SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 29, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

3320-
3320A Tivoli Stock LLC, et al., Index 108052/06
Petitioners-Appellants,

-against-

New York City Department of Housing
Preservation and Development, et al.,
Respondents-Respondents.

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

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for City respondent.

Collins, Dobkin & Miller, LLP, New York (Stephen Dobkin of counsel), for Tivoli Towers Tenants Association, respondent.

Amended judgment, Supreme Court, New York County (Robert D. Lippmann, J.), entered January 12, 2007, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 challenging respondent New York City Department of Housing Preservation and Development's refusal to issue a Letter of No Objection to petitioners' request to dissolve or reconstitute Tivoli Towers Housing Co., and seeking discovery in the form of a subpoena duces tecum, and costs and disbursements, unanimously affirmed, without costs. Appeal from judgment, same

court and Justice, entered December 8, 2006, unanimously dismissed, without costs, as superseded by the appeal from the amended judgment.

Part of the realty at issue is subject to a restrictive covenant requiring that, for 50 years, "no change shall be made in the use of the land as specified in the plan of the area." Petitioners, who are seeking to convert a Mitchell-Lama housing complex to non-rent-regulated housing, argue that the only use specified in the Development Plan Summary is that the "site will be devoted entirely to residential use." They conclude, therefore, that the restriction does not mean the site must necessarily be used for affordable housing.

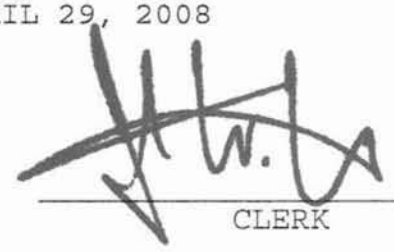
The Plan Summary, however, further requires the restriction to run for 50 years after certain events including the "neighborhood rehabilitation of the area" which the Plan anticipates will be achieved through public financing and the creation of "moderately priced modern well-equipped housing." Thus, the article 78 court correctly determined that petitioners had ignored the context in which the restriction is found. The court correctly held that "[p]etitioner is bound by the covenants contained in the deed, which reflect the spirit of the original plan. It would be unfair and inappropriate to permit high rents

for what was always planned and intended as a project for middle-income housing" (*see Matter of Columbus Park Corp. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 80 NY2d 19, 27-31 [1992]).

Although, as petitioners rightly assert the attendant tax exemptions are only for 30 years, this has no bearing on the issue of the restrictive covenant (*see Matter of Columbus Park Corp.*, 80 NY2d at 29 [tax exemption was but one part of the bargain struck with the City for providing Mitchell-Lama housing]). Further, contrary to petitioners' contention, the deeds are not void for vagueness, as they describe the restrictive covenant with reasonable certainty (*see Thurlow v Dunwell*, 100 AD2d 511, 512 [1984]), and the record fails to support petitioners' complaint of selective enforcement (*see Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 631 [2004]).

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

ENTERED: APRIL 29, 2008



CLERK

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

1752 Victor Verdi, Index 8258/00
Plaintiff-Appellant,

-against-

Top Lift & Truck Inc.,
Defendant-Respondent.

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

White, Fleischner & Fino, LLP, New York (Walter Williamson of counsel), for respondent.

Order and judgment (one paper), Supreme Court, Bronx County (Maryann Brigantti-Hughes, J.), entered on or about May 23, 2005, which granted defendant's motion for a directed verdict on the grounds of insufficient evidence, set aside a jury verdict in plaintiff's favor, and dismissed the complaint with prejudice, unanimously reversed, on the law, without costs, the motion denied and the jury verdict reinstated.

The trial court properly denied the branch of defendant's motion for a directed verdict that was based on the argument that plaintiff's behavior was so reckless as to constitute the sole legal cause of his injuries (*see Soto v New York City Tr. Auth.*, 6 NY3d 487, 492 [2006]). Plaintiff's carelessness in maneuvering the motorized power jack in violation of the written warnings on the machine "did not constitute such an unforeseeable or superseding event as to break the causal connection between his

injury and defendant's negligence" (*id.* at 493).

Contrary to defendant's contention, it owed a duty of care to plaintiff, even though it was not in privity with him (*see e.g. Hopper v Regional Scaffolding & Hoisting Co., Inc.*, 21 AD3d 262, 263 [2005], *lv dismissed* 6 NY3d 806 [2006]), based on evidence of its exclusive maintenance and repair contract with his employer (*Palka v Servicemaster Mgmt. Servs. Corp.*, 83 NY2d 579 [1994]) and plaintiff's detrimental reliance on its continued performance of its contractual duties (*Hopper* at 263; *see generally Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]).

Viewing the evidence in the light most favorable to plaintiff (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]), a rational jury could find that defendant negligently performed its undertaking to repair and maintain the machine that injured plaintiff (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 557 [1973]). It was the jury's prerogative to reject the testimony offered by defendant (*see, e.g., Harding v Noble Taxi Corp.*, 182 AD2d 365, 370 [1992]) that contradicted plaintiff's position that defendant had made (apparently deficient) repairs to the emergency reverse button. Accordingly, the jury verdict, which found defendant 60% negligent and plaintiff 40% negligent, should be reinstated.

The trial court's exclusion of certain testimony that plaintiff sought to offer does not warrant a new trial.

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

ENTERED: APRIL 29, 2008

CLERK

Andrias, J.P., Nardelli, Williams, Catterson, Moskowitz, JJ.

2644 Michael Gindi, Index 116716/05
Plaintiff-Respondent-Appellant,

-against-

Intertrade Internationale Ltd.,
Defendant-Appellant-Respondent,

Paykin Greenblatt Lesser & Krieg LLP,
Defendant.

Lauterbach Garfinkel Damast & Hollander, LLP, New York (David J. Wolkenstein of counsel), for appellant-respondent.

Herrick, Feinstein LLP, New York (John P. Sheridan of counsel), for respondent-appellant.

Order and judgment (one paper), Supreme Court, New York County (Bernard J. Fried, J.), entered July 31, 2006, which, to the extent appealed from, dismissed the complaint as against defendant Intertrade Internationale, denied that portion of Intertrade's motion to retain plaintiff's down payment as liquidated damages, and denied plaintiff's cross motion for specific performance, unanimously affirmed, without costs.

Intertrade failed to demonstrate that it could deliver insurable title at the time fixed for closing, particularly with respect to a building encroachment. Summary judgment was thus properly denied on its counterclaim for a declaration of entitlement to retain plaintiff's down payment as liquidated damages (*see Gargano v Rubin*, 200 AD2d 554 [1994]).

Plaintiff, on the other hand, in order to establish that he

is entitled to summary judgment on his claim for specific performance, must demonstrate that he was ready, willing and able to perform pursuant to the contract of sale on the original law day or, if time was not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter (*Paglia v Pisanello*, 15 AD3d 373 [2005]; *Nuzzi Family Ltd. Liab. Co. v Nature Conservancy*, 304 AD2d 631 [2003]), and, in accordance therewith, must show that he possessed the financial ability to complete the purchase (*Del Pozo v Impressive Homes, Inc.*, 29 AD3d 620 [2006]; *Madison Equities, LLC v MZ Mgt. Corp.*, 17 AD3d 639, 640 [2005], *lv dismissed* 5 NY3d 849 [2005]).

We disagree with the motion court that plaintiff made no showing that he was financially capable of performing on the closing date. Indeed, plaintiff submitted documentation that the $1,500,000 due at closing was available to him, and there is no evidence that he was not prepared to execute the 90-day purchase money mortgage at closing. To the extent that plaintiff did not demonstrate that he had the financial wherewithal to satisfy the $6,500,000 debt when the note became due 90 days later, such showing, in our view, is unnecessary.

It is also settled, however, that "[w]hen a contract for the sale of real property contains a clause specifically setting forth the remedies available to the buyer if the seller is unable to satisfy a stated condition, fundamental rules of contract

construction and enforcement require that we limit the buyer to the remedies for which it provided in the sale contract" (*Mehlman v 592-600 Union Ave. Corp.*, 46 AD3d 338, 343 [2007], quoting *101123 LLC v Solis Realty LLC*, 23 AD3d 107, 108 [2005]).

In the matter at bar, paragraph 3 of the rider to the contract of sale provides, in pertinent part, that:

> "if for any reason, *except for seller's willful default*, the seller shall be unable to convey good and marketable title, subject to and in accordance with this Contract, then the sole obligation of the seller shall be to refund to the purchaser the deposit made hereunder and to reimburse the purchase[r] for the 'net cost of title examination'" (emphasis added).

Since there is no evidence of a willful default on the part of defendant, we find that plaintiff is not entitled to specific performance of the contract of sale, and that his remedies are limited to those provided in the contract as set forth above.

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

ENTERED: APRIL 29, 2008

CLERK

Andrias, J.P., Friedman, Buckley, McGuire, Moskowitz, JJ.

2946 Tania P. Fairclough, Index 23875/04
Plaintiff-Respondent,

-against-

All Service Equipment Corp.,
Defendant-Appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Kisha V. Augustin of counsel), for appellant.

Tiger & Daguanno, LLP, New York (Stephen B. Tiger of counsel), for respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered May 15, 2007, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff, a sous chef at Houston's restaurant on East 53rd Street in Manhattan, was severely burned on December 30, 2003, when a soup tureen containing au jus gravy, which was sitting on a four-burner gas stove in a pot of boiling water, fell and spilled boiling liquid on her. The accident was allegedly the result of a partially broken cast iron grate covering the stove burner, which was unstable when something was put on it. Plaintiff claimed that the grate had been broken for a couple of months prior to the accident.

Houston's had a commercial kitchen equipment service

agreement with defendant covering all food equipment then installed in the premises. In return for a fixed annual charge, defendant agreed to give Houston's preferential service, including regular on demand and emergency service whenever defendant was notified by Houston's, and to "provide optimum operating efficiency per the manufacturers specifications to maintain it in good operating condition." Such service consisted of "inspection, lubrication and servicing on a quarterly basis," not including the cost of replacement parts and materials.

Defendant's service technician testified that he went to the restaurant on a regular basis to consult with the manager or assistant manager on any problems with kitchen equipment, and performed his own inspection to detect problems. He stated that he would service everything in the kitchen, even equipment still under warranty from the manufacturer. He had been to the kitchen approximately one week before the accident, at which time he neither was advised about nor detected a defective stove grate.

In denying defendant's summary judgment dismissing the complaint, the motion court found that there were issues of fact as to whether defendant had a duty to plaintiff as a result of her detrimental reliance on defendant's continued performance under its contract with her employer.

The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the

court (*see Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]). The general rule is that a contractor does not owe a duty of care to a noncontracting third party, with three exceptions: first, "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]); second, where the plaintiff suffers injury as a result of reasonable reliance on the defendant's continued performance of a contractual obligation; and third, "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 112, quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

The facts presented here fail to fall within any of the three sets of circumstances that have been recognized as exceptions to the general rule. Although the agreement provided that it would automatically terminate with no further responsibility by defendant if the covered equipment was moved or serviced by any other person, this is not the type of "comprehensive and exclusive" service agreement found by the Court of Appeals in *Palka v Servicemaster Mgt. Servs. Corp.* (83 NY2d 579, 588 [1994]), where the defendant's "extensive privatization arrangement displaced entirely the hospital's prior in-house maintenance program and substituted an exclusive responsibility in Servicemaster to perform all of Ellis

Hospital's pertinent nonmedical, preventative, safety inspection and repair service functions" (*id.* at 584). Nor can it be said that defendant's performance or non-performance of its contract "launched a force or instrument of harm" (*see H.R. Moch Co. V Rensselaer Water Co.*, 247 NY 160, 168 [1928]).

Finally, plaintiff's alleged detrimental reliance on defendant's continued performance of its service contract is belied by her deposition testimony that, although she repeatedly complained to Houston's supervisory personnel about the broken stove grate ("Had to be over ten times [a month]"), she never once complained to defendant's servicemen, whom she regularly saw when they visited the kitchen on routine and other service calls.

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

ENTERED: APRIL 29, 2008

Tom, J.P., Buckley, Sweeny, Moskowitz, JJ.

3026 The City of New York, Index 1403/03
Plaintiff-Respondent,

-against-

Ivio Mazzella, et al.,
Defendants-Appellants.

Steven J. Mines, Long Beach, for appellants.

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

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered September 29, 2006, that granted the motion of plaintiff City of New York (the City) for summary judgment to recover what the City describes as a portion of Ditmars Street and directed defendants to remove a fence as well as any property stored there, unanimously reversed, on the law, without costs, the motion denied and the matter remanded for further proceedings including a determination as to whether the deed for Lot 330 contained restrictions concerning the public right of way.

The facts are not in dispute. Defendant Ivio Mazzella and his wife reside at 235 Ditmars Street, also known as Block 5645, Lot 290, in the Bronx. They purchased Lot 290 in 1959 and subsequently built a home on that lot. In 1966, the Mazzellas acquired title to the lands under water adjacent to Lot 290. Thereafter, the Mazzellas filled in a portion of the lands under water creating Block 5645, Lot 330. The New York City Department

of Ports and Terminals issued a permit for the landfill work.

After the Mazzellas filled in the property, the high water mark of Long Island Sound changed, moving outward approximately 150 feet. Defendants erected a fence on their property across the length of Ditmars Street approximately 18 feet from the high-water line. The City asserts that defendants have obstructed and blockaded a "public street." The City commenced this action to recover the portion of that "public street" extending from the fence defendants erected to the new high water line. The City sought a judgment of possession as well as judgment for the reasonable value of defendants' use and occupancy of the premises and a proportionate share of the income from those storing boats on the property. Supreme Court granted summary judgment to the City. The court found that the landfill created an extension of Ditmars Street to the high water line of Long Island Sound and that therefore defendants were without lawful authority to erect a fence across that street. Defendants appealed.

As the motion court found, it is correct that "[a] perpetual right of way exists in favor of the public between the terminus of a street at the high-water line of navigable tidal waters and those waters" (*Matter of City of New York [Main St.]*, 216 NY 67, 75 [1915]). It is also correct that whenever the waters bounding the end of a street become displaced by earth or other filling, the easement of the street extends by operation of law to the end

of the filling (*id.* at 75-76; *see also Knickerbocker Ice Co. v Forty-Second St. & Grand St. Ferry R.R. Co.*, 176 NY 408, 417-419 [1903] [the general public has a right of passage where streets of the City of New York and navigable waters meet that the law extends over a wharf or bulkhead built at the end of a street]). Finally, it is also correct that when a municipality conveys property abutting a street or highway, there is a presumption that the municipality has no intention to part with that public street or highway (*see City of Albany v State* of New York, 28 NY2d 352 [1971]).

The City and Supreme Court extrapolate from these cases that: (1) the City never gave up title to Ditmars Street and (2) that once the Mazzellas filled in Lot 330, the law operated to extend Ditmars Street across the Mazzellas' property to the high water line. Reasoning that because the Mazzellas never held title to the portion of Ditmars Street that would cut through Lot 330, the court ruled that defendants must remove any obstruction to the public right of way, are not entitled to just compensation for that public easement and, instead, owe the City for the use and occupancy of the premises.

It is true that the public has a right of way to the water and that easement continues where the property owners have "destroyed the then existing connection of the street and the water" (*Main Street*, 216 NY at 77). However, while the public

may have the right to an easement across the Mazzellas' property to access the navigable waters of Long Island Sound, this does not mean that the Mazzellas do not hold title to the entire portion of Lot 330, such that they ought to receive compensation for the exercise of that easement.

In *People v Steeplechase Park Co.* (218 NY 459 [1916]), a private amusement park in Coney Island completely blocked public access along the beach. Several grants conveyed the land the amusement park sat upon. All of these grants save one (the Huber grant) reserved public access to the shore. In the Huber grant, the State of New York had, on October 4, 1897, granted to one of the defendants certain lands under water in fee simple without restrictions concerning the public right of way or otherwise. The State of New York brought an action for an injunction requiring all the defendants, including Huber, to remove the obstructions to the shore. The motion court granted the injunction as to each defendant. With respect to Huber, Special Term held that although the grant to Huber was unqualified, it was subject by implication to the public's right to access the navigable waters. The Appellate Division, Second Department, affirmed, stating that the commissioners of the land office had exceeded their authority in granting Huber the lands under water in fee simple with no restrictions (165 App Div 231 [1914]).

The Court of Appeals affirmed, but only with respect to

those defendants holding grants that had reserved the public right of access. The Court of Appeals reversed that part of the order of the Appellate Division, Second Department that concerned the Huber grant and held:

> "[w]here the state has conveyed lands without restriction intending to grant a fee therein for beneficial enjoyment, the title of the grantee, except as against the rights of the riparian or littoral owners, is absolute, and unless the grant is attacked for some reason recognized as a ground for attack by the courts or the use thereof is prevented by the Federal government, there is no authority for an injunction against its legitimate use."

(*id.* at 479-480). In so holding, the Court noted that one of the obstructions on the Huber property, a pier, had permission from the federal government's Secretary of War and the Department of Docks and Ferries of the City of New York (*id.* at 469).

The decision in *Steeplechase* was not unanimous. There was one concurrence and three judges dissented. The Chief Judge at the time, Judge Bartlett, concurred in the result. However, he wrote separately to emphasize that there was no "substantial interference with navigation" (*id.* At 481), but that a land grant of larger size might violate the public trust. The dissent (Judges Hogan, Cardozo and Seabury) believed that the grant to Huber contained an "implied reservation of public rights" (*id.* at 483).

The plurality and Judge Bartlett's concurrence in *Steeplechase* control. Accordingly, without an express

reservation, a grant in fee simple of lands under water is absolute and the public has no implied rights (*cf. Appleby v City of New York*, 271 US 364, 399 [1926] [construing New York law and discussing *Steeplechase* at length, the United States Supreme Court held that the City had "parted with the sovereign regulation of navigation" because the deeds in question covered only the ends of the piers and not their sides]).[1]

Without having reserved the public's interest, the City cannot interfere with the Mazzellas' beneficial enjoyment without paying them just compensation. The City did not include the deed by which the Mazzellas acquired Lot 330 in the record.[2] Consequently, any conditions under which the Mazzellas hold the property remain at issue.

It is apparent the City did not include the deed because it assumed the public has the right to access the waterfront regardless of the language of the deed. As the plurality holding

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[1] We take no position on the issue Judge Bartlett raised in his concurring opinion in *Steeplechase* except to note that a conveyance this small would not raise concerns that a violation of the public trust has occurred.

[2] In 1976, several neighbors of the Mazzellas on City Island claimed a right of way over that portion of the street that defendants' fence blocked. They sued the Mazzellas unsuccessfully in *Dimino v Mazzella* (Sup Ct, Bronx County, Aug. 21 1978, McCooe, J., index no. 15307/76). The deed apparently was a part of the record in that case because the decision of Justice William P. McCooe, refers to certain "deeds" and states that they were "silent as to any express easement on behalf of any plaintiff."

in *Steeplechase* indicates, this was an incorrect assumption. The cases the City cites do not contravene *Steeplechase*. The City relies upon *City of Albany v State of New York* (28 NY2d 352, 357 [1971] *supra*), to argue that it held title to Ditmars Street by operation of law. However, that case is not relevant because here, the Mazzellas are not claiming title to Ditmars Street, but rather to a filled in lot at the foot of Ditmars Street. The City still retains title to Ditmars Street itself. *Main Street* (216 NY at 78), upon which the City primarily relies, is inapplicable because the land grant in that case contained a reservation for public access and still the City of New York had to provide just compensation to the property owner. The Court of Appeals in recognizing that the public had an easement, specifically stated "[t]he public have this easement of passage merely and cannot in appropriating or exercising it destroy or seize without compensation other or additional property rights" (*id.* at 76).

Likewise, *People v Lambier*, (5 Denio 9 [Sup. Ct, NY County 1847]) did not involve a sale of lands under water, but rather a landowner filling in lands under water at the edge of his fee. Nor is *Knickerbocker Ice Co, v Forty-Second St. & Grand St. Ferry R.R. Co.* (176 NY 408 [1903] *supra*), to the contrary. In that case, the plaintiff had brought an action to restrain defendant railroad company and others from constructing a bulkhead at the

foot of West 43rd Street. There, the Court of Appeals sustained the City of New York's right to extend 43RD Street into the Hudson River, construing the deed at issue to convey merely wharfage rights rather than an absolute fee. In addition, the City was later required to compensate the plaintiff for the loss of those rights (*see American Ice Co. v City of New York*, 217 NY 402, 412 [1916]).

Matter of the City of New York [Sealand Dock & Term. Corp] (29 NY2d 97 [1971]), in which the plaintiffs were only entitled to nominal damages is distinguishable because in that case the State of New York deeded the lands under water "on the *express condition* that they would set aside public streets giving access to the waterfront 'forever'" (*id.* at 101 [citation omitted). Thus, in *Sealand Dock & Term. Corp*, the plaintiff had a restricted grant. Here, the City has given no indication that the deed conveying the property to the Mazzellas contained a restriction. Also, as in *Steeplechase*, the Mazzellas purchased the property from the City for valuable consideration and filled it in at their own expense with permission of the City. Thus, because the City has not provided a deed containing restrictions, it has failed to establish a prima facie case for summary judgment.

Because of this determination, we need not reach the issue of abandonment that defendants raised. Were we to reach it, we

would reject defendants' argument because Highway Law § 205(1) does not apply to a street on lands formerly under water that filling created (*Sealand Dock & Term. Corp*, 29 NY2d at 102).

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

ENTERED: APRIL 29, 2008

CLERK

Mazzarelli, J.P., Andrias, Williams, Buckley, Acosta, JJ.

3096-
3097 In re Francia Gomez, Index 118663/06
Petitioner-Respondent,

-against-

New York City Department of Education,
Respondent-Appellant.

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

Karasik & Associates, LLC, New York (Sheldon Karasik of counsel), for respondent.

Judgment, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered July 2, 2007, granting the petition and annulling respondent's determination to permanently revoke petitioner's school bus driver certification, affirmed, without costs.

On April 26, 2006, when petitioner, a school bus driver since 1998 with a previously unblemished employment record, reported for work, she was notified that she had been randomly selected to appear at a Queens laboratory for a drug test and that her failure to submit to such test on that date might result in her decertification. It is undisputed that, instead of going to the laboratory, petitioner kept a previously scheduled appointment with her doctor in the Bronx and did not go to the laboratory to be tested for drugs until the next morning, which test yielded a negative result. Although respondent's

disciplinary conference officer found that petitioner presented a very sympathetic argument regarding the importance of her doctor's appointment, she nevertheless found that the permanent revocation of petitioner's bus driver certification was an appropriate penalty due to her failure to timely report for a random drug test on the appointed date. Respondent concurred and, in its determination dated October 13, 2006, placed petitioner on the Department of Education Invalid list.

It goes without saying that an administrative agency cannot impose a penalty not provided for by statute or by its own rules or regulations and written policies. In this case, despite the statement of respondent's counsel at the administrative hearing that the Office of Pupil Transportation has "zero tolerance for drug use," respondent failed to present any evidence of such a policy (*compare Matter of Rice v Belfiore*, 13 Misc 3d 1223A, 2006 NY Slip Op 51953U [2006][record did not support petitioner's claim that respondents adopted an unwritten zero tolerance policy which required a police officer's termination after he tested positive for marijuana use pursuant to a random drug test]). On the contrary, Chapter 6 of Title 17 of the Administrative Code of the City of New York, which governs "Drug Testing of School System Conveyance Drivers," merely provides that "[a]ny driver who refuses to take a drug test shall immediately be removed from active duty for a period of at least one year and shall not

return to active duty until passing a return to active duty drug test" (Administrative Code § 17-610[c]).

Accordingly, as found by Supreme Court, even assuming that petitioner's failure to take the test on the appointed date and her taking it one day late may be considered a "refusal" to take the test, there is simply no provision that a driver who refuses to take a randomly scheduled drug test shall be permanently decertified as a bus driver. Thus, the penalty imposed was arbitrary and capricious as a matter of law. Moreover, as also noted by Supreme Court, since at the time of its judgment petitioner had not been on active duty for over a year, a remand to respondent for consideration of an appropriate penalty is unnecessary.

All concur except Williams and Buckley, JJ. who concur in a separate memorandum by Buckley, J. as follows:

BUCKLEY (concurring)

Because the penalty imposed (revocation of petitioner's school bus driver certification) for petitioner's failure to appear for a drug test was harsher than the penalty permitted under the pertinent rules if she had taken the test and failed, the penalty imposed was so disproportionate to the offense as to be shocking to one's sense of fairness (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]), and therefore should be annulled and the matter remanded to the Department for imposition of an appropriate, lesser penalty.

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

ENTERED: APRIL 29, 2008

CLERK

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

3495 The People of the State of New York, Respondent, Ind. 2923/04

-against-

Anthony Parker, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lawrence H. Cunningham of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Thomas Farber, J.), rendered March 14, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree, and sentencing him to a term of 15 years to life, unanimously affirmed.

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. The fact that the jury acquitted defendant of another sale described by the same undercover officer does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

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 permitted elicitation of defendant's attempted murder conviction, which was relevant to his credibility as a witness. The potential for prejudice was minimized by the fact that the prior conviction was very different from the charges upon which defendant was being tried, and by the court's preclusion of any reference to the underlying facts.

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

ENTERED: APRIL 29, 2008

CLERK

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

3496 In re Alberto T.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about June 29, 2007, which adjudicated appellant a juvenile delinquent, upon his admission that he had committed acts, which if committed by an adult, would constitute the crimes of attempted robbery in the first degree and menacing in the second degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and instead adjudicating him a juvenile delinquent and imposing a conditional discharge (*see Matter of Katherine W.*, 62 NY2d 947, 948 [1984]). Appellant's lack of prior arrests, generally positive school record and commendable community

activities were outweighed by the seriousness of the underlying offenses, which involved the use of a weapon.

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

ENTERED: APRIL 29, 2008

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

3497 Wolfgang Shatriya, Index 106545/06
Plaintiff-Respondent,

-against-

Bruce Gilden, et al.,
Defendants,

Magnum Photos International, Inc.,
Defendant-Appellant.

Hoffman Law Firm, New York (Barbara Hofffman of counsel), for appellant.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered August 28, 2007, which, to the extent appealed from, denied defendant-appellant's motion for summary judgment dismissing the causes of action for breach of contract and a permanent injunction as against it, unanimously affirmed, with costs.

The motion court correctly held that an issue of fact as to the meaning of the term "PR" or "public relations" precludes summary judgment on the cause of action for breach of a contract allegedly prohibiting the posting of plaintiff/model's photographs on the Internet. Injunctive relief may be available should plaintiff prevail on his cause of action for breach of contract and show that damages are an inadequate remedy. We have

considered and rejected appellant's other arguments.

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

ENTERED: APRIL 29, 2008

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

3498 Janet Pizzo, Index 23572/06
Plaintiff-Appellant,

-against-

Rabbi Joel Goor,
Defendant-Respondent,

The Metropolitan Synagogue,
Defendant.

Tacopina & Arnold, LLC, New York (Joseph Tacopina of counsel), for appellant.

Barry N. Berger, New York, for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered on or about March 22, 2007, which, insofar as appealed from, granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Defendant's promise to pay plaintiff money at the end of their cohabitation relationship is unenforceable because the main consideration therefor, under the parties' cohabitation agreement, was plaintiff's provision of "companionship (both platonic and sexual)" (*see Morone v Morone*, 50 NY 2d 481, 486 [1980]; *McRay v Citrin*, 270 AD 2d 191 [2000]). Furthermore, the agreement, which was executed prior to plaintiff's divorce, facilitated adultery (*see Dulko v Reich*, 276 AD2d 521 [2000]). Plaintiff's causes of action for fraud, unjust enrichment, imposition of a constructive trust and intentional infliction of

emotional distress are based on the promises contained in the agreement and therefore cannot be maintained (*see Jennings v Hurt*, 160 AD2d 576 [1990], *lv denied* 77 NY2d 804 [1991]; *cf. Artache v Goldin*, 133 AD2d 596, 600 [1987]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: APRIL 29, 2008

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

3499 The People of the State of New York, Ind. 5431/03
Respondent,

-against-

Ruben Polanco,
Defendant-Appellant.

John R. Lewis, Sleepy Hollow, for appellant.

Robert M. Morgenthau, District Attorney, New York (Hilary Hassler of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert H. Straus, J.), rendered May 12, 2005, as amended May 25, 2005, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree and conspiracy in the second and fourth degrees, and sentencing him to concurrent terms of 19 years, 8⅓ to 25 years and 1⅓ to 4 years, respectively, unanimously affirmed.

With appropriate limiting instructions, the court permitted a detective involved in the investigation to testify as an expert on coded drug-related conversations and to interpret a particular recorded conversation that was the principal evidence supporting the sale conviction. This testimony was generally admissible, even though it involved the interpretation of otherwise innocuous terms that had drug-related meanings within the context of the particular case. Contrary to defendant's argument, the detective relied on his personal knowledge and other facts in evidence to

interpret these terms, rather than hearsay or speculation (*see People v Jones*, 73 NY2d 427, 430 [1989]; *People v Ramirez*, 33 AD3d 460 [2006], *lv denied* 7 NY3d 928 [2006]; *People v Contreras*, 28 AD3d 393, 394 [2006], *lv denied* 7 NY3d 928 [2006]). To the extent that the detective may have gone beyond the proper role of an expert and encroached on the jury's fact-finding function, any error was harmless. The court's instructions minimized any prejudice, and the agent's interpretation of the intercepted telephone call at issue was not the only evidence submitted by the People in support of the sale count. Defendant's associate, who was present at and overheard the conversation, fully explained its meaning. Among other things, he testified that immediately after the phone conversation ended he had a follow-up conversation with defendant, in which defendant confirmed that the call was about the sale of five kilograms of cocaine. The accomplice also placed the call in context through extensive testimony about the drug operation and the events leading up to the call. Furthermore, there was additional evidence such as telephone records showing several calls from the buyer to defendant during the applicable time period, and police surveillance tracking the buyer's travel.

We similarly reject defendant's challenges to the sufficiency and weight of the evidence supporting the sale count, and his claim that the court should have delivered a

circumstantial evidence charge. As noted, there was ample evidence establishing that the phone conversation at issue was an offer to sell drugs. In addition, the evidence established that defendant had both the intent and the ability to proceed with the sale (*see People v Samuels*, 99 NY2d 20 [2002]; *People v Mike*, 92 NY2d 996 [1998]). Most notably, at the end of the phone conversation, defendant specifically told his accomplice that he had the ability to deliver the quantity of drugs at issue. Finally, since the evidence was both direct and circumstantial, the court properly denied defendant's request for a circumstantial evidence charge (*see People v Roldan*, 88 NY2d 826 [1996]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 29, 2008

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

3500 In re Jennifer H. S.,
Petitioner-Appellant,

-against-

Damien P. C.,
Respondent-Respondent.

- - - - - - -

In re Damien P. C.,
Petitioner-Respondent,

-against-

Jennifer H. S.,
Respondent-Appellant.

Lee A. Rubenstein, New York, for appellant.

Warren L. Millman, Brooklyn, for respondent.

Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about October 5, 2007, denying appellant mother's objections to the Support Magistrate's orders, dated March 30, 2007, inter alia, directing her to pay child support in the amount of $245.97 a week, unanimously affirmed, without costs.

The Family Court properly sustained the Support Magistrate's finding that the father was the custodial parent for child support purposes, given that the children currently reside with him the majority of the time (*see Bast v Rossoff*, 91 NY2d 723, 728 [1998]; *cf. Baraby v Baraby*, 250 AD2d 201 [3d Dept 1998]).

The Support Magistrate providently exercised his discretion in imputing income to the mother based on her earning potential

(*see* Family Court Act § 413[1][b][5][v]; *Matter of Culhane v Holt*, 28 AD3d 251, 252 [2006]). The mother's pro rata share of the children's unreimbursed health care expenses, determined to be $45.07 per week (Family Court Act § 413[1][c][5]), is not "unjust or inappropriate" (§ 413[1][f]). The Support Magistrate's credibility findings are accorded "great deference" (*Andre v Warren*, 192 AD2d 491 [1993]), and there is no indication that the magistrate was biased against the mother.

The Support Magistrate did not abuse his discretion in not ordering the father to maintain life insurance for the benefit of the children, in excess of that which was voluntarily maintained (*see Gina P. v Stephen S.*, 33 AD3d 412 [2006]; Family Court Act § 416[b]).

The mother's argument that the court erred in not awarding her counsel fees is unpreserved, since she did not object to the Support Magistrate's determination not to award her such fees, and we decline to review it (*see generally Matter of Vermont Dept. of Social Welfare v Louis T.*, 25 AD3d 515 [2006]).

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

ENTERED: APRIL 29, 2008

CLERK

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

3503 The People of the State of New York, Ind. 7483/03
Respondent,

-against-

Kevin Dozier,
Defendant-Appellant.

Law Offices of Daniel M. Perez, New York (Daniel M. Perez of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Melissa Pennington of counsel), for respondent.

Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered February 21, 2006, convicting defendant, after a jury trial, of three counts of criminal contempt in the first degree, three counts of criminal contempt in the second degree, and two counts of aggravated harassment in the second degree, and sentencing him to an aggregate term of 1⅓ to 4 years, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence supporting his conviction of first-degree criminal contempt under Penal Law § 215.51(b)(iii) is without merit. In violation of orders of protection, defendant continued to leave threatening messages for officials of the college where he had been a student. Each victim testified to his subjective fear, and such fear was objectively reasonable, given the explicit death threats

contained in the messages (*compare People v Demisse*, 24 AD3d 118, 119 [2005], *lv denied* 6 NY3d 833 [2006]).

The court properly admitted, with suitable limiting instructions, a threatening message from defendant to another college official that did not form the basis of any of the charges, but which was close in time to the charged crimes. This evidence was relevant to establish defendant's overall intent to terrorize officials of the college, and it was not unduly prejudicial.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). After the prosecution explained its reasons for the challenge at issue, defense counsel remained silent and simply moved on to his own peremptory challenges. Therefore, despite ample opportunity to do so, defendant failed to preserve his current claim for appellate review (*People v Allen*, 86 NY2d 101, 111 [1995]), and we decline to review them it the interest of justice. As an alternative holding, we also reject it on the merits. The record establishes

that the nondiscriminatory reasons provided by the prosecutor for the challenge in question were not pretextual.

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

ENTERED: APRIL 29, 2008

Saxe, J.P., Gonzalez, Catterson, Acosta, JJ.

3504 JPMorgan Chase Bank, Index 650006/04
Plaintiff-Appellant,

-against-

Larry Orleans, et al.,
Defendants-Respondents,

Reba Singh,
Defendant.

Andrew R. Kosloff, New York, for appellant.

Lawrence M. Segan, New York, for Larry Orleans, respondent.

Joseph Carbonaro, New York, for Tim Schnitzler, respondent.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered on February 1, 2007, which, insofar as appealed from as limited by the briefs, granted defendants-respondents' cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff alleges that defendants provided various gifts, such as small electronic items and furniture, to its employee, a named defendant who has defaulted in the action, to induce her to order an inordinate amount of office supplies from a now bankrupt company that was owned by one defendant and employed the other as a commission salesperson. Plaintiff contends that the company's invoices for the products ordered by the employee were fraudulent because they represented that the prices stated reflected the fair value of the products, that plaintiff needed the products,

and that the products were being delivered. In fact, plaintiff asserts, the markup on the products was 900%, the amount of products ordered was many times more than plaintiff's needs, and most of the products were never delivered. The first two of these assertions have no legal significance absent evidence that plaintiff's reliance on the invoices for purposes of ascertaining its office supplies requirements and the fair value thereof was justified (*see Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 87 [2007]). Certainly, plaintiff was in a better position than defendants to know its requirements, and plaintiff could easily have ascertained if it was being overcharged by seeking out other vendors. In any event, there is nothing about the invoices, and there is no other evidence, that tends to show that any representations were made, either in the invoices themselves or by defendants to the employee, concerning the value of the goods sold or plaintiff's requirements. Furthermore, it was reasonable for defendants to believe that the employee was authorized to place the orders where numerous invoices had been paid by plaintiff on a regular basis without complaint. The claim that most of the supplies were never delivered is also legally insignificant where plaintiff does not dispute that its employee requested that delivery be deferred. Plaintiff's other claim of unjust enrichment also lacks merit. The equities do not favor plaintiff absent evidence that defendants knew of the

employee's misconduct or conspired with her to defraud plaintiff into buying overpriced, unneeded supplies, and given plaintiff's complete lack of oversight of its employee and failure to take even minimal steps to monitor its expenses (*see Sharp v Kosmalski*, 40 NY2d 119, 123 [1976]; *cf. Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]).

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

ENTERED: APRIL 29, 2008

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

3507 The People of the State of New York, Ind. 4203/05
Respondent,

-against-

Kenneth Moore, also known as James Jackson,
Defendant-Appellant.

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

Kenneth Moore, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Allen J. Vickey of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered April 20, 2006, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 5½ years, unanimously affirmed.

Defendant's challenges to the prosecutor's summation are entirely unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). The court's curative actions were sufficient to prevent defendant from being

prejudiced by anything in the summation.

Defendant's pro se arguments are without merit.

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

ENTERED: APRIL 29, 2008

CLERK

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

3509 The People of the State of New York, Ind. 4125/04
Respondent,

-against-

Laurence McKelvin,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered September 7, 2006, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 12½ years, unanimously affirmed.

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. There was extensive evidence of defendant's guilt including, among other things, eyewitness testimony that defendant was one of the two men who shot the victim.

The court properly exercised its discretion when it denied defendant's mistrial motion, made during the court's jury charge after the court briefly referred to a matter not in evidence. The court immediately corrected its inadvertent error and gave a curative instruction that was sufficient to prevent any prejudice

(*see People v Santiago*, 52 NY2d 865, 866 [1981]).

Defendant's remaining contentions regarding the court's jury instructions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. In each instance the court's charge, viewed as a whole, conveyed the proper standards. The absence of objections by trial counsel did not deprive defendant of effective assistance, since nothing in the instructions at issue was constitutionally deficient or caused defendant any prejudice.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 29, 2008

CLERK

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

3510 The People of the State of New York, Ind. 396/05
Respondent,

-against-

Humberto Fernandez,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Michael Ambrecht, J.), rendered on or about October 27, 2005, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 29, 2008

CLERK

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

3511 Dolph Timmerman, Index 109435/06
Petitioner-Appellant,

-against-

Board of Education of the City School District of the City of New York, et al.,
Respondents-Respondents.

James R. Sandner, New York (Wendy M. Star of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Kibbie F. Payne, J.), entered February 6, 2007, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking to direct respondents to reimburse petitioner the expenses he incurred in defense of criminal charges leveled against him by two of his students, unanimously reversed, on the law, without costs, and the petition granted.

"Judicial review of the propriety of any administrative determination is limited to the grounds invoked by the agency in making its determination" (*Matter of Missionary Sisters of Sacred Heart, Ill. v New York State Div. of Hous. & Community Renewal*, 283 AD2d 284, 288 [2001]). In denying petitioner's request to be reimbursed for attorneys' fees and expenses, respondents merely said that his "criminal proceeding does not fall within the scope of Education Law § 3028." At the agency level - as opposed to

their response to the petition - respondents made no pronouncements about the meaning of the phrase "arising out of" in Education Law § 3028. Thus, while deference is appropriate to an agency's "specific application of a broad statutory term" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [internal quotation marks and citations omitted]), there was no agency interpretation in the instant case. Accordingly, since the record shows that the criminal proceeding against petitioner clearly arose out of disciplinary actions that he took against pupils, respondents should reimburse petitioner for the attorneys' fees and expenses he incurred in defending himself (*see Matter of Cutler v Poughkeepsie City School Dist.*, 73 AD2d 967 [1980]).

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

ENTERED: APRIL 29, 2008

CLERK

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

3512N Citibank, N.A., Index 118797/01
Plaintiff,

-against-

American Banana Co., Inc., et al.,
Defendants,

George Mouyios,
Defendant-Appellant,

George Liakeas,
Judgment Creditor-Respondent.
- - - - - - -
Pauline Mouyios,
Non-Party-Appellant.

Law Offices of Paul D. Stone, P.C., Tarrytown (Paul D. Stone of counsel), for appellants.

Wachtel & Masyr, LLP, New York (Jeffrey T. Strauss of counsel), for respondent.

Order, Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered March 14, 2007, which denied defendant George Mouyois' motion to preclude judgment creditor George Liakeas from enforcing a judgment, to annul the assignment of the judgment to Liakeas, to vacate the judgment as against Mouyios, and to vacate a restraining notice dated October 19, 2006, unanimously affirmed, with costs.

Plaintiff Citibank commenced this action against the corporate defendants, and the individual defendants who had guaranteed payment on a credit line extended by Citibank to the corporate defendants. Defendant Mouyios moved, inter alia, to

vacate the judgment Citibank obtained in connection with this action, and argued that the settlement agreement between Citibank and the family members of the since-deceased defendant Demetrios Contos, reached in a separate fraudulent transfer action that Citibank commenced against the family members, involved an improper assignment of judgment to a spouse of one family member (Liakeas). Mouyios alleged that the settlement and assignment of judgment were obtained with assets that had been fraudulently transferred and, as such, enforcement of the judgment as against him is barred by the doctrine of unclean hands.

Mouyios' motion was properly denied. Reliance upon the doctrine of unclean hands is applicable only "when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct" (*Mehlman v Avrech*, 146 AD2d 753, 754 [1989]; *see Rooney v Slomowitz*, 11 AD3d 864, 868 [2004]). To charge a party with unclean hands, it must be shown that said party was "guilty of immoral or unconscionable conduct directly related to the subject matter" (*Frymer v Bell*, 99 AD2d 91, 96 [1984]). Here, the fraudulent transfer issue was separate from the original litigation commenced by Citibank, and there was nothing in the record to suggest that the settlement agreement between Citibank and the family members of Demetrios Contos was illegal,

inequitable or barred by a contract right (*see e.g. Sparkling Waters Lakefront Assn., Inc. v Shaw*, 42 AD3d 801, 804 [2007]). Furthermore, Mouyios' argument for apportionment of liability based on common-law contribution is not compelling as the Contos family members who settled the fraudulent transfer action were not debtors on the Citibank credit line.

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

ENTERED: APRIL 29, 2008

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

3513N Gilian Abramowitz, Index 119038/06
Plaintiff-Respondent,

-against-

145 East 16th Street LLC,
Defendant-Appellant.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Jeffrey R. Metz and Paul N. Gruber of counsel), for appellant.

Law Offices of Bryan W. Kishner & Associates, New York (Ryan O. Miller of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered January 12, 2007, which granted plaintiff's motion for a *Yellowstone* injunction, unanimously affirmed, with costs.

Under the circumstances presented, it was a proper exercise of discretion to grant plaintiff residential tenant *Yellowstone* relief despite the availability of RPAPL 753(4) (*see Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 28 [1984]; *see e.g. Stolz v 111 Tenants Corp.*, 3 AD3d 421 [2004]).

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

ENTERED: APRIL 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3514 The People of the State of New York, Ind. 1124/06
Respondent,

-against-

David Lewis,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), and Milbank Tweed, Hadley & McCloy LLP, New York (Dorothy Heyl of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Arlene R. Silverman, J. at hearing; Daniel P. FitzGerald, J. at plea and sentence), rendered March 8, 2007, convicting defendant of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The officer had probable cause to believe that defendant had committed a violation in his presence (*see* CPL 140.10[1][a], [2][a]). The pertinent portions of Arts and Cultural Affairs Law § 25.11 and § 25.35 make it a violation to resell or offer to resell (at any price) tickets to an entertainment venue seating over 5000 persons, within 1500 feet of the building. The officer observed defendant saying to passersby "I got tickets, Billy Joel tickets," approximately 200 feet from the entrance to Madison

Square Garden, where Mr. Joel was scheduled to perform. Defendant's conduct was clearly inconsistent with that of an innocent man, and it had no rational explanation except that defendant was offering to sell Billy Joel tickets. In any event, probable cause does not require proof beyond a reasonable doubt or the exclusion of every reasonable innocent explanation (*see e.g. People v Mercado*, 68 NY2d 874, 877 [1986], *cert denied* 479 US 1095 [1987]). Furthermore, we reject defendant's argument that, before making an arrest, the officer was obligated to ask defendant to explain his behavior. In view of the unequivocal conduct the officer had already observed, it is unlikely that any explanation would have negated probable cause.

Since the officer had probable cause, he properly arrested defendant and, pursuant to that arrest, searched him and found counterfeit Billy Joel tickets and heroin. The officer's decision to make an arrest was not invalidated by the fact that he had the option of issuing a summons instead, and a search incident to an arrest for a violation is lawful regardless of whether there is reason to suspect the presence of weapons or evidence would be found on defendant's person (*People v Weintraub*, 35 NY2d 351, 353-54 [1974]; *People v Anderson*, 111 AD2d 109, 110 [1985]). These principles apply equally to arrests for violations defined in statutes other than the Penal Law (*see*

e.g. People v Taylor, 294 AD2d 825, 826 [2002][open container ordinance]). While there is an exception for minor vehicular offenses (*see People v Marsh*, 20 NY2d 98 [1967]), we see no reason to apply it here. A major rationale underlying *Marsh* and other traffic cases is that "except in the most rare of instances, there can be no 'fruits' or 'implements' of such infractions." (*id.* at 101). Here, the fact that defendant had counterfeit tickets on his person illustrates the potential that a person violating Arts and Cultural Affairs Law § 25.11 might be carrying evidence or instrumentalities of a crime.

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

ENTERED: APRIL 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3515 The People of the State of New York, ex rel. Raul Coriano, Petitioner-Appellant, Index 75022/06

-against-

Warden, Riker's Island, et al., Respondents-Respondents.

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Malancha Chanda of counsel), for respondents.

Appeal from order, Supreme Court, Bronx County (Margaret L. Clancy, J.), entered July 7, 2006, which dismissed the petition for a writ of habeas corpus, unanimously dismissed, without costs, as moot.

Petitioner's challenge to the alleged untimeliness of his parole revocation hearing was rendered moot by the revocation of his parole pursuant to his guilty plea at the final hearing (*see People ex rel. Scott v Warden of Rikers Is. Correctional Facility*, 26 AD3d 209 [2006]; *People ex rel. McCummings v DeAngelo*, 259 AD2d 794 [1999], *lv denied* 93 NY2d 810 [1999]). The appeal is also moot in light of petitioner's release to parole supervision (*see People ex rel. Burns v Mellas*, 8 NY3d 857 [2007]; *People ex re. Abreu v Warden of Rikers Is. Correctional Facility*, 37 AD3d 353 [2007], *lv denied* 8 NY3d 811 [2007]).

Petitioner's arguments that the appeal is not moot are unavailing. Were we not dismissing the appeal, we would affirm.

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

ENTERED: APRIL 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3516-
3516A-
3516B-
3516C Leslie Dick Worldwide, Ltd., et al., Index 600222/06
Plaintiffs-Appellants,

-against-

Macklowe Properties, Inc., et al.,
Defendants-Respondents.

Hantman & Associates, New York (Robert J. Hantman of counsel), for appellants.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Brian J. Howard of counsel), for Macklowe Properties, Inc., Fifth Avenue 58/59 Acquisition Co., L.P. and Harry Macklowe, respondents.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Jacqueline G. Veit of counsel), for Eastdil Realty Company, LLC, Benjamin V. Lambert and Wayne L. Maggin, respondents.

Butler, Fitzgerald, Fiveson & McCarthy, P.C., New York (David J. McCarthy of counsel), for George Soros and Soros Fund Management LLC, respondents.

Kirkland & Ellis LLP, New York (Matthew F. Dexter of counsel), and Kirkland & Ellis LLP, Chicago, IL (Reed S. Oslan, of the Illinois Bar, admitted pro hac vice, of counsel), for Conseco, Inc., Carmel Fifth LLC, 767 Intermediate, LLC and Chuck Cremens, respondents.

Judgments, Supreme Court, New York County (Karla Moskowitz, J.), entered December 20, 2006 and February 2, 2007, dismissing the complaint pursuant to orders, same court and Justice, entered on or about December 5, 2006 and on January 30, 2007, which, in

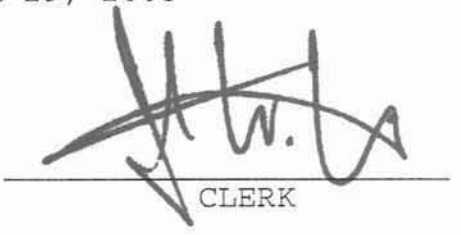
an action arising out of plaintiffs' offer to purchase a building, granted defendants' motion pursuant to CPLR 3211(a)(1), (7) to dismiss the complaint, unanimously affirmed, with costs. Appeals from the orders unanimously dismissed, with costs, as subsumed in the appeals from the judgments.

The confidentiality statement signed by plaintiffs acknowledges that the building could be withdrawn from the market for any reason whatsoever, without notice, and that the sellers were "expressly reserv[ing] the right in [their] sole discretion to terminate, at any time with or without notice and without liability, any discussions with any party regarding a possible sale of the property." After receiving this acknowledgment from plaintiffs, the sellers' agent sent plaintiffs a letter advising that the sellers were "reserv[ing] the right, in [their] sole discretion, to accept or reject any offer for any reason," and that factors in addition to price would be considered in selecting a purchaser, including level of due diligence, closing capacity and credibility, and earnest money deposit. This documentary evidence suffices to negate any reasonable reliance on any prior representations that the building would be sold at auction to the highest bidder. Accordingly, plaintiffs do not

have a cause of action for fraud (*see Banner Indus. v Schwartz*, 204 AD2d 190 [1994], *lv denied* 84 NY2d 804 [1994]; *Daily News v Rockwell Intl. Corp.*, 256 AD2d 13, 14 [1998], *lv denied* 93 NY2d 803 [1999]) or promissory estoppel (*see Steele v Delverde S.R.L.*, 242 AD2d 414, 415 [1997]). We have considered plaintiffs' other claims and find them without merit.

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

ENTERED: APRIL 29, 2008



CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3519 Robert Hernandez, Index 117165/03
Plaintiff-Respondent-Appellant, 591442/03

-against-

Columbus Centre, LLC, et al.,
Defendants-Appellants-Respondents.

[And a Third-Party Action]

Fiedelman & McGaw, Jericho (Andrew Zajac of counsel), for appellants-respondents.

O'Dwyer & Bernstien, LLP, New York (Steven Aripotch of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (John F. O'Donnell, J., and a jury), entered December 22, 2006, awarding plaintiff, inter alia, $15,300 and $127,500 for past and future pain and suffering, respectively, on a finding that defendants were liable for plaintiff's injuries under Labor Law § 200 and § 241(6), unanimously modified, on the law, to vacate all findings of liability except the finding against defendant Bovis Lend Lease LMB under Labor Law § 200, and, on the facts, to vacate the award for past pain and suffering, and a new trial directed on the Labor Law § 241(6) claim against defendant Columbus Centre, and a new trial directed on the damage issue, unless, in the event plaintiff prevails at the new trial on liability, both defendants stipulate, or, in the event Columbus Centre prevails at the new trial, Bovis stipulates, within 24 hours after return of the

verdict, without prejudice to post-trial motions, to increase the award for past pain and suffering to $100,000, and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

The Labor Law § 200 claim against Bovis, the construction manager, was properly before the jury, since there was evidence that the injury arose "from the condition of the work place created by or known to the contractor, rather than the method of plaintiff's work" (*Murphy v Columbia Univ.*, 4 AD3d 200, 202 [2004]). However, no such evidence existed as to defendant Columbus Centre, the owner, and the Labor Law § 200 claim should have been dismissed as against it.

The Labor Law § 241(6) claim was properly before the jury to the extent it was based on Industrial Code (12 NYCRR) § 23-1.30. Plaintiff's testimony, confirmed by his supervisor, that lighting conditions were poor, consisting only of a street light 150 to 200 feet away, created a triable issue of fact as to adequate lighting (*see Murphy v Columbia Univ.*, 4 AD3d at 202). The remaining three Code provisions submitted to the jury as predicates for liability were not supported by sufficient evidence. As to Industrial Code (12 NYCRR) § 23-1.7(b)(1), plaintiff did not fall from a height of 15 feet (*see Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 338 [2006]) and the opening in the planks, which buckled beneath him, was not large enough for a

person to fit through (*see Messina v City of New York*, 300 AD2d 121, 123 [2002]). As to Industrial Code (12 NYCRR) §§ 23-1.7(d) and (e)(2), there was no evidence of a slippery condition or the presence of debris or scattered materials, respectively. However, since these four theories of liability were submitted in the form of a general verdict, we cannot determine the basis on which the jury found for plaintiff, and the judgment rendered on that verdict must be reversed (*see Davis v Caldwell*, 54 NY2d 176 [1981]). A new trial must be had to determine liability under section 241(6) predicated on the theory of inadequate lighting against Columbus Centre alone, Bovis having separately been found liable under Labor Law § 200 (*see Weigl v Quincy Specialties Co.*, 1 AD3d 132, 133 [2003]).

The jury's award for past pain and suffering was inconsistent with its award of approximately three years' worth of lost earnings (*see generally Rivera v City of New York*, 253 AD2d 597, 600 [1998]; *Schaefer v RCP Assoc.*, 232 AD2d 286 [1996]) and was against the weight of the evidence. We find that an award of $100,000 award for past pain and suffering over three years is reasonable, considering that plaintiff sustained a partial meniscal tear that required surgery, on an out-patient basis, crutches and then a cane, extensive physical therapy and pain medication.

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 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3520 Kuwaiti Engineering Group, Index 600033/05
Plaintiff-Appellant,

-against-

Consortium of International Consultants, LLC,
Defendant,

Safege Consulting Engineers,
Defendant-Respondent.

Norman A. Kaplan, Great Neck, for appellant.

Baker & McKenzie LLP, New York (David Zaslowsky of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered March 19, 2007, which granted the motion of defendant Safege Consulting Engineers (Safege) to dismiss the complaint on forum non conveniens grounds, unanimously modified, on the law and the facts, to the extent of conditioning the order of dismissal upon defendants' consent to jurisdiction of the courts of Kuwait and France, and otherwise affirmed, with costs in favor of defendants, payable by plaintiff.

Dismissal of the complaint on forum non conveniens grounds (CPLR 327[a]) was a provident exercise of discretion in this action where plaintiff, a Kuwaiti corporation, seeks to enforce a contract as a third-party beneficiary, and alleges, inter alia, tortious interference with its contract rights to act as agent for defendants in performing environmental consulting work in

Kuwait. The motion court balanced the appropriate factors, including that defendant Consortium of International Consultants, LLC (CIC) is a Delaware limited liability company headquartered in Virginia, and Safege is a French corporation. The consulting work agreements at issue involved work to be wholly performed in Kuwait, and were negotiated, only in part, in New York, and were otherwise completed and executed outside New York. The conduct underlying the alleged interference with contractual rights occurred outside New York, and as agent to the consulting firms, plaintiff was obligated to obtain non-American, non-European union workers to assist the engineers in performing their work in Kuwait. Furthermore, the courts of either Kuwait or France provide viable alternative forums. Under these circumstances, we find that Safege met its heavy burden to establish that New York was an inconvenient forum (*see e.g. Creditanstalt Inv. Bank AG v Chadbourne & Parke LLP*, 14 AD3d 414, 415 [2005]), and that a substantial nexus between New York and this action was lacking (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 [1984], *cert denied* 469 US 1108 [1985]; *Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171 [2004]).

Although we agree with the motion court's dismissal of this action, we do not find plaintiff's appeal to be frivolous within the meaning of 22 NYCRR 130-1.1(c). Accordingly, Safege's

request for sanctions is denied (*cf. Timoney v Newmark & Co. Real Estate*, 299 AD2d 201, 201-202 [2002], *lv dismissed* 99 NY2d 610 [2003]).

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

ENTERED: APRIL 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3521-
3521A The People of the State of New York, Ind. 5539/04
Respondent, 388N/05

-against-

Reginald Randolph,
Defendant-Appellant.

Donald E. Cameron, New York, for appellant.

Judgments, Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about December 7, 2005, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 29, 2008

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3522 Norma C. Prestol, Index 111512/05
Plaintiff-Respondent,

-against-

Carol I. McKissock, et al.,
Defendants,

Angel M. Calvo,
Defendant-Appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellant.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered September 4, 2007, which denied defendant Calvo's motion (and the remaining defendants' cross motion) for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion to the extent of dismissing plaintiff's claim that she sustained a medically determined injury of a non-permanent nature that prevented her from performing substantially all of her usual and customary daily activities for 90 of the 180 days immediately following the accident, and, upon a search of the record, to grant the cross motion to the same extent, and otherwise affirmed, without costs.

The only evidence as to plaintiff's claim of injury in the 90/180 period is her own deposition testimony that she was

confined to bed and home and unable to work for approximately two months, i.e., 60 days (*see Furrs v Griffith*, 43 AD3d 389 [2007]).

As to plaintiff's remaining claims, while defendants met their initial burden on their motions, in opposition, plaintiff raised a triable issue of fact through her treating chiropractor's affidavit, which reported objective medical findings of range of motion limitations contemporaneous with the accident and on recent examination and adequately explained the reason for the three-year gap in plaintiff's treatment (*see Sung v Mihalios*, 44 AD3d 500 [2007]; *Green v Nara Car & Limo, Inc.*, 42 AD3d 430 [2007]). By resubmitting defendants' expert orthopedist's affirmed report, plaintiff also sufficiently countered defendants' argument that her injuries reflected preexisting degenerative disease (*see Pommells v Perez*, 4 NY3d 566, 577-578 [2005]).

Upon a search of the record, plaintiff's 90/180 claim is also dismissed as against defendants Carol I. McKissock and Jonathon P. McKissock (*see Brewster v FTM Servo, Corp.*, 44 AD3d 351, 353 [2007]).

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

ENTERED: APRIL 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3523 The People of the State of New York, Ind. 4758/04
Respondent,

-against-

Teddy Williams,
Defendant-Appellant.

Stanley Neustadter, New York (Gaynor L. Cunningham of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Elizabeth Anne Squires of counsel), for respondent.

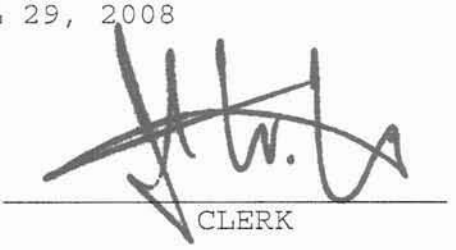
Judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered October 19, 2005, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree (two counts) and criminal possession of a weapon in the second and third degrees, and sentencing him, as a persistent violent felony offender, to an aggregate term of 21 years to life, unanimously affirmed.

Defendant's argument regarding the sufficiency of the evidence corroborating the testimony of his accomplice is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits, because the testimony was corroborated by extensive evidence that included defendant's presence at the scene of the crime and motive for committing it (*see People v Breland*, 83 NY2d 286, 292-294 [1994]). 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.

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

ENTERED: APRIL 29, 2008



CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3524-
3524A In re Kairi Jazlyn F., and Another,

Carlos Manuel F., Jr.,
Respondent-Appellant,

-against-

Catholic Guardian Society, et al.,
Petitioners-Respondents.

Kenneth M. Tuccillo, Hastings-On-Hudson, for appellant.

Joseph T. Gatti, New York, for respondent.

Amanda P. Slater, New York, Law Guardian.

Orders, Family Court, New York County (Jody Adams, J.), entered on or about December 4, 2006, which terminated respondent father's parental rights upon findings of abandonment and transferred custody and care of the children to petitioner agency and the Commissioner of Social Services for the purposes of adoption, unanimously affirmed, without costs.

The findings of abandonment are supported by clear and convincing evidence that the father failed to communicate with the children or agency during the six months immediately preceding the filing of the petition ((Social Services Law § 384-b[5][a]); *Matter of Anthony M.*, 195 AD2d 315 [1993]). The father's minimal and insubstantial contacts with the agency during this period are insufficient to defeat these findings (*see Matter of Elizabeth Amanda T.*, 44 AD3d 507 [2007]; *Matter of*

Chantelle TT, 281 AD2d 660 [2001]). The father's testimony, which conflicted with that of the caseworker and the records of the agency, presented credibility issues for the court, whose assessment is entitled to deference *(see Matter of Donelle Thomas M.*, 4 AD3d 137 [2004]).

In light of the father's insufficient contacts and his failure to plan for the children, as well as the evidence that the children have been together - and thriving - in the same stable and caring pre-adoptive home for almost their entire lives, the Family Court correctly concluded that termination of respondent's parental rights was in the children's best interests. Contrary to respondent's contention, in these circumstances, a suspended judgment would not have been appropriate *(see Matter of Charlene Lashay J.*, 280 AD2d 320 [2001]; *Matter of Shareal Stacey S.*, 17 AD3d 251 [2005]).

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

ENTERED: APRIL 29, 2008

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3525-
3525A Mary Farrell, Index 108886/05
Plaintiff,

-against-

Gristede's Supermarkets, Inc.,
Defendant-Appellant,

The Gap, Inc., et al.,
Defendants-Respondents.

Nicholas C. Katsoris, New York (Dara Siegel of counsel), for appellant.

McAndrew, Conboy & Prisco, LLP, Woodbury (Mary C. Azzaretto of counsel), for respondents.

Order, Supreme Court, New York County (Leland DeGrasse, J.), entered November 27, 2007, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' (The Gap) cross motion for summary judgment dismissing the complaint and cross claim as against them, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 18, 2007, which declined to sign Gristede's proposed order to show cause, unanimously dismissed, without costs, as taken from a nonappealable paper.

Plaintiff was injured when she fell over debris that was on the sidewalk in front of Gristede's; adjacent to Gristede's is the loading door for The Gap's store. Plaintiff commenced an action against Gristede's and The Gap, and Gristede's asserted a

cross claim for indemnification and/or contribution on the basis that the subject debris originated from The Gap. Following The Gap's successful cross motion for summary judgment, Gristede's entered into a settlement with plaintiff.

Gristede's cross claim against The Gap is one for contribution and not indemnification, since the record fails to establish that any duty to indemnify, either contractual or otherwise, exists between The Gap and Gristede's. Nor does the evidence in the record allow Gristede's liability to plaintiff to be characterized as merely vicarious or secondary. Accordingly, in light of Gristede's settlement with plaintiff, its cross claim for contribution against The Gap is barred by General Obligations Law § 15-108(c) (*see Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 645 [1988]; *Rosado v Proctor & Schwartz*, 66 NY2d 21 [1985]; *see also Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [2006], *lv dismissed* 7 NY3d 864 [2006]).

The appeal from the December 18, 2007 order is dismissed because "[n]o appeal lies from an order declining to sign an order to show cause" (*Nova v Jerome Cluster 3, LLC*, 46 AD3d 292, 293 [2007]; *see M & J Trimming v Kew Mgt. Corp.*, 254 AD2d 21 [1998]).

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

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

ENTERED: APRIL 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3526 The People of the State of New York, Respondent, Ind. 4386/05

-against-

Karim Parker, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Daniel A. Warshawsky of counsel), and Cadwalader, Wickersham & Taft LLP, New York (Jared J. Perez of counsel), for appellant.

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

Judgment, Supreme Court, New York County (William A. Wetzel, J. at hearing; Arlene D. Goldberg, J. at plea and sentence), rendered April 24, 2006 convicting defendant of robbery in the first degree, and sentencing him to a term of 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police observed three men in a car engaging in a pattern of "casing"-type and otherwise suspicious behavior as well as traffic violations, but did not initially stop the car and lost sight of it. Immediately thereafter, they heard radio broadcasts describing a gunpoint robbery committed by three men occupying a car bearing some similarities to the car they had been observing. When the officers encountered the same car they had seen before, given the close spatial and temporal factors, the police had, at the very least, reasonable suspicion that the occupants were

involved in criminal activity, sufficient to justify an ordinary, nonforcible automobile stop. The record establishes that as the officers approached the car, and prior to any seizure going beyond a vehicular stop, they noticed that two of the three occupants met specific descriptions that matched two of the three robbery suspects (especially with regard to one suspect's tattoos). At this point, the police clearly had probable cause to arrest the occupants (*see People v Garcia*, 24 AD3d 308, 309 [2005], *lv denied* 6 NY3d 833 [2006]). In any event, even assuming for the sake of argument that the police forcibly removed the occupants at gunpoint *before* noticing that two of them fit the descriptions, the totality of circumstances at least provided reasonable suspicion justifying such action (*see People v Hicks*, 68 NY2d 234, 238 [1986]), and such suspicion ripened into probable cause as soon as the police noticed the resemblance of the men to the described robbery suspects.

After the police removed the occupants, they noticed a pistol in the car. Even assuming that this was not an open-view observation, it was justified under the automobile exception (*see People v Blasich*, 73 NY2d 673 [1989]), because there was probable cause to believe the occupants had just committed a robbery involving a firearm. Even if, prior to the discovery of the pistol, the police still had no more than reasonable suspicion, a limited check of the car for weapons was still permissible since

the circumstances posed a threat to the officers' safety (*see People v Mundo* 99 NY2d 55 [2002]), and the presence of the weapon was an additional basis for the lawful arrest of the occupants. Finally, even if at the time the robbery victims arrived to identify the suspects, the police still had only reasonable suspicion, the investigatory detention was still lawful, notwithstanding the handcuffing of the suspects (*see People v Allen*, 73 NY2d 378 [1989]). Thus, under any of the scenarios posited above, there was no Fourth Amendment violation, and no basis upon which to suppress any evidence as fruit of an unlawful seizure.

The showup identification of defendant, approximately 30 minutes after the crime, was not unduly suggestive. Both the use of a showup and the manner in which it was conducted were justified by the exigencies of the case and the interest of prompt identification (*see People v Duuvon*, 77 NY2d 541 [1991]; *People v Love*, 57 NY2d 1023, 1024 [1982]). While defendant cites a series of allegedly suggestive circumstances surrounding the showup, the overall effect was not significantly greater than what is inherent in any showup (*see People v Gatling*, 38 AD3d 239, 240 [2007], *lv denied* 9 NY3d 865 [2007]). Defendant offers no support for his assertion that the police "could have

conducted a prompt lineup," or any estimate of the delay that would have resulted from efforts to locate three sets of suitable fillers.

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

ENTERED: APRIL 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3527 Patricia Berman, et al., Index 115402/05
Plaintiffs-Appellants-Respondents,

-against-

Dominion Management Company, et al.,
Defendants-Respondents,

Board of Managers of 500 West End Avenue Condominium,
Defendant-Respondent-Appellant.

Finkelstein Newman Ferrara LLP, New York (Barry Gottlieb of counsel), for appellants-respondents.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Maria I. Beltrani of counsel), for Board of Managers of 500 West End Avenue Condominium, respondent-appellant, and Dominion Property Group LLC, respondent.

Sperber Denenberg & Kahan, P.C., New York (Jacqueline Handel-Harbour of counsel), for Dominion Management Company and WSC West End Avenue Owners, LLC, respondents.

Order, Supreme Court, New York County (Marcy Friedman, J.), entered July 10, 2007, which, to the extent appealed from as limited by the briefs, denied that portion of plaintiffs' motion for summary judgment that sought a hearing on legal fees, and granted defendants' cross motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In view of the mixed results of this litigation, in which plaintiffs stipulated to resolve certain remediation claims, but also stipulated to discontinue their personal injury claims, and abandoned their claims based on breach of the lease, plaintiffs

cannot be considered the prevailing party in this litigation (*see* Real Property Law § 234; *Mosesson v 288/98 W. End Tenants Corp.*, 294 AD2d 283 [2002]).

As to the cross appeal, since the court granted defendant board of managers' motion to dismiss the complaint in its entirety, there is no necessity for a modification of the order.

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

ENTERED: APRIL 29, 2008

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3528 The People of the State of New York, Ind. 8677/99
Respondent,

-against-

Michael Sookoo,
Defendant-Appellant.

Robert DiDio, Kew Gardens, for appellant.

Robert M. Morgenthau, District Attorney, New York (Dana Poole of counsel), for respondent.

Judgment, Supreme Court, New York County (Herbert Altman, J.), rendered February 20, 2001, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record regarding counsel's strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). In particular, counsel's affirmative use of all of the testimony defendant now challenges as inadmissible suggests that counsel had strategic reasons for not objecting to that testimony. 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]). Under the circumstances of the case, defendant

was not prejudiced by the fact that his attorney did not request an alibi charge or an expanded identification charge.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice.

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

ENTERED: APRIL 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3529 The People of the State of New York, Respondent, Ind. 613/06

-against-

Charlie Dunnell, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (John Schoeffel of counsel), and Davis Polk & Wardwell, New York (Namita Wahi of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jung Park of counsel), for respondent.

Appeal from judgment, Supreme Court, New York County (Micki A. Scherer, J. at motion; Richard D. Carruthers, J. at jury trial and sentence), rendered August 1, 2006, convicting defendant of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, held in abeyance and the matter remanded for a suppression hearing.

Relying on this Court's decision in *People v Burton* (16 AD3d 241 [2005]), the motion court summarily denied defendant's suppression motion solely on the ground of lack of standing. However, as the People concede, defendant established standing in light of the principles set forth by the Court of Appeals in its decision reversing this Court's order in *Burton* (6 NY3d 584 [2006]). We also note that the Court of Appeals decided *Burton* after defendant's motion but before his trial, and when defendant called the trial court's attention to the reversal, that court

improperly refused to either send the motion back to the motion court for reconsideration or to address the issue itself. We also conclude that defendant's moving papers were sufficient to warrant a hearing when considered in the context of the limited information provided by the People as to the basis for his arrest. Although the felony complaint and voluntary disclosure form revealed that defendant was arrested for stealing money from a complainant in an incident that had occurred about 20 minutes before the arrest, the People did not disclose any facts explaining why the police suspected defendant of this theft (*compare People v Bryant*, 8 NY3d 530, 533-534 [2007], *with People v Roldan*, 37 AD3d 300 [2007], *lv denied* 9 NY3d 850 [2007]). Under these circumstances, defendant's denial of having committed any theft was sufficient to warrant a hearing (*see People v Hightower*, 85 NY2d 988 [1995]).

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

ENTERED: APRIL 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3530 Eduardo Rivera, Index 110177/05
Plaintiff,

-against-

Ray Bari Pizza, etc.,
Defendant-Appellant,

Nevada Towers, Inc., et al.,
Defendants,

Nevada Towers Associates,
Defendant-Respondent.

Goldberg & Carlton, PLLC, New York (Gary M. Carlton of counsel), for appellant.

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

Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered November 1, 2007, which, to the extent appealed from as limited by the brief, granted summary judgment to defendant Nevada Towers Associates (Nevada) on its claims for defense and indemnification against defendant Ray Bari Pizza West 69th Street d/b/a Ray Bari Pizza (Ray Bari), unanimously affirmed, without costs.

Given that the parties are sophisticated commercial entities and that Ray Bari was obligated under the lease to procure insurance, the lease indemnification provision does not violate

General Obligations Law § 5-321 (*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]; *Rubin v Port Auth. of N.Y. & N.J.*, 2008 NY Slip Op 02627 [2008]). We have considered appellant's remaining arguments and find them unavailing.

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

ENTERED: APRIL 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3531N Lucillo Gomez, Index 23134/04
Plaintiff-Respondent,

-against-

Penmark Realty Corp.,
Defendant-Appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Laurence M. Savedoff, P.L.L.C., Bronx (Laurence M. Savedoff of counsel), for respondent.

Order, Supreme Court, Bronx County (Alan J. Saks, J.), entered March 12, 2007, which, in an action for personal injuries sustained by plaintiff while performing his duties as superintendent of a building managed by defendant, sua sponte denied as untimely defendant's motion for summary judgment dismissing the complaint on the basis of the exclusivity provisions of the Workers' Compensation Law, and sua sponte struck defendant's affirmative defense based on the Workers' Compensation Law, unanimously reversed, on the law, without costs, the affirmative defense reinstated, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

The motion, which was made within 120 days as required by CPLR 3212(a), should not have been denied as untimely based on Justice Saks's part rules imposing a 60-day limit where the case

had not previously been before Justice Saks but a different judge whose part rules made no provision for the timing of summary judgment motions, and it does not appear that defendant could have known of the assignment to Justice Saks until after the 60 days had run. Nor should the workers' compensation defense have been stricken because defendant had previously made and withdrawn a motion for summary judgment based on that defense. The parties' stipulation withdrawing the motion shows that plaintiff agreed to the withdrawal, and does not show that defendant agreed not to make the motion again or conceded lack of merit to the workers' compensation defense. On the merits, the record establishes that although, as the Workers' Compensation Board ruled, plaintiff was the building owner's employee, plaintiff was interviewed and hired by defendant, his paychecks were signed by defendant, and his daily activities were comprehensively and exclusively supervised by an employee of defendant, establishing, as a matter of law, that defendant was plaintiff's special employer, and thus defendant is shielded from this action by the exclusivity provisions of the Workers' Compensation Law (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557-559, 560 [1991]; *Ayala v Mutual Hous. Assn., Inc.*, 33 AD3d 343 [2006];

Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co., Inc., 37 AD3d 155 [2007]).

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

ENTERED: APRIL 29, 2008

CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3532N Hazel Warsop, etc., et al., Index 108999/04
Plaintiffs-Respondents,

-against-

Stephen Novik, M.D., et al.,
Defendants,

Peter E. Tangredi, etc.,
Non-Party Appellant.

Denise O'Connor, Bedford, for appellant.

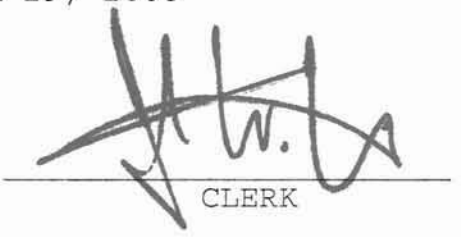
Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 19, 2007, which, to the extent appealed from, upon granting appellant's motion to be relieved as counsel, directed that appellant turn plaintiff's case file over to new counsel within five days of receiving a written request, without directing payment of appellant's disbursements, unanimously modified, on the law, to provide that the subject file be turned over only after plaintiff pays disbursements of $8,934.19 or provides security therefor, and otherwise affirmed, without costs.

Absent evidence of discharge for cause, a court should not order turnover of an outgoing attorney's file before the client fully pays the attorney's disbursements or provides security

therefor (*see Gonzalez v City of New York*, 45 AD3d 347, 348 [2007], *lv denied* 10 NY3d 701 [2008]; *Tuff & Rumble Mgt. v Landmark Distribs.*, 254 AD2d 15 [1998], *lv dismissed* 93 NY2d 920 [1999]).

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

ENTERED: APRIL 29, 2008



CLERK

Tom, J.P., Mazzarelli, Andrias, Williams, JJ.

3533N In re American Transit Insurance Company, Petitioner-Respondent, Index 102841/06

-against-

Cora Wason, et al., Respondents,

Robin Palache, etc., et al., Additional Respondents-Appellants.

Martin, Fallon & Mullé, Huntington (Richard C. Mullé of counsel), for appellants.

Aeneas E. Wills, Jr., Brooklyn, for American Transit Insurance Company, respondent.

Order, Supreme Court, New York County (Nicholas Doyle, Special Referee), entered June 21, 2007, which granted the petition to stay arbitration of an uninsured motorist claim upon a finding that the vehicle owned by additional respondent Palache and insured by additional respondent State Farm Insurance Co., was involved in the subject accident, unanimously affirmed, without costs.

Respondent Cora Wason testified at a framed-issue hearing that the taxi in which she was a passenger was involved in an accident with a dark green, four-door vehicle, which fled the scene. Upon exiting the taxi, Wason and the taxi driver discovered a bumper with a license plate attached to it. The bumper was placed in the trunk of the taxi and taken to a nearby

police precinct, and was subsequently left in the possession of the taxi driver. Approximately one week later, the driver delivered the license plate, now detached from the bumper, to Wason, who provided it to her attorney. The evidence was undisputed that the plate was registered to Palache, who while acknowledging that she owned a dark green, four-door vehicle, maintained that her vehicle was not involved in the accident.

The finding of the Special Referee, resting in large measure on considerations relating to the witnesses' credibility, that Palache's vehicle was involved in the subject accident, is supported by a fair interpretation of the evidence (*see Claridge Gardens v Menotti*, 160 AD2d 544 [1990]). It was within the province of the Special Referee to reject the chain of custody arguments proffered by additional respondents and conclude that the license plate discovered at the scene of the accident was the same one produced at the hearing.

We have considered additional respondents' remaining arguments and find them unavailing.

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

ENTERED: APRIL 29, 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 29, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Eugene Nardelli
John T. Buckley
James M. Catterson, Justices.

The People of the State of New York, Ind. 5118/06
Respondent,

-against- 3506

Quanne McCutchen,
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 (Charles H. Solomon, J.), rendered on or about May 29, 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 29, 2008.

Present - Hon. Peter Tom, Justice Presiding
Angela M. Mazzarelli
Richard T. Andrias
Milton L. Williams, Justices.

The People of the State of New York, Ind. 4337/05
Respondent,

-against- 3518

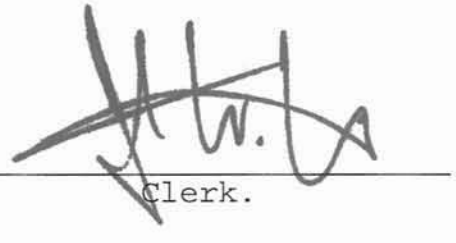
Edwardo Gonzalez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about January 12, 2006,

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 29, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David B. Saxe
David Friedman
Eugene Nardelli, Justices.

Amanda Fortini,
Plaintiff-Respondent-Appellant,

Index 114262/02

-against-

3044-
3044A-
3044B

Francis Ford Coppola, et al.,
Defendants,

AZX, LLC, doing business as
Zoetrope All-Story,
Defendant-Appellant-Respondent.

Appeals having been taken to this Court by the above-named appellants from a judgment of the Supreme Court, New York County (Martin Shulman, J.), entered on or about November 1, 2006, and orders, same court (Sherry Klein Heitler, J.), entered April 12, 2005 and March 20, 2006,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 16, 2008,

It is unanimously ordered that the appeal from the aforesaid judgment is withdrawn in accordance with the terms of the aforesaid stipulation and the appeals from the aforesaid orders are unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

ENTER:

Clerk.