

accurate, would still have to satisfy the elements of the crime beyond a reasonable doubt; in particular, intent was a major issue in the case. However, the charge as a whole conveyed the proper standard and was not constitutionally defective (see *People v Umali*, 10 NY3d 417, 426-427 [2008]; *People v Drake*, 7 NY3d 28, 33 (2006)). The challenged language was both immediately preceded and immediately followed by thorough instructions on the requirement that every element be proven beyond a reasonable doubt. The charge was not contradictory, because the offending language was plainly delivered in the context of explaining that the People were not obligated to call more than one witness. Intent was the subject of a detailed instruction by the court as well as extensive summation comment, and the isolated language at issue could not have misled the jury into believing that in this case the issue of intent turned only on the victim's credibility.

The court properly exercised its discretion in precluding defense counsel from making a summation argument positing an alternate scenario that would have required the jury to draw excessively speculative inferences from the evidence (see *People v Charles*, 61 NY2d 321, 329 [1984]; *People v Blount*, 286 AD2d 649 [2001], *lv denied*, 97 NY2d 701 [2002]). Since defendant never asserted a constitutional right to make this argument, her present constitutional claim is unpreserved (see *People v Umali*, 10 NY3d at 428-429; *People v Lane*, 7 NY3d 888, 889 [2006]), and

we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. In any event, any error, constitutional or otherwise, was harmless. Defendant was not prejudiced by the court's ruling, because the precluded argument had little or no chance of persuading the jury, and because it would have opened the door to damaging uncharged crimes evidence that the court had excluded.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: APRIL 28, 2009

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

404-

405 In re Syed I., and Others,

Children Under the Age of
Eighteen Years, etc.,

Sheika I.,
Respondent-Appellant,

Syed I.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Elisa Barnes, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner
of counsel), for ACS, respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan
Clement of counsel), Law Guardian.

Order of fact-finding and disposition, Family Court, New
York County (Sara P. Schechter, J.), entered on or about August
20, 2007, which released the subject children to their parents
under the supervision of petitioner Commissioner of
Administration for Children's Services of the City of New York
upon a finding that the mother neglected the two older children
and derivatively neglected the infant, unanimously affirmed,
without costs.

A preponderance of the evidence supports the court's
findings that the father neglected the two older children by,
inter alia, inflicting excessive corporal punishment on them

(Family Court Act § 1012[f][i][B]) and that the mother neglected the two older children by failing to take appropriate measures to protect them from the father's excessive corporal punishment (see *Matter of Alysha M.*, 24 AD3d 255 [2005], *lv denied* 6 NY3d 709 [2006]). This evidence supports the finding of derivative neglect as to the infant (see *Matter of Joshua R.*, 47 AD3d 465, 466 [2008], *lv denied* 11 NY3d 703 [2008]).

The children's out-of-court statements that the father punished them by hitting them, making them do knee bends, and threatening to withhold food if they did not memorize written passages were amply corroborated by the father's medical records and the mother's statements that she feared the father, was aware of his deteriorating mental health, and could not protect the children when he hit them (see FCA § 1046[a]; *Matter of Nicole V.*, 71 NY2d 112, 118-119 [1987]).

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

ENTERED: APRIL 28, 2009

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

406 In re Brandon C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

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 (Marta Ross of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 28, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the third degree and attempted assault in the third degree, and placed him on probation for a period of 15 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification

and credibility. The victim had a sufficient opportunity to view her assailant, and she spontaneously recognized appellant minutes after the robbery.

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

ENTERED: APRIL 28, 2009

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deposition testimony, which reveal that plaintiff was confined to bed and home for only a few weeks after the accident.

Plaintiff failed to raise a triable issue of fact as to whether a serious injury was sustained. Despite the positive MRI report, there were no admissible objective findings immediately following the accident to demonstrate any initial range of motion restrictions on plaintiff's cervical and lumbar spine, or any detailed explanation for their omission (*Thompson*, 15 AD3d at 98). The quantitative range of motion assessment plaintiff did submit was made some two years after the accident by a physician who examined her for the first time on that occasion, apparently for purposes of litigation (see *Atkinson v Oliver*, 36 AD3d 552, 552-553 [2007]). We also note that there was a significant gap in treatment.

Plaintiff also failed to raise a triable issue of fact as to whether she was incapacitated from performing substantially all of her usual and customary activities for at least 90 of the first 180 days after the accident. The subjective claims of pain

and "unsubstantiated claim of inability to perform [her] customary daily activities are insufficient to raise a triable issue of fact" (*Thompson*, 15 AD3d at 101).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 28, 2009

CLERK

plaintiff submitted his papers in opposition to defendant's motion (see *Masucci-Matarazzo v Hoszowski*, 291 AD2d 208 [2002]). Plaintiff's affidavit submitted in opposition contradicted his deposition testimony and thus raised only a feigned issue of fact (see *Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327, 327-328 [2006]).

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indicated in the service maintenance records it kept (*Parris v Port of New York Auth.*, 47 AD3d 460, 460-61 [2008]). In opposition, plaintiffs' expert opined that the escalator could have jerked due to deterioration or wearing of various parts, and inferred that Otis had not performed necessary maintenance by replacing certain parts. However, his affidavit was not probative, since it was not based upon the depositions or documents produced, but rather on speculation, conjecture, and purported "missing documents" (see *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Finally, plaintiffs' "reliance on the doctrine of res ipsa loquitur is unavailing because [they] failed to demonstrate that the escalator, which was subject to extensive public contact on a daily basis, was in defendant's exclusive control" (*Parris*, 47 AD3d at 460-61; *Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]), and the undisputed testimony established that the escalator could have stopped for any number of reasons that would not entail liability on the part of defendants.

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vigilance is necessary." There was substantial medical evidence about the dangers of sleep apnea and blood oxygen desaturation, and the extreme risks posed by this condition, especially with respect to a police officer's duties. Petitioners' medical expert, who testified at the hearing, concluded that Elias's condition could lead to dire health consequences in the future.

"An appointing authority has wide discretion in determining the fitness of candidates . . . particularly . . . in the hiring of law enforcement officers, to whom high standards may be applied" (*Matter of Verme v Suffolk County Dept. of Civ. Serv.*, 5 AD3d 498 [2004]). "In determining whether a candidate is medically qualified to serve as a police officer, the appointing authority is entitled to rely upon the findings of its own medical personnel, even if those findings are contrary to those of professionals retained by the candidate, and the judicial function is exhausted once a rational basis for the conclusion is found" (*Matter of Thomas v Straub*, 29 AD3d 595, 596 [2006]). CSC's decision was irrational because it disregarded the informed medical opinions of NYPD's doctors and was based instead on the brief and conclusory statement of Elias's physician, which did not address in detail the condition at issue as it might affect the physical demands of police duty. Furthermore, Elias failed

to offer convincing evidence as to his future fitness for the job
(see *Matter of City of New York v New York City Civ. Serv.*
Comm., 6 NY3d 855 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 28, 2009

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Bailey, 52 AD3d 336 [2008], *lv denied* 11 NY3d 707 [2008]). We have considered and rejected defendant's remaining claims.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 28, 2009

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deviate materially from what would be reasonable compensation under the circumstances presented (CPLR 5501[c]; see e.g. *Lopez v Consolidated Edison Co. of N.Y., Inc.*, 40 AD3d 221 [2007]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 28, 2009

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Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

420-		Index	601183/08
421-			105584/08
422-			601187/08
423-			105575/08
424-			105466/08
425N	GFI Securities, LLC, Petitioner-Appellant,		601099/08

-against-

Tradition Asiel Securities, Inc., et al.,
Respondents-Respondents.

- - - - -
[And Other Actions]

- - - - -
Michael Babcock,
Petitioner-Respondent,

-against-

GFI Securities, et al.,
Respondents-Appellants.

- - - - -
Donald P. Fewer,
Plaintiff-Respondent,

-against-

GFI Group, et al.,
Defendants-Appellants.

Carter Ledyard & Milburn LLP, New York (Jeffrey S. Boxer and
Lawrence F. Carnavale of counsel), for appellants.

Schnader Harrison Segal & Lewis LLP, New York (Daniel J. Brooks
of counsel), for respondents.

Orders, Supreme Court, New York County (Richard B. Lowe III,
J.), entered July 29, 2008, which denied GFI Securities'
application for a preliminary injunction, unanimously affirmed,
with one bill of costs.

In these five arbitrations and an action to determine whether an inter-dealer firm raided another firm's brokers and whether the brokers violated the restrictive covenants in their employment agreements, GFI failed to show irreparable harm in support of its motion for a preliminary injunction pursuant to CPLR 7502(c) (see *Orasure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348 [2007]; *National Educ. Prod., Inc. v Educational Reading Aids Corp.*, 34 AD2d 769 [1970]), since it failed to submit evidence showing that its defecting brokers were irreplaceable or that its losses, other than the speculative claim of lost good will, were not compensable by money damages (see e.g. *Famo, Inc. v Green 521 Fifth Ave. LLC*, 51 AD3d 578 [2008]).

Although, as admitted in the reply of a GFI executive for purposes of the relief sought (see *Ficus Invs., Inc. v Private Capital Mgt, LLC*, _AD3d_, 872 NYS2d 93, 100 [2009]), most of the restrictive covenants at issue have expired, rendering the appeal with respect to their enforcement academic (see *Mitel Telecomm. Sys., Inc. v Napolitano*, 226 AD2d 165 [1996]; *Benco Intl. Importing Co. v Krooks*, 53 AD2d 536 [1976]), dismissal is not warranted in light of the unexpired restrictive covenant of respondent Wallack and GFI's breach of contract, tortious interference and other claims.

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

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 28, 2009

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oral approval from the New York City Landmarks Commission to make the proposed structural changes in January 2007, when in fact it had received oral approval in November 2006 and written approval during the week of December 18, 2006, and it purposefully waited to apply for a building permit until March 2, 2007 - the date on which defendant threatened to return to court. While plaintiff maintained that the reason for the delay was unseasonably cold temperatures, the record supports the inference that plaintiff was waiting to have the work on the building facade done before beginning the repair to defendant's terrace. Even after the court directed plaintiff, in the order restoring the case to the calendar, to complete the facade work on the area around defendant's apartment and immediately commence the repairs to his terrace, plaintiff waited approximately one month to begin work, and then it performed the facade work on all other parts of the building before starting on the area around defendant's terrace. As a result, the terrace repair work was not completed until September 2007 - a full year after the parties entered into the stipulation to settle this action, which plaintiff initiated, in

March 2006, claiming that the terrace had to be repaired immediately because it was in imminent danger of collapsing.

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asked whether sharing a crack pipe constituted a sale, the court did not constructively amend the indictment by repeating its charge that to sell a controlled substance means to "sell, exchange, give or dispose of to another" (see Penal Law § 220.00[1]), and it properly declined to instruct the jury that it could only consider whether defendant exchanged the drug for money, as alleged by the People. Any variance from the People's theory resulted from defendant's testimony that he committed a different version of the same crime for which he was indicted (see *People v Spann*, 56 NY2d 469, 474 [1982]; *People v Fuller*, 252 AD2d 353 [1998], *lv denied* 92 NY2d 897 [1998]). There was no change in the material elements of the indicted crime, which contain no requirement that the drugs be transferred in any particular manner or for any particular reason. The principle set forth in *Spann* is clearly applicable, and we reject defendant's arguments to the contrary.

The surcharges and fees were properly imposed (see *People v Guerrero*, 12 NY3d 45 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
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This was due to a dearth of evidence that defendant WSC, the shareholder in the cooperative and holder of the proprietary lease appurtenant to the apartment, had any rights to the roof area.

There was no ambiguity in the lease, which controls the parties' rights and obligations. The lease referred only to the "Apartment," not the roof, except in a standard-form provision in the attached Rules prohibiting tenants from drying their clothes there (*see Hazlett v Rahbar*, 27 AD3d 384 [2006]). Nothing in the admitted documents or the parties' conduct allows an interpretation permitting plaintiff to use the roof/terrace area (*see 1050 Fifth Ave. v May*, 247 AD2d 243 [1998]; *Jossel*, 235 AD2d at 206).

In an action for declaratory judgment, where a disposition on the merits is against granting certain relief, the court should make a declaration rather than simply dismissing that aspect of the complaint (*Hirsch v Lindor Realty Corp.*, 63 NY2d 878 [1984]; *see also Real Bidder v St.Luke's-Roosevelt Hosp. Ctr.*, 254 AD2d 123 [1998]). Accordingly, we declare that plaintiff has no possessory rights under the lease to the roof area.

We have considered the balance of plaintiff's argument and find it unavailing.

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

ENTERED: APRIL 28, 2009

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

429-

430 In re Penny B.,
 Petitioner-Appellant,

-against-

Gary S.,
Respondent-Respondent.

Kliegerman & Joseph, LLP, New York (Michael P. Joseph of
counsel), for appellant.

Patricia Ann Fersch Family Law Center, New York (Patricia Ann
Fersch of counsel), for respondent.

Lawyers for Children, Inc., New York (Nancy Dunbar of counsel),
Law Guardian.

Order, Family Court, New York County (Elizabeth Barnett,
Referee), entered on or about August 31, 2007, which denied
petitioner mother's motion for the appointment of an additional
forensic evaluator, and order, same court and Referee, entered on
or about February 15, 2008, which, inter alia, granted respondent
father's petition for custody of the subject child, unanimously
affirmed, without costs.

The totality of the circumstances establish that the award
of custody to the father was in the best interests of the child
and has a sound and substantial basis in the record (*see Eschbach
v Eschbach*, 56 NY2d 167 [1982]; *Matter of James Joseph M. v
Rosana R.*, 32 AD3d 725 [2006], *lv denied* 7 NY3d 717 [2006]). In
making its determination, the court considered the appropriate

factors and recognized that the mother would not be willing or able to foster an optimum relationship between the father and his child. Indeed, the record shows that the mother engaged in a repeated pattern of interference in the father's relationship with the child following the parties' separation, and the father was limited to supervised visitation in the early stages of the proceedings due to the mother's unfounded allegations of sexual misconduct by him while he was with the child (see *Matter of Osbourne S. v Regina S.*, 55 AD3d 465 [2008]).

The mother also completely disregarded the best interests of the child by her repeated false allegations of sexual abuse at the father's hands, which subjected this young child to repeated examinations by medical and mental health personnel. Indeed, the evidence shows that the mother's focus on the father's purported sexual desire for the child actually caused harm to the child. She failed to recognize that her reactions to the child's behavior were a factor in the exacerbation of such behavior. Furthermore, the record demonstrates that the father established his clear involvement and concern for his child and that he had

been significantly involved with raising the child both pre-separation and throughout the proceedings. There was also no evidence that the father would not foster a relationship between the mother and child (see *James Joseph M.*, 32 AD3d at 726).

The court providently exercised its discretion in denying the mother's motion for the appointment of an additional expert in child sexuality (see *Matter of Jessica R.*, 78 NY2d 1031 [1991]; *Matter of Fatima M.*, 16 AD3d 263, 272-273 [2005]). The court was sufficiently informed about the child's behavioral problems and the parties' psychological makeup, and had an extensive amount of medical evidence showing that no sexual abuse had occurred. There was no demonstrated need for the additional appointment, and the court reasonably found that the child had already been subjected to numerous examinations and would be harmed by additional testing.

The court did not improvidently exercise its discretion when it refused to compel the father's therapist to testify or to release his records to the mother (see *People ex rel. Hickox v Hickox*, 64 AD2d 412 [1978]). Indeed, the court acted properly when it conducted an in camera review of the therapist's notes, and then, in order to satisfy the mother's concern about whether the father had been consistently attending therapy sessions, the court permitted her to review the therapist's appointment sheets.

Furthermore, the court informed the parties that the therapist had determined that the father did not pose a risk to the child, and it was unnecessary to release the therapist's notes or for him to testify since the court had sufficient information about the father from other sources. Nor did the court err when it denied the mother's request to call the child's therapist as a witness, since it was apparent that the mother only sought to call the therapist in order to advance her own interests.

THIS CONSTITUTES THE DECISION AND ORDER
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response, plaintiff submitted an affirmation from her treating internist showing that she had a restricted range of motion in both the cervical and lumbar portions of her spine. She also submitted an MRI report showing a cervical bulge and herniation in a lumbar disc. However, the expert's examination and the MRI report were insufficient to raise an issue of fact as to serious injury, as they failed to adequately address, in other than speculative and conclusory terms (see *Innocent v Mensah*, 56 AD3d 379, 380 [2008]), either the radiological findings or the effect of a motor vehicle accident in which plaintiff had previously been involved four years before the subject accident (see *Style v Joseph*, 32 AD3d 212, 214 [2006]).

With respect to the 90/180-day serious injury claim, defendants met their initial burden by relying on plaintiff's deposition testimony stating that she missed only one week of work after the accident, and was not confined to bed for any period afterward. In opposition, plaintiff submitted an affidavit stating she was, in fact, confined to bed for a period of time after the accident. Plaintiff's affidavit clearly contradicts her deposition testimony, and appears to have been tailored to avoid its consequences (see *Blackmon v Dinstuhl*, 27 AD3d 241 [2006]). In any event, plaintiff's subjective claims of pain and a limitation on sports and exercise activities do not prove a restriction on her usual and customary daily activities

for at least 90 days of the 180 days following the accident (see *Becerril v Sol Cab Corp.*, 50 AD3d 261 [2008]).

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information had already been provided to defendant in a police report. There is no merit to defendant's argument that, even with the additional testimony, the People still failed to establish probable cause.

The totality of the circumstances establishes the voluntariness of defendant's written and videotaped statements, in which he admitted shooting the deceased but claimed self-defense (see *Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). Although defendant was in custody for a total of approximately 15 hours between his arrest and the conclusion of his videotaped statement, this period was not excessive, the circumstances were not unduly coercive, and only a few hours were actually spent on interrogation. The hearing evidence, including the videotape, fails to support defendant's contention that the coldness of the room in which he was kept affected the voluntariness of his statements.

The court properly exercised its discretion in denying defendant's mistrial motions made when the prosecutor attempted to introduce evidence that the deceased lacked a criminal history. The court's curative actions were sufficient to prevent any prejudice.

Of defendant's remaining arguments concerning his trial, the only claims that are arguably preserved are his challenges to the

prosecutor's summation comments on defendant's familiarity with firearms, on an alleged connection between defendant and his companions and a certain vehicle, and on an inconsistency in defendant's statements, as well as defendant's challenges to alleged testimonial hearsay in an autopsy report, to a photograph of the deceased while alive, and to a detective's testimony relating actions of other officers. As to these summation and evidentiary claims, we find any errors harmless.

Defendant's remaining contentions, including those concerning alleged errors to which he made general objections, are unpreserved (see *People v Tevaha*, 84 NY2d 879 [1994]), and we decline to review them in the interest of justice. As an alternative holding, we likewise find any errors harmless. With regard to both the preserved and unpreserved issues, while there were improprieties, they did not deprive defendant of a fair trial or affect the verdict. The jury acquitted defendant of murder and failed to reach a verdict on manslaughter. It only convicted defendant of criminal possession of a weapon in the second degree, which, at the relevant time, constituted possession with intent to use unlawfully. Possession was undisputed, and the evidence, viewed in light of the presumption of unlawful intent (Penal Law § 265.15[4]), overwhelmingly established intent to use the weapon unlawfully against another,

regardless of whether defendant's actual use of the weapon against the deceased was justified (see *People v Pons*, 68 NY2d 264 [1986]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 28, 2009

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

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436A

Index 113633/07

Myron Zuckerman,
Plaintiff-Respondent,

-against-

Sydell Goldstein, et al.,
Defendants-Appellants.

Lance A. Landers, New York, for appellants.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (I. Michael Bayda of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 29, 2008, which granted reargument and adhered to the prior determination granting plaintiff's motion for summary judgment to the extent of dismissing the counterclaims of defendant Sam-Fay Realty Corp. accruing prior to October 17, 2002 and dismissing the counterclaims of the remaining defendants in their entirety, and denying defendants' cross motions for summary judgment, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 23, 2008, unanimously dismissed, without costs, as superseded by the appeal from the October 29, 2008 order.

The court correctly ruled that the counterclaims accruing prior to October 17, 2002 were barred by releases in paragraph 8

of the agreement of that date ("2002 Agreement"). The parties' releases acknowledged that the distributions made in connection with the 2002 Agreement were in full settlement of the disputes that existed between plaintiff and the individual defendants as shareholders in the four family corporations with respect to prior personal and/or business transactions that involved or affected the assets, liabilities and business of the corporations and/or the shareholders individually. The only exclusion was "claims, if any, that are purely personal in nature and do not arise from the operations and business of the four corporations and do not arise from an individual's status as a shareholder of any one of the four [family] corporations." The court also properly rejected defendants' argument that their claims for breach of fiduciary duty and as beneficiaries of a family trust were personal in nature and thus not extinguished by the releases. The loans in connection with the purchase of the property in Maspeth, N.Y., the management agreement, the loan repayments, and the sale and distribution of the proceeds with respect to both the Maspeth and West 29th Street properties were all related to the business of four family corporations, and thus

covered by the releases. 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 28, 2009

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

437 In re Cesar P.,

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 (Mordecai Newman of counsel), for presentment agency.

Order, Family Court, Bronx County (Robert R. Reed, J.), entered on or about August 11, 2008, which adjudicated appellant a juvenile delinquent, upon his admission that he had committed an act which, if committed by an adult, would constitute the crime of attempted assault in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

Given the seriousness of the offense, which involved injury to an assistant principal, as well as appellant's poor performance in school and chronic truancy, the court properly exercised its discretion in placing appellant on probation under the enhanced supervision program. This was the least restrictive dispositional alternative consistent with appellant's needs and the need for protection of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Appellant's argument that the court

should have granted him an adjournment in contemplation of dismissal is unpreserved and without merit.

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ENTERED: APRIL 28, 2009

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light of his pattern of violent sexual offenses (*see generally*
People v Guaman, 8 AD3d 545 [2004]).

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including penetration (see e.g. *People v Collins*, 166 AD2d 270, 271 [1990], *lv denied* 76 NY2d 1020 [1990]).

The court properly excluded evidence containing multiple levels of hearsay. Since defendant offered hearsay in oral form and did not offer any documents, his reliance on the business records exception is misplaced. In any event, defendant could not have been prejudiced because the evidence he sought to introduce had no exculpatory value.

We have considered and rejected defendant's remaining argument.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 28, 2009

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Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

441 Trevor Ram, Index 117696/06
Plaintiff-Appellant,

-against-

64th Street-Third Avenue Associates, LLC,
Defendant-Respondent.

Gary E. Rosenberg, P.C., Forest Hills (Gary E. Rosenberg of
counsel), for appellant.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel),
for respondent.

Order, Supreme Court, New York County (Richard F. Braun,
J.), entered November 6, 2008, which granted defendant's motion
for summary judgment dismissing the cause of action for
negligence, unanimously affirmed, without costs.

Plaintiff was injured when, attempting to turn off a
ceiling-mounted box fan, he placed his right hand within the area
of the revolving blades. The fan was located in a parking garage
that was operated by plaintiff's employer under a lease with
defendant, the building's owner. The motion court correctly
granted defendant's motion for summary judgment on the ground
that defendant was an out-of-possession landlord that could not
be held liable for any dangers posed by the fan where its lease
with plaintiff's employer required the latter to keep all
fixtures in good working order and to make any nonstructural
repairs at its own expense (*see generally Reyes v Morton Williams*

Associated Supermarkets, Inc., 50 AD3d 496, 497 [2008] [given right to reenter, liability must be based on a "significant structural or design defect that is contrary to a specific statutory safety provision]; *cf. Javier v Ludin*, 293 AD2d 448 [2002] [dangerous fluorescent light fixture hanging from ceiling not a significant structural defect]). Plaintiff's reliance on Administrative Code of City of NY §§ 27-756 and 27-772, which relate to the installation and operation of HVAC systems, and Reference Standards RS-13, §§ 2-2.3.1, 2-2.3.3, and 2-3.7.3(b), which relate to the fans and air inlets of HVAC systems, is misplaced; these provisions do not apply given no evidence that the fan was ducted or connected to the building's air distribution system (see RS-13 § 1.5, defining, *inter alia*, "air distribution system" and "air inlet"). Administrative Code §§ 27-127 and 27-128 are general safety provisions that cannot support a claim of liability against an out-of-possession landlord based on a significant structural defect (*Boateng v Four Plus Corp.*, 22 AD3d 323, 324 [2005]; *Reddy v 369 Lexington Ave. Co., L.P.*, 31 AD3d 732, 733 [2006]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: APRIL 28, 2009

CLERK

Andrias, J.P., Catterson, DeGrasse, Richter, JJ.

442N Dale Kleinser, Index 116844/06
Plaintiff-Respondent,

-against-

Mark Astarita, et al.,
Defendants-Appellants.

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Barry Jacobs of counsel), for appellants.

Dale Kleinser, respondent pro se.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered December 9, 2008, which, in an action for legal malpractice, granted plaintiff's motion to join additional parties, unanimously affirmed, with costs.

Plaintiff pro se served an amended complaint without leave of the court in which he named as additional defendants four partners of the law firm that had represented him in the underlying action. Defendants moved to dismiss the amended complaint on the ground that the newly added partners had no connection with the underlying action or contact with plaintiff. The motion court, after noting that the amended complaint was improperly served without court leave, dismissed it as against the newly added partners for failure to state a cause of action as against them "in their individual capacity." Several months later, plaintiff moved for leave to add the same four partners, submitting a proposed second amended complaint that was the same

as the first except that it added an allegation that the four were partners of the firm at the time of the alleged malpractice "and are each individually, jointly and severally, liable for the acts and omissions of their partners." The motion court characterized the claim against the proposed four new defendants as "colorable," citing Partnership Law § 26, and granted plaintiff leave to add them.

On appeal, defendants do not argue that the amended complaint fails to state a cause of action as against the four newly added defendants, but rather that the court, in permitting their joinder, violated the law of the case doctrine, exceeded its authority by exercising appellate jurisdiction to sua sponte vacate its own order, and erroneously granted what was actually an untimely motion to reargue. The law of the case doctrine, however, is not implicated because the court did not alter a ruling by another court of coordinate jurisdiction but rather its own ruling (*Wells Fargo Bank, N.A. v Zurich Am. Ins. Co.*, 59 AD3d 333 [2009]). "[E]very court retains continuing jurisdiction to reconsider its [own] prior interlocutory orders during the pendency of the action" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]), and may do so "regardless of statutory time limits concerning motions to reargue" (*id.*). Thus, even if plaintiff's motion for leave to add the four partners were a belated motion to reargue the prior order dismissing the action as against those

partners for failure to state a cause of action, the court had discretion to reconsider its prior order, sua sponte, and correct it. Such discretion was properly exercised here in view of plaintiff's pro se status.

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

ENTERED: APRIL 28, 2009

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, DeGrasse, JJ.

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[M-1254] In re Diane Word,
Petitioner,

Index 402060/08

-against-

Hon. Karen Smith, etc.,
Respondent.

Diane Word, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Charles F. Sanders
of counsel), for respondent.

Application for an order pursuant to article 78 of the Civil
Practice Law and Rules denied and the petition dismissed,
without costs or disbursements. All concur. No opinion. Order
filed.

Andrias, J.P., Saxe, Sweeny, Catterson, Moskowitz, JJ.

4787-

Index 122974/02

4788 John Melfi, etc.,
Plaintiff-Respondent,

-against-

Mount Sinai Hospital, et al.,
Defendants-Appellants,

New York City Police Department, et al.,
Defendants.

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York (Steven C. Mandell of counsel), for Mount Sinai Hospital, appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for New York City Health and Hospitals Corporation, appellant.

Tacopina, Seigel & Turano, P.C., New York (Brian King of counsel), for respondent.

Order, Supreme Court, New York County (Joan B. Carey, J.), entered May 5, 2008, modified, on the law, defendant Mount Sinai's motion to strike plaintiff's demand for punitive damages in connection with the loss of sepulcher claim granted, and otherwise affirmed, without costs.

Opinion by Catterson, J. All concur.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
APRIL 28, 2009

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

M-1725X Danzis v Chase Investment Services Corp.

Appeal withdrawn.

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

M-1728X Boudreau v Broadway Houston Mack Development, LLC;
Broadway Houston Mack Development, LLC v Cosner
Construction Corp. - IDI Construction Co., Inc.
- Estate of Boudreau

Appeals withdrawn.

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

M-1731X Lachs v Best Buy Stores, Co., Inc.
[And other actions]

Appeal withdrawn.

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

M-1727X Strickon v Kargo Global, Inc.

Appeal and cross appeal withdrawn.

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

M-1382 NYCTL 1999-1 Trust v 114 Tenth Avenue Assoc., Inc.
Motion deemed withdrawn.

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

M-1410 Mirvish v Mott - Estate of Lipchitz
Dismissal of appeal granted unless perfected for the
November 2009 Term, as indicated.

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

M-1621 People v Blackman, Anthony

M-1622 People v Bogan, Jeffrey

M-1626 People v Hayes, David, also known as
Hayes, David L.

M-1627 People v Herbin, Reginald

M-1628 People v Manners, Troy

M-1629 People v Miles, Terry

M-1630 People v Vargas, Luis

M-1631 People v Virdree, Michael

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

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

M-1625 People v Garcia, Miguel

Leave to prosecute defendant's appeal from judgment of Supreme Court rendered March 12, 2009 as a poor person granted, as indicated. Appeal taken by the People from order entered November 17, 2008, deemed withdrawn, as indicated.

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

M-1497 People v Hill, Demetrius

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

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

M-1536 People v Ward, Darrick

Leave to prosecute appeal as a poor person and related relief granted; Clerk of the Supreme Court shall expeditiously have made and filed with the criminal court two transcripts of the SORA hearing and other proceedings, as indicated.

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

M-1514 People v Davis, Jamel

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

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

M-1494 People v White, Jamel

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

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

M-1424 Kaiser v Raoul's Restaurant Corporation

Time to perfect appeal enlarged to the September 2009 Term.

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

M-1402 Jamal-Eddine v Federated Department Stores, Inc.;
Federated Department Stores, Inc. v Richemont
North America, Inc.

Appeals consolidated; time to perfect same enlarged to the September 2009 Term, as indicated.

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

M-1418 Barrett Japaning Inc. v Bialobroda

Time to perfect consolidated direct appeals enlarged to the September 2009 Term, as indicated. Should defendant fail to so perfect, plaintiff is directed to perfect the cross appeal as a direct appellant for the next available Term of Court.

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

M-1736 People v Roque, Apolinar

Counsel substituted.

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

M-1113 Shanker v 119 East 30th Ltd.

Stay granted, as indicated.

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

M-442 In the Matter of G., Albert Jr.; G., Giana;
G., Kristen; G., Pamela; G., Lindarose -
Administration for Children's Services

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

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

M-1192 In the Matter of R., Jazmyn; F., Kieasha -
Administration for Children's Services

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

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

M-580 William-Torand v Torand

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

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

M-1154 In the Matter of C., Robert V. v H., Polly V.

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

Tom, J.P., Nardelli, McGuire, Moskowitz, JJ.

M-814 Arts4All, Ltd v Hancock; Hancock v Ng - Osgood

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

Mazzarelli, J.P., Sweeny, Nardelli, Freedman, Richter, JJ.

M-1759 Simmons v Sacchetti - T.M.S. Management Company -
M-1754 Ambassador Fuel - Oil Burner Corp. - F & B Fuel Oil
Co., Inc.

Stay of trial granted.

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

M-1455 McClier Corporation v United States Rebar, Inc., also
known as U.S. Rebar - National Union Fire Insurance
Company of Pittsburgh, PA.

Time to perfect appeal enlarged to the September 2009
Term.

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

M-1471 Lazarus v Perez

Time to perfect appeal enlarged to the September 2009 Term.

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

M-1496 People v Hernandez, Carlos

Time to perfect appeal enlarged to the September 2009 Term.

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

M-1502 Correa v The City of New York - New York Yankees
[And three third-party actions]

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

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

M-1442 People v Spivey, Eric

Leave to prosecute appeal as a poor person and related relief granted; Clerk of the Supreme Court shall expeditiously have made and filed with the criminal court two transcripts of the SORA hearing and other proceedings, as indicated.

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

M-1057 Fertel v The Chelsea 19 Condominium, By its Board of
M-1091 Managers; The Chelsea 19 Condominium v Chelsea 19
Associates, a Partnership, by its partner Zweibon -
Zweibon

Dismissal of appeal denied (M-1057 and M-1091); notice
of appeal deemed timely filed.

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

M-1431 People v Mendez, Manuel

Time to perfect appeal enlarged to the November 2009
Term.

DeGrasse, J.

M-1659 People v Alexander, Paul

Reconsideration denied.

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

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

M-1559 Patricia Anne Jendraszek, admitted on 9-25-1989,
at a Term of the Appellate Division,
First Department

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

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

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

M-1697 Heidi Chang, admitted on 2-5-2001,
at a Term of the Appellate Division,
First Department

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

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

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

M-1765 Dorothy Ashley Doherty, admitted on 3-29-1976,
at a Term of the Appellate Division,
First Department

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

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

M-4715 In the Matter of Amir Rosenthal,
an attorney and counselor-at-law:

Respondent disbarred and his name stricken from the
roll of attorneys and counselors-at-law in the State of New York,
effective nunc pro tunc to February 8, 2007. Opinion Per Curiam.
All concur.

The Following Order Was Entered And Filed On April 23, 2009:

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

M-1663 American Express Travel Related Services Company, Inc.
v Gaal

CPLR 5704(a) relief denied.