

Duane Reade store, including the store where this crime was committed.

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

ENTERED: MARCH 24, 2009

CLERK

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

123 In re Khalif H.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

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

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about July 24, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree and grand larceny in the fourth degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's fact-finding determination was based on legally sufficient evidence and 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 testimony of the victim as to appellant's conduct throughout this incident warrants the conclusion that appellant intended to aid his companion in taking

the victim's property (see *Matter of Juan J.*, 81 NY2d 739, 740-741 [1992]; *People v Mendez*, 34 AD3d 697, 698-699 [2006]). While appellant's anger over a prior incident may have contributed to the targeting of this victim, the evidence demonstrates that appellant intended to take part in a robbery and not merely to menace or intimidate the victim (see *People v Stewart*, 57 AD3d 301 [2008]).

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that allegedly caused the accident (see *Garcia v Delgado Travel Agency*, 4 AD3d 204 [2004]). In opposition, plaintiffs failed to raise a triable issue of fact.

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

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Phillip R. Woodie,
Plaintiff-Respondent,

Index 603582/04

-against-

Azteca International Corporation,
etc., et al.,
Defendants-Appellants,

Luis J. Escharte, etc., et al.,
Defendants.

Nixon Peabody LLP, New York (Roger R. Crane of counsel), for appellants.

Melvyn R. Leventhal, New York, for respondent.

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 26, 2007, after jury trial, inter alia, awarding plaintiff the principal sum of \$559,086 against defendants Azteca International, TV Azteca and San Roman, plus an additional \$26,615.89 from Azteca International, and order, same court and Justice, entered December 21, 2007, which denied said defendants' motion to set aside the verdict, unanimously affirmed, without costs.

A three-part analysis is required for proving employment discrimination under Executive Law § 296 (see *Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270-271 [2006]). The employee must first establish a prima facie case of discrimination. The burden then shifts to the employer

to rebut the prima facie case with a legitimate reason, in which case the burden shifts back to the employee to show that the proffered reasons are pretextual.

Here, after plaintiff made a prima facie case of discrimination, defendants offered nondiscriminatory reasons for plaintiff's dismissal, and plaintiff then adduced facts permitting a reasonable inference that the reasons proffered for his termination were false and merely a pretext for discrimination. The verdict was not against the weight of the evidence because the jury could have reached its conclusion on a fair interpretation of the evidence. Furthermore, inasmuch as a valid line of reasoning and permissible inferences could have led rational jurors to the conclusion they reached, the evidence was legally sufficient to support the verdict (*see Young v Geoghegan*, 250 AD2d 423 [1998]).

The court did not improvidently exercise its discretion in granting plaintiff's motion in limine to preclude the introduction of certain extrinsic evidence at trial (*see Caster v Increda-Meal, Inc.*, 238 AD2d 917, 918 [1997]). The court did not err in charging the jury that to meet his prima facie burden on his discrimination claim, plaintiff initially had to show simply that he was "qualified to hold the position of president of sales" (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). Nor did the court err in declining to give the jury a

"same actor inference" charge (see *Copeland v Rosen*, 38 F Supp 2d 298, 305 [SD NY 1999]). Given the evidence in this case, the failure to give the legitimate expectations charge was harmless (see NY PJI 9:1, comment, at 1471 [2009]).

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

130 6085 Strickland Associates, LLC, Index 402980/06
 Plaintiff-Appellant,

-against-

The Whitmore Group, Ltd., et al.,
Defendants-Respondents.

Certilman Balin Adler & Hyman, LLP, East Meadow (Edward G. McCabe of counsel), for appellant.

Kral Clerkin Redmond Ryan Perry & Girvan, LLP, Mineola (Michael G. Walker of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered June 26, 2008, which, in an action for negligent failure to procure insurance, denied plaintiff's motion for summary judgment and granted defendants insurance brokers' cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

It appears that the Genstar policy was procured to cover the subject property while vacant; that upon commencement of construction on the property, the Genstar policy was canceled for nonpayment of premium and replaced by the Sirius policy specifically designed for construction-related liabilities; and that plaintiff incurred out-of-pocket litigation costs because the limits of the Sirius policy were insufficient to settle a lawsuit brought by an injured construction worker. Plaintiff asserts that it instructed defendants, or justifiably expected

them, to leave the Genstar policy in effect as a supplement to the Sirius policy; that defendants therefore had a duty to procure reinstatement of the Genstar policy after its cancellation, or procure replacement insurance, or inform plaintiff of their inability to do so; and that plaintiff would not have incurred the litigation costs it seeks to recover had the Genstar policy been in effect at the time of the accident. Because plaintiff received a notice of cancellation of the Genstar policy for nonpayment of premium but did not pay defendants the premium due on that policy within 15 days of the notice (see Insurance Law § 3426[a][3]), there could be no breach by defendants of any duty to keep the Genstar policy in effect (*cf. Murphy v Kuhn*, 90 NY2d 266, 271 [1997] [plaintiff insured's lack of initiative in inquiring of broker concerning his insurance needs does not qualify as legally recognizable reliance on broker's expertise]). No issues of fact exist as to whether plaintiff ever requested defendants to keep the Genstar policy in effect. Plaintiff's principal admits that he has no recollection of ever having specifically requested defendants to renew or reinstate the Genstar policy or to procure replacement coverage, or of defendants having ever advised him that the Genstar and Sirius policies were to be in effect simultaneously, and defendants' contemporaneous internal memoranda clearly indicate that they intended the Genstar policy to be completely replaced

by the Sirius policy. We reject plaintiff's argument that its requests and defendants' advice are evidenced by the checks it sent to defendants after the cancellation of the Genstar policy that were applied to that policy by defendants. While it appears that defendants temporarily misapplied plaintiff's checks to the cancelled Genstar policy, plaintiff's principal's letters to defendants accompanying these checks make no references to the Genstar policy but simply state that the checks represent partial payment for amounts due on the subject property. By obtaining the Sirius policy, defendants met their obligation to procure coverage for the construction on the property, and there is no evidence of any requests by plaintiff for insurance over and above the Sirius policy. We have considered plaintiff's other arguments and find them unavailing.

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

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\$26,000 per year as of the date of the document request in 2006 (see Real Property Tax Law § 467-b[3][a]; NY City Admin Code §§ 26-405[m][2][ii], 26-509[b][ii]). Hence, the remedy of redacting financial information, proposed by petitioners on their administrative appeal, would not cure privacy concerns, inasmuch as disclosure of the documents, even redacted, would still permit the public to determine the general income level of the SCRIE tenants and members of their households. This very concern was expressed in a 1998 advisory opinion of the New York State Committee on Open Government (FOIL-AO-10747).

Petitioners' argument that their FOIL request should be granted because they are already entitled to know the identities of members of the tenants' households under the Rent Stabilization Law (see Rent Stabilization Code [9 NYCRR] § 2523.5[e]) is unavailing, since FOIL requests are analyzed from the perspective of the general public (see *Matter of John P. v Whalen*, 54 NY2d 89, 99 [1981]). Therefore, the fact that petitioners already know the identities of the subjects of the FOIL requests is irrelevant in assessing privacy concerns generated by the requests (see *Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 748 [2001]).

Given the highly specific nature of petitioners' requests for all documents relating to individually named tenants, it is questionable whether privacy concerns could be satisfied by

redacting the files to eliminate all identifying information under Public Officers Law § 89(2)(c)(i). In any event, in light of petitioners' stipulation at the invitation of Supreme Court that they "do not desire to supplement the record of these proceedings," there is no basis on the record before us to remand for further consideration of this issue. In so stipulating, petitioners "chart[ed] their own procedural course" and fixed the record upon which this matter must be decided (see *Kass v Kass*, 91 NY2d 554, 568 n 5 [1998]).

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

133 The People of the State of New York, Index 75056/07
 ex. rel. Herbert Lewis,
 Petitioner-Appellant,

-against-

New York State Division of Parole,
Respondent-Respondent.

Susanna De La Pava, New York, for appellant.

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

Order, Supreme Court, Bronx County (Ralph Fabrizio, J.),
entered June 4, 2007, which denied petitioner's application for a
writ of habeas corpus and dismissed the proceeding, unanimously
affirmed, without costs.

Although the remedy of habeas corpus is unavailable because
petitioner is no longer in custody, this proceeding is not moot
because, among other things, it affects parole time credited to
petitioner. Therefore, we consider the matter as a CPLR article
78 proceeding (see CPLR 103[c]). Nevertheless, petitioner's
arguments are without merit. Regardless of any alleged
indications to the contrary, petitioner's 1994 sentence ran

consecutively to his previous sentences (see *People ex rel. Gill v Greene*, __ NY3d __, 2009 NY Slip Op 01067).

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

134 Charles Khoury, et al., Index 7918/07
Plaintiffs-Appellants,

-against-

Katherine Khoury, etc.,
Defendant-Respondent.

Reingold & Tucker, Brooklyn (Abraham Reingold of counsel), for appellants.

McCullough, Goldberger & Staudt, LLP, White Plains (Ruth F-L. Post of counsel), for respondent.

Order, Supreme Court, Bronx County (Alan Saks, J.), entered on or about January 2, 2008, which granted defendant's motion to dismiss the complaint for failure to state a cause of action for constructive trust, unanimously affirmed, without costs.

The complaint contains no allegation that defendant promised the decedent that she would allow his relatives to continue to live in the subject building if he bequeathed the building to her (see *Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]).

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

135 Ernestine Engler, Index 119255/06
Plaintiff-Respondent,

-against-

Mark Kalmanowitz, etc., et al.,
Defendants-Appellants.

Catalano Gallardo & Petropoulos, LLP, Jericho (Matthew K. Flanagan of counsel), for appellants.

A. Paul Bogaty, New York (Joan P. Brody of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered August 1, 2008, which denied defendants' motion for summary judgment dismissing the complaint, 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.

Defendants in this legal malpractice action demonstrated plaintiff could not prove that but for their alleged negligence, she would have prevailed on the merits in the underlying litigation (see *e.g. Davis v Klein*, 88 NY2d 1008 [1996]). Plaintiff alleged that Celebrity Cruise Lines had an open seam in its carpet, which created a tripping hazard when pressure was applied from pedestrian traffic. She failed, however, by either her witnesses or her expert, to show that defendants had notice of this allegedly defective condition. Witnesses for both sides

testified that this open seam was not visibly noticeable (see *Cooper v Kelner & Kelner*, 45 AD3d 323 [2007]). Plaintiff's expert's attestation that the carpet's adhesive had lost its holding strength over time, causing the seam to open, was insufficient to establish notice, since it failed to show that the alleged defect was visible and apparent for a sufficient period of time to permit the ship operators to discover and remedy it (see *Peffer v Hilton Hotels Corp.*, 279 AD2d 386 [2001]).

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months after serving their demand for a change of venue with their answer, in noncompliance with the statutory 15-day time limit in CPLR 511(b), is not so compelling a circumstance as to override CPLR 504(3). We also reject plaintiff's argument that Bronx County is a proper venue by reason of his detention for slightly more than a day at Rikers Island, in the Bronx, after his arrest and booking.

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the tenant had not made a conscious decision about the commencement date of the untimely renewal offered (see e.g. *Matter of 201 E. 81st St. Assoc. v New York State Div. of Hous. & Community Renewal*, 288 AD2d 89 [2001]). Accordingly, since the lease was not renewed until April 1, 2006, the determination to direct petitioner to issue an amended renewal commencing July 1, 2006 and to apply the 2006 guideline rent increases to that lease was rationally based (see Rent Stabilization Code [9 NYCRR] § 2523.5[c][1]; § 2522.7).

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

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

141 In re Norman Christian K., etc.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Derrick B.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

Robin S. Steinberg, The Bronx Defenders, Bronx (M. Chris
Fabricant of counsel), for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for
respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia S.
Colella of counsel), Law Guardian.

Resettled order, Family Court, Bronx County (Gayle P.
Roberts, J.), entered on or about September 21, 2007, which, to
the extent appealed from, determined, after a hearing, that
respondent father was not a person whose consent to his child's
adoption was required, unanimously affirmed, without costs.

Respondent's consent to the adoption of his child was not
required since he did not maintain "substantial and continuous or
repeated contact with the child" (Domestic Relations Law §
111[d][1]). The record shows that respondent failed to provide
financial support according to his means while the child was in
foster care (see *Matter of Margaret Jeanette P.*, 30 AD3d 359
[2006]; *Matter of Christopher Robert T.*, 303 AD2d 759, 760 [2003]

[respondent father's argument that he failed to contribute financial support to his children because he was never ordered to do so by the court was rejected]), and he did not visit his son at least monthly or, as here, when visitation was not possible, communicate regularly with him or his custodian (see *Matter of Pedro Jason William M.*, 45 AD3d 431 ([2007], lv dismissed and lv denied 10 NY3d 804 [2008])). Accordingly, respondent never acquired a constitutionally protected interest (see *Lehr v Robertson*, 463 US 248, 262 [1983]). Contrary to respondent's contention, the statute does not require the agency to encourage an unwed father to perform the acts specified therein (see Domestic Relations Law § 111[1][d]).

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entered the building, permitted the jury to find that defendant entered the building with at least the intent to commit a crime such as menacing therein (see *People v Lewis*, 5 NY3d 546, 552 [2005]; *People v Ortiz*, 173 AD2d 189 [1991], lv denied 78 NY2d 1129 [1991]).

The court properly denied defendant's request for a justification charge with respect to the murder committed on August 6, 2001, since there was no reasonable view of the evidence, when viewed most favorably to defendant, to support that defense (see *People v Watts*, 57 NY2d 299, 301-302 [1982]). In the first place, defendant was clearly the initial aggressor (see Penal Law § 35.15[1][b]). Moreover, although the victim was armed, "there was still no evidence that defendant believed he was in imminent danger of the deceased's use of deadly force, or that such belief was reasonable" (*People v Hubrecht*, 2 AD3d 289, 290 [2003], lv denied 2 NY3d 741 [2004]; see also *People v Jones*, 3 NY3d 491, 496 [2004]). Instead, the victim only revealed his own weapon when he complied with defendant's gunpoint command to remove his hands from his pockets. The victim then held his weapon at his side, as defendant paused long enough to announce to his companions that the victim had a handgun, and then commenced firing.

The record does not support defendant's speculative claim, raised for the first time on appeal, that two witnesses to whom

he made inculpatory statements while in prison were acting as agents of the prosecution, thereby violating his right to counsel (see *People v Kinchen*, 60 NY2d 772 [1983]; see also *People v Bent*, 160 AD2d 1176, 1177 [1990], lv denied 76 NY2d 937 [1990]). Since the existing record does not reveal a factual basis for such a claim, defendant's argument that his trial counsel rendered ineffective assistance by not raising this issue is unreviewable on direct appeal (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]).

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on the premises (see *Matter of Satterwhite v Hernandez*, 16 AD3d 131 [2005]).

The penalty imposed does not shock the conscience (*id.*).

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

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

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145A Chaudry Construction Corp.,
Plaintiff-Respondent,

Index 108933/02

-against-

James G. Kalpakis & Associates,
Defendant-Appellant.

John V. Decolator, Garden City, for appellant.

Andrew Lavooott Bluestone, New York, for respondent.

Order, Supreme Court, New York County (John E.H. Stackhouse, J.), entered September 15, 2008, which denied defendant's motion to vacate a default judgment, unanimously reversed, on the law, without costs, the motion granted, and the answer reinstated. Appeal from earlier interim order, same court and Justice, later entered September 26, 2008, which granted defendant's motion to vacate the default to the extent of setting the matter down for a traverse hearing, unanimously dismissed, without costs, as academic.

Even assuming the affirmations of service by plaintiff's counsel sufficiently raised a presumption of proper mailing, defendant rebutted that presumption by showing they were mailed to an incorrect address (*see Matter of Holland v New York City*, 271 AD2d 609, 610 [2000]), necessitating a traverse hearing (*see Northern v Hernandez*, 17 AD3d 285 [2005]). Furthermore, defendant's submissions offered factual support for a meritorious

defense (*see Mandell v Stein*, 183 AD2d 488 [1992]).

At the traverse hearing, plaintiff failed to carry its burden of establishing proper service. Under such circumstances, the court erred in shifting that burden to defendant to disprove service.

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

146 R.C. Dolner, Inc., Index 602672/01
Plaintiff-Respondent,

-against-

My-Way Contracting Corp., et al.,
Defendants,

Crum & Forster Insurance Co., et al.,
Defendants-Appellants.

Carroll, McNulty & Kull L.L.C., New York (Ann Odelson of
counsel), for appellants.

Wasserman Grubin & Rogers LLP, New York (Vashali Maria Aggarwal
of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick,
J.), entered January 28, 2008, which granted plaintiff's motion
for summary judgment against defendants Crum & Forster and U.S.
Fire in the amount of \$178,205.16, and denied those defendants'
cross motion for summary judgment dismissing plaintiff's claim
for damages, unanimously affirmed, with costs.

This Court previously affirmed the ruling that Crum &
Forster and its subsidiary, U.S. Fire, were obligated, under
plaintiff's insurance policy, to provide coverage for damages
incurred in connection with the renovation of a hotel (41 AD3d
185). The amount of such damages is irrefutably established by
evidence in the record. The award of pre-judgment interest and

the determination of the date from which computed were
appropriate exercises of the court's discretion (CPLR 5001[a]).

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ENTERED: MARCH 24, 2009

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

147 CS Plumbing, Inc., et al., Index 17361/06
Plaintiffs-Respondents,

-against-

Action Nissan, Inc., et al.,
Defendants,

White Plains Nissan, Inc., etc.,
Defendant-Appellant.

Richard Weiss, New Rochelle, for appellant.

Mitchell Silberberg & Knupp, New York (Lauren J. Wachtler of
counsel), for respondents.

Order, Supreme Court, Bronx County (Patricia Anne Williams,
J.), entered September 13, 2007, which, inter alia, granted
plaintiffs' motion to be released from further obligations to
make payments on a leased vehicle, unanimously affirmed, with
costs.

At the hearing on the subject application, all defendants
were represented and their counsels were present and were served
with the papers upon which plaintiffs sought relief. The
transcript of proceedings shows that neither appellant, nor any
of the other defendants, at any time requested leave to file
opposing papers, objected to the entry of the relief granted by
the motion court or preserved any objections. Thus, appellants'
objections to the court's order are improperly raised for the
first time on this appeal and unpreserved for our review (see

Prendergast v City of New York, 44 AD3d 414, 415 [2007], *lv denied* 9 NY3d 818 [2008], *cert denied* 128 S Ct 2516 [2008]).

Were we to consider appellants' contentions, we would find them unavailing.

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the plea, it was made equally clear to defendant that the offer was an aggregate term of 25 years to life to cover all the charges. Defendant, who was exposed to a much greater aggregate term if convicted of multiple charges after trial, accepted this offer. It was only after defendant agreed to accept this sentence that the court misspoke in referring to a 25-year determinate sentence. Neither this misstatement, nor the court's failure to specify the minimum term of the concurrent sentence defendant would receive on the burglary conviction, could have influenced defendant's decision to plead guilty.

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

150 Diana McDonald, Index 14944/01
Plaintiff-Appellant,

-against-

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

Alexander J. Wulwick, New York, for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for respondents.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 26, 2007, which granted defendants' motions to dismiss the complaint for failure to prosecute, and denied plaintiff's cross motion to vacate or extend the CPLR 3216 notice served by the court, unanimously affirmed, without costs.

The subject notice (in which the court crossed out the number 90 and inserted the number 120) was issued after the fifth pre-note of issue conference and sixth pre-note of issue order pertaining to disclosure. While plaintiff's attorney offered some compelling personal reasons for the general pre-notice delay, the only specific excuse he gave, in an affirmation submitted after the 120-day period had already run, for not being able to meet the 120-day deadline was his office's relocation during the 120-day period. Such excuse did not demonstrate good cause for the requested extension of the already extended notice. While plaintiff contends that defendants were themselves

noncompliant with the prior disclosure orders, and that such noncompliance was preventing her from filing a note of issue, she had her remedies during the lengthy period of general delay (CPLR 3124, 3126), and no basis exists to disturb the motion court's finding that plaintiff's laxity and delay were "wanton."

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

151 Asa Nathanson, et al.,
Plaintiffs-Appellants,

Index 60207/06

-against-

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

Lawrence A. Omansky, New York, for appellants.

John P. DeMaio, New York, for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 19, 2008, insofar as it granted defendants' motion for summary judgment to the extent of dismissing the second, third, fourth and fifth causes of action asserted in the amended complaint, and denied plaintiffs' cross motion for summary judgment, unanimously affirmed, without costs. Appeal from that part of the aforesaid order incorporating prior rulings, unanimously dismissed, without costs.

The court properly granted defendants' motion to the extent of dismissing the fraud causes of action asserted in the amended complaint. Section 4.01 of the contract provided that "unless otherwise provided, Seller is the sole owner of the premises." As found by the court, the Seller did "otherwise provide" - by handwritten amendment to the form contract which stated that "if at closing Seller does not have or cannot convey title the contract is rescinded," a reference to the fact that the property

was being "flipped." Language expressly granting DeMaio, the escrow agent, permission to transfer all or part of the down payment held in escrow to a separate escrow account to be held as an additional deposit under the purchase contract also could only refer to the underlying contract between the owner, Vaij Realty, and Tri-State. Given the express terms of the contract, plaintiffs cannot claim to have been misled regarding the nature of the transaction.

Plaintiffs assert that other "issues of fact" warranted denial of defendants' motion. However, the issues to which plaintiffs point, i.e., the legality of the purported assignment from plaintiffs to Omansky, whether defendants acknowledged same, and whether or not there was a financing contingency, go to which party breached the contract, and have no bearing on dismissal of the fraud claims.

Finally, plaintiffs assert that they are entitled to rescission of the contract since it is undisputed that defendants never had title to the property and were never in a position to convey title to the property. The contract does provide that "[i]f at closing seller does not have or cannot convey title, the contract is rescinded." However, as the court found, there are factual issues concerning which party first breached the contract, precluding judgment as a matter of law on this issue.

To the extent plaintiffs seek appellate review of prior

rulings on the cross motion with respect to amending the complaint, striking the answer, disqualifying defendants' counsel and for a default judgment, which were set forth in transcripts not included in the record before us, the appeal is dismissed for failure to comply with the rules of this Court (see CPLR 5528[a][5]; Rules of App Div, 1st Dept [22 NYCRR] § 600.5[a]).

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during the evaluation and the recording transcribed later, and otherwise affirmed, without costs.

On the record presented, the motion court properly permitted plaintiffs to record the psychological examination of the infant plaintiff, provided that the stenographer is not present in the examination room (see *Barraza v 55 W. 47th St. Co.*, 156 AD2d 271 [1989]; *Milam v Mitchell*, 51 Misc 2d 948, 950 [1966]).

Defendants have not shown that the presence of a stenographer outside the room will unduly interfere with the examination.

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without testing it. Therefore, we conclude the officer had, at least, reasonable suspicion to believe that defendant possessed an illegal weapon (see *People v Snovitch*, 56 AD3d 328 [2008]; *People v Carter*, 49 AD3d 377 [2008], lv denied 10 NY3d 860 [2008]). Being reasonably concerned for his safety, he properly secured the knife by removing it from defendant's pocket (see *People v Batista*, 88 NY2d 650, 654 [1996]; *People v Benjamin*, 51 NY2d 267, 271 [1980]). Patting down defendant's pocket would have served no useful purpose, since the knife was visible and a patdown would have revealed what the officer already knew.

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

ENTERED: MARCH 24, 2009

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heating convector covers to reach the windows' upper areas. While plaintiff worked on one window, the convector cover he stood on suddenly came loose from the wall and he fell, injuring himself.

We find that the window-washing task here involved an elevation-related risk of the type contemplated by the safety devices listed in Labor Law § 240(1) (see e.g. *Swiderska v New York University*, 10 NY3d 792, 792-793 [2008]). Plaintiff was effectively instructed to stand on the convector covers to get the job done, a practice established by record evidence as being routinely used by workers to access the building's windows and ceilings.

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

155 Mark Bruce International, Inc., Index 603388/06
Plaintiff-Appellant,

-against-

Blank Rome, LLP,
Defendant-Respondent.

Gibbons, P.C., New York (Jeffrey A. Mitchell of counsel), for
appellant.

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

Order, Supreme Court, New York County (Herman Cahn, J.),
entered May 30, 2008, which, in an action for breach of contract
and unjust enrichment, granted defendant's cross motion for
summary judgment dismissing the complaint and denied plaintiff's
motion for summary judgment, unanimously affirmed, without costs.

The exchange of e-mails, which did not set forth the fee for
plaintiff's services or an objective standard to determine it,
was too indefinite to be enforceable (*see generally Cobble Hill
Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482-484 [1989],
cert denied 498 US 816 [1990]). The standard of reasonableness,
left for future determination by the parties themselves, rather
than by a third party, was not made objective by the implied duty
to determine the amount of the fee in good faith. Furthermore,
the unjust enrichment claim was properly dismissed as it is

duplicative of the breach of contract claim (see *Andrews v Cerberus Partners*, 271 AD2d 348 [2000]).

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

156N Moyses Garces,
 Plaintiff-Appellant,

Index 6183/07

-against-

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

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

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for respondents.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered January 10, 2008, which, in an action against the City and two police officers for, inter alia, false arrest and imprisonment, malicious prosecution, assault and battery and violation of civil rights, granted defendants' motion to change venue from Bronx County to Queens County, unanimously affirmed, without costs.

The action was properly transferred to Queens County where plaintiff was arrested, initially incarcerated and prosecuted. CPLR 504(3), which provides that the place of trial in an action against the City shall be in the county within the City where the cause of action arose, "should be complied with absent compelling countervailing circumstances" (*Rose v Grow-Perini*, 271 AD2d 210, 210 [2000]). We also reject plaintiff's contention that Bronx County is a proper venue by reason of his one-day detention at

its Rikers Island facility. Alternatively, transfer was proper as a matter of discretion pursuant to CPLR 510.

THIS CONSTITUTES THE DECISION AND ORDER
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claims, respondent waived that defense (*see e.g. Dougherty v City of Rye*, 63 NY2d 989, 991-992 [1984]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278 [2006], *appeal dismissed* 8 NY3d 837 [2007]).

Similarly, respondent failed to argue that mandamus did not lie in this proceeding. As respondent itself contends with respect to some of petitioner's claims, an argument raised for the first time on appeal should not be considered.

Under the circumstances of this case, the court correctly determined that respondent's actions were not authorized. As currently written, respondent's by-laws make no provision for mid-year reconstitution of the Nominating Committee or for the Board's rejection of the Committee's list of candidates; indeed, Article IV, Section 9, supports the inference that the Board may not interfere with the Committee's choice of candidates. The business judgment doctrine does not help respondent in this case; "it constitutes no grant of general or inherent power in the directors to enforce against a shareholder an edict of the directors beyond their authority to make under ... the bylaws of the corporation" (*Fe Bland v Two Trees Mgt. Co.*, 66 NY2d 556, 565 [1985]).

Petitioner made a showing of irreparable harm if an injunction were not granted. Before March 28, 2008, he was a candidate for the 2008 election and had secured the number two spot on the ballot; on March 28, the chairman of respondent's

Board notified petitioner that the Board had vacated his nomination. Given the animosity between the parties, it is highly unlikely that petitioner would be renominated by a reconstituted Nominating Committee.

Petitioner also showed that a balancing of the equities favored the injunction. Respondent will not be irreparably harmed if the election goes forward. First, the candidates selected by the Nominating Committee might not be elected; respondent's by-laws permits incumbents who are not selected by the Nominating Committee to run for the Board and the Supervisory Committee. Second, even if one or more candidates selected by the Nominating Committee are elected, the report of respondent's Supervisory Committee admits that they appear to be well qualified. Third, if respondent is aggrieved by the election results, it can find a shareholder to bring a petition pursuant to Banking Law § 466(3).

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

ENTERED: MARCH 24, 2009

CLERK

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
MARCH 24, 2009

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

M-1166 In the Matter of Petty v Donovan

 Proceeding, previously perfected for the March 2009
Term, withdrawn.

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

M-1184 In the Matter of Guity v The New York City Department
 of Housing Preservation and Development

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

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

M-750 In the Matter of V., Ralph v V., Elizabeth, also known
 as A., Elizabeth

 Transfer of trial record and other relief denied;
appeal dismissed.

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

M-379 In the Matter of Bonfante v Donovan

M-586

Leave to prosecute appeal as a poor person and other relief denied; appeal dismissed.

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

M-685 People v Letterio, Anthony

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

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

M-721 People v Rodriguez, Angel M., also known as
Rodriguez, Angel

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

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

M-730 People v Rodriguez, Benjamin

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

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

M-731 People v Ciochenda, Ioan, also known as Ciochendea,
Ioan

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

Tom, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

M-855 People v Sealy, Nathaniel A., also known as Sealy,
Nathaniel

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

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

M-963 People v Cintron, Ryehine

M-964 People v English, Anthony

M-965 People v Mena, Pedro

M-967 People v Pollard, Edwin H., also known as Pollard,
Edwin

M-968 People v Restivo, Charles

M-969 People v Reyes, Miguel

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

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

M-970 People v Reyes, Richard

M-971 People v Urena, Ramon

M-976 People v Enriquez, Ariel, also known as Henriquez,
Ariel

M-977 People v Gonzalez, Freddie

M-1022 People v Gunter, Darren

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

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

M-864 People v Walker, Florence

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

Tom, J.P., Gonzalez, Sweeny, Caterson, Moskowitz, JJ.

M-3217 In the Matter of W., Kayla Emily - Catholic Guardian
Society and Home Bureau

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

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

M-828 In the Matter of Smith v The New York City Department
 of Education

 Time to perfect appeal enlarged to the September 2009
Term, as indicated.

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

M-900 In the Matter of S., Thomas v S., Latisha

 Time to perfect appeal enlarged to the September 2009
Term, as indicated.

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

M-784 Wilson v The New York City Transit Authority

M-817 Gray v The City of New York

M-866 In the Matter of The City of New York v Novello

 Time to perfect appeals enlarged to the September 2009
Term.

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

M-889 Manko v Lenox Hill Hospital

 Time to perfect consolidated appeals enlarged to the
September 2009 Term.

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

M-1097 Seneca Insurance Company, Inc. v J.M.D. All Star
Import Export, Inc.; Sarin v CNA Financial Corporation

Time to perfect respective appeals enlarged to the
September 2009 Term; Clerk directed to calendar appeals for
hearing together in said Term.

Mazzarelli, J.P., Buckley, Acosta, Renwick, DeGrasse, JJ.

M-944 In the Matter of Young v Office of Housing Operation/
Division of Tenant Resources

Time to perfect proceeding enlarged to the September
2009 Term, as indicated; stay of Civil Court summary eviction
proceeding vacated.

Mazzarelli, J.P., Buckley, McGuire, DeGrasse, JJ.

M-444 Kenig v Rada Electronic Industries, Ltd.

Reconsideration denied; appeal dismissed.

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

M-948 Allen v Harlem International Community School

Reargument denied.

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

M-722 People v Mosley, Anthony

Enlargement of time to file notice of appeal and other
relief denied.

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

M-1018 Connolly v Payton Lane Nursing Home, Inc - Payton
Lane Properties, Inc.
(And a third-party action)

Stay of trial denied.

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

M-863 People v Hernandez, Felix

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

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

M-1096 Pello v 425 E. 50 Owners Corp. - Barnabel
(and other actions)

Time to perfect consolidated appeals enlarged to the
September 2009 Term and caption corrected, as indicated.

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

M-782 Martin v Citibank, N.A.

Stay of trial denied.

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

M-1137 AWL Industries, Inc. v QBE Insurance Corp.

Stay denied.

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

M-299 South Street Seaport Limited Partnership v Hayley
Manufacturing, Inc., doing business as Taqueria
Mexicali

Leave to appeal from the Appellate Term and other
relief denied.

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

M-845 People v Shaw, Michael

Leave to file pro se supplemental brief granted for
the September 2009 Term, to which Term appeal adjourned, as
indicated.

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

M-799 People v Mateo, Pedro

Appeal dismissed.

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

M-6021 Wechsler v Wechsler

Leave to appeal to the Court of Appeals granted, as
indicated. All concur except McGuire, J., who dissents as
follows:

I dissent from the majority's determination to grant the
wife's application for leave to appeal to the Court of Appeals
from our order modifying the judgment of divorce (58 AD3d 62
[2008]). In addition to the extensive modifications we directed,
on the law and the facts, we remanded for further proceedings,
including a hearing. As our order did not finally dispose of the
appeal, the wife's application is for leave to pursue an
interlocutory appeal to the Court of Appeals. Accordingly, only
this Court, not the Court of Appeals, is empowered to grant leave
to appeal (see CPLR 5602[a][1][i]; [b][1]).

The wife's application is premised on the "novel" nature of the question of the proper methodology for valuing the investment holding corporation owned by the husband in light of taxes embedded in the corporation's assets. A novel and important issue would be presented if we had been asked to decide between the valuation approach adopted by the majority of the Eleventh Circuit in *Matter of Jelke v Commissioner of Internal Revenue* (507 F3d 1317 [2007], cert denied ___US___, 129 S Ct 168 [2008]) -- the same approach adopted by the Fifth Circuit in *Matter of Dunn v Commissioner of Internal Revenue* (301 F3d 339 [2002]) -- or the valuation approach adopted by Judge Carnes in his dissenting opinion in *Jelke* (507 F3d at 1333) -- the one espoused in *Jelke* by the Internal Revenue Service. That choice, however, was not before us and it was not before Supreme Court. Indeed, we expressly stated that "[t]his appeal ... does not require us to reach a conclusion about which of the two approaches is preferable with respect to the issue of embedded taxes" (58 AD3d at 68-69). We could not have been clearer in holding that as between the *Jelke/Dunn* methodology proposed by both the neutral expert and the husband's expert, and the methodology proposed by the wife's expert, which is not the one Judge Carnes would have adopted but instead is one without any precedential support, Supreme Court should have chosen the former.

Our authority in this regard is as broad as that of Supreme Court (see *Majauskas v Majauskas*, 61 NY2d 481, 493-494 [1984]). What also is of decisive significance is that we set forth at some length the particular fact-bound reasons supporting both our determination that "under all the factual circumstances of th[e] case" (58 AD3d at 71-72) the approach proposed by the neutral expert and the husband's expert was the more appropriate one (*id.* at 68-73) and our determination that we would not remand for what would amount to another valuation trial even if we were of the view that the approach Judge Carnes would have adopted is more appropriate in a matrimonial action (*id.* at 72 n 7).

Under these circumstances I am at a loss to understand how the Court of Appeals could review our order for anything but an abuse of discretion (*cf. Majauskas*, 61 NY2d at 493-494 [reviewing equitable distribution award and noting that "[t]he authority of the Appellate Division is ... as broad as that of the Trial Judge, and absent an exercise of discretion on its part so egregious that it can be characterized as an abuse as a matter of law, its exercise of discretion is not reviewable by us"] [citation omitted]). Notably, in her reply submission in support of her motion the wife does not provide any reason for concluding that the Court of Appeals could review these aspects of our order

on a broader basis. Furthermore, even the dissenter in this Court, who also votes to grant the wife's application for leave to appeal, did not contend that we had abused our broad discretion.

If I am right about the limited scope of review of our order, a subject that the majority chooses not to discuss, granting leave will not result in a decision from the Court of Appeals resolving any broad question of law regarding the appropriate valuation methodology for corporations like the one owned by the husband. Granting leave, however, will have decidedly adverse consequences, as discussed below, not the least of which is that the Court of Appeals will be burdened with reviewing an order that is essentially beyond its review powers.

But on the assumption that I am wrong and the Court of Appeals can exercise some review power broader than abuse of discretion, leave to appeal still should not be granted. Unless there is a settlement, a consummation devoutly to be wished but one that is undermined by the majority's decision to grant leave, this case will be coming back to this Court following our remand and the entry of a final judgment. When the next appeal to this Court is resolved we can grant leave (CPLR 5602[a][1][i]; [b][1]) and, assuming we do not again remand, so could the Court of Appeals (CPLR 5602[a][1][i]). The wife provides no reason at all for supposing that she will be prejudiced if review by the Court of Appeals occurs after final judgment rather than now.

This bitter and protracted action was commenced in 2001. We expressly recognized that expedition was necessary in this case given, among other things, "the passage of more than seven years since the commencement of this action and the enormous litigation costs incurred by the parties" (58 AD3d at 77). For these same reasons, moreover, we directed that the hearing we ordered "take place as expeditiously as possible and, in the event of another appeal, encourage[d] either party to move this Court for an order expediting the appeal" (*id.* at 90).

Inexplicably, the two other members of the majority who agreed with the necessity for expedition nonetheless cast their votes in favor of an interlocutory appeal to the Court of Appeals.

In contrast to New York law, federal appellate procedure permits interlocutory appeals only under narrow circumstances (*see generally Cunningham v Hamilton County, Ohio*, 527 US 198, 203-204 [1999]; *id.* at 203 ["an appeal ordinarily will not lie until after final judgment has been entered in a case"]). The general prohibition against taking an appeal before final judgment "serves several salutary purposes" (*id.*), including

"avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals" and "the important purpose of promoting efficient judicial administration" (*id.* at 203-204 [internal quotation marks omitted; brackets in original]). Although New York law broadly permits appeals to intermediate appellate courts, it furthers those same salutary purposes when it comes to interlocutory appeals to the Court of Appeals in civil cases. They are allowed, after all, only when leave to appeal is granted by the Appellate Division (CPLR 5602[b]). We vindicate those purposes only if we are most circumspect about exercising the authority entrusted to us. If this were a novel question of law presenting an issue of state-wide significance, it might be appropriate now to grant leave. But this appeal lies at the opposite end of the spectrum. The fact-bound nature of our resolution of the valuation issue is evident and undeniable; the very fact that no matrimonial action previously has arisen in which this valuation issue has been addressed is proof enough of the absence of any issue of state-wide significance.

If this case presents a valuation issue that is appropriate for review by the Court of Appeals, that review should occur after a final judgment has been entered, when the Court of Appeals also may review all issues of law we previously decided and all issues of law we may decide when the case comes back before us following remand. Instead, the majority guarantees further delays and further costs on top of the extensive delays and enormous costs that already have been incurred.

I respectfully submit that the majority's decision to grant an interlocutory appeal at this juncture is profligate as well as unreasonable.

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

M-894 Tatta v Eggleston

Leave to prosecute appeal as a poor person denied.

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

M-1016 Melnick v Khoroushi

Leave to appeal to the Court of Appeals denied.

Mazzarelli, J.

M-515 People v Abreu, Ernesto

Leave to appeal to this Court denied.

Andrias, J.

M-732 People v Williams, Javaar

Release on recognizance or other relief denied.

Sweeny, J.

M-950 People v Santana, Leonardo

Leave to appeal to this Court denied.

Mazzarelli, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

M-5855 In the Matter of James J. Jackson
(admitted as James Judson Jackson),
an attorney and counselor-at-law:

Respondent publicly censured. Opinion Per Curiam.
All concur.

The following orders were entered and filed on March 19, 2009:

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

M-812 In the Matter of Hotel 71 Mezz Lender, LLC. v
Rosenblatt - Mitchell - Mitchell Hotel Group, LLC

Stay of all proceedings, including turnover of certain
funds, granted on condition appeal perfected for the June 2009
Term, as indicated.

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

M-829 People v Cameron, Kenneth

Appeal dismissed.