

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 24, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3053 In re Kadiatou B.,

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

Fatamatou N.-B., et al.,
Respondents-Respondents,

Administration for Children's Services,
Petitioner-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ann E.
Scherzer of counsel), for appellant.

Patricia W. Jellen, Eastchester, for Fatamatou N.-B., respondent.

Lisa H. Blitman, New York, for Mamadou B., respondent.

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

Order, Family Court, Bronx County (Clark V. Richardson, J.),
entered on or about June 27, 2006, which, after a fact-finding
hearing, dismissed a derivative neglect petition against
respondent parents, unanimously affirmed, without costs.

The record evidence supports Family Court's dismissal of the
derivative neglect petition at issue. The court's prior finding
of child abuse, which is the basis of that petition, was based
upon vague, nonspecific evidence as to the earlier death of

respondents' three-month-old baby (who was also named Kadiatou) in 1999, and the parents have since demonstrated a positive change in circumstances. It should be noted that the court was particularly familiar with the evidence in this case inasmuch as it had also presided over the predicate 2002 abuse case and the 2005 Family Court Act § 1028 hearing.

As this Court has stated, proof of the abuse or neglect of one child "may, in appropriate circumstances, be sufficient to sustain a finding of abuse or neglect" of a second child (*Matter of Cruz*, 121 AD2d 901, 902 [1986]). We further stressed, however, that the

"determinative factor is whether, taking into account the nature of the conduct and any other pertinent considerations, the conduct which formed the basis for a finding of abuse or neglect as to one child is so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exists (*id.* at 902-903)."

Other relevant factors include whether the conduct upon which the prior finding was based "supports the conclusion that the parents have a faulty understanding of the duties of parenthood" (*Matter of Christina Maria C.*, 89 AD2d 855 [1982]), and whether sufficient positive change in the parents' behavior has occurred (*see Matter of Kimberly H.*, 242 AD2d 35, 39 [1998]).

Initially, the prior conduct that resulted in the 2002 finding of abuse - the 1999 death of three-month-old Kadiatou and the severe injury to her twin sister, Aisstou - some seven years

earlier, is, under the circumstances, sufficiently remote in time from the petition at issue. Although there is no hard and fast rule governing time proximity, the underlying abuse finding was inconclusive as to the parents' role. In fact, the record sheds no light on "the nature of the conduct." Rather, the conduct relating to Kadiatou's death supporting the prior abuse finding was never defined, and neither of the respondents was ever found to have committed an intentional, reckless or even negligent act against the children; nor was either of the respondents found to have been responsible for their injuries. Indeed, neither parent was ever charged with any criminal conduct. Rather, the finding was reached solely on the basis of the legal construct *res ipsa loquitur*. Hence, the record contains no specific evidence as to whether the prior abuse finding supports the conclusion that respondents had a faulty understanding of their parental duties. This case is thus distinguishable from *Matter of Justice T.* (305 AD2d 1076 [2003], *lv denied* 100 NY2d 512 [2003]), where a longer time interval was found not to be remote because such faulty understanding was evidenced by the parent's conviction for egregious intentional conduct that occurred while she was receiving rehabilitative services due to prior allegations of abuse. It is also distinguishable from *Matter of Umer K.* (257 AD2d 195 [1999]), where there was criminal responsibility imposed on the parents for the abuse, and strong expert testimony

supporting the continued inability of the parents to care for the child.

With respect to the injuries causing Kadiatou's death in 1999, the only evidence offered by ACS was the records of the Medical Examiner that were received at the fact-finding hearing. The cause of death was stated as "homicide" and, specifically, "blunt impact to [the] head." The records indicate that Kadiatou was born prematurely, at 24 weeks gestation, and died on November 18, 1999, at the reported age of 3½ months. She had suffered multiple fractures and other injuries to her skull and head. At least three and possibly four skull fractures (the records are ambiguous in this regard) were observed, as well as subscapular, subdural and subarachnoid hemorrhages.

Although ACS urges on appeal that the injuries were inflicted on more than one occasion, there is no such finding in the record. Moreover, ACS did not offer any testimony from a representative of the Office of the Medical Examiner either to explain the homicide finding or to opine on the injuries. Rather, to support this legal conclusion, ACS relies on references in the records to the effect that the fractures were "healing" and certain of the hemorrhages were "fresh, recent and organizing."¹

¹ACS also relies on a treatise on forensic pathology, which states that "considerable force" is necessary to cause a fracture to an infant's skull (Spitz and Fisher, *Medicolegal Investigation*

Unquestionably, the death of respondents' infant child is extremely disturbing. But like Family Court, we cannot blink at ACS' failure to present any testimony bearing on the issue of whether Kadiatou's skull fractures occurred at separate times, or whether her fatal injuries were the result of intentional conduct by a caregiver, let alone one of the respondents in particular. Indeed, there is no basis in the record to identify which of the respondents Kadiatou was with, or even whether she was with one of them, when she suffered the fatal injuries.

In addition, no evidence was presented that dismissing the petition would be harmful to the welfare of the subject child, now three years old. There is a plethora of evidence to the contrary regarding the parents' positive behavior. In its comprehensive and well-reasoned written opinion, Family Court agreed with the caseworker that respondents "complied with each and every element of the service plan" jointly devised by ACS and New York Foundling, a child and family services agency, to wit:

"They engaged in and completed parenting skills courses, they engaged in a course of treatment of individual psychotherapy and they visited regularly with [the surviving twin] Aisstou, reportedly not missing a single visit. Indeed, not only did the Respondents complete that which was asked of them, they continued with services of their own accord thereafter, thereby building upon the foundation which those services offered by ACS had set."

of Death, 707 [3rd ed. 1993]). The term "considerable" force, however, is unilluminating and, of course, "considerable force" can be inflicted accidentally and without committing homicide.

Furthermore, since 2002, respondent mother has undergone individual counseling at Harlem Hospital, and learned sufficient English to allow her to undergo individual psychotherapy, which she successfully completed. She enrolled and participated in the Nah We Yone Program, which provides family services, counseling and a women's wellness support network to immigrant and displaced Africans. Nah We Yone also provided a social worker who successfully taught the mother how to play games, read and relate to Aisstou, who was 5 years old at the time. By way of contrast, when the deceased child and Aisstou were born, the mother was only 15 years old, shy and withdrawn, had only recently arrived in the United States, spoke no English, and her support network consisted of her husband and one friend. The father has also received parenting skills training and individual counseling, and more recently was participating in family counseling. The parents have been active in Nah We Yone as a couple, both clinically and socially.

Observations, by the caseworker and social workers, of the parents' interactions with Aisstou and the subject child have been positive. Indeed, as Family Court also noted, the caseworker "pointedly stated that she saw no parenting issues with the parents." Moreover, in October 2005, during the pendency of this matter in Family Court, ACS discharged Aisstou from foster care to the custody of her parents without prior

consultation with the Family Court. As Family Court observed, that determination by ACS "clearly manifest[s] the Agency's belief that the parents have overcome whatever problems existed in the past, are capable of caring for a child and are not exhibiting any fundamental defect in judgment."

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defendant's incarceration on another case was not unreasonable (see *People v Turner*, 222 AD2d 206, 207 [1996], lv denied 88 NY2d 855 [1996]).

Defendant's valid waiver of his right to appeal precludes review of his excessive sentence claim. In any event, we perceive no basis for reducing the sentence.

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and mutual demands for counsel fees in an arbitration proceeding constitute, in effect, an agreement to submit the issue to arbitration, with the resultant award being valid and enforceable (see *Matter of Warner Bros. Records (PPX Enters.)*, 7 AD3d 330 [2004]; compare *Matter of Matza v Oshman, Helfenstein & Matza*, 33 AD3d 493, 494-495 [2006]). While respondents may have attempted to withdraw the request for attorneys' fees in connection with their counterclaim, there was no such attempt in connection with their defense of the arbitration proceeding.

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third-party complaint and the second third-party complaint, respectively, and all cross claims as against them, unanimously modified, on the law, Otis's motion granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendant building owner, The 740 Corporation (740 Corp.), did not submit competent proof to controvert Otis's expert evidence that the freight elevator in question was not defective at the time plaintiff worker was injured (*see generally Nazario v St. Barnabas Hosp.*, 34 AD3d 345 [2006]). Nor did it offer proof to show that Otis had actual or constructive notice of any alleged defective condition (*see Parris v Port Auth. of N.Y. & N.J.*, 47 AD3d 460 [2008]; *Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]). The elevator service agreement between 740 Corp. and Otis did not include the freight elevator in question, and testimony that Otis may have inspected the freight elevator pursuant to 740 Corp.'s verbal request was too vague and non-specific as to the time frame of the alleged request to raise an issue of fact as to liability on such grounds. In the absence of a contract for routine or systematic maintenance, an independent repair contractor has no duty to inspect or warn of any purported defects (*see Daniels v Kromo Lenox Assoc.*, 16 AD3d 111 [2005]).

Tisch's motion was properly denied. The plain language of the indemnification provision in the alteration agreement between

740 Corp. and Tisch, as owners of a duplex under renovation, provided that Tisch would be liable for "all" injury to persons or property "in the [b]uilding," arising out of the renovation work. Plaintiff was injured in the building while removing refuse from the renovation, which work was within the scope of the agreement between Tisch and the contractor, plaintiff's employer. Tisch's interpretation of the indemnification provision as restricting indemnification to liabilities that arise after the renovation work has been completed fails when the whole provision is read in context; furthermore, it is an attempt to create an ambiguity where none exists (see *U.S.B.M. Realty Co., Inc. v Studio MacBeth, Inc.*, 46 AD3d 317 [2007]).

We reject 740 Corp.'s request that we search the record and find that it is entitled to summary judgment on its contractual indemnification claim. 740 Corp. has not demonstrated, as a matter of law, that it is free of any negligence that might have contributed to plaintiff's injury. The conflict in testimony between plaintiff and his coworker as to the cause of the

accident, as well as the inspection and condition of the elevator, creates issues of fact which cannot be resolved on this motion.

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

3987-

3988-

3989 In re Samuel L., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Christopher S.,
Respondent,

Jennifer F.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Julian A. Hertz, Larchmont, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for ACS, respondent.

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

Order of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about April 23, 2007, placing the subject children in the custody of the Commissioner of Social Services upon a fact-finding determination that respondent-appellant abused one of the children and derivatively neglected the other children, unanimously affirmed, without costs.

A prima facie showing of abuse was made out with medical testimony that the five-month-old child was brought to the hospital with injuries, including a bulging fontanel, bilateral subdural hematoma, skull fracture, and retinal hemorrhages, that

were of such a nature as not to be accidental or sustained less than a few days, and more likely a few weeks, before the child was seen (Family Ct Act § 1012[e][i]; 1046[a][ii]). Respondent, who presented no medical evidence of her own, offered explanations for these injuries that were inconsistent with this medical testimony and otherwise not plausible, and thus failed to rebut the presumption of culpability (see *Matter of Sara B.*, 41 AD3d 170 [2007]). No basis exists to disturb Family Court's findings of credibility (see *id.*).

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uncharged crimes. The record suggests that counsel took a reasonable calculated risk that the court would not perceive his summation argument, which was beneficial to his client, as sufficient to permit the People to introduce the precluded evidence, particularly at that late stage of the trial. 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]). Defendant has not established that his counsel's actions were unreasonable, or that, even if unreasonable, they caused defendant any prejudice or deprived him of a fair trial. Defendant's claim that the court improperly precluded him from introducing certain evidence is contradicted by the record, which reveals that he succeeded in eliciting that evidence. We have considered and rejected defendant's remaining arguments in this regard.

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

3991 Herbert Altman, et al., Index 604220/06
Plaintiffs-Appellants,

-against-

New York Board of Trade, Inc.,
Defendant-Respondent,

The Board of Governors of the
New York Board of Trade,
Defendant.

Bernfeld, DeMatteo & Bernfeld, LLP, New York (David B. Bernfeld
of counsel), for appellants.

Milbank, Tweed, Hadley & McCloy LLP, New York (Michael L.
Hirschfeld of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III,
J.), entered April 6, 2007, which, insofar as appealed from as
limited by the briefs, granted defendant New York Board of Trade,
Inc.'s motion to dismiss the first through fifth and eighth
through thirteenth causes of action, and denied plaintiffs'
application for leave to amend the complaint, unanimously
affirmed, with costs.

Plaintiffs, holders of Trading Permits on the Board of Trade
of the City of New York (NYBOT), brought this action to block a
proposed merger between the NYBOT, organized under the New York
Not-For-Profit Corporation Law, and the InterContinental
Exchange, Inc., a Delaware for-profit corporation. Plaintiffs
allege that defendants' actions in connection with the proposed

merger would deprive them of their rights as members of the NYBOT to vote on the proposed merger and share in the proceeds of the merger, and ultimately strip them of their right to trade on the NYBOT in the "open outcry" format. The merger closed in January 2007.

Plaintiffs' causes of action for breach of contract (eighth through eleventh) were properly dismissed pursuant to CPLR 3211(a)(1). The only written document governing plaintiffs' rights and obligations as Permit Holders is the NYBOT By-Laws, which expressly state in section 101(b) that "Permit Holders . . . shall not constitute 'members' within the meaning of the N[-]PCL . . . and will not have any voting rights in the Exchange or any rights to receive any distributions of cash, securities or other property, whether on dissolution, liquidation, merger, consolidation or otherwise." Likewise, plaintiffs cannot expand the scope of their rights on the basis of a course of conduct. Any such course of conduct plaintiffs allege contradicts the plain language of the NYBOT By-Laws, which make clear that Permit Holders do not have the right to vote on a proposed merger or share in merger proceeds (*see Julien J. Studley, Inc. v New York News*, 70 NY2d 628, 629-30 [1987]).

Plaintiffs' claims asserted under the N-PCL (first through fifth and twelfth) are also not viable since the N-PCL expressly delegates to the NYBOT the right to designate who is a "member"

in its certificate of incorporation or by-laws (see N-PCL 102[a][9]; 601). The NYBOT's By-Laws clearly provide that only Equity Members are to be deemed "members" for purposes of the N-PCL, and that Permit Holders "shall not have any of the rights or privileges of 'members' under the N[-]PCL." Because plaintiffs are not "members" within the meaning of the N-PCL, the merger did not proceed in violation of their rights under this statute (see *Harris v Lyke*, 217 AD2d 982 [1995], *lv denied* 87 NY2d 801 [1995]; see also *Kemp's Bus Serv. v Livingston-Wyoming Ch. Of NYSARC*, 267 AD2d 1085, 1086 [1999]; *Pellegrini v Rockland Community Action Council*, 190 AD2d 881, 882-883 [1993]). For the same reason, the NYBOT's Board of Governors owe no fiduciary duty to plaintiffs under the N-PCL.

Plaintiffs' fraud cause of action (thirteenth) is duplicative of their breach of contract claims (see *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 305 [2003]).

Furthermore, the motion court appropriately rejected plaintiffs' request to amend the complaint inasmuch as it is apparent that any proposed amendment would be futile in light of the evidence (see *Norte & Co. v New York & Harlem R.R. Co.*, 222 AD2d 357, 358 [1995], *lv denied* 88 NY2d 811 [1996]).

We have considered plaintiffs' remaining contentions and find them unavailing.

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

3993-

3993A Goldman & Greenbaum, P.C.,
Plaintiff-Respondent,

Index 102460/06

-against-

Parisis G. Filippatos,
Defendant-Appellant.

Parisis G. Filippatos, New York, appellant pro se.

Martin Wm. Goldman, New York, for respondent.

Orders, Supreme Court, New York County (Debra A. James, J.), entered April 25, 2007, which denied defendant's motion to dismiss the complaint and granted plaintiff's motion for partial summary judgment, referring the matter of damages and costs to a Special Referee to hear and report, unanimously affirmed, with costs.

The Fee Dispute Resolution Program has no applicability where the amount in dispute exceeds \$50,000 (see 22 NYCRR 137.1[b][2]); both parties agree that the amount in dispute substantially exceeds that amount. Plaintiff contends that since it rescinded the tentative credit of \$50,000, the amount owed by defendant client is approximately \$140,000. Defendant admits he paid only \$114,000 of the approximately \$250,000 billed in attorney's fees. The amount in dispute clearly exceeds the \$50,000 cap.

Plaintiff law firm did not consent to arbitration (22 NYCRR § 137.2). Accordingly, it is unnecessary to consider whether defendant waived his right to arbitration.

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

3994-

3994A Daniel Sidelev,
Plaintiff-Respondent,

Index 103348/07

-against-

Roman Tsal-Tsalko, et al.,
Defendants-Appellants.

Law Offices of Bukh & Associates, Brooklyn (Nicholas M. Wooldridge of counsel), for appellants.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 31, 2007, which denied defendants' motion to vacate an earlier dismissal order, reinstate their answer and restore the action to the trial calendar, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded to Supreme Court for further proceedings. Appeal from the earlier order, entered October 29, 2007, which sua sponte struck defendants' answer for purported discovery violations and directed entry of judgment in favor of plaintiff, unanimously dismissed, without costs.

The court improvidently exercised its discretion under CPLR 3126 in denying defendants' motion to vacate the striking of their answer, since they did not have "prior notice . . . that such a sanction might be imminent" (*Postel v New York Univ. Hosp.*, 262 AD2d 40, 42 [1999]). Furthermore, the record indicates that the court never issued a written order at the

conclusion of the preliminary conference, or had its discovery directions recorded by a court reporter (22 NYCRR § 202.12[d]). Under the circumstances, the court should have afforded defendants "a second chance to furnish the information [they] had allegedly not turned over" (*Hanson v City of New York*, 227 AD2d 217 [1996]).

The record also indicates that defendants substantially complied with the court's discovery directions, and thus any delay in disclosing the requested information was not willful, contumacious or in bad faith (*Postel*, 262 AD2d at 42). Since defendants did provide the missing information and documents, along with a reasonable excuse for the delay, the court should have granted their motion, especially since plaintiff failed to substantiate any claim of prejudice (*Marks v Vigo*, 303 AD2d 306, 307 [2003]).

A preliminary conference order "is not appealable as of right because it is not an order which determined a motion made upon notice" (*Postel*, 262 AD2d 40 at 41). However, since defendants did subsequently move, on notice, to vacate that

order, the appeal from the later order denying that motion is reviewable (see *Santoli v 475 Ninth Ave. Assoc., LLC*, 38 AD3d 411, 414 [2007]).

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reflected in their physical appearances (see *People v Grant*, 43 AD3d 800, 801 [2007], *lv denied* 9 NY3d 990 [2007]; *People v Amuso*, 39 AD2d 425 [2007], *lv denied* 9 NY3d 862 [2007]).

Defendant failed to preserve his claim that the court at his second trial erred in instructing the jury that it should not consider self-defense or justification, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court reasonably anticipated that although defendant did not raise a justification defense, there was some evidence in the case that might lead the jury to speculate about such a defense. Accordingly, the court properly exercised its discretion in directing the jury not to consider that issue (*cf. People v Medor*, 39 AD3d 362 [2007], *lv denied* 9 NY3d 867 [2007]), and this instruction could not have undermined defendant's misidentification defense or caused him any prejudice.

We perceive no basis for reducing the sentence.

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

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When the officer asked if defendant had "anything on [him]," defendant, notwithstanding the obvious pocket bulge, answered "no." While these observations would have justified a protective frisk (see *People v Mims*, 32 AD3d 800 [2006]), notwithstanding possibly innocent explanations for defendant's conduct (see *People v Allen*, 42 AD3d 331 [2007], *affd* 9 NY3d 1013 [2008]), the officer instead made the limited intrusion of ordering defendant out of the car, touching the outside of the bulge, and asking defendant what was in his pocket. When defendant replied that he had drugs, this provided probable cause for his arrest.

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there has not been an adverse disposition of the action (see *Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 AD2d 45 [1993]). However, plaintiff's breach of contract claim, arising from the same facts and alleging similar damages, should have been dismissed as duplicative (see *InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [2003]).

The third-party action for contribution or indemnification was not viable since third-party defendants did not share in defendant's responsibility for plaintiff's alleged loss, not having represented him as defendant's successor until after expiration of the limitations period on the personal injury claim (see *Wilson v Quaranta*, 18 AD3d 324, 326 [2005]). We reject defendant's contention that third-party defendants, first authorized by the bankruptcy court to represent plaintiff's estate after the limitations period had run, were responsible for seeking an order of retention nunc pro tunc assuming arguendo that they could have done so (see *In re Piecuil*, 145 BR 777, 783 [WD NY 1992]; cf. *In re Bennett Funding Group, Inc.*, 213 BR 234, 243 [ND NY 1997]). Defendant's actions and communications with both the trustee and the attorney for the named defendant in the personal injury action showed that he was acting as plaintiff's attorney (see *Wei Cheng Chang v Pi*, 288 AD2d 378, 380 [2001], *lv denied* 99 NY2d 501 [2002]; see also *Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 99 [2008]), yet he never sought an order

of retention despite being repeatedly advised of the requirement and the need to act expeditiously in light of the imminent running of the statute of limitations.

Disqualification of plaintiff's attorneys based on a claimed conflict of interest was moot in light of the dismissal of the third-party action. Nor was relief warranted under the advocate-witness rule in light of defendant's failure to demonstrate that the attorney testimony was necessary (see *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445-446 [1987]).

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

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as against the individual respondent as well as respondent law firm, or that the amount of the award is "totally irrational" (see *Graniteville Co. v First Natl. Trading Co.*, 179 AD2d 467, 469 [1992], *lv denied* 79 NY2d 759 [1992]). Consolidation was properly denied as the Petition for Trial De Novo Review of Arbitration Award had been dismissed.

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defendant raises additional challenges to his sentence, we likewise find them without merit.

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be rendered ineffectual without such provisional relief" (CPLR 7502[c]). Moreover, applying the traditional three-pronged analysis, petitioner showed a likelihood of success on the merits by showing that his claims have prima facie merit (see e.g. *Trimboli v Irwin*, 18 AD3d 866 [2005]), including a claim of fraud based on alleged misrepresentation of facts beyond mere intention not to perform on a contract (see *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1999]). We also find that the motion court soundly exercised its discretion in concluding that petitioner faced irreparable harm and that the balance of the equities was in his favor. The undertaking, as effectively amended by petitioner's stipulation and the second order, was rationally related to the potential damages recoverable if the preliminary injunction is later determined to have been unwarranted (*Kazdin v Putter*, 177 AD2d 456 [1991]).

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

3442 Bernadette Speach, et al.,
Plaintiffs-Appellants,

Index 401087/03

-against-

Consolidated Edison Company of New York, Inc.,
Defendant,

The City of New York,
Defendant-Respondent.

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of
counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai
Newman of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.),
entered January 29, 2007, which granted defendant City of New
York's motion for summary judgment dismissing the complaint as
against it, unanimously affirmed, without costs.

Dismissal of the complaint as against the City was proper in
this action where plaintiff was injured when she allegedly
tripped and fell in a five-inch deep sinkhole located on a City
street. The record establishes that the City lacked prior
written notice of the defective condition as required under
Administrative Code of the City of New York § 7-201(c)(2)
(Pothole Law), and plaintiff failed to raise a triable issue of
fact as to whether the City created the defective condition
within the meaning of the exception to the prior written notice
requirement, "which requires that the affirmative negligence of

the City immediately result in the existence of a dangerous condition" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; see *Bielecki v City of New York*, 14 AD3d 301 [2005]). Even assuming that the City failed to address the underlying cause of the sinkhole in its prior repair efforts, the condition that caused plaintiff's fall developed over time (see *Bielecki*, 14 AD3d at 302).

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

3617N Richard Jackson, et al.,
Plaintiffs-Appellants,

Index 115879/01

-against-

Westminster House Owners Inc., et al.,
Defendants-Respondents.

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for appellants.

Irwin, Lewin, Cohn & Lewin, P.C., New York (Edward Cohn of counsel), for respondents.

Order, Supreme Court, New York County (Kibbie F. Payne, J.), entered May 17, 2007, which, insofar as appealed from, denied plaintiffs' motion to renew that portion of an order and judgment (one paper), same court and Justice, entered May 18, 2005, awarding attorneys' fees to defendant residential cooperative, unanimously affirmed, without costs.

Plaintiffs sued defendants cooperative and managing agent under various contract and tort theories. The coop, pursuant to paragraph 28 of the proprietary lease, asserted a counterclaim for attorneys' fees incurred in defending that action. The court, in the order and judgment that plaintiffs seek to vacate, which was affirmed by this Court (24 AD3d 249 [2005], *lv denied* 7 NY3d 704 [2006]), dismissed the complaint, granted the counterclaim, and referred the matter to a Special Referee to determine the amount of reasonable attorneys' fees. Plaintiffs

correctly argue that in *Dupuis v 424 E. 77th Owners Corp.* (32 AD3d 720 [2006]), which was decided subsequent to the subject order and judgment, we held that paragraph 28 of the proprietary lease therein, identical to paragraph 28 herein, did not entitle the defendant coop to recover attorneys' fees, since there was no claim that the plaintiff tenant/shareholder, who sued the coop for breach of the warranty of habitability, was in default of her lease obligations. Contrary to plaintiffs' characterization, however, *Dupuis* was neither new law nor a clarification of prior law, and thus cannot serve as a basis for renewal (CPLR 2221[e][2]). Our prior ruling in *Mogulescu v 255 W. 98th St. Owners Corp.* (135 AD2d 32, 40-41 [1988], *lv dismissed in part and denied in part* 73 NY2d 868 [1989]), cited by *Dupuis*, articulated the same proposition with respect to an identical paragraph 28, as had the Second Department in *St. George Tower & Grill Owners Corp. v Honig* (232 AD2d 475 [1996]), also cited by *Dupuis*. Nor do plaintiffs offer an explanation for their failure to timely assert these precedents that might excuse such failure and

warrant vacatur of the judgment in the interests of justice (CPLR 5015[a][1]; see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

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

ENTERED: JUNE 24, 2008

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

3653-

3654-

3654A Artalyan, Inc., et al., Index 605038/01
Plaintiffs-Appellants-Respondents,

Royal Insurance Company of America,
etc., et al.,
Plaintiffs,

-against-

Kitridge Realty Co., Inc., et al.,
Defendants-Respondents,

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

Meier Franzino & Scher, LLP, New York (Davida S. Scher and
Tinamarie Franzoni of counsel), for appellants-respondents.

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

Kral Clerkin Redmond Ryan Perry & Girvan, LLP, Smithtown (James
V. Derenze of counsel), for Kitridge Realty Co., Inc.; Estate of
Irving Goldman; BLDG Management Co., Inc.; Wembly Management Co.,
Inc.; IG Second Generation Partners, L.P.; IG Second Generation
Partners & I BLDG Co., Inc. and IG Second Generation Partners,
L.P. & I BLDG Co., respondents.

Gartner & Bloom, P.C., New York (Susan P. Mahon of counsel), for
Extreme Building Services Corp., respondent.

Fiedelman & McGaw, Jericho (Dawn C. DeSimone of counsel), for MRC
II Contracting, Inc., respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.),
entered April 20, 2007, which, to the extent appealed from as
limited by the briefs, granted the motion of defendants Kitridge
Realty Co., Inc., Irving Goldman, Wembly Management Co., Inc., IG

Second Generation Partners, L.P., IG Second Generation Partners & I BLDG Co., Inc., and IG Second Generation Partners & I Bldg Co. (the Kitridge defendants) for summary judgment dismissing that portion of the complaint of plaintiffs Artalyan, Inc., Duran Jewelry, Inc., Oscar Platinum & Co., Roy Rover New York, Inc., Rover & Lorber, LLC, Roy Rover individually, and Ultramax, Inc. (plaintiffs) setting forth claims for conversion; granted the motion of defendant Extreme Building Services for summary judgment dismissing the complaint as against it; and granted the motion of the City of New York and New York City Police Department (the City defendants) for summary judgment dismissing the claims against them for conversion, unanimously affirmed, without costs. Order, same court and Justice, entered April 24, 2007, which granted defendant MRC II Contracting's motion for summary judgment dismissing the complaint against it, unanimously affirmed, without costs. Order, same court and Justice, entered June 26, 2007, which denied the City defendants' motion for summary judgment with respect to plaintiffs' negligence claim premised on alleged failure to safeguard plaintiffs' personal property, unanimously reversed, on the law, without costs, to dismiss the negligence claim as against the City defendants.

The motion court properly dismissed plaintiffs' claims for conversion. The record is devoid of evidence that either the Kitridge defendants or MRC II had control and dominion over

plaintiffs' property; thus, they cannot be liable for conversion (see *Zion Tsabbar, D.D.S., P.C. v Hirsch*, 266 AD2d 91, 92 [1999]; cf. *Glass v Wiener*, 104 AD2d 967, 968-969 [1984]). Similarly, defendant Extreme was not liable for conversion, as the record demonstrates that it also did not exercise dominion and control over plaintiffs' property, but merely did as it was directed to do by excavating the building debris and turning over any recovered property to the New York City Police Department for safekeeping. Finally, the City defendants cannot be liable for conversion, as the record is devoid of evidence that any City employee claimed possession of plaintiffs' property, wrongfully denied plaintiffs access to it, or wrongfully disposed of it.

Further, defendants are not subject to vicarious liability for any conversion that was allegedly carried out by their employees. With respect to Extreme and MRC II, the acts complained of were not within the scope of employment for either one of those defendants' employees, as such acts, if any, would have been committed for personal motives unrelated to the furtherance of the employers' business (see *Naegele v Archdiocese of N.Y.*, 39 AD3d 270, 271 [2007], *lv denied* 9 NY3d 803 [2007]; *Adams v New York City Tr. Auth.*, 211 AD2d 285, 294 [1995], *affd* 88 NY2d 116 [1996]; *Campos v City of New York*, 32 AD3d 287, 291-92 [2006], *lv denied* 8 NY3d 816 [2007], *lv dismissed* 9 NY3d 953 [2007]). Similarly, there is no basis for vicarious liability

against the Kitridge defendants, as they did not control the actions of Extreme's or MRC II's employees at the demolition site, nor is there any evidence in the record that any of their employees deliberately took property from the site (see *Marino v Vega*, 12 AD3d 329, 330 [2004]).

The motion court also erred in denying the City defendants' motion to dismiss the complaint insofar as asserted against them for negligence. A public employee's discretionary acts may not result in the municipality's liability even when the conduct is negligent (*Pelaez v Seide*, 2 NY3d 186, 198 [2004]; *Lauer v City of New York*, 95 NY2d 95, 99 [2000]). Rather, to impose liability, duty must be born of a special relationship between the plaintiff and the governmental entity, and when such relationship is shown, the government is under a duty to exercise reasonable care toward the plaintiff (*Pelaez*, 2 NY3d at 198-99; *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]). Here, plaintiffs allege that there was a special relationship between them and the City defendants because of the City defendants' voluntary assumption of a duty that generated justifiable reliance. However, plaintiffs failed to sustain their heavy burden of showing any special relationship between itself and the City (*Pelaez*, 2 NY3d at 202). To the contrary, none of the evidence in the record showed that plaintiffs justifiably relied on any statements by City representatives, and in any event, the

alleged statements of City representatives were too vague to induce plaintiffs' reasonable reliance (see *Luisa R. v City of New York*, 253 AD2d 196, 203 [1999]; *Taebi v Suffolk County Police Dept.*, 31 AD3d 531 [2006]).

In light of the foregoing, we need not consider the parties' remaining contentions.

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

ENTERED: JUNE 24, 2008

CLERK

Newman Fitch Altheim Myers, P.C., New York (Michael H. Zhu of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for McNeill respondents.

Marks, O'Neill, O'Brien & Courtney, P.C., Elmsford (John J. Hopwood of counsel), for ETS Contracting, Inc., respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Miller Druck Co. Inc., Miller Druck Specialty Contracting, Inc. and D. Magnan & Co., Inc., respondents.

Judgment, Supreme Court, New York County (Wilma Guzman, J.), entered March 1, 2007, awarding plaintiff Wilbur McNeill, on a jury verdict, damages against defendants-appellants G.C.T. Venture, Inc. (GCT) and Lehrer McGovern & Bovis, Inc. and Bovis Lend Lease LMB, Inc. (formerly known as Lehrer McGovern & Bovis, Inc.) (collectively, Bovis), and dismissing defendants-appellants' third third-party complaint against third third-party defendant ETS Contracting, Inc. (ETS), the appeal from which brings up for review an order, same court (Kenneth L. Thompson, Jr., J.), entered October 13, 2005, granting second third-party defendants Miller Druck Co. Inc. and Miller Druck Specialty Contracting, Inc. (collectively, Miller Druck) and D. Magnan & Co., Inc. (Magnan) summary judgment dismissing defendants-appellants' second third-party complaint, unanimously reversed, on the law, without costs, the second and third third-party complaints reinstated, and the matter remanded for a new trial on all issues.

Plaintiff, an asbestos abatement inspector, alleges that he injured his knee when he slipped and fell on a liquid substance on the floor while he was walking to an abatement area to perform an inspection in the course of the renovation of Grand Central Terminal. The project was owned by defendant-appellant GCT, and defendant-appellant Bovis was the construction manager. After trial, the jury returned a verdict finding Bovis and GCT (collectively, appellants) liable for plaintiff's injuries under Labor Law § 241(6). For the reasons discussed below, we reverse the judgment, reinstate appellants' second third-party complaint against Miller Druck and Magnan and appellants' third third-party complaint against ETS (both of which were dismissed before the case went to the jury), and remand for a new trial on all issues.

Initially, we reject appellants' argument that plaintiff was not within the class of persons entitled to assert claims based on violations of Labor Law § 241(6). Plaintiff's inspection of asbestos abatement work during the construction phase of the Grand Central Terminal renovation project was essential and integral to the progress of the construction, since the abatement work could not continue unless he gave his approval. Plaintiff was thus within the class of persons that Labor Law § 241(6) was intended to protect (*see Aubrecht v Acme Elec. Corp.*, 262 AD2d 994 [1999]).

At trial, the main thrust of appellants' defense on the

issue of liability was to question the credibility of plaintiff's uncorroborated account of his accident. Appellants also questioned the credibility of plaintiff's testimony about the severity of his injury and its causation. Nonetheless, the court refused to permit appellants to impeach plaintiff's credibility by questioning him, on cross-examination, as to the reason he lost the job he held at the time of the accident. Although plaintiff testified at his deposition that he was laid off for economic reasons, the record reflects that appellants obtained documentation indicating that plaintiff was terminated for having defrauded his employer through the submission of fraudulent reimbursement slips. Such dishonest conduct (assuming plaintiff engaged in it) plainly falls within the category of prior immoral, vicious or criminal acts having a direct bearing on the witness's credibility, inasmuch as "it demonstrates an untruthful bent or significantly reveals a willingness or disposition . . . voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society" (*People v Walker*, 83 NY2d 455, 461 [1994] [citations, internal quotations marks and brackets omitted]). Moreover, appellants sought to question plaintiff about this matter in good faith, and with a reasonable basis in fact (see *People v Kass*, 25 NY2d 123, 125-126 [1969]). While the reason for plaintiff's termination, as a collateral matter (since plaintiff did not seek lost-

earnings damages), was not a proper subject for extrinsic proof (see *Badr v Hogan*, 75 NY2d 629, 634-635 [1990]), under the circumstances of this case, the trial court abused its discretion as a matter of law in preventing appellants from questioning plaintiff about it during cross-examination. Since the issue of plaintiff's credibility went to the heart of appellants' defense as to both liability and damages, the error was not harmless, and a new trial is required.

The trial court also erred in precluding appellants from questioning plaintiff on cross-examination about his deposition testimony that the liquid on which he slipped might have been "encapsulate" (a milky liquid used in the abatement of asbestos) and in dismissing the third-party complaint against ETS, the project's asbestos abatement subcontractor, on that basis. At his deposition, plaintiff testified that he thought the liquid on which he slipped "could be some kind of encapsulate, but I wasn't sure." At trial, however, plaintiff testified that he had no idea what kind of liquid had caused his accident. Under these circumstances, appellants were entitled to question plaintiff about the deposition testimony in question, both for purposes of impeachment and to use the prior inconsistent testimony as evidence-in-chief that the liquid was encapsulate. In the latter regard, plaintiff's deposition testimony, which was given under oath by a declarant available for cross-examination at trial, has

sufficient indicia of reliability to be considered as evidence-in-chief (see *Letendre v Hartford Acc. & Indem. Co.*, 21 NY2d 518 [1968]; *Campbell v City of Elmira*, 198 AD2d 736, 738 [1993], *affd* 84 NY2d 505 [1994]; *cf. Nucci v Proper*, 95 NY2d 597, 602 [2001] [witness's prior inconsistent "unsworn oral statements" were not admissible as evidence-in-chief], *affg* 270 AD2d 816, 817 [2000] [distinguishing *Campbell* on the ground that the prior inconsistent statement therein "was sworn testimony and was admissible as evidence-in-chief"]. Given that plaintiff is subject to cross-examination at trial, the admissibility of his prior deposition testimony is not affected by the circumstance that ETS did not receive notice of the deposition by reason of its own failure (although served with process) to appear in the action as of that time.

The appeal from the judgment brings up for review a pretrial order rendering summary judgment dismissing appellants' third-party complaint against Miller Druck (the project's marble, stone and tile contractor) and Magnan (to which Miller Druck subcontracted the terrazzo floor work). This grant of summary judgment was erroneous. It appears from the record that the work of Miller Druck and Magnan produced a liquid "slurry" that could end up on the floor. As plaintiff's deposition did not conclusively establish that he slipped on encapsulate, rather than the slurry by-product of Miller Druck's and Magnan's work,

an issue of fact exists as to which contractor was responsible for the liquid on which plaintiff slipped. Contrary to the arguments of Miller Druck and Magnan, the record contains evidence tending to show that these contractors were working in reasonable proximity to the site of plaintiff's accident. Accordingly, the pretrial motion and cross motion by Miller Druck and Magnan for summary judgment dismissing appellants' third-party complaint against them should have been denied.

Finally, the trial court erred in precluding appellants' expert witness, Dr. Lubliner, from testifying that the subject incident, which occurred in September 1997, was not a proximate cause of a lateral meniscus injury that first came to light in January 2004. Although Dr. Lubliner's CPLR 3101(d)(1) disclosure statement, served three years before trial, did not state that he would opine as to the proximate causation of this particular injury, the reason for this omission was that plaintiff never gave any notice prior to trial that his expert, Dr. Goldstein, would connect the lateral meniscus injury (discovered in 2004) to the subject incident (which occurred in 1997). Appellants first learned that the lateral meniscus injury would be attributed to the subject incident when Dr. Goldstein testified at trial. Under these circumstances, plaintiff could not claim to have been misled or prejudiced by appellants' expert disclosure, and fairness demanded that appellants be permitted to present expert

testimony to counter plaintiff's surprise contention that the subject incident caused the late-appearing lateral meniscus injury. We note that appellants' supplemental expert disclosure, served a month before trial, advised plaintiff that Dr. Lubliner's testimony would be based on his review of the medical records and of other testimony offered at trial. Accordingly, at the trial to be held on remand, in the event plaintiff presents evidence attributing the lateral meniscus injury to the subject incident, appellants should be permitted to present testimony on that issue by Dr. Lubliner or any other expert they may subsequently identify.

In view of the foregoing, we need not reach the parties' remaining arguments.

THIS CONSTITUTES THE DECISION AND ORDER
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fifth cause of action for breach of contract, predicated upon appellants' corporate predecessor having sold the allegedly defective impeller in November 1999, which defendant Power Cooling installed as a component to subrogor building owner's air conditioning system in 2000, is also barred by the four-year limitations period (*id.*).

Summary judgment, however, on plaintiff's first (negligence) and third (strict products liability) causes of action was properly denied. Depositions and expert discovery have yet to be conducted, and the record presents triable issues.

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 24, 2008

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

3999 Nicoll & Davis LLP,
Plaintiff-Respondent,

Index 602324/06

-against-

Isaac Ainetchi, et al.,
Defendants-Appellants.

Ross & Asmar LLC, New York (Steven B. Ross of counsel), for appellants.

Nicoll Davis & Spinella LLP, New York (Jack T. Spinella of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 26, 2007, which, to the extent appealed from, denied defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff law firm's failure to comply with the rules on retainer agreements (22 NYCRR 1215.1) does not preclude it from suing to recover legal fees for services provided (see *Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JUNE 24, 2008

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THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
JUNE 24, 2008

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

M-2889X Moore v DL Restaurant Development, LLC, doing business
as Scalini Fedeli, NYC

M-2893X Gibson v Campbell

M-2916 People v Keile, George, also known as Arafat, Abdullah
Appeals withdrawn.

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

M-2358 Global Asset Management, Inc. v Lewis
Motion deemed withdrawn.

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

M-2422 (D.C. #16) In the Matter of M., Ilene; M., Crystal; M.,
Hector; M., Ariel - Administration for
Children's Services

Upon the Court's own motion, appeal dismissed.

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

M-2421 (D.C. #14) In the Matter of L., Tyree

Upon the Court's own motion, appeals dismissed.

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

M-2433 (D.C. #26) Tung v Levy

Upon the Court's own motion, proceeding dismissed.

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

M-2181A People v Santiago, Angel

Leave to prosecute appeal as a poor person granted, as indicated. The order of this Court entered on May 20, 2008 [M-2181] recalled and vacated.

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

M-2596 Exxon Mobil Corporation v Certain Underwriters at Lloyd's London

Reargument or other relief denied.

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

M-1988 M&B Joint Venture, Inc. v Laurus Master Fund, Ltd.

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

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

M-2293 Robertson v New York City Housing Authority

Dismissal of appeal denied; time to perfect appeal enlarged to the October 2008 Term, as indicated.

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

M-2548 People v Conde, Abraham

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

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

M-2552 People v Glover, James

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

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

M-2550 People v Mickens, Shawndale

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

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

M-2554 People v Jones, Dominique

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

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

M-2768 Fairmont Funding, Ltd. v J&G Realty Properties, LLC.

CPLR 5704(a) relief denied.

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

M-2446 In the Matter of R.-W., Gayle v W., Marc
Time to perfect appeal enlarged to the October 2008
Term.

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

M-2401 D'Esposito v Gusrae, Kaplan & Bruno, PLLC
Stay denied.

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

M-2341 Fields v Fields
M-2541
Motion (M-2341) deemed withdrawn. Appeals
consolidated; time to perfect same enlarged to the October
2008 Term, as indicated (M-2541).

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

M-2713 Kinberg v Kinberg
Reargument or other relief denied.

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

M-2333 People v Villanueva, Armando, also known as Villanueva,
Armondo
Leave to prosecute appeal as a poor person denied, with
leave to renew, as indicated.

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

M-179 People v Cephas, Herbert

Writ of error coram nobis denied.

Tom, J.P., Mazzairelli, Saxe, Catterson, JJ.

M-6808A In the Matter of D., Pathjrie, also known as D., Patrij
- Administration for Children's Services

Leave to prosecute appeal as a poor person granted;
motion otherwise denied, as indicated. The order of this Court
entered on February 20, 2007 (M-6808) recalled and vacated.

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

M-2150 People v Santin, Jorge

M-2321

Leave to prosecute appeal as a poor person and related
relief denied (M-2150); appeal dismissed (M-2321).

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

M-2588 People v Tucker, James

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

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

M-2604 People v Campbell, William

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

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

M-2524 (D.C. #76) People v Sidberry, Yuseiph, also known as
Wiggins, Yuseiph

Upon the Court's own motion, and upon papers filed,
counsel substituted, as indicated.

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

M-1128 The RGH Liquidating Trust v Deloitte & Touche LLP
Reargument or other relief denied.

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

M-2476 Schaefer v Schaefer

Enlargement of time to perfect appeal denied; appeal
dismissed.

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

M-2374 People v Taveras, Jose Luis

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

Mazzarelli, J.P., Andrias, Saxe, Buckley, JJ.

M-2081 People v Hemphill, David

Reargument denied.

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

M-2662 In the Matter of R., Jeremiah - Catholic Home Bureau
for Dependent Children

Appeal dismissed.

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

M-2592 People v Santiago, Ralph

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

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

M-1795 In re Brimberg v The Commissioner of Finance of the
City of New York

Reargument and/or clarification or other relief denied.

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

M-2643 CDR Créances, S.A. v Cohen, also known as Levy
M-2644 (And another action)

Appeals dismissed.

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

M-4725 People v Perrilla, Sergio

Writ of error coram nobis denied.

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

M-2736 LaFurge v Cohen

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

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

M-2360 Ryan v Kellogg Partners Institutional Services

Stay denied.

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

M-2851 Imaging International, Inc. v Hell Graphic Systems, Inc.

Appeal from orders entered on or about October 29, 2007 and October 30, 2007 dismissed as subsumed within appeal from judgment entered on or about March 24, 2008; time to perfect said appeal enlarged to the November 2008 Term.

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

M-2711 Sky v Tabs

Stay of trial granted.

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

M-2483 American Guarantee and Liability Insurance Company v
Hoffmann

Notice of appeal deemed timely served and filed.

Lippman, P.J.

M-2622 People v Alvarez, Omar J.

Leave to appeal to this Court denied.

Lippman, P.J.

M-2383 People v McMillian, Melvin

Leave to appeal to this Court denied.

Acosta, J.

M-2712 People v Figueroa, Christian

Leave to appeal to this Court granted, as indicated.

DeGrasse, J.

M-2676 The Alphonse Hotel Corp., doing business as The Hotel
Carter v Diallo

Leave to appeal to this Court denied.

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

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

M-2716 Marvin A. Freiman, admitted on 6-28-49,
at a Term of the Appellate Division,
First Department

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

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

M-104 In the Matter of Winford Kent Bishop,
M-948 an attorney and counselor-at-law:

Respondent disbarred and his name stricken from the
roll of attorneys and counselors-at-law in the State of New York,
effective the date hereof. Cross motion for dismissal of
petition denied. Opinion Per Curiam. All concur.

The following order was entered and filed on June 19, 2008:

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

M-2903 Cuomo v Greenberg
Stay and related relief denied.