.Y.2d 230, 238, 367 N.Y.S.2d 213, 218-219, 326 N.E.2d 787, 791 (1975); People v. Felder, 47 N.Y.2d 287, 418 N.Y.S.2d 295, 391 N.E.2d 1274 (1979). In the latter line of cases, deprivation of counsel does not always mandate such a remedy.

In Wardlaw, the Court held that the right to counsel is "indeed very important" but that

> " deprivations of important constitutional rights do not require a remedy when it is clear beyond reasonable doubt that they did not contribute to a conviction. There are rare exceptions when a defendant has been denied his fundamental right to a fair trial, *but a violation of the right to counsel at a pretrial hearing is not among them.*" Wardlaw, 6 N.Y.3d at 561, 816

N.Y.S.2d at 402 (internal quotation marks and citations omitted) (emphasis added).

The Wardlaw Court observed that, "ordinarily" the remedy for such a violation at a suppression hearing requires a remand for a de novo hearing, and a new trial *only if* a de novo suppression hearing results in a finding that the evidence should have been suppressed. Wardlaw, 6 N.Y.3d at 559, 876 N.Y.S.2d at 400. However, the Court dispensed with automatic remand for a de novo hearing where "it is clear, beyond a reasonable doubt, that the outcome of the suppression hearing [at which the violation occurred] could not have affected the outcome of the trial." Wardlaw, 6 N.Y.3d at 558, 876 N.Y.S.2d at 399. Thus, the Court held that deprivation of counsel at a pretrial hearing was subject to a harmless error analysis. Id. (remedy to which a defendant is entitled depends on what impact if any, the tainted proceeding had on the case as a whole), citing People v. Wicks, 76 N.Y.2d 128, 556 N.Y.S.2d 970, 556 N.E.2d 409 (1990) (harmless error analysis applicable where defendant was not provided counsel at a preliminary hearing).

Moreover, while not "depreciating the stature of the constitutionally protected right of a criminal defendant effectively to confer with counsel," the Court also has found

that there are occasions when the violation of a right to counsel requires an objection by defendant to preserve the issue for appellate review. People v. Narayan, 54 N.Y.2d 106, 112, 444 N.Y.S.2d 604, 606, 429 N.E.2d 123, 125 (1981) (where defense counsel was ordered not to communicate with defendant while the defendant was testifying at trial). The Court stated,

> "We find no justification for departing from the requirement that trial court error (here interference with [right to counsel]) must be brought to the court's attention by protest timely made, at least where counsel acting on defendant's behalf is present and available to register a protest *and where the error if called to the court's attention is readily susceptible to effective remedy*." Narayan, 54 N.Y.2d at 112, 444 N.Y.S.2d at 606 (emphasis added).

Initially then, I dissent from the majority view that preservation is not required in this case. The majority relies on Margan (157 A.D.2d at 70, 554 N.Y.S.2d at 680, supra) which distinguishes Narayan as standing for the oxymoronic-like proposition that counsel has to be "actually present" at the time an erroneous ruling respecting right to counsel is made in order to object for the record. In Margan, the People commenced the direct examination of the first State witness at trial before defense counsel arrived in court. Hence, the majority observes it is analagous to this case where counsel had not yet arrived for the hearing, and so could not lodge an objection.

Setting aside the fact that the Second Department holding in Margan is not binding on this Court, the facts, sparse as they are, suggest that the case involved a sole defendant facing a jury trial. It appears, therefore, that the violation occurred under circumstances where there was "no opportunity adequately to cure the prejudice it caused." Margan, 157 A.D.2d at 70, 554 N.Y.S.2d at 680.

In my opinion, the majority interprets the requirement for counsel's presence at the very moment of deprivation too literally. In fact, the Narayan Court's holding was broader in that it stated that appellate review was not secured "in light of counsel's acquiescence *at a time when correction was possible*." 54 N.Y.2d at 113, 444 N.Y.S.2d at 606 (emphasis added).

In this case, there is no dispute that defense counsel acquiesced in the court's commencement of the hearing in his absence; he arrived after the hearing had started, and not only failed to object, but apologized and thanked the court as the defendant was called from the public gallery. Nor do I believe there can be any dispute that, upon his arrival, the error was still "susceptible to [an] effective remedy." For example, the court could have asked the court reporter for a readback of the proceeding or restarted the hearing. The hearing was a bench

proceeding, and not a jury trial; and the deprivation was confined to 38 pages of transcript out of an eventual 210.[1] The first witness, who had taken the stand on page 15, was still being questioned by the People when defense counsel arrived on page 53.

I fail to see the relevance of the majority's view that surmising about a remedy is inconsistent with the circumstances in this case because the court was adamant in its refusal to wait for counsel, and therefore an objection would have been futile. It is well established that an objection is made in order to bring the alleged error to the court's attention in order to give the court an *opportunity* to correct it at a point when the error is capable of correction without a vast waste of judicial resources. People v Gray, 86 N.Y.2d 10, 629 N.Y.S.2d 173, 652 N.E.2d 919 (1995). Certainly, it is not up to defense counsel to make an assessment of how the objection will be received, and what the odds are that the court will agree to correct the alleged error, before deciding whether to object at all. This

[1]Because there is no way to assess how many minutes elapsed before defense counsel's arrival in court, the standard measurement here will be in transcript pages. The first witness was called on page 15. Defense counsel arrived on page 53; hence defense counsel missed 38 pages of court proceeding.

would turn the preservation requirement into nothing more than a mental exercise for defense counsel, necessarily leading to the appellate argument of, "well I thought about it, but . . ."

In any event, even if I was inclined to review the issue in the interest of justice, nevertheless, I would decline to remand for a de novo hearing. In my opinion, what transpired after defense counsel's arrival was, in fact, a de novo suppression hearing, notwithstanding that it occurred without defense counsel raising any objection.

The People's argument that the defendant was "unrepresented for only a small portion of the cumulative testimony" misses the point. Precedent renders it impermissible to calculate whether presence of counsel would have changed the result *of the proceeding*. See Wardlaw, 6 N.Y.3d at 559, 816 N.Y.S.2d at 400. In my opinion, a more significant finding, upon a careful review of the record, is that the defendant was not unrepresented for testimony appertaining to him.

The People, with the court's permission, refrained from asking any specific questions appertaining to the defendant during defense counsel's absence. Any information imparted about defendant as a result of questions asked about codefendant Reyes was repeated after defense counsel's arrival.

On page 25, after asking Special Agent Forget some general questions about surveillance, wiretap investigations and drug organizations, the People began a line of questioning about the night of the arrests. Thus, the People elicited answers as to who was arrested from the black Jeep (Jose Concepcion, Reyes, and the defendant) and what property was recovered from the Jeep (5 cell phones, bills, parking ticket, set of keys, automobile insurance and registration in the name of defendant's wife.) Of the five cell phones seized, one belonged to Concepcion and was the phone that was intercepted by the task force on the way to the drug transaction.

On page 45, the People elicited a series of answers establishing that the task force had never intercepted defendant on a wiretap call, and had never identified defendant prior to his arrest. Only one answer (to the question do you see any of the defendants arrested on April 6th?) resulted in a positive identification of the defendant in the courtroom. On page 46, the prosecutor asked the court if she could "skip just the Huntley with respect to [the defendant] at this point because [defense counsel] is not here?"

Defense counsel arrived on page 53. On page 68, with Special Agent Forget still being questioned, the prosecutor

returned to earlier testimony, stating: "I'm going to go back through and ask you now that [defense counsel] has joined us some questions with respect to [the defendant]."

Whereupon, the People elicited for a second time the circumstances surrounding the arrest of the defendant (he was the driver of the Jeep carrying codefendants Jose Concepcion and Reyes); for the second time the People established that the Jeep the defendant was driving was registered to his wife. The People then repeated the questions as to whether defendant had ever been intercepted over a wiretap, or identified as a member of the drug organization prior to the night of the arrest. Then, the People for the first time asked about the statement that defendant had made to Forget. According to the testimony, the defendant had acknowledged he was driving the Jeep, and said that he was on his way to a strip club.

On page 72, when Reyes's attorney interjected to inquire about the report the witness was using to refresh his recollection as to defendant's statement, the court commented to Reyes's attorney: "this has no bearing on your client . . . if I were to compartmentalize it, this is a Huntley hearing for [the defendant]." On page 74, codefendant Reyes's attorney commenced cross-examination of Forget. The cross-examination returned to

statements that Forget had made in defense counsel's absence about experience, training and his responsibilities as lead investigator.

On page 137, defense counsel commenced his cross-examination of the special agent by stating: "I represent Mr. Strothers . . . I know I came in late. Sorry about that. I'll try not to reiterate too much." Whereupon, he too asked about Forget's experience and expertise; he also established, as the People had already done, that prior to the arrest, the defendant was not under surveillance, and that his cell phone had not been tapped. Defense counsel also established that there had been no surveillance of the Jeep, and no one had run the license plates of the Jeep; that there were no drugs or massive bundles of cash recovered from the Jeep, and that "in sum and substance, [the defendant] was arrested because he was the driver of the black Jeep."

To the extent that the defendant's position at the hearing, at trial and on appeal, is that the police had no probable cause *to arrest* him *after the stop* of the Jeep based merely on his presence at the scene, the testimony relating to that was fully reiterated at the hearing and defense counsel had full opportunity to cross-examine on it.

Defense counsel did not raise any objection to the commencement of proceedings at the end of the hearing, nor did he claim that the defendant had been prejudiced in any way. Nor did he revisit the issue subsequently at trial. In my opinion, the People rely correctly on People v. Dekle (56 N.Y.2d 835, 452 N.Y.S.2d 568, 438 N.E.2d 101 (1982)), to assert that allowing the defendant to raise the issue now, two years after trial would "encourage gamesmanship and waste judicial resources." 56 N.Y.2d at 837, 452 N.Y.S.2d at 569.

Finally, the defendant is not entitled to a de novo hearing because the alleged deprivation of counsel was harmless error. In my opinion, it is beyond reasonable doubt that the outcome of the suppression hearing did not contribute to defendant's conviction. A harmless error analysis requires us to assume arguendo that had defense counsel been present from the beginning of the hearing, the challenged evidence and statement would have been suppressed. See Wardlaw, 6 N.Y.3d at 559-660, 876 N.Y.S.2d at 400-401. The defendant argues that without the personal property seized from him and his Jeep, that is, his cell phone and $2,200 in cash, there was nothing to link him to Jose Concepcion, the drug kingpin, or to the drug organization and the transaction other than that he was driving the Jeep on the night

of his arrest.

The majority agrees, observing that the evidence subsequently seized lawfully from Jose Concepcion's house on the day of the arrests, and lawfully obtained phone company records is not sufficient to link the defendant to the drug transaction. That evidence included phone company records for a non-intercepted cell phone belonging to Jose Concepcion, and his American Express bill. The non-intercepted cell phone showed the defendant as a phone contact while the American Express bill showed that Concepcion had purchased two round-trip tickets to Orlando, Florida for himself and the defendant. The majority's view is that this circumstantial evidence is not sufficient because "the facts that defendant traveled with Concepcion and had multiple conversations with him do not, by themselves, establish [defendant's] participation [in the drug transaction]." This glosses over a few additional, salient facts that were established at trial. For example, "multiple" in this case meant more than 330 conversations between Concepcion and the defendant over a two-month period; *more than 120* of these calls were placed in the *two weeks* before the wiretap investigation led the task force to seize $1.4 million destined for an earlier drug transaction in Rockland County. On the *day* of the February

seizure there were *21 calls* between Concepcion and the defendant. It is possible that defendant and Concepcion were merely chatting about sports, or politics, or religion, but common sense precludes such a finding where the evidence proffered at defendant's trial established that Concepcion was a drug kingpin involved in multi-million dollar drug transactions; and that he owned and used multiple cell phones because of the nature of his business. I am persuaded by the People's assertion that the sheer volume of calls and their timing point to a business relationship between the defendant and Concepcion. Moreover, the round-trip to Orlando was more than just "defendant traveling with Concepcion." Evidence proffered by the People at trial established that Concepcion then drove from Orlando to Houston, Texas, to meet with his cocaine supplier and to settle an outstanding payment on his portion of the $1.4 million seized in February in Rockland County. Again, phone company records established frequent calls between Concepcion and the defendant before and after the road trip, but essentially no phone contact between them during the trip. This, together with proof that Concepcion's rental car was driven more than 2,000 miles in three days, could lead to a rational conclusion by the jury that the defendant drove with the drug kingpin to meet the drug supplier.

The majority's observation that it is possible to infer that defendant and Concepcion had a business relationship, but that the circumstantial evidence here does not exclude to a moral certainty the possibility that defendant was not a participant in the drug transaction at which he was arrested, is incomprehensible. In my view, the People did not need the cell phones found in the Jeep, or the fact that the defendant had $2,200 in cash in his pocket to prove beyond a reasonable doubt that the defendant was knowingly involved in the drug transaction on the night he was arrested.

For all the foregoing reasons, I would affirm the defendant's conviction without remanding for a de novo suppression hearing.

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

ENTERED: AUGUST 11, 2011

CLERK

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

4632 The People of the State of New York, Ind. 3071/03
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about December 15, 2009, which denied defendant's CPL 440.46 motion for resentencing, reversed, as a matter of discretion and in the interest of justice, without costs, and the matter remanded for further proceedings on the resentencing motion.

In January 2005, defendant was convicted, upon a guilty plea, of criminal possession of a controlled substance in the third degree and bail jumping in the second degree. The plea was part of a cooperation agreement, which defendant violated when he failed a drug test. Following an unsuccessful direct appeal (36 AD3d 522 [2007], *lv denied* 8 NY3d 919 [2007]), in January 2010, defendant moved to be resentenced pursuant to the resentencing

provisions of the Drug Law Reform Act of 2009 (*see* CPL 440.46[1], [3]; L. 2009, ch. 56, § 9). In its response to the motion, the prosecution acknowledged that defendant was eligible for resentencing but argued that the application should be denied on substantial justice grounds.

On November 17, 2009, defendant appeared with counsel for the first time. At that proceeding, counsel served defendant's reply to the People's opposition papers. The court then adjourned the case to December 15, 2009, but did not indicate that it intended to render a decision on that date.
In the interim, the court permitted the prosecution to submit a surreply in further opposition to defendant's application.

On December 15, 2009, defendant appeared with counsel. The court handed down a written decision denying defendant's application. Counsel was surprised, and requested that the court consider additional information pertinent to the resentencing application that counsel had just learned the day before. Counsel handed the information to the court in the form of a letter, dated December 15, 2009, explaining that she had been in contact with Deputy Inspector General Christopher Martuscello at the Office of the Inspector General of the Department of Correctional Services. Martuscello confirmed with counsel on

December 14, 2009 that he had information relevant to the resentencing application that he wished to share with the court. Martuscello's delay in providing that information occurred because defendant's file had been misplaced. Accordingly, defense counsel requested an adjournment so that Mr. Martuscello's information could be obtained.

Defense counsel stated that although she did not have specific information, the letter that she had submitted contained a number for the court to call "to obtain some additional information about [defendant] . . . while in state prison." However, the court responded, "You can submit it, but I'm letting you know I have filed a decision. I've considered everything, and my decision is what it is. I'll look at what you submit, but I'm not going to make any representation that I'm going to alter my decision or have a further adjournment here." In her continuous efforts to get an adjournment, counsel explained that

> "the reason that nothing was submitted before is because I just got information yesterday that I think pertains to the resentencing decision, and I would therefore like to present that to the court with the hopes that the court might take the action suggested here and possibly reconsider its decision."

Again, the court refused to grant an adjournment, explaining, "I filed a decision . . . The case is over." In its written decision, the court concluded that defendant was eligible to be resentenced under CPL 440.46 (1), but denied the application on substantial justice grounds. This appeal ensued.

We find that the court should have granted an adjournment to consider the information from the Deputy Inspector General at the Department of Correctional Services. Once a court makes the determination that a defendant is eligible to be resentenced under DLRA, it must give the defendant an opportunity to be heard (*see* L. 2004, ch 738, § 23; *People v Figueroa*, 21 AD3d 337, 339 [2005], *lv denied* 6 NY3d 753 [2005]; *People v Diaz*, 68 AD3d 497 [2009] [DLRA required the court to offer defendant an opportunity for a hearing, notwithstanding that he was also serving a concurrent sentence of equal length for his first-degree conspiracy conviction, upon which he is ineligible for resentencing]).

While the court had no duty to take the affirmative steps of calling the Deputy Inspector General to procure the information being offered, it should have given defense counsel a reasonable opportunity to gain access to the information. Significantly, no claim has been made that defense counsel failed to exercise due

diligence in attempting to procure the information offered by the Deputy Inspector General. In fact, it is undisputed that the Deputy Inspector General's delay in communicating with counsel was due to his misplacement of defendant's file. Significantly, defense counsel made the application before the court immediately upon becoming aware of the availability of the information. Under the circumstances, it was not unreasonable for defendant to request an adjournment to procure the presence of the Deputy Inspector General or a letter detailing defendant's activities in prison that purportedly are relevant to resentencing.

The dissent's statement that the "letter contains no substantive factual assertions" ignores the context within which the issue arose. Before broaching the subject of the letter, defense counsel asked the court to close the courtroom. The court, however, refused to do so, for no apparent reason. Thus, it appears that defense counsel's circumspect handling of the matter was based on legitimate concerns for her client's safety. Any reluctance of defense counsel to reveal information was not unreasonable; it was error for the court to deny an adjournment under these circumstances.

Accordingly, we remand on defendant's application for resentencing to allow defendant a reasonable opportunity to procure the information being offered by the Deputy Inspector General.

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

SAXE, J. (dissenting)

I would affirm the denial of defendant's CPL 440.46 motion for resentencing.

The court met its obligation to "offer an opportunity for a hearing and bring the applicant before it" (L 2004, ch 738, § 23), as required by the 2009 Drug Law Reform Act (*see* CPL 440.46[3]), when defendant was "brought before the court and given an opportunity to be heard" (*People v Soler*, 45 AD3d 499, 499 [2007], *lv dismissed* 9 NY3d 1009 [2007]).

Defendant's moving papers were dated October 7, 2009, and he submitted his reply papers at the initial appearance on the motion on November 17, 2009. At that point, the court was entitled to proceed on the assumption that it had been provided with all the information and arguments on which defendant intended to rely in seeking resentencing. Because there was nothing in those submissions establishing the existence of disputed facts warranting an evidentiary hearing, the statute required nothing further on the part of the court, except its decision (*see People v Burgos*, 44 AD3d 387 [2007], *lv dismissed* 9 NY3d 990 [2007]). The court therefore correctly proceeded on the assumption that it could hand down its decision on the motion on the adjourn date.

The letter that defense counsel handed up to the court on the adjourn date was insufficient to require the court to handle the motion in any other way. The letter contained no substantive factual assertions. It merely amounted to an assertion by defense counsel that a Department of Correctional Services official had unspecified "information relevant to the resentencing application" to share with the court. Such a vague reference to "information" does not give rise to a "controverted issue of fact" (L 2004, ch 738, § 23) so as to warrant a hearing. Nor was the letter even sufficient to indicate that the referred-to information was material to the issues relevant to resentencing (*see People v Diggins*, 11 NY3d 518, 524-525 [2008]).

The majority agrees that the court had no obligation to procure the purported information, but concludes that it erred in failing to grant defendant an adjournment. I disagree. First, the letter does not explain why the existence and substance of that information could not have been timely obtained and provided; its unexplained reference to a "misplaced" file is insufficient. Second, the record establishes no reason to conclude that an adjournment was warranted, either as a matter of law or in the exercise of discretion. If, as the majority agrees, the extra time sought was not to be used for the court to

contact the Deputy Commissioner, then the court should have been given some basis to believe that counsel possessed substantive information that she would be able to document in the intervening period. However, nothing in the submitted letter indicates that given additional time, the defense could have obtained the vaguely referred-to additional information. Indeed, the record fails to establish that defense counsel possessed actual substantive information at that time, and chose not to convey it because the court denied defense counsel's request to close the courtroom. Counsel said on the record that "rather than describe [the additional information] in open court I would like to submit this letter," and then submitted a letter that failed to describe even the nature of the information. She did not seek to speak off the record at a sidebar conference, or take any other steps to protect defendant from public disclosure of the claimed information.

On the merits of the motion, the court properly exercised its discretion in determining that substantial justice dictated the denial of the application. That conclusion was warranted by the totality of the circumstances, including defendant's six

felony convictions, his involvement in the sale of large quantities of drugs, his extensive prison disciplinary record, and his multiple failures to appear in court (*see e.g. People v Estela*, 80 AD3d 526 [2011]). I would therefore affirm.

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

ENTERED: AUGUST 11, 2011

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Román, JJ.

4999-
4999A Empire 33rd LLC, Index 602074/09
Plaintiff-Appellant,

-against-

The Forward Association Incorporated, et al.,
Defendants-Respondents.

_____

Rosenberg Calica & Birney LLP, Garden City (Ronald J. Rosenberg of counsel), for appellant.

Kaye Scholer LLP, New York (Richard C. Seltzer of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered April 7, 2010, dismissing the complaint, and bringing up for review an order, same court and Justice, entered April 2, 2010, unanimously affirmed, without costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, a putative purchaser, seeks to recover the $5,350,000 down payment it made under a contract with the board of directors of defendant nonprofit corporations for the purchase of real property comprising substantially all of defendants' corporate assets. The sale of the property was authorized by the Supreme Court, in an order dated September 25, 2007, pursuant to Section 511 of the Not-For-Profit Corporation Law. Plaintiff

commenced this action seeking, as a first cause of action, a judgment declaring the contract null and void. The complaint further alleges — as additional, unspecified causes of action — that defendants made material misrepresentations, that plaintiff was "wrongfully induced" to enter into the purchase agreement and that plaintiff has an equitable lien on the property for the amount of its down payment.

Defendants interposed this pre-answer motion to dismiss the complaint on the record (CPLR 3211[a][1] and [7]). In support of the motion, defendants submitted an affidavit from an executive officer of defendant The Workmen's Circle/Arbeter Ring, Inc. (WC/AR) stating that at the 2008 WC/AR National Convention, a resolution was adopted approving the sale at issue. The minutes and resolution of the meeting were also submitted. In opposition, plaintiff argued that while the not-for-profit corporations had obtained the requisite judicial leave to make the sale (Not-For-Profit Corporation Law § 510[a][3]), such leave was fraudulently obtained. According to plaintiff, the petition falsely represented that approval of the membership of defendant WC/AR was not required because its constitution gives the board of directors full power over corporate affairs and corporate property. Plaintiff asserted that neither the constitution nor

the by-laws limit the right of the membership to vote on the disposition of corporate property (Not-For-Profit Corporation Law § 510[a][1]).

Defendants did not submit reply papers. However, at oral argument, they contended that judicial approval of the transaction having been obtained, the sale is immune from any attack predicated on the corporation's purported lack of authority to make the conveyance (Not-For-Profit Corporation Law § 203). As a result, they asserted, plaintiff is without standing to contest the order approving the sale. Plaintiff responded that if deprived of the opportunity to contest the validity of the proposed conveyance in this action, it would be left without a remedy should a title company refuse to insure title, stating, "Under their theory, your Honor, I'm stuck at that closing. I have no remedy. I have no standing." Supreme Court sided with defendants and dismissed the complaint in its entirety.

Plaintiff's action is at best premature (*see American Ins. Assn. v Chu*, 64 NY2d 379, 385 [1985], *cert denied, appeal dismissed* 474 US 803 [1985]). In addition, its protestation that it is without a remedy is specious, and a declaratory judgment is unnecessary where a plaintiff can be accorded complete relief at

law. The record before us contains no indication that any exception has been raised to the insurability of title to the property. In any event, the contingency on which plaintiff postulates an inability to convey title is a *prospective* decision by a third-party insurer to decline to issue title insurance. This contemplated future event is beyond the control of the parties and may never occur; thus, plaintiff is seeking an impermissible advisory opinion, which the courts must decline (*Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354-355 [1988]; *American Ins. Assn.*, 64 NY2d at 385-386).

The three remaining causes of action of the complaint are inartfully drafted and likewise deficient. The fraud claims (second and third causes of action) were properly dismissed both for lack of the necessary particularity (CPLR 3016[b]; *see Hu v Ziming She*n, 57 AD3d 616, 619 [2008]) and as duplicative since they do not allege the breach of a duty independent of the contract (*see Baker v Norman*, 226 AD2d 301, 304 [1996], *lv dismissed* 88 NY2d 1040 [1996]). Thus, plaintiff is consigned to its contractual remedies (*Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 389-390 [1987]). Finally, even assuming for purposes of this motion the falsity of defendants' representation

concerning their authority to convey the property (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), consideration of the fraud claims is premature. That a title company might refuse to insure title irrespective of the judicial approval of the sale and the statutory presumption of Not-For-Profit Corporation Law § 203 is not an occurrence within defendants' expectation so as to sustain an action for fraud (*cf. Cristallina v Christie, Manson & Woods Intl.*, 117 AD2d 284, 294-295 [1986]).

The fourth cause of action is devoid of merit. Plaintiff has an equitable lien against the property in the amount of its down payment as a matter of law (*see Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 405 [1983]; *Sloan v Pinafore Homes*, 38 AD2d 718 [1972]), and this cause of action was properly dismissed as academic.

Reduced to its essentials, this is a garden-variety real estate transaction in which a party seeks to avoid its obligations under the contract due to the asserted inability of the other party to consummate the sale. In the absence of anticipatory breach (not asserted here), the parties have until the time designated for performance to fulfill their contractual obligations, that is, until closing of title (*Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 268 [1995]). From

plaintiff's perspective, one of two possible outcomes will obtain on that occasion: (1) defendants will be able to convey good and insurable title, thereby obligating plaintiff to consummate the sale or (2) defendants will be unable to convey good and insurable title, in breach of the contract, thereby entitling plaintiff to the return of its down payment (*see Stadtmauer v Brel Assoc. IV*, 270 AD2d 59, 60 [2000]). Only in the event that defendants fail to refund plaintiff's deposit will an actual controversy exist warranting resort to the judicial forum. Thus, plaintiff has a complete remedy at law, and there is no reason for a court to pass on the hypothetical defect in title plaintiff presently postulates.

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

ENTERED: AUGUST 11, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5102 The People of the State of New York, Ind. 6300/06
Respondent,

-against-

Terrence Allen, also known as
Tony Green,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 18, 2007, convicting defendant, after a jury trial, of robbery in the first and third degrees, and sentencing him, as a second felony offender, to concurrent terms of 8 years, unanimously affirmed.

Defendant was charged with first-degree robbery under a theory of displaying what appeared to be a firearm. He asserted the affirmative defense that the object displayed was not actually a loaded, operable firearm (Penal Law § 160.15[4]). In convicting defendant of first-degree robbery with regard to one of his victims, the jury determined that defendant failed to establish the affirmative defense. We find no merit to

defendant's contention that this determination was against the weight of the evidence.

Defendant and a companion were observed hanging around a restaurant, drinking whiskey and behaving in a disorderly manner. They engaged in conversation with two persons, whom they ultimately robbed. One of the victims had heard defendant make threatening statements, including that "somebody could get shot" and that he was going to "get somebody." During the robbery, defendant placed his hand under his sweatshirt, leading the victims to believe that defendant had a weapon. At one point, defendant even threatened to "blast" one of the victims. However, neither victim actually saw any part of a firearm.

When one of the victims went to seek assistance, defendant and his companion remained at the scene, where they continued to converse with the second victim. A woman who appeared to be acquainted with both the victim and defendant intervened and eventually convinced defendant to return almost all of the property he had taken from the two victims.

Defendant then crossed the street, met some other men, and remained out of sight for a few minutes. After defendant returned and resumed his conversation with the second victim, the first victim arrived with the police, who frisked a large group

of men, including defendant. No weapons were recovered.

We find that the preponderance of the evidence fails to rebut the jury's conclusion that defendant was armed. While nothing resembling a firearm was actually viewed and no one observed defendant attempt to dispose of any object, the statute is satisfied by the conscious display of something that, although obscured or hidden within a garment, is witnessed by the victim — by sight, touch or sound — and the victim perceives this display as a threat with a firearm (*People v Baskerville*, 60 NY2d 374, 381 [1983]; *People v McDanie*l, 54 AD3d 577, 577-578 [2008] *affd* 13 NY3d 751 [2009]). Moreover, defendant had ample opportunity to rid himself of a firearm while, after crossing the street, he was unobserved for several minutes. Defendant had reason to dispose of the firearm because he was aware that the first victim had left and would most likely return with the police to assist his friend.

Defendant's contention that the verdict was against the weight of the evidence with regard to the element of intent to permanently deprive another person of property is likewise without merit. Defendant had the requisite intent at the time of the taking, regardless of whether he subsequently changed his mind.

The court properly denied defendant's request for an intoxication instruction. The evidence, viewed most favorably to defendant, was insufficient for a reasonable person to entertain a doubt as to the element of intent on the basis of intoxication (*see People v Gaines*, 83 NY2d 925, 927 [1994]; *People v Rodriguez*,76 NY2d 918, 920 [1990]).

Defendant did not preserve his challenges to the prosecutor's remarks on summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal *(see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: AUGUST 11, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5106-
5107- Virginia Marie Henneberry, Index 350503/05
5108- Plaintiff-Appellant-Respondent,
5109-
5110- -against-
5111 &
M-1929 Leon Baer Borstein,
Defendant-Respondent-Appellant.

_____

Bender Rosenthal Isaacs & Richter LLP, New York (Aimee L. Richter of counsel), for appellant-respondent.

Leon Baer Borstein, New York, respondent-appellant pro se.

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Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered December 2, 2009, insofar as appealed from as limited by the briefs, awarding defendant a credit for half the carrying charges on the boat, awarding plaintiff the amount of $239,455 as her share of the marital portion of the appreciation on the Ghent, New York, real property (the farm), declining to deem marital plaintiff's debt to ING Capital Advisors, LLC, which is now a judgment in the amount of $903,243, and divide it equally between the parties, valuing the Sutter Securities Account as of the date of trial, awarding plaintiff the amount of $90,500 as half the appreciation on defendant's share of his law practice, and bringing up for review an order, same court and Justice, entered June 25, 2009, which denied plaintiff's motion

for attorneys' fees, unanimously modified, on the law and the facts, to deem the ING debt marital and divide it equally between the parties, and to increase the award to plaintiff for her share of the appreciation on the farm from $239,455 to $295,704.88, and otherwise affirmed, without costs. Order, same court and Justice, entered July 16, 2010, which, inter alia, denied plaintiff's motions to hold defendant in contempt and to award her counsel fees as sanctions against defendant for frivolous motion practice, unanimously affirmed, without costs. Appeal from the aforesaid June 25, 2009 order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The record demonstrates that plaintiff did not act in such a way as to place the ING debt outside the parties' "economic partnership" (*see Capasso v Capasso*, 129 AD2d 267, 293 [1987], *lv denied* 70 NY2d 988 [1988]; *see also Hartog v Hartog*, 85 NY2d 36, 49 [1995] [husband's bonus, earned during course of marriage but paid after commencement of divorce proceedings, is marital property]). On the contrary, she commenced the arbitration that resulted in the debt largely at defendant's behest. In addition, defendant or his law firm acted as her counsel during the arbitration and was actively involved in hiring counsel to bring a motion to vacate the award and to appeal the denial of that

motion.

In the calculation of plaintiff's share of the marital portion of the appreciation of the farm, which defendant acquired before the marriage, the premarital mortgage debt of $150,000 should have been deducted, thereby increasing plaintiff's share by $56,249.88.

We have considered the parties' remaining contentions and find them either improperly raised on appeal or without merit.

M-1929 ***Virginia Marie Henneberry v Leon Baer Borstein***

Motion to strike brief granted to the extent of requiring defendant to pay half the costs incurred by plaintiff for printing the joint record on appeal.

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

ENTERED: AUGUST 11, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, Acosta, Abdus-Salaam, JJ.

5150 Yvonne Clemons, Index 116474/06
Plaintiff-Appellant,

-against-

Schindler Elevator Corporation,
Defendant-Respondent.

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

Sonageri & Fallon L.L.C., Garden City (James C. De Norscia of counsel), for respondent.

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Purported appeals from decisions, Supreme Court, New York County (Judith J. Gische, J. and Ira Gammerman, J.H.O.), filed January 12, 2010, which, respectively, denied a motion to strike this matter from the trial calendar, and denied an application to adjourn the proceedings and directed dismissal of the complaint with prejudice for failure to prosecute, unanimously dismissed, with costs, as taken from nonappealable papers.

In December 2008, trial of this matter was adjourned to January 7, 2009 to accommodate the vacation plans of plaintiff's trial counsel. Several days later, plaintiff brought an order to show cause to remove the case from the trial calendar in order to permit amendment of her expert's report to assert an additional basis of liability. The motion was heard by Supreme Court

(Judith J. Gische, J.) and denied in an order entered January 14, 2009. The unsigned transcript of the proceedings, reciting that it "constitutes the decision and order of the Court," was not filed until January 12, 2010.

After appearing before Justice Gische, the parties proceeded to the trial part, where plaintiff sought adjournment on the ground that trial counsel was on trial in another matter. After JHO Gammerman indicated his acquiescence to the extent of adjourning trial for a few days, plaintiff's counsel requested that the court go off the record. When the proceedings resumed, JHO Gammerman ruled that it was dismissing the matter for failure to prosecute, stating that "it is a dismissal with prejudice, and the Clerk is directed to enter appropriate judgment." The transcript of these proceedings, likewise unsigned, was also not entered until January 12, 2010.

The ruling sought to be reviewed on this appeal is indeterminate. The notice of appeal dated January 13, 2010 recites that the appeal is taken "from the order of [Supreme] Court duly entered in the office of the Clerk on January 12, 2010." While the notice fails to specify the individual judge or judicial hearing officer, plaintiff's pre-argument statement (McKinney's NY Rules of Court [22 NYCRR] § 600.17[a]) identifies

the ruling appealed from as that of Justice Gische. Finally, plaintiff's brief designates the question to be decided as whether the trial court committed an abuse of discretion in denying the motion to mark the matter off the trial calendar, leading to an order dismissing the case, and concludes that "the orders [*sic*] appealed from should be reversed."

Although the transcript of proceedings before JHO Gammerman indicates that, upon signing, it may be presented to the Clerk for entry of judgment, it is not signed and no subsequent proceedings are reflected in the record. Particularly, there is no indication that judgment was ever entered.

Neither of the decisions filed on January 12, 2010 constitutes an appealable paper (CPLR 5512[a]), and this appeal must be dismissed for lack of jurisdiction (*Matter of Grosso v Slade*, 179 AD2d 585, 586 [1992]). The ruling by Justice Gische was reduced to a short-form order duly entered on January 14,

2009 (CPLR 2219[a]) but not appealed from. The JHO's decision was never presented for signature by a Supreme Court Justice, and there is no record of any judgment having been entered thereon from which an appeal could be taken.

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

ENTERED: AUGUST 11, 2011

CLERK

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

5404 Newmark & Company Real Estate, Inc., etc., Plaintiff-Appellant, Index 601602/09

-against-

GCJ Holdings LLC, et al., Defendants-Respondents.

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Lionel A. Barasch, New York, for appellant.

Henry E. Rakowski, Bellmore, for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 3, 2010, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the complaint as against defendants GCJ Holdings LLC and Jeff Wasserman and the causes of action alleging "procuring cause" and third-party beneficiary status as against defendant MJG Holdings LLC, and denied, without prejudice, plaintiff's cross motion for leave to amend the complaint, unanimously affirmed, without costs.

The evidence demonstrates that Wasserman was not acting in his personal capacity when he retained plaintiff to assist him in finding a suitable property for his proposed business venture. Indeed, as plaintiff acknowledges, the Term Sheet provided for

payment of the broker's commission by GCJ. Plaintiff participated in subsequent negotiations for the sublease of the subject premises by GCJ, not Wasserman personally. Thus, plaintiff was or should have been on notice that it was dealing with Wasserman as the representative of a disclosed corporate principal – initially GCJ and later the newly formed MJG – not in his personal capacity.

Moreover, the only written agreement, an Assignment Agreement, expressly states that MJG and no other entity will pay the brokerage commission to plaintiff, and plaintiff may not rely upon parol evidence to vary this term (*see Tullett & Tokyo Forex v Sandomeno*, 258 AD2d 427 [1999]). We note also that the Assignment Agreement contains a clear and unambiguous merger clause providing that it constitutes the entire agreement between the parties with respect to the subject matter contained therein. Indeed, by participating in the drafting and revision of the broker's commission clause of the Assignment Agreement, plaintiff was fully aware that MJG was to be the sole party responsible for paying the commission, and consented to that arrangement.

We reject plaintiff's contention that Wasserman is liable because MJG was not formed until several months after the property was selected and a deal was negotiated. There was at

all times an existing principal – initially GCJ and subsequently MJG – and plaintiff does not dispute that it knew that Wasserman was not seeking the property for his own use but for a business that he planned to operate.

Plaintiff's argument that a novation was not effected by the Assignment Agreement is equally unavailing. Clearly, by participating in the drafting and revision of section 5.3 of the Assignment Agreement, plaintiff was fully aware that MJG was to be the sole party responsible for paying the commission, and, by failing to add Wasserman or GCJ as parties liable for payment of the commission, it consented to that arrangement and to a replacement of whatever prior oral agreement existed.

The evidence also demonstrates that plaintiff is not a third-party beneficiary of the Assignment Agreement. While the broker's commission clause expressly names plaintiff as the broker of record, the agreement as a whole was not intended for plaintiff's benefit (*see State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]). Indeed, the broker's commission clause expressly states that the commission will be paid to plaintiff pursuant to a separate agreement.

In view of the foregoing, plaintiff's motion for leave to

amend the complaint is moot to the extent it seeks to add claims against GCJ and Wasserman. To the extent it seeks to add claims for additional commissions against MJG, the amendment is unnecessary; these claims are encompassed within the existing complaint.

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

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

ENTERED: AUGUST 11, 2011

CLERK