SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 22, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Mazzarelli, Friedman, Buckley, JJ.

1899 The People of the State of New York, Respondent, Ind. 2271/01

-against-

Kent Edwards, Defendant-Appellant.

Robert T. Perry, New York, 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 June 24, 2002, convicting defendant, upon his plea of guilty, of attempted rape in the first degree, and sentencing him to a term of 12 years, unanimously modified, on the law, to remit the matter to Supreme Court for resentencing that shall impose post-release supervision as mandated by statute, and otherwise affirmed.

Defendant raises various issues relating to the voluntariness of his plea and the effectiveness of his representation by counsel. However, defendant expressly states that he does not wish his plea to be vacated, and instead requests that this Court remand for resentencing, or make an

unspecified discretionary reduction in his sentence. Neither of these remedies is appropriate for any of defendant's claims (*see People v Johnson*, 25 AD3d 331 [2006], *lv denied* 6 NY3d 835 [2006]).

In any event, we find these claims without merit, with one exception. Defendant was never informed that a period of post-release supervision would be added to his sentence of 12 years, and this rendered his plea involuntary (*see People v Louree*, 8 NY3d 541 [2007]; *People v Van Deusen*, 7 NY3d 744 [2006]; *People v Catu*, 4 NY3d 242 [2005]). However, the sole remedy to which this error would entitle him is vacatur of the plea (*see People v Hill*, 9 NY3d 189 [2007]), and, as noted, he declines such relief.

Since the trial court failed to impose post-release supervision at the sentencing hearing, we are required to remit for resentencing (*see People v Sparber*, __ NY3d __, 2008 NY Slip Op 03946 [April 29, 2008]).

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

ENTERED: MAY 22, 2008

Lippman, P.J., Mazzarelli, Sweeny, Moskowitz, Renwick, JJ.

3642 The People of the State of New York, Ind. 5939/06
Respondent,

-against-

Leon Powell,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Micki A. Scherer, J.), rendered April 11, 2007, as amended April 17, 2007, convicting defendant, upon his plea of guilty, of robbery in the second degree (seven counts) and attempted robbery in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 14 years, unanimously affirmed.

We perceive no basis for reducing defendant's sentence. Defendant's claim regarding the imposition of a mandatory surcharge and fees is without merit (*see People v Harris*, __ AD3d __, Appeal 3681 [May 15, 2008]).

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

ENTERED: MAY 22, 2008

CLERK

Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3701 The People of the State of New York, Ind. 2599/03
Respondent,

-against-

Rene Irizarry,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert Sackett, J.), rendered November 16, 2004, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first and second degrees, and criminal possession of a weapon in the fourth degree, and sentencing him, as a second violent felony offender, to concurrent terms of 12 years, 12 years, 6 years and 1 year, respectively, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's homicidal intent could be readily inferred from his actions (*see e.g. People v Suero*, 235 AD2d 357 [1997], *lv denied* 89 NY2d 1101 [1997]), and we reject defendant's claim that certain testimony by prosecution witnesses undermined that inference. The element of serious physical injury required for first-degree assault was satisfied by

evidence that the victim's injuries resulted in permanent scarring, as well as a protracted impairment of his health that necessitated two separate hospitalizations.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 22, 2008

Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3702 In re Peter G.,
Petitioner-Appellant,

-against-

Karleen K.,
Respondent-Respondent.

Levine & Gilbert, New York (Harvey A. Levine of counsel), for appellant.

Richard J. Feinberg, New City, for respondent.

Order, Family Court, New York County (Karen I. Lupuloff, J.), entered December 5, 2007, which, after a fact-finding hearing, in this proceeding brought pursuant to article 8 of the Family Court Act, dismissed the petition seeking an order of protection, unanimously affirmed, without costs.

The court properly dismissed the petition where the evidence failed to establish by a fair preponderance thereof that respondent committed acts that would constitute assault in the third degree during an incident where the parties' five-year-old son would not willingly attend a weekend visit with petitioner (*see* Family Court Act § 812[1]; § 832; Penal Law § 120.00). There exists no basis upon which to disturb the court's credibility determinations (*see Matter of Smith v Smith*, 308 AD2d 592 [2003]).

We decline to review petitioner's request that the Family

Court Judge be recused and that his custody petition be assigned to a different judge, since this issue is raised for the first time on appeal.

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

ENTERED: MAY 22, 2008

CLERK

Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3703 Hilda Santana, Index 350740/03
Plaintiff-Appellant,

-against-

Pedro Santana,
Defendant-Respondent.

Lawrence Leonard, New York, for appellant.

Judgment, Supreme Court, New York County (Marian Lewis, Special Referee), entered April 20, 2007, inter alia, awarding plaintiff child support of $1,666.67 per month, maintenance of $2,000 per month for three years, and $80,000 representing 50% of the appraised value of defendant's business, unanimously modified, on the law and the facts, to vacate the award of child support and extend the duration of maintenance to five years, the matter remanded for a recalculation of the parties' child support obligations, and otherwise affirmed, without costs.

Several errors were made in determining child support. First, the court applied the statutory 25% percentage applicable to two children despite unrebutted testimony that the parties' younger daughter (born July 23, 1990) has been living with defendant. Defendant should not have to pay plaintiff basic child support for this child as of the time the child began living with him. Second, the court incorrectly calculated the parties' total combined income. Plaintiff's annual income was

correctly found to be $26,200 based on recent income tax returns, and defendant's annual income could not be ascertained because of his evasive and conflicting testimony and failure to produce appropriate documentation. The court therefore properly imputed income of $118,843.60 to defendant based on the average of his annual deposits into his personal checking account (*see Matter of Klein v Klein*, 251 AD2d 733, 735 [1998]); however, the court apparently overlooked an additional $18,250 per year that the neutral court evaluator found defendant earns from a wire transfer business located in his store. Third, where, as here, the combined parental income exceeds $80,000, the court is required to either apply the statutory percentage to the amount in excess of $80,000 or articulate reasons for not doing so (*see Matter of Cassano v Cassano*, 85 NY2d 649 [1995]; *Gina P. v Stephen S.*, 33 AD3d 412, 414 [2006]). The court, however, capped defendant's income at $80,000, and then apparently took a straight 25% of $80,000 in arriving at defendant's monthly basic child support obligation of $1,666.67, rather than multiplying combined parental income by the appropriate child support percentage and then prorating the product in the same proportion as each parent's income is to the combined parental income (Domestic Relations Law § 240[1-b][c][2], [3]). The only reasons the court gave for deviating from the statutory method were the parties' "modest" marital lifestyle and the fact that the younger

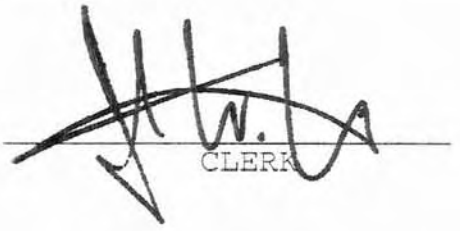
child resides with defendant. The latter fact, while a reason for not awarding plaintiff child support for the younger child, is not a reason for capping defendant's income, and, moreover, the record is insufficient to support a finding that the parties' marital lifestyle was modest. Fourth, the court failed to award the children's future reasonable health care expenses not covered by insurance, which award should be made in the same proportion as each parent's income is to the combined parental income (Domestic Relations Law § 240[1-b][c][5]). Fifth, given the great disparity in the parties' incomes, the court should have directed defendant to pay his pro rata share of the younger child's college tuition and expenses based on the proportion of his income to the total combined parental income, rather than directing defendant to pay only 50% of those expenses.

Plaintiff is not entitled to permanent maintenance, as she claims, simply by reason of defendant's imputed high earnings. The purpose of maintenance is to give the recipient spouse a sufficient period of time to become self-supporting (*see Naimollah v De Ugarte*, 18 AD3d 268, 271 [2005]). However, given the length of the parties' marriage, over 20 years, and the fact that plaintiff needs 12 more credits to complete her master's degree, attainment of which should enable her to earn more income, we modify the maintenance award to extend its duration from three to five years.

We have considered plaintiff's remaining contentions, including those relating to the distribution of marital property, and find them without merit.

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

ENTERED: MAY 22, 2008



Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3704 The City of New York, Index 400093/06
Petitioner-Appellant,

-against-

Antonia C. Novello, as Commissioner of the New York State Department of Health, et al.,
Respondents-Respondents.

- - - - -

Brad H., et al.,
Amici Curiae.

Michael A. Cardozo, Corporation Counsel, New York (Alan Beckoff of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (David Lawrence III of counsel), for respondents.

Debevoise & Plimpton LLP, New York (Julie M. Calderon of counsel), New York Lawyers for the Public Interest, Inc., New York (John A. Gresham of counsel), and The Urban Justice Center, New York (Jennifer J. Parish of counsel), for Brad H., et al., on behalf of themselves and all other members of the class certified in *Brad H. v City of New York*, amici curiae.

Bellin & Associates LLC, New York (Aytan Y. Bellin of counsel), for The New York Chapter of the National Academy of Elder Law Attorneys, amicus curiae.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 11, 2006, which, insofar as appealed from, in an action involving petitioner City of New York's obligation to provide discharge planning for the class consisting of city inmates receiving treatment for mental illness while incarcerated (the class), denied the petition brought pursuant to CPLR article 78 seeking, inter alia, an order directing respondents-

respondents to provide the City with the authority to provide "temporary Medicaid benefits" to members of the class in immediate need, unanimously reversed, on the law, without costs, to the extent of granting the petition as to all members of the class not affected by Social Services Law § 366(1-a), and the appeal otherwise dismissed as moot.

In 1999, a group of individuals, later certified as the Brad H. Class (*see Brad H. v City of New York*, 185 Misc 2d 420 [2000], *affd for reasons stated* 276 AD2d 440 [2000]), commenced an action against the City for failure to provide adequate discharge planning to inmates who received mental health treatment while incarcerated. Following a stipulation of settlement entered into by the parties, this Court, in affirming a modification of the stipulation, held that the "stipulation of settlement needed further modification, pursuant to Social Services Law § 133, to require the grant of temporary Medicaid benefits pending the completion of an investigation for class members in immediate need" (*Brad H. v City of New York*, 8 AD3d 142, 142-143 [2004], *lv denied* 4 NY3d 702 [2004]). It was determined that Social Services Law § 133 applied to Medicaid benefits and that "[t]he language of the statute is clear, providing for temporary assistance or care pending any investigation relating to benefit eligibility" (*id.* at 143).

The City, in an effort to comply with its obligations,

forwarded a proposed local rule to respondents Department of Health (DOH) and Office of Temporary Disability Assistance that would authorize the City to grant temporary Medicaid benefits pending the completion of an eligibility investigation for class members in immediate need. The proposed local rule was rejected and the City commenced this proceeding.

This appeal is partially moot due to the recently enacted amendment to Social Services Law § 366, effective April 1, 2008, which provides that "a person who is an inmate of a state or local correctional facility . . . [who] was in receipt of medical assistance . . . immediately prior to being admitted to such facility, such person shall remain eligible for medical assistance while an inmate . . .. Upon release from such facility, such person shall continue to be eligible for receipt of medical assistance . . ." (Social Services Law § 366[1-a]). Thus, an inmate eligible for Medicaid prior to incarceration becomes eligible upon release without having to submit to a new application process. Accordingly, the appeal, as it relates to inmates who had active Medicaid prior to their incarceration, is moot.

However, there is a live controversy with respect to the remaining class members, and we conclude that respondents' rejection of the City's attempt to comply with the modified stipulation of settlement was arbitrary and capricious and

contrary to law (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231-232 [1974]). This Court's decision interpreting Social Services Law § 133 is controlling, and since the City required DOH's approval for it to provide temporary Medicaid benefits that were found to be authorized pursuant to Social Services Law § 133, DOH should have accepted the proposed rule, or otherwise provided petitioner with the authority to provide temporary Medicaid benefits to class members in immediate need.

We have considered respondents' remaining arguments, including that the City's proposed local rule is unnecessary, and find them unavailing.

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

ENTERED: MAY 22, 2008

Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3705 Syndicated Communication Venture Partners IV, LP,
Plaintiff-Appellant,

Index 601656/03
590547/04
590546/04
591193/05

-against-

BayStar Capital, L.P., now known as Northbay Opportunities, L.P., et al.,
Defendants-Respondents,

Steven Lamar, et al.,
Defendants.

[And a Third-Party Action]

Dreier LLP, New York (Joseph M. Pastore III of counsel), for appellant.

Abbey Spanier Rodd & Abrams, LLP, New York (Karin E. Fisch of counsel), for Northbay Opportunities, L.P., respondent.

Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., New York (Edward M. Spiro of counsel), for BayStar Capital II, L.P., BayStar Capital Management, LLC and Lawrence Goldfarb, respondents.

Schulte Roth & Zabel LLP, New York (Robert M. Abrahams of counsel), for CLIX Network, Inc., R. Steven Hicks, Hicks Capital, LLC and Alton Hoover, respondents.

Epstein, Becker & Green, PC, New York (Alesia J. Kantor of counsel), for Sierra Ventures Associates VII, LLC, Sierra Ventures VII, LP and Jeffrey Drazan, respondents.

Lawrence J. Studnicky III, New York, respondent pro se.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 12, 2007, which, after a nonjury trial, dismissed the first amended complaint with prejudice, unanimously affirmed, with costs.

The court's dismissal of the complaint alleging, inter alia, minority shareholder oppression, fraud, breach of fiduciary duty, and misappropriation of trade secrets, is supported by a fair interpretation of the evidence (*see Saperstein v Lewenberg*, 11 AD3d 289 [2004]), and contrary to plaintiff's contention, the court made "essential" findings of fact in its decision to satisfy the requirements of CPLR 4213(b) (*see Marks v Macchiarola*, 250 AD2d 499 [1998]).

The record supports the court's conclusion that plaintiff failed to prove breach of fiduciary duty or present evidence to overcome the protection afforded the directors under the business judgment rule (*see e.g. Aronson v Lewis*, 473 A2d 805, 812 [Del 1984], *overruled on other grounds by Brehm v Eisner*, 746 A2d 244 [Del 2000]). The evidence also did not support a finding of breach of fiduciary duty as to the corporate defendants, or in connection with the unsuccessful financing attempts. Rather, the evidence demonstrates that no affirmative steps were taken to hasten or cause the demise of the failed corporation (ClickRadio), and in fact, unsuccessful efforts to seek financing were made to save the corporation.

Plaintiff's cause of action for misappropriation of trade secrets was not supported by the evidence inasmuch as the assets that could be considered trade secrets, in particular ClickRadio's technology, were acquired at public auction for

which plaintiff had notice, and plaintiff failed to establish that the remaining items constituted trade secrets (*see Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]). Furthermore, although the court dismissed plaintiff's fraud claims prior to trial, it provided plaintiff with the opportunity to prove the factual allegations at trial, which it was unable to do.

There is no basis upon which to disturb the court's determination that plaintiff failed to prove damages. Finding defendants' valuation expert to be more credible than plaintiff's expert, the court accepted the opinion that the company only had liquidation value (*see Felt v Olson*, 51 NY2d 977, 979 [1980]).

Plaintiff was not deprived of its right to a jury trial where plaintiff's joinder of claims for legal and equitable relief resulted in a waiver of the right to a jury trial (*see Marcus v Marcus*, 17 AD3d 219 [2005]).

Finally, "a trial court has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary" (*Campbell v Rogers & Wells*, 218 AD2d 576, 579 [1995]), and contrary to plaintiff's assertions, there is no evidence of bias, vindictiveness, or any other action on the part of the court that deprived plaintiff of a fair trial.

We have considered plaintiffs' remaining contentions, including that the court improperly excluded certain evidence at trial, and find them unavailing.

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

ENTERED: MAY 22, 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 22, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Richard T. Andrias
Eugene Nardelli
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 5571/05
Respondent,

3706

-against-

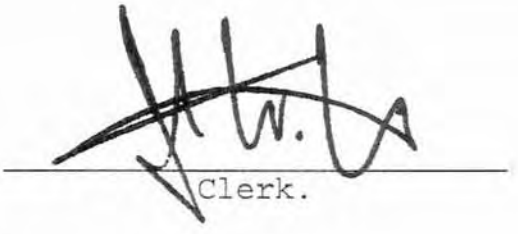
Shanti Brooker,
Defendant-Appellant.

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

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

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

ENTER:



Clerk.

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

Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3707 The People of the State of New York, Ind. 3617/03
Respondent,

-against-

Michael Stuart,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Robert H. Straus, J.), rendered October 8, 2004, convicting defendant, after a jury trial, of grand larceny in the second degree and practicing or appearing as an attorney-at-law without being admitted and registered (Judiciary Law § 478), and sentencing him to an aggregate term of 2 to 6 years, with restitution in the amount of $87,000, unanimously affirmed.

The court properly declined to instruct the jury on the theory of larceny by false promise and its special "moral certainty" standard of proof (Penal Law § 155.05[2][d]). The evidence primarily supported a theory of larceny by false pretenses (Penal Law § 155.05[2][a]), particularly with regard to defendant's misrepresentations as to his qualification to render legal services. Even though the evidence may have also supported the theory of larceny by false promise, the People were entitled

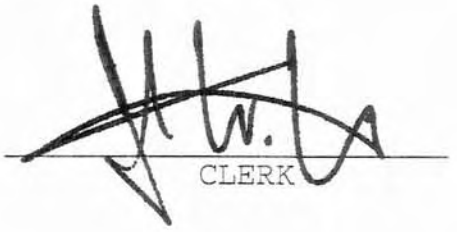
to elect between these theories (*see People v King*, 85 NY2d 609, 625 [1995]). Defendant did not preserve his claim that the court's charge actually authorized a conviction on a false promise theory, without including the statutory "moral certainty" language, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. There is nothing in the charge to suggest a false promise theory.

Defendant did not preserve (*see People v Gray*, 86 NY2d 10, 19 [1995]) his claim that the evidence was legally insufficient to establish that the victim named in the indictment was the owner of the stolen funds and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. In addition, we find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence showed that the victim had a right of possession to the funds in her corporation's bank account superior to that of defendant (*see People v Hutchinson*, 56 NY2d 868, 869 [1982]; *People v Marshall*, 293 AD2d 629 [2002], *lv denied* 98 NY2d 711 [2002]). Defendant's related argument

concerning the restitution order is likewise unpreserved and without merit (*see People v Scott*, 15 AD3d 884 [2005], *lv denied* 4 NY3d 856 [2005]).

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

ENTERED: MAY 22, 2008



Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3708 Sara Kinberg, Index 16440/02
Plaintiff-Appellant,

-against-

Heidi Opinsky,
Defendant-Respondent.

Sara Kinberg, appellant pro se.

McManus, Collura & Richter, P.C., New York (Scott C. Tuttle of counsel), for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered March 30, 2007, which, insofar as appealed from as limited by the briefs, in an action for legal malpractice, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

A 2003 order denying defendant's prior motion for, inter alia, pre-answer summary judgment (CPLR 3211[c]), expressly reserved substantive issues for a later time. Accordingly, defendant showed sufficient cause for this motion under CPLR 3212 (*see Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 [2002]). The record shows that plaintiff failed to demonstrate that defendant committed negligent acts but for which plaintiff's 1992 matrimonial action, which plaintiff ultimately settled in 2000 after having discharged defendant, would have ended more favorably to her (*see e.g. Tanel v Kreitzer & Vogelman*, 293 AD2d 420, 421 [2002]). Moreover, in two causes of

action, plaintiff fails to plead any demand for compensatory damages, and her demands for punitive damages are unsupported by evidence that would warrant such relief (*see Gamiel v Curtis & Riess-Curtis, P.C.*, 16 AD3d 140, 141 [2005]). Plaintiff's cause of action alleging that defendant violated Judiciary Law § 487 is not viable, as the requisite evidence of a "chronic and extreme pattern of legal delinquency" is not found in the record (*see Nason v Fisher*, 36 AD3d 486, 487 [2007], quoting *Solow Mgt. Corp. v Seltzer*, 18 AD3d 399, 400 [2005], *lv denied* 5 NY3d 712 [2005]).

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

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

ENTERED: MAY 22, 2008

Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3709 Phoenix Capital Investments LLC, Index 602204/07
Plaintiff-Respondent-Appellant,

-against-

Ellington Management Group, L.L.C.,
Defendant-Appellant-Respondent.

Williams & Connolly LLP, Washington, D.C. (Tobin Joe Romero of counsel), for appellant-respondent.

Sullivan & Cromwell, LLP, New York (David B. Tulchin of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered November 13, 2007, which granted defendant's dismissal motion only to the extent of dismissing part of the first cause of action and the entire fourth and sixth causes of action, unanimously modified, on the law, the fifth and seventh causes of action dismissed as well, and otherwise affirmed, with costs in favor of defendant payable by plaintiff.

The 2000 agreement and its 2003 revisions, when read together, made clear that plaintiff was entitled to a fee for bringing defendant and prospective investors together only if the actual investment was made within one year of either the last contact between plaintiff and a particular investor on defendant's behalf, or one of the parties providing the other with a written termination of the agreement, whichever occurred earlier. Plaintiff claims it introduced defendant to a

prospective investor, Norges Bank, and expended considerable time and expense encouraging Norges Bank to invest in the funds managed by defendant. Several weeks after an introductory meeting, defendant terminated the agreement with plaintiff. Norges Bank did eventually invest with defendant, but two years later. Under the explicit terms of the contract, which plaintiff negotiated and, in 2003, renegotiated, plaintiff was not entitled to an annual fee of 1% as a consequence of the Norges Bank investment. Plaintiff's claim that the 2003 amendment omitted -- and thus eliminated -- this one-year "tail" provision is belied by the terms of the 2003 amendment, which provided that the original fee schedule would continue, with exceptions not applicable herein, and even expanded the tail provision.

Plaintiff's claim that defendant caused Norges Bank to purposely delay its investment until after the lapse of the one-year tail period, so as to impede plaintiff's recovery of its fee, is an invalid substitute for its nonviable breach of contract claim (*Triton Partners v Prudential Sec.*, 301 AD2d 411 [2003]). The claim is defeated since defendant, in terminating its agreement with plaintiff, acted entirely within the agreement termination provision (*id.*). Plaintiff actively negotiated the tail provision, with all its risks and benefits to both parties, and cannot nullify that provision on the basis of a bare allegation that defendant acted unfairly, both in terminating the

agreement and in exercising its rights pursuant to the tail provision (*Gallagher v Lambert*, 74 NY2d 562, 567 [1989]). We adhere to the well-established principle that the implied covenant of good faith and fair dealing will be enforced only to the extent it is consistent with the provisions of the contract (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]; *SNS Bank v Citibank*, 7 AD3d 352, 354-355 [2004]). To allow plaintiff to plead a conclusory claim that defendant contrived with Norges Bank to delay its investment of hundreds of millions of dollars for two years so as to avoid paying plaintiff its fee, thereby breaching an implied covenant of good faith and fair dealing, would unjustifiably frustrate the expectations of the parties as made explicit in the contract. The stark inconsistency between the claim and the negotiated terms of the contract requires that the claim be dismissed.

For similar reasons, plaintiff's claim under the Connecticut Unfair Trade Practices Act (Conn Gen Stat § 42-110b[a]) must be dismissed. The claim is defeated because defendant, by adhering to the precise terms of the negotiated contract, did not act wrongfully (*Ramirez v Health Net of Northeast*, 285 Conn 1, 21, 938 A2d 576, 590 [2008]; *Edmands v CUNO, Inc.*, 277 Conn 425, 451, 892 A2d 938, 955 [2006]).

Finally, plaintiff has failed to adequately plead a claim that defendant tortiously interfered with its prospective

business relations with Norges Bank involving other potential investment opportunities from which plaintiff might have realized additional fees. Initially, the claim that in some unelaborated manner defendant directed Norges Bank, which had several hundred million dollars to invest in defendant's funds and elsewhere, to cease all communications with plaintiff, thus freezing plaintiff out of unrelated business opportunities with Norges Bank, fails as entirely conclusory (*Jacobs v Continuum Health Partners*, 7 AD3d 312 [2004]; *Herman v Greenberg*, 221 AD2d 251 [1995]). Moreover, the complaint fails to allege the requisite malice -- that defendant acted solely to harm plaintiff, or that the conduct constituted a crime or independent tort or was otherwise egregious (*Carvel Corp. v Noonan*, 3 NY3d 182, 189 [2004]).

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

ENTERED: MAY 22, 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 22, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Richard T. Andrias
Eugene Nardelli
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 1866/06
Respondent,

3710

-against-

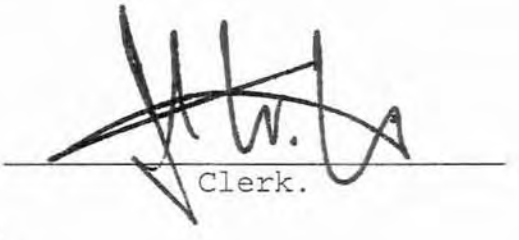
Radames Colon,
Defendant-Appellant.

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

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

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

ENTER:



Clerk.

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

Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3711 Gregory Healy, Index 314802/04
Plaintiff-Appellant,

-against-

Desiree Healy,
Defendant-Respondent.

Gregory Healy, appellant pro se.

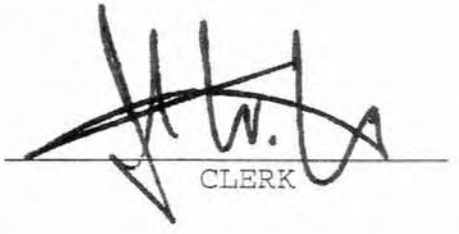
Order, Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered March 23, 2007, which denied plaintiff husband's motion for a downward modification of his spousal maintenance and child support awards, unanimously reversed, on the law, without costs, and the matter remitted to the Supreme Court for further proceedings consistent herewith.

Following a trial in August of 2005, judgment was entered in February 2007, awarding defendant wife, among other things, a divorce on her counterclaim, custody of the couple's five children, $2,750 in spousal maintenance per month and $2,631 in child support per month. Plaintiff was represented by counsel at trial, and he promptly moved pro se for a downward modification after entry of judgment. At trial, his 2005 income tax return was admitted into evidence, indicating a substantial decrease in earnings. The court never indicated it was imputing income to plaintiff based on an attempt to avoid obligations or hide income. Accordingly, it was required to consider plaintiff's

latest income tax return in determining the child-support award (Family Ct Act § 413[1][b][5][i]; Domestic Relations Law § 240[1-b][b][5][i]; *see Miller v Miller*, 18 AD3d 629, 631 [2005]), rather than income-averaging his reported income from 2001 to 2004 (*see Wallach v Wallach*, 37 AD3d 707, 708-709 [2007]). Plaintiff's most recent tax return should also have been considered in determining the appropriate award for spousal maintenance.

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

ENTERED: MAY 22, 2008



Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3712-
3713 In re Theresa Cannalonga, etc., Index 108662/06
Petitioner-Appellant,

-against-

Robert Doar, as Commissioner of the Office of Temporary and Disability Assistance of the New York State Department of Family Assistance, et al.,
Respondents-Respondents.

Law Office of Peter Vollmer, P.C., Sea Cliff (Peter Vollmer of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Oren L. Zeve of counsel), for State respondent.

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

Order, Supreme Court, New York County (William A. Wetzel, J.), entered March 23, 2007, which denied petitioner's application seeking, inter alia, to annul the determination of respondent New York State Office of Temporary and Disability Assistance (OTDA), made after a fair hearing, upholding the determination by respondent City Human Resources Administration (HRA) denying petitioner's parent-only application for public assistance, and dismissed the petition, unanimously affirmed, without costs. Order, same court and Justice, entered April 9, 2007, which denied petitioner's application for class certification, unanimously affirmed, without costs.

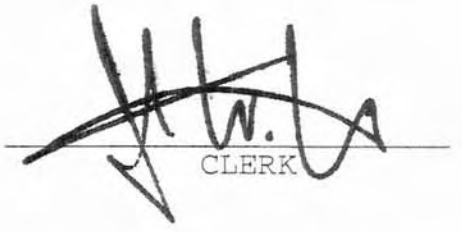
In August 2005, shortly after the birth of her daughter, petitioner, who at all relevant times has lived with her daughter and the latter's father, filed an application seeking temporary public assistance benefits for herself only, since her daughter's financial needs were being met by the daughter's father. While Social Services Law § 131-a(1) generally requires that public assistance be provided to "needy persons who constitute or are members of a family household," and while Social Services Law § 131-c(1) specifically requires that when a minor applies for public assistance, all siblings and parents residing with him or her "also apply for assistance and be included in the household application for the purpose of determining eligibility and grant amounts," the statute contains no provisions specifically requiring a parent applying for public assistance to include other household members in his or her application. Indeed, prior to December 2001, OTDA permitted parents living with minor children to make "parent-only" applications for benefits (*see Matter of Janes v Doar*, 20 AD3d 914 [2005]). Effective November 1, 2003, OTDA's Commissioner adopted a rule amending 18 NYCRR 352.30(a) to require any applicant for public assistance "to include his or her minor dependent children in the application." We reject petitioner's argument that the amendment is inconsistent with section 131-c and that OTDA therefore lacked authority to promulgate it. The challenged amendment permissibly

goes beyond the text of the legislative product to fill in an interstice in section 131-c(1) in a manner not inconsistent with its language or underlying purpose that, as indicated in section 131-a(1), eligibility for and the amount of benefits be determined on a "family household" basis (*see Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254 [2004]). Petitioner's additional argument, that requiring inclusion of minor children in a parent's application inverts the support relationship between parent and child in violation of in violation of Social Services Law § 101, is unpersuasive as such inclusion does not impose a support obligation on children but merely treats the family as an economic unit. We note that when a minor is the applicant, section 131-c(1) requires inclusion of all minor siblings in the application even though there is no statutory support obligation between siblings, and even though some siblings may receive child support earmarked for them while others do not. We have considered petitioner's other arguments, including that the challenged amendment was not adopted in compliance with the State Administrative Procedure Act § 202 and § 203, and that the regulation was subsequently amended to delete the challenged

amendment, and find them unavailing. In view of the foregoing, the motion for class certification is academic.

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

ENTERED: MAY 22, 2008



Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3714 The People of the State of New York, Ind. 5602/02
Respondent,

-against-

Ismael Otero,
Defendant-Appellant.

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

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

Appeal from judgment, Supreme Court, New York County (Budd G. Goodman, J.), rendered October 6, 2005, convicting defendant, upon his guilty plea, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony offender, to a term of 4 to 8 years, held in abeyance, and the matter remanded for a hearing on defendant's suppression motion.

Although the court granted defendant a *Dunaway* hearing on the issue of whether an undercover officer's identification of defendant was the fruit of an unlawful seizure, it summarily denied defendant's motion to suppress physical evidence. As the People concede, defendant is entitled to a hearing on his motion to suppress money recovered from his person. However, contrary to the People's argument, we find that the hearing should also encompass defendant's motion to suppress evidence recovered from a jacket found on a windowsill in defendant's vicinity.

Defendant's moving papers were sufficient to assert a reasonable expectation of privacy (*see People v Ramirez-Portoreal*, 88 NY2d 99, 110 [1996]) in the jacket, at least for pleading purposes. In any event, we note that the claim involving the jacket is "grounded in the same facts involving the same police witnesses" (*People v Mendoza*, 82 NY2d 415, 429 [1993]) as the claims regarding which defendant is undisputedly entitled to a hearing, and "given that CPL 710.60(3) merely permits, but does not mandate summary denial, the interest of judicial economy militates in favor of the court's conducting a hearing on the [entire] suppression motion in the exercise of its discretion despite a perceived pleading deficiency" (*People v Rivera*, 42 AD3d 160, 161 [2007]).

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

ENTERED: MAY 22, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 22, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Richard T. Andrias
Eugene Nardelli
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 5106/06
Respondent, 6052/06

-against- 3716

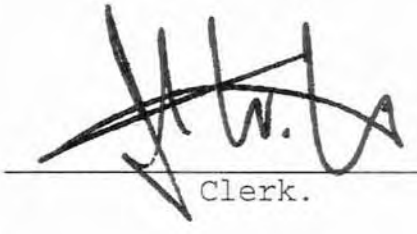
Steven Shaw,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (William A. Wetzel, J.), rendered on or about May 29, 2007,

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

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

ENTER:



Clerk.

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

Lippman, P.J., Andrias, Nardelli, Acosta, DeGrasse, JJ.

3717N Volo Logistics LLC, et al. Index 602536/07
Plaintiffs-Appellants,

-against-

Varig Logistica S.A.,
Defendant-Respondent,

Volo Do Brasil S.A.,
Defendant.

- - - - -

3718N Volo Logistics LLC,
Plaintiff,

CAT Aerea LLC,
Plaintiff-Respondent,

-against-

Varig Logistica S.A.,
Defendant-Appellant,

Volo Do Brasil S.A.,
Defendant.

Bracewell & Giuliani LLP, New York (Kenneth A. Caruso of counsel), for Volo Logistics LLC and CAT Aerea LLC, appellants/respondent.

Holland & Knight LLP, New York (H. Barry Vasios of counsel), for Varig Logistica S.A., respondent/appellant.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered December 21, 2007, which, to the extent appealed from as limited by the briefs, held in abeyance defendant Varig Logistica's motion to disqualify plaintiffs' attorneys and referred to a Special Referee the issue of whether it had a prior attorney-client relationship with the attorneys, unanimously

reversed, on the law, without costs, and the motion denied. Order, same court and Justice, entered January 29, 2008, which, to the extent appealed from, denied said defendant's motion to dismiss the second cause of action and compel plaintiff CAT Aerea to arbitrate that claim, unanimously reversed, on the law, without costs, and the motion granted.

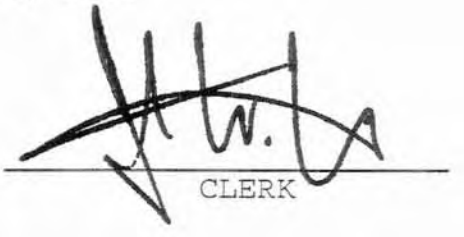
In this action for breach of a loan agreement representing $29.7 million worth of Brazilian airline financing, even if plaintiff lenders' attorneys did represent both sides in the loan transactions at issue, defendants knew at all times that they represented plaintiffs, did not have a reasonable expectation of confidentiality in their dealings with them, and thus cannot seek their disqualification in litigation over the loan obligations (*Meyers v Lipman*, 284 AD2d 207 [2001]; *see Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143 [1994], *affd* 87 NY2d 826 [1995]). We note that Varig failed to identify any confidential information that might have been divulged to the attorneys (*Saftler v Government Employees Ins. Co.*, 95 AD2d 54, 53 [1983]; *see also Bank of Tokyo Trust Co. v Urban Food Malls*, 229 AD2d 14, 31 [1996]).

The arbitration clause in the debt assumption agreement by which Varig assumed the borrower's loan obligation, governing "any" dispute "arising out of" said agreement, was broad enough to encompass the claims at issue; additional expansive language

was not necessary (*see Louis Dreyfus Negoce S.A. v Blystad Shipping & Trading Inc.*, 252 F3d 218, 225-226 [2d Cir 2001], *cert denied* 534 US 1020 [2001]). Unlike the clearly interrelated agreements here, the agreement containing the arbitration clause in *Renis Fabrics Corp. v Millworth Converting Corp.* (25 Misc 2d 280 [1960]), relied upon by the motion court, did not refer to the prior loan agreement that gave rise to the dispute in that case.

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

ENTERED: MAY 22, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 22, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Richard T. Andrias
Eugene Nardelli
Rolando T. Acosta
LeLand G.DeGrasse, Justices.

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342 East 72nd St. Corporation, et al.,
Petitioners,

-against-

3719
[M-703 & 2244]

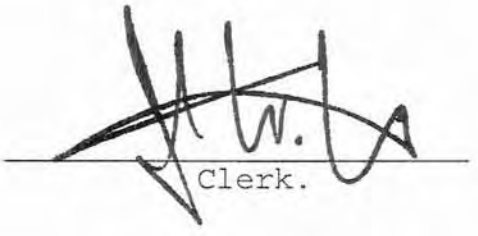
Metropolitan Transportation Authority,
Respondent.

The above-named petitioners having presented an application to this Court praying for an order pursuant to Eminent Domain Procedure Law § 207,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the cross motion to dismiss granted, without costs and without prejudice to recommencement after federal approval of the proposed sidewalk entrances.

ENTER:



Clerk.

Mazzarelli, J.P., Williams, Sweeny, Catterson, Moskowitz, JJ.

2831 In re Metrobuild Associates, Inc., Index 602211/06
Petitioner-Appellant,

-against-

Kenneth Nahoum, et al.,
Respondents-Respondents.

Rivelis, Pawa & Blum, LLP, New York (Howard Blum of counsel), for appellant.

Sheldon Farber, New York, for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 20, 2006, which denied the petition to confirm, and instead vacated an arbitration award, unanimously reversed, on the law, with costs, the award confirmed and the matter remanded for further proceedings including the entry of judgment.

On or about June 16, 2003, petitioner and respondent Kenneth Nahoum (Kenneth), a photographer and film maker, entered into a written construction contract, whereby Metrobuild agreed to perform extensive work on Kenneth's SoHo home (the premises). The contract provided for arbitration of all disputes. In or about June 2004, Kenneth assigned the contract to respondent Nahoum Production Enterprises (Nahoum), that Kenneth owned, and Kenneth guaranteed payment in the event of Nahoum's default.

On or about June 1, 2005, petitioner filed a demand for arbitration against Kenneth, claiming that he had breached the contract by failing to pay petitioner $495,978. Kenneth

responded that he had terminated the contract for cause because Metrobuild had not performed as promised.

Petitioner concedes that it was not a licensed home improvement contractor. The Administrative Code of the City of New York § 20-387(a) states: "No person shall solicit, canvas, sell, perform or obtain a home improvement contractor. . . from an owner without a license therefore." Courts strictly construe the licensing requirements for home improvement contractors (*Chosen Constr. Corp. v Syz*), 138 AD2d 284, 286 [1988]), and public policy prohibits an unlicensed home improvement contractor from recovering for breach of contract or in quantum meruit (*see Blake Elec. Contr. Co. v Paschall*, 222 AD2d 264 266 [1995]; *Matter of Schwartz [American Swim. Pools, Div. of Urban-Suburban Recreation]*, 74 AD2d 638, 639 [1980]).

Respondents never sought the proper remedy available to them consistent with the clear provisions of the Administrative Code, viz, to stay the arbitration of this dispute on the ground that the Administrative Code prohibited enforcement of the contract (*see Al-Sullami v Broskie*, 40 AD3d 1021 [2007]; *Matter of Schwartz*, 74 AD2d at 639). Instead, respondents actively engaged in the arbitration, participating in no less than 13 evidentiary hearings.

The arbitrator awarded Metrobuild the entirety of its unpaid bill plus anticipated profit, for a total of $204,513.

Nothing on the face of the arbitrator's award indicated that the arbitrator found that the work Metrobuild performed was residential in part.

In this proceeding, Metrobuild moved to confirm the arbitration award and respondents filed a cross motion to vacate the award on the ground that it violated the public policy against awarding damages to unlicensed home improvement contractors, and that it was irrational, in that the arbitrator essentially rewrote the contract by failing to consider the 10% retainage that the contract provided. Respondents also contended the parties never disputed that the apartment was Kenneth's home, and that he had a separate office nearby for his business.

The motion court vacated the award, holding that even if some of the work was commercial, part of it was residential, and, as such, Metrobuild's failure to obtain a license barred it from recovery. We now reverse.

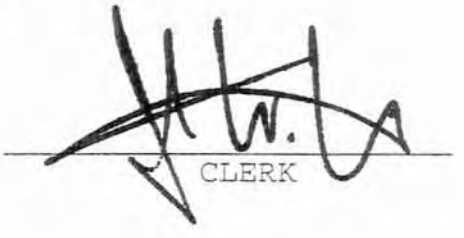
As this Court has repeatedly held, a court should not set aside an arbitral award when "there is nothing on the face of the award to indicate that it violates the public policy against recovery by unlicensed home improvement contractors" (*Matter of Hirsch Constr. Corp. [Anderson]*, 180 AD2d 604, 604 [1992]; *see also, Matter of Sanders Constr. Corp. [Becker]*, 292 AD2d 155 [2002], *lv denied*, 98 NY2d 614 [2002]; *Matter of Kuchar v Baker*, 261 AD2d 402 [1999]).

An arbitrator's factual findings and interpretation of the contract or judgment concerning remedies bind the court. "A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one" (*Matter of New York State Correctional Officers & Police Benevolent Assn., Inc. v State of New York*, 94 NY2d 321, 326 [1999]).

Here, there is nothing on the face of the award to indicate that the work petitioner performed was residential, even in part. Therefore, there is nothing on the face of this award to indicate that it violates public policy (*see Matter of Jaidan Indus. v M.A. Angeliades, Inc.*, 97 NY2d 659, 661 [2001]; *see also Matter of Hirsch Constr. Corp.*, 180 AD2d at 604-605). Accordingly, the court erred in vacating the award (*see Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350, 352 [2006] [Supreme Court exceeded its authority by undertaking its own review of the evidence and substituting its judgment for that of the arbitrator]).

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

ENTERED: MAY 22, 2008



Andrias, J.P., Nardelli, Acosta, DeGrasse, JJ.

3715 Parker & Waichman,
Plaintiff,

Index 605388/01
591271/04

-against-

Paul J. Napoli, et al.,
Defendants.

- - - - -

Napoli Kaiser Bern &
Associates LLP, etc.,
Third-Party Plaintiff-Respondent,

-against-

Jerrold Parker, et al.,
Third-Party Defendants,

Trief & Olk, LLP, et al.,
Third-Party Defendants-Appellants.

Trief & Olk, New York (Barbara E. Olk of counsel), for appellants.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Eric Alan Stone of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 7, 2007, which denied the Trief third-party defendants' motion for summary judgment without prejudice to renewal following further discovery, unanimously reversed, on the law, with costs, the motion granted, and the third-party complaint dismissed as to said parties. The Clerk is directed to enter judgment accordingly.

This Court's order of May 18, 2006 (29 AD3d 396, *lv dismissed* 7 NY3d 844 [2006]) held that the breach of contract

claims asserted by plaintiff on behalf of clients it had referred to third-party plaintiff law firm and others (collectively "NKB") in the Fen-Phen diet drug litigation could not be sustained in the absence of proof that plaintiff was a third-party beneficiary of any contract between the referred clients and NKB. We dismissed all of plaintiff's fraud-based claims as an impermissible collateral attack on a prior order. Left standing were plaintiff's allegedly accrued but unpaid referral fee claims, and contract-based damage claims (predicated upon alleged lost fees) associated with the referred-client cases that NKB pursued in an allegedly negligent manner. Such claims concern only contractual fee arrangements between plaintiff and NKB, and there is no evidence from NKB that the Trief parties were involved in such arrangements, or that they interfered with the performance of referral agreements. In any event, NKB's third-party claim for contribution from the Trief parties is devoid of merit inasmuch as there was no evidence that the latter breached a duty owed to plaintiff. In any event, there was no evidence that a breach by the Trief parties contributed to or aggravated plaintiff's alleged damages (*see Rosner v Paley*, 65 NY2d 736, 738 [1985]). Unrefuted record evidence indicates plaintiff's claimed damages arose solely from NKB's allegedly wrongful conduct.

NKB has not shown the need for further discovery. The Trief

parties' remaining arguments are rendered academic by the above conclusions, and we decline to reach them.

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

ENTERED: MAY 22, 2008

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
Milton L. Williams
John T. Buckley
Rolando T. Acosta, JJ.

3100
Ind. 18072C/05

The People of the State of New York,
Respondent,

-against-

Michelle Williams,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered July 12, 2006, convicting her, after a jury trial, of two counts of offering a false instrument for filing in the first degree and imposing sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson and Risa Gerson of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Vincenzo S. Lippiello and Rafael Curbelo of counsel), for respondent.

ACOSTA, J.

The core issue on this appeal is whether defendant's right to be present at all material stages of her trial was violated when the court held sidebar conferences with three potential jurors in defendant's absence. We hold that defendant's well-established right to be present (*see People v Antommarchi*, 80 NY2d 247 [1992]) was violated, and she is thus entitled to a new trial.

Defendant was charged with filing a false New York City Police Department complaint form and automobile theft affidavit alleging that her car had been stolen on February 10, 2005, when in fact it had been destroyed in a fire four days earlier.

During voir dire, defense counsel asserted his client's *Antommarchi* right to be present during questioning of prospective jurors. Notwithstanding the assertion of this right, the record is clear that defendant was not present during the questioning of three potential jurors. Specifically, defendant, through her lawyer, informed the court that she believed one of the prospective jurors had been a coworker. The venirewoman, S.D., told a court officer something similar.

At the beginning of the sidebar with S.D., the minutes indicate "a discussion . . . among the prospective juror, both assistant district attorneys and defense counsel." (According to

the People's brief, referring to an affidavit offered by the court reporter, the minutes should have added, "The defendant is not present.") S.D. told the court and counsel that she had worked at the same health center as defendant for two months, some eight years before the trial. She did not work with defendant, but she had daily contact with her. S.D. did not have any feelings about defendant one way or the other, would not lean one way or the other, and never saw defendant in a situation that led her to think badly of defendant. The minutes indicate that at the conclusion of this sidebar, defendant was present for the voir dire of a different prospective juror. Although defendant still had peremptory challenges left, she did not challenge S.D., who became a member of the jury.

Defendant was also absent from sidebar discussions with M.C. and Y.T. M.C. said she had a prior conflict with the law, and could not promise that she would keep her own case separate and apart from defendant's. Y.T. said she had lived next door to a firehouse for 20 years, and this might affect her assessment of witnesses who were firemen; she did not think she could keep her positive experiences with firefighters separate and apart from defendant's case. Both M.C. and Y.T. were excused on consent.

Defendant was ultimately convicted of two counts of offering a false instrument for filing in the first degree (Penal Law §

175.35), and was sentenced to five years' probation and a fine of $1,000. On appeal she contends, inter alia, that her right to be present at all material stages of her trial was violated because of her absence from conferences with prospective jurors S.D., M.C. and Y.T. We agree.

It is well settled that a criminal defendant has a fundamental right to be present at all material stages of trial (CPL 260.20; *People v Roman*, 88 NY2d 18, 25-26 [1966]; *People v Favor*, 82 NY2d 254, 262-265 [1993]), and that a sidebar discussion with a prospective juror regarding her background, bias and ability to be impartial is considered a material stage of a trial (*People v Antommarchi*, 80 NY2d 247 [1992]; *see also People v Maher*, 89 NY2d 318, 324 [1996]). Exclusion of a defendant from such a sidebar discussion without first obtaining a knowing, intelligent and voluntary waiver of the right to be present constitutes per se reversible error where the prospective juror is either seated on the jury, excused on consent, or peremptorily challenged by the defense (*see People v Davidson*, 89 NY2d 881, 883 [1996]; *Antommarchi*, 80 NY2d at 250; *but see Maher*, 89 NY2d at 325 ["where a defendant has been erroneously excluded from a sidebar conference with a prospective juror, the error is not reversible if that potential juror has been excused for cause by the court"]; *Roman*, 88 NY2d at 28).

Here, defendant was not present while prospective jurors S.D., M.C. and Y.T. were being questioned about their potential bias and ability to be impartial. Indeed, the People concede as much (*see People v Madera*, 216 AD2d 89, 90 [1995] [where sidebar noted only presence of court and counsel, and resumption in open court noted presence of defendant, defendant's absence from sidebar was apparent from record]). And, based on the record before us, we reject "the People's speculative suggestion that defendant may have been able to hear what was said during the sidebar" (*People v Rodriguez*, 20 AD3d 355, 357 [2005]). Moreover, S.D. went on to serve as a juror and M.C. and Y.T. were excused on consent. Accordingly, defendant's absence from these sidebar discussions constitutes per se reversible error (*Davidson*, 89 NY2d at 883).[1]

The People contend that defendant implicitly waived her

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[1] Although this Court has deemed certain excusals on consent to be excusals for cause, in which case defendant's absence would not have been reversible error (*People v Maher*, 89 NY2d at 325; *see People v Garcia*, 265 AD2d 171 [1999], *lv denied* 94 NY2d 862 [1999] [excusal of prospective jurors on consent after expressing some degree of bias against defendant was in the nature of an uncontested excusal for cause]; *People v Martin*, 253 AD2d 681 [1998], *lv denied* 93 NY2d 900 [1999]), in the present case the rationale underpinning *Garcia* and *Martin* could potentially apply only to M.C. and Y.T. Inasmuch as a reversal would be required because defendant was not present during the colloquy with S.D., who was seated as a juror, there is no reason for this Court to determine whether *Garcia* and *Martin* are applicable to the facts of this case.

right to be present at sidebars with prospective jurors because she was absent from ten sidebar discussions. This argument, however, is unavailing. First, "[a] court may conduct side-bar discussions with prospective jurors in a defendant's absence if the questions relate to juror qualifications such as physical impairments, family obligations and work commitments" (*Antommarchi*, 80 NY2d at 250). Of the ten sidebars mentioned by the People, four involved such issues. One cannot infer from defendant's absence at those sidebars that she was also willing to be absent from sidebars touching on partiality.

Second, one of the ten sidebars mentioned by the People was with a *sworn* juror, not a *prospective* juror. "The disqualification of a seated juror presents a different issue than the issue addressed in . . . *Antommarchi*" (*People v Harris*, 99 NY2d 202, 212 n 2 [2002]). "Whether a seated juror is grossly unqualified to serve is a legal determination, and as such the presence of counsel at a hearing to determine a juror's qualification is adequate" (*id.* at 212, citations omitted).

Third, a waiver of the right to be present must be "voluntary, knowing and intelligent" (*People v Vargas*, 88 NY2d 363, 375-376 [1996]), and "will not be inferred from a silent record" (*People v Lucious*, 269 AD2d 766, 767 [2000]; *see also People v McAdams*, 22 AD3d 885 [2005]). Indeed, *McAdams* found

that the defendant did not waive his right to be present, even though he was "absent from numerous sidebar conferences" (*id.* at 885-886).

A reconstruction hearing should not be ordered because there is nothing in the record to suggest that defendant may have waived her rights after having asserted them in open court (*see People v Velasquez*, 1 NY3d 44, 49 [2003] [no reconstruction hearing required where there is no evidence that a proceeding was not transcribed, that the trial court refused to record the proceedings, that a portion of the minutes were lost, or that there was some ambiguity in the record]). On the contrary, unlike *Lucious*, and *People v Tor* (254 AD2d 214 [1998]),[2] relied on by the prosecution, the record in this case seems to indicate that the stenographer painstakingly recorded all relevant colloquy as well as who was present at each sidebar and in open court.

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[2] In *Lucious*, the record did not indicate whether the jurors were excused by the court, on consent, or pursuant to a peremptory challenge (269 AD2d at 768-769). Similarly, in *Tor* the record was inconclusive as to whether the defendant was absent from the robing room conferences, and if he was, whether he had waived his right to be present (254 AD2d at 214). In the present case, on the other hand, the record definitively states that defendant exercised her desire to be present during all sidebars, that she was not present during the sidebars in question, that M.C. and Y.T. were excused on consent, and that S.D. was selected to serve on the jury. There is simply no ambiguity in this record.

Nor is this Court ordering a reconstruction hearing to determine the distance between the bench and the defense table to determine, as the People suggest, whether defendant was "essentially present at the sidebars." As we noted in *Rodriguez* (20 AD3d at 357), we are not "persuaded by the People's speculative suggestion that defendant may have been able to hear what was said during the sidebar because he was only seated 12 feet away." The distance between the table and the bench is not determinative; it does not take into consideration the loudness of the sidebar conferences (which by their very nature are intended to be held in hushed tones) on the day they occurred or defendant's ability to hear the conversations.

We have considered defendant's remaining arguments regarding the pre-trial *Huntley/Dunaway* hearing and determination and find them to be without merit.

Accordingly, the judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered July 12, 2006, convicting defendant, after a jury trial, of two counts of offering a false instrument for filing in the first degree, and sentencing her to a term of five years' probation and a fine of $1,000, should be reversed, on the law, and the matter remanded for a new trial.

All concur except Williams and Buckley, JJ.
who dissent in part in an Opinion by Buckley, J.

BUCKLEY, J. (dissenting in part)

Rather than remanding for a new trial, I would remand for a reconstruction hearing to determine whether the sidebar with prospective juror S.D. was conducted in such a manner as to permit defendant, seated only eight feet away, to see and hear the colloquy (*see People v Brown*, 221 AD2d 160 [1995], *lv denied* 87 NY2d 898 [1995]; *see also People v Torres*, 224 AD2d 251 [1996], *lv denied* 88 NY2d 886 [1996] [defendant was in close proximity to sidebar, and therefore able to see and hear]; *People v Swift*, 213 AD2d 355 [1995], *lv denied* 86 NY2d 784 [1995] [defendant's position at defense table did not prevent him from hearing sidebar conference]; *compare People v Rodriguez*, 20 AD3d 355, 357 [2005] [speculative that defendant, seated twelve feet away, could hear]). Indeed, in *People v Davidson* (210 AD2d 76 [1994]) we remanded for a reconstruction hearing to determine "the extent to which defendant actually saw and heard sidebar voir dire." It was only after a reconstruction hearing was conducted that a determination could be made that the defendant, who was seated ten feet away, could not hear a sidebar conference (*see* 224 AD2d 354, 355 [1996], *affd* 89 NY2d 881 [1996]).

A reconstruction hearing would not be necessary with respect to prospective jurors M.C. and Y.T., because their excusals were

in the nature of an uncontested excusal for cause (*see People v Garcia*, 265 AD2d 171 [1999], *lv denied* 94 NY2d 862 [1999]).

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

ENTERED: MAY 22, 2008

CLERK