

failed to advise him, either at plea or at sentence, that the term of incarceration would be followed by a five-year period of postrelease supervision, as mandated by statute (Penal Law § 70.45[1], [2]). He contends that such sentence does not comport with the 10-year term he was promised in exchange for his guilty plea (see *People v Catu*, 4 NY3d 242, 245 [2005]). However, defendant does not seek to vacate his plea but requests modification of his sentence to a five-year prison term followed by the mandated five-year period of postrelease supervision.

It is settled that a defendant's remedy for a *Catu* violation is withdrawal of the plea and restoration of the defendant's pre-agreement status (*People v Hill*, 9 NY3d 189, 191 [2007], *cert denied* 2008 WL 394022, 2008 US LEXIS 4138 [2008]). Where the defendant does not seek to vacate his plea and the sentence imposed is not in compliance with statutory requirements, the matter must be remanded for pronouncement of a legal sentence to correct the procedural error (*People v Sparber*, __ NY3d __, 2008 NY Slip Op 03946 [April 29, 2008]).

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

ENTERED: MAY 27, 2008

CLERK

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

2802 In re Jonathan C.,

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 (Marta Ross of counsel), for presentment agency.

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about August 16, 2006, which denied appellant's motion to vacate an order of disposition, same court and Judge, entered on or about April 22, 2005, which adjudicated him a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of sexual abuse in the first, second and third degrees, and forcible touching, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously reversed, as a matter of discretion in the interest of justice, without costs, the motion granted, the juvenile delinquency adjudication vacated, and the matter remanded for new fact-finding and dispositional hearings before a different Judge.

Appellant, whose order of disposition has already been affirmed by this Court (29 AD3d 386 [2006]), moved, pursuant to

Family Court Act § 315.2 and § 355.1, to vacate the order of disposition and dismiss the petition on the ground that, after a separate, subsequent fact-finding hearing, the same Judge who presided over appellant's hearing dismissed the petition against the three juveniles with whom appellant allegedly acted in concert in sexually abusing the victim. While it is generally no defense to a prosecution based on accessorial liability that a co-actor "has not been prosecuted for or convicted of any offense based upon the conduct in question, or has previously been acquitted thereof" (Penal Law § 20.05[2]; see also *Matter of Khaliek W.*, 193 AD2d 683, 684 [1993]), we find, under the facts presented herein, that a substantial change in circumstances exists and that appellant should be granted a new fact-finding hearing at which he would be given the opportunity to elicit impeaching testimony introduced at the other three juveniles' hearing (see Family Court Act § 355.1).

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

ENTERED: MAY 27, 2008

CLERK

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

3019 Cary Hershkowitz,
Plaintiff-Respondent,

Index 104436/06

-against-

New York City Department of Education,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for appellant.

Wolf & Wolf, LLP, Bronx (Edward H. Wolf of counsel), for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered January 8, 2007, which, to the extent appealed from as limited by the briefs, denied defendant the New York City Department of Education's (DOE) motion to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

In 1999, DOE commenced a disciplinary proceeding pursuant to Education Law § 3020-a, charging plaintiff, a tenured teacher, with 12 specifications of sexual misconduct and other inappropriate interactions with respect to several students. Plaintiff moved to suppress his written confession, in which he admitted to sending "many" instant messages to a female student explicitly discussing and soliciting various sexual acts. The hearing officer suppressed the statement as violative of the

collective bargaining agreement between DOE and the United Federation of Teachers (UFT), and thereafter dismissed all the charges against plaintiff and ordered him reinstated. Supreme Court vacated the determination and directed a new hearing, at which the written statement was to be considered; we affirmed (*Board of Educ. of City of N.Y. v Hershkowitz*, 308 AD2d 334 [2003], *lv dismissed* 2 NY3d 759 [2004]).

Following the new hearing, at which the written statement was admitted and plaintiff declined to testify, the hearing officer sustained six of the charges, and as a penalty imposed a one-year suspension without pay. DOE commenced a special proceeding pursuant to CPLR article 75 and Education Law § 3020-a, challenging the penalty as inadequate. Supreme Court granted DOE's petition to the extent of remanding for a new hearing before a different hearing officer. A reading of the detailed, 15-page decision reveals that Supreme Court upheld the factual determination that plaintiff was guilty of the six sustained charges and remanded only on the issue of the penalty. Supreme Court ruled that the penalty of a one-year suspension was "totally irrational" and "against New York's strong public policy of protecting children," in that it:

"not only defies logic given the seriousness of [plaintiff's] admitted sexual misconduct . . . , but it is offensive to the disciplinary process negotiated by [DOE] and [UFT]. Indeed, to suspend [plaintiff] for one year actually tells him and everybody else that these perverted and insidious acts are not serious. Importantly, it also tells [the female student] and her mother that [the student's] resolve and her mother's courage used in withstanding and reporting [plaintiff's] persistent and improper advances were for naught. In fact, [the student's] resolve is being used against her by those responsible for ensuring her safety as an attempt to minimize the heinous nature of [plaintiff's] acts . . . [T]his Court chooses to call this teacher's acts for what they are -- an abuse of trust of the most serious kind

"To be sure, the fact that physical contact apparently did not occur here . . . is a tribute to the student's resolve, not [plaintiff's] exercise of restraint. For his part, it is clear that he tried

"Last, considering the seriousness of [plaintiff's] conduct, a one year suspension is not justified by the fact that [he] had a clean record prior to this incident He not only tried extremely hard to seduce [the student] into a clandestine and inappropriate relationship, but systematically dismantled the systems a parent puts in place to protect her daughter, namely honesty and open communication."

The new hearing officer misconstrued the order as directing a de novo hearing on the merits of the charges as well as the appropriate penalty. The parties relied on the record established at the prior hearings, and the hearing officer found plaintiff culpable of the same six charges previously sustained, and directed him to be dismissed from service.

Thereafter, plaintiff commenced this action to recover back

pay and benefits for the period of time between the award suspending him for one year, which was annulled, and the final order terminating his employment.

The complaint should be dismissed for failure to state a cause of action, since the matter was remanded solely for a redetermination of the penalty and plaintiff ultimately received a harsher penalty (see *Matter of Lugo v City of Newburgh*, 209 AD2d 414 [1994]; *Matter of DeMartino v Meehan*, 149 AD2d 703, 704-705 [1989]). The fact that the second hearing officer erroneously believed that he was to make a redetermination as to the charges is immaterial.

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

ENTERED: MAY 27, 2008

CLERK

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

3040-

3040A Kermanshah Oriental Rugs, Inc.,
Plaintiff-Appellant,

Index 602070/04

-against-

Parivas Latefi, et al.,
Defendants-Respondents.

Harvard Hollenberg, New York, for appellant.

Allen M. Schwartz, New York, for respondents.

Judgment, Supreme Court, New York County (John E. H. Stackhouse, J.), entered May 3, 2007, after a nonjury trial, dismissing the complaint and awarding defendants the principal sum of \$11,200 on their counterclaim, unanimously reversed, on the law and the facts, without costs, plaintiff awarded \$16,000, with statutory interest from December 31, 2001, on its claim for goods sold and delivered, and the counterclaims dismissed. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered on or about January 22, 2007, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Initially, we find that the trial court erred when it dismissed plaintiff's claims on the ground that the agreements herein ran afoul of the statute of frauds (General Obligations Law § 5-701[a]), which applies only to those agreements which, by their terms, "have absolutely no possibility in fact and law of

full performance within one year" (*D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]; see *Foster v Kovner*, 44 AD3d 23, 26 [2007]). In this matter, no such terms existed and the agreements between the parties were certainly capable of being performed within the statutory time frame.

We also find unavailing plaintiff's claim that a new trial is warranted on the ground that the decision and judgment failed to state the essential facts on which they are based for, although brief, the trial court's decisions set forth sufficient findings of fact and conclusions of law to satisfy the requirements of CPLR 4213(b). In any event, the record, which encompasses the entire trial transcript and exhibits, is adequate enough to allow this Court to conduct an independent factual review and make the requisite findings (*Hugh O'Kane Elec. Co., LLC v MasTec N. Am., Inc.*, 45 AD3d 413, 414 [2007]; *Marks v Macchiarola*, 250 AD2d 499 [1998]).

It is well settled that the fact-finding determination of a trial court should not be disturbed, particularly where such determination rests, in whole or in part, upon the credibility of witnesses (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; *Bragdon v Bragdon*, 23 AD3d 203, 204 [2005]).

Bearing the foregoing in mind, we decline to disturb the trial court's findings in favor of defendants with regard to those consignments where defendants claimed, and plaintiff

denied, that plaintiff had accepted reduced payments for the delineated items. With respect to two of the consignments, however, dated January 22, 2002 and May 22, 2002, both of which involved \$8,000 items, the documentary evidence indicates that those items were delivered to defendants but never paid for.

Finally, the court erred in awarding \$8,000 on a counterclaim since that claim sought damages for services rendered to one of plaintiff's partners in his individual capacity, even though he is not a named party (*Michelman-Cancelliere Iron Works, Inc. v Kiska Const. Corp-USA*, 18 AD3d 722, 723 [2005]; *Corcoran v National Union Fire Ins. Co. of Pittsburgh*, 143 AD2d 309, 311 [1988]). Moreover, there was no basis for the additional award of \$3,200 for payments allegedly not credited to defendants, especially in the absence of any counterclaim for such relief.

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

ENTERED: MAY 27, 2008

CLERK

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

3168 Douglas Lackow,
Petitioner-Respondent,

Index 103798/06

-against-

The Department of Education (or "Board")
of the City of New York, et al.,
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer
of counsel), for appellants.

Gregory L. Hawthorne, Brooklyn, for respondent.

Order, Supreme Court, New York County (Marilyn Shafer, J.),
entered January 30, 2007, which, to the extent appealed, granted
the petition to the extent of vacating certain determinations of
teacher misconduct and remanded for imposition of a lesser
penalty than termination of employment, unanimously reversed, on
the law, without costs, the determinations reinstated with
respect to specifications III(c), (d), (g), (j), (k) and (l), the
cross motion to dismiss granted, and the petition dismissed.

At issue in this matter, brought pursuant to CPLR 7511 and
7803 and Education Law § 3020-a(5), are Supreme Court's vacatur
of findings of guilt on several specifications filed against the
petitioner, Douglas Lackow, by respondent Department of Education
of the City of New York (DOE) and its remand to the hearing
officer for reconsideration of the penalty to be imposed by the
DOE.

On December 3, 2004, petitioner, then employed by DOE as a tenured biology teacher, became the subject of an investigation of the Special Commissioner's Office for Investigation based on an incident in which a student reported to the Assistant Principal that she had yelled out "Lackow sucks," and petitioner responded, "No, you suck, well that's what it says in the boys' bathroom."

In response to this reported incident, a DOE Special Investigator interviewed the Principal, Assistant Principal, seven students, a teacher and a teaching assistant. The investigation unearthed a number of complaints about petitioner's use of sexual innuendo in high school classes he taught, and the First Deputy Commissioner prepared a report concluding that the claims were substantiated and that termination was proper. In or about February 2005, petitioner was removed from the classroom and reassigned to a DOE facility in Staten Island.

On or about April 19, 2005, DOE preferred disciplinary charges, pursuant to Education Law § 3020-a, consisting of 16 specifications. DOE alleged that petitioner had "engaged in insubordination, sexual harassment, used inappropriate language and engaged in conduct unbecoming a teacher." A compulsory arbitration hearing was held pursuant to Education Law § 3020-a. Five of the specifications were withdrawn before the hearing and two were dismissed by the hearing officer in a decision dated

February 24, 2006. The remaining nine specifications were sustained, and a penalty of discharge was imposed.

Petitioner commenced this proceeding seeking vacatur of the hearing officer's findings or, in the alternative, a penalty short of termination. DOE cross-moved to dismiss the proceeding and to confirm the arbitration determination. Supreme Court vacated six of the specifications, sustained three others, and remanded the matter to the hearing officer to reconsider the penalty because it found the penalty of dismissal so disproportionate to petitioner's conduct as to shock the court's sense of fairness and constitute an abuse of discretion. We reverse, reinstate the hearing officer's findings and recommended penalty, and grant the cross motion to dismiss the petition and confirm the determination.

Initially, as noted, three of the specifications sustained by the hearing officer were not vacated by the court. The first was Specification I(a), which alleged that petitioner had made a comment about the color of a student's underwear. In Specification II, petitioner was charged with saying, in response to a female student's comment that "[petitioner sucks]," "No, you suck, well that's what it says in the boys' bathroom." The third charge, Specification III(a), alleged that, while teaching with a model of female reproductive organs, petitioner said to a male student words to the effect "that [the student] would never see

one, so enjoy it, referring to a woman's vagina." Although the court did not disturb those findings, it concluded that, within the context in which each of these comments was made, the language, while inappropriate, did not justify the penalty of dismissal, which the court found to be disproportionate to the offenses and shocking to its sense of fairness.

The six other specifications that the hearing officer sustained, but which the court vacated, reflect a similar pattern of inappropriate comments. In Specification III(c), petitioner was charged with saying to a student words to the effect "I don't want to hear stories of you with your legs up in the air." The court found that the comment was made in the context of a reprimand to a female student who was describing to a fellow student how "[a] boy put my legs in the air like this" and, then, for dramatic effect, actually lifted her legs up over her desk and then into the air. The court concluded that under the circumstances the comment did not constitute language or behavior unbecoming a teacher without explaining why the language used by petitioner was appropriate, especially when he was admonishing a teenage girl.

In Specification III(d), petitioner was charged with saying, in the course of a conversation about masturbation, words to the effect "that there are some people in this class that would never leave their rooms." The court found that the comment did not

constitute language unbecoming a teacher since it was made during a classroom discussion of safe sex, and observed that petitioner testified that he had actually said, "there are people who will misunderstand this information and they may not leave the house." The court's acceptance of petitioner's explanation that this was a harmless joke is inconsistent with the repetitive pattern of petitioner's sexually-laced comments to a gathering of impressionable adolescents.

Specification III(g) charged petitioner with talking to students about how many times he ejaculates. In vacating the finding of guilt with regard to this specification, the court found that there was no evidentiary support for the hearing examiner's conclusion, despite the testimony of a paraprofessional that she heard petitioner discuss the number of times he ejaculated while masturbating.

In Specification III(j), petitioner was charged with talking to the students about having sex with animals. Petitioner testified that, in a class on human sexual reproduction, one of the students asked if sex between an animal and a human being would result in a "half animal, half human." As a result, petitioner testified, he entered into a discussion of bestiality, "a sexual disorder in which people want to have sex with animals." He claimed that the exchange was limited to the scientific aspects of the process and the genetic consequences of

such intercourse. The court found that this colloquy did not constitute conduct unbecoming a teacher, without elaborating on how the subject of, as the court phrased it, "cross-fertilization" can also properly encompass a discussion of bestiality. The court also ignored testimony that petitioner was overheard saying "animals don't enjoy having sex and that's why they make strange noises."

Specification III(k) charged petitioner with talking to students about necrophilia. Petitioner testified that he discussed that subject only in response to students' questions. The hearing officer rejected petitioner's explanation, stating that the "suggest[ion] that discussion[] on [the] subject[] [of] necrophilia . . . [was an] appropriate or legitimate subject[] of discussion is beyond comprehension." The court, however, found that the "only" evidence supporting this specification was testimony from a teacher that she overheard petitioner telling a group of students about a man who was arrested for having sex with a dead body in the morgue of an upstate college town. That "only" one witness provided testimony supporting this specification was an insufficient basis upon which to disturb the findings of the hearing officer; the testimony provided a rational basis for the hearing officer's conclusion that petitioner discussed the subject and that the discussion was inappropriate.

In the last charge, Specification III(1), petitioner was charged with talking to students about women having multiple orgasms. The court vacated the finding of guilt, observing that petitioner testified that the issue was raised by a student during a discussion of the male and female reproductive systems. When the student queried as to why men cannot have multiple orgasms, petitioner claimed that he explained the biological reasons, i.e., that a certain period of time is required for the production of male sperm after ejaculation. In vacating the finding the court stated, "[DOE] has shown no rational basis for why class discussion of orgasm and ejaculation constitutes language unbecoming a school teacher in the context of instruction on human sexual reproduction." Yet, as the Assistant Principal testified, the course was designed to prepare students for the Regents biology exam, with limited material on human reproduction.

Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. Under such review an award may only be vacated on a showing of "misconduct, bias, excess of power or procedural defects" (*Austin v Board of Educ. of City School Dist. of City of N.Y.*, 280 AD2d 365 [2001]). Nevertheless, where the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties

have submitted to voluntary arbitration (see *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]; *Cigna Prop. & Cas. v Liberty Mut. Ins. Co.*, 12 AD3d 198, 199 [2004]). The determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78 (*Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 186 [2002]). The party challenging an arbitration determination has the burden of showing its invalidity (*Caso v Coffey*, 41 NY2d 153, 159 [1990]).

Here, the record is clear that petitioner made the statements alleged in the specifications. Although the court found that some of the statements were contextually inoffensive, that is not a proper basis for vacating the findings that they had been made. Petitioner was charged with making the statements, and the record supports the hearing officer's conclusions that he made them. Whether the making of the statements, individually or in the aggregate, justified petitioner's removal is a separate issue.

Not only did the court err in seeking to find justifications for the statements, in at least one instance it paid no heed to highly relevant testimony. The court found that petitioner did not make the statement concerning the number of times he ejaculated by referencing one witness's testimony, but apparently

overlooked the testimony of another witness clearly stating that she heard him discussing his ejaculations.

Moreover, the court suggested that some of the students were disciplinary problems, and thus their credibility was suspect. A hearing officer's determinations of credibility, however, are largely unreviewable because the hearing officer observed the witnesses and was "able to perceive the inflections, the pauses, the glances and gestures -- all the nuances of speech and manner that combine to form an impression of either candor or deception" (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). The record does not support the inference that the witnesses upon whose testimony the hearing officer relied were incredible as a matter of law. Thus, it was improper for the court to credit petitioner's testimony to the exclusion of the accounts given by the other witnesses.

Furthermore, petitioner was teaching a biology class, and was not a student counselor empowered to give advice on teenage sexuality. That certain questions would arise in a biology class that had some relationship to the course but were not part of the curriculum is understandable. However, petitioner had been warned by his Assistant Principal in conversations and writing about the inappropriateness of his behavior on at least three prior occasions. His choice of language, in any event, is inexcusable. Petitioner's argument that he had not been warned

of the possibility of dismissal rings hollow. Even without a warning about the possibility of dismissal, certain conduct, such as petitioner's, is clearly unacceptable. Moreover, being admonished not to repeat prior behavior patterns was sufficient warning.

The standard for reviewing a penalty imposed after a hearing pursuant to Education Law § 3020-a is whether the punishment of dismissal was so disproportionate to the offenses as to be shocking to the court's sense of fairness (*Matter of Harris v Mechanicville Cent. School Dist.*, 45 NY2d 279, 285 [1978]; *Matter of Pell v Bd. of Educ.*, 34 NY2d 222 [1974]).

In view of petitioner's proven misconduct, and that he had three times been previously warned in writing about the inappropriateness of his behavior, the penalty of dismissal does not shock the conscience. Of particular concern is the repetitive nature of petitioner's misconduct. Petitioner continued in a pattern of conduct that was clearly irresponsible and inappropriate within the classroom setting. Discussing his own ejaculations, admonishing a student about putting her legs in the air, telling another student that he should take a good look at a diagram of a woman's vagina because he will not see one otherwise, talking about the color of a student's underwear, and responding to a student's inappropriate comment by remarking about seeing her name on bathroom walls, constitute more than

isolated, aberrant behavior. Rather, such conduct is indicative of a continued pattern of offensive behavior that reflect an inability to understand the necessary separation between a teacher and his students.

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

ENTERED: MAY 27, 2008

CLERK

(see e.g. *People v Vasquez*, 41 AD3d 111 [2007], lv dismissed 9 NY3d 870 [2007]).

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

ENTERED: MAY 27, 2008

CLERK

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

3721-
3721A-
3721B

Hannah Goldstein,
Plaintiff,

Index 24388/88

Roberta Schreiber Ulmer,
Plaintiff-Appellant,

-against-

Arthur I. Winard,
Defendant-Respondent,

Marvin Rosenblatt, et al.,
Defendants.

Guzov Ofsink, LLC, New York (Damien Matthew Bosco of counsel),
for appellant.

Arthur I. Winard, P.C., New York (Mark L. Rosenfeld of counsel),
for respondent.

Judgment, Supreme Court, New York County (Rolando T. Acosta,
J.), entered July 31, 2007, dismissing the complaint as against
defendant Winard, unanimously affirmed, without costs. Appeals
from orders, same court and Justice, entered April 13, 2007, and
October 2, 2007, unanimously dismissed, without costs.

The action was properly dismissed for failure to prosecute,
plaintiffs having failed to show a reasonable excuse for not
having served and filed a note of issue within 90 days of
defendant Winard's CPLR 3216 demand, or a reasonable excuse for
the extensive past delay in prosecuting this action (*Baczkowski v
Collins Constr. Co.*, 89 NY2d 499 [1997]). Since Winard's service

of the 90-day demand in September 2006 for resumption of prosecution (CPLR 3216[b][3]), plaintiff Ulmer's attorney has sought to withdraw from the case, and neither plaintiff has taken any steps to resume prosecution or file a note of issue. None of the papers submitted in response to Winard's motion offered an adequate explanation for the more than 15 years of delay in prosecuting this action.

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

ENTERED: MAY 27, 2008

CLERK

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

3722 In re Kavon B.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

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

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

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about October 3, 2007, which adjudicated appellant a person in need of supervision, upon a fact-finding determination that appellant committed acts, which, if committed by an adult, would constitute criminal sexual act in the first degree and sexual misconduct, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's motion to dismiss the petition in furtherance of justice, and instead placed him on probation while substituting a person in need of supervision adjudication for appellant's juvenile delinquency adjudication. In light of the seriousness of the underlying incident, appellant's need for therapy, and the unlikelihood of his receiving proper therapy without court

intervention, this disposition was the least restrictive alternative consistent with appellant's needs (see e.g. *Matter of Jonaivy Q.*, 286 AD2d 645 [2006]).

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

ENTERED: MAY 27, 2008

CLERK

that the fire had not spread because of the absence of a self-closing door (see *Graham v New York City Hous. Auth.*, 42 AD3d 323 [2007], *lv denied* 9 NY3d 816 [2007]).

Plaintiffs' opposition failed to raise a triable issue of fact that the fire had been caused by some reason other than a compromised extension cord. The affidavits from plaintiffs' experts were not based on facts in the record or personally known to the expert witnesses (see *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714-715 [2005]), but largely consisted of unsupported and conclusory speculation, which is insufficient to defeat summary judgment (see *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]; *Butler-Francis*, 38 AD3d at 434). Furthermore, the motion court appropriately rejected plaintiffs' theories of liability that had not been set forth in the notice of claim (see *Chieffet v New York City Tr. Auth.*, 10 AD3d 526, 527 [2004]).

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

ENTERED: MAY 27, 2008

CLERK

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

3724 Frank Gabrielli, et al., Index 107333/03
Plaintiffs-Appellants,

-against-

Dobson & Pinci, etc., et al.,
Defendants,

Frank Ferrante, etc., et al.,
Defendants-Respondents.

Sandra Ruth Schiff, New York, for appellants.

Sankel, Skurman & McCartin, LLP, New York (Claudio J. Dessberg of counsel), for Frank Ferrante, respondent.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Peter D. Rigelhaupt of counsel), for Jerry Lefkowitz, respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 25, 2007, which granted defendant Ferrante's motion for summary judgment dismissing the complaint against him and granted defendant Lefkowitz's motion pursuant to CPLR 3211(a) (7) to dismiss the third and fourth causes of action in the separate amended complaint against him, unanimously affirmed, without costs.

In this legal malpractice action, plaintiffs cannot show that defendant Ferrante's failure to comply with a condition precedent under plaintiffs' contract was the cause of any loss (see *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]), since Ferrante did not prevent them from obtaining the same recovery at a later juncture. Nor can plaintiffs show that

Ferrante failed to submit timely a notice of claim to the architect with regard to a separate claim; its timeliness was not before the Second Department when it denied the motion to compel arbitration of said claim (*Matter of Anagnostopoulos v Union Turnpike Mgt. Corp.*, 300 AD2d 393 [2002]).

As to defendant Lefkowitz, the alleged failure to extend a mechanic's lien filed by his predecessor was not negligent because he was retained after it had expired as a matter of law. The alleged failure to commence or advise of the availability of a plenary action pursuant to General Business Law § 399-c was not negligent since the statute's bar of mandatory arbitration of certain claims was intended to benefit consumers, not plaintiffs contractors (see *Ragucci v Professional Constr. Servs.*, 25 AD3d 43 [2005]). Even if, *arguendo*, plaintiffs fall within the protective ambit of the statute, any plenary action would have been barred by the condition precedent, which was also applicable to litigation. Moreover, Lefkowitz's failure to anticipate the 2005 appellate ruling in *Ragucci*, upon which plaintiffs rely (*id.*), would not have constituted a departure from the professional standard of care (see *Darby & Darby v VSI Intl., Inc.*, 95 NY2d 308, 314 [2000]).

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

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

ENTERED: MAY 27, 2008

CLERK

court properly considered, among other things, reliable information as to the large amount of cocaine that defendant possessed at the time of his arrest, which would constitute a class A-I felony even under the present law. We have considered and rejected defendant's remaining claims, including his constitutional argument (*see People v Alea*, 46 AD3d 398 [2007], *lv dismissed* 9 NY3d 1030).

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

ENTERED: MAY 27, 2008

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credibility of the witnesses" (*Universal Leasing Servs. v Flushing Hae Kwan Rest.*, 169 AD2d 829, 830 [1991]), Appellate Term properly determined that Civil Court's findings were incompatible with any fair interpretation of the evidence. "Where, as here, a lease contains a clause requiring modification of its terms to be in a writing signed by the landlord, oral modification is generally precluded" (*Aris Indus. v 1411 Trizechahn-Swig*, 294 AD2d 107 [2002]; see General Obligations Law § 15-301[1]). The evidence at Civil Court established that despite several discussions and the exchange of a proposed extension of the lease, the parties, as in *Aris*, ultimately did not reach an agreement. Moreover, as Civil Court noted, the rent to be paid during the holdover period -- an essential term of a lease agreement (see *Martin Delicatessen v Schumacher*, 52 NY2d 105, 109-110 [1981]) -- was left unresolved. Appellate Term properly rejected Bloomberg's estoppel claim since, under the circumstances, there could have been no reasonable reliance on the alleged oral promise and no unconscionable injury (*Aris*, 294 AD2d at 107).

Appellate Term also properly determined there was no alleged oral license agreement since, as noted above, an essential term of the alleged agreement was undecided (see *Marinas of the Future v City of New York*, 87 AD2d 270, 277 [1982], appeal dismissed 57 NY2d 775 [1982]), and the record indicates that the parties were

negotiating a lease extension to grant Bloomberg exclusive possession of the premises, not just use or occupancy (see e.g. *American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1994]).

The liquidated damages clause, providing for two times the existing rent in the event of a holdover, was not an unenforceable penalty. Bloomberg failed to establish that damages could be anticipated in 1995, when the lease was executed (see *Parsons & Whittemore v 405 Lexington*, 299 AD2d 156 [2002], *lv denied* 99 NY2d 650 [2003]), or that the amount fixed was “plainly or grossly disproportionate to the probable loss” (*Truck Rent-A-Center v Puritan Farms 2nd*, 41 NY2d 420, 425 [1977]).

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(CPL 160.50; see *Matter of Harper v Angiolillo*, 89 NY2d 761, 767 [1997]).

Even assuming the 911 recordings were subject to the sealing statute, "the mere reception of erroneously unsealed evidence at petitioner's disciplinary hearing does not, without more, require annulment of [the agency's] determination" (*Matter of Charles Q. v Constantine*, 85 NY2d 571, 575 [1995]). The evidence independent of the 911 tapes was sufficient to establish that petitioner violated the Housing Authority's policy, and thus that agency's determination should be confirmed.

The penalty of dismissal does not shock the conscience (see *Matter of Kelly v Safir*, 96 NY2d 32, 39-40 [2001]).

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

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interest of justice. As an alternative holding, we also reject them on the merits (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). Nothing in the summation deprived defendant of a fair trial.

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

3731 Benjamin Abraham, Index 119012/03
Plaintiff-Appellant,

-against-

City of New York,
Defendant,

104 Second Realty, LLC, et al.,
Defendants-Respondents.

Parker Waichman Alonso LLP, Great Neck (Ronni Robbins Kravatz of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Terry Holmes-Nelson of counsel), for 104 Second Realty, LLC, respondent.

Cartafalsa, Slattery, Turpin & Lenoff, Tarrytown (Regina M. Coady of counsel), for Ming Kam Cheong and Bamboo House Restaurant, respondents.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered February 26, 2007, which granted defendants-respondents' respective motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to summary judgment, and the evidence offered by plaintiff in opposition to defendants' motions failed to raise a triable issue of fact as to whether defendants engaged in snow removal on

the public sidewalk where plaintiff slipped and fell (see *Stein v State St. Bank & Trust Co. of Conn. N.A.*, 279 AD2d 427 [2001]).

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People v Birth, 49 AD3d 290 [2008]; *People v Smith*, 309 AD2d 608 [2003], *lv denied* 1 NY3d 580 [2003]; *People v Berrier*, 223 AD2d 456 [1996], *lv denied* 88 NY2d 876 [1996]).

We perceive no basis for reducing the sentence.

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

3733 Soterios (Steve) Tzolis, et al., Index 104022/07
 Plaintiffs-Appellants,

-against-

RB Estates LLC, et al.,
Defendants-Respondents.

Feldman Weinstein & Smith LLP, New York (Eric Weinstein of
counsel), for appellants.

Herrick, Feinstein LLP, New York (Arthur G. Jakoby of counsel),
for RB Estates LLC, respoondent.

Loeb & Loeb LLP, New York (David M. Satnick of counsel), for 316
Pennington LLC, respondent.

Order, Supreme Court, New York County (Herman Cahn, J.),
entered January 25, 2008, unanimously affirmed for the reasons
stated by Cahn, J., without costs and disbursements. No opinion.
Order filed.

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

3735N Janet Wiebusch, Index 101526/03
Plaintiff-Respondent,

-against-

Bethany Memorial Reform Church,
Defendant,

Marble Collegiate Church,
Defendant-Appellant.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of
counsel), for appellant.

Kahn Gordon Timko & Rodriques, P.C., New York (Nicholas I. Timko
of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.),
entered December 4, 2007, which, upon plaintiff's motion to
vacate the note of issue and certificate of readiness in this
action for personal injuries, adjourned the trial date 10 weeks,
directed the parties to conduct limited additional discovery, and
denied the cross motion of defendant Marble Collegiate Church
(Marble) to dismiss the complaint for failure to prosecute,
unanimously affirmed, without costs.

The illness of plaintiff's prior attorney, which developed
following the filing of the note of issue and certificate of
readiness and resulted in plaintiff being unable to obtain the
return of her complete case file, constitutes unusual or
unanticipated circumstances warranting the relief provided (see
22 NYCRR 202.21[d]). Contrary to Marble's contention, plaintiff

was not required to demonstrate the merits of her case in furtherance of the motion (*id.*), and the record shows that Marble is not prejudiced by the court's determination (see *Acevedo v New York City Tr. Auth.*, 294 AD2d 310 [2002]; *Urena v Bruprat Realty Corp.*, 179 AD2d 505 [1992]).

THIS CONSTITUTES THE DECISION AND ORDER
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Andrias, J.P., Saxe, Sweeny, Moskowitz, DeGrasse, JJ.

3736N-

3737N Famo, Inc.,
Plaintiff-Appellant,

Index 109028/07

-against-

Green 521 Fifth Avenue LLC,
Defendant-Respondent.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 25, 2007, which denied plaintiff's motion for a preliminary injunction, and order, same court and Justice, entered January 15, 2008, which, upon granting plaintiff's motion for reargument, adhered to the prior ruling and lifted all stays, unanimously affirmed, without costs.

As part of its lobby renovation, defendant landlord planned to install a floating wall near the entrance to plaintiff tenant's art gallery, which would interfere with certain sight lines. In seeking a preliminary injunction, plaintiff failed to meet its burden of demonstrating a likelihood of success on the merits, irreparable injury unless the relief sought is granted, and a balancing of the equities in its favor (see *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]). The unambiguous language of the lease provided that the demised space was to be used solely

as a gallery for the benefit of the building tenants. The court properly found that the loss of visibility from certain vantage points did not render the space unusable for its purpose. Furthermore, any loss would be compensable by monetary damages (see *Credit Index v RiskWise Intl.*, 282 AD2d 246 [2001]).

We have considered the balance of plaintiff's argument and find it without merit.

THIS CONSTITUTES THE DECISION AND ORDER
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THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
MAY 27, 2008

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

M-2480X Stewart v New York City Transit Authority
 Appeal withdrawn.

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

M-2546 People v Anthony, Michael
 Appeal withdrawn.

Lippman, P.J., Tom, Gonzalez, Buckley, Renwick, JJ.

M-2085 Hernandez, also known as Soto v Estate of Ziess
M-2310
 Appeal dismissed unless perfected for the October 2008
Term, as indicated. Enlargement of time to perfect appeal
granted to said Term.

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

M-1604A In the Matter of McQ. II, Mark Anthony, also known as
 McQ., Mark, also known as McQ., Marc and C., Tyrhiek
 Davon, also known as C., Tyrhiek - SCO Family of
 Services

 Motion deemed withdrawn. Clerk directed to calendar
appeal in the next available Term of Court. Order of this Court
entered May 6, 2008 (M-1604) recalled and vacated.

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

M-2218 People v Alston, Donnell

M-2219 People v Cajigas, Norman

M-2220 People v Harry, Travis

M-2221 People v Hudson, Ronald

M-2222 People v Rodriguez, Francisco

M-2223 People v Sanders, David Jr.

M-2224 People v Saunders, Louis

M-2225 People v Valdivia, Mario

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

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

M-1603 In the Matter of F., Bernadette v S., Richard

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

Lippman, P.J., Tom, Gonzalez, Buckley, Renwick, JJ.

M-2177 Romero v Twin Parks Southeast Houses Inc.

Time to perfect appeal enlarged to the October 2008 Term.

Lippman, P.J., Tom, Gonzalez, Buckley, Renwick, JJ.

M-2216 In the Matter of L., Anita v N., Damon

Enlargement of record on appeal granted, as indicated.

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

M-1898 People v Hyatt, Anthony, also known as Layten, Hyatt,
also known as Hyatt, Layten Garth Anthony

Reargument denied.

Lippman, P.J., Mazzarelli, Williams, Sweeny, Acosta, JJ.

M-2277 Pagliaro v The City of New York - Judlau Contracting,
Inc.

Stay of trial denied.

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

M-2110 CDR Crèances, S.A. v Cohen, also known as Levy
M-2111 (And another action)

Motions dismissed.

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

M-1858 Private Capital Group LLC v Private Capital
M-1859 Management, LLC - Donovan - Chalavoutis - Riley
M-1913 (And other actions)

Stay granted to the extent of continuing the interim relief granted by order of a Justice of this Court dated April 7, 2008, on condition that appellants perfect appeals for the September 2008 Term, as indicated. Motions otherwise denied.

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

M-1772 Private Capital Group LLC v Private Capital
Management, LLC - Donovan
(And another action)

Time to perfect appeal enlarged to the September 2008
Term; Clerk directed to calendar appeal for hearing together with
related appeals from order entered on or about April 4, 2008 (See
M-1858/M-1859/M-1913 entered May 6, 2008 [Corrected Order May 27,
2008]).

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

M-1419 In the Matter of B., Ibrahim, also known as B., Ibrahim
Majeed; M., Yusef, also known as A-M., Yusef Shaheed;
and A-M., Hajja, also known as A-M., Shahidah - Family
Support Systems Unlimited, Inc.

Appeal dismissed unless perfected for the September
2008 Term, as indicated.

Tom, J.P., Friedman, Nardelli, Buckley, Renwick, JJ.

M-2274 Meza v Proud Transit, Inc.

Stay granted on condition appeal perfected for the
September 2008 Term, as indicated.

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

M-2068 Dodson v Dodson

Appeal deemed filed for the September 2008 Term.

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

M-2050 Joseph Chai Corp. v Gemological Institute of America
(And a third-party action)

Appeals consolidated; time to perfect same enlarged to
the November 2008 Term.

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

M-2288 In the Matter of Go West Entertainment, Inc. v New York
State Liquor Authority

Clerk directed to maintain proceeding on this Court's
calendar for the September 2008 Term.

Friedman, J.P., Williams, Catterson, Acosta, JJ.

M-2091 BDP International Finance Corporation v Castillo

Appeal from order entered on August 22, 2006 withdrawn;
consolidation of remaining appeals denied; appeals taken from
orders entered April 25, 2007, September 11, 2007 and
December 11, 2007, dismissed, as subsumed by plaintiffs' appeal
taken from order and judgment (one paper) entered on or about
March 6, 2008; enlargement of record on appeal denied.

Friedman, J.P., Williams, Catterson, Acosta, JJ.

M-2262 Children's Corner Learning Center v A. Miranda
Contracting Corp.; Henry Loheac, P.C. v George E.
Berger & Associates, LLC

Time to perfect appeal enlarged to the October 2008
Term.

Friedman, J.P., Williams, Catterson, Acosta, JJ.

M-2276 In the Matter of W., Veronica - Guiden - Floyd

Time to perfect appeal enlarged to the November 2008
Term.

Gonzalez, J.P., Catterson, McGuire, Moskowitz, JJ.

M-1895 People v Natt, David

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

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

M-2000 Wells Fargo Bank, N.A. v Carney - New York City Parking
Violations Bureau

New York City Commissioner of Finance and the New York
City Department of Finance are directed to pay defendant-
appellant Carney all monies due her, as indicated.

Tom, J.

M-1299 People v Oliveri, John

Leave to appeal to this Court denied.

Gonzalez, J.

M-6505 People v Kelly, Thomas

Leave to appeal to this Court denied.

Gonzalez, J.

M-6525 People v Roldan, Luis
Leave to appeal to this Court denied.

Gonzalez, J.

M-6701 People v Bell, Julian
Leave to appeal to this Court denied.

Nardelli, J.

M-1986 People v Grosso, Charles
Leave to appeal to this Court denied.

Renwick, J.

M-1985 People v Romero, Ubaldo
Leave to appeal to this Court denied.

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

M-1920 In the Matter of Richard Boter,
a disbarred attorney:

Finding of civil contempt confirmed, respondent fined \$250 and directed to serve a term of 20 days' incarceration, as indicated. No opinion. All concur.

Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

M-1860 In the Matter of Alan J. Lichtenstein,
(admitted as Alan Lichtenstein),
an attorney and counselor-at-law:

Respondent's name stricken from the roll of attorneys
and counselors-at-law in the State of New York, effective nunc
pro tunc to March 19, 2008. Opinion Per Curiam. All concur.

The following order was entered and filed on May 22, 2008:

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

M-2438 Carmona v Mathison - Alcon Laboratories Inc., et al.
Stay denied.