SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 17, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2902 Hassan Gorden, Index 115977/03
Plaintiff-Appellant,

-against-

Leonite Liranzo Tibulcio, et al.,
Defendants-Respondents.

[And A Third-Party Action]

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Napoli Bern Ripka, LLP, New York (Denise A. Rubin of counsel), for appellant.

Picciano & Scahill, P.C., Westbury (Gilbert J. Hardy of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 9, 2006, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he sustained personal injuries in September 2002 while a passenger in a vehicle, driven by his brother, which became involved in an accident. He claims that when the accident occurred, his chest and knees hit the dashboard and his right shoulder hit the door of the vehicle.

In his bill of particulars, plaintiff specified the following injuries: disc herniations, disc bulging, degeneration

of the parespinal muscles, sensory loss of the upper extremities, impaired mobility, pain aggravated by coughing and sneezing, difficulty standing or sitting, and difficulty walking and climbing stairs. His supplemental bill of particulars alleged injuries to his knees, including tears of the menisci, buckling, locking, instability, burning, clicking and swelling. Plaintiff claims he was confined to bed for approximately 90 days, confined to home for approximately 6 months, and was partially disabled.

At his deposition, plaintiff testified that he could not return to work from the date of the accident until January 2003, and that he remained confined to bed and/or home for approximately four months after the accident. He also testified that he first sought medical treatment approximately one week after the accident, complaining of pain in both knees, both shoulders, and his neck and back. He undertook a four-month course of physical therapy, which included acupuncture, massage, electrical stimulation and chiropractic, five days a week. He was also sent for radiological studies, including an MRI.

Plaintiff further testified he had been involved in a prior auto accident in September 2000 that resulted in injuries to his neck and lower back. He commenced a lawsuit for that accident that was settled for $500.00.

Two independent medical examinations were conducted on plaintiff. The first was performed in January 2005 by Dr.

Michael J. Katz, an orthopedist. Dr. Katz reviewed the X-ray, MRI and EMG reports taken at the time of the 2002 accident and performed various range-of-motion tests on plaintiff's cervical and lumbar spine, knees and shoulders. Dr. Katz found plaintiff's range of motion to be normal and concluded that cervical and lumbosacral strains, as well as the bilateral knee and shoulder contusions, were all "resolved." Dr. Katz further opined that plaintiff showed "no signs or symptoms of permanence on a causally related basis," that he was not disabled, and was "capable of gainful employment as a security guard, but is not working by choice. He is capable of all activities of his daily living."

The second independent medical examination, conducted in June 2005 by Dr. Burton S. Diamond, a neurologist, also found plaintiff's range of motion to be within normal ranges. Although Dr. Diamond noted a decreased range of motion in the low back area, based upon the results of various tests, he concluded that "this restriction was purely voluntary." He also concluded that plaintiff's cervical and lumbar sprain was resolved, there was no permanency to his condition, that plaintiff was capable of working on a full-time basis and performing the normal activities of daily living.

Defendants moved for summary dismissal of the complaint on the ground that plaintiff did not meet the serious injury

threshold set forth in Insurance Law § 5102(d). In opposition, plaintiff submitted four medical reports from his treating physicians at the time of the accident, which included copies of the radiologic and MRI studies. In an affirmed follow-up report dated October 28, 2002, Dr. Jefferson Gabella compared range-of-motion limitations to the normal range in a percentage format, and he diagnosed plaintiff as having lumbar sprain/strain, lumbar radiculopathy, cervical herniated/bulging discs, and internal derangement of the left shoulder and right knee. Dr. Gabella opined that these injuries were causally related to the 2002 accident and limited plaintiff in the activities of daily living.

Plaintiff also submitted the affirmed report of his current treating physician, Dr. Louis C. Rose, who first examined plaintiff some 3 ½ years after the accident. He also reviewed the MRI studies and X-ray evaluations from 2002. Although Dr. Rose reported restricted range of motion, he did not indicate in his report the normal range of motion for the areas tested. Dr. Rose concluded plaintiff's injuries to his shoulders and knees were a "direct result" of the 2002 accident, and his spinal injuries were due to an "exacerbation of a pre-existing injury to his neck and lower back."

The IAS court found that defendants established a prima facie case of entitlement to summary judgment, and that plaintiff failed to raise triable issues of fact that he had sustained a

qualifying injury under Insurance Law § 5102(d). The court found that with the exception of Dr. Rose’s affirmation, none of the medical documentation was submitted in admissible form. Moreover, Dr. Rose relied on unsworn medical reports to reach his conclusions after an examination that took place more than three years after the accident, and his report failed to state with specificity the normal range-of-motion with respect to tests he had performed on plaintiff.

Defendants met their burden of establishing prima facie entitlement to summary judgment that plaintiff did not sustain a serious injury under Insurance Law § 5102(d). The affirmed reports of an orthopedist and neurologist, made after a review of plaintiff’s medical records and a personal examination in 2005, stated that as of that date, plaintiff did not suffer from a neurologic or orthopedic disability, and that the injuries to plaintiff’s shoulder, cervical and lumbar injuries were resolved (*see Perez v Hilarion*, 36 AD3d 536 [2007]). Moreover, the reviews conducted by these doctors of plaintiff’s medical records, MRIs and the treating physicians’ reports, including the records of treatment during the 180-day treatment period immediately following the accident, were insufficient to establish that plaintiff had sustained a serious injury under the 90/180 category of Insurance Law § 5102[d], thus shifting the burden to plaintiff to establish triable issues of fact with

respect to these claims (*see Nelson v Distant,* 308 AD2d 338, 339 [2003]).

At the time of the incident, plaintiff's physicians made three references to plaintiff's ability to perform his usual and customary activities for 90 of the 180 days following the incident: Dr. Gabella's September 30, 2002 report stated he instructed plaintiff not to perform "heavy work" until told to do so by the doctor; Dr. Mohamed K. Nour's October 15, 2002 report recommended that plaintiff "Avoid any strenuous activities as lifting, carrying, pushing or pulling heavy weights"; and Dr. Gabella's October 28, 2002 report concluded that "patient is somewhat limited in activities of daily living." These statements are too general in nature to raise an issue of fact that plaintiff was unable to perform his usual and customary activities during the statutorily required time period and do not support plaintiff's claim that his confinement to bed for 90 days and to home for 6 months was medically required.

Under the permanent consequential limitation and significant limitation categories of Insurance Law § 5102(d), plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ,

member, function or system" (*John v Engel*, 2 AD3d 1027, 1029 [2003]). Certainly, the reports of defendants' examining doctors are detailed and contain such objective, quantitative evidence. While the unsworn MRI reports that plaintiff submitted in opposition to the motion were improperly rejected by the motion court (*see Thompson v Abbasi*, 15 AD3d 95, 97 [2005], citing inter alia, *Ayzen v Melendez*, 299 AD2d 381 [2002]), the material contained therein was reviewed and cited by plaintiff's physicians in their respective reports. Dr. Rose's report cites an MRI taken of plaintiff's knees a few weeks after the accident, revealing "intrasubstance tear and/or mixoid degeneration involving the posterior horn of both menisci." Dr. Rose diagnosed "internal derangement . . . with possible medial meniscal tear." However, he does not explain why he ruled out degenerative changes as the cause of the internal derangement. This failure rendered his opinion speculative that the derangement was caused by the accident (*see Abreu v Bushwick Bldg. Prods. & Supplies, LLC*, 43 AD3d 1091, 1092 [2007]). Similarly, MRIs of plaintiff's spine taken shortly after the accident revealed herniations and other pathologies that plaintiff's expert opines were sustained in the September 2000 motor vehicle accident and exacerbated by the instant September 2002 accident, but the expert does not indicate that he reviewed the medical records concerning plaintiff's condition immediately

following the previous accident. Thus, there is no objective basis by which to measure the claimed aggravation of injuries, or to attribute any new injuries to the later accident (*McNeil v Dixon*, 9 AD3d 481, 483 [2004]). Moreover, while plaintiff's expert states plaintiff had a restricted range of motion, he does not indicate the normal range for the areas tested, and he further fails to describe the objective tests he used to measure the restrictions reported (*see Shaw v Looking Glass Assoc., LP*, 8 AD3d 100, 103 [2004]). Also unexplained is plaintiff's lack of treatment since January 2003 (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

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

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

ENTERED: APRIL 17, 2008

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CLERK

Mazzarelli, J.P., Andrias, Buckley, Sweeny, McGuire, JJ.

2431 The People of the State of New York, Ind. 1380/05
Respondent,

-against-

Eric Joyner,
Defendant-Appellant.

Appeal from a judgment, Supreme Court, New York County (Budd G. Goodman, J. at motion and plea, John Cataldo, J. at sentence), rendered August 18, 2005, unanimously withdrawn in accordance with the terms of the stipulation of the parties hereto. No opinion. Order filed.

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

2982-
2982A Marilyn Rodriguez, Index 18104/94
Plaintiff-Respondent,

-against-

New York City Health and Hospitals Corporation,
Defendant-Appellant.

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

Slingsby, Sanders & Pagano, Bronx (Carl Sanders and Christopher Pagano of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about August 25, 2006, upon a jury verdict awarding plaintiff damages in this medical malpractice action predicated on lack of informed consent, unanimously reversed, on the law, without costs, and the complaint dismissed. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered July 6, 2006, which denied defendant's motion to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleged that although she signed a consent form for the surgery, her lack of ability to read English rendered that consent invalid. She further claimed she was not properly advised by defendant's surgeon that the recommended breast

reduction surgery would leave hypertrophic scars, that he did not advise her of alternative treatment methods, and that her difficulty in understanding English prevented her from giving an informed consent.

"To recover damages for lack of informed consent, a plaintiff must establish, pursuant to Public Health Law § 2805-d, that (1) the defendant physician failed to disclose the material risks, benefits, and alternatives to the contemplated medical procedure which a reasonable medical practitioner 'under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation', and (2) a reasonably prudent person in the patient's position would not have undergone the procedure if he or she had been fully informed" (*Dunlop v Sivaraman,* 272 AD2d 570-571 [2000], citing paragraphs 1 and 3 of the statute). Where a plaintiff fails to adduce expert testimony establishing that the information disclosed to the patient about the risks inherent in the procedure is qualitatively insufficient, the cause of action for medical malpractice based on lack of informed consent must be dismissed (CPLR 4401-a; *Gardner v Wider*, 32 AD3d 728, 730 [2006]), particularly where she has failed to prove that a reasonably prudent person in her position would not have undergone the procedure had she been fully informed of the risks of the procedure,(*Evans v Holleran*, 198 AD2d 472, 474 [1993]).

In this case, Dr. Cooper, plaintiff's expert, reviewed plaintiff's medical files and records and found no fault with the surgery itself. However, while testifying that it is essential in this type of surgery to inform the patient specifically of the kinds of scarring possible, he did not indicate how the consent obtained by defendant's surgeon and medical staff was insufficient. In fact, his opinion was based on a hypothetical question that presupposed that plaintiff did not read or understand English, and that certain procedures which he deemed necessary were not followed, rather than what the actual evidence in this case revealed. Dr. Cooper further testified that he personally performed nearly 1,000 breast reduction surgeries, and that in each case he discussed the full risks involved. Each of those patients elected to undergo the surgical procedure despite the stated risks.

Defendant's surgeon, while not specifically recalling the discussions with plaintiff concerning the risks involved in this surgery, testified that consent is an ongoing process of discussion between physician and patient, and that not all risks or matters of discussion are set forth in the signed consent form. Plaintiff testified that she had difficulty reading English and did not understand the consent form she signed for the surgery. She did not, however, ask to have a Spanish consent form or interpreter provided for the surgical consent, although

she did sign a consent in Spanish for general medical services to be provided by the hospital. Morever, although she claimed to have difficulty understanding English when spoken, she testified that she acted as a translator for another Spanish-speaking patient while at the hospital. While Dr. Cooper and defendant's two experts agreed that a lack of understanding of the English language would prevent a signed consent from being valid, there was insufficient evidence that plaintiff did not understand the discussions with defendant's surgeon or other hospital staff.

Of significance is the discrepancy in plaintiff's own testimony on the issue of whether she would have proceeded with the surgery in any event. Although she testified on direct examination that had she known about the potential for wide scarring she would not have undergone the procedure, she reversed course on cross-examination and testified that regardless of the risks involved, she would have had the surgery because she wanted to alleviate the pain in her back and shoulders. Indeed, she was even inconsistent with how she came to be at the plastic surgery unit of the hospital in the first place, initially stating she was referred there by the hospital clinic, but then stating it was her own idea to go to the plastic surgery unit to inquire about breast reduction surgery.

In short, plaintiff's expert evidence did not establish that the information provided to her was qualitatively insufficient,

as a matter of law, to support the jury's finding that a reasonably prudent person in her position would not have proceeded with the surgery had she been fully informed of the risks, benefits and alternatives (Public Health Law § 2805-d[3]; *see Thompson v Orner*, 36 AD3d 791 [2007]).

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

ENTERED: APRIL 17, 2008

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CLERK

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

3379 Jesse Cintron, Jr., etc., et al., Index 6780/97
Plaintiffs-Appellants,

-against-

New York City Transit Authority,
Defendant-Respondent.

____

Profeta & Eisenstein, New York (Fred R. Profeta, Jr. of counsel), for appellants.

Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for respondent.

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Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered January 4, 2007, which granted defendant's motion to set aside a jury verdict on damages to the extent of granting a new trial unless plaintiff stipulated to reduce the $20 million award for past and future pain and suffering to $2.5 million, before a further 50% reduction for plaintiff's own negligence, unanimously modified, on the law and the facts, without costs, to increase the stipulation amount to $4.75 million, before a further 50% reduction for plaintiff's own negligence, and otherwise affirmed, without costs.

The infant plaintiff was 14 years old when he suffered a traumatic brain injury and hip fracture after being hit by a subway car as he was painting graffiti in a subway tunnel. His injuries included such cognitive impairments as significant deficits in perceptual organization, processing speed and memory;

residual weakness principally in the left hand; pain and headaches; and depression. The awards for pain and suffering, as set by the jury, were clearly excessive, and the trial court correctly found that they deviated "materially from what would be reasonable compensation" (CPLR 5501[c]); *see Paek v City of New York*, 28 AD3d 207 [2006] *lv denied* 8 NY3d 805 [2007]. However, although the court reasoned that plaintiff's injuries were not as severe as other brain trauma cases it analyzed, we cannot agree that $2.5 million is sufficient compensation for past and future pain and suffering. We thus modify the court's figure to the extent indicated.

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3408 The People of the State of New York, Ind. 2400/05
Respondent,

-against-

Edward Giordano,
Defendant-Appellant.

Shearman & Sterling LLP, New York (Jae Woo Park of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered February 3, 2006, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant was convicted of fourth-degree grand larceny, which requires a theft of property worth in excess of $1000, based on testimony that he shoplifted two jackets whose tags indicated selling prices of $1,695 and $410, respectively. Defendant concedes that, in this case, the selling price of the jackets constituted their market value for Penal Law purposes (*see People v Irrizari*, 5 NY2d 142, 146 [1959]). He nevertheless argues that the price tags constituted inadmissible hearsay, as did the testimony of two security guards, whose testimony as to the selling price of the jackets was based on the price tags. He

further asserts that only sales or management personnel, rather than security guards, would have been competent to testify as to selling price.

We disagree. First, we conclude that the price tags were not hearsay. The tags were not offered as an assertion of value as distinct from selling price; as defendant concedes, only selling price itself is at issue here. Instead, the tags constituted circumstantial evidence of the price a shopper would have been expected to pay for the jackets. Thus, the tags were essentially verbal acts by the store, stating an offer to sell at a particular price (*cf. People v Ayala*, 273 AD2d 40 [2000], *lv denied* 95 NY2d 863 [2000][directions given by one participant in the crime to another were non-hearsay circumstantial evidence of accessorial conduct]). Defendant asserts that the price tags did not establish the garments' actual selling price on the date defendant stole them, since the garments might have been on sale for a lower price that day. However, that factor would not affect the admissibility of the price tags as evidence of selling price, but rather the weight to be accorded them, and whether the tags alone could establish a prima facie case with regard to the element of value. Here, the guards testified that they were familiar with the store's procedures, with particular reference to an electronic scanning procedure that verified the correspondence, in this case, between the price tags and the

actual selling prices of the jackets on the day in question. Furthermore, there was no evidence suggesting either or both of the jackets was being offered at a lower price than stated on the tags. The evidence permitted the jury to conclude there was no reasonable possibility that the actual selling price of the jackets fell below the statutory threshold (*see People v Trilli*, 27 AD3d 349 [2006], *lv denied* 6 NY3d 899 [2006]).

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3409 In re Llonnie D.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
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Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan Beckoff of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about May 15, 2007, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute obstructing governmental administration in the second degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for a dismissal or an adjournment in contemplation of dismissal, and instead adjudicating him a juvenile delinquent and imposing a conditional discharge (*see e.g. Matter of Jonaivy Q.*, 286 AD2d 645 [2001]), in light of the fact that, after stealing property, appellant refused to obey the

lawful command of a police officer to stop and fled, resulting in a serious injury to the officer.

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3410 Harry Kalt, Index 601652/01
Plaintiff-Respondent,

-against-

Sidney Ritman,
Defendant,

HBS, Ltd.,
Defendant-Appellant.

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Michael C. Marcus, Long Beach, for appellant.

Gordon & Gordon, Forest Hills (Peter S. Gordon of counsel), for respondent.

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Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered August 15, 2007, after nonjury trial, awarding plaintiff the principal sum of $200,000, unanimously reversed, on the facts, with costs, and the complaint dismissed. The Clerk is directed to enter an amended judgment accordingly.

While the conclusions of a fact-finding court should not be disturbed on appeal unless they obviously could not have been reached under any fair interpretation of the evidence, especially when the findings rest in large measure on witness credibility (*Watts v State of New York*, 25 AD3d 324 [2006]), our reach in reviewing the evidence in a nonjury trial is as broad as that of the trial court (*see Universal Leasing Servs. v Flushing Hae Kwan Rest.*, 169 AD2d 829 [1991]).

The record in this action to collect on a purported loan

reveals a preponderance of evidence that the $200,000 check given by plaintiff to defendant HBS and immediately turned over to the latter's factor was in consideration for the release of plaintiff as a personal guarantor of a corporate debt. Contemporaneous with receipt of the funds, the factor amended the guaranty to effect such release. No repayment period was ever agreed to between the parties, no interest was set on the principal amount, and no loan agreement exists. The testimony of the parties' accountant that the transaction was characterized as a loan in corporate records and tax returns to obtain a tax benefit, with no expectation on the part of either party that it would be repaid, was uncontroverted.

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3413 Roberto Vilomar, Index 17393/03
Plaintiff-Appellant,

-against-

490 East 181st Street Housing
Development Fund Corp Corporation, et al.,
Defendants-Respondents.

Peña & Kahn, PLLC, Bronx (Steven L. Kahn of counsel), for appellant.

Brody, Benard & Branch, LLP, New York (Tanya M. Branch of counsel), for respondents.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered December 18, 2006, which, in an action for personal injuries sustained when plaintiff slipped on a banana peel on an interior stairwell in his apartment building, granted the motion of defendants property owner and management company for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants made a prima facie showing that they did not have constructive notice of the banana peel on which plaintiff allegedly slipped (*see Piacquadio v Racine Realty Corp.*, 84 NY2d 967 [1994]) by submitting plaintiff's deposition testimony that he did not see any banana peels on the stairs the day before the accident, and the deposition testimony of the building's superintendent that he cleaned the stairs twice a day, on arriving for work between 6:00 and 6:45 a.m. and after 4:00 p.m.

before leaving work, that there was no garbage on the stairs when he left the building the evening before the accident, and that the accident happened shortly before he arrived for work (*see Strowman v Great Atl. & Pac. Tea Co.*, 252 AD2d 384, 384-385 [1998]). In opposition, plaintiff offered the affidavit of his live-in companion that the building had not been cleaned for at least four days before the accident, that she had seen the banana peel on which plaintiff said he slipped on the stairs for at least two days before the accident, that there was a lot of other garbage on the stairs for several consecutive days before the accident, and that she complained to both the superintendent and the management office about the garbage that was always on the stairs and in the hallways and lobby but that nothing was ever done. This affidavit was properly rejected by the motion court as feigned evidence tailored to avoid the consequences of plaintiff's deposition testimony that he did not observe any banana peels on the stairs the day before the accident and never made any complaints to defendants specifically about garbage on

the stairs (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318 [2000]; *Schiavone v Brinewood Rod & Gun Club*, 283 AD2d 234, 235-236 [2001]).

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3414 The People of the State of New York, Ind. 4280/05
Respondent,

-against-

Christopher Lomnicki,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Kevin F. Meade of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Nicole Beder of counsel), and Orrick, Herrington & Sutcliffe, New York (Melissa DePetris of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered June 30, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 3 years, unanimously affirmed.

The court properly granted the People's request that potential spectators other than defendant's family submit to a screening process before entering the courtroom during the undercover officer's testimony. The People made a proper showing under *Waller v Georgia* (467 US 39 [1984]) to justify such a procedure. The officer testified at a *Hinton* hearing (*People v Hinton*, 31 NY2d 71 [1972]) that he had worked undercover in the area of defendant's arrest as recently as one to two weeks before the hearing, and he expected to return to that area as early as the next day. Moreover, the courthouse was easily accessible

from both the area where the undercover officer predominantly worked, near the Port Authority (*see People v Pearson*, 82 NY2d 436, 443 [1993]), and the area where defendant was arrested, near Tompkins Square Park. He also had three or four cases pending in the courthouse, and took precautions when coming to court (*see People v Cummings*, 271 AD2d 305 [2000], *lv denied* 95 NY2d 864 [2000]; *People v White*, 271 AD2d 263 [2000], *lv denied* 95 NY2d 872 [2000]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3415 Marguerite Camaiore, Index 350023/05
Plaintiff-Respondent,

-against-

Frank Farance,
Defendant-Appellant.

Joseph & Smargiassi, LLP, New York (Mario A. Joseph of counsel), for appellant.

Goldweber Epstein LLP, New York (Nina S. Epstein of counsel), for respondent.

Marguerite Camaiore, respondent pro se.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about January 14, 2008, which granted plaintiff's motion for clarification of the parties' stipulation of settlement to the extent of finding that each party's right of first priority to care for the parties' children during the other party's unavailability is limited to "occasions when a parent has an unusual change in his or her schedule" and does not apply "when the mother has made appropriate after-school arrangements for the children, consistent with her regular work schedule," unanimously reversed, on the law, without costs, and plaintiff's motion denied in its entirety.

The subject first-priority clause (article 5, paragraph 3[e]) is clear and unambiguous and does not contain the terms added by the motion court. "In adjudicating the rights of

parties to a contract, courts may not fashion a new contract under the guise of contract construction” (*Slatt v Slatt*, 64 NY2d 966, 967 [1985]). Nor may they “‘imply a condition which the parties chose not to insert in their contract’” (*Nichols v Nichols*, 306 NY 490, 496 [1954]).

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3416 G.G., Index 20100/95
Plaintiff-Appellant,

-against-

Yonkers General Hospital,
Defendant-Respondent,

Paul "Doe," et al.,
Defendants.

Fellows, Hymowitz & Epstein, P.C., New City (Darren J. Epstein of counsel), for appellant.

Pilkington & Leggett, P.C., White Plains (Michael N. Romano of counsel), for Yonkers General Hospital respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 10, 2006, which granted defendant hospital's motion for summary judgment to the extent of dismissing the entire complaint against all defendants, unanimously modified, on the law, so much of the complaint as claimed negligent retention reinstated against defendant hospital, and otherwise affirmed, without costs.

This action seeks recovery for personal injuries sustained by plaintiff in 1993, while a patient at defendant hospital, when she was sexually assaulted and raped by a male nurse at the hospital.

In order to recover against an employer for negligent retention of an employee, a plaintiff must show that "the employer was on notice of a propensity to commit the alleged

acts" (*White v Hampton Mgt. Co., LLC*, 35 AD3d 243, 244 [2006]). The hospital met its initial burden for summary dismissal of the claim of negligent retention by submitting evidence that during the six years the nurse had worked for the hospital prior to the incident, he received positive reviews.

In opposition, plaintiff raised a triable issue of fact based on the testimony of a nursing aide who had previously reported that the nurse had offered a patient medication in exchange for sex. As plaintiff and the other patients were in a drug rehabilitation program, this knowledge could be found by the trier of fact to have triggered a duty to protect plaintiff from a known or suspected sexual predator (*see N. X. v Cabrini Med. Ctr.*, 97 NY2d 247 [2002]). While we recognize that the record reflects questions about the credibility of the nursing aide, resolution of such issues is not for the court.

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3417 The People of the State of New York, Ind. 268/04
Respondent,

-against-

Raheim Williams,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Laura Burde of counsel), for appellant.

Raheim Williams, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentence), rendered December 15, 2005, convicting defendant, of six counts of robbery in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 20 years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The hearing evidence credited by the court established that defendant never requested that his counsel be present at his lineup.

Defendant failed to make a record that is sufficient to

permit review (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]; *People v Johnson*, 46 AD3d 415 [2007]) of his claim that the court did not provide defense counsel with notice of jury notes and an opportunity to be heard regarding the court's responses (*see People v O'Rama*, 78 NY2d 270 [1991]). Viewed in light of the presumption of regularity that attaches to judicial proceedings (*see People v Velasquez*, 1 NY3d 44, 48 [2003]), the existing record, to the extent it permits review, demonstrates that the court satisfied its "core responsibility" under *People v Kisoon* (8 NY3d 129, 135 [2007]) to disclose jury notes and permit comment by counsel. The court specifically invited the attorneys to read any jury notes and assist in formulating responses. Furthermore, the court read each note into the record, except for notes merely requesting exhibits, and a note concerning a readback where the record clearly reflects counsel's input into the response. Accordingly, counsel's failure to object to the procedure employed by the court or to its responses to the jury notes renders the claim that the court violated CPL 310.30 unpreserved (*see e.g. People v Salas*, 47 AD3d 513 [2008]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court merely provided exhibits, readback of testimony and a rereading of a charge already provided to the jury, in addition to advising the jury that it could not answer its factual questions about

matters outside the record. Counsel’s input into any response could have only been minimal.

The court properly exercised its discretion in summarily denying defendant’s CPL 330.30(2) motion to set aside the verdict on the ground of juror misconduct. Defendant failed to establish that he was prejudiced by a midtrial conversation between the foreperson and her friend, during which the foreperson discovered that her friend was defendant’s niece, and proceeded to comment briefly on the trial. On the contrary, this incident was, if anything, beneficial to defendant (*see People v Clark*, 81 NY2d 913, 914 [1993]). The remainder of defendant’s motion was an impermissible effort to impeach the verdict by probing into the jury’s deliberative process (*see People v Maragh*, 94 NY2d 569, 573 [2000]).

We have considered and rejected defendant’s pro se claims.

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3418 The People of the State of New York, Respondent, Ind. 4558/06

-against-

Miguel Cruz,
Defendant-Appellant.

____

Robert S. Dean, Center for Appellate Litigation, New York (Elaine Friedman of counsel), for appellant.

____

Judgment, Supreme Court, Bronx County (Lawrence Bernstein, J.), rendered on or about May 21, 2007, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

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

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3419 Donald Miller, et al., Index 101342/03
Plaintiffs-Respondents, 591001/03

-against-

Metropolitan 810 7th Avenue, et al.,
Defendants-Appellants,

Otis Elevator Co., et al.,
Defendants.

[And A Third-Party Action]

____

Gannon, Rosenfarb & Moskowitz, New York (Jason B. Rosenfarb of counsel), for appellants.

Shapiro Law Offices, Bronx (Jason S. Shapiro of counsel), for respondents.

____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered November 13, 2007, which denied defendants-appellants' motion pursuant to CPLR 3108 for an open commission to conduct a post-note of issue deposition of an out-of-state nonparty witness, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in denying appellants' motion, where appellants failed to demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue that would warrant such relief (*see* 22 NYCRR 202.21[d]; *Karr v Brant Lake Camp*, 265 AD2d 184 [1999]). The record establishes that appellants were aware of the nonparty witness several years prior to the filing of the note of issue, yet made a strategic decision not to seek

his deposition after he was interviewed by their investigator. Appellants never moved to vacate the note of issue, and the instant motion was brought 10 months after the note of issue was filed and 5 months after appellants discovered the purported discrepancy between the witness’s statements to their investigator and those he subsequently made in an affidavit that was submitted in support of plaintiffs’ opposition to summary judgment motions.

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3420 Geraldine L. Ortner, Index 6632/02
Plaintiff-Appellant, 84802/05

-against-

The City of New York,
Defendant,

E.J. Excavating Company, Inc.,
Defendant-Respondent.

[And A Third-Party Action]

____

Kevin D. Moloney, Scarsdale, for appellant.

Baxter, Smith, Tassan & Shapiro, P.C., Hicksville (Joseph M. Guzzardo of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered January 26, 2007, which granted defendant E.J. Excavating Company's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Respondent E.J. Excavating satisfied its burden of establishing prima facie entitlement to summary judgment with evidence that its repaving of the roadway in 1989 was satisfactorily performed and approved by the City. In opposition, plaintiff failed to raise a triable issue of fact. There was no evidence to support the conclusory opinion in plaintiff's expert's affidavit that plaintiff's accident was caused by a street pavement condition "due to the improper original placement of the asphalt pavement [i.e., the repaving

work performed by respondent more than a decade earlier] or by failing to allow enough time for the asphalt to cure before re-opening the road to traffic." The speculative nature of this opinion is underscored by its contrast with the opinion set forth in his report, prepared five years earlier. The report concluded that the defect had been in existence for "at least several months," whereas the expert opined in his subsequent affidavit, as noted, that the condition had been existence since the "original placement of the asphalt," over a decade earlier. There is no suggestion in the report, nor any evidence from which it can be inferred, that the condition could have existed for that length of time. Moreover, the expert fails to rule out other causes of the alleged defect, such as the mere passage of time or heavy use of the road (*see Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364 [1982]).

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3421 The People of the State of New York, Ind. 4418/04
Respondent,

-against-

Gary Rodriguez,
Defendant-Appellant.

____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Proskauer Rose LLP, New York (Colin Cabral of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 29, 2005, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him, as a second violent felony offender, to concurrent terms of 25 years and 15 years, respectively, unanimously affirmed.

The verdict 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 jury's determinations concerning credibility. The evidence established that one of the participants in the robbery displayed what appeared to be a firearm, and we reject defendant's arguments to the contrary.

The trial court properly admitted, under the present sense impression exception to the hearsay rule, two nontestifying declarants' statements to 911 operators describing the victim's

pursuit of defendant and his accomplice (*see People v Brown*, 80 NY2d 729 [1993]). Furthermore, the 911 calls were not testimonial within the meaning of *Crawford v Washington* (541 US 36 [2004]), as the statements in the calls were primarily made "to enable police assistance to meet an ongoing emergency" (*Davis v Washington*, 547 US 813, 822 [2006]; *see also People v Smith*, 37 AD3d 333, 334 [2007], *lv denied* 8 NY3d 950 [2007]). Any error in failing to redact portions of the calls that related to events that occurred prior to the chase actually being witnessed by the callers was harmless under the standards for constitutional or nonconstitutional error (*see People v Crimmins*, 36 NY2d 230 [1975]). The information at issue was cumulative to other evidence and had little bearing on defendant's guilt.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3422 The People of the State of New York, Ind. 3670/04
Respondent,

-against-

Franklin Middleton,
Defendant-Appellant.

____

Robert E. Nicholson, Brooklyn, for appellant.

____

Judgment, Supreme Court, New York County (Charles Solomon, J.), rendered on or about May 31, 2005, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

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

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3424 The People of the State of New York, Ind. 1956/05
Respondent,

-against-

Reynaldo Vincente,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Lucy Jane Lang of counsel), for respondent.

Judgment, Supreme Court, New York County (Ruth Pickholz at plea; Michael R. Ambrecht, J. at sentence), rendered on or about March 23, 2006, unanimously affirmed. No opinion. Order filed.

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3425N Vincenzo Badalamenti, et al., Index 26464/03
Plaintiffs-Appellants,

-against-

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

Talisman & DeLorenz, P.C., Brooklyn (Paul F. McAloon of counsel), for appellants.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for The City of New York and New York City Health and Hospitals Corporation, respondents.

London Fischer LLP, New York (Brian A. Kalman of counsel), for G.A.L. Manufacturing Corporation, respondent.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered February 2, 2007, which, insofar as appealed from as limited by the briefs, denied that part of plaintiffs' motion to produce discovery arising from a similar accident involving identical defendants, unanimously reversed, on the law, without costs, the motion granted and defendants directed to produce all reports relating to the *Neary* litigation.

The motion court erred in denying plaintiffs' request for the production of reports arising out of and relating to the *Neary* case, where the pit-stop switch for the building's elevators involved in both the subject accident and in the accident involving *Neary* are identical devices manufactured by

defendant G.A.L. Manufacturing Corp. (*see McKeon v Sears Roebuck & Co.*, 190 AD2d 577 [1993]).

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

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3426N-
3427N Armando Gonzalez, as the Auxiliary Executor for the Estate of Antonio Laurentino Turbel, et al., Plaintiffs-Appellants, Index 605012/98

-against-

Société Générale,
Defendant-Respondent.

Bolatti & Griffith, LLP, New York (Edward Griffith of counsel), for appellants.

Friend & Reiskind, New York (Edwin M. Reiskind, Jr., of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 14, 2007, which denied plaintiffs' motion for disclosure sanctions resolving certain issues and for leave to amend the complaint, and order, same court and Justice, entered November 30, 2007, which granted defendant's motion to strike plaintiffs' notice of deposition, unanimously affirmed, with one bill of costs.

At the least, it appears that defendant, a New York bank, had a good faith belief that it was not legally obligated to produce documents solely in the possession of an Argentine affiliate that had been dismissed from the action years earlier (*see* 276 AD2d 446 [2000]), a belief eventually confirmed by the motion court's ruling that such production could not be compelled (*see* 37 AD3d 187). Therefore, it cannot be said that any

noncompliance by defendant with prior disclosure orders pertaining to such production was so willful as to justify the extreme sanction of precluding it from contesting potentially dispositive issues at trial. Nor should plaintiffs be given leave to amend their complaint nearly five years after they filed a note of issue, especially in view of the proposed new allegations concerning the actions and intentions of a plaintiff long deceased, or the opportunity on the eve of trial to depose a witness without any persuasive explanation why that deposition could not have been conducted earlier.

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

ENTERED: APRIL 17, 2008

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CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3428
[M-1497] In re Michael Paccione, Ind. 2971/97
Petitioner,

-against-

Hon. Cheryl Chambers, etc., et al.,
Respondents.

Ita Parnass, Brooklyn, for petitioner.

Andrew M. Cuomo, Attorney General, New York (Roberta L. Martin of counsel), for state respondents.

Charles J. Hynes, District Attorney, Brooklyn (Christopher P. Blank of counsel), for Charles J. Hynes, George B. Alexander and Brian Fisher, respondents.

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.

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

2252 The People of the State of New York, Respondent, — Ind. 6523/03, 6697/03

-against-

Paul Boyd,
Defendant-Appellant.

Dominic J. Sichenzia, Carle Place, for appellant.

Robert M. Morgenthau, District Attorney, New York (David M. Cohn of counsel), for respondent.

Judgments, Supreme Court, New York County (Philip M. Grella, J.), rendered September 21, 2004, reversed, on the law, the pleas vacated, the full indictment reinstated, and the matter remitted for further proceedings.

Opinion by Tom, J.P. All concur except McGuire, J. who dissents in an Opinion.

Order filed.

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

2718 The People of the State of New York, Ind. 4852/01
Respondent,

-against-

David Martinez,
Defendant-Appellant.

____

Richard M. Greenberg, Office of the Appellate Defender, New York (Mugambi Jouet of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Eric Rosen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 15, 2006, affirmed.

Opinion by Acosta, J. All concur.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
APRIL 17, 2008

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

M-1816 People v Waters, Robert

Appeal withdrawn.

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

1799X Running Subway, LLC v Jujamcyn Theatres LLC

Appeal withdrawn.

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

M-1442 People v Carter, Junai

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

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

M-6677 In the Matter of S., Nikeerah
— Hale House Center, Inc.

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

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

M-1340 Khoury v Khoury
M-1621

Stay denied; cross motion denied, as unnecessary.

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

M-1595 National Academy of Television Arts & Sciences v Academy of Television Arts & Sciences

Clerk directed to calendar appeal for hearing in first week of the September 2008 Term on condition same be perfected by July 7, 2008 for said Term.

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

M-1494 Trinity Centre LLC v Broad Street Advisors, LLC

Time to perfect appeal enlarged to the September 2008 Term.

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

M-1596 Capogrosso v Reade Broadway Associates

Time to perfect appeal enlarged to the September 2008 Term.

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

M-1677 People v Mercedes, Teofilo

Time to perfect appeal enlarged to the September 2008 Term.

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

M-1533 Rodas v 2328 On Twelfth, LLC

Enlargement of time to perfect appeal and other relief denied.

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

M-2294 (DC #30) In the Matter of Pelage v the New York City Housing Authority

Motion deemed withdrawn, the proceeding having been dismissed by the order of this Court entered on April 11, 2006 (M-1128).

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

M-638 In the Matter of D., Natalie Maria
— The Children's Aid Society

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

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

M-6622 In the Matter of G., Isabella Star
— Episcopal Social Services

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

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

M-922 People ex rel. Nelson, Dion v Warden

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

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

M-3203 People v Olba, Juan

Writ of error coram nobis denied.

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

M-1267 People v Spata, Aslan

Appeal deemed withdrawn.

Mazzarelli, J.P., Andrias, Williams, Buckley, Acosta, JJ.

M-851 In the Matter of S., Greta v The Administration for Children's Services

Time to perfect appeal enlarged to the September 2008 Term.

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

M-635 In the Matter of S., Al M., also known as S., Alex, Jr.; S., Gloria M., and M., John William, III — Leake & Watts Services, Inc.

Dismissal of appeal denied, with leave to renew, as indicated.

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

M-1370 Klein-Bullock v North Shore University Hospital at Forest Hills — Klein

Time to perfect appeal enlarged to the September 2008 Term.

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

M-1539 Schuster v Five G Associates

Time to perfect appeal enlarged to the September 2008 Term.

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

M-1541 Figueroa v The City of New York

Time to perfect appeal enlarged to the September 2008 Term.

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

M-1456 Santos v Ford Motor Company and Action Nissan, Inc.

Time to perfect respective appeals enlarged to the September 2008 Term.

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

M-1534 People ex rel. Barnes, McKinley v Horn

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

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

M-1535 People ex rel. Johnson, Keith v Warden

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

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

M-1540 Flores v Isabella Geriatric Center, Inc.

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

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

M-1086 People v Morales, Isaac

Reinstatement denied.

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

M-1296 In the Matter of H., Tony — New Alternatives for Children, Inc.

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

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

M-1357 In the Matter of Yovine, also known as Yovino v The New York City Civil Service Commission

Time to perfect appeal enlarged to the November 2008 Term; leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

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

M-1364 People v Forson, Samuel, Mitchell, Heyward
Thomas, Yvonne

People permitted to respond to appeals for the September 2008 Term, to which Term appeals adjourned, as indicated. Clerk directed to calendar appeals for hearing together in said Term.

Williams, J.

M-1391 People v Graves, Garland

Leave to appeal to this Court denied.

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

M-5977 In the Matter of Frank Valentin,
a disbarred attorney:

Petition for reinstatement as an attorney and counselor-at-law in the State of New York granted only to the extent of referring this matter to a Hearing Panel for a Hearing Report, as indicated. No opinion. All concur except McGuire, J., who dissents and would deny petition.

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

M-486 In the Matter of Joel Jay Rogge,
an attorney and counselor-at-law:

Respondent publicly censured. Opinion Per Curiam. All concur.

The following motion orders were entered and filed on April 15, 2008:

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

M-1480 Ford v The City of New York - Kerisant
— Richmond Elevator Co., Inc.
(And a third-party action)

Stay of trial granted.

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

M-1696 Echostar Satellite LLC v ESPN, Inc.

Appellate injunction denied; enlargement of time to perfect appeal granted to extent directed in the order of a Justice of this Court dated March 26, 2008, for the September 2008 Term.

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

M-1656 Post Broadway Associates, also known as 59 South Broadway Venture v Minskoff Grant Realty & Management Corp.

Stay denied; interim relief granted by order of a Justice of this Court, dated March 25, 2008, vacated.

Tom, J.P., Mazzarelli, Williams, Sweeny, JJ.

M-1702 Kaufman v Cohen

Enlargement of time to perfect appeal from order entered on or about January 30, 2007 denied and appeal and cross appeal dismissed; stay of trial from order entered March 19, 2008 granted on condition appeal perfected for the September 2008 Term, as indicated.

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

M-1878 Merrill Lynch Mortgage Capital, Inc. v Esmerian

Affirmative relief granted and auction stayed, as indicated.

Saxe, J.P., Nardelli, Buckley, Catterson, JJ.

M-1594 Nicholson v Luce

Stay of trial denied.