SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 3, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Saxe, Buckley, Acosta, JJ.

3576 Arnold Tuico, Index 117680/04
Plaintiff-Appellant,

Edward J. Garofalo,
Plaintiff-Appellant-Respondent,

-against-

Edward C. Maher, et al.,
Defendants-Respondents.

Robert George Bombara, Howard Beach, for appellants.

Law Offices of John P. Humphreys, New York (Evy L. Kazansky of counsel), for appellant-respondent.

Kay & Gray, Westbury (Lynn Golder of counsel), for Edward C. Maher, respondent.

Kelly, Rode & Kelly, LLP, Mineola (Susan M. Ulrich of counsel), for Jacqueline M. Bendick, respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 5, 2006, which granted defendants' motion and cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motions denied, and the complaint reinstated.

Although defendants made a sufficient prima facie showing of entitlement to judgment on the question of "serious injury"

(Insurance Law § 5102[d]), the expert affirmations in response designated a numeric percentage for each plaintiff's loss of range of motion, and an objective basis for comparing those limitations "to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). Plaintiffs' experts specifically quantified the range-of-motion limits (*see Desulme v Stanya*, 12 AD3d 557 [2004]) and causally related them to the accident, sufficient to defeat summary dismissal.

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

ENTERED: JUNE 3, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3771 The People of the State of New York, SCI 630/05
Respondent,

-against-

Dzemil Balic,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Lucy Jane Lang of counsel), for respondent.

Order, Supreme Court, New York County (Brenda Soloff, J.), entered on or about September 14, 2005, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

As the People concede, certain points were incorrectly assessed and defendant's presumptive risk level should thus be level one. Nevertheless, the record supports the court's alternate conclusion that an upward departure to level two is warranted. Clear and convincing evidence established aggravating factors that were not otherwise adequately taken into account by the risk assessment guidelines (*see e.g. People v Brown*, 45 AD3d 1123 [2007]). Defendant's background includes a violent sexual

attack on a child, and a pattern of misconduct displaying a likelihood of recidivism.

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

ENTERED: JUNE 3, 2008

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3772 Anne Grezinsky, et al., Index 601451/06
Plaintiffs-Appellants,

-against-

Mount Hebron Cemetery, et al.,
Defendants-Respondents,

Lane Lodge #36 of the Independent
Order of Odd Fellows,
Defendant.

Ballon Stoll Bader & Nadler, P.C., New York (Will Levins of counsel), for appellants.

Camacho Mauro Mulholland, LLP, New York (Suzanne Lodge of counsel), for respondents.

Order, Supreme Court, New York County (Martin Shulman, J.), entered May 3, 2007, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

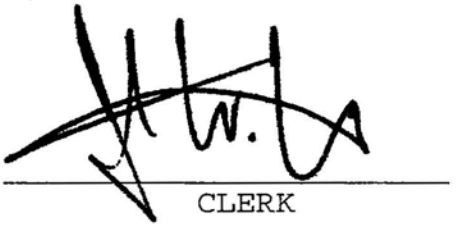
Under New York's transactional approach to the doctrine of res judicata (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]), the court properly held this action barred because the claims were litigated or could have been litigated in the prior Kings County action commenced in 1995 (*Marinelli Assoc. v Helmsley-Noyes Co.*, 265 AD2d 1 [2000]). That action was dismissed for failure to prosecute, a motion to vacate was denied, and each court found that despite numerous opportunities, plaintiffs failed to set forth a meritorious cause of action (*see*

Grezinsky v Mount Hebron Cemetery, 305 AD2d 542 [2003]).

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

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

ENTERED: JUNE 3, 2008



CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3773 L.A. Gear, Inc., Index 602727/06
Plaintiff-Appellant,

-against-

Kidfusion, LLC, et al.,
Defendants-Respondents.

Greenberg Traurig, LLP, New York (Timothy E. Di Domenico of counsel), for appellant.

Edward A. Christensen, Oyster Bay, for respondents.

Order, Supreme Court, New York County (Lancelot B. Hewitt, Special Referee), entered December 3, 2007, directing the Clerk to enter judgment in favor of plaintiff and against defendants in the amount of $75,801.76, with statutory interest from the date of the Special Referee's decision, unanimously modified, on the law, to increase the amount of the judgment by $802,116.47, with statutory interest on the latter amount from August 2, 2006, and otherwise affirmed, with costs in favor of plaintiff payable by defendants. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that the individual defendants, who own a 100% interest in defendant Kidfusion LLC, fraudulently formed defendant Bradley Imports Apparel LLC to take over Kidfusion's assets and business for the purpose of defeating a judgment that plaintiff had obtained against Kidfusion. Upon granting

plaintiff's motion for a default judgment, the court referred "the issue of the assessment of Plaintiff's damages and attorneys' fees" to a Special Referee to determine. The Special Referee, after noting his understanding that the attorneys' fees and litigation expenses that plaintiff had incurred in this action and was seeking to recover were one and the same as the "'damages'" it was also seeking to recover, assessed the reasonable value of plaintiff's attorneys' fees and directed entry of judgment in the amount thereof plus the amount of plaintiff's other litigation expenses. This improperly deviated from the order of reference, which clearly indicated that damages and attorneys' fees were separate issues and that both were to be determined (*cf. Dunleavy v White*, 236 AD2d 316, 317 [1997]). Accordingly, we modify to award plaintiff, jointly and severally against defendants, an additional $802,116.47, the unpaid amount of plaintiff's judgment against Kidfusion, with interest thereon from August 2, 2006, the date the judgment was entered.

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

ENTERED: JUNE 3, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3774-
3774A In re Lourdes O. and Another

Dependent Children Under the
Age of Eighteen Years, etc.,

William O.,
Respondent-Appellant.

Fatima DeLos S.,
Respondent,

Administration for Children's Services, et al.,
Petitioners-Respondents.

Howard M. Simms, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein of counsel), for Administration for Children's Services, respondent.

Steven Banks, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose, LLP, New York (Joanna Smith of counsel), Law Guardian.

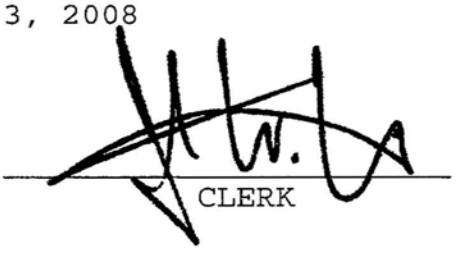
Orders of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about August 2, 2006, which, to the extent appealed from, terminated respondent father's parental rights to the subject children upon a finding that he violated the terms of a suspended judgment, and committed custody and guardianship of the children to petitioner Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The determination that respondent violated the conditions of the suspended judgment is supported by a preponderance of the evidence (*see Matter of Shawna DD.*, 289 AD2d 892, 894 [2001]), including his failure to work diligently to obtain suitable housing for himself and his children, and to attend individual therapy and his children's mental health appointments (*see Matter of Aparicio Rodrigo B.*, 29 AD3d 351 [2006]). Lapses by the agency due to a transfer of the case from one agency to another did not relieve respondent of his responsibility to comply with the terms of the suspended judgment (*see Matter of Jessica J.*, 44 AD3d 1132, 1133-1134 [2007]).

The circumstances presented do not warrant an extension of the suspended judgment for an additional year where respondent failed to demonstrate the "exceptional circumstances" required to extend a suspended judgment (Family Court Act § 633[b]), and where the record establishes that further efforts to reunite the family would not be in the best interests of the children (*see Matter of Rigoberto M.*, 18 AD3d 405 [2005]).

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

ENTERED: JUNE 3, 2008



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Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3775 Adi Keizman, et al., Index 103461/02
Plaintiffs-Respondents,

-against-

Issac Hershko, et al.,
Defendants-Appellants,

Yaron Hershko, et al.,
Defendants.

Snitow Kanfer Holtzer & Millus, LLP, New York (Virginia K. Trunkes of counsel), for appellants.

Anthony J. Siano, White Plains, for respondents.

Order and judgment (one paper), Supreme Court, New York County (Ira Gammerman, J.H.O.), entered December 5, 2006, in favor of plaintiff Keizman and against defendants-appellants in the principal amount of $4,437,186.66, together with interest, costs and disbursements, and dismissing defendants' counterclaims, unanimously modified, on the facts, to reduce the principal amount of the judgment by $30,000, together with any corresponding interest, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly.

Unrefuted evidence establishes that defendants are entitled to a $30,000 credit for a check drawn by plaintiff Keizman on the parties' joint venture account that Keizman made payable to a separate business entity of which he was a principal. Apart from

this one credit, the trial's court's calculation of damages is supported by a fair interpretation of the evidence (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). We note that while a trial court may be accorded significant leeway in ascertaining a fair approximation of the loss where, as here, a breach of fiduciary duty has been proved (*see Wolf v Rand*, 258 AD2d 401, 402-403 [1999]), here, the trial court's methodology and findings in reaching the damage amount (except to the extent indicated) have substantial support in the parties' agreements, business and accounting records, and in the credited testimony.

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

ENTERED: JUNE 3, 2008

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3776 The People of the State of New York, Ind. 2923/04
Respondent,

-against-

Devon Brown,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Bryan C. Hughes of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered October 2, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first and second degrees and four counts of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 17 years to life, unanimously affirmed.

Over the course of a month, an undercover officer, posing as a member of organized crime who was looking to acquire drugs in order to serve patrons of clubs he ostensibly owned, made several purchases of heroin and cocaine from defendant. The undercover officer indicated that he wanted to continue doing business with

defendant. He also generally alluded to "replacing" a person who posed as his employee (but was actually a confidential informant), who supposedly performed general but unelaborated responsibilities for $1,500 per week. Defendant eventually was accompanied by a codefendant, from whom he appeared to acquire the drugs. In support of his agency defense, defendant testified that the codefendant was the actual seller, and that defendant himself neither sought nor received compensation for the sales in which he participated. Rather, he testified that his participation was motivated solely by his hope that the buyer would hire him to replace his ostensible employee.

The sole preserved challenge to the court's agency charge was to the court's inclusion, within a list of factors possibly bearing on the agency defense, of language calling upon the jury to consider whether defendant "expected" a benefit. Defendant argues that the court should have omitted this language because the only evidence of such an expectation was his hope of being hired by the buyer. He argues, among other things, that a hope that was not directly related to the drug transactions or communicated to the buyer was not a basis upon which to reject his defense. However, receipt of any substantial benefit, as opposed to a "tip" or other incidental benefit, is inconsistent

with the agency defense (*see People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], *cert denied* 439 US 935 [1978]). Defendant testified that his hope of receiving a lucrative job from a person he believed to be an organized crime figure was, in defendant's mind, a serious expectation that motivated his involvement in the drug sales. Although the expected benefit was not part of the proceeds of the transactions, it was still inconsistent with the agency defense, whose purpose is to limit the liability of a person who helps another person obtain drugs primarily as "a favor for a friend" (*id.* at 74), rather than for economic reasons.

Defendant did not preserve any of his other challenges to the court's agency charge (*see People v Hoke*, 62 NY2d 1022 [1984]; *People v Whalen*, 59 NY2d 273, 280 [1983]; *People v Newland*, 300 AD2d 199, 200 [2002], *lv denied* 99 NY2d 631 [2003]), or any of his prosecutorial misconduct claims, and we decline to review any of these arguments in the interest of justice. As an alternative holding, we find no basis for reversal. To the extent the prosecutor improperly bolstered a witness's testimony

and neglected to make a certain redaction from an audiotape, those errors were harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: JUNE 3, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3777 Graciela Chichilnisky, Index 600894/00
Plaintiff-Appellant,

-against-

The Trustees of Columbia University
in the City of New York,
Defendant-Respondent.

Robert N. Felix, New York, for appellant.

Proskauer Rose LLP, New York (Edward A. Brill of counsel), for respondent.

Order, Supreme Court, New York County (Leland DeGrasse, J.), entered December 4, 2007, which granted defendant's motion to strike plaintiff's jury demand and denied plaintiff's motion to compel supplemental disclosure pursuant to CPLR 3101(h), unanimously modified, on the law, to direct a trial by jury of defendant's counterclaims, and otherwise affirmed, without costs.

While the motion court correctly held that plaintiff waived her right to a jury trial by joining claims for legal and equitable relief arising out of the same transactions and occurrences (*see Kaplan v Long Is. Univ.*, 116 AD2d 508 [1986]), we modify as above indicated since plaintiff is concededly entitled to a jury trial on defendant's counterclaims, and the counterclaims are sufficiently intertwined with plaintiff's main claims, to make one trial of all causes of action appropriate

(*see Hudson View II Assoc. v Gooden*, 222 AD2d 163, 169 [1996]). While plaintiff asserts that her expert cannot complete an updated analysis of her damages based on the data that defendant has provided for the 10-year period ending in 2005, by entering into two stipulations agreeing that discovery was complete and thereafter filing the note of issue and certificate of readiness, plaintiff waived any right she may have had to supplemental disclosure (*cf.* 22 NYCRR 202.21[d]; *see Think Pink, Inc. v Rim, Inc.*, 19 AD3d 331 [2005]; *Green v Staten Is. Hosp.*, 221 AD2d 416 [1995]). 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: JUNE 3, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3778 James Garten, Index 112114/07
Plaintiff-Respondent,

-against-

Shearman & Sterling LLP,
Defendant-Appellant.

Shearman & Sterling LLP, New York (Kirsten Nelson Cunha of counsel), for appellant.

Donald Pearce, New York, for respondent.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered December 12, 2007, which, in this legal malpractice action arising out of a loan transaction, denied defendant's motion to dismiss the complaint, unanimously modified, on the law, to dismiss the causes of action for breach of contract, breach of fiduciary duty, and common-law negligence, and otherwise affirmed, without costs.

Plaintiff has stated a cause of action for legal malpractice by alleging that "but for" defendant's failure to prepare and procure documents necessary to provide him with a first-priority security interest, he would have been able to recover the amounts owed to him by the defaulting borrower (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). The documentary evidence does not establish a defense as a matter of law (*see*

Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326-327 [2002]). Under "Documentation relating to Security Agreement," defendant's closing documents checklist included "[e]vidence that all other action that the Lender may deem necessary or desirable in order to perfect and protect the first priority liens and security interests created under the Security Agreement has been taken (including, without limitation, UCC-3 termination statements)." Thus, defendant was obligated not only to prepare the loan documents, but also to protect plaintiff's expectation that the agreement that he would hold a senior security interest was effective. However, defendant allegedly neither attempted to obtain such documentation from the senior creditors nor advised plaintiff of the hazards of proceeding with the loan without it.

Neither the borrower's failure to repay the loan nor the senior creditors' eventual failure to act honorably and adhere to the understanding that their liens were to be junior to plaintiff's relieves defendant of potential liability for its negligence. Nor is plaintiff responsible for his own loss simply because he executed the documents that defendant prepared for him (*see Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 305 [2001]).

The causes of action for breach of contract, breach of fiduciary duty, and common-law negligence are redundant of the legal malpractice cause of action (*see Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38-39 [1998]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [2004]; *Darby & Darby v VSI Intl.*, 95 NY2d 308, 313 [2000]).

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

ENTERED: JUNE 3, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3779 The People of the State of New York, Ind. 3344/06
Respondent,

-against-

Linda Williams,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered November 20, 2006, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing her to a term of 4½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. The People established probable cause for defendant's arrest, notwithstanding the absence of testimony from the officers who initially detained defendant, given the testimony of the officer who placed defendant under arrest immediately thereafter. The only reasonable conclusion that could be drawn from the totality of the hearing evidence is that defendant was detained based on radio transmissions describing the suspects (*see People v Gonzalez*, 91 NY2d 909, 910 [1998]). There is no merit to defendant's suggestion that the type of circumstantial inferences

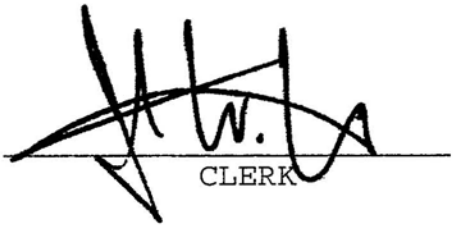
drawn in *Gonzalez* should be limited to "buy and bust" cases (*see e.g. People v Colon*, 39 AD3d 233 [2007], *lv denied* 9 NY3d 874 [2007]; *People v Dingle*, 30 AD3d 1121, 1122 [2006], *lv denied* 7 NY3d 925 [2006]; *People v Myers*, 28 AD3d 373 [2006], *lv denied* 7 NY3d 760 [2006]).

The imposition of mandatory surcharges and fees by way of court documents, but without mention in the court's oral pronouncement of sentence, was lawful (*see People v Harris*, ___AD3d___, 2008 NY Slip Op 4446 [May 15, 2008]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 3, 2008



Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3780 Miron Zohar, et al., Index 601505/06
Plaintiffs-Appellants,

-against-

3 West 16th Associates, LLC., et al.,
Defendants-Respondents.

Frederic Walker, New York, for appellants.

Herrick, Feinstein LLP, New York (John Oleske of counsel), for respondents.

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 5, 2007, insofar as appealed from, upon a nonjury verdict in favor of defendants on the first and second causes of action of the complaint, unanimously affirmed, with costs.

The trial court correctly concluded that plaintiffs were not entitled to recovery under their first (breach of contract) and second (specific performance) causes of action. The two preliminary agreements signed by the parties were not intended to bind the parties to a real estate transaction prior to the execution of a formal contract (*see BMH Realty v 399 E. 72nd St. Owners*, 221 AD2d 165 [1995]). Rather, the inclusion of a term stating that in the event that the formal contract is not signed, defendant seller agrees to pay plaintiff Interbelmont Realty's

broker's fee within the time frame for signing the formal contract, establishes that the parties intended to leave themselves the option of not going forward with the deal (*see Brause v Goldman*, 10 AD2d 328, 332-333 [1960], *affd* 9 NY2d 620 [1961]).

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

ENTERED: JUNE 3, 2008

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3781 Mohammed A. Noman, Index 107838/07
Petitioner-Respondent,

-against-

Management, West 31st Street Apartments,
Respondent-Appellant.

Lebensfeld Borker Sussman & Sharon LLP, New York (Stephen Sussman of counsel), for appellant.

Mohammed A. Noman, respondent pro se.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered February 26, 2008, which, insofar as appealed from, upon converting the action into a special proceeding under CPLR article 78, denied respondent's motion to dismiss the proceeding, and directed respondent to recalculate petitioner's annual income by multiplying the average number of regular hours worked over the past three years by his current regular pay rate, and adding to such result, the average number of overtime hours worked multiplied by his overtime rate, unanimously reversed, on the law, without costs, the petition denied and respondent's motion to dismiss the proceeding granted.

Following respondent's denial of petitioner's application for a low-income apartment for himself and his family in respondent's building on the ground that petitioner's household

gross income exceeded eligibility requirements, petitioner commenced this action seeking a review of the method used by respondent for calculating his income and upon such review, to be issued an affordable apartment. For purposes of determining annual income, United States Department of Housing and Urban Development Handbook 4350.3 REV-1, ch 5, at 5-5(A)(1) states, in pertinent part, that "[g]enerally, the owner must use current circumstances to anticipate income. The owner calculates projected annual income by annualizing current income." In addition, 24 CFR 5.609(a)(2) defines annual income as "all amounts, monetary or not, which...[a]re anticipated to be received from a source outside the family during the 12-month period following admission," and such income includes overtime pay (24 CFR 5.609[b][1]).

When calculating petitioner's income, respondent projected petitioner's income by annualizing his current income based on his last eight pay stubs. We find that under the circumstances such method of calculation was rationally based (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]).

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

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

ENTERED: JUNE 3, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3782 Priscilla Eichelbaum, Index 117428/05
Plaintiff-Appellant,

-against-

Douglas Elliman, LLC, et al.,
Defendants-Respondents.

Alan M. Sanders, LLC, Carle Place (David M. Schwarz of counsel), for appellant.

Law Offices of Bruce A. Lawrence, Brooklyn (Eric A. Schnittman of counsel), for Douglas Elliman, LLC, respondent.

Hoey, King, Toker & Epstein, New York (Edgar Matos of counsel), for Daniel Gale Agency, Inc., respondent.

Kelly, Rode & Kelly, LLP, Mineola (John W. Hoefling of counsel), for Michael and Sara Craig-Scheckman, respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered June 11, 2007, which granted defendants' respective motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to raise an issue of fact responsive to defendants real estate brokers' prima facie showing that their only connection to the house in which plaintiff fell was to show it to prospective buyers, such as plaintiff, and that they therefore owed plaintiff no duty to make the house safe (*see Pirie v Krasinski*, 18 AD3d 848, 850 [2005], *Meyer v Tyner*, 273 AD2d 364, 365 [2000]). Defendants owners were properly granted

summary judgment in the absence of evidence -- responsive to their prima facie showing that the pre-finished shiny wood floor had never been waxed or polished after installation and was mopped with only a small amount of water -- that the floor was slippery for reasons other than its inherent smoothness (*see Murphy v Conner*, 84 NY2d 969, 971-972 [1994]). For the same reason it does not avail plaintiff that defendants may have had notice of the inherent slippery nature of the floor, i.e., any danger due to smoothness would have been as apparent to her as to defendants (*see DeMartini v Trump 767 5th Ave., LLC*, 41 AD3d 181, 182 [2007]), it does not avail plaintiff to argue that defendants created or exacerbated the danger by requesting her to remove her shoes on entering the house.

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

ENTERED: JUNE 3, 2008

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3783 The People of the State of New York, Ind. 1432/96
Respondent,

-against-

Allen A. also known as Angel M.,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Bryan C. Hughes of counsel), for respondent.

Judgment of resentence, Supreme Court, Bronx County (Joseph Fisch, J.), rendered November 20, 2006, vacating a prior youthful offender adjudication and sentence of probation, and sentencing defendant, as a second felony offender, to a term of 6 to 12 years, unanimously modified, on the law, to the extent of reinstating the youthful offender adjudication and sentence of probation and remanding for further violation of probation proceedings, and otherwise affirmed.

Although a court has inherent authority to vacate a youthful offender adjudication where it was achieved through fraud or misrepresentation (*see Matter of Lockett v Juviler*, 65 NY2d 182, 187 [1985]), the record does not establish that defendant received YO treatment as the result of any fraudulent conduct on his part. In 1996, defendant pleaded guilty in return for a

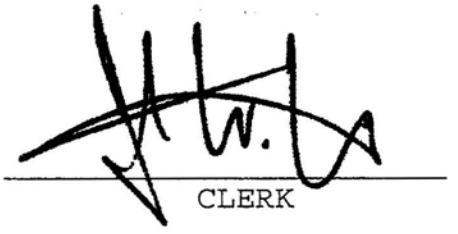
promise of YO treatment and probation. While defendant's use of aliases and passive concealment of the fact that he had already been convicted of a felony in 1995 and was thus YO-ineligible should not be condoned, this misconduct was not the cause of his sentencing as a YO when he was returned on a bench warrant in 2002. On the contrary, the 2002 sentencing court (Robert H. Straus, J.), had before it all the information about defendant's criminal record that it needed to determine whether defendant was YO-eligible, including information as to defendant's 1995 felony conviction, as well as the fact that defendant was sentenced as a second felony offender in yet another case in 1996. That court nevertheless concluded, albeit erroneously, that defendant was YO-eligible as to the instant case. With the prosecutor's consent, the court adjudicated defendant a YO and sentenced him to probation.

In 2006, defendant appeared before the resentencing court for violation of probation proceedings. The resentencing court concluded that defendant had obtained YO treatment by fraud, revoked the YO adjudication, vacated the sentence of probation and resentenced defendant as a second felony offender. Since the finding as to fraud was erroneous, the resentencing court lacked authority to vacate YO treatment or impose a new sentence (*see*

People v Calderon, 79 NY2d 61, 67 [1992]; *see also Matter of Campbell v Pesce*, 60 NY2d 165 [1983]; *People v Medina*, 35 AD3d 163 [2006], *lv denied* 8 NY3d 925 [2007]).

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

ENTERED: JUNE 3, 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 June 3, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Angela M. Mazzarelli
Milton L. Williams
John W. Sweeny, Jr.
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 2564/05
Respondent,

-against- 3784

Bajro Hoti,
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 (Lewis Bart Stone, J.), rendered on or about March 6, 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.

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3785-
3785A Lumbermens Mutual Casualty Company, et al., Plaintiffs-Appellants, Index 600175/07

-against-

The Commonwealth of Pennsylvania, et al., Defendants-Respondents.

Donovan Hatem, LLP, New York (David M. Pollack of counsel), for appellants.

Kaufman Dolowich Schneider Bianco & Voluck LLP, Woodbury (Ivan J. Dolowich of counsel), for respondents.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered February 29, 2008, dismissing the action for lack of subject matter jurisdiction pursuant to an order, same court and Justice, entered January 31, 2008, which, in a declaratory judgment action involving insurance coverage for environmental pollution in Pennsylvania allegedly caused by highway construction in Pennsylvania, granted defendants Commonwealth of Pennsylvania and Pennsylvania Department of Transportation's (Penn DOT) motion to dismiss the action, and denied, as academic, plaintiffs insurers' cross motion for a preliminary injunction prohibiting defendants from litigating the issue of coverage in Pennsylvania, unanimously reversed, on the

law, without costs, the complaint reinstated and the matter remanded for consideration of the cross motion on the merits. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the above judgment.

In enacting General Obligations Law § 5-1402 and CPLR 327(b), the Legislature made explicit that public policy favors New York courts retaining actions against foreign states where a choice of New York law has been made and the foreign state agreed to submit to New York's jurisdiction. The doctrine of comity does not, in the present declaratory context involving insurance coverage and New York forum-selection and choice-of-law clauses contained in the insurance policy, warrant recognition of defendants' sovereign immunity (*cf. Korsinsky v Society Natl. Bank*, 304 AD2d 793 [2003], citing *Legal Capital, LLC v Medical Professional Liability Catastrophe Loss Fund*, 561 Pa 336, 342, 750 A2d 299, 302 [Pa 2000]). We reject defendants' argument that Penn DOT lacked authority to waive its sovereign immunity by agreeing to submit to New York's jurisdiction. Penn DOT did not waive its sovereign immunity; rather, it agreed to litigate in a forum where it does not have sovereign immunity (*see Nevada v Hall*, 440 US 410, 416 [1979] [while "no sovereign may be sued in

its own courts without its consent," there is "no support for a claim of immunity in another sovereign's courts"]). We have considered and rejected defendants' other arguments.

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

ENTERED: JUNE 3, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3786 Jeanette Castro, Index 24603/02
Plaintiff,

-against-

New York City Transit Authority,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

M.A. Angeliades,
Third-Party Defendant-Respondent.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Andrea S. Kleinman of counsel), for appellant.

Law Office of Thomas K. Moore, White Plains (Patrick Colligan, Sr. of counsel), for respondent.

Order, Supreme Court, Bronx County (Janice L. Bowman, J.), entered June 8, 2007, which denied defendant Transit Authority's motion for summary judgment on its third-party claims, unanimously affirmed, without costs.

Plaintiff in the main action slipped shortly after exiting the staircase from the elevated platform at the IRT station at 161st Street/Yankee Stadium. She testified that she took one or two steps, then slipped on a foreign substance allegedly leaking from pipes overhead. At the time of the accident, a major station renovation, under the auspices of third-party defendant general contractor, was underway. Pursuant to its contract with

defendant, third-party defendant was required to refurbish the station, including installation of new drain pipes from the roof of the elevated subway structure and from the mezzanine structure to the sidewalk. The testimony showed, however, that third-party defendant was not responsible for drainage pipes leading from the tracks to the sidewalk, which discharged in the same vicinity as those pipes that were its responsibility.

On this record, issues of fact exist concerning the exact cause of plaintiff's accident, precluding summary judgment in defendant's favor on its third-party claims for contractual and common-law indemnification. Pappas, third-party defendant's representative, unequivocally testified as to pipes in the station that were not its responsibility, specifically, the drain pipes that ran from the track to the sidewalk, which remained the responsibility of defendant Transit Authority. Pappas averred, in his affidavit in opposition to defendant's motion for summary judgment, that there were two pipes in the vicinity of the staircase where plaintiff fell: a drain pipe from the roof (which would have been third-party defendant's responsibility), and a drain pipe from the tracks (which, according to Pappas's earlier testimony, would be the responsibility of defendant). The liquid on which plaintiff fell may have come from a pipe that necessarily emanated from a different level of the station [i.e.,

the roof or the track area]. The evidence showed that defendant remained in control of the track area of the station. On this record, it cannot be determined which of the two pipes was implicated in plaintiff's accident, and thus, which party, as between defendant and third-party defendant, was negligent.

The fact that third-party defendant may have furnished "flaggers" when work was being performed on the sidewalk or street, or that as general contractor it was responsible for general site safety, is not dispositive. It is well settled that a party may not be indemnified for its active negligence (*see* General Obligations Law § 5-322.1). Since a triable issue of fact exists regarding the negligence of the respective parties, defendant was not entitled to summary judgment on its third-party claims for indemnification (*see Mannino v J.A. Jones Constr. Group, LLC*, 16 AD3d 235 [2005]).

We reject defendant's argument that Pappas's affidavit contradicted his earlier deposition testimony. We do note that his testimony, standing alone, raises a triable issue of fact, since he stated that there were track drain pipes not under the control of third-party defendant in the vicinity of plaintiff's accident. Pappas unequivocally testified at his deposition as to drainage pipes within the station for which third-party defendant

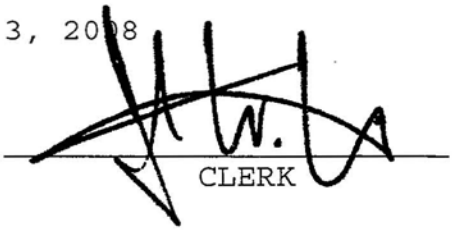
was not responsible, specifically, those leading from the tracks to the sidewalk. His subsequent affidavit noted that in the specific area where plaintiff fell, there was one such pipe, as well as a pipe leading from the roof to the sidewalk (which would have been third-party defendant's responsibility). Although the affidavit more specifically describes the types of pipes in the immediate vicinity of the area where plaintiff fell, it is not contradictory to the prior deposition testimony, but merely amplifies it. In reaching this conclusion, we have not relied upon the photographs that defendant claims were unauthenticated.

Defendant contends that third-party defendant breached its contractual duty to procure the requisite CGL coverage naming defendant as an additional insured. Third-party defendant did in fact obtain CGL coverage, which names defendant as an additional insured. The fact that third-party defendant's insurer denied coverage and a defense, on the ground that the claim did not arise out of its insured's "work," is not tantamount to a failure, on third-party defendant's part, to procure the requisite coverage. Third-party defendant did fail, however, in one respect: it procured CGL coverage with per-occurrence limits of $1 million, rather than the $2 million called for in the

parties' contract. Thus, to the extent plaintiff's claim exceeds the $1 million policy limit, third-party defendant remains potentially liable.

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

ENTERED: JUNE 3, 2008



Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3787 The People of the State of New York, Ind. 11966/94
Respondent,

-against-

Eduar DeJesus,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David A. Crow of counsel), and Proskauer Rose LLP, New York (Jennifer O'Brien of counsel), for appellant.

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

Judgment of resentence, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered May 3, 2007, resentencing defendant, upon his conviction of criminal possession of a controlled substance in the first degree, to a term of 17 years, unanimously affirmed.

The court properly exercised its discretion in reducing defendant's sentence of 20 years to life to 17 years pursuant to the Drug Law Reform Act (L 2004, ch 738), and we perceive no basis for reducing the sentence any further.

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

ENTERED: JUNE 3, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3788 Imptex International Corp., Index 108953/05
Plaintiff-Appellant,

-against-

HSBC Bank USA, N.A.,
Defendant-Respondent.

Robert M. Rosenblith, Chestnut Ridge, for appellant.

Tracy S. Woodrow, Buffalo, for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 16, 2007, which, in an action to recover damages for wrongful honor of three presentments on a letter of credit, denied plaintiff's motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny so much of defendant's cross motion for summary judgment with respect to the third presentment on the letter of credit, and grant plaintiff's motion for summary judgment on the third presentment, and otherwise affirmed, without costs, and the matter remanded for further proceedings.

The record establishes that defendant appropriately honored the first two presentments on the subject letter of credit since

the documents presented by the beneficiary strictly complied with the terms of the letter of credit (*see United Commodities-Greece v Fidelity Intl. Bank*, 64 NY2d 449, 455 [1985]). Although, in addition to stating that the merchandise was "on rolls," as required by the letter of credit, the presented documents described the merchandise as packaged in "bales," a term not specified in the letter of credit, the additional references to "bales" did not, under the circumstances, create a discrepancy or inconsistency with the terms of the letter of credit (*compare Hellenic Republic v Standard Chartered Bank*, 219 AD2d 498 [1995]).

However, the record demonstrates that plaintiff is entitled to recovery with respect to the third presentment, since the quantity of goods listed in the presentment document exceeded the quantity listed in the letter of credit by more than 5%, in violation of article 39(b) of the applicable Uniform Customs and Practice for Documentary Credits. Accordingly, the third presentment documents did not strictly conform to the terms and conditions of the letter of credit, and should not have been honored.

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

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

ENTERED: JUNE 3, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3789 Dante Smith, et al., Index 13470/02
Plaintiffs-Respondents,

-against-

2328 University Avenue Corp., et al.,
Defendants,

NL Industries, Inc.,
Defendant-Appellant.

Kornstein Veisz Wexler & Pollard, LLP, New York (Daniel J. Kornstein of counsel), for appellant.

Levy Phillips & Konigsberg, LLP, New York (Philip Monier, III of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about October 12, 2007, which denied the motion by defendant NL Industries, Inc. to dismiss the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant NL Industries dismissing the complaint as against it.

This is an action for damages for injuries sustained by the infant plaintiffs as the result of their exposure to lead-based paint in the apartment where they resided between 1995 and 2001. While the litigation was pending, NL Industries was identified as the manufacturer of the paint pigments containing the lead used

to make the paint that allegedly poisoned the infants; a second amended complaint alleged causes of action against NL for negligence and strict products liability.

The dangers to young children from exposure to lead-based paint are well known (*see Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 342-343 [2003]). New York City has prohibited the sale and use of lead paint for residential interiors since 1960 (*see* New York City Health Code [24 RCNY] § 173.13), and requires the owners of multiple dwelling units to abate this hazard by remediating the condition in apartments occupied by children under age 7 (*see* Administrative Code of City of NY § 27-2056.3). Even though it is the responsibility of the owners of affected buildings to remediate the lead conditions in any unit where a child of six or younger is living, these plaintiffs also demand recovery from the entity that allegedly produced the lead-based paint pigments to which the infants were exposed.

NL stopped manufacturing lead pigments decades ago. Any interior lead paint present in plaintiffs' home was applied before 1960, i.e., before the manufacture, sale and distribution of lead-based pigments and/or paint, and its use in residential units, was outlawed. While manufacturers of defective products may be held strictly liable for injury caused by their products,

i.e., they may be liable regardless of privity, foreseeability or reasonable care and a product may be considered defective due to mistake in the manufacturing process, defective design or inadequate warnings about the use of the product (*Sprung v MTR Ravensburg*, 99 NY2d 468, 472 [2003]), the paint pigments created by NL were not inherently dangerous to adults and only became so to young children upon deterioration in the form of peeling paint and dust, which presupposes a lack of proper maintenance by the owner and/or manager of the property.

Plaintiffs do not allege any specific defect in the design of the paint pigments manufactured by NL. It is their position that since all lead is hazardous to children, any lead pigment used in interior residential paint must, by implication, be defective notwithstanding the fact that the manufacturer of the lead component did not have exclusive control of the risk, the paint manufacturer decided which and how much pigment to use, and control of the risk passed to the residential landlord once the paint peeled and flaked, thereby becoming hazardous through possible ingestion or inhalation. At that point, the owners or landlord could control the risk by proper maintenance of their property (*Brenner v American Cyanamid Co.*, 263 AD2d 165, 172-173 [1999]).

"New York does not impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product" (*Forni v Ferguson*, 232 AD2d 176, 177 [1996]). The paint pigments manufactured by NL were not defective at the time they were created, nor was distribution thereof prohibited until 1960. Any problems with lead-based paint arise only after years of inadequate maintenance of the premises by the owner. Under these circumstances, a manufacturer of a product may not, as a matter of law, be found liable for harm inflicted some 50 or more years after its creation, especially in light of the duty of the landlord to abate any existing lead conditions in apartments inhabited by young children.

"In order to establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]). The harm that plaintiffs allege is not only far too remote from NL's otherwise lawful commercial activity to hold it accountable, but is also attributable to intervening third

parties (*see People v Sturm, Ruger & Co.*, 309 AD2d 91, 103 [2003], *lv denied* 100 NY2d 514 [2003]).

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

ENTERED: JUNE 3, 2008

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3790N Xiomara Herrera, etc., Index 16731/06
Plaintiff-Appellant,

-against-

R. Conley Inc., et al.,
Defendants-Respondents.

Elliot Ifraimoff & Associates, P.C., Forest Hills (David E. Waterbury of counsel), for appellant.

Cerussi & Spring, White Plains (Thomas F. Cerussi of counsel), for R. Conley Inc. and Tracey E. Bango, respondents.

Kent & McBride, P.C., New York (Christopher D. Devanny of counsel), for Jaime R. Herrera, respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 23, 2007, which granted defendant Herrera's motion and codefendants' cross motion to change venue from Bronx to Westchester County, unanimously reversed, on the law, without costs, and the motion denied.

Bronx County was an improper venue for this action as it appears that plaintiff and one defendant reside in Westchester County, the other two defendants reside in Erie and Jefferson Counties, and the action arose in Westchester. Nevertheless, for a change in venue predicated on a plaintiff's designation of an

improper county (CPLR 510[1]), the demand must be served with or prior to the answer (CPLR 511[a]), unless plaintiff's misleading statements regarding residence caused defendants' untimely service of the demand (*Philogene v Fuller Auto Leasing*, 167 AD2d 178 [1990]), in which case the delay can be excused. While the allegations in the complaint with respect to residence were untrue, this was rectified with service of the bill of particulars in which plaintiff identified Westchester as her county of residence. Defendants failed, without explanation, to serve a demand for change of venue until more than eight months after the bill of particulars was served.

The motion and cross motion did not set forth a basis for a discretionary change in venue (CPLR 510[3]), and defendants argued that their motion and cross motions were respectively made "as of right" pursuant to CPLR 511. Because the statutory procedure was not followed, defendants were not entitled to a change of venue as of right. Even if a discretionary venue change had been sought, the omission of affidavits or other proofs from material witnesses claiming to be inconvenienced by a

trial in the Bronx, as well as defendants' failure to identify such witnesses, would have been fatal to the motion *(see Kurfis v Shore Towers Condominium*, 48 AD3d 300, 301 [2008]).

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

ENTERED: JUNE 3, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3791N Gryphon Domestic VI, LLC, et al., Plaintiffs-Appellants, Index 603315/02

Warner Mansion Fund, Plaintiff,

-against-

APP International Finance Company, B.V., et al., Defendants-Respondents.

Siller Wilk LLP, New York (Jay S. Auslander of counsel), for appellants.

Schnader Harrison Segal & Lewis, LLP, New York (Benjamin P. Deutsch of counsel), for respondents.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered March 11, 2008, which, insofar as appealed from, (1) vacated the parts of the order of J.H.O. Beverly Cohen, dated January 16, 2008, directing the depositions of defendants/judgment debtors P.T. Indah Kiat Pulp & Paper Corp. and Indah Kiat International Finance Co. B.V. (the Indah Kiat defendants) to be held in New York and (2) directed those depositions to take place in Indonesia, Singapore, or the Far East, unanimously modified, on the facts and in the exercise of discretion, to delete Indonesia as a potential deposition location, to change "Far East" to "mutually convenient location in Asia," to direct defendants to pay plaintiffs-appellants'

expenses to attend and conduct the Indah Kiat defendants' depositions in Singapore or elsewhere in Asia, and to direct P.T. Indah Kiat's deposition to take place within 30 days of entry of this order, and otherwise affirmed, without costs.

While "[t]he preferred practice, except in cases where hardship is shown to exist, is to proceed with examinations here" (*Kahn v Rodman*, 91 AD2d 910, 911 [1983]), a preferred practice is not the same as an inflexible rule. Under the circumstances of this case, the motion court did not improvidently exercise its discretion in declining to direct the depositions of the Indah Kiat defendants to take place in New York. However, as defendants concede, the court should not have offered Indonesia as a potential deposition locale; in light of an Indonesian court order, it might be illegal for plaintiffs to take defendants' depositions there (*see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 41 AD3d 25, 28, 36 [2007]). We incorporate into our order defendants' offer to pay plaintiffs' expenses and suggestion that the location of the deposition be mutually convenient. Since J.H.O. Cohen directed that the deposition of P.T. Indah Kiat Pulp & Paper Corp. take place on or before March 31, 2008, but that Indah Kiat International Finance Co. B.V.'s deposition take place at a date to be determined by her, our order sets a date only for the former deposition.

We note that this is an opportunity for defendants to show their good faith. If, notwithstanding the instant favorable order, they place roadblocks in the way of the Indah Kiat defendants' depositions, and if a dispute should arise in the future as to the location of another defendant's deposition, we may exercise our discretion differently.

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

ENTERED: JUNE 3, 2008

CLERK

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

3792 In re Kelly's Sheet Metal, Inc.,
[M-911] Petitioner,

-against-

William C. Thompson, as Comptroller
of the City of New York, et al.,
Respondents.

Rabinowitz & Galina, Mineola (Michael R. Galina of counsel), for petitioner.

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

Determination of respondent Comptroller of the City of New York, dated January 14, 2008, which, inter alia, found that petitioner willfully failed to pay the prevailing rate of wages and benefits to three complainants who worked on projects at Bellevue Hospital, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (commenced in this Court pursuant to Labor Law § 220[8]), dismissed, without costs.

Petitioner's argument that it did not exercise sufficient control over the complainants to render them its employees is not preserved; before the Administrative Law Judge, petitioner's argument was that the complainants had completely fabricated their stories and had not worked at Bellevue Hospital on the

dates mentioned in their complaints (*see Matter of Nash v New York State Dept. of Labor*, 34 AD3d 905, 907-908 [2006], *lv denied* 8 NY3d 803 [2007]). Although petitioner's principal and one of its employees testified that the employee did not have authority to hire the complainants on petitioner's behalf, that testimony was rejected by the Administrative Law Judge, who heard and saw the witnesses and is the best judge of their credibility (*see Matter of Stork Rest. v Boland*, 282 NY 256, 274 [1940]). Petitioner's argument that there was insufficient evidence of willfulness is improperly raised for the first time in its reply brief. Were we to consider this argument, we would reject it, in view of petitioner's principal's testimony that 99% of petitioner's jobs are public works, and that as a person who has been doing public works contracts for a long time, he knows the penalties for not paying prevailing wages (*see Nash*, 34 AD3d at 907).

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

ENTERED: JUNE 3, 2008

CLERK

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

2650 Merle Hirschmann, Index 111521/04
Plaintiff,

-against-

Constantine Hassapoyannes,
Defendant-Respondent.

- - - - -

Constantine Hassapoyannes,
Third-Party Plaintiff-Respondent,

-against-

20166 Tenants Corp., et al.,
Third-Party Defendants-Appellants,

Jon Shechter, et al.,
Third-Party Defendants.

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

Vernon & Ginsburg, LLP, New York (Darryl M. Vernon of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered June 18, 2007, which, in a third-party action for housing discrimination arising out of a contract for the sale of a cooperative apartment, granted third-party plaintiff buyer's motion for summary judgment, inter alia, permanently enjoining third-party defendants cooperative and members of its board to reinstate their approval of buyer's application to purchase the apartment, and to proceed forthwith to closing, unanimously

affirmed, without costs.

For present purposes, it appears that when informed at his board interview of the co-op's rules, including one against washers and dryers in apartments, buyer indicated that he had no problems therewith; that just prior to the closing, at the urging of plaintiff seller's broker, buyer informed the co-op's managing agent that his disability required him to have a washer/dryer in the apartment; and that once so informed, the board adjourned the closing and then rescinded its prior approval of buyer's purchase application. The co-op argues that while it knew from buyer's financial disclosure that he was receiving disability payments, his concurrence at the interview with the co-op's rules, and failure to disclose his need for a washer/dryer until the last minute, were indicative of a dishonest and uncooperative nature that gave the co-op reason to believe that buyer would not work with the co-op to insure a safe installation of a washer/dryer, thus providing a legitimate, nondiscriminatory reason for rescinding its approval.

The motion court correctly rejected this argument on the ground that, by law, buyer was not required to disclose, and the co-op was not permitted to inquire into, buyer's disability, and consequent need for a reasonable accommodation, at the interview, or indeed at any time prior to its decision on the application.

The co-op conceded that the buyer had established a prima facie case of discrimination. The burden then shifted to the co-op to offer a legitimate, nondiscriminatory reason for rescinding its approval (*see Woods v Real Renters Ltd.*, 2007 WL 656907, * 9, 2007 US Dist LEXIS 19631, *28 [SD NY 2007]). While a cooperative board has the responsibility to protect shareholders from potential or existing shareholders who might harm the shareholders' and the co-op's interests (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 156 [2003]; *1050 Tenants Corp. v Lapidus*, 39 AD3d 379, 385 [2007], *lv denied* 9 NY3d 807 [2007]), here, the co-op entirely failed to present a nondiscriminatory reason for revoking its approval of the buyer.

We have considered the co-op's other arguments and find them unavailing.

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

ENTERED: JUNE 3, 2008

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3793 The People of the State of New York, Ind. 1348/06
Respondent,

-against-

Tyrone Council,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at initial severance motion; Bonnie G. Wittner, J. at renewed severance motion, jury trial and sentence), rendered January 16, 2007, convicting defendant of conspiracy in the second degree, and sentencing him, as a second felony offender, to a term of 6 to 12 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established the elements of second-degree conspiracy (*see People v Ozarowski*, 38 NY2d 481, 489 [1976]). It is a reasonable inference from the evidence that defendant's involvement in a large-scale drug-selling operation was significant, and that he was not merely an independent

street-level dealer who obtained his supply of drugs from the conspirators.

The motion and trial courts properly denied defendant's motion to sever his case from that of his codefendants (*see* CPL 200.40[1][iii]). Evidence relating to the acts of the codefendants was admissible against defendant and necessary to prove conspiracy, and defendant did not establish good cause for a severance.

The court properly admitted evidence that defendant threatened a witness during trial, even though the witness only testified about acts of the codefendants. Given defendant's relationship with his codefendants and the overlap of evidence, this threat was probative of defendant's consciousness of guilt (*see People v Rosario*, 309 AD2d 537, 538 [2003], *lv denied* 1 NY3d 579 [2003]) *People v Major*, 243 AD2d 310 [1998], *lv denied* 91 NY2d 928 [1998]). Defendant's argument regarding the court's jury instruction on this evidence is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the instruction was appropriate.

The record supports the conclusion that defendant consented

to submission of statutory materials to the jury pursuant to CPL 310.30 (*see People v Brown*, 90 NY2d 872, 874 [1997]; *People v Brown*, 17 AD3d 283, 284-85 [2005], *lv denied* 5 NY3d 804 [2005]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 3, 2008

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3794 Todd Meister, Index 111757/07
Petitioner-Appellant,

-against-

Stephen B. Salzman,
Respondent-Respondent.

Foley & Lardner, LLP, New York (Peter N. Wang of counsel), for appellant.

Arkin Kaplan Rice LLP, New York (Sean R. O'Brien of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered December 10, 2007, which, to the extent appealed from as limited by the briefs, denied petitioner's motion to seal the arbitration proceeding and its related award, unanimously affirmed, without costs.

The information in the arbitration award specifically cited by petitioner does not provide a sufficient ground for sealing the proceeding *(see Liapakis v Sullivan*, 290 AD2d 393, 394 [2002]; *Matter of Hofmann*, 284 AD2d 92 [2001]). The agreement between the parties contemplated potential public disclosure of arbitration awards if a party sought to confirm an award.

We have considered petitioner's other claims and find them without merit.

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

ENTERED: JUNE 3, 2008

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3795 Aldoro, Inc., Index 604044/06
Plaintiff-Appellant-Respondent,

-against-

Gold Force International Ltd.,
now known as GF Int'l Holdings, Inc., et al.,
Defendants-Respondents,

Gary M. Jacobs, et al.,
Defendants-Respondents-Appellants,

Michael Anthony Jewelers LLC, et al.,
Defendants.

Noel W. Hauser and Associates, New York (Noel W. Hauser of counsel), for appellant-respondent.

Schneider Goldstein Bloomfield LLP, New York (Donald F. Schneider of counsel), for respondents-appellants, and Gold Force International Ltd, respondent.

Mayer Brown LLP, New York (Richard A. Lafont of counsel), for ABN Amro Bank N.V., respondent.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered November 28, 2007, which, in an action arising out of the sale of goods, inter alia, granted defendants' motion to dismiss the complaint with leave to plaintiff to replead its fraud claims against the individual defendants, and denied plaintiff's cross motion to amend the complaint so as to allege

breach of fiduciary duty and the aiding and abetting of that breach, unanimously affirmed, with costs.

The sole theory underlying plaintiff's breach of fiduciary duty claim, the so-called "trust fund doctrine," under which persons in control of an insolvent corporation must hold the corporation's remaining assets in trust for the benefit of its creditors, cannot be invoked by a "simple contract creditor" like plaintiff, who has not yet obtained a judgment on the debt and had execution returned unsatisfied (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 549-550 [2000]). As plaintiff does not have a claim for breach of fiduciary duty against the debtor defendant and its principals, it cannot have claims against the other defendants for aiding and abetting that breach. Plaintiff, however, was properly granted leave to replead fraud claims against the individual defendants alleging that when they gave plaintiff post-dated checks in payment for the goods, they knew that their company was insolvent and that

the checks would not be paid on presentment (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986]). We have considered plaintiff's other claims and arguments and find them without merit.

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

ENTERED: JUNE 3, 2008

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3796 In re Antonia Mykala P.,

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

Antonio P.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Steven Banks, The Legal Aid Society, New York (Judy Waksberg of counsel), and Proskauer Rose LLP, New York (Samantha F. Freedman of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered February 6, 2007, which, upon a finding of permanent neglect, terminated respondent father's parental rights with respect to the subject child and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

The agency developed a realistic plan tailored to the father's needs, which included the goal of ultimately reuniting with the child, all of which satisfied its obligation to make diligent efforts to encourage and strengthen the parental

relationship (*see Matter of Jonathan M.*, 19 AD3d 197 [2005], *lv denied* 5 NY3d 798 [2005]). The fact-finding determination of permanent neglect was supported by clear and convincing evidence that the father did not realistically plan for the child's future in accordance with Social Services Law § 384-b(7)(a) (*Matter of Galeann F.*, 11 AD3d 255 [2004], *lv denied* 4 NY3d 703 [2005]). The child has extraordinary medical needs, which the father has shown himself unable to address adequately. Termination of parental rights, in order to facilitate the adoption process, is in the best interests of the child, and is supported by the requisite preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]).

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

ENTERED: JUNE 3, 2008

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3797 Anton Sanko, Index 111063/05
Plaintiff-Respondent,

-against-

Ira Mark, et al.,
Defendant-Appellants,

Selrob Family Limited Partnership, et al.,
Defendants.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for appellants.

Atlas & Marantz LLP, New York (Louis M. Atlas and Douglas D. Aronin of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Marylin G. Diamond, J.), entered June 29, 2007, which, to the extent appealed from, as limited by the briefs, granted plaintiff's motion for summary judgment on his cause of action for partition, unanimously reversed, on the law, with costs, the motion denied, and the matter remanded for further proceedings consistent herewith.

Plaintiff, defendants Ira Mark, Mark Family Realty LLC, Selrob Family Limited Partnership, Selina Henry and Robert Henry own the property located at 801-803 Greenwich Street in Manhattan as tenants-in-common. When plaintiff purchased his

undivided one-third interest, in November 1991, his co-tenants were the late Phyllis Mark, mother of defendant Ira Mark (and holder of a one-third interest), and Selina and Robert Henry (collectively, holders of a one-third interest). On or about March 17, 1992, the tenants-in-common entered into an agreement that, inter alia, entitled each to occupy and exercise control over a certain portion of the premises, provided each with a "right of first refusal" with respect to the sale of any other co-tenant's undivided one-third share and occupied space, and was by its terms applicable to successors and assigns. The issue on appeal is whether the right of first refusal contained in the parties' agreement violates that branch of the rule against perpetuities that prohibits remote vesting (EPTL § 9-1.1[b]). We hold that it does not.

As an initial matter, we reject plaintiff's contention that this appeal should be dismissed as taken from an interlocutory judgment that does not bring up for review prior orders. To the contrary, the appeal from the judgment ordering partition of the property necessarily brings up for review the order in which the court held that the right of first refusal was void as violative of the rule against remote vesting and therefore did not bar

plaintiff's action for partition (*see Lowinger v Lowinger*, 287 AD2d 39 [2001], *lv denied* 98 NY2d 605 [2002]; *Delcor Laboratories v Cosmair, Inc.*, 169 AD2d 639, *lv dismissed* 78 NY2d 952 [1991]).

The rule against perpetuities arose out of the "natural antagonism between society's interest in promoting the free and ready transfer of property and the desire of property owners to control the future disposition of their holdings" (*Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 160-161 [1986]). However, in certain contemporary settings, principally commercial ones, application of the rule would contravene its very purpose of "ensur[ing] the productive use and development of property by its current beneficial owners" (*id.* at 161, 166). One such setting is that of condominium ownership; "because the management of condominium developments has a valid interest not only in securing the occupancy of the units but also in protecting the ownership of the common areas and the underlying fee, its preemptive rights to repurchase units before sale to third parties should be excepted from the operation of the rule" (*id.* at 165; *see Anderson v 50 E. 72nd St. Condominium*, 119 AD2d 73 [1986], *appeal dismissed* 69 NY2d 743 [1987]; *Goodstein v Goodstein Bros. & Co.*, 204 AD2d 231 [1994], *lv dismissed* 85 NY2d 924 [1995]).

The property at issue here is used for commercial purposes,

the tenants-in-common deriving rents from both commercial and residential leases of the majority of the units. It was used for commercial purposes when plaintiff acquired his one-third interest, in 1991; indeed, the mortgage given by plaintiff to his predecessor-in-interest notes, "Premises are improved as commercial property." Moreover, while not a condominium or cooperative association, it is effectively operated as one, with the tenants-in-common controlling their respective occupied spaces and sharing control over the common areas. The preemptive right provided for in the parties' agreement encourages productive use of the property by giving the tenants-in-common an incentive to develop their occupied spaces as well as the common areas, as the value of the fee and the buildings erected thereon would as a whole be enhanced. Indeed, it is evident from the provisions affording the right of first refusal and imposing certain restrictions on transfers of the interests of the tenants-in-common that the entire agreement was designed to foster development of the premises and to ensure that it remained in the hands of the co-investors or their relations. "[A]lthough preemptive rights offend the basic policy of the rule against remote vesting, the offense is properly offset by their utility in modern legal transactions and that usefulness justifies excepting them from the operation of the rule" (*Bruken*, 67 NY2d

at 164-165).

While excepted from operation of the rule against remote vesting, however, the right of first refusal is subject to analysis under the common-law rule against unreasonable restraints on alienation (*id.* at 161, 167, 168). We find that the requirement that a tenant-in-common desiring to sell first offer his share and occupied space to the remaining parties, on the same terms and conditions as are contained in any bona fide third-party offer, and that the remaining parties have 30 days to match such offer, is reasonable (*see id.* at 167; *Anderson*, 119 AD2d at 79).

Partition, the remedy sought by plaintiff, is incompatible with the right of first refusal, at least for such time (30 days) as plaintiff's co-tenants have in which to exercise that right (*see Tramontano v Catalano*, 23 AD2d 894 [1965]).

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

ENTERED: JUNE 3, 2008

CLERK

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3798 The People of the State of New York, Ind. 4422/05
Respondent,

-against-

Eugene Hamilton,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Seon Jeong Lee of counsel), for appellant.

Eugene Hamilton, appellant pro se.

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered February 22, 2006, convicting defendant, after a jury trial, of attempted murder in the second degree and two counts of assault in the first degree, and sentencing him to an aggregate term of 40 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that the sentences run concurrently, and otherwise affirmed.

Defendant did not preserve his challenges to the legal sufficiency of the evidence and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We further find that the verdict was not

against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. We reject defendant's particular challenge to his conviction of depraved-indifference assault with respect to an unintended victim. When viewed in the light of the court's charge, the evidence clearly established that crime. Moreover, we reach the same conclusion under the current standard, as set forth in *People v Feingold* (7 NY3d 288 [2006]). Contrary to defendant's contention, the fact that defendant intended to shoot one victim when he fired into a crowd did not preclude a finding that he acted with depraved indifference with respect to a different victim, regardless of whether the evidence would have also supported a transferred intent theory (*see People v Monserate*, 256 AD2d 15 [1998], *lv denied* 93 NY2d 855 [1999]).

Defendant's ineffective assistance of counsel claims, including those raised in his pro se supplemental brief, are without merit (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We find the sentence excessive to the extent indicated.

Defendant's remaining pro se claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: JUNE 3, 2008

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3799 [M-108] In re Citrin Cooperman & Company, LLP,
Petitioner,

-against-

Tax Appeals Tribunal of the
City of New York, et al.,
Respondents.

Zukerman Gore & Brandeis, LLP, New York (John K. Crossman of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Andrew G. Lipkin of counsel), for respondents.

Decision of respondents, dated September 10, 2007, affirming an administrative determination that sustained a deficiency notice for petitioner's New York City Unincorporated Business Tax (UBT) returns for calendar years 1996 and 1997, unanimously confirmed, the petition denied and this proceeding, commenced in this Court pursuant to CPLR 506(b)(4), dismissed, without costs.

The Tax Tribunal's decision was rationally based and supported by substantial evidence (*see Matter of CS Integrated, LLC v Tax Appeals Trib. of State of N.Y.*, 19 AD3d 886, 889 [2005]), and is thus entitled to deference (*see Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400 [1984]). Exemption and deduction provisions are to be construed

in favor of the taxing authority (*see Matter of Mobil Oil Corp. v Finance Adm'r of City of N.Y.*, 58 NY2d 95, 99 [1983]), and the extent to which a deduction shall be allowed is a matter of legislative grace (*Matter of Royal Indem. Co. v Tax Appeals Trib.*, 75 NY2d 75, 78 [1989]) to which a taxpayer must prove entitlement (*see Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 [1975]).

Petitioner did not meet its burden of proof (Administrative Code of City of NY § 11-529[e]) that the Tribunal had erred in finding the payments to retired partners in 1996 and 1997 were for nondeductible services and were thus required to be added back to the UBT returns for those years pursuant to Administrative Code § 11-507(3). Petitioner chose the formulation "past service compensation" when it could have denominated the payments anything other than good will; the terminology was denominated in numerous partnership documents, not only as titles but in explanatory language describing the payments as such in the text of the various agreements; and the partners agreed to recognize the payments as ordinary income for federal tax purposes, entitling petitioner to a federal income tax deduction. Furthermore, analysis of the hearing record and supporting documents supports a finding that the payments were actually for past service compensation.

Petitioner's argument of violation of the Supremacy Clause of Article VI of the U.S. Constitution is not properly before this Court since it was not raised before the Tribunal.

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

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

ENTERED: JUNE 3, 2008

CLERK

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3800 Cherise S. Page, Index 6846/05
Plaintiff,

Lonnie Jackson, et al.,
Plaintiffs-Appellants,

-against-

Rain Hacking Corp., et al.,
Defendants-Respondents,

Waheed Brokerage, Inc.,
Defendant.

Mallilo & Grossman, Flushing (Linda T. Ziatz of counsel), for appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Holly E. Peck of counsel), for respondents.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered May 9, 2007, which granted the motion by defendants Rain Hacking Corp. and Ashraf for summary judgment dismissing the complaint of plaintiffs Jackson, Graham and Ruby Page, unanimously affirmed, without costs.

The moving defendants' prima facie showing of entitlement to summary judgment demonstrated that plaintiffs did not satisfy the serious injury threshold of Insurance Law § 5102(d). Plaintiffs failed to satisfy their evidentiary burden to submit, in opposition to the motion, "objective medical proof of a serious injury causally related to the accident in order to survive

summary dismissal" (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). Although the MRI reports were sufficient to establish the existence of disc bulges and herniations (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]), plaintiffs' expert attributed present pain to an unquantified loss of range of motion, and did "not report his personal observations of plaintiff[s] while sitting and standing, or identify the tests, if any, he performed," or compare his observations to "the norm" (*Burke v Torres*, 8 AD3d 118, 119 [2004]; *compare Garner v Tong*, 27 AD3d 401 [2006]; *see also Gonzalez v Vasquez*, 301 AD2d 438 [2003]). With regard to plaintiff Jackson, the physicians failed to address the degenerative nature of his pre-existing condition (*Mullings v Huntwork*, 26 AD3d 214 [2006]; *see also Montgomery v Pena*, 19 AD3d 288 [2005]).

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

ENTERED: JUNE 3, 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 June 3, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
Luis A. Gonzalez
Karla Moskowitz
Leland DeGrasse, Justices.

The People of the State of New York, Ind. 3298/04
Respondent,

-against- 3802

Edward Brown,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Lloyd Barrett, J.), rendered on or about February, 28, 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.

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3803-
3804 Isabel Marcelle Cristina Goldsmith, et al., Plaintiffs-Appellants,

-against-

Sotheby's, Inc., Defendant-Respondent.

[And a Third-Party Action]

Index 603504/04
591167/04

Davis & Gilbert LLP, New York (Bruce M. Ginsberg of counsel), for appellants.

Weil, Gotshal & Manges, LLP, New York (Caitlin J. Halligan of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered June 19, 2007, insofar as appealed from as limited by the briefs, dismissing the complaint pursuant to an order, same court and Justice, entered May 2, 2007, which, in an action for conversion, granted defendant's motion for summary judgment on the ground that the action was untimely under English law, unanimously reversed, on the law, without costs, defendants' motion denied, the complaint reinstated and the matter remanded for further proceedings consistent herewith. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs commenced this action for conversion against defendant in connection with the auctioning of a rare and valuable table owned by plaintiffs. The table was stored at a warehouse in England from 1985 until April 1995, at which time it was removed from the warehouse unbeknownst to plaintiffs. In 1999, after making inquiries, plaintiff Goldsmith was informed that the table was not at the warehouse and could not be located, and in 2000, she learned that defendant had sold the table at an auction in New York in November 1998.

Defendant sought summary judgment because, inter alia, under the English Limitation Act of 1980, a cause of action for conversion must be brought within six years of the original conversion, regardless of subsequent conversions, and since the original conversion occurred in April 1995, the action commenced in October 2001 was untimely. Plaintiffs countered that the action was timely under CPLR 214(3) because it was brought within three years of the auction of the table.

We agree with the motion court that English law applies to this action. There exists an actual conflict between the limitations periods of CPLR 214(3) and the English statute of

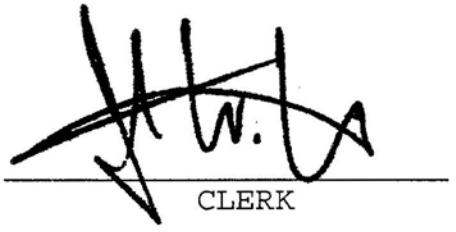
repose for plaintiffs' conversion cause of action (*see Matter of Allstate Ins. Co. [Stolarz]* 81 NY2d 219, 223 [1993]), and England has the greatest concern with the specific issue raised in the litigation (*see Babcock v Jackson*, 12 NY2d 473, 481 [1963]). Although the auction of plaintiffs' table occurred in New York, the remainder of the significant contacts were located in England (*see Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]). Furthermore, the subject statutes are loss-allocating rules inasmuch as they "prohibit, assign, or limit liability after the tort occurs" (*id. at 522*).

However, dismissal of the complaint was not warranted since the record shows that plaintiffs raised an issue of fact as to whether, under English law, the applicable repose period had been tolled. According to both parties' experts, the six-year limitations period does not begin to run from the date of the conversion where such conversion is a theft or related to a theft. Plaintiffs' expert opined that, under applicable provisions of English Law, the alleged conversion of the table may have constituted a theft, and the expert's findings, along with additional documentary and testimonial evidence submitted by

plaintiff, presents triable issues regarding the accrual date of the conversion claim.

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

ENTERED: JUNE 3, 2008



CLERK

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3805 The People of the State of New York, Ind. 6619N/05
Respondent,

-against-

Eric Badger,
Defendant-Appellant.

Georgia J. Hinde, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Edward A. Jayetileke of counsel), for respondent.

Judgment, Supreme Court, New York County (James A. Yates, J. at hearing; Edward J. McLaughlin, J. at plea and sentence), rendered October 10, 2006, as amended October 17, 2006, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's motion to suppress drugs recovered from his person. An experienced narcotics officer saw defendant engage in what reasonably appeared to be a drug transaction, and then drive away. Acting upon a description of defendant and his vehicle transmitted by radio, a field team stopped defendant's vehicle and apprehended him. The radio communication from the observing officer was, itself, a

sufficient basis for a lawful arrest (*see People v Ketcham*, 93 NY2d 416 [1999]; *People v Brown*, 304 AD2d 321 [2003], *lv denied* 100 NY2d 536 [2003]). In addition, one of the apprehending officers detected the distinctive odor of marijuana emanating from the vehicle (*see People v Reisman*, 29 NY2d 278, 284 [1971], *cert denied* 405 US 1041 [1972]), and this independently established probable cause to search the automobile and its occupants (*see People v Chestnut*, 43 AD2d 260 [1974], *affd* 36 NY2d 971 [1975]). The hearing court properly credited an officer's testimony that he recognized the smell of marijuana.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 3, 2008

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3806-
3806A Nina Thomas, Index 104316/05
Plaintiff-Appellant,

-against-

Broadway Pilates, Ltd.,
Defendant-Respondent.

Bruce J. Gitlin, P.C., New York (Bruce J. Gitlin of counsel), for appellant.

Gordon & Silber, P.C., New York (William L. Hahn of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered May 7, 2007, dismissing the complaint, bringing up for review an order, same court and Justice, entered April 10, 2007, which granted defendant's motion for summary judgment, unanimously affirmed, without costs. Appeal from the aforementioned order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant met its burden of establishing entitlement to judgment, and plaintiff failed to raise a triable issue of fact in opposition (*Papadopoulos v Gardner's Village*, 198 AD2d 216 [1993]). By voluntarily participating in a fitness and exercise program at defendant's studio for five years before her accident, including use of the equipment on which she was injured,

plaintiff consented to and was aware of the risks commonly associated with this activity (*Morgan v State of New York*, 90 NY2d 471 [1997]). Defendant's loss of plaintiff's client index card was not crucial to her case, so spoliation sanctions were not appropriate (*Bach v City of New York*, 33 AD3d 544 [2006]).

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

ENTERED: JUNE 3, 2008

CLERK

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3808 The People of the State of New York, Ind. 5788/05
Respondent,

-against-

Brett Smith,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (William A. Loeb of counsel), for appellant.

Brett S. Smith, appellant pro se.

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

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered June 12, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 5 years, unanimously affirmed.

The court properly denied defendant's request for an agency charge since there was no reasonable view of the evidence, viewed most favorably to defendant, that he acted solely on behalf of the buyer *(see People v Herring*, 83 NY2d 780 [1994]; *People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], *cert denied* 439 US 935 [1978]; *People v Vaughan*, 300 AD2d 104 [2002], *lv denied* 99 NY2d 633 [2003]). Defendant's actions were those of a steerer and order taker who, among other things, offered a discounted price.

There was no evidence he was doing "a favor for a friend" (*Lam Lek Chong*, 45 NY2d at 74), or "of any conversation between defendant and the undercover purchaser as to why the latter needed or wanted to be represented by an 'agent' instead of simply buying his own drugs" (*Vaughan*, 300 AD2d at 104).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se claims.

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

ENTERED: JUNE 3, 2008

CLERK

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3809 In re Matthew Lowe, Index 10174/07
Petitioner,

-against-

John J. Doherty, Commissioner, New York City Department of Sanitation, et al.,
Respondents.

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Ann E. Scherzer of counsel), for respondents.

Determination of respondent Commissioner of New York City Department of Sanitation, dated October 17, 2007, terminating respondent's employment as a sanitation worker, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Shirley Werner Kornreich, J.], entered June 12, 2007), dismissed, without costs.

The finding that petitioner solicited and accepted a gratuity in exchange for collecting trade waste is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]), including the testimony of the undercover investigators who conducted an "integrity test" on petitioner and the audio recording they made

of the test. No basis exists to disturb the hearing officer's findings of credibility (*cf. Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). The penalty of termination does not shock the conscience (*cf. Cranford v Sexton*, 159 AD2d 348, 349 [1990]).

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

ENTERED: JUNE 3, 2008

CLERK

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3810 Ira Cliff Schulman, et al., Plaintiffs-Appellants, Index 103028/04 590818/06

-against-

Greenwich Associates, LLC, et al., Defendants-Respondents.

[And a Third-Party Action]

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel). for appellants.

Lederman Abrahams & Lederman, LLP, Massapequa (Bruce H. Lederman of counsel), for respondents.

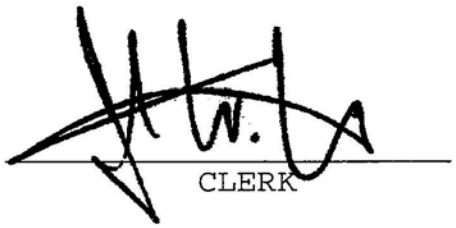
Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered September 24, 2007, which, to the extent appealed from, granted the motion to dismiss the complaint as against defendant Wallach and denied plaintiffs' cross motion to amend the complaint, unanimously affirmed, without costs.

Plaintiffs failed to plead fraud with the requisite specificity (CPLR 3016[b]), and their proposed amended complaint fails to cure this deficiency. The causes of action for fraud and fraud in the inducement merely allege that defendants did not intend to properly perform the construction contemplated in the contract. This is insufficient. "While a party who is fraudulently induced to enter into a contract may join a cause of action for fraud with one for breach of the same contract, it may

do so only if the misrepresentations alleged consist of more than mere promissory statements about what is to be done in the future," and the alleged misrepresentations "must be misstatements of material fact or promises made with a present, but undisclosed intent not to perform them" (*Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220, 222 [1994]). Plaintiffs have failed to allege what misrepresentations, if any, were made by the individual defendant, and have not asserted any allegations that would warrant imposing individual liability upon him.

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

ENTERED: JUNE 3, 2008



CLERK

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3811 The People of the State of New York, Ind. 3824/04
Respondent,

-against-

Tyrone Minton,
Defendant-Appellant.

Robert J. Boyle, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Rither Alabre of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered November 17, 2005, convicting defendant, after a jury trial, of robbery in the second and third degrees, three counts of grand larceny in the fourth degree and two counts of criminal possession of stolen property in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

Viewing the evidence in light of the court's charge, we find that the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence establishes that defendant took the victim's truck by force, and defendant's arguments to the contrary are without merit. The fact that defendant was acquitted of robbery in the first degree does not

warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]; *People v Mulosmanaj*, 14 AD3d 389 [2005], *lv denied* 4 NY3d 855 [2005]).

The court properly granted the People's reverse-*Batson* application (*see Batson v Kentucky*, 476 US 79 [1986]; *People v Kern*, 75 NY2d 638 [1990], *cert denied* 498 US 824 [1990]). The record supports the court's finding that the race-neutral reasons provided by defense counsel for the peremptory challenge at issue were pretextual. These findings, based primarily on the court's assessment of counsel's credibility, are entitled to great deference (*see Snyder v Louisiana*, __US__, 128 S Ct 1203, 1208 [2008]; *People v Hernandez*, 75 NY2d 350, 356 [1990], *affd* 500 US 352 [1991]). Counsel's theory that the panelist's *husband's* place of employment was an indication that he possessed a personality type unfavorable to the defense was far-fetched to begin with, and his assertion that this personality trait should be attributed to the panelist herself was even less plausible. Furthermore, counsel's disparate treatment of similarly situated panelists provided additional support for the court's finding of pretext.

The court properly precluded defendant from introducing the exculpatory statement he made to the police. Defendant asserts

that this statement was an excited utterance precipitated by his arrest. We need not decide whether an arrest could ever be the type of startling event contemplated by the excited utterance exception to the hearsay rule. Here, defendant did not establish that his arrest was such an event, or, even if it was, that he made his self-serving declaration while under the influence of the stress caused by the event (*see People v Sostre*, 70 AD2d 40, 45-46 [1979], *affd* 51 NY2d 958 [1980]).

Defendant did not preserve his argument that he was constitutionally entitled to introduce his exculpatory statement, his challenges to evidence elicited by the People, or his argument concerning the court's handling of an incident that occurred during jury deliberations, and we decline to review these claims in the interest of justice. As an alternative holding, we also reject each of these claims on the merits.

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]). Even if trial counsel should have raised the issues suggested by defendant on appeal, we would find that his failure to do so did not deprive defendant of a fair trial or cause him any prejudice

(*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Stultz*, 2 NY3d 277, 287 [2004]; *compare People v Turner*, 5 NY3d 476 [2005]).

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

ENTERED: JUNE 3, 2008

CLERK

Andrias, J.P., Gonzalez, Moskowitz, DeGrasse, JJ.

3813N 952 Associates, LLC, Index 113733/07
Plaintiff-Appellant,

-against-

Ann Palmer,
Defendant-Respondent.

Grimble & LoGuidice, LLC, New York (Robert Grimble of counsel), for appellant.

John D. Gorman, New York, for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered December 26, 2007, which denied plaintiff's motion to stay and remove a Civil Court proceeding for consolidation with the instant action, and stayed this action pending resolution of the Civil Court proceeding, unanimously affirmed, with costs.

Defendant agreed in Civil Court to the entry of a judgment of eviction and to vacate the premises in exchange for $550,000, in accordance with NY City Civil Court Act § 204. The Housing Part of Civil Court has the same subject matter jurisdiction to compel compliance with this "so-ordered" settlement agreement (*see* CPLR 5221[a][3]; NY City Civ Ct Act § 1508) as would the Supreme Court (*see* NY City Civ Ct Act § 212). Once such jurisdiction is established, Civil Court is able to hear related

matters, such as plaintiff's cross motion to disgorge disputed funds, and the determination of monies due defendant, pursuant to its adjunct power under § 212.

Plaintiff's argument that it was unable to provide defendant with copies of the settlement between the remaining rent stabilized tenant and the prospective purchaser is unavailing. The plain language of the settlement makes it clear that plaintiff would provide not only any agreement it entered into with the remaining rent stabilized tenant, but "any other agreements or writing or documents related to any compensation received by [the tenant] for her surrendering and vacating her apartment at the Premises."

We reject plaintiff's argument that the Civil Court proceeding must be removed to Supreme Court because it seeks substantial disclosure. A summary proceeding pursuant to the Real Property Actions and Proceedings Law is a special proceeding (CPLR art 4) in which disclosure may be utilized by leave of court (CPLR 408; *McQueen v Grinker*, 158 AD2d 355, 359 [1990]). Stay of an action rests within the court's discretion (*see Britt v International Bus Servs.*, 255 AD2d 143, 144 [1998]).

In general, only where the decision in one action will determine all the questions in the other action, and the judgment on one trial will dispose of the controversy in both, is a stay

justified; this requires a complete identity of the parties, the causes of action and the judgment sought (*Pierre Assoc. v Citizens Cas. Co. of N.Y.*, 32 AD2d 495, 497 [1969]). Here, the Civil Court proceeding involved an enforcement action in which plaintiff willingly submitted its contention of a breach on the part of defendant. The central issue in both the Civil Court proceeding and the Supreme Court action is whether defendant breached the confidentiality provision of her settlement agreement, thereby requiring defendant to disgorge all funds previously received from plaintiff. Accordingly, the IAS court's sua sponte grant of a stay pending resolution of the Civil Court proceeding was not improper.

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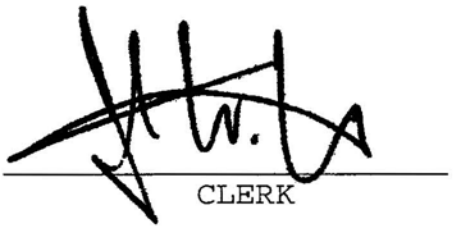
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 3, 2008



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