SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 27, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2453 The People of the State of New York, Respondent, Ind. 7298/00

-against-

Tyrone Craig,
Defendant-Appellant.

Tyrone Craig, appellant pro se.

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

Order, Supreme Court, New York County (Renee White, J.), entered or about July 10, 2006, which denied defendant's CPL 440.10 motion to vacate his judgment of conviction, unanimously modified, on the law, to the extent of remanding the matter for resentencing, which shall include the proper pronouncement of the relevant term of postrelease supervision and, except as so modified, affirmed.

Defendant was convicted, on his guilty plea, of attempted kidnapping in the first degree, a class B violent felony, and sentenced to a term of 10 years, the minimum sentence prescribed by law for a second violent felony offender (Penal Law § 70.04[3][a]). On this motion, defendant asserts that the court

failed to advise him, either at plea or at sentence, that the term of incarceration would be followed by a five-year period of postrelease supervision, as mandated by statute (Penal Law § 70.45[1], [2]). He contends that such sentence does not comport with the 10-year term he was promised in exchange for his guilty plea (*see People v Catu*, 4 NY3d 242, 245 [2005]). However, defendant does not seek to vacate his plea but requests modification of his sentence to a five-year prison term followed by the mandated five-year period of postrelease supervision.

It is settled that a defendant's remedy for a *Catu* violation is withdrawal of the plea and restoration of the defendant's pre-agreement status (*People v Hill*, 9 NY3d 189, 191 [2007], *cert denied* 2008 WL 394022, 2008 US LEXIS 4138 [2008]). Where the defendant does not seek to vacate his plea and the sentence imposed is not in compliance with statutory requirements, the matter must be remanded for pronouncement of a legal sentence to correct the procedural error (*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 27, 2008

CLERK

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

2802 In re Jonathan C.,

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

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

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

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about August 16, 2006, which denied appellant's motion to vacate an order of disposition, same court and Judge, entered on or about April 22, 2005, which adjudicated him a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of sexual abuse in the first, second and third degrees, and forcible touching, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously reversed, as a matter of discretion in the interest of justice, without costs, the motion granted, the juvenile delinquency adjudication vacated, and the matter remanded for new fact-finding and dispositional hearings before a different Judge.

Appellant, whose order of disposition has already been affirmed by this Court (29 AD3d 386 [2006]), moved, pursuant to

Family Court Act § 315.2 and § 355.1, to vacate the order of disposition and dismiss the petition on the ground that, after a separate, subsequent fact-finding hearing, the same Judge who presided over appellant's hearing dismissed the petition against the three juveniles with whom appellant allegedly acted in concert in sexually abusing the victim. While it is generally no defense to a prosecution based on accessorial liability that a co-actor "has not been prosecuted for or convicted of any offense based upon the conduct in question, or has previously been acquitted thereof" (Penal Law § 20.05[2]; *see also Matter of Khaliek W.*, 193 AD2d 683, 684 [1993]), we find, under the facts presented herein, that a substantial change in circumstances exists and that appellant should be granted a new fact-finding hearing at which he would be given the opportunity to elicit impeaching testimony introduced at the other three juveniles' hearing (*see* Family Court Act § 355.1).

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

ENTERED: MAY 27, 2008

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

3019 Cary Hershkowitz, Index 104436/06
Plaintiff-Respondent,

-against-

New York City Department of Education,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for appellant.

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

Order, Supreme Court, New York County (Karen S. Smith, J.), entered January 8, 2007, which, to the extent appealed from as limited by the briefs, denied defendant the New York City Department of Education's (DOE) motion to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

In 1999, DOE commenced a disciplinary proceeding pursuant to Education Law § 3020-a, charging plaintiff, a tenured teacher, with 12 specifications of sexual misconduct and other inappropriate interactions with respect to several students. Plaintiff moved to suppress his written confession, in which he admitted to sending "many" instant messages to a female student explicitly discussing and soliciting various sexual acts. The hearing officer suppressed the statement as violative of the

collective bargaining agreement between DOE and the United Federation of Teachers (UFT), and thereafter dismissed all the charges against plaintiff and ordered him reinstated. Supreme Court vacated the determination and directed a new hearing, at which the written statement was to be considered; we affirmed (*Board of Educ. of City of N.Y. v Hershkowitz*, 308 AD2d 334 [2003], *lv dismissed* 2 NY3d 759 [2004]).

Following the new hearing, at which the written statement was admitted and plaintiff declined to testify, the hearing officer sustained six of the charges, and as a penalty imposed a one-year suspension without pay. DOE commenced a special proceeding pursuant to CPLR article 75 and Education Law § 3020-a, challenging the penalty as inadequate. Supreme Court granted DOE's petition to the extent of remanding for a new hearing before a different hearing officer. A reading of the detailed, 15-page decision reveals that Supreme Court upheld the factual determination that plaintiff was guilty of the six sustained charges and remanded only on the issue of the penalty. Supreme Court ruled that the penalty of a one-year suspension was "totally irrational" and "against New York's strong public policy of protecting children," in that it:

> "not only defies logic given the seriousness of [plaintiff's] admitted sexual misconduct . . ., but it is offensive to the disciplinary process negotiated by [DOE] and [UFT]. Indeed, to suspend [plaintiff] for one year actually tells him and everybody else that these perverted and insidious acts are not serious. Importantly, it also tells [the female student] and her mother that [the student's] resolve and her mother's courage used in withstanding and reporting [plaintiff's] persistent and improper advances were for naught. In fact, [the student's] resolve is being used against her by those responsible for ensuring her safety as an attempt to minimize the heinous nature of [plaintiff's] acts . . . [T]his Court chooses to call this teacher's acts for what they are -- an abuse of trust of the most serious kind . . .
>
> "To be sure, the fact that physical contact apparently did not occur here . . . is a tribute to the student's resolve, not [plaintiff's] exercise of restraint. For his part, it is clear that he tried . . .
>
> "Last, considering the seriousness of [plaintiff's] conduct, a one year suspension is not justified by the fact that [he] had a clean record prior to this incident . . . He not only tried extremely hard to seduce [the student] into a clandestine and inappropriate relationship, but systematically dismantled the systems a parent puts in place to protect her daughter, namely honesty and open communication."

The new hearing officer misconstrued the order as directing a de novo hearing on the merits of the charges as well as the appropriate penalty. The parties relied on the record established at the prior hearings, and the hearing officer found plaintiff culpable of the same six charges previously sustained, and directed him to be dismissed from service.

Thereafter, plaintiff commenced this action to recover back

pay and benefits for the period of time between the award suspending him for one year, which was annulled, and the final order terminating his employment.

The complaint should be dismissed for failure to state a cause of action, since the matter was remanded solely for a redetermination of the penalty and plaintiff ultimately received a harsher penalty (*see Matter of Lugo v City of Newburgh*, 209 AD2d 414 [1994]; *Matter of DeMartino v Meehan*, 149 AD2d 703, 704-705 [1989]). The fact that the second hearing officer erroneously believed that he was to make a redetermination as to the charges is immaterial.

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

ENTERED: MAY 27, 2008

Mazzarelli, J.P., Saxe, Friedman, Nardelli, JJ.

3040-
3040A Kermanshah Oriental Rugs, Inc., Index 602070/04
Plaintiff-Appellant,

-against-

Parivas Latefi, et al.,
Defendants-Respondents.

Harvard Hollenberg, New York, for appellant.

Allen M. Schwartz, New York, for respondents.

Judgment, Supreme Court, New York County (John E. H. Stackhouse, J.), entered May 3, 2007, after a nonjury trial, dismissing the complaint and awarding defendants the principal sum of $11,200 on their counterclaim, unanimously reversed, on the law and the facts, without costs, plaintiff awarded $16,000, with statutory interest from December 31, 2001, on its claim for goods sold and delivered, and the counterclaims dismissed. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered on or about January 22, 2007, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Initially, we find that the trial court erred when it dismissed plaintiff's claims on the ground that the agreements herein ran afoul of the statute of frauds (General Obligations Law § 5-701[a]), which applies only to those agreements which, by their terms, "have absolutely no possibility in fact and law of

full performance within one year" (*D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]; *see Foster v Kovner*, 44 AD3d 23, 26 [2007]). In this matter, no such terms existed and the agreements between the parties were certainly capable of being performed within the statutory time frame.

We also find unavailing plaintiff's claim that a new trial is warranted on the ground that the decision and judgment failed to state the essential facts on which they are based for, although brief, the trial court's decisions set forth sufficient findings of fact and conclusions of law to satisfy the requirements of CPLR 4213(b). In any event, the record, which encompasses the entire trial transcript and exhibits, is adequate enough to allow this Court to conduct an independent factual review and make the requisite findings (*Hugh O'Kane Elec. Co., LLC v MasTec N. Am., Inc.*, 45 AD3d 413, 414 [2007]; *Marks v Macchiarola*, 250 AD2d 499 [1998]).

It is well settled that the fact-finding determination of a trial court should not be disturbed, particularly where such determination rests, in whole or in part, upon the credibility of witnesses (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; *Bragdon v Bragdon*, 23 AD3d 203, 204 [2005]).

Bearing the foregoing in mind, we decline to disturb the trial court's findings in favor of defendants with regard to those consignments where defendants claimed, and plaintiff

denied, that plaintiff had accepted reduced payments for the delineated items. With respect to two of the consignments, however, dated January 22, 2002 and May 22, 2002, both of which involved $8,000 items, the documentary evidence indicates that those items were delivered to defendants but never paid for.

Finally, the court erred in awarding $8,000 on a counterclaim since that claim sought damages for services rendered to one of plaintiff's partners in his individual capacity, even though he is not a named party (*Michelman-Cancelliere Iron Works, Inc. v Kiska Const. Corp-USA*, 18 AD3d 722, 723 [2005]; *Corcoran v National Union Fire Ins. Co. of Pittsburgh*, 143 AD2d 309, 311 [1988]). Moreover, there was no basis for the additional award of $3,200 for payments allegedly not credited to defendants, especially in the absence of any counterclaim for such relief.

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

ENTERED: MAY 27, 2008

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

3168 Douglas Lackow, Index 103798/06
Petitioner-Respondent,

-against-

The Department of Education (or "Board")
of the City of New York, et al.,
Respondents-Appellants.

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

Gregory L. Hawthorne, Brooklyn, for respondent.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered January 30, 2007, which, to the extent appealed, granted the petition to the extent of vacating certain determinations of teacher misconduct and remanded for imposition of a lesser penalty than termination of employment, unanimously reversed, on the law, without costs, the determinations reinstated with respect to specifications III(c), (d), (g), (j), (k) and (l), the cross motion to dismiss granted, and the petition dismissed.

At issue in this matter, brought pursuant to CPLR 7511 and 7803 and Education Law § 3020-a(5), are Supreme Court's vacatur of findings of guilt on several specifications filed against the petitioner, Douglas Lackow, by respondent Department of Education of the City of New York (DOE) and its remand to the hearing officer for reconsideration of the penalty to be imposed by the DOE.

On December 3, 2004, petitioner, then employed by DOE as a tenured biology teacher, became the subject of an investigation of the Special Commissioner's Office for Investigation based on an incident in which a student reported to the Assistant Principal that she had yelled out "Lackow sucks," and petitioner responded, "No, you suck, well that's what it says in the boys' bathroom."

In response to this reported incident, a DOE Special Investigator interviewed the Principal, Assistant Principal, seven students, a teacher and a teaching assistant. The investigation unearthed a number of complaints about petitioner's use of sexual innuendo in high school classes he taught, and the First Deputy Commissioner prepared a report concluding that the claims were substantiated and that termination was proper. In or about February 2005, petitioner was removed from the classroom and reassigned to a DOE facility in Staten Island.

On or about April 19, 2005, DOE preferred disciplinary charges, pursuant to Education Law § 3020-a, consisting of 16 specifications. DOE alleged that petitioner had "engaged in insubordination, sexual harassment, used inappropriate language and engaged in conduct unbecoming a teacher." A compulsory arbitration hearing was held pursuant to Education Law § 3020-a. Five of the specifications were withdrawn before the hearing and two were dismissed by the hearing officer in a decision dated

February 24, 2006. The remaining nine specifications were sustained, and a penalty of discharge was imposed.

Petitioner commenced this proceeding seeking vacatur of the hearing officer's findings or, in the alternative, a penalty short of termination. DOE cross-moved to dismiss the proceeding and to confirm the arbitration determination. Supreme Court vacated six of the specifications, sustained three others, and remanded the matter to the hearing officer to reconsider the penalty because it found the penalty of dismissal so disproportionate to petitioner's conduct as to shock the court's sense of fairness and constitute an abuse of discretion. We reverse, reinstate the hearing officer's findings and recommended penalty, and grant the cross motion to dismiss the petition and confirm the determination.

Initially, as noted, three of the specifications sustained by the hearing officer were not vacated by the court. The first was Specification I(a), which alleged that petitioner had made a comment about the color of a student's underwear. In Specification II, petitioner was charged with saying, in response to a female student's comment that "[petitioner sucks]," "No, you suck, well that's what it says in the boys' bathroom." The third charge, Specification III(a), alleged that, while teaching with a model of female reproductive organs, petitioner said to a male student words to the effect "that [the student] would never see

one, so enjoy it, referring to a woman's vagina." Although the court did not disturb those findings, it concluded that, within the context in which each of these comments was made, the language, while inappropriate, did not justify the penalty of dismissal, which the court found to be disproportionate to the offenses and shocking to its sense of fairness.

The six other specifications that the hearing officer sustained, but which the court vacated, reflect a similar pattern of inappropriate comments. In Specification III(c), petitioner was charged with saying to a student words to the effect "I don't want to hear stories of you with your legs up in the air." The court found that the comment was made in the context of a reprimand to a female student who was describing to a fellow student how "[a] boy put my legs in the air like this" and, then, for dramatic effect, actually lifted her legs up over her desk and then into the air. The court concluded that under the circumstances the comment did not constitute language or behavior unbecoming a teacher without explaining why the language used by petitioner was appropriate, especially when he was admonishing a teenage girl.

In Specification III(d), petitioner was charged with saying, in the course of a conversation about masturbation, words to the effect "that there are some people in this class that would never leave their rooms." The court found that the comment did not

constitute language unbecoming a teacher since it was made during a classroom discussion of safe sex, and observed that petitioner testified that he had actually said, "there are people who will misunderstand this information and they may not leave the house." The court's acceptance of petitioner's explanation that this was a harmless joke is inconsistent with the repetitive pattern of petitioner's sexually-laced comments to a gathering of impressionable adolescents.

Specification III(g) charged petitioner with talking to students about how many times he ejaculates. In vacating the finding of guilt with regard to this specification, the court found that there was no evidentiary support for the hearing examiner's conclusion, despite the testimony of a paraprofessional that she heard petitioner discuss the number of times he ejaculated while masturbating.

In Specification III(j), petitioner was charged with talking to the students about having sex with animals. Petitioner testified that, in a class on human sexual reproduction, one of the students asked if sex between an animal and a human being would result in a "half animal, half human." As a result, petitioner testified, he entered into a discussion of bestiality, "a sexual disorder in which people want to have sex with animals." He claimed that the exchange was limited to the scientific aspects of the process and the genetic consequences of

such intercourse. The court found that this colloquy did not constitute conduct unbecoming a teacher, without elaborating on how the subject of, as the court phrased it, "cross-fertilization" can also properly encompass a discussion of bestiality. The court also ignored testimony that petitioner was overheard saying "animals don't enjoy having sex and that's why they make strange noises."

Specification III(k) charged petitioner with talking to students about necrophilia. Petitioner testified that he discussed that subject only in response to students' questions. The hearing officer rejected petitioner's explanation, stating that the "suggest[ion] that discussion[] on [the] subject[] [of] necrophilia . . . [was an] appropriate or legitimate subject[] of discussion is beyond comprehension." The court, however, found that the "only" evidence supporting this specification was testimony from a teacher that she overheard petitioner telling a group of students about a man who was arrested for having sex with a dead body in the morgue of an upstate college town. That "only" one witness provided testimony supporting this specification was an insufficient basis upon which to disturb the findings of the hearing officer; the testimony provided a rational basis for the hearing officer's conclusion that petitioner discussed the subject and that the discussion was inappropriate.

In the last charge, Specification III(l), petitioner was charged with talking to students about women having multiple orgasms. The court vacated the finding of guilt, observing that petitioner testified that the issue was raised by a student during a discussion of the male and female reproductive systems. When the student queried as to why men cannot have multiple orgasms, petitioner claimed that he explained the biological reasons, i.e., that a certain period of time is required for the production of male sperm after ejaculation. In vacating the finding the court stated, "[DOE] has shown no rational basis for why class discussion of orgasm and ejaculation constitutes language unbecoming a school teacher in the context of instruction on human sexual reproduction." Yet, as the Assistant Principal testified, the course was designed to prepare students for the Regents biology exam, with limited material on human reproduction.

Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. Under such review an award may only be vacated on a showing of "misconduct, bias, excess of power or procedural defects" (*Austin v Board of Educ. of City School Dist. of City of N.Y.*, 280 AD2d 365 [2001]). Nevertheless, where the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties

have submitted to voluntary arbitration (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]; *Cigna Prop. & Cas. v Liberty Mut. Ins. Co.*, 12 AD3d 198, 199 [2004]). The determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78 (*Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 186 [2002]). The party challenging an arbitration determination has the burden of showing its invalidity (*Caso v Coffey*, 41 NY2d 153, 159 [1990]).

Here, the record is clear that petitioner made the statements alleged in the specifications. Although the court found that some of the statements were contextually inoffensive, that is not a proper basis for vacating the findings that they had been made. Petitioner was charged with making the statements, and the record supports the hearing officer's conclusions that he made them. Whether the making of the statements, individually or in the aggregate, justified petitioner's removal is a separate issue.

Not only did the court err in seeking to find justifications for the statements, in at least one instance it paid no heed to highly relevant testimony. The court found that petitioner did not make the statement concerning the number of times he ejaculated by referencing one witness's testimony, but apparently

overlooked the testimony of another witness clearly stating that she heard him discussing his ejaculations.

Moreover, the court suggested that some of the students were disciplinary problems, and thus their credibility was suspect. A hearing officer's determinations of credibility, however, are largely unreviewable because the hearing officer observed the witnesses and was "able to perceive the inflections, the pauses, the glances and gestures -- all the nuances of speech and manner that combine to form an impression of either candor or deception" (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). The record does not support the inference that the witnesses upon whose testimony the hearing officer relied were incredible as a matter of law. Thus, it was improper for the court to credit petitioner's testimony to the exclusion of the accounts given by the other witnesses.

Furthermore, petitioner was teaching a biology class, and was not a student counselor empowered to give advice on teenage sexuality. That certain questions would arise in a biology class that had some relationship to the course but were not part of the curriculum is understandable. However, petitioner had been warned by his Assistant Principal in conversations and writing about the inappropriateness of his behavior on at least three prior occasions. His choice of language, in any event, is inexcusable. Petitioner's argument that he had not been warned

of the possibility of dismissal rings hollow. Even without a warning about the possibility of dismissal, certain conduct, such as petitioner's, is clearly unacceptable. Moreover, being admonished not to repeat prior behavior patterns was sufficient warning.

The standard for reviewing a penalty imposed after a hearing pursuant to Education Law § 3020-a is whether the punishment of dismissal was so disproportionate to the offenses as to be shocking to the court's sense of fairness (*Matter of Harris v Mechanicville Cent. School Dist.*, 45 NY2d 279, 285 [1978]; *Matter of Pell v Bd. of Educ.*, 34 NY2d 222 [1974]).

In view of petitioner's proven misconduct, and that he had three times been previously warned in writing about the inappropriateness of his behavior, the penalty of dismissal does not shock the conscience. Of particular concern is the repetitive nature of petitioner's misconduct. Petitioner continued in a pattern of conduct that was clearly irresponsible and inappropriate within the classroom setting. Discussing his own ejaculations, admonishing a student about putting her legs in the air, telling another student that he should take a good look at a diagram of a woman's vagina because he will not see one otherwise, talking about the color of a student's underwear, and responding to a student's inappropriate comment by remarking about seeing her name on bathroom walls, constitute more than

isolated, aberrant behavior. Rather, such conduct is indicative of a continued pattern of offensive behavior that reflect an inability to understand the necessary separation between a teacher and his students.

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

ENTERED: MAY 27, 2008

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3720 The People of the State of New York, Respondent, Ind. 12131/91

-against-

Cesar Martinez, Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Eduardo Padro, J.), entered on or about September 29, 2006, which denied defendant's motion to be resentenced under the Drug Law Reform Act of 2004, unanimously affirmed.

The court, which expressly stated that defendant was eligible to be considered for resentencing, properly recognized the degree of discretion it possessed (*compare People v Arana*, 32 AD3d 305 [2006]) and providently exercised it. Defendant was a major participant in a large-scale narcotics ring, as established by evidence adduced at his trial, and there is no basis for disturbing the court's determination that, in view of the seriousness of defendant's crimes, resentencing was not warranted

(*see e.g. People v Vasquez*, 41 AD3d 111 [2007], *lv dismissed* 9 NY3d 870 [2007]).

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

ENTERED: MAY 27, 2008

CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3721-
3721A-
3721B Hannah Goldstein, Index 24388/88
Plaintiff,

Roberta Schreiber Ulmer,
Plaintiff-Appellant,

-against-

Arthur I. Winard,
Defendant-Respondent,

Marvin Rosenblatt, et al.,
Defendants.

Guzov Ofsink, LLC, New York (Damien Matthew Bosco of counsel), for appellant.

Arthur I. Winard, P.C., New York (Mark L. Rosenfeld of counsel), for respondent.

Judgment, Supreme Court, New York County (Rolando T. Acosta, J.), entered July 31, 2007, dismissing the complaint as against defendant Winard, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered April 13, 2007, and October 2, 2007, unanimously dismissed, without costs.

The action was properly dismissed for failure to prosecute, plaintiffs having failed to show a reasonable excuse for not having served and filed a note of issue within 90 days of defendant Winard's CPLR 3216 demand, or a reasonable excuse for the extensive past delay in prosecuting this action (*Baczkowski v Collins Constr. Co.*, 89 NY2d 499 [1997]). Since Winard's service

of the 90-day demand in September 2006 for resumption of prosecution (CPLR 3216[b][3]), plaintiff Ulmer's attorney has sought to withdraw from the case, and neither plaintiff has taken any steps to resume prosecution or file a note of issue. None of the papers submitted in response to Winard's motion offered an adequate explanation for the more than 15 years of delay in prosecuting this action.

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

ENTERED: MAY 27, 2008

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3722 In re Kavon B.,

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 October 3, 2007, which adjudicated appellant a person in need of supervision, upon a fact-finding determination that appellant committed acts, which, if committed by an adult, would constitute criminal sexual act in the first degree and sexual misconduct, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's motion to dismiss the petition in furtherance of justice, and instead placed him on probation while substituting a person in need of supervision adjudication for appellant's juvenile delinquency adjudication. In light of the seriousness of the underlying incident, appellant's need for therapy, and the unlikelihood of his receiving proper therapy without court

intervention, this disposition was the least restrictive alternative consistent with appellant's needs (*see e.g. Matter of Jonaivy Q.*, 286 AD2d 645 [2006]).

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

ENTERED: MAY 27, 2008

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3723 Jeremy Delgado, etc., et al., Plaintiffs-Appellants, Index 21412/04

-against-

New York City Housing Authority, Defendant-Respondent.

Kerner & Kerner, New York (Kenneth T. Kerner of counsel), for appellants.

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 24, 2007, which, in an action for personal injuries sustained by the infant plaintiff in an apartment fire, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established a prima facie entitlement to summary judgment by submitting evidence including, inter alia, the investigating fire marshal's deposition testimony that the fire had been caused by a problematic extension cord that was situated in combustible material, rather than any defect in the premises' wiring system or outlet (*see Butler-Francis v New York City Hous. Auth.*, 38 AD3d 433 [2007]; *Colon v H & B Plumbing & Heating*, 305 AD2d 235 [2003], *lv denied* 1 NY3d 506 [2004]). The evidence further shows that defendant had provided the requisite smoke detectors to and maintained them for the tenant of record, and

that the fire had not spread because of the absence of a self-closing door (*see Graham v New York City Hous. Auth.*, 42 AD3d 323 [2007], *lv denied* 9 NY3d 816 [2007]).

Plaintiffs' opposition failed to raise a triable issue of fact that the fire had been caused by some reason other than a compromised extension cord. The affidavits from plaintiffs' experts were not based on facts in the record or personally known to the expert witnesses (*see Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714-715 [2005]), but largely consisted of unsupported and conclusory speculation, which is insufficient to defeat summary judgment (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]; *Butler-Francis*, 38 AD3d at 434). Furthermore, the motion court appropriately rejected plaintiffs' theories of liability that had not been set forth in the notice of claim (*see Chieffet v New York City Tr. Auth.*, 10 AD3d 526, 527 [2004]).

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

ENTERED: MAY 27, 2008

CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3724 Frank Gabrielli, et al., Index 107333/03
Plaintiffs-Appellants,

-against-

Dobson & Pinci, etc., et al.,
Defendants,

Frank Ferrante, etc., et al.,
Defendants-Respondents.

Sandra Ruth Schiff, New York, for appellants.

Sankel, Skurman & McCartin, LLP, New York (Claudio J. Dessberg of counsel), for Frank Ferrante, respondent.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Peter D. Rigelhaupt of counsel), for Jerry Lefkowitz, respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 25, 2007, which granted defendant Ferrante's motion for summary judgment dismissing the complaint against him and granted defendant Lefkowitz's motion pursuant to CPLR 3211(a)(7) to dismiss the third and fourth causes of action in the separate amended complaint against him, unanimously affirmed, without costs.

In this legal malpractice action, plaintiffs cannot show that defendant Ferrante's failure to comply with a condition precedent under plaintiffs' contract was the cause of any loss (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]), since Ferrante did not prevent them from obtaining the same recovery at a later juncture. Nor can plaintiffs show that

Ferrante failed to submit timely a notice of claim to the architect with regard to a separate claim; its timeliness was not before the Second Department when it denied the motion to compel arbitration of said claim (*Matter of Anagnostopoulos v Union Turnpike Mgt. Corp.*, 300 AD2d 393 [2002]).

As to defendant Lefkowitz, the alleged failure to extend a mechanic's lien filed by his predecessor was not negligent because he was retained after it had expired as a matter of law. The alleged failure to commence or advise of the availability of a plenary action pursuant to General Business Law § 399-c was not negligent since the statute's bar of mandatory arbitration of certain claims was intended to benefit consumers, not plaintiffs contractors (*see Ragucci v Professional Constr. Servs.*, 25 AD3d 43 [2005]). Even if, arguendo, plaintiffs fall within the protective ambit of the statute, any plenary action would have been barred by the condition precedent, which was also applicable to litigation. Moreover, Lefkowitz's failure to anticipate the 2005 appellate ruling in *Ragucci*, upon which plaintiffs rely (*id.*), would not have constituted a departure from the professional standard of care (*see Darby & Darby v VSI Intl., Inc.*, 95 NY2d 308, 314 [2000]).

We have considered the parties' other contentions for affirmative relief and find them unavailing.

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

ENTERED: MAY 27, 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 27, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
David B. Saxe
John W. Sweeny, Jr.
Karla Moskowitz
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 6391/06
Respondent,

-against- 3725

Scott Diberardino,
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 J. Obus, J.), rendered on or about May 31, 2007,

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

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

ENTER:

Clerk.

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

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3726 The People of the State of New York, Ind. 5267/03
Respondent,

-against-

Tyrone Davis,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Mario A. Moya of counsel), for appellant.

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

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about March 19, 2007, which denied defendant's motion to be resentenced pursuant to the 2005 Drug Law Reform Act, unanimously affirmed.

The court properly recognized the degree of discretion it possessed (*compare People v Arana*, 32 AD3d 305 [2006]), and providently exercised its discretion when it determined that substantial justice dictated that defendant's resentencing application should be denied (*see e.g. People v Vasquez*, 41 AD3d 111 [2007], *lv dismissed* 9 NY3d 870 [2007]). In considering such an application, the court is vested with a level of discretion to consider "any facts or circumstances relevant to the imposition of a new sentence which are submitted by such person or the people and may, in addition, consider the institutional record of confinement of such person . . ." (L 2005, ch 643, § 1). The

court properly considered, among other things, reliable information as to the large amount of cocaine that defendant possessed at the time of his arrest, which would constitute a class A-I felony even under the present law. We have considered and rejected defendant's remaining claims, including his constitutional argument (*see People v Alea*, 46 AD3d 398 [2007], *lv dismissed* 9 NY3d 1030).

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

ENTERED: MAY 27, 2008

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3727 Tenber Associates, a New York limited partnership, Petitioner-Respondent,

-against-

Bloomberg L.P., a Delaware limited partnership, etc., Respondent-Appellant,

"John Doe," et al., Respondents.

Index 570948/05

Herrick, Feinstein LLP, New York (Milton Mollen of counsel), for appellant.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Douglas H. Flaum of counsel), for Tenber Associates, respondent.

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered June 26, 2006, reversing orders of the Civil Court, New York County (Geoffrey D. Wright, J.), entered March 2, 2005, which had dismissed petitioner commercial landlord's holdover petition, and May 12, 2005, which had denied petitioner's motion to reargue the prior order and granted tenant Bloomberg's cross motion to amend its answer to assert a counterclaim for legal fees, and remanding to Civil Court for calculation of use and occupancy owed petitioner pursuant to the lease agreement, unanimously affirmed, without costs.

Even though "due regard must be given to the decision of the Trial Judge who was in a position to assess the evidence and the

credibility of the witnesses" (*Universal Leasing Servs. v Flushing Hae Kwan Rest.*, 169 AD2d 829, 830 [1991]), Appellate Term properly determined that Civil Court's findings were incompatible with any fair interpretation of the evidence. "Where, as here, a lease contains a clause requiring modification of its terms to be in a writing signed by the landlord, oral modification is generally precluded" (*Aris Indus. v 1411 Trizechahn-Swig*, 294 AD2d 107 [2002]; *see* General Obligations Law § 15-301[1]). The evidence at Civil Court established that despite several discussions and the exchange of a proposed extension of the lease, the parties, as in *Aris*, ultimately did not reach an agreement. Moreover, as Civil Court noted, the rent to be paid during the holdover period -- an essential term of a lease agreement (*see Martin Delicatessen v Schumacher*, 52 NY2d 105, 109-110 [1981]) -- was left unresolved. Appellate Term properly rejected Bloomberg's estoppel claim since, under the circumstances, there could have been no reasonable reliance on the alleged oral promise and no unconscionable injury (*Aris*, 294 AD2d at 107).

Appellate Term also properly determined there was no alleged oral license agreement since, as noted above, an essential term of the alleged agreement was undecided (*see Marinas of the Future v City of New York*, 87 AD2d 270, 277 [1982], *appeal dismissed* 57 NY2d 775 [1982]), and the record indicates that the parties were

negotiating a lease extension to grant Bloomberg exclusive possession of the premises, not just use or occupancy (*see e.g. American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1994]).

The liquidated damages clause, providing for two times the existing rent in the event of a holdover, was not an unenforceable penalty. Bloomberg failed to establish that damages could be anticipated in 1995, when the lease was executed (*see Parsons & Whittemore v 405 Lexington*, 299 AD2d 156 [2002], *lv denied* 99 NY2d 650 [2003]), or that the amount fixed was "plainly or grossly disproportionate to the probable loss" (*Truck Rent-A-Center v Puritan Farms 2nd*, 41 NY2d 420, 425 [1977]).

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

ENTERED: MAY 27, 2008

CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3728 In re Raeshan Dockery, Index 403319/05
Petitioner,

-against-

New York City Housing Authority, et al.,
Respondents.

Steven Banks, The Legal Aid Society, New York (Robert C. Newman of counsel), for petitioner.

Ricardo Elias Morales, New York (Samuel Veytsman of counsel), for New York City Housing Authority, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for New York City Police Department, respondent.

Determination of respondent Housing Authority, dated February 10, 2006, terminating petitioner's employment, unanimously confirmed, the petition denied, and the proceeding (transferred to this Court by order of Supreme Court, New York County [Rolando T. Acosta, J.], entered January 17, 2007), dismissed, without costs.

The determination was supported by substantial evidence that petitioner violated the Housing Authority's policy against violence in the workplace. The 911 recordings were properly admitted into evidence at the disciplinary hearing since they were not official records relating to petitioner's arrest or prosecution, and thus were not subject to the sealing statute

(CPL 160.50; *see Matter of Harper v Angiolillo*, 89 NY2d 761, 767 [1997]).

Even assuming the 911 recordings were subject to the sealing statute, "the mere reception of erroneously unsealed evidence at petitioner's disciplinary hearing does not, without more, require annulment of [the agency's] determination" (*Matter of Charles Q. v Constantine*, 85 NY2d 571, 575 [1995]). The evidence independent of the 911 tapes was sufficient to establish that petitioner violated the Housing Authority's policy, and thus that agency's determination should be confirmed.

The penalty of dismissal does not shock the conscience (*see Matter of Kelly v Safir*, 96 NY2d 32, 39-40 [2001]).

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 27, 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 27, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
David B. Saxe
John W. Sweeny, Jr.
Karla Moskowitz
Leland G. DeGrasse, Justices.

The People of the State of New York, SCI 3068/05
Respondent,

-against- 3729

Robert Francisco,
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 (A. Kirke Bartley, J. at plea; Laura A. Ward, J. at sentence), rendered on or about December 22, 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.

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3730 The People of the State of New York, Ind. 5276/03
Respondent,

-against-

Latee Robinson,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Robert Torres, J.), rendered March 3, 2006, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of imprisonment of 25 years to life, unanimously affirmed.

Defendant's claim that the court failed to respond properly to a jury note (*see People v O'Rama*, 78 NY2d 270 [1991]) is based on facts that are similar to those set forth in *People v Mitchell* (46 AD3d 480 [2007]) and *People v Johnson* (46 AD3d 415, 416-417 [2007]). As in those cases, the circumstances establish that the jury's request for "all the evidence" referred to exhibits and not testimony, so that the court clerk's ministerial compliance with that request, in accordance with the parties' prior stipulation, was proper.

Defendant did not preserve any of his challenges to the prosecutor's summation 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]). Nothing in the summation deprived defendant of a fair trial.

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

ENTERED: MAY 27, 2008

CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3731 Benjamin Abraham, Index 119012/03
Plaintiff-Appellant,

-against-

City of New York,
Defendant,

104 Second Realty, LLC, et al.,
Defendants-Respondents.

Parker Waichman Alonso LLP, Great Neck (Ronni Robbins Kravatz of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Terry Holmes-Nelson of counsel), for 104 Second Realty, LLC, respondent.

Cartafalsa, Slattery, Turpin & Lenoff, Tarrytown (Regina M. Coady of counsel), for Ming Kam Cheong and Bamboo House Restaurant, respondents.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered February 26, 2007, which granted defendants-respondents' respective motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to summary judgment, and the evidence offered by plaintiff in opposition to defendants' motions failed to raises a triable issue of fact as to whether defendants engaged in snow removal on

the public sidewalk where plaintiff slipped and fell (*see Stein v State St. Bank & Trust Co. of Conn. N.A.*, 279 AD2d 427 [2001]).

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

ENTERED: MAY 27, 2008

CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3732 The People of the State of New York, Ind. 1410/06
Respondent,

-against-

Steven Carter,
Defendant-Appellant.

Georgia J. Hinde, New York, for appellant.

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

Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered December 7, 2006, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, unanimously affirmed.

Defendant's challenges to the sufficiency of the evidence are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established all the required elements of criminal possession of a weapon, specifically with respect to possession of a gravity knife (*see*

People v Birth, 49 AD3d 290 [2008]; *People v Smith*, 309 AD2d 608 [2003], *lv denied* 1 NY3d 580 [2003]; *People v Berrier*, 223 AD2d 456 [1996], *lv denied* 88 NY2d 876 [1996]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 27, 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 27, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
David B. Saxe
John W. Sweeny, Jr.
Karla Moskowitz
Leland G. DeGrasse, Justices.

Soterios (Steve) Tzolis, et al.,
Plaintiffs-Appellants,

Index 104022/07

-against-

3733

RB Estates LLC, et al.,
Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Herman Cahn, J.), entered January 25, 2008,

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 order so appealed from be and the same is hereby affirmed for the reasons stated by Cahn, J., without costs and disbursements.

ENTER:

Clerk.

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3734 The People of the State of New York, Ind. 3247/05
Respondent,

-against-

Pablo Negron,
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 (Lucy Jane Lang of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered March 14, 2006, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to a term of 2½ years' incarceration, unanimously affirmed.

We perceive no basis to reduce defendant's sentence.

The imposition of mandatory surcharges and fees by way of court documents, but without mention in the court's oral pronouncement of sentence, was lawful (*see People v Harris*, __ AD3d __, Appeal No. 3681 [May 15, 2008]).

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

ENTERED: MAY 27, 2008

CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3735N Janet Wiebusch, Index 101526/03
Plaintiff-Respondent,

-against-

Bethany Memorial Reform Church,
Defendant,

Marble Collegiate Church,
Defendant-Appellant.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellant.

Kahn Gordon Timko & Rodriques, P.C., New York (Nicholas I. Timko of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 4, 2007, which, upon plaintiff's motion to vacate the note of issue and certificate of readiness in this action for personal injuries, adjourned the trial date 10 weeks, directed the parties to conduct limited additional discovery, and denied the cross motion of defendant Marble Collegiate Church (Marble) to dismiss the complaint for failure to prosecute, unanimously affirmed, without costs.

The illness of plaintiff's prior attorney, which developed following the filing of the note of issue and certificate of readiness and resulted in plaintiff being unable to obtain the return of her complete case file, constitutes unusual or unanticipated circumstances warranting the relief provided (*see* 22 NYCRR 202.21[d]). Contrary to Marble's contention, plaintiff

was not required to demonstrate the merits of her case in furtherance of the motion (*id.*), and the record shows that Marble is not prejudiced by the court's determination (*see Acevedo v New York City Tr. Auth.*, 294 AD2d 310 [2002]; *Urena v Bruprat Realty Corp.*, 179 AD2d 505 [1992]).

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

ENTERED: MAY 27, 2008

Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3736N-
3737N Famo, Inc., Index 109028/07
Plaintiff-Appellant,

-against-

Green 521 Fifth Avenue LLC,
Defendant-Respondent.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 25, 2007, which denied plaintiff's motion for a preliminary injunction, and order, same court and Justice, entered January 15, 2008, which, upon granting plaintiff's motion for reargument, adhered to the prior ruling and lifted all stays, unanimously affirmed, without costs.

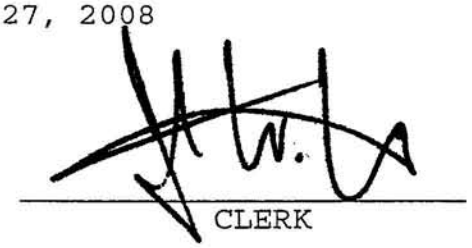
As part of its lobby renovation, defendant landlord planned to install a floating wall near the entrance to plaintiff tenant's art gallery, which would interfere with certain sight lines. In seeking a preliminary injunction, plaintiff failed to meet its burden of demonstrating a likelihood of success on the merits, irreparable injury unless the relief sought is granted, and a balancing of the equities in its favor (*see W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]). The unambiguous language of the lease provided that the demised space was to be used solely

as a gallery for the benefit of the building tenants. The court properly found that the loss of visibility from certain vantage points did not render the space unusable for its purpose. Furthermore, any loss would be compensable by monetary damages (*see Credit Index v RiskWise Intl.*, 282 AD2d 246 [2001]).

We have considered the balance of plaintiff's argument and find it without merit.

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

ENTERED: MAY 27, 2008



CLERK

MAY 27 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
James M. McGuire
Rolando T. Acosta, JJ.

3256-
3256A
Ind. 3627/06

The People of the State of New York,
Appellant,

-against-

Rashan May,
Defendant-Respondent.

The People appeal from orders of the Supreme Court, New York County (Marcy L. Kahn, J.), entered January 19, 2007 and February 15, 2007, which, to the extent appealed from as limited by the brief, respectively granted defendant's motion to suppress cocaine recovered from his person and dismissed the first two counts of the indictment.

Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli and Julie Paltrowitz of counsel), for appellant.

Law Offices of Don Savatta, New York (Don Savatta and Germana F. Giordano of counsel), for respondent.

SAXE, J.P.

Where police officers who initially detained defendant on a routine traffic stop continued to detain him when no further identifiable grounds for the stop remained, defendant's suppression motion was properly granted.

On the night of June 21, 2006, Police Officer Brian Erbis was driving a marked police car on patrol in Manhattan's Chelsea neighborhood with Sergeant Pelicotti and Lieutenant Ryan. At approximately 9:45 P.M., Officer Erbis saw a Chevrolet Impala parked in a no standing zone in front of 501 West 28th Street. Erbis drove past the car and turned left onto 10th Avenue, while continuing to watch it. He then saw an African-American male exit a building and enter the driver's side of the car, after which the car drove east on 28th Street. Erbis followed behind, believing the car's occupants were involved in "some sort of drug activity."

The Impala turned south onto Seventh Avenue and double-parked in front of a delicatessen at the corner of 27th Street. The driver, defendant Rashan May, exited the car and went inside the deli, while his passenger, Robert Patterson, remained in the front passenger seat. Officer Erbis pulled behind the Impala and activated the police car's emergency lights. Carrying flashlights, all three officers approached the Impala. Sergeant

Pelicotti stood behind the front passenger door, where he could see inside the car, Lieutenant Ryan stood behind the car, and Erbis approached the driver's side. All the car's windows were rolled down. At this point, Erbis suspected that "other things were going on."

Erbis quickly scanned the car's interior, looking for weapons, then bent down, looked through the driver's window and asked Patterson where he was coming from. Patterson initially replied "[U]ptown," and then stated that he and defendant had just come from West 28th Street, where they were trying to locate a woman named Lindsey. Patterson's demeanor was calm and friendly.

Erbis first testified that when he asked Patterson to tell him Lindsey's apartment number, Patterson said he did not know. However, Erbis later testified that when asked this question, Patterson replied that Lindsey lived in Apartment 1E. When confronted by the court about this discrepancy, Erbis maintained that when asked, Patterson did not know Lindsey's apartment number. However, the People's Voluntary Disclosure Form states that Patterson told Erbis that Lindsey lived in Apartment 1E. Erbis then asked for and took possession of Patterson's Alabama driver's license.

When defendant exited the deli, Erbis told him that he was

double-parked and asked where he'd come from, to which defendant replied, "West 28th Street." Defendant provided Erbis with his license and the car's registration, which Erbis took back to the patrol car. Before doing so, though, Erbis asked defendant if there was anything in the car that he should know about, to which he received a negative response. Erbis then radioed the dispatcher to perform a license/registration/warrant check. He explained:

> "[I]t was very busy that night, so the dispatcher took the information and was processing it. And I remember it taking a while before the dispatcher came back to me with a response. Later on, a dispatcher said it was, quote, just no hit. I didn't feel comfortable with that kind of response because usually the dispatcher relays all kinds of information in regards. So, just on a professional hunch, I called for an available sector to come that has a computer."

The sector car arrived 10 to 15 minutes later. Erbis ran a background check on its computer and learned that there was an outstanding warrant for defendant on a DWI charge. At this point, it was about 10:30 P.M., 40 minutes after the initial stop and 25 to 30 minutes after Erbis had taken possession of defendant's driver's license and registration.

Upon learning of the warrant, Erbis instructed defendant to step out of the car. Defendant opened the car door, activating the interior lights, at which time, Erbis testified, he saw two small containers the size of prescription medicine bottles, two

inches high and 1½ inches in diameter, with white caps, containing a green leafy substance, on the floorboard behind the passenger seat. Erbis had previously seen this type of vial used to package hydroponic marijuana. Erbis then searched the car, recovering a plastic bag filled with additional vials of marijuana, which he also found on the rear floorboard. More vials were found in the center console, along with cash and business cards that Erbis believed were for a drug courier business. Defendant and Patterson were arrested and transported to the precinct, where searches conducted incident to arrest revealed cocaine in their possession.

The suppression court, while it accepted the bulk of Erbis's testimony, discredited his testimony that the two small vials of marijuana were in plain view when the door was opened. Rather, it found, based upon the size of the vials and the photographs depicting their location and visibility in the car, that the officer could not have seen the containers, and certainly could not have seen them well enough to observe that they contained marijuana. It held that because the search of the car was illegal, the marijuana seized as a result thereof should be suppressed, and that because the cocaine found on defendant's person was discovered due solely to an arrest made after an unlawful detention, it too must be suppressed.

Discussion

The People do not challenge the court's credibility finding and its consequent suppression of the marijuana. Their contention on appeal is limited to challenging the suppression of the cocaine found on defendant's person following his arrest. They argue that defendant's continued detention after the initial stop was not unreasonable in either scope, duration or intensity, and that the length of the detention was necessary and proper because the officer's initial check with authorities produced information that was lacking in reliability, requiring the officer to probe further.

To begin, the officers' initial approach of the Impala, their request for limited information and documents, and their detention of the vehicle for purposes of calling in a computer check and drawing up a summons were proper based upon the traffic violation (*see People v Valerio*, 274 AD2d 950 [2000], *lv denied* 95 NY2d 873 [2000], *cert denied* 532 US 981 [2001]). However, a traffic stop constitutes a limited seizure of a vehicle's occupants (*People v Banks*, 85 NY2d 558, 562 [1995], *cert denied* 516 US 868 [1995]; *People v Barreras*, 253 AD2d 369, 372 [1998]), and the length of any subsequent detention must be reasonably related to the circumstances which first justified the stop

(*United States v Sharpe*, 470 US 675, 682 [1985]; *Banks* at 562; *Barreras* at 372-73).

In *Banks*, the Court of Appeals reversed a denial of the defendant's suppression motion where the defendant's car was pulled over on the Thruway for a seat belt violation, and thereafter detained while the Trooper who stopped them called for back-up to search the vehicle. The Court held that the defendant's nervousness and the innocuous discrepancies between the driver's and the passenger's answers regarding the origin, destination and timing of their trip did not provide a basis for reasonable suspicion of criminality (85 NY2d at 562). In *Barreras*, this Court reversed the denial of the defendant's suppression motion, where the defendant's car had been pulled over for going through a stop sign, and although his papers were in order, the officer, suspecting further illegality but unable to supply an objective reasonable foundation for his suspicion, continued his questioning and then asked for permission to search the car. We held that "'[o]nce defendant's papers were all found to be in order, the officers, without more, were obligated to issue the stop-sign summons and allow defendant to resume his journey, i.e., 'the initial justification for seizing and detaining defendant . . . was exhausted'" (253 AD2d at 373).

We reject the People's contention that notwithstanding the

dispatcher's negative report, the police were entitled to detain defendant for such a protracted period based on nothing more than the belief that the dispatcher might not have performed a thorough and complete license and registration check.

In general, to detain an individual, the police must have a reasonable suspicion that criminal activity is either occurring or imminent (*People v May*, 81 NY2d 725, 727 [1992]; *People v Sobotker*, 43 NY2d 559, 563-564 [1978]). The Court of Appeals has held that for such a reasonable suspicion, "[t]he requisite knowledge must be more than subjective; it should have at least some demonstrable roots. Mere 'hunch' or 'gut reaction' will not do" (*Sobotker* at 564; *see People v Ingle*, 36 NY2d 413, 418-19 [1975]; *People v Elam*, 179 AD2d 229 [1992], *appeal dismissed* 80 NY2d 958 [1992]).

Here, defendant's protracted detention was not based upon reasonable suspicion, but rather was based purely upon the officer's "professional hunch." Neither defendant nor Robinson had behaved suspiciously when answering the officer's questions, and any minor discrepancies in Robinson's account of where they were traveling from "did not alone, as a matter of law, provide a basis for reasonable suspicion of criminality" (*People v Banks*, 85 NY2d at 562). The dispatcher's response, "[N]o hit," may have been unusually or unsatisfactorily brief to the officer, but it

cannot establish the type of reasonable suspicion necessary to further detain defendant once his documents were found to be in order and the time needed to draw up a summons had passed.

The People also argue that the information the officers ultimately received of the open bench warrant "purge[d] any taint" caused by the unlawful detention. Such a use of hindsight to justify police actions has already been roundly criticized and flatly rejected. As the Court of Appeals explained in *People v Sobotker*:

> "Subsequent events did indeed demonstrate that the officers' hunch may well have been correct. But a search may not be justified by its avails alone. Constitutionally protected rights are not to be dispensed with . . . solely because the results of the improper . . . seizure uncovered the fact that one or all of the persons who were its targets were [subject to criminal charges]. Almost any series of indiscriminate seizures is bound to produce some instances of criminality that might otherwise have gone undetected or unprevented. But were hindsight alone to furnish the governing criteria, a vital constitutional safeguard of our personal security would soon be gone"

(43 NY2d at 565; see also *Wong Sun v United States*, 371 US 471, 484 [1963] ["a search unlawful at its inception may [not] be validated by what it turns up"]). The attenuation cases relied upon by the People have no applicability to these circumstances.

Since defendant's continued and protracted detention was unlawful, his arrest pursuant thereto was improper, and the contraband seized from his person as a result was properly

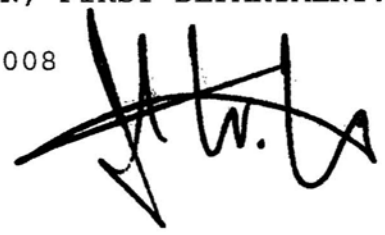
suppressed by the motion court.

Accordingly, the orders of the Supreme Court, New York County (Marcy L. Kahn, J.), entered January 19, 2007 and February 15, 2007, which, to the extent appealed from as limited by the brief, respectively granted defendant's motion to suppress cocaine recovered from his person and dismissed the first two counts of the indictment, should be affirmed.

All concur.

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

ENTERED: MAY 27, 2008



CLERK