SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Luis A. Gonzalez
John W. Sweeny, Jr., JJ.

1957
Ind. 6210/04

The People of the State of New York,
Respondent,

-against-

Enrique Alvarez,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Marcy L. Kahn, J.), rendered August 30, 2005, convicting him, after a jury trial, of criminal sale of a controlled substance in the third degree, and imposing sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Simpson, Thacher & Bartlett, LLP, New York (Justin Engel of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

GONZALEZ, J.

The primary issue on this appeal from defendant's conviction of criminal sale of a controlled substance in the third degree is whether the trial court's exclusion of defendant's girlfriend from the courtroom during the trial testimony of two undercover police officers violated his Sixth Amendment right to a public trial. Two corollary issues are whether the court abused its discretion in reopening the *Hinton* hearing after it had initially ruled that the girlfriend would not be excluded, and whether the court properly allowed the officers to testify under assumed names. Defendant also claims error in the trial court's denial of a jury charge on a lesser included offense.

We conclude that the court's initial *Hinton* ruling declining to exclude the girlfriend during the undercovers' testimony was erroneous, and that the court properly exercised its discretion in reopening the *Hinton* hearing to correct its error and to receive additional testimony regarding the particularized threat posed by the girlfriend. As defendant's remaining arguments lack merit, we affirm defendant's conviction.

Hinton Hearing

Prior to commencement of the trial, the People sought to exclude all members of the public from the courtroom during the testimony of two undercover officers, with the exception of

defendant's family members, and further requested that the officers be permitted to identify themselves during their testimony by their police department shield number. In arguing for closure, the prosecutor noted that defendant's girlfriend lived in the area of the drug sale, which raises an "additional concern."

The court ordered a *Hinton* hearing (31 NY2d 71 [1972], *cert denied* 410 US 911 [1973]), at which undercover officer (UC) #6813 testified that he was assigned to the 25th Precinct in Manhattan and had participated in approximately 250 narcotics purchases. He further testified that he intended to work as an undercover in the same neighborhood where the charged sale occurred during the week of the upcoming trial, and that he had also worked there during the previous week on a long-term investigation. He noted that several subjects of that investigation were still at large.

UC #6813 testified that on days he had to testify in court, he took precautions to protect his identity, such as using side entrances to the courthouse, appearing in plainclothes and never testifying under his own name. He stated that he had been threatened by subjects on multiple occasions, and believed that testifying in his own name would jeopardize his and his family's safety, noting that an old friend had once located him by an Internet search. On cross-examination, UC #6813 conceded that he

had never been threatened by this defendant nor anyone associated with him.

At the conclusion of the testimony, the prosecutor asked that the general public be excluded from the courtroom, but that he would not object to the presence of defendant's family, unless those family members lived in the vicinity of the instant drug sale. The prosecutor noted that defendant's girlfriend, who was present in the courtroom, lived with defendant in the neighborhood of the sale and "we do not want her to be identifying the undercovers when they're out doing their job."

In opposition, defense counsel argued that there was no evidence of any particularized threats from either defendant or anyone associated with him, even while he was out on bail. Counsel opposed the exclusion of defendant's girlfriend, citing the lack of any evidence of a particularized threat involving her. Counsel further requested that if the undercover officer was permitted to testify anonymously, he do so under an assumed name, instead of a shield number.

In its initial *Hinton* ruling, the court partially granted the People's application. It ruled that a sufficient showing had been made that "disclosure of the detective's name and having him testify publicly as an undercover would likely prejudice his effectiveness and could very well jeopardize his family's

safety." Therefore, the court announced that it would position a court officer outside the door to the courtroom, and in the event anyone wished to enter during the undercover's testimony, the officer would advise the court, which would then make a ruling. However, the court denied the People's request to exclude defendant's girlfriend, stating that the People had failed to make the "stronger showing" that is required to exclude family members. Finally, the court ruled that the undercover would be permitted to testify under an assumed name.

The next day, the prosecutor moved to reopen the *Hinton* hearing with respect to the non-exclusion of the girlfriend. The prosecutor informed the court that he had become aware of "specific information" indicating that the girlfriend was involved in the drug trade. Specifically, UC #6813 had reported to him that during the drug transaction charged in this case, defendant had told the undercover that his girlfriend had obtained some cocaine and then "cut him out of the deal." In response to the court's inquiry as to why this evidence was not presented at the initial *Hinton* hearing, the prosecutor responded that he did not realize its significance because defendant's statement did not mention the girlfriend by name, and that he was "focusing on the statement as it relate[d] to the defendant and not focusing as to who the other person was." In addition, the

prosecutor submitted case law to the court, holding that the exclusion of family members was justified based on their residence in the area of the crime and the ongoing undercover operations.

Defense counsel objected to the reopening of the hearing, arguing that the People had ample opportunity at the first hearing to bring out this information, but failed to do so, and that they were merely requesting a "mulligan," after the court had ruled in defendant's favor. Counsel further noted that it was not clear from defendant's alleged statement that he was referring to his present girlfriend, who was in court that day. The court ruled that the People had made a sufficient showing to reopen the hearing to accept further testimony on the issue of whether a particularized fear exists of testifying in the girlfriend's presence.[1]

At the reopened *Hinton* hearing, UC #6813 testified that defendant had told him that he and his girlfriend had purchased cocaine in Washington Heights and that she had "cut him out of the deal." UC #6813 understood this to mean that the girlfriend was involved in selling drugs. He further testified that because

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[1]In its ruling reopening the *Hinton* hearing, the court also took specific note of the cases cited by the prosecutor which hold that a family member's residence in the area of ongoing undercover operations will often justify closure.

he understood that the girlfriend lived in the same area as the sale, an area where he continued to work as an undercover, he was concerned that she might be able to point him out as a police officer.

After the testimony, the prosecutor rested on the record and defense counsel argued that the court should "adhere to its original ruling." Counsel noted that the additional evidence was equivocal at best, since it did not name the girlfriend and didn't explicitly state that the girlfriend sold drugs. He also attacked the credibility of the evidence, noting that the undercover had never mentioned this alleged statement by defendant in his prior testimony or in the police reports.

In its second *Hinton* ruling, the court stated that the People have made "a particularized showing of concern about the presence of the defendant's girlfriend to warrant her exclusion during the testimony of undercover 6813." The court found that because the girlfriend lived in the area where the charged sale occurred and where the undercover was continuing to work, the undercover's safety and effectiveness could be compromised if she was permitted to observe his testimony in court.

A few days later, a third *Hinton* hearing was held for UC #5109, who acted as the "ghost" undercover in this case. UC #5109 testified similarly to UC #6813 as to the risk of

testifying in his own name, and his fear of testifying in front of defendant's girlfriend. Defense counsel opposed, but noted that the issue was likely moot, since the girlfriend had been hospitalized and was unable to come to court on the day of UC #5109's scheduled testimony. The court ruled that it would follow the same procedure for closing the courtroom as utilized for UC #6813, and also that UC #5109 could also testify under an assumed name.

The Trial

Undercover #6813's trial testimony established that on November 11, 2004, he approached defendant at the corner of 131st Street and Fifth Avenue and asked him for "krills," a street term for crack cocaine. Defendant asked how many the undercover wanted, and directed him to give him the money and then walk with him. UC #6813 handed defendant $10 in prerecorded buy money and walked with him to 2101 Madison Avenue, which is between 132nd and 133rd Street. Defendant led the undercover into the lobby and then went upstairs. Defendant returned a few minutes later and handed UC #6813 a plastic twist containing a substance that later proved to be cocaine.

Subsequently, the two walked to 2114 Fifth Avenue, where defendant said he lived. During the walk, defendant made the statement about his girlfriend cutting him out of a drug deal,

and also said that the next time the undercover wanted to buy drugs, he should come to 2114 Fifth Avenue and ask for "Cuba," which was defendant's nickname. Shortly thereafter, as he was leaving the scene, the undercover observed the back up team arrest defendant, who had no pre-recorded buy money or drugs on his person.

Jury Charge

At the close of the evidence, defense counsel requested that the court charge the jury on the agency defense. The People opposed the application, but alternatively argued that if the jury was given an agency charge, the court should also submit the charge of criminal possession of controlled substance in the seventh degree as a lesser included offense of the third-degree sale charge. The prosecutor explained that a reasonable view of the evidence existed that defendant committed the crime of possession, but not sale, since once the agency defense was charged, the jury would be entitled to conclude that even though he did not act as a seller, defendant indisputably possessed the cocaine that he delivered to the undercover, albeit in his capacity as agent of the buyer.

Defense counsel initially argued that the submission of the lesser included offense might confuse the jury, but nevertheless agreed with the prosecutor that it was a lesser included offense

under *People v Johnson* (45 NY2d 546 [1978]). In the end, defense counsel did not affirmatively join the prosecutor's request to charge; nor did he oppose it ("I do not believe there's not a basis [for the lesser included charge]").

Ultimately, the court ruled that it would grant the agency charge, but deny the lesser included charge. While conceding that under *Johnson* the possession charge was a lesser included of the third-degree sale charge, it nevertheless found that there was no reasonable view of the evidence that defendant merely possessed the cocaine, citing *People v Scarborough* (49 NY2d 364 [1980]), since such a finding would require the jury to indiscriminately reject and accept portions of the undercover's testimony.

Discussion

Defendant raises four arguments in support of his appeal: 1) the trial court abused its discretion in granting the People's request to reopen the *Hinton* hearing after a decision on the merits; 2) the exclusion of defendant's girlfriend during a portion of the trial violated his Sixth Amendment right to a public trial; 3) the court violated defendant's confrontation rights by permitting the officers to testify under assumed names; and 4) the court committed reversible error in refusing to submit to the jury the lesser included charge of criminal possession of

a controlled substance in the seventh degree.

We address the issue of courtroom closure first. A criminal defendant's right to a public trial is guaranteed by the Sixth Amendment to the United States Constitution and has been described by the Court of Appeals as "fundamental but not absolute" (*People v Kin Kan*, 78 NY2d 54, 57 [1991]). Thus, while it is undisputed that trial courts "possess 'inherent discretionary power' to exclude members of the public from the courtroom" (*People v Ramos*, 90 NY2d 490, 497 [1997], *cert denied Ayala v New York*, 522 US 1002 [1997], quoting *Hinton*, 31 NY2d at 75), such power should be exercised "sparingly and only after balancing the competing interests 'with special care'" (*People v Nieves*, 90 NY2d 426, 429 [1997], quoting *Waller v Georgia*, 467 US 39, 45 [1984]).

In *Waller*, the United States Supreme Court set out a four-prong test for determining whether a courtroom closure violates a criminal defendant's Sixth Amendment rights: 1) the party seeking closure must advance an overriding interest that is likely to be prejudiced, 2) the closure must be no broader than necessary to protect that interest, 3) the trial court must consider reasonable alternatives to closing the proceeding, and 4) it must make findings adequate to support closure (*id.* at 48). New York

courts have adopted this standard (*see People v Ramos*, 90 NY2d at 497; *People v Martinez*, 82 NY2d 436 [1993]; *People v Kin Kan*, 78 NY2d at 57-58).

The Court of Appeals has also recognized that a criminal defendant's interest in having the courtroom open to members of his or her family is a compelling one (*Kin Kan* at 59), which necessitates even more careful consideration of the *Waller* factors (see *Nieves* at 430 [where trial court is made aware that defendant would like to have family present, exclusion of those individuals must be necessary to protect the interest advanced by the People in support of the closure]). Thus, in order to establish that closure is no broader than necessary with respect to a defendant's family member, the prosecution must show a "substantial probability" that the undercover officer's safety would be jeopardized by the presence of the family member during the undercover's testimony (*Nieves* at 431), and the threat must be particularized as to each family member sought to be excluded *see Nieves* at 430-431; *People v Gutierez*, 86 NY2d 817, 818 [1995]; *People v Garcia*, 271 AD2d 81, 84 [2000], *affd* 95 NY2d 946 [2000]).

Because it is relevant to the issue of the propriety of reopening the *Hinton* hearing, we examine the court's initial *Hinton* ruling first. As indicated, UC #6813's testimony

established his involvement in over 200 narcotics purchases, that he intended to work as an undercover officer in the neighborhood of the instant crime during the week of the trial, that he had several subjects still at large, that he had taken precautions in entering the courthouse, and that he had been threatened by subjects in the past. He told the court that testifying in his own name would jeopardize his and his family's safety. Finally, although the undercover did not expressly state his fear of testifying in front of defendant's girlfriend, the record makes clear that she was a specific focus of the prosecution's application because she lived in the neighborhood where the undercovers were actively operating.

In light of the above showing, the motion court should have followed well-established precedent holding that the exclusion of a defendant's family member from the courtroom will be justified when such family member lives in the area where the officer is actively engaged in undercover operations. Indeed, appellate courts have uniformly held that such a showing will establish a substantial probability that an overriding interest will be

prejudiced by the undercover's open-court testimony (*see People v Goris*, 305 AD2d 178, 179 [2003], *lv denied* 100 NY2d 620 [2003]; *People v Blake*, 284 AD2d 339 [2001], *lv denied* 96 NY2d 916 [2001]; *People v Powell*, 246 AD2d 494 [1998], *lv denied* 92 NY2d 859 [1998]; *People v Feliciano*, 228 AD2d 519 [1996], *lv denied* 88 NY2d 1068 [1996]).

Plainly, because both undercovers continued to work in an undercover capacity in the same area where the sale occurred and defendant's girlfriend lived, a credible and legitimate threat existed that the girlfriend might spot the officers on the street during their operations and recognize them from court (*see People v Ramos*, 90 NY2d at 499 [prosecution met burden of showing prejudice to overriding interest where, among other things, officers expected to resume undercover operations in area of arrest within a day and took precautions in entering courthouse]). Obviously, exposing their identities in this manner could have dangerous consequences, and such danger cannot be overlooked merely because neither defendant nor any of his associates had personally threatened either officer in the past.

The cases cited by defendant in support of his argument that a family member's residence in the area of ongoing undercover operations is insufficient to justify closure are

distinguishable. Although in *People v Nieves* (90 NY2d at 430-431) and *People v Gutierez* (86 NY2d at 818), the Court of Appeals held that the trial courts' exclusion of those defendants' family members was unconstitutionally overbroad, critical to each of these holdings was the fact that neither undercover officer had expressed any particularized fear of testifying in the presence of the defendants' family members (*see also People v Kin Kan*, 78 NY2d 54, *supra*; *see also People v Garcia*, 271 AD2d at 82 [courtroom closure overbroad where court stated it would grant or deny *Hinton* application "in toto," without consideration of specific relatives]; *People v Green*, 215 AD2d 309 [1995] [prosecution failed to establish officer's concern over defendant's family or that he continued to work as an undercover in that area]).

Here, in contrast, the prosecutor's *Hinton* application was specifically directed at the exclusion of the defendant's girlfriend from the outset, and the record clearly shows that the basis for the prosecution's concern was her residence in the specific area of continuing undercover operations (*Ramos*, 90 NY2d at 499; *compare Nieves* at 431 [closure overbroad where area of defendant's residence was not discussed at *Hinton* hearing and

played no part in court's decision]; *People v Cooper*, 228 AD2d 297 [1996], *lv dismissed* 89 NY2d 863 [1996] [exclusion of mother of defendant's fiancé impermissibly broad where no fear of family stated and no evidence that mother resided in area]).

Even assuming, without deciding, that the trial court's erroneous *Hinton* ruling is not reviewable on this appeal by defendant (*see People v LaFontaine*, 92 NY2d 470, 473-474 [1998]; CPL 470.15[1]), it is relevant to the court's discretionary determination to reopen the *Hinton* hearing. It is defendant's position that under *People v Havelka* (45 NY2d 636 [1978]), the prosecution is afforded only one full opportunity to present evidence of a dispositive issue at a pretrial hearing, and that the court violated this rule by allowing the prosecution a second chance to introduce evidence of the girlfriend's involvement in the drug trade, despite its availability at the time of the initial *Hinton* hearing. We disagree for two reasons.

First, we do not find *Havelka* applicable under the circumstances of this case. In *People v Malinsky* (15 NY2d 86, 95-96 [1965]), the Court of Appeals established the rule that although the prosecution is generally entitled to a single opportunity to meet its evidentiary burden at a pretrial suppression hearing, where an error of law is committed by the hearing court which directly causes the prosecutor to fail to

offer potentially critical evidence, a rehearing may be ordered. The suppression court in *Malinsky* had denied disclosure of a crucial informant's identity, and then denied the defendant's motion to suppress. After defendant was convicted, he argued on appeal that the suppression court erred by not requiring the prosecution to disclose the identity of the informant. Although the Court of Appeals agreed with the defendant that denial of disclosure of the informant's identity was erroneous, it did not reverse, but instead held the appeal in abeyance and remanded for a rehearing. In the *Malinsky* Court's view, the prosecution was entitled to at least one opportunity "to prove that there was sufficient evidence of probable cause apart from the communication of the informer" (15 NY2d at 96).

The Court of Appeals has applied the *Malinsky* rule in subsequent cases to permit a rehearing on a suppression motion where an error of law is committed by the hearing court that causes the People to fail to offer an alternative justification for the search or seizure (*see People v Crandall*, 69 NY2d 459, 466-467 [1987] [Appellate Division properly remitted case to hearing court where suppression court's erroneous ruling upholding "oral search warrant" deprived People of opportunity to

establish alternative justification]; *People v Payton*, 51 NY2d 169, 177 [1980] [court's erroneous ruling upholding arrest based on then-valid statute required remand for hearing court to provide People with opportunity to establish exigent circumstances]; *People v Green*, 33 NY2d 496 [1974] [proper to remit for rehearing to consider search incident to lawful arrest justification, after hearing court erroneously upheld search that went beyond scope of valid search warrant]).

In *Havelka*, however, the Court distinguished the *Malinsky* line of cases on the ground that "[n]o erroneous ruling interfered in any way with the People's opportunity to advance evidence to justify the challenged police activity" (*id.* at 644). Although the suppression court's ruling in *Havelka* was, in fact, erroneous, the Court apparently found that the prosecution was not impeded from providing alternative justifications, since two witnesses were available but not called by the prosecution.

Assuming that the rules regarding the reopening of suppression hearings established in *Malinsky* and *Havelka* are applicable to *Hinton* hearings, there was clear judicial error in this case that justified the prosecution's request to reopen the hearing to introduce further evidence. As the prosecutor argued in his request to reopen, established case law permitted the exclusion of defendant's family member if such person lived in

the area of ongoing undercover operations (*see People v Ramos*, 90 NY2d at 499; *People v Goris*, 305 AD2d at 179; *People v Blake*, 284 AD2d at 339-340). In fact, the motion court essentially conceded its earlier error by stating that "whether she is a drug dealer or not, [defendant's girlfriend] pose[d] a particularized threat to [the undercover's] future effectiveness" since she lived with defendant in the area where the undercover continued to work.[2] Accordingly, because well-established precedent eliminated any incentive to provide further evidence justifying the girlfriend's exclusion (*see People v Crandall*, 69 NY2d at 466), and the court's judicial error essentially prevented the People from satisfying their burden at the initial *Hinton* hearing, the motion court providently exercised its discretion in reopening the hearing and reconsidering its ruling.

A second reason supporting the trial court's discretionary determination to reopen the *Hinton* hearing may be found in the distinct purposes of suppression and *Hinton* hearings. At a suppression hearing, the prosecution generally undertakes to meet its burden of demonstrating the propriety of the police conduct

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[2]Further evidencing her concession of error, the trial judge later stated that "she doesn't have to be a drug seller *under this case law* to be barred from this testimony. So that finding [that defendant made statements suggesting she was a drug seller] is not essential, okay. That's my ruling (emphasis added)."

by eliciting testimony from police witnesses regarding the facts underlying a search or seizure, an identification procedure or the taking of an oral or written statement. Most critically, the testimony usually consists of past facts relating to the police investigation, which often have occurred months before the hearing and which are frequently documented in police reports. As such, the evidence offered at a suppression hearing is usually known to the prosecution well in advance of the hearing, and is not generally subject to change.

In contrast, the purpose of *Hinton* hearings is not to uncover past facts regarding a police investigation in order to determine the admissibility of trial evidence. Instead, the evidence offered by the prosecution at a *Hinton* hearing generally relates to existing safety risks posed to undercover officers by virtue of their imminent open-court testimony. By its very nature, the *Hinton* inquiry is a more fluid one, requiring the prosecution to demonstrate actual or potential threats to the officers' safety, a nexus between those threats and their in-court testimony, and, with respect to the exclusion of family members, a particularized threat posed by each individual family member. This analysis necessarily requires a continuing and ongoing assessment of the circumstances surrounding the

assignments of the undercovers, their frequency of testifying at the courthouse and a contemporaneous evaluation of those present in the courtroom at the time of the *Hinton* hearing and trial. Viewed in this light, the *Hinton* inquiry must be treated with significantly more flexibility and wider discretion in considering a party's request to reopen the proceedings to consider additional argument or proof.

The need for greater flexibility and discretion in *Hinton* hearings is aptly illustrated in the circumstances of this case. Here, the court's error of law might have placed the undercover officers' safety at significant risk, had the court not exercised its discretion in reconsidering its apparent error and hearing additional evidence uncovered by the People. While defendant, citing *Havelka*, argues that permitting the People "a second chance to succeed where once they had tried and failed" (*People v Bryant*, 37 NY2d 208, 211 [1975]), would encourage abuse in the form of tailored testimony "to fit the court's established requirements" (*Havelka* at 643), we believe that the hearing court was more than up to the task of evaluating the risk of manufactured testimony. Here, the prosecutor stated that he had been aware of defendant's statement about his girlfriend's involvement in the drug trade prior to the initial hearing, but

did not realize its significance to the *Hinton* issue until after such hearing was concluded. In our view, it was within the hearing court's broad discretion to consider the credibility of this assertion, and we find no abuse in this instance in permitting additional evidence on the closure issue. We note that a *Hinton* ruling based on an incomplete record could have immediate and dangerous consequences regarding the safety of undercover police witnesses. Accordingly, broad discretion should be afforded trial courts in this highly sensitive area.

We also reject defendant's argument that his confrontation rights were violated by the trial court's ruling permitting the undercovers to testify under assumed names. Applying the three-prong analysis enunciated in *People v Stanard* (42 NY2d 74 [1997], *cert denied*, 434 US 986 [1977]), and reaffirmed in *People v Waver* (3 NY3d 748 [2004]), the court correctly ruled that the prosecution's evidence at the initial *Hinton* hearing was sufficient to establish that the officers should be excused from disclosing their names due to safety concerns, and that such concerns outweighed defendant's interest in learning the names of the officers (*see People v Smith*, 33 AD3d 462, 463-464 [2006], *lv denied* 8 NY3d 849 [2007]; *People v Henderson*, 22 AD2d 311, 312 [2005], *lv denied* 6 NY3d 813 [2006]).

Defendant's final argument that the trial court committed reversible error in refusing to submit to the jury the lesser included offense of seventh-degree possession is unpreserved for appellate review, and we decline to review in the interests of justice (CPL 470.05[2]). As mentioned, defense counsel never requested the charge down, and even suggested that such an instruction might confuse the jury. By failing to request that the court charge the lesser included or by failing to object to its refusal to charge, defendant failed to preserve an issue of law for this Court's review (*People v Buckley*, 75 NY2d 843, 846 [1990]; *People v Ware*, 303 AD2d 173, 174 [2003], *lv denied* 100 NY2d 543 [2003]; *People v Lee*, 176 AD2d 966 [1991], *lv denied* 79 NY2d 859 [1992]; *see also People v Purcell*, 103 AD2d 938, 939 [1984]).

Nor did the prosecutor's request that the court charge the lesser included offense suffice to preserve the issue on defendant's behalf (*People v Buckley*, 75 NY2d at 846). Although a 1986 amendment to CPL 470.05(2) broadened the circumstances under which an error of law is preserved for appellate review where, "in response to a protest by a party, the court expressly decided the question on appeal" (L 1986, ch 798, § 1), this amendment merely "eliminate[d] the need for a nexus between the

ground advanced for the protest and the rationale for the ruling," but "does not relieve counsel from the duty of making a protest to preserve the issue of law" (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 470.05, at 11; *see also People v Colon*, 46 AD3d 260, 263 [2007] ["(t)o read out of CPL 470.05(2) the requirements of a timely 'protest by a party' and a causal nexus between the protest and the question 'expressly decided' would violate a fundamental canon of construction"]). Thus, in order to preserve a question of law regarding the failure of the trial court to charge a lesser included offense, a defendant must individually request the charge or protest the failure to give it, and cannot rely on the People or a codefendant to do so on his or her behalf (*Buckley* at 846 ["(f)or tactical reasons codefendants might take different positions on the desirability of various instructions to the jury and each must specify his or her objection to preserve legal error with respect to lesser included offenses"]). We note that, here, defense counsel appeared to make the tactical decision to rely on the agency defense in order to gain an outright acquittal of the sale charge, the only charge submitted to the jury.

Even if the issue was preserved, we would find no reversible

error in the refusal to charge the lesser included. In *People v Glover* (57 NY2d 61 [1982]), the Court of Appeals established a two-pronged test for determining whether a defendant is entitled to a lesser included offense charge. "First, defendant must establish that it is impossible to commit the greater crime without concomitantly committing the lesser offense by the same conduct. Secondly, there must be a reasonable view of the evidence to support a finding that the defendant committed the lesser offense but not the greater" (*People v Van Norstrand*, 85 NY2d 131, 135 [1995]; *see Glover* at 63; CPL 300.50[1]). In applying this second prong, we must view the evidence in a light most favorable to the defendant and be guided by the principle that a jury is free "to accept or reject part or all of the defense or prosecution's evidence" (*People v Johnson*, 45 NY2d at 550, quoting *People v Henderson*, 41 NY2d 233, 236 [1976]).

Assuming, without deciding, that the first prong of *Glover* was met,[3] the court properly denied the request to charge the

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[3]There is a split in authorities on the issue of whether seventh-degree drug possession is a lesser included offense of criminal sale of a controlled substance. In several pre-*Glover* holdings, the Court of Appeals held that under CPL 1.20 (37), the charge of simple drug possession is a lesser included offense of those crimes charging drug sales (*People v Johnson*, 45 NY2d at 549; *People v Jenkins*, 41 NY2d 307, 313-314 [1977]; *People v Malave*, 21 NY2d 26, 29-30 [1967]). However, there are several post-*Glover* Appellate Division decisions that have squarely held that "possession offenses relating to controlled substances are

lesser included offense because there is no reasonable view of the undercover's testimony in this case that defendant unlawfully possessed narcotics, but did not sell them. Under established Court of Appeals precedent,

> "where proof of guilt of the greater and lesser offenses is found essentially in the testimony of one witness, a charge-down to the lesser offense is appropriate where it would be reasonable for the jury to reject a portion or segment of the witness' testimony establishing the greater offense, while crediting that portion of the testimony establishing the lesser crime" (*People v Negron*, 91 NY2d 788, 792 [1998].

Here, however, there was no rational basis to reject the undercover's testimony that he and defendant negotiated and consummated a sale of a "twist" of cocaine, while simultaneously accepting the same officer's testimony that defendant possessed the cocaine that he hand-delivered to the officer. The integrated testimony of the undercover was either true or it was not; a partial credit is not sustainable on the facts of this case. (*see id.*; *see also People v Scarborough*, 49 NY2d at 371-373).

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not lesser included offenses of those crimes prohibiting their sale" (*People v Cogle*, 94 AD2d 158, 159 [3d Dept 1983]; see also *People v Yon*, 300 AD2d 1127, 1128 [4th Dept 2002], *lv denied* 99 NY2d 621 [2003]; *People v Reed*, 222 AD2d 459, 460 [2d Dept 1995], *lv denied* 87 NY2d 976 [1996]; *People v Teixeira*, 101 AD2d 818 [1984]).

Defendant's argument that a reasonable view of the evidence exists that he possessed, but did not sell, drugs rests on the agency defense. He contends that once the court determined that a reasonable view of the evidence exists that defendant was acting solely as an agent of the undercover-buyer, a corresponding reasonable view of the evidence would exist that defendant possessed the narcotics solely in this capacity as agent, and not as a drug seller dispensing his wares (see *e.g. People v Carr*, 41 NY2d 847, 848 [1977]).

Although the argument has some facial appeal, it is effectively refuted by the overwhelming evidence that defendant was acting as a drug seller in this case. The undercover's testimony showed that defendant exhibited salesmanlike behavior by asking the undercover how many "krills" the undercover wanted and accepting $10 of prerecorded buy money from him. Then, defendant brought the undercover into a building from which he obtained drugs, and consummated the sale in a hand-to-hand transaction. Finally, defendant subsequently engaged the undercover in a conversation about his and his girlfriend's drug dealing, and invited him to return for more drugs.

Although the trial court concluded that a reasonable view of agency existed, we find that the defense was barely supportable under the facts of this case and was properly rejected by the

jury that considered it (*see People v Ortiz*, 76 NY2d 446, 449-450 [1990]). The fact that defendant appeared to directly profit from the sale and discussed other drug dealings with the undercover provided compelling evidence that this was not a favor for a buyer, but rather a commercial transaction (*see People v Herring*, 83 NY2d 780, 782-783 [1994]; *People v Chong*, 45 NY2d 64, 75 [1978], *cert denied* 439 US 935 [1978]). In light of the weak agency defense and the substantial evidence that defendant was acting as a drug seller, the court properly denied the prosecutor's request to charge the lesser included offense of possession in the seventh degree (*People v Negron*, 91 NY2d at 793-794).

In any event, even if the failure to charge down constituted error, such error was harmless in light of the overwhelming evidence of defendant's guilt (*People v Gray*, 232 AD2d 179, 179-180 [1996], *lv denied* 89 NY2d 1093 [1997]; *see also People v Jones*, 3 NY3d 491, 497 [2004] [overwhelming evidence disproved justification defense, and there is no reasonable possibility that the verdict would have been different had the court given the requested instruction on the home exception to the duty to retreat]).

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 27, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Gonzalez, Nardelli, Sweeny, JJ.

2145 Town House Stock LLC, et al., Plaintiffs-Respondents, Index 602514/06

-against-

Coby Housing Corp., et al., Defendants-Appellants,

Leslie M. Westreich, et al., Defendants.

Morrison Cohen LLP, New York (Mary E. Flynn of counsel), for appellants other than Portofino Biscayne LLC.

Ganfer & Shore, LLP, New York (Steven J. Shore of counsel), for Portofino Biscayne LLC, appellant.

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

Judgment, Supreme Court, New York County (Helen E. Freedman, J.), entered April 6, 2007, insofar as appealed from, awarding plaintiffs $4.5 million, plus interest and attorneys' fees, pursuant to an order which granted plaintiffs' motion for partial summary judgment on their causes of action for breach of contract and attorneys' fees, unanimously affirmed, with costs.

Plaintiffs sustained their burden of establishing that they were entitled to judgment as a matter of law in this action involving the breach of a 2006 Settlement Agreement arising out

of two interrelated real estate contracts with time of the essence clauses. The record evidence established that plaintiffs duly tendered the signed and notarized deed and other closing documents, while defendants-appellants failed to tender the requisite $95 million for the Florida property, the closing of which was to take place simultaneously with the closing of certain real property in New York. This constituted a material breach of the contract entitling plaintiffs to retain the $4.5 million deposit (*see New Colony Homes, Inc. v Long Island Property Group, LLC*, 21 AD3d 1072 [2005]; *Friedman v O'Brien*, 287 AD2d 311, 312 [2001]). The burden then shifted to appellants to raise a triable issue that plaintiffs failed to satisfy their obligations under the parties' agreements, thereby allowing them to terminate the agreements and receive the return of their contract deposit. Appellants failed to sustain this burden.

Appellants' position that they were excused from closing on the basis that plaintiffs breached their obligation to maintain the premises imposed by Section 4.4(a) of the Florida Property Contract, which section was reaffirmed in the 2006 Settlement Agreement, is not supported by the express language of the agreements. Appellants agreed to purchase the property in "as is" condition and, under Section 1 of the 2006 Settlement Agreement, waived any breaches that occurred prior to the execution of that agreement. Moreover, the pre-closing

maintenance covenant was not a condition precedent to appellants' obligation to close, and appellants otherwise failed to substantiate their claims concerning plaintiffs' alleged failure to maintain the property (*see Sikander v Prana-BF Partners*, 22 AD3d 242 [2005]). We next reject appellants' claim that plaintiffs failed to timely deliver all schedule 2 documents as required by the 2006 Settlement Agreement inasmuch as it contradicts the position taken by them before the motion court. In any event, the time of the essence provision contained in the Florida Property Contract concerning documents does not apply to the schedule 2 documents which were required to be produced for the first time as part of the 2006 Settlement Agreement. Regarding appellants' argument that plaintiffs breached the representation in Section 5.2(m) of the Florida Property Contract by entering into a renewed lease with Florida East Coast Railway, L.L.P., which required that a fence be installed by the Florida property owner, it was appellants who demanded that the lease be renewed, and appellants had ample opportunity prior to the time of the essence closing date to insist that plaintiffs erect the fence, but failed to do so.

The court properly awarded interest and prevailing-party attorneys' fees against all appellants since this action is premised upon a breach of the 2006 Settlement Agreement, which was signed by all appellants, and reaffirmed the interdependency

of the two real estate transactions, and the parties' obligations concerning attorneys' fees.

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

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

ENTERED: MARCH 27, 2008

CLERK

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3166 The People of the State of New York, Ind.3223/05
Respondent,

-against-

Javier Rivera,
Defendant-Appellant.

Goldstein & Weinstein, Bronx (David J. Goldstein of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Beth Potashnick of counsel), for respondent.

Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered January 18, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of 2½ years, unanimously affirmed.

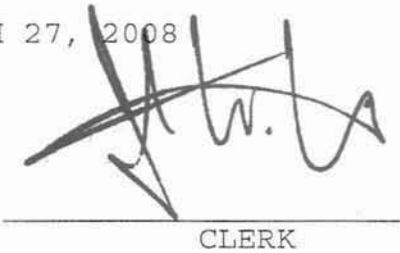
The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The hearing court had the unique opportunity to see and hear the witnesses.

Since the only argument that defendant made before the hearing court was that the police testimony was incredible, all of the other arguments he raises on appeal are unpreserved (*see People v Tutt*, 38 NY2d 1011 [1976]; *see also People v Buckley*, 75 NY2d 843 [1990]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on

the merits. The police conduct was lawful at each stage of the encounter.

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

ENTERED: MARCH 27, 2008



CLERK

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3167 Amy Lipman, Index 100155/07
Plaintiff-Appellant,

-against-

Gail Ionescu,
Defendant-Respondent.

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

Kelly, Rode & Kelly, LLP, Mineola (George J. Wilson of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Edward H. Lehner, J.), entered July 24, 2007, which granted defendant's motion to dismiss the complaint, deemed an appeal from judgment (CPLR 5501[c]), same court and Justice, entered September 20, 2007; said judgment unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

The motion court erred when it viewed defendant's statements as merely an unfavorable assessment of plaintiff's work performance. In the context of informing parents of two- and three-year-olds that the children's teacher has been terminated, defendant's statements were reasonably susceptible to a defamatory meaning and slanderous per se because they directly implied that plaintiff had done something so egregious that it made her unfit to practice her profession even one more day (*see*

People v Grasso, 21 AD3d 851 [2005]; *Chiaverelli v Williams*, 256 AD2d 111 [1998]).

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

ENTERED: MARCH 27, 2008

CLERK

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3169 In re Damian Richard A., Jr.,

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

Damian A., Sr.,
Respondent-Appellant,

Concord Family Services, Inc.,
Petitioner-Respondent.

Lisa H. Blitman, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Order, Family Court, New York County (Sara P. Schechter, J.), entered on or about June 1, 2006, which denied respondent father's motion to vacate a dispositional order of the same court and Judge, entered on or about May 12, 2006, which, upon his default in appearing at the underlying fact-finding and dispositional hearings, terminated his parental rights to the subject child on grounds of permanent neglect and committed custody and guardianship of the child to the petitioning agency and the Commissioner of Social Services for the City of New York for the purpose of adoption, unanimously affirmed, without costs.

Respondent failed to show either a reasonable excuse for his failure to appear for the fact-finding and dispositional hearings or a meritorious defense to the proceeding. His excuse that he was "out of town" because it was Easter week is insufficient and

also does not explain why he failed to contact his attorney, the court, or the agency to advise of his unavailability (*see Matter of Laura Mariela R.*, 302 AD2d 300 [2003]; *Matter of Ashley Marie M.*, 287 AD2d 333 [2001]). In light of respondent's chronic failure to appear, the court properly went forward with the proceeding in his absence (*see Matter of Kristen Simone V.*, 30 AD3d 174 [2006]). Respondent's assertion that he visited the child on a regular basis was unsubstantiated. Furthermore, even if we credited his assertion that he began attendance at the required programs in June 2005, approximately four months before the filing of the petition, respondent failed to establish that he complied with the service plan during the statutorily relevant time frame.

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

ENTERED: MARCH 27, 2008

CLERK

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3170 The People of the State of New York, Respondent, Ind. 296/06

-against-

Alonza Snider, etc., Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered October 30, 2006, as amended November 6, 2006, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony drug offender, to concurrent terms of 4 years, unanimously affirmed.

At issue on appeal is whether the court's response to several jury notes violated the principles of *People v O'Rama* (78 NY2d 270, 277-278 [1991]). We conclude that defendant failed to make a record that is sufficient to permit appellate review of this issue (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]), or to overcome the presumption of regularity that attaches to judicial proceedings (*see People v Velasquez*, 1 NY3d 44, 48 [2003]). The record does not establish that the court failed to

fulfill its "core responsibility" under *People v Kisoon* (8 NY3d 129, 135 [2007]). There is no evidence that the court prevented counsel from knowing the specific contents of the notes, or from suggesting different responses than those the court provided (*compare People v Starling*, 85 NY2d 509, 516 [1995], *with People v Cook*, 85 NY2d 928 [1995]). Accordingly, we reject defendant's claim that there was a mode of proceedings error exempt from preservation requirements, and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find no basis for reversal. The notes simply called for readbacks of portions of the court's charge, which the court provided, and any input by counsel would have been minimal. However, as the Court of Appeals stated in *Kisoon*, "we underscore the desirability of adherence to the procedures outlined in *O'Rama*" (8 NY3d at 135).

Defendant's claim that his counsel was ineffective for failing to object to the court's procedure in responding to the notes is unreviewable on direct appeal. The record does not establish that counsel did not have notice of the jury notes and an opportunity to be heard (*see People v Love*, 57 NY2d 998 [1982]).

We decline to invoke our interest of justice jurisdiction to dismiss the noninclusory concurrent count of fifth-degree

possession (*see e.g. People v Brown*, 298 AD2d 158 [2002], *lv denied* 99 NY2d 556 [2002]).

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

ENTERED: MARCH 27, 2008

CLERK

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3176 In re Diwantie Seemangal, Petitioner,

-against-

New York State Office of Children and Family Services, et al., Respondents.

Index 112461/06

Warren S. Hecht, Forest Hills, for petitioner.

Andrew M. Cuomo, Attorney General, New York (Carol Fischer of counsel), for respondents.

Determination of respondent New York State Office of Children and Family Services dated May 17, 2006, after an evidentiary hearing, to suspend and revoke petitioner's license to operate a group family day care home, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Louis B. York, J.], entered January 26, 2007) dismissed, without costs.

Substantial evidence supports respondents' findings that petitioner violated four Department of Social Services regulations covering the management and administration of group family day care homes (18 NYCRR 416.15[a][10] [refusal to cooperate and allow access to the home]; 18 NYCRR 416.8[c][2] [use of an unauthorized caregiver]; 18 NYCRR 416.15[a][4]

[exceeding authorized capacity]; and 18 NYCRR 416.4[f] [non-approved second egress]) and that such violations placed the health, safety and welfare of the children in imminent danger (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180 [1978]).

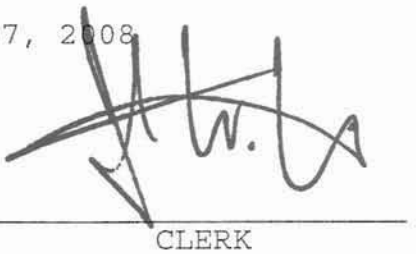
Petitioner's due process rights were not violated by the issuance of the report by a person who did not preside at the hearing. The regulations specifically require that the decision after fair hearing be made by the Commissioner or his or her designee and that it be based "exclusively on the record of the hearing" (18 NYCRR § 413.5[m]; *see Matter of Pluta v New York State Off. of Children and Family Servs.*, 17 AD3d 1126, 1127 [2005], *lv denied* 5 NY3d 715 [2005]).

The determination to revoke petitioner's license does not shock the conscience (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232-234 [1974]).

We have considered petitioner's remaining arguments and find them without merit.

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

ENTERED: MARCH 27, 2008



CLERK

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3178 Manhattan Medical Diagnostic & Rehabilitation, P.C., Plaintiff-Appellant, Index 116287/04 590612/05

-against

Wachovia National Bank, N.A., Defendant-Respondent.

- - - - - -

Wachovia Bank, National Association, Third-Party Plaintiff,

-against-

Bruce Paswall, M.D. Third-Party Defendant-Respondent,

Roy H. Brown, M.D., Third-Party Defendant.

Lowell B. Davis, Carle Place, for appellant.

Rosner Nocera & Ragone, LLP, New York (Peter A. Ragone of counsel), for Wachovia National Bank, N.A., respondent.

Kasowitz, Benson, Torres & Friedman LLP, New York (Mitchell R. Schrage of counsel), for Bruce Paswall, M.D., respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered October 10, 2006, which insofar as appealed from, granted the cross motion of defendant Wachovia National Bank, N.A. for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

Plaintiff alleges that Wachovia failed to act in a commercially reasonable manner in allowing third-party defendant

Paswall to open a checking account in plaintiff's name, resulting in the conversion of checks payable to plaintiff.

The record establishes that Wachovia acted in a commercially reasonable manner in opening the subject account. Wachovia's vice-president identified the documents relied upon in opening the account, including a certificate of incorporation, a corporate resolution and a copy of Paswall's driver's license, and set forth that the bank's conduct was reasonable under the circumstances (*see Sybedon Corp. v Bank Leumi Trust Co. of N.Y.*, 224 AD2d 320 [1996]).

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

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

ENTERED: MARCH 27, 2008

CLERK

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3179 The People of the State of New York, Ind. 4281/05
Respondent,

-against-

Ronald Massey,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Alan Axelrod of counsel), and Simpson Thacher & Bartlett LLP, New York (Meryl G. Rosen of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Eric Rosen of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J. at hearing; Edward J. McLaughlin, J. at jury trial and sentence), convicting defendant of criminal sale of a controlled substance in the third degree and resisting arrest, and sentencing him, as a second felony drug offender, to an aggregate term of 4 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the jury's determinations concerning credibility. The account of the transaction given by the prosecution witnesses was at odds with defendant's agency defense (*see e.g. People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], *cert denied* 439 US 935 [1978]), and defendant's present argument rests on his own testimony, which the jury was entitled to reject. Defendant's

arguments concerning the resisting arrest conviction are without merit.

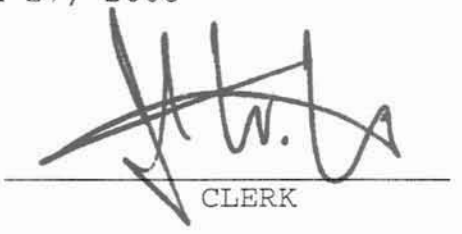
As defendant concedes, the fact that he interposed an agency defense permitted the People to introduce evidence of prior drug sales. We reject defendant's argument that the court permitted elicitation of excessive and prejudicial details about his prior drug sale conviction. The challenged evidence was highly probative to refute his agency defense, and that probative value outweighed the potential for undue prejudice (*see People v Castaneda*, 173 AD2d 349, 350 [1991], *lv denied* 78 NY2d 963 [1991]), which the court minimized by means of a limiting instruction. Moreover, defendant specifically opened the door to inquiry into the facts of his prior case when, on cross-examination, he testified that he was innocent of the prior crime notwithstanding his guilty plea in that case.

The court properly denied defendant's suppression motion. Defendant's generalized argument that the police lacked probable cause for his arrest failed to preserve his present contentions (*see People v Tutt*, 38 NY2d 1011 [1976]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The hearing evidence warranted the conclusion that the arresting officer acted

lawfully, pursuant to the fellow officer rule (*see People v Ketcham*, 93 NY2d 416 [1999]; *People v Green*, 2 AD3d 279 [2003], *lv denied* 2 NY3d 740 [2004]).

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

ENTERED: MARCH 27, 2008



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Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3181 Eddie H. Valentin, Index 115500/04
Plaintiff-Respondent,

-against-

Melcar Garage, Inc.,
Defendant-Appellant,

Park Hill Tenants Corp., et al.,
Defendants.

Bivona & Cohen, P.C., New York (Kevin J. Donnelly of counsel), for appellant.

Grossman & Grossman, P.C., New York (Brett M. Grossman of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 21, 2007, which, in an action for personal injuries sustained by a parking garage attendant in a parking garage operated by defendant Melcar Garage, Inc. (Melcar), denied Melcar's motion for summary judgment dismissing the complaint as against it as barred by the exclusivity provisions of the Workers' Compensation Law, unanimously affirmed, without costs.

Melcar's motion was properly denied for lack of documentation showing, inter alia, exactly who paid plaintiff and supervised his daily activities, and that such person or entity, if not Melcar itself, is Melcar's alter ego (*see Hughes v Solovieff Realty Co., L.L.C.*, 19 AD3d 142, 143 [2005]). In view of the foregoing, we need not reach Melcar's argument that

plaintiff's injuries are not "grave" within the meaning of the statute and that any common-law claims against it must therefore be dismissed.

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

ENTERED: MARCH 27, 2008

CLERK

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3182 The People of the State of New York, Ind. 4794/06
Respondent,

-against-

Warren Mitchell,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Eric Rosen of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about March 15, 2007, unanimously affirmed. No opinion. Order filed.

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3184 The People of the State of New York, Ind. 4447/06
Respondent,

-against-

Edward Greeman,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

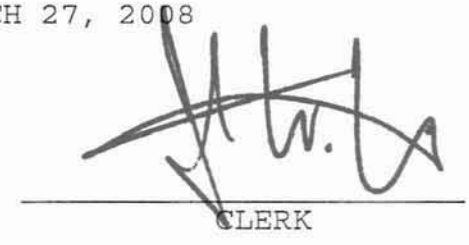
Judgment, Supreme Court, New York County (Robert H. Straus, J.), rendered January 31, 2007, convicting defendant, upon his plea of guilty, of criminal tampering in the first degree and criminal possession of a forged instrument in the second degree, and sentencing him to concurrent terms of 6 months, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]), after a colloquy in which the court clearly explained to him that the waiver was separate from the rights automatically forfeited by a guilty plea, and that it encompassed the very issue he now seeks to raise concerning his forged instrument conviction. In any event, regardless of whether defendant validly waived his right to appeal, his claim that he pleaded guilty to a "nonexistent crime" has been waived for an independent reason. Criminal possession

of a forged instrument in the second degree (Penal Law § 170.25) is not "nonexistent." Defendant is essentially claiming that the instrument he possessed, a bent MetroCard, did not satisfy the forgery statute. To the extent defendant is thus challenging the sufficiency of the evidence that was before the grand jury and would have been presented had he gone to trial, that claim is foreclosed by a guilty plea (*People v Taylor*, 65 NY2d 1 [1985]; *People v Thomas*, 53 NY2d 338 [1981]). To the extent defendant is challenging the sufficiency of his plea allocution, that claim is unpreserved and we decline to review it in the interest of justice; the narrow exception to the preservation rule explained in *People v Lopez* (71 NY2d 662, 665-666 [1988]) does not apply since defendant's factual recitation did not negate any element of the crime or cast significant doubt on his guilt.

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

ENTERED: MARCH 27, 2008



CLERK

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3186N Junk'n Doughnuts Inc. doing business as Schmuck Bros. of Pennsylvania, Plaintiff-Respondent, Index 106634/06

-against-

Department of Consumer Affairs of the City of New York, Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for appellant.

Dunnington, Bartholow & Miller, LLP, New York (Raymond J. Dowd of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 16, 2007, which denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Plaintiff seeks a declaratory judgment setting aside as unconstitutional the New York City statute governing the licensing of dealers in second-hand articles (Administrative Code of the City of N.Y., title 20, chapter 2, subchapter 11). After plaintiff received a Notice of Violation (NOV) from defendant alleging that it was operating as an unlicensed second-hand dealer in violation of Administrative Code § 20-265 and failed to appear for a scheduled hearing on the NOV, defendant issued a default order finding plaintiff guilty of the violation.

Plaintiff moved unsuccessfully to vacate the default. It then commenced a CPLR article 78 proceeding to challenge defendant's determination to deny its motion. In the petition, plaintiff stated that it was not submitting the constitutionality of the statute to the court but arguing that the constitutional infirmity of a statute constituted a meritorious defense in the administrative proceeding. Because the constitutional challenges plaintiff raises in the instant action arose out of the same transaction from which his article 78 claims arose, and plaintiff could have raised them in the article 78 proceeding, the constitutional challenges are barred by the doctrine of res judicata (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

In any event, the statute does not impose unconstitutional restrictions on plaintiff's First Amendment rights but merely requires a license for dealing in second-hand articles (*see Matter of Irreplaceable Artifacts v City of N.Y. Dept. of Consumer Affairs*, 22 AD3d 410, 411-412 [2005]). Nor does it impose an excessive burden on interstate commerce (*see Pike v Bruce Church, Inc.*, 397 US 137, 142 [1970]) or disadvantage a suspect class or interfere with a fundamental right (*see San Antonio Ind. School Dist. v Rodriguez*, 411 US 1, 17 [1973]). Plaintiff was not prevented from practicing its chosen profession

by the licensing scheme (*see New York State Trawlers Assoc. v Jorling*, 16 F3d 1303, 1311 [2d Cir 1994]). The inspection of its property did not violate its Fourth Amendment rights (*see Matter of Glenwood TV v Ratner*, 103 AD2d 322 [1984], *affd* 65 NY2d 642 [1985]; *see also Donovan v Dewey*, 452 US 594, 598-599 [1981]).

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

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

ENTERED: MARCH 27, 2008

CLERK

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3187N In re State Farm Mutual Automobile Insurance Company, Petitioner-Respondent, Index 16348/07

-against-

Sheldon Scott, et al., Respondents-Appellants.

Alpert & Kaufman, LLP, New York (Gary Slobin of counsel), for appellants.

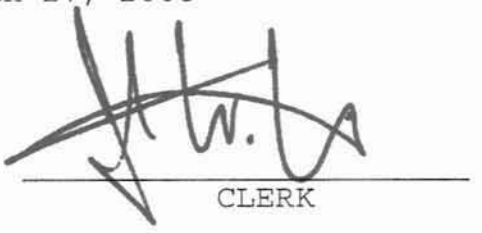
Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 20, 2007, which granted petitioner insurer's application to permanently stay a hit-and-run arbitration demanded by respondents insureds, unanimously affirmed, without costs.

There is no merit to respondents' argument that the timeliness of the proceeding under CPLR 7503(c) should be measured from service of their attorney's April 16, 2007 letter notifying petitioner of their intention to arbitrate their "uninsured motorist claims." That letter gave no indication whether such claims were being brought under the lack-of-coverage or hit-and-run provision of the uninsured motorist claim section of the subject policy. Rather, timeliness should be measured from service of respondents' May 30, 2007 demand to arbitrate. That was the first notice given by respondents that their claims were being brought under the hit-and-run provision, and thus when

petitioner first learned that it had a ground for seeking a stay of arbitration, namely, respondent passenger's statement to petitioner shortly after the accident that there was no physical contact with the offending vehicle (*see Matter of Prudential Prop. & Cas. Ins. Co. v Hobson*, 67 NY2d 19 [1986]; *cf. Matter of Allcity Ins. Co. [Jimenez]*, 78 NY2d 1054, 1056 [1991]). No hearing was required since the lack of physical contact was undisputed. We have considered respondents' other contentions and find them unavailing.

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

ENTERED: MARCH 27, 2008



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Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3189 The People of the State of New York, Respondent, Ind. 7277/03

-against-

Hector Coste, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Frances Gallagher of counsel), and Kramer Levin Naftalis & Frankel LLP, New York (Jeremy Robert Saks of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Alice Wiseman of counsel), for respondent.

Appeal from judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered September 23, 2004, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, held in abeyance and the matter remitted to Supreme Court, New York County, for a *Mapp* hearing.

Although defendant denied that he had the physical evidence at issue on his person, he was not required to admit possession in order to comply with the factual pleading requirement of CPL 710.60 (*People v Burton*, 6 NY3d 584, 589 [2006]; *People v Johnson*, 42 AD3d 341 [2007]). Rather, he was entitled to meet

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3190 Josh Segal, individually and derivatively on behalf of Lighthouse Real Estate Advisors, L.L.C., Plaintiff-Respondent, Index 102768/07

-against-

Paul Cooper, et al., Defendants-Appellants.

Mark L. Lubelsky and Associates, New York (Mark L. Lubelsky of counsel), for appellants.

Michael T. Sucher, Brooklyn, for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered November 23, 2007, which denied defendants' motion to dismiss the amended complaint, unanimously modified, on the law, to strike plaintiff's demands for punitive damages, and otherwise affirmed, without costs.

Accepting as true the facts as alleged in the complaint, according plaintiff the benefit of every favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]), we find that plaintiff's causes of action were adequately alleged. As to fraud, whether plaintiff's reliance upon defendants' alleged misrepresentations was reasonable is a factual issue not to be resolved on a motion directed at the pleadings (*see generally Brunetti v Musallam*, 11 AD3d 280 [2004]). The adequacy of the breach of contract cause

of action is gleaned from the complaint as a whole (*see Dulberg v Mock*, 1 NY2d 54, 56 [1956]). Plaintiff's allegations that, on behalf of the business venture he entered into with the individual defendants to market certain properties, he actively marketed the properties, and commissions were generated and paid to defendants, who ultimately diverted them, depriving him of his share of the commissions, adequately state a cause of action for unjust enrichment (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119-121 [1998]). Moreover, contrary to defendants' contention, that cause of action need not be dismissed merely because it "contradicts the underlying theory" of the breach of contract cause of action (*see Cohn v Lionel Corp.*, 21 NY2d 559, 563 [1968]; *Limited v McCrory Corp.*, 169 AD2d 605, 607 [1991]; CPLR 3014). As to the unjust enrichment cause of action asserted derivatively, plaintiff alleged with sufficient particularity that a majority of the controlling members of the limited liability company were interested in the challenged transactions and that therefore a demand to initiate a lawsuit would have been futile (*see Marx v Akers*, 88 NY2d 189, 198 [1986]).

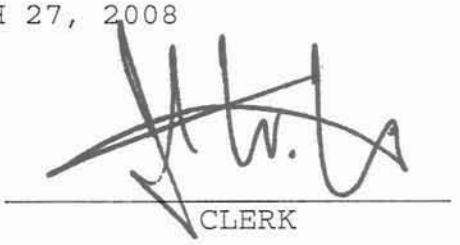
Plaintiff's demand for punitive damages should have been struck since his primary claim is contract-based and there is no allegation that defendants' conduct was directed at the public generally (*see Gilban v Murphy*, 73 NY2d 769 [1988]). Nor do the allegations indicate that defendants' conduct in the transactions

involved a high degree of moral turpitude (*see Gamiel v Curtis & Riess-Curtis, P.C.*, 16 AD3d 140 [2005]).

We have reviewed defendants' remaining arguments and find them without merit.

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

ENTERED: MARCH 27, 2008



CLERK

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3191 Orlando Coombs, Index 24451/03
Plaintiff-Respondent,

-against-

Izzo General Contracting, Inc.,
Defendant-Appellant,

Twins Electric Corp.,
Defendant.

Carol R. Finocchio, New York (Marie R. Hodukavich of counsel), for appellant.

Nicholas C. Harris, New York, for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered February 5, 2007, which, insofar as appealed from, upon reargument, vacated so much of its prior order granting defendant-appellant's motion for summary judgment dismissing plaintiff's Labor Law § 240(1) and § 241(6) causes of action and denying plaintiff's cross motion for summary judgment on the causes of action as against appellant, and granted plaintiff's cross motion, unanimously reversed, on the law, without costs, plaintiff's cross motion denied and defendant-appellant's motion for summary judgment dismissing the Labor Law § 240(1) and § 241(6) causes of action granted.

Plaintiff, a superintendent of a building that was undergoing demolition and construction, is not within the class

of persons entitled to invoke the protection of Labor Law § 240(1) and § 241(6). Although an individual need not actually be engaged in physical labor to be entitled to coverage under the Labor Law, plaintiff did not perform work integral or necessary to the completion of the construction project, nor was he "a member of a team that undertook an enumerated activity under a construction contract" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). As superintendent of the building, plaintiff was responsible for maintaining the building, keeping it clean, supervising the building staff, and watching for unsafe conditions. Although the demolition and construction work made his job more difficult insofar as it affected the portion of the building that was not under construction, plaintiff was not responsible for inspecting the areas of the building under construction. Nor was he responsible for performing any work related to the construction, and his job duties did not change after the project commenced (*Spadola v 260/261 Madison Equities Corp.*, 19 AD3d 321, 322-323 [2005], *lv denied* 6 NY3d 770 [2006]; *Blandon v Advance Contr. Co.*, 264 AD2d 550, 551-552 [1999], *lv denied* 94 NY2d 754 [1999]).

M-453 - Coombs v Izzo General Contracting, Inc., et al.

Motion seeking leave to enlarge time to file an appellant's brief denied and consolidated appeal of Twins Electric Corp. dismissed.

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

ENTERED: MARCH 27, 2008

CLERK

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3192 In re Joshua S.,

A Person Alleged to be
A Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

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

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Alma Cordova, J.), entered on or about February 2, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of attempted gang assault in the first degree, assault in the second degree (two counts), assault in the third degree and menacing in the second and third degrees, and placed him on probation for a period of up to 18 months, unanimously modified, on the law, to the extent of vacating the findings as to assault in the second degree under count 6 and assault in the third degree under count 10 and dismissing those counts of the petition, and otherwise affirmed, without costs.

The court's fact-finding determination was based on legally sufficient evidence and 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 determinations concerning identification and credibility. The testimony of the victim and eyewitness provided ample evidence to support the inference that appellant was a participant in the crimes and not a bystander.

As the presentment agency concedes, the finding as to felony assault (Penal Law § 120.05[6]) should be vacated because there was no underlying felony other than the assault itself, and the third-degree assault finding should be vacated as a lesser included offense under the remaining second-degree assault count.

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

ENTERED: MARCH 27, 2008

CLERK

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3193 Fatima Pareja, Index 26771/01
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

New York City Transit Authority, et al.,
Defendants-Respondents.

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for appellant.

Steve S. Efron, New York, for respondents.

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered November 13, 2007, dismissing the compliant after a jury verdict in defendants' favor, unanimously affirmed, without costs.

Plaintiff was allegedly injured when the bus on which she was a passenger hit a pillar on White Plains Road. At trial, the bus driver testified that he swerved to avoid an oncoming car that cut in front him.

There is no evidence that the offensive summation remarks of defense counsel cited by plaintiff improperly affected the verdict (*cf. Kohlmann v City of New York*, 8 AD2d 598 [1959]). Moreover, these remarks were brief and, after a 12-day trial with numerous witnesses, were unlikely to have affected the outcome. We nonetheless observe that the remarks of defense counsel were

uncalled for. There is no justification for attacking the credibility of opposing counsel. The veracity of counsel is simply not a subject for summation.

There was nothing improper about admitting into evidence plaintiff's verified bill of particulars (*see Owen A. Mandeville, Inc. v Zah*, 38 AD2d 730 [1972], *affd* 35 NY2d 769 [1974]) to demonstrate her alleged failure to provide notice of prior injuries. Statements and allegations in pleadings are always admissible as evidence, and may be used for any legitimate purpose at trial (*Holmes v Jones*, 121 NY 461 [1890]).

There was no requirement to charge sections of the Vehicle and Traffic Law that have no relevance or reasonable connection to the manner in which the accident is said to have occurred (*see Sutton v Piasecki Trucking*, 59 NY2d 800 [1983]; *Vail-Beserini v Rosengarten*, 267 AD2d 812 [1999]). The sections cited by plaintiff were not relevant to this accident.

We have reviewed the balance of plaintiff's argument and find it without merit.

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

ENTERED: MARCH 27, 2008

CLERK

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3194 The People of the State of New York, Respondent, Ind. 1498/04

-against-

Carlos Santos, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne Gantt of counsel), and Dewey & LeBoeuf, LLP, New York (Mayur R. Patel of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky III of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Joseph Fisch, J. at suppression hearing; Seth L. Marvin, J. at jury trial and sentence), rendered November 3, 2005, convicting defendant of burglary in the first degree, and sentencing him, as a second felony offender, to a term of 18 years, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved (*see People v Gray*, 86 NY2d 10 [1995]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was overwhelming proof of defendant's guilt, including identification testimony and extensive circumstantial evidence.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility

determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), including its rejection of defendant's testimony that he told the police he was represented by counsel on an unrelated charge and requested the presence of his attorney at a lineup. Defendant's other arguments concerning the lineup are without merit.

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

ENTERED: MARCH 27, 2008

CLERK

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3195 In re 62nd & 1st LLC doing business as Cigar Lounge @ Merchants NY, Petitioner-Respondent, Index 116887/06

-against-

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

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for appellants.

Richard L. Cohn, New York, for respondent.

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered May 1, 2007, granting the petition and vacating the determination of respondent New York City Department of Health and Mental Hygiene to deny petitioner's application for registration as a tobacco bar, unanimously affirmed, without costs.

Petitioner's nominal predecessor, 1125 First LLC, began operating a cigar bar in 1997, on the lower level of premises where, several months earlier, it had begun operation of a restaurant on the upper level. In December 2001, ostensibly for estate planning purposes, 1125 First LLC became petitioner 62nd & 1st LLC. The officers and members remained the same, as did the percentages of their membership interests. In 2003, following amendment of the New York City Smoke-Free Air Act (Administrative Code of City of N.Y., title 17, chapter 5) and the promulgation

of rules for implementing the provisions thereof (Rules of the City of New York Department of Health and Mental Hygiene [24 RCNY] § 10-01 et seq.), petitioner sought to register with respondent as a grandfathered "tobacco bar" exempt from the ban on smoking in enclosed areas within public places (*see* Administrative Code § 17-503[a][20]; 24 RCNY 10-07]). Tobacco bar is defined as:

> "a bar that, in the calendar year ending December 31, 2001, generated ten percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, not including any sales from vending machines, and is registered with the department of health and mental hygiene in accordance with the rules of such agency. Such registration shall remain in effect for one year and shall be renewable only if: (i) in the preceding calendar year, the previously registered tobacco bar generated ten percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors; and (ii) the tobacco bar has not expanded its size or changed its location from its size or location as of December 31, 2001" (Administrative Code § 17-502 [jj]).

Respondent denied petitioner's application on the ground, inter alia, that the change in ownership caused the automatic revocation of petitioner's Food Service Establishment (FSE) permit (*see* 24 RCNY 5.11) and that therefore petitioner had not shown, as required, that it operated a tobacco bar pursuant to an FSE permit "since the calendar year ending December 31, 2001" (24 RCNY 10-07[a]). However, there is no question that the current

owners are precisely the same as the former owners, no suggestion that petitioner intended to violate the FSE permit requirement, and no evidence of prejudice to the public interest. In these circumstances, the penalty imposed by respondent is wholly disproportionate to the offense and constitutes an abuse of discretion (*see Matter of Shore Haven Lounge v New York State Liq. Auth.*, 37 NY2d 187, 190-191 [1975]; *Matter of Circus Disco v New York State Liq. Auth.*, 51 NY2d 24, 32-33 [1980]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232-234 [1974]).

Respondent denied the application on the additional ground that petitioner failed to include the upper-level restaurant in its calculation of gross sales from tobacco, despite the restaurant's and cigar bar's single owner, single premises, single FSE permit, single entrance through which patrons could proceed to either the upper or lower level, and single tax returns filed in 2001 and 2002. This determination was arbitrary and capricious. Respondent denied petitioner's application for a new FSE permit without explanation, thus allowing only one permit for both the restaurant and the cigar bar. More importantly, respondent does not deny that it has issued single permits to owners of separate businesses. Nor does it deny that separate businesses owned by a single owner, even at different locations,

may file consolidated tax returns. The factors proved by petitioner, that the restaurant and cigar bar began operations at different times and maintained separate records, separate menus, separate hours, separate restroom facilities, separate ventilation systems and, most importantly, separate liquor licenses, outweigh the factors of single ownership and a consolidated tax return.

None of respondent's remaining reasons for denying petitioner's application justified the drastic penalty of shutting down petitioner's business.

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

ENTERED: MARCH 27, 2008

CLERK

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3196 Teresa Mercedes Gomez, Index 106848/04
Plaintiff-Respondent,

-against-

The City of New York, et al.,
Defendants,

Empire City Subway, Inc.,
Defendant-Appellant.

Conway, Farrell, Curtin & Kelly, P.C., New York (Darrell John of counsel), for appellant.

Fotopoulos, Rosenblatt & Green, New York (Alexander D. Fotopoulos of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 26, 2007, which, insofar as appealed from in this action for personal injuries, denied the motion of defendant Empire City Subway, Inc. (Empire) to dismiss the complaint as against it, and deemed that the proposed amended complaint was served and filed nunc pro tunc to July 19, 2006, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as against Empire. The Clerk is directed to enter judgment accordingly.

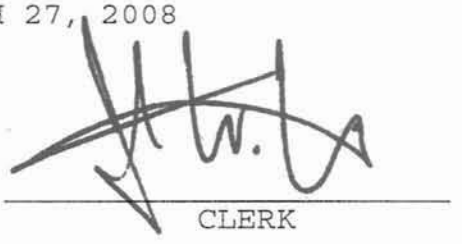
Although the filing of plaintiff's motion for leave to amend the complaint to name Empire as a defendant, along with the proposed amended pleadings, was sufficient to toll the statute of limitations, it was not itself the interposition of the claim

within the meaning of CPLR 203(a) (*see Pérez v Paramount Communications*, 92 NY2d 749, 754-756 [1999]). Because plaintiff never served Empire after having received leave of the court to do so, the court never obtained personal jurisdiction over Empire, and thus, it was without power to grant relief nunc pro tunc (*see Louden v Rockefeller Ctr. N.*, 249 AD2d 25 [1998]), even in the absence of surprise or prejudice to Empire (*see Luis v New York City Hous. Auth.*, 309 AD2d 719 [2003]).

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

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

ENTERED: MARCH 27, 2008



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Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3197-
3197A The People of the State of New York, Ind. 3220/03
Respondent, 5884/03

-against-

Zachary Lewis, also known as Scotty Brown,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Karen M. Kalikow of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Alan Gadlin of counsel), for respondent.

Judgments, Supreme Court, New York County (Carol Berkman, J.), rendered June 2, 2005, convicting defendant, upon his pleas of guilty, of murder in the second degree and criminal sale of a controlled substance in the third degree, and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

Defendant made valid written and oral waivers of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248 [2006]), which foreclose his suppression claims. In a thorough colloquy, the court carefully explained to defendant that the right to appeal was separate from the rights automatically forfeited by pleading guilty, and that, in consideration of the plea, defendant was giving up his right to appellate review of the court's suppression ruling. To the extent that defendant is arguing that this Court should entertain his suppression arguments regardless of the waiver, that argument

is without merit (*see People v Holman*, 89 NY2d 876 [1996]). As an alternative holding, we also reject defendant's suppression claims on the merits.

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

ENTERED: MARCH 27, 2008

CLERK

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3198-
3198A International Strategies Group, Ltd, etc., Plaintiff-Respondent-Appellant, Index 601604/04

-against-

ABN AMRO Bank N.V., Defendant-Respondent,

First Merchant Bank OSH Ltd., Defendant-Appellant.

Morrison Cohen LLP, New York (Malcolm I. Lewin of counsel), for appellant.

Liddle & Robinson, LLP, New York (Blaine H. Bortnick of counsel), for respondent-appellant.

Zuckerman Spaeder LLP, New York (C. Evan Stewart of counsel), for respondent.

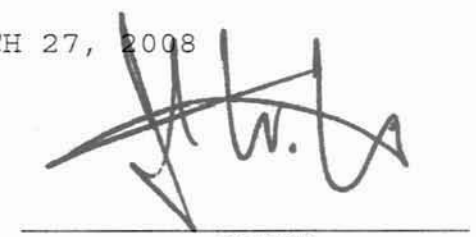
Order, Supreme Court, New York County (Karla Moskowitz, J.), entered February 1, 2007, which, inter alia, denied plaintiff's motion for leave to amend its complaint so as to include a cause of action against defendant-respondent for aiding and abetting defendant-appellant's fraud, and denied defendant-appellant's cross motion to dismiss plaintiff's cause of action against it for fraud, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 5, 2005 unanimously dismissed, without costs, as superseded by the appeal from the February 1, 2007 order.

The motion court correctly applied an actual knowledge

standard in deciding that plaintiff's allegations are insufficient to state a cause of action against defendant-respondent for aiding and abetting defendant-appellant's alleged fraud (*see National Westminister Bank v Weksel*, 124 AD2d 144, 149 [1987], *lv denied* 70 NY2d 604 [1987]; *see also JP Morgan Chase Bank v Winnick*, 406 F Supp 2d 247, 252, n 4 [SD NY 2005]; *cf. Williams v Sidely Austin Brown & Wood, L.L.P.*, 38 AD3d 219, 220 [2007]). We reject defendant-appellant's argument that the documentary evidence conclusively establishes that plaintiff's assignor was aware of the alleged fraud more than three years prior to institution of the action, and that the action is therefore barred by California's statute of limitations. We have considered the parties' other arguments for affirmative relief and find them unavailing.

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

ENTERED: MARCH 27, 2008



CLERK

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3200-
3201 The People of the State of New York, Ind. 10755/98
Respondent,

-against-

Juan Ramirez,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Dennis Rambaud of counsel), for respondent.

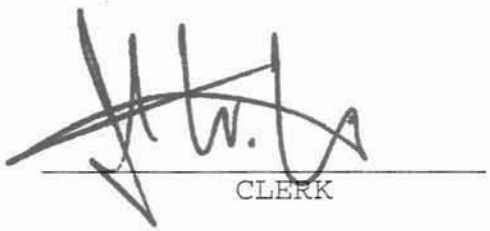
Order, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about May 19, 2006, as amended September 6, 2006, which adjudicated defendant a second felony offender whose prior felony conviction was for a violent felony and specified and informed him that the court would resentence him to a term of 15 years for his conviction of criminal possession of a controlled substance in the first degree, unanimously affirmed, and the matter remitted to Supreme Court, New York County, for further proceedings upon defendant's application for resentencing.

There was no predicate felony adjudication at the time of defendant's original sentence of 15 years to life, and such an adjudication would have been superfluous under the law existing at that time. Defendant's request for resentencing placed the case in a procedural posture that required the People to file a predicate felony statement, and the court was required to

sentence defendant as a second felony drug offender whose prior conviction is for a violent felony (*see People v Alcequier*, 43 AD3d 699 [2007]). *People v Winthrow* (38 AD3d 323 [2007]) is not to the contrary, since it deals with a different procedural situation that is addressed by CPL 400.21(8).

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

ENTERED: MARCH 27, 2008



CLERK

Mazzarelli, J.P., Andrias, Buckley, Catterson, JJ.

3202 Brunilda Tirado,
Plaintiff,

Index 18681/05
85024/05
85634/06

-against-

Bovis Lend Lease LMB, Inc., et al.,
Defendants.

- - - - -

[And a Third-Party Action]

- - - - -

Safeway Environmental Corp.,
Second Third-Party Plaintiff-Appellant,

-against-

John Catsimatidis, et al.,
Second Third-Party Defendants-Respondents.

Appeal from an order, Supreme Court, Bronx County (Stanley Green, J.), entered April 9, 2007, unanimously withdrawn in accordance with the terms of the stipulation of the parties hereto. No opinion. Order filed.

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3203 The People of the State of New York, Ind. 3451/03
Respondent,

-against-

Joseph Grajales also known
as Joseph Granjales,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Hannah E.C. Moore of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Margaret Clancy, J.), rendered on or about November 9, 2005, unanimously affirmed. No opinion. Order filed.

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3204-
3204A Benedict P. Morelli & Associates, P.C., etc., Petitioner-Appellant, Index 604172/04

-against-

Sybil Shainwald, et al., Respondents-Respondents.

Morelli Ratner, P.C., New York (Rory Lancman of counsel), for appellant.

Krauss PLLC, White Plains (Geri S. Krauss of counsel), for respondents.

Judgment, Supreme Court, New York County (Herman Cahn, J.), entered February 1, 2007, which confirmed the arbitration award and awarded respondents the total sum of $77,731.66, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered January 25, 2007, which denied petitioner's application to vacate the arbitration award and granted respondents' cross motion to confirm the award, unanimously dismissed, with costs, as subsumed in the appeal from the judgment.

The record does not support appellant's contention that the arbitrators' allocation of arbitration fees, appointment of an accountant at appellant's expense and denial of appellant's claim for disbursements were punitive. Such claim is speculative in this case. Assuming that a "punitive" award would have been improper, the "mere possibility" that the award was punitive is

not a basis for disturbing it (*see Matter of West Side Lofts [Sentry Contr.]*, 300 AD2d 130 [2002]). Indeed, an award should be vacated on this ground "only where the damages are genuinely intended to be punitive" (*Board of Educ. of Cent. School Dist. No. 1 of Towns of Niagara, Wheatfield, Lewiston & Cambria v Niagara-Wheatfield Teachers Assn.*, 46 NY2d 553, 558 [1979]).

Appellant's claim that the inclusion in the award of cost allocations was outside the scope of the arbitrators' authority is unpreserved, and we decline to review it. Were we to consider this claim, we would find it without merit. The arbitrators' issuance of their decision in two parts was well within their discretion, as was their decision to apportion the arbitration fees, expenses, and compensation between the parties as they found appropriate. Arbitrators are free to shape a remedy with unrestrained flexibility in order to achieve a just result (*Matter of Board of Educ. of Norwood-Norfolk Cent. School Dist. [Hess]*, 49 NY2d 145, 152 [1979]). Moreover, the Commercial Arbitration Rules of the American Arbitration Association, which apply herein, permit the arbitrator to make interim rulings and awards in addition to a final award (R-43[b]) and to apportion fees, expenses, and compensation among the parties in amounts deemed appropriate (R-43[c]).

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

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

ENTERED: MARCH 27, 2008

CLERK

Mazzarelli, J.P., Saxe, Buckley, Catterson, JJ.

3205N B.J. Hoppe, Index 105393/06
Plaintiff-Respondent,

-against-

The Board of Directors of the
51-78 Owners Corp., et al.,
Defendants-Appellants.

Michael B. Kramer & Associates, New York (Rubin Jay Ginsberg of counsel), for appellants.

Herrick, Feinstein LLP, New York (Marni J. Galison of counsel), for respondent.

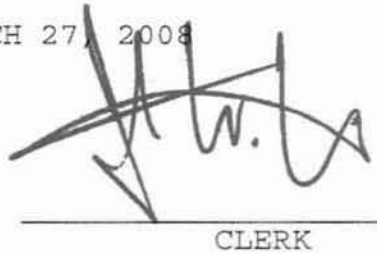
Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered June 25, 2007, which granted plaintiff's motion to amend the complaint, unanimously reversed, on the law, with costs, and the motion denied.

The court improperly granted plaintiff's motion to amend the complaint in this dispute between plaintiff shareholder and defendants cooperative corporation and its board of directors in connection with defendants' denial of plaintiff's proposed alterations to her two units. Although leave to amend a pleading is freely granted (CPLR 3025[b]), such leave should "not be granted upon mere request, without appropriate substantiation" (*Brennan v City of New York*, 99 AD2d 445, 446 [1984]). Here, the proposed amended complaint seeks to include a breach of fiduciary duty claim against various past and present members of defendant board, yet ascribes no independent tortious conduct to any

individual director (*see Messner v 112 E. 83rd St. Tenants Corp.*, 42 AD3d 356, 357 [2007], *lv dismissed* 9 NY3d 976 [2007]; *DeCastro v Bhokari* 201 AD2d 382, 383 [1994]). Insofar as plaintiff alleges that one of the board members endeavored to coerce a settlement of the instant action, a review of the allegations contained in the proposed amended complaint reveals that the misconduct alleged was occasioned by the board acting in its corporate capacity, or by the board member acting within the scope of his corporate duties (*see Konrad v 136 E. 64th St. Corp.*, 246 AD2d 324, 325-326 [1998]).

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

ENTERED: MARCH 27, 2008



CLERK

Gonzalez, J.P., Williams, Catterson, Moskowitz, JJ.

3245N Lifsha Spira, Index 100266/06
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Law Office of Herschel Kulefsky, New York (Ephrem J. Wertenteil of counsel), for respondent.

Order, Supreme Court, New York County (Robert D. Lippmann, J.), entered October 6, 2006, which granted plaintiff's motion for a default judgment, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, and the motion denied on condition that defendants pay $5,000 to plaintiff's attorneys within 30 days of service of a copy of the order.

Under the circumstances, it was an improvident exercise of discretion to grant the default judgment. While defendant's excuse for its default, i.e., law office failure by reason of understaffing, is not particularly compelling, it constitutes "good cause" nonetheless (*Casiano v City of New York*, 245 AD2d 244 [1997]), especially since there is no evidence that plaintiff was prejudiced; on the other hand, defendant will be severely prejudiced if the motion is granted. Moreover,

Tom, J.P., Friedman, Gonzalez, Sweeny, JJ.

1957 The People of the State of New York, Ind. 6210/04
Respondent,

-against-

Enrique Alvarez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Simpson, Thacher & Bartlett, LLP, New York (Justin Engel of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered August 30, 2005, affirmed.

Opinion by Gonzalez, J. All concur.

Order filed.