SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 6, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3334 In re Community Related Services, Inc. (CRS), Petitioner-Respondent, Index 113740/09

-against-

New York State Department of Health, et al., Respondents-Appellants.

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Eric T. Schneiderman, Attorney General, New York (Bethany A. Davis Noll of counsel), for appellants.

Stahl & Zelmanovitz, New York (Joseph Zelmanovitz of counsel), for respondent.

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Appeal from order and judgment (one paper), Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 2, 2015, directing respondents to reimburse petitioner for improperly denied Medicaid claims in the amount of $7,458,017.98, unanimously dismissed, without costs.

This article 78 proceeding essentially seeks to enforce an administrative law judge's (ALJ) decision after a hearing, reversing a finding by the Office of the Medicaid Inspector

General (OMIG) that petitioner committed "unacceptable practices" and that it was required to reimburse alleged overpayments from the Medicaid program. Petitioner, the only clinic providing outpatient alcohol and substance abuse services to Farsi-speaking Bukharian Jews from the Asian part of the Soviet Union, used "Code 10" for a number of years to identify the reason that their Medicaid billings were delayed. The ALJ reversed OMIG's determination on the basis of equitable estoppel, finding that for years OMIG, or other State entities involved in instructing petitioner or processing these claims, had accepted untimely claims coded in this manner. The ALJ determined that petitioner's use of Code 10 (a catchall administrative delay excuse), was not an unacceptable practice. In this CPLR article 78 proceeding, Supreme Court ordered that a special referee hear and report whether 103,054 unpaid Medicaid claims in the amount of $7,458,017.98 were withheld or denied because petitioner had used "Code 10" as the reason for the untimely filing of those claims. The Special Referee's recommendation, that it was "more likely than not," that the use of Code 10 was the reason for the denial, was confirmed by Supreme Court in its order entered January 30, 2014. In addition to granting judgment in favor of petitioner, confirming the ALJ, Supreme Court also directed entry

of a money judgment against respondents for unpaid claims. A judgment was entered February 4, 2014, and amended on May 5, 2014. Respondents' motion to vacate the order entered January 30, 2014 and the amended judgment was denied by Supreme Court by order, entered July 16, 2014.

Respondents appealed Supreme Court's July 16, 2014 order (131 AD3d 890 [1st Dept 2015] [prior appeal]). The crux of respondent's argument in the prior appeal was that Supreme Court had exceeded its jurisdiction in ordering a freestanding money judgment against respondents, which are State entities, and that only the Court of Claims could do so. A second argument advanced by respondents in connection with that prior appeal was that entry of a money judgment against them was not incidental to the relief sought by petitioners in this article 78 proceeding. Aside from these jurisdictional arguments, respondents did not otherwise challenge the sum confirmed by Supreme Court in its order or final judgment, nor did they raise any substantive arguments.

In deciding the prior appeal, this Court vacated the amended judgment and the portion of Supreme Court's order entered January 30, 2014 directing entry of a money judgment against respondents, replacing such language with a directive that respondents must

"reimburse petitioner for improperly denied Medicaid claims, in the amount of $7,458,017.98" (*Community Related Servs.*, 131 AD3d at 890). In modifying Supreme Court, this Court decided that reimbursement was, in fact, "incidental to the primary relief sought by petitioner and granted" by Supreme Court, but that Supreme Court had "exceeded its jurisdiction in directing the entry of a money judgment against [the State]" (*id.* at 891, citing Court of Claims Act § 9[4] and CPLR 5207). Accordingly, this Court modified the order only to the extent indicated, but "otherwise affirmed," without costs (131 AD3d at 890). In deciding the appeal, we directed the Clerk to "enter judgment accordingly" (*id.*). A new judgment dated October 23, 2015 was subsequently entered by the Clerk on November 2, 2015 (new judgment), effectuating this Court's order.

Respondents now appeal from the new judgment on the basis that they are aggrieved by it because it is the only "valid" final judgment to have been entered in this proceeding. They contend that the prior money judgment against the State was so deficient that it was void ab initio and, therefore, the substantive issues they now seek to raise could not have been raised by them in the prior appeal. In other words, they contend vacatur of the prior judgment allows them to now challenge

Supreme Court's decision that respondents improperly withheld payment of petitioner's Medicaid claims. We disagree.

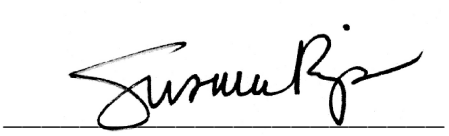
The prior appeal involved Supreme Court's order entered January 30, 2014, and the amended judgment; it resolved the issues in the case by ordering that petitioner "shall have judgment." The order entered January 30, 2014, judgment granted the petition and provided ancillary relief in the form of a money judgment that petitioner could file and seek to enforce. Although this Court modified Supreme Court by directing a different procedure by which petitioner would obtain the ancillary relief (i.e., reimbursement of such money, not a money judgment), the ultimate relief, a final judgment in petitioner's favor, was unaffected and affirmed.

The entry of a new judgment effectuating this Court's decision on the appeal does not present respondents with a new opportunity to collaterally challenge the relief that this Court already determined that petitioners are entitled to, that is, payment of $7,458,017.98 in Medicaid claims that were unpaid because of the manner in which they were coded. Once the prior appeal was decided and this Court directed the Clerk to enter judgment effectuating our order, that new judgment entered November 2, 2015 was entered subsequent to an order of this Court

disposing of all the issues in the action (CPLR 5701[a][1]; *see Powell v City of New York*, 146 AD3d 701, 702-703 [1st Dept 2017). That new judgment entered at our direction was purely ministerial and cannot be collaterally attacked by respondents. The issue of whether respondents owe this money to petitioner has already been finally determined against them.

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

ENTERED: JUNE 6, 2017



CLERK

Acosta, P.J., Tom, Kapnick, Kahn, Gesmer, JJ.

3416 Janice Foley, Index 114390/08
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

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McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for respondent.

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Order, Supreme Court, New York County (Frank P. Nervo, J.), entered October 8, 2015, which granted defendant's motion pursuant to CPLR 4404 to set aside the jury's verdict on liability and dismissed the complaint, reversed, on the law, without costs, the motion denied, and the jury verdict reinstated.

"Although '[t]he awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident,' where there are factual issues as to the precise location of the defect that caused a plaintiff's fall and whether the defect is designated on the map, the question should be resolved by the jury" (*Reyes v City of New York*, 63 AD3d 615, 615 [1st Dept 2009], *lv denied* 13 NY3d 710

[2009], quoting *Roldan v City of New York*, 36 AD3d 484, 484 [1st Dept 2007]; *see also Quinn v City of New York*, 305 AD2d 570, 571 [2d Dept 2003]). The trial court improperly set aside the verdict against the City for lack of legally sufficient evidence that the City had prior written notice of the alleged defect in the curb at the corner where plaintiff indicated she fell (Administrative Code of City of NY § 7-201[c]). A jury verdict may not be set aside for legal insufficiency unless there is "no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Here, it cannot be said that it was "utterly irrational for [the] jury to reach the result it has determined upon" (*id.*).

At trial, plaintiff testified that she tripped and fell, due to a defect at the corner of Madison Street and Rutgers Street. Plaintiff testified that she stepped off the curb with her left foot into the crosswalk on to Madison Street and that the tip of her right foot got caught on something on the ground, which caused her to fall and fracture her ankle. Plaintiff further testified that the curb where she tripped and fell was "separated from the sidewalk and raised." Plaintiff also entered into

evidence photographs of the street corner where she fell that depicted a broken, cracked and defective curb in front of 197 Madison Street. Another photograph entered into evidence showed that the address of "197 Madison St." was clearly reflected on the H and M Deli storefront awning, located at the corner of the intersection where plaintiff fell. Counsel for the City further highlighted this point during re-cross-examination of plaintiff regarding the precise location of her fall, when counsel inquired, "In front of that H and M Deli?... The deli that is addressed 197 Madison, right?" To which plaintiff replied, "Yes." Additionally, the Big Apple Map, which the City stipulated to receiving, denoted an "X" in front of 197-199 Madison Street, and, according to the Big Apple Map Legend, an "X" indicates a "broken, misaligned or uneven curb."

Our dissenting colleague contends that it is "undisputed that there are no defect marks shown at the crosswalk or the curb near the crosswalk where plaintiff fell." This statement, however, is not wholly correct and attempts to gloss over the issue presented in this case, an issue that, appropriately, went to the jury for consideration. First, although plaintiff did indeed fall into, and ultimately land in, the crosswalk, she never testified that a defect in the crosswalk caused her to

fall. Thus, our dissenting colleague's focus on a lack of a "defect mark in the area of the crosswalk including the nearby curb area between Madison and Rutgers Streets where plaintiff fell" is misplaced. Moreover, while it is true that the Big Apple Map did not have an "X" at the precise corner where plaintiff fell, the map did depict an "X" in front of the address of 197 Madison Street, which encompasses multiple storefronts within one building, stretching from the building on the corner towards the middle of the block. Second, our dissenting colleague puts much emphasis on the key chart of the Big Apple Map in an attempt to support his argument that the map does not indicate any defect where plaintiff fell because an "extended defect" symbol does not appear "on Madison Street or at the corner where plaintiff fell." However, the key chart to the Big Apple Map, which we have reviewed and is informative, does not provide any information as to "the length or distance of the defect," nor can such information be gleaned from the map itself. Indeed, the Big Apple Map employee testified that the map does not indicate how far a defect is from a curb or a tree, nor does the map indicate the size, width or length of the defect. Lastly, no one testified that the defect designated on the map was 35 feet away from the defect that caused plaintiff's

accident. Rather, the City made that argument in its motion to set aside the verdict, and, as already noted, the Big Apple Map does not provide any information regarding how far the defect is from the curb or any information as to the size, width or length of the defect. Thus, whether the "precise location of the defect that caused [] plaintiff's fall . . . is designated on the map" was, under the circumstances at bar, an issue of fact for the jury's resolution

(*Reyes*, 63 AD3d at 615; *see also Patane v City of New York*, 284 AD2d 513, 514-515 [2d Dept 2001]), and the evidence provided a

sufficient basis for the jury to conclude that the City had prior written notice of the defect.[1]

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

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[1] Although the *Reyes* case involved the symbol on the Big Apple Map "show[ing] an extended portion of broken or misaligned curb," the case does not, contrary to our dissenting colleague's contention, stand for the proposition that only cases involving an "extended defect" present an issue for the jury as to the "length of the defect and whether it caused plaintiff's fall." Moreover, *Almadotter v City of New York* (15 AD3d 426 [2d Dept 2005]), cited by the *Reyes* court and relied upon by our dissenting colleague does not turn only on the presence of "extended defects." Rather there, the Court was faced with the question of whether the issue concerning the difference between the plaintiff's description of the defect on the sidewalk and the language used in the key chart to describe the defect depicted on the Big Apple Map presented a question of fact to be resolved by the jury. The Court found that it did. The fact that the condition at issue involved an "extended section of obstructions" of the sidewalk was of no moment. Further support of this is demonstrated by the *Almadotter* Court's finding that *Camacho v City of New York* (218 AD2d 725 [2d Dept 1995]), relied upon by the City, was clearly distinguishable because "[t]here, the one-foot-deep hole measuring three by four feet in width clearly was not the raised sidewalk noticed on the Big Apple Pothole map" (*Almadotter v City of New York*, 15 AD3d at 427-428). "Therefore, since the prior notice law is in derogation of the common law and must be strictly construed against the City, a notice is sufficient if it brought the particular condition at issue to the attention of the authorities" (*id.* at 427). As previously discussed, "[W]here there are factual issues as to the precise location of the defect that caused a plaintiff's fall . . . the question should be resolved by the jury" (*Reyes v City of New York*, 63 AD3d at 615), which is what occurred here.

TOM, J. (dissenting)

I would find that the trial court properly set aside the verdict against the City for lack of legally sufficient evidence that the City had prior written notice of the alleged defect in the crosswalk at the corner where plaintiff indicated she fell (Administrative Code of City of NY § 7-201[c]). Plaintiff's evidence was insufficient to show that the markings on the Big Apple Map constituted notice of defects at the location of her accident, since she fell at a completely different location than the sidewalk defect marking on the Big Apple Map (*see Vega v 103 Thayer St., LLC,* 23 NY3d 1027 [2014]; *Roldan v City of New York*, 36 AD3d 484 [1st Dept 2007]). Accordingly, I respectfully dissent.

At trial, plaintiff specifically testified that she fell at "the corner in the crosswalk right after the light pole" by the intersection of Madison Street at Rutgers Street. Referring to photographs in evidence that depicted a grate near the crosswalk and light pole, plaintiff remarked that she was sure that this corner was the location, stating, "I know where I fell. I didn't want to hit that grate with my face. That's how I remember exactly where I fell." Plaintiff marked a photograph showing the area of the crosswalk where she fell. While plaintiff recognized

the "Chen Wong restaurant," also numbered 197 Madison Street, and Madison Bagels and Grocery, she stated that the accident did not take place in front of those locations. Plaintiff's unequivocal testimony was that she fell in the crosswalk at an intersection and not on the sidewalk where the defects are indicated on the Big Apple Map. It is undisputed that there are no defect marks shown at the crosswalk or the curb near the crosswalk where plaintiff fell, and there is no basis for the majority's suggestion that stating there are no defect marks at the corner is "not wholly correct."

In contrast with plaintiff's testimony, the Big Apple Map received in evidence shows a straight line and an "X" (indicating a section of broken, misaligned or uneven curb) on the sidewalk approximately at the midpoint of the building addressed 197 Madison Street and, based on photographs in evidence, at least two large storefronts' length away from the corner of Madison and Rutgers Streets - the area where plaintiff testified she fell. The key chart to the Big Apple Map symbols, also received into evidence, shows extended and nonextended pavement defects. The extended defects are shown by two same symbols of a particular type of defect connected by a straight line reflecting the extended length or distance of the defect. However, none of

these "extended defect" symbols appear on Madison Street or at the corner where plaintiff fell. The nonextended or localized defect is shown by a singular symbol reflecting a particular type of pavement defect. Here, the symbols placed on Madison Street are depicted as nonextended, localized defects that could not fairly be read as encompassing the entire block or reaching to the corner where plaintiff fell, as the majority seeks to do.

There is nothing in the record that shows a defect mark in the area of the crosswalk including the nearby curb area between Madison and Rutgers Streets where plaintiff fell. Nor did the location of the defect markings in front of 197 Madison Avenue present an issue for the jury's consideration, as the jury could not reasonably find that a single defect, depicted by a singular mark, at least two large storefronts' length away from the corner where plaintiff fell to be a proximate cause of her fall. The defect mark on Madison Street is not close to the corner where plaintiff fell, as the majority intimates, and is a significant distance away from the corner. Contrary to the majority's position, no fair interpretation of the evidence presented in this case allows for the conclusion that the localized defects could somehow extend past the length of two large storefronts and then wind their way to the crosswalk where plaintiff fell, and

thus the jury's verdict cannot stand (*Goldstein v Snyder*, 3 AD3d 332, 333 [1st Dept 2004] [considering whether the "verdict is contrary to any conclusion that might be reached on the basis of a fair interpretation of the evidence"]; *Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). The City points out in its motion to set aside the verdict that using the scale on the map, the defect markings on the Big Apple Map indicate the defects in the sidewalk were about 35 feet from the corner where plaintiff claims she fell.

The majority is attempting to conflate a localized defect and an extended defect, which is an unreasonable conclusion. In this regard, the majority states that the "key chart to the Big Apple Map . . . does not provide any information as to the "'length or distance of the defect.'" However, that point might be relevant if we were faced with an extended defect and the jury could have assessed the length of the defect to determine whether it reached the corner. Significantly, this case involves a localized defect that under no circumstances could fairly be seen to extend more than two large storefronts' length to the area where plaintiff fell. The majority avoids the meaning of the key chart and appears to treat all defects as extended defects. But, such a view does not comport with the key chart's careful

distinctions between localized and extended defects.

Once again, plaintiff testified that she fell in the crosswalk at the corner of Madison Street and Rutgers Street. She never testified that she fell on the sidewalk or anywhere near where the Big Apple Map defect symbols are located. Consequently, there were no factual issues as to the precise location where plaintiff fell at the crosswalk or that the defect designated on the map was on the sidewalk and over 35 feet away from the corner where plaintiff claimed she fell (*cf. Reyes v City of New York*, 63 AD3d 615 [1st Dept 2009], *lv denied* 13 NY3d 710 [2009]).

Notably, unlike this case, in *Reyes*, relied on by the majority, the symbol on the Big Apple Map "showed an extended portion of broken or misaligned curb," as reflected by two "Xs" connected by a straight line, fairly presenting an issue for the jury as to the length of the defect and whether it caused the plaintiff's fall (*id.* at 616). Such an extended defect is not present here. Contrary to the majority's reading of the case, the basis for our holding in *Reyes* was that the defect there was an extended defect, which, in conjunction with the other evidence, permitted the jury to fairly conclude that it was the same defect that caused the plaintiff to fall. Notably, the

cases upon which *Reyes* relied also involved extended defects (*see Almadotter v City of New York*, 15 AD3d 426, 427 [2d Dept 2005] ["(e)xtended section of obstructions protruding from (the) sidewalk"] [internal quotation marks omitted]) or multiple defects at the location of the accident all within close proximity to each other (*see Johnson v City of New York*, 280 AD2d 271 [1st Dept 2001]).[1] Accordingly, *Reyes* does not permit a jury to utilize a localized defect at a different location on the Big Apple Map to find that the City had notice of a defect a fair distance away that allegedly caused the plaintiff to fall.

Further, while the address of 197 Madison Street encompasses multiple storefronts within one building, the "X" shown on the

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[1]Contrary to the majority's view, the fact that the defect at issue in *Almadotter* was an extended defect was certainly relevant to the Court's finding that a question of fact was presented for a jury to resolve. Specifically, the evidence submitted by the plaintiff there, including photographic evidence of a "stretch of concrete sidewalk with contiguous slabs that are of different heights," (15 AD3d at 427) combined with the presence of an extended section of obstructions on the Big Apple Map, raised an issue as to the precise location of the defect that allegedly caused the plaintiff's fall, and whether the alleged defect was designated on the map, thus presenting an issue to be resolved by the jury. In contrast, the case before us involves a localized defect on the map and testimony from plaintiff clearly establishing that such defect was not in the vicinity of her fall. Accordingly, there is a crucial distinction between this case and those involving extended defects, and it would be improper to conclude that this case raise an issue of fact for the jury to resolve.

Big Apple Map is located directly in the front entrance of 197 Madison Street. Once again, the mark on the Big Apple Map reflects defects only in the area of the marking itself. This does not permit the unreasonable inference, which the majority makes, that the "X" mark somehow encompasses and extends to the entire address, or over 35 feet away to the corner of Madison Street and Rutgers Street. This would be an unreasonable interpretation of the Big Apple Map. Accordingly, there was no basis for the jury to find that the City had prior written notice of any defect at the corner of Madison Street and Rutgers Street where plaintiff fell, and thus no legal basis to support a verdict in favor of plaintiff.

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

ENTERED: JUNE 6, 2017

CLERK

Acosta, P.J., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3953N Isaac Yamali, et al., Index 603116/97
Plaintiffs-Respondents,

-against-

Robert Felshman,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Martin Shulman, J.), entered on or about July 11, 2016,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 2, 2017,

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

ENTERED: JUNE 6, 2017

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, Kapnick, JJ.

3082 The People of the State of New York, Ind. 4370/08
Respondent,

-against-

Carlos Tapia,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Orrick, Herrington & Sutcliffe LLP, New York (Daniel A. Rubens of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Miriam Best, J.), rendered February 28, 2013, convicting defendant, after a jury trial, of attempted assault in the first degree, and sentencing him to a term of 5 years, with 3 years' postrelease supervision, affirmed.

Defendant contends that his conviction is legally insufficient and was against the weight of the evidence. Legal sufficiency and weight of evidence review are two standards of intermediate appellate review. Although related, "each requires a discrete analysis" (*People v Bleakley*, 69 NY2d 490, 495 [1987]). In reviewing whether a verdict is supported by legally sufficient evidence, we must determine whether, viewing the

evidence in the light most favorable to the People, "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]; *see also People v Gordon*, 23 NY3d 643, 649 [2014]; *People v Bleakley*, 69 NY2d at 495). "This deferential standard is employed because the courts' role on legal sufficiency review is simply to determine whether enough evidence has been presented so that the resulting verdict was lawful" (*People v Acosta*, 80 NY2d 665, 672 [1993]). If that is satisfied, then the verdict will be upheld on a legal sufficiency basis (*People v Danielson*, 9 NY3d at 349; *People v Acosta*, 80 NY2d at 672).

To determine whether a verdict is supported by the weight of the evidence, however, our analysis is not limited to that legal test. Even if all the elements and necessary findings are supported by some credible evidence, we must examine the evidence further. "If based on all the credible evidence a different finding would not have been unreasonable," then we must "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" (*People v Bleakley*, 69 NY2d at 495 [internal

quotation marks omitted]). "Based on the weight of the credible evidence," we must then decide "whether the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*People v Danielson*, 9 NY3d at 348). However, in performing this analysis, we must be "careful not to substitute [ourselves] for the jury. Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor. Without question the differences between what the jury does and what the appellate court does in weighing evidence are delicately nuanced, but differences there are" (*People v Bleakley* 69 NY2d at 495; *see also People v Kancharla*, 23 NY3d 294, 303 [2014]; *People v Romero*, 7 NY3d 633, 644 [2006]).

Here, defendant was charged with attempted assault in the first degree based on the use of a dangerous instrument under an acting-in-concert theory. The victim was unequivocal that he was attacked and beaten by two people. Several witnesses also told the police two people attacked the victim and pointed out defendant and a man named Torres as the two attackers. The police officers testified that they arrived on the scene while defendant was still in the process of beating the victim. Torres, for his part, was fidgeting with his waistband and running toward defendant and the victim. Both officers testified they observed

defendant body slam the victim in the street, drag him between parked vehicles, and punch and kick him. They lost sight of defendant and the victim for "seconds" when they first got out of the patrol car because their vision was blocked by a van. One officer arrested Torres while the other officer physically pulled defendant off the victim as defendant was still kicking the victim in the head. While it is true that no blades, razors or other sharp instruments were found either on defendant or in the immediate area of the fight, and no one saw defendant personally cut the victim, the officers candidly testified that they "wanted to close this investigation down" as they believed they had the perpetrators of the assault. They did not recover or analyze any of the broken glass in the area or check surveillance cameras that may have captured images of the fight as part of their investigation.

Nevertheless, viewing the evidence in a light most favorable to the People, the jury could have drawn a reasonable inference that defendant and Torres were acting in concert and one or the other caused the injuries to the victim's neck and face by using a sharp instrument at some point in the assault. Certainly, Officer Bello testified be observed defendant kicking the victim in the head while the victim was bleeding. The medical evidence,

as the dissent notes, was unequivocal that the cuts sustained by the victim were consistent with being struck with a "sharp cutting instrument." Coupled with the fact that the victim was sure he was assaulted by two individuals, and the witnesses interviewed by the police at the scene identified defendant and Torres as the attackers, the jury could certainly reasonably infer that defendant and Torres were acting in concert, and that one or the other used a "sharp cutting instrument" to cause the victim's injuries. Based on the weight of the credible evidence, we find no basis for disturbing the jury's determination in finding defendant guilty beyond a reasonable doubt (*People v Danielson*, 9 NY3d at 348; *People v Bleakley*, 69 NY2d at 495).

The court properly denied defendant's motion to suppress a showup identification. The prompt, on-the-scene showup was conducted as part of an unbroken chain of events and was justified by the interest of prompt identification (*see People v Duuvon*, 77 NY2d 541, 545 [1991]; *People v McLean*, 143 AD3d 538 [1st Dept 2016], *lv denied* 28 NY3d 1148 [2017]). The circumstances of the showup, as a whole, did not create a likelihood of misidentification (*see Duuvon*, 77 NY2d at 545; *People v Sanabria*, 266 AD2d 41, 41 [1st Dept 1999], *lv denied* 94 NY2d 884 [2000]).

The court also properly exercised its discretion in admitting Officer Cosgrove's grand jury testimony as past recollection recorded. "The requirements for admission of memorandum of a past recollection are generally stated to be that the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information" (*People v Taylor*, 80 NY2d 1, 8 [1992]). Here, the People laid a proper foundation for admission of this evidence as Cosgrove testified at trial that he had no present recollection of this incident, that his review of his grand jury minutes did not refresh his recollection, that his grand jury testimony represented his knowledge and recollection when made, and that he testified truthfully and accurately before the grand jury (*see People v Lewis*, 232 AD2d 239, 240 [1st Dept 1996] *lv denied* 89 NY2d 865 [1996]). Moreover, the admission of this evidence did not violate the Confrontation Clause since Cosgrove testified at trial and was subject to cross-examination (*People v Rahman*, 137 AD3d 523, 523-524 [1st Dept 2016, *lv denied* 28 NY3d 935 [2016]]; *see also People v DiTommaso*, 127 AD3d 11, 15 [1st Dept 2015], *lv denied* 25 NY3d 1162 [2015]). In any

event, there was no prejudice to defendant because it was entirely cumulative of Officer Bello's testimony (*see People v Holmes*, 291 AD2d 247, 248 [1st Dept 2002], *lv denied* 98 NY2d 676 [2002]).

By raising general objections, or by failing to object or to request further relief after the court delivered a curative instruction, defendant failed to preserve his present challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

All concur except Moskowitz and Kapnick, JJ. who dissent in part in a memorandum by Kapnick, J. as follows:

KAPNICK, J. (dissenting in part)

Defendant Carlos Tapia was charged and convicted after a jury trial with attempted assault in the first degree based on the use of a dangerous instrument under an acting-in-concert theory. Because the People failed to prove a crucial required element of this count, namely, that defendant or the other alleged attacker used a sharp instrument to cut the victim, I would find that the evidence was not legally sufficient to support the judgment of conviction.

I agree with the majority, that in assessing the legal sufficiency of the evidence, this Court, viewing the evidence in the light most favorable to the People, "must decide whether a jury could rationally have excluded innocent explanations of the evidence . . . and found each element of the crime proved beyond a reasonable doubt" (*People v Reed*, 22 NY3d 530, 535 [2014]). Put another way, we "must determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial and *as a matter of law satisfy the proof and burden requirements for every element of the crime charged*" (*People v Bleakley*, 69 NY2d 490, 495 [1987] [internal citations omitted] [emphasis added]). However, I disagree with

the majority's determination that here "the jury could have drawn a reasonable inference that defendant and Torres were acting in concert and one or the other caused the injuries to the victim's neck and face by using a sharp instrument at some point in the assault."

The question before us on this appeal is whether the evidence sufficed to show that defendant wielded the dangerous instrument or acted in concert with another, presumably Mr. Torres, who wielded the dangerous instrument, and slashed the victim's face. As relevant here, a person is guilty of assault in the first degree when "[w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument" (Penal Law § 120.10[1]). "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime" (Penal Law § 110.00). To establish accessorial liability, or acting-in-concert, the People must prove beyond a reasonable doubt that the accused shared the "mental culpability of his companion or solicited, requested, commanded, importuned, or intentionally aided his companion" to cut the victim (*Matter of Paris M.*, 218 AD2d 554, 556 [1st Dept 1995]; *see also* Penal Law §

20.00). Here, there was no proof beyond a reasonable doubt that defendant cut the victim's face and neck or shared the intent of the individual, whether Mr. Torres or someone else, who did cut the victim (*see People v Rivera*, 176 AD2d 510, 511 [1st Dept 1991] *lv denied* 79 NY2d 863 [1992]).

While the victim's face was cut several times by a sharp object, there was no witness's testimony or any other direct evidence that defendant personally cut the victim. Rather, at trial, the victim testified repeatedly that he did not see who cut him or the weapon that was used to cut him. He further testified that he was face down on the ground at various times, indeed even covering his face and parts of his body while he was being punched and kicked; and, therefore, that he could not see who was attacking him or who cut him. Furthermore, the victim was unable to say when, exactly, during this attack he was cut, and only realized he had been cut when he felt blood running down his face. The majority seeks to cast the victim's testimony that he "was sure he was assaulted by two individuals," as unequivocal, however, this is incorrect. In fact, and as already noted, the victim said he could not see who assaulted him, and, moreover, he testified that it "could have been . . . that several people had hit [him], because that's the way [he] felt."

Additionally, the testimony by one of the arresting officers that two witnesses at the scene identified defendant and Torres as the attackers does not rise to the level of proving beyond a reasonable doubt that the two men were acting in concert or shared the requisite "mental culpability" for the harm done to the victim.

Morever, and as noted by the majority, the police did not recover any blades, razors or other sharp instruments from either defendant or the immediate area of the fight. The police also testified that they did not recover or analyze any of the broken glass from a shattered beer bottle on the sidewalk in front of the bar where the incident had occurred, or the pieces of broken glass scattered on the ground where defendant had been kicking the victim when the police arrived. Indeed, at trial the People called a doctor who testified regarding the injuries that the victim sustained. The doctor stated that the cuts were not consistent with someone falling onto broken glass or being struck with a fist, but rather, were consistent with being struck with a "sharp cutting instrument," such as a "knife, a box cutter" or a "piece of glass if it . . . had the right edge." Additionally, the People failed to put forth any evidence to suggest that defendant was aware that another attacker used a sharp object to

cut the victim's face, nor was there evidence of any connection between defendant and the other alleged attacker, Mr. Torres. Indeed, one of the arresting officers testified that he never even asked the victim who had cut him. Moreover, there was testimony that there were approximately 15 to 20 people on the sidewalk exiting the bar at the time of the incident.

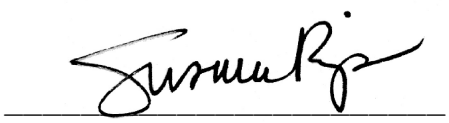
Therefore, in assessing the legal sufficiency of the evidence, I would find that the evidence failed to establish beyond a reasonable doubt, directly or by inference circumstantially, that defendant carried a dangerous instrument, cut the victim's face with it, or was aware that the other attacker intended to or was cutting the victim with such an instrument (*see People v Campbell*, 79 AD3d 624 [1st Dept 2010], *lv denied* 17 NY3d 793 [2011]; *Matter of Paris M.*, 218 AD2d at 556; *People v Rivera*, 176 AD2d at 510-512).

However, defendant's own actions supported a conviction for attempted second-degree assault, based on the theory that, "[w]ith intent to cause serious physical injury to another person, he cause[d] such injury to such person" (Penal Law § 120.05[1]). Accordingly, I would reduce the conviction to

attempted assault in the second degree and reduce the sentence to time served, with 1 ½ years' postrelease supervision (*see People v Campbell*, 79 AD3d at 624).

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

ENTERED: JUNE 6, 2017



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Sweeny, J.P., Mazzarelli, Moskowitz, Gische, Kahn, JJ.

3345 The People of the State of New York, Ind. 6055/10
Respondent,

-against-

Roque Silvagnoli,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Stephen J. Kress of counsel), for respondent.

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Judgment, Supreme Court, New York County (Renee A. White, J. at suppression hearing; Rena K. Uviller, J. at plea and sentencing), rendered November 20, 2012, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 18 years, reversed, on the law, the motion to suppress defendant's statements granted, the plea vacated, and the matter remanded for further proceedings.

Even where two criminal matters themselves are not related, police may not question a suspect on one matter on which he or she is represented by counsel "in a manner designed to elicit statements on an unrelated matter" in which the suspect is not represented (*People v Cohen*, 90 NY2d 632, 641 [1997]) [internal quotation marks omitted]. The key inquiry is whether the

"impermissible questioning . . . was not discrete or fairly separable" (*id.*[internal quotation marks omitted]).

Here, the detective who questioned defendant in a homicide investigation acknowledged that during the questioning a "conversation came up" in which he told defendant that he knew about a pending drug case against defendant in which he knew defendant was represented by counsel. Specifically, the detective recounted telling defendant that "you could say nothing, but that was kind of a dumb thing you did selling drugs to an undercover back in 2007," and asking if he was so smart why he had sold drugs to an undercover officer.

Although the reference to the drug charges on which defendant was represented was brief and flippant, it was not, in context, innocuous or discrete and fairly separable from the homicide investigation. The detective told defendant during the questioning that he knew defendant was involved in selling drugs at the location of the murder and that the killing was over a drug debt. The remarks regarding the pending drug case went to defendant's alleged participation in the drug trade at the location of the homicide, the very activity out of which a motivation for killing the victim arose. Indeed, it succeeded in eliciting from defendant a response that may fairly be

interpreted as incriminating himself in dealing drugs at the location, the alleged motivation and context out of which the homicide occurred. Accordingly, because questioning regarding the drug case on which defendant was represented by counsel was intertwined with questioning regarding the homicide, defendant's statements should have been suppressed.

However, we find no other basis for suppression. As the dissent notes, the repeated comments made to defendant by the detective and his colleagues to the effect that defendant should "tell [his] side of the story" immediately because if he were to wait until trial, "[no] one is going to believe" him and he would be "charged with murder, not . . . manslaughter" did not vitiate the *Miranda* warnings defendant had received (*Matter of Jimmy D.* 15 NY3d 417 [2010]).

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

MAZZARELLI, J. (dissenting)

Over two and one-half years after the homicide for which defendant was ultimately convicted, he was arrested for an unrelated crime. Detective Eric Ocasio, the lead investigator in connection with the homicide, who suspected defendant of being its perpetrator, took custody of him after the arrest, and, after reading defendant his *Miranda* rights, which defendant waived, questioned him at the 9th precinct stationhouse over the course of three and one-half hours. At the end of the interrogation, defendant confessed to shooting the victim, who he stated was a customer of his drug-dealing business in and around the Campos Plaza projects. According to the written statement, defendant came upon the victim at the projects, and reminded him of a $220 drug debt owed by the victim to defendant. The victim gave him $20, spit in his face and assaulted him. Defendant went up to his girlfriend's apartment and then came back down, where he saw the victim holding a knife. Defendant retrieved a gun that he knew to be hidden in a nearby garbage can. The victim walked towards him holding the knife and threatened to use it if defendant did not shoot him first. Defendant stated that he squeezed the trigger, not expecting the gun to fire since he had tested it previously and it hadn't worked. It did, however, and

the victim fled.

Defendant moved to suppress the statement. At the suppression hearing, Detective Ocasio testified that defendant was in a gang or crew known as the Money Boys that hung out around Campos Plaza, and that multiple people had identified him as the shooter. Ocasio also learned from a witness or witnesses that defendant and his crew fled from the scene immediately after the shooting. Ocasio was unable to locate defendant, who had another criminal case from 2007 pending against him for allegedly selling cocaine to an undercover police officer about five months before the shooting at the same location. On April 30, 2008, Ocasio went to Supreme Court, where defendant had a scheduled court appearance in the 2007 drug case, hoping that defendant would show up. Although defendant's lawyer on that case was present, defendant was not.

Ocasio described the interrogation as taking place over three discrete sessions, beginning around 4:00 p.m. and marked by breaks that took place at about 5:30 p.m. and again sometime between 7:00 and 7:30 p.m., until defendant gave his statement. During the first session Detective Ocasio elicited general background information about defendant to relax him and build a mutual rapport. During the next session, Ocasio confronted

defendant with evidence compiled against him and charges that could be brought. Ocasio told defendant that several people had identified him as the perpetrator of the homicide, showing him the photo array from which defendant had been identified. Ocasio also showed defendant pictures of the victim and falsely told defendant that the victim had gurgled defendant's name before dying. Ocasio further told defendant that his cell phone had been traced to a cell tower in the area.

Nevertheless, defendant repeatedly denied killing the victim and said words to the effect of "I got nothing to say about this. I've told you what I've got to say." However, Ocasio denied under cross-examination by defendant's counsel that defendant ever said, "I've answered your questions, but now I'm done talking."

Ocasio told defendant during the second session of the interrogation that he knew defendant was involved in drug dealing at Campos Plaza. Ocasio testified that the subject of drug dealing at Campos Plaza came up "numerous times," that he told defendant that he knew the Money Boys were selling crack, the victim was a drug user, and the killing was over a $20 drug debt. Further, Ocasio acknowledged that a "conversation came up" in which he told defendant that he knew about the pending case in

Supreme Court, and that he had told defendant that "you could say nothing, but that was kind of a dumb thing you did selling drugs to an undercover back in 2007," to which defendant responded, in sum and substance, "[T}hat was just drugs. I'm talking about drugs, right. I didn't have anything to do with this murder."

Although he could not recall every word and the precise phrases he used, Ocasio "several times" told defendant that it would be a good idea to explain what happened. He told defendant that the only issue was why he had done it, he could clear up his side of the story, and everyone does stupid things when they are young but what is really stupid "is if you've got nothing to say about what you've done." He further asked whether defendant was acting in self-defense and told him that if he was or if he did not intend to kill the victim, manslaughter, rather than a murder charge carrying a 25-year to life sentence, was a possibility, although he made no promise that defendant would get manslaughter. Toward the end of the second session Ocasio told defendant that he was going to be charged with murder, and "it's up to you to say your side of the story . . . And I said if you went to a courtroom and you're not going to say nothing, that's up to you." He also asked defendant words to the effect of "How you think it's going to look if you go to trial, you got no

statement, you get up on the witness stand and then for the first time you try to convince a jury of what happened? No one is going to believe you if you wait until then to do it."

Detective Ocasio gave defendant a second break, during which he left the interrogation room to get defendant a meal. Ocasio left some photos of the crime scene and the victim on the table and told defendant to "basically think about it." He returned about 10 to 20 minutes later with another detective and discussed the case with defendant for another 10 to 15 minutes, reiterating that defendant was going to be arrested and charged with murder, "and that if he had to say something now would be the time." Ocasio and his colleague stepped back out for a brief moment so Ocasio could use the restroom, and when they again returned, he saw that a photo of the victim had been placed face down on the table and defendant said, "I'll tell you how it happened." Defendant then gave an oral statement, signed the written statement described above and, later that evening, after again being advised of and waiving his *Miranda* rights, recorded a video statement.

Finding that the People's witnesses testified in a forthright and credible manner, Supreme Court concluded that defendant's statements were not improperly elicited and denied

his motion to suppress. The court characterized Ocasio's reference to the pending case arising out of defendant's sale of drugs to an undercover officer, for which defendant was represented by counsel, as a "flippant comment" that "was part of his interrogation strategy," but concluded that "there was nothing untoward" in it. The court noted that, although "the crimes occurred within the same geographical area and are, generally, drug-related," they were not intertwined, since Ocasio "did not ask defendant questions regarding his pending matter nor was the open drug case the focus of the interrogation." Accordingly, any incriminating response would have involved the separate drug case.

The court further held that defendant's statements to the effect that he had "nothing to say" when denying committing the crime was not an unequivocal invocation of his right to remain silent that negated the effect of his prior waiver of *Miranda*. Further, Ocasio did not mislead defendant regarding his right to remain silent but merely told him that a jury would find any explanation more credible if he did not give it for the first time at trial. Thereafter, defendant pleaded guilty to manslaughter in the first degree in full satisfaction of the indictment and was sentenced to a prison term of 18 years with

five years of post-release supervision.

Defendant argues on appeal that his right to counsel was violated when Detective Ocasio questioned him on a prior drug offense, for which charges were pending and for which Ocasio knew he was represented by counsel, in an effort, as alleged by defendant, to leverage those charges into an admission of guilt for the homicide. The leading case on which defendant bases this argument is *People v Cohen* (90 NY2d 632 [1997]). In that case, police took the defendant into custody after recovering a weapon that had been stolen from a garage during a burglary, and that was later used during the robbery of a convenience store in which a clerk was shot to death. The detectives who conducted an interrogation of the defendant a few days after the homicide were aware that the defendant was already a suspect in the garage burglary and that he was represented by counsel in connection with that investigation. In fact, counsel had specifically warned the detectives not to question the defendant in connection with the burglary. Nevertheless, throughout the interrogation, the detectives interspersed questions about the burglary with questions about the subsequent robbery and homicide, resulting in the defendant's confession to the latter crimes.

In suppressing the statement, the Court of Appeals

identified three separate categories of instances where questioning about a matter for which the defendant has retained counsel is intermingled with questioning about a separate matter for which there is no representation. In the first, "the two criminal matters are so closely related transactionally, or in space or time, that questioning on the unrepresented matter would all but inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel" (90 NY2d at 638). The second category involves "interrogations concerning crimes less intimately connected, but where the police were aware that the defendant was actually represented by an attorney in one of the matters" (*id.* at 640). A third category involves questioning of a suspect who is in custody with respect to a matter for which he or she is represented by counsel (*id.*).

In cases falling under the first and third categories, no questioning may be conducted with respect to even the unrepresented matter (*id.* at 638-639). In *Cohen*, the Court found that the police questioning implicated the second category. Applying precedent, particularly *People v Ermo* (47 NY2d 863 [1979]), the Court observed that questioning on a represented matter is permissible, so long as it is "discrete or fairly separable" from, and not "so interrelated and intertwined with,"

the questioning on the other matter (*Cohen* at 641 [internal quotation marks omitted]). Further, it is "critical" to a finding that questioning was impermissible "that the police purposely 'exploited concededly impermissible questioning' in order to obtain a confession in the unrepresented matter" (*id.*, quoting *Ermo*, 47 NY2d at 865). The Court found that the questioning of the defendant was improper because, despite their knowledge that the defendant was represented in connection with the investigation into the garage burglary, they deliberately joined it with the homicide in an effort to exploit the former crime and "engaged in their most forceful and heated questioning in connection" with the represented crime (*id.* at 642). As the Court stated, "[U]nquestionably, their pointed questioning on the garage crimes, impliedly signifying knowledge of the damning connection between that matter and the . . . homicide, was designed to add pressure on defendant to confess" (*id.*).

The questioning in this case also falls under the second category identified in *Cohen*. However, I disagree with the majority's conclusion that it rises to the standard set forth in that case. First, while Detective Ocasio testified that he discussed "drug dealing at Campos" with defendant numerous times, there is no basis in the record to conclude that Ocasio brought up the actual

crime for which defendant was arrested more than once. To the extent that Ocasio explored in more general terms a possible drug-selling relationship between defendant as seller and the victim as the buyer, it is clear from the record that this was an effort to signal to defendant that he knew defendant had a motive to shoot the victim. This strategy in no way depended on Ocasio's emphasizing the drug transaction between defendant and an undercover officer. Accordingly, I agree with the hearing court's characterization of the reference to the represented matter as a "single, flippant, comment."

That being the case, the questioning about the charged crime could not have been "completely interrelated and intertwined and not discrete or fairly separable" from the questioning about the homicide (*Cohen*, 90 NY2d at 642 [internal citations and quotation marks omitted]). Further, because the statement was so isolated, it could not have comprised a strategy "designed to add pressure on defendant to confess" (*id.* at 642). In contrast to *Cohen*, in which the detectives clearly tried to link the burglary, which resulted in the theft of the gun, and the robbery in which that very gun was used to kill a clerk, there is no linkage between the undercover sale and the homicide, such that Ocasio could be said to have had a purposeful strategy in mentioning the sale.

I agree with the majority to the extent it concludes that defendant's *Miranda* warnings were not vitiated when Detective Ocasio advised defendant to tell his side of the story to him lest he not be believed when he told it for the first time to the jury. *People v Dunbar* (24 NY3d 304 [2012], *cert denied* __ US __, 135 SCt 2051 [2015]), on which defendant relies, dealt with an improper, scripted statement *prior to* the issuance of *Miranda* warnings that directly undermined those warnings by encouraging the defendant to take advantage of what would be his only opportunity to speak before he went to court. Here, Ocasio never suggested to defendant that it would behoove him to speak rather than remain silent. Indeed, defendant had already waived his right to remain silent and instead adamantly denied that he was involved in the homicide. Ocasio's statements merely indicated that this full-throated denial would reflect poorly on defendant's overall credibility at trial if he adopted a trial strategy of admitting his involvement but seeking to excuse it because of the need to defend himself against the victim's advance with a knife. In my opinion, there was nothing improper about that. Further, as held in *Matter of Jimmy D.* (15 NY3d 417 [2010]), it is a "novel theory" that waiver of properly administered *Miranda* warnings may subsequently be vitiated by

misleading representations about the right to counsel during the course of the interrogation (15 NY3d at 424).

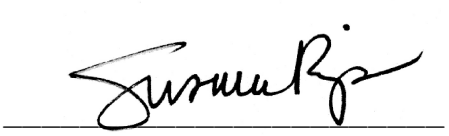
Finally, although the majority does not reach it, I disagree with defendant's argument that he effectively retracted his *Miranda* waiver when he said words to the effect of "I've told you what I've got to say." After *Miranda* warnings have been administered and a suspect agrees to talk to police, any subsequent invocation of the right to remain silent and for questioning to cease must be "unequivocal" (*People v Barrios*, 259 AD2d 407, 407 [1st Dept 1999], *lv denied* 93 NY2d 966 [1999]). Here, read in its proper context, defendant's statement, as Ocasio related it, was merely intended to reiterate that he denied killing the victim. In no way did it convey the message that he was invoking his right to remain silent and that Ocasio should stop questioning him (see *People v Cole*, 59 AD3d 302, 302 [1st Dept 2009], *lv denied* 12 NY3d 924 [2009] ["I have nothing to say to you" was not unequivocal invocation of the defendant's right to cut off questioning" when viewed in the context of defendant's full statement denying involvement in the robberies"]; *People v Lowin*, 36 AD3d 1153, 1155 [3d Dept 2007], *lv denied* 9 NY3d 847 [2007] [the defendant's statement "I'm done talking, okay, because that's what happened" merely reflected the

defendant's unwillingness to change his story]). It bears repeating that Ocasio explicitly denied that defendant had stated that he had answered all of the detective's questions and was done talking.

For the foregoing reasons, I would affirm the judgment of conviction.

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

ENTERED: JUNE 6, 2017



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Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4170 The People of the State of New York, Ind. 1640/97
Respondent,

-against-

Juan Paulino Rosario,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

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Purported appeal from order, Supreme Court, New York County (Robert M. Mandelbaum, J.), entered on or about May 26, 2016, which, after a hearing, denied defendant's CPL 440.10 motion to vacate his judgment of conviction, unanimously dismissed, on the ground of failure to obtain leave to appeal pursuant to CPL 460.15.

Because defendant did not seek or obtain permission from a justice of this Court to appeal from the order that denied his CPL 440.10 motion, this Court lacks jurisdiction to entertain the appeal (*see* CPL 450.15[1], 460.15; *People v Ramos*, 105 AD3d 684 [1st Dept 2013], *lv denied* 21 NY3d 1045 [2013]; *People v Argentieri*, 66 AD3d 558, 559 [1st Dept 2009], *lv denied* 14 NY3d 769 [2010]). Although defendant obtained leave to appeal from a

prior order that summarily denied his original CPL 440.10 motion, resulting in this Court's reversal of that order and remand for a hearing (132 AD3d 454 [1st Dept 2015]), this did not obviate the necessity of permission to appeal from the separate order entered after the hearing was held.

"A defendant's right to appeal within the criminal procedure universe is purely statutory ... and adherence to those requirements is a jurisdictional prerequisite for the taking of an appeal" (*People v Smith*, 27 NY3d 643, 647 [2016][internal quotation marks omitted]; *see also People v Pagan*, 19 NY3d 368, 370 [2012]). To deem defendant's present notice of appeal to be a motion for leave to appeal, and to grant such leave, would be contrary to the language and purpose of the statute, as well as that of this Court's rules (Rules of App Div, 1st Dept [22 NYCRR] § 600.8[d]).

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

ENTERED: JUNE 6, 2017

CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4171 In re Rosa M.,
Petitioner-Appellant,

-against-

Francisco P.,
Respondent-Respondent.

_____

Law Office of Thomas R. Villecco P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Larry S. Bachner, Jamaica, attorney for the child.

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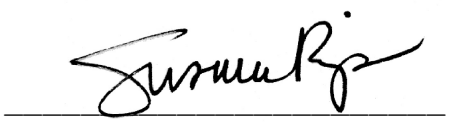
Appeal from order, Family Court, New York County (Gail A. Adams, Referee), entered on or about February 8, 2016, which, to the extent appealed from as limited by the briefs, modified a visitation order to provide for overnight visitation with the parties' child every Wednesday until April 14, 2016, unanimously dismissed, without costs.

The temporary visitation order is not an order of disposition and thus not appealable as of right (*see* Family Ct Act § 1112[a]; *Matter of Holtzman v Holtzman*, 47 AD2d 620 [1st Dept 1975]), and we decline to review it (*see id.*). Moreover,

the appeal is moot, as the temporary order has already expired (*see Matter of Sasha B. [Erica B.]*, 73 AD3d 587, 587 [1st Dept 2010], *appeal dismissed* 16 NY3d 755 [2011]).

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

ENTERED: JUNE 6, 2017



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Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4172-
4173 Index 650773/15
650795/15

Southern Advanced Materials, LLC,
Plaintiff-Appellant-Respondent,

-against-

Robert S. Abrams, Individually and as the
Trustee of Robert S. Abrams Living Trust, et al.,
Defendants-Respondents-Appellants,

John Does 1-10,
Defendants.

- - - --

Robert S. Abrams Living Trust,
Plaintiff,

Robert S. Abrams,
Plaintiff-Respondent,

-against-

Southern Advanced Materials, LLC,
Defendant-Appellant.

_____

Schulte Roth & Zabel LLP, New York (Robert J. Ward of counsel), for appellant-respondent/appellant.

DLA Piper LLP, New York (Joseph G. Finnerty III of counsel), for respondents-appellants/respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 29, 2016, which, to the extent appealed from as limited by the briefs, upon defendants Robert S. Abrams and Robert S. Abrams Living Trust's (collectively the Abrams parties) motion to dismiss (under index No. 650773/15), sustained

plaintiff Southern Advanced Materials, LLC's (SAM) first cause of action, ruled that § 14.4 of the Operating Agreement is inapplicable, and dismissed the second and sixth causes of action; and, upon the Abrams plaintiffs' motion to dismiss (under index No. 650795/15), dismissed SAM's first counterclaim, unanimously modified, on the law, to vacate the ruling that § 14.4 of the Operating Agreement is inapplicable, and otherwise affirmed, without costs.

The actions concern a dispute over the proper payout to SAM, an investor in a company called CV Holdings, LLC (CVH), as a result of a sale of CVH to a third party (the Wendel transaction).

The motion court correctly sustained the first cause of action, which alleges breach of §§ 9.7 and 13.3 of the Operating Agreement. While the Abrams parties claim that the Wendel transaction was an equity sale under § 14.4 of the agreement, SAM contends that it was a "[d]issolution" of CVH (as defined under § 13.1 of the agreement) entitling it to a 10% preferred return under §§ 9.7 and 13.3 of the agreement. As the motion court found, the nature of the transaction at this point is unclear. Further, SAM has sufficiently shown that, as defined in the agreement, the transaction could be a "disposition" of

substantially all of CVH's assets (i.e., a "dissolution"), given SAM's allegations that the Abrams parties transferred to themselves assets worth substantial amounts, including one of the four subsidiaries held by CVH, under the "Pre-Closing Restructuring" of CVH before nonparty Wendel S.A.'s purchase of the remaining equity interests.

To the extent § 14.4 may still apply, we agree with the motion court that § 14.4 does not require, as a condition precedent to obtaining a fairness opinion on the Wendel transaction, that all Class B Common Members and Preferred Members jointly request such an opinion. Nevertheless, we vacate the court's ruling to the extent it found § 14.4 inapplicable as a matter of law. While SAM alleged that it had requested a fairness opinion, the Abrams parties had argued before the court that none of the Class B Common Members or Preferred Members had requested one. These conflicting claims raise an issue of fact as to whether the condition precedent had been satisfied and therefore whether § 14.4 is applicable.

The motion court correctly dismissed the second cause of action, which alleges breach of the "Promoter Agreement" against Abrams individually. This claim is barred by the integration clause in the Operating Agreement. The agreements were between

the same parties (CVH and SAM) and covered the same subject matter (SAM's right to its Preferred Return) (*see ESG Capital Partners II, LP v Passport Special Opportunities Master Fund, LP*, 2015 WL 9060982, *11, 2015 Del Ch LEXIS 302, *34-35 [Del Ch, Dec. 16, 2015, C.A. No. 11053-VCL]). SAM's argument that the agreements involve different parties because Abrams signed the Promoter Agreement individually, and not on behalf of CVH, is belied by a reading of the agreement. SAM's remaining arguments regarding the integration clause are unavailing. In any event, even if not barred, SAM fails to state a claim against Abrams individually, as Abrams did not enter into the agreement personally.

The motion court correctly dismissed the sixth cause of action, which alleges breach of the "Make Good Agreement" against Abrams individually. Under the agreement, SAM was to receive additional preferred shares equal to one half of the number of additional shares obtained by another preferred investor, Smart Plastics. SAM alleges that additional preferred shares had been issued to Smart Plastics, but no such shares had been issued to SAM. However, even according SAM the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), SAM's vague allegation that it believed, based solely on

"the size of the payments made to Smart Plastics in connection with the Wendel Transaction," that Smart Plastics had been issued additional shares is too speculative to support the breach of contract claim. Similarly, SAM's claimed discovery of an undisclosed $5.3 million "side note" is also too speculative to support its claim that Smart Plastics had been issued additional shares.

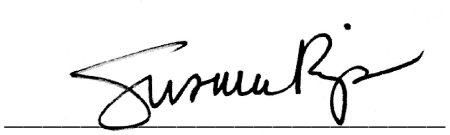
The motion court correctly dismissed SAM's counterclaim alleging that Abrams had fraudulently induced it into forgoing its "True-Up Option" by misrepresenting the distributions that the other preferred investors had received from the Wendel transaction. Under Delaware law, which applies here, "[c]ommon law fraud can be demonstrated in three ways: 1) overt misrepresentation; 2) silence in the face of a duty to speak; or 3) deliberate concealment of material facts" (*Bay Center Apartments Owner, LLC v Emery Bay PKI, LLC*, 2009 WL 1124451, *11, 2009 Del Ch LEXIS 54, *41 [Del Ch, April 20, 2009, C.A. No. 3658-VCS]). SAM fails to state a claim under any of these theories. In particular, SAM failed to show that the Seller Payoff Schedule submitted by the Abrams parties as part of the information package contained overt misrepresentations. Further, as the Retained Claims Agreement requires Abrams to disclose only

information on the terms of the Wendel transaction, and did not require disclosure of payments made pursuant to ancillary agreements he may have had with the other investors, his providing of the Seller Payoff Schedule did not create a false impression that required the submission of additional qualifying information (*see Wal-Mart Stores, Inc. v AIG Life Ins. Co.*, 901 A2d 106, 115 [Del 2006]; *Corporate Prop. Assoc. 14 Inc. v CHR Holding Corp.*, 2008 WL 963048, *6, 2008 Del Ch LEXIS 45, *24 [Del Ch, April 10, 2008, C.A. No. 3231-VCS]). Nor has SAM alleged any affirmative acts to support a fraud claim under an active concealment theory (*see Bay Ctr. Apartments Owner, LLC v Emery Bay PKI, LLC*, 2009 WL 1124451, *12, 2009 Del Ch LEXIS 54, *47-48 [Del Ch, April 20, 2009, C.A. No. 3658-VCS]). SAM's reliance on a fiduciary- and contract-based theory is misplaced. The holding

in *Metro Communication Corp. BVI v Advanced Mobilecomm Tech. Inc.* (854 A2d 121, 153-154 [Del Ch 2004]) does not establish such a theory for fraud, but rather, is limited to the circumstances of that case.

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

ENTERED: JUNE 6, 2017



CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4175 The People of the State of New York, Ind. 1754/14
Respondent,

-against-

Jeffrey Taylor,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Shane Tela of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered September 16, 2014, unanimously affirmed.

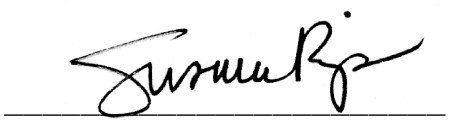
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 6, 2017



CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4176 New York Studios, Inc., et al., Index 654351/12
Plaintiffs-Respondents,

-against-

Steiner Digital Studios, et al.,
Defendants-Appellants.

_____

Guazzo & Guazzo, New York (Delia M. Guazzo of counsel), for appellants.

Crawford Bringslid Vander Neut, LLP, Staten Island (Allyn J. Crawford of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about April 15, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the causes of action for usurpation of corporate opportunities and an accounting, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The parties' operating agreement, which allows defendants to compete with plaintiff Eponymous Associates, LLC, does not flatly contradict plaintiffs' claim that defendants usurped Eponymous's corporate opportunities and assets (see CPLR 3211[a][1]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *see also Leon v Martinez*, 84 NY2d 83, 88

[1994]). However, the claim is not pleaded with the requisite particularity (*see* CPLR 3016[b]; *Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]).

In the absence of an allegation that plaintiffs demanded an accounting, the claim for an accounting fails to state a cause of action (*see Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568 [1st Dept 2011]; *Adam v Cutner & Rathkopf*, 238 AD2d 234, 241 [1st Dept 1997]; *compare Kaufman v Cohen*, 307 AD2d 113, 123-124 [1st Dept 2003]).

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

ENTERED: JUNE 6, 2017

CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4177 In re Diana Margot Garcia, Index 92502/08
An Incapacitated Person.

- - - - -

James Castro-Blanco,
Nonparty Appellant.

_____

James Castro-Blanco, appellant pro se.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 16, 2015, which, insofar as appealed from as limited by the brief, found that appellant's compensation as a co-property guardian should be based on quantum meruit, unanimously affirmed, without costs.

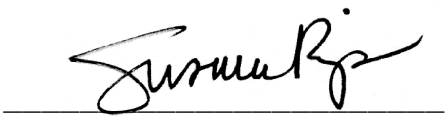
Although the initial guardianship order provided that appellant would be compensated pursuant to SCPA 2309, the court had the discretion to change the method of computing his compensation based on the services he actually rendered, rather than the value of the trust assets (*see Matter of Goldstein v Zabel,* 146 AD3d 624, 625 [1st Dept 2017]). The court was not required to make a finding of malfeasance or misconduct in order to make the change (*id.* at 630).

Appellant argues that he is prejudiced because he failed to keep time records for a portion of the period he served as a co-guardian because he relied on the provisions of the initial

guardianship order. However, Mental Hygiene Law § 81.28(a) clearly provided the court with the power to modify the plan for reasonable compensation for appellant's services. The court properly found that appellant's compensation may be based on a detailed affirmation of the services rendered.

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

ENTERED: JUNE 6, 2017



CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4178- Ind. 4234/09
4179 The People of the State of New York,
Respondent,

-against-

Kenith Agard,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Appellant,

-against-

Kenith Agard,
Defendant-Respondent.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant/respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Amanda Katherine Regan and Vincent Rivellese of counsel), for respondent/appellant.

_____

Judgment of resentence, Supreme Court, New York County (Melissa C. Jackson, J.), rendered August 31, 2015, resentencing defendant, as a second felony offender, to consecutive terms of 12 years and 2 to 4 years, unanimously modified, on the law, to the extent of vacating the second felony offender adjudication and substituting a second violent felony offender adjudication, and otherwise affirmed.

Upon our remand for a new second violent felony offender

adjudication and sentencing (127 AD3d 602 [1st Dept 2015]), the resentencing court determined that defendant's predicate violent felony conviction, which was obtained in violation of *People v Catu* (4 NY3d 242 [2005]), could not be used to enhance defendant's sentence, and it adjudicated him a second (nonviolent) felony offender on the basis of another predicate conviction, while reimposing defendant's original sentence. However, as defendant concedes, the subsequent decision of the Court of Appeals in *People v Smith* (28 NY3d 191 [2016]) precludes retroactive application of *Catu* to invalidate a sentence enhancement. Accordingly, defendant's original adjudication as a second violent felony offender was lawful.

As for defendant's appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 6, 2017

CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4180 Ian Pai, Index 650427/16
Plaintiff-Appellant-Respondent,

-against-

Blue Man Group Publishing, LLC, et al.,
Defendants-Respondents-Appellants,

Blue Man Toronto, LLC,
Defendant.

_____

Piliero & Associates, PLLC, New York (Robert D. Piliero of counsel), for appellant-respondent.

Frankfurt Kurnit Klein & Selz, PC, New York (Toby M. Butterfield of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered September 29, 2016, which, to the extent appealed from, granted defendants' motion to dismiss plaintiff's sixth cause of action for fraud, and denied defendants' motion to dismiss the remaining causes of action, except to the extent that those causes of action were barred in part by the applicable statutes of limitations, unanimously affirmed, without costs.

Although plaintiff's breach of fiduciary duty claim grounded in fraud was timely (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139-140 [2009]), the court properly limited plaintiff's recovery to the applicable statute of limitations

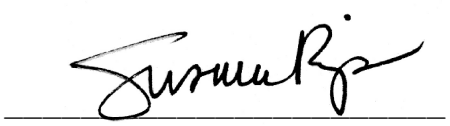
periods, which here is six years (*see e.g. Carlingford Ctr. Point Assoc. v MR Realty Assoc.*, 4 AD3d 179, 180 [1st Dept 2004]; *Chiu v Man Choi Chiu*, 71 AD3d 621 [2d Dept 2010]). Contrary to plaintiff's arguments, his stale claims for underpaid royalties during the fiduciary relationship but prior to the limitations periods were not revived by tolling or equitable estoppel.

The court properly determined that plaintiff's allegations for his breach of fiduciary duty claim were sufficient to defeat the motion to dismiss (*see generally Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The statute of frauds did not bar that claim or plaintiff's remaining claims for royalties based upon the live performances, which were not covered under any agreement. Nevertheless, inasmuch as plaintiff's fraud claim was duplicative of the breach of fiduciary duty claim, it was properly dismissed (*see Frydman & Co. v Credit Suisse First Boston Corp.*, 272 AD2d 236, 238 [1st Dept 2000]).

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: JUNE 6, 2017



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Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4181 Beverly Hemmings, Index 601507/08
Plaintiff-Appellant,

-against-

Leatrice Sutton, as Administratrix
of the Estate of Percy Sutton,
Defendant-Respondent.

Law Office of Andrea M.A. Osborne, Chestnut Ridge (Andrea M.A. Osborne of counsel), for appellant.

Law Office of Basem Ramadan LLC, New York (Basem Ramadan and Alan D. Bowman of the bar of the State of New Jersey, admitted pro hac vice of counsel), for respondent.

Judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered December 17, 2015, dismissing with prejudice the complaint seeking to enforce a promissory note, and bringing up for review an order, same court and Justice, entered on or about September 30, 2015, which, after a bench trial, directed that judgment be entered in favor of defendant, unanimously affirmed, with costs.

The trial court properly concluded that the note plaintiff sought to enforce was void due to a lack of consideration (*see* UCC 3-408; *Samet v Binson*, 122 AD3d 710, 711 [2d Dept 2014]). Plaintiff testified that the note was given in exchange for past economic, technological, and financial assistance, but failed to

submit any documentary evidence of such work. The trial court found the claim to be not credible, and that finding is entitled to deference on appeal (*see Matter of Metropolitan Transp. Auth.*, 86 AD3d 314, 320 [1st Dept 2011]; *see also New Media Holding Co., L.L.C. v Kagalovsky*, 118 AD3d 68, 78 [1st Dept 2014]).

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: JUNE 6, 2017

CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4182 Rafaela Fontecchio, Index 307558/12
Plaintiff-Respondent,

-against-

Bronx 656 Food Corp., et al.,
Defendants-Appellants,

John Catsimatidis, et al.,
Defendants-Respondents.

_____

McAndrew, Conboy & Prisco, LLP, Melville (Michael J. Prisco of counsel), for appellants.

Office of Nicholas C. Katsoris, New York (James Schmitz of counsel), for John Catsimatidis and Apple Group, respondents.

Millilo & Grossman, Flushing (Francesco J. Pomara of counsel), for Rafaela Fontecchio, respondent.

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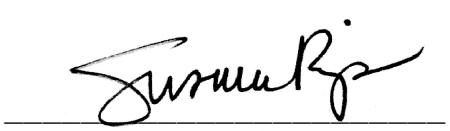
Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about July 28, 2016, which, to the extent appealed from, denied defendants Bronx 656 Food Corp. and Fine Fare Supermarket's (together, Fine Fare) motion for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

The lease between Fine Fare and the owner of the shopping center does not explicitly state that Fine Fare was responsible for maintaining the parking lot in which plaintiff alleges she was injured after stepping into a hole. However, it does make

Fine Fare responsible for "appurtenances" to the demised premises (*see Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 267 [1st Dept 2009]). On this record, an issue of fact exists as to whether the parking lot was an "appurtenance."

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

ENTERED: JUNE 6, 2017



CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4183 The People of the State of New York, Ind. 4757/13
Respondent,

-against-

Bonta Smith,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Ronald Zweibel, J. at suppression hearing; Daniel P. Fitzgerald, J. at plea and sentencing), rendered February 20, 2015 , unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 6, 2017

CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4184 Christopher Varona, Index 104177/11
Plaintiff-Appellant,

-against-

Brooks Shopping Centers LLC,
et al.,
Defendants-Respondents,

Macy's Retail Holdings, Inc.,
Defendant.

_____

Sobo & Sobo, L.L.P., Middletown (Michael D. Wolff of counsel), for appellant.

Cerussi & Spring, P.C., White Plains (Richard D. Bentzen of counsel), for Brooks Shopping Center LLC, respondent.

Law Office of Curtis, Vasile, Mehary & Dorry PC, Merrick (Patricia M. D'Antone of counsel), for the Whiting-Turner Contracting Company, respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered February 4, 2016, which granted defendants Brooks Shopping Centers LLC's and the Whiting-Turner Contracting Company's motions for summary judgment dismissing the complaint as against them, and denied plaintiff's motion for summary judgment as to liability on the Labor Law § 240(1) cause of action, unanimously affirmed, without costs.

Plaintiff failed to establish his entitlement to application of the *Noseworthy* doctrine (*Noseworthy v City of New York* (298 NY

76 [1948]), because he did not demonstrate by clear and convincing evidence that he suffered amnesia and that there was a causal relationship between defendants' alleged fault and his alleged amnesia (*see Schechter v Klanfer*, 28 NY2d 228 [1971]; *Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198 [1st Dept 2010]). In any event, the parties were on equal footing as to their knowledge of the facts of the incident (*see Lynn v Lynn*, 216 AD2d 194 [1st Dept 1995]; *Gayle v City of New York*, 256 AD2d 541 [2d Dept 1998]).

Defendants' evidence suggests that, while working on a scaffold, plaintiff suffered a seizure and collapsed. Plaintiff failed to raise a triable issue of fact whether Labor Law § 240(1) was violated. It is undisputed that he did not fall off the scaffold, and he submitted no evidence that his injuries were the "direct consequence" of a failure to provide adequate protection against an elevation-related risk (*see Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015]). While plaintiff was working at an elevated level, his injuries did not occur as the result of a risk posed by the elevation (*see e.g. Reyes v Magnetic Constr., Inc.*, 83 AD3d 512 [1st Dept 2011]). Contrary to plaintiff's argument, given his own testimony that he had been walking on the scaffold before he lost consciousness, it

is not reasonable to infer from the testimony of a coworker who did not directly witness the accident that he fell from the top of the wall onto the scaffold.

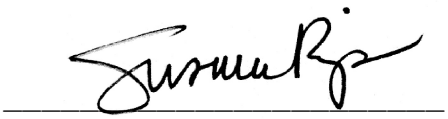
Defendants demonstrated with respect to the Labor Law § 200 and common-law negligence claims that they did not supervise or control plaintiff's work (*see Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 626 [1st Dept 2015]). Defendant Brooks Shopping Centers LLC's regular inspection of the site to check on the progress of the work, and its authority to stop any work perceived to be unsafe, do not rise to the requisite level of supervision under Labor Law § 200 (*Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 608 [1st Dept 2015]).

Industrial Code (12 NYCRR) § 23-5.1(b) is not sufficiently specific to serve as a predicate for a Labor Law § 241(6) claim (*Kosovrasti v Epic [217] LLC*, 96 AD3d 695, 696 [1st Dept 2012]). 12 NYCRR 23-1.7(b) does not apply, because plaintiff did not fall through a "hazardous opening" in the scaffold (*Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]; *see also Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 714 [2d Dept 2007]). Nor is there evidence that plaintiff tripped over any materials, debris or equipment (12 NYCRR 23-1.7[e]). As plaintiff did not fall from the scaffold, a missing rail, in violation of 12 NYCRR

23-5.1(j)(1), was not a proximate cause of his injuries. Plaintiff improperly cites 12 NYCRR 23-1.16 for the first time on appeal (*see Kosovrasti*, 96 AD3d at 696). In any event, that provision, which sets standards for safety belts, harnesses, and lines, does not apply, because plaintiff was not provided with any of those devices (*Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337 [1st Dept 2006]).

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

ENTERED: JUNE 6, 2017



CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4185 Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4, Plaintiff-Appellant, Index 380995/07

-against-

Frances Thompson, Defendant-Respondent,

New York City Transit Adjudication Bureau, et al., Defendants.

_____

Fein, Such, & Crane, LLP, Westbury (Michael S. Hanusek of counsel), for appellant.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about December 9, 2015, which denied plaintiff Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4's (Deutsche Bank) motion to vacate its default and restore the action to the calendar, unanimously affirmed, without costs.

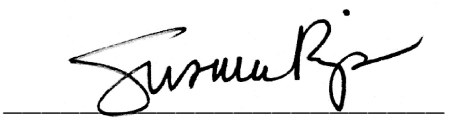
The motion court determined that the discrepancy between the physical description of the person personally served, according to the affidavit of service, and that of defendant warranted a traverse hearing (*see Matter of St. Christopher-Ottilie* (169 AD2d 690, 691 [1st Dept 1991]). After several

adjournments, Deutsche Bank failed to appear at the final scheduled hearing.

Even if Deutsche Bank has provided a reasonable excuse for default based on law office failure (*see Dokmecian v ABN AMRO N. Am.*, 304 AD2d 445, 445 [1st Dept 2003]), the motion to restore was properly denied. Deutsche Bank provided no proof on the motion that it could have prevailed at the traverse hearing.

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

ENTERED: JUNE 6, 2017



CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4186N In re Allstate Insurance Company, Index 260647/11
Petitioner-Appellant,

-against-

Almeta Howell,
Respondent-Respondent.

_____

Bruno, Gerbino & Soriano, LLP, Melville (Nathan Shapiro of counsel), for appellant.

Law Offices of Nicole R. Kilburg, New York (Nicole R. Kilburg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about April 14, 2016, which denied petitioner's motion to permanently stay arbitration, unanimously reversed, on the law, without costs, and the motion granted.

Petitioner seeks to permanently stay an underinsured motorist benefits arbitration proceeding brought by respondent in New York.

The motion court erred in dismissing the motion to stay as untimely. The time restrictions set forth at CPLR 7503(c) do not apply where, as here, respondent waived her right to arbitrate by initiating litigation on the same claims (*see Sherrill v Grayco Bldrs., Inc.*, 64 NY2d 261, 272-273 [1985]; *Matter of Waldman v Mosdos Bobov, Inc.*, 72 AD3d 983, 983 [2d Dept 2010], *lv*

denied 15 NY3d 715 [2010]). "[O]nce waived, the right to arbitrate cannot be regained, even by the respondent's failure to [timely] seek a stay of arbitration" (*Waldman*, 72 AD3d at 984; *see also Ryan v Kellogg Partners Inst. Servs.*, 58 AD3d 481, 481-482 [1st Dept 2009]).

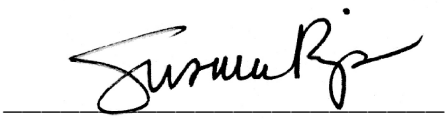
That petitioner participated, under objection, in the arbitration is immaterial. Even if the arbitration had been completed and an award issued, the award would be subject to vacatur on the ground that the arbitrator lacked authority to conduct the arbitration (*see* CPLR 7511[b][1][iii]; *Waldman*, 72 AD3d at 984).

Respondent's argument that an evidentiary hearing is required is likewise unavailing. Respondent submitted evidence suggesting that petitioner acted in bad faith by requesting a change of venue from South Carolina to New York and then claiming that New York was not a proper venue (*see Matter of Hertz Corp. v Holmes*, 106 AD3d 1001, 1002-1003 [2d Dept 2013]; *Matter of Liberty Mut. Ins. Co. v Mohabir*, 68 AD3d 435, 435 [1st Dept 2009]). But even assuming there was an agreement between counsel to proceed in New York, it appears to have been an agreement to litigate - *not* arbitrate - in New York, which only points to continuing respondent's 2012 action to the extent it seeks a

court declaration that petitioner is required to provide coverage. At any rate, the agreement (to the extent there was one) was not binding on the parties because it was not memorialized in a signed writing (*see* CPLR 2104; *Greenidge v City of New York*, 179 AD2d 386, 387 [1st Dept 1992]).

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

ENTERED: JUNE 6, 2017



CLERK

Renwick, J.P., Richter, Feinman, Gische, Kahn, JJ.

4187N Ian Jack Miller, Index 155512/15
Plaintiff-Respondent,

-against-

Zara USA, Inc.,
Defendant-Appellant,

Dilip Patel, et al.,
Defendants.

_____

Littler Mendelson P.C., New York (David S. Warner of counsel), for appellant.

Sanford Heisler, LLP, New York (David Tracey of counsel), for respondent.

_____

Order, Supreme Court, New York County (David Benjamin Cohen, J.), entered on or about August 8, 2016, which granted plaintiff's motion for a protective order to preclude defendant from accessing plaintiff's personal documents on a company-owned laptop, unanimously modified, on the law, to deny so much of the motion as sought protection of attorney-client privilege, to direct plaintiff to produce to Supreme Court all items in his privilege log in which he asserts attorney work product protection, and to remand to Supreme Court for in camera review and determination of whether such documents are in fact protected attorney work product, and as so modified, affirmed, without

costs.

Application of the factors set forth in *In re Asia Global Crossing, Ltd.* (322 BR 247, 257 [Bankr, SD NY 2005]) indicates that plaintiff lacked any reasonable expectation of privacy in his personal use of the laptop computer supplied to him by defendant Zara USA, Inc. (Zara), his employer, and thus lacked the reasonable assurance of confidentiality that is foundational to attorney-client privilege (*see Peerenboom v Marvel Entertainment, LLC*, 148 AD3d 531, 531-532 [1st Dept 2017]; *In re Asia Global Crossing, Ltd.* (322 BR 247, 257 [Bankr, SD NY 2005]). Among other factors, Zara's employee handbook, of which plaintiff, Zara's general counsel, had at least constructive knowledge (*see Peerenboom*, 148 AD3d at 532; *Scott v Beth Israel Med. Ctr. Inc.*, 17 Misc 3d 934, 942 [Sup Ct, NY County 2007]), restricted use of company-owned electronic resources, including computers, to "business purposes" and proscribed offensive uses. The handbook specified that "[a]ny data collected, downloaded and/or created" on its electronic resources was "the exclusive property of Zara," emphasized that "[e]mployees should expect that all information created, transmitted, downloaded, received or stored in Zara's electronic communications resources may be accessed by Zara at any time, without prior notice," and added

that employees "do not have an expectation of privacy or confidentiality in any information transmitted or stored in Zara's electronic communication resources (whether or not such information is password-protected)."

Plaintiff avers, and defendant does not dispute, however, that, while reserving a right of access, Zara in fact never exercised that right as to plaintiff's laptop and never actually viewed any of the documents stored on that laptop. Given the lack of any "actual disclosure to a third party, [plaintiff's] use of [Zara's computer] for personal purposes does not, standing alone, constitute a waiver of attorney work product protections" (*Peerenboom*, 148 AD3d at 532; *see Bluebird Partners v First Fid. Bank, N.J.*, 248 AD2d 219, 225 [1st Dept 1998], *lv dismissed* 92 NY2d 946 [1998]). We accordingly modify to the extent indicated (*see Peerenboom*, 148 AD3d at 531-532).

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

ENTERED: JUNE 6, 2017

CLERK

Andrias, J.P., Moskowitz, Feinman, Gische, Gesmer, JJ.

3256 The Alliance to End Chickens as Kaporos, et al., Plaintiffs-Appellants, -against- The New York City Police Department, et al., Defendants-Respondents, Congregation Beis Kosov Miriam Lanynski, et al., Defendants. Index 156730/15

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Law Offices of N.C. Marino, New York (Nora Constance Marino of counsel), for appellants.

Cyrus R. Vance, Jr., District Attorney, New York (Damion K.L. Stodola of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered September 24, 2015, affirmed, without costs.

Opinion by Gische, J. All concur except Andrias, J.P. and Gesmer, J. who dissent in a Opinion by Gesmer, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Karla Moskowitz
Paul G. Feinman
Judith J. Gische
Ellen Gesmer, JJ.

3256
Index 156730/15

_____x

The Alliance to End Chickens as Kaporos, et al.,
Plaintiffs-Appellants,

-against-

The New York City Police Department, et al.,
Defendants-Respondents,

Congregation Beis Kosov Miriam Lanynski, et al.,
Defendants.

_____x

Plaintiff appeal from the order of the Supreme Court, New York County (Debra A. James, J.), entered September 24, 2015, which upon converting the plenary action as against the City defendants to a CPLR article 78 proceeding granted the City defendants' motion to dismiss the proceeding.

Law Office of Nora Constance Marino, Great Neck (Nora Constance Marino of counsel) for appellants.

Zachary W. Carter, Corporation Counsel, New York (Damion K. L. Stodola and Jane L. Gordon of counsel), for respondents.

GISCHE, J.

The central issue raised by this appeal is whether plaintiffs have a right, via a writ of mandamus, to compel the municipal defendants to enforce certain laws related to preserving public health and preventing animal cruelty, which they allege are violated by Orthodox Jews who perform the religious practice of Kaporos. We affirm Supreme Court's dismissal of the proceeding against the City defendants, which include the New York City Police Department (NYPD), NYPD's Commissioner and the New York City Department of Health and Mental Hygiene (DOH) (collectively City), because mandamus does not lie, where as here, plaintiffs seek to compel the enforcement of laws and regulations implicating discretionary actions (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]).[1] [2]

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[1]This action was originally styled as a plenary action against individual defendants and the City defendants. Supreme Court appropriately converted the relief against the City defendants into an article 78 proceeding seeking mandamus.

[2]Plaintiffs also sought a preliminary injunction against the practice of Kaporos, pending resolution of the underlying nuisance action. Supreme Court denied that relief. Although plaintiffs originally appealed from that portion of the order, they subsequently stipulated to withdraw that issue from the appeal.

The individual plaintiffs reside, work or travel within Brooklyn neighborhoods where the non-City defendants engage in the Kaporos ritual every year before Yom Kippur. Plaintiff the Alliance to End Chickens as Kaporos, of which some individual plaintiffs are members, is associated with nonparty United Poultry Concerns, a non profit organization promoting compassionate and respectful treatment of domestic fowl. The non-City defendants are individual Orthodox Jewish rabbis, members of yeshivas or other Orthodox Jewish religious institutions, and several Orthodox Jewish religious institutions, all based in Kings County.

Kaporos is a customary Jewish ritual practiced by the non-City defendants, who are ultra Orthodox. It dates back to biblical times and occurs only once a year, the few days immediately preceding the holiday of Yom Kippur. Adherents of Kaporos believe this ritual is required by religious law and that it brings atonement and redemption. The ritual entails grasping a live chicken and swinging the bird three times overhead while saying a prayer that symbolically asks God to transfer the practitioners' sins to the birds. Upon completion of the prayer, the chicken is killed in accordance with the kosher dietary laws, by slitting the chicken's throat. Its meat is then required to be donated to the poor and others in the community. Each year

thousands of chickens are sacrificed in furtherance of this ritual and the practice takes place outdoors, on public streets in Brooklyn, and in full public view.

Plaintiffs allege that the manner in which Kaporos is practiced is a health hazard and cruel to the animals. They decry the practice as "party-like" and having a "carnival" atmosphere. They contend the practice involves the erection of makeshift slaughter houses in which "[d]ead chickens, half dead chickens, chicken blood, chicken feathers chicken urine, chicken feces [and] other toxins . . . consume the public streets" (amended complaint ¶ 168). They also allege that there is blatant animal abuse and cruelty (*id.* at ¶ 174). It is plaintiffs' contention that Kaporos is a public nuisance to all those who, like them, pass through these locations for day to day activities, including going home, to work, or to shop. Their goal is to stop this practice. They argue that there are other, better ways for Kaporos adherents to practice their faith and express their devotion, including by using coins instead of live chickens. They denounce Kaporos as "a far cry from a solemn religious ritual." These claims are disputed by the non-City defendants, who otherwise claim that they have a constitutional right to practice Kaporos.

In seeking the remedy of mandamus against the City

defendants, plaintiffs claim that this ritual violates numerous laws, rules and regulations, including Agriculture and Markets Law §§ 96-a; 96-b [requiring licensing of places where fowls are slaughtered or butchered]; Labor Law § 133(2)(o) [prohibiting employment of a minor in a slaughterhouse]; 1 NYCRR 45.4 [sanitary precautions against avian influenza when entering premises containing live poultry]; Administrative Code of City of NY § 18-112(d) [no slaughterhouse in parts of Brooklyn]; New York City Health Code (24 RCNY) § 153.09 [no blood, offensive animal matter, or dead animals to be put on city streets]; former New York City Health Code (24 RCNY) § 153.21(a) [persons contracted or undertaken to remove dead or diseased animals must do so promptly]; New York City Health Code (24 RCNY) § 161.11 [prevention of animal nuisances]; New York City Health Code (24 RCNY) § 161.19[c] [live poultry intended for sale prohibited on the same premises as a multiple dwelling]; New York City Health Code § 161.19(b) [areas of slaughter to be kept clean and free of animal nuisances]; Agriculture and Markets Law §§ 353, 371 [prohibiting animal cruelty]; Agriculture and Markets Law §§ 355 [prohibiting abandonment of animals to die in a street]; Agriculture and Markets Law § 359 [prohibiting carrying animals in a cruel manner]; former New York City Health Code (24 RCNY) §161.03(a) [prohibition against animal blood, feces and body

parts on pubic sidewalks]; and New York City Department of Sanitation Rules and Regulations §§ 16B118(6) [no offensive animal material shall be allowed to fall on a person or run into any street or public place]).

Plaintiffs claim that they are entitled to have the courts compel the City to enforce these laws. They seek to have this Court direct the City to "enforce the law, issue summonses, issue arrests, and issue violations when such situations are warranted" (amended complaint ¶184).[3]

Article 78 is the codification of the common-law writs, including a writ of mandamus to compel (CPLR 7801, 7803[1]). Mandamus to compel is a judicial command to an officer or body to perform a specified ministerial act that is required by law to be performed. It does not lie to enforce a duty that is discretionary (*Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d 88, 96 [1981]). The availability of mandamus to compel the

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[3] We do not agree with the dissent's conclusion that plaintiffs are not seeking to compel a particular action, but seek only to compel the City defendants to investigate. While the pleadings broadly claim such relief along with other relief, the facts plaintiffs allege simply belie any claim that they only seek the limited relief of an investigation. Plaintiffs concede that investigations were, in fact, made of their complaints, albeit, in their opinion, belatedly. Moreover, they admit that the City defendants were fully aware of the circumstances attendant to Kaporos, but failed to take the action they believe is necessary. It is clear that plaintiffs simply disagree with how the City defendants have acted.

performance of a duty does not depend on the applicant's substantive entitlement to prevail, but on the nature of the duty sought to be commanded – i.e., mandatory, non-discretionary action (*id.* at 97). A ministerial act is best described as one that is mandated by some rule, law or other standard and typically involves a compulsory result (*New York Civ. Liberties Union*, 4 NY3d at 184). Discretionary acts, on the other hand, are not mandated and involve the exercise of reasoned judgment, which could typically produce different acceptable results (*id.*). Mandamus is not available to compel an officer or body to reach a particular outcome with respect to a decision that turns on the exercise of discretion or judgment. In other words, mandamus will lie to compel a body to perform a mandated duty, not how that duty shall be performed (*Klostermann v Cuomo*, 61 NY2d 525, 539-540 [1984]). It lies "only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (*New York Civ. Liberties Union*, 4 NY3d at 184).

Mandamus is generally not available to compel government officials to enforce laws and rules or regulatory schemes that plaintiffs claim are not being adequately pursued (*see e.g. Jones v Beame*, 45 NY2d 402, 409 [1978], citing *People ex rel. Clapp v Listman*, 40 Misc 372 [Sup Ct, Onondaga Special Term 1903] [mandamus does not lie to compel enforcement of Sunday "blue"

laws]; *Matter of Walsh v LaGuardia*, 269 NY 437 [1936] [no right to compel Mayor and Police Commissioner to prohibit operators of nonfranchised bus routes]; *Matter of Perazzo v Lindsay*, 30 AD2d 179 [1st Dept 1968], *affd* 23 NY2d 764 [1968] [no right to compel enforcement of laws governing operation hours of coffee houses]; *Matter of Morrison v Hynes*, 82 AD3d 772 [2d Dept 2011] [cannot compel the initiation of a prosecution]; *Matter of Bullion v Safir*, 249 AD2d 386 [2d Dept 1998] [no mandamus to compel police to make arrests]). This reflects the long-standing public policy prohibiting the courts from instructing public officials on how to act under circumstances in which judgment and discretion are necessarily required in the fair administration of their duties.

We hold that the laws which plaintiffs seek to compel the City defendants to enforce in this action involve the judgment and discretion of those defendants. This is because the laws themselves implicate the discretion of law enforcement and do not mandate an outcome in their application. With the exception of Agriculture and Markets Law § 371 (addressed separately below), there is nothing in the plain text of any of the laws and regulations relied upon by plaintiffs to suggest that they are mandatory. Nor is there anything in the legislative history supporting a conclusion that any of the implicated laws and

regulations are mandatory. There is no express provision designating Kaporos as a prohibited act. There are disputes about whether the conduct complained of is in violation of the implicated laws and regulations. There are disputes about whether and to what extent the implicated laws can be enforced without violating constitutional rights belonging to the non-City defendants. Rituals involving animal sacrifice are present in some religions and although they may be upsetting to nonadherents of such practice, the United States Supreme Court has recognized animal sacrifice as a religious sacrament and decided that it is protected under the Free Exercise Clause of the Constitution, as applied to the states through the Fourteenth Amendment (*Church of the Lukumi Babalu Aye, Inc. v Hialeah*, 508 US 520, 531 [1993]).

Consequently, the decision whether and how to enforce these laws and regulatory provisions allegedly violated during Kaporos implicates the reasoning and discretion of the City defendants and the law enforcers. None of the laws or regulations plaintiffs rely on preclude the City defendants from deciding whether or not to enforce those laws in the context of Kaporos. Plaintiffs do not have a "clear legal right" to dictate which laws are enforced and how, or against whom. Determining which laws and regulations might be properly enforced against the non-City defendants without infringing upon their free exercise of

religion involves the exercise of reasoned judgment on the part of the City defendants. The outcome cannot be dictated by the court through mandamus.

We also reject any argument that Agriculture and Markets Law § 371 may provide a basis for the court to mandate that the police either issue an appearance ticket, or summon, or arrest and bring before the court, the non-City defendants for having practiced animal cruelty.

Agriculture and Markets Law § 371 provides in pertinent part that:

> "A constable or police officer *must*, and any agent or officer of any duly incorporated society for the prevention of cruelty to animals may issue an appearance ticket pursuant to section 150.20 of the criminal procedure law, summon or arrest, and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of article twenty-six of the agriculture and markets law" (emphasis added).

Notwithstanding the use of the word "must" in the statute,[4] it is still subject to the definition of animal cruelty as otherwise defined in the Agriculture and Markets Law. Agriculture and Markets Law § 350 defines "torture" or "cruelty"

[4]The "must" language pertains only to constables or the police. Consequently, by its terms it cannot support a claim for mandamus against the DOH.

to include "unjustifiable physical pain, suffering or death." Thus, a determination of whether a practice in killing animals is "unjustifiable" implicates discretion and is not susceptible to a predictable, mandated outcome. For that reason, the parties' dispute concerning whether plaintiffs made complaints to law enforcement is irrelevant because enforcement of this statute is discretionary. The dissent's reasoning that a hearing should be held to determine whether the killing of these birds is "justified" proves the point. There is no ministerial determination to be made about the justification for killing chickens. Thus, the City defendants' decision of whether action is necessary, and if so, the nature of such action, is inherently discretionary. Opening up claims of this nature to discovery and possible trials would be an unjustified intrusion into the everyday affairs of the City defendants. Consequently, since the City defendants may exercise their judgment in deciding whether there has been a violation of Agriculture and Markets Law § 371, they cannot be compelled to act a certain way (*see Klostermann* at 540).

Matter of Jurnove v Lawrence (38 AD3d 895 [2d Dept 2007]), relied upon by plaintiffs, does not dictate a different result. The issue in *Jurnove* was that the police had adhered to an internal policy of referring all article 26 violations, most of

which involved animal cruelty, to the local society for prevention of cruelty to animals (SPCA) (*Jurnove* at 896). The court held that a hearing was necessary on the issue of whether the officers had "abdicated their statutorily-imposed duty" by routinely referring the claims to the SPCA without considering them at all (*id.*). At bar, however, the plaintiffs are really challenging the core decision by law enforcement not to arrest or take other legal action against the non-City defendants for what plaintiffs believe are violations of law. In other words, they are seeking to drive a particular outcome. Notably, the court in *Jurnove* observed that "[a] subordinate body can be directed to act, but not how to act," noting further that law enforcement has "broad discretion" in allocating resources and devising enforcement strategies (*id.*). This statement of law is harmonious with controlling Court of Appeals precedent, reminding courts "to avoid . . . the fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches" (*Klostermann*, 61 NY2d at 541).

Plaintiffs' own claims demonstrate that the City defendants have not been derelict in their duties. Although plaintiffs deride NYPD for, and accuse it of, aiding and abetting the non-

City defendants by enclosing the Kaporos area with barriers, placing orange cones, providing generators to supply light for the area and erecting "no parking" signs, these actions contain the event and maintain order, each of which is a proper exercise of the NYPD's law enforcement obligations. As for DOH, it too has acted on plaintiffs' complaints, by sending an investigator. Notwithstanding plaintiffs' complaint that the investigator arrived after Kaporos ended, plaintiffs have no clear right to dictate when, how, or if at all, such investigation takes place.

Accordingly the order of the Supreme Court, New York County (Debra A. James, J.), entered September 24, 2015, which, upon converting the plenary action as against the City defendants to a CPLR article 78 proceeding, granted the City defendants' motion to dismiss the proceeding, should be affirmed, without costs.

All concur except Andrias, J.P. and Gesmer, J. who dissent in an Opinion by Gesmer J.

GESMER, J. (dissenting)

Because I believe that plaintiffs have stated a claim for mandamus relief sufficient to survive a motion to dismiss, I respectfully dissent.

Plaintiff Alliance to End Chickens as Kaporos (Alliance), of which some individual plaintiffs are members, advocates for the substitution of coins, or other non-animal symbols of atonement, for chickens in the religious practice of Kaporos.[1] In this plenary action, plaintiffs seek to enjoin the performance of the religious ritual known as Kaporos to the extent that it is practiced with live chickens. As plaintiffs point out, other Orthodox Jewish communities use coins in place of live chickens, and plaintiffs do not oppose this practice.

As we must on a motion to dismiss, I accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into a cognizable legal theory (CPLR 3211; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). I have also considered plaintiffs' affidavits, which may be submitted on a

[1]Because the motion court converted the claims against the City defendants into an article 78 proceeding, the City defendants are denominated respondents, and the plaintiffs are denominated petitioners in that part of this matter. For simplicity, they are referred to as defendants and plaintiffs throughout this opinion.

motion to dismiss to remedy inartful pleading of potentially meritorious claims (*id.* at 88).

Plaintiffs claim that, for as many as four days before Yom Kippur, truckloads of crates overcrowded with live and some dead chickens are left on the streets of Brooklyn, with as many as 16 birds per crate, stacked up to 10 crates high. In the days before the birds are slaughtered, they remain crammed into their cages, are not given food or water, are not protected from the elements or from feces and urine falling from the crates above, and sometimes fall out of the crates onto the public street. Birds are injured during the ritual, and their throats are frequently cut incorrectly, to the extent that the carotid artery is not completely severed and the birds die an unnecessarily slow and painful death. The slaughter takes place on public streets in makeshift open-air slaughterhouses, and dead and nearly dead birds, blood, excrement, used tarps and gloves, and other by-products of the slaughter are left on the street for days afterwards. This creates an unbearable stench and a health hazard both before and after the ritual. Children are present during, and sometimes assist in, the slaughter. Plaintiffs' toxicology expert states in his affidavit that these conditions create a risk of public exposure to, and spreading of, Salmonella, Campylobacter, strains of influenza, and other

pathogens, toxins, and biohazards, which can cause respiratory complications, dermatitis, and infectious diseases in humans. The non-City defendants do not seek or obtain required permits, and there is no oversight and no system for cleanup. At the time the matter was argued before the motion court, the non-City defendants had purchased 50,000 live chickens for the approaching holiday. Plaintiffs have complained repeatedly about the situation and obtained no meaningful response.

Plaintiffs seek mandamus relief against the City defendants, claiming that the City defendants have failed and refused to act on their complaints, and that the police actively assist the non-City defendants by blocking off streets and allowing practitioners to use Police Department generators, barricades, traffic cones, and "no parking" signs during the event.

Plaintiffs claim that, by their actions, the non-City defendants have violated, and the City defendants have failed to enforce and/or have "aided and abetted" the non-City defendants in violating, some 17 state and local statutes, regulations, and rules regarding the keeping and slaughter of animals, public health and safety, and animal cruelty, including provisions of the Agriculture and Markets Law, the Labor Law, the New York City Health Code, the Rules and Regulations of the New York City Department of Sanitation, and the rules of the New York City

Street Activity Permit Office. They further allege that defendants have unreasonably interfered with the rights of plaintiffs and the public, and have caused a public nuisance. Plaintiffs seek a permanent injunction against the non-City defendants to prevent them from erecting slaughterhouses and slaughtering chickens on public streets and sidewalks. Plaintiffs seek an order of mandamus against the City defendants, compelling them to

> "uphold the law, properly issue summonses where warranted, properly issue violations where warranted, properly engage in arrests where warranted [in connection with Kaporos] . . . [and] preventing the . . . City Defendants from encouraging, assisting, and participating in . . . Kaporos . . . [and] from aiding and abetting the [non-City] Defendants to engage in illegal acts . . . and improperly blocking off specific streets and sidewalks."

By order entered September 24, 2015, the motion court converted the plenary action as against the City defendants into a proceeding pursuant to article 78 of the Civil Practice Law and Rules, and granted the City defendants' motion to dismiss it as against them. The motion court based its dismissal as against the City defendants on its finding that plaintiffs had failed to allege that any of the City defendants had ever tried to file a complaint with regard to a violation of the Agriculture and Markets Law or that the police ever refused to accept such a complaint. As discussed below, the record does not support this

finding.

Section 7803 of the Civil Practice Law and Rules permits article 78 petitions in the nature of mandamus to determine "whether the body or officer failed to perform a duty enjoined upon it by law" (CPLR 7803[1]). Mandamus lies "only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]). "[I]f a statutory directive is mandatory, not precatory, it is within the courts' competence to ascertain whether an administrative agency has satisfied the duty that has been imposed on it by the Legislature and, if it has not, to direct that the agency proceed forthwith to do so" (*Klostermann v Cuomo*, 61 NY2d 525, 531 [1984]). It is the "function of mandamus to compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so" (*id.* at 540). However, courts must not intrude into the "broad legislative and administrative policy beyond the scope of judicial correction" (*Jones v Beame*, 45 NY2d 402, 408 [1978]). Accordingly, "rarely, if ever, should mandamus lie to command the Commissioner of Public Safety to enforce the Sunday 'blue' laws or the ordinance forbidding the riding of bicycles on the sidewalk" (*id.* at 409). Mandamus is not available to compel a general course of conduct by an official

(*Matter of Walsh v LaGuardia*, 269 NY 437, 442 [1936]; *New York Civ. Liberties Union*, 4 NY3d at 184).

The motion court dismissed the proceeding as against the City defendants on two bases, both of which I conclude are faulty.

First, it found that the duties at issue are largely discretionary and not ministerial, and thus mandamus will not lie. However, where "the legislation in question established a standard of conduct which executive officers must meet unless or until the legislative body changes it, a dispute over compliance is generally considered justiciable because the courts can compel performance of the statutory command" (*Matter of Natural Resources Defense Council v New York City Dept. of Sanitation*, 83 NY2d 215, 220 [1994]). "The character of the duty, and not that of the body or officer, determines how far performance of the duty may be enforced by mandamus" (*Klostermann*, 61 NY2d at 540).

Here, the actions at issue are mandatory not discretionary. The DOH is required to enforce the Health Code (*New York City Coalition to End Lead Poisoning v Koch*, 138 Misc 2d 188, 191 [Sup Ct NY County 1987], *affd* 139 AD2d 404 [1st Dept 1988]). Similarly, pursuant to section 435(a) of the New York City Charter, the New York City Police Department "shall have the power and it shall be their duty" to, inter alia,

> "disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public streets, sidewalks, parks and places; . . . guard the public health, preserve order at . . . all public meetings and assemblages; subject to the provisions of law and the rules and regulations of the commissioner of traffic, regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health; remove all nuisances in the public streets, parks and places; . . . inspect and observe all places of public amusement . . . ; enforce and prevent the violation of all laws and ordinances in force in the city; and for these purposes to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crimes or offenses" (New York City Charter § 435[a]).

In addition, Agriculture and Markets Law § 371 directs that a "police officer must . . . issue an appearance ticket pursuant to section 150.20 of the criminal procedure law, summon or arrest, and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of article twenty-six of the agriculture and markets law." The mandatory nature of this provision is "a stark and surprising contrast to the permissive language found in the arrest provisions of the New York Criminal Procedure Law" (Jed L. Painter, 2016 Practice Commentaries, McKinney's Cons Laws of NY, Book 2B, Agriculture and Markets Law § 371, Cum Pocket Part at 166). The article which the police are enjoined to enforce prohibits animal cruelty, including torture, unjustifiable

injury, maiming, mutilating or killing of any animal, as well as depriving an animal of "necessary sustenance, food or drink," or causing such treatment (Agriculture and Markets Law § 353). It further provides that such acts constitute a class A misdemeanor punishable by imprisonment for not more than one year, a fine of up to one thousand dollars, or both (Agriculture and Markets Law § 353; *see also* Penal Law §§ 60.01[3][c]; 70.15; 80.05). While the majority is correct that section 350 of the Agriculture and Markets Law defines animal cruelty as the infliction of "unjustifiable" pain, suffering or death (Agriculture and Markets Law § 350[2]), it is not at all clear that the alleged treatment of poultry in the days leading up to Kaporos, or in improper slaughter, is justifiable. None of the defendants has claimed that violating the Agriculture and Markets Law, or any of the other laws plaintiffs claim the non-City defendants have violated, is necessary to carry out the religious ritual and thus justifiable. In addition, plaintiffs have raised questions about whether the slaughtered birds are donated for human consumption as the non-City defendants claim, and, if so, whether the proper precautions are being taken to ensure consuming them is safe, each of which also bears on whether the cruelty alleged is justifiable.

Thus, while the City defendants may exercise discretion in

the process of determining whether a violation has occurred and, if so, how to respond to it, they have, at a minimum, an obligation to determine whether or not a reported violation has occurred. Pursuant to section 371 of the Agriculture and Markets Law, if the police determine that they have probable cause to believe that a violation of article 26 of the Agriculture and Markets Law has occurred, they "must" issue an appearance ticket or summons or make an arrest.

Second, the motion court incorrectly found that plaintiffs had not shown that any of them had tried to file a complaint with regard to violations under the Agriculture and Markets Law. The motion court found that plaintiffs' failure to do so distinguished this case from *Matter of Jurnove v Lawrence* (38 AD3d 895 [2d Dept 2007]), in which the Second Department held that the petitioners had stated a mandamus cause of action where they asserted that the local police failed and refused to accept their complaints alleging violations of article 26 of the Agriculture and Markets Law.

This was error for two reasons. First, plaintiffs Rina Deych, Lisa Renz, and Steven and Vanessa Dawson submit affidavits in which they describe instances when they approached police officers personally or called the DOH, 911, and/or 311 to report animal cruelty and/or conditions posing a public health hazard,

and when they participated in or observed protests concerning Kaporos in the presence of the police. In each instance described, their action led to no meaningful action by the police to address the violations of the Agriculture and Markets Law or by the DOH to respond to complaints of hazardous conditions.

Second, the City defendants do not claim that they have ever made a determination that the acts reported do not constitute violations of the statutes, regulations and rules cited by plaintiffs, including article 26 of the Agriculture and Markets Law. I disagree with the majority that plaintiffs seek to direct the City defendants how to act. The complaint seeks to compel them to issue summonses or make arrests "where warranted," and to refrain from "aiding and abetting" the non-City defendants in violating the law. I view the complaint as seeking to compel the City defendants not to abdicate their mandatory duty.

Indeed, at least one plaintiff alleges that two police officers admitted to being "horrified" by what they saw when they arrived in response to her call, and that they were unaware of their obligation to enforce the Agriculture and Markets Law before she showed them the relevant sections. Nevertheless, she was told by the officers that they had "orders from on high not to disturb practitioners" of Kaporos. Other plaintiffs allege that their complaints to the police, the DOH, and/or 311 were not

addressed at all. One plaintiff claims that the DOH did not investigate the area in response to her complaint until two months after Kaporos had ended. Unsurprisingly, they found no evidence of the blood, fecal matter, used gloves and feathers she had reported being on the street. In my view, these claims are sufficient to withstand a motion to dismiss plaintiffs' mandamus claim. If, as plaintiffs allege, the City defendants have made a policy decision to take no action against Kaporos practiced with chickens on the public streets, without even an investigation, this would appear to be an abdication, rather than, as the majority states, a "proper exercise" of the City defendants' obligations. Moreover, if, as plaintiffs allege, the City defendants are assisting the non-City defendants to violate the law, their provision of supplies and assistance with street closures would not appear to be a proper exercise of discretion.[2]

The portion of plaintiffs' complaint that seeks to compel the City defendants to "uphold the law" seeks to compel a general course of conduct, for which mandamus relief is not available.

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[2]For example, plaintiffs allege that the City defendants "aid and abet" the non-City defendants' violation of Administrative Code of the City of New York section 18-112(d), which prohibits the erection of slaughterhouses "or any other . . . calling, which may be in anywise dangerous, obnoxious or offensive to the neighboring inhabitants" along Eastern Parkway or streets intersecting Eastern Parkway.

Accordingly, I agree that that portion of the complaint should be dismissed (*Walsh*, 269 NY at 442; *New York Civ. Liberties Union*, 4 NY3d at 184). However, "to the extent that plaintiffs can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties" (*Klostermann*, 61 NY2d at 541; *see also Matter of Jurnove*, 38 AD3d 895). Since, in my view, plaintiffs have established, at a minimum, that the police have a mandatory duty under the Agriculture and Markets Law, that portion of their complaint seeking an order compelling them to "issue summonses where warranted, . . . issue violations where warranted [and] properly engage in arrests where warranted" should not be subject to dismissal on this motion. Plaintiffs' allegation that the City defendants "encourag[e], assist[], and participat[e]" in the non-City defendants' violation of the specified laws and regulations is essentially an allegation that they have abdicated their duty to the point that they actively undermine a law they are mandated to enforce. Therefore, this is also an appropriate subject of mandamus relief (*see Matter of Jurnove*, 38 AD3d at 896).[3]

[3]I would also find that plaintiffs have a right to the relief they seek. The City defendants rely mainly on their argument that plaintiffs have failed to show a mandatory duty, and do not focus on whether plaintiffs have a legal right to the

Accordingly, I would vote to reverse the dismissal of plaintiffs' mandamus cause of action against the City defendants, except to the extent that plaintiffs seek to compel the City defendants to "uphold the law" as a general matter.

In reaching this conclusion, I intimate no view as to the merits of plaintiffs' claims but I would permit them to proceed with discovery and a determination on the merits. Furthermore, I am by no means taking lightly the constitutional issues implicated by governmental involvement in religious activities. Plaintiffs' claims are all predicated on their allegations that the challenged acts take place in public places, on public streets and sidewalks, not within the confines of a religious institution or on its grounds (*cf. Church of the Lukumi Babalu Aye, Inc. v Hialeah*, 508 US 520 [1993] [invalidating laws which barred religious practice of animal sacrifice, even if

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relief they seek. Plaintiffs clearly have a right to the relief they seek in the same sense that the petitioner National Resources Defense Council had a right to seek compliance with a local law requiring the Department of Sanitation to establish a recycling program in *Matter of Natural Resources Defense Council v New York City Dept. of Sanitation* (83 NY2d 215 [1994]) and petitioner citizens had a right to have their complaints of animal cruelty responded to by police in *Matter of Jurnove v Lawrence* (38 AD3d 895).

practiced in private]). It appears that a court could grant the relief that plaintiffs seek without infringing on religious freedom.

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

ENTERED: JUNE 6, 2017

CLERK