



registration proceeding (*see People v Wroten*, 286 AD2d 189 [2001], *lv denied* 97 NY2d 610 [2002]; *see also Martinez v Hudson Armored Car & Courier*, 201 AD2d 359, 361 [1994]).

At the further hearing, the People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level two adjudication. Grand jury testimony and other reliable information, as well as the reasonable inferences to be drawn therefrom, supported each of the risk factors at issue (*see* Correction Law § 168-n[3]; *People v Dort*, 18 AD3d 23, 25 [2005], *lv denied* 4 NY3d 885 [2005]), and we have considered and rejected defendant's arguments as to each factor.

Defendant's challenges to the choice of risk factors made by the Legislature and the Board of Examiners of Sex Offenders are both waived and without merit (*see People v Bligen*, 33 AD3d 489 [2006]; *People v Joe*, 26 AD3d 300 [2006], *lv denied* 7 NY3d 703 [2006]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, P.J., Friedman, Williams, Acosta, JJ.

2920 Anthony Okoh,  
Plaintiff-Respondent,

Index 16673/04

-against-

Andrea B. Bunis, et al.,  
Defendants-Appellants.

---

Law Office of Vincent P. Crisci, New York (Joy R. Simon of  
counsel), for appellants.

Barry Siskin, New York, for respondent.

---

Order, Supreme Court, Bronx County (Mark Friedlander, J.),  
entered March 27, 2006, which, in an action for personal injuries  
sustained in an automobile accident, denied defendants' motion to  
dismiss the complaint for failure to make service within 120 days  
after the filing of the summons and complaint as required by CPLR  
306-b, and granted plaintiff's cross motion pursuant to CPLR  
306-b for an extension of time to make service, unanimously  
reversed, on the law and the facts, without costs, the motion  
granted and the cross motion denied. The Clerk is directed to  
enter judgment in favor of defendants dismissing the complaint.

Plaintiff's excuses all relate to the failure to make  
service within the 120-day period. There is no explanation  
whatsoever why plaintiff's attorney waited more than 14 months to  
ask for an extension, and then only in response to defendants'

motion to dismiss. Nor is there a showing of merit (see *Jimenez v City of New York*, 13 AD3d 107 [2004]). The only injuries specified in plaintiff's opposition are "bulging" discs in the lower back; he makes no claim of hospitalization and does not describe any treatment. Under the circumstances, we reject the motion court's finding that notwithstanding the failure to show merit and the lack of diligence after the 120-day period, an extension is warranted by reason of plaintiff's attorney's illness during the 120-day period, the expiration of the statute of limitations, and the prompt notice within weeks of the accident that plaintiff's attorney gave defendants and their insurer of plaintiff's claims arising out of the accident.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, P.J., Friedman, Williams, Acosta, JJ.

2921 Nurudeen McM.,  
Petitioner-Respondent,

-against-

Patricia W.,  
Respondent-Appellant.

---

Geoffrey P. Berman, New York, for appellant.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), Law Guardian.

---

Appeal from order, Family Court, New York County (Susan Knipps, J.), entered, on default, on or about April 6, 2007, unanimously dismissed, without costs or disbursements.

Application by appellant's assigned counsel to withdraw is granted (see *Matter of Louise Wise Servs.*, 131 AD2d 306 [1987]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, P.J., Friedman, Williams, Acosta, JJ.

2922            700 Madison Partners, LLC,  
                  Plaintiff-Respondent,

Index 601796/05

-against-

Louis Martin Hubrecht  
Defendant-Appellant.

---

Herrick Feinstein, LLP, New York (Christopher J. Sullivan of  
counsel), for appellant.

Finkel Goldstein Rosenbloom & Nash, New York (Kevin J. Nash of  
counsel), for respondent.

---

Judgment, Supreme Court, New York County (Karla Moskowitz,  
J.), entered December 30, 2005, awarding plaintiff damages and  
bringing up for review an order and judgment (one paper), same  
court and Justice, entered December 29, 2005, which, inter alia,  
granted plaintiff's motion for summary judgment and denied  
defendant's cross motion for a stay of the action pending a  
determination of an appeal before the New York City Tax Appeals  
Tribunal, unanimously affirmed, with costs.

Pursuant to the terms of the parties' lease, defendant  
agreed to pay all transfer taxes and to indemnify plaintiff  
against his failure to pay same. The Department of Finance (DOF)  
subsequently assessed both parties for a transfer tax, and after  
DOF's Conciliation Bureau rejected defendant's claim that no tax  
was owed, he sought relief from the New York City Tax Appeals

Tribunal in an action that remains pending. Despite numerous requests, defendant failed to provide plaintiff with copies of the decision of the Conciliation Bureau or the Tax Appeals Tribunal filings, and so as to protect its leasehold, plaintiff paid the transfer tax, and then filed suit for reimbursement under the indemnification clause of the parties' lease.

There being no dispute as to defendant's obligation to pay the transfer tax pursuant to the lease, and plaintiff being entitled to protect its leasehold by paying the tax and seeking restitution, the motion court properly granted summary judgment in plaintiff's favor (*see Universal Children's Wear v Galasso*, 133 AD2d 623 [1987]). There was also no abuse of discretion by the court in declining to stay the instant matter pending resolution of the tax appeal, as the two actions do not share complete identity of parties or issues (*Hope's Windows v Albro Metal Prods. Corp.*, 93 AD2d 711, 712 [1983], *lv dismissed* 59 NY2d 968 [1983]).

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

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



in petitioner's certain eviction (see *Matter of 110-45 Queens Blvd. Garage v Park Briar Owners*, 265 AD2d 415, 416 [1999]; *Bressler v Amsterdam Operating Corp.*, 194 Misc 76, 78-79 [1949]). Contrary to petitioner's contention, the evidence before the Civil Court amply supports the finding that he was selling counterfeit goods from his booth at respondent's flea market.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



Lippman, P.J., Friedman, Williams, Acosta, JJ.

2925 Mark Leyse, Individually and on Index 100792/05  
Behalf of All Others Similarly Situated,  
Plaintiff-Appellant,

-against-

Domino's Pizza LLC,  
Defendant-Respondent.

---

Todd C. Bank, Kew Gardens, for appellant.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of  
counsel), for respondent.

---

Order, Supreme Court, New York County (Marylin G. Diamond,  
J.), entered March 15, 2007, which, in a purported class action  
seeking an injunction and a judgment declaring that defendant  
food distributor trespassed on plaintiff's property by slipping  
an advertising flier under the door to plaintiff's apartment  
without plaintiff's permission, granted defendant's cross motion  
to dismiss the complaint and for 22 NYCRR part 130 costs and  
sanctions, unanimously modified, on the facts, to vacate the  
award of costs and sanctions, and otherwise affirmed, without  
costs.

The action was properly dismissed in the absence of prior  
notice by plaintiff to defendant that he objected to delivery of  
the flier. Such notice was required by defendant's

constitutional right of free speech (*cf. Rowan v United States Post Off. Dept.*, 397 US 728 [1970]; *Tillman v Distribution Sys. of Am.*, 224 AD2d 79 [1996], *lv denied* 89 NY2d 814 [1997]). In addition, the specter of numerous apartment dwellers suing distributors of restaurant fliers warrants a floodgate. The action, however, is not frivolous. The cases cited by defendant and the motion court do not explicitly rule that prior notice is a constitutional prerequisite to a trespass action brought to protect the privacy of a home against these sorts of intrusions; rather, these cases involved either notice that happened to have been given (*id.*; *Miller v Distribution Sys. of Am.*, 175 Misc 2d 513 [1997]), or a statute that required notice (*Rowan, supra*). Nor are part 130 costs and sanctions warranted by plaintiff's continued maintenance of the action after being advised that the offending flier came not from defendant but a franchisee of defendant. There has been no disclosure, and plaintiff's counsel was not required to accept defendant's assertion at face value. We have considered plaintiff's other contentions and find them unavailing.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, P.J., Friedman, Williams, Acosta, JJ

2926 Gale Ann Wallach,  
Plaintiff-Appellant,

Index 123498/00

-against-

Unger & Stutman, LLP, et al.,  
Defendants-Respondents.

---

Schwartz & Ponterio, PLLC, New York (Matthew F. Schwartz of  
counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Robert  
J. Pariser of counsel), for respondents.

---

Order, Supreme Court, New York County (Walter B. Tolub, J.),  
entered December 12, 2006, which, in an action for legal  
malpractice, granted defendants' motion to dismiss the complaint,  
unanimously affirmed, without costs.

The action is barred by the unappealed order that recognized  
defendants' charging lien in the underlying action in which  
defendants were discharged by plaintiff (*Smira v Roper, Barandes  
& Fertel*, 302 AD2d 305 [2003]; *Molinaro v Bedke*, 281 AD2d 242  
[2001]). This result is not affected by the parties' stipulation  
in which defendants agreed not to pursue the charging lien until

after the disposition of the instant action. Since the charging lien had already been imposed, the stipulation merely deferred the proceeding for fixing the amount of defendants' fee.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, P.J., Friedman, Williams, Acosta, JJ.

2927 Delidakis Construction Co., Inc., Index 603462/04  
Plaintiff-Appellant,

-against-

City of New York,  
Defendant-Respondent.

---

Mastropietro-Frade, LLC, New York (John P. Mastropietro of  
counsel), for appellant.

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

---

Order, Supreme Court, New York County (Karla Moskowitz, J.),  
entered October 27, 2006, which, to the extent appealed from as  
limited by the briefs, denied plaintiff's cross motion to renew  
an earlier order granting summary dismissal of the fourth and  
fifth causes of action, unanimously affirmed, without costs.

Contrary to plaintiff's position, *CAB Assoc. v City of New  
York* (32 AD3d 229 [2006]) did not constitute a change in the law  
that would alter the court's prior determination under CPLR  
2221(e)(2). The relevant claims are time-barred under the  
provisions of the agreement.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, P.J., Friedman, Williams, Acosta, JJ.

2928            John Tipaldo,  
                 Plaintiff-Appellant,

Index 106057/97

-against-

Christopher Lynn, etc., et al.,  
Defendants-Respondents.

---

Shapiro, Beilly, Rosenberg & Aronowitz, LLP, New York (Lewis Rosenberg of counsel), for appellant.

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

---

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered July 31, 2006, which, in this action commenced by plaintiff City employee pursuant to Civil Service Law § 75-b, the "whistle-blowers' statute," granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, the motion denied, the cross motion granted, and the matter remanded for a determination of damages.

The motion court improperly dismissed this action, where plaintiff seeks reinstatement and compensation for retaliatory action taken by his employer, on the basis that plaintiff failed to comply with the statutory preconditions of Civil Service Law § 75-b. There is no dispute that retaliatory actions were taken

against plaintiff, and although a cause of action pursuant to the subject statute requires plaintiff to have first reported the alleged violation to the internal Department of Transportation "appointing authority" (Civil Service Law § 2[9]), here, that was defendants Commissioner and First Deputy Commissioner. Because these were the individuals plaintiff alleged had improperly procured signs in connection with a traffic reconfiguration project, reporting the violation to them would have been futile. Under the circumstances presented, plaintiff's good-faith efforts in the manner and timing of his reporting, first informally to his immediate supervisors, and then soon thereafter to the Department of Investigation, satisfactorily met the requirements of Civil Service Law § 75-b(2) (see *Matter of McDonnell v Lancaster*, 13 Misc 3d 959, 965-966 [2006]; and compare *Brohman v New York Convention Ctr. Operating Corp.*, 293 AD2d 299 [2002]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



that possession of such a large number of bags was indicative of a dealer and not a buyer. Accordingly, there was ample evidence supporting the inference that defendant possessed drugs with intent to sell (see e.g. *People v Robinson*, 26 AD3d 202 [2006], *lv denied* 7 NY3d 762 [2006]). Defendant's acquittal of the sale charges does not warrant a different conclusion (see *People v Freeman*, 298 AD2d 311 [2002], *lv denied* 99 NY2d 582 [2003]). "[T]here is no good reason why a court should resolve any inconsistency in favor of a defendant rather than the People who, after all, have no right of appellate review of jury acquittals in mixed verdicts." (*People v Rayam*, 94 NY2d 557, 562 [2000]). Although defendant argues that mercy or leniency is an unlikely explanation of the mixed verdict because third-degree sale and possession are both class B felonies and normally involve concurrent sentences, he does not explain how a jury would be privy to that information.

The trial court properly modified its *Sandoval* ruling to allow the prosecutor to question defendant about the precluded underlying facts of a prior drug felony conviction, since defendant opened the door to such questions by volunteering the precluded facts (see *People v Green*, 257 AD2d 542, 543 [1999], *lv denied* 93 NY2d 899 [1999]). On direct examination of defendant, defense counsel elicited that defendant's instant arrest occurred

in a drug-prone area. When, on cross-examination, the prosecutor asked defendant how he knew that, defendant referred to his prior conviction and proceeded to place before the jury, in a misleading and incomplete fashion, some of the same facts he had successfully sought to keep out. Thus, he cannot be heard to complain about the prosecutor's clarifying questions, which his testimony invited.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



These impediments have since been removed and while discovery, including a deposition of Downing, has been conducted since our prior determination, the additional evidence adds nothing relevant.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, P.J., Friedman, Williams, Acosta, JJ.

2932-

2933 Rite Aid Corporation, et al.,  
Plaintiffs-Appellants,

Index 603384/05  
601347/06

-against-

Alex Grass, et al.,  
Defendants-Respondents.

[And Another Action]

---

Ballard Spahr Andrews & Ingersoll, LLP, Philadelphia, PA (William A. Slaughter of the Commonwealth of Pennsylvania Bar, admitted pro hac vice, of counsel), for appellants.

Stillman, Friedman & Shechtman, P.C., New York (Scott M. Himes of counsel), for Alex Grass and A.G. Capital, Inc., respondents.

Dershowitz, Eiger & Adelson, P.C., New York (Nathan Z. Dershowitz of counsel), for Franklin Brown, respondent.

Barger & Wolen LLP, New York (Michael J. Levin and Kyle M. Medley of counsel), for Joseph Rosen, respondent.

---

Judgment, Supreme Court, New York County (Karla Moskowitz, J.), entered June 11, 2007, dismissing the complaints, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered April 25, 2007, which granted upon renewal defendants' motion for summary judgment, denying as moot plaintiffs' motion to depose defendant Brown, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

A cause of action in fraud must be commenced within six

years of the date of the fraudulent act, or within two years of the date the fraud was, or with reasonable diligence could have been, discovered (CPLR 213[8]). An inquiry as to the time a reasonably diligent plaintiff could have discovered the fraud "turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred" (*Ghandour v Shearson Lehman Bros.*, 213 AD2d 304, 305-306 [1995], *lv denied* 86 NY2d 710 [1995]).

Plaintiffs alleged that in the process of acquiring the stock of Sera-Tec Biologicals, a Rite Aid subsidiary, defendants obtained the stock of two other plaintiff-owned companies -- Immucor and Isolyser Company -- unbeknownst to the Rite Aid board of directors. We find that plaintiffs, both independently and through counsel, had notice of operative facts that should have prompted further inquiry as to the Sera-Tec transaction. Defendants' key proof -- financial records and internal company correspondence -- had been in plaintiffs' possession since 1994. They fail to explain their inability to discover these documents (and their claims) within the requisite time for filing suit.

We reject plaintiffs' contention that summary judgment was premature, absent the completion of discovery, as additional

discovery "was unlikely to be productive" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 74 [2006], *cert denied* \_ US\_, 127 S Ct 832 [2006]). At a minimum, plaintiffs were on inquiry notice based on their own financial records and communications, so additional discovery would not have been helpful.

We also reject plaintiffs' claim of equitable estoppel, as this doctrine will not toll a limitations statute where plaintiffs possessed timely knowledge sufficient to have placed them under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations (*Gleason v Spota*, 194 AD2d 764, 765 [1993]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, P.J., Friedman, Williams, Acosta, JJ.

2934 Glenn Connolly,  
Plaintiff-Appellant,

Index 118593/03

-against-

The Peninsula Group, et al.,  
Defendants-Respondents.

---

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for appellant.

Fiedelman & McGaw, Jericho (Dawn C. DeSimone of counsel), for respondents.

---

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered May 24, 2006, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

Plaintiff alleges that he was seriously injured while participating in member activities at The Peninsula Spa under the supervision of defendant trainer Cardoso. During a training session, Cardoso, who was aware of plaintiff's limited mobility in his shoulder and complaints about certain exercises, allegedly insisted that plaintiff engage in a modified lateral pulldown. During that session, plaintiff felt a snap in his shoulder and later learned that a piece of steel in his shoulder from a previous surgery had dislodged.

In support of the motion to dismiss, defendants argued, inter alia, that plaintiff's claims were barred by a release that included a covenant against bringing suit for personal injuries incurred in a personal training session. Although the language of the release was clear and unambiguous, it is void as against public policy (General Obligations Law § 5-326), inasmuch as the training sessions plaintiff received were ancillary to the recreational activities offered by the spa (see *Debell v Wellbridge Club Mgt., Inc.*, 40 AD3d 248, 249 [2007]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



ambulance crew members for some supplies from the ambulance, which they gave her, and she applied gauze and bandages to plaintiff's wounds. Plaintiff, her aunt and Johnson then left without seeing a doctor. No person other than Johnson, who has not appeared in the action, looked at the wounds or provided any treatment. Indeed, there is no evidence that the technicians even saw plaintiff, or knew what the gauze was for or witnessed Johnson's treatment. All that the record shows is that at Johnson's request, the technicians gave her gauze and bandages. Thus, there is no merit to plaintiff's argument that the technicians were under a special duty to respond and treat her (see *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]). As the technicians were under no duty to treat plaintiff, HHC cannot be held vicariously liable for any of their acts or omissions. Nor can HHC be held vicariously liable for any negligence by Johnson in treating plaintiff since such treatment, undertaken while Johnson was off-duty, did not fall within the scope of her

employment (see *Kawoya v Pet Pantry Warehouse*, 3 AD3d 368, 369 [2004], appeal dismissed 2 NY3d 752 [2004]; *Schilt v New York City Tr. Auth.*, 304 AD2d 189 [2003]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



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

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, P.J., Friedman, Williams, Acosta, JJ.

2938           The People of the State of New York,           Index 401980/06  
              by Elliot Spitzer, Attorney General  
              of the State of New York,  
              Petitioner-Respondent,

-against-

Park Avenue Plastic Surgery, P.C., et al.,  
Respondents,

David Haim Ostad, etc.,  
Respondent-Appellant.

---

David Ostad, appellant pro se.

Andrew M. Cuomo, Attorney General, New York (Laura R. Johnson of  
counsel), for respondent.

---

Amended order and judgment (one paper), Supreme Court, New  
York County (Nicholas Figueroa, J.), entered November 17, 2006,  
which granted the petition to permanently enjoin respondents from  
engaging in the practice of medicine, disposing of any funds or  
assets until satisfaction of all financial obligations, engaging  
in any other business without posting a \$200,000 bond, and  
destroying any records of said practice, and ordered restitution  
in the amount of \$56,187.50 and payment of \$4,500 in civil  
penalties, unanimously affirmed, without costs.

Respondents were involved in the delivery of fraudulent and  
deceptive medical services. Ostad argues, pro se, that the court  
declined to consider his post-hearing submissions. The fact

remains, however, that his own responses to petitioner's detailed charges, which were supported by sworn statements, consisted merely of conclusory self-serving denials and, in one instance, the invocation of his right against self-incrimination under the Fifth Amendment. Summary determination in petitioner's favor was warranted (see CPLR 409[b]). Even though the court invited any additional information prior to the issuance of a ruling, it made clear that it would not entertain post-argument, ex parte communications, which instruction Ostad repeatedly ignored.

Ostad now argues that the court's determination must be set aside because the corporate respondents were not represented by counsel. However, both corporate entities are wholly owned by him, and he did not avail himself of the opportunity to retain counsel for them. Since a corporation is required, under most circumstances, to appear by counsel (CPLR 321[a]), he lacks standing to raise any arguments on behalf of these entities (see *Hilton Apothecary v State of New York*, 89 NY2d 1024 [1997]).

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

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, J.P., Friedman, Williams, Acosta, JJ.

2939-

2940 Jericho Group Ltd.,  
Plaintiff-Appellant,

Index 600887/04

-against-

Pioneer Management and Realty, LLC, et al.,  
Defendants-Respondents.

---

Herzfeld & Rubin, P.C., New York (Herbert Rubin of counsel), for  
appellant.

Geballe & Geller, LLP, New York (Jonathan L. Geballe of counsel),  
for respondents.

---

Order, Supreme Court, New York County (Leland DeGrasse, J.),  
entered February 24, 2006, which, to the extent appealed from as  
limited by the briefs, granted defendants' cross motion for  
summary judgment dismissing the complaint, unanimously reversed,  
on the law, with costs, the cross motion denied, and the  
complaint reinstated. Appeal from order, same court and Justice,  
entered March 23, 2007, which, to the extent appealable, denied  
plaintiff's motion to renew, unanimously dismissed as academic.

The cross motion for summary judgment was based on  
plaintiff's failure to comply with discovery demands. The court  
instead dismissed the complaint for plaintiff's purported failure  
to raise a triable issue of fact as to whether it was ready,  
willing and able to perform the contract. Defendants never did

establish a prima facie entitlement to judgment on that ground, or even the absence of a triable issue of fact on that point (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; see also *Knopff v Johnson*, 29 AD3d 741 [2006]). Plaintiff's failure to attempt to establish its readiness, willingness and financial ability to perform, while perhaps mistaken, required only denial of its own motion for partial summary judgment.

There were also triable issues of fact as to a modification of the contract of sale by letter agreements between the parties, allegedly made to induce plaintiff to conditionally cancel the contract. Those agreements provided for a payment of \$200,000, and were not precluded by the contract's "sole remedy" provision. In light of the alleged modification, the court's focus on the return of the down payment to plaintiff was unfounded. Notably, defendants did not adequately explain the letters plaintiff attached to its motion regarding the modification. Nor did they offer any evidence to contradict plaintiff's position. Indeed, the documents offered by plaintiff support its position that the cancellation of the contract was conditioned on the return of the

deposit, payment of \$200,000, and sale of the premises to a third party.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, P.J., Friedman, Williams, Acosta, JJ.

2941-

2941A Banco Popular North America,  
Petitioner-Respondent,

Index 603226/06

-against-

Philian Designs LLC,  
Respondent-Appellant.

---

Labaton Sucharow LLP, New York (Joseph H. Einstein of counsel),  
for appellant.

Jaspan Schlesinger Hoffman LLP, Garden City (Maria Sideris of  
counsel), for respondent.

---

Judgment, Supreme Court, New York County (Richard B. Lowe  
III, J.), entered September 11, 2007, awarding petitioner the  
principal sum of \$500,000, unanimously reversed, on the law, with  
costs, the judgment vacated and the matter remanded for further  
proceedings consistent herewith. Appeal from order, same court  
and Justice, entered April 23, 2007, which, upon renewal and  
reargument of prior order granting the petition and denying the  
cross motion to dismiss the petition, adhered to its  
determination, unanimously dismissed as subsumed in appeal from  
the judgment.

In an unrelated action, petitioner was issued an order of  
attachment against the property of certain debtors. In the  
instant proceeding, brought pursuant to CPLR 6214(d), petitioner

alleges that respondent was served with a copy of said order of attachment but failed to furnish a garnishee statement as required by CPLR 6219.

Notice of this special proceeding was required by statute to be served upon the debtor-defendants and the sheriff (CPLR 6214[d]). As it is undisputed that such notice was not served, the proceeding is jurisdictionally defective (see *Oil City Petroleum Co. v Fabac Realty Corp.*, 70 AD2d 859 [1979], *affd* 50 NY2d 853 [1980]). The jurisdictional defense went to subject matter (see *Nomikos [London] Ltd. v Petroutsis*, 186 Misc 710, 715 [1946]), and thus could not be waived (see *Finnerty v New York State Thruway Auth.*, 75 NY2d 721 [1989]). Accordingly, petitioner is directed to cure the defect by serving all necessary and required parties with notice of the proceeding.

Were we not vacating the judgment on jurisdictional grounds, we would vacate it as premature, given the existence of issues of fact concerning respondent's possession of property subject to

attachment, the value of any such property, whether respondent served a garnishee statement, and whether respondent was the party served with the order of attachment.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Lippman, P.J., Friedman, Williams, Acosta, JJ.

2942N            Zulema Languasco,  
                  Plaintiff-Appellant,

Index 29324/02

-against-

Victor R. Ruiz, et al.,  
Defendants-Respondents.

---

Mitchell Dranow, Mineola, for appellant.

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

Corigliano, Geiger, Verrill & Brandwein, Jericho (Kathleen M. Geiger of counsel), for Norbert Peat, respondent.

---

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered February 24, 2006, which denied plaintiff's motion to vacate a 2004 order that had granted defendant summary judgment dismissing the complaint on default, and to renew her opposition thereto, unanimously affirmed, without costs.

Plaintiff offered no reasonable excuse for her default (see *Montero v City of New York*, 38 AD3d 748 [2007]). In any event, the opposition presented in her request for leave to renew was insufficient to establish that she had sustained a serious

injury, due to the infirmities in the medical submissions, as well as the nearly three-year, unexplained gap in her medical treatment (see *Pommells v Perez*, 4 NY3d 566 [2005]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

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

2522 James Couri, Index 107240/04  
Plaintiff-Respondent-Appellant,

-against-

John Siebert, et al.,  
Defendants-Appellants-Respondents.

---

Russo & Burke, New York (Joseph M. Burke of counsel), for  
appellants-respondents.

James Couri, respondent-appellant, pro se.

---

Order, Supreme Court, New York County (Sherry Klein Heitler,  
J.), entered February 21, 2007, which denied defendants' motion  
to strike the complaint for failure to comply with discovery  
orders of a Special Referee and denied plaintiff's cross motion  
seeking summary judgment striking defendants' answer and  
counterclaims, unanimously modified, on the law, to the extent of  
granting defendants' motion and dismissing the complaint and,  
except as so modified, affirmed, without costs. The Clerk is  
directed to enter judgment accordingly.

Supreme Court improvidently exercised its discretion in  
denying defendants' motion to strike the complaint. In June  
2005, Hon. Harold Beeler referred defendants' motion to compel  
production of documents, together with all discovery issues  
raised therein, to Special Referee Louis Crespo. After

conducting hearings, the Special Referee issued an order, dated March 16, 2006, directing plaintiff to produce documents, including income tax returns, for various businesses under his control. Despite issuance of three more orders over the ensuing three months to produce the tax returns or provide releases enabling defendants to obtain them, the Special Referee was unable to procure plaintiff's compliance. Defendants' motion to strike the complaint and plaintiff's cross motion for summary judgment ensued.

Rather than rule on the merits of defendants' motion, Supreme Court referred the matter to a second Special Referee, who "directed the parties to comply with specific discovery requests." The court denied defendants' motion, reasoning that "the discovery issues have been addressed in the decision of Special Referee Bernard Fields." Plaintiff's cross motion was denied on the ground that summary judgment had previously been denied by Justice Beeler, and his decision was "law of the case."

Justice Beeler referred defendants' motion to compel document production as well as "ALL PRE-NOTE DISCOVERY, INCLUDING ALL DISCOVERY CONFERENCES" to Special Referee Crespo. It is clear from the Special Referee's issuance of orders disposing of discovery motions that the order of reference was to hear and determine (CPLR 4311). There is no indication that Justice

Beeler's order was withdrawn or that Special Referee Crespo was unable to continue to supervise discovery so as to require the appointment of a successor referee (CPLR 4314). Thus, as a matter of comity, the matter should have been referred to Special Referee Crespo so as to avoid abrogating a standing order issued by a court of coordinate jurisdiction (CPLR 2221[a]; see *Mears v Chrysler Fin. Corp.*, 243 AD2d 270, 272 [1997]; *George W. Collins, Inc. v Olsker-McLain Indus.*, 22 AD2d 485, 488-489 [1965] [a breach of comity is not to be tolerated because it would "lead to unseamly conflicts of decision and to protracting the litigation"] [citations and internal quotation marks omitted]). The same considerations of judicial economy underlying the Individual Assignment System strongly militate in favor of referring all discovery issues to the referee designated to decide them (see *Clearwater Realty Co. v Hernandez*, 256 AD2d 100 [1998]).

Plaintiff has failed to allege, let alone demonstrate, that he complied with four orders directing him to take necessary measures to enable defendants to obtain the tax returns they sought. Plaintiff's conduct in this litigation has been "dilatory, evasive, obstructive, and ultimately contumacious" (*Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 374 [1990]) and, in the absence of any semblance of an excuse for his

noncompliance with defendants' legitimate discovery demands, warrants striking his pleading (CPLR 3126[3]). Plaintiff pro se has engaged in frivolous, defamatory and prejudicial conduct that includes multiple actions against Dr. Siebert and his counsel, ex parte communications with the court and the Special Referee, voluminous and unnecessary motion practice, unresponsive papers disparaging the Special Referee, defendants, their attorney and their accountant, and invidious attacks on Dr. Siebert's professional standing by way of communications with his colleagues and other third parties.

The courts are not obliged to indulge the excesses of a pro se litigant at the expense of decorum, judicial economy and fairness to opposing parties. Proceeding pro se is not a license to ignore court orders, engage in dilatory and obstructive conduct or malign officers of the court.

We find the medical excuse plaintiff proffered for his behavior to be unconvincing. The extent to which he was incapacitated by treatment for a malignant melanoma is not discernible from the record. In any event, it does not excuse his failure to perform the ministerial act of signing tax waivers at a time he was obviously capable of preparing lengthy communications to the Special Referee. Nor is there any suggestion that plaintiff was financially incapable of retaining

counsel to assist him. Rather, it is apparent that his obstructive conduct was calculated to impede examination of the merits of defendants' counterclaims alleging that plaintiff defrauded them out of millions of dollars, an inquiry that plaintiff would be understandably eager to avoid (*see United States v Gilbert*, Fed Sec L Rep p 98,244, 1981 WL 1662, \*8, \*10 [SD NY 1981], *affd* 668 F2d 94 [1981], *cert denied* 456 US 946 [1982] [guilty pleas to share price manipulation, two counts of making false statements to a bank]; *United States v Gilbert*, 504 F Supp 565 [1980]; *Securities & Exchange Commission v Gilbert*, 82 FRD 723 [DC NY 1979]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

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

2793 In re Michael Mays,  
Petitioner-Appellant,

Index 405063/06

-against-

New York City Police Department,  
Respondent-Respondent.

---

Michael Mays, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Norman  
Corenthal of counsel), for respondent.

---

Order, Supreme Court, New York County (Lewis Bart Stone,  
J.), entered April 20, 2007, which, in a proceeding pursuant to  
the Freedom of Information Law (FOIL), granted respondent's cross  
motion to dismiss on the ground of res judicata, unanimously  
affirmed, without costs.

In June 1995, petitioner made a FOIL request to respondent  
essentially seeking all documents relating to a particular  
indictment. Petitioner did not request certified copies of the  
documents. Respondent provided petitioner with certain documents  
but refused to provide others. Petitioner commenced a CPLR  
article 78 proceeding for review of respondent's response to the  
FOIL request. In November 1999, following an in camera  
inspection of the documents respondent refused to provide to  
petitioner, Supreme Court granted the petition in part, provided

petitioner with certain additional documents, and otherwise denied the petition.

In May 2006, petitioner made another FOIL request to respondent essentially seeking all documents relating to the same indictment. This time, however, petitioner provided a more detailed description of the documents he sought and requested certified copies of the documents. Respondent denied petitioner's request as duplicative of his June 1995 request. Petitioner's CPLR article 78 proceeding challenging respondent's denial of his request was dismissed on respondent's motion on the ground that the proceeding was barred by res judicata. We affirm.

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). Here, petitioner's claim that he was entitled under FOIL to all documents relating to a particular indictment was adjudicated on the merits in the prior CPLR

article 78 proceeding. That petitioner's second request was more detailed and specific is irrelevant; in both requests he essentially sought all documents relating to the same indictment. Furthermore, petitioner could have raised in the prior proceeding his present claim that he was entitled to certified copies of the documents.

We have considered petitioner's remaining argument and find it unavailing.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

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

2801 Julio Silvio Sinchi,  
Plaintiff-Appellant,

Index 25178/03

-against-

Mario Aloia, et al.,  
Defendants,

Jorge Pereira Construction, Inc.,  
Defendant-Respondent.

---

Quirk and Bakalor, P.C., New York (Timothy J. Keane of counsel),  
for appellant.

Bolan Jahnsen Salter & Sachs, New York (Gary C. Sachs of  
counsel), for respondent.

---

Order, Supreme Court, Bronx County (Lucy Billings, J.),  
entered on or about October 31, 2006, which, to the extent  
appealed from, granted the cross motion of defendant Jorge  
Pereira Construction, Inc. for summary judgment dismissing the  
complaint and all cross claims against it, unanimously affirmed,  
without costs.

Plaintiff sustained injury while working on the second story  
of a house being built for the Aloias. He fell into the basement  
through three-by-six-foot openings cut into the first and second  
floors to accommodate a chimney to be constructed by Pereira.  
Plaintiff's intimation that the protective planking that had  
covered the openings in the first and second floors might have

been removed by one of Pereira's employees is unsupported by admissible evidence, and the complaint was properly dismissed as against said defendant (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

2875N Asa Nathanson,  
Plaintiff-Appellant,

Index 602071/06

Lawrence A. Omansky,  
Plaintiff,

-against-

Tri-State Construction LLC, et al.,  
Defendants.

- - - - -

Vaij Associates LLC,  
Proposed Defendant-Respondent.

---

Lawrence A. Omansky, New York, for appellant.

The Law Firm of Jeffrey S. Dweck, P.C., New York (Jeffrey S. Dweck of counsel), for respondent.

---

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 14, 2007, which, to the extent appealed from, denied plaintiff Nathanson's motion to amend the complaint to add Vaij Associates as a defendant, to consolidate this case with another pending matter, and to impose a constructive trust on the proposed new defendant, affirmed, without costs.

Nathanson failed to demonstrate merit to the proposed amendment (*Helene-Harrisson Corp. v Moneyline Networks*, 6 AD3d 151 [2004]). In light of our recent affirmance of the dismissal of the case with which Nathanson sought consolidation (*see Tri State Constr., LLC v Vaij Realty Assoc.*, 45 AD3d 328 [2007]), the

contentions regarding this issue have been rendered academic. Were we to reach the issue, we would find that none of the elements required for imposition of a constructive trust have been established (see *Sharp v Kosmalski*, 40 NY2d 119 [1976]).

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

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

The denial of that aspect of plaintiff's motion for a constructive trust on Vaij Associates (Vaij) has been rendered academic by our determination that plaintiff failed to demonstrate merit to that aspect of the motion seeking to amend the complaint to add Vaij as a defendant. Without a valid complaint against Vaij or anyone else, plaintiff's motion for a constructive trust on Vaij obviously has been rendered academic. Accordingly, this Court should not unnecessarily express an opinion on the merits of that aspect of the motion for a constructive trust (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714 [1980] [the mootness doctrine, "which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary"])). The contrary-to-fact construction with which the majority prefaces its

"contingent observation" about the merits of that motion (*Bell v Miller*, 500 F3d 149, 155 [2d Cir 2007]) serves only to underscore the unnecessary character of that observation.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



presence (*see People v McIntosh*, 96 NY2d 521, 526-27 [2001]). In any event, even if the first request for information was justified, once the police questioned the occupants of the car and found nothing to create any degree of suspicion, the police clearly had no basis for their second approach and inquiry, made on foot. Moreover, in his confusing and contradictory testimony, the officer never explained why there were two requests for information, and we reject the People's argument that the second approach was merely a continuation of the first. Furthermore, we conclude that the ultimate discovery of a firearm in the car was the direct result of the second inquiry, and cannot accurately be characterized as a mere observation, from a lawful vantage point, of contraband in plain view.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gonzalez, Sweeny, JJ.

2898           The People of the State of New York,           Index 52205/05  
              ex rel. Robert Harrison,  
                  Petitioner-Appellant,

-against-

Warden, Rikers Island Correctional  
Facility, et al.,  
Respondents-Respondents.

---

Darius Wadia, New York, for appellant.

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

---

Order, Supreme Court, Bronx County (Darcel D. Clark, J.),  
entered March 23, 2006, which denied petitioner's application for  
a writ of habeas corpus and dismissed the proceeding, unanimously  
affirmed, without costs.

Petitioner cannot challenge the complained-of defect in the  
proceedings since he pleaded guilty to a violation of parole (see  
*e.g. People ex rel. Miller v Walters*, 60 NY2d 899 [1983]).

In any event, he was afforded a timely parole revocation  
hearing (see Executive Law § 259-i[3][f][i]; *People ex rel. Brown  
v New York State Div. of Parole*, 70 NY2d 391, 395 [1987]). The  
Status Inquiry Summary, which petitioner failed to rebut, showed  
that the challenged adjournments were sought by his counsel (see  
*People ex rel. Jefferson v Kelly*, 178 AD2d 973 [1991]).

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

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gonzalez, Sweeny, JJ.

2899            In re Marilyn Lee, also known as            Index 102846/06  
                 Marilyn H.M. Lam, et al.,  
                 Petitioners,

-against-

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

---

Bruce Feffer & Associates, LLC, New York (Bruce Feffer of  
counsel), for petitioners.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A.  
Brenner of counsel), for Department of Housing Preservation and  
Development of the City of New York, respondent.

Kellner Herlihy, Getty & Friedman, LLP, New York (Jeanne-Marie  
Williams of counsel), for Chinatown Apartments, Inc., respondent.

---

Determination of respondent Department of Housing  
Preservation and Development dated November 2, 2005, issuing a  
certificate of eviction, unanimously confirmed, the petition  
denied and the proceeding brought pursuant to CPLR article 78  
(transferred to this Court by order of the Supreme Court, New  
York County [Kibbie F. Payne, J.], entered June 28, 2006)  
dismissed, without costs.

The finding that petitioner Marilyn Lee did not maintain the  
subject apartment as her primary residence for many years is  
supported by substantial evidence, including testimonial  
admissions. Petitioners' argument that petitioner Charlene Lam

is entitled to succession rights through her aunt was improperly raised for the first time in the article 78 proceeding (see *Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). We have considered petitioners' other arguments and find them without merit.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gonzalez, Sweeny, JJ.

2900 DeMicco Bros., Inc., Index 105973/02  
Plaintiff-Respondent,

-against-

Consolidated Edison Company  
of New York, Inc., et al.,  
Defendants-Appellants,

Time Warner Cable,  
Defendant.

---

Richard W. Babinecz, New York (Frank A. Lisi of counsel), for  
Consolidated Edison Company of New York, Inc., appellant.

Kirkland & Ellis LLP, New York (Joseph Serino, Jr. of counsel),  
for Empire City Subway Co., Ltd., appellant.

---

Order, Supreme Court, New York County (Richard B. Lowe III,  
J.), entered May 25, 2006, which, to the extent appealed from as  
limited by the briefs, granted plaintiff's motion for summary  
judgment as to liability for prima facie tort, unanimously  
reversed, on the law, without costs, and the motion denied.

The court improperly inferred disinterested malevolence, as  
a matter of law, from defendants' alleged breach of their common-  
law duty to remove the overhead wires that plaintiff claims were  
interfering with its public works contract with the City of New  
York. Defendants' proffered justification for their failure to  
remove the subject wires, i.e., that in numerous locations  
plaintiff's work had been completed before defendants received

the City's orders directing them to relocate the wires, raised a triable issue whether the failure to remove the wires was motivated solely by a desire to harm plaintiff (see *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]; *L/M Ninety CM Corp. v 2431 Broadway Realty Co.*, 170 AD2d 373 [1991]).

**M-521      DiMicco Bros., Inc. v Consolidated Edison Co.,  
et al.**

Motion seeking leave to dismiss appeal as  
moot denied.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



Defendant sufficiently showed that the Treasury bills titled in his name and the names of his children from his first marriage came from separate assets (see *Sarafian v Sarafian*, 140 AD2d 801, 804-805 [1988]). By contrast, he offered no documentary evidence that prior to his marriage to plaintiff, he had been in the habit of jointly owning stocks with his son. Furthermore, many of the initial stock investments were modest and could have come out of the parties' marital income as opposed to defendant's premarital savings.

The stocks jointly titled in defendant and his son were purchased during the marriage, and are thus presumptively marital property despite the form of the title (see Domestic Relations Law § 236[B][1][c]). It was defendant's burden to rebut this presumption (see *DeJesus v DeJesus*, 90 NY2d 643, 652 [1997]), and he failed to do so. Indeed, there was evidence that some of the investment in the Vanguard Windsor II fund came from the parties' joint checking account, and that most of the funds for the Pfizer and Merck shares originally came from the parties' joint preferred money market account.

The insured money market account at Citibank, jointly titled in defendant's and his son's name, was also opened during the marriage, so it, too, is presumptively marital property. In reviewing defendant's net worth statement and his trial testimony

as a whole, we find that he failed to rebut the presumption that the account was marital property. Among other things, he commingled money from the parties' joint preferred money market account (later renamed a Super Yield money market account) with the insured money market account.

On November 10, 1989 (i.e., during the marriage), defendant purchased 40.707 shares of IBM. The funds to purchase these shares came from the insured money market account, but defendant failed to prove that account was his separate property. Accordingly, we find that this IBM stock, as adjusted for subsequent stock splits, constitutes marital property.

There are 100 Prudential shares titled in defendant's name. He received some of these shares when Prudential demutualized, but by his own admission, some were purchased during the marriage with joint funds. The shares resulting from the demutualization are defendant's separate property, but the additional purchased shares are marital property. Since the demutualization occurred in 2001 (i.e., during the marriage), it was defendant's burden to prove how many shares came from the demutualization and how many from the additional purchases. Since he did not, we will deem half the Prudential shares to be separate property and half marital property.

In light of the parties' 24-year marriage and their equal

contribution thereto, we award plaintiff half the shares titled jointly in defendant and his son, half the bank account titled in defendant and his son, half of the 40.707 IBM shares purchased on November 10, 1989 (as adjusted for subsequent stock splits), and one quarter of the Prudential shares (i.e., half of the portion of the Prudential shares constituting marital property) (see e.g. *Bisca v Bisca*, 108 AD2d 773, 774-775 [1985], *appeal dismissed* 66 NY2d 741 [1985]).

Plaintiff's contention that she should be awarded half the appreciation that occurred during the marriage in the value of the Exxon Mobil and other IBM shares defendant had purchased before the marriage is unavailing. The increase in the value of stock in these large, publicly traded corporations was due to market forces and inflation, not defendant's efforts (see e.g. *Price v Price*, 69 NY2d 8, 18 [1986]).

It is undisputed that the marital residence, which defendant purchased long before the parties' marriage, is defendant's separate asset. During the long-standing marriage, the residence increased in value by \$585,000. In view of plaintiff's direct and indirect contributions to the marriage and the home, we

conclude that she should have been awarded one-quarter of the appreciation of the residence (*Price v Price*, 69 NY2d 8 [1986]).

**M-651      *Lee v Lee***

Motion seeking leave to file a sur-reply brief, an order dismissing appeal and reimbursement of attorneys fees denied.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



of City of NY, § 16-123[a]). In opposition, plaintiff submitted an affidavit stating that she slipped on ice as well as snow and that while there were snow flurries the morning of her accident, there was no accumulation; photographs of a sidewalk with patches of ice, identified by plaintiff at her deposition as fairly and accurately depicting the area of sidewalk where she fell; and climatological data showing that on the day before plaintiff's fall, New York City had .92 inches of "rain" and "drizzle" between 1:00 p.m. and 7:00 p.m., and that there was no precipitation on the day of plaintiff's fall. An issue of fact exists as to whether, inter alia, plaintiff was mistaken when she testified at deposition that it was snowing when she fell (see *Howard v J.A.J. Realty Enters.*, 283 AD2d 854, 855-856 [2001] [summary judgment in defendant's favor precluded by conflict between plaintiff's deposition testimony that it was snowing and affidavit of meteorological expert that it was not]; cf. *Powell v Hillside Assoc.*, 290 AD2d 345, 345 [2002] [evidence of storm in progress especially persuasive when based on analysis of licensed meteorologist]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gonzalez, Sweeny, JJ.

2907 James Crooms,  
Plaintiff-Appellant,

Index 6122/03

-against-

Sauer Bros. Inc.,  
Defendant-Respondent.

---

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

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondent.

---

Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered September 12, 2006, after a jury trial, awarding plaintiff damages of \$75,000 for past pain and suffering and nothing for future pain and suffering, unanimously affirmed, without costs.

In 2002, plaintiff, an unemployed former transit worker on disability, allegedly fell in the backyard of his building, owned by defendant, when he stepped into a hole, lost his balance, and struck his ankle on a rock the size of a bowling ball. He suffered a fracture of the fifth metatarsal bone on his left foot, and developed a deep vein thrombosis from the cast that was applied. After hospitalization for a week, he wore a cam-walker for another two months. Plaintiff alleges that he also suffered consequent injuries to his left ankle and spine, requiring

surgery in 2004 and 2005, respectively.

At trial, plaintiff was cross-examined regarding an affirmation he had signed in connection with an auto accident involving his family. The affirmation suggested that plaintiff had been in the car, but on cross-examination he stated that the affirmation was erroneous. Plaintiff sought to offer into evidence a police report and other documents to bolster his testimony that he had not been in the car, but the court denied the request on the ground that the issue was collateral and relevant only to credibility. At a later point in the trial, a report of defendant's expert suggested that plaintiff might indeed have been in an accident subsequent to the one at issue.

Plaintiff challenges the verdict on the ground that the court should have permitted him to prove that he had not been in a later auto accident, to avoid speculation by the jury on this collateral event. He also asserts that the verdict was inconsistent, against the weight of the credible evidence, and deviated materially from reasonable compensation.

A collateral matter is one that has no direct bearing on any issue in the case, other than credibility. The trial court is invested with broad discretion in restricting inquiry into such matters (*see Coopersmith v Gold*, 89 NY2d 957 [1997]). The record reflects that plaintiff was asked about the affirmation in the

context of a series of questions designed to challenge his credibility. At no point did defense counsel suggest plaintiff's alleged injuries were the consequence of a later accident, and in summation defense counsel stated that the only relevance of the affirmation was the fact it was false and plaintiff signed it. Accordingly, the court properly refused to admit extrinsic evidence regarding the subsequent auto accident.

The record also reflects sufficient evidence to support the verdict and the adequacy of the award. Based on the report of defendant's expert, portions of which were read into the record, plaintiff made a full recovery, had a full range of motion and normal alignment, and the soft tissue and bony structure of the foot were normal, with no disability or permanent injury as a result of the subject accident. Plaintiff's experts disagreed.

In evaluating conflicting testimony of expert witnesses, the jury is entitled to accept or reject an expert's testimony in whole or in part (*Mejia v JMM Audubon*, 1 AD3d 261 [2003]). If the jury credited defendant's expert, there is no inconsistency in the award of damages for past pain and suffering but none for future pain and suffering, in light of plaintiff's full recovery.

Defendant's expert also opined that the surgery on plaintiff's ankle in 2004 and his back in 2005 were consequences of unrelated medical problems. The award of \$75,000 for a

fractured metatarsal and thrombosis does not deviate materially from reasonable compensation (see *Brandwein v New York City Tr. Auth.*, 14 AD3d 396 [2005]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



panelist's employment or educational level. The record supports the court's finding that these nondiscriminatory reasons were not pretextual. This finding, which essentially involved an assessment of the prosecutor's credibility, is entitled to great deference (see *People v Hernandez*, 75 NY2d 350, 356 [1990], *affd* 500 US 352 [1991]), and we do not find any disparate treatment by the prosecutor of similarly situated panelists. Defendant did not preserve his present claims regarding a fifth panelist stricken during the first round of voir dire, or his claim that, in making its rulings, the court failed to follow the proper *Batson* procedure, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. Viewed in context, the court's statement that the nondiscriminatory reasons were "not incredible" was a proper ruling, under step three of *Batson*, that these reasons were nonpretextual, and the court implicitly made the appropriate factual findings.

The court properly instructed the jury that the intent element of burglary could be satisfied in this case by, among other things, an intent to commit the crime of harassment in the first degree (Penal Law § 240.25). On the evidence presented, the jury could have found that at the time of his entry into the premises, defendant intended to continue a course of conduct or

series of repeated acts that placed the victim in reasonable fear of physical injury (*cf. People v India*, 67 AD2d 488, 493 [1979] [dictum that entry with intent to continue an ongoing kidnapping would constitute burglary]).

As the People concede, since the crime was committed four days prior to the effective date of the legislation providing for an increase in the mandatory surcharge and crime victim assistance fee, they should be reduced as indicated.

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



sale. Defendants did not respond to plaintiff's request that they itemize any alleged damage to the apartment. Indeed, defendant Gideon Gartner acknowledged in an affidavit submitted in opposition to plaintiff's motion that when he and his wife signed the contract in August 2004 they had not seen the inside of the apartment for at least eight months, and in a December 14, 2004 facsimile, defendants conceded that they had not inspected the apartment in detail until the date of the closing. The architects' report does not discuss how the condition of the apartment may have changed between the date of contract and the date of closing; it addresses areas of needed improvement that would have been evident on the date of the contract. Lacking any evidence of the state of the apartment on the date of the contract, defendants failed to raise a triable issue whether the condition of the apartment had changed by the time of the closing.

Furthermore, in a November 17, 2004 email, defendants admitted that the reason they would not purchase the apartment was the high cost of renovations, together with their recent financial troubles; they made no mention whatsoever of damage to the apartment. Indeed, defendants conceded that the failure to close rested with them and that as a consequence they were forfeiting their down payment. Contrary to defendants'

contention, the November 17, 2004 email is not inadmissible under CPLR 4547, which applies only to offers "to compromise a claim which is disputed"; defendants admitted liability. In any event, in the December 14, 2004 facsimile, defendants similarly admitted that they cancelled the closing because of the expense of remodeling, and they do not claim that the December 14, 2004 facsimile is inadmissible under CPLR 4547.

Defendants are not absolved from liability because plaintiff subsequently sold the apartment to a third party for more than they had agreed to pay for it (see *Johnson v Werner*, 63 AD2d 422, 424 [1978]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK



render meaningless the express exclusion of Specification III in the agreement's first paragraph (see *Acme Supply Co., Ltd. v City of New York*, 39 AD3d 331 [2007]; *Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64, 69 [1999]). To reconcile these two paragraphs, the second paragraph's reference to "this specific matter" must necessarily be read as excluding Specification III. Since Specification III was never withdrawn, and petitioner failed to avail himself of the grievance procedures set forth in the collective bargaining agreement, he is precluded from seeking relief in this CPLR article 78 proceeding (see *Matter of Plummer v Klepak*, 48 NY2d 486, 489 [1979], *cert denied* 445 US 952 [1980]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gonzalez, Sweeny, JJ.

2911 Donna M. Hughes, Index 101633/04  
Plaintiff-Respondent,

-against-

Paul F. Farrey,  
Defendant-Appellant.

- - - - -

Lawrence Anthony Porcari,  
Nonparty-Appellant.

---

Lawrence Anthony Porcari, Yonkers, for Paul F. Farrey, appellant,  
and appellant pro se.

Alterman & Boop LLP, New York (Arlene F. Boop of counsel), for  
respondent.

---

Order, Supreme Court, New York County (Louis B. York, J.),  
entered October 3, 2006, which granted plaintiff's motion for  
sanctions against defendant's attorney in the amount of \$2500 and  
against defendant in the amount of \$3000, and authorized the  
filing of the note of issue, unanimously affirmed, with costs.

Given defendant's unexcused failure to appear for a  
deposition that had been twice ordered by the court, it is clear  
that the IAS court properly determined that his conduct and that  
of his attorney were frivolous (see 22 NYCRR 130-1.1[a]), and  
there is no reason to disturb the exercise of discretion as to  
either the imposition of sanctions or the amounts awarded (see  
*Seldon v Bruno*, 204 AD2d 180 [1994]).

Allowing plaintiff to file the note of issue despite defendant's claim that certain discovery was outstanding was not an abuse of the court's broad discretion to supervise disclosure (see *Kamhi v Dependable Delivery Serv.*, 234 AD2d 34 [1996]; *Matter of American Home Prods. Corp. v Shainswit*, 215 AD2d 317 [1995]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gonzalez, Sweeny, JJ.

2913 Sharon Rosenberg, etc., Index 106697/06  
Plaintiff-Respondent,

-against-

Alpha Wire Company, et al.,  
Defendants,

Belden Wire & Cable Company,  
Defendant-Appellant.

Appeal from an order, Supreme Court, New York County (Helen E. Freedman, J.), entered September 11, 2007, unanimously withdrawn in accordance with the terms of the stipulation of the parties hereto. No opinion. Order filed.



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

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gonzalez, Sweeny, JJ.

2916            Nicholas N. Sorge, Jr.,  
                  Plaintiff-Appellant,

Index 117825/04

-against-

North Star Waste, LLC, et al.,  
Defendants-Respondents.

---

Alexander J. Wulwick, New York, for appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Andrea A. Brochetelli of counsel), for respondents.

---

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 14, 2006, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff was injured when the vehicle he was driving collided into the rear of defendants' truck while it was stopped at a traffic light. Plaintiff's submissions failed to raise a triable

issue of fact as to whether defendants caused or contributed to the collision (*see Mullen v Rigor*, 8 AD3d 104 [2004]).

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gonzalez, Sweeny, JJ.

2917N-

2918N Sara Kinberg,  
Plaintiff-Appellant,

Index 12723/05

-against-

Yoram Kinberg,  
Defendant-Respondent.

---

Sara Kinberg, appellant pro se.

Jane Bevans, New York, for respondent.

---

Order, Supreme Court, Bronx County (Latia W. Martin, J.), entered July 10, 2006, which granted defendant's motion to dismiss the complaint, and order, same court and Justice, entered April 10, 2007, which, to the extent appealable, denied plaintiff's motion to renew the prior order, unanimously affirmed, without costs.

Plaintiff wife's first cause of action, in which she sought defendant husband's imprisonment and a fine for his alleged perjury, failed to state a cause of action, since it is the district attorney who generally retains sole authority to prosecute such criminal activity (see County Law § 700; *Della Pietra v State of New York*, 71 NY2d 792, 796 [1988]; *People v Rodgers*, 205 Misc 1106 [1954]). The second cause of action, alleging forgery, was similarly defective in failing to indicate

that defendant had submitted a signed and sworn Domestic Relations Law § 253 statement bearing plaintiff's name.

The third cause of action alleged that defendant had schemed to defraud by submitting a false affidavit to the court that his counsel represented plaintiff, who was requesting an expedited judgment of divorce. That erroneous representation was a scrivener's error, the documentary evidence clearly indicating that defendant's counsel represented only defendant, and that he was seeking the expedited judgment of divorce, not plaintiff.

The fourth cause of action sought punitive damages for defendant's alleged violation of Domestic Relations Law § 253. Defendant did submit a sworn statement indicating he had removed all barriers to plaintiff's remarriage pursuant to that section, but he was not required to file such a statement because the action for divorce was not based on a decree or judgment of separation (§ 170[5]) or a written separation agreement (§ 170[6]) (see § 253[4]).

The fifth cause of action sought punitive damages and imprisonment for the crime of bigamy, and the sixth cause of action sought to void the allegedly bigamous marriage. As already noted, the authority to prosecute defendant for criminal activity resides solely with the District Attorney. Moreover, the documentary evidence indicates that defendant remarried only

after obtaining a binding secular decree of divorce (see Domestic Relations Law § 8).

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

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

ENTERED: FEBRUARY 28, 2008

---

CLERK

**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**FEBRUARY 28, 2008**

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-883X Drozdov v Stones Transportation, Inc.

Appeal withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-868 5 West 120<sup>th</sup> Realty Corp. v Continental Capital Group, LLC.

Appeal, previously perfected for the April 2008 Term, deemed withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-888 Johnson v JKS Realty, Inc. - C&M Automotive, Inc.,  
doing business as Xpert Automotive, Inc. v Travelers  
Indemnity Company

Appeal and cross appeals, previously perfected for the  
April 2008 Term, withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-152 Fernandez v Riverdale Terrace Housing Development Fund  
Company, Inc., sued herein as Riverdale Terrace

Motion and appeal deemed withdrawn.

Lippman, P.J., Tom, Mazzairelli, Andrias, Saxe, JJ.

M-339 Mendez v 455 Central Park West, LLC.  
(And a third-party action)

M-532 Peguero v 601 Realty Corp.

M-542 Plimpton v Massachusetts Mutual Life Insurance Company  
(And a third-party action)

Motions deemed withdrawn.

Lippman, P.J., Tom, Mazzairelli, Andrias, Saxe, JJ.

M-733 People v Hill, Renata; Dandridge, Terrain

Motion deemed withdrawn; appeals adjourned to the June 2008 Term. Clerk directed to calendar appeals for hearing together in said Term.

Lippman, P.J., Tom, Mazzairelli, Andrias, Saxe, JJ.

M-764 People v Bacote, Roderic

M-765 Brown, Thomas

M-770 Burgos, Christian

M-772 Carter, Caprian

M-775 Hinson, Bernard

M-779 Taylor, Shahana

M-780 Vargas, Eville

Leave to prosecute appeals as poor persons granted, as indicated.

Lippman, P.J., Tom, Mazzairelli, Andrias, Saxe, JJ.

M-376A People v Dominguez, Luis

Upon the Court's own motion, the order of this Court entered February 5, 2008 (M-376) recalled and vacated; counsel reassigned and poor person relief previously granted continued, as indicated.

Lippman, P.J., Tom, Nardelli, Catterson, Moskowitz, JJ.

M-515 In the Matter of G., Heather

Time to perfect appeal enlarged to the June 2008 Term.

Lippman, P.J., Tom, Nardelli, Catterson, Moskowitz, JJ.

M-410 Cintron v Fuller

Time to perfect appeal enlarged to the June 2008 Term.

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

M-6414 People v Vasquez, Jesus

Leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Lippman, P.J., Saxe, Nardelli, Williams, Moskowitz, JJ.

M-6559 In the Matter of L., Tamia, also known as J., Tamia -  
Administration for Children's Services

Leave to prosecute appeal as a poor person granted, as indicated. (See M-6560 decided simultaneously herewith).

Lippman, P.J., Saxe, Nardelli, Williams, Moskowitz, JJ.

M-6560 In the Matter of J., Faith Jevonne, also known as J.,  
Faith, also known as W., Baby Girl - Administration for  
Children's Services

Leave to prosecute appeal as a poor person granted,  
as indicated. (See M-6559 decided simultaneously herewith).

Lippman, P.J., Friedman, Williams, Acosta, JJ.

M-533 In the Matter of Bobian v New York City Housing  
Authority

Stay granted on condition appellant personally serve  
respondent with a copy of this Court's order; appeal to be  
perfected for the June 2008 Term, as indicated.

Lippman, P.J., Friedman, Williams, Acosta, JJ.

M-399 People v Smith, Jason

Leave to prosecute appeal as a poor person denied, with  
leave to renew, as indicated.

Lippman, P.J., Friedman, Williams, Acosta, JJ.

M-404 People v Ritchie, Seth

Substitution of counsel denied.

Lippman, P.J., Friedman, Williams, Acosta, JJ.

M-435 Tahari v Rosen

M-668

Appeal dismissed unless perfected for the October 2008 Term, as indicated; enlargement of time to perfect same granted accordingly.

Lippman, P.J., Gonzalez, Williams, Buckley, JJ.

M-344 People v Canaan, Jose

Leave to prosecute appeal as a poor person granted, as indicated.

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

M-452 Eleventh Avenue Auto Repair Corp. v Weir

Motion and appeal deemed withdrawn.

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

M-428 People v Dunlop, German

Dismissal of appeal denied; appellant directed to perfect appeal for the June 2008 Term of this Court.

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

M-273 People v Mirabel, Julian, also known as Mirabal, Julian

Leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

M-516 Friedman, also known as Finan v Finan  
CPLR 5704(a) relief denied.

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

M-287 George v Joseph  
Reargument denied.

Tom, J.P., Andrias, Friedman, Williams, Gonzalez, JJ.

M-646 People v Chandler, Barret

Enlargement of time to file pro se supplemental brief  
granted; defendant directed to the prior order of this Court  
entered January 22, 2008 (M-6545).

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

M-797 CSP Technologies, Inc. v Hekal  
Stay denied.

Mazzarelli, J.P., Andrias, Saxe, Gonzalez, Sweeny, JJ.

M-630 In the Matter of Martinez v New York City Housing  
Authority

Leave to prosecute proceeding as a poor person granted  
to the extent indicated.

Mazzarelli, J.P., Andrias, Saxe, Gonzalez, Sweeny, JJ.

M-457        In the Matter of Feliz v New York City Housing  
                 Preservation and Development

                 Vacatur of stay granted unless proceeding perfected for  
the September 2008 Term, as indicated.

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

M-667        Firtell v Update, Inc., also known as Update Legal  
  
                 Stay denied.

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

M-412        In the Matter of Rios v New York State Department of  
                 Correctional Services

                 Leave to prosecute appeal as a poor person granted to  
the extent indicated; assignment of appellate counsel continued.  
(See the order of this Court entered February 9, 2006 [M-7206]).

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

M-752        In the Matter of Miller - Lawrence v Miller  
  
                 Motion deemed withdrawn.

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

M-518        In the Matter of Toolasprashad v Kelly

                 Dismissal of appeal denied; matter remanded to Supreme  
Court, as indicated.

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

M-710        174 Second Equities Corp. v Bae

Time to perfect appeal enlarged to the September 2008 Term, as indicated.

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

M-715        Wiebusch v Marble Collegiate Church

Stay denied; interim relief granted by order of this Court, dated February 5, 2008, vacated.

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

M-546        People v Liggan, Stacy

Enlargement of time to file pro se supplemental brief granted for the September 2008 Term, to which Term appeal adjourned, as indicated.

Andrias, J.P., Friedman, Sweeny, Moskowitz, JJ.

M-471        Sorenson v Bridge Capital Corp.

Motion deemed withdrawn.

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

M-525        In the Matter of 5-7 East 17<sup>th</sup> LLC v Cuomo

Leave to appeal to this Court granted and relief afforded by order of a Justice of this Court, dated January 25, 2008, continued, as indicated.

Nardelli, J.P., Williams, Sweeny, Catterson, JJ.

M-739 Kralik v 239 East 79<sup>th</sup> Street Owners Corp. - Council of  
New York Cooperatives

Amicus brief deemed filed.

Tom, J.

M-30 People v Nova, Ricardo

Leave to appeal to this Court denied.

Sweeny, J.

M-214 People v Ford, Corey

Leave to appeal to this Court denied.

Mazzarelli, J.P., Sweeny, Catterson, McGuire, Malone, JJ.

M-6183 In the Matter of Linda J. Stanch  
(admitted as Linda Joan Stanch),  
a disbarred attorney:

Reargument denied. No opinion. All concur.

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

M-5848 In the Matter of William Jarblum,  
an attorney and counselor-at-law:

Respondent suspended from the practice of law in the  
State of New York for a period of two years, effective the date  
hereof and until further order of this Court. Opinion Per  
Curiam. All concur.

**The following order was entered and filed on February 26, 2008:**

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

M-653        In the Matter of Watts v The Chancellor of the City  
                 University of New York

Vacatur of stay denied.