SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 6, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Mazzarelli, Saxe, Williams, Buckley, JJ.

2382 Emfore Corp., Index 601400/04
Plaintiff-Appellant,

-against-

Blimpie Associates, Ltd., et al.,
Defendants-Respondents,

- - - - -

International Franchise Association,
Amicus Curiae.

Einbinder & Dunn, LLP, New York (Michael Einbinder of counsel), for appellant.

Corbally, Gartland and Rappleyea, LLP, Poughkeepsie (Vincent L. DeBiase of counsel), for respondents.

Kaufmann, Feiner, Yamin, Gildin & Robbins LLP, New York (David J. Kaufmann of counsel), amicus curiae.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered September 18, 2006, which, to the extent appealed from as limited by the briefs, upon the grant of reargument, granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment dismissing certain affirmative defenses, unanimously modified, on the law, to the extent of reinstating the seventh, eighth, ninth and tenth causes of action pursuant to the

Franchise Act (General Business Law § 680 et seq.) and dismissing the individual defendants' second affirmative defenses and the corporate defendant's first, second, and sixth affirmative defenses to the extent that they rely on release and waiver clauses, and otherwise affirmed, without costs.

The court erred in dismissing plaintiff's claims pursuant to General Business Law § 683 and § 687 based on the representations made by plaintiff concerning information supplied to it by defendant, and in not dismissing defendant's affirmative defenses based on those representations. We agree with defendant that the questionnaire to which plaintiff responded is not violative of General Business Law § 687 (4) and (5) on its face. Indeed, by requesting franchisees to disclose whether a franchisor's representatives made statements concerning the financial prospects for the franchise during the sales process, franchisors can effectively root out dishonest sales personnel and avoid sales secured by fraud. However, defendant, in direct contravention of the laudatory goal it claims to be advancing, is asking this Court to construe the representations made by plaintiff in the questionnaire as a waiver of fraud claims. Such waivers are barred by the Franchise Act. Accordingly, defendant's attempt to utilize the representations as a defense must be rejected (*see generally Draper v Georgia Props.*, 230 AD2d 455, 457-458 [1997], *affd* 94 NY2d 809 [1999]).

The court correctly held that reliance is an element of a fraud claim under the Franchise Act, which refers to "artifice to defraud" (GBL § 687[2][a]) and "fraud" (GBL § 687[2][c]). Subsumed in the definition of "fraud" is the notion of reliance, since a plaintiff must show reliance to sustain a fraud claim (*see e.g. Shisgal v Brown*, 21 AD3d 845, 846 [2005]). However, issues of fact exist as to the extent and reasonableness of plaintiff's reliance on defendants' alleged oral misrepresentations. Furthermore, as GBL § 683 requires that an offering prospectus be registered with the Attorney General prior to the offer or sale of franchises, plaintiff properly alleged that defendants' representations, which were not contained in the prospectus, ran afoul of GBL § 683.

However, the court correctly dismissed plaintiff's common-law fraud claims. The disclaimers were not generalized boilerplate exclusions, but were contained in a separate rider, which plaintiff's principal read and initialed, stating specifically that she was not relying on any representations by defendants (*see Citibank v Plapinger*, 66 NY2d 90, 94 [1985]; *General Bank v Mark II Imports*, 293 AD2d 328 [2002]).

The court also correctly dismissed plaintiff's claims for breach of contract, as it is uncontroverted that plaintiff failed

to provide written notice of any breach pursuant to Article 18.2 of the franchise agreement (*see e.g. F. Garofalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80 [2000], *lv dismissed* 95 NY2d 825 [2000]).

The Decision and Order of this Court entered herein on December 20, 2007, is hereby recalled and vacated (*see* M-248 & 994 decided simultaneously herewith).

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

ENTERED: MAY 6, 2008

CLERK

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

3575 The People of the State of New York, Respondent, Ind. 8645/88

-against-

Hernando Rizo, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Friedman Kaplan Seiler & Adelman LLP, New York (Lili Zandpour of counsel), for appellant.

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

Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered April 5, 2007, which denied defendant's application for resentencing pursuant to the Drug Law Reform Act (L 2004, ch 738), unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the application. The magnitude of defendant's involvement in international drug trafficking outweighed his favorable prison record (*see People v Salcedo*, 40 AD3d 356 [2007], *lv denied* 9 NY3d 850 [2007]; *see also People v Arana*, 45 AD3d 311 [2007], *lv dismissed* 9 NY3d 1031 [2008]). The court relied primarily on facts that were undisputed or established at defendant's trial, and other

reliable information, and we see no reason for a remand for further proceedings. We have considered and rejected defendant's remaining claims.

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

ENTERED: MAY 6, 2008

CLERK

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

3577 In re Marlon B.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Frederic P. Schneider, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Nelida Malave-Gonzalez, J.), entered on or about November 15, 2006, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would have constituted the crimes of unlawful imprisonment in the second degree and menacing in the third degree [PL 120.15], and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The findings as to unlawful imprisonment and menacing were established by evidence that appellant and two friends surrounded the victim, prevented him from leaving, asked him threatening

questions and assaulted him (*see Matter of Rashaun S.*, 46 AD3d 412 [2007]; *Matter of Kori W.*, 40 AD3d 479 [2007]).

Probation was the least restrictive alternative consistent with the needs of appellant and the community in light of appellant's behavioral, attendance and academic problems, and the violent nature of the underlying incident (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: MAY 6, 2008

CLERK

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

3578 Marlene S. Colgate, Index 109763/94
Plaintiff-Respondent,

-against-

Broadwall Management Corp.,
Defendant-Appellant.

Horing, Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel) for appellant.

Law Offices of Bernard D'Orazio, P.C., New York (Bernard D'Orazio of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered December 10, 2007, which denied defendant's motion to vacate a judgment previously entered against it or, alternatively, to amend such judgment, unanimously affirmed, with costs.

Following an award in favor of plaintiff tenant by the Division of Housing and Community Renewal, and defendant managing agent's subsequent unsuccessful administrative and judicial challenges thereto, a judgment was entered against defendant in April 1994. After defendant's motion to vacate the judgment was denied, its motion was granted to the extent of reducing the principal amount of the judgment to reflect a rent credit that had been taken by plaintiff. As a result, the County Clerk entered an amended judgment in December 1994, but defendant again moved, in part, to vacate the award, and now appeals from the

denial of that motion.

Supreme Court may entertain all causes of action unless its jurisdiction has been specifically proscribed (*Sohn v Calderon*, 78 NY2d 755 [1991]; *see also Missionary Sisters of Sacred Heart v Meer*, 131 AD2d 393, 394-395 [1987]). There is no constitutional or legislative proscription against Supreme Court's subject matter jurisdiction in controversies concerning a rent overcharge. No challenge to subject matter jurisdiction was raised before the motion court. Defendant was clearly aware of the judgment against it, from its repeated efforts to vacate, and yet, it has refused to make any payment to plaintiff. There appears to be no reasonable excuse for defendant's recalcitrance in meeting this legal obligation under a properly entered judgment.

Moreover, defendant may not avoid payment of interest on the judgment. It is well settled that "interest is not a penalty. Rather, it is simply the cost of having the use of another person's money for a specified period," and "is intended to indemnify successful plaintiffs 'for the nonpayment of what is due to them'" (*Love v State of New York*, 78 NY2d 540, 544 [1991], citation omitted). Therefore, barring any inequitable or dilatory conduct on the part of the judgment creditor, which is not apparent here, a money judgment bears interest from the date of its entry and continues to accrue at the statutory rate until

it is satisfied (*see* CPLR 5003; *see also Feldman v Brodsky*, 12 AD2d 347, 349 [1961], *affd* 11 NY2d 692 [1962]).

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

ENTERED: MAY 6, 2008

CLERK

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

3579-
3580 Deborah Azizo, Index 350673/02
Plaintiff-Respondent,

-against-

Daniel Azizo,
Defendant-Appellant.

Brett Kimmel, P.C., New York (Brett Kimmel of counsel), for appellant.

Cohen Hennessey Bienstock & Rabin P.C., New York (Peter Bienstock of counsel), for respondent.

Judgment, Supreme Court, New York County (Laura Visitación-Lewis, J.), entered July 13, 2006, directing, inter alia, that defendant pay basic child support of $4,168 per month (with an annual cost of living adjustment) and 100% of reasonable add-on expenses until emancipation, plus spousal maintenance of $6,125 per month for 84 months (subject to certain limitations); awarding 70% of marital assets to plaintiff; and finding that defendant wastefully dissipated $779,000 of marital assets, thus entitling plaintiff to a credit of 70% therefor, unanimously modified, on the law, the facts and in the exercise of discretion, basic child support reduced to $2,834.39 a month once the parties' older child is emancipated, the cost-of-living adjustment to basic child support deleted, the distribution of marital assets 55% for plaintiff and 45% for defendant to be used in adjusting all payments and calculating all credits, defendant

credited with $102,823.73 as 45% of his overpayments of pendente lite support and maintenance, and otherwise affirmed, without costs. Order, same court and Justice, entered May 24, 2006, which, to the extent appealed from, awarded plaintiff attorneys' fees of $664,538 and expert fees of $57,142, unanimously affirmed, without costs.

The trial court erred when it averaged defendant's income for the four years preceding commencement of this divorce action (*Reilich v Reilich*, 275 AD2d 929 [2000]). However, we do not accept defendant's claim that his income is only $63,800 per year (*see* Domestic Relations Law § 240[1-b][b][5][v]; *see also e.g. Isaacs v Isaacs*, 246 AD2d 428 [1998]). Instead, we impute income to him as follows: in fiscal year 2001 (the most recent undistorted year), his income represented 20.7% of the gross revenue of Azizo Imports; in fiscal year 2005, the gross revenue of the business was $1.25 million; 20.7% of $1.25 million amounts to $258,750 per year.

Given that *a)* defendant's income did decline, *b)* he was paying the children's private school tuition and medical costs, all carrying costs on the marital residence, and premiums for life insurance policies on which plaintiff was the beneficiary, *c)* some of the expenses on plaintiff's net worth statement (i.e., the statement underlying the pendente lite order) turned out to be exaggerated, and *d)* plaintiff's pendente lite award is

actually greater than her final award after taking into account the carrying costs of the marital residence, the temporary monthly awards of $4,134 for child support and $5,000 for spousal maintenance were excessive. More reasonable monthly figures would be $1,666.67 for pendente lite child support (25% of $80,000), and $2,500 for pendente lite maintenance. Since defendant paid $9,134 per month for 46 months but should have paid only $4,166.67 per month, he overpaid by $228,497.18. Accordingly, since the pendente lite support was paid out of marital assets, defendant should receive a credit of 45% of his overpayment of $228,497.18, amounting to $102,823.73.

Given that plaintiff has only two years of college education and did not work outside the home for most of the parties' marriage, and given their pre-divorce standard of living, the trial court's post-trial decision properly awarded plaintiff $6,125 per month in maintenance (*see e.g. Acosta v Acosta*, 301 AD2d 467, 468 [2003], *lv denied* 100 NY2d 504 [2003]; *Cash-Scher v Scher*, 299 AD2d 193 [2002]).

In light of "the large financial disparity between the parties and the family's preseparation standard of living" (*Mostel v Mostel*, 27 AD3d 291 [2006]), the trial court properly went above the $80,000 Child Support Standards Act cap (*see also Kosovsky v Zahl*, 272 AD2d 59 [2000]).

Defendant's contention that his basic child support payments should be reduced by the amount of his education expense contributions is unavailing. First, basic child support can be reduced by the *room and board* portion of boarding school or college expenses, but not the tuition portion (*see e.g. Lee v Lee*, 18 AD3d 508, 512 [2005]). Second, there is no evidence that the children were attending boarding school as of the time of the judgment. If one of the children is now attending boarding school, defendant may move to modify the judgment in light of changed circumstances.

Instead of directing defendant to pay basic child support of $4,168 per month (based on 25% of combined parental income) until both children are emancipated, the trial court should have directed the payment to be reduced to $2,834.39 per month (17%) when the older child becomes emancipated (*see id.* at 511; *Rubenstein v Rubenstein*, 155 AD2d 522 [1989]).

The court should not have imposed a cost-of-living adjustment of basic child support on the parties absent their agreement (*see Bizzarro v Bizzarro*, 106 AD2d 690, 693 [1984]; *Provenzano v Provenzano*, 71 AD2d 618 [1979]).

Defendant's claims that the judgment varies from the court's decision in certain respects are not properly raised on appeal; instead, he should have moved below to correct the judgment (*see Hanlon v Thonsen*, 146 AD2d 743, 744 [1989]).

Since defendant was the only wage earner at the time of the judgment, he was properly ordered to pay 100% of add-on expenses (*see Greenfield v Greenfield*, 234 AD2d 60, 61 [1996]). If plaintiff becomes employed, defendant may move to reallocate the add-ons, especially the children's unreimbursed health care expenses (*see* Domestic Relations Law § 240[1-b][c][5]).

The direction that defendant pay the children's college expenses was appropriate in the circumstances presented.

We decline to disturb the trial court's finding that defendant dissipated $779,000 of marital assets. That determination rests largely on the court's assessment of the credibility of the parties and of plaintiff's expert.

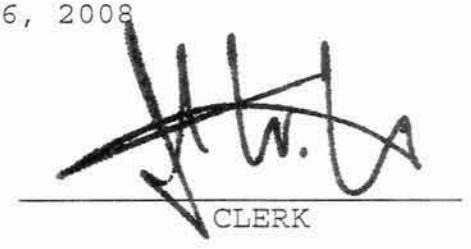
Defendant was certainly guilty of some economic fault. However, his fault was less than in *Maharam v Maharam* (245 AD2d 94 [1997]), where the wife was awarded 65% of marital assets, and *Davis v Davis* (175 AD2d 45 [1991]), where the wife was awarded 60% of the marital estate. The award of 70% to plaintiff in the instant case was excessive, and we reduce it to 55%.

Since pendente lite payments should not be made from marital property (*see e.g. McInnis v McInnis*, 23 AD3d 241, 242 [2005]), the trial court properly required defendant to reimburse the marital estate for marital assets he liquidated in order to comply with the pendente lite order.

In light of the economic disparity between the parties and defendant's conduct during this action, the trial court providently exercised its discretion in awarding plaintiff counsel and expert fees (*see e.g. Cash-Scher v Scher*, 299 AD2d 193, *supra*).

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

ENTERED: MAY 6, 2008



CLERK

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

3581 Norman Bobrow & Co., Inc., Index 600436/04
Plaintiff-Appellant,

-against-

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

Heller, Horowitz & Feit, P.C., New York (Eli Feit of counsel), for appellant.

Kornstein Veisz Wexler & Pollard, LLP, New York (Catherine M. Irwin of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered July 24, 2007, which denied plaintiff's motion for summary judgment on his second cause of action, and granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, defendants' motion denied, the complaint reinstated and otherwise affirmed, without costs.

The parties entered into an agreement that provided for plaintiff to act as defendants' exclusive broker for real estate transactions in New York until December 31, 2004. The agreement stated, "Upon and after the termination of this agreement, [defendants] shall recognize [plaintiff] as broker for any buildings or spaces to which [defendants] were introduced by [plaintiff] for a period of twenty-four (24) months after the

termination of this agreement." After the ownership of defendants changed, the new owner terminated the agreement before December 31, 2004, and leased space without using plaintiff's services. On the parties' motions for summary judgment, the court held that the language of the agreement demonstrated the parties' intent to permit the agreement to be terminated before December 31, 2004, and granted defendants' motion on the ground that the new owner sent a termination notice before the lease was signed.

There are, as the motion court found, numerous issues of fact that preclude summary judgment in plaintiff's favor. However, it is not at all clear that the exclusive brokerage agreement permitted termination before December 31, 2004. Further, plaintiff's president testified that the agreement was not terminable before December 31, 2004, and that the intent of the parties was to protect him after that date in the event defendants entered into a transaction that he had introduced. This reasonable alternative construction of the agreement

precludes summary judgment in defendants' favor as well (*see Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880-881 [1985]; *Yanuck v Paston & Sons Agency*, 209 AD2d 207 [1994]).

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

ENTERED: MAY 6, 2008

CLERK

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

3582 The People of the State of New York, Respondent,

-against-

Marcus Davis,
Defendant-Appellant.

SCI 2826/03

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

Robert M. Morgenthau, District Attorney, New York (Nicole Beder of counsel), for respondent.

Order, Supreme Court, New York County (Edwin Torres, J.), entered on or about January 9, 2007, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C) unanimously affirmed, without costs.

The circumstances of the case warranted separate assessments of points under the factor based on the age of the victim, who was 10 years old at the time of the incident, and under the factor based on the physical helplessness of the victim, who was asleep during the sexual assault (*see People v Vaughn*, 26 AD3d 776 [2006]; *People v Frisbee*, 3 Misc 3d 507, 510 [2004]). The physical helplessness had nothing to do with her age, and there was no improper double counting.

Even if we were to accept defendant's argument concerning the assessment of points for the drug or alcohol abuse factor, he

would remain a level two sex offender. In any event, we reject that argument (*see People v Wilkens*, 33 AD3d 399 [2006], *lv denied* 8 NY3d 801 [2007]).

To the extent defendant is also arguing in favor of a downward departure, he has not established the requisite special circumstances.

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

ENTERED: MAY 6, 2008

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

3584 Showole Coker, Index 117728/05
Petitioner-Respondent,

-against-

City of New York Department
of Probation, et al.,
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for appellants.

Cheng & Fasanya, LLP, Rosedale (Ade Fasanya of counsel), for respondent.

Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered September 6, 2006, inter alia, granting the petition and declaring that respondent Department of Probation (DOP) acted arbitrarily and capriciously when it terminated petitioner's employment, and directing that petitioner be reinstated with back pay, unanimously affirmed, without costs.

As an initial matter, the court's conversion of respondents' motion to dismiss into a motion for summary judgment was proper. In response to the court's invitation to submit affidavits or any other material it chose, respondents neither sought to offer evidence nor objected to the conversion, but simply stated their

position, without disputing any factual issues (*see Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 101-102 [1984]; *Matter of Hawkins v New York City Tr. Auth.*, 26 AD3d 169 [2006]; *Matter of Davila v New York City Hous. Auth.*, 190 AD2d 511 [1993], *lv denied* 87 NY2d 801 [1995]).

On the merits, the court properly found that DOP's termination of petitioner was arbitrary and capricious. Petitioner had been directed to complete a Partner Abuse Counseling (PAC) program as a requirement of his conditional discharge by the criminal court following a domestic violence incident. He also had been placed on disciplinary probation pursuant to a stipulation with DOP. The stipulation required petitioner to "strictly adhere" to the PAC program's counseling plan and to forward to DOP each month a "writing" from the PAC program indicating that he had "attended" all counseling sessions and similar events for the preceding month. Any writing indicating that petitioner had failed to "report" for all such events would be deemed insufficient, and any violation by petitioner of the requirements of the stipulation would cause DOP to terminate him. The stipulation also provided that "[a]ny action taken by [DOP] . . . shall not be arbitrary or capricious."

By correspondence dated September 1, 2005, the PAC program

informed DOP that petitioner was compliant with the program and participated well in group discussions, but that he had not been permitted to attend one such session because he had arrived too late, saying he had had difficulty getting a money order to pay for the session. Petitioner made up this session and ultimately completed the PAC program. Nevertheless, DOP terminated his employment "[p]ursuant to the terms of the Stipulation."

Any ambiguity in the stipulation will be resolved against DOP, its drafter (*see generally Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 267 [1995]). It is uncontested that petitioner appeared for the missed session, i.e., he "attended" and did "report" for it. While he appeared without a money order and by the time he returned with one was too late to be permitted to participate, it is also uncontested that petitioner made up the missed session. Moreover, as required by the stipulation, petitioner did "strictly adhere" to PAC's counseling plan, as evidenced by the fact that he completed the program. Thus, the court correctly found that petitioner did not violate the requirements of the stipulation.

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

ENTERED: MAY 6, 2008

CLERK

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

3585 Eleanor Close-Barzin, by Antal P. de Bekessy, her legal administrator, Plaintiff-Appellant, Index 603800/05

-against-

Christie's, Inc., et al., Defendants-Respondents,

- - - - -

Marguerite De Bekessy, NonParty Defendant.

Scheichet & Davis, P.C., New York (Victor P. Muskin of counsel), for appellant.

Hughes Hubbard & Reed LLP, New York (Michael E. Salzman of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Leland DeGrasse, J.), entered June 21, 2006, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion to consolidate, deemed to be an appeal from judgment, same court and Justice, entered June 27, 2006 (CPLR 5501[c]), and, so considered, said judgment unanimously affirmed, with costs.

Plaintiff's conversion claim is time-barred, since she alleges bad faith and the action was commenced more than three years after the alleged taking of the property occurred (*see* CPLR § 214[3]; *Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 317-318 [1991]; *Davidson v Fasanella*, 269 AD2d 351 [2000]; *Matter of Spewack*, 203 AD2d 133 [1994]). Given plaintiff's allegation

that defendants knowingly consigned and sold her property, a demand and refusal was not a prerequisite to commencement of an action for conversion (*see Lubell*, 77 NY2d at 318), and plaintiff's reliance on CPLR 206 is misplaced (*see LeFebvre v New York Life Ins. & Annuity Corp.*, 214 AD2d 911, 913 [1995]).

Defendants are not barred by the doctrine of equitable estoppel from asserting the statute of limitations defense (*see General Stencils v Chiappa*, 18 NY2d 125, 128 [1966]; *Pahlad v Brustman*, 33 AD3d 518, 519-520 [2006], *affd* 8 NY3d 901 [2007]). Contrary to plaintiff's argument that she was affirmatively induced by defendants to refrain from pursuing her claims, the allegations of her complaint demonstrate that she had all the information necessary to commence an action for conversion well within the limitations period.

Plaintiff's allegation that defendants knowingly ignored well known facts fails to state a cause of action for fraud (*see Friedman v Anderson*, 23 AD3d 163, 166 [2005]). Nor do her allegations state a cause of action for fraudulent conspiracy (*see LeFebvre*, 214 AD2d at 913).

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

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

ENTERED: MAY 6, 2008

CLERK

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

3586-
3586A The Scotts Company, LLC, Index 602712/05
Plaintiff-Appellant,

-against-

Ace Indemnity Insurance
Company, etc., et al.,
Defendants,

Pacific Employers Insurance Company,
Defendant-Respondent.

Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York (Kevin S. Reed of counsel), for appellant.

Siegal & Park, Mount Laurel, NJ, (Brian G. Fox of counsel), for respondent.

Order and amended order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 1, 2007 and March 26, 2007, respectively, which granted the motion of defendant Pacific Employers Insurance Company (PEIC) for summary judgment dismissing the complaint as against it and declared that the Settlement Agreement and Release executed by the parties in December 2000 is valid and enforceable, unanimously affirmed, with costs.

Pursuant to a settlement agreement and release entered into in December 2000, plaintiff, in exchange for $325,000, released defendants from any and all past, present and future claims under insurance policies, whether known or unknown, issued by

defendants. Four and a half years after executing the agreement and accepting the $325,000, plaintiff commenced this action to rescind the agreement. Plaintiff claims that the policy chart prepared by its agent, on which plaintiff relied in the negotiations leading to the agreement, contained a visual error that gave the impression that the total amount in primary coverage under the policies issued by defendant PEIC was $16 million. It is undisputed that the actual limits of each of the PEIC primary policies were $2 million per occurrence with an aggregate limit of $10 million per year. Thus, the difference between the primary coverage depicted on the policy chart and the amount of primary coverage actually provided by the PEIC policies was $64 million. It is also undisputed that the correct limits were written on the policy chart in eight different places, i.e., where the policies were depicted. However, the bars of the graph representing the policies were a smaller size than was commensurate with the dollar amounts.

There is no legitimate dispute that the settlement agreement and release was entered into by two sophisticated commercial entities, that there were no deceptive or high pressure tactics, that there was no fine print in the unambiguous agreement, and that there was no disparity between plaintiff and defendants in experience or bargaining power. The negotiations took place over

a period of 21 months; plaintiff was advised by legal counsel and had retained a consulting firm that assists policyholders in resolving complex insurance claims. Plaintiff was free to walk away from the negotiations at any time and litigate its differences with defendants in the United States District Court for the Southern District of New York, where a declaratory judgment action by defendants was pending. Thus, plaintiff's claim of procedural unconscionability fails as a matter of law (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10-11 [1988]; *186-90 Joralemon Assoc. v Dianzon*, 161 AD2d 329, 330 [1990]; *Chrysler Credit Corp. v Kosal*, 132 AD2d 686 [1987]). Nor, contrary to plaintiff's contention, does the disparity in exchanged value - i.e., the release of $80 million in insurance coverage for $325,000 - demonstrate substantive unconscionability (*see Gillman*, 73 NY2d at 12), since the disparity between the amount of insurance coverage plaintiff believed it was releasing, i.e., $16 million, and the $325,000 it received in exchange was itself substantial, and yet, after 21 months of negotiations, plaintiff agreed to that exchange.

Plaintiff's claim of mutual mistake also fails as a matter of law. Plaintiff admits that its agent prepared the policy chart based on its review of the insurance policies, rather than on any information provided by PEIC. Moreover, while the bar

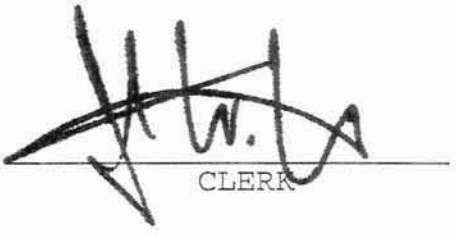
graph may have been inaccurate, the text that accompanied it set forth the correct policy limits. Since plaintiff's agent obviously was aware of those limits, there was no mistake. However, even assuming there was a mistake, the mistake was not so material as to go to the foundation of the agreement (*see DaSilva v Musso*, 53 NY2d 543, 552 [1981]). The stated purpose of the agreement was to fully and finally terminate the parties' relationship as insurer and insured under the policies. The nature of the agreement thus remains intact irrespective of the policy limits. In fact, although in the agreement the policies were identified by number, policy period and issuing company, the policy limits were not even mentioned. Moreover, under the agreement, plaintiff released an unknown number of policies with unknown limits. In any event, it does not avail plaintiff to invoke even a material mistake to avoid the consequences of its own negligence (*see P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200, 201 [1996]). Plaintiff could have easily ascertained the limits of the policies by reading the policies. Instead, it assumed the risk of proceeding based upon second-hand information presented to it by its own agent.

Further discovery will not aid plaintiff in overcoming the hurdles to its claims.

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

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

ENTERED: MAY 6, 2008



CLERK

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

3587 The People of the State of New York, Respondent, Ind. 2493/04

-against-

Alfredo Rivera, Defendant-Appellant.

Tilem & Campbell, LLP, White Plains (John Campbell of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Alexis Pimentel of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered March 21, 2006, convicting defendant, after a jury trial, of two counts of operating a motor vehicle while under the influence of alcohol, and sentencing him to concurrent terms of 1⅓ to 4 years and a fine of $2500, unanimously affirmed.

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

Contrary to defendant's contention, the record establishes

that the sentencing court did not consider the crime of which defendant was acquitted.

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

ENTERED: MAY 6, 2008

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

3589 Mary E. Cook, Index 103874/04
Plaintiff-Respondent,

-against-

Consolidated Edison Company of NY, Inc.,
Defendant,

E Plus E LLC,
Defendant-Appellant,

Madison 55th Restaurant, Inc., etc.,
doing business as "Burger Heaven", et al.,
Defendants-Appellants-Respondents.

Law Offices of Charles J. Siegel, New York (Alfred T. Lewyn of counsel), for appellant.

Billig Law, P.C., New York (Darin Billig of counsel), for appellants-respondents.

Law Office of Kenneth A. Wilhelm, New York (Barry Liebman of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 10, 2007, which, in an action for personal injuries sustained in a fall in front of premises leased by one defendant Burger Heaven (tenant) and owned by defendant E Plus (owner), denied tenant's motion for summary judgment dismissing the complaint and all cross claims as against it, denied owner's motion for summary judgment on its cross claim for contractual indemnification against tenant, and denied owner's request in its reply papers for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff alleges that she tripped in the gap between two shunt boards that had been placed by defendant Con Edison on the sidewalk in front of tenant's restaurant to cover temporary wires laid by Con Edison to restore electricity to the premises. With respect to both tenant and owner, issues of fact exist as to whether the placement of the shunt boards constituted a special use of the sidewalk such as to give rise to a duty to maintain this "provisional sidewalk structure" (*Eliassian v Consolidated Edison Co. of N.Y.*, 300 AD2d 51 [2002]; *cf. Nordquist v Piccadilly Hotel Co.*, 173 AD2d 412 [1991]), and whether they had constructive notice of a recurring dangerous condition that they routinely left unaddressed. In addition, owner was under a statutory nondelegable duty to maintain the sidewalk (Administrative Code of City of NY § 7-210). Nor can it be concluded as a matter of law that the alleged gap between the shunt boards was so open and obvious as to relieve owner and tenant of any duty to warn of the hazard (*see Westbrook v WR Activities-Cebrera Mkts.*, 5 AD3d 69, 71 [2004]). In the latter regard, plaintiff asserts that her line of sight of the gap was obstructed by other pedestrians on the crowded sidewalk, who were wearing long coats and carrying shopping bags; in addition, the fact that a condition is visible does not necessarily mean it is open and obvious (*see id.* at 72). Since issues of fact exist concerning owner's and tenant's negligence, the motion court

correctly denied, as premature, owner's motion for summary judgment on its cross claim for contractual indemnification against tenant. We have considered appellants' remaining arguments and find them unavailing.

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

ENTERED: MAY 6, 2008

CLERK

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

3590 The People of the State of New York, Respondent, Ind. 2285/06

-against-

Muhamad Ahdil, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheila O'Shea of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered January 3, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of 6 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, and the minor inconsistencies in testimony do not warrant a different conclusion.

The court providently exercised its discretion in limiting defendant's cross-examination about whether the police could have used additional investigative devices since such questions called

for improper speculation and were irrelevant to the issues before the jury (*see e.g. People v Smith*, 303 AD2d 206 [2003], *lv denied* 100 NY2d 543 [2003]; *People v Tejada*, 249 AD2d 208 [1998], *lv denied* 92 NY2d 906 [1998]; *People v Smith*, 204 AD2d 140, 141 [1994], *lv denied* 84 NY2d 872 [1994]). Defendant's related challenges to the court's comments and jury instructions and his constitutional 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. Defendant received a full opportunity to advance a defense that challenged the sufficiency of the People's proof. The court's instructions during voir dire and comments during cross-examination did not direct the jury to disregard the absence of further investigative steps or undermine defendant's summation arguments concerning the lack of evidence (*see People v Jiovani*, 258 AD2d 277 [1999], *lv denied* 93 NY2d 900 [1999]), and its final charge adequately explained that a reasonable doubt can arise from such a lack.

We perceive no basis to reduce the three-year period of post-release supervision.

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

ENTERED: MAY 6, 2008

CLERK

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

3591 Elena Alicea Rodriguez, etc., et al., Index 113392/04
Plaintiffs-Respondents,

-against-

Stuart Saal, et al.,
Defendants,

New York Organ Donor Network, et al.,
Defendants-Appellants.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for appellants.

Dinkes & Schwitzer, New York (Anthony Forgione of counsel), for respondents.

Order, Supreme Court, New York County (Joan B. Carey, J.), entered November 2, 2007, which, in an action for wrongful death alleging that a cancerous kidney transplanted into plaintiff's decedent at defendant hospital was procured by defendant-appellant organ donor network (Network), denied Network's motion to dismiss the complaint as against it on the ground of release, with leave to renew after a hearing on the issue of whether the subject release was intended to cover Network, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants-appellants dismissing the complaint as against them.

The subject "general release" states that consideration provided by the hospital constituted "complete payment for all damages and injuries" and was intended to release not only the

hospital but also, "whether presently known or unknown, all other tortfeasors liable or claimed to be liable jointly with the [hospital]; and whether presently known or unknown all other potential or possible tortfeasors liable or claimed to be liable jointly with the [hospital]"). Some four months earlier, when plaintiff and the hospital advised the court of their settlement, plaintiff's attorney stated that the settlement was not intended to include Network; it appears that Network's attorney was not present at this conference, and that there was no response to this statement from the hospital's attorney. The action should be dismissed as against Network based on this clear and unambiguous release intended to put an end to the action. Any ambiguity was created by plaintiff's counsel's statements on the record months before the release was executed. Those statements are extrinsic to the release and other settlement documents and therefore cannot be considered (*see Wells v Shearson Lehman/American Express*, 72 NY2d 11, 19 [1988]). It does not avail plaintiff that Network was not specifically identified in the release (*id.*). 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: MAY 6, 2008

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

3592 Ajet Delaj, et al., Index 21076/05
Plaintiffs-Appellants,

-against-

Kenneth R. Jameson,
Defendant.
- - - - -
Mark E. Seitelman Law Offices, P.C.,
Nonparty Respondent.

Ajet Delaj, et al., appellants pro se.

Law Office of Mark E. Seitelman, New York (Mark E. Seitelman of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered May 21, 2007, which, to the extent appealed from, upon granting the motion of Mark E. Seitelman Law Offices, P.C. (Seitelman) to withdraw as plaintiffs' counsel, preserved a charging lien sought by Seitelman pending the final resolution of the underlying personal injury action and directed plaintiffs to pay Seitelman disbursements prior to the release of the case file, unanimously affirmed, without costs.

The record establishes that Seitelman's representation did not terminate due to attorney misconduct, discharge for cause, or unjustified abandonment and accordingly, the court properly preserved Seitelman's right to a charging lien (*see Klein v Eubank*, 87 NY2d 459, 464 [1996]). Contrary to plaintiffs' contention, a charging lien is not only applicable to instances

in which the attorney is discharged and may be applicable to instances where the attorney withdraws (*id.* at 463-464). The court also properly directed plaintiffs to pay the disbursements prior to Seitelman's release of the case file (*see Gonzalez v City of New York*, 45 AD3d 347, 348 [2007], *lv denied* 10 NY3d 701 [2008]; *Tuff & Rumble Mgt. v Landmark Distribs.*, 254 AD2d 15 [1998], *lv dismissed* 93 NY2d 920 [1999]).

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

ENTERED: MAY 6, 2008

CLERK

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

3593 In re Dominick Friscia, etc., Petitioner,

-against-

Raymond W. Kelly, as Commissioner of the New York City Police Department, et al., Respondents.

Index 109043/06

Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

Respondent Kelly's Final Order, dated April 24, 2006, which dismissed petitioner from the Police Department, unanimously confirmed, the petition denied, and this proceeding (transferred to this Court by order of Supreme Court, New York County [Michael D. Stallman, J.], entered April 4, 2007), dismissed, without costs.

The administrative determination is supported by substantial evidence (*People ex rel. Vega v Smith*, 66 NY2d 130 [1985]) that pursuant to random drug-testing procedures, petitioner gave two samples of hair from his head that were subjected to repeated testing by independent laboratories, yielding positive results for the presence of cocaine. This Court may not disturb the administrative hearing officer's resolution of conflicting testimony (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]) regarding petitioner's independent testing of a hair

sample from his underarm, or his conclusion that such testing still allowed for the possibility that the underarm hair did in fact contain cocaine and was not exculpatory.

We have considered petitioner's other arguments and find them unavailing.

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

ENTERED: MAY 6, 2008

CLERK

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

3594 The People of the State of New York, Respondent,

Ind. 6101/06

-against-

Chuvasco Rodriguez, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Brenda Soloff, J.), rendered on or about January 2, 2007, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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

ENTERED: MAY 6, 2008

CLERK

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

3595N In re Triborough Bridge and Tunnel Authority, Petitioner-Appellant, Index 403038/06

-against-

Triborough Bridge and Tunnel Authority Bridge and Tunnel Officers Benevolent Association, Respondent-Respondent.

Robert M. O'Brien, New York (John G. Epstein of counsel), for appellant.

Law Office of Stuart Salles, New York (Stuart Salles of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered April 5, 2007, which denied petitioner Triborough Bridge and Tunnel Authority's petition to vacate an arbitration award directing the Authority to cease and desist from requiring members of respondent Bridge and Tunnel Officers Benevolent Association to take a break of four hours between the end of a regular shift and the commencement of a voluntary eight-hour overtime shift, and dismissed the proceeding, unanimously affirmed, without costs.

While the Public Authorities Law empowers the Authority to "acquire, design, construct, maintain, operate, improve and reconstruct" the bridges and tunnels under its jurisdiction (§ 553[9]), and to appoint bridge and tunnel officers (BTOs) and

fix their compensation, subject to the provisions of the Civil Service Law (§ 553[7]), it does not expressly empower the Authority to decide how long BTOs can safely work without a break, or otherwise prohibit, "in an absolute sense," an arbitrator from making that decision (*see Matter of New York City Tr. Auth. v Transport Workers Union of Am.*, 99 NY2d 1, 11-12). Accordingly, the public policy exception to the scope of an arbitrator's power to resolve disputes does not apply (*see generally id.* at 6-7). Nor does it appear that the power claimed by the Authority is conferred on it by any contract or rule or regulation, such as might warrant a finding that the arbitrator wrote a new contract for the parties or otherwise exceeded his authority (*see Matter of Local 333, United Mar. Div., Intl. Longshoreman's Assn., AFL-CIO v New York City Dept. of Transp.*, 35 AD3d 211, 214 [2006], *lv denied* 9 NY3d 805 [2007]). Indeed, the parties' collective bargaining agreement provides that it consists not only of its express terms but also "past practices imbedded in the present understanding of the contract." Thus, the award was rationally based on a finding of a past practice

requiring only a one-hour break between shifts. 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: MAY 6, 2008

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

3596N JMT Brothers Realty, LLC, Index 114420/07
Petitioner-Appellant,

-against-

First Realty Builders, Inc., et al.,
Respondents,

Joseph R. Foster doing business as
JRF Construction Management, etc.,
Respondent-Respondent.

Welby, Brady & Greenblatt, LLP, White Plains (Adam W. Downs of counsel), for appellant.

Zetlin & DeChiara, LLP, New York (Tara B. Mulrooney of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered November 20, 2007, which denied the petition pursuant to CPLR article 75 to permanently stay arbitration of the counterclaims of respondents First Realty Builders, Inc. (First Realty), Robert Caffese, and Joseph R. Foster d/b/a JRF Construction Management d/b/a JRF Construction Management, LLC (JRF Construction), and denied respondent Foster's cross motion to permanently stay arbitration of claims petitioner asserted against him individually, unanimously reversed, on the law, without costs, and the petition and cross motion granted.

Petitioner entered into a contract with respondents First Realty and JRF Construction for the conversion of a townhouse from individual apartments and offices into a single family

residence. The contract, which contained an arbitration clause, was signed by Joseph Foster on behalf of JRF Construction and by Robert Caffese on behalf of First Realty and, separately, on a line indicating that he was personally guaranteeing the contract. Following a dispute between petitioner and Caffese over an alleged misuse of funds, petitioner terminated First Realty. JRF Construction thereafter continued work on the project for several months until it was advised to stop work in light of petitioner's demand for arbitration against First Realty, Caffese, and JRF Construction. First Realty and Caffese asserted counterclaims relating, inter alia, to the subject project, and JRF Construction asserted a counterclaim seeking recovery of its fee, supervision costs, and reimbursement of costs for open invoices.

Petitioner then brought this petition seeking a stay of arbitration of the counterclaims on the ground that respondents were home improvement contractors that failed to obtain licenses required by law (*see* Administrative Code of the City of New York § 20-385, *et seq.*). First Realty and Caffese defaulted, thereby admitting the allegations that they were unlicensed home improvement contractors engaged in a home improvement project (*see Access Capital v DeCicco*, 302 AD2d 48, 52 [2002]). Accordingly, as First Realty and Caffese are barred from recovery, the petition to stay the arbitration of their counterclaims should have been granted.

JRF Construction opposed the petition on the basis that it was not required to be licensed since its role on the project was solely to coordinate, monitor and supervise the renovation project. Accepting those allegations as true, JRF Construction nevertheless was required to obtain a license when providing services in connection with a home improvement project (*see O'Mara Org. v Plehn*, 179 AD2d 548 [1992]). Since an unlicensed contractor is precluded, as a matter of public policy, from either enforcing a home improvement contract or seeking recovery in quantum meruit (*see B & F Bldg. Corp. v Liebig*, 76 NY2d 689 [1990]; *Blake Elec. Contr. Co. v Paschall*, 222 AD2d 264 [1995]), the petition to stay arbitration of JRF Construction's counterclaim should also have been granted (*see Matter of Heller [Clark Constr. Corp.]*, 178 AD2d 195 [1991]).

Furthermore, the court erred in denying Foster's cross motion to stay arbitration of the claims against him individually since he signed the arbitration agreement in his capacity as president of JRF Construction, and a party will not be compelled to arbitrate absent evidence that affirmatively establishes an express agreement to do so (*see Matter of Metamorphosis Constr. Corp. v Glekel*, 247 AD2d 231 [1998]; *Matter of Jevremov [Crisci]*, 129 AD2d 174 [1987]). We reject petitioner's claim that Foster may be held personally liable because the entity named in the parties' contract, "JRF Construction Management," is a

nonexistent entity. Petitioner drafted the contract and there is no claim of confusion as to the parties involved in the contract (*see Matter of Harmon v Ivy Walk Inc.*, 48 AD3d 344 [2008]).

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

ENTERED: MAY 6, 2008

Tom, J.P., Friedman, Nardelli, Catterson, JJ.

2446 The People of the State of New York, Ind. 1760/04
Respondent,

-against-

Lynette Caban,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Frances Gallagher of counsel), and Kaye Scholer LLP, New York (Kerren R. Misulovin of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered April 28, 2005, convicting defendant, after a jury trial, of criminally negligent homicide, and sentencing her to a term of 1 to 3 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The subject incident occurred when defendant was backing up her Jeep Grand Cherokee along the west side of Third Avenue, moving south (the wrong way on a one-way thoroughfare) toward the intersection with East 107th Street. As defendant moved the Jeep, against a red light, into the pedestrian right of way at the northwest corner of Third Avenue and East 107th Street, the vehicle struck an elderly pedestrian who had been crossing Third Avenue heading west. The impact threw the pedestrian through the

air and onto the asphalt, resulting in fatal injuries. The People's expert estimated that the Jeep was moving in the range of 13 to 19 miles per hour when it struck the pedestrian. At the time, the Jeep's rear passenger-side window was missing and had been replaced with a taped black plastic bag, thereby reducing visibility in the direction from which the pedestrian had been approaching.

The evidence of the foregoing facts presented at trial was sufficient to support the verdict convicting defendant of criminally negligent homicide (Penal Law § 125.10), given that the jury could rationally conclude that it had been proven, beyond a reasonable doubt, that defendant's failure to perceive the risk of death created by her conduct "constitute[d] a gross deviation from the standard of care that a reasonable person would observe in the situation" (Penal Law § 15.05[4]; *see People v Boutin*, 75 NY2d 692, 695-696 [1990]). In addition, the verdict comported with the weight of the evidence.

A new trial is required, however, based on the trial court's erroneous admission into evidence, on the People's case, of testimony by an employee of the Department of Motor Vehicles to the effect that, at the time of the incident, defendant's driver's license was suspended. Contrary to the People's arguments, the suspension of defendant's license had no relevance to the case; it was neither a background fact necessary to

explain the situation to the jury, nor was it probative of whether defendant "gross[ly] deviat[ed] from the standard of care a reasonable person would observe in the situation" (Penal Law § 15.05[4]). Even in a personal injury action arising from a motor vehicle accident, this Court has held that a defendant's "license suspension was clearly irrelevant to the issues of negligence and proximate cause" and "could have had no purpose other than to prejudicially influence the jurors" (*White v Molinari*, 160 AD2d 302, 303 [1990]). This principle would have at least equal applicability in a criminal case, where the standard is proof beyond a reasonable doubt. We note that, since defendant was not charged with having intended to cause the victim's death (which no one claimed was the case), but with having failed to use due care to avoid an unintended result, the People's argument that the license suspension "tended to disprove [defendant's] claim of mistake or accident" is a non sequitur. Further, under the circumstances, the admission of the evidence of the license suspension was sufficiently prejudicial to constitute reversible error (*see People v Resek*, 3 NY3d 385, 389 [2004] [admission of evidence of uncharged crime was reversible error where "the

prejudice to defendant outweighed the probative value of the evidence"]). In view of the foregoing, we need not reach defendant's remaining arguments.

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

ENTERED: MAY 6, 2008

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

2555 Jennifer Ramirez, etc,
Plaintiff-Respondent,

Index 117376/03

-against-

Columbia Presbyterian Hospital, et al.,
Defendants,

NASA Real Estate Corp.,
Defendant-Appellant.

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

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered June 11, 2007, which denied the motion of defendant-appellant NASA Real Estate Corp. (NASA) for summary judgment dismissing the complaint and cross claims asserted against it, reversed, on the law, without costs, the motion granted and the complaint dismissed as to NASA. The Clerk is directed to enter judgment accordingly.

In these consolidated actions to recover for personal injuries allegedly caused by exposure to lead paint, it is undisputed that the infant plaintiff, who was born April 13, 1992, resided in apartment 3E for four months in 1993 and apartment 3B from March 1995 to December 1997, both of which were in a building located at 80 Arden Street in Manhattan (the Arden Building). In his deposition testimony and affidavit in support

of NASA's motion for summary judgment, NASA's treasurer and shareholder, Frank Cadeddu, stated that he is a principal and employee of several separate entities that own and manage apartment buildings, including, among others, defendants Arden St. Realty, LLC and NASA. Mr. Cadeddu stated that the Arden Building is owned and managed by Arden St. Realty and that, since its inception around 1976 or 1977, NASA had only owned two buildings, one located in Sunnyside, Queens and another building that it owned for two years during the 1970's. Mr. Cadeddu also stated that around 1995 he used a broker to obtain insurance for various property owning entities, including Arden St. Realty and NASA, and the broker decided to insure all of the entities under one policy issued to NASA, which included coverage for the Arden Building. Mr. Cadeddu emphasized, however, that NASA never owned, operated, managed or controlled the Arden Building.

In denying NASA's motion, the motion court, although stating that it "is an extremely close question," held that NASA had not sustained its burden of showing with absolute certainty that it had no control over the subject premises. However, given that the deed for the Arden Building reflects that it has been owned by Arden St. Realty Co. since September 17, 1981, and Mr. Cadeddu's uncontradicted deposition testimony and affidavit that NASA never owned, operated, managed or controlled it, the mere facts that the Arden Building and other properties owned by

various entities in which Cadeddu and others had an ownership interest were insured under one policy issued to NASA and that the insurance application stated that "All entities are same financial control," are not indicia of NASA's possession or control over the premises and are insufficient to withstand summary judgment (*cf. Smith v Andre*, 43 AD3d 770, 771-772 [2007]).

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

MAZZARELLI, J.P. (dissenting)

I would affirm the order appealed because issues of fact exist regarding whether appellant had control over the premises sufficient to confer liability. Two of the four apartments in which the infant plaintiff was allegedly exposed to lead paint were located at 80 Arden Street in Manhattan. It is not disputed that defendant Arden St. Realty is the title owner of that building. Appellant NASA Real Estate Corp. (NASA) is a management company whose principal, Frank Cadeddu, is also a principal of Arden St. Realty. Cadeddu owns or is involved in the management of several other entities which own various buildings. Cadeddu testified at his deposition, and asserted in an affidavit, that NASA never managed the affairs of 80 Arden Street or otherwise controlled its operations. Further, he testified that an insurance broker retained by him to procure insurance for all of the entities in which he was involved, whether through ownership or management, procured a single insurance policy. Cadeddu stated that this policy, which covered several buildings, including 80 Arden Street, named NASA as the insured.

At the time NASA made its motion for summary judgment, it had not yet produced a copy of the insurance policy, despite demand therefor by plaintiffs. Accordingly, the motion court issued an order requiring production by NASA of "a complete copy

of its insurance policy." Nevertheless, NASA did not produce the policy itself, but rather some declaration sheets, a schedule of insured locations, some endorsements to the policy and the policy application. The declaration sheets reveal that NASA is the insured under general commercial liability policy number 1021627 issued by First Central Insurance Company. The schedule of "locations of all premises you (NASA) own, rent or occupy" includes 80 Arden Street. Although one of the endorsement pages produced by NASA reflects a change to the policy to add additional named insureds for two of the insured locations, no such endorsement was produced in connection with 80 Arden Street. Indeed, 80 Arden St. Realty is not mentioned at all in the materials produced by NASA, as an additional insured or otherwise. Moreover, the record reveals that by letter to NASA dated February 25, 2004, the State of New York Insurance Department Liquidation Bureau, which was handling the affairs of First Central, disclaimed coverage in connection with this action because "In so far [*sic*] as Arden St. Realty, LLC is not named within First Central policy CPP 1021627 as either a Named Insured or as an additional insured, coverage cannot be afforded."

The foregoing facts raise a triable question about whether NASA procured the insurance policy to insulate itself from liability from claims related to 80 Arden Street. Based strictly on the materials produced by NASA, the policy provided it, and no

one else, protection in connection with 80 Arden Street. This is sufficient to raise the inference that NASA procured the policy because it was engaged in activity with respect to 80 Arden Street from which liability could arise (*see Butler v Rafferty*, 100 NY2d 265, 271, n 2 [2003]). Indeed, there is no other reasonable explanation.

Cadeddu's assertion in his affidavit that his broker "decided to insure all the entities under one policy issued to [NASA], which included coverage for the building at 80 Arden Street," does not entitle NASA to summary judgment. There is no explanation in the record as to why Cadeddu would not have purchased insurance on behalf of Arden St. Realty or some other entity with an insurable interest in the property. In fact, without such explanation, the assertion, in light of what the policy materials actually demonstrate, cannot be reconciled with the statement that "[NASA] never owned, operated, managed or controlled this building." Thus, the majority's conclusion that the policy's being in NASA's name "is no indicium of NASA's possession or control over the premises," is untenable. Indeed, the only plausible conclusion which can be reached, based strictly on the materials produced by NASA in relation to the policy, is that NASA had some reason to insure itself in connection with 80 Arden Street.

The majority's reference to *Smith v Andre* (43 AD3d 770 [2007]), is misplaced. In that case, the defendants agreed to temporarily maintain the insurance on property which they had recently sold, until the purchasers could put their own insurance in place. Moreover, the new owners admitted that they owned, managed, controlled and maintained the premises. Here, NASA has offered no plausible explanation for why, if it has no connection to 80 Arden Street, it, and only it, maintained insurance on the building exclusively in its own name. The only evidence in this record that NASA did not control the premises is Cadeddu's conclusory statement that it did not. It has never explained just what its relationship to the premises was. In light of the questions raised concerning the insurance policy, this unsupported statement is insufficient to establish, as a matter of law, that NASA bears no liability for plaintiff's injuries.

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

ENTERED: MAY 6, 2008

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

3597 The People of the State of New York, Respondent, Ind. 5013/01

-against-

Malik Robinson, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Rosalyn Richter, J.), rendered October 28, 2002, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree and assault in the first degree, and sentencing him, as a second violent felony offender, to a term of 25 years to life, consecutive to two concurrent terms of 15 years, unanimously affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the prosecutor's stated nondiscriminatory reasons for challenging the panelist at issue, relating to both demeanor and employment, were not pretextual, and this finding is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). When the prosecutor cited the panelist's demeanor, the court, employing its unique opportunity

to make such observations, immediately recognized what aspect of that demeanor the prosecutor was referring to, confirmed that this concern was legitimate, and concluded that the prosecutor "credibly relied on demeanor in exercising a strike." (*Snyder v Louisiana*, __US__, 128 S Ct 1203, 1209 [2008]). As for the employment-related reason, which the court also accepted, the record sufficiently explains an alleged disparity in the prosecutor's pattern of challenges.

Since the verdict convicting defendant of assault in the first degree and acquitting him of criminal possession of a weapon in the second degree was not repugnant, the court properly denied his request to resubmit the case to the jury (*see People v Haymes*, 34 NY2d 639, 640 [1974], *cert denied* 419 US 1003 [1974]; *People v Sackes*, 11 AD3d 364 [2004], *lv denied* 4 NY3d 748 [2004]).

Defendant's challenges to the court's main and supplemental charges are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Defendant's ineffective assistance of counsel claim relating to the position taken by counsel regarding a certain jury instruction involves matters of strategy and is thus unreviewable on direct appeal (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to

the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 6, 2008

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

3598 3636 Greystone Owners, Inc., Index 15435/03
Plaintiff-Appellant,

-against-

Greystone Building Co.,
Defendant-Respondent.

Toback, Bernstein & Reiss LLP, New York (Brian K. Bernstein of counsel), for appellant.

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal P.C., Yonkers (Lawrence T. Schiro of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about September 18, 2007, which, to the extent appealed from as limited by the brief, dismissed as time-barred the action for a judgment declaring that plaintiff was the owner of certain garage spaces and for money damages, unanimously affirmed, with costs.

Contrary to its contention, plaintiff was not the beneficial owner of the garage spaces at the time that defendant leased the spaces to it, and the lease was not void ab initio. Thus, the court did not err in applying the statute of limitations to this action (*see Riverside Syndicate, Inc. v Munroe*, 10 NY3d 18, 24 [2008]). Title to the building containing the spaces was in defendant's name when the lease was executed. It had not been transferred to plaintiff. Nor had the cooperative offering plan been amended to include the garage spaces.

Pursuant to the offering plan, plaintiff had a claim to the garage spaces as a result of defendant's failure to obtain a ruling from the Division of Housing and Community Renewal that the spaces were not subject to rent stabilization. However, plaintiff did not timely pursue said claim. Plaintiff's failure to recognize that defendant had not applied for the ruling was a unilateral mistake born of its own lack of diligence in enforcing its rights under the offering plan (*see Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369 [2007]).

The doctrine of equitable estoppel, which plaintiff invokes to bar defendant from pleading the statute of limitations as an affirmative defense, is inapplicable here since the alleged misrepresentation or act of concealment forms the basis of both plaintiff's estoppel argument and its underlying substantive cause of action (*see Kaufman v Cohen*, 307 AD2d 113, 122 [2003]). Further, since plaintiff had sufficient facts within the six-year limitation period to put it "on inquiry" as to the existence of its claim to the garage spaces, its negligence in failing to make the inquiry is "fatal to [its] plea of ignorance" (*Kingsland v Fuller*, 157 NY 507, 511 [1899]).

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

ENTERED: MAY 6, 2008

CLERK

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

3599-
3599A The New York Racing Association Inc., Index 602390/04
Plaintiff-Appellant,

-against-

New York City Off-Track
Betting Corporation,
Defendant-Respondent.

Bee Ready Fishbein Hatter & Donovan, LLP, Mineola (Robert Connolly of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered February 14, 2007, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 26, 2007, which denied plaintiff's motion for summary judgment and granted defendant's cross motion to dismiss the complaint for failure to timely serve a notice of claim, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff's failure to serve a notice of claim within 90 days after defendant's alleged breach of the parties' Memorandum

of Understanding is a bar to the instant action (*see* Racing, Pari-Mutuel Wagering and Breeding Law § 618; *Zoll v New York City Off-Track Betting Corp.*, 258 AD2d 267 [1999], *lv denied* 94 NY2d 754 [1999]; *see also Zoll v Suffolk Regional Off-Track Betting Corp.*, 259 AD2d 696 [1999]). Plaintiff's claim accrued when its damages were ascertainable (*see C.S.A. Contr. Corp. v New York City School Constr. Auth.*, 5 NY3d 189, 192-193 [2005]; *Alfred Santini & Co. v City of New York*, 266 AD2d 119 [1999], *lv denied* 95 NY2d 752 [2000]), i.e., after it received the first of defendant's monthly payments that did not include the increase allegedly due under the renewal provision of the Memorandum of Understanding. Plaintiff did not file its notice of claim until more than 10 months after it received the payment.

Plaintiff's estoppel argument has no support in the record.

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

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

ENTERED: MAY 6, 2008

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

3601 In re Fermin A.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about August 13, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The evidence established a seizure of a knife in open view.

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

ENTERED: MAY 6, 2008

CLERK

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

3602 The State of New York, Index 406660/96
Plaintiff-Respondent,

-against-

Seventh Regiment Fund,
Defendant-Appellant.

Law Office of Philip M. Chiappone, Brooklyn (Philip M. Chiappone of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Patrick J. Walsh of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered October 27, 2006, after a nonjury trial, declaring plaintiff the owner of certain property, unanimously affirmed, without costs.

The trial court fairly interpreted the evidence in finding that defendant had failed to carry its burden, as the party asserting the statute of limitations, of proving that defense (*see New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d 75, 80 [2006]). In finding defendant to be a bona fide purchaser of the subject property so that plaintiff's conversion claim accrued upon demand and refusal in 1996, rather than at an earlier juncture (*see* 98 NY2d 249, 260-261), the court correctly determined that the 1952 transfer of the property was for value, not just with respect to the $1 consideration recited in the bill of sale but also in exchange for the assurance that the property

would be properly cared for (*see* UCC 1-201[44][d]; *Apfel v Prudential-Bache Sec.*, 81 NY2d 470, 475-476 [1993]; *Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982]; *Hamer v Sidway*, 124 NY 538, 545 [1891]). There was no showing that the transfer was not in good faith (*see* UCC 1-201[19]), notwithstanding the transferor's possibly ulterior motive. Nor was it shown that defendant had constructive knowledge of any defect in the transferor's title; in fact, the testimony and previously submitted affidavit of defendant's president, defendant's interrogatory response and the public circumstances of the transfer all indicated to the contrary.

In view of the foregoing, it is unnecessary to address defendant's other contentions.

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

ENTERED: MAY 6, 2008

CLERK

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

3603 Marc Curtis, Index 20903/05
Plaintiff-Appellant,

-against-

Edmond Brent,
Defendant-Respondent.

Jonathan Silver, Kew Gardens, for appellant.

Law Offices of Vincent P. Crisci, New York (Caroline Papadatos of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered June 7, 2007, which granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff's verified bill of particulars, medical records, and deposition testimony and defendant's expert's affirmed report established prima facie that plaintiff did not sustain a serious injury, but rather cervical, lumbar and left shoulder strains, which had resolved as of 16 months after the accident, and that he was not prevented, for 90 of the 180 days following the accident, from performing his usual and customary activities (*see Lopez v Simpson*, 39 AD3d 420 [2007]; *Norona v Manhattan & Bronx Surface Tr. Operating Auth.*, 40 AD3d 480 [2007]; *Style v Joseph*, 32 AD3d 212, 214 n * [2006]). Plaintiff's experts' reports provide neither quantitative nor qualitative assessments of the

seriousness of plaintiff's injuries (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]), and contain no competent medical evidence that he sustained a medically determined injury of a nonpermanent nature (*see id.* at 357; *Lopez*, 39 AD3d at 421; *Norona*, 40 AD3d at 480-481).

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

ENTERED: MAY 6, 2008

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

3604 The People of the State of New York, Ind. 5248/04
Respondent,

-against-

Marwan Sidberry,
Defendant-Appellant.

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

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

Judgment, Supreme Court, Bronx County (Eduardo Padro, J.), rendered August 8, 2005, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 5 to 10 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification, particularly where the evidence included a prompt identification and the recovery of prerecorded buy money from defendant's person. The inconsistencies in

testimony cited by defendant do not warrant disturbing the verdict.

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

ENTERED: MAY 6, 2008

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

3605 Evelyn Sommer, et al., Index 114156/04
Plaintiffs-Respondents,

-against-

Jean Joseph Pierre, et al.,
Defendants-Appellants.

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for appellants.

Gair, Gair, Conason, Steigman & Mackauf, New York (Rhonda E. Kay of counsel), for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered January 17, 2008, which, to the extent appealed from,, denied defendants' motion to bifurcate the trial on issues of liability and damages, unanimously affirmed, without costs.

Bifurcation is appropriate in complicated cases of liability and damages where such clarification or simplification will assist in reaching a fair and more expeditious resolution of the issues (22 NYCRR 202.42[a]; *Mazur v Mazur*, 288 AD2d 945 [2001]). A ruling on such a request is a matter of discretion as to which the trial court should be afforded great deference (*Johnson v Hudson Riv. Constr. Co.*, 13 AD3d 864 [2004]). In this case, fairness and convenience weigh in favor of a unified trial, which

will serve to prevent a verdict based on undue sympathy for either party.

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

ENTERED: MAY 6, 2008

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

3606 In re Richard J. Condon, in his official capacity as Special Commissioner of Investigation for the New York City School District, Petitioner-Respondent,

-against-

The Inter-Religious Foundation for Community Organization, Inc., Respondent-Appellant.

Index 406703/07

- - - - -

In re Richard J. Condon, in his official capacity as Special Commissioner of Investigation for the New York City School District, Petitioner-Respondent,

-against-

Lucius Walker, Jr., Respondent-Appellant.

Index 406704/07

New York Civil Liberties Union Foundation, New York (Palyn Hung of counsel), for appellants.

Richard J. Condon, New York (Ann E. Ryan of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered January 17, 2008, which granted the petitions to compel compliance with subpoenas duces tecum directed to respondents and denied their cross motions to quash the subpoenas, unanimously affirmed, without costs.

Petitioner has established a factual basis for his investigation of possible misconduct by teachers employed by the Department of Education (DOE) in connection with trips to Cuba by

students attending a DOE high school, the relevance of evidence he seeks, and his authority for issuing subpoenas for that evidence (*see Matter of A'Hearn v Committee on Unlawful Practice of Law of N.Y. County Lawyers' Assn.*, 23 NY2d 916 [1969], *cert denied* 395 US 959 [1969]). While it is undisputed that the federal government has preempted the field with respect to enforcement of laws and regulations concerning travel to Cuba for educational purposes (*see* 31 CFR 515.565; *Miami Light Project v Miami-Dade County*, 97 F Supp 2d 1174 [SD Fla 2000]), petitioner's investigation involves distinct issues within his jurisdiction and does not require a determination as to whether any federal laws were actually violated in connection with the trip. Respondent Rev. Walker submitted evidence that the federal agency charged with enforcement of Cuban embargo regulations has requested information, apparently directed at determining whether respondent Foundation has been impermissibly acting as a travel service provider for trips to Cuba. Whether or not such an investigation is proceeding, petitioner's investigation is directed solely at whether DOE employees committed misconduct in the scope of their employment. Therefore, petitioner's investigation is not preempted by federal law or in conflict with any federal investigation of the Foundation.

Respondents made no prima facie showing that any encroachment on their liberties would result from the disclosure

sought, and thus petitioner was not required to demonstrate a compelling need for the information (*see New York State Natl. Org. for Women v Terry*, 886 F2d 1339, 1354-1355 [2d Cir 1989], *cert denied* 495 US 947 [1990]). Nor do the subpoenas, which seek documents related to specific trips and not membership lists, on their face implicate core First Amendment concerns of freedom of association that would require some heightened showing to warrant disclosure (*cf. Federal Election Commn. v Larouche Campaign*, 817 F2d 233 [2d Cir 1987]).

The hearing court correctly ruled that the Fifth Amendment privilege was not generally available to the Foundation, and that Rev. Walker was required to assert a privilege individually in response to particular questions (*Flushing Natl. Bank v Transamerica Ins. Co.*, 135 AD2d 486 [1987]). Since he has already done this, the issue is academic.

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

ENTERED: MAY 6, 2008

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

3607 William A. Galison, Index 602478/04
Plaintiff-Appellant,

-against-

Jeffrey A. Greenberg, Esq., et al.,
Defendants-Respondents

Rounder Records,
Defendant.

The Law Offices of Neal Brickman, P.C., New York (Neal Brickman and Ethan Leonard of counsel), for appellant.

Leon Friedman, New York, for Jeffrey A. Greenberg, Esq. and Beldock Levine & Hoffman LLP, respondents.

Levitt & Kaizer, New York (Yvonne Shivers of counsel), for Madeleine Peyroux, respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 29, 2007, which granted defendants-respondents' motion for summary judgment dismissing causes of action for defamation and tortious interference with contract, unanimously affirmed, without costs.

The defamation cause of action was properly dismissed on findings that the letter on which it is based is protected by the common interest privilege, and that plaintiff failed to adduce evidence sufficient to raise an issue of fact as to defendants' malice (*see Liberman v Gelstein*, 80 NY2d 429, 437-438 [1992]). The tortious interference with contract claim was properly

dismissed for lack of evidence of a valid contract (*see Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 424 [1996]). We have considered plaintiff's arguments, including that further disclosure might reveal the existence of material facts warranting the denial of summary judgment on these claims, and find them unavailing.

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

ENTERED: MAY 6, 2008

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

3608 Anna Bialobroda, Index 117702/05
Plaintiff-Respondent,

-against-

Howard Buchwald, et al.,
Defendants-Appellants.

Law Offices of Edward Weissman, New York (Edward Weissman of counsel), for appellants.

Anna Bialobroda, respondent pro se.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered October 17, 2007, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the first, second, third, ninth, tenth, and fourteenth causes of action, unanimously affirmed, with costs.

Viewing the complaint in a light most favorable to plaintiff, we conclude that the first, second, and third causes of action allege harm suffered by plaintiff individually due to defendants' failure to comply with their duties under the parties' stipulations entered into in settlement of prior litigation, which duties are distinct from the duties owed by defendants to the corporation (*see Abrams v Donati*, 66 NY2d 951 [1985]; *Goldstein v Consolidated Edison Co. of N.Y.*, 115 AD2d 34, 39-40 [1986], *lv denied* 68 NY2d 604 [1986]). The ninth and tenth causes of action allege injuries suffered by plaintiff alone with

no concomitant injury to the corporation (*see Goldstein*, 115 AD2d at 39-40). Moreover, with respect to the ninth cause of action, plaintiff may plead conspiracy in order to connect defendants' actions with her underlying claims of fraud and constructive eviction (*American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 416 [1988]). The fourteenth cause of action states a prima facie case for piercing the corporate veil (*see Shisgal v Brown*, 21 AD3d 845, 848-849 [2005]).

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

ENTERED: MAY 6, 2008

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

3609 The People of the State of New York, Ind. 5988/05
Respondent,

-against-

Claude Reed,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for appellant.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about December 15, 2006, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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

ENTERED: MAY 6, 2008

CLERK

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

3610 The People of the State of New York, Respondent, Ind. 5638/04

-against-

Johnny Noka, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Arlene Goldberg, J.), rendered May 18, 2005, convicting defendant, after a jury trial, of stalking in the third degree, and sentencing him to a term of 1 year, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was ample evidence to support the "reasonable fear" element of third-degree stalking under Penal Law § 120.50(3). Defendant, who had a history of making violent threats against his daughter and ex-wife, intentionally approached the women with an angry look and with one hand in his jacket pocket. Defendant's ex-wife's testimony clearly established her reasonable fear that this familiar gesture signified the presence of a firearm and a threat to her safety, and defendant's contrary interpretation of the testimony is without merit. On six other occasions over the

course of a nine-month period, defendant reappeared in the same vicinity, and it is a reasonable inference that defendant carefully timed his appearances to coincide with the victims' pattern of commuting. We have considered and rejected defendant's remaining arguments.

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

ENTERED: MAY 6, 2008

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

3611 Karlene Allen, as Mother and Natural Guardian of Sandino McKnight, et al., Plaintiffs-Respondents, Index 16626/05

-against-

Turyali Fast Food, Inc. doing business as Kennedy Fried Chicken, Defendant/Third-Party Plaintiff-Respondent,

Tasty Poultry LLC doing business as New York Poultry Co., Defendant/Third-Party Defendant-Appellant.

Hammill, O'Brien, Croutier, Dempsey & Pender, P.C., Syosset (Kristin Blair Tyler of counsel), for appellant.

McMahon, McCarthy & Verrelli, Bronx (Patrick J. Rooney of counsel), for Allen, respondents.

Hoffman & Roth, LLP, New York (Edward Kiss of counsel), for Turyali Fast Food, Inc., respondent.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered on or about September 24, 2007, which denied the motion of defendant Tasty Poultry LLC d/b/a New York Poultry Co. (Tasty) for summary judgment dismissing the complaint and all cross claims as against it, and granted the cross motion defendant Turyali Fast Food, Inc. d/b/a Kennedy Fried Chicken (Turyali) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

The infant plaintiff testified that when he sat down to eat his meal at one of the two tables in Turyali's restaurant, he

observed that the floor was clean and dry. While eating, plaintiff watched two men, Tasty's employees, make a delivery of chicken in cardboard boxes on a hand truck, and noticed that the boxes were wet. The men made four or five trips and took about 10 minutes. About five minutes after the delivery, as plaintiff was getting up to leave the restaurant, he slipped and fell. While on the floor, he first observed a trail of bloody water leading from the area where he fell to the back of the restaurant. Plaintiff also testified that the only restaurant employees he observed were the man behind the grill and the man behind the counter where customers ordered, picked up and paid for their food. An employee of Turyali, who was not at the restaurant on the day of the accident, testified that deliveries were made on hand trucks that were brought through the customer entrance and customer area to a cooler behind the counter, and that there was no other entrance to the restaurant for deliveries. Such evidence is sufficient to permit an inference that negligence on the part of Tasty created the hazardous trail of water (*see Healy v ARP Cable*, 299 AD2d 152, 154-155 [2002]), warranting the denial of Tasty's motion for summary judgment. It is also sufficient to show, prima facie, that Turyali did not create or have actual or constructive notice of the trail of

water (*see Kesselman v Lever House Rest.*, 29 AD3d 302, 304 [2006]; *cf. Rose v Da Ecib USA*, 259 AD2d 258, 260 [1999]), warranting the granting of Turyali's cross motion for summary judgment in the absence of countervailing evidence.

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

ENTERED: MAY 6, 2008

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

3612 Brenda Cornell, Index 113104/04
Plaintiff-Respondent,

-against-

360 West 51st St. Realty, LLC, et al.,
Defendants-Respondents,

360 W. 51st Street Corp., et al.,
Defendants.

- - - - -

360 West 51st St. Realty, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Supreme Services of New York Inc.,
Third-Party Defendant-Appellant,

Andre Vaque,
Third-Party Defendant.

Ahmuty, Demers & McManus, Albertson (Deborah Delsordo of counsel), for appellant.

Gallet Dreyer & Berkey, LLP, New York (Beatrice Lesser of counsel), for Brenda Cornell, respondent.

Landman Corsi Ballaine & Ford P.C., New York (Christopher G. Fretel of counsel), for 360 West 51st St. Realty, LLC, Brusco Realty Corp., Robert Baranoff and Brusco Realty Management LLC, respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 23, 2007, which denied the motion by third-party defendant Supreme Services for summary judgment dismissing the third-party complaint against it and granted plaintiff's cross motion to amend the complaint naming Supreme as a direct

defendant, unanimously affirmed, with costs.

Plaintiff alleges she was injured by hazardous substances released into the air during demolition work performed by 360 West 51st Street Realty and the Brusco Realty defendants (including the latter's property manager, Baranoff). Those defendants commenced a third-party action against Supreme Services, alleging negligent removal of debris from the basement of the apartment building.

Although "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]), an exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition by launching its own "force or instrument of harm" (*Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]; *see also Espinal*, 98 NY2d at 141-142; *Grant v Caprice Mgt. Corp.*, 43 AD3d 708 [2007]; *Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334 [2004]). Plaintiff's allegation that Supreme negligently removed the debris falls within this exception (*see id.* at 336-338). The record in this case presents triable issues of fact regarding the manner in which Supreme performed the work for which it had been hired.

We have examined Supreme's challenge to its addition as a direct party defendant and find it without merit.

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

ENTERED: MAY 6, 2008

CLERK

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

3613 The People of the State of New York, Ind. 2083/06
Respondent,

-against-

Giancarlo Alvarez,
Defendant-Appellant.

Lazzaro Law Firm, P.C., Brooklyn (James Kirshner of counsel), for appellant.

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered November 20, 2006, as amended December 15, 2006, convicting defendant, after a jury trial, of robbery in the first degree (two counts), robbery in the second degree (two counts) and attempted robbery in the first and second degrees, and sentencing him to an aggregate term of 6 years, unanimously affirmed.

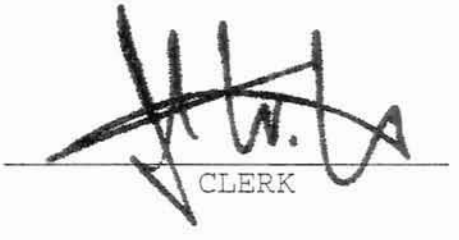
Defendant's challenges to the admissibility of evidence and to the court's jury instructions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits, except that we find the court's receipt of testimony concerning photographic identifications to be harmless error (*see People v Johnson*, 32 NY2d 814, 816 [1973]).

Defendant's ineffective assistance of counsel claims are

unreviewable on direct appeal because they involve matters outside the record, particularly regarding counsel's strategic decisions and the asserted availability of an alibi defense (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defense counsel pursued a reasonable strategy primarily aimed at establishing that the main complainant falsely accused defendant of the robbery after defendant rejected that complainant's sexual advances, and the acts of counsel that defendant challenges on appeal were consistent with that strategy. Furthermore, counsel's alleged errors did not cause defendant any prejudice or compromise his right to a fair trial.

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

ENTERED: MAY 6, 2008



CLERK

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

3616N Tag 380, LLC, Index 101396/04
Plaintiff-Appellant,

-against-

Howard P. Ronson,
Defendant-Respondent,

Commet 380, Inc., et al.,
Defendants.

Rosenberg & Estis, P.C., New York (Warren A. Estis and Michael E. Feinstein of counsel), for appellant.

DLA Piper US LLP, New York (Todd B. Marcus of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered November 30, 2007, which, insofar as appealed from as limited by the briefs, denied plaintiff's cross motion for sanctions brought pursuant to 22 NYCRR 130-1.1, unanimously affirmed, without costs.

The court appropriately exercised its discretion in denying the cross motion for sanctions, since the motion for substitution, necessitated by the March 2007 death of defendant Ronson, was neither without merit nor brought in an effort to delay or frustrate the proceedings. That the court denied the motion and requested additional information from Ronson's counsel as to the propriety of the motion does not render counsel's

conduct sanctionable (*see Parks v Leahey & Johnson*, 81 NY2d 161, 165 [1993]).

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

ENTERED: MAY 6, 2008

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 May 6, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
David B. Saxe
Joseph T. Buckley
Rolando T. Acosta, Justices.

The People of the State of New York,
Respondent,

-against-

Ibn Mitchell,
Defendant-Appellant.

Ind. 2294/04
6852/04
SCI 4949/04
1531/07

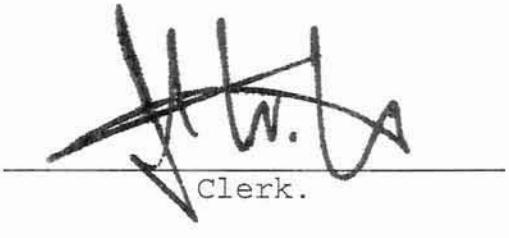
3588-
3588A

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Ambrecht, J. at plea; Laura A. Ward, J. at sentence), rendered on or about February 16, 2007, and judgment, same court (Patricia Nunez, J. at plea; Anthony Ferrara, J. at sentence), rendered on or about April 30, 2007,

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

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

ENTER:



Clerk.

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

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 6, 2008.

Present - Hon. Peter Tom, Justice Presiding
Richard T. Andrias
Eugene Nardelli
Milton L. Williams, Justices.

The People of the State of New York, Ind. 3444/06
Respondent,

-against- 3600

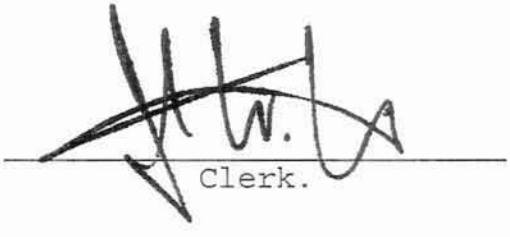
Ronald Banzaca,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about September 27, 2006,

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

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

ENTER:



Clerk.

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

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 6, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
David B. Saxe
John T. Buckley
Rolando T. Acosta, Justices.

Brandon Hernandez, infant by his mother and natural Guardian Grace Melendez,
Plaintiff-Respondent,

Index 110080/06

-against-

3583

Raza Mahmood Syed,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered on or about November 29, 2007,

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

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

ENTER:

Clerk.