

in the context of a search of a person at liberty, defendant did not address the diminished Fourth Amendment rights of a prison inmate (see *Bell v Wolfish*, 441 US 520, 557 [1979]). The facts alleged in defendant's moving papers did not set forth a basis for suppression, given the prison context (see *Hudson v Palmer*, 468 US 517, 529 [1984]; *People v Frye*, 144 AD2d 714 [1988], lv denied 73 NY2d 891 [1989]). We have considered and rejected defendant's remaining arguments.

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

ENTERED: APRIL 22, 2008

CLERK

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3430-
3430A

Steve Newman,
Plaintiff-Respondent,

Index 602338/04

-against-

Morrell I. Berkowitz,
Defendant-Appellant.

Gallet Dreyer & Berkey, LLP, New York (Joseph V. Aulicino of counsel), for appellant.

Steve Newman, New York, respondent pro se.

Order, Supreme Court, New York County (Debra A. James, J.), entered August 24, 2006, which, to the extent appealed from as limited by the briefs, ordered defendant to pay plaintiff's costs, including attorney's fees, incurred in opposing a motion for reargument, unanimously affirmed, without costs. Order, same court and Justice, entered July 19, 2007, which denied defendant's motion for summary judgment dismissing the complaint and granted plaintiff's cross motion for summary judgment in his favor to the extent of granting plaintiff summary judgment as to liability, unanimously reversed, on the law, without costs, plaintiff's motion denied and defendant's motion granted. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

This breach of contract action should have been dismissed because defendant, as an individual, was not a party to the

contract. Read as a whole, the letter agreement, which was drafted on the letterhead of defendant's professional corporation and included a schedule indicating that legal fees were to be shared between plaintiff and defendant's professional corporation, shows that the intended party was the corporation. The absence of a reference to a corporate office above or below defendant's personal signature does not prove otherwise (see *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 7 [2004]; *PNC Capital Recovery v Mechanical Parking Sys.*, 283 AD2d 268, 270-271 [2001], *lv dismissed* 96 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]).

Conduct is frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR 130-1.1[c]). The court properly found that defendant's motion for reargument was frivolous, since defendant was unable to articulate a legal ground for it, and followed proper procedure in imposing the sanction against him (see *Spinnell v Toshiba Am. Consumer Prods.*, 239 AD2d 175 [1997]).

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amount of \$8,095 per month pending the Support Magistrate's new findings, unanimously modified, on the law and the facts, to permit respondent's expert to examine the child and testify thereto, to delete the requirement that the Support Magistrate make additional findings regarding household expenses (including the mortgage payment), and to reduce respondent's monthly support payment to \$5,500 pending the Support Magistrate's new findings, and otherwise affirmed, without costs.

The July 2007 order found that respondent had willfully failed to obey a 1998 support order by not obtaining life insurance in the amount of \$750,000. However, in September 2006, the Support Magistrate specifically found that respondent "non-wilfully failed to obey" the 1998 order by not obtaining insurance and ordered respondent to obtain insurance by November 1, 2006. Petitioner neither appealed from nor filed objections to that finding, but instead brought the instant violation petition, alleging that respondent had willfully failed to obey the September 2006 order. If respondent's failure to obtain life insurance prior to September 2006 was not willful, his post-September 2006 failure can not be deemed willful, where the record shows that respondent suffered a brain aneurysm in January 2005, and as a result, was unable to obtain life insurance, even though he had approached at least 20 insurance carriers as of April 2007. Even assuming respondent willfully violated the 1998

order because he could have obtained life insurance between 1998 and the time he suffered the brain aneurysm, incarcerating him now will not make him insurable. Considering that civil contempt penalties should be remedial, not punitive (see *Matter of Wynyard v Beiny*, 214 AD2d 344 [1995]), and since respondent is uninsurable (see *Hartog v Hartog*, 85 NY2d 36, 50 [1995]), the motion to vacate the May 7, 2007 order and arrest warrant should have been granted. Accordingly, with the order being vacated, there is no basis for requiring respondent to post \$97,140 to purge his contempt.

Regarding the August 2007 order, respondent never argued that petitioner's upward modification petition should have been dismissed because the parties' 1998 stipulation of settlement was non-modifiable pursuant to Family Court Act § 516. Were we to consider this unpreserved argument, we would find it unavailing because the proceeding settled by the parties' stipulation was not a paternity action brought under article 5 of the Family Court Act, but rather was an action brought under article 4.

Respondent contends that the upward modification petition should have been dismissed because the child's needs are being met by petitioner's income and respondent's child support payments. This argument is unavailing because pursuant to Family Court Act § 424-a(b), the petition could have been granted based solely on respondent's failure to file a financial disclosure

affidavit (see *Matter of Wallace v Whitsett*, 183 Misc 2d 177, 179 [1999]). Respondent is also deemed to have admitted the expenses set forth in petitioner's financial disclosure affidavit because he failed to submit his own affidavit (see e.g. *Matter of Brim v Combs*, 25 AD3d 691, 693 [2006], *lv denied* 6 NY3d 713 [2006]). However, Family Court Act § 424-a(b) does not require the court to grant the relief demanded in the petition, but provides the court with the choice of granting such relief, or precluding the respondent from offering evidence as to his financial ability to pay support. Here, rather than simply granting petitioner the requested amount, the Support Magistrate held a hearing and calculated the child's needs, and contrary to petitioner's contention, respondent's failure to provide financial information did not preclude Family Court from remanding to the Support Magistrate for additional calculations.

The court properly directed the Support Magistrate to re-calendar the matter to permit respondent to cross-examine petitioner's expert (see *Musumeci v Musumeci*, 267 AD2d 365 [1999]; *Hill v Arnold*, 226 AD2d 232, 233 [1996]). However, respondent's expert should have also been permitted to examine the child and testify thereto (see *Musumeci*, 267 AD2d at 365).

Family Court ordered respondent to keep paying \$8,095 a month pending the Support Magistrate's new findings. If the Support Magistrate ultimately finds that respondent's child

support obligation is less than \$8,095 per month, respondent will be unable to recover the overpayments by reducing future support payments (see e.g. *Matter of Maksimyadis v Maksimyadis*, 275 AD2d 459, 461 [2000]). Since we previously granted a stay pending appeal on condition that respondent, inter alia, pay \$5,500 per month pending the Support Magistrate's new findings (2007 NY Slip Op 83249(U) [2007]), respondent shall continue paying that amount. We emphasize that this figure is not meant to prejudge what respondent's ultimate child support obligation will be.

Since Family Court found that the Support Magistrate's determination of household expenses other than the mortgage payment was reasonable, there was no need to remand for additional findings on such household expenses. As for the mortgage, the stipulation does not say that the only mortgage was an interest-free loan of \$120,000 owed by petitioner to respondent; on the contrary, it acknowledged that there was a mortgage of \$250,000 on the condominium unit. The allegation that petitioner improperly took out an additional \$250,000 mortgage on the condominium in 2006 was made only in the affirmation of respondent's attorney, and since there is no indication that the attorney had first-hand knowledge of petitioner's actions, the affirmation has no evidentiary value (see *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Respondent's claim that the Support Magistrate was biased

against him, as evidenced by the Support Magistrate's ex parte communications with petitioner's counsel, is unpreserved (see e.g. *Douglas v Kingston Income Partners '87*, 2 AD3d 1079, 1082 [2003], *lv denied* 2 NY3d 701 [2004]). Were we to consider the claim, we would find that the Support Magistrate's child support order was not based on any improper communications (see *Kawasaki v Kasting*, 124 AD2d 1034 [1986]).

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

ENTERED: APRIL 22, 2008

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Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3435-

3435A The People of the State of New York,
Respondent,

Ind. 2111/93

-against-

Calvin Buari,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington
of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Joseph A. Cerbone,
J.), rendered December 5, 1995, convicting defendant, after a
jury trial, of two counts of murder in the second degree, and
sentencing him to consecutive terms of 25 years to life, and
order, same court (Dominic R. Massaro, J.), entered on or about
April 10, 2006, which denied defendant's CPL 440.10 motion to
vacate the judgment, unanimously affirmed.

Defendant's argument that the trial court failed to follow
the three-step *Batson* protocol (*Batson v Kentucky*, 476 US 79
[1986]) by not allowing him to give a race-neutral reason for one
of his peremptory strikes is unpreserved (see *People v Glenn*, 7
AD3d 314 [2004], *lv denied* 3 NY3d 674 [2004]), and we decline to
review it in the interest of justice. Defendant's objection to
seating the juror was insufficient to preserve the specific
procedural claim he raises on appeal. As an alternative holding,

we also reject this claim on the merits. Contrary to defendant's contention, the trial court gave him an opportunity to proffer a race-neutral reason for his challenge, and properly seated the juror when defendant failed to provide any reason.

At sentencing, defense counsel asserted that, after the verdict, defendant's family told him that one of the jurors was defendant's allegedly "estranged" great-uncle. Counsel also submitted an affidavit from a defense investigator relating his interview of the juror, who claimed he never revealed the family relationship during trial because he was unaware of it. Counsel requested an adjournment for further investigation into whether the juror might be lying about his prior unawareness of the relationship, and for the purpose of determining whether to file a CPL 330.30(2) motion to set aside the verdict on the ground of the juror's alleged misconduct. We conclude that the court properly exercised its discretion in declining to adjourn the sentencing (*see People v Boddie*, 240 AD2d 155 [1997], *lv denied* 90 NY2d 902 [1997]). Defendant's claim of misconduct was speculative, and the only information before the sentencing court specifically contradicted it. Furthermore, the sentencing court invited defendant's retained counsel to raise this issue in a CPL 440.10 motion, but no such motion was forthcoming until many years later, after the juror in question had died. Although on appeal defendant claims to be prejudiced by the juror's present unavailability as a witness, defendant is entirely responsible

for the delay, and his attempt to excuse the delay is without merit.

Furthermore, that portion of defendant's CPL 440.10 motion raising the juror issue was properly denied (see *People v Friedgood*, 58 NY2d 467, 471-473 [1983]). The information before the motion court further undermines defendant's claim, since there was evidence that defendant's family told defense counsel about defendant's relationship to the juror during the trial, rather than after the verdict. To the extent defendant raises a constitutional claim under *McDonough Power Equip. v Greenwood*, 464 US 548, 556 [1984]), such claim is unavailing since defendant failed to establish that the juror deliberately lied during voir dire (see *United States v Shaoul*, 41 F3d 811, 815 [2d Cir 1994]). The court properly denied those portions of the CPL 440.10 motion made on the ground of newly discovered evidence. 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]). After a thorough hearing, the court properly found that the alleged new evidence, consisting essentially of unreliable recantations and confessions that were themselves recanted, and extremely remote evidence of third party-culpability, did not justify vacating the judgment (see CPL 440.10 [1][g]; see also *People v Dukes*, 284 AD2d 236 [2001], lv denied 97 NY2d 681 [2001]). We note that the hearing evidence

supports the conclusion that defendant coerced one of the People's witnesses into confessing to the crimes of which defendant was convicted. Since the record supports the motion court's findings that none of the alleged newly discovered evidence was reliable, and since there is no reason to believe that any prosecution witness committed perjury at defendant's trial, or that anyone but defendant committed the murders, we reject defendant's constitutional claims relating to this evidence. We also find that defendant was not prejudiced by the People's delay in disclosing a taped conversation relating to the subject of the hearing.

While, at trial, the prosecutor failed to disclose a pending marijuana possession charge against one of the witnesses (see CPL 240.45[1][c]; see also *Brady v Maryland*, 373 US 83 [1963]), despite defendant's specific request for such information, and failed to correct the witness's mistaken trial testimony that the subject charge had been dismissed, the motion court properly denied the portion of defendant's CPL 440.10 motion raising that issue. There is no reasonable possibility that the nondisclosure

affected the verdict (see *People v Vilardi*, 76 NY2d 67, 73-77 [1990]), given the overwhelming evidence of defendant's guilt, and the nature of the pending charge.

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challenges to the prosecutor's cross-examination of defense witnesses, or any of her contentions regarding evidence of her prearrest silence, the prosecutor's summation or the court's main charge and response to a jury note, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Even if trial counsel should have raised the issues suggested by defendant on appeal, we would find that his failure to do so did not deprive defendant of a fair trial or cause her any prejudice (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]; *compare People v Turner*, 5 NY3d 476 [2005]).

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

ENTERED: APRIL 22, 2008

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Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3439-

3439A Anthony Matthews, et al.,
Plaintiffs-Respondents,

Index 100715/04
591121/04

-against-

Trump 767 Fifth Avenue, LLC, et al.,
Defendants-Respondents-Appellants,

Otis Elevator Company,
Defendant-Respondent,

Conseco, Inc.,
Defendant.

- - - - -

Trump 767 Fifth Avenue, LLC, et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

Triangle Services, Inc.,
Third-Party Defendant-Appellant-Respondent.

Gallo Vitucci Klar Pinter & Cogan, LLP, New York (Yolanda L. Ayala of counsel), for appellant-respondent.

Hoey, King, Toker & Epstein, New York (Robert O. Pritchard, Jr. of counsel), for respondents-appellants.

Salenger Sack Schwartz & Kimmel, LLP, New York (Michael Schwartz of counsel), for Anthony and Carol Matthews, respondents.

Geringer & Dolan, LLP, New York (John T. McNamara of counsel), for Otis Elevator Company, respondent.

Orders, Supreme Court, New York County (Carol R. Edmead, J.), entered February 2 and July 17, 2007, which, in an action by a window washer, employed by third-party defendant Triangle, for personal injuries sustained while working on a powered work platform, maintained by defendant Otis and known as a Wall

Glider, at high-rise building owned and managed by the Trump defendants (collectively Trump), inter alia, upon motions for summary judgment, dismissed plaintiff's cause of action under Labor Law § 200 as against Otis and sustained it as against Trump, denied Trump's motion for summary judgment on its cause of action against Triangle for contractual indemnification, dismissed Trump's causes of action against Triangle for contribution and common-law indemnification, and dismissed Trump's causes of action against Otis for contribution and contractual and common-law indemnification, unanimously affirmed, without costs.

We note that it is Triangle, not plaintiff, who is appealing the dismissal of plaintiff's negligence claim against Otis. Otis made a prima facie showing that the Wall Glider was operating properly on the day of the accident, based on the testimony of plaintiff, Otis's resident mechanic, and Otis's expert (see *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712 [2005]). Plaintiff's assertions that the platform's armatures had a history of disengaging from the indented vertical mullions in windy conditions or because of weight distribution and other problems, do not implicate any specific negligent acts on the part of Otis (see *Reilly v Newireen Assoc.*, 303 AD2d 214, 224 [2003], lv denied 100 NY2d 508 [2003]); Trump's own witness asserted that the mullions are permanently affixed to the

building and were not maintained by Otis as part of the Wall Glider equipment. Nor was Otis under an obligation to provide an anemometer. The Trump/Otis contract was limited to maintenance and excluded the provision of "major parts such as, but not limited to, gearing, ropes, brakes, armatures, etc." Thus, it was Triangle's or Trump's responsibility, not Otis's, to supervise the work of the window washers and supply them with equipment.

Trump's argument that it cannot be held liable in negligence because the method used by plaintiff to reengage the armature into the mullion was improper, unforeseeable and the sole proximate cause of his back injury, and also because Trump did not have actual or constructive notice of the platform's arms disengaging from the mullions, is rebutted by the testimony of Trump's handyman that the mullions were wavy, that it was Trump's responsibility to maintain them, and that the arms disengaged due to windy conditions on several occasions when he rode the Wall Glider. Also on the basis of this handyman's testimony that he employed the same method as plaintiff when the arms disengaged from the mullions, it cannot be said, as a matter of law, that plaintiff's method was so unforeseeable as to constitute the sole and superseding cause of his injuries (*see Kush v City of Buffalo*, 59 NY2d 26, 33 [1983]).

For this same reason, i.e., the existence of an issue of

fact as to Trump's negligence in maintaining the mullions, Trump's motion for summary judgment on its claim against Triangle for contractual indemnification was properly denied (see *Linarello v City Univ. of N.Y.*, 6 AD3d 192, 194 [2004]). Trump's claim for common-law indemnification against Otis was properly dismissed given no evidence that Otis had notice of, or was responsible for causing, the disengagement of the platform's arm from the mullion (see *Reilly v DiGiacomo & Son*, 261 AD2d 318 [1999]). Because such disengagement did not implicate any functions to be performed by Otis under its contract with Trump, Trump's claim against Otis for contractual indemnification was also properly dismissed.

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 22, 2008

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Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3440 Ida Hovav,
 Plaintiff-Appellant,

Index 102806/97

Philip Hovav,
Plaintiff,

-against-

Michael Loew,
Defendant-Respondent,

Ester Purjes,
Defendant.

Herbert Monte Levy, New York, for appellant.

Rosenfeld & Kaplan, L.L.P., New York (Steven M. Kaplan of
counsel), for respondent.

Judgment, Supreme Court, New York County (Jane S. Solomon,
J.), entered August 13, 2007, dismissing the complaint after a
nonjury trial, unanimously affirmed, with costs.

The court's finding that plaintiff-purchaser Ida Hovav
breached the contract of sale by failing to provide financial
information required by the cooperative board was amply supported
by the evidence. The purchaser redacted material information
from the tax return she was required to submit, and provided no
verification for her claimed assets, refusing to provide such
information despite repeated warnings from defendant Loew, who
was the escrow agent for defendant-seller Purjes. This failure
prevented submission of the purchaser's application to the
cooperative board (see *Glanzer v Altman*, 267 AD2d 79 [1999]).

Even months after the information should have been submitted, the trial evidence shows that the seller was still willing to close on the transaction. Under these circumstances, the escrow agent acted in good faith in disbursing the deposit to the seller, who also happened to be his law client.

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automatic sprinkler system was activated but did not put out the fire. The system had been installed by third-party defendant Buckmiller Automatic Sprinkler Corp. in early 1990 and inspected monthly by third-party defendant Petzvel Corp. for a year preceding the fire. Although Sugar Reef conceded its own negligence, issues of fact exist as to negligence on the part of Buckmiller and Petzvel and whether any of their actions or omissions were an additional proximate cause of the fire (see *Raquet v Braun*, 90 NY2d 177, 183 [1997]; *Odhan v City of New York*, 268 AD2d 86, 89 [2000], *lv denied* 95 NY2d 769 [2000]; see also CPLR 1401).

As Sugar Reef admitted fault, it is not entitled to common-law indemnification (see *Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [2006], *appeal dismissed* 7 NY3d 864 [2006]).

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installed by defendant Buckmiller in 1990 was defective and/or not properly inspected by defendant Petzvel, pursuant to a 1999 inspection agreement. Plaintiff insurer was subrogated to its insured's rights after it made payment on the insured's claim. Plaintiff's negligence action was timely commenced against defendants in February 2003. While the relationship between the parties had its genesis in contract, the nature of the contracted-for services at issue had a significant impact on the public interest, giving rise to a duty of reasonable care independent of contractual obligations that would be more time-bound to a date of breach (see *Sommer v Federal Signal Corp.*, 79 NY2d 540, 552-553 [1992]; *Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects*, 192 AD2d 151 [1993]). Deposition testimony from the principal of both defendants, combined with, inter alia, the fire sprinkler inspection observations of plaintiff's expert, raise issues of fact whether the sprinkler system was negligently installed and/or maintained by defendants.

Defendants' spoliation argument was properly rejected. They had an opportunity to inspect the fire-damaged premises on several occasions, and did so. Plaintiff promptly notified defendants formally of its intent to seek indemnification based on the allegedly faulty sprinkler system. Plaintiff's letter also advised that the sprinkler system would be disassembled, and

expressly requested that defendants respond so a mutual date for disassembly and inspection could be arranged. Defendants' principal acknowledged receiving that letter, yet there is no assertion or evidence in the record that they ever responded. On this record, it can not be concluded that premature disposal of the sprinkler gave plaintiff an unfair advantage over defendants (see e.g. *Ifraimov v Pheonix Indus. Gas*, 4 AD3d 332 [2004]). The trial court can instruct the jury, if appropriate, as to adverse inferences, as well as the need to weigh plaintiff's explanation of how and why the sprinkler system is no longer available (*Tawedros v St. Vincent's Hosp. of N.Y.*, 281 AD2d 184 [2001]).

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in front of the garage between defendant, the proposed witness and his younger daughter, after which defendant walked away from the garage with his two daughters, met up with friends on the street, and assisted his daughters in obtaining a taxi.

The court precluded this proposed testimony on the ground that it either constituted alibi evidence, for which defendant failed to serve the notice required by CPL 250.20, or that, if it did not constitute an alibi, it was irrelevant. On appeal, the People concede that the precluded testimony was not alibi testimony, but argue that it was properly precluded as lacking probative value. Their principal argument is that, given the spatial and temporal factors, the events described by the undercover officer and those set forth in the proposed testimony could have both happened.

While the daughter's testimony, if credited, would not have rendered the prosecution scenario impossible, it would have rendered that scenario unlikely, supported defendant's defense, and corroborated his testimony (see *People v Cuevas*, 67 AD2d 219, 223-225 [1979]; see also *People v Jack*, 74 NY2d 708 [1989]). There is no indication that defendant sought to call his daughter primarily to garner sympathy from the jury, or that the testimony would have been unduly prejudicial to the People. Accordingly, the evidence should not have been precluded on the ground of irrelevance.

Furthermore, to the extent the court considered the daughter an alibi witness, under the circumstances of the case it should have admitted her testimony after giving the People a reasonable opportunity to prepare (see CPL 250.20[3]). Counsel's failure to serve an alibi notice does not appear to have been an attempt to obtain a tactical advantage, but instead appears to have resulted from counsel's good faith belief that no notice was required as a matter of law, and the absence of notice would not have caused irreparable prejudice to the People (see *Taylor v Illinois*, 484 US 400, 414-415 [1988]; *Noble v Kelly*, 246 F3d 93, 98-100 [2d Cir 2001], *cert denied* 534 US 886 [2001]).

We also find that the error in precluding this testimony was not harmless. We decline to reach any other issue.

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ENTERED: APRIL 22, 2008

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Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3447 Yoda, LLC, et al.,
Plaintiffs-Respondents,

Index 115498/06

-against-

National Union Fire Insurance Company
of Pittsburgh, Pa.,
Defendant-Appellant,

Han Soo Lee, et al.,
Defendants.

Sedgwick, Detert, Moran & Arnold LLP, New York (Jeffrey M. Winn
of counsel), for appellant.

Miranda Sokoloff Sambursky Slone Vervenoitis, LLP, Mineola
(Michael A. Miranda of counsel), for respondents.

Order, Supreme Court, New York County (Doris Ling-Cohan,
J.), entered December 28, 2006, which denied defendant National
Union Fire's motion to dismiss the complaint and granted
plaintiffs' cross motion for summary judgment to the extent of
declaring the insurer's disclaimer of coverage ineffective under
Insurance Law § 3420(d), unanimously modified, on the law, the
cross motion denied, without prejudice to renewal after
completion of discovery, and otherwise affirmed, without costs.

Inasmuch as no discovery has been conducted in this matter,
and contrary to the IAS court's observation, National Union did
object to entertaining the motion for summary judgment, the court

erred in ruling on it at this juncture (*see Primedia Inc. v SBI USA LLC*, 43 AD3d 685 [2007]; *see also City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]). A judgment for plaintiffs on the merits must at least await the filing of an answer.

National Union's motion to dismiss was properly denied, however, since there are questions concerning, for instance, the parties' intentions, the terms of the subcontract, and National Union's delay in disclaiming while monitoring the underlying Labor Law litigation, which preclude a determination as a matter of law that Yoda and Riverhead were not additional insureds, even in the absence of an explicit listing of their names on the umbrella policy (*see e.g. Queens Off. Tower Assoc. v General Mills Rest.*, 269 AD2d 223, 224 [2000]).

National Union's reliance on the employers' liability exclusion in its policy is unavailing. The reason for this is that if Yoda and Riverhead are found to be additional insureds, the liability of National Union's insured (the nonparty subcontractor and employer of the injured worker) would be

indirect (see *North Riv. Ins. Co. v United Natl. Ins. Co.*, 81 NY2d 812, 814 [1993]).

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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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that the mother's records are necessary or relevant (*Scipio v Upsell*, 1 AD3d 500, 501 [2003]).

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Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

3450N-

3450NA American Furniture, LLC, et al.,
Plaintiffs-Appellants,

Index 121141/03

-against-

ACG Credit Company, LLC, et al.,
Defendants-Respondents.

Patterson Belknap Webb & Tyler LLP, New York (John D. Winter of counsel), for appellants.

Hahn & Hessen LLP, New York (Zachary G. Newman of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered November 3, 2006, which, to the extent appealed from as limited by the briefs, awarded defendant ACG Credit attorney fees and denied plaintiffs' motion for a hearing as to whether the sale of collateral was commercially reasonable, and supplemental judgment, same court and Justice, entered February 1, 2007, awarding defendants the principal sum of \$460,000 in post-judgment attorney fees, unanimously affirmed, with one bill of costs.

The court correctly interpreted the expansive fee provisions in the note and guaranty in awarding attorney fees with respect to certain New Hampshire litigation and post-judgment matters, inter alia, and properly applied the governing rule and reviewed the evidence in awarding reasonable fees. Plaintiffs failed to raise an issue of fact regarding collusion, fraud or self-dealing

in opposition to defendants' showing that their disposition of the collateral had been performed in a commercially reasonable manner, and no hearing was warranted on the issue (see *Golden City Commercial Bank v Hawk Props. Corp.*, 240 AD2d 218, 219 [1997]). Under the circumstances, while the sale price of the collateral differed from that in an appraisal several years earlier, this did not require further scrutiny (see *Buttermark Plumbing & Heating Corp. v Sagarese*, 119 AD2d 540 [1986], *lv denied* 68 NY2d 607 [1986]).

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Supreme Court for further proceedings consistent herewith.

The Racing Board did not waive its argument that the statute of limitations on petitioners' first two causes of action challenging the promulgation of an emergency rule accrued when the rules were promulgated because, although the nature of its argument was modified on appeal, the Racing Board asserted the statute of limitations on its cross motion to dismiss, and the modified argument does not depend on any facts not contained in the record considered by the court (*see New York City Health and Hosps. Corp. v Bane*, 208 AD2d 97, 103 [1995], *revd on other grounds*, 87 NY2d 399 [1995]). Because the first two causes of action challenge the enactment of the emergency rule that was in place on the date petitioners were informed that their horses had tested positive for Fluphenazine, the claims asserted in those causes of action accrued for statute of limitations purposes at the latest on August 18, 2004, the day the rule was promulgated, which was more than four months before this proceeding was commenced (State Administrative Procedure Act § 202[8]; CPLR 217[1]; *see Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]). The Racing Board is not equitably estopped from asserting the statute of limitations, because petitioners have not established that they were induced by fraud, misrepresentations or deception to refrain from filing a timely action (*see Simcuski v Saeli*, 44 NY2d 442, 448-49 [1978]).

The third cause of action is not time-barred, however, because it alleges constitutional infirmities in the manner in which the rule was enforced, not in how it was enacted, and was brought within four months of its accrual on the date petitioners were informed that the horses had tested positive. Nor is this cause of action premature. Insofar as the determination that the horses tested positive directs petitioners to return the purse monies and not race the horses until they are re-tested, its effect is certain and it constitutes a final determination (see *Matter of Edmead v McGuire*, 67 NY2d 714, 716 [1986]). Furthermore, the Racing Board does not identify any steps that petitioners could have taken administratively to challenge the denial of their due process right to a hearing.

The court correctly declined to dismiss the proceeding for failure to join necessary parties. While the owners of other horses who ran in the races from which petitioners' horses were disqualified may have had a material interest in the disposition of the escrowed purse money, such disposition was not the subject matter of the petition (see generally *Matter of Martin v Ronan*, 47 NY2d 486, 490 [1979]). Nor is there any indication that those owners consider themselves aggrieved by the manner in which the emergency rules were enacted or by the failure of the Racing Board to afford petitioners a hearing, so that they can be said to have a due process right to be heard in this proceeding (*id.*).

Finally, if petitioners prevail against the Racing Board, they may be entitled to recover their forfeited purse and claiming fees lost as a result of the disqualification as incidental damages (see *Pauk v Board of Trustees of City Univ. of N.Y.*, 111 AD2d 17, 21 [1985], *affd* 68 NY2d 702 [1986]). Accordingly, Supreme Court is directed to consider petitioners' request for such damages in the event they prevail.

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

ENTERED: APRIL 22, 2008

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Mazzarelli, J.P., Andrias, Catterson, McGuire, JJ.

2564-

2564A Francisco Reyes, et al.,
Plaintiffs-Respondents,

Index 17842/03

-against-

Morton Williams Associated
Supermarkets, Inc.
Defendant,

Emil Mosbacher Real Estate LLC,
Defendant-Appellant,

Red and White Markets, Inc.
Defendant-Respondent.

Gannon, Rosenfarb & Moskowitz, New York (David A. Drossman of counsel), for appellant.

Goldblatt & Associates, P.C., Mohegan Lake (Spencer M. Fein of counsel), for Francisco and Benefactora Reyes, respondents.

Paganini, Herling, Cioci, Cusumano & Farole, Lake Success (Peter A. Cusumano of counsel), for Red and White Markets, Inc., respondent.

Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered July 12, 2007, insofar as it, upon reargument, denied the motion of defendant Emil Mosbacher Real Estate LLC (Mosbacher) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, Mosbacher's motion granted and the complaint dismissed as against it. The Clerk is directed to enter judgment accordingly. That part of the appeal from the dismissal of Mosbacher's cross claims for contractual indemnification against Red and White Markets

unanimously dismissed, without costs, as academic. Appeal from order, same court and Justice, entered March 19, 2007, insofar as it dismissed Mosbacher's cross claims for contractual indemnification against Red and White, unanimously dismissed, without costs, as superseded by the appeal from the July 12 order.

The injured plaintiff, an employee of the Associated Supermarket operated by Red and White Markets at 15 East Kingsbridge Road in the Bronx, testified at his deposition that he was walking up a concrete ramp in the rear stockroom of the store when he slipped on water that had apparently dripped from overhead refrigeration pipes and accumulated on the ramp. He further testified that he tried to hold onto something to break his fall, but there was nothing to grab. Plaintiff's engineering expert submitted an affidavit concluding, based on his examination of the ramp, a conversation with plaintiff, and a review of his deposition testimony, that the lack of handrails violated the New York City Building Code, thereby deviating from good and accepted engineering practice, and was a substantial cause of the accident.

It is well settled that an out-of-possession landlord such as Mosbacher is generally not liable for negligence with respect to the condition of the demised premises unless it "(1) is contractually obligated to make repairs or maintain the premises,

or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Vasquez v The Rector*, 40 AD3d 265, 266 [2007]).

In granting plaintiff reargument and denying Mosbacher summary judgment, the motion court found that plaintiff had raised a triable issue of fact whether Mosbacher was subject to liability because it appeared that the lack of a handrail is a statutory violation. However, not only is the applicability of the Building Code a purely legal question for the court to determine (see *Buchholz v Trump 767 Fifth*, 4 AD3d 178, 179 [2004], *affd* 5 NY3d 1 [2005]), but, also, none of the sections of the Building Code relied upon by plaintiff's expert, which relate to means of egress from buildings and require handrails on certain interior stairs and ramps used in lieu of such stairs, apply to the ramp in question (*cf. Gaston v New York City Hous. Auth.*, 258 AD2d 220, 224 [1999]). Moreover, it is undisputed that the ramp and overhead refrigeration pipes, which were installed by Red and White Markets after it took possession of the premises and made renovations, were not located in a public portion of the building, the stockroom being specifically off limits to the public. Thus, there is no basis on which to impose liability on Mosbacher, which was required by its lease with Red and White Markets to maintain and repair only the public portions

of the building. Red and White Markets, on the other hand, was required, at its sole cost and expense, to make all nonstructural repairs to the premises.

With respect to contractual indemnification, the relevant portion of that clause provides that Red and White Markets will indemnify Mosbacher against any and all claims, suits, actions or damages arising from any personal injury or damage to property sustained on the premises, and for all costs, counsel fees and expenses incurred in defense of any actions, unless caused by or resulting from Mosbacher's negligence. The summary dismissal of Mosbacher's cross claims was premature, as there was a possibility Mosbacher would be found at trial not to have acted negligently. In such event, the broad language of the indemnification clause would have obligated Red and White Markets to indemnify Mosbacher (*cf. Rivera v Urban Health Plan, Inc.*, 9 AD3d 322 [2004]). However, in light of our dismissal of the complaint as against Mosbacher, the question of indemnification is academic.

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

ENTERED: APRIL 22, 2008

CLERK

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

2711 In re Isabel L.,
 Petitioner-Appellant,

-against-

 Biridia L.,
 Respondent-Respondent.

Law Office of Kenneth M. Tuccillo, Hastings-On-Hudson (Kenneth M. Tuccillo of counsel), for appellant.

Anne Reiniger, New York, for respondent.

Carol Sherman, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), Law Guardian.

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about January 10, 2006, insofar as it awarded custody of the subject children to respondent, unanimously affirmed, without costs. Appeal from so much of the order as advised respondent to arrange for grandparent and sibling visitation unanimously dismissed as academic, without costs.

While an evidentiary hearing was required (*cf. Alix A. v Erika H.*, 45 AD3d 394 [2007]), Gilbert has now been living uneventfully with respondent for the past two years, and we see no reason to remit the matter for a hearing at this point, particularly where the record supports the court's finding that awarding custody to respondent was in the children's best

interests (see *Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]; *Skidelsky v Skidelsky*, 279 AD2d 356 [2001]; *Melnitzky v Melnitzky*, 278 AD2d 2 [2000]).

That portion of the order that advised respondent to arrange for grandparent and sibling visitation has been superseded by an order of visitation, rendering academic this aspect of the appeal (see *Matter of Maria Raquel L.*, 36 AD3d 425 [2007]).

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

ENTERED: APRIL 22, 2008

CLERK

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

2780 Purchase Partners II, LLC, et al., Index 604219/04
Plaintiffs-Appellants,

-against-

Anthony E. Westreich,
Defendant-Respondent.

[And a Third-Party Action]

Emery, Celli, Brinckerhoff & Abady, LLP, New York (Richard D. Emery of counsel), for appellants.

Kramer Levin Naftalis & Frankel LLP, New York (Marshall H. Fishman of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 8, 2007, which, insofar as appealed from, granted defendant's motion for summary judgment dismissing the complaint and denied plaintiffs' motion for summary judgment, unanimously modified, on the law, to declare that plaintiffs are not entitled to enforce the August 11, 2004 letter agreement, and otherwise affirmed, without costs.

Even if, *arguendo*, plaintiffs were third-party beneficiaries of the August 11, 2004 letter agreement between defendant and third-party defendant Hochfelder, the merger clause in their November 12, 2004 separation agreement effectively barred their claims under the earlier agreement (*see Jarecki v Shung Moo Louie*, 95 NY2d 665, 669 [2001]). Plaintiffs were aware of the terms of the separation agreement, which did not contain the

claimed benefits but did contain such merger clause, and they did not object (see *Barnum v Milbrook Care Ltd. Partnership*, 850 F Supp 1227, 1236 [1994], *affd* 43 F3d 1458 [1994]). We modify solely to declare in defendant's favor (see *Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

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

ENTERED: APRIL 22, 2008

CLERK

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
APRIL 22, 2008

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

M-1792X Corso v NYP Holdings, Inc.

Appeal withdrawn.

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

M-1798X Ficus Investments, Inc. v Private Capital
Management, LLC - Donovan
(And other actions)

Appeal withdrawn.

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

M-1811X Gonzalez v New York Yankees

Appeal withdrawn.

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

M-1867 Tawill v Caffe Tina, Inc., doing business as
Caffe Tina

Appeal withdrawn.

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

M-1524 Salame v Allaham

Motion to relieve counsel denied, with leave to renew,
as indicated.

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

M-1544 Philips South Beach LLC v ZC Specialty Insurance
Company

Motion deemed withdrawn, as indicated.

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

M-1481 People v Best, Antoine

Continuation of stay granted; relief previously granted
by orders of a Justice of this Court, dated October 23, 2007 and
January 7, 2008, respectively, continued on condition appeal
perfected for the September 2008 Term.

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

M-1496 Einheber v Fine

Enlargement of time to perfect appeal denied; appeal
dismissed.

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

M-1511 Veneski v Queens-Long Island Medical Group, P.C. -
Cousins

Enlargement of time to perfect appeal denied; appeal
dismissed.

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

M-1610 Helie v McDermott Will & Emery - Gramercy Financial
Group, LLC

Time to perfect appeal enlarged to the September 2008
Term.

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

M-1188 Okun v Tanners

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

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

M-320 Eurycleia Partners, LP v Seward & Kissel, LLP
(And another action)

Reargument or other relief denied.

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

M-476 Jordan v Bates Advertising Holdings, Inc.,
formerly known as AC&R Advertising, Inc.

Reargument or other relief denied.

Lippman, P.J., Mazzarelli, Catterson, Acosta, JJ.

M-826 Capellan v Stone - Santos
(And another action)

Leave to appeal to the Court of Appeals denied.

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

M-875 Clark v Kaplan - Island Properties Real Estate &
Management Corp.
(And a Third-Party Action)

Reargument or other relief denied.

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

M-1636 People ex rel. Jones, Roy v Warden
Appeal deemed withdrawn.

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

M-1053 People v Labour, Claudio
Dismissal of appeal denied; time to perfect appeal
enlarged to the September 2008 Term, as indicated.

Tom, J.P., Mazzairelli, Friedman, Moskowitz, JJ.

M-34 People v Hull, Edward, also known as
Brown, James
Writ of error coram nobis denied.

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

M-1682 Hoagland v The City of New York
Time to perfect appeal enlarged to the September 2008
Term.

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

M-1244 In re Richardson v Wetzel
Reargument denied.

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

M-5368 People v Peterson, Tyrone
Reargument denied.

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

M-1457 People v Wilson, Nathaniel

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

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

M-300 In the Matter of S., Ronald v R., Deidre

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

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

M-1407 People v Mears, Steven

Defendant-appellant directed to file pro se supplemental brief for the September 2008 Term, to which Term appeal adjourned, as indicated; motion otherwise denied.

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

M-1529 Allstate Insurance Company v Belt Parkway Imaging, P.C.

Time to perfect appeal enlarged to the September 2008 Term.

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

M-6514 Federal Insurance Company, individually and as subrogee of Galaxy General Contracting Corp. v North American Specialty Insurance Co.

Reargument or other relief denied.

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

M-1771 In the Matter of Rodriguez v Hernandez

Enlargement of time to file reply brief denied.

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

M-6601 IDT Corporation v Morgan Stanley Dean Witter & Co.

Reargument denied; leave to appeal to the Court of Appeals granted, as indicated.

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

M-1420 Shibolet v Yerushalmi

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

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

M-1522 Clark v Kelly

Time to perfect appeal enlarged to the September 2008 Term.

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

M-1549 People ex rel. Mack, Allen v Warden

Pro se supplemental brief submitted with moving papers deemed filed for the September 2008 Term, to which Term appeal adjourned.

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

M-1643 Fermin v Dutt

Expedited hearing of appeal denied, without prejudice to defendant-respondent moving to dismiss appeal should appellant fail to perfect same for the September 2008 Term.

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

M-1112 People v Concepcion, Pedro

Appeal dismissed.

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

M-1385 In the Matter of R., Jennifer - Mercy First/
Angel Guardian Children and Family Services

Appeal dismissed, without prejudice to respondent seeking certain relief, as indicated.

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

M-6237 People v Dillon, Chauncey

Writ of error coram nobis denied.

**The following motion orders were entered and filed on
April 17, 2008:**

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

M-1477 Lowerre Place Association v Banks

Leave to appeal from the Appellate Term and other relief denied; interim relief granted by order of a Justice of this Court, dated March 17, 2008, vacated.

Mazzarelli, J.P., Friedman, Gonzalez, Nardelli, Catterson, JJ.

M-1339 People v Jones, Maleek, also known as
Stroman, Jermaine

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

Saxe, J.P., Gonzalez, Williams, Catterson, JJ.

M-1182 Homeside Development Corp. v Amin Ijbara Equity Corp.
M-1294

Enlargement of time to perfect appeals denied and
appeals dismissed; notice of pendency cancelled, as indicated.

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

M-1409 Flores v The City of New York

Time to perfect appeal enlarged to the September 2008
Term.