

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**MARCH 4, 2008**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Nardelli, Buckley, Gonzalez, Sweeny, JJ.

2229 Christian Hernandez, Index 0014629/05  
Plaintiff-Respondent,

-against-

Bethel United Methodist  
Church of New York, etc.,  
Defendant-Appellant.

---

Simon Lesser, PC, New York (Leonard F. Lesser of counsel), for  
appellant.

The Law Offices of Kenneth A. Wilhelm, New York (Rory M. Sheckman  
of counsel), for respondent.

---

Order, Supreme Court, Bronx County (Lucindo Suarez, J.),  
entered March 6, 2007, which, upon reargument, granted  
plaintiff's motion for partial summary judgment on his Labor Law  
§ 240(1) claim, affirmed, without costs.

Plaintiff was injured November 7, 2002, while working for  
nonparty Master Fire Prevention Systems, installing fireproofing  
insulation on new duct work at premises owned by defendant Bethel  
United Methodist Church of New York. At the time of the  
accident, plaintiff was standing on the third step of a six-foot  
A-frame ladder in order to reach the duct work. The ladder was  
placed on a sheet of plastic that had been put down in order to

protect the carpet. Plaintiff stated that, before he began to climb the ladder, he heard and saw the latches on each side lock into place. He was working alone in the room at the time and was the sole witness to his accident.

Plaintiff was using a nail gun to install the insulation and, at the time of the accident, had the nail gun in his right hand and the insulation in his left hand. He leaned to his left while standing on the third step of the ladder, in order to affix the insulation with the nail gun, and the ladder began to move unsteadily. The feet of the ladder on the right side then came off the ground and he started to fall. He tried to grab the ladder with his left arm in order to stop himself from falling, but continued to hold onto the nail gun with his right hand. He fell down the ladder and both of his feet landed on the first step. As he was falling, the nail gun hit one of the steps and a nail from the gun entered plaintiff's right eye. Plaintiff was not wearing goggles or any protective eye covering at the time of the accident.

Plaintiff initially brought this suit alleging causes of action for negligence and violations of Labor Law § 200 and § 241(6). He later moved to amend the complaint to assert a cause of action for violation of Labor Law § 240(1) and for summary judgment on the issue of liability pursuant to that section. In support of the motion, plaintiff submitted his deposition

testimony and his own sworn affidavit.

At his deposition, plaintiff testified that he was leaning to the left and the ladder "shook and wobbled." He also clearly stated that he felt the ladder shaking and wobbling before two of the legs came off the ground. He acknowledged that he could have moved the ladder a foot closer to where he was working, but noted that he had previously been able to reach in that manner without incident.

In his affidavit, plaintiff again asserted that he leaned to his left to install the insulation and felt the ladder shaking and wobbling before the legs came off the ground. He also stated that there were no rubber grips or safety feet on the bottom of the ladder, nor was the ladder secured or fastened in any manner. In addition, plaintiff stated that no one was holding the ladder and that no safety devices of any kind were provided or made available to protect him from falling.

Supreme Court granted plaintiff's motion to amend the complaint but denied his motion for summary judgment, finding triable issues of fact as to whether the ladder afforded proper protection and whether plaintiff's actions were the sole proximate cause of the accident. Plaintiff subsequently moved to reargue the motion for summary judgment. Supreme Court granted reargument and granted plaintiff's motion for summary judgment on the issue of liability under section 240(1), without elaboration.

"Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1)" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [2004] [citations and quotation marks omitted]). "It is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Orellano v 29 E. 37<sup>th</sup> St. Realty Corp.*, 292 AD2d 289, 291 [2002]). Thus, "where the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, '[n]egligence, if any, of the injured worker is of no consequence'" (*Orellano*, 292 AD2d at 291, quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; and citing *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]).

Plaintiff satisfied his prima facie burden by establishing that he was using the ladder to install fireproofing in the course of his employment, that the ladder was shaking and wobbling, that the feet of the ladder came off the ground and that defendant failed to provide plaintiff with adequate safety devices or to properly secure the ladder. Under these

circumstances, plaintiff cannot be deemed the sole proximate cause of his injuries.

Contrary to defendant's argument, plaintiff's affidavit is not inconsistent with his deposition testimony. Plaintiff was asked at his deposition whether he "fe[lt] anything before the legs came off the ground?" His response was, "The shaking and the wobbling." Plaintiff's previous statement that he "was leaning to [his] left so the right two legs were coming off the ground" was made in response to a question asking whether the feet of the ladder stayed in place. The most reasonable interpretation of his answer is that he was indicating which of the ladder's feet left the ground, not that the feet came off the ground due to his movement. He did not state that the feet left the ground before the shaking and wobbling. In fact, both plaintiff's subsequent testimony and his affidavit clearly indicate that was not the case.

The dissent states that plaintiff had "two options" - either to reposition the ladder or to direct another worker to hold his ladder while he worked. However, the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

Here, plaintiff established that defendant's failure to provide adequate safety devices or to properly secure the ladder was a contributing cause of his accident. In opposition, defendant was unable to raise an issue of fact whether plaintiff was the sole proximate cause of the accident. Thus, plaintiff is entitled to summary judgment on the issue of liability under Labor Law § 240(1).

All concur except Nardelli and Buckley, JJ.  
who dissent in a memorandum by Nardelli, J.  
as follows:

NARDELLI, J. (dissenting)

I respectfully dissent and vote to reverse the order of the motion court and deny plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim.

Plaintiff Christian Hernandez was employed by Master Fire Prevention Systems, Inc. (Master Fire) as a welder/installer and claims that on November 7, 2002, he was injured as the result of a fall from a ladder. Master Fire had been hired by defendant Bethel United Methodist Church of New York to install new duct work in a two-floor building it owned, which was designated as 3404 Bailey Avenue, the Bronx. The duct work was to be installed throughout the inside of the building on both floors and, at the time of the accident, plaintiff was in a back office affixing fireproof insulation around the new duct work with a standard nail gun.

In order to reach the area where the insulation was to be installed, plaintiff was using a small, four-step A-frame ladder that had been supplied by Master Fire. Plaintiff testified at an examination before trial conducted on June 14, 2006 that he had set up the ladder on plastic sheeting which had been laid over a carpeted floor and, before climbing onto the ladder, had heard, and was certain, both latches on the legs of the ladder had locked into place. Plaintiff stated that at the time of the accident, he was standing with both feet "firmly planted" on the

third step of the ladder, which step was approximately two and one-half feet off the ground, and had insulation in his left hand and the nail gun in his right hand.

Plaintiff further testified that he was holding the nail gun above his head in order to secure the pre-cut insulation to the duct and that, prior to his fall, he was "leaning to my left so the right two legs [of the ladder] were coming off the ground." Plaintiff maintained that the ladder began to shake and wobble and as he tried to hug the ladder with his left hand to prevent a fall, he lost his balance and slipped from the third rung to the first, causing the nail gun to strike one of the steps and discharge, resulting in a nail striking his eye.

In response to questioning regarding why plaintiff did not reposition the ladder, rather than leaning to the left and above his head to reach the area where he was securing the insulation, the following colloquy took place:

"Q. Did anything stop you before the accident from getting off the ladder and repositioning it under where you needed to?

A. No, getting down and stuff like that, it was going to take a few minutes but it could have been a difference, like I didn't thought (sic) it was going to be something happening, you know. It was just like reaching just real quick, you know.

Q. Was the reason you chose to reach from the ladder because you had been able to reach like that before without accident?

A. Yes.

Q. Did you think you would be able to reach from the ladder without making the ladder come off the ground because you had done it before?

A. Yes."

Plaintiff had commenced this action by the service of a summons and complaint in April 2005, asserting causes of action grounded in negligence and various violations of the Labor Law. In September 2006, plaintiff moved to amend the complaint to interpose a cause of action under Labor Law § 240(1) and, upon such amendment, granting plaintiff partial summary judgment on that claim. The motion court, in a decision and order entered November 20, 2006, granted, among other things, plaintiff leave to amend the complaint but denied that branch of the motion which sought partial summary judgment on the Labor Law § 240(1) claim. Plaintiff thereafter moved for leave to reargue and contended that the motion court erred when it found triable issues of fact as to whether the ladder provided to plaintiff furnished proper protection, and whether plaintiff's use of the ladder was the sole proximate cause of the accident. The motion court, in a decision and order entered March 6, 2007, granted plaintiff's motion for leave to reargue and, upon reargument, granted plaintiff partial summary judgment on his Section 240(1) claim, finding that there were no issues of fact regarding plaintiff's conduct and whether that conduct was the sole proximate cause of the accident. Defendant appeals and, since I agree with the

motion court's original analysis set forth in its November 20 order, I vote to reverse.

Labor Law § 240(1), which is often referred to as the scaffold law, provides, in pertinent part, that:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders . . . which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has long and repeatedly observed that the purpose of the statute is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owners and general contractors, instead of on the individual workers who are not in a position to protect themselves (*Martinez v City of New York*, 93 NY2d 322, 325-326 [1999]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985]; *Koenig v Patrick Constr. Corp.*, 298 NY 313, 318 [1948]). Consistent with this objective, the statute places absolute liability upon owners, contractors, and their agents for any breach of the statutory duty that is the proximate cause of a plaintiff's injuries and, accordingly, it is to be construed as liberally as necessary to accomplish the purpose for which it was

framed (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]).

In *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.* (1 NY3d 280, 286-287 [2003]),<sup>1</sup> however, the Court of Appeals endeavored to clarify the use of the words strict or absolute liability in conjunction with the statute, noting that those terms do not appear in the current, or any of the former variations of the statute but, rather, were first utilized by the Court of Appeals in 1923 to describe an employer's duty under that section. The Court in *Blake* went on to caution that "[i]t is imperative . . . to recognize that the phrase 'strict (or absolute) liability' in the Labor Law § 240(1) context is different from the use of the term elsewhere. Often, the term means 'liability without fault' (see generally 3 Harper, James and Gray, Torts § 14.1 et seq. [2d ed 1986]), as where a person is held automatically liable for causing injury even though the activity violates no law and is carried out with the utmost care" (*id.* at 287-288). The Court of Appeals further commented:

"Given the varying meanings of strict (or absolute) liability in these different settings, it is not surprising that the concept has generated a good deal of litigation under Labor Law § 240(1). The terms may have given rise to the mistaken belief that a fall from a scaffold or ladder,

---

<sup>1</sup>For a lengthy discussion of the history of Labor Law § 240(1) and the development of case law concerning that statute, see *Blake* at 284-287.

in and of itself, results in an award of damages to the injured party. That is not the law, and we have never held or suggested otherwise" (*id.* at 288).

In sum, in order to prevail on a Labor Law § 240(1) cause of action, the plaintiff must demonstrate that the statute was violated, and that such violation was a proximate cause of the injuries sustained (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Delahaye v Saint Anns School*, 40 AD3d 679, 682 [2007]). Accordingly, the mere fact that plaintiff herein fell from a ladder does not, in and of itself, establish that the statute was violated and that absolute liability attaches, for where a plaintiff's own actions are the sole proximate cause of the accident, there is no liability (*Cahill*, 4 NY3d at 39; *Blake*, 1 NY3d at 290).

In this matter, I find that there is a plausible view of the evidence, sufficient to raise an issue of fact, that no statutory violation occurred, and that plaintiff's own acts or omissions were the sole cause of the accident. Plaintiff testified that he had insulation in his left hand, a nail gun in his right hand, and was attempting to install the insulation on a duct positioned over his head when he leaned to the left causing the two right legs of the ladder to come off the ground. The ladder did not slide or change position, and plaintiff admittedly chose not to reposition the ladder where it was needed because that would have taken a few minutes, although "it could have been a difference."

Plaintiff further testified that he was part of a six-member work crew and that he "was basically the one that used to tell everyone what to do" and was more or less the head of the crew.

It is clear then that plaintiff, in light of his deposition testimony, had two options, and chose to avail himself of neither. Plaintiff, instead of leaning off the ladder to his left to save a few minutes, could have stepped down the two and one-half feet and repositioned the ladder. Plaintiff also could have directed another member of his crew to stabilize the ladder while he worked and, in my view, a jury could conclude that plaintiff's failure to exercise either of those safety options, which were readily available, was the sole proximate cause of his injury (*see generally Egan v Monadnock Constr., Inc.*, 43 AD3d 692 [2007]; *Mercado v New York Univ.*, 29 AD3d 496 [2006]).

Finally, I disagree with the majority's conclusion that there are no material inconsistencies between plaintiff's deposition testimony and his affidavit in support of his motion for summary judgment. Indeed, plaintiff, in his affidavit, claims that the ladder began to shake and wobble before the legs came off the ground, which is in stark contrast to his deposition testimony which indicates that he was leaning to his left while working on the duct above his head when the right legs of the ladder came off the ground, and *then* the ladder became unstable. Those inconsistencies not only raise issues as to how the accident

occurred, but also as to plaintiff's credibility, and I disagree with the majority's finding that a reasonable interpretation of the sequence of questions asked of plaintiff at the deposition, and the answers given, is to the contrary. Moreover, while I agree with the majority's conclusion that the Labor Law does not require a plaintiff to act in a manner completely free from negligence, I find that a jury, from the facts presented, could conclude that plaintiff made a conscious decision to not reposition an adequate, properly functioning ladder in order to save time, so as to render the ladder unstable, and the situation unsafe, and further neglected, despite the fact that it was admittedly within his power to do so, to direct another member of his work crew to stabilize the ladder, rendering his actions not within the ambit of contributory negligence, but the sole proximate cause of his injuries.

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2502N-

2502NA M&B Joint Venture, Inc.,  
Plaintiff-Respondent,

Index 115741/06

-against-

Laurus Master Fund, Ltd., et al.,  
Defendants-Appellants,

Newman & Newman, P.C., et al.,  
Defendants.

---

Brune & Richard LLP, New York (Hillary Richard of counsel), for appellants.

Salon Marrow Dyckman Newman & Broudy LLP, New York (Richard P. Romeo of counsel), for respondent.

---

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered January 16, 2007, which denied the motion of defendants Laurus Master Fund, Ltd., Laurus Master Fund, Ltd., as agent, 14-16 East 67<sup>th</sup> Street Holding Corp. (collectively Laurus), to cancel the notice of pendency, affirmed, without costs. Order, same court and Justice, entered February 23, 2007, which denied Laurus's motion to dismiss the complaint, modified, on the law, to the extent of granting the motion to dismiss the cause of action for unjust enrichment, and otherwise affirmed, without costs.

Plaintiff claims an equitable lien in the face of its failure to obtain an allegedly agreed-upon mortgage to secure a \$490,000 bridge loan it extended to defendant Penthouse

International, Inc., in connection with the refinancing of the latter's townhouse, which mortgage was intended to be secondary to Laurus's \$24 million consolidated first mortgage. There was a basis for the notice of pendency (see *5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 [1984]). The evidence, not only of the bridge loan but also of the conversation with a Laurus official and a Penthouse representative during which Penthouse allegedly agreed to the mortgage on the property and Laurus was made aware of the mortgage, supplemented the allegations of the complaint to sufficiently state a cause of action for an equitable lien (see *Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996]).

However, the cause of action for unjust enrichment should have been dismissed because plaintiff failed to identify the benefit bestowed on Laurus as a result of the bridge loan (see *CDR Creances S.A. v Euro-American Lodging Corp.*, 40 AD3d 421, 422 [2007]). The general conclusion that Laurus's entire transaction would otherwise not have gone through was neither alleged in the complaint nor a reasonable inference therefrom. Similarly, it was not alleged that plaintiff extended the loan at Laurus's behest (see *General Sec. Prop. & Cas. Co. v American Fleet Mgt., Inc.*, 37 AD3d 345, 346 [2007]; *Kagan v K-Tel Entertainment*, 172 AD2d 375, 376 [1991]).

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

All concur except Gonzalez and McGuire, JJ. who concur in part and dissent in part in a memorandum by McGuire, J. as follows:

McGUIRE, J. (concurring in part, dissenting in part)

I agree with the majority that Supreme Court erred in denying that aspect of defendants-appellants' motion to dismiss which sought dismissal of the cause of action for unjust enrichment. I disagree, however, that the court properly denied that aspect of that motion which sought dismissal of the claim for an equitable lien, and that Laurus' separate motion to cancel the notice of pendency was properly denied. Accordingly, I respectfully dissent in part.

On February 23, 2004, defendant Penthouse International, Inc. (PHI) entered into a series of agreements with defendant Laurus Master Fund.<sup>1</sup> Pursuant to the agreements, Laurus provided a total of \$24 million to PHI in exchange for a mortgage on a townhouse located at 14-16 East 67th Street (the premises). On that same day, PHI conveyed the premises to P.H. Realty Associates, LLC (P.H. Realty), a holding company in which PHI held a 99% interest. P.H. Realty, in turn, delivered a deed in lieu of foreclosure to Laurus, which placed the deed in escrow. On April 15, 2004, the agreements evincing Laurus' mortgage on the premises and the deed between PHI and P.H. Realty were recorded.

PHI defaulted on the agreements in August 2004, and Laurus

---

<sup>1</sup>Laurus Master Fund in its capacity as an agent of 14-16 East 67th Street Holding Corp. was also named as a defendant.

obtained a judgment of foreclosure and sale in January 2006. P.H. Realty conveyed the premises to 14-16 East 67th Street Holding Corp., an entity wholly owned by Laurus, by a deed recorded on May 25, 2006.

On October 20, 2006, plaintiff commenced this action claiming, among other things, that it has an equitable lien on the premises and asserting a cause of action for, among other things, unjust enrichment. In the complaint, plaintiff alleges that “[i]n February, 2004 P.H. Realty approached [plaintiff] and asked [plaintiff] to provide P.H. Realty with a Loan in the amount of . . . [\$490,000] . . . to enable P.H. Realty to acquire and subsequently refinance [the premises] . . .” Plaintiff also alleges that “[i]t was understood and agreed that the Loan was short term purchase money financing to be used by P.H. Realty in the acquisition of the [premises] and the subsequent refinancing of the mortgage debt on the [premises],” and that “[i]t was understood and agreed that in connection with the Loan . . . P.H. Realty was to execute and deliver to [plaintiff] a promissory note and a security interest in the [premises] which security interest would be a second priority mortgage behind Laurus who [sic] held the first mortgage on the [premises].” According to plaintiff, it transmitted \$490,000 to defendant Newman, the attorney who acted as the escrow agent for PHI and P.H. Realty, with instructions to hold the funds in escrow until plaintiff or

Newman received "a fully executed promissory note and second priority mortgage secured by the [premises]." Plaintiff alleges, however, that Newman released the funds to P.H. Realty without obtaining the promissory note and second priority mortgage. Plaintiff claims that it was repaid \$100,000 of the loan, but that an unpaid balance of \$390,000 remains due. In addition to filing its summons and complaint, plaintiff filed a notice of pendency of the action.

By an order to show cause signed by Supreme Court on November 8, 2006, Laurus, which was seeking to sell the premises, moved to cancel the notice of pendency on the ground that "[p]laintiff ha[d] no interest that affects the [premises]," i.e., had no cause of action against Laurus. Immediately after moving to cancel the notice of pendency, Laurus moved to dismiss the complaint as against it. Plaintiff opposed both motions. In separate orders, Supreme Court denied both motions, and this consolidated appeal ensued.

"In cases where the court has considered extrinsic evidence on a CPLR 3211 motion, the allegations are not deemed true. The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted. Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are

not presumed to be true and accorded every favorable inference” (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 80-81 [1999] [internal quotation marks, citations and ellipsis omitted], *affd* 94 NY2d 659 [2000]; *see Mass v Cornell Univ.*, 94 NY2d 87, 91 [1999]; *Morgenthau & Latham v Bank of New York Co.*, 305 AD2d 74, 78 [2003]). Concomitantly, where extrinsic evidence is used, the standard of review on a CPLR 3211(a)(7) motion is “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Here, essential facts alleged in the complaint regarding plaintiff’s claim for an equitable lien have been negated beyond substantial question by the extrinsic evidence on this motion.

To establish an equitable lien, “plaintiff must show a particular agreement by defendant to confer a security interest in the property at issue. Plaintiff’s mere expectation of payment, however sincere, is insufficient to establish an equitable lien” (*Security Pac. Mtge. & Real Estate Servs., Inc. v Republic of Philippines*, 962 F2d 204, 209 [2d Cir 1992] [internal quotation marks, citations and brackets omitted]; *see Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996]).

Newman, the attorney who acted as the escrow agent for PHI and P.H. Realty, averred that nonparty 21st Century Technologies (21st Century) wired Newman over \$1,000,000 between January and

February 2004. 21st Century's president, Dunn, represented to Newman that all of the funds came from 21st Century. Dunn instructed Newman that the funds were to be loaned to PHI, and that a second mortgage on the premises in favor of *21st Century*, subordinate to the mortgage of Laurus, should serve as security for the loan. A letter on 21st Century's letterhead, dated February 20, 2004, from Dunn to Newman confirms Newman's assertions that Dunn represented that all of the funds transferred by 21st Century to Newman came from 21st Century, and that the second mortgage was to be in favor of 21st Century. Moreover, Newman expressly averred that he was not aware of plaintiff prior to the consummation of the loan transactions between PHI, Laurus and 21st Century.

According to Newman, he released the funds to PHI around the date the agreements were entered into between PHI and Laurus, but did not obtain a second mortgage in favor of 21st Century because the agreements between PHI and Laurus prohibited additional encumbrances on the premises. The various agreements between PHI and Laurus, dated February 23, 2004, corroborate Newman's affidavit. Pursuant to those agreements, PHI warranted that the premises were and would remain free of liens, security interests and other encumbrances, except those expressly permitted by the agreements. A breach by PHI of the provisions proscribing liens, security interests and other encumbrances would have constituted

a default under the agreements, entitling Laurus to accelerate repayment of the note, a default rate of interest and foreclosure.

The conclusory allegations in the complaint to the effect that there was an agreement between PHI or P.H. Realty and plaintiff that PHI or P.H. Realty would confer upon plaintiff a security interest in the premises are flatly contradicted and negated beyond substantial question by the extrinsic evidence on the motion. Specifically, Newman's affidavit, the February 20, 2004 letter, the mortgage, security agreement and mortgage consolidation agreement between PHI and Laurus demonstrate that neither PHI nor P.H. Realty agreed to confer a security interest in the premises to anyone other than Laurus.<sup>2</sup> Moreover, even assuming PHI or P.H. Realty did agree to confer a security interest in the premises based on the loan from the funds released to PHI by Newman, plaintiff was not the party who would be entitled to such an interest. Rather, as Newman's affidavit and the February 20, 2004 letter make plain, 21st Century sought the security interest.

---

<sup>2</sup>In addition to being flatly contradicted by the extrinsic evidence, plaintiff's allegation that PHI or P.H. Realty granted plaintiff a lien on the premises is inherently incredible (see generally *Fernicola v New York State Ins. Fund*, 293 AD2d 844 [2002]). After all, in the event that PHI or P.H. Realty permitted such a lien on the premises, they would have defaulted under the February 2004 agreements, and placed at risk \$24 million in funding for a \$490,000 loan.

None of plaintiff's submissions in opposition to the motion to dismiss rehabilitated the conclusory allegations in the complaint that were flatly contradicted by the other extrinsic evidence. The affidavit of Brent Romney, an investor in plaintiff, indicates nothing more than that plaintiff loaned PHI or P.H. Realty \$490,000. The affidavit does not support plaintiff's allegations that PHI or P.H. Realty agreed to provide plaintiff with a security interest in the premises.

Kevin Romney, another investor in plaintiff, averred that in February 2004 he had a telephone conversation with an agent of PHI and P.H. Realty and an unidentified official of Laurus. Kevin Romney stated that:

"4. During that conversation, [he] asked the official [from Laurus] if [the official] understood that [plaintiff] would be making a short-term loan to P.H. Realty to allow [it] to acquire the Property. During the conversation, it was understood that [plaintiff]'s short-term loan was to have security in the form of collateral on the Property.

5. [He] also asked the official if he could confirm that Laurus was to provide some type of funding with respect to P.H. Realty's acquisition of the Property, which funding would include full payment of the short-term . . . purchase money loan [that plaintiff was providing]. That official responded, 'That's what our intent is.'

6. Thus, in February 2004, prior to [plaintiff] making any purchase money loan to P.H. Realty, Laurus was fully aware that [plaintiff] was making a short-term purchase money loan to P.H. Realty, that such loan was to be used by P.H. Realty to acquire the Property, and further that [plaintiff] was to receive some sort of collateralized security on the Property in exchange for that loan."

Notably, the vague assertion in paragraph 4 (cast in the passive

voice, to boot), that "it was understood" that plaintiff was to have a security interest, is not supported by any allegations identifying what was said and by whom, or otherwise establishing this understanding. Indeed, for all that appears in the affidavit, the alleged "underst[anding]" may have been Kevin Romney's unilateral understanding. Nowhere in the affidavit, after all, does he assert that the Laurus representative said *anything* that evidenced a bilateral understanding.

Putting aside these infirmities of the averments, they fail to demonstrate "a *clear* intent between the parties that [the premises] be held [or] given . . . as security for [the loan]" (*Liselli v Liselli*, 263 AD2d 468, 469 [1999] [emphasis added], *lv denied* 94 NY2d 751 [1999], quoting *Datlof v Turetsky*, 111 AD2d 364, 365 [1985]; see *Miller v Marchuska*, 31 AD3d 949, 951 [2006] [specific property must be given to secure loan]). Rather, these averments indicate nothing more than an agreement to pay a debt out of a designated fund, which does not operate to create an equitable lien (*Datlof*, 111 AD2d at 365, citing *James v Alderton Dock Yards*, 256 NY 298, 303 [1931]).

At bottom, plaintiff had nothing more than an expectation that the loan it advanced to PHI or P.H. Realty would be repaid. That expectation is insufficient to support a claim for an equitable lien (see *Scivoletti v Marsala*, 61 NY2d 806, 809 [1984]). Because plaintiff does not have a claim for an

equitable lien (see generally *Guggenheimer*, 43 NY2d at 275), that aspect of Laurus' motion seeking dismissal of that claim should have been granted. Moreover, since plaintiff does not have a claim against Laurus for an equitable lien, the very claim upon which plaintiff's filing of the notice of pendency was predicated (see CPLR 6501), the notice of pendency should be cancelled (see *Liselli*, 263 AD2d at 469; *Borrero v East Harlem Council for Human Servs.*, 165 AD2d 807 [1990]).

I agree with the majority for the reasons it provides that plaintiff's cause of action for unjust enrichment should be dismissed as against Laurus. Accordingly, for the reasons stated above, I would reverse the orders appealed, grant both motions, dismiss the complaint as against Laurus and cancel the notice of pendency.

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

ENTERED: MARCH 4, 2008

---

CLERK

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

736 Ivelisse T., etc., et al.,  
Plaintiffs-Respondents,

Index 17439/01

-against-

Property Resource Corporation, et al.,  
Defendants-Appellants,

John Doe, et al.,  
Defendants.

Appeal from an order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered July 13, 2006, unanimously withdrawn in accordance with the terms of the stipulation of the parties hereto. No opinion. Order filed.

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

2830 Ari Kramer, as Administrator Index 101978/05  
of the Estate of Irving T. Bush  
and as Executor of the Estate of  
Virginia Casey Bush,  
Plaintiff-Respondent,

-against-

Ioannis Danalis,  
Defendant-Appellant.

---

Odesser, Schillinger & Finsterwald, LLP, White Plains (Peter Schillinger of counsel), for appellant.

Haynes and Boone, LLP, New York (Kendyl Hanks and Kenneth J. Rubenstein of counsel), for respondent.

---

Judgment, Supreme Court, New York County (Rosalyn Richter, J.), entered July 17, 2006, granting the motion of plaintiff's decedent Virginia Casey Bush for partial summary judgment, declaring that she had the exclusive right to manage the subject property pursuant to an operating agreement, unanimously reversed, on the law, without costs, the judgment vacated, the motion denied, and the matter remanded to Supreme Court for further proceedings.

There was no basis for the court to consider summary judgment on plaintiff's unpleaded claim for enforcement of the operating agreement. Summary judgment may be awarded on an unpleaded cause of action only if the proof supports such a claim and if the opposing party has not been misled to its prejudice (*Weinstock v Handler*, 254 AD2d 165, 166 [1998]).

Here, the amended complaint does not even make reference to the operating agreement, and in fact seeks to have all the agreements declared void, which is contradictory to the relief actually granted. Furthermore, even if it were appropriate to consider the unpleaded claim, summary judgment would not lie. The court erred in finding that a February 2002 interest holders' agreement between defendant and plaintiff's decedent Irving Bush was superseded by a subsequent operating agreement dated October 4, 2002, which was neither the subject of negotiation between defendant and Irving nor pertained to precisely the same subject matter.

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: MARCH 4, 2008

---

CLERK



each (*Matter of Burk* 6 AD2d 429[1958]; *cf. Matter of Schneider*, 24 AD3d, 225[2005]). Without this, we are unable to render meaningful review of the compensation granted.

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

ENTERED: MARCH 4, 2008

---

CLERK



the time of trial, cast doubt on his mental capacity (see *People v Francabandera*, 33 NY2d 429 [1974]).

Defendant did not preserve his challenge to the legal sufficiency of the evidence and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Furthermore, the verdict was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was extensive evidence that defendant entered the apartment in question with the intent to commit a crime therein, including, among other things, signs of forced entry and evidence supporting the inference that defendant was looking for something to steal (see *People v Barnes*, 50 NY2d 375 [1980]).

Defendant's challenge to the court's jury charge is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: MARCH 4, 2008

---

CLERK



In view of the objective medical evidence demonstrating that petitioner's cardiomyopathy was of unknown origin and that while he had high blood pressure since 2003, it was unlikely that this was the cause of the cardiomyopathy because he had no history of hypertension, the statutory presumption set forth in General Municipal Law § 207-k was sufficiently rebutted, and the determination that petitioner's condition was not job-related had a rational basis (*see Matter of Walsh v Board of Trustees of N.Y. City Police Dept. Pension Fund, Art. II, 37 AD3d 370 [2007]; Matter of Seldon v Kelly, 21 AD3d 840 [2005]*).

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2945 In re Daniel R.,

A Person Alleged to  
be a Juvenile Delinquent,  
Appellant.

- - - - -

Presentment Agency

---

Randall S. Carmel, Syosset, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for presentment agency.

---

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about June 13, 2007, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of assault in the third degree and menacing in the third degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

Appellant's challenge to the facial sufficiency of the menacing count of the petition is without merit. The petition and its supporting deposition contained specific allegations supporting the element of intent to place the victim in fear of physical injury (see Penal Law § 120.15), namely, that appellant threatened to injure the victim, struck him, and threatened to cause further injury.

To the extent that appellant is challenging the legal

sufficiency of the evidence presented at the fact-finding hearing, that 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. We also conclude that the court's finding was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The evidence established that appellant punched the victim in the face, causing bleeding. Evidence that appellant continued to make threats to hurt the victim after he had already punched him twice and had to be restrained, and that the victim was frightened by these threats, was sufficient to establish the elements of menacing (see *Matter of Troy F.*, 40 AD3d 352 [2007]).

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2947-

2948-

2949 Ruckle and Guarino, Inc.,  
Plaintiff-Respondent,

Index 6438/06

-against-

Michael Hangan, et al.,  
Defendants-Appellants,

Edgewater Park Owners Cooperative Inc.,  
Defendant.

---

Rabinowitz & Galina, Mineola (Gayle A. Rosen of counsel), for appellants.

Peter A. Joseph, New York, for respondent.

---

Judgment, Supreme Court, Bronx County (Janice L. Bowman, J.), entered May 24, 2007, awarding plaintiff the principal sum of \$80,000, payable from a mechanic's lien discharge bond filed by defendants Hangan and International Fidelity, unanimously reversed, on the law, with costs, the judgment vacated, and the matter remanded for further proceedings. Appeals from orders, same court and Justice, entered December 26, 2006, which granted plaintiff's motion for summary judgment to enforce the lien, and April 17, 2007, which, to the extent appealable, denied the motion by Hangan and International Fidelity to renew the prior order, unanimously dismissed as subsumed in the appeal from the judgment.

To establish the right to enforce a mechanic's lien, the

contractor, or in this case the subcontractor, must make a prima facie case that the lien is valid, and that it is entitled to the amount asserted in the lien (8 Warren's Weed New York Real Property § 92.11[3][a] [5<sup>th</sup> ed], citing *Cramer v Esswein*, 220 App Div 10 [1927]; see *LHV Precast Inc. V Woodstock Lawn & Home Maintenance*, 296 AD2d 736 [2002]). Plaintiff did not adduce sufficient evidence to establish prima facie entitlement to summary judgment enforcing the lien. Notably, the proposal on which plaintiff relies postdates the work performed, and plaintiff's evidence failed to establish that plaintiff is entitled to the amount asserted in the lien, i.e., \$80,000.

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2956 Carleton Samuels, Index 13564/01  
Plaintiff-Respondent,

-against-

Montefiore Medical Center, et al.,  
Defendants-Appellants.

---

Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains  
(Edward J. Guardaro, Jr., of counsel), for appellants.

Barry Siskin, New York, for respondent.

---

Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.),  
entered June 1, 2006, which denied defendants' motion for summary  
judgment, unanimously reversed, on the law, without costs, and  
the motion granted. The Clerk is directed to enter judgment in  
favor of defendants dismissing the complaint.

On January 26, 2005, after plaintiff in this medical  
malpractice action failed to comply with a November 2002  
preliminary conference order and an August 2003 compliance  
conference order, Justice Tuitt conditionally precluded him from  
offering evidence at trial unless he provided all outstanding  
discovery within 45 days. Plaintiff never sought vacatur of that  
conditional order. At the scheduled status conference on March  
21, 2005, Justice Tuitt found that plaintiff still had not  
complied with the prior orders and issued a "self executing order  
of preclusion." Defendants moved in January 2006 for summary  
judgment based on the March 21 order. The court denied that

motion on the ground defendants had failed to demonstrate the merit of their defense.

No such demonstration was necessary. The preclusion of plaintiff's evidence rendered him unable to establish a prima facie case, thus requiring dismissal of the complaint (*Zapco 1500 Inv. v Wiener*, 299 AD2d 206 [2002]). Contrary to plaintiff's contention, this was not a discovery-related motion requiring the submission of an affirmation of good faith pursuant to 22 NYCRR 202.7(a). Defendants inadvertently failed to submit the March 21 order on their summary judgment motion, but plaintiff did not dispute its contents as quoted in its entirety in the attorney's affirmation in support of the dismissal motion. Even though the order is de hors the record on appeal, it is included in the motion court's files, and we take judicial notice of it (see *People v Davis*, 161 AD2d 787, 788 [1990], *lv denied* 76 NY2d 939 [1990]).

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

ENTERED: MARCH 4, 2008

---

CLERK



and could be jailed if he failed to do so. It was not necessary to inform defendant that his waiver meant he was waiving the right to factfinders who had not had such ex parte communications (see *People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US \_\_\_, 126 S Ct 2971 [2006][while allocution by court is preferred practice, "no particular catechism is required to establish the validity of a jury trial waiver."]). The record establishes that defendant's waiver was knowing, intelligent and voluntary.

Defendant did not preserve any of his constitutional or other challenges to the fact that the court conducted an in camera, ex parte proceeding involving the prosecutor and complaining witness, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. This conference, which resulted in the witness's compliance without the necessity of a material witness order, was indistinguishable from a material witness proceeding under CPL article 620. Such a proceeding is brought against a recalcitrant witness by the party seeking to call such witness. The proceeding seeks an order fixing bail to secure the attendance of a witness who would not be amenable or responsive to a subpoena; it has nothing to do with the content of the witness's testimony or any legal or factual issue that might

involve the opposing party in the underlying criminal case (see *People v Hamilton*, 272 AD2d 553 [2000], *lv denied* 95 NY2d 935 [2000]; *People v Lovett*, 192 AD2d 326 [1993], *lv denied* 82 NY2d 722 [1993]). Moreover, the existence of a record of the conference was disclosed to defendant and the record clearly established that no facts or trial issues were discussed (compare *People v Ortega*, 78 NY2d 1101 [1991]).

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2959            West Village Associates Limited            Index 108423/05  
                 Partnership, etc., et al.,  
                 Plaintiffs-Appellants,

-against-

Balber Pickard Battistoni Maldonado  
& Ver Dan Tuin, PC, et al.,  
Defendants-Respondents.

---

Duane Morris, LLP, New York (Thomas R. Newman of counsel), for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Thomas A. Leghorn of counsel), for respondents.

---

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered January 18, 2007, which granted defendants' pre-answer motion to dismiss the amended complaint, unanimously modified, on the law, the claims for legal malpractice reinstated, and otherwise affirmed, without costs.

A legal malpractice claim accrues when the malpractice is committed (*Glamm v Allen*, 57 NY2d 87, 93 [1982]), not when the client discovers it. Under the "continuous representation" doctrine, however, a client cannot reasonably be expected to assess the quality of the professional service while it is still in progress (see *Greene v Greene*, 56 NY2d 86, 94-95 [1982]). The doctrine is "generally limited to the course of representation concerning a specific legal matter," and thus is "not applicable to a client's . . . continuing general relationship with a lawyer

. . . involving only routine contact for miscellaneous legal representation . . . unrelated to the matter upon which the allegations of malpractice are predicated" (*Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). The pleading must assert more than simply an extended general relationship between the professional and client, and the facts are required to demonstrate continued representation in the specific matter directly under dispute.

The complaint here went beyond mere allegations that defendants continuously represented plaintiffs in a general professional relationship after the specific act of malpractice occurred (*cf. Zaref v Berk & Michaels*, 192 AD2d 346, 348 [1993]), specifically alleging the continued advice they received from defendants regarding rent regulation, as a result of which they failed to take appropriate steps to assure the subject property would be free from rent regulation. As a result, plaintiffs stated a cause of action that was not barred by the statute of limitations (*see Greene*, 56 NY2d at 95).

Finally, plaintiffs sufficiently alleged bases for liability against the individual defendants under Business Corporation Law § 1505(a) (*cf. Ecker v Zwaik & Bernstein*, 240 AD2d 360, 361-362 [1997]).

We have reviewed plaintiffs' other contentions and find them without merit.

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

ENTERED: MARCH 4, 2008

---

CLERK



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

2961-

2961A Thomas Cacciatore, et al.,  
Plaintiffs-Respondents,

Index 34599/98

-against-

The City of New York,  
Defendant,

Brooklyn Union Gas Company,  
Defendant-Appellant.

---

Cullen and Dykman LLP, Brooklyn (Margaret Mazlin of counsel), for appellant.

Henry Stanziale, Mineola, for respondents.

---

Order, Supreme Court, Kings County (Martin M. Solomon, J.), entered April 10, 2007, which, in an action arising out of a trip and fall allegedly caused by a roadway defect, insofar as appealed from, granted plaintiffs' motion to vacate a prior order granting defendant-appellant Brooklyn Union Gas Co.'s motion for summary judgment upon plaintiffs' failure to appear for oral argument, unanimously affirmed, without costs. Order, same court (Jack M. Battaglia, J.), entered May 21, 2007, which, insofar as appealed from, denied Brooklyn Union's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, the motion granted, and the complaint and all cross claims dismissed as against Brooklyn Union. The Clerk is directed to enter judgment accordingly.

The prior order was properly vacated upon an adequate showing that the reason plaintiffs did not appear for oral argument of Brooklyn Union's and defendant City's post-note of issue motions for summary judgment, after having submitted written opposition thereto, was law office failure, and that plaintiffs had been otherwise diligent in prosecuting this then-eight-year-old action (CPLR 2005; see *White v Incorporated Vil. of Hempstead*, 41 AD3d 709, 710 [2007]). While plaintiffs' showing of merit was sufficient for the purpose of vacating a minor, nonprejudicial default, they failed to raise an issue of fact in response to Brooklyn Union's prima facie showing that it never performed any work on the west side of the street where the injured plaintiff fell, only the east side where the gas main is located. Plaintiffs' engineer asserts that some of Brooklyn Union's frequent and admitted work on the east side of the street was such as to require excavations on the west side, but he does not claim to have ever personally visited the site, much less inspected it or taken any measurements, and his affidavit is

otherwise speculative and conclusory (see *Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Haberman v Cheesecake Factory Rests., Inc.*, 43 AD3d 392 [2007]).

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2962 Carlisle SoHo East Trust, Index 600363/06  
Plaintiff-Respondent,

-against-

Lexington Insurance Company,  
Defendant-Appellant.

---

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York  
(Louis H. Klein of counsel), for appellant.

Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel),  
for respondent.

---

Order, Supreme Court, New York County (Milton A. Tingling,  
J.), entered August 31, 2007, which denied defendant's motion for  
summary judgment declaring that it is not obligated to defend or  
indemnify plaintiff in the underlying personal injury action and  
granted plaintiff's cross motion for summary judgment to the  
extent of declaring that defendant is so obligated, unanimously  
affirmed, with costs.

Clear language in the relevant contract demonstrates the  
sub-subcontractor's agreement to be bound by the insurance  
requirements of the subcontract incorporated by reference (*cf.*  
*Bussanich v 310 E. 55<sup>th</sup> St. Tenants*, 282 AD2d 243 [2001]). The  
incorporated subcontract, which required, inter alia, that  
plaintiff be named as an additional insured under the  
subcontractor's general liability and umbrella policies,  
expressly stated that all insurance required thereunder was

binding on a sub-subcontractor retained by the subcontractor. Moreover, the sub-subcontractor, in agreeing to be bound by the subcontract, made specific revisions to the provisions setting forth the limits of umbrella coverage but made no change to the provision requiring that plaintiff be covered as an additional insured, thereby demonstrating a specific intent to be bound by the latter (see *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). Accordingly, plaintiff was entitled to coverage under the terms of the policy issued by defendant to its named insured, the sub-subcontractor, which states that it includes as an additional insured "any person or entity that is required to be so named in a covered written contract with [the named insured]."

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: MARCH 4, 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: MARCH 4, 2008

---

CLERK



After reevaluating its position as to the cause of petitioner's disability, in light of the gap in treatment between the two injuries, the Medical Board concluded that the 1999 injury was the competent causal factor. This finding is supported by petitioner's conservative treatment for the 1994 injury, the subsequent gap in treatment, and his return to full duty (see *Matter of Doyle v Kelly*, 8 AD3d 125, 126 [2004]; *Matter of Calzerano v Board of Trustees of N.Y. City Police Pension Fund*, Art. II, 245 AD2d 84 [1997]).

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

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2966N-

2966NA Yvette Timan, etc.,  
Plaintiff-Appellant,

Index 20528/05

-against-

Nazar Sayegh, M.D., et al.,  
Defendants-Respondents,

Cain Ranjan, M.D., et al.,  
Defendants.

---

Scaffidi & Associates, New York (Robert M. Marino of counsel),  
for appellant.

Voute, Lohrfink, Magro & Collins, LLP, White Plains (Elliot A.  
Cristantello of counsel), for Nazar Sayegh, M.D. and Midland  
Avenue Family Practice, respondents.

Ellenberg & Rigby, LLP, New York (Charles Lim of counsel), for  
Ricky Sayegh, M.D., respondent.

Landman Corsi Ballaine & Ford, P.C., New York (Kenneth J. Burford  
of counsel), for Christopher Tschinkel and Yonkers Central Park  
CVS, Inc., respondents.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Joseph  
D'Ambrosio of counsel), for Mile Square Pharmacy, Inc.,  
respondent.

---

Order, Supreme Court, Bronx County (Kenneth L. Thompson,  
J.), entered on or about June 12, 2006, which granted the  
respective motion and cross motion by defendants Mile Square  
Pharmacy and Ricky Sayegh to change venue from Bronx to  
Westchester County and denied plaintiff's cross motion to retain  
venue in the Bronx, and order, same court and Justice, entered  
June 20, 2006, which granted the motion by defendants Yonkers

Central Park CVS and Tschinkel to change venue from Bronx to Westchester and reiterated denial of plaintiff's cross motion to retain venue in the Bronx, unanimously reversed, on the law, without costs, the motions and cross motion for change of venue denied, and plaintiff's cross motion granted.

Plaintiff's decedent committed suicide in Yonkers, where he had lived with his family. He had been suffering from depression, anxiety, substance abuse and low back pain, and had received medical treatment from the physician defendants, whose medical offices were located in Yonkers. Other nonparty medical providers who had rendered services to the decedent, as noted by defendants, either lived or worked in lower Westchester. The Yonkers Police Department investigated the incident and the Westchester County Medical Examiner's Office conducted the autopsy. Plaintiff commenced the instant action alleging medical malpractice and wrongful death, claiming the medical and pharmacy defendants were negligent in rendering medical care and/or in the distribution of pharmaceuticals.

Venue was properly laid in the Bronx on the basis of a defendant's residence there (CPLR 503[a]). In seeking a change of venue to Westchester for the convenience of material witnesses (CPLR 510[3]), defendants failed to meet their burden of showing, *inter alia*, that such witnesses had been contacted and would be willing to testify, and how they would be inconvenienced by having

to attend a trial in the Bronx (see *Heinemann v Grunfeld*, 224 AD2d 204 [1996]). Mere general statements as to witness inconvenience are not enough (*Hartigan v Kurian*, 224 AD2d 299 [1996]). We have rejected a change of venue in similar cases where witnesses predominantly resided or maintained offices in Yonkers and failed to explain how they would be inconvenienced by a trial in the Bronx as opposed to Westchester, particularly given that the distance from Yonkers to the courts in the two counties is roughly the same (see e.g. *Rosario v St. John's Riverside Hosp.*, 11 AD3d 351 [2004]; *Prelidakaj v Gazivoda*, 224 AD2d 280 [1996]; *Kurnitz v New Rochelle Hosp. Med. Ctr.*, 166 AD2d 390 [1990]).

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2967

[M-210] In re William Johnson Belliard,  
Petitioner,

Ind. 1794/07

-against-

Hon. John S. Moore, etc., et al.,  
Respondents.

---

William Johnson Belliard, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Susan Anspach of  
counsel), for Hon. John S. Moore, respondent.

Robert T. Johnson, District Attorney, Bronx (Lisa Biedrzycki of  
counsel), for Robert T. Johnson, respondent.

---

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.



the interest of justice. As an alternative holding, we also reject them on the merits. The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenges in question were not pretextual. This finding is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2969 Anthony J. Harris,  
Plaintiff-Respondent,

Index 17594/05

-against-

Fenton Morrison, et al.,  
Defendants-Appellants,

Aduke Clay, et al.,  
Defendants.

---

Galvano & Xanthakis, P.C., New York (Steven F. Granville of  
counsel), for appellants.

Rimland & Associates, Brooklyn (Anthony M. Grisanti of counsel),  
for respondent.

---

Order, Supreme Court, Bronx County (Dianne T. Renwick, J.),  
entered March 2, 2007, which denied the motion by defendants  
Morrison and Dawes to dismiss the complaint as abandoned,  
unanimously affirmed, without costs.

Plaintiff showed "sufficient cause . . . why the complaint  
should not be dismissed" (CPLR 3215[c]). Acceptance of the  
excuse offered for the relatively short delay was, under the  
circumstances, a proper exercise of judicial discretion (see  
*Pappoe v Custodio*, 156 AD2d 211 [1989]).

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2970-

2971 In re Antwone Lee S. and another,

Dependent Children Under Eighteen  
Years of Age, etc.,

Tracye W., also known as Tracye S.,  
Respondent-Appellant,

The Catholic Home Bureau for  
Dependent Children,  
Petitioner-Respondent.

---

Lisa H. Blitman, New York, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel),  
for respondent.

Steven Banks, The Legal Aid Society, New York (Judy Waksberg of  
counsel), Law Guardian, and Proskauer Rose, LLP, New York (Andrew  
I. Gerber of counsel), for Law Guardian.

---

Orders of disposition, Family Court, Bronx County (Sidney  
Gribetz, J.), entered on or about June 20, 2006, which, upon a  
finding of permanent neglect, terminated respondent's parental  
rights to the subject children and committed custody and  
guardianship of the children to petitioner agency and the  
Commissioner of Social Services for the purposes of adoption,  
unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and  
convincing evidence of respondent's failure, notwithstanding the  
petitioner's diligent efforts, to learn to control her anger and  
complete all of the programs to which she was referred, and

refusal to accept guidance on proper parenting (see *Matter of Alpacheta C.*, 41 AD3d 285 [2007], *lv denied* 9 NY3d 812 [2007]; *Matter of Jah'lil Dale Emanuel McC.*, 44 AD3d 547 [2007]).

Termination of respondent's parental rights is supported by a preponderance of the evidence showing that the children, who have been in foster care virtually since birth, have bonded with a foster parent who provides for their special needs and desires to adopt, and that respondent continues to have problems controlling her anger and does not have suitable housing (see *Matter of Shaka Efion C.*, 207 AD2d 740 [1994]).

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

ENTERED: MARCH 4, 2008

---

CLERK



finding of [their] 'presence' in this jurisdiction is warranted" (*Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 [1990]). The record evidence also demonstrates that said companies' minimal contacts with New York are not sufficient to constitute the purposeful business activities required to subject them to this State's long-arm jurisdiction (see CPLR 302[a][1]; *Professional Personnel Mgt. Corp. v Southwest Med. Assoc.*, 216 AD2d 958 [1995]).

Even if personal jurisdiction was not lacking, the court providently exercised its discretion in dismissing the action as against all defendants on forum non conveniens grounds (see CPLR 327[a]). The court considered the relevant factors, including the domicile of plaintiff and many of the defendants, the site of the loss, the location of records and files, the number of witnesses in Canada and in locations other than New York, and the fact that a related action is currently pending in the Canadian courts, and appropriately determined that Canada is the more appropriate forum (see *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], cert denied 469 US 1108 [1985]; see also *Hbouss v Bank of Montreal*, 23 AD3d 152 [2005]).

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

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2974            Leeward Isles Resorts, Limited,            Index 600142/99  
                 Plaintiff-Respondent,

-against-

Charles C. Hickox,  
Defendant-Appellant.

---

Hughes Hubbard & Reed LLP, New York (Hagit Elul of counsel), for appellant.

Kravet & Vogel, LLP, New York (Donald J. Kravet of counsel), for respondent.

---

Order and judgment (one paper), Supreme Court, New York County (Helen Freedman, J.), entered January 9, 2007, which granted plaintiff's motion for summary judgment declaring that the subject guaranty is not enforceable, unanimously affirmed, with costs.

The 1989 loan agreement between defendant creditor's assignor and plaintiff guarantor's principal, which significantly increased the amounts extended under the 1986 loan agreement by defendant's assignor to plaintiff's principal, and expressly "supersede[d] and replace[d]" the 1986 loan agreement, did not merely modify the 1986 loan agreement, as defendant argues, but constituted a novation thereof (*see Northville Indus. Corp. v Fort Neck Oil Terms. Corp.*, 100 AD2d 865, 867 [1984], *affd* 64 NY2d 930 [1985]; *compare Crossland Fed. Sav. Bank v A. Suna & Co.*, 935 F Supp 184, 199 [ED NY 1996] [modifications only as to

the time of payment and rate of interest did not constitute a novation]). Thus, plaintiff's 1987 guaranty of the 1986 loan agreement is unenforceable (see *Bier Pension Plan Trust v Estate of Schneierson*, 74 NY2d 312, 315 [1989]; *Flaum v Birnbaum*, 120 AD2d 183, 192 [1986]). There is no merit to defendant's argument that the 1986 loan agreement could not be extinguished without plaintiff's consent. Plaintiff was only a guarantor of that loan, not a party to it. We have considered defendant's other arguments and find them unavailing.

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

ENTERED: MARCH 4, 2008

---

CLERK



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

2976 In re Leah Jacobowitz,  
Petitioner,

Index 117155/05

-against-

New York City Housing Authority,  
Respondent.

---

Tenenbaum & Berger, LLP, Brooklyn (Michele L. Henry of counsel),  
for petitioner.

Ricardo Elias Morales, New York (Nancy M. Harnett of counsel),  
for respondent.

---

Determination of respondent, dated August 10, 2005, which,  
after an administrative hearing, denied petitioner's claim to  
succession to a public housing lease, unanimously confirmed, the  
petition denied, and this proceeding (transferred to this Court  
by order of Supreme Court, New York County [Sheila Abdus-Salaam,  
J.], entered October 6, 2006), dismissed, without costs.

The challenged determination, which denied petitioner's  
grievance for failure to demonstrate her continuous occupancy  
until the previous tenants of record (her parents) vacated their  
leasehold, was supported by substantial evidence (*300 Gramatan  
Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]) and  
is rationally based (*Matter of Jennings v New York State Off. of  
Mental Health*, 90 NY2d 227, 239-240 [1997]). Although petitioner  
was a member of the original tenant family, there are no  
affidavits of income or family composition, as required by NYCHA

policy and governing regulation (see 24 CFR 960.257[a]), for the years 2000-2003, listing her as an occupant of these premises. Petitioner's documentary evidence attested only to at best sporadic occupancy during the period in question. The testimony by NYCHA officials working at the public housing development formerly occupied by petitioner and her family, credited by the hearing officer, strongly indicated that the family vacated the premises before surrendering their leasehold.

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

ENTERED: MARCH 4, 2008

---

CLERK



comparison technology (see *United States v Lovasco*, 431 US 783 [1977]; *People v Singer*, 44 NY2d 241, 252-255 [1978]; *People v Taranovich*, 37 NY2d 442 [1975]). Defendant's arguments to the contrary, including those that improperly cite documents that are not part of the record, are without merit.

Defendant's written and oral waivers, taken together, establish a valid and enforceable waiver of the right to appeal (see *People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248 [2006]). The court expressly informed defendant that as a condition of the plea he was agreeing to waive his right to appeal, and the court separated that right from the rights automatically forfeited by a guilty plea. This waiver forecloses review of defendant's procedural and substantive claims relating to his suppression motion, and his excessive sentence claim. In any event, we find all of these claims without merit.

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2978 Robert Gherardi, et al., Index 22153/02  
Plaintiffs-Respondents,

-against-

The City of New York, et al.,  
Defendants.

Harris Corporation, et al.,  
Defendants-Appellants.

---

Law Office of Vincent D. McNamara, East Norwich (Anthony Marino  
of counsel), for appellants.

Alexander J. Wulwick, New York, for respondents.

---

Order, Supreme Court, Bronx County (Mark Friedlander, J.),  
entered January 10, 2007, which, insofar as appealed from, denied  
defendant contractors' motion for summary judgment dismissing the  
Labor Law § 241(6) cause of action, unanimously affirmed, without  
costs.

A contractor's obligation under the statute is only "when  
constructing," which is defined in 12 NYCRR 23-1.4 as including  
the same activities enumerated under Labor Law § 240(1), and  
plaintiff was not "constructing, demolishing or excavating"  
because the ramp was not in his work area.

Even if, arguendo, defendant contractors' argument regarding  
the nature of plaintiff's work may be raised at this juncture,  
such work, involving an extensive project for the installation of  
wiring on four floors of a public high school building, effected

a significant physical change and was therefore an "alteration" (see *Joblon v Solow*, 91 NY2d 457, 465-466 [1998]; *Weininger v Hagedorn & Co.*, 91 NY2d 958, 959-960 [1998]). Although the accident occurred on an entrance ramp used for worker ingress and for bringing in materials, and not where plaintiff's work was actually being conducted, the protection of the statute extends to such area (see *Smith v McClier Corp.*, 22 AD3d 369, 371 {2005}; *Whalen v City of New York*, 270 AD2d 340, 342 [2000]), and it is not necessary for the offending instrumentality to have been erected for worker use.

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

ENTERED: MARCH 4, 2008

---

CLERK



the grievance procedures contained in the collective bargaining agreement, and the availability of a CPLR article 78 proceeding, which plaintiff did not pursue, satisfies due process hearing requirements (see *Matter of Tully Constr. Co. v Hevesi*, 214 AD2d 465, 466 [1995]).

Dismissal of the Executive Law § 296 claim was also proper because plaintiff did not file a notice of claim within three months of her termination (see Education Law § 3813[1]; *Sangermano v Board of Coop. Educ. Servs. of Nassau County*, 290 AD2d 498 [2002], *lv dismissed* 99 NY2d 531 [2002]). Contrary to plaintiff's argument that her claim did not accrue until she had exhausted all administrative remedies, an employment discrimination claim accrues on the date that an adverse employment determination is made and communicated to plaintiff, and the possibility that the determination may be reversed is insufficient to toll the limitations period (see *Cordone v Wilens & Baker*, 286 AD2d 597, 598 [2001]).

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

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2980-

2981 Nora Kavner,  
Plaintiff-Appellant,

Index 102969/06

-against-

Matthew Geller, et al.,  
Defendants-Respondents.

---

Crosby & Higgins LLP, New York (Todd A. Higgins of counsel), for appellant.

Blank Rome LLP, New York (Harris N. Cogan of counsel), for Matthew Geller, respondent.

Kasowitz Benson Torres & Friedman LLP, New York (Daniel P. Goldberg of counsel), for CIBC Oppenheimer Corp. and CIBC World Markets Corp., respondents.

---

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered December 12, 2006, dismissing the complaint pursuant to an order, same court and Justice, entered November 14, 2006, which granted defendants' CPLR 3211 motion, unanimously affirmed, with costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff does not allege any affirmative misstatement of material facts with the requisite particularity to support a claim for fraud in the inducement of the stipulation into which she entered with her former husband, defendant Geller (see CPLR 3016[b]; *New York City Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391 [2005]; *J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 390-391 [2005])). Nor may

plaintiff assert that she reasonably relied on defendants' silence or any misrepresentation regarding whether the CIBC defendants' job offer to Geller was contingent on plaintiff settling her dispute with him. She was an intelligent professional separately represented by counsel in the negotiations in this adversarial proceeding, and chose to forgo any discovery in the bankruptcy action, out of which arose the settlement of her claims seeking to enforce the divorce judgment (see *Kojovic v Goldman*, 35 AD3d 65, 69-70 [2006], lv denied 8 NY3d 804 [2007]; see also *Cosh v Cosh*, 45 AD3d 798 [2007]). Moreover, even if, arguendo, Geller had a duty to speak, CIBC clearly did not, as it was merely an adversary creditor in a bankruptcy proceeding, and owed plaintiff no fiduciary duty (see *National Union Fire Ins. Co. of Pittsburgh, Pa. v Red Apple Group*, 281 AD2d 296, 297 [2001]; *900 Unlimited v MCI Telecom. Corp.*, 215 AD2d 227 [1995]).

Furthermore, contrary to plaintiff's assertion, the record establishes that in Geller's motion to dismiss the bankruptcy proceeding, to which plaintiff was a party, he revealed that a pending disputed arbitration against himself and CIBC, which he had listed as a contingent liability, would not exist following the dismissal of the bankruptcy. This put plaintiff on notice that the arbitration had been disposed of insofar as Geller was concerned, yet plaintiff neither opposed the motion nor sought

any discovery as to the status of the arbitration.

The unjust enrichment cause of action was properly dismissed inasmuch as the settlement between Geller and plaintiff is a valid and enforceable contract which controls the rights of the parties as they relate to the instant dispute (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]).

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

ENTERED: MARCH 4, 2008

---

CLERK



Defendant breached the lease by failing to issue an estoppel certificate in connection with plaintiff's application to refinance the underlying mortgage. Under Article 34 of the lease, and the 1995 so-ordered stipulation that reaffirmed same, plaintiff was absolutely entitled to the issuance of such a certificate. Article 34 unambiguously provides that within 20 days of a request by the tenant, the landlord must furnish an estoppel certificate. Defendant argues that the proposed certificate sought a more extensive certification than required under the lease. Even if this were the case, defendant was still obliged to issue a certificate as to those items set forth in the lease. Defendant could have marked up the certificate or supplied its own form of certification, as suggested in plaintiff's attorney's letter of September 29, 2003. The fact that plaintiff may have requested a certification of items not specifically identified in the lease did not relieve defendant of its absolute obligation to issue an estoppel certificate within 20 days of the request.

Defendant also argues that the request for an estoppel certificate was not sent by registered mail, as required in Article 24 of the lease. However, defendant's receipt of the request and its failure to object promptly constitute a waiver of that defect; service was not invalidated under the circumstances (see *Rower v West Chamson Corp.*, 210 AD2d 7 [1994]).

As a consequence of defendant's wrongful withholding of the certificate, plaintiff is entitled to damages that were the natural and probable consequence of the breach. The trial court appropriately awarded damages over a 10-year period corresponding to the period of the refinanced loan. For the first three years of this period, the court awarded the difference between plaintiff's existing mortgage rate (7.54%) and the rate available on the refinanced loan (5.31%), for a total of \$236,592 in increased mortgage payments. Since plaintiff's original loan was fully payable on January 1, 2007, the court then awarded the difference between the rate available at the time of trial in August 2006 (6.12%) and the rate available on the refinanced loan (5.31%), representing damages of \$194,201 over the seven-year period. Plaintiff was further damaged in the amount of \$20,000, representing its nonrefundable application fee.

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2984 In re Harold Bell,  
Petitioner,

Index 403022/05

-against-

The New York City Housing Authority,  
Respondent.

---

Harold Bell, petitioner pro se.

Ricardo Elias Morales, New York (Andrew Koppel of counsel), for  
respondent.

---

Determination of respondent, dated April 20, 2005,  
terminating petitioner's tenancy on the ground of  
nondesirability, 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  
[Alice Schlesinger, J.], entered January 5, 2006), dismissed,  
without costs.

The finding of nondesirability is supported by substantial  
evidence, including petitioner's 2003 guilty plea to criminal  
possession of a controlled substance in the seventh degree (see  
*Matter of Bradford v New York City Hous. Auth.*, 34 AD3d 463  
[2006]), and the testimony of a detective that, in July 2004,  
while executing a search warrant of petitioner's apartment, he  
saw petitioner holding a gun, and found drugs and drug  
paraphernalia in the apartment (see *Harris v Hernandez*, 30 AD3d  
269 [2006]). There exists no basis to disturb the hearing

officer's findings crediting the detective's testimony (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]), and although the criminal charges pertaining to petitioner's 2004 arrest were still pending at the time of the administrative hearing, respondent properly considered the underlying police documents in reaching its determination, notwithstanding the subsequent dismissal of those charges (see *Matter of Ono v Long Is. Coll. Hosp.*, 12 AD3d 299 [2004]).

The penalty of termination does not shock our sense of fairness (see *Harris*, 30 AD3d at 269).

We have considered petitioner's remaining contentions, including that he received ineffective assistance of counsel at the administrative hearing, and find them unavailing.

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2986 Janice Hammett,  
Plaintiff-Appellant,

Index 7997/05

-against-

Fausto C. Diaz-Frias, et al.,  
Defendants-Respondents,

Amadou B. Diallo,  
Defendant.

---

Mitchell Dranow, Mineola, for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Holly E. Peck of counsel), for Fausto C. Diaz-Frias and Juan Baez, respondents.

Richard T. Lau & Associates, Jericho (Joseph G. Gallo of counsel), for Melbourne P. Clarke, respondent.

---

Order, Supreme Court, Bronx County (Lucy Billings, J.), entered November 29, 2006, which granted defendants' motion and cross motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion and cross motions denied, and the complaint reinstated.

The experts for both sides referred in their affirmations to plaintiff's MRI reports that were before the court (see *Thompson v Abbasi*, 15 AD3d 95 [2005]; *Brown v Achy*, 9 AD3d 30 [2004]; *Gonzalez v Vasquez*, 301 AD2d 438 [2003]), which established the existence of disc bulges and herniations (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]).

The affirmed report of Dr. Howell, who first examined

plaintiff four days after the incident, connected plaintiff's injuries to the incident and raised a triable issue of fact as to whether they constituted a "serious injury" as defined by Insurance Law § 5102(d). While Howell did not provide qualitative limitations in his report or specify the tests he conducted (see *Burke v Torres*, 8 AD3d 118 [2004]), his reference to an unsworn report of Dr. Sloan, which did provide such data, should have been considered by the motion court, since "evidence, otherwise excludable at trial, may be considered to deny a motion for summary judgment provided that this evidence does not form the sole basis for the court's determination" (*Largotta v Recife Realty Co.*, 254 AD2d 225 [1998], quoting *Wertheimer v New York Prop. Ins. Underwriting Assn.*, 85 AD2d 540, 541 [1981]).

Even though he did not examine plaintiff until 10 months after the incident, plaintiff's doctor was able to report that plaintiff's symptoms were caused by the June 2004 accident, that her condition was permanent in nature, in part an "exacerbation of underlying degenerative joint disease and prior injuries," and that she sustained permanent consequential limitation in her

cervical and lumbosacral spine. This was sufficient to raise a triable issue of fact as to the permanence of the injury.

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

ENTERED: MARCH 4, 2008

---

CLERK

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

2987 Steven Tanger, Index 116838/05  
Plaintiff-Respondent,

-against-

Alfred Ferrer III, et al.,  
Defendants-Appellants.

---

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Thomas W. Hyland of counsel), for appellants.

The Brown Law Group, P.C., New York (Rodney A. Brown of counsel), for respondent.

---

Order, Supreme Court, New York County (Donna M. Mills, J.), entered January 18, 2007, which, in this action alleging legal malpractice and breach of contract, granted plaintiff's motion for summary judgment on the issue of liability for legal malpractice, unanimously reversed, on the law, without costs, and the motion denied.

This action arises out of defendants' representation of plaintiff in an action brought by plaintiff's landlord. During the course of said action, defendants drafted three tenders that purported to be made pursuant to CPLR 3219. This Court found that the tenders were conditional and therefore did not act to stop the accrual of interest on the landlord's claim (*Solow Mgt. Corp. v Tanger*, 1 AD3d 165, 166 [2003]). In addition, in the underlying action, defendants filed untimely post-trial briefs, which were not considered by the court, and prepared, but did not

file, an appellate reply brief, contrary to their written acknowledgment to plaintiff.

As the landlord's recovery in the underlying action was less than the moneys tendered, plaintiff has established that, but for defendants' negligence in filing ineffective tenders, he would have received the benefits of CPLR 3219, i.e., the landlord's recovery of costs and interest would have been limited and plaintiff would have been entitled to a recovery of costs in defending the action from the date of the tender. Thus, he has demonstrated his entitlement to summary judgment on the issue of liability as to his legal malpractice claim (see *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). In opposition, defendants failed to raise a triable issue of fact or establish a need for discovery.

While we reject defendants' argument that the tenders were proper, the finding that they were ineffective merely reflects an unsuccessful litigation strategy and does not constitute negligence. In order to be effective, a CPLR 3219 tender must be unconditional (see *Castle Coal & Oil Co. v Frank's Fuel*, 45 AD2d 836 [1974]), and defendants are collaterally estopped from contesting the determination that the tenders were conditional (see *Beuchel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). In any event, by including a "reservation of rights" in the

tender notice, defendants imposed a condition on the tender, by seeking to allow plaintiff's defenses and counterclaims to survive, contrary to a satisfaction of the landlord's claim in that action (see CPLR 3219). Having chosen the litigation strategy of employing a CPLR 3219 tender, defendants were obligated to execute the strategy in compliance with the statute. This does not necessarily constitute malpractice in the context of the ongoing dispute between Solow and plaintiff which involved six separate and ongoing lawsuits arising out of a rent strike. An explication of this strategy necessarily requires trial as it is a contested issue unresolved by discovery.

Plaintiff's breach of contract cause of action is dismissed as duplicative of his legal malpractice cause of action (see *InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [2003]).

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

ENTERED: MARCH 4, 2008

---

CLERK



demeanor and responses (see *People v Bess*, 299 AD2d 263 [2002],  
*lv denied* 99 NY2d 580 [2003]); *People v Clarke*, 251 AD2d 7  
[1998])).

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

ENTERED: MARCH 4, 2008

---

CLERK



**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**MARCH 4, 2008**

---

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

M-349 People v Castillo, Bladimil

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

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

M-378 People v Brizan, Michael, also known as  
Brizen, Michael

M-396 People v Nowrang, Joshua, also known as  
Nowrang, Jushua

M-398 People v Redd, Sharbu

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

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

M-421 Keating v High Thor Taxi Corp.

Time to perfect appeal enlarged to the September 2008 Term.

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

M-548 Oscar Blandi Salon, Inc. v CPS 1 Realty L.P.,  
doing business as The Plaza Hotel

Time to perfect appeal enlarged to the September 2008 Term.

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

M-385 Askin v The City of New York

Time in which respective parties to perfect the appeal and cross appeal enlarged to the September 2008 Term. Should municipal appellants fail to perfect, plaintiffs directed to perfect as direct appellants for next available Term of Court.

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

M-402 Downtown Manhattan C.D.C. v Barone

Leave to appeal from the Appellate Term denied.

Lippman, P.J., Andrias, Williams, McGuire, JJ.

M-886 Rosenzweig v Givens

Appeal adjourned to the May 2008 Term; motion otherwise denied.

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

M-619 Irshad v 88 Lex Grill, Inc.

Time to perfect appeal enlarged to the September 2008 Term.

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

M-809 In the Matter of J., Baby Girl, also known as D., Pathjrie, also known as J., Pjetrit – Lutheran Social Services of Metropolitan New York, Inc.

Time to perfect appeal enlarged to the September 2008 Term.

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

M-78            In the Matter of W., Allen Jerome, and  
                 W., Tyric Robert – The Salvation Army Social  
                 Services of Greater New York

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

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

M-195           In the Matter of S., Patrice  
                 – Commissioner of Social Services

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

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

M-363           People v Bermudez, Roberto

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

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

M-351           People v Ortiz, Luis

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

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

M-523           In the Matter of E., Tamara v B., Joseph

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

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

M-531 Jindal v Jindal

Stay of trial granted on condition appeal perfected for the September 2008 Term, as indicated.

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

M-449 People v Duran De La Rosa, Wander

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

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

M-440 People v Cantey, Theodore

M-450 People v Duran De La Rosa, Carlos

M-499 People v Manuel, Jose, also known as Infante, Franklin

M-507 People v Murray, Jamila, also known as Murray, Jamilya

M-524 People v Ortiz, Angelo

M-581 People v Rivera, Jose

Notices of appeal deemed timely filed; leave to prosecute appeals as poor persons granted, as indicated.

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

M-6681 In the matter of Quadier, G., and P., Tashameeka  
– Administration for Children's Services

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

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

M-448 People v Feliz, Jacobo

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

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

M-493 People v Gritten, Sharon

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

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

M-419 Vargas v The City of New York

M-429 People v Edison, Antonio

M-535 Purcell v St. Barnabas Hospital

M-539 A-1 Technologies Private Limited v Erevolution, LLC

M-803 Walker v Hughes Hubbard & Reed, LLP

Time to perfect appeals enlarged to the September 2008 Term.

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

M-573 Melendez v The City of New York  
Estate of Marrero

Time to perfect consolidated appeals and cross appeal enlarged to the September 2008 Term.

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

M-618 Lamot v The City of New York

Time for parties to perfect respective appeal and cross appeal enlarged to the September 2008 Term. Should municipal appellant fail to so perfect, plaintiff directed to perfect as direct appellant for next available Term of Court.

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

M-612 Conry v Bartha - Estate of Bartha

Time to perfect appeal enlarged to the December 2008 Term. (See M-614, decided simultaneously herewith.)

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

M-614 Benbaset v Bartha - Estate of Bartha

Time to perfect appeal enlarged to the December 2008 Term. (See M-612, decided simultaneously herewith.)

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

M-387 In the Matter of S., Thomas v S., Latisha  
Dismissal of appeal denied, as indicated.

Andrias, J.P., Saxe, Sweeny, McGuire, JJ.

M-534 Trump CPS LLC v Gotbetter

Reargument and other relief denied.

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

M-1761 Liggett Realtors, Inc. v Public Administrator –  
M-6590 New York County as Representative of the Estate of  
Gresham

Reargument or other relief denied, as indicated  
(M-1761); motion for reargument deemed one for substitution of  
administrator and, as such, granted, as indicated; motion  
otherwise denied (M-6590).

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

M-604 People v Hall, Alexander

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

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

M-506 People v Medina, Raymond

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

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

M-596 People v Cidron, Eugenio

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

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

M-601 People v Diaz, David

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

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

M-636 In the Matter of K., Robert, J., Kevin and J., Keith  
Commissioner of Social Services of the City of New York  
Time to perfect appeal enlarged to the September 2008  
Term.

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

M-620 Santana v The City of New York  
Time to perfect appeal enlarged to the September 2008  
Term, as indicated.

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

M-732 Kaufman v Bachman  
Time to perfect appeal enlarged to the September 2008  
Term, as indicated.

Moskowitz, J.

M-529 In the Matter of G., Robert Lehr v W.-G., Beverly  
Stay denied, without prejudice to further proceedings  
in Family Court, New York County, as indicated.

Acosta, J.

M-706 People v Pedraza, Eugenia  
Leave to appeal to this Court granted, as indicated.

Mazzarelli, J.P., Saxe, Nardelli, Williams, Sweeny, JJ.

In the Matter of Attorneys Who Are in Violation  
of Judiciary Law Section 468-a:

M-914 Marc Berger, admitted on 2-25-1980,  
at a Term of the Appellate Division,  
First Department

Respondent reinstated as an attorney and counselor-at-law in the State of New York, effective the date hereof. No opinion. All concur.

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

M-72 In the Matter of Angelo Cappelli,  
an attorney and counselor-at-law:

Respondent's resignation accepted and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to January 2, 2008. Opinion Per Curiam. All concur.

**The following orders were entered and filed**  
**on February 28, 2008:**

---

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

M-889 Ledesma v Aragona Management Group  
(And third party and second third-party actions)

Stay of trial granted.

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

M-194        In the Matter of the Application of  
              Sonya Latimore (admitted as Sonya  
              Whitten Latimore), a suspended attorney:

              Leave to withdraw as counsel for petitioner granted,  
and petitioner's hearing for reinstatement adjourned, as  
indicated. No opinion. All concur.