CORRECTED ORDER - APRIL 10, 2014

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10812 The People of the State of New York, Respondent, Ind 64579C/07

-against-

Norma Whatts, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

Judgment, Supreme Court, **Bronx** County (Robert K. Holdman, J.), rendered June 30, 2011, convicting defendant, after a nonjury trial, of attempted assault in the third degree, harassment in the second degree and two counts of disorderly conduct, and sentencing her to a conditional discharge, affirmed.

Defendant brings a weight of the evidence challenge to her conviction of various offenses relating to resisting arrest. The People's and the defense witnesses' accounts begin somewhat consistently, but diverge completely at the point of defendant's husband's arrest. The People's witnesses describe escalating violence at this point in time, with defendant's husband cursing at an officer who stopped him on the street, and defendant approaching the encounter screaming at the police, resisting her own arrest and attempting to assault her arresting officer. By contrast, the defense testimony paints a picture of an unlawful

arrest of defendant's husband, followed by defendant calmly offering her hands to be arrested, without resisting, attempting an assault, or engaging in disorderly conduct. The defense witnesses testified that defendant was an innocent victim of unprovoked police brutality. By its verdict, explained at sentencing, the trial court accepted the People's version and found defendant's account incredible. The trial testimony was as follows.

Police Officers Doigenes Escano, Yurantz Assade, and Henry Adames each testified that they were on patrol in a marked police van, and pulled over when they saw a group of people drinking on the sidewalk outside a building. Assade, who was driving, stayed in the van, and as Escano and Adames approached the group, one man began running down the block. The two officers chased but did not apprehend him. Assade followed in the van. Escano arrested a second man, later identified as Jose Flores, who was also running up the block, upon finding that he possessed a gravity knife and a bag of marijuana. He was placed in the van, and Assade drove Adames and Escano back to the building.

Once there, Escano stayed in the van with Flores, and Adames and Assade canvassed the location for contraband. Adames directed a group gathered on the sidewalk to leave the area. Everyone except Javier Rivera, defendant's husband, complied. Adames and Escano testified that when Adames asked Rivera for his identification, Rivera cursed and refused, even after being

warned that he could be arrested for disorderly conduct. Adames and Assade felt it best to deal with Rivera at the station because a crowd was gathering. Adames handcuffed Rivera and led him to Assade, to be placed in the van. Escano testified that when Flores saw Rivera arrested, he started acting up, kicking the inside of the van's door and window.

Assade and Adames testified that defendant then came toward them, shouted an obscenity, and yelled: "You got the wrong guy." Adames testified that he told defendant to back up, or, that if she wanted, she could come to the precinct and he would explain to her why Rivera was arrested. Adames testified that defendant kept screaming and cursing, and when he finished putting Rivera in the van, defendant "pulled [him] by the left shoulder and punched [him] on the left side of [his] face" with a closed fist. The other two officers did not see defendant punch Adames. However, Assade testified that later he asked Adames what happened to his face because it "was reddish and swollen."

Adames testified that right after being punched, he grabbed defendant's right arm to arrest her. She was resisting - flailing her arms and kicking her legs. The crowd was growing. Adames was able to place one handcuff on defendant, but she clutched his leg with her free hand. Adames grabbed defendant's shirt from behind, and tripped her, so that she fell to the ground. People in the surrounding buildings started throwing things out of windows at the officers, including a bowling ball

and a dumbbell. More than 30 people had gathered, and some of them were shaking the police van. Officers from two different precincts were called to assist.

When backup arrived, defendant was fully handcuffed, and she told Adames that "she was going into a seizure." Assade called an ambulance, and defendant was taken to the hospital. After the incident, Adames also went to the hospital. The parties introduced medical records and photographs of Adames into evidence. The photographs are not in the appellate record, but Adames testified that they showed that the side of his face was red and swollen.

Assade did not recall whether defendant was kicking or flailing her arms so as not to be handcuffed. In a 30-second silent amateur video introduced by the defense, defendant is seen struggling with the officer identified at trial as Adames, with her legs moving. At trial, Assade testified that he first observed the interaction between defendant and Adames when he "got pushed in the back."[1] At trial, Assade testified that after he gave Rivera to Escano in the van:

> "I turned around and Adames had one handcuff on [defendant]. And then I turned around a little further, I saw [a] group coming down the block so I picked up my radio and I called for help. And, at that time, the group started, like being

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[1] On cross-examination, defense counsel confronted Assade with prior deposition testimony before the Civilian Complaint Review Board (CCRB) in which he did not mention being pushed. Before the CCRB, Assade testified that the first thing he observed was Adames with one handcuff on defendant, who was on the ground.

> real tumultuous. They were trying to get to us. They were trying to get to Adames. So I had to grab them and push them back into the sidewalk and told them to get back...."

Assade did not see Adames step on defendant or flip her to the ground.

The defense consisted of the testimony of defendant and three witnesses. Julio Nunez related that he was outside the building with defendant, Rivera, Victoria Morales, and others when a police van approached. Two individuals ran up the block, and the van went after them. The van then returned. Defendant's husband had begun walking down the street to buy a pack of cigarettes when three police officers "hopped out" and arrested him for no reason. Nunez testified that defendant walked[2] over to the police, and asked why they were arresting her husband. One officer (whom he identified as Adames) used obscene language and told defendant to step back or she would be arrested. Defendant did not get upset, but instead turned around and offered her hands behind her back. Nunez saw two other officers on the street outside the police van.

The next thing Nunez saw was that Adames grabbed defendant by her right arm, put the cuff on that arm, and "just swept her by her feet [and] tripped her real hard and dropped her to the floor." Defendant was screaming; all three police officers were "jumping on her and kicking her." People in the area started

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[2]On cross-examination Nunez testified that defendant was either jogging or running.

getting mad, and started throwing things. Nunez testified that the police officers called for backup and when it arrived, he started running so that he would not be arrested.

Zinia Negron next testified that she was talking to defendant in the area outside their building when a "patty wagon" (sic) came up and a few police officers exited the vehicle. She went inside the building. About 15 minutes later, from her window, she saw a police officer throwing defendant to the ground. Negron ran downstairs to help, but police officers were blocking the area.

Victoria Morales also testified that she was with defendant and Negron when the police van arrived. She saw defendant's husband walking to the store, and getting stopped and arrested by three or four police officers. Morales saw defendant calmly approach the police. Morales said that after being warned to step away, defendant turned her back, and offered her hands to be handcuffed. Morales saw an officer swing defendant around, throw her to the ground, and stomp on her chest approximately three times. Defendant was screaming because her foot was stuck between a car wheel and the sidewalk. Six or seven police officers were around defendant, and although she was convulsing on the ground, nobody put anything under her head. Morales called out that defendant was having a seizure, and someone should call for an ambulance. Morales was also filming the incident. She testified that officers ordered her arrested

because she had a camera. She testified that the police erased her video at the precinct.

On cross-examination, Morales acknowledged that the police had found two bags of marijuana in the back seat of the police vehicle that transported her to the precinct. She also revealed that she had a pending lawsuit against the City of New York alleging that she had been falsely arrested as a result of this incident.

Finally, defendant testified on her own behalf. She recalled that as her husband was going to get cigarettes, he was approached by two police officers and arrested. She walked with Morales and Nunez toward her husband and the police officers. Adames told defendant to step back, and she complied. She was calm; just had some questions. After her husband had been transferred from Adames to another officer, she continued to ask why he was being arrested. Because the police refused to give her a reason for her husband's arrest, she peacefully offered to be arrested too. She turned around, and placed her hands behind her back to be handcuffed. She did not punch, push or make any physical contact with officer Adames or any of the other officers.

Defendant testified that Adames handcuffed her right hand, and before he handcuffed her left hand, "swept [her] backwards from [her] foot" and "hit the back of [her] head." She did not flail her arms, kick her legs or do anything to make it difficult

for Adames to put the other handcuff on her. Once Adames pulled her between the two parked cars, he stomped on her foot and she felt it break. She was screaming, and Adames told her, in Spanish, to stop faking and get up. Adames continued to stomp on her. He then put his foot on her chest and only removed it when he noticed that she could not breathe. Although Adames was the only police officer assaulting her, she saw officers Assade and Escano standing nearby. She was taken by ambulance to the hospital. She had suffered a broken left foot.

Defendant confirmed that she gave a statement to the Internal Affairs Bureau (IAB) approximately eight hours after the incident that conflicted with her trial testimony about calmly offering her hands to be arrested. In the IAB statement defendant claimed that Adames had told her to shut up or she would be arrested. She asked "for what purpose," and Adames "grabbed [her] arm and [] put the handcuffs on [her], and with a very large force, swung [her] over and swung [her] over on [her] back, which [she] moved with him." Defendant confirmed that she has a pending civil case against the City for her injuries.

The court found defendant guilty of: (1) attempted assault in the third degree; (2) disorderly conduct (two counts); and (3) harassment in the second degree. The court found defendant's testimony regarding her demeanor at the scene "incredible and unbelievable." It also found that the videotape introduced by the defense corroborated the police officers' account because it

showed "mayhem" at the scene.

> "You could see in [the officers'] faces that they were in fear. And the fact that [Assade] did not see or some [sic] doesn't see what may have been going on with the defendant is because they're looking up at the crowd ... they almost look like they are in a battle scene with their hands on their head and swivel [sic] going back and forth with backs up against the van ...
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> "So when the defendant placed herself in the middle of the officers effectuating the [allegedly] unlawful arrest, she is what started the mayhem. She is what caused all that ruckus and all that dangerous activity, not only the police officers' safety but the public. And she is what ended up causing her own injury."

We reject defendant's contention that her conviction was against the weight of the evidence. "[W]eight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable. If so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based upon the weight of the credible evidence, the court then decides whether the [factfinder] was justified in finding the defendant guilty beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 348 [2007]). Weight of the evidence review is identical regardless of whether the factfinder was a judge, as here, or a jury (*People v Lane*, 7 NY3d 888, 890 [2006]). We find, upon independent review of the trial record that the court's conviction was supported by the credible evidence.

On issues of pure credibility, we must accord deference to

the factfinder because "[t]he memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses can be passed upon with greater safety by those who see and hear than by those who read the printed narrative" (*People v Romero*, 7 NY3d 633, 645 [2006] [internal quotation marks omitted]). Here, the court found defendant incredible, and inconsistent with the video introduced by the defense, which depicts a short period of time after Adames handcuffed defendant. The video shows defendant on her back with one hand cuffed, her feet raised above the bumper of a nearby parked car and screaming, which is consistent with Adames's testimony that defendant was screaming, flailing and generally resisting arrest. It also shows that there were two officers outside of the police van in a defensive position, not six or seven, as testified by Morales.

Defendant and the dissent find fault with the fact that none of the other police officers was able to corroborate Adames's account that defendant was resisting arrest or attempted to punch him. However, none of the People's witnesses saw defendant calmly offering herself to be arrested, and all of the officers testified that the crowd was growing and chaos escalating before defendant was arrested. The court believed Assade's testimony that he was not focused on the interaction between Adames and defendant because the scene was chaotic, with a large crowd surrounding the police van, yelling, screaming and throwing

things, and requiring backup officers to be called. There is no basis for disturbing this conclusion, and none of defendant's witnesses testified otherwise. Escano, who was in the van, testified that his charges were "kicking the door," "kicking the window" and generally "getting out of control in the vehicle." We accept his testimony that this was his main focus, rather than events occurring outside the van.

There was a rational basis for the court's finding that defendant's account was incredible. A spouse's arrest would naturally evoke emotion, but defendant was adamant that she was not emotional when she approached the police. She testified that she remained calm upon not being told why her husband was being arrested, that she complied with all of the officer's directives to back up and then volunteered herself for arrest by turning around and placing both her hands behind her back. However, it is uncontoverted that Officer Adames placed only one handcuff on her. The chaos of the video is also consistent with the testimony of the People's witnesses.

Finally, we reject defendant's claim that she has been deprived of meaningful appellate review based upon the People's failure to preserve and maintain the photographs of Adames's face taken after the incident, since she has not demonstrated that she was prejudiced by the absence of these exhibits (*see People v Roper*, 235 AD2d 326 [1st Dept 1997], *lv denied* 89 NY2d 1100 [1997]). The court accepted Adames's testimony that defendant

struck him in the face as she resisted arrest, and it rejected, as incredible, defendant's testimony to the contrary. The photographs were sufficiently described in the trial record, and, in any event, were not decisive evidence of any element of defendant's conviction. Defendant was convicted of attempted assault in the third degree, which does not require a showing of "physical injury."

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

I would find the verdict to be against the weight of the evidence, and reverse. "[A]n acquittal would not have been unreasonable" in view of the conflicting testimony and the lack of evidence establishing defendant's guilt beyond a reasonable doubt (*People v Danielson*, 9 NY3d 342, 348-349 [2007]).

On October 19, 2007, officers from the "conditions" team at the 41st precinct observed a group of people drinking in public, defendant's husband among them. As the arresting officer and his partner escorted defendant's husband to a nearby police van, defendant emerged, shouting to the officers that they "got the wrong guy."

The arresting officer testified that defendant pulled him by the left shoulder and punched him on the left side of the face. He testified that he grabbed defendant's arm and proceeded to place her under arrest for assaulting a police officer. He cuffed one of her hands, but was unable to cuff the other because she was flailing and kicking. According to the officer, defendant "was going wild and she was screaming so hard that a crowd started forming" around them.

The arresting officer testified that he "grabbed" defendant's shirt from behind and "trip[ped]" her with his leg in order to maneuver her to the ground and effectuate the arrest. According to the officer, defendant grabbed his leg with her free

arm and "wouldn't let go."

The arresting officer's partner, though standing next to him, was unable to corroborate his partner's testimony that defendant punched him or otherwise resisted arrest.[1] Neither he, nor the officer inside the van, observed defendant strike the arresting officer or otherwise assault him, though both officers were in close proximity and in a position to observe what was transpiring.

Defendant testified that she approached the officers and asked them why they were arresting her husband. She complied with the officer's directive to step back, but continued asking why her husband was being placed under arrest. The officer told defendant to "step the f*** back." He said he would have to arrest defendant as well for interfering, and defendant replied "I guess you're going to have to arrest me."

Defendant testified that she turned around and placed her hands behind her back. The officer grabbed defendant's right

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[1]The officer testified at trial that he observed his partner "struggle" with defendant. However, in earlier testimony before the Civilian Complaint Review Board, he testified that when he turned and first observed defendant, she had one knee on the ground, with one hand cuffed (i.e., the position in which defendant is observed in the video that was introduced into evidence). The officer inside the van told the Civilian Complaint Review Board only that he observed defendant speaking to the two officers outside of the van. Yet, at trial he maintained that he was focused on the two prisoners in the van to the exclusion of all else transpiring outside, including, allegedly, a near riot.

arm, placed the cuff on her right hand, put his foot behind her foot, and "flipped" her, tripping her backward and causing her to fall to the ground. The officer then dragged her, screaming, from the sidewalk to a space in between two parked vehicles.

While defendant was lying on the ground between the two vehicles, the officer stomped on her foot, which she immediately felt break. She screamed, but the officer yelled at her in Spanish to stop "faking." He then kneed her on the back and stomped on her chest, only removing his foot when he noticed that she was unable to breathe.

Defendant testified that at no point did she punch the officer, flail, kick, or resist being handcuffed, testimony corroborated by the other witnesses at the scene. Witnesses observed the arresting officer throw defendant to the ground, drag her to the curb and stomp on her chest. A video introduced into evidence shows defendant, on the ground, being held and dragged by one cuffed hand by the arresting officer, with his partner standing right beside him, belying any notion that he was not in a position to have observed what was transpiring, and calling the credibility of both officers into question (*see People v Ortiz*, 99 AD3d 596 [1st Dept 2012] [verdict against the weight of the evidence where the victim's testimony was inconsistent with the documented conduct of the defendant]).

One of the other officers, observing defendant shaking and

having what appeared to be a seizure, called EMS. Defendant was taken away from the scene via ambulance. Although the arresting officer, by his own admission, was engaged with defendant on the ground, eventually succeeding in cuffing her, he testified that he did not observe her shaking or having a seizure.

Defendant's medical records state that she sustained "blunt trauma to the dorsum of her left foot," causing a "Lisfranc injury between the first and second metatarsals as well as the medial and middle cuneiform." She later underwent two surgeries, the first of which required that she use crutches for a period of 16 weeks.

The Sprint report of a radio run indicated "[n]o MOS [member of service] injured, injured female at location." The officer's medical records from the evening state that he suffered only a superficial skin abrasion. Photos allegedly depicting the extent of the officer's injuries were misplaced by the prosecution, and are currently irretrievable.

I would find the verdict to be against the weight of the evidence, and reverse. Defendant testified that she never struck, pushed or made any physical contact with the arresting officer, testimony which was corroborated by the video and the defense witnesses, and consistent with the testimony of the other officers on the scene, who were in a position to have observed the encounter, yet failed to witness physical violence. Defense

witnesses testified that the officer threw defendant on the ground and stomped on her repeatedly, which would explain the nature and the extent of defendant's injuries (*see Matter of Edward F.*, 154 AD2d 464, 465 [2d Dept 1989] [evidence of appellant's injuries showed officer's motive to lie and was "directly probative of credibility" in a case where it was claimed that the appellant had struck an officer, and the appellant alleged, on the other hand, that the officers had fabricated the story in an attempt to cover up their own misconduct in striking him with their nightsticks]).

The only evidence contradicting defendant's account was that of the arresting officer. But the evidence at trial revealed the officer's testimony to be incredible, a conclusion supported by defendant's medical records documenting a fracture of the foot and the video which captured part of the incident. Further, the officer had a strong motive to lie, since defendant's injuries had become the subject of both a civil lawsuit against the City and a New York City Civilian Complaint Review Board investigation.

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11414 Kelley D.F. Hardwick, Index 153557/12
Plaintiff-Appellant,

-against-

Geno Auriemma, etc., et al.,
Defendants-Respondents,

National Basketball Association,
et al.,
Defendants.

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Newman Ferrara LLP, New York (Randolph M. McLaughlin of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for Geno Auriemma, respondent.

Bryan Cave LLP, New York (Vincent Alfieri of counsel), for USA Basketball, Inc., and James Tooley, respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 15, 2013, which granted defendants James Tooley and USA Basketball, Inc.'s motion to dismiss the causes of action for violations of the New York State and New York City Human Rights Laws pursuant to CPLR 3211(a)(2), granted defendant Geno Auriemma's motion to dismiss the cause of action for assault pursuant to CPLR 3211(a)(8), and dismissed the complaint in its entirety as to all three defendants, unanimously affirmed, without costs.

Plaintiff is the Director of Security for her employer, the

National Basketball Association (NBA). She commenced this action against defendants alleging, inter alia, discrimination and retaliation in violation of the State and City Human Rights Law. Defendants Geno Auriemma and James Tooley are employed, respectively, as the executive director and head coach of USA Basketball, Inc. (USAB), the national governing body for the sport of basketball. Although it is an Illinois corporation, USAB has its main headquarters in Colorado Springs. Tooley is a Colorado resident and Auriemma is a Connecticut resident. The NBA is a New York City based company and a member of the USAB. Although plaintiff resides within the state, she is not a New York City resident.

Plaintiff had expected to provide security to the Women's National Basketball team at the 2012 London Olympics and had traveled with it to the Olympics on at least two prior occasions in 2004 and 2008. In 2011, however, while she was abroad with the team, plaintiff learned that Auriemma had instructed Tooley that he did not want her at the 2012 Olympics. Plaintiff claims that Auriemma's actions were motivated by her rejection of Auriemma's inappropriate sexual advances towards her during a 2009 overseas assignment.

Plaintiff alleges that Tooley cooperated with Auriemma's request, and contacted her supervisor, James Cawley, who agreed

to remove her from the 2012 London Olympics assignment. After plaintiff complained about the reassignment, the NBA investigated and found her complaint unsubstantiated. Plaintiff then commenced this action in June 2012. Subsequently, in July 2012, she learned that the NBA had decided that she would be attending the London Olympics after all.

Although she attended the Olympics, plaintiff claims that she had "significantly diminished material responsibilities" while in London. Her complaints included that she was not provided with certain security credentials that would have allowed her access to the basketball arena, she was assigned to transport guests to and from the arena, and she was told she could not sit in the bleachers at the gym while the team was practicing. Plaintiff claims these limitations were all part of Auriemma's retaliation campaign against her, in which Cawley and Tooley were complicit.

USAB, Tooley and Auriemma moved to dismiss the complaint against them. Their motions were granted on the basis that the discriminatory acts alleged took place outside of New York by nonresidents and the conduct alleged had no impact in New York. The court rejected plaintiff's argument that her place of employment was the location of the injury for purposes of evaluating where its impact was felt. Her employer and Cawley

have answered the complaint. They have not moved and the order appealed from does not affect plaintiff's claims against them. We agree that the motions by non-residents USAB, Auriemma and Tooley, dismissing the Human Rights Law and collateral tort claims against then, were properly granted.

The State and City Human Rights Laws do not apply to acts of discrimination against New York residents committed outside their respective boundaries by foreign defendants (*see e.g. Sorrentino v Citicorp*, 302 AD2d 240 [1st Dept 2003]; *see also* Executive Law § 296[1][a],[e]; Administrative Code of the City of NY §§ 2-201, 8-101). In analyzing where the discrimination occurred, "courts look to the location of the impact of the offensive conduct" (*Robles v Cox & Co.*, 841 F Supp 2d 615, 623 [EDNY 2012])(internal quotation marks ommitted). A non-New York City resident cannot avail him or herself of the protections of the City Human Rights Law unless he or she can demonstrate that the alleged discriminatory act had an impact within the City's boundaries (*Hoffman v Parade Publs.*, 15 NY3d 285, 289 [2010]). Although plaintiff does not reside in New York City, she resides within the state and is employed by the NBA which is based in New York City. However, the order on appeal addresses plaintiff's claims against USAB, Auriemma and Tooley, none of which are residents of this state. Thus, the focus is on whether the

actions these defendants are alleged to have committed had an impact within the respective boundaries of the City and State of New York, in order for the court to exercise jurisdiction over them.

Plaintiff contends that the decision to reassign her and later reduce her responsibilities took place within the City boundaries and, therefore, her place of employment is where the impact of the alleged discriminatory acts occurred. However, it is the place where the impact of the alleged discriminatory conduct is felt that controls whether the Human Rights Laws apply, not where the decision is made (*see Hoffman v Parade Publs.*, 15 NY3d at 290-292; *Robles v Cox and Co., Inc.*, 841 F Supp 2d at 623-624). This standard applies whether the claim is made under the City or State Human Rights Laws (*Hoffman,* 15 NY3d at 289-291). Without more, plaintiff's mere employment in New York does not satisfy the "impact" requirement.

The allegations in the amended complaint, construed broadly in favor of plaintiff, fail to allege any facts sufficient to state a claim under the Human Rights Laws against non-residents USAB, Auriemma and Tooley. Even if the decision to modify her assignment was made within the City's boundaries, the discriminatory acts alleged did not occur within the City or State of New York, but in London where she claims she was

relegated to inferior tasks not commensurate with her usual assignments (*see Shah v Wilco Systems, Inc.*, 27 AD3d 169, 176 [1st Dept 2005]). Plaintiff makes no claim that the alleged retaliatory acts, including the reduction in her duties at the London Olympics, have had any impact on the terms, conditions or extent of her employment with the NBA within the boundaries of New York. Although she describes events that took place while she was in London, and describes her duties there as being less privileged than her usual assignments, it does not appear that her job has been negatively affected. The complaint's conclusory assertion that plaintiff's New York City employment was affected by the discriminatory conduct in London, is insufficient to establish subject matter jurisdiction. Since plaintiff failed to set forth any factual allegations supporting her claim that the acts had an impact within the boundaries of this state, there is no subject matter jurisdiction over plaintiff's Human Rights claims against USAB, Tooley or Auriemma and they were properly dismissed against these defendants.

We reject plaintiff's contention that she has separate tort claims against Auriemma and Tooley, based on an alleged agreement to aid and abet each other in discriminating against her, which survives dismissal of the Human Rights Law claims. Not only are these allegations insufficiently pleaded (*see Forrest v Jewish*

Guild for the Blind, 3 NY3d 295, 328 [2004]), but an individual cannot aid and abet his or her own violation of the Human Rights Law (*Strauss v New York State Dept. Of Educ.*, 26 AD3d 67, 73 [2d Dept. 2005]). Since it is alleged that Auriemma's own actions give rise to the discrimination claim, he cannot also be held liable for aiding and abetting. In any event, the civil tort alleged against Auriemma and Tooley is blurred and indistinguishable from the dismissed Human Rights Law claims against them. Consequently, these tort claims were also properly dismissed. We do not reach the issue of whether the court had long arm jurisdiction over these defendants.

Plaintiff's appeal from the dismissal of the assault claim is deemed abandoned since she failed to address it in her appellate brief (*Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009]).

Finally, leave for jurisdictional discovery was properly denied. Plaintiff failed to show that discovery would uncover facts establishing that the impact of the alleged discrimination was felt in New York (*see* CPLR 3211[d]).

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

ENTERED: APRIL 8, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11963 General Motors Acceptance Corp., et al., Plaintiffs-Respondents, Index 109668/06

-against-

New York Central Mutual Fire Insurance Company, Defendant-Appellant.

Saretzky Katz Dranoff & Glass, L.L.P., New York (Patrick J. Dellay of counsel), for appellant.

Lawrence, Worden, Rainis & Bard, P.C., Melville (Roger B. Lawrence of counsel), for respondents.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 19, 2013, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion is granted. The Clerk is directed to enter judgment accordingly.

The motion court erred when it denied defendant insurer's motion for summary judgment where plaintiffs, defendant's insured and the excess insurer, failed to raise an issue of fact. The record does not present conduct that constitutes a "gross disregard" by defendant of plaintiffs' interests (*see Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453-454 [1993]). We reject plaintiffs' argument that defendant avoided acknowledging

the underlying plaintiff's potential damages such that a refusal to offer the policy limit constituted a reckless or conscious disregard of the excess insurer's rights. While there was some indication that damages could be significant if the medical records substantiated the underlying plaintiff's claim of a loss of smell from a severe blow to the head, the record established that defendant's investigation presented a great deal of medical evidence tending to show that the underlying plaintiff's injuries were primarily preexisting soft tissue injuries unrelated to the automobile accident on April 24, 1994. Defendant's investigation included the medical opinion of four physicians that conducted independent medical examinations; one psychologist who conducted a review of the extensive medical records; experienced defense counsel; and separate monitoring counsel for the damages trial. The review of the numerous medical records, which included contradicting evaluations of the underlying plaintiff's treating physicians, provided a justifiable basis to fairly evaluate potential damages and assess the relative risks of declining to offer a settlement of the policy limit.

Given this evaluation, defendant's actions do not amount to bad faith. In hindsight, it is evident that defendant's failure to make a settlement offer of the policy limit was not prudent. However, "[a]n insurer does not breach its duty of good faith

when it makes a mistake in judgment or behaves negligently" (*Federal Ins. Co. v North Am. Specialty Ins. Co.*, 83 AD3d 401, 402 [1st Dept 2011]). Here, the assessment of the insured's exposure and the failure to make a settlement offer of the policy limit was a mistake in judgment. It does not demonstrate that defendant acted in bad faith by failing to heed contrary evidence. Instead, the record shows defendant's reasonable belief that, under the No Fault Law, the underlying plaintiff did not sustain a serious injury causally related to the accident. Thus, we find that the record does not demonstrate any pattern of reckless or conscious disregard for plaintiffs' rights. Further, there was no settlement opportunity presented at a time where defendant's doubts concerning the ability to prove serious injury had been eliminated.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, DeGrasse, Richter, JJ.

11977 Joseph Cerverizzo, et al., Index 15302/05
Plaintiffs-Respondents, 84681/05
85328/06
-against- 86200/07

The City of New York, et al.,
Defendants-Appellants.
- - - - -
The City of New York, et al.,
Third-Party Plaintiffs-Appellants,

-against-

J. Blanco Associates, Inc., et al.,
Third-Party Defendants.

[And Other Third-Party Actions]

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Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for appellants.

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for respondents.

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered January 14, 2013, which, insofar as appealed from as limited by the briefs, denied defendants/third-party plaintiffs' motion for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241(6) claims, and for summary judgment on their third-party contractual indemnification claim against third-party defendant J. Blanco Associates, Inc., unanimously modified, on the law, to grant the portions of the motion seeking summary dismissal of the Labor Law § 241(6) claim as predicated

on 12 NYCRR 23-1.8(b) and conditional summary judgment on the contractual indemnification claim, and otherwise affirmed, without costs.

Plaintiff Joseph Cerverizzo, an employee of third party defendant subcontractor Delta Installations, Inc., suffered injuries allegedly due to the inhalation of toxic fumes while he was installing brackets in an empty aeration tank at the Hunts Point Sewage Treatment Plant, owned by defendants New York City and the Department of Environmental Protection (DEP), which hired defendant Yonkers Construction Corp., as general contractor, to upgrade the plant (collectively, defendants).

The court properly denied the portion of defendants' motion seeking dismissal of plaintiffs' Labor Law § 241(6) claim as predicated on 12 NYCRR 23-1.7(g). We find that, as a matter of law, the aeration tank is an unventilated confined area requiring air quality monitoring (*see Buchholz v Trump 767 Fifth Ave.*, 4 AD3d 178, 179 [1st Dept 2004], *affd* 5 NY3d 1 [2005] [holding that "the question of the applicability of the section is a purely legal one"]). Pursuant to 12 NYCRR 23-1.7(g), the atmosphere of an unventilated confined area must be monitored "where dangerous air contaminants may be present or where there may not be sufficient oxygen to support life." Here, the cement tank is a large container used to aerate and clean sewage. Entering the

tank poses a potential hazard since, as admitted by a deputy superintendent for the DEP in his deposition, a person could experience oxygen depletion as gases "displace the oxygen."

Defendants contend that in order for an area to be a confined space, as defined by 12 NYCRR 12-1.3(f), it must have a restricted means of access, such as a trap door or a manhole. We reject this argument. An area does not need to be accessible only by a narrow opening in order to have a "restricted means of egress" (12 NYCRR 12-1.3[f]). Although the top of the tank was open to the air, access was still restricted as Cerverizzo needed to use a 20-foot ladder to enter and exit the tank. Therefore, given the tank's use in the process of filtering sewage and its restricted means of access, 12 NYCRR 23-1.7(g) is applicable.

To the extent defendants contend that they had, in any event, adequately monitored the tank for air quality, the record raises triable issues of fact on this point. The daily air monitoring reports prepared by Yonkers' air monitoring contractor, Environmental Energy Associates (EEA), contain no indication that the tank was monitored for air quality from August 17, 2004 through August 31, 2004, the day of the incident. Yonkers' project engineer testified, and EEA's on-site representative confirmed, that Yonkers asked EEA to monitor the aeration tank on August 31, 2004, after plaintiff became sick,

raising an issue of credibility for the jury to decide (*see MJM Adv. v Panasonic Indus. Co.*, 2 AD3d 252, 252-253 [1st Dept 2003]; *Morrone v Chelnik Parking Corp.*, 268 AD2d 268, 269 [1st Dept 2000]). In addition, evidence that Cerverizzo was feeling dizzy and nauseous prior to the day of the incident, was given oxygen for 12 hours after the incident, sustained injuries from oxygen depletion due to exposure to hydrogen sulfite gas, and was diagnosed with "hypoxicischemic encephalopathy due to toxic inhalation" raises an issue as to whether defendants adequately monitored the tank's air quality.

The Labor Law § 241(6) claim insofar as predicated on 12 NYCRR 23-1.8(b) should have been dismissed. As defendants contend, Cerverizzo's bracket installation work is not one of the activities requiring the use of a respirator pursuant to 12 NYCRR 23-1.26 and 23-2.8 and Cerverizzo has not pointed to any provision requiring a respirator for the work he was performing. To the extent 12 NYCRR 23-1.7(g) is subject to relevant provisions of Industrial Code part 12 which require respirators, those provisions, by their plain language, apply to limited situations not relevant here (*see* 12 NYCRR 12-1.5[a][1], 12-1.9[a][1]).

Because triable issues of fact exist as to whether defendants fulfilled their duty to adequately monitor the air

quality in the subject tank, and thus, whether they had constructive notice of the fume condition that caused Cerverizzo's injuries, dismissal of the common-law negligence and Labor Law § 200 claims was properly denied (*see Personius v Mann*, 5 NY3d 857, 859 [2005]; *Debellis v NYU Hosps. Ctr.*, 12 AD3d 320, 321 [1st Dept 2004]).

However, defendants are entitled to conditional summary judgment on their contractual indemnification claim. The broad indemnification clause provides for indemnification for injuries "arising out of or in connection with ..., the Work of the Subcontractor under this Subcontract ... whether caused in whole or in part by the Subcontractor ..." and it does not purport to indemnify defendants for their own negligence (*see Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548 [1st Dept 2013]; *Burton v CW Equities, LLC*, 97 AD3d 462, 463 [1st Dept 2012]).

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

ENTERED: APRIL 8, 2014

CLERK

Tom, J.P., Friedman, Moskowitz, Gische, Clark, JJ.

11999 Eric Alexander, Index 304255/09
Plaintiff-Respondent,

-against-

Hany Alexander,
Defendant-Appellant.

_____

Sherri Donovan & Associates, P.C., New York (Sherri Donovan of counsel), for appellant.

Garr Silpe, P.C., New York (Ira E. Garr of counsel), for respondent.

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Judgment, Supreme Court, New York County (Matthew F. Cooper, J.), entered November 26, 2012, which, to the extent appealed from as limited by the briefs, awarded defendant wife a 35% interest in plaintiff husband's corporate stock shares, valued as of the commencement date of the action, failed to award her additional counsel and expert fees, or health insurance, or to direct the husband to purchase life insurance to cover his obligations under the judgment, and awarded maintenance in the amount of $7,500 per month until the earliest of either party's death, the wife's remarriage, or December 31, 2024, unanimously affirmed, without costs.

The court's prior unappealed ruling conclusively held that the husband's corporate stock shares were active, based on his daily role in the management of the company, and would be valued

as of the April 2009 commencement date of the action. The court properly accepted the neutral appraiser's valuation based on the formula in the shareholders' agreement and properly rejected the wife's expert witness's valuation, which was significantly higher. Among other things, the wife's expert "did not consider the stock transfer restrictions contained in the shareholders' agreement" (*Amodio v Amodio*, 70 NY2d 5, 8 [1987]), as he acknowledged at trial. As the price in the shareholders' agreement was the "only evidence in the record of its actual value" (*id.*), the court properly credited the neutral appraiser's report, which was based on that price.

The court properly exercised its discretion in determining that the wife was entitled to 35% of the value of those shares. The court properly considered the length of the marriage (nearly 25 years), the contribution by the wife in running the household and raising their two sons throughout the marriage, and the fact that most of the increase in corporate revenues, which resulted in the increased share price, occurred in the same year as the commencement of this action (*McKnight v McKnight*, 18 AD3d 288, 289 [1st Dept 2005]; *see also Arvantides v Arvantides*, 64 NY2d 1033, 1034 [1985]; *Ventimiglia v Ventimiglia*, 307 AD2d 993, 994 [2d Dept 2003], *lv denied* 1 NY3d 508 [2004]).

We find no basis to disturb the court's exercise of

discretion in determining the amount and duration of maintenance. The $7,500 in taxable maintenance to the wife, payable from September 1, 2012 through December 31, 2024 is adequate, notwithstanding her age at 56 years old, her lack of a work history, and her inability to support herself after being a homemaker throughout the nearly 25-year marriage. We reject the wife's contention that the court should have awarded her maintenance of $20,000 per month, consistent with the expenses detailed in her net worth statement, and that she should have received a lifetime maintenance award.

It is well settled that the determination of maintenance is within the sound discretion of Supreme Court upon consideration of the relevant factors enumerated in Domestic Relations Law § 236B(6)(a) and the parties' pre-divorce standard of living (*see Hartog v Hartog*, 85 NY2d 36, 50-51 [1995]; *Morrow v Morrow*, 19 AD3d 253 [1st Dept 2005]). Here, the court credited the husband's evidence that the parties lived relatively modestly, in contrast to the wife's statement of net worth, for which she failed to present sufficient evidence to substantiate her claims. The court also credited expert testimony that the husband could work for another 12 years, until age 67, with an earning capacity of $275,000 to $320,000 per year. Further, the record shows that the wife failed to provide medical evidence to substantiate her

claims regarding a medical condition or health-related issues. Given the court's consideration of these factors, and in light of the wife's ability to keep the parties' marital home, valued at $2 million, along with the equitable distribution award, which leaves her with approximately $750,000 in cash as of 2015, we find that the durational maintenance of at most 12 years at $7,500 per month is amply supported by the record, and was a proper exercise of discretion.

The trial court properly declined to award the wife expert fees or counsel fees in addition to the $135,000 interim counsel fees that she had already received (*see* Domestic Relations Law § 237). Further, given the lack of evidence substantiating the wife's medical claims, the court properly exercised its discretion in declining to require the husband to pay the wife's unreimbursed medical expenses, or her health insurance, which the husband paid throughout the pendency of the proceedings.

Similarly, the court properly declined to require the husband to obtain life insurance to cover his obligations under the judgment, since the wife elicited no evidence relevant to the issue.

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12148 The People of the State of New York, Dkt. 9465C/11
Respondent,

-against-

Dennis P. Smalls,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Robert Sackett, J.), rendered December 19, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the seventh degree, and sentencing him to a term of 30 days, unanimously affirmed.

The information was not jurisdictionally defective. Nonhearsay allegations established every element of the charged offense, notwithstanding the absence of a laboratory report (*see People v Kalin*, 12 NY3d 225 [2009]). Based on the allegation that defendant possessed a glass pipe containing "a tar-like substance" that, based on the officer's "training in the recognition of controlled substances and their packaging, . . . [he] believed to be crack-cocaine residue," an inference can be

drawn that defendant knew that he was in possession of cocaine (*see People v Jennings*, 22 NY3d 1001 [2013]). We have considered and rejected defendant's remaining arguments.

M-782 - *People v Dennis P. Smalls*

Motion for permission to file supplemental brief denied.

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12149 Phyllis Schwartz, Index 107139/10
Plaintiff-Appellant,

-against-

Kings Third Ave. Pharmacy, Inc., etc.,
Defendant-Respondent.

_____

Rheingold, Valet, Rheingold, McCartney & Giuffra LLP, New York (Jeremy A. Hellman of counsel), for appellant.

Harris, King & Fodera, New York (Laura Cohen of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 8, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff was injured when she allegedly tripped and fell over a display rack in the aisle of defendant's store. Defendant demonstrated that the display rack was an open and obvious condition and was not inherently dangerous (*see e.g. Schulman v Old Navy/Gap, Inc.*, 45 AD3d 475 [1st Dept 2007]). Defendant referred to plaintiff's testimony that she saw the display rack before the accident and submitted photographs of the rack showing its open and obvious nature, and

that it was placed in a reasonably safe location. The photographs also show that the base did not protrude into the aisle, was essentially flush with the shelves above, and that the rack was placed flat against the shelving in the aisle, which was clear and uncluttered (*see Gonzalez v Dong Yun Corp.*, 110 AD3d 484 [1st Dept 2013]; *Speirs v Dick's Clothing & Sporting Goods*, 268 AD2d 581 [2d Dept 2000]).

In opposition, plaintiff failed to raise a triable issue of fact. Contrary to her argument that the display rack was placed at the end of the aisle such that she did not have sufficient time to perceive it upon turning into the aisle, the evidence, including her testimony, shows that the rack was located at least several feet into the aisle (*compare Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [1st Dept 2004]; *Robinson v 206-16 Hollis Ave. Food Corp.*, 82 AD3d 735 [2d Dept 2011]). Moreover, plaintiff stated that she noticed the rack before the accident, and her expert's affidavit fails to raise a triable

issue, and was conclusory and speculative (*see e.g. Vazquez v JRG Realty Corp.*, 81 AD3d 555 [1st Dept 2011]).

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

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12150 Elvis Bisram, Index 304678/11
Plaintiff-Respondent,

-against-

Long Island Jewish Hospital,
et al.,
Defendants-Appellants.

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Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered September 11, 2013, which granted plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) claim, and denied as moot defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant defendants' motion as to the Labor Law § 200 and common-law negligence claims and the Labor Law § 241(6) claim predicated upon violations of Industrial Code (12 NYCRR) § 23-1.7(b)(1)(i) and (iii), and otherwise affirmed, without costs.

Plaintiff established his entitlement to summary judgment as to liability on his Labor Law § 240(1) claim by testifying that when he stepped onto the metal decking he had just laid in place but not yet fastened, the beam beneath it shifted, causing him to

fall from the first-floor level of the building to the cellar level. Plaintiff testified that he was wearing a harness that was tied into a retractor at the time of his fall. However, these safety devices proved inadequate to protect him against injury resulting from falling off the beam (*see Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561 [1st Dept 2008]). Defendants' argument that plaintiff was the sole proximate cause of his accident because he failed to tie his harness into the retractor line is not supported by the evidence. In addition to plaintiff's own testimony that he was tied off before he fell, defendants' construction supervisor observed that plaintiff was tied off 15 minutes before the accident, and plaintiff's employer's vice president observed that plaintiff was tied off 10 minutes before the accident.

In any event, defendants' failure to secure the steel beam was a proximate cause of the accident. Contrary to defendants' argument, the metal deck flooring and beam on which plaintiff was standing to perform his job duties functioned as an elevated platform (*see Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552 [1st Dept 2011]). Its collapse evinces a violation of Labor Law § 240(1) (*see Becerra v City of New York*, 261 AD2d 188 [1st Dept 1999]).

Plaintiff's Labor Law § 200 and common-law negligence claims

should be dismissed since the dangerous condition that caused plaintiff's accident arose from the means and methods of his work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Plaintiff established that the general contractor may have coordinated the subcontractors at the work site or told them where to work on a given day, and had the authority to review onsite safety, but those responsibilities do not rise to the level of supervision or control necessary to hold the general contractor liable for plaintiff's injuries under Labor Law § 200 (*see Reilly v Newireen Assoc.*, 303 AD2d 214, 219 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]; *De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190 [1st Dept 2003]).

Since plaintiff was provided with certain safety devices addressed in 12 NYCRR 23-1.16(f)(1), and the devices failed to protect him from injury, his Labor Law § 241(6) claim predicated on a violation of that Code provision should be sustained.

However, the Labor Law § 241(6) claim predicated on a violation of 12 NYCRR 23-1.7(b)(1)(i) and (iii) should be

dismissed since the area through which plaintiff fell – between the beams – when the beam beneath the metal decking on which he was standing shifted did not constitute a hazardous opening within the meaning of 12 NYCRR 23-1.7(b)(1)(i) (*see Lupo v Pro Foods, LLC*, 68 AD3d 607, 608 [1st Dept 2009]).

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12151 The People of the State of New York, Respondent, Ind. 4526/09

-against-

Robert Mangieri, Defendant-Appellant.

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Sidney Baumgarten, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered August 24, 2011, convicting defendant, after a nonjury trial, of criminal possession of a forged instrument in the second degree and practicing or appearing as an attorney-at-law without being admitted and registered (Judiciary Law § 478), and sentencing him to an aggregate term of five years' probation and a $2500 fine, unanimously affirmed.

Defendant did not preserve his legal sufficiency claim regarding the forged instrument conviction, or his related claim of inconsistent verdicts, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's

credibility determinations. There was ample evidence, including recorded conversations, to support the conclusion that defendant sent a forged social security card to another person, and that he did so with the requisite knowledge and intent.

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12153-
12154 Index 4348/09

In re Dorothy K. Mendelson,
Deceased.

- - - - -

Jonathan Mendelson,
Petitioner-Appellant,

-against-

William A. Kass, et al.,
Respondents-Respondents,

- - - - -

In re Estate of Dorothy K. Mendelson,
Deceased.

- - - - -

William A. Kass,
Petitioner-Respondent,

-against-

James Mendelson,
Respondent,

Jonathan Mendelson,
Objectant-Appellant.

_____

Novick & Associates, Huntington (Donald Novick of counsel), for appellant.

Kantor, Davidoff, Mandelker, Twomey & Gallanty, P.C., New York (Michael E. Twomey of counsel), for respondents.

_____

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about April 16, 2012, which granted William Kass's motion and James Mendelson's cross motion for summary judgment dismissing appellant's objections to probate of the will of the deceased, and admitted the will to probate,

unanimously affirmed, without costs. Order, same court (Rita Mella, S.), entered on or about July 12, 2013, which granted Kass and Barbara Miller's motion for summary judgment dismissing the petition to turn over certain bank accounts, and denied appellant's cross motion for summary judgment granting the petition, unanimously affirmed, without costs.

The court properly found that appellant presented no evidence of undue influence in the making of the will (*see Matter of Walther*, 6 NY2d 49, 53-54 [1959]). Indeed, it was undisputed that decedent was strong-willed and competent at the time of execution of the will, and that some of the challenged provisions were present in her prior wills.

The court also correctly found that appellant presented no evidence that decedent did not understand the challenged provisions. Decedent's attorney, who drafted the will, testified that all of the provisions of the will were explained to decedent in detail, that she affirmed she understood the provisions, and that the will reflected her wishes.

Appellant failed to present evidence sufficient to invalidate decedent's choice of executor (*see Matter of Rattner*, 107 AD3d 600 [1st Dept 2013]).

The court properly found that an unchallenged power of attorney signed by decedent in 2000 had authorized decedent's

sister to re-title certain bank accounts in decedent's name. Appellant presented no evidence that the 2000 power of attorney had been revoked by decedent, and he admitted that she told him that she had been advised by her attorney to re-title the accounts.

The court also correctly determined that appellant failed to present sufficient evidence to raise a triable issue of fact as to the sister's self-dealing.

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12155 The People of the State of New York, Ind. 4667/11
Respondent,

-against-

Andrew Hanson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered April 11, 2012, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 2

to 4 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12156 In re Gina C.,
Petitioner-Respondent,

-against-

Augusto C.,
Respondent-Appellant.

_____

Richard L. Herzfeld, New York, for appellant.

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Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 2, 2013, which, upon the Support Magistrate's fact-finding determination, dated May 2, 2013, that respondent father willfully violated a child support order, committed him to the New York City Department of Corrections for a term of four months intermittent weekend incarceration, unless discharged by payment of $7,000.00 to the Child Support Collection Unit, unanimously affirmed, without costs.

The Support Magistrate properly found that respondent wilfully violated the order of child support. Petitioner established prima facie that respondent's failure to pay child support over a five year period was a willful violation of the order of support. In response, respondent failed to show that the violation was not willful by evidence that he was unable to make the required payments (*see Matter of Powers v Powers*, 86 NY2d 63, 69-70 [1995]). Respondent and his witnesses gave

conflicting testimony as to whether he was working and there is no basis upon which to disturb the Support Magistrate's credibility determinations (*see Matter of Bruce L. v Patricia C.*, 62 AD3d 566, 567 [1st 2009], *lv denied* 12 NY3d 715 [2009]).

Further, "unemployment alone does not establish inability to pay" (*Clark v Clark*, 88 AD3d 1095 [3rd Dept 2011], *lv denied* 18 NY3d 803 [2012], *lv dismissed* 18 NY3d 918 [2012]), especially given respondent's failure to show that he used his "best efforts to obtain employment commensurate with his qualifications and experience" (*see Bianca J. v Dwayne A.*, 105 AD3d 574, [1st Dept 2013]). Moreover, prior to each court appearance, he appeared with a promise of employment and a minor payment on his outstanding arrears, only to lose the new job and discontinue support between hearing dates. Respondent's last minute attempts to avoid the consequences of his previous failure to pay, including staving off a potential jail sentence, should not be countenanced (*see Marcus v Marcus*, 14 AD3d 359 [1st Dept 2005], *lv dismissed* 4 NY3d 846 [2005]).

Respondent's claims that he was denied a fair trial, due to the Support Magistrate's reference to respondent's failure to pay child support for years prior to the hearing, and the Magistrate's questioning of the witnesses are unpreserved (*see Matter of Sheenagh O'R. v Sean F.*, 50 AD3d 480, 482-83 [1st Dept

2008]). Were we to consider these claims, we would find that the Support Magistrate demonstrated no bias, and that the actions complained of were necessary in order to facilitate or expedite the orderly progress of the hearing (*see Cadle v Hill*, 23 AD3d 652 [2d Dept 2005]).

To the extent that the Support Magistrate considered certain notes and tape recordings of prior proceedings, the error, was harmless, given the evidence supporting the determination (*see 49th St. Mgt. Co. v New York City Taxi and Limousine Commn.*, 277 AD2d 103, 106 [1st Dept 2000]).

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12159-
12159A

The People of the State of New York,
Respondent,

-against-

Roy Gray,
Defendant-Appellant.

Ind. 90052/05

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

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

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered October 23, 2008, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, and order, same court and Justice, entered on or about June 27, 2011, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant was not deprived of effective assistance of counsel by the fact that his attorney did not move to reopen a suppression hearing based on trial testimony. Defendant has not established a reasonable probability that the new evidence elicited at trial would have resulted in suppression of his written confession on the ground of lack of attenuation from an inadmissible oral confession.

At trial the investigating detective made clear that

defendant had in fact given a substantive oral confession between the time he received defective initial *Miranda* warnings and the time he received proper warnings. However, the less precise suppression hearing testimony left the impression that this statement consisted only of a declaration that defendant intended to "take the blame" for his brother, and contained no substantive admission of guilt. In our decision on the People's appeal from an order of the hearing court (Seth L. Marvin, J.), that granted suppression, we determined, based on this latter understanding of the facts, that, regardless of the validity of the initial oral warnings, defendant's "written statement was sufficiently attenuated to be admissible" (51 AD3d 63, 67 [1st Dept 2008], *lv denied* 10 NY3d 863 [2008], *cert denied* 555 US 1182 [2009].

Even accepting defendant's argument that no plausible strategy could justify counsel's failure to seek a reopened suppression hearing after the evidentiary landscape was altered by the detective's trial testimony, we find that the lack of reopening did not prejudice defendant (*see Strickland v Washington*, 466 US 668 [1984]) or render the assistance he received less than meaningful (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]). Specifically, we find that although the information that emerged at trial gave defendant a stronger argument that his written statement was not attenuated, it did

not give him a winning one. We rely on many of the considerations we referred to in our first decision. First, defendant's announcement that he would speak in order to take the blame for his brother evinced an independent willingness to speak to police that weighs in favor of a finding of attenuation (*see People v Paulman*, 5 NY3d 122, 131 [2005]). Second, even if defendant did incriminate himself in his oral statement, the fact remains that he then received two undisputedly valid sets of warnings, and that there was a 45-minute gap between the two, during which defendant was not questioned. Third, as we indicated in our earlier decision, defendant's extensive criminal record, including eight prior arrests, further supports the conclusion that, before making his written statement, he was "returned, in effect, to the status of one who is not under the influence of questioning" (*People v Chapple*, 38 NY2d 112, 115 [1975]). Finally, we consider it relevant that defendant's oral statement was not preceded by a complete absence of warnings, but by oral warnings that were incomplete, apparently because they omitted the warning about appointment of free counsel.

The court properly exercised its discretion in admitting into evidence a box of ammunition of a type capable of being used in the homicide. The ammunition was sufficiently connected to defendant to meet the test of relevance, and its probative value

outweighed any prejudicial effect (*see People v Bonnemere*, 308 AD2d 418, 419 [1st Dept 2003], *lv denied* 1 NY3d 568 [2003]).

By failing to object, making general objections or failing to request any specific further relief after the court sustained an objection, defendant failed to preserve his present challenges to the prosecutor's summation (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). We have considered and rejected defendant's ineffective assistance claim relating to the summation.

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12161 The People of the State of New York, Respondent, Ind. 3723/03 1343/04

-against-

Alexis Padilla, also known as Roberto Garcia, also know as Jose Ribira. Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered May 24, 2012, resentencing defendant, as a second felony offender, to consecutive terms of 10 years, with five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12162 In re Ira J. Benlevi, Index 104069/09
Petitioner,

-against-

The New York City Department
of Buildings,
Respondent.

_____

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for petitioner.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

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Determination of respondent New York City Department of Buildings (DOB), dated January 22, 2009, as adhered to February 18, 2009, which, after a hearing, revoked petitioner's filing and professional certification privileges with the agency pursuant to Administrative Code of City of NY § 28-211.1.2 and Rules of City of New York Department of Buildings (1 RCNY) § 21-02, unanimously modified, on the law, the facts and in the exercise of discretion, to vacate the penalty imposed, and remand the matter to the agency for imposition of a lesser penalty, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Emily Jane Goodman, J.], entered July 26, 2011, as adhered to by order of the same court [Shlomo Hagler, J.], entered on or about April

15, 2013), otherwise disposed of by confirming the remainder of the determination, without costs.

Substantial evidence supports respondent's determination that petitioner falsely represented that he was licensed to practice architecture when, during his six-month suspension from practice, imposed by the State Department of Education, he filed with DOB amendments to plans that had been submitted and pre-approved before the suspension, and in so doing, affixed his seal as a licensed and registered architect (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]; CPLR 7803[4]). Hence, petitioner's contentions that he did not file any new plans during his suspension, that he filed the amendments only to spare his clients additional costs and inconvenience, and that the amendments were only minor corrections which did not constitute the actual practice of architecture, are beside the point, and do not undermine the finding that his submissions to DOB falsely represented that his architect's license was current and in good standing.

However, we find that the penalty imposed is excessive upon considering the following factors: DOB did not place any temporal limitation on the prohibition of petitioner filing documents, nor did it explain why such a permanent penalty was imposed; petitioner is a solo practitioner for whom over ninety percent of

his business is in New York City; the prohibition applies to the entire city, and would essentially end petitioner's independent architectural business, thus depriving him of his livelihood; and respondent has never alleged, much less made any showing, that the falsehood at issue pertained to the substance or content of the building plans and thus presented potential safety risks which Administrative Code of City of NY § 28-211.1.2 was designed to address (*see Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 234-235 [1974]; *cf. Matter of St. Clair Nation v City of New York*, 14 NY3d 452 [2010]; *Matter of Scarano v City of New York*, 86 AD3d 444 [1st Dept 2011], *appeal dismissed, lv denied* 17 NY3d 901 [2011]).

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12164N Herbert Alford,
Plaintiff-Respondent,

Index 402905/08
590268/11

-against-

City of New York,
Defendant,

New York City Housing Authority,
et al.,
Defendants-Appellants.

[And a Third-Party Action]

Steve S. Efron, New York, for appellants.

Kenneth J. Gorman, New York, for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J), entered October 25, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for a protective order precluding disclosure of his medical records pertaining to prior substance abuse and mental health treatment and precluding defendants from using any such medical records already obtained, and denied defendants New York City Housing Authority's and Schindler Elevator Corporation's cross motions for sanctions and to compel disclosure of such records, unanimously affirmed, without costs.

Plaintiff commenced this action to recover for injuries to his knee and back, as well as post-traumatic stress disorder

(PTSD) and mental and psychological injuries, allegedly suffered when he fell about seven feet down an elevator shaft located in a building owned by defendant NYCHA. There is no dispute that plaintiff's condition at the time of the accident will be relevant at trial, and medical and hospital records relating to his condition at that time have been provided in discovery. The branch of plaintiff's motion seeking leave to withdraw his claim for PTSD and mental and psychological injuries was granted, and that part of the order is not addressed by defendants on appeal.

Having granted plaintiff's motion to withdraw the claimed injuries relating to his mental condition, the motion court providently determined that plaintiff cannot be compelled to disclose confidential records relating to prior treatment for substance or alcohol abuse or his mental condition (*see Churchill v Malek*, 84 AD3d 446, 446 [1st Dept 2011]; Mental Hygiene Law § 33.13[c][1]). Defendant's remaining claim for "loss of enjoyment of life," relating solely to his claimed physical injuries, does not warrant disclosure of substance abuse and mental health treatment information, since its potential relevance has not been shown (*see L.S. v Harouche*, 260 AD2d 250 [1st Dept 1999]; *Cronin v Gramercy Five Assoc.*, 233 AD2d 263 [1st Dept 1996]). A protective order preventing defendants from obtaining or using plaintiff's medical records regarding his mental health and

purported treatment for alcohol abuse was properly issued, because defendants have not shown that the interests of justice significantly outweigh plaintiff's right to confidentiality (*see Napoleoni v Union Hosp. of Bronx*, 207 AD2d 660, 661-663 [1st Dept 1994]). Given defendants' failure to offer expert or other evidence establishing a particularized need for inquiry into matters not directly at issue in this action, the denial of their discovery request was appropriate (*see Budano v Gurdon*, 97 AD3d 497, 499 [1st Dept 2012]; *Elmore v 2720 Concourse Assoc., L.P.*, 50 AD3d 493 [1st Dept 2008]).

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

ENTERED: APRIL 8, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12165 [M-636] In re Gennady Lvovsky, Petitioner, Index 300055/14

-against-

Anna Lvovsky, etc., et al., Respondents.

Law Office of Yonatan S. Levoritz, P.C., Brooklyn (Jose M. Medina of counsel), for petitioner.

Anne Peyton Bryant, New York, for Anna Lvovsky, respondent.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for Hon. Tandra L. Dawson, respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: APRIL 8, 2014

CLERK

Acosta, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

11231 Philip Caprio, et al., Index 651176/11
Plaintiffs-Appellants,

-against-

New York State Department of
Taxation and Finance, et al.,
Defendants-Respondents,

Andrew M. Cuomo, etc.,
Defendant.

_____

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (John G. Nicolich of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Cecelia C. Chang of counsel), for respondents.

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Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered November 5, 2012, reversed, on the law, without costs, the judgment vacated, it is declared that the retroactive application as to plaintiffs of the 2010 amendment to Tax Law § 632(a)(2) resulted in a due process violation, and defendants are hereby enjoined from enforcing the notice of deficiency. The Clerk is directed to enter judgment accordingly.

Opinion by Richter, J. All concur except Andrias, J. who dissents in an opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Richard T. Andrias,
Karla Moskowitz,
Rosalyn H. Richter,
Sallie Manzanet-Daniels, JJ.

11231
Index 651176/11

_____x

Philip Caprio, et al.,
Plaintiffs-Appellants,

-against-

New York State Department of
Taxation and Finance, et al.,
Defendants-Respondents.

_____x

Plaintiff appeal from the judgment of the Supreme Court, New York County (Paul G. Feinman, J.), entered November 5, 2012, dismissing the complaint, and bringing up for review an order, same court and Justice, entered September 25, 2012, which granted defendants' motion for summary judgment and denied plaintiffs' cross motion for summary judgment declaring unconstitutional the retroactive application of the 2010 amendment to Tax Law § 632(a)(2) as to them.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (John G. Nicolich and Roger Cukras of counsel), and Pitta & Giblin LLP, New York (Vincent F. Pitta of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Cecelia C. Chang and Richard Dearing of counsel), for respondents.

RICHTER, J.

In this appeal, we are asked to decide whether an amendment to the Tax Law enacted on August 11, 2010 can be applied retroactively to a transaction entered into by plaintiffs on February 1, 2007, more than 3 1/2 years earlier. Applying the balancing test set forth by the Court of Appeals, we conclude that the retroactive application of the amendment as to plaintiffs is impermissible. Plaintiffs reasonably relied on the old law in structuring the transaction, and had no forewarning of the change in the legislation. In light of plaintiffs' reliance, the excessive length of the retroactive period, and the absence of a compelling public purpose, a due process violation occurred.

Plaintiffs, a married couple who reside in Florida, are the former owners and sole shareholders of Tri-Maintenance & Contractors, Inc. (TMC), a company that provides janitorial and other services. TMC, which conducts some of its business in New York, was incorporated in New Jersey, and had elected to be treated as an S-corporation for federal and New York State purposes. Under both the Internal Revenue Code and the New York Tax Law, S-corporations are permitted to avoid corporate income taxes by passing through income and losses to shareholders for inclusion in their individual federal and state income tax returns (*see* Internal Revenue Code [IRC] [26 USC] §§ 1361-1379;

Tax Law § 660).

Pursuant to a stock purchase agreement dated February 1, 2007, plaintiffs sold all of their shares of TMC stock to Sanitors Services, Inc. for a base price of approximately $20 million, plus certain additional contingent payments. The agreement was structured so that Sanitors would pay the base price in two installments with interest: (1) an initial payment of approximately $19.5 million on March 1, 2007; and (2) the remaining sum of $500,000 on February 1, 2008. On the February 1, 2007 closing date of the transaction, Sanitors gave plaintiffs promissory notes for the installment obligations.

The parties' agreement also provided that they would jointly make an election pursuant to IRC 338(h)(10). That provision allowed the transaction to be treated, for federal tax purposes, as a sale of TMC's assets, immediately followed by a complete liquidation of TMC. Thus, TMC was deemed to have sold all of its assets to Sanitors in exchange for the promissory notes that plaintiffs received, and deemed to have made a distribution of the notes to plaintiffs. Under IRC 331(a), the amounts received by plaintiffs in the distribution in complete liquidation of TMC "shall be treated as in full payment in exchange for the stock."

Because TMC and plaintiffs received installment obligations (i.e., the promissory notes) in exchange for the TMC stock, they

elected to use the installment method of accounting (*see* IRC 453, 453B; *see also* Tax Law § 605[a][3] [requiring New York taxpayers to use same accounting method used for federal income tax purposes]). Generally speaking, under the installment method, gains are recognized only when cash payments are actually received. Under IRC 453B(h), an S-corporation that distributes an installment obligation in a complete liquidation does not recognize any gain or loss with respect to the distribution. On its 2007 federal and New York State S-corporation tax returns for the short taxable year ending February 1, 2007 (the date of the transaction), TMC did not report any realized gain on the transaction. According to plaintiffs, no gain was reported because TMC had not received any cash payments from Sanitors (but only had received the installment obligations), and because no gain was realized with respect to the deemed distribution pursuant to IRC 453B(h).

The gain was, however, reported on plaintiffs' individual federal tax returns. IRC 453(h)(1)(A) provides that a shareholder who receives an installment obligation in exchange for stock in a section 331(a) liquidation does not recognize income upon receipt of the obligation, but only upon receipt of the payments thereunder. Such payments, when received by the shareholder, "shall be treated as the receipt of payment for the

stock" (IRC 453[h][1][A]). Plaintiffs received the first installment payment under the promissory notes on March 1, 2007, which resulted in a capital gain of over $18 million. Plaintiffs reported this amount on their 2007 individual federal income tax return as a gain from the installment sale of their TMC stock. Plaintiffs also reported a gain of over $1 million on their 2008 federal return in connection with the second installment payment for the stock.

Plaintiffs, however, did not pay New York State taxes on these gains. New York State levies personal income tax on nonresident individuals only to the extent their income is derived from or connected to New York sources (Tax Law § 601[e]). Under Tax Law § 631(b)(2), gains received by nonresidents from the disposition of intangible personal property, such as stock, are not considered to be derived from a New York source unless the stock itself (as opposed to the underlying assets of the corporation) is "employed in a business, trade, profession, or occupation carried on in [New York]" (*see also* 20 NYCRR 132.5[a], 132.8[c]). Here, there is no allegation that the TMC stock itself was used in a New York trade or business. Thus, because IRC 453(h)(1)(A) treats the installment payments as the receipt of payments for stock, plaintiffs did not report the gains as derived from a New York source on their 2007 and 2008 New York

nonresident individual tax returns.

In June 2009, the New York State Division of Tax Appeals issued a ruling involving an installment transaction similar to the one here. In *Matter of Mintz* (2009 WL 1657395 [NY State Div of Tax Appeals June 4, 2009]), an administrative law judge (ALJ) held that the nonresident shareholders of an S-corporation did not have New York source income for payments they received under an installment obligation distributed by the S-corporation in an IRC 331 liquidation governed by IRC 453(h)(1)(A). The ALJ concluded that since the installment payments the shareholders received were gains from the sale of stock held by a nonresident, they were not includable as New York source income and thus not subject to taxation by New York State. The result in *Mintz* is consistent with plaintiffs' treatment of their gain as coming from the sale of stock not taxable by New York.

Defendant New York State Department of Taxation and Finance (the Tax Department) subsequently proposed legislation to override the *Mintz* decision and to provide that the type of transaction at issue here would result in taxable New York Sate income. As relevant here, in August 2010, the following sentence, drafted by the Tax Department, was added to Tax Law § 632(a)(2):

> "If a nonresident is a shareholder in an S

> corporation . . . and the S corporation has distributed an installment obligation under section 453(h)(1)(A) of the Internal Revenue Code, then any gain recognized on the receipt of payments from the installment obligation for federal income tax purposes will be treated as New York source income . . .”

(the 2010 amendment)(L 2010, ch 57, part C, as amended by L 2010, ch 312, part B).[1] This new provision of the Tax Law applied to taxable years beginning on or after January 1, 2007, a more than 3 1/2 year period of retroactivity.[2]

In February 2011, six months after the new legislation was enacted, DTF issued a notice of deficiency with respect to plaintiffs’ 2007 and 2008 state income tax returns, assessing approximately $775,000 in additional taxes and interest due as a result of the TMC transaction. Plaintiffs then commenced this action seeking a declaration that the retroactive application of the 2010 amendment, as to them, violates the Due Process Clauses of the federal and state constitutions. Plaintiffs named as defendants the Tax Department, its commissioner and mediation bureau, the State of New York and Governor Andrew M. Cuomo. Plaintiffs also sought an injunction preventing defendants from

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[1] Although other changes were made to Tax Law § 632(a)(2), plaintiffs do not challenge those provisions.

[2] This retroactive period was applicable provided that the statute of limitations for seeking a refund or assessing additional tax was still open.

enforcing the notice of deficiency against them.

Defendants moved for summary judgment dismissing the complaint, and plaintiffs cross-moved for summary judgment in their favor. The parties agreed that their respective motions raised an issue of law that could be decided without the need for developing a more detailed factual record. In an order entered September 25, 2012, the motion court denied plaintiffs' cross motion, granted defendants' motion, and dismissed the complaint. A judgment was subsequently entered on November 5, 2012 dismissing the complaint.[3] Plaintiffs appeal and we now reverse.[4]

Retroactive legislation is generally looked upon with disfavor and distrust (*James Sq. Assoc. LP v Mullen*, 21 NY3d 233, 246 [2013]). Nevertheless, retroactive provisions of tax legislation are not necessarily unconstitutional, and can be considered valid if they allow for a "short period" of retroactivity (*id.*). "The courts must examine in light of the nature of the tax and the circumstances in which it is laid, [whether] the retroactivity of the law is so harsh and oppressive

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[3] The motion court noted that defendants specifically asked for a judgment of dismissal rather than a declaration in their favor.

[4] Plaintiffs do not challenge the dismissal of the complaint as against Governor Cuomo.

as to transgress the constitutional limitation" (*id.* [internal quotation marks omitted]).

Determining whether the retroactive application of a tax statute violates a taxpayer's due process rights "is a question of degree" and "requir[es] a balancing of [the] equities" (*Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 70 NY2d 451, 456 [1987], *appeal dismissed* 485 US 950 [1988] [internal quotation marks omitted]). In *James Sq.*, the Court of Appeals recently reaffirmed a three-prong test to determine whether the retroactive application of a tax statute passes constitutional muster. "The important factors in determining whether a retroactive tax transgresses the constitutional limitation are (1) 'the taxpayer's forewarning of a change in the legislation and the reasonableness of . . . reliance on the old law,' (2) 'the length of the retroactive period,' and 3) 'the public purpose for retroactive application'" (21 NY3d at 246, quoting *Matter of Replan*, 70 NY2d at 456).

With respect to the first factor, which has been described as the "predominant" factor (*Replan*, 70 NY3d at 456), plaintiffs here had no actual forewarning of the change made by the 2010 amendment. Indeed, the amendment was not even proposed to the legislature until after the *Mintz* decision was issued in June 2010, long after plaintiffs had entered into the February 2007

TMC transaction. Thus, plaintiffs had "no warning and no opportunity [in 2007] to alter their behavior in anticipation of the impact of the [2010 amendment]" (*James Sq.*, 21 NY3d at 248).

The dissent argues that plaintiffs could not have relied on the *Mintz* decision because it was decided two years after the TMC transaction. Plaintiffs, however, do not allege reliance on *Mintz*. Instead, they argue that they structured the TMC transaction reasonably relying on the law as it previously existed. There is no dispute that, prior to the 2010 amendment, the Tax Law contained no specific provision governing a nonresident's receipt of payments from an S-corporation's distribution of an installment obligation under IRC 453(h)(1)(A). Plaintiffs make a compelling argument that under the previous law, those payments were not taxable by New York. As noted earlier, under IRC 453(h)(1)(A), a shareholder who receives an installment obligation in exchange for stock in a section 331(a) liquidation recognizes income upon receipt of payments on the obligation, and such payments "shall be treated as the receipt of payment for the stock." Because New York Tax Law § 631(b)(2) provides, as a general matter, that a nonresident's sale of stock is not taxable, plaintiffs' reasonably relied on existing law to conclude their installment payments were not taxable by New York.

Defendants' primary argument to the contrary is not based on a different reading of the then-applicable laws, but instead is rooted in their claim that New York had a longstanding practice of taxing S-corporation shareholders for transactions like the TMC sale.[5] The dissent echoes this argument, repeatedly referring to the Tax Department's purported long-established policy. The only proof that such a policy existed, however, is an isolated 2002 PowerPoint presentation made to Tax Department auditors purportedly reflecting such a practice. Even if such a policy were in existence, the record contains no evidence that the Tax Department took any steps to inform taxpayers of its policy. Nor is there any evidence that the internal PowerPoint presentation was made publicly available, or that plaintiffs, when they structured the 2007 transaction, had any other knowledge of the Tax Department's alleged practice. We disagree with the dissent that plaintiffs were required to have sought an advisory opinion from the Tax Department before entering into the TMC transaction. A reasonable reading of the Tax Law, as it existed in February 2007, is that the transaction was not subject

[5] Defendants also suggest that the TMC transaction was taxable based on language in the previous version of Tax Law § 632(a)(2). That language, however, merely sets forth the general rules for determining New York source income of a nonresident shareholder of an S-corporation, and contains no specific provision governing transactions like the TMC sale.

to New York tax, and plaintiffs had no knowledge of the Tax Department's contrary view. Thus, they had no reason to seek clarification from the Tax Department.

Defendants argue that plaintiffs cannot establish reasonable reliance because they did not submit evidence on how they would have structured the TMC transaction differently had they known it could subject them to New York taxation. However, the law does not require plaintiffs to show a specific proposed alternative course of action to satisfy the element of reasonable reliance. Rather, the proper inquiry is whether plaintiffs "conducted their business affairs in a manner consistent with [the previous law], justifiably relying on the receipt of the tax benefits that were then in effect" (*James Sq.*, 21 NY3d at 248; *see Matter of Replan*, 70 NY2d at 456 [reliance factor focuses on whether the taxpayer's expectations as to taxation have been unreasonably disappointed]).[6] Because plaintiffs structured the TMC transaction in reasonable reliance on the previous law, and in the absence of any evidence that they had any forewarning of the change in the law, the first *James Sq.* factor weighs in their

[6] In any event, plaintiffs point out that had they foreseen the change in the law, they could have avoided or minimized any tax liability by structuring the transaction differently or by requiring Sanitors to indemnify them for any subsequent tax assessments.

favor.

The second *James Sq.* factor, the length of the retroactive period, also favors plaintiffs. Excessive periods of retroactivity "have been held to unconstitutionally deprive taxpayers of a reasonable expectation that they will secure repose from the taxation of transactions which have, in all probability, been long forgotten" (*Matter of Replan*, 70 NY2d at 456 [internal quotation marks omitted]). As noted earlier, retroactive application of tax laws can be considered valid if they provide for a "short period" of retroactivity (*James Sq.*, 21 NY3d at 246). In *James Sq.*, the Court concluded that a retroactive period of 16 months "should be considered excessive and weighs against the State" (21 NY3d at 249). Here, the period of retroactivity was 3 1/2 years — nearly three times longer than the period found excessive in *James Sq.* As in *James Sq.*, we conclude that this excessive period was "long enough . . . so that plaintiffs gained a reasonable expectation that they would secure repose in the existing tax scheme" (*id.* [internal quotation marks omitted]; *see Matter of Lacidem Realty Corp. v Graves*, 288 NY 354 [1942] [four-year retroactive period invalidated as harsh and oppressive]).

Defendants contend that longer periods of retroactivity may be warranted where tax legislation does not impose a wholly new

tax, but is a curative measure meant to correct errors (*see James Sq.*, 21 NY3d at 249). The parties sharply dispute whether the 2010 amendment is a new tax or was designed to correct a previous legislative error. The dissent points to the preamble of the legislation, which shows that the 2010 amendment was intended to make the law consistent with the Tax Department's (unpublished) policy, and to overturn an administrative decision that failed to account for this policy. Tellingly, defendants point to no legislative history that indicates that the legislature was correcting any specific error in the existing law, as opposed to amending the law to account for the Tax Department's purported policy. Thus, contrary to the dissent's view, the legislative history does not support a view that the 2010 amendment was a curative measure.

Plaintiffs, on the other hand, persuasively argue that the 2010 amendment created an exception to the general rule, set forth in Tax Law § 631(b)(2), that gains from a nonresident's sale of stock (not used in a New York business) are not subject to New York taxation. Under the 2010 amendment, the particular stock sale engaged in here is now unquestionably subject to New York taxation, and thus can fairly be considered a new tax. Because the 2010 amendment cannot be reasonably viewed as merely correcting a legislative error, the longer period of

retroactivity urged by defendants is not warranted, and on balance, the second *James Sq.* factor weighs against defendants.

The final *James Sq.* factor is the public purpose for the retroactive application of the 2010 amendment. Although a close question, on balance, plaintiffs have the better argument. The legislative history indicates that enactment of the legislation was necessary to implement the 2010-2011 executive budget by raising tax revenues by $30 million in that fiscal year. Indeed, defendants expressly state in their brief that the legislature made the law retroactive to prevent revenue loss. But "raising money for the state budget is not a particularly compelling justification" and "is insufficient to warrant retroactivity in a case [as here] where the other factors militate against it" (*James Sq.*, 21 NY3d at 250). Defendants' argument that retroactivity is necessary so that other taxpayers are not unfairly burdened while plaintiffs receive a windfall is just another way of saying that the legislation is necessary to raise tax revenues. Indeed, we take issue with the dissent's use of the term "windfall" because if plaintiffs were merely following the law as it existed at the time they originally filed their state tax returns, there is nothing unfair about the result here. In any event, although apportionment of tax liability among various groups of taxpayers is a laudable goal, defendants offer

no convincing rationale for applying the 2010 amendment retroactively instead of only prospectively.

Accordingly, the judgment of the Supreme Court, New York County (Paul G. Feinman, J.), entered November 5, 2012, dismissing the complaint, and bringing up for review an order, same court and Justice, entered September 25, 2012, which granted defendants' motion for summary judgment and denied plaintiffs' cross motion for summary judgment declaring unconstitutional the retroactive application of the 2010 amendment to Tax Law § 632(a)(2) as to them, should be reversed, on the law, without costs, the judgment vacated, it is declared that the retroactive application as to plaintiffs of the 2010 amendment to Tax Law § 632(a)(2) resulted in a due process violation, and defendants are hereby enjoined from enforcing the notice of deficiency. The Clerk is directed to enter judgment accordingly.

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

ANDRIAS, J. (dissenting)

Tax Law § 632(a)(2), as amended in August 2010 (L 2010, ch 57, part C, as amended L 2010, ch 312, part B), provides that nonresident subchapter S shareholders who sell their interests in an S corporation pursuant to an election under Internal Revenue Code (26 USC) § 338(h)(10) or § 453(h)(1)(A) are to be taxed in accordance with that election and that the transaction is to be treated as an asset sale producing New York source income. The issue before us is whether the retroactive application of the 2010 amendments to assess additional taxes on plaintiffs for the 2007 and 2008 tax years violates the Due Process Clauses of the United States and New York State constitutions.

The majority finds that the retroactive application of the 2010 amendments to plaintiffs violates their due process rights in light of plaintiffs' reasonable reliance on the Tax Law as it existed in 2007 and the lack of forewarning of the 2010 changes, the length (3½ years) of the retroactive period, and the absence of a compelling public purpose. Because I agree with the motion court that the retroactivity provision and the duration of the retroactivity period are rationally related to the legitimate purpose behind the amendments and within the reasonable expectations of a taxpayer, and that plaintiffs failed to sufficiently demonstrate detrimental reliance on the pre-2010

law, I respectfully dissent.

Plaintiffs, residents of Florida, were the sole shareholders of Tri-Maintenance & Contractors, Inc. (TMC), incorporated in New Jersey as an S corporation for federal and New York State income tax purposes. Pursuant to a stock purchase agreement dated February 1, 2007, plaintiff sold their TMC stock to Sanitors Services, Inc. for a base price of $20 million, payable in installments of $19.5 million on March 1, 2007, and $500,000 on February 1, 2008. As part of the sale, the parties made an election under Internal Revenue Code (IRC) (26 USC) § 338(h)(10) to treat the transaction as an asset sale. TMC also elected to use the installment method of accounting under which gains are generally recognized when cash payments are actually received (IRC 453, 453B; *see also* Tax Law § 605[a][3]).

On their individual federal tax returns for the taxable years 2007 and 2008, plaintiffs reported a gain from the installment asset sale of $18 million and $1 million respectively. However, on their New York State returns for those years, plaintiffs treated the installment payments as payments received in exchange for their stock that were not subject to state tax, given plaintiffs' nonresident status.

In 2009, administrative decisions in *Matter of Baum* (2009 WL 427425 [NY Tax App Trib February 12, 2009]) and *Matter of Mintz*

(2009 WL 1657395 [NY Div Tax App June 4, 2009]) held that an S-corporation transaction could be treated as an asset sale for federal income tax, but as a stock sale for New York State income tax. According to the Department of Taxation and Finance (DTF), these rulings contravened its long-established policy of parallel treatment and created the risk of substantial, unintended tax loopholes, potentially immunizing hundreds of past transactions from all New York State tax liability.

To override *Baum and Mintz*, DTF sought to obtain amendments to Tax Law § 632(a)(2), which in 2010 was amended, as follows:

> "In determining New York source income of a nonresident shareholder of an S corporation where the election provided for in subsection (a) of section six hundred sixty of this article is in effect, there shall be included only the portion derived from or connected with New York sources of such shareholder's pro rata share of items of S corporation income, loss and deduction entering into his federal adjusted gross income, increased by reductions for taxes described in paragraph two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code, as such portion shall be determined under regulations of the commissioner consistent with the applicable methods and rules for allocation under article nine-A or thirty-two of this chapter, *regardless of whether or not such item or reduction is included in entire net income under article nine-A or thirty-two for the tax year. If a nonresident is a shareholder in an S corporation where the election provided for in subsection (a) of section six hundred sixty of this article is in effect,*

and the S corporation has distributed an installment obligation under section 453(h)(1)(A) of the Internal Revenue Code, then any gain recognized on the receipt of payments from the installment obligation for federal income tax purposes will be treated as New York source income allocated in a manner consistent with the applicable methods and rules for allocation under article nine-A or thirty-two of this chapter in the year that the assets were sold. In addition, if the shareholders of the S corporation have made an election under section 338(h)(10) of the Internal Revenue Code, then any gain recognized on the deemed asset sale for federal income tax purposes will be treated as New York source income allocated in a manner consistent with the applicable methods and rules for allocation under article nine-A or thirty-two of this chapter in the year that the shareholder made the section 338(h)(10) election. For purposes of a section 338(h)(10) election, when a nonresident shareholder exchanges his or her S corporation stock as part of the deemed liquidation, any gain or loss recognized shall be treated as the disposition of an intangible asset and will not increase or offset any gain recognized on the deemed assets sale as a result of the section 338(h)(10) election." (see L 2010, Ch 57, Part C, § 2) (emphasis added to language added by the 2010 amendment).

The amendments were made retroactive, and apply

> "to taxable years beginning on or after January 1, 2007 for which the statute of limitations for seeking a refund or assessing additional tax is still open, provided, however, that in cases of failure to file, failure to report federal changes, or filing a false or fraudulent return with intent to evade tax, as specified under paragraph 1 of

> subsection (c) of section 683 of the tax law, or in cases of substantial omission of income under subsection (d) of section 683 of the tax law, it shall apply to all taxable years as long as such statute of limitations remain open and are subject to assessment" (*id.*).

On February 7, 2011, DTF issued a notice of deficiency with respect to plaintiffs' 2007 and 2008 state income tax returns, assessing approximately $775,999 in additional taxes and interest as a result of the TMC sale. Asserting that the deficiency was "attributable entirely" to DTF's retroactive application of the 2010 amendments to Tax Law § 632(a)(2), plaintiffs commenced this action alleging that, in violation of their federal and state due process rights, the 2010 amendments imposed "a tax for the first time on the gain recognized on payments received from installment obligations distributed under Section 453(h)(1)(A) of the Code, and ... provide[d] an excessive period of retroactivity of three and one-half years as applied to [plaintiffs], thereby creating a hard and oppressive effect on the settled expectations of" plaintiffs. In their answer, defendants, among other things, denied that the assessment was attributed entirely to the 2010 amendments.

In determining whether the retroactivity provisions of a tax statute should be upheld, "[t]he courts must examine in light of the nature of the tax and the circumstances in which it is laid,

[whether] the retroactivity of the law is so harsh and oppressive as to transgress the constitutional limitation" (*James Sq. Assoc. LP v Mullen*, 21 NY3d 233, 246 [2013] [internal quotation marks omitted]). The determination requires a balancing of the equities based on the facts and circumstances of each case, including a consideration of "1) 'the taxpayer's forewarning of a change in the legislation and the reasonableness of [] reliance on the old law,' 2) 'the length of the retroactive period,' and 3) 'the public purpose for retroactive application'" (*James Sq.*, 21 AD3d at 246, quoting *Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 70 NY2d 451, 456 [1987], *appeal dismissed* 485 US 950 [1988]). "Notably, when legislation is curative, retroactivity may be liberally construed" (*Matter of Moran Towing Corp. v Urbach*, 1 AD3d 722, 724 [3d Dept 2003]; *see also United States v Carlton*, 512 US 26 [1994]).

Here, the legislative findings leave no question that the 2010 amendments were a curative measure:

> "Legislative findings. The legislature finds that it is necessary to correct a decision of the tax appeals tribunal and a determination of the division of tax appeals that erroneously overturned the longstanding policies of department of taxation and finance that nonresident subchapter S shareholders who sell their interest in an S corporation pursuant to an election under section 338(h)(10) or section 453(h)(1)(A) of the Internal Revenue Code, respectively, are taxed in accordance with that election and the transaction is treated as an asset sale producing New York source

> income. Section two of this act is intended to clarify the concept of federal conformity in the personal income tax and is necessary to prevent confusion in the preparation of returns, unintended refunds, and protracted litigation of issues that have been properly administered up to now." (L 2010, c 57, pt C, § 1);

see *also* Mem in Support of 2010-11 Executive Budget at 13 ["Section 2 of the bill would clarify that shareholders of a subchapter S corporation that made an election under IRC §§ 338(h)(10) and 453 are required to treat the income as income from the sale of New York assets, and not a stock sale as held in the *Baum* and *Mintz* cases"]).

Given DTF's long-established policy of parallel treatment, plaintiffs cannot establish "cognizable detrimental reliance" (*Matter of Varrington Corp. v City of N.Y. Dept. of Fin.*, 85 NY2d 28, 35 [1995] [two-year period of retroactivity upheld where taxpayer did not detrimentally rely on the temporarily altered tax policy]). Plaintiffs could not have relied on *Mintz* or *Baum* to conclude that DTF would allow them to treat the 2007 TMC transaction as an asset sale on their federal tax return, but as a stock sale on their New York return, because those cases were not decided until 2009. Moreover, insofar as the majority finds that plaintiffs had no forewarning of the change in the Tax Law created by the 2010 amendments, defendants have shown, and plaintiffs have not refuted, that the decisions in *Mintz* and *Baum*

were inconsistent with DTF's longstanding policy to treat such transactions as asset sales when the taxpayer so elects. This policy, which was in effect when plaintiffs structured the TMC transaction in 2007,

> "is consistent with Article 22 of the Tax Law, under which a resident taxpayer's New York adjusted gross income starts with his or her Federal adjusted gross income, and a nonresident taxpayer's New York source income is his or her Federal adjusted gross income derived from New York sources with such income maintaining its Federal character" (Mem in Support of 2010-11 Executive Budget at 12-13).

Moreover, treating a stock sale as the sale of the assets of the S corporation for state tax purposes when an IRC 338(h)(10) election is made has also been approved by courts in other jurisdictions (*see Prince v State Dept of Revenue,* 55 So3d 273, 281 n 3 [Ala Civ App 2010], *cert denied* 55 So3d 287 [Ala 2010]).

While the majority questions whether plaintiffs were aware of DTF's parallel treatment policy, it is significant to note that plaintiffs could have requested a binding advisory opinion from the DTF prior to engaging in the TMC transaction (*see* 20 NYCRR 2376.1, 2376.4), but did not do so. Furthermore, plaintiffs have not shown that they would have structured the transaction any differently had they been aware of DTF's parallel treatment policy.

The majority believes that defendants have not established that a longstanding policy of parallel treatment existed. However, this view conflicts with the explicit statements in the legislative history that such a policy existed, and gives no weight to the affidavit submitted by DTF, which was not refuted. Further support is found in the fact that the administrative decisions in *Mintz* and *Baum* cancelled notices of tax deficiency issued by DTF pursuant to that very practice.

Nor do I agree with the majority that the retroactivity period was excessive. New York courts have eschewed the adoption of rigid rules for determining whether the duration of the retroactive period of a tax is unconstitutional (*see Matter of Replan Dev.*, 70 NY2d at 456). Each case must be judged on its particular facts and circumstances and the fact that the 3½-year retroactive period in this case is longer than the period of retroactivity found to be excessive in *St. James*, is not dispositive. In view of the curative nature of the statute, the legislature's decision to apply the amendments to past open tax years, for which the statute of limitations had not run, was reasonable and rationally related to the legislative goal of minimizing the negative impact of the determinations in *Mintz* and *Baum*, which the legislature viewed as erroneous, as well as the legitimate purpose of raising tax revenues. Even if the

amendments did not correct a mistake in law, they were supported by the legitimate purpose of fixing a perceived loophole that departed from DTF's long-established tax practice of holding shareholders to the federal elections they make in structuring S-corporation transactions, and giving the transactions parallel treatment under state law, and the amendments rationally furthered that purpose. Due process does not prohibit the legislature from making the equitable choice to deny plaintiffs the windfall of tax immunity, rather than inflict costs and burdens on other, innocent taxpayers.

Accordingly, I would affirm the order which granted defendants' motion for summary judgment and denied plaintiffs' cross motion for summary judgment declaring the retroactive application of the 2010 amendments to Tax Law § 632(a)(2) unconstitutional, as applied to them.

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

ENTERED: APRIL 8, 2014

CLERK