

limitation of use of a body organ or member" (Insurance Law § 5102[d]), yet failed to award any damages for future pain and suffering. Since the failure to award such damages cannot be reconciled with a finding of permanent injury, retrial is mandated on all issues as there is a strong likelihood that the verdict results from a trade-off on a finding of liability in return for a compromise on damages (see *McKenna v Lehrer McGovern Bovis*, 302 AD2d 329, 330 [2003]; *Patrick v New York Bus Serv.*, 189 AD2d 611, 612 [1993]).

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defendant and another man (see *People v Sanchez*, 245 AD2d 105 [1997], *lv denied* 92 NY2d 860 [1998]; *People v Brown*, 238 AD2d 204 [1997], *lv denied* 90 NY2d 1010 [1997]; see also *People v Gonzalez*, 91 NY2d 909, 910 [1998]). We have considered and rejected defendant's remaining arguments.

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Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3946 Diana Mastroddi,
Plaintiff-Respondent,

Index 102790/05

-against-

WDG Dutchess Associates Limited
Partnership, et al.,
Defendants,

North Atlantic Industrial Maintenance, Inc.,
Defendant-Appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York
(Michael I. Josephs of counsel), for appellant.

Worby Groner Edelman, LLP, White Plains (Michael L. Taub of
counsel), for respondent.

Order, Supreme Court, New York County (Marcy Friedman, J.),
entered August 16, 2007, which denied the motion of defendant
North Atlantic Industrial Maintenance, Inc. for summary judgment
dismissing the complaint as against it, unanimously affirmed,
without costs.

North Atlantic, a snow removal contractor, contends that it
owed plaintiff no duty of care because none of the three
situations in which a contractual obligation may give rise to
tort liability to third persons obtains here (*see Espinal v
Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). However, North
Atlantic failed to eliminate all triable issues of fact with
respect to any of these situations. It failed to produce the
snow removal contract with the premises owner in support of the

argument that its contractual obligation did not displace the owner's duty to safely maintain the premises (see *id.* at 140-141 [2002]; *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643-644 [1994]; *Colbourn v ISS Intl. Serv. Sys.*, 304 AD2d 369 [2003]), and it failed to establish that plaintiff did not detrimentally rely on the continued performance of its snow removal duties (see *Espinal* at 140). In addition, given defendant's silence with respect to the actual snow removal operations and the condition of the parking lot on the relevant date, defendant failed to meet its burden of whether it created or exacerbated a hazard (see *Prendeville v International Service Systems, Inc.*, 10 AD3d 334 [2004]).

Accordingly, since North Atlantic failed to meet its burden on the motion for summary judgment, such motion was properly denied by the Supreme Court regardless of the sufficiency of plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Raynor-Brown v Garden City Plaza Assoc.*, 305 AD2d 572, 573-574 [2nd Dept 2003]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JUNE 17, 2008

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Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3947-

3948 In re Breeyanna S.,

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

Sidney S.,
Respondent-Appellant,

Necola F.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Nancy Botwinik, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson
of counsel), for Administration for Children's Services,
respondent.

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

Appeal, insofar as taken from orders, Family Court, New York
County (Sara P. Schechter, J.), entered on or about December 19,
2006 and July 17, 2007, which continued the subject child's
placement with petitioner, approved a plan of reunification with
the child's mother, and directed that respondent father's
visitation remain supervised, unanimously dismissed as moot, and,
insofar as taken from "all orders previously issued in this
matter," as limited by the briefs, unanimously dismissed as
abandoned, without costs.

The appeal is moot insofar as taken from the December 19,

2006 and July 17, 2006 permanency hearing orders, such orders having been superseded by subsequent permanency hearing orders continuing the child's placement in foster care and discharging her to the mother on a trial basis (see 45 AD3d 498, 498 [2007], *lv denied* 10 NY3d 706 [2008]). Contrary to respondent's argument, the appeal does not bring up for review the August 11, 2005 fact-finding determination of neglect. Respondent abandoned the issue of neglect by failing to raise it in his prior appeal from the June 27, 2006 order of disposition (45 AD3d 498, *supra*) (see *Nam Tai Elecs., Inc. v UBS PaineWebber Inc.*, 46 AD3d 486, 486 [2007]; *cf. Matter of Sephaniah A.*, 45 AD3d 386, 386 [2007]). Were we to consider the merits, we would find that a preponderance of the evidence shows that respondent put the child's physical, mental or emotional condition in imminent danger of becoming impaired by continually leaving the child in the mother's care when he went to work although aware of the mother's then long-standing alcohol abuse (Family Ct Act § 1012[f][i][B]; see *Matter of Ashante M.*, 19 AD3d 249 [2005]).

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ENTERED: JUNE 17, 2008

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Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3949 Jasmine Pollock, an infant over the age of 14 years, etc., and Pauline Washington, individually, Plaintiffs-Appellants, Index 24023/04

-against-

Luis Bones,
Defendant,

Boys & Girls Harbor, Inc.,
Defendant-Respondent.

David Henry Sculnick, New York, for appellants.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered June 13, 2007, which granted the motion of defendant Boys & Girls Harbor, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The record contains no evidence of previous physical altercations between the infant plaintiff and her fellow camper that would have placed defendant day camp on notice that the fellow camper's act that allegedly caused plaintiff's injuries could reasonably have been anticipated (*see Baker v Trinity-Pawling School*, 21 AD3d 272, 274 [2005], *lv dismissed* 7 NY3d 739 [2006]). In any event, the infant plaintiff had left camp at the end of the day and was no longer under the physical

custody and control of defendant's personnel when she was struck by the vehicle (see *Pratt v Robinson*, 39 NY2d 554, 560 [1976]; *Harker v Rochester City School Dist.*, 241 AD2d 937 [1997], *lv denied* 90 NY2d 811 [1997]). Moreover, her running into the street was an independent intervening act "so attenuated from the [camp's] conduct that responsibility for the injury should not reasonably be attributed to [it]" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]).

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counsel, who had been made aware through the suppression hearing testimony of a different officer of the full content of defendant's statement, elicited the entire statement on cross-examination of the detective. In addition, counsel made affirmative use of the challenged portion of the statement, which was arguably exculpatory. Accordingly, there is no basis upon which to find any misconduct by the prosecutor or prejudice to defendant.

Defendant's challenge to the court's jury charge is also is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court properly instructed the jury pursuant to *People v Dawson* (50 NY2d 311 [1980]) that a witness has no duty to volunteer exculpatory information to the authorities, and there was nothing prejudicial about the particular language challenged by defendant on appeal.

On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Trial counsel's failure to raise the issues suggested by defendant on appeal did not cause defendant any prejudice.

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is not implicated with respect to the delay that followed defendant's release, during which time he resumed the status of an absconder. Accordingly, the lengthy delay in imposing sentence was "attributable almost entirely to defendant's conduct" (see *People v McQuilken*, 249 AD2d 35 [1998], lv denied 92 NY2d 901 [1998]).

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Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3953 The People of the State of New York Index 404620/06
 by Andrew M. Cuomo, Attorney General
 of the State of New York,
 Plaintiff-Respondent-Appellant,

-against-

Coventry First LLC, et al.,
Defendants-Appellants-Respondents.

O'Melveny & Myers LLP, New York (Yosef Rothstein of counsel), for
Coventry First LLC, The Coventry Group Inc., and Montgomery
Capital Inc., appellants-respondents.

Pillsbury Winthrop Shaw Pittman LLP, New York (Mark R. Hellerer
of counsel), for Reid S. Buerger, appellant-respondent.

Andrew M. Cuomo, Attorney General, New York (Cecelia C. Chang and
Lawrence D. Borten of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Helen E. Freedman,
J.), entered September 28, 2007, which denied defendants' motion
to dismiss the complaint as it pertains to life settlement
transactions by non-New York brokers or to non-New York
misconduct, granted the motion with respect to, inter alia, the
securities fraud and common-law fraud causes of action, and
denied their motion to compel arbitration, unanimously modified,
on the law, the common-law fraud cause of action reinstated, and
otherwise affirmed, without costs.

The Donnelly Act claim was properly dismissed to the extent
that the alleged conduct did not take place "in this state" (see

General Business Law § 340[1]; see also *Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 324-325 [2002]), as was the Martin Act claim with respect to alleged conduct not “within or from this state” (see General Business Law § 352-c[1]), and to the extent that it pertained to variable annuity policies already subject to regulation by the Department of Insurance (see *Meagher v Metropolitan Life Ins. Co.*, 119 Misc 2d 615 [1983]). In other respects, these claims, as well as the claim pursuant to Executive Law § 63(12), constituted proper exercises of the State’s regulation of businesses within its borders in the interest of securing an honest marketplace (see *Matter of People v Telehublink*, 301 AD2d 1006, 1009-1010 [2003]). The latter cause of action was sufficiently stated; the elements of fraud need not be alleged (see *People v Concert Connection*, 211 AD2d 310, 320 [1995], appeal dismissed 86 NY2d 837 [1995]; see also *People v General Elec. Co.*, 302 AD2d 314 [2003]). There were sufficient nonconclusory allegations that the life settlement brokers were agents of the sellers of the insurance policies, thereby imposing upon them the fiduciary prohibition against hidden compensation; the rules governing real estate and insurance brokers are not dispositive. Defendants’ actual knowledge of the brokers’ wrongdoing may be fairly inferred from

the allegations that defendants participated in and covered up the alleged bid-rigging, supporting the claim for aiding and abetting breach of fiduciary duty (see *Kaufman v Cohen*, 307 AD2d 113, 125-126 [2003]).

The common-law fraud claim should not have been dismissed, since "out-of-pocket" nonspeculative losses were alleged by claims of specific lost sales (see *Bernstein v Kelso & Co.*, 231 AD2d 314, 322 [1997]). The contrary ruling in *Beznicki v Fetaya* (2006 NY Misc LEXIS 979, 2006 WL 1132351), citing our decision in *Bernstein* for the general damages rule but failing to distinguish it, is unpersuasive.

The motion court properly declined to compel arbitration of even the victim-specific claims (see *EEOC v Waffle House, Inc.*, 534 US 279 [2002]; *State of Minnesota v Cross Country Bank*, 703 NW2d 562, 570 [Minn App 2005]). Contrary to defendants' contention, none of the exceptions to the rule against subjecting nonsignatories to arbitration applied (see e.g. *Denney v BDO Seidman, L.L.P.*, 412 F3d 58, 70 [2d Cir 2005]; *Mark Ross & Co., Inc. v XE Capital Mgt., LLC*, 46 AD3d 296 [2007]).

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

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JUNE 17, 2008

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Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3954-

3955-

3955A

Marden D. Paru, etc.,
Plaintiff-Respondent-Appellant,

Index 602325/04

-against-

Mutual of America Life Insurance Company,
Defendant-Appellant-Respondent.

Proskauer Rose LLP, New York (Howard Wilson of counsel), for
appellant-respondent.

Allegaert Berger & Vogel LLP, New York (Louis A. Craco, Jr. of
counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Bernard J. Fried,
J.), entered November 16, 2007, dismissing the second amended
complaint and bringing up for review an order, same court and
Justice, entered November 1, 2007, which granted defendant's
motion to dismiss the second amended complaint pursuant to CPLR
3211(a)(7), unanimously affirmed, without costs. Appeal from
above order unanimously dismissed, without costs, as subsumed in
the appeal from the judgment. Appeal from order, same court and
Justice, entered March 22, 2007, which, inter alia, granted
plaintiff's cross motion for leave to file a second amended
complaint, unanimously dismissed, without costs.

Plaintiff, an investor in a variable annuity contract (VAC)
issued by defendant, claims he suffered damages when other
investors in the VAC engaged in so called market timing

transactions. The sole claim in the second amended complaint is that defendant was obligated by the covenant of good faith and fair dealing to take steps to prevent market timing in the funds related to the VAC.

Dismissal of the complaint was appropriate, since the obligation plaintiff sought to imply controverted the express terms of the contract (see *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268 [2003]). Market timing is a generally lawful investment strategy that uses information about closing prices on securities in foreign exchanges to make advantageous trades on a domestic exchange. Essential to this is the market timer's ability to make transfers between accounts in the VAC by phone or other instantaneous means. Although there is no dispute that had defendant required that all transfers be executed by mail there could have been no market timing in the fund, the parties' agreement expressly permitted transfers to be made by phone, and vested sole discretion concerning the manner in which transfers could be made in defendant. Accordingly, plaintiff's allegation that defendant was required to bar instantaneous transfers is contradicted by the express terms of the agreement (see *Keifer v Sony Music Entertainment, Inc.*, 8 AD3d 107 [2004]), and contrary to plaintiff's contention, the parties' contract was not one of adhesion (see *Brower v Gateway 2000*, 246 AD2d 246, 252 [1998]). In light of the foregoing, we need not reach defendant's argument

that the complaint should also have been dismissed as time-barred. Were we to address it, we would find that the action was timely since the time to commence the action was tolled by the filing of the original punitive class action complaint (see *American Pipe & Constr. Co. v Utah*, 414 US 538, 551-554 [1974]; *Yollin v Holland Am. Cruises*, 97 AD2d 720 [1983]).

Defendant's appeal from the March 2007 order granting leave to plaintiff to file a second amended complaint terminated with entry of the judgment (see *Matter of Aho*, 39 NY2d 241, 248 [1976]). Nor is the order brought up for review from the appeal from the judgment since it does not "necessarily affect[]" the final judgment (CPLR 5501[a][1]). Accordingly, we decline to reach defendant's argument that the second amended complaint was precluded by the Securities Litigation Uniform Standards Act of 1998, 15 USC § 78bb. Were we to reach it, we would agree with the court that neither fraud nor misrepresentation are a "necessary component," either factually or legally, of plaintiff's claim for breach of the covenant of good faith (see *Xpedior Creditor Trust v Credit Suisse First Boston (USA) Inc.*, 341 F Supp 2d 258, 266 [2004]).

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

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

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him that he was prohibited from entering the premises, since the notice was read to him and placed in his pocket after he had stolen items from the store, the People established that, when he entered the premises on two separate occasions weeks later, he did so knowingly and unlawfully (see e.g. *People v Polite*, 302 AD2d 227 [2003], lv denied 99 NY2d 657 [2003]). The actions of the store employees amply satisfied the statutory requirement that such a notice be "personally communicated," (Penal Law § 140.00[5]), and defendant was not entitled to defeat the legal effect of the notice by refusing to pay attention to it.

The court properly exercised its discretion in admitting evidence of a similar uncharged crime, consisting of the shoplifting incident that resulted in the issuance of the notice barring defendant from the store, since it helped establish elements of the crime of burglary in the third degree, namely whether the trespass notice was lawful and whether it was personally communicated to defendant (see *People v Alvino*, 71 NY2d 233 [1987]; *People v Giles*, 47 AD3d 88 [2007]). We reject defendant's contention that the admission of a surveillance videotape and still photographs made from the videotape was excessive and unduly prejudicial. The evidence was relevant to essential elements of the crime and issues raised at trial, and the People "were not bound to stop after presenting minimum evidence but could go on and present all the admissible evidence

available to them, regardless of the trial strategy defendant adopted" (*Alvino*, 71 NY2d at 245; see also *People v Matthews*, 276 AD2d 385, 386 [2000], *lv denied* 96 NY2d 736 [2001]). The court gave appropriate limiting instructions on two separate occasions, and we reject defendant's arguments concerning these instructions.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (see *People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). Defendant's theft-related crimes were highly relevant to his credibility, and the court only permitted the People to elicit a fraction of defendant's extensive criminal history.

Defendant failed to preserve his challenge to the court's response to a note from the deliberating jury, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

We find the sentences excessive to the extent indicated.

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

ENTERED: JUNE 17, 2008

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Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3958 Sempra Energy Trading Corp.,
 Plaintiff-Appellant,

Index 600322/07

-against-

BP Products North America, Inc.
 Defendant-Respondent,

BP North America Petroleum,
 Defendant.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Jeffrey T. Golenbock of counsel), for appellant.

Sidley Austin LLP, Chicago, IL (Thomas K. Cauley, Jr., of the Bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered July 20, 2007, which granted defendants' motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff commenced this action for breach of contract alleging that defendants delivered fuel oil that failed to comply with the terms of the parties' agreement. Pursuant to the contract, defendants promised to deliver plaintiff fuel oil with an API gravity of 11.3, and the parties agreed that the quality and quantity of the fuel would be determined and certified prior to discharge by a mutually acceptable inspector, and that the

pre-discharge report was binding on the parties except in the event of fraud or manifest error. The record shows that pre-discharge testing of the delivered oil established that the API gravity was in compliance with the parties' agreement. However, post-discharge testing conducted at plaintiff's request revealed the API gravity to be below the specified minimum.

The complaint was properly dismissed, where plaintiff's breach of contract claim was refuted by the documentary evidence, namely the pre-discharge inspection report showing that the delivered fuel oil was in compliance with contract specifications (see *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *150 Broadway Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [2004]). Plaintiff's allegations of manifest error on the face of the official pre-discharge inspection report were properly rejected (see *Matter of Hermance v Ulster County*, 71 NY 481, 486 [1877]; see also *Structured Credit Partners v PaineWebber Inc.*, 306 AD2d 132 [2003]). Plaintiff relied on the post-discharge report, which was not material under the parties' agreement, to allege the possibility of manifest error in the official binding pre-discharge report. Furthermore, plaintiff did not plead its claim for fraud with any

specificity and merely suggested fraud on the part of defendants when loading the fuel (see CPLR 3016[b]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318-319 [1995]).

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move, picked up the bag and ran away with it. The jury could infer from this attack, which had "no apparent motive other than robbery" (*Matter of Merriel B.*, 9 AD3d 256 [2004]; compare *Matter of Niazia F.*, 40 AD3d 292 [2007]), that defendant used force with larcenous intent.

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

ENTERED: JUNE 17, 2008

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Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3961N-

3961NA Paulette Simmons, Individually and
as Administratrix of the
Estate of Daisy Knowles, Deceased,
Plaintiff-Respondent,

Index 116077/06

-against-

Northern Manhattan Nursing Home, Inc.
doing business as Northern Manhattan
Rehabilitation & Nursing Center,
Defendant-Appellant,

North General Hospital,
Defendant.

Martin Clearwater & Bell LLP, New York (Claudia J. Charles of
counsel), for appellant.

The Cochran Firm, New York (Paul A. Marber of counsel), for
respondent.

Orders, Supreme Court, New York County (Milton A. Tingling,
J.), entered January 9, 2008, which, in an action for personal
injuries and wrongful death arising out of plaintiff's decedent's
fall and subsequent care in defendant nursing home, inter alia,
denied in part said defendant's motion for a protective order and
granted in part plaintiff's cross motion to compel disclosure,
unanimously modified, on the law, to strike demand #37, and
otherwise affirmed, without costs.

Plaintiff's demands, as time-limited by the court, for (1)
negative outcome and incident reports involving conditions and
occurrences like those alleged in the complaint, (2) the

personnel files of personnel who treated the decedent, and (3) all documents and information relating to the demotion of any personnel who treated the decedent, are material and necessary (see generally *Anonymous v High School for Env'tl. Studies*, 32 AD3d 353, 358 [2006]), and are not overly broad or unduly burdensome inasmuch as defendant is compelled by regulation to maintain and continuously collect "information concerning the facility's experience with negative health care outcomes and incidents injurious to residents" (10 NYCRR 415.15[a][3][I]), and does not deny maintenance of personnel files. Demand #37 for all Quality Assessment and Assurance Committee reports prepared in accordance with 10 NYCRR 415.27(c)(6) relating to the types and conditions and occurrences alleged in the complaint should have been stricken, as such reports are statutorily immune from disclosure (*Matter of Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434, 438-440 [2003]). However, defendant failed to meet its burden of demonstrating that "all documentation of and from" such Committee regarding the decedent relates to the Committee's quality assurance function. Accordingly, demand #36 for such documentation was properly sustained (see *id.* at 439-441; *Kivlehan v Waltner*, 36 AD3d 597, 598 [2007]), subject to the understanding that "documentation" does not include the "reports"

sought in demand #37. We have considered defendant's other arguments, as well as plaintiff's argument that defendant waived any right to claim privilege, and find them unavailing.

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

ENTERED: JUNE 17, 2008

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Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3962N Donald G. Fellner,
Plaintiff-Appellant,

Index 600560/05

-against-

Masaharu Morimoto,
Defendant-Respondent.

Steven Landy & Associates, PLLC, New York (Steven Landy of counsel), for appellant.

Reed Smith LLP, New York (Gil Feder of counsel), for respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered June 14, 2007, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for leave to amend the complaint to (1) add Morimoto, Inc. as an additional defendant; (2) add a cause of action directing defendant to render a full accounting of the business affairs and transactions of Moridon Group, LLC (Moridon); (3) add a cause of action for waste on behalf of plaintiff and Moridon; and (4) impose a constructive trust on the assets of defendant and proposed additional defendant Morimoto, Inc., unanimously reversed, on the law, without costs, and the motion granted.

We reject defendant's contention that no appeal lies from the subject order since the denial of plaintiff's motion seeking, inter alia, leave to amend his complaint is appealable as it "affects a substantial right" (CPLR 5701[a][2][v]). Nor does the court's order constitute, as defendant suggests, an advisory

opinion. Although plaintiff could have sought leave to renew its motion once the decision on the subsequent summary judgment motions was rendered, this does not lead to the conclusion that the order appealed from did not determine the rights of the parties and was one from which there was no right to appeal.

The motion court erred in denying plaintiff leave to amend the complaint (see CPLR 3025[b]). There was no undue delay in bringing the motion, and the claims sought to be added arise out of the same facts as those underlying the original complaint (see *Brown v 3392 Bar Corp.*, 2 AD3d 324 [2003]). The original complaint alleges that defendant improperly usurped certain business opportunities and profits rightfully belonging to Moridon, the entity formed by plaintiff and defendant to carry out their business partnership. The proposed claims for waste and for a constructive trust similarly allege that such diversions, in violation of defendant's fiduciary duties, constitute waste and entitle plaintiff to the imposition of a constructive trust on the improperly diverted funds. Moreover, Morimoto, Inc. is wholly-owned by defendant, and accordingly, defendant would not be unduly prejudiced or surprised by its addition as a defendant (see *id.* at 325; *Donovan v All-Weld Prods. Corp.*, 34 AD3d 257 [2006]).

The proposed claims are also not devoid of merit. Regarding the cause of action for the imposition of a constructive trust,

plaintiff sufficiently alleges that certain profits and business opportunities rightfully belonging to Moridon and its members were improperly diverted to defendant and Morimoto, Inc., without consideration, thereby unjustly enriching defendant and Morimoto, Inc., an entity in which plaintiff has no interest (see *Schneidman v Tollman*, 190 AD2d 524 [1993]). As for the cause of action for waste, although such a claim is usually asserted as a derivative one on behalf of the company, "where a wrongdoer has breached an obligation to a shareholder which is independent of any duty owing to the corporation, the shareholder has an individual cause of action" (*Matter of Rudey v Landmarks Preserv. Commn. of City of N.Y.*, 137 AD2d 238, 244 [1988]), and here, plaintiff has adequately alleged a cause of action for waste both on his and Moridon's behalf.

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

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

ENTERED: JUNE 17, 2008

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Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3963N Darsweil Rogers,
Plaintiff-Appellant,

Index 350389/06

-against-

Marlyn Rogers,
Defendant-Respondent.

Laurence P. Greenberg, New York, for appellant.

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered December 19, 2007, which, to the extent appealed from as limited by the brief, granted defendant's motion for pendente lite maintenance and child support to the extent of imputing an income of \$250,000 to plaintiff and directing plaintiff to: (1) pay unallocated temporary non-taxable maintenance and child support of \$5,500 per month; (2) continue paying an allowance of \$100 per week to the parties' son; (3) continue paying all carrying charges on the marital residence, including maintenance, condo assessments, rent, mortgage, insurance and all utilities; (4) pay all unreimbursed non-elective pharmaceutical, medical and dental expenses incurred by defendant and the parties' son; (5) maintain in full force and effect all presently existing insurance policies including life, medical and dental on behalf of defendant and the parties' son; and (6) pay college tuition and school related expenses

for the parties's son, and denied plaintiff's cross motion for preclusion sanctions pursuant to CPLR 3126, unanimously affirmed, without costs.

The court properly imputed income to plaintiff based on his well-documented earning history, his present earning potential, and his apparent intentional reduction in his earnings for the purposes of mitigating or avoiding his support obligations (see *Hickland v Hickland*, 39 NY2d 1, 5-6 [1976], cert denied 429 US 941 [1976]; *Fruchter v Fruchter*, 29 AD3d 942, 943 [2006]). Notably, plaintiff offers no explanation for his failure to obtain or attempt to obtain comparable employment since the end of 2006, when his severance pay from his prior employer terminated.

We decline to disturb the pendente lite award, where there is no showing of exigent circumstances, and where the court gave proper consideration to the factors specified in Domestic Relations Law § 236(B)(6) (see *Sumner v Sumner*, 289 AD2d 129, 130 [2001]).

Defendant's request for preclusion sanctions was properly denied, where the record shows that any failure on defendant's part to comply with discovery was not willful, deliberate or in bad faith (see *Maillard v Maillard*, 243 AD2d 448 [1997]).

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

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

ENTERED: JUNE 17, 2008

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a necessary element for such an easement (*see Turner v Baisley*, 197 AD2d 681 [1993]); use as a "mere convenience" is insufficient (*id.*).

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

ENTERED: JUNE 17, 2008

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

3832 Roslyn Knee, etc., Index 105766/07
Plaintiff-Respondent,

-against-

A.W. Chesterton Co., et al.,
Defendants,

The Goodyear Tire & Rubber Company,
Defendant-Appellant.

Lynch Daskal Emery LLP, New York (Scott R. Emery of counsel), for
appellant.

Weitz & Luxenberg, P.C., New York (Stephen J. Riegel of counsel),
for respondent.

Order, Supreme Court, New York County (Helen E. Freedman,
J.), entered October 25, 2007, which denied defendant-appellant's
motion for summary judgment dismissing the complaint as against
it, unanimously affirmed, without costs.

The deposition testimony of plaintiff's decedent showed that
he was exposed to gaskets and gasket materials containing
asbestos while working on a ship known as the Constellation at
the Brooklyn Navy Yard, that dust from the asbestos gaskets was
pervasive, and that he breathed it. Deposition testimony of the
plaintiff and a second witness from an unrelated asbestos
litigation and the plaintiff from a second unrelated asbestos
litigation describes work involving gaskets on the same ship,
under the same conditions, within the same time period, and
identifies appellant as the manufacturer of the gaskets.

Appellant was a party in these two other actions and present at all three depositions. We note that one of these witnesses may be available to testify at trial. We reject appellant's argument that these three witness depositions from other actions cannot be used for present purposes (*see Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 149 [2001]; *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 320 [1996]). These depositions raise an issue of fact as to whether the decedent was exposed to asbestos contained in appellant's gaskets (*cf. Reid v Georgia-Pac. Corp.*, 212 AD2d 462, 463 [1995]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 17, 2008

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

3859 Maria T.,
Plaintiff-Respondent,

Index 14686/04

-against-

New York Holding Company
Associates, et al.,
Defendants-Appellants.

Morris, Duffy, Alonso & Faley, New York (Pauline E. Glaser of counsel), for appellants.

Kelner & Kelner, New York (Joshua D. Kelner of counsel), for respondent.

Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered March 16, 2007, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

Plaintiff was a tenant in a building located at 584 Academy Street in Manhattan, owned by defendant New York Holding Company Associates and managed by defendant Metro Management & Development, Inc. In the early afternoon of February 26, 2002, plaintiff entered the building through the lone entrance available to the tenants. A man whom plaintiff did not recognize entered the building immediately after her. The man walked ahead of plaintiff up a staircase, which plaintiff was using to reach her unit on the second floor. As plaintiff opened the door to

her apartment, the man, who had continued up the staircase when plaintiff walked from the staircase to her unit, ran down the staircase and pushed plaintiff into the apartment. The man then sexually assaulted plaintiff at gunpoint.

Plaintiff commenced this action to recover damages for personal injuries, claiming that defendants failed to provide adequate security for the building. Specifically, plaintiff's theory of liability is that defendants failed to maintain a working lock on the door to the tenants' entrance, which failure allowed the assailant to gain entry to the building and assault plaintiff.

Defendants jointly moved for summary judgment dismissing the complaint on the ground that the assault was not foreseeable, arguing that, although there was drug activity in the surrounding neighborhood, there was no history of criminal activity in the building. In opposition, plaintiff submitted evidence demonstrating that, in the four and a half years prior to the assault, several incidents occurred in or near the building to which the police responded. Plaintiff also submitted the affidavit of an expert in the field of premises security who averred, among other things, that the building was in a high crime area and that the assault on plaintiff was foreseeable. In reply, defendants argued that the prior incidents relied upon by plaintiff were not similar to the assault and therefore did not

demonstrate that the assault was foreseeable. Supreme Court, finding a triable issue of fact to exist with respect to the issue of foreseeability, denied the motion.

Building owners and managing agents have a common-law duty to take minimal security precautions to protect tenants from the foreseeable criminal acts of third parties (see *Jacqueline S. v City of New York*, 81 NY2d 288 [1993]; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507 [1980]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301 [2001]). As Justice Ritter stated for the Second Department in addressing the issue of whether a crime giving rise to a lawsuit was foreseeable to owners and operators of the building in which the crime occurred:

"[T]here is no requirement 'that the past experience relied on to establish foreseeability be of criminal activity at the exact location where plaintiff was harmed or that it be of the same type of criminal conduct to which plaintiff was subjected', or that 'the operative proof must be limited to crimes actually occurring in the specific building where the attack took place' (*Jacqueline S. v City of New York, supra*, at 294). However, this does not mean that the criminal activity relied upon by the plaintiffs to support their claim of foreseeability need not be relevant to predicting the crime in question.... Rather, to establish foreseeability, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location" (*Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 152-153 [1999]).

Our case law is to the same effect (see *Buckeridge v Broadie*, 5 AD3d 298, 300 [2004]; see also *Wayburn*, 282 AD2d at 303-304; *Brewster v Prince Apts.*, 264 AD2d 611, 614-615 [1999], *lv denied* 94 NY2d 762 [2000]; *Williams v Citibank*, 247 AD2d 49, 51 [1998]; *Todorovich v Columbia Univ.*, 245 AD2d 45, 46 [1997], *lv denied* 92 NY2d 805 [1998]).

Defendants met their initial burden of establishing their entitlement to judgment as a matter of law by making a prima facie showing that the sexual assault committed against plaintiff was not reasonably predictable. In support of their motion, defendants submitted the deposition testimony of three witnesses -- plaintiff, an employee of the managing agent and the superintendent of the building. The deposition testimony of these witnesses established nothing more than that, in the words of the employee of the managing agent, there was "a lot of drug and drug-related activity" in the neighborhood. Moreover, with respect to the building itself, each witness testified that he or she was not aware of any criminal activity in the building prior to the assault committed against plaintiff.

In opposition to the motion, plaintiff submitted police reports indicating that the following criminal activities had occurred in or near the building prior to the assault: (1) on July 5, 1997, a young female tenant was sexually harassed by a male tenant; (2) on March 18, 1998, two police officers, while on

patrol, observed two individuals in the doorway of the building, one of whom was holding a marijuana cigarette, and, upon searching them, the officers discovered that both individuals possessed crack cocaine; (3) on March 14, 1999, a man walking on Academy Street somewhere in the vicinity of the building was shot in the groin by a woman whom the man did not know and could not identify; (4) on August 8, 1999, a man was punched while exiting the building by four individuals; (5) on October 19, 1999, a female tenant received three sexually explicit prank phone calls from an unknown male; (6) on November 24, 1999, a contractor working at the building found two rifles and ammunition somewhere in or near the building; and (7) on October 13, 2000, a tenant's bedroom window was broken when one or more unidentified individuals threw oranges at the window. Plaintiff also submitted the affidavit of an expert in the field of premises security who averred, among other things, that the building was in a police precinct with high rates of crime, the drug activity in the neighborhood "attract[ed] criminal elements to [the] neighborhood" and the assault on plaintiff was foreseeable.

Plaintiff's evidence was insufficient to raise a triable issue of fact with respect to whether the sexual assault was foreseeable, i.e., reasonably predictable. Of the seven prior instances of criminal activity relied upon by plaintiff, only three involved crimes against the person and none are similar to

the sexual assault committed against plaintiff. During the March 18, 1998 incident, police officers observed two individuals standing in the doorway of the building, one of whom was holding a marijuana cigarette; the officers reported that one of the individuals pushed one of the officers when the officers approached the individuals. The March 14, 1999 incident involved a shooting that occurred off the premises on the street somewhere in the vicinity of the building. The August 8, 1999 assault, which occurred approximately two years and seven months prior to the assault committed against plaintiff, involved four individuals punching a man as he exited the building, a markedly different crime than the one to which plaintiff, who was accosted while entering her apartment and sexually assaulted by a lone perpetrator who was a stranger, was subjected. The remaining four instances of prior criminal activity involved the harassment of a tenant by a cotenant, the receipt of prank phone calls by a tenant, the discovery of two rifles and ammunition in or near the building and a misdemeanor entailing minor property damage, none of which are at all similar to the sexual assault committed against plaintiff.

Thus, the sexual assault committed against plaintiff was not reasonably predictable based on the prior criminal activity in or

near the building (see *Buckeridge*, 5 AD3d at 300; *Novikova*, 258 AD2d at 152-153; see also *Todorovich*, 245 AD2d at 46-47; cf. *De Luna-Cole v Fink*, 45 AD3d 440 [2007] [assault of plaintiff in defendants' building was foreseeable since, in the several years preceding the assault, multiple crimes, including assault, armed robbery, burglary and theft, had been committed in the building, and the area in which building was located experienced high rate of crime]; *Rivera v 1652 Popham Assoc.*, 31 AD3d 297 [2006] [triable issue of fact existed regarding whether rape of plaintiff was foreseeable since, among other things, pervasive drug dealing and frequent other criminal activity occurred in the building that was serious enough to warrant regular police vertical patrols of the building]).

Without trivializing the criminal activity in and around plaintiff's building, it must be acknowledged that, with the exception of the shooting that took place on a street somewhere in the vicinity nearly three years earlier, the criminal activity plaintiff relies upon consists of low-level crimes. When one considers that plaintiff includes all the criminal activity in and around the building over a period of more than four and a half years, it also must be acknowledged that the extent of criminal activity plaintiff relies upon is hardly unusual. Justice Ritter made the point well in *Novikova*:

"As the endless supply of crime statistics attest, crime is a fact of life and is foreseeable. Criminal activity is more frequent in our urban centers, although there are marked differences between neighborhoods. However, the courts have repeatedly held that ambient neighborhood crime alone is insufficient to establish foreseeability" (258 AD2d at 152-153 [citations omitted]).¹

Justice Sullivan, in determining that the assault of a customer of an ATM facility was not foreseeable to the operator of the facility, made the following related observation: "That a person using an ATM might be subject to robbery is conceivable, but conceivability is not the equivalent of foreseeability. To hold defendant liable for plaintiff's injury would be to stretch the concept of foreseeability beyond acceptable limits [and make defendant an insurer of plaintiff's safety]" (*Williams*, 247 AD2d at 52 [internal quotation marks and citation omitted]). The same holds true here. That a woman entering her apartment in New York

¹Similarly, this Court has repeatedly recognized that, since building owners and managing agents have neither the capacity nor the duty to protect tenants against neighborhood crime, ambient neighborhood crime is insufficient to establish that a particular criminal act was foreseeable, i.e., reasonably predictable (see *Regina v Broadway-Bronx Motel Co.*, 23 AD3d 255 [2005]; *Buckeridge*, 5 AD3d at 300; *Todorovich*, 245 AD2d at 47).

City might be subject to a sexual assault is conceivable, but
conceivability is not the equivalent of foreseeability.

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

ENTERED: JUNE 17, 2008

CLERK

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

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

M-2826X Porat v Akam Associates, Inc.

Appeal withdrawn.

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

M-2827X The Hop, LLC v Gotham City Company

Appeal withdrawn.

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

M-2828X Ramirez v Ramirez

Appeal withdrawn.

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

M-2474 Dooley v Bal Global Finance, LLC

Motion and appeal deemed withdrawn.

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

M-2307 People v Ndure, Musa

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

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

M-2319 People v Redd, Sharbu

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

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

M-2681 People v Brown, Jamel

M-2682 People v Cochran, Joseph, also known as Cochran,
Joseph C.

M-2683 People v Coleman, Darryl

M-2685 People v Green, Andre

M-2686 People v Hall, Gregory

M-2687 People v McDonald, Abram

M-2691 People v Sanchez, Pablo

M-2692 People v Thompson, Shawn

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

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

M-2408(DC#4) In the Matter of C., Demetrie T.J. -
Commissioner of Social Services

Upon the Court's own motion, time to perfect appeal
enlarged to the September 2008 Term, as indicated.

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

M-2455 People v Greene, Giander

Counsel substituted.

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

M-2393 People v Teichman, Boris

Substitution of counsel and other relief denied.

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

M-2331 People v Powers, Mo, also known as Powers, Mo I.

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

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

M-2381 People v Curry, Cornell

Clerk of Supreme Court, New York County, directed to
provide defendant with certain transcripts, as indicated.

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

M-2385 Wiesel v 310 East 46 LLC

Time to perfect appeal enlarged to the September 2008 Term.

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

M-2538 In the Matter of K., Tristam - Administration for Children's Services

Appeal from order entered April 17, 2007 dismissed as superceded by appeals from subsequent orders entered April 14, 2008, as indicated.

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

M-2822 Santos v Rosing

Stay of trial granted on condition appeal perfected for the October 2008 Term, as indicated.

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

M-2344 People v Eugenio, Luis

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

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

M-2308 People v Henry, Marlon, also known as Henry, Merlin
Counsel substituted.

Tom, J.P., Mazzairelli, Gonzalez, Sweeny, DeGrasse, JJ.

M-2315 Property Clerk of the Police Department of the City
of New York v Robinson

Time to perfect proceeding enlarged to the October 2008
Term.

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

M-2119 Salomon v Angsten - Estate of Levine - Fink
M-2440

Appeals consolidated; time to perfect same enlarged
to the November 2008 Term, as indicated. Cross motion otherwise
denied.

Mazzairelli, J.P., Gonzalez, Nardelli, Williams, JJ.

M-855 People v Thomas, Larry

Writ of error coram nobis denied.

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

M-1972 Manohar v The City of New York Human Resources
M-1973 Administration

Leave to hold defendants-respondents and their
attorneys in contempt denied; reargument and other relief denied.

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

M-831 People v Cagle, Robert
M-1587

Leave to withdraw as counsel on appeal granted;
leave to prosecute appeal as a poor person denied, with leave
to renew, as indicated; time to perfect appeal enlarged to the
November 2008 Term; adjournment of appeal denied, as indicated.

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

M-2209 People v Cobbs, Patricia

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

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

M-2318 People v Reyes, Wilmen

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

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

M-2320 People v Bonilla, Rene

Notice of appeal and order of assignment amended,
as indicated.

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

M-2377 People v Quijano, Boris

Assigned counsel relieved; substitution of retained counsel denied, as unnecessary.

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

M-2297 People v Brizan, Michael, also known as Brizen,
Michael

Leave to prosecute appeal as a poor person denied as academic, said relief having been granted by order of this Court entered April 8, 2008 (M-1228).

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

M-146 People v Walker, Leonard

Reargument denied.

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

M-2245 Kambousi Restaurant Inc., trading as Royal Coach Diner
v Burlington Insurance Company

Time to perfect appeal enlarged to the October 2008
Term.

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

M-2481 In the Matter of Lassiter v New York City Housing
Authority

Clarification denied.

Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

M-2621 Greenberg v SNA Consultants, Inc.

Stay denied; interim relief granted by order of a
Justice of this Court, dated May 20, 2008, vacated.

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

M-2165 People v Tarafa, Eddie

Enlargement of time to file notice of appeal denied.

Nardelli, J.

M-2237 People v Moore, Kenneth

Leave to appeal to this Court denied.

Renwick, J.

M-2217 People v Argentieri, Michael

Leave to appeal to this Court denied.

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

M-2602 In the Matter of Edward D. Fagan
(admitted as Edward Davis Fagan),
an attorney and counselor-at-law:

Motion to vacate prior order of this Court entered
April 2, 2007 (M-6486) and for other relief denied. No opinion.
All concur.

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

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

M-2723 Hilton M. Weiner
(admitted as Hilton Mark Weiner),
admitted on May 7, 1975,
at a Term of the Appellate Division,
Second Department

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

The following motion orders were entered and filed on
June 12, 2008:

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

M-2905 In the Matter of B., Tayquan - Harlem Dowling-Westside
Center for Children and Family Services

Upon the Court's own motion, law guardian substituted;
Clerk directed to maintain appeal on calendar for hearing in
September 2008 Term.

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

M-2675 Nemeroff v The Koby Group

Stay of trial granted.

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

M-2454(DC#40) People v Cruz, Elio

M-2539

Upon papers filed and upon the Court's own motion,
transcription of minutes directed, as indicated.

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

M-2204 People ex rel. Allah, Jisun v Warden

M-2403(DC#1)

Upon papers filed and upon the Court's own motion,
time to perfect appeal enlarged to the September 2008 Term,
as indicated.