

against Dr. Ronald Kraft and Cornell University, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff commenced this action to recover damages for personal injuries sustained in connection with the alleged unnecessary removal of two-thirds of his right lung due to a misdiagnosis of his condition. Specifically, the radiologist who interpreted a PET scan performed on plaintiff's chest found that plaintiff had a pulmonary lesion that was "most suspicious for primary lung carcinoma." However, an analysis of the lung tissue following the surgery disclosed that there was no cancer and that, as indicated by plaintiff's first CT scan, the lesion had been caused by an atypical mycobacterial infection, a condition that the radiologist admitted can look exactly like cancer.

A review of the expert affirmations submitted by the respective parties reveals that plaintiff's opposition to the motions for summary judgment submitted by the radiology defendants was sufficient to establish the existence of triable questions of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). The evidence indicates that the radiologist's reading of the PET scan may have been misleading and that the surgeon, who was unfamiliar with the test, may have unduly relied upon it in electing to perform the surgery upon plaintiff. However, for the reasons stated below, a trier of fact could not

reasonably conclude that the internist's alleged delay in referring plaintiff to a pulmonologist for a consultation was a contributing factor to the decision to perform the surgery.

Robert B. Kraft, the internist, examined plaintiff for the first time in August 2002, after he had been seen by an otolaryngologist. The latter had ordered a CT scan after plaintiff experienced a single incident of spitting blood a month earlier. The CT scan indicated that the incident of spitting blood (hemoptysis) may have been caused by an atypical mycobacterial infection. Based on that diagnosis, the radiologist who performed the CT scan recommended a follow-up CT scan in six months. At that time, plaintiff did not have any symptoms that the infection was progressing, such as fatigue or weight loss. He continued treatment with Dr. Kraft for various other unrelated conditions.

There were three follow-up visits to Dr. Kraft before plaintiff underwent the second CT scan. At the October 2002 visit, plaintiff reported feeling better and had had no recurrence of spitting blood. At the December 2002 visit, plaintiff complained of breathing difficulty, which he himself attributed to a nasal obstruction. After ascertaining that plaintiff's lungs were clear, Dr. Kraft prescribed Nasonex. At the third visit in January 2003, Plaintiff reported improvement in his breathing since he had begun taking the medication. There

were no other incidents of hemoptysis. It was on April 7, 2003, after plaintiff complained of mild shortness of breath, that Dr. Kraft ordered the repeat CT scan. Based on a radiologist's report of a mass seen on the CT scan, Dr. Kraft referred plaintiff to a pulmonologist, who ordered testing for TB, which was negative. Plaintiff then saw another pulmonologist, Mark Spero, M.D. Dr. Spero ordered the aforementioned PET scan that indicated the presence of a lesion suspicious for primary carcinoma in the right lower lobe. He then sent plaintiff to a thoracic surgeon, who recommended a biopsy. Plaintiff went to another surgeon, John McCabe, M.D., to have the biopsy performed. Dr. McCabe ended up removing a portion of plaintiff's right lung, which he claimed was necessary to reach the mass shown on the PET scan.

Dr. Kraft proffered the affidavit of Dr. Bruce F. Farber, an internist with a sub-specialty in infectious diseases, who opined that Dr. Kraft treated plaintiff in accordance with good and accepted practices. Dr. Farber averred that the proper treatment for mycobacterial infection is to monitor symptoms to determine if there is progression and repeat the CT scan after six months to determine if the condition has progressed or cleared. Based on the symptoms reported at the visits between August and April, Dr. Farber found that there was no evidence of progression of disease before April 2003, at which time Dr. Kraft did refer

plaintiff to two pulmonologists.

Plaintiff submitted the affidavit of an unnamed thoracic surgeon who opined that Dr. Kraft deviated from good and accepted practices by not referring plaintiff to a pulmonologist earlier, contending that, had such a referral been made, the pulmonologist would have performed a bronchoscopy or needle biopsy that would have determined that plaintiff suffered from a mycobacterial infection and would have prescribed appropriate antibiotics.

However, neither pulmonologist whom plaintiff did consult performed or ordered a bronchoscopy or needle biopsy and neither one prescribed or suggested prescribing an antibiotic -- despite the fact that there had already been a diagnosis of atypical mycobacterial infection, based on the August CT scan. The expert's contention that it was too late to do a bronchoscopy belies common sense if, indeed, a bronchoscopy would have been the appropriate diagnostic procedure. In any event, presumably a bronchoscopy would have furnished information that was already known. If antibiotic treatment were indicated, at least one of the pulmonologists would have prescribed or recommended it, and neither did. Even after the surgery, when a substantial amount of tissue was available for culture, if antibiotic treatment were appropriate, it would have been prescribed to contain any remaining infection. The only treatment given was a TB medication although plaintiff had not tested positive for TB, and

that medication was discontinued shortly thereafter. Dr. McCabe, the surgeon, who initially planned to perform a biopsy but ended up performing a partial lung resection, stated that a needle biopsy was not indicated because it might miss malignant tissue.

Since plaintiff offered no evidence that the mycobacterial infection was progressing or even present between October 2002 and January 2003 (the visit prior to April 2003), it would be pure speculation to find that an earlier referral would have prevented the allegedly unnecessary surgery (*see e.g. Brown v Bauman*, 42 AD3d 390, 392 [2007]).

Since plaintiff's claim against Cornell University is based on its vicarious liability for the acts of Dr. Kraft, the complaint should also be dismissed as against Cornell (*see Perry v Costa*, 97 AD2d 655 [1983], *affd sub nom. Perry v Inter-County Sav. Bank*, 62 NY2d 630 [1984]).

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

ENTERED: MARCH 17, 2009

CLERK

alleged in the complaint as true and accord the plaintiffs the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d at 87). Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, the criterion being not whether the proponent of the pleading has simply stated a cause of action, but whether he or she actually has one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [motion must be denied if "from [the] four corners [of the pleading] factual allegations are discerned which taken together manifest any cause of action cognizable at law"]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114 [1998]).

Giving plaintiffs the benefit of every possible favorable inference (see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]), defendants' evidence that plaintiffs were not the tenants of record, that plaintiffs' occupancy of the apartment was not known to them, and that they did not have notice that a child under seven years old was living in the apartment is rebutted by plaintiffs' evidence that, for approximately two months during the summer of 2004, they lived in the apartment

with the tenant of record, who was the adult plaintiff's sister, and the latter's two daughters, one of whom was under seven years old at the time. It thus appears that defendants had notice that at least one child under seven was living in the apartment (see *Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646 [1996]). For present purposes, the contradiction between the original complaint's allegation that plaintiffs were living in the apartment during the summer of 2003, and plaintiffs' pleadings in the other action that they were living in Chicago during the summer of 2003, was adequately explained as a typographical error or miscommunication with counsel, and, like the inconsistent statements made in the pleadings in the other action concerning plaintiffs' residence during the summer of 2004, merely raises issues of credibility for the factfinder.

The court properly permitted plaintiffs to amend the complaint and serve the second supplemental bill of particulars, dispensing with a motion for leave to amend, where there was no showing of prejudice by defendants (see *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [2007]), and, in opposition to defendants' cross motion to dismiss, plaintiffs submitted evidentiary proof that would have satisfied their

burden on a motion for leave. The motion court properly consolidated two actions that concern the same injuries to the same plaintiffs and involve many common issues of law and fact.

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

ENTERED: MARCH 17, 2009

CLERK

believable context (*see People v Dorm*, __NY3d__, 2009 NY Slip Op 01065). We have considered and rejected defendant's remaining arguments relating to this evidence.

The court's *Sandoval* ruling, which permitted the People to elicit defendant's prior sexual abuse conviction without mentioning any underlying facts, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Pavao*, 59 NY2d 282, 292 [1983]; *People v Rosado*, 53 AD3d 455 [2008], *lv denied* 11 NY3d 835 [2008]).

The court properly permitted the People to rebut a claim of recent fabrication by introducing a prior consistent statement made by the victim, since this statement predated a particular motive to falsify that had been asserted by the defense (*see People v McDaniel*, 81 NY2d 10, 18 [1993]; *People v Whitley*, 14 AD3d 403, 406 [2005], *lv denied* 4 NY3d 892 [2005]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 17, 2009

CLERK

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

60 In re Javone C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

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

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about June 19, 2008, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act, which, if committed by an adult, would constitute the crime of reckless endangerment in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for a dismissal of the petition or an adjournment in contemplation of dismissal (see *Matter of Katherine W.*, 62 NY2d 947 [1984]). The court properly determined that appellant required supervision (see Family Ct Act § 352.1[1]) and that probation was the least restrictive available alternative (see Family Ct Act § 352.2[2]). Given the gravity of

appellant's acts and his need for psychiatric treatment, the 12-month period of probation supervision is appropriate.

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

ENTERED: MARCH 17, 2009

CLERK

continued treatment following her last appointment (*compare O'Donnell v Siegel* 49 AD3d 415, 417 [2008]).

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

ENTERED: MARCH 17, 2009

CLERK

judgment, and determined that New York law governs the insurance coverage issues raised in this action, unanimously affirmed, with costs.

We have held that a contract of liability insurance is “governed by the law of ‘the state which the parties understood was to be the principal location of the insured risk ...’” (*Certain Underwriters at Lloyd’s, London v Foster Wheeler Corp.*, 36 AD3d 17, 22-23 [2006], *affd* 9 NY3d 928 [2007]), that “where it is necessary to determine the law governing a liability insurance policy covering risks in multiple states, the state of the insured’s domicile should be regarded as a proxy for the principal location of the insured risk” (*id.* at 24) and that a corporate insured’s domicile is the state of its principal place of business (*id.* at 25). The contracts of liability insurance at issue here, which do not contain choice-of-law clauses and cover risks that are spread through multiple states, were purchased by GE, which, having obtained rulings in its favor as to its principal place of business (*see e.g. Gafford v General Elec. Co.*, 997 F2d 150, 161-163 [6th Cir 1993]; *Northeast Nuclear Energy Co. v General Elec. Co.*, 435 F Supp 344, 347-348 [D Conn 1977]), is judicially estopped from denying that its principal place of

business is New York (see e.g. *D & L Holdings, LLC v RGC Goldman Co.*, 287 AD2d 65, 71 [2001], *lv denied* 97 NY2d 611 [2002]; *Bankers Trustee Co. Ltd. v First Mexican Acceptance Corp.*, 273 AD2d 81, 81 [2000], *lv denied* 95 NY2d 766 [2000]). Accordingly, we find New York law controlling in this matter.

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

ENTERED: MARCH 17, 2009

CLERK

testify does not, by itself, constitute ineffective assistance of counsel warranting dismissal of the indictment (see *People v Simmons*, 10 NY3d 946, 949 [2008]; *People v Wiggins*, 89 NY2d 872 [1996]). Defendant made no showing that his appearance before the grand jury would have altered the result (*People v Sutton*, 43 AD3d 133, 136 [2007], *lv denied* 9 NY3d 1010 [2007]). Even if defendant had testified along the lines of his statement to the police, there is no reason to believe the grand jury would have credited that testimony.

The trial court, after ascertaining on the record that the possibility that a sworn juror may have had a casual encounter with the prosecution's main witness seven or eight years before the trial did not bias the juror, properly determined that the juror was not grossly unqualified to continue serving (see CPL 270.35[1]; *People v Condes*, 23 AD3d 1149, 1150 [2005], *lv denied* 6 NY3d 774 [2006]). Defendant's request to replace the juror did not preserve his distinct argument that the trial court should have conducted a further inquiry (see *People v Cruz*, 48 AD3d 205 [2008], *lv denied* 10 NY3d 957 [2008]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits, because the court's inquiry was sufficient. The juror's possible contact with the witness was so fleeting that the juror was not even sure that the witness was the same person she recalled meeting once, many years before.

This fell far short of an acquaintance or relationship between the two.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 17, 2009

CLERK

the remaining 1/6 of the risk contemplated by the agreement in the event of a decline in value of South Beach's assets (see *Morris v 702 East Fifth Street HDFC*, 46 AD3d 478, 479 [2007]). That the amount of damages, if any, is not yet known due to a related action brought against plaintiff by ESE does not preclude the assertion of plaintiff's contract claim against Dynamic (see *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]).

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

ENTERED: MARCH 17, 2009

CLERK

indemnify is distinct from, and does not inherently contain, a duty to insure (see *Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Since the subcontract contains no obligation on the part of JEM to procure insurance for Knight, Knight cannot be deemed an additional insured under the additional-insured endorsement to JEM's commercial general liability policy (see *International Couriers Corp. v North Riv. Ins. Co.*, 44 AD3d 568 [2007]; *Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 32-34 [1979], *affd* 49 NY2d 924 [1980]). Because defendants demonstrably have no duty to procure insurance for Knight, plaintiffs' claim for breach of the duty to procure insurance must also fail.

There is no basis in this record for interfering with the motion court's discretionary decision to decline to dismiss plaintiffs' request for declaratory relief in the fourth cause of action, in light of the prior pendency of claims asserted in the context of the underlying personal injury action (see *Whitney v Whitney*, 57 NY2d 731 [1982]).

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

ENTERED: MARCH 17, 2009

CLERK

protective frisk (see *People v Batista*, 88 NY2d 650, 654 [1996];
People v Benjamin, 51 NY2d 267, 271 [1980]; see also *People v*
King, 102 AD2d 710 [1984], *affd* 65 NY2d 702 [1985]).

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

ENTERED: MARCH 17, 2009

CLERK

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

71-

71A Graubard Miller,
Plaintiff-Respondent,

Index 603932/04

-against-

Ronald I. Nadler,
Defendant-Appellant.

Akerman Senterfitt LLP, New York (Brian A. Bloom of counsel), for appellant.

Graubard Miller, New York (Nancy R. Sills of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 10, 2007, which, insofar as appealed from as limited by the briefs, in this action seeking payment of legal fees, granted plaintiff's motion for summary judgment on its causes of action for an account stated and for quantum meruit, and directed entry of judgment in favor of plaintiff in the principal amount of \$103,492.44 plus costs and disbursements, and denied defendant's cross motion for summary judgment dismissing the quantum meruit claim, and order, same court and Justice, entered November 16, 2007, granting defendant's motion to reargue and, upon reargument, adhering to its prior determination, unanimously affirmed, with one bill of costs.

Plaintiff law firm established entitlement to summary judgment on its claim for an account stated by production of documentary evidence showing that defendant received and retained

the invoice without objection (see *Federal Express Corp. v Federal Jeans, Inc.*, 14 AD3d 424 [2005]). Defendant's "self-serving, bald allegations of oral protests were insufficient to raise a triable issue of fact as to the existence of an account stated" (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]).

Plaintiff also established its claim for quantum meruit by the production of documentary evidence demonstrating the firm's performance of services in connection with the subject transaction, the acceptance of such services, the firm's expectation of payment therefor, and the reasonable value of the services (see e.g. *Soumayah v Minnelli*, 41 AD3d 390, 391 [2007]).

Plaintiff's failure to comply with the rules on retainer agreements (22 NYCRR 1215.1) does not preclude it from suing to recover legal fees for the services it provided (see *Egnotovitch v Katten Muchin Zavis & Roseman LLP*, 55 AD3d 462, 464 [2008]; *Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 63-64 [2007]).

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 17, 2009

CLERK

and was never consulted by any of the medical personnel who rendered care and treatment to her during her prenatal visits or during her labor and delivery. However, a certified nurse midwife testified that she had consulted and collaborated with the attending physician in the labor and delivery department when plaintiff presented there a week before she experienced placental abruption, and the medical record identifies defendant as the attending physician that day. This evidence raises the issues whether the midwife consulted with defendant concerning the treatment of plaintiff and, if so, whether an implied physician-patient relationship arose from the consultation (see *Raptis-Smith v St. Joseph's Med. Ctr.*, 302 AD2d 246 [2003]; *Cogswell v Chapman*, 249 AD2d 865, 866-867 [1998]; see also Education Law § 6951).

Since defendant's motion was based solely on his assertion that he did not render any treatment to plaintiff, the burden did not shift to plaintiffs to submit evidence to raise issues of fact as to compliance with the standard of care and proximate cause (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). In any event, however, the motion court properly granted reargument to consider plaintiffs' expert's affirmation, which had been submitted initially in redacted form (see *Mattis v Keen, Zhao*, 54 AD3d 610, 611-612 [2008]), and the affirmation was

sufficient to raise said issues of fact (see *Cruz v St. Barnabas Hosp.*, 50 AD3d 382 [2008]).

We have considered defendant's remaining contention and find it without merit.

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

ENTERED: MARCH 17, 2009

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 17, 2009

CLERK

reliable identification of defendant, as well as testimony from an occupant of an apartment to which the robbers fled, and where they deposited incriminating evidence.

The court properly exercised its discretion when it denied defendant's application to proceed pro se, made during the presentation of the People's case, since defendant did not assert any compelling circumstances or legitimate basis for his belated request (see *People v McIntyre*, 36 NY2d 10, 17 [1974]). There is no merit to defendant's argument that he was constitutionally entitled to represent himself notwithstanding the fact that the trial had begun.

Defendant received effective assistance of counsel under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; see also *Strickland v Washington*, 466 US 668 [1984]). Defendant was not deprived of effective assistance by his attorney's failure to seek to introduce expert testimony on identification. The pursuing officer identified defendant under circumstances that made mistaken identity highly unlikely, and this identification was supported by powerful corroborating evidence. Accordingly, there is no reason to believe that an application to call an identification expert would have been successful (see *People v LeGrand*, 8 NY3d 449 [2007]; *People v Young*, 7 NY3d 40, 45-46 [2006]), or that such testimony would have affected the verdict.

In his initial and renewed severance motions, defendant did not establish a sufficient basis for severance. At the time of these motions, the information before the court concerning the proposed defenses of defendant and his codefendant, including the codefendant's attorney's outline of his client's proposed testimony, did not reveal any irreconcilable conflict (*see People v Mahboubian*, 74 NY2d 174, 183-184 [1989]). On appeal, defendant asserts that a particular portion of the codefendant's testimony and summation argument tended to inculcate defendant. Under the circumstances, the prior severance motions did not preserve this issue, and a further renewed motion would have been necessary. We decline to review this unpreserved issue in the interest of justice. As an alternative holding, we also reject it on the merits, because the defenses of defendant and the codefendant remained compatible throughout the trial, and defendant was not prejudiced by the joint trial. A midtrial severance motion would have been untimely in any event, since specifics as to the allegedly prejudicial aspect of the codefendant's defense could have been ascertained and presented to the court prior to trial (*see People v Funches*, 4 AD3d 206, 207 [2004], *lv denied* 3 NY3d 640 [2004]).

The court properly exercised its discretion in denying defendant's request for a one-week adjournment to consult with a DNA expert. Defense counsel received a suitable opportunity to

consult with his expert before the People's DNA expert testified, and the court's refusal to adjourn the trial did not cause defendant any prejudice (see *People v Roberts*, 50 AD3d 530 [2008], *lv denied* 10 NY3d 963 [2008]). Furthermore, DNA proof linking defendant to some of the physical evidence was only a small component of the People's extensive case.

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

ENTERED: MARCH 17, 2009

CLERK

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

80 Iqbal Singh,
Plaintiff-Appellant,

Index 1185/06

-against-

The City of New York Division of Housing
Preservation and Development,
Defendant-Respondent.

Iqbal Singh, appellant pro se.

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

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 5, 2008, which, to the extent appealable, denied plaintiff's motion for renewal of a prior order that had denied his motion for partial summary judgment for \$500,000 in damages, and granted defendant's cross motion to dismiss the complaint, unanimously affirmed, without costs.

The pro se plaintiff landlord had stipulated in 2005 to the appointment of an Article 7-A administrator (RPAPL 778) to remedy dangerous conditions existing at the 1072 Findlay Avenue premises in the Bronx. Plaintiff's third effort, in June 2008, to have this administrator removed was barred by collateral estoppel (see *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343 [1999]).

In moving for reconsideration, plaintiff failed to demonstrate new or additional facts warranting renewal.

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

ENTERED: MARCH 17, 2009

CLERK

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

82-

82A-

82B Paula A.,
 Petitioner-Respondent,

-against-

 Jose A.,
 Respondent-Appellant.

Neal D. Futeran, White Plains, for appellant.

Orders, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about October 11, 2007, which granted petitioner and the parties' son a five-year order of protection against respondent, and determined that respondent violated a temporary order of protection and committed him to the New York City Department of Corrections for a term of 30 days, and order, same court and Judge, entered on or about October 11, 2007, which awarded custody of the parties' son to petitioner and directed that respondent's access to the child must be court authorized, unanimously reversed, on the law, without costs, and the matter remanded for a hearing on the family offense and custody petitions.

The court erred in issuing a custody order without the benefit of a hearing, where the best interests of the parties'

son could be fully considered (see *Matter of Linda J. v Nakisha P.*, 10 AD3d 287, 288 [2004]; *Matter of Hudgins v Goodley*, 301 AD2d 524 [2003]).

Similarly, the court erred in issuing a permanent order of protection without having held a fact-finding or a dispositional hearing (see *Matter of Shevlin v Minas*, 253 AD2d 435 [1998]), and its finding that aggravating circumstances existed is not supported by the record (see Family Court Act § 827[a][vii]).

Furthermore, the court improperly held respondent in civil contempt in the absence of an evidentiary hearing, and because neither petitioner nor the court filed a petition alleging a violation of the temporary order of protection (see Family Court Act § 846; § 846-a; *Matter of Janczuk v Janczuk*, 305 AD2d 680 [2003]; see also *James W.D. v Sandra C.*, 44 AD3d 423, 424 [2007]). “Inasmuch as enduring consequences potentially flow from an order adjudicating a party in civil contempt, an appeal from that order is not rendered moot simply because the resulting prison sentence has already been served” (*Matter of Bickwid v Deutsch*, 87 NY2d 862, 863 [1995]).

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

ENTERED: MARCH 17, 2009

CLERK

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

84 Gabrielle Lequerique, etc., Index 115195/05
Plaintiff-Appellant,

-against-

Stella Lequerique,
Defendant-Respondent,

Lekerika, LLC,
Defendant.

Annette G. Hasapidis, South Salem, for appellant.

Kantrowitz, Goldhamer & Graifman, P.C., Chestnut Ridge (John M. Chakan of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered November 19, 2007, which granted the motion of defendant Stella Lequerique for summary judgment dismissing the complaint and declared that she is the owner of the subject property, unanimously affirmed, without costs.

In 2000, plaintiff's decedent, her father, who held title to certain real property in his own name, conveyed the property to himself and defendant - plaintiff's mother and decedent's surviving spouse - thereby creating a tenancy by the entirety (see *Buddle v Buddle*, 53 AD3d 745 [2008]). At that time, the decedent had a will which left his entire estate to defendant.

In 2004, after decedent was diagnosed with terminal cancer, he decided to transfer ownership of the property to a limited

liability company. The attorney handling the transaction was given an earlier deed which showed decedent as the sole owner of the property and prepared a deed transferring ownership from decedent to the LLC, in which decedent and defendant each had a 50% interest. Subsequently, decedent changed his will, leaving defendant the minimum statutory share and bequeathing 80% of the residuary estate to plaintiff. In this action, plaintiff seeks a declaration that the LLC is the beneficial owner of the property, reformation of the deed and a constructive trust.

Tenancy by the entirety confers on the surviving spouse a right to absolute ownership of the property upon the other spouse's death (*V.R.W., Inc. v Klein*, 68 NY2d 560, 564 [1986]). Since the deed transferring the property, held by decedent and his wife as tenants by the entirety, was signed only by decedent, it was ineffective to transfer title to the LLC. Where spouses own property as tenants by the entirety, a conveyance by one spouse, to which the other has not consented, cannot impair the non-consenting spouse's survivorship interest (*id.*).

Plaintiff has failed to raise a triable issue of fact with respect to her claim that defendant intended to transfer her interest in the property to the LLC. At best, the evidence shows only that defendant acquiesced in the transaction; there is no evidence, however, that she knowingly surrendered her survivorship rights. Accordingly, the court properly denied

reformation of the deed (see *Lieberman v Greens at Half Hollow, LLC*, 54 AD3d 908, 909 [2008]). For the same reason, plaintiff's claim that defendant ratified decedent's attempt to transfer title to the LLC is unavailing (see *Lipman v Vebeliunas*, 39 AD3d 488 [2007]).

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

ENTERED: MARCH 17, 2009

CLERK

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

86 Centennial Insurance Company, Index 603784/06
Plaintiff-Respondent,

-against-

Apple Builders & Renovators, Inc.,
Defendant-Appellant,

Jagganathan Kuttambakkam, et al.,
Defendants.

Lindabury, McCormick, Estabrook & Cooper, P.C., New York (Scott M. Yaffe of counsel), for appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, Morristown, NJ (Robert S. Moskow II of counsel), for respondent.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered November 5, 2007, which, insofar as appealed from, denied defendants' cross motion to disqualify plaintiff's attorneys, unanimously affirmed, with costs.

The motion court properly denied defendants' cross motion, since defendant Apple Builders & Renovators, Inc. had executed a written waiver in its retainer agreement with the same law firm specifically waiving any conflict of interest that might arise from the firm's representation of Centennial and Apple. Apple cannot compel the disqualification of plaintiff's counsel simply because the representation to which it consented has since devolved into litigation (see *St. Barnabas Hosp. v New York City Health and Hospitals Corp.*, 7 AD3d 83, 92 [2004]). Apple's claim

that it did not understand the implications of the waiver is unsupported by the clear language of the retainer agreement and the record evidence.

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

ENTERED: MARCH 17, 2009

CLERK

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

88 David Goldstein,
Plaintiff-Appellant,

Index 102136/07

-against-

Massachusetts Mutual Life Insurance Company,
Defendant-Respondent.

Niehaus LLP, New York (Paul R. Niehaus of counsel), for
appellant.

Rivkin Radler LLP, Uniondale (Harris J. Zakarin of counsel), for
respondent.

Order, Supreme Court, New York County (Emily Jane Goodman,
J.), entered February 19, 2008, which, to the extent appealed
from, granted defendant's motion to dismiss the complaint,
unanimously affirmed, with costs.

In 1992, plaintiff chiropractor purchased a disability
insurance policy from defendant's predecessor-in-interest. In
1993, he sustained nerve damage which impaired the use of his
left arm as a result of a motor vehicle accident, and in 1994, he
was directed to stop working as a chiropractor and began
receiving disability benefits. Later that year plaintiff was
diagnosed with Epstein Barr virus/chronic fatigue syndrome, and
in May 1999, with generalized anxiety disorder, accompanied by
obsessive compulsive disorder.

Plaintiff commenced his first action against defendant in
New York County in 1999 alleging that he was "Presumptively

Totally Disabled" under the terms of the policy, and seeking a declaration that the requirement that he submit monthly progress reports and remain under a physician's care be waived. That complaint was dismissed on the basis that plaintiff's injury did not meet the policy's definition of "presumptive disability."

Plaintiff commenced a second action against defendant in Queens County in 2005, asserting claims for, inter alia, a declaration that the requirement of a doctor's care be waived and intentional and negligent infliction of emotional distress by undertaking conduct to aggravate his chronic fatigue syndrome. That action was dismissed upon a finding that the claim for declaratory relief was barred by res judicata and that the tort claims were time barred (*see Goldstein v Massachusetts Mut. Life Ins. Co.*, 32 AD3d 821 [2006]).

Plaintiff commenced this action in 2007 alleging that defendant engaged in a campaign of harassment in administering the subject policy by, inter alia, requiring him to submit monthly reports, delaying payments, and refusing to acknowledge the permanence of his injury, most of which conduct was alleged to have occurred before 2005. As a result of this conduct, plaintiff allegedly suffered severe emotional distress.

All three actions involve the same parties, insurance policy, claim and challenge to the frequency of reports demanded. Thus, plaintiff's claims for intentional and negligent infliction

of emotional distress, to the extent they arise from pre-2005 conduct, were properly dismissed on the ground of res judicata, as the claims arise out of the same series of transactions as the prior actions (see *Matter of Hunter*, 4 NY3d 260, 269 [2005]; *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). For the same reason, the claim for breach of the covenant of good faith and fair dealing arising out of pre-2005 conduct, was subject to dismissal on res judicata grounds. The claims for intentional and negligent infliction of emotional distress, as they relate to pre-2005 acts, are also barred by the doctrine of collateral estoppel as identical claims were dismissed in 2005 (see *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]), and plaintiff cannot relitigate his dismissed claims by adding allegations that could have been brought earlier.

Plaintiff's claims for intentional and negligent infliction of emotional distress, to the extent not otherwise barred, fail to state a cause of action as they lack the necessary element of "extreme and outrageous conduct" (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]; see *Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362 [2005]). This element requires conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Howell*, 81 NY2d at 122 [internal quotation marks and citations

omitted]), and defendant's demand of progress and physician's reports at a permissible frequency and the occasional delay in the payment of benefits, clearly does not rise to such a level of conduct.

Furthermore, plaintiff's claim for breach of the covenant of good faith and fair dealing was properly dismissed, since he failed to allege the deprivation of any right under the policy (see *Ezrasons, Inc. v American Credit Indem. Co.*, 257 AD2d 447, 448 [1999]), or that defendant failed to perform under the policy (see *Odingo v Allstate Ins. Co.*, 251 AD2d 81 [1998], *lv denied* 92 NY2d 810 [1998]).

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

ENTERED: MARCH 17, 2009

CLERK

life, that request is not properly before this Court. Defendant has already unsuccessfully appealed from the underlying judgment of conviction (303 AD2d 295 [2003], *lv denied* 100 NY2d 584 [2003]), and this appeal is only from the order denying resentencing under the DLRA.

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

ENTERED: MARCH 17, 2009

CLERK

2001, and her transfer request to respondent two years prior to her death, showed that she listed only herself and her minor daughter as occupants of the apartment. The Housing Assistant also testified that the tenant's folder contained no indication that she ever requested respondent's permission for petitioner to move into the subject apartment (see *Matter of Abreu v New York City Hous. Auth. E. Riv. Houses*, 52 AD3d 432, 433 [2008]).

Petitioner's argument that both he and the tenant of record were unable to register his occupancy because of respondent's failure to make reasonable accommodations for their severe disabilities in violation of the Americans with Disabilities Act (ADA) (see 42 USC § 12132) is unavailing. Petitioner cannot invoke the Act because he is not a "qualified individual with a disability" as that term is defined (see 42 USC § 12131[2]), since he does not meet the essential eligibility requirements for admission into public housing, i.e., he never submitted an application for public housing, he was neither born nor adopted into an existing tenancy, and the tenant of record never applied for or obtained respondent's written permission for his occupancy. Furthermore, even if petitioner was a "qualified individual," both the lease and respondent's rules and regulations place the obligation on the tenant of record to obtain written permission before allowing someone to move into the apartment.

Petitioner's attempt to invoke the ADA on behalf of the tenant of record (his companion) fails since he does not have standing to assert such a claim (see *Willson v Association of Graduates of the U.S. Military Academy*, 946 F Supp 294, 296 [SD NY 1996]). In any event, although the evidence at the hearing established that the tenant was physically debilitated because of cancer, no evidence was presented to indicate that she lacked the mental capacity to request written permission for petitioner's occupancy. The tenant remained in telephone contact with her Housing Assistant as recently as two weeks before her death, and at no time did she mention petitioner's occupancy. There is also no explanation as to why the tenant was unable to seek written permission to add petitioner to her household at any time between 1995 when he allegedly moved in, and the onset of her illness in 1998.

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

ENTERED: MARCH 17, 2009

CLERK

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

92	Arthur Picchione, Plaintiff-Respondent, -against- Sweet Construction Corp., et al., Defendants-Respondents-Appellants, First Lexington Corporation, et al., Defendants-Appellants. - - - - - First Lexington Corporation, et al., Second Third-Party Plaintiffs-Appellants, -against- Discovery Communications, Inc., Second Third-Party Defendant-Respondent-Appellant, Schindler Elevator Corporation, et al., Second Third-Party Defendants. - - - - - Discovery Communications, Inc., Third Third-Party Plaintiff-Appellant, -against- Arc Electric Construction Co., Third Third-Party Defendant-Appellant. - - - - - First Lexington Corporation, et al., Fifth Third-Party Plaintiffs-Appellants, -against- Discovery New York, Inc., Fifth Third-Party Defendant-Respondent.	113518/04 590694/05 591040/05 591106/06 590667/06 590436/07
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[and two other third-party actions]

Herzfeld & Rubin P.C., New York (David B. Hamm of counsel), for
First Lexington Corporation and Rudin Management Co., Inc.
appellants.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for Sweet Construction Corp. and Arc Electric Construction Co., respondents-appellants.

Churbuck Calabria Jones & Materazo, P.C., Hicksville (Nicholas P. Calabria of counsel), for Discovery Communications, Inc., appellant, and Discovery New York, Inc., respondent.

Field Law Firm, P.C., New York (John G. Korman of counsel), for Arthur Picchione, respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered July 1, 2008, which, inter alia, denied the motion by defendants First Lexington and Rudin Management for summary judgment dismissing the complaint and for indemnification on their cross claim against co-defendant Sweet Construction and their claims against defendant-third-party defendant Discovery Communications and third-party defendant Discovery New York, denied the motion by Sweet and third-party defendant Arc Electric for summary judgment dismissing all claims against them, granted the cross motion by Discovery Communications for summary judgment dismissing the complaint as against it and for common-law indemnification against Sweet, and denied the cross motion by Discovery Communications, Discovery New York and third-party defendant Hartford Insurance for summary judgment with respect to plaintiff's Labor Law § 241(6) cause of action and for common-law indemnification against Arc, unanimously modified, on the law, the motion by First Lexington and Rudin granted to the extent of dismissing the common-law negligence and Labor Law § 200 causes

of action against them, and granting their claims for contractual and common-law indemnification against Sweet and contractual indemnification against Discovery New York, the cross motion by Discovery Communications for summary judgment for contractual indemnification against Arc granted, and otherwise affirmed, without costs.

Plaintiff was employed as a foreman by Arc, a subcontractor working on the gut renovation and build-out of office space on the eighth floor of a building owned by First Lexington and managed by Rudin. Sweet was the general contractor, hired by Discovery Communications, the tenant occupying the premises under a lease between First Lexington and Discovery New York, the parent of Discovery Communications.

Plaintiff allegedly sustained a lower back injury while pushing a 300-400-pound loaded equipment cart along a hallway at the site when a wheel caught in a groove in the unfinished floor and broke, causing the cart to tip over and push him against a wall. He seeks recovery for common-law negligence and pursuant to Labor Law § 200 and § 241(6). With respect to § 241(6), plaintiff claims that the floor was broken up, uneven and filled with holes, depressions and other defects constituting a tripping hazard, in violation of Industrial Code (12 NYCRR) § 23-1.7(e)(1), and that the wheel of the cart was not "free-running and well secured" to its frame (§ 23-1.28[b]).

The motion court properly denied dismissal of the § 241(6) claim. Contrary to defendants' contentions, the Industrial Code sections relied upon are sufficiently specific positive mandates to impose liability under the statute (see *Vieira v Tishman Constr. Corp.*, 255 AD2d 235 [1998]; *Freitas v New York City Tr. Auth.*, 249 AD2d 184, 185 [1998]; see generally *Morris v Pavarini Constr.*, 9 NY3d 47, 50 [2007]). Moreover, in light of the testimony regarding defects in the raw floor, the fact that there was neither debris nor loose pieces of concrete in the hallway where the alleged accident occurred is irrelevant. Since First Lexington and Rudin failed to carry their burden as movants to show that the wheel was not defective (*cf. Ruggiero v Cardella Trucking Co.*, 16 AD3d 342, 343-344 [2005]), the burden never shifted to plaintiff to submit an expert opinion to show that it was. In the absence of evidence that plaintiff destroyed the cart, rather than merely having it removed from the area, there is no basis for any spoliation sanction; plaintiff's explanatory affidavit was properly considered, inasmuch as it did not contradict his earlier deposition testimony (see *e.g. Meyer v Moreno*, 258 AD2d 315, 316 [1999]).

The court also properly denied Sweet's motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims. In view of the evidence that Sweet or its demolition contractor created the allegedly defective condition of the

floor, the question whether it exercised supervision or control over the work or had notice of the defective condition is irrelevant (see *Piazza v Shaw Contr. Flooring Servs., Inc.*, 39 AD3d 1218 [2007]). There was no issue of fact as to where the alleged accident occurred, since the unsworn physician reports suggesting a different location were inadmissible hearsay and, in any event, insufficient (see *Flaherty v American Turners N.Y.*, 291 AD2d 256, 257-258 [2002]); moreover, the apparent discrepancy was reconciled by plaintiff's deposition testimony.

Contribution and common-law indemnification were properly denied against Arc, plaintiff's employer, since there was no showing of "grave injury" (see Workers' Compensation Law § 11; *Konior v Zucker*, 299 AD2d 320 [2002]).

However, the Labor Law § 200 and common-law negligence claims against First Lexington and Rudin should have been dismissed. The fact that their employee had walked the construction site to monitor compliance with their alteration specifications, which contained virtually no directives regarding safety, constituted the type of general supervision that does not establish liability against an owner (see *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272-273 [2007], *lv denied* 10 NY3d 710 [2008]; see also *Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [2008]).

First Lexington and Rudin should also have been granted

common-law and contractual indemnification from Sweet. The common-law indemnification claim prevails since these defendants were not liable for common-law negligence or pursuant to Labor Law § 200, and were only vicariously liable under § 241(6) (see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), while indemnitor Sweet was negligent (see *Correia v Professional Data Mgt.*, 259 AD2d 60, 64-65 [1999]). With respect to contractual indemnification, the stand-alone Sweet indemnity agreement was an enforceable writing, containing sufficient detail and signed by the party to be charged. Even if this agreement purported to indemnify First Lexington and Rudin for their own negligence, it would be enforceable under General Obligations Law § 5-322.1 because they were in fact not negligent (see *Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 434 [2007]); granting indemnification would not be premature (see e.g. *Mejia v Levenbaum*, 57 AD3d 216 [2008]), even though a judgment has not been entered or paid in the main action.

First Lexington and Rudin should also have been granted summary judgment on their claim against Discovery New York for contractual indemnification under the lease. While managing agent Rudin was not a party to the lease, the provision nonetheless indemnified it as the "owner's agent." Such an

indemnity provision does not run afoul of General Obligations Law § 5-322.1.

Discovery Communications should also have been granted summary judgment on its claim for contractual indemnification pursuant to the Sweet-Arc subcontract. It is undisputed that Discovery Communications hired Sweet for the alterations, and First Lexington played no role in the hiring; therefore, contrary to the understanding of the motion court, Discovery Communications was "the owner" contemplated by the indemnification provision. It is thus unnecessary to speculate whether the parties, for contractual purposes, adopted the Labor Law meaning of "owner," which encompasses a person with an interest in the property who contracts to have work performed for his benefit (*Zaher v Shopwell, Inc.*, 18 AD3d 339 [2005]), or whether Discovery Communications was an intended beneficiary of the provision merely because the subcontract indicated that the work was to be performed at its premises. Since Discovery Communications was not negligent, the indemnification provision is enforceable under the General Obligations Law (see *Rhodes-Evans*, 44 AD3d at 434). Moreover, the agreement to indemnify "to the fullest extent permitted by law" should be read in a manner giving effect to this provision, rather than rendering it void (see *Murphy v Columbia Univ.*, 4 AD3d 200, 202-203 [2004]).

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

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

ENTERED: MARCH 17, 2009

CLERK

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

96 Julien M. Dieujuste, Jr.,
Plaintiff-Respondent,

Index 8089/07
302721/07

-against-

Kiss Management Corporation, et al.,
Defendants-Appellants.

- - - - -

[And Another Action]

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

Louis A. Badolato, Roslyn Harbor, for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered September 8, 2008, which, insofar as appealed from, denied defendants-appellants' motion for summary judgment dismissing the complaint for lack of a serious injury under Insurance Law § 5102(d), unanimously modified, on the law, to dismiss the claims alleging injury to the lumbar spine and a 90/180-day curtailment of plaintiff's activities, and otherwise affirmed, without costs.

An issue of fact as to whether plaintiff sustained a serious injury to his right wrist is raised by the affirmed reports of plaintiff's treating physician, who initially examined plaintiff 11 days after the accident and determined that the pain, tenderness, and limited range of motion and grip strength in plaintiff's right wrist, coupled with plaintiff's abnormal MRI showing several sprains and the absence of any preexisting

injury, indicated that plaintiff had sustained significant injury to his right wrist as a result of the accident. Plaintiff's treating physician further concluded that, even though plaintiff showed some improvement in wrist extension and grip strength approximately eight months after the accident, further treatment would be only palliative in nature, the prognosis for a full recovery was guarded, and plaintiff's wrist injury was therefore permanent. Plaintiff's expert physician corroborated these findings, reporting that, nearly one year after the accident, plaintiff still exhibited significant limitations on all range of motion tests performed on his right wrist, and concluding that plaintiff demonstrated a 20% loss of use of his right arm, and that plaintiff's right wrist injuries are permanent in nature and will have a substantial qualitative effect on his life (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]).

Plaintiff, however, fails to raise an issue of fact as to whether he sustained a serious injury to his lumbar spine. While plaintiff's treating physician found that plaintiff exhibited pain and tenderness in his lumbar spine upon palpation and his range of motion in that area was slightly limited immediately after the accident, he also found that plaintiff's lumbar spine MRI was within normal limits and that, within six months after the accident, plaintiff's range of motion was almost completely normal. Clearly, any injury to plaintiff's lower back was minor

or insignificant (see *Licari v Elliott*, 57 NY2d 230, 236 [1982]).

Nor is an issue of fact raised as to whether plaintiff sustained a 90/180-day injury by the conclusory statements in his expert's affirmation that his right wrist injury rendered him unable to perform substantially all of his usual daily activities during the seven-month period immediately following the accident and that plaintiff's treating physician maintained plaintiff on light duty status from the time of the accident until at least five months later. It appears from plaintiff's deposition that he missed no time from work as a construction worker, and there is no evidence that plaintiff was unable to perform all significant aspects of his job (see *Ronda v Friendly Baptist Church*, 52 AD3d 440, 441 [2008]; *Lopez v Simpson*, 39 AD3d 420, 421 [2007]; cf. *Nigro v Penree*, 238 AD2d 908, 909 [1997]), or that his leisure activities were substantially curtailed (see *Nelson v Distant*, 308 AD2d 338, 340 [2003]).

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 17, 2009

CLERK

presumed since plaintiff's commercial lease has been terminated, plaintiff failed to demonstrate a likelihood that it will succeed in proving that it was not aware of the termination provision contained in the overlease. Plaintiff's claim of a merger of estates is reliant on the premise that Property and Lessee are alter egos of each other, such that piercing the corporate is warranted. Plaintiff, however, has failed to make the requisite showing of domination of either entity which was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences (see *Kali Corp. v A. Goldner Inc.*, 49 AD3d 397, 398 [2008]). Dismissal of the cause of action for a declaration required that the court make some declaration in favor of defendants, and we modify accordingly (*Decana, Inc. v Contogouris*, 55 AD3d 325, 326 [2008]). Absent a showing that a preliminary injunction is warranted, the remaining issues are common landlord tenant issues which were properly dismissed since they should be litigated in Civil Court (see *Post v 120 East End Ave. Corp.*, 62 NY2d 19, 28 [1984]; *Cox v J.D. Realty Assocs.*, 217 AD2d 179, 181 [1995]).

The court providently exercised its discretion in declining to impose sanctions on plaintiff for its questionable conduct in this litigation.

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

ENTERED: MARCH 17, 2009

CLERK

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

98

[M-428] In re Carl Wells,
Petitioner,

Ind. 6548/06
41/07

-against-

Hon. Gregory Carro, etc.,
Respondent.

Carl Wells, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Roberta L. Martin of
counsel), for 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 FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
MARCH 17, 2009

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

M-1000X Stafford v Scientia Health Group, Inc.

M-1001X Hufford v New York Convention Center Operating
Corporation

M-1002X Storch v Storch

M-1003X Fluxo-Cane Overseas Ltd. v Newedge USA, LLC (formerly
known as Fimat USA, LLC)

M-1073X Board of Managers of the Whitehouse Condominium v
Chuang

M-1072 People v Clancy, Michael

M-1087 People v Banabdrahime, Foudel, also known as
Provchalye, Anjoliano

Appeals withdrawn.

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

M-1085 Yuen v The City of New York

Appeal, previously perfected for the April 2009 Term,
withdrawn.

Tom, J.P., Moskowitz, Renwick, Freedman, JJ.

M-541 Lowe v New York City Health and Hospitals Corporation

Enlargement of time to perfect appeal denied; appeal
dismissed.

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

M-568 People v Francis-Polanco, Juan

Extension of time to file a notice of appeal denied.

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

M-874 People v Bey, Deysaan

M-875 People v Castro, Jose

M-876 People v Etienne, Jerry

M-879 People v Joseph, Jahmeeka

M-880 People v Payne, Lonnie

M-881 People v Santos, Daniel

M-882 People v Torres, Amauris

M-883 People v Vaello, Jose

M-884 People v Zohri, Monzir

M-888 People v Abreu, Jose

M-896 People v Benekin, Larry

M-899 People v Harper, Yolanda

M-910 People v Fernandez, Larry

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

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

M-878 People v Hill, Marvin

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

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-779 People v Pinales, Luis E., also known as
Pinales, Luis

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

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-752 People v Almonte, Julio

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

Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

M-929 IRB-Brasil Resseguros, S.A. v Portobello International Limited - Usati-Portobello ABPS Ltda.

Stay denied, as indicated.

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

M-4943 People v Jones, Ivan

Writ of error coram nobis denied.

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

M-5745 People v Westergreen, Ian

Reargument denied.

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

M-719 In the Matter of M., Kadija Tempie, also known as
M., Kadijah - Edwin Gould Services for Children and
Families

Motion deemed withdrawn.

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

M-891 Lagoa v Joremi Enterprises, Inc. - Maldonado

Time to perfect appeal enlarged to the September 2009
Term.

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

M-681 People v Deveon, Santi

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

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

M-684 People v Vargas, Marcoangelo

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

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

M-696 People v Walcott, Saneisha

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

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

M-692 People v Jimenez, Julio Aquino, also known as
Aquino, Julio

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

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

M-695 People v Haywood, Eugene

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

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

M-720 People v Wine, Jason

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

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

M-596 Tavarez v Oquendo

Reargument or other relief denied.

Andrias, J.P., Saxe, Acosta, Renwick, JJ.

M-168 Gooding v Corp. Headquar FJC Security Services

M-360

Enlargement of time to perfect appeal denied (M-168);
cross motion granted and appeal dismissed, as indicated (M-360).

Andrias, J.P., Saxe, Acosta, Renwick, JJ.

M-802 Komarow v Komarow

Time to perfect appeal enlarged to the September 2009
Term.

Andrias, J.P., Saxe, Acosta, Renwick, JJ.

M-877 Sirius America Insurance Company v Burlington Insurance
Company

Time to perfect appeal enlarged to the September 2009
Term.

Andrias, J.P., Saxe, Acosta, Renwick, JJ.

M-743 Kiam v Park & 66th Corporation

Preference denied.

Andrias, J.P., Saxe, Acosta, Renwick, JJ.

M-680 People v Bryant, Rickey

Counsel substituted, as indicated.

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

M-569 People v Culbero, Lorenzo

Reargument denied.

Saxe, J.P., Friedman, Sweeny, Renwick, Freedman, JJ.

M-849 People v Rodriguez, Reyes

Leave to file a pro se supplemental brief denied.

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

M-581 People v Mack, Lloyd

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

Gonzalez, J.P., Nardelli, Buckley, Acosta, JJ.

M-694 People v Brunson, Anthony

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

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

M-805 People v Birch, Robert

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

Gonzalez, J.P., Buckley, Catterson, McGuire, Acosta, JJ.

M-6143 In the Matter of V., Anahys; V., Naish,
also known as O., Naish Johanna V. -
Commissioner of Social Services

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

Gonzalez, J.

M-5350 People v Byron, Richard, also known as
Farrell, Mike, also known as
Sunday, Richard, also known as
Ifill, Richard

Leave to appeal to this Court denied.

Catterson, J.

M-5281 In the Matter of Fetterusso v Hogan
M-5530

Leave to appeal to this Court and stay denied.

Freedman, J.

M-1168 People v Wilson, Desirie

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

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

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

M-1012 Maurice Henry Blum, admitted on 11-26-1980,
at a Term of the Appellate Division,
Second 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, Nardelli, Buckley, JJ.

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

M-841 Yuri Elizabeth Kim, admitted on 8-10-1992,
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.

Tom, J.P., Saxe, Gonzalez, Sweeny, Catterson, JJ.

M-520 In the Matter of Joseph G. O'Shea,
(admitted as Joseph Gerard O'Shea),
an attorney and counselor-at-law:

Respondent's name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to January 20, 2009. Opinion Per Curiam. All concur.

The Following Orders Were Entered And Filed On March 12, 2009:

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-831 In the Matter of R., Sarah Lee; V., Marco; G., Steven -
Administration for Children's Services

Leave to respond as a poor person granted, as
indicated. (See M-859, decided simultaneously herewith.)

Tom, J.P., Saxe, Sweeny, Acosta, Freedman, JJ.

M-859 In the Matter of R., Sarah Lee; V., Marco; G., Steven -
Administration for Children's Services

Leave to respond as a poor person granted, as
indicated. (See M-831, decided simultaneously herewith.)

Andrias, J.P., Gonzalez, Buckley, Acosta, JJ.

M-954 Nutley v Skydive The Ranch

Stay of trial granted on condition appeal perfected for
the June 2009 Term, as indicated.

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

M-689 Kerrigan v RM Associates, Inc., individually and doing
business as Metro Risk Management - Estate of Connelly
- Erin Erectors, Inc.

Stay granted.

Mazzarelli, J.P., Andrias, Gonzalez, Moskowitz, Renwick, JJ.

M-885 International Plaza Associates, L.P. v Lacher
[And another action]

Time to perfect appeal enlarged to the June 2009 Term.

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

M-699 Gotay v Breitbart - Handwerker -
M-871 Handwerker, Honschke, Marchelos & Gayner

Stay of trial granted.