

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**FEBRUARY 26, 2008**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Mazzarelli, Gonzalez, Sweeny, McGuire, JJ.

2503N Omar Berete, etc., Index 14389/05  
Plaintiff-Respondent,

-against-

New York City Health and Hospitals  
Corporation, et al.,  
Defendants-Appellants.

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

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

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Order, Supreme Court, Bronx County (Douglas E. McKeon. J.),  
entered January 6, 2006, which granted plaintiff's motion to deem  
his notice of claim timely served nunc pro tunc, unanimously  
reversed, on the law, without costs, the disposition vacated and  
the matter remanded to Supreme Court for reconsideration of  
plaintiff's application for leave to serve a late notice of  
claim.

The court erroneously concluded that it was without  
discretion to deny leave to serve a late notice of claim to a  
plaintiff who allegedly suffered a neonatal injury at a facility

owned by defendant Health and Hospitals Corporation, where a medical record existed memorializing the details of the delivery. General Municipal Law § 50-e (5) requires courts to exercise discretion in determining whether to grant or deny leave to file a late notice of claim. The statute "contains a nonexhaustive list of factors that the court should weigh, and compels consideration of all relevant facts and circumstances" (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). The three relevant statutory criteria in this case are whether defendants had actual knowledge of the essential facts constituting the claim, plaintiff's infancy, and whether the delay in serving the notice of claim substantially prejudiced defendants.

Plaintiff alleges trauma, seizures, brain damage and developmental delays resulting from defendants' use of forceps during his delivery. In support of his motion, he submitted medical records noting that he had sustained a "moderate cephalohematoma" and "moderate facial bruising on the right cheek." We do not, however, pass judgment on the merits of plaintiff's claim, nor defendants' argument that these same records indicate a difficult delivery albeit without indication of long-term injury.

These issues go to the question of whether Supreme Court, in the exercise of its sound discretion, should grant plaintiff's

application to file a late notice of claim (*Matter of Semyonova v New York City Hous. Auth.*, 15 AD3d 181 [2005]). Accordingly, we remand to permit Supreme Court to exercise its discretion "after consideration of the factors and circumstances relevant to an application pursuant to General Municipal Law § 50-e (5)" (*Matter of Jordan v City of New York*, 38 AD3d 336, 339 [2007]).

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timely move for substitution (see CPLR 1015[a]; 1021). Moreover, the strong public policy of this State is to dispose of matters on the merits (*Noriega v Presbyterian Hosp. in City of N.Y.*, 305 AD2d 220, 221 [2003]). Accordingly, a motion to substitute a party after a lengthy delay should be granted absent a showing of prejudice by the defendant (*Schwartz v Montefiore Hosp. & Med. Ctr.*, 305 AD2d 174, 176 [2003]). Here, defendant Mariani failed to demonstrate prejudice because the action will likely rely on medical records and other documentary evidence and not the testimony of eyewitnesses (see *Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376, 378 [2004]).

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degree drug sale, defendant is serving a concurrent life sentence for murder.

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appeal the order denying the motion to vacate (see *Myers & Co. v Owsley & Sons*, 192 AD2d 927 [1993]).

Were we to consider the issues raised, we would affirm. Dismissal of the complaint was a proper exercise of judicial discretion in light of plaintiff's longstanding pattern of noncompliance with court orders and discovery demands (CPLR 3126; see *Goldstein v CIBC World Mkts. Corp.*, 30 AD3d 217 [2006]). Plaintiff's failure to offer a reasonable excuse for his noncompliance gives rise to an inference of willful and contumacious conduct (*Siegman v Rosen*, 270 AD2d 14 [2000]).

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correct the clerical error stating that defendant was sentenced  
as a second felony offender.

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Plaintiff sued the former holders of certain long-term notes for brokerage commissions arising from their acquisition. After the former note holders sold the long-term notes to 96-97th Street in 2001 pursuant to a note purchase agreement, plaintiff amended its complaint to pursue that assignee and its guarantors of obligations under the notes. At the conclusion of a consolidated trial, the court rejected the corporate defendant's position that the fee agreement between plaintiff and the original note holders was extinguished by the assignment of those notes, determining that the obligation to pay the brokerage fees owed to plaintiff extended to whoever owned the long-term notes during their lifetime. Defendants in the second action appeal.

"No particular words are necessary to effect an assignment; it is only required that there be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things assigned" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). An assignee stands in the shoes of its assignor, subject to all the equities and burdens attached to the property acquired (see *Matter of International Ribbon Mills*, 36 NY2d 121, 126 [1975]). The original acquisition of the long-term notes was burdened by an obligation to pay a percentage to plaintiff as a brokerage fee. The selling note holders did not purport to assign to 96-97th Street simply the

monies payable under the long-term notes, but rather the holders' "right, title and interest in" the notes. The trial court's conclusion that the duty to pay brokerage fees to plaintiff ran with the long-term notes was confirmed by the uncontroverted actions and testimony of signatories of the original fee agreement, as well as the language of the 2001 stock purchase agreement.

We have considered appellants' remaining arguments and find them unavailing.

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

2880-

2880A-

2880B

Vintage, LLC,  
Plaintiff-Respondent,

Index 15819/02

-against-

Laws Construction Corp., et al.,  
Defendants-Appellants,

Westway Industries, Inc., et al.,  
Defendants.

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Andrew Greene & Associates, P.C., White Plains (Stanley S. Zinner of counsel), for appellants.

Goetz Fitzpatrick LLP, New York (Donald J. Carbone of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about September 14, 2006, awarding plaintiff the principal sum of \$1.5 million against defendants Laws Construction, the Westway/Laws Construction joint venture, and United States Fidelity and Guaranty, unanimously reversed, on the law, with costs, the award vacated, and the complaint dismissed. The Clerk is directed to enter an amended judgment accordingly. Appeal from order, same court and Justice, entered February 9, 2007, which denied appellants' motion to set aside the jury

verdict and judgment against them, unanimously dismissed, without costs, as academic, in view of the foregoing. Order, same court and Justice, entered on or about August 14, 2007, settling the transcript, unanimously affirmed, without costs.

The court erred in not granting appellants' request for a jury charge containing all the elements of a joint venture (see *Cobblah v Katende*, 275 AD2d 637, 639 [2000]). Further, the verdict should have been set aside because there was insufficient evidence from which the jury could have determined that a joint venture had been formed as of the date plaintiff claims to have entered into two contracts with that venture (see *Chanler v Roberts*, 200 AD2d 489 [1994], *lv denied* 84 NY2d 903 [1994]). Because the remaining defendants (not parties to this appeal) settled out of the case prior to trial, the complaint should be dismissed in its entirety.

Appellants' challenge to the settling of the transcript was undermined by their counsel's statement immediately after the charge was given, and by their failure to raise a timely objection (CPLR 4110-b).

We have considered appellants' remaining contentions and find them unavailing.

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

2881 Aurelina Filipinas, as the Index 108854/04  
Administratrix of the Estate  
of Sergio Solana, et al.,  
Plaintiffs-Appellants,

-against-

Action Auto Leasing, et al.,  
Defendants-Respondents.

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McMahon, McCarthy & Verrelli, Bronx (Matthew J. McMahon of  
counsel), for appellants.

Murphy & Higgins, LLP, New Rochelle (Richard S. Kaye of counsel),  
for respondents.

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Order, Supreme Court, New York County (Martin Shulman, J.),  
entered May 17, 2007, which, in this wrongful death action,  
granted defendants' motion to set aside the verdict and directed  
a new trial on the issue of damages unless plaintiff stipulated  
to a reduction in the award for conscious pain and suffering from  
\$750,000, to \$350,000, unanimously reversed, on the facts,  
without costs, the motion denied and the verdict reinstated.

The trial evidence established that within an hour of the  
accident, plaintiff's decedent was heavily medicated and/or  
sedated, justifying the trial court's reasoning that the decedent  
endured pain and suffering for a limited amount of time.  
However, contrary to the court's determination, the award for  
conscious pain and suffering did not deviate materially from what

is reasonable compensation, where, as a result of being struck in the head by the side mirror of defendants' van, plaintiff's decedent sustained fractures of the left orbit and right temporal bone, a subdural hematoma and subarachnoid hemorrhaging (see *Twersky v Busche*, 37 AD3d 704 [2007]; *Ramos v La Montana Moving & Stor.*, 247 AD2d 333 [1998]).

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injuries have resolved (see *Thompson v Ramnarine*, 40 AD3d 360 [2007]). In opposition, the report of plaintiff's medical expert, who found, based on his own quantitative assessments, that plaintiff has limited ranges of motion in her cervical and lumbosacral spine, raises an issue of fact whether such limitations are permanent or significant (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]).

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meaning, i.e., "stopped performing labor" (*Sea Crest Constr. Corp. v Amwest Sur. Ins. Co.*, 263 AD2d 433, 434 [1999]). The affidavit submitted by the contractor's president, the Application and Certificate for Payment submitted by the contractor to the owner, and an e-mail from the owner's counsel to the surety establish that the contractor stopped performing labor on the project two years before plaintiff commenced the action, and that the action, insofar as brought against the surety, is therefore barred by the bond's one-year suit limitation provision. Plaintiff's arguments that there is no evidence that the contractor was formally terminated or that its work was 100% complete are unavailing. Commencement of the one-year period depends simply on when the contractor ceased work. Plaintiff's claim that the contractor, who was engaged to perform excavation and foundation work, may be called upon to finish its contract in the future is mere speculation that, moreover, is refuted by a document, submitted with the surety's reply papers, in which the owner, a public authority, reports the completion of the project as one of its fiscal year 2006-2007 "Highlights, Accomplishments & Programs." Plaintiff fails to set forth any credible evidentiary basis pursuant to CPLR 3212(f) for believing that disclosure might reveal new information that would create an

issue of fact as to when the contractor ceased work (see *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [2006], *lv denied* 8 NY3d 804 [2007]).

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police witness, defense counsel elicited that about five drug sales had been consummated in the apartment in the months preceding the charged sales, but that defendant was not present during those transactions. On appeal, defendant challenges this testimony as hearsay and "uncharged crimes." Since the record is clear that defense counsel deliberately elicited all of the challenged testimony, which was responsive to his cross-examination of the officer, defendant has waived any challenge except in context of his ineffective assistance of counsel claim (see *People v Garcia*, 298 AD2d 107 [2002], lv denied 99 NY2d 558 [2002]). Defendant's ineffective assistance claim regarding this evidence is unreviewable on direct appeal because it involves matters of strategy outside the record (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; see also *Strickland v Washington*, 466 US 668 [1984]). It was a reasonable strategy for counsel to elicit the testimony in question, which tended to support the defense theory. Defendant's other ineffective assistance claims are without merit.

Nothing in the prosecutor's summation shifted the burden of proof, and, in any event, the court's curative instruction on that subject was sufficient to prevent any prejudice. Defendant's remaining challenges to the summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (see *People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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alteration work to Tenant's apartment in Owners' building. Uribe was granted partial summary judgment on his Labor Law § 240(1) claim against Owners, and Owners seek to hold Tenant liable based on Tenant's breach of a lease provision requiring Owners' prior written consent to the work, and discussions between Tenant and the contractor regarding which phase of the job to start first.

Dismissal of the third-party complaint was proper where the record evidence establishes that Tenant was not in the apartment when the subject work was performed, gave the contractor no instructions regarding how to do the work, and did not supply any equipment or tools. Tenant also exercised no supervisory authority or control over the job, and Tenant's alleged violation of the lease is not relevant to the issue of common-law indemnification in light of the lack of evidence that the accident was attributable to negligence on Tenant's part (see *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1999]). Similarly, Tenant's alleged conversations with the contractor regarding which tasks to perform first are insufficient to

establish control over the work (see *Garcia v Petrakis*, 306 AD2d 315 [2003]; *Richichi v Construction Mgt. Tech.*, 244 AD2d 540 [1997]).

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Evidence established that Century, which serviced the elevator on a twice-monthly basis, had recorded no problems with the elevator's electronic eye door sensors in the three months since their installation (see *Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]). The property's owner's marginally untimely cross motion for summary judgment was properly considered by the court because it raised nearly identical issues, inter alia, of lack of proof of defect and notice, as asserted in Century's timely motion; the court properly searched the record to grant appropriate relief (see *Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304 [2006]).

Plaintiff's opposition papers, including affidavits by herself and an expert safety engineer, failed to raise an issue of fact as to the existence of a defect, and whether defendants had actual or constructive notice. The expert, who inspected the elevator four years after the incident, offered an unsubstantiated conclusion that the elevator doors would not have closed on plaintiff's hand had the electronic sensors been working properly. Plaintiff's averments that defendants had prior notice of the elevator's malfunctioning through prior complaints constituted inadmissible hearsay, absent firsthand evidence. To the extent plaintiff averred that she had seen prior complaints recorded in the building's lobby logbook, she failed to move for its production. Further, there was no

evidence from plaintiff that the alleged prior incidents involved the same or similar defects as those that caused her accident (see *Gjonaj*, 38 AD3d at 385). On this record, plaintiff's proof of notice was entirely speculative and insufficient to raise a triable issue of fact.

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agreement between two companies of which plaintiff was a principal, and the issuance of shares of stock to defendants. Accordingly, plaintiff's remedy is a motion pursuant to CPLR 5015(a)(2) and (3) addressed to the court that issued the judgment dismissing the prior action. In view of the foregoing, we do not address the parties' substantive arguments.

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inappropriate and extensive telephone contact with four female students. Based on SCI's report, DOE issued a directive placing petitioner on its Ineligible/Inquiry List. That determination was rationally based and amply supported by the undisputed telephone records (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Contrary to petitioner's contention, DOE was not required to afford him notice or an opportunity to be heard prior to making its determination since he had no legitimate claim of entitlement to continue his role as a volunteer coach (see e.g. *Matter of Frazier v Board of Educ. of City School Dist. of City of New York*, 71 NY2d 763, 765 [1988]; *Matter of Von Gizycki v Levy*, 3 AD3d 572, 573 [2004]), or to access to public school facilities (see *Silano v Sag Harbor Union Free School Dist. Bd. of Educ.*, 42 F3d 719, 725 [1994], cert denied 515 US 1160 [1995]).

Furthermore, inasmuch as petitioner "has not denied the truth of the central factual assertions" which formed the basis for the DOE's directive, he cannot state a "stigma-plus" due process claim (see *Matter of Johnson v Kelly*, 35 AD3d 297, 298 [2006]; and see *O'Connor v Pierson*, 426 F3d 187, 195 [2005]). Nor was such claim made in the underlying petition. Respondents cannot be held responsible for speculation and rumors that may have been

spread by members of the school community concerning the reasons for the nonparty SCI investigation (*id.*).

To the extent petitioner seeks declaratory relief with respect to the SCI report, the court properly determined that SCI is a necessary party and could not be joined after expiration of the four-month limitations period (*see Matter of Solid Waste Servs., Inc. v New York City Dept. of Env'tl. Protection*, 29 AD3d 318, 319 [2006], *lv denied* 7 NY3d 710 [2006]).

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of the type of facial surgery defendant underwent 10 days before the assault. Although defendant argued that this evidence was relevant to his state of mind, particularly with regard to his supposed motive to protect himself from being reinjured by the officer, he did not present any testimony about his actual mental state or establish any connection between the prior surgery and his mental state at the relevant point in the incident. As a result, the jury would have been called upon to engage in speculation. To the extent that defendant is raising a constitutional claim, such claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (see *Crane v Kentucky*, 476 US 683, 689-690 [1986]).

We perceive no basis for reducing the sentence.

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the time the fraud was discovered or with reasonable diligence could have been discovered, whichever is later (see CPLR 213[8], 203[g]; *Saphir Intl., SA v UBS PaineWebber Inc.*, 25 AD3d 315 [2006]).

Here, the fraud allegedly occurred, and plaintiff's cause of action accrued, prior to execution of the stipulation of settlement on July 13, 1998, more than six years before her complaint was filed. In "late 2003," plaintiff was put on inquiry notice of the facts she now claims were fraudulently concealed from her, yet her complaint was filed more than two years thereafter. Accordingly, her cause of action is time-barred (see *Lucas-Plaza Hous. Dev. Corp. v Corey*, 23 AD3d 217 [2005]; *TMG-II v Price Waterhouse & Co.*, 175 AD2d 21 [1991], *lv denied* 79 NY2d 752 [1992]). Because we hold the action untimely, we do not reach the issue of whether the fraud was sufficiently pleaded.

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

2896

[M-181] In re Roy Taylor,  
Petitioner,

Index 4664/06

-against-

Hon. Thomas Farber, etc.,  
Respondent.

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Roy Taylor, petitioner pro se.

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Application for an order pursuant to article 78 of the Civil Practice Law and Rules denied and the petition dismissed, without costs or disbursements. All concur. No opinion. Order filed.



accident, plaintiff began receiving Workers' Compensation benefits. Plaintiff thereafter commenced this action against defendants Henry Todaro Jr. (Todaro), Todaro Properties and "XYZ Corporation," alleging that defendants negligently owned, managed and maintained the building and the elevator involved in the accident.

Defendants Todaro and Todaro Properties moved to dismiss the action. Todaro Properties argued that it was not the owner, operator and/or manager of the building in question on the date of the accident, and in support of that argument submitted a copy of a deed for the property indicating that ownership was transferred to it on the day after plaintiff's accident. However, the deeds as typed dated the transfer of ownership in May, but these typewritten entries were crossed out and "August" was handwritten in place.<sup>1</sup> Moreover, Todaro testified that Todaro Properties did not own the premises at the time of the accident.

Plaintiff raises issues of fact as to whether Todaro Properties owned or managed the building on the date of plaintiff's accident: 1) The handwritten correction on the deed

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<sup>1</sup>While the building is a single entity, there are in fact two deeds, one for 718 Tenth Avenue, New York, NY and the other for 720 Tenth Avenue, New York, NY.

conveniently placed ownership of the building with Todaro Properties one day after plaintiff's accident; 2) Todaro testified that even though Todaro Properties was formed in 1999 for the purpose of taking ownership in the building, it had no assets, nor did it conduct any business until the alleged transfer of the premisses on the day after plaintiff's accident; 3) The New York Department of State lists the premises as the mailing address for service of process on Todaro Properties.<sup>2</sup>

Todaro Properties does not contend that it is entitled to any of the protections otherwise provided by the Workers' Compensation Law. The existence of material alterations on the face of each deed, the failure of Todaro Properties to provide any competent evidence from the attorney who prepared these deeds as to the source of these alterations or the notary who took Todaro's signature, coupled with the timing of the transfer of the property in relation to this accident all raise genuine factual questions which cannot be resolved on a motion for summary judgment. Accordingly, the motion for summary judgment

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<sup>2</sup>While this court previously held that a question of fact did indeed exist as to whether Todaro Properties "owned or managed the property on the date of the accident," that appeal focused on whether plaintiff's complaint set forth a viable cause of action pursuant to CPLR 3211, and not whether a motion for summary judgment should be granted (*DeJesus v Todaro*, 2 AD3d 282 [2003]).

dismissing the claims against Todaro Properties LLC was properly denied.

However, as a matter of law, plaintiff cannot sustain a viable cause of action against Todaro and, therefore, the claims against him should be dismissed. Whatever interpretation is applied to the evidence submitted in support of Todaro's motion for summary judgment, only two conclusions are possible as to the status of his relationship with plaintiff at the time of the accident. Either both were employed by HT Sales Co., Inc. (Todaro as its president and sole shareholder and plaintiff as the firm's shipping manager), or Todaro was plaintiff's employer. No other conclusion is possible from any rational view of the evidence. If Todaro was plaintiff's co-employee or his employer at the time of the accident, the exclusivity provisions of the Worker's Compensation Law apply and as a matter of law, plaintiff's causes of action must be dismissed (see Workers' Compensation Law § 29[6], § 11).<sup>3</sup>

In addition, if one is to accept Todaro's claim that he owned the building on the date of the accident, his obligation as

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<sup>3</sup>While plaintiff questions the legitimacy of HT Sales Co., Inc. as a viable entity, defendants did produce, in support of their motion, a certificate of incorporation on behalf of the company on file with the Department of State, as well as unsigned corporate tax returns listing both Todaro and plaintiff as employees, that it claims were filed in 2001.

owner to maintain a safe premises is indistinguishable from his duty as owner of the business to maintain a safe workplace for his employees (*Heritage v Van Patten*, 59 NY2d 1017, 1019 [1983]; *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 158-159[1980]; *Concepcion v Diamond*, 224 AD2d 189 [1996]). While residential tenants of the building have on occasion used the elevator, the fact remains that it was a commercial elevator primarily used by the hardware store to transport commercial materials to and from the building's basement. It is uncontroverted that when the accident occurred plaintiff was working as an employee at a work site controlled by his employer and was using the elevator in the execution of his employment responsibilities (see *Macchirole v Giamboi*, 97 NY2d 147 [2001]; *Kinsman v McGill*, 210 AD2d 659 [1994]; cf *Cusano v Staff*, 191 AD2d 918 [1993]). Accordingly, Todaro's motion for summary judgment should have been granted.

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improvement license with the New York City Department of Consumer Affairs (DCA), it failed to inform the agency that it had shortened and changed its name to Ivy Walk, Inc., although its address, ownership, telephone and tax identification numbers remained the same. A new home improvement license, under a different number, was issued by DCA to Ivy Walk, Inc. in or about September or October 2006, subsequent to the parties submitting their papers in connection with the underlying motion in this case.

The home improvement contract between the parties herein was an AIA Standard Form of Agreement Between Owner and Contractor, which incorporated the AIA's General Conditions of the Contract for Construction as well as instructions to bidders and addenda prepared by petitioners' in-state architects. The instructions specified that one of the contractors was from out of state and specified the use of certain out-of-state components to be shipped to New York. The contract provided that New York law would govern. Section 4.6.1 of the General Conditions provided that "Any Claim arising out of or related to the Contract . . . shall . . . be subject to arbitration" but that "Prior to arbitration, the parties shall endeavor to resolve disputes by mediation."

When petitioners' architect refused to certify payment

application #6, Ivy Walk objected and served a demand for arbitration with a request for preliminary mediation in July 2006. Petitioners challenged this demand on the ground that the caption stated the name "Ivy Walk Corporation" rather than the name on the contract, "Ivy Walk Incorporated."

Ivy Walk served an Amended Demand for Arbitration, correcting the name to "Ivy Walk Incorporated." By letter dated July 27, 2006 to the American Arbitration Association (AAA), petitioners objected and claimed the demand was defective since Ivy Walk was incorporated as "Ivy Walk, Inc." rather than "Ivy Walk Incorporated," stating they would not participate in an arbitration because "Ivy Walk Incorporated" was "a non-existent corporation" to which petitioners had "no obligation of any kind," and that the corporation "lacks standing to make, file or proceed with the Amended Demand." By letter dated August 1, 2006, AAA advised the parties that after careful review of the submissions in this case, it intended to proceed with the arbitration unless the parties agreed to a stay or a party obtained relief from a court.

Petitioners commenced this proceeding to permanently stay the mediation and arbitration, raising the same issue as its objection to arbitration. Petitioners also raised a claim that the AIA contract was void because they could not find the entity

"Ivy Walk Incorporated" in any Department of Corporations or Department of Consumer Affairs database, and thus the corporation did not exist and could not be a home improvement contractor pursuant to the Home Improvement Business Law of the City of New York.

Respondents argued that Ivy Walk, Inc. was a duly filed and existing corporation, and petitioners cited no cases to support the claimed distinction between using "Incorporated" or "Inc." Moreover, they stated that the company had obtained a license under its then existing name, Ivy Walk Construction Company, Inc., from the DCA to operate a home improvement business, and that license was still valid. Finally, Ivy Walk contended that all issues of fact, including issues regarding incorporation or licenses, were to be determined by an arbitrator.

In reply, petitioners argued for the first time that the license was invalid because it was issued to the corporation in its former name, and the failure to notify DCA of "any change of control in ownership, management or business name or location" violated NYC Administrative Code § 20-393, rendering the agreement to arbitrate between the parties void. The IAS court accepted this argument and granted petitioners' motion to permanently stay mediation and arbitration.

Ivy Walk appealed and moved for reargument/renewal on the

grounds that the court failed to consider the application of the Federal Arbitration Act (9 USC § 1 et seq.) and *Matter of Diamond Waterproofing Sys. v 55 Liberty Owners Corp.* (4 NY3d 247 [2005]). It also submitted additional facts to demonstrate that the project involved interstate commerce. The IAS court denied reargument and made no separate ruling as to renewal.

The Home Improvement Business Law (Administrative Code of City of New York Chapter 2, subchapter 22,) is a consumer protection statute whose intent was to safeguard and protect consumers against fraudulent practices and inferior work by persons and businesses claiming to be home improvement contractors (§ 20-385; see *B&F Bldg. Corp. v Liebig*, 76 NY2d 689, 692 [1990]). The code provides that those who conduct home improvement contractor businesses must be licensed (§ 20-387[a]) and strict compliance with this licensing requirement is mandatory (*Hanjo Contrs. v Wick*, 155 AD2d 304 [1989]).

Here, it is undisputed that Ivy Walk Construction Company, Inc. had a license issued by DCA. It is also undisputed that at all times, Ivy Walk, by whatever name it used, had the same address, the same ownership, the same phone number and the same tax identification number. The issue, therefore, is whether Ivy Walk's failure to notify DCA of its name change, as required by § 20-393(7), voided its license and, by extension, the contract.

Initially, it is important to note that § 20-393 applies only to licensed contractors. The court, by finding a violation of that section, acknowledged that Ivy Walk was a licensed contractor. The Code treats violations by licensed contractors (§ 20-392) differently from violations by unlicensed contractors (§ 20-401), and provides notice and due process requirements (§ 20-399) before imposition of a penalty against a licensee. Indeed, one such potential penalty is suspension of the contractor's license. The appropriate penalty to be imposed rests with the Commissioner. Only after a penalty is imposed do the courts enter into the controversy, by way of judicial review (§ 20-400).

Here, the court circumvented the procedures set forth in the Code regarding the due process requirements applicable to Ivy Walk as a licensed contractor. Although it recognized that "Ivy Walk, Inc." was merely a shorter name of the company under which the license was held, it found that such change, since it was not reported to DCA, mandated a voiding of the contract. However, it has long been held that "a corporation may be known by several names in the transaction of its business, and it may enforce and be bound by contracts entered into in an adopted name other than the regular name under which it was incorporated" (*Mail & Express Co. v Parker Axles*, 204 App Div 327, 329 [1923]). This is particularly true where there is no confusion as to the parties

involved in the contract (*R.P.I. Servs., Inc. v Eisenberg*, 29 AD3d 459 [2006]). There is no issue here that the parties did not know whom they were dealing with, since Ivy Walk had the same principals, offices and contact information as those on file with DCA. While it did not comply with the name change requirements of the Code, that issue should be addressed as set forth in the Code, not in the context of an action to stay arbitration.

Accordingly, the parties are directed to proceed to arbitration pursuant to the terms of the contract.

In view of the foregoing, it is not necessary to address respondent's arguments regarding the Federal Arbitration Act.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: FEBRUARY 26, 2008

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excuse cannot recover her down payment (*Lawrence v Miller*, 86 NY 131 [1881]; *Maxton Bldrs. v Lo Galbo*, 68 NY2d 373 [1986]; *Uzan v 845 UN Ltd. Partnership*, 10 AD3d 230 [2004]). Plaintiff, after entering into a contract of sale and making a down payment in September 2006, was unable to produce the balance of the purchase price at the closing. Although she correctly argues that a letter sent by defendant Konkol's counsel to her counsel purporting to render time of the essence was deficient, since there was no clear and unequivocal warning that failure to close on or before October 18, 2006 would be considered a default (see *Zev v Merman*, 134 AD2d 555 [1987], *affd* 73 NY2d 781 [1988]), that is not the dispositive issue here. The only reason the October 16, 2006 closing was not concluded (all transfer documents having been executed except the deed) was plaintiff's default in delivering the balance of the purchase price, due to the alleged embezzlement of funds by one of her attorneys and to her own failure to fulfill her contractual obligation to apply for a mortgage loan (see *Sutton v Santora*, 87 AD2d 796 [1982]), neither of which constitutes a lawful excuse. Given these circumstances and the terms of the purchaser default provision of the parties'

contract of sale, the sellers are entitled to retain the down payment as liquidated damages.

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tell his attorney about this incident until after summations, and provided no excuse for the delay. Thus, there was no compelling reason for the court to deviate from the normal order of proof (see CPL 260.30; *People v Olsen*, 34 NY2d 349, 353 [1974]; *People v Mason*, 263 AD2d 73, 77 [2000]).

To the extent that defendant is raising a constitutional claim, such claim is unpreserved (see *People v Lane*, 7 NY3d 888, 889 [2006]) and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Since defendant had the opportunity to introduce this evidence at the proper time and in the proper manner, there was no impairment of his right to present a defense (see *Crane v Kentucky*, 476 US 683, 689-690 [1986]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: FEBRUARY 26, 2008

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

2854-

2855-

2856

Gwendolyn C. Dinham,  
Plaintiff-Appellant,

Index 114429/05

-against-

Edward D. Wagner, et al.,  
Defendants,

Nancy Kim, et al.,  
Defendants-Respondents.

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Dubow, Smith & Marothy, Bronx (Steven J. Mines of counsel), for appellant.

Buratti, Kaplan, McCarthy & McCarthy, East Elmhurst (Vanessa A. Gomez of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 6, 2006, which, upon reargument of a prior order, granted the Kim defendants' motion for summary judgment dismissing the complaint against them, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered August 4 and 31, 2006, unanimously dismissed, without costs, as superseded by appeal from the October 6 order.

Plaintiff, a passenger in a vehicle owned by defendant Wagner and driven by defendant Dinham, seeks damages for injuries sustained in an accident in which that vehicle collided at an intersection with a vehicle driven by defendant Choung-Mi Kim.

It is undisputed that Kim had the traffic light in her favor at the intersection. It is well settled that "an operator who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield" (*Namisnak v Martin*, 244 AD2d 258, 260 [1997]), and has "no duty to watch for and avoid a driver who might fail to stop . . . at a stop sign" (*Perez v Brux Cab Corp.*, 251 AD2d 157, 159-160 [1998]). The Kim defendants made a prima facie showing of entitlement to summary judgment by submitting the accident report containing a statement by Dinham that she had run the red light, and an affidavit from defendant Mi-Choung Kim stating that she was not at fault and could not have avoided the vehicle that ran the red light (see *Espinoza v Loor*, 299 AD2d 167 [2002]). In opposition, plaintiff failed to raise a triable issue of fact (see *Murchison v Incognoli*, 5 AD3d 271 [2004]). The affirmation by plaintiff's counsel, who had no personal knowledge of the accident, was insufficient to raise an issue of fact as to whether Kim was comparatively negligent (see *Jenkins v R.C. Alexander*, 9 AD3d 286 [2004]).

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

THIS CONSTITUTES THE DECISION AND ORDER  
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mediation. Defendants' motion to amend their answer should have been denied upon the ground of laches (see *Noy v 765 9th Ave. Corp.*, 281 AD2d 232 [2001]).

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ENTERED: FEBRUARY 26, 2008

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

2862-

2863 J Squared Software, LLC,  
Plaintiff-Appellant,

Index 112375/06

-against-

Bernette Knitware Corp., etc., et al.,  
Defendants-Respondents.

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Leavitt, Kerson & Duane, Forest Hills (Alexandra Mishail of  
counsel), for appellant.

Davidoff Malito & Hutcher LLP, New York (Charles Klein of  
counsel), for respondents.

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Judgment, Supreme Court, New York County (Jane S. Solomon,  
J.), entered July 26, 2007, dismissing the complaint pursuant to  
an order, same court and Justice, entered June 18, 2007, which,  
in an action for conversion of a software program, denied  
plaintiff's motion for partial summary judgment on the issue of  
liability, granted defendants' cross motion for summary judgment  
dismissing the complaint, and vacated a prior order preliminarily  
restraining defendants from publishing the subject program to  
third parties, unanimously affirmed, with costs. Appeal from the  
aforesaid order, unanimously dismissed, without costs, as  
subsumed in the appeal from the judgment.

Plaintiff does not have a cause of action for conversion  
where it alleges that the program was obtained by defendant

licensee pursuant to a valid contract and does not claim that it ever demanded the program's return (see *Agawam Trading Corp. v Malbin Co.*, 37 AD2d 946 [1971]). The disclosure that plaintiff seeks cannot possibly cure this deficiency in proof. The preliminary injunction was properly vacated upon dismissal of the complaint (see *Jou-Jou Designs v International Ladies' Garment Workers' Union, Local 23-25*, 94 AD2d 395, 400 [1983], *affd* 60 NY2d 1011 [1983]).

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

ENTERED: FEBRUARY 26, 2008

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CLERK

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

2864-

2865 Genesis Jimenez, an infant under 14, Index 23438/01  
by her mother and natural guardian,  
Ana Disla, et al.,  
Plaintiffs-Respondents,

-against-

Brenillee Corporation,  
Defendant,

Jesseo Realty LLC,  
Proposed Intervenor-Appellant.

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John J. Flynn, New York, for appellant.

Fotopoulos, Rosenblatt and Green, New York (Alexander D.  
Fotopoulos of counsel), for respondents.

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Order, Supreme Court, Bronx County (Sallie Manzanet, J.),  
entered March 1, 2006, which denied the proposed intervenor's  
motion for leave to intervene or to set aside a 2003 judgment,  
unanimously affirmed, with costs. Appeal from order, same court  
and Justice, entered December 15, 2006, which, to the extent  
appealed from as limited by the briefs, denied plaintiffs' motion  
for attorney's fees without prejudice to resubmission with proper  
accounting, unanimously dismissed, with costs.

Proposed intervenor Jesseo Realty acquired real property  
subject to plaintiffs' judgment lien, and then moved to intervene

and vacate the judgment for lack of jurisdiction (CPLR 5015[a][4]) on the ground that the corporate defendant had not appeared by counsel, in violation of CPLR 321(a). For purposes of this appeal, we assume without deciding that Jesseo is an "interested person" as that term is used in CPLR 5015(a) and thus that it had standing to move to intervene (*see generally Oppenheimer v Westcott* 47 NY2d 595, 603 [1979]) The motion was factually and legally meritless. The record is devoid of any support for Jesseo's contention that the corporate defendant was unrepresented at the settlement. Moreover, even if the corporate defendant were not so represented, its failure to appear by counsel would not have deprived the court of jurisdiction over it, but would have constituted a default permitting entry of judgment against it (*see Mail Boxes Etc. USA v Higgins*, 281 AD2d 176 [2001], *appeal dismissed* 96 NY2d 895 [2001]). A corporate defendant's failure to comply with CPLR 321 provides no basis for vacating a judgment entered against that defendant, since the rule is not intended to penalize an adverse party for the corporation's improper appearance (*Lake George Park Commn. v Salvador*, 245 AD2d 605, 607 [1997], *lv denied* 91 NY2d 939 [1998]), but is rather to ensure that the corporation has a licensed representative who is "answerable to the court and other

parties for his or her own conduct in the matter" (*Matter of Sharon B.*, 72 NY2d 394, 398 [1988]).

Absent any suggestion that the settlement entered into in open court and approved by the court following an infant's compromise hearing was a product of fraud, duress or mistake, or that any other substantive basis for vacating the judgment exists, the proposed intervenor's motion was properly denied (see *Sanchez v City of New York*, 40 AD3d 276 [2007]; *Clark v Bristol-Myers Squibb & Co.*, 306 AD2d 82 [2003]).

The proposed intervenor is not aggrieved by the order denying plaintiffs' motion for an award of costs and expenses (see CPLR 5511; *Insurance Co. of State of Pa. v Adessie Imports, Ltd.*, 24 AD3d 230 [2005]). To the extent the parties correctly understood that order to mean it would grant the motion upon plaintiffs' submission of a proper affidavit of legal services, it did not affect a substantial right (CPLR 5701[a][2][v]), but simply deferred disposition of the motion; therefore, it is not

reviewable (*Marriott Intl. v Lonny's Hacking Corp.*, 262 AD2d 10  
[1999]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: FEBRUARY 26, 2008

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Defendant did not preserve his claim that he was improperly adjudicated a second felony offender on the basis of a out-of-state conviction for a crime that allegedly lacked equivalency to a New York felony, and we decline to review it in the interest of justice. Defendant also claims that he was deprived of effective assistance of counsel as a result of his trial attorney's failure to raise this issue. Under the circumstances of the case, that claim is unreviewable on direct appeal because it involves matters outside the record regarding the relationship, if any, between counsel's plea negotiation strategy and his waiver of any challenge to defendant's second felony offender status (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; see also *Strickland v Washington*, 466 US 668 [1984]), in that counsel's performance in this regard was within the broad range of reasonable professional competence.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: FEBRUARY 26, 2008

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

2869           The People of the State of New York           Index 402873/07  
              ex rel. Yusuf Harris,  
                  Petitioner-Appellant,

-against-

James T. Conway, Superintendent of  
Attica Correctional Facility, et al.,  
Respondents-Respondents.

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Yusuf Harris, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Michael S.  
Morgan of counsel), for respondent.

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Order, Supreme Court, New York County (Brenda Soloff, J.),  
entered on or about June 22, 2007, which denied petitioner's  
application for a writ of habeas corpus and dismissed the  
proceeding, unanimously affirmed, without costs.

The petition was improperly brought in a county other than  
the county of incarceration (see *Matter of Hogan v Culkin*, 18  
NY2d 330 [1966]). Furthermore, petitioner's challenge to the  
validity of his criminal conviction may not be raised by way of

habeas corpus (see e.g. *People ex rel. Grant v Scully*, 190 AD2d 543 [1993], *appeal dismissed* 92 NY2d 946 [1998]), and is meritless in any event.

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

ENTERED: FEBRUARY 26, 2008

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

2870-

2870A Pauline Dana-Sitzer,  
Plaintiff-Respondent,

Index 312829/04

-against-

Steven Sitzer,  
Defendant-Appellant.

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Segal & Greenberg LLP, New York (Philip C. Segal of counsel), for appellant.

Rosenthal & Herman, P.C., New York (William C. Herman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Harold B. Beeler, J.), entered December 28, 2006, which, insofar as appealed from as limited by the briefs, awarded sole custody of the parties' children to plaintiff pursuant to an order, same court and Justice, entered on or about November 21, 2006, unanimously affirmed, without costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant never asked the trial court to appoint a law guardian or forensic mental health expert for the parties' children, or to conduct an in camera interview with the children. Accordingly, his current argument that the trial court should

have done all of these things is unpreserved (see *Matter of Diaz v Santiago*, 8 AD3d 562, 563 [2004]; *Elkenani v Abdel-Raouf*, 290 AD2d 720, 721 [2002], *lv dismissed* 98 NY2d 646 [2002]), and we do not find any public policy exception to the preservation requirement in this case. In any event, the court's failure to appoint a law guardian or expert or conduct an interview *sua sponte* was not an improvident exercise of its discretion, as the record does not indicate that they were necessary for the court to resolve the custody issue (see *Matter of Farnham v Farnham*, 252 AD2d 675, 677 [1998]), and defendant's claim that the children's due process rights were violated is unavailing.

An award of sanctions pursuant to 22 NYCRR 130-1.1 is not warranted under the circumstances presented.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: FEBRUARY 26, 2008

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being no other evidence tending to show that defendants created or had notice of the mold hazard, the action was properly dismissed. Furthermore, the record evidence demonstrates that within days of being notified of the condition, defendants removed the contaminated wall and floor (*cf. Daitch v Naman*, 25 AD3d 458 [2006]).

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either plaintiff; indeed, plaintiffs had no knowledge of the loan transactions. Furthermore, Soltzer had no apparent authority to enter into the transactions. Apparent authority must be based on words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction; an agent cannot, though his own acts, cloak himself with apparent authority (see *Hallock v State of New York*, 64 NY2d 224, 231 [1984]). This rule holds especially true where a party fails to conduct a reasonable inquiry into the scope of the purported agent's authority (see *Ford v Unity Hosp.*, 32 NY2d 464, 472-473 [1973]; *Morgold, Inc. v ACA Galleries*, 283 AD2d 407 [2001]). Here, Soltzer's only authority arose from his own acts. No acts or statements by plaintiffs conferred such authority (*56 E. 87th Units Corp. v Kingsland Group, Inc.*, 30 AD3d 1134 [2006]). To the contrary, the documents upon which defendant solely relied were provided to it by Soltzer, and defendant took no further steps to assure itself that Soltzer had the authority to enter into the loan transactions (see *Fleet Bank v Consola, Ricciteli, Squadere Post No. 17*, 268 AD2d 627, 630 [2000]).

Finally, defendant did not have a valid and enforceable security interest in the collateral, as Soltzer had no authority,

apparent or otherwise, to pledge plaintiffs' property as collateral for the loans.

THIS CONSTITUTES THE DECISION AND ORDER  
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Tom, J.P., Nardelli, Gonzalez, Kavanagh, JJ.

1595 NFL Enterprises LLC,  
Plaintiff-Appellant,

Index 603469/06

-against-

Comcast Cable Communications, LLC,  
Defendant-Respondent.

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Covington & Burling LLP, New York (C. William Phillips of  
counsel), for appellant.

Davis Polk & Wardwell, New York (Michael P. Carroll of counsel),  
for respondent.

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Order and judgment (one paper), Supreme Court, New York  
County (Bernard Fried, J.), entered May 8, 2007, modified, on the  
law, Comcast's motion denied, and otherwise affirmed, without  
costs, and the matter remanded for further proceedings consistent  
herewith.

Opinion by Gonzalez, J. All concur.

Order filed.



**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**FEBRUARY 26, 2008**

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

M-821X      Francisco v Ajayi - Verizon New York, Inc.

M-837X      Gerling America Insurance Company v Transportation  
Insurance Company, Inc.

M-838X      Bergollo v Smur

M-840X      Rosenberg v Alpha Wire Company

M-841X      Kassim v Citibank, N.A.  
(And a third-party action)

Appeals withdrawn.

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

M-839X      Cranmer v Tornquist

Appeals and cross appeals withdrawn.

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

M-161      Private Capital Group LLC v Private Capital Management  
- Donovan  
[And other actions]

Motion deemed withdrawn.

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

M-627 Melendez-Natal v Maren Engineering Corporation, a  
division of Kine Corporation - Red Apple Group, Inc.;  
Melendez-Natal v Squicciarini

Motion deemed withdrawn.

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

M-799 Steinberg v New York City Transit Authority -  
Cornelia Commercial Holding Corp.

Appeal, previously perfected for the March 2008 Term,  
withdrawn.

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

M-829 Alexander v Taktarov

Appeal, previously perfected for the March 2008 Term,  
withdrawn.

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

M-514 LaMasa v Bachman

Time to perfect appeal enlarged to the June 2008 Term.

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

M-517 Abdul-Aziz v City of New York

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

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

M-267        In the Matter of T., Amanda Lynn; M., Samantha --  
Administration for Children's Services

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

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

M-148        People v Banner, Rohan O.

Counsel relieved; poor person previously granted continued; assignment of pro bono counsel denied as unnecessary.

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

M-110        People v Nachum, Gadi

Notice of appeal deemed timely filed; leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Lippman, P.J., Andrias, Williams, Buckley, Kavanagh, JJ.

M-6329       NYCTL 1999-1 Trust v 114 Tenth Avenue Assoc., Inc.

Reargument or other relief denied.

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

M-406        People v Sunter, Male

Transcription of minutes denied as unnecessary.

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

M-513 Penn v Human Resources Administration of the  
City of New York

Vacatur of temporary restraining order denied.

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

M-418 In the Matter of Develop Don't Destroy Brooklyn, Inc.  
M-677 v Urban Development Corporation, doing business as  
Empire State Development Corporation

Preliminary appellate injunction denied; appellants  
directed to perfect appeal for the September 2008 Term.

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

M-318 People v Martinaj, Bernard

Leave to strike appellant's brief and appendix denied,  
without prejudice to addressing the issue on appeal.

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

M-416 In the Matter of Camacho v Kelly

Dismissal of appeal denied.

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

M-160 In the Matter of Santiago v N.Y.C. Department of  
Corrections

Leave to file notice of appeal denied.

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

M-6144 In the Matter of T., John v P., Olethea

Leave to prosecute appeal as a poor person granted, as indicated. (See M-6144A, decided simultaneously herewith.)

Andrias, J.

M-6144A In the Matter of T., John v P., Olethea

Stay granted. (See M-6144, decided simultaneously herewith.)

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

M-420 People ex rel. Lewis, Herbert v Warden

Leave to prosecute appeal as a poor person denied as academic; appeal dismissed.

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

M-324 People v Placek, Steven

Counsel substituted.

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

M-306 People v Moret, Felix

Leave to file a pro se supplemental brief granted for the September 2008 Term, to which Term appeal adjourned, as indicated.

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

M-116 NYCTL 1999-1 Trust and The Bank of New York, as  
Collateral Agent and Custodian for the NYCTL 1999-1  
Trust v 573 Jackson Avenue Realty Corp.

Stay denied; interim relief granted by order of a  
Justice of this Court, dated January 8, 2008, vacated.

Tom, J.P., Friedman, Williams, McGuire, Kavanagh, JJ.

M-134 In re Solomon v The Department of Buildings of the City  
of New York

Leave to appeal to the Court of Appeals denied.

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

M-77 Hunts Point Multi-Service Center, Inc. v Bizardi

Reargument or other relief denied.

Tom, J.P., Mazzairelli, Andrias, Nardelli, Malone, JJ.

M-6082 Lavandier, formerly known as Rosario v Landmark  
M-6480 Insurance Company - Sobel Affiliates, Inc.

Reargument or other relief denied.

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

M-266 People v Van Honand, Nikkolaz, also known as  
Hoornaert, Admir

Dismissal of appeal denied, without prejudice to the  
People addressing the issue on appeal; appeal adjourned for the  
May 2008 Term.

Mazzarelli, J.P., Saxe, Friedman, Catterson, Acosta, JJ.

M-189 People v Aviles, Angel

Notice of appeal and order of assignment amended, as indicated.

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

M-222A People ex rel. Simmons, Alphonso v Harrehand

Assignment of counsel denied. (The order of this Court entered on February 21, 2008 [M-222], recalled and vacated.)

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

M-426 In the Matter of Plaza 43 Associates, a Partnership v  
New York City Tax Appeals Tribunal

Time to perfect proceeding enlarged to the September 2008 Term.

Mazzarelli, J.P., Saxe, Friedman, Catterson, Acosta, JJ.

M-6388 People v Smith, Shawntain

Motion and underlying matter transferred to the Appellate Term, First Judicial Department.

Mazzarelli, J.P., Andrias, Gonzalez, Nardelli, JJ.

M-21 In re Maloney v Office of Court Administration  
Leave to appeal to the Court of Appeals denied.

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

M-386        Kuhn v American International Realty Corp.;  
              American International Realty Corp. v Otis Elevator  
              Company  
              (And a second third-party action)

              Leave to withdraw appeal denied as unnecessary, as  
indicated.

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

M-321        Tishman Construction Corp. v Great American Insurance  
              Company - Schiavone Construction Company

              Motion deemed withdrawn.

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-5           In the Matter of P., Antonia Mykala -- The Children's  
              Aid Society

              Appeal dismissed.

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

M-600        People v Reed, Michael

              Appeal adjourned to the September 2008 Term.

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

M-537        The People of the State of New York -  
              Cuomo v Coventry First LLC - Buerger

              Stay denied; interim relief granted by order of a  
Justice of this Court, dated January 29, 2008, vacated.

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

M-628            In Re: New York City Asbestos Litigation -  
M-806            Levine v A. W. Chesterton Company Inc.;  
                  Machnicki v 3M Company

                  Stay of trial denied; interim relief granted by order  
of a Justice of this Court, dated February 11, 2008, vacated.

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

M-530            McLaughlin, formerly known as North v Walker

                  Stay denied.

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

M-584            People v Rampersaud, Liloutie

                  Leave to strike defendant's brief and stay denied;  
People directed to serve and file responding brief for the June  
2008 Term, to which Term appeal adjourned.

Andrias, J.P., Buckley, Catterson, Malone, Kavanagh, JJ.

M-6467           Chun v Yoram Ginach, P.C.

                  Reargument denied.

Andrias, J.P., Friedman, Williams, Buckley, Sweeny, JJ.

M-5968A        People v Strawder, William

                  Reargument denied. (See M-5968, decided simultaneously  
herewith.)

Friedman, J.

M-5968 People v Strawder, William

Leave to appeal to the Court of Appeals denied. (See M-5968A, decided simultaneously herewith.)

Andrias, J.

M-726 People v James, Tebrue

Leave to appeal to the Court of Appeals granted, as indicated.

Williams, J.

M-362 People v Jackson, Ronald

Leave to appeal to this Court denied.

Malone, J.

M-872 People v Packer, Andrew

Leave to appeal to the Court of Appeals granted, as indicated.

Andrias, J.P., Nardelli, Gonzalez, Sweeny, Catterson, JJ.

M-2855 In the Matter of Richard Pu,  
a disbarred attorney:

Petition for reinstatement granted to the extent of referring petition to the Committee to designate a Hearing Panel to conduct a hearing, as indicated. No opinion. All concur.

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-6600 In the Matter of Louise M. Brown  
(admitted as Louise Mitchell Brown),  
an attorney and counselor-at-law:

Respondent disbarred and her name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to January 26, 2007. Opinion Per Curiam. All concur.

**The Following Orders Were Entered And Filed On February 21, 2008:**

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

M-633 Famo, Inc. v Green 521 Fifth Avenue LLC

Preliminary appellate injunction denied; appeals consolidated, as indicated.

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

M-754 Kotzker v New York City Health and Hospitals,  
Corporation

Stay of trial denied.

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

M-364        People v McDaniel, Jermar, also known as  
                  McDaniel, Jermar R., also known as  
                  McDaniels, Jamar

Leave to file a pro se supplemental brief denied.

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

M-643        2246 Holding Corp. v Nolasco

Dismissal of appeal denied, with leave to renew, should respondent-tenant-appellant fail to perfect appeal on or before March 17, 2008 for the June 2008 Term, as indicated.

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

M-164        Kosovsky v Zahl

Appeals consolidated; time to perfect same enlarged to the June 2008 Term, as indicated; motion otherwise denied.

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

M-563        Bialobroda v Buchwald

Leave to file a supplemental record granted, as indicated; appeal adjourned to the May 2008 Term; motion otherwise denied.

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

M-613        Certain Underwriters at Lloyds, London v Millennium  
                 Holdings, LLC

                 Restriction of access to certain confidential documents  
granted, as indicated.

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-2            Shmueli v NRT New York, Inc., doing business as  
M-143        The Corcoran Group  
M-483

                 Leave to strike certain documents, imposition of  
sanctions and attorney's fees (M-2/M-143) denied, with leave to  
the respective parties to seek to confirm or disaffirm a report  
of a Special Referee, as indicated. Matter remanded to the  
Supreme Court for immediate assignment to the office of Special  
Referees. Clerk directed to remove appeal from calendar with  
leave to appellant to seek to restore subsequent to the  
determination upon resubmitted motion(s). Leave to serve and  
file a brief amicus curiae (M-483) denied, without prejudice to  
renewal subsequent to restoration of appeal, if any.