SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 1, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Tom, Williams, Acosta, JJ.

3210 In re Jose Tavarez, Petitioner, Index 52271/06

-against-

NYC Department of Correction, etc., Respondent.

Steven Banks, The Legal Aid Society, New York (William Gibney of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for respondent.

Determination of respondent New York City Department of Correction, dated November 17, 2006, which, after a hearing, found that petitioner inmate violated the disciplinary rule prohibiting possession of contraband weapons, and directed that petitioner be detained for 60 days in punitive segregation, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, Bronx County [Martin Marcus, J.], entered March 29, 2007), dismissed, without costs.

The record reveals that during a search of petitioner's cell, a flat metal plate was discovered in the top gate cover of

the entrance to the cell. Although petitioner argues, inter alia, that he did not have exclusive access to the area where the weapon was found, a reasonable inference of possession arises from the fact that the weapon was discovered in a location within petitioner's control (*see Matter of Shackleford v Goord*, 3 AD3d 622 [2004]; *Matter of Tarbell v Goord*, 263 AD2d 563 [1999]). This inference, together with the report and notice of infraction, investigation report, incident report and testimony adduced at the hearing, provides substantial evidence to support the determination (*see Matter of Foster v Coughlin*, 76 NY2d 964 [1990]).

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

ENTERED: APRIL 1, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3211 Milca Esdaille, Individually and as Mother and Natural Guardian of Alanna Vaughns, etc., Plaintiff,

-against-

Whitehall Realty Company, et al., Defendants-Respondents.

- - - - - - - - -

Milca Esdaille, Individually and as Mother and Natural Guardian of Alanna Vaughns, etc., Plaintiff-Respondent,

-against-

Whitehall Tenants Corp., et al., Defendants-Appellants.

Index 16238/03
15508/04

Garcia & Stallone, Melville (Eric N. Bailey of counsel), for appellants.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for Whitehall Realty Company and Hampton Management Company, respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for Milca Esdaille, respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered January 18, 2007, which, insofar as appealed from, in an action for personal injuries resulting from an apartment fire, denied defendants-appellants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Appellants, the owner and managing agent of the subject building, failed to meet their initial burden of establishing a

prima facie entitlement to summary judgment. Appellants failed to address two of the grounds for liability put forth by plaintiffs, i.e., that the smoke detector in the apartment was not maintained in proper working order and that the window guards had been negligently installed, and although appellants attempted to cure these deficiencies in a reply affirmation, the motion court properly declined to consider it (*see Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625-626 [1995]). Regarding plaintiffs' remaining theory of liability, that the wiring in the apartment was negligently maintained, appellants failed to establish entitlement to judgment as a matter of law through the introduction of competent evidence in admissible form (*see Denicker v Rohan*, 236 AD2d 359 [1997]; *compare Butler-Francis v New York City Hous. Auth.*, 38 AD3d 433 [2007]).

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: APRIL 1, 2008

Lippman, P.J., Tom, Williams, Acosta, JJ.

3212 In re Fred Darryl B.,

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

Fred Linnie B.,
Respondent-Appellant,

New Alternatives for Children Inc.,
Petitioner-Respondent.

Louise Belulovich, New York, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Order, Family Court, New York County (Sara P. Schechter, J.), entered on or about May 2, 2007, which, to the extent appealed from, after a fact-finding hearing wherein it was determined that respondent father had permanently neglected the child, terminated his parental rights to the child and transferred custody and guardianship to the New York City Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Permanent neglect may be found where a parent fails to acknowledge the problem that led to foster care placement in the first place (*Matter of Violeta P.*, 45 AD3d 352 [2007]). Notwithstanding respondent's completion of classes in parenting skills and anger management, there was clear and convincing

evidence he had failed to plan for his child's future (*see* Social Services Law § 384-b[7]). The determination as to the child's best interests, in furtherance of finding him a permanent home, was supported by a preponderance of the evidence that his needs are being met by the foster family with whom he has lived most of his life, and which has adopted two of his siblings and desires to adopt him as well (*Matter of Arriola Nicole S.*, 45 AD3d 407 [2007]).

M-874&
M-932 ***In re Fred Darryl B.***

Motions seeking leave to strike appellant's reply brief denied and for an order seeking judicial notice of testimony granted.

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

ENTERED: APRIL 1, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3213-
3213A-
3213B The People of the State of New York, Ind. 3155/05
Respondent, 4405/05
6193/05

-against-

Felicita Figueroa,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgments, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 13, 2006, convicting defendant, upon her plea of guilty, of forgery in the second degree (two counts) and grand larceny in the fourth degree, and sentencing her to an aggregate term of 4 to 8 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be served concurrently, resulting in a new aggregate term of 2 to 4 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: APRIL 1, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3215-
3215A Arthur H. Stevens, Index 602716/03
Plaintiff-Appellant,

-against-

Publicis, S.A., et al.,
Defendants-Respondents.

Lebow & Sokolow LLP, New York (Donald Stuart Bab of counsel), for appellant.

Reed Smith LLP, New York (Peter D. Raymond and John B. Webb of counsel), for respondents.

Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered February 26, 2007, dismissing the complaint in its entirety after a jury trial, unanimously affirmed, with costs. Order, same court and Justice, entered January 12, 2007, which granted defendants' motion for partial summary judgment on their claim for reasonable attorneys' fees and expenses, unanimously affirmed, with costs.

In October 1999, plaintiff sold his New York-based public relations firm, Lobsenz-Stevens (L-S), to defendant Publicis S.A., a French global communications company, and its co-defendant American subsidiary. The sale involved two contracts: a stock purchase agreement, pursuant to which plaintiff sold all the stock of L-S to defendants, and an employment agreement, pursuant to which plaintiff was to continue as Chairman and CEO of the new company, named Publicis-Dialog, Public Relations, New

York (PDNY), for three years. Plaintiff's duties were to be the "customary duties of a Chief Executive Officer."

Under the stock purchase agreement (SPA), plaintiff received an initial payment of $3,044,000, and stood to earn "earn-out" payments of up to $4 million contingent upon PDNY achieving certain levels of earnings before interest and taxes during the three calendar years after closing.

Within six months of the acquisition, signs of financial problems appeared. Plaintiff admits that revenue and profit targets were not met. Further, PDNY lost L-S's largest pre-acquisition client, Pitney Bowes. On March 5, 2001, plaintiff had a meeting with Jon Johnson, former CEO of Publicis Dialog, a related entity, at which he was shown financial statements and told that the business had lost approximately $900,000 in the year 2000. Plaintiff was removed as CEO of the business, and was given several options, including leaving the firm, staying and working on new business, and a third option to come up with another alternative. Thereafter, Bob Bloom, former chairman and CEO of Publicis USA, became involved in the matter. Bloom and plaintiff exchanged a series of e-mails, culminating in a March 28 message from Bloom setting forth his understanding of the parties' terms regarding plaintiff's new role at PDNY:

> "Thus I suggested an allocation of your time that would permit the majority of your effort to go against new business development (70%). I also suggested that the remaining time be

> allocated to maintaining/growing the former Lobsenz Stevens clients (20%) and involvement in management/operations of the unit (10%). *This option, it would seem, is in your best interest because it offers the best opportunity for you to achieve your stated goal of a full earn-out.* When I suggested this option, you seemed to have considerable enthusiasm for it and expressed your satisfaction with it so I, of course, assumed that it was an option you preferred [emphasis added]."

By e-mail the next day, plaintiff wrote:

> "Bob, to begin with, I want to thank you again for helping me restore the dignity and respect that I'm entitled to as a senior professional. Things were really getting out of hand until you intervened.
>
> "What's happened since the lunch you and I had has been almost cathartic. . .
>
> "*That being said, I accept your proposal with total enthusiasm and excitement.* . .
>
> "I'm psyched again and will do everything in my power to generate business, maintain profits, work well with others and move forward [emphasis added]."

Bloom replied the same day:

> "I am thrilled with your decision. You have my personal assurance that all of us will continue to work in the spirit of partnership to achieve our mutual goal and function together as close senior collaborators in a climate of respect and dignity for all."

Each of the e-mail transmissions bore the typed name of the sender at the foot of the message.

In denying plaintiff's motion for partial summary judgment prior to trial, the court found that the parties had agreed in

writing to modify plaintiff's duties under the employment agreement. In so ruling, the court properly relied on the e-mail exchange between the parties in which both sides expressed their unqualified acceptance of the modification to the agreement.

The series of e-mails beginning with Bloom's March 26, 2001 message setting forth the terms of the proposed modification, together with plaintiff's March 29 acceptance of the terms of the agreement and Bloom's immediate reply, memorialized the terms of the parties' agreement to change plaintiff's responsibilities under the employment agreement. The agreement is further confirmed in another e-mail sent to Andrew Hopson, chief operating officer of PDNY, in which plaintiff reaffirmed his unconditional acceptance of the modified agreement.

The e-mails from plaintiff constitute "signed writings" within the meaning of the statute of frauds, since plaintiff's name at the end of his e-mail signified his intent to authenticate the contents (*see Rosenfeld v Zerneck*, 4 Misc 3d 193 [2004]). Similarly, Bloom's name at the end of his e-mail constituted a "signed writing" and satisfied the requirement of § 13(d) of the employment agreement that any modification be signed by all parties.

The trial court's instruction regarding the covenant of good faith and fair dealing was proper. In *Pernet v Peabody Eng'g Corp.* (20 AD2d 781, 782 [1964]), we stated that a breach of the

covenant depends upon a finding that the defendant acted with intent to deprive the plaintiff of his rights under the agreement to which the defendant was a party, "or, if the same was brought about by conduct of the defendant in such reckless or neglectful disregard of plaintiff's contract rights as to justify an inference of bad faith." The Restatement, which sets forth the same formulation of the implied covenant, indicates that "bad faith" may include "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance" (Restatement [Second] of Contracts § 205, Comment *d*). This is the very conduct alleged in the complaint. Therefore, the use of the term "bad faith" in describing the conduct necessary to find a breach of the covenant was not improper.

The court properly declined plaintiff's request to offer rebuttal testimony, since plaintiff had testified on these topics at length during his direct case. There was no error in instructing the jury, during a read-back of Johnson's testimony, that the "breach" to which Johnson referred was a breach of the employment agreement and not the stock purchase agreement. The instruction was proper. In March 2001, when the conversation occurred, breach of the SPA was not yet an issue since plaintiff at that point did not know whether he would be entitled to any

earn-out payments. As of that point in time, no earn-out calculations had been performed for 2000 and 2001, and it was not yet 2002. Furthermore, as the court noted, the employment agreement, not the SPA, contains the relevant provisions concerning plaintiff's position and job duties.

The jury's verdict was based on a fair interpretation of the evidence, and was not against the weight of the evidence. Attorneys' fees were properly awarded pursuant to § 13(h) of the employment agreement since breach of that agreement was at issue during the trial, and the claim was only removed from the case prior to its submission to the jury. However, since the claim was admittedly removed from the case as of that point in time, any award of attorneys' fees should exclude fees in connection with preparation of post-trial memoranda.

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

ENTERED: APRIL 1, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3216 Evangelia Manios Zachariou, Index 601196/06
Plaintiff-Appellant,

-against-

Vassilios Manios,
Defendant-Respondent,

Charalambos V. Sioufas, et al.,
Defendants.

Hughes Hubbard & Reed LLP, New York (Derek J.T. Adler of counsel), for appellant.

Watson, Farley & Williams, New York (John G. Kissane of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered May 7, 2007, which, to the extent appealed from as limited by the briefs and by a stipulation of discontinuance, dismissed plaintiff's causes of action for fraud, negligent misrepresentation, and conspiracy, unanimously affirmed, with costs.

The causes of action for fraud and negligent misrepresentation either fell under the 1999 Greek Agreement or the London Agreement, which both contain mandatory Greek forum selection clauses (*see Micro Balanced Products Corp. v Hlavin Indus.*, 238 AD2d 284, 285 [1997]), or were based upon conduct "innate to the performance of the contract" and thus encompassed

in the breach of contract cause of action (*McMahan & Co. v Bass*, 250 AD2d 460, 462-63 [1998], *lv dismissed in part, denied in part* 92 NY2d 1013 [1998]).

There is no independent cause of action for civil conspiracy (*Bronx-Lebanon Hosp. Ctr. v Wiznia*, 284 AD2d 265, 266 [2001], *lv dismissed* 97 NY2d 653 [2001]).

Based on plaintiff's claim that she has not completed the accounting and report required under the U.S. Agreement because of defendant's alleged defaults in providing books and records, pursuant to ¶ 10 of the U.S. Agreement, any award of compensatory damages must be determined by the arbitrator.

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

ENTERED: APRIL 1, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3217 Keith D. Silverstein, Index 601706/07
Plaintiff-Appellant,

-against-

Westminster House Owners, Inc., et al.,
Defendants-Respondents,

Judy Kleinberger, et al.,
Defendants.

Keith D. Silverstein, New York, appellant pro se.

Cantor, Epstein & Mazzola, LLP, New York (Robert I. Cantor of counsel), for respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered December 3, 2007, which denied plaintiff's motion to dismiss defendants' counterclaim and second and fourth affirmative defenses and granted the cross motion of defendants Westminster House Owners, Inc., Schrager and Kaufman for dismissal of the complaint, unanimously modified, on the law, to the extent of dismissing the counterclaim, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff, a former shareholder of defendant cooperative apartment corporation, commenced this action against the cooperative and its directors for breach of fiduciary duty and related claims, based on defendants' allegedly improper failure to approve the sale of plaintiff's shares and proprietary lease

to prospective purchasers.

Plaintiff's allegations of self-dealing and misconduct against Schrager and Kaufman, the two individual defendants remaining in the action, are based on the fact that their wives are real estate brokers who had entered into a 90-day exclusive listing agreement with plaintiff, which ended several months before defendants' alleged misconduct took place, to market the sale of the shares associated with plaintiff's apartment.

The proper standard of judicial review of decisions by residential cooperative corporations is the business judgment rule (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]), which places on the party seeking review of a cooperative board's decision the burden of demonstrating a breach of fiduciary duty (*id.* at 539; *see also Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Plaintiff's speculative allegations as to the directors' rejection of the application of one prospective purchaser and the imposition of conditions on another, who contracted to - and ultimately did - purchase the apartment, lack an evidentiary basis and are insufficient to sustain a cause of action for breach of fiduciary duty (*see Park Royal Owners, Inc. v Glasgow*, 19 AD3d 246, 248 [2005]; *Simpson v Berkley Owner's Corp.*, 213 AD2d 207 [1995]). For the same reason, plaintiff's breach of contract claim, based upon defendants' alleged breach of the proprietary lease's

implied covenant of good faith and fair dealing, was properly dismissed. Plaintiff cannot avoid dismissal by further speculating that discovery would provide the necessary evidence (*see Auerbach* at 636; *Cooper v 6 W. 20th St. Tenants Corp.*, 258 AD2d 362 [1999]).

As there is no allegation that plaintiff was in default of the lease, the cooperative corporation was not entitled to recover attorney's fees pursuant to Paragraph 28 of the proprietary lease, and its counterclaim seeking such relief should have been dismissed (*see Dupuis v 424 E.77th Owners Corp.*, 32 AD3d 720, 721 [2006]).

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

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

ENTERED: APRIL 1, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3218 The People of the State of New York, Respondent, Ind. 1766/04

-against-

Robert Smith-Merced, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered March 29, 2005, as amended December 12, 2005, convicting defendant, after a jury trial, of grand larceny in the second degree and 34 counts of criminal possession of a forged instrument in the second degree, and sentencing him to an aggregate term of 7⅓ to 22 years, unanimously affirmed.

Defendant did not preserve his claim that the court should have instructed the jury that certain prosecution witnesses were accomplices as a matter of law and that their testimony required corroboration, and we decline to review it in the interest of justice. As an alternative holding, we find that the absence of such a charge was harmless in light of the very extensive corroborating evidence (*see e.g. People v Schwartz*, 21 AD3d 304, 307 [2005], *lv denied* 6 NY3d 845 [2006]), including highly incriminating physical evidence recovered from defendant's

residence that unmistakably linked him to a check-counterfeiting scheme.

Defendant's claim that his counsel rendered ineffective assistance by failing to request an accomplice charge is unreviewable because, in the context of this case, it involves matters outside the record concerning counsel's strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Counsel could have reasonably found such a charge to be counterproductive, in that it might have focused the jury's attention not on the unreliability of the accomplices, but on defendant's accessorial liability and the strength of the corroborating evidence. In the alternative, counsel's failure to request an accomplice charge did not affect the outcome of the trial or cause defendant any prejudice.

The court properly admitted limited evidence of uncharged crimes as background, given defendant's theory of defense (*see People v Vails*, 43 NY2d 364 [1977]). To the extent there was any

error, it was harmless in view of the overwhelming evidence of guilt. Defendant's constitutional claim is unpreserved and without merit.

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

ENTERED: APRIL 1, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3219 Gerald Waitkus, Index 114196/02
Plaintiff-Appellant, 590652/03

-against-

Metropolitan Housing Partners,
Defendant,

Carlisle Soho East Trust,
Defendant-Respondent.

- - - - -

Carlisle Soho East Trust,
Third-Party Plaintiff-Appellant,

-against-

Symmetry Products Group,
Third-Party Defendant,

Exterior Erecting Systems, Inc.,
Third-Party Defendant-Respondent.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for Gerald Waitkus, appellant.

Lifflander & Reich, LLP, New York (Kent B. Dolan of counsel), for Carlisle Soho East Trust, respondent/appellant.

Baxter, Smith, Tassan & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for Exterior Erecting Systems, Inc., respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered January 2, 2007, which granted the motion of defendant Carlyle Soho East Trust s/h/a Carlisle for summary judgment dismissing the complaint against it and denied plaintiff's cross motion for partial summary judgment on liability against Carlyle, denied Carlyle's motion for summary

judgment on its contractual indemnification and contribution claims against third-party defendant Exterior Erecting Systems and granted the cross motion by Exterior for summary judgment dismissing the third-party complaint against it, unanimously affirmed, without costs.

Plaintiff's Labor Law § 200 claim raised no issue of fact as to whether defendants exercised supervisory control over the work site (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). The § 241(6) claims were also properly dismissed because Industrial Code (12 NYCRR) § 23-2.1(a)(1) and § 23-1.7(e)(2) do not apply to these facts. Even assuming, for the sake of argument, that the panels that caused plaintiff's injury were being stored on the roof at some time before he began working there, they were not in storage but rather were being installed at the time of the alleged incident. Section 23-2.1(a), which refers to storage of material, thus does not apply (*see McLaughlin v Malone & Tate Bldrs., Inc.*, 13 AD3d 859 [2004]). In any event, plaintiff was in a work area, not a passageway, further removing the injury from the ambit of § 23-2.1 (*see Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158 [2005]). Similarly, Industrial Code § 23-1.7(e)(2) does not apply because the record contains no testimony that plaintiff was injured due to tripping in his work area, that any tools were scattered about, or that he was injured by a sharp projection.

The third-party claim for contractual indemnification was properly dismissed since the promise on which it was based is found in the main agreement between Carlyle and the original contractor, to which third-party defendant Exterior was not a signatory. While it is true that the construction subcontract signed by Exterior incorporated the main agreement by reference, "[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [2001]).

We have considered the parties' remaining contentions for affirmative relief and find them without merit.

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

ENTERED: APRIL 1, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3221 Juan Carlos Becerril, Index 14719/06
Plaintiff-Respondent,

-against-

Sol Cab Corp., et al.,
Defendants-Appellants.

Feinman & Grossbard, P.C., White Plains (Steven N. Feinman of counsel), for appellants.

Law Office of Michael T. Ridge, Port Washington (Michelle S. Russo of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about October 25, 2007, which denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants established a prima facie entitlement to summary judgment by submitting, inter alia, the affirmed report of a radiologist who opined that plaintiff's MRI films revealed degenerative disc disease, and no evidence of post-traumatic injury to the disc structures (*see Montgomery v Pena*, 19 AD3d 288, 289 [2005]). Defendants also submitted plaintiff's deposition testimony, where he stated that he missed no work as a result of his accident.

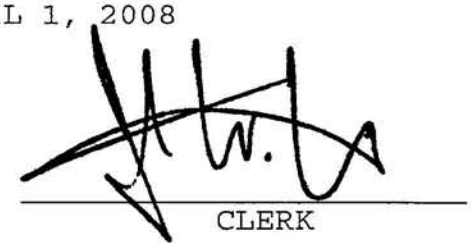
In opposition, plaintiffs failed to raise a triable issue of fact as to whether he sustained a serious injury. Although plaintiff submitted an affirmed report from his treating chiropractor detailing the objective testing employed during plaintiff's examination and revealing limited ranges of motion, no adequate explanation was provided that plaintiff's injuries were caused by the subject accident (*see Style v Joseph*, 32 AD3d 212, 215 [2006]). Notably, plaintiff conceded at his deposition that he sustained injuries to his neck and back in a prior accident, and an MRI conducted shortly after the subject accident showed degenerative disc disease. In these circumstances, it was incumbent upon plaintiff to present proof addressing the asserted lack of causation (*see Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [2007]).

Furthermore, as noted, plaintiff missed no work as a result of the accident, and absent objective medical evidence, his subjective statements that he was limited in his ability to exercise or perform personal maintenance were insufficient to establish a serious injury under the 90/180 day prong of Insurance Law § 5102(d) (*see Nelson v Distant*, 308 AD2d 338, 340 [2003]; *Lauretta v County of Suffolk*, 273 AD2d 204, 205 [2000], *lv denied* 95 NY2d 770 [2000]).

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: APRIL 1, 2008



CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3222 Philip DeCarlo, Index 117221/04
Plaintiff-Respondent,

-against-

HSBC Bank USA,
Defendant-Appellant.

[And a Third-Party Action]

Tracy S. Woodrow, Buffalo, for appellant.

Philip DeCarlo, respondent pro se.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 19, 2007, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Defendant failed to demonstrate as a matter of law that it was the agent of the bond issuer, rather than the trustee of the funds for the bondholder's benefit (*see Ehag Eisenbahnwerte Holding AG. v Banca Nationala a Romaniei*, 306 NY 242, 250-253 [1954]). Contrary to defendant's contention, this action on the bond is subject to the 20-year statute of limitations (CPLR 211[a]). Issues of fact whether defendant was prejudiced by the delay in the presentation of the bond for payment preclude

summary judgment on defendant's equitable defense of laches (*see Hay Group v Nadel*, 170 AD2d 398, 399 [1991]).

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

ENTERED: APRIL 1, 2008

Lippman, P.J., Tom, Williams, Acosta, JJ.

3223 The People of the State of New York, Respondent, Ind. 1246/04

-against-

Kenneth Moore, Defendant-Appellant.

Mitchell Dranow, Sea Cliff, for appellant.

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered October 25, 2004, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

Defendant received effective assistance of counsel (*see People v Ford*, 86 NY2d 397, 404 [1995]), and his plea was knowing, intelligent and voluntary (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). Although, at the suppression hearing, defense counsel rested on the record without making any arguments, defendant has not shown that any such arguments could have resulted in suppression of any evidence (*compare People v Johnson*, 37 AD3d 363 [2007]), or that counsel's performance at

the hearing had any effect on his guilty plea (*see People v Petgen*, 55 NY2d 529, 535 n 3 [1982]).

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

ENTERED: APRIL 1, 2008

Lippman, P.J., Tom, Williams, Acosta, JJ.

3224 Linda Myers, Index 100497/05
Plaintiff-Appellant,

-against-

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

Law Offices of Kathleen Ann Waybourn, New York (Kathleen Ann Waybourn of counsel), for appellant.

Krez & Peisner, LLP, New York (Jon E. Newman of counsel), for respondents.

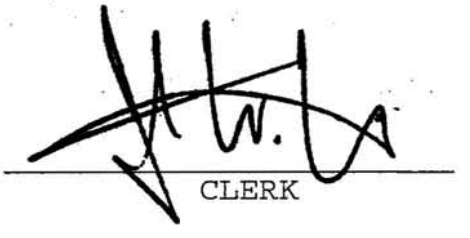
Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered November 21, 2006, upon a jury verdict in defendants' favor, unanimously affirmed, without costs.

Plaintiff was injured when she fell while walking on a subway platform that was being retiled. During plaintiff's direct case, she called, among others, a mechanical engineer employed by defendant Transit Authority, and although plaintiff should have been permitted to use leading questions in examining the employee of an adverse party (*see Jordan v Parrinello,* 144 AD2d 540, 541 [1988]), and ask him questions as an expert with respect to the renovation project he was supervising (*see Lippel v City of New York,* 281 AD2d 327, 328 [2001]), the record does not establish that the trial court's erroneous rulings on these issues deprived plaintiff of access to favorable evidence or otherwise prejudiced her. Nor was plaintiff prejudiced by a pre-

trial ruling limiting her use of the employee's deposition testimony for impeachment purposes (*see Gogatz v New York City Tr. Auth.*, 288 AD2d 115 [2001]), and the trial record does not demonstrate that plaintiff was precluded from offering any particular portion of the employee's deposition testimony for any purpose as evidence in her case-in-chief (CPLR 3117[a][2]). The record further fails to support plaintiff's contention that the court ruled that she could not use enlarged photographs of the alleged defective condition during the trial, but rather shows that plaintiff abandoned the request.

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

ENTERED: APRIL 1, 2008



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Lippman, P.J., Tom, Williams, Acosta, JJ.

3225N In re Social Service Employees Union, Local 371, etc., Petitioner-Respondent, Index 106356/06

-against-

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

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for appellants.

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for respondent.

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered January 16, 2007, granting petitioner's motion to annul an arbitrator's award and denying respondents' cross motion to confirm the award, unanimously reversed, on the law, without costs, petitioner's motion denied and respondents' cross motion granted.

Contrary to petitioner's contention, the arbitrator, who was not bound by rules of evidence *(see Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]), did not exceed her power (CPLR 7511[b][1][iii]) by admitting into evidence a memorandum from the director of the facility where petitioner was employed to a fellow employee about the status of the latter's complaint about petitioner, unrelated to the instant arbitration. Petitioner argues that the arbitrator violated a provision of the collective bargaining agreement. However, the limitation contained in that

provision is not specifically related to the power of the arbitrator (*see Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 373 [2004]; *Pharma Consult, Inc. v Nutrition Tech. LLC*, 25 AD3d 421 [2006], *lv denied* 6 NY3d 713 [2006]). Moreover, even where an arbitrator makes errors of law or fact, "courts will not assume the role of overseers to conform the award to their sense of justice" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). Nor was the objected-to memorandum so prejudicial that any mistake in accepting it was "so gross or palpable as to establish fraud or misconduct" (*Korein v Rabin*, 29 AD2d 351, 356 [1968]; CPLR 7511[b][1][i]).

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

ENTERED: APRIL 1, 2008

CLERK

Lippman, P.J., Tom, Williams, Acosta, JJ.

3226N Anthony Webb, an Infant Under the Age of 10 Years, by his Mother and Natural Guardian, Earlene Bryant, Petitioner-Appellant, Index 100030/07

-against-

New York City Health & Hospitals Corporation, Respondent-Respondent.

Michael H. Zhu, New York, for appellant.

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

Order, Supreme Court, New York County (Karen S. Smith, J.), entered July 24, 2007, which denied petitioner's application for leave to file a late notice of claim, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in denying the application, where the delay in seeking leave to file a late notice of claim is not reasonably explained by petitioner's allegation that medical personnel at respondent hospital assured her that infant petitioner would outgrow his health problems, and that the complications stemmed from his prematurity, where petitioner failed to file a notice of claim for over two years after seeking a new medical opinion. Although the lack of a reasonable excuse for the delay is not fatal by itself (*see Harris v City of New York*, 297 AD2d 473, 473-74 [2002], *lv denied* 99 NY2d 503 [2002]), petitioner has also failed

to sufficiently demonstrate that respondent had actual notice of the pertinent facts underlying the claim within 90 days after the claim arose, or a reasonable time thereafter. The subject medical records alone, on their face, do not evince that respondent, by its acts or omissions, inflicted injuries on infant petitioner (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *see also Matter of Nieves v New York Health & Hosps. Corp.*, 34 AD3d 336 [2006]).

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

ENTERED: APRIL 1, 2008

Lippman, P.J., Tom, Williams, Acosta, JJ.

3227N William Pagan, et al., Index 112222/06
Plaintiffs-Appellants,

-against-

Four Thirty Realty LLC, etc., et al.,
Defendants-Respondents.

William Pagan and Tania Pagan, appellants pro se.

Mirotznik & Associates, LLC, East Meadow (Mary Ellen O'Brien of counsel), for respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered March 21, 2007, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for a default judgment, unanimously affirmed, without costs.

In this action alleging discrimination in housing, retaliatory eviction and personal injury, defendants demonstrated a reasonable excuse for their delay in answering the complaint (*see Castillo v Garzon-Ruiz*, 290 AD2d 288, 290 [2002]; *Parker v I.E.S.I. N.Y. Corp.*, 279 AD2d 395 [2001], *lv dismissed* 96 NY2d 927 [2001]; *Barajas v Toll Bros.*, 247 AD2d 242 [1998]; *Ganvey Merchandising Corp. v Knudsen El. Corp.*, 169 AD2d 518 [1991]). We note that they established prima facie meritorious defenses to plaintiffs' claims. Plaintiffs have not demonstrated that they suffered any prejudice as a result of the delay (*see Castillo*, 290 AD2d at 290; *Shure v Village of Westhampton Beach*, 121 AD2d 887 [1986]). This State's public policy favors determinations on

the merits (*see Guzetti v City of New York*, 32 AD3d 234 [2006]).

M-183 ***Pagan v Four Thirty Realty LLC, etc., et al.,***

Motion seeking stay denied.

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

ENTERED: APRIL 1, 2008

CLERK

Mazzarelli, J.P., Andrias, Buckley, Sweeny, McGuire, JJ.

2418 The People of the State of New York, Respondent, Ind. 121/05

-against-

Donald France, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered August 11, 2005, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, affirmed.

The court's summary denial of defendant's suppression motion was proper. Defendant was provided with sufficient information to rebut the People's position that the police had probable cause to search him. The felony complaint alleged that defendant was identified by an informant, who was also the victim, as the perpetrator of the charged crime, and the voluntary disclosure form asserted that the victim pointed defendant out to the police moments before his arrest. The reliability of the victim's information was bolstered by defendant's statement indicating that he had sold the very rings the victim had told the police

defendant stole from him. Accordingly, it was not enough for defendant to deny that he committed the crime and to state that he was doing nothing unlawful at the time of his arrest (*see People v Roldan*, 37 AD3d 300 [2007], *lv denied* 9 NY3d 850 [2007]). Rather, he was required to demonstrate that the police acted unreasonably in relying on the victim (*see Spinelli v United States*, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]). Since defendant did not dispute that the victim had pointed him out to the police or deny giving the statement, the allegations in his motion papers did not raise any factual issue warranting a hearing (*see People v Mack*, 281 AD2d 194 [2001], *lv denied* 96 NY2d 903 [2001]).

This is not a case where "[b]ased upon . . . meager information, defendant could do little but deny participation in the [crime]" (*People v Hightower*, 85 NY2d 988, 990 [1995]). Moreover, it differs from *People v Bryant* (8 NY3d 530 [2007]), which the dissent relies on to support its position that the People provided insufficient information. In that case, the voluntary disclosure form stated that "a [w]itness picked out [defendant's] photo," (id. at 532) which the defendant contended made unclear whether he was identified as a person who committed a crime or as a person who frequented the area where the crime was committed, knew the victim, or was seen in the area at the time of the incident. The court found that the People did not

sufficiently establish "the factual predicate for [defendant]'s arrest" and that "[t]he People could not both refuse to disclose the informant's identity, *or at least some facts showing a basis for the informant's knowledge the police relied upon to establish probable cause for the arrest*, and insist that defendant's averments in his pleadings were insufficient to obtain a *Mapp/Dunaway* hearing" (*id.* at 534) (emphasis added). Here, the People's pleadings clearly disclosed that the police relied on the informant having been the victim of the crime, his having identified defendant as the perpetrator, and defendant's own statement, to establish probable cause. Accordingly, defendant's challenge to "the sufficiency and reliability of the persons and/or information that [led] to his arrest" was insufficiently specific to require a hearing (*see People v Long*, 8 NY3d 1014 [2007]).

We perceive no basis for reducing the sentence.

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

ANDRIAS, J. (dissenting)

Because defendant's averments in support of his motion to suppress physical evidence are sufficient to warrant a hearing, I would hold the appeal in abeyance and remit the matter for such hearing.

It is now well settled that, in determining the sufficiency of a defendant's factual allegations, a court must read the defendant's suppression motion in the context of the case and "[w]hether a defendant has raised factual issues requiring a hearing can only be determined with reference to the People's contentions." A court must also consider "the degree to which the pleadings may reasonably be expected to be precise in view of the information available to defendant" (*People v Bryant*, 8 NY3d 530, 533, 534 [2007], quoting *People v Mendoza*, 82 NY2d 415, 427, 429 [1993]).

The felony complaint alleges that the arresting officer had been informed by an unnamed individual known to the District Attorney's Office that defendant approached the informant and stated in substance: "TAKE OFF THE RINGS. TAKE THEM OFF OR ELSE YOU WILL DIE. I HAVE A WEAPON WITH ME IF YOU DON'T WANT TO DIE YOU SHOULD GIVE ME WHAT YOU HAVE DO IT SLOWLY SO NO ONE WILL NOTICE." The informant also told the officer that while defendant was threatening him, defendant's hand was inside his jacket pocket as if he was holding something and pushing it

outward. The informant stated that he then removed the rings and gave them to defendant.

The voluntary disclosure form (VDF) states that the alleged robbery occurred on January 3, 2005 at approximately 1:30 p.m. in front of Jackie Robinson Park near the corner of St. Nicholas and Edgecomb Avenues, which is located at 135th Street; that, at approximately 3:05 p.m., there was a "non-police arranged point out" identification of defendant in front of 561 West 145th Street; that, at approximately 3:08 p.m., defendant told Police Officer Alimonos, "I have the receipt and money from the pawnshop for the rings"; and that defendant was arrested at approximately 3:10 p.m. in front of 561 West 145th Street. The VDF further alleges that "$106.00 and a receipt from the pawn shop" had been obtained from defendant.

In support of defendant's motion to suppress the physical evidence seized, defendant's counsel stated, in pertinent part:

> "22. Mr. France has not been provided with police reports or other Rosario material that may be necessary to support suppression of physical evidence; the defendant should therefore not be denied a Mapp hearing on the grounds that the defendant is unable to give precise factual averments in support of this motion...
> 23. It is alleged that on January 3, 2005 at about 1:30 p.m. Mr. France stole rings from someone else. He was arrested an hour and [a] half later in front of 561 West 145th Street....
> 24. Mr. France states that at or around 1:00 p.m. to 1;30 p.m. he was walking in the vicinity of 145th Street and near either Convent Avenue or St. Nicholas Avenue. He may have spoken to someone he knows from

> the neighborhood for a few minutes, then continued to walk along 145th Street. Sometime later that afternoon Mr. France was forcibly seized by uniformed police officers and searched resulting in the aforementioned items taken from his possession. Mr. France denies taking any property from anyone on that day, January 3, 2005; pretending he had a weapon, or possessing property without the permission or consent of the owner. Mr. France denies doing anything illegal at that time or prior to, 1:30 p.m., or at the time of his arrest. Since Mr. France's conduct can only be described as innocent, there was no probable cause for his arrest ... Mr. France challenges both the sufficiency and reliability of the persons and/or information that lead[sic] to his arrest."

In support of his motion to suppress his statement, defendant asserted that any statements made "were involuntary as they were elicited by coercion and the force of police authority; pursuant to police questioning, while the Defendant was in police custody and prior to Miranda warnings."

The court granted defendant's suppression motion to the extent of ordering a hearing with respect to the voluntariness of his statement, but denied it with respect to the identification on the ground that it "was a point-out and that no police arranged identification occurred." As to the physical evidence seized, the court denied defendant's motion without a hearing, finding that defendant failed to make any sworn allegations of fact to contest the People's factual allegations in the felony complaint, VDF and indictment and that his failure to address the factual allegations in the felony complaint may be deemed a concession that renders a hearing unnecessary.

The People allege that not only did their papers provide defendant with sufficient information regarding his arrest, but that he had personal knowledge of such events inasmuch as he was present at the time the witness identified him to the police "in a face-to-face encounter" and, "quite obviously, was also present when he made his statement to the police officer." Thus, they argue, those facts reveal that probable cause for his arrest was based on "a civilian's tip and his own statement." However, nothing in the information provided to defendant by the People supports a conclusion that defendant was aware at the time of his arrest that someone had identified him as a robber, or that he saw the unidentified informant point him out to the police (*compare People v Lopez*, 5 NY3d 753 [2005] [the defendant's written postarrest statement described events very close in time and place to one of the charged crimes, but defendant failed to controvert such statement, which on its face showed probable cause for his arrest]). As in *People v Bryant* (8 NY3d 530 [2007], *supra*), the informant's identity was never disclosed to defendant.

Moreover, the circumstances surrounding defendant's statement, which by itself did not give the police probable cause to search or arrest defendant, cannot be discerned from either the felony complaint, VDF or the indictment. The statement was allegedly made to Officer Alimonos not to the arresting officer,

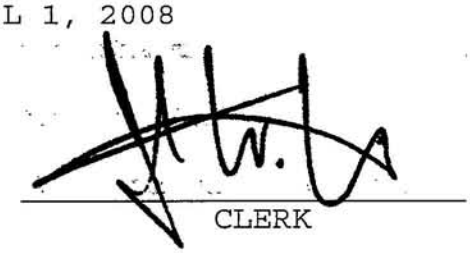
Officer Gonzalez, who swore to the felony complaint. The People asserted in opposition to defendant's motion that "the identification was not police-arranged. Rather, the witness was following the defendant, flagged down the police and pointed out the defendant." Not only is there no basis in the record for such statement, but it is seemingly implausible, since defendant was apparently arrested more than an hour and a half after the alleged robbery, approximately ten or more blocks from the scene of the crime, and after he supposedly pawned the rings stolen from the unidentified informant. Nevertheless, the People unconvincingly argue that from the VDF defendant "knew" that "a civilian witness had followed him, then flagged down the police and identified him to the police."

Not only did defendant deny participating in any robbery that day or doing anything illegal at or prior to 1:30 p.m., or at the time of his arrest, but he stated that at or around 1:00 p.m. to 1:30 p.m. (the time of the alleged robbery in front of Jackie Robinson Park) he was ten blocks away, walking along 145th Street. Thus, inasmuch as the court already ordered a hearing with regard to the voluntariness of defendant's statement made just before or at the time of his arrest, I see no plausible reason to deny defendant a hearing with regard to the physical evidence seized from him at the same time (*see People v Mendoza*, 82 NY2d at 429; *see also People v Rivera*, 42 AD3d 160, 161 [2007]

[while technically not part of the test for determining the sufficiency of a defendant's factual allegations, since CPL 710.60(3) merely permits, but does not mandate summary denial, the interest of judicial economy militates in favor of the court's holding a hearing on the suppression motion despite a perceived pleading deficiency]), particularly where the People argue that such statement, by itself, was so inculpatory that it alone provided the police with probable cause to arrest defendant.

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

ENTERED: APRIL 1, 2008



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Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

2874N Academy Street Associates, et al., Index 112062/06
Petitioners-Appellants,

-against-

Elliot Spitzer, as Attorney General
for the State of New York,
Respondent-Respondent.

Robert D. Werth, New York for appellants.

Andrew M. Cuomo, Attorney General, New York (Robert C. Weisz of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered January 6, 2007, which, upon reargument, adhered to a prior order denying petitioners' application to compel the issuance of a confirmatory letter, affirmed, without costs.

Petitioners are the sponsors of Academy Twins Condominium Association, for which the original offering plan was filed in 1987. After the 12th amendment to the offering plan was filed and accepted in 1991, no further amendments were filed until 2004, when, after the commencement of an investigation by the Attorney General, petitioners submitted a proposed 13th amendment to the Attorney General. Upon the Attorney General's issuance of a deficiency letter rejecting the 13th amendment, petitioners commenced this article 78 proceeding. Petitioners now appeal from the denial of their petition.

Whether the petition is analyzed as a mandamus to compel the

Attorney General to accept for filing the 13th amendment to the offering plan, or a mandamus to review the Attorney General's deficiency letter, petitioners' claims fail in that they have neither identified a clear legal right entitling them to the relief sought nor demonstrated that respondent's determination was arbitrary, capricious or an abuse of discretion (*see* CPLR 7803[1],[3]; *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757-758 [1991]). The propriety of the deficiency letter was established, without more, by the failure of petitioner Academy Street Associates, one of the two sponsors, to provide the required certification, under penalty of perjury, that, after review and investigation by Academy's principals, the submission sets forth the complete terms of the offering and does not omit any material fact or contain any misstatement of material fact (*see* 13 NYCRR 20.2[c][5][i][A-1]; 20.4[b]). Further, an amendment to an offering plan must disclose all material changes, including "any lawsuits, administrative proceedings or other proceedings the outcome of which may materially affect the offering, the property, the rights of unit owners, sponsor's capacity to perform all of its obligations under the plan, the condominium or the operation of the condominium" (13 NYCRR 20.5[c][1]). The deficiency letter states that the 13th amendment was rejected based on its failure to make adequate disclosure of, among other things, the identity and

background of certain principals of the sponsors, prior litigation involving the sponsors, a prior investigation under the Martin Act, and prior sales practices in which the sponsors engaged in sales activity without updating the existing offering plan or providing a purchase agreement to prospective purchasers. It was neither arbitrary nor capricious for respondent to conclude that these are material facts that may have significantly altered the "total mix" of information available to the investor (*see State of New York v Rachmani Corp.*, 71 NY2d 718 [1988]). Accordingly, respondent's rejection of the proposed 13th amendment to the offering plan was properly sustained.

We recognize that this appeal could be decided based solely on Academy's failure to provide the required certification. It is nonetheless appropriate to reach the merits of the Attorney General's substantive objections to the statements and omissions of the proposed 13th amendment, which objections have been fully litigated in Supreme Court and on appeal, in the interest of avoiding further protracting this litigation. After all, if we did not reach the merits of those objections, the issues they present would remain in dispute between the parties. We reiterate that, insofar as reasonable minds could differ as to the need to disclose the information in question, we are required to uphold the Attorney General's rational determination that such disclosure was required in an amendment to the offering plan

submitted 13 years after the previous amendment.

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

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

McGUIRE, J. (concurring)

I agree with the majority that the failure of the sponsors to provide the required certification for one of the sponsors is alone sufficient to compel the conclusion that the Attorney General was not arbitrary and capricious in rejecting the 13th Amendment. Although the sponsors point to the allegation in the petition that the failure to provide the certification was a "mere oversight," they do not offer any precedent or authority for the proposition that this Court can overlook it. Accordingly, I also agree that the order appealed from should be affirmed.

I disagree, however, with the majority's determination to forsake resolving this appeal on that narrow and unavoidable ground. Rather, the majority goes on to note that the Attorney General also rejected the 13th Amendment on the ground that the sponsors should have made various disclosures, some of which the majority summarizes, in addition to those that were made in the Amendment. Then, the majority sweepingly and unnecessarily determines, in what it apparently regards as an alternative ground of decision, that "[i]t was neither arbitrary nor capricious for [the Attorney General] to conclude that these are material facts that may have significantly altered the total mix of information available to the investor" (internal quotation marks omitted).

The Attorney General does enjoy broad authority in this context to require disclosure. But that broad power is not an unlimited power. Rather, "there must be a substantial likelihood that the disclosure of the omitted material fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available" (*State of New York v Rachmani Corp.*, 71 NY2d 718, 726 [1988] [internal quotation marks and citations omitted]).

The majority sets a sweeping precedent upholding each and every one of the items of disclosure sought by the Attorney General even though a narrower ground requires us to affirm in any event. For the majority to opine so unnecessarily implicates the principle that "forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, [which] is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common law judiciary" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714 [1980]).

The imprudence of the majority's decision to uphold the Attorney General's determination to require the sponsors to make each and every one of the contested items of disclosure comes into sharper focus when certain of the items are considered. Paragraph 7 of the Amendment reads in full as follows:

> "7. Prior Litigation: In 2003, the Board of Managers commenced an action against, *inter*

> *alia*, [the sponsors], claiming past due common charges. This action was entitled Board of Managers v. William Grossman and Action Financial et al., Index No. 600003/03. While all allegations were completely denied, and while [the sponsors] interposed various counterclaims, the parties amicably settled their dispute by a settlement agreement dated January 7, 2005. Annexed hereto is a letter from the Board of Managers of the Association, which we are attaching to this 13th Amendment at their request. This letter contains important information concerning your purchase."[1]

The Attorney General's deficiency letter stated that one of the grounds for rejecting the Amendment was that it "must disclose" the litigation with the Board, "including the index number[], the presiding court[], the nature[] of the action[], [a] summar[y] of the factual allegations and procedural posture[], the disposition[] and the present status[]." In addition, "the amendment must disclose a detailed description of the terms and conditions of the settlement of the action."

As the sponsors point out, the Amendment did provide the index number, the nature of the action (a claim by the Board of "past due common charges") and the procedural posture, disposition and present status of the action (by stating, among other things, that the action was "amicably settled by a

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[1]The letter, among other things, confirmed the settlement, stated that the Board was "fully satisfied" with the settlement, "welcome[d] all new purchasers" and stated that the sponsors were "current in their obligations to the Association."

settlement agreement dated January 7, 2005," and including the accompanying letter in which the Board confirmed the amicable resolution of the dispute and the sponsors' currency in their obligations). The sponsors also assert without contradiction by the Attorney General that the settlement agreement contains some 32 different provisions and is approximately 60 pages long.

In part because of the facts that were disclosed (including that the action was "amicably settled"), the sponsors contend that there is no "substantial likelihood" that the additional disclosures sought by the Attorney General (the "presiding court[]," a "summar[y] of the factual allegations" and a "detailed description of the terms and conditions of the settlement") would be regarded as material by a reasonable investor. Especially because the action was settled without any finding or admission of fault, the sponsors contend that to require detailed disclosure of unproven allegations against them "would merely prejudice a potential purchase without being material." In addition, the sponsors also rely -- with at least some facial support from the decision in *Rachmani Corp.* -- that they are not required to spoon-feed potential investors (71 NY2d at 728 ["there is no requirement that information already adequately disclosed be spoonfed to (potential investors in a cooperative)" [internal quotation marks omitted]).

With one exception, the Attorney General also insisted that

the sponsors provide the same disclosures concerning the lawsuit commenced by the sponsors against the Attorney General and the president of the Board in October 2005 (*Academy I*). *Academy I* did not end in a settlement, and thus the one exception is that the Attorney General did not require "a detailed disclosure of the terms and conditions of the settlement of the action." Thus, the Attorney General's deficiency letter took the position that the sponsors were required to disclose "the index number[]," the "presiding court[]," the nature[] of the action[]," a "summar[y] of the factual allegations and procedural posture[], the disposition[] and the present status[]" of *Academy I*.

As the Attorney General acknowledges, *Academy I* sought (1) an order deeming the 13th Amendment accepted for filing because the Attorney General did not act on it within 30 days of its submission, as required by General Business Law § 352-e(2), (2) one million dollars in damages and (3) an extension of time in which the sponsors could sell their condominium units under the settlement of the action brought by the Board. In June 2006, Supreme Court dismissed *Academy I* as against the Attorney General, as barred by the four-month statute of limitations, leaving only the sponsors' claim against the Board's president for additional time in which to sell their units.[2] Following the

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[2]On October 30, 2007, a panel of this Court affirmed the order dismissing *Academy I* as against the Attorney General (44 AD3d 592 [2007]).

dismissal by Supreme Court, the sponsors resubmitted the 13th Amendment. Thereafter, within 30 days, the Attorney General issued the deficiency letter at issue on this appeal requiring, among other things, the disclosures noted above with respect to *Academy I*.

Now, on this appeal, the sponsors urge that none of the disclosures sought with respect to *Academy I* are material. The Attorney General makes no effort in its brief to defend the position that the sponsors should have made these disclosures with respect to the causes of action in *Academy I* asserted against the Attorney General. Rather, the Attorney General focuses solely on the relief sought against the president of the Board and argues only that the sponsors should have made the required disclosures because they "sought to alter the amount of time they have to divest themselves of all their Condominium units."

Presumably, the Attorney General has sound reasons for offering only this narrow defense of the position it asserted in the deficiency letter regarding the absence of the disclosures relating to *Academy I*. It might be, for example, that the Attorney General concluded that it would be difficult to defend the notion that there is a substantial likelihood that a reasonable investor would regard as material a disclosure that the sponsors (unsuccessfully) alleged in *Academy I* that the

failure of the Attorney General to act on the 13th Amendment in a timely fashion required that the Amendment be deemed accepted. In any event, even putting aside that it is unnecessary, it is even more difficult to understand why the majority thinks it appropriate to uphold unreservedly the Attorney General's position with respect to all the disclosures he sought regarding *Academy I*.

At least one more of the other alleged disclosure failures should be mentioned. In paragraph 9 of the 13th Amendment, entitled "Investigation," the sponsors disclosed as follows: "The Attorney General has made inquiry of the Sponsors regarding certain activities regarding the Martin Act, concerning how the Sponsors sold units and made disclosures in accordance with the New York General Business Law." In the deficiency letter, dated August 14, 2006, the Attorney General asserted that the Amendment "must also disclose that the Attorney General commenced an investigation, still ongoing, in 2003, into potential violations by the Sponsors of Article 23-A of the General Business Law pertaining *to failure of the Sponsors to provide full and fair disclosure to potential purchasers*" (emphasis added). As the Attorney General concedes, that investigation never resulted in either an action by the Attorney General against the sponsors alleging, or any admission by the sponsors that they had committed, such violations. Of course, as the Attorney General

argues, it is not required to bring an action whenever it believes that an action lawfully could be brought. But it is not at all obvious that the Attorney General properly can require, as the italicized language would indicate, that the Sponsor in fact committed such disclosure violations.

I do not of course take a position on whether the sponsors' arguments concerning each of the disclosures sought regarding the two lawsuits and the investigation are convincing. In upholding the Attorney General's determination to require each of these items of disclosure (and all of the other items), the majority does more than unnecessarily resolve everything in dispute in this case between these sponsors and the Attorney General. In addition, the majority unnecessarily affects future disputes between other sponsors and the Attorney General.

Perhaps reasonable minds could differ on whether one or more or even all of the disclosures sought by the Attorney General are material under the applicable standard. At the very least, however, some of them are questionable. With respect to the items of disclosure highlighted above -- those regarding the two lawsuits and the investigation -- the majority provides no reason to conclude that they are material. Moreover, the majority ignores that the Attorney General makes no effort to defend the position staked out in the deficiency letter that the sponsors were required to make each of the specific disclosures relating

to the causes of action in *Academy I* asserted against the Attorney General. Rather, the majority sweeps up these and every one of the other contested disclosures in its conclusory assertion that "[i]t was neither arbitrary nor capricious for [the Attorney General] to conclude that these are material facts that may have significantly altered the total mix of information available to the investor" (internal quotation marks omitted).[3]

The majority's sole defense for reaching the merits of each and every one of the disclosures demanded by the Attorney General is "the interest of avoiding further protracting this litigation." As the majority goes on to explain, "[a]fter all, if we did not reach the merits of those objections, the issues they present would remain in dispute between the parties."

The flaw in this reasoning is that it simply assumes that if we were to decide this appeal solely on the narrow ground that in any event requires us to affirm, there would be no negotiated resolution of the dispute. The majority does not and cannot know that no negotiated resolution would ensue, just as I do not and cannot know that a negotiated resolution would ensue. But if we were to rest our affirmance solely on the narrow ground, this

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[3]The requisite conclusion by the Attorney General is that there be a "*substantial likelihood* that the disclosure of the omitted material fact *would have* been viewed by the reasonable investor as having significantly altered the total mix of information made available" (*Rachmani Corp.*, 71 NY2d at 726 [internal quotation marks omitted; emphasis added]).

much is clear: both sides would have incentives to reach a negotiated resolution as each thereby would avoid the risk of an adverse decision on one or more of the contested items of disclosure. Accordingly, another weakness inheres in the majority's approach, because encouraging the settlement of disputes through negotiation and compromise is a venerable and important public policy (*see White v Old Dominion S.S. Co.*, 102 NY 660, 662 [1886]; *see also Mitchell v New York Hosp.*, 61 NY2d 208, 214 [1984]).

To reiterate: the majority not only unnecessarily resolves each and every one of the disputed items of disclosure, it does so in a wholly conclusory manner and needlessly sets a precedent that will affect future disputes between other sponsors and the Attorney General.[4]

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

ENTERED: APRIL 1, 2008

CLERK

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[4]No special acuity is needed to see that in future disputes with sponsors the Attorney General will be able to tout this Court's broad holding and point to the record on appeal to establish the particulars and full sweep of that holding.

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

3229 The People of the State of New York, Respondent, Ind. 6179/03

-against-

Lamink Martin, also known as Tommy Regin, Defendant-Appellant.

John S. Esposito, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered March 21, 2005, convicting defendant, after a jury trial, of criminal sexual act in the first degree (two counts), sexual abuse in the first degree (two counts), robbery in the first degree, attempted robbery in the first degree and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

The verdict 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 jury's determinations concerning credibility, including its acceptance of the testimony of the two victims and rejection of that of defendant. Defendant's arguments concerning his assault conviction under Penal Law § 120.05(3) are likewise meritless.

Defendant has not established that he was prejudiced in any

way by the court's conduct of the trial (*see e.g. People v Pierce*, 303 AD2d 314 [2003], *lv denied* 100 NY2d 565 [2003]). To the extent there were acrimonious exchanges between the court and defense counsel, they took place outside the presence of the jury. To the extent defendant challenges the court's conduct in the jury's presence, that conduct consisted of making proper rulings on evidence or innocuous comments such as telling counsel to speak more slowly. Defendant's related claim that he was deprived of the effective assistance of counsel is without merit (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). The court properly exercised its discretion in denying defendant's mistrial motion made after the prosecutor went beyond the *Sandoval* ruling during cross-examination; a curative instruction would have sufficed, but defendant expressly declined that remedy (*see People v Young*, 48 NY2d 995 [1980]).

The court properly exercised its discretion in limiting defendant's cross-examination of one of the victims, and its

ruling did not impair defendant's right of confrontation (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]) or cause him any prejudice.

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

ENTERED: APRIL 1, 2008

CLERK

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

3230 Zulma Villalba, Index 107491/06
Petitioner-Appellant,

-against-

The New York City Department of Education, et al.,
Respondents-Respondents.

Shebitz, Berman & Cohen, New York (Julia R. Cohen of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for respondents.

Order, Supreme Court, New York County (William A. Wetzel, J.), entered October 19, 2006, which denied petitioner's application to annul respondent Board of Education's determinations rating her job performance as unsatisfactory and dismissing her from her position as a probationary assistant principal, unanimously affirmed, without costs.

The "U" ratings are unreviewable for failure to exhaust the grievance procedures set forth in the collective bargaining agreement (*Matter of Plummer v Klepak,* 48 NY2d 486 [1979], *cert denied* 445 US 952 [1980]; *Matter of Cantres v Board of Educ. of City of N.Y.*, 145 AD2d 359, 361 [1988]).

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

ENTERED: APRIL 1, 2008

CLERK

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

3231 In re Attia A., also known as Attia-Mona S.,

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

Gerald S.,
Respondent-Appellant,

Commissioner of Social Services of the City of New York, et al.,
Petitioners-Respondents.

Louise Belulovich, New York, for appellant.

John R. Eyerman, New York, for Family Support Systems Unlimited, Inc., respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about April 27, 2007, which, upon, inter alia, a fact-finding determination that respondent father's consent was not required for the adoption of the subject child, at which hearing respondent did not personally appear, transferred custody and care of the child to petitioners for purposes of adoption, unanimously affirmed with respect to the disposition, and the appeal unanimously dismissed with respect to the fact-finding determination, without costs.

There can be no review of a fact-finding determination made upon a default at the hearing (*Matter of "Male" M.*, 18 AD3d 215 [2005]). Were we to review the determination, we would find that

it is supported by clear and convincing evidence that respondent failed to provide financial support and to maintain regular communication with the child (Domestic Relations Law § 111[1][d]; *Matter of Robert R.*, 30 AD3d 309 [2006], *lv denied* 7 NY3d 718 [2006]).

The court's determination that it would be in the child's best interests to free her for adoption is supported by a preponderance of the evidence (*see Matter of Monica Betzy D.*, 291 AD2d 289, 290 [2002]). Respondent has been homeless for more than half the child's life and has failed to address his alcohol and drug abuse problems. He has not provided a realistic and feasible plan that would provide the child with a stable home within a reasonable time (*see Matter of Star Leslie W.*, 63 NY2d 136, 143 [1984]).

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

ENTERED: APRIL 1, 2008

CLERK

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

3232 Wells Fargo Bank, N.A., etc., Index 601735/06
Plaintiff-Respondent,

-against-

ADF Operating Corp.,
Defendant,

Nancy Levy, etc., et al.,
Defendants-Appellants.

Schneider Goldstein Bloomfield LLP, New York (Harvey N. Goldstein of counsel), for appellants.

Saiber Schlesinger Satz & Goldstein, LLC, New York (Michael J. Geraghty of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered September 28, 2007, which granted defendants' motion to dismiss the complaint only as against defendant ADF Operating Corp., unanimously modified, on the law, the motion denied and the complaint reinstated as against ADF Operating Corp., and otherwise affirmed, without costs.

Plaintiff alleges that it is the successor in interest to the lender under two promissory notes and security agreements executed by ADF LI, LLC, that defendants formed for the purpose of owning and operating two restaurant franchises; that among the provisions of the security agreements was a prohibition against changes in ADF LI's organizational structure or ownership interests without prior written consent of the lender; and that, after two and a half years of timely payment on the notes,

without consent of the lender, Levy and Harty transferred their ownership interest in ADF LI to a third party that had limited restaurant experience, that, within a short time, defaulted on the notes. Accepting the facts as alleged in the complaint as true, according plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the court properly found that plaintiff adequately pleaded the requisite elements of a tortious interference claim (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

The economic interest defense is not applicable because plaintiff alleged that defendants were not acting to protect their financial interests in ADF LI when they sold their interests to a third party, but rather sold to profit themselves to the detriment of ADF LI (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). The allegations in the complaint, read together, also sufficiently allege intentional procurement of the breach and "but for" causation (*see e.g. Madison Third Bldg. Cos., LLC v Berkey*, 30 AD3d 1146 [2006]).

Nor is dismissal warranted on the basis of documentary evidence, because defendants' construction of the security agreements, relying solely on section 3, renders sections 4 and 12(b) meaningless (*see Two Guys from Harrison-N.Y. v S.F.R.*

Realty Assoc., 63 NY2d 396, 403 [1984]).

Contrary to the court's finding, and as defendants concede, defendant ADF Operating Corp. was not a party to the security agreements.

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

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

ENTERED: APRIL 1, 2008

CLERK

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

3233 Denise Barranco, Index 104748/02
Plaintiff-Appellant,

-against-

Cabrini Medical Center,
Defendant-Respondent.

Bosco, Bisignano & Mascolo, LLP, Staten Island (James A. Maleady of counsel), for appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered April 18, 2007, which, after granting defendant's trial motion to amend its answer to assert lack of standing, dismissed the complaint on that ground, unanimously affirmed, without costs.

On or about February 21, 2001, plaintiff filed a petition in the United States Bankruptcy Court for the District of New Jersey. Some two months later, on or about April 17, she sustained injury due to the alleged negligence of defendant. On May 29, 2001, the Bankruptcy Court issued an order of discharge, and on June 22 the trustee certified that plaintiff's bankruptcy estate had been fully administered. The instant action was commenced in March 2002.

It is undisputed that plaintiff never reported to the Bankruptcy Court or her court-appointed trustee the existence of

any potential claim for damages from the incident that occurred at defendant hospital. When defendant eventually learned of the bankruptcy proceeding, it was permitted to amend its answer to plead the affirmative defense of lack of standing.

It is well settled that the failure to schedule a legal claim as an asset in a bankruptcy proceeding deprives the debtor of standing to raise it in a subsequent legal action (*see Dynamics Corp. of Am. v Marine Midland Bank-N.Y.*, 69 NY2d 191 [1987]; *Gazes v Bennett*, 38 AD3d 287 [2007]). Although plaintiff argues that her claim against defendant survived because it accrued after she had filed for bankruptcy, the fact remains that whether the claim asserted in the complaint arose prior to the filing of the bankruptcy petition or afterward, such claim is still the property of the bankrupt's estate pursuant to the Bankruptcy Code (*Williams v Stein*, 6 AD3d 197 [2004]). Since it is clear that plaintiff's claim against defendant accrued while her bankruptcy proceeding was still pending, she could not institute the present action.

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

ENTERED: APRIL 1, 2008

CLERK

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

3235 The People of the State of New York, ex rel. Roy Taylor,
Petitioner-Appellant,

-against-

Warden, Rikers Island Correctional Facility,
Respondent-Respondent.

Index 404207/06

Steven N. Feinman, White Plains, for appellant.

Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Brenda Soloff, J.), entered December 18, 2006, denying petitioner's application for a writ of habeas corpus and dismissing the petition, unanimously affirmed, without costs.

Contrary to petitioner's contention, the record is sufficient to permit review. While petitioner alleged a violation of CPL 180.80, it is clear from the face of the petition that petitioner's lawyer had waived the requirement that a hearing be held within 144 hours of petitioner's arrest (*see* CPL 180.80[1]). In any event, even if there had been a CPL

180.80 violation at the inception of the underlying criminal case, that would not presently entitle petitioner to release.

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

ENTERED: APRIL 1, 2008

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

3236 The People of the State of New York, Ind. 4261/03
Respondent,

-against-

Jermaine Jones,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Heather Volik, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about May 3, 2007, which denied defendant's motion to be resentenced pursuant to the Drug Law Reform Act of 2005 (L 2005, ch 643), unanimously affirmed.

In concluding that substantial justice dictated denial of defendant's application, the court did not rely solely on defendant's advantageous plea bargain, but properly considered the totality of circumstances including the amount of drugs involved in this case and defendant's extensive history of large scale drug trafficking (*see People v Salcedo*, 40 AD3d 356 [2007], *lv dismissed* 9 NY3d 852 [2007]; *People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]). The court properly concluded that defendant's positive prison record during his most

recent incarceration did not overcome the factors weighing against resentencing.

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

ENTERED: APRIL 1, 2008

CLERK

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

3237 Olga Batyreva, Index 107548/06
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

Wolf & Wolf, LLP, Bronx (Edward H. Wolf of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered November 3, 2006, which granted respondent's cross motion to dismiss the petition brought pursuant to CPLR article 78 seeking, inter alia, to reverse two unsatisfactory evaluation ratings petitioner received during the 2003-2004 and 2004-2005 school years, unanimously affirmed, without costs.

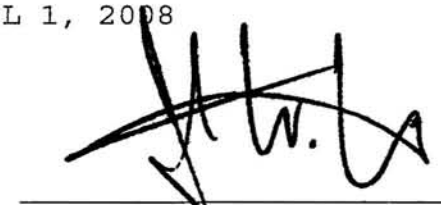
Respondent's cross motion was properly granted, where the record evidence, including seven unsatisfactory classroom observations of petitioner's classroom performance for the 2003-2004 school year, and four unsatisfactory observation reports for the 2004-2005 school year, establishes that the administrative decision to uphold petitioner's unsatisfactory reviews was not arbitrary, capricious or irrational (*see Matter of Chauvel v Nyquist*, 43 NY2d 48, 52 [1977]). We reject petitioner's claims that this matter should have been transferred to this Court for a

substantial evidence determination, and that factual issues are raised by the incomplete tapes of her hearing before the Chancellor's Committee, as raised for the first time on appeal (*see District Council 37, Am. Fedn. of State, County & Mun. Empls., AFL-CIO v City of New York*, 22 AD3d 279, 284 [2005]; *Matter of Wallace v Environmental Control Bd. of City of N.Y. [Dept. of Consumer Affairs]*, 8 AD3d 78 [2004]). Were we to review these claims, we would find that the petition should not have been transferred because it did not seek review of a determination made "as a result of a hearing held . . . pursuant to direction by law" (CPLR 7803[4]). Nor has petitioner demonstrated that a full transcript of the hearing before the Chancellor's Committee, which was held in conformity with respondent's bylaws, was unavailable upon request.

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

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

ENTERED: APRIL 1, 2008



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

3238 The People of the State of New York, Ind. 1249C/05
Respondent,

-against-

William Kennedy,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Nikki D. Faldman of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Caesar D. Cirigliano, J.), rendered April 26, 2007, convicting defendant, after a jury trial, of aggravated harassment in the second degree, and sentencing him to a term of 1 year, unanimously affirmed.

Defendant did not preserve his challenge to the legal sufficiency of the evidence and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Given the surrounding circumstances, it is a reasonable inference that the phone call

at issue was both intended and likely to be alarming and annoying to the recipient (*see* Penal Law § 240.30[1][a]).

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

ENTERED: APRIL 1, 2008

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

3240 The People of the State of New York, Ind. 3345/05
Respondent,

-against-

Khan Li,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David A. Crow of counsel), and Davis Polk & Wardwell, New York (Thomas M. Noone of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered March 30, 2006, convicting defendant, after a nonjury trial, of attempted assault in the first degree, attempted gang assault in the first degree, assault in the second degree, criminal possession of a weapon in the fourth degree, grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and sentencing him to an aggregate term of 3½ 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]). In the early morning hours, the police received two radio calls reporting an assault and/or robbery at a specified location involving a large group of Asian men. Minutes later, less than two blocks from the reported crime

scene, the police saw defendant and two other Asian men moving quickly. The direction of travel and location of these men corresponded to information in one of the radio messages, and there was no one else present there, or on any nearby streets. The extreme spatial and temporal proximity and absence of other persons created a strong inference that defendant and his companions had some connection to the reported incident. The police lawfully asked the men to stop, and before they interfered with defendant or engaged in any conduct constituting a seizure, they noticed that defendant, who was behaving nervously, had a scratch on his nose and what appeared to be blood on his pants and sneakers. The apparently bloody clothing was indicative of violence and was consistent with the type of criminality reported in the radio calls. This factor distinguishes this case from our prior holding in *People v Brown* (215 AD2d 333 [1995]). Based on the totality of these factors, the officers had a reasonable suspicion of criminality that justified a frisk (*see People v Watts*, 43 AD3d 256 [2007], *lv denied* 9 NY3d 965 [2007]; *People v Schollin*, 255 AD2d 465 [1998], *lv denied* 93 NY2d 878 [1999]), which revealed brass knuckles. Therefore, defendant's arrest was lawful and none of the subsequent fruits of that arrest were subject to suppression on Fourth Amendment grounds.

The court also properly declined to suppress the statements defendant made after he received *Miranda* warnings. While

defendant may have been previously questioned by a different officer who did not administer the warnings, there was no evidence of a continuous line of police questioning, or that defendant made any incriminating statements prior to receiving his warnings (*see People v Paulman*, 5 NY3d 122, 130 [2005]; *see also People v Prater*, 258 AD2d 600 [1999] *lv denied* 93 NY2d 1005 [1999]).

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

ENTERED: APRIL 1, 2008

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

3241 Ralph Villanueva, etc., Index 21290/00
Plaintiff-Appellant,

-against-

Herzl Ragins, M.D., et al.,
Defendants-Respondents,

Montefiore Medical Center, et al.,
Defendants.

Andrew Rosner and Associates, Garden City (David Shumer of counsel), for appellant.

Silverson, Pareres & Lombardi LLP, New York (Rachel H. Poritz of counsel), for respondents.

Order, Supreme Court, Bronx County (Diane T. Renwick, J.), entered January 17, 2007, which granted defendants' motion to set aside the jury verdict on liability as inconsistent and against the weight of the evidence, and denied plaintiff's motion to set aside the award on damages as inadequate, unanimously modified, on the law, to deny defendants' motion, the verdict reinstated, and otherwise affirmed, without costs.

The jury's verdict, finding that defendants did not improperly delay surgery but did improperly administer a fluid overload that was a cause of the decedent's death, is not inconsistent (*cf. Brezinski v Island Med. Care*, 291 AD2d 366 [2002]), and is adequately supported by plaintiff's expert's testimony that although large amounts of fluid were necessary at the time of the decedent's admission to the hospital, after a

point, the fluid given to the decedent was grossly miscalculated. The damage awards are not against the weight of the evidence and do not deviate materially from what would be reasonable compensation (*see Mejia v JMM Audubon*, 1 AD3d 261, 262 [2003]).

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

ENTERED: APRIL 1, 2008

CLERK

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

3242 Dahlia Moore, Index 6289/06
Plaintiff-Appellant,

-against-

Bronx-Lebanon Hospital,
Defendant-Respondent,

Shawn Fisher,
Defendant.

Leeds Morelli & Brown, P.C., Carle Place (Steven A. Morelli of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Ricki E. Roer of counsel), for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered February 7, 2007, which granted defendant hospital's motion to dismiss the complaint against both defendants, unanimously reversed, on the law, without costs, the motion denied, the complaint reinstated, and the matter remanded for further proceedings.

The court is required to accept the factual allegations as true and determine whether they fit within any cognizable theory of recovery. Plaintiff has pleaded a prima facie case with minimum sufficiency by alleging she was a member of a protected group, was qualified for the position, but was terminated from

the position under circumstances giving rise to an inference of discrimination (*see Brennan v Metropolitan Opera Assn.*, 284 AD2d 66, 70 [2001]). The pleadings should have been found sufficient.

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

ENTERED: APRIL 1, 2008

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

3243 Beverly Williams-Gardner, Index 102496/05
Plaintiff-Appellant,

-against-

Elizabeth A. Almeyda,
Defendant-Respondent,

St. Luke's Roosevelt Hospital Center,
Defendant.

Godosky & Gentile, P.C., New York (Robert E. Godosky of counsel), for appellant.

Garson DeCorato & Cohen, LLP, New York (Joshua R. Cohen of counsel), for respondent.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered January 30, 2007, which granted defendant-respondent's motion pursuant to CPLR 3211(a)(5) to dismiss this medical malpractice action as time-barred, unanimously affirmed, without costs.

Given that after plaintiff's appointment with defendant on November 1, 1999, further treatment was not "explicitly anticipated" (*Richardson v Orentreich*, 64 NY2d 896, 898 [1985]; *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]) - the parties contemplated such treatment only "as necessary" - the continuous treatment doctrine does not apply (*see Richardson* at 898-899). Even if the Xeroform gauze, placed in plaintiff's umbilicus during the original surgery and discovered during subsequent exploratory surgery in 2002, were

considered a "foreign object" within the meaning of CPLR 214-a, this action, commenced in February 2005, is untimely.

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

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

ENTERED: APRIL 1, 2008

CLERK

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

3246N Wells Fargo Bank, N.A., etc., Index 109815/06
Plaintiff-Respondent,

-against-

Denise Carney,
Defendant-Appellant,

Aldencort Corp., et al.,
Defendants.

- - - - -

Gordon R. Hamilton,
Intervenor-Respondent.

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Patricia A. Friederich of counsel), for appellant.

Eschen, Frenkel, Weisman & Gordon, LLP, Bayshore (Keith L. Abramson of counsel), for Well Fargo Bank, N.A., respondent.

Henry Kohn, Brooklyn, for Gordon R. Hamilton, respondent.

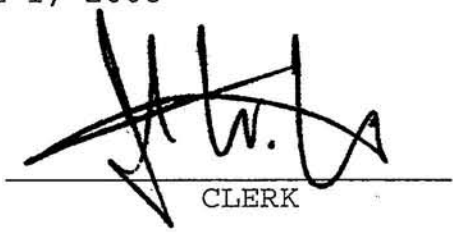
Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 9, 2007, which, insofar as appealed from as limited by the briefs, denied defendant Denise Carney's motion to vacate a judgment of foreclosure and sale, unanimously affirmed, without costs.

The court properly found that there was no fraud, collusion, mistake, or misconduct that would permit it to set aside a sale of foreclosure in the absence of compliance with the requirements of RPAPL 1341 (*see NYCTL 1996-1 Trust v LFJ Realty Corp.*, 307 AD2d 957 [2003], *lv dismissed* 1 NY3d 622 [2004]). Carney's contention that her right of redemption continued until delivery

of the referee's deed is unsupported by case law (*see GMAC Mtge. Corp. v Tuck*, 299 AD2d 315, 316 [2002]; *United Capital Corp. v 183 Lorraine St. Assoc.*, 251 AD2d 400 [1998]), and contradicted by the plain wording of RPAPL 1341, which "does not allow for a discretionary interpretation or application" (*Gabriel v 351 St. Nicholas Equities*, 168 AD2d 338, 339 [1990]).

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

ENTERED: APRIL 1, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 1, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding
Milton L. Williams
James M. Catterson
Karla Moskowitz, Justices.

The People of the State of New York, Ind. 4799/06
Respondent,

-against- 3234

Carlos Jordan,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Brenda Soloff, J.), rendered on or about April 16, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTER:

Clerk.

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 1, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Peter Tom
Milton L. Williams
Rolando Acosta, Justices.

Sylvia Savitt,
Plaintiff-Respondent, Index 103185/06

-against- 3214

Isabella Freedman Jewish Retreat Center, Inc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Michael Stallman, J.), entered on or about November 8, 2007,

And said appeal having been submitted by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 13, 2008,

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

ENTER:

Clerk.