

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 30, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3508 In re Terrace HealthCare Center, Inc., Index 8754/06
 Petitioner-Appellant,

-against-

 Antonia C. Novello, M.D.,
 Commissioner of Health for the
 State of New York, et al.,
 Respondents-Respondents.

Ruskin Moscou Faltischek, P.C., Uniondale (Mark S. Mulholland of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Carol Fischer of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered November 30, 2006, dismissing the petition to set aside as untimely the results of all respondent Department of Health's (DOH) audits of petitioner's patient review instruments (PRIs), used to calculate petitioner's Medicaid reimbursement rate, performed within the six years preceding the petition, to direct DOH to use petitioner's PRI unaudited submissions from 1996 to the present to calculate its Medicaid reimbursement rate, to rescind the parties' March 3, 2003 agreement, and to enjoin

the review scheduled for March 15, 2006 of petitioner's December 1999 PRIs, affirmed, without costs.

Petitioner's challenges to the reviews of its PRI submissions for December 1996, June 1997, December 1997, June 1998 and December 1998 are barred by the four-month statute of limitations for article 78 review (CPLR 217[1]). Petitioner contends that it is entitled to a six-year limitation period because it is challenging the constitutionality of the review process under 10 NYCRR 86-2.30. However, the review of the submissions in question was not conducted pursuant to 10 NYCRR 86-2.30. It was conducted pursuant to the parties' March 3, 2003 "Agreement to Accelerate PRI Processing," which petitioner entered into voluntarily. DOH did not breach the agreement by failing to expedite the process. The agreement did not set forth a schedule to which DOH was required to adhere, and the record shows that, based on the agreement's procedures, DOH became more timely in the reviews and began to reduce the backlog.

Nor were DOH's reviews untimely because they were performed more than six years after the PRIs were submitted. Petitioner's reliance on *Matter of Blossom View Nursing Home v Novello* (4 NY3d 581, 595-596 [2005]) is misplaced. DOH did not attribute the backlog to mere administrative inadvertence but explained that the delays were the result of having to proceed through all

stages of review in 7 of the 10 reviews that preceded the review of the December 1996 submissions, because of petitioner's improper submissions.

DOH's determination was not arbitrary and capricious. DOH is not obligated to accept petitioner's submissions without review on the ground that they were prepared by an independent organization it approved. Moreover, it is uncontested that petitioner did not have proper documentation for at least one such submission. The assertion of the organization's president that the documents must have existed when the submissions were made is not based on personal knowledge, and DOH was not required to accept it in lieu of the documents. Nor was petitioner's counsel's assertion that there had been a fire "some years ago" a substitute for the proper documentation, which, upon execution of the March 2003 agreement, petitioner knew or should have known it was required to preserve. Petitioner has raised no material issues regarding the remaining PRI reviews.

All concur except Catterson, J. who dissents in a memorandum as follows:

CATTERSON, J. (dissenting)

I must respectfully dissent because in my view relief may not be had under CPLR article 78; thus, dismissal pursuant to the four-month statute of limitations is inappropriate and would deprive the plaintiff of all relief. Because the defendant's audits of the plaintiff healthcare facility were delayed almost seven years despite the defendant's agreement to "expedite" the review process, I would convert this action to one for a declaratory judgment and find the audits untimely as a matter of law.

The plaintiff, Terrace Healthcare Center (hereinafter referred to as "Terrace") is a 240-bed nursing home that receives a majority of its income from Medicaid. In New York, the Department of Health (hereinafter referred to as "DOH") administers the program, establishing reimbursement rates for nursing homes. The DOH calculates reimbursement based on a Case Mix Index (CMI) which reflects the utilization of resources for each patient: the higher the CMI, the higher the reimbursement rate. Utilization is documented by Patient Review Instruments (PRI), which are prepared and submitted to the DOH every six months. The PRI details each patient's medical diagnosis, treatment, and care requirements during the four weeks preceding the submission of the form.

The DOH reviews the accuracy of PRIs approximately every 18 months. Reviews are structured in three stages. In Stage I, the records of 40 patients are assessed by an independent auditor and compared to the PRIs prepared by the facility. If there is a statistically significant discrepancy between the auditor's assessment and the facility's assessment, then a Stage II review is performed. During a Stage II review, 80 patient records are examined and the facility has an opportunity to dispute any Stage I findings and may present additional documentation. The auditor has the option of overturning Stage I findings. If there is a significant statistical discrepancy after a Stage II review, a Stage III review will be performed. In a Stage III review, all of the patients at the facility are reviewed except for those that are already being reimbursed at the lowest rate, and the facility has the opportunity to challenge Stage II determinations. If the facility "fails" (i.e. there is again a significant statistical discrepancy) the Stage III review, the DOH will require the facility to contract with a DOH-approved independent third-party assessor to prepare its PRIs based on records supplied by the facility. The reimbursement rate that is calculated at the end of a Stage III review is based on the DOH's CMI calculation and is considered final, and there is no formal or statutory procedure available to challenge this final

reimbursement rate.

In the years prior to 1996 (the first year of PRIs at issue in this case), the DOH conducted several reviews of Terrace's PRIs and found statistical discrepancies that precipitated additional stages of review. Over time, the reviews became increasingly delayed. For the years 1996 through 2001, Terrace's PRIs were timely filed and prepared by independent assessors in compliance with the DOH.

In February 2003, when the delay in DOH reviews had risen to more than six years, the Assistant Director of the Division of Health Care Financing offered to remedy the situation with a modified audit process that consisted of one onsite review of all outstanding PRIs for one period. The purported "expedite agreement" was represented to Terrace as "accelerat[ing] the inclusion of a more current case mix index" and saving "months of time." As part of the expedite agreement, Terrace waived the opportunity to challenge Stage I and Stage II results and also the right to an exit conference.

In July 2003, five months after the expedite agreement was signed, the DOH reviewed Terrace's 1996 PRIs (six years, eight months after submission) and continued reviewing each period as follows: June 1997 submissions were reviewed in May 2004 (six years, eleven months after submission), December 1997 submissions

were reviewed in October 2004 (six years, ten months after submission), June 1998 submissions were reviewed in February 2005 (six years, eight months after submission), December 1998 submissions were reviewed in June 2005 (six years, six months after submission), June 1999 submissions were reviewed in November 2005 (six years, five months after submission), and December 1999 submission were reviewed in March 2006 (six years, four months after submission). This "expedited" schedule reflected a consistent pattern of a six to-seven-year delay between the submission of the PRIs and DOH review. The DOH found that Terrace had "failed" all but the final review (June 1999 PRIs).

Pending review of the December 1999 PRIs which was scheduled for March 15, 2006, Terrace filed this article 78 proceeding on March 13, 2006 petitioning the court to rescind the March 3, 2003 expedite agreement, to set aside the results of the audits for the previous six years, and to direct DOH to use Terrace's PRIs to calculate reimbursement rates for that period.

The Supreme Court dismissed the action, finding the claims for all but the 1999 PRIs barred by the article 78 four-month statute of limitations, and dismissed claims related to the 1999 PRIs for failing to set forth a basis for the relief sought. In addressing the substantive issues for the 1999 PRIs, it concluded

that the DOH reviews were not untimely, Terrace was not prejudiced by the delay, and that DOH had not materially breached the expedite agreement. Additionally, it found that Terrace was not denied a due process right to review.

In my opinion, the court erred. It could have and should have sua sponte converted the proceeding to one for declaratory judgment on the ground that the ongoing series of determinations by DOH was ill-suited for article 78 proceedings.

It is well established that where the appropriate relief cannot be granted in an article 78 proceeding, the court may consider the matter as one for a declaratory judgment. Matter of Concord Realty Co. v. City of New York, 30 N.Y.2d 308, 314, 333 N.Y.S.2d 161, 164, 284 N.E.2d 148, 150 (1972); Matter of Greene v. Finley, Kumble, Wagner, Heine & Underberg, 88 A.D.2d 547, 547-48, 451 N.Y.S.2d 741, 742-43 (1st Dept. 1982); CPLR 103(c). Here, there is no dispute that each notification following a DOH audit constituted a final administrative act which began the four-month statute of limitations running for an article 78 proceedings. If, however, as Supreme Court concluded, the only vehicle available to Terrace was an article 78 proceeding, the four-month statute of limitations would have necessitated the filing of seven consecutive article 78 petitions. Given the factual complexity of this case, it would be an absurd use of

judicial resources to foreclose Terrace from bringing one action and insist instead on multiple petitions. See Perez v. Paramount Communications, 92 N.Y.2d 749, 754, 686 N.Y.S.2d 342, 344, 709 N.E.2d 83, 85 (1999) (stating that judicial economy and preventing a multiplicity of suits is an objective of the CPLR).

Moreover, in this case, constraining Terrace to an article 78 proceeding bound by the four-month statute of limitations after the DOH delayed the audits for over six years eviscerates the purpose of the four-month statute of limitations. See Solnick v. Whalen, 49 N.Y.2d 224, 232, 425 N.Y.S.2d 68, 73, 401 N.E.2d 190, 195 (1980) (citing Mundy v. Nassau County Civ. Serv. Comm., 44 N.Y.2d 352, 359, 405 N.Y.S.2d 660, 663, 376 N.E.2d 1305, 1308 [1978], Breitel, Ch. J., dissenting). In Solnick, the Court emphasized the rationale underlying the implementation of a four-month statute of limitations for an article 78 proceeding. Quoting Judge Breitel's dissent in Mundy, the Court stated the crux of the four-month statute of limitations for an article 78 petition "is the strong policy, vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammelled by stale litigation and stale determinations." Solnick, 49 N.Y.2d at 232, 425 N.Y.S.2d at 73. The DOH tarried almost seven years in performing the audits at issue and should not be permitted to invoke the statute of limitations as both a

sword and shield.

In my view, therefore, it is appropriate for the six-year statute of limitations for a declaratory judgment to apply. CPLR 213; see Solnick, 49 N.Y.2d at 230, 425 N.Y.S.2d at 72 (noting that “[i]f no other form of proceeding exists for the resolution of the claims tendered in the declaratory judgment action the six-year limitation of CPLR 213 (subd. 1) will then be applicable”). In any event, under the next-nearest theory advanced in Solnick, the closest proceeding would have been against DOH for breach of contract (also a six-year statute of limitations) for failing to expedite the review process pursuant to the expedite agreement and merely maintaining the same six to seven-year delay between audits. Solnick at 230, 425 N.Y.S.2d at 72, 401 N.E.2d at 194 (“Inquire into the kind of action that would have been most likely to raise the same substantive issues had there been no declaratory action available, and determine what the statute of limitations would have been on such next-nearest action”) (internal quotation marks and citations omitted); SRN Corp. v. Glass, 244 A.D.2d 545, 546, 664 N.Y.S.2d 357, 358 (2nd Dept. 1997) (holding that since the claim was based in contract, the six-year statute of limitations rather than the four-month period should apply in an action brought by a nursing home seeking a declaration that a resident was eligible for

medical assistance).

The substantive issue in the declaratory judgment action thus becomes whether the PRI audits conducted by the DOH were timely. As a threshold matter, since it is undisputed that the DOH's onsite audits constituted a "final decision" concerning Terrace's PRIs, the question of their timeliness is ripe for our review. Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 519, 505 N.Y.S.2d 24, 29-30, 496 N.E.2d 183, 188-89 (1986) cert. denied, 479 U.S. 985, 107 S.Ct. 574, 93 L.Ed.2d 578 (1986); see also Committee to Save the Beacon Theater by Meltzer v. City of New York, 146 A.D.2d 397, 402-03, 541 N.Y.S.2d 364, 367-68 (1st Dept. 1989).

In my opinion, the DOH audits were also untimely as a matter of law. See Matter of Blossom View Nursing Home v. Novello, 4 N.Y.3d 581, 596, 797 N.Y.S.2d 370, 380, 830 N.E.2d 268, 278 (2005). In that case, the Court held that a six to seven-year delay in PRI audits was inexcusable when the DOH claimed "administrative oversight (meaning inadvertence, not supervision)." Id. at 595-96, 797 N.Y.S.2d at 380. In this case, the court distinguished Blossom by accepting the DOH's excuse that it was Terrace, rather than the DOH, that caused the delay by submitting "inadequate filings." I disagree. There simply is nothing in the record to indicate that Terrace caused

the delay. The original PRIs were timely submitted and Terrace contracted with a DOH-approved third-party agency to prepare them. The DOH asserted that because Terrace's PRIs were inadequate, Stage II and Stage III PRI audits had to be performed. This distinction is unpersuasive because it nevertheless amounts to an administrative failing by the DOH to timely administer its own internally regulated processes. In Blossom, the Court found the six to seven-year delay in performing PRI audits "untimely as a matter of law." Id. at 596, 797 N.Y.S.2d at 380. Similarly, in this case, I would reject the DOH's pretext that Terrace was responsible by its conduct for the delay, and find the six to seven-year delay in audits inexcusable and untimely as a matter of law. This is particularly true since eliminating the stage reviews in the guise of "expediting" the process did nothing to hasten the glacial pace of the audits.

Moreover, I believe that an analysis of the other three factors of untimeliness enumerated in Matter of Cortlandt Nursing Home v. Axelrod (66 N.Y.2d 169, 178, 495 N.Y.S.2d 927, 932, 486 N.E.2d 785, 790 [1985] cert. denied, 476 U.S. 1115, 106 S.Ct. 1971, 90 L.Ed.2d 655 [1986] (determining whether a period of delay is reasonable within the meaning of State Administrative Procedure Act § 301(1))), also requires a finding in favor of Terrace. In addition to the causal connection between the conduct

of the parties and the delay, the Court also considered the nature of the private interest allegedly compromised by the delay, the actual prejudice to the private party, and the underlying public policy advanced by governmental regulation.

Id. Prejudice results when the administrative delay has damaged a party's ability to mount a defense in an adversarial administrative proceeding. Id. at 180-81, 495 N.Y.S.2d at 791-92. The important public policy at issue in recalculating Medicaid reimbursement rates is the recovery of public funds. Id. at 182, 495 N.Y.S.2d at 793.

I believe that the court erred in finding that Terrace was not prejudiced by the delay. Here, the private interest compromised by the delayed audits was Terrace's right to present support for its PRIs. The DOH claims that Terrace was on notice to preserve documents as of the March 2003 agreement, and so cannot claim prejudice. In fact, however, the six to seven-year delay caused Terrace to be unable to present additional information during the onsite audits such as documentation regarding ADLs (Activities of Daily Living) and rehabilitation, the oral testimony of the staff who treated the patients, and the opportunity to demonstrate a patient's condition and care through direct observation. But for the delay in audits, Terrace claims it would have been able to present valuable support for its

submitted PRIs that was no longer available by the time the expedited audits were performed. For example, the record reflects that documents for one of the audit periods were inadvertently lost or destroyed by fire which led the DOH to reject certain PRIs and replace them with their own, resulting in a lower CMI index and reimbursement rate.

The fourth factor, public policy, is weighed against the first three. While there is a "strong, defined public policy of this State to recover public funds improperly received" (Cortlandt Nursing Home, 66 N.Y.2d at 182, 495 N.Y.S.2d at 936), as the Blossom Court pointed out, long-delayed and protracted PRI audits "harm the public fisc by thwarting prompt recoupment of any Medicaid overpayments." Blossom, 4 N.Y.3d at 595, 797 N.Y.S.2d at 379. Although great deference is normally accorded administrative agency delays when there are complex issues involved, (Cortlandt Nursing Home, 66 N.Y.2d at 181, 495 N.Y.S.2d at 934-35), as the Blossom Court aptly observed, "'timely' is not synonymous with 'timeless.'" Blossom, 4 N.Y.3d at 595, 797 N.Y.S.2d at 380.

Thus, for the foregoing reasons, I would convert this CPLR article 78 proceeding to a declaratory judgment action, find the audits performed in 2003, 2004, 2005, and 2006 untimely as a

matter of law, and order the DOH to recompute the reimbursement rate based on Terrace's originally submitted PRIs for the periods 1996, 1997, 1998, and 1999.

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

ENTERED: SEPTEMBER 30, 2008

CLERK

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

3911-

3911A Andrew Nemeroff,
Plaintiff-Respondent,

Index 600778/05

-against-

The Coby Group, et al.,
Defendants-Appellants.

Vandenberg & Feliu, LLP, New York (Mark R. Kook of counsel), for appellants.

Seyfarth Shaw LLP, New York (David M. Monachino of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered March 10, 2008, which, upon reargument, adhered to a prior order denying defendants' motion for summary judgment dismissing plaintiff's causes of action for quantum meruit and unjust enrichment, and vacated that portion of the prior order that rejected plaintiff's claim that he was entitled to a finder's fee, unanimously reversed, on the law, with costs, the motion granted and said causes of action and claim dismissed. Appeal from the prior order, same court and Justice, entered April 5, 2007, unanimously dismissed, without costs, as superseded by the appeal from the later order.

Plaintiff, a licensed real estate broker, contends that a transaction in which defendants "flipped" property for a profit

of \$15 million would not have happened but for the involvement of nonparties Alex Adjmi and Robert Cayre whom he brought into the transaction through his role as a broker or finder. Despite numerous allegations in plaintiff's appellate brief and before the motion court, there is no evidence of record that supports plaintiff's position that the transaction would not have happened without Adjmi and Cayre, or that Adjmi and Cayre would not have participated in the transaction but for plaintiff's introducing them to defendants. Similarly, there is no evidence that defendants consciously appropriated plaintiff's services, that plaintiff reasonably expected to be compensated therefor, or that defendants recognized the value of the services (see *Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 266-267 [1995]). There is also no evidence to support the cause of action for unjust enrichment: namely, that plaintiff helped lay the "groundwork" for the transaction and that the services he provided were "instrumental to the realization of [defendants'] gain" (*Galbreath Riverbank v Sheft & Sheft*, 273 AD2d 35, 36 [2000]); see also *Korff v Corbett*, 18 AD3d 248, 251 [2005]). As to plaintiff's claim of entitlement to a finder's fee, there is no evidence that the services he performed at defendants' behest were proximately linked to the consummated "flip" (see *Gregory v Universal Certificate Group LLC*, 32 AD3d 777, 778-779 [2006]; see

also *Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162-163 [1993]). Indeed, there is no evidence that plaintiff had anything at all to do with the "flip" of the property.

It is black letter law in this Department that plaintiff cannot avoid summary judgment by offering "self-serving affidavits" that have been "tailored to avoid the consequences of [his] earlier testimony . . ." (*Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]). The verified complaint and plaintiff's deposition testimony make plain that plaintiff was only entitled to earn a fee if he successfully procured financing and defendants closed on the property in question. It is beyond dispute that plaintiff never obtained financing and that defendant Coby did not purchase the Florida property. The record is clear that Coby completed the "flip" of the property to MCZ Centrum without obtaining any financing. Plaintiff's continued reference to an "industry practice" of compensating a broker merely because the broker was engaged to perform a particular service is also unsupported by any citation to authority or the record.

The "Draft Preliminary Sheet" from Aareal Bank that plaintiff claims supports his position that he had procured financing instead directly rebuts his argument. It simply is not a "final version" of any term sheet evidencing financing, and

indeed the record demonstrates that no financing ever took place. Plaintiff's claim in quantum meruit also fails because he proffered no proof as to either the work he actually performed or a "reasonable value" for those alleged services (*Soumayah v Minnelli*, 41 AD3d 390, 391 [2007]; *Geraldi v Melamid*, 212 AD2d 575, 576 [1995]).

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to cause serious physical injury could be readily inferred from defendant's responses during the allocution (see *People v McGowen*, 42 NY2d 905 [1977]; see also *People v Seeber*, 4 NY3d 780, 781 [2005]). The court's inquiry into defendant's claim of self-defense was sufficient to establish that he had no viable justification defense, and that he made a valid waiver of that defense.

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 30, 2008

CLERK

Saxe, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4141 Mark Carmelengo, et al.,
Plaintiffs-Appellants,

Index 8741/06

-against-

Phoenix Houses of New York, Inc.,
Defendant-Respondent,

Caesar Sosa,
Defendant.

Cleary Gottlieb Steen & Hamilton LLP, New York (Timothy M. Haggerty of counsel), for appellants.

Cravath, Swaine & Moore LLP, New York (Francis Patrick Barron of counsel), for respondent.

Order, Supreme Court, Bronx County (Janice L. Bowman, J.), entered January 17, 2007, which granted defendant-respondent's motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without costs.

Plaintiffs contend that while they were resident inmates in the Marcy Program, a Comprehensive Alcohol and Substance Abuse Treatment Program (CASAT) (see 7 NYCRR 1950.1 *et seq.*) operated by Phoenix House and administered by the New York State Department of Correctional Services, defendants discriminated against them on the basis of their religion in violation of Section 8-107(4) of the Administrative Code of the City of New York, by denying their requests, as practicing Muslims, to attend

Friday religious services at a local mosque, while residents of other religious faiths were permitted to attend services.

The preliminary issue is whether Phoenix House is a "place or provider of public accommodation" as defined in section 8-102(9) of the Administrative Code and thus subject to section 8-107(4). While the question of whether a facility is such a place or provider is ordinarily an issue of fact that cannot be determined on a motion to dismiss (*see generally Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d 401, 412 [1983]), and while the procedural posture of this case affords the plaintiffs every favorable inference, there is no question as to the exact nature of this particular program, because it is fully set out in 7 NYCRR 1950.1 *et seq.* The absence of an affidavit by Phoenix House describing its operations is therefore immaterial; nor is there any need for discovery before it can be determined exactly how Phoenix House operates.

While it is true that certain types of places not usually open to the general public have on occasion been held to constitute public accommodations under the State Human Rights Law, these places do provide services to the general public (*see Ness v Pan Am. World Airways*, 142 AD2d 233, 239-240 [1988]). An entity should not be viewed as a place of public accommodation

when it offers a particular program to a select subset of a small segment of the public. Not only are members of the general public barred from even being considered as potential participants in defendants' program, but there is a highly selective process by which a small subset of the prison inmate population may qualify for the drug rehabilitation services of the CASAT program, as well as other strict limitations placed on participation. The motion court was therefore correct to conclude, as a matter of law, that the Phoenix House program at issue does not qualify as a place or provider of public accommodation.

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

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proceedings on the motion as indicated (see *People v LaFontaine*, 36 AD3d 474, [2007]; *People v Arana*, 32 AD3d 305 [2006]). We reject defendant's requests for other relief.

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

ENTERED: SEPTEMBER 30, 2008

CLERK

Saxe, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4148 In re Carol B.,
 Petitioner-Appellant,

-against-

Sanford B.,
Respondent-Respondent.

Burger Yagerman & Green, LLP, New York (Nancy M. Green and Howard W. Yagerman of counsel), for appellant.

Reisman, Peirez & Reisman, L.L.P., Garden City (Michael J. Angelo of counsel), for respondent.

Order, Family Court, New York County (Jody Adams, J.), entered on or about July 25, 2007, which, in a proceeding to recover alleged child support arrears, denied petitioner mother's objection to that part of an October 19, 2006 Support Magistrate's order determining that a six-year statute of limitations period applies, and granted respondent father's objection to that part of the same order directing him to pay child support arrears in the amount of \$17,669.25, unanimously affirmed, without costs.

Family Court properly determined that, under the plain terms of the separation agreement, which was incorporated but not merged into the judgment of divorce, the father owed no additional support payments. In any event, for more than 17 years after the separation agreement was executed, the mother

accepted the father's support payments without raising any objections. The parties' course of conduct under a contract is persuasive evidence of their agreed intention (see *Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 [1999]). In view of the foregoing, we need not address the mother's remaining contention that the 20-year statute of limitations in CPLR 211(e) applies, not the six-year statute in CPLR 213(1).

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statements to the Internal Affairs Bureau investigators (see *Matter of Berenhaus v Ward*, 70 NY2d 436 [1987]; *Matter of D'Augusta v Bratton*, 259 AD2d 287 [1999]).

The penalty of dismissal does not shock our sense of fairness, particularly where the evidence gives rise to the inference that petitioner obtained the stolen license plate by virtue of his official position and intended to use the plate for fraudulent purposes (see *e.g. Matter of Kelly v Safir*, 96 NY2d 32 [2001]).

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

ENTERED: SEPTEMBER 30, 2008

CLERK

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

3764-

3765-

3766 In re Jonathan V.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

In re Drew C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

In re Michael B.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Frederic P. Schneider, New York, for Jonathan V., appellant.

David Adam Goldstein, New York, for Drew, C., appellant.

Steven N. Feinman, White Plains, for Michael B., appellant.

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

Orders of disposition, Family Court, New York County (Mary
E. Bednar, J.), entered on or about June 27, 2007 (Jonathan V.)
and June 11, 2007 (Drew C. and Michael B.), affirmed, without
costs.

Opinion by Catterson, J. All concur. Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
SEPTEMBER 30, 2008

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

M-4370X Corwin v Morrisville Auxiliary Corporation
Appeal withdrawn.

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

M-4371X Primedia Inc. v SBI USA, LLC
Appeal withdrawn.

Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

M-3915 Rios v Djavaheerian
M-3921

Time to perfect appeal enlarged to the January 2009
Term (M-3921); dismissal of appeal granted unless perfected for
said Term, as indicated (M-3915).

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

M-2599 Reyes v Harding Steel, Inc.
M-2704 (And other actions)
M-2762

Reargument or other relief denied.

Lippman, P.J., Saxe, Buckley, Acosta, JJ.

M-2853 Coker v City of New York Department of Probation
Reargument or other relief denied.

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

M-3004 Leffler v Feld
Reargument or other relief denied.

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

M-3069 Baker v Bronx Lebanon Hospital Center
M-3070
Reargument or other relief denied.

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

M-3262 Lumbermens Mutual Casualty Company v The Commonwealth
of Pennsylvania
Reargument or other relief denied.

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

M-3505 Sacca v 41 Bleeker Street Owners Corp.
Reargument or other relief denied.

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

M-3912 Estate of Golden - Golden v Golden

Reargument or other relief denied.

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

M-3662 Peter-MacIntyre v Lynch International, Inc.

Reargument denied.

Lippman, P.J., Gonzalez, Sweeny, Catterson, DeGrasse, JJ.

M-4252 Katsam Holdings LLC v 419 West 55th Street Corporation

Stay granted on condition that (1) appellant consents to plaintiff's payment of monthly maintenance to appellant's counsel to be held in escrow; (2) appellant posts a certain undertaking amount; and (3) appellant perfects appeal on or before November 10, 2008 for the January 2009 Term, as indicated.

Tom, J.P., Gonzalez, Sweeny, Catterson, Moskowitz, JJ.

M-3313 A-1 Capital Corp. v Jehova Shalom, Inc.

M-3552

Time to perfect appeal enlarged to the January 2009 Term; dismissal of appeal denied, as indicated.

Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

M-3809 Estate of Tarka - Tarka v Public Administrator of
M-3608 the County of New York

Motions consolidated for disposition and so much thereof which seeks an order of this Court setting aside the stipulation of discontinuance denied. So much of the motion which seeks a discontinuance of the appeal granted to the extent of deeming the appeal withdrawn, as indicated.

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

M-2887 Galison v Greenberg
M-2926 Reargument or other relief denied.

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

M-2937 The Trustees of Princeton University v National Union
Fire Insurance Co. of Pittsburgh, Pa.
Reargument or other relief denied.

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

M-3103 In re Lancer Insurance Company v Lackraj
Reargument or other relief denied.

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

M-3244 In re Rownd v The Teachers Retirement System of the
City of New York
Reargument or other relief denied.

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

M-2572 People v Caban, Lynette

Reargument denied.

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

M-2986 The State of New York v Seventh Regiment Fund

Reargument denied.

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

M-3510 Knee v A.W. Chesterton Co. - The Goodyear Tire & Rubber
Company

Reargument denied.

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

M-2564 Angel v O'Neill

Leave to appeal to the Court of Appeals denied.

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

M-2998 People v Tan, Jian, also known as
Tan, Jian Xiong

Reinstatement and writ of error coram nobis denied.

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

M-1468 People v Rubi, Jose

Writ of error coram nobis denied.

Mazzarelli, J.P., Buckley, Acosta, Renwick, DeGrasse, JJ.

M-3736 Rollock v Vardaxis

Appeal dismissed.

Mazzarelli, J.P., Buckley, Acosta, Renwick, DeGrasse, JJ.

M-3099 Cortez v Lalite

Enlargement of time to take a notice of appeal from judgment entered December 19, 2007, or for alternative relief, denied; appeal from order entered August 17, 2007 dismissed.

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

M-3481 Humphreys & Harding, Inc. v Universal Bonding Insurance Company - Welch Construction Corp.

Reargument or other relief denied.

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

M-3522 T., Elizabeth Amanda - Graham-Windham Services to Families and Children

Reargument or other relief denied.

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

M-3572 Callan v Structure Tone, Inc. v Atlas-Acon Electric
Services Corp.

Reargument or other relief denied.

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

M-3591 Brenner v Brenner

M-3794

Reargument or other relief denied.

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

M-3934 McDonald v Montefiore Medical Center

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

Mazzarelli, J.P., Buckley, Acosta, Renwick, DeGrasse, JJ.

M-3740 In the Matter of Guiden - W., Veronica - Floyd

Leave to unseal record on appeal denied; time to
perfect appeal enlarged to the January 2009 Term, as indicated.

Mazzarelli, J.P., Friedman, Gonzalez, Williams, JJ.

M-2805 People v Funches, Trevis

Writ of error coram nobis denied.

Mazzarelli, J.P., Buckley, Acosta, Renwick, DeGrasse, JJ.

M-3898 People ex rel. Boddie, Terence v New York State
Division of Parole

Writ of error coram nobis and other relief denied.

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

M-2463 Freeford Limited v Pendelton

M-2465

M-2614

Reargument or other relief denied.

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

M-2645 Purchase Partners II, LLC v Westreich
(And a third-party action)

Leave to appeal to the Court of Appeals denied.

Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

M-4096 Batyрева v N.Y.C. Department of Education

Stay granted, as indicated.

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

M-3527 Aldrich v Marsh & McLennan Companies, Inc.

Reargument or other relief denied.

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

M-3561 Ronda v Friendly Baptist Church
Reargument or other relief denied.

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

M-3624 Littman v Magee
Reargument or other relief denied.

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

M-3814 In the Matter of S., Thomas v S., Latisha
Time to perfect appeal enlarged to the February 2009
Term.

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

M-3930 Joseph Chai Corp. v Gemological Institute of America
(And a third-party action)
Time to perfect consolidated appeals enlarged to the
January 2009 Term.

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

M-3910 People v Pena, Victor
Appellant directed to file an appendix containing
certain documents on or before November 10, 2008 for the January
2009 Term; motion otherwise denied, with leave to renew, as
indicated.

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

M-3919 People v Robinson, David

Transcription of minutes directed, as indicated; time to perfect appeal enlarged to the February 2009 Term.

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

M-3515 Callahan v Carey; Eldredge v Koch

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

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

M-4033 People v Gumbs, Junior

Leave to file pro se supplemental brief granted to the January 2009 Term, to which Term appeal adjourned, as indicated.

Saxe, J.

M-3785 People v Hemphill, David

Leave to appeal to the Court of Appeals denied.

Friedman, J.

M-3784 People v Soto, Randy

Leave to appeal to the Court of Appeals denied.

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

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

M-4242 Susan Jane Abraham, admitted on 6-18-1984,
at a Term of the Appellate Division,
First Department

This Court's order entered October 12, 2006 [M-3061.9]
recalled and vacated, and the Opinion Per Curiam filed therewith
amended to vacate so much thereof as pertains to the above-named
respondent, as indicated. 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-4231 Hal Barry Eisenstein, admitted in 1969,
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. No
opinion. All concur.

Tom, J.P., Gonzalez, Sweeny, Catterson, Moskowitz, JJ.

M-2999 In the Matter of Manuel Campos-Galvan,
an attorney and counselor-at-law:

Respondent's name stricken from the roll of attorneys
and counselors-at-law in the State of New York, nunc pro tunc to
June 13, 2008. Opinion Per Curiam. All concur.

The Following Order Was Entered And Filed
On September 23, 2008:

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

M-4389 Mike v Riverbay Corporation

Stay of trial denied.

The Following Orders Were Entered And Filed
On September 25, 2008:

Tom, J.P., Friedman, Buckley, Acosta, Freedman, JJ.

M-4149 Melnick v Khoroushi

Stay granted on the terms and conditions of the order of a Justice of this Court, dated August 26, 2008.

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

M-4316 Catarino v The State of New York

Stay of trial on damages granted.

Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

M-4492 Bengis v Bengis

Stay denied. All concur except McGuire, J. who concurs separately as follows:

McGuire, J. (concurring)

I agree that we should deny the application of defendant husband for equitable relief from this Court pending his appeal from the order described below. Given the unusual facts of this motion, I think it appropriate to explain the rationale of my conclusion.

In 2004, the husband was convicted under a federal statute prohibiting the over-fishing of certain sea life. After serving a sentence of imprisonment, he was released; he is presently on supervised release, which is scheduled to end in January 2009.

The wife commenced this action for divorce. She was awarded temporary support and attorney's fees by Supreme Court, most of which the husband has failed to pay. The wife claims that he has substantial assets because he has interests in several corporate entities. The husband concedes that he has not satisfied all his support obligations and has failed to pay, as directed by the court, certain of the wife's legal fees. He contends, however, that he does not possess the means to satisfy these obligations. While some documentary disclosure has been completed, no depositions have yet been taken.

On July 24, 2008, the husband sought from Judge Lewis A. Kaplan, the District Court Judge who presided over the criminal action, permission to travel abroad from September 25, 2008 to October 8, 2008 to visit family during the Jewish holidays. Specifically, the husband plans to go to Israel and England. According to the husband, his family is paying for the trip. Judge Kaplan granted the request on August 8. The husband then brought an order to show cause before Supreme Court on September 10, seeking, in effect, the court's permission to travel abroad. On this record, it is not entirely clear why the husband sought Supreme Court's permission, but it appears the husband agreed that, in the event the federal probation authorities who were in possession of his passport released it, his counsel would take possession of the passport and would not release it absent Supreme Court's approval. In any event, the wife opposed the motion, and Supreme Court denied it, reasoning that international travel is a privilege, not a right, and that, since the husband failed to pay the court-ordered support and attorney's fees, he should not be afforded that privilege. In addition, Supreme Court expressed concern that the husband might secrete or transfer assets while abroad. With respect to Judge Kaplan's order granting the husband permission to travel, Supreme Court concluded that the federal court was concerned only with monitoring the husband's whereabouts, while Supreme Court was

concerned with the rights of the parties to the matrimonial action.

The husband now seeks what he characterizes as a stay of Supreme Court's order so that he can take this trip. It is not clear what authority Supreme Court has to prevent a litigant in a civil case from traveling abroad; Supreme Court cited none and the wife points to no precedent recognizing such authority. Notably, the husband has not been found in contempt. Moreover, he has a constitutionally protected right to travel (see *Haig v Agee*, 453 US 280, 307 [1981] [the right of international travel, while not unqualified like the right of interstate travel, is an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment]). Furthermore, the husband and wife have no minor children, so there is no concern over the possibility that the husband might abscond with a child (cf. *Matter of Welsh v Lewis*, 292 AD2d 536 [2002]). Nor would it be sensible to conclude that the husband poses a flight risk, assuming the relevance of that issue. Putting aside that he is a United States citizen, the husband would run the risk of being sent back to prison for violating the terms of his supervised release if he were to fail to return, an act that would be all the more irrational given that his term of supervised release will end in a little more than three months. Thus, it is hardly surprising that Judge Kaplan approved the husband's trip and that the federal probation authorities did not oppose it. Furthermore, in the event the husband for some inexplicable reason failed to return, Supreme Court would not be powerless (see generally *Wechsler v Wechsler*, 45 AD3d 470 [2007]).

To the extent Supreme Court relied on the possibility that the husband would transfer or secrete assets while abroad, suffice it to say there is no reason to conclude that the husband could not do so while residing in the United States.

In short, the husband has made a strong showing of a likelihood of success on the merits and, because of the constitutional dimension of his right to travel abroad, a showing of irreparable injury (see generally *Mitchell v Cuomo*, 748 F2d 804, 806 [2d Cir 1984] ["When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary"] [internal quotation marks and citation omitted]). If the husband was able to meet his support and other obligations, that of course would be a serious matter that would weigh heavily against him in balancing the equities. But on this record, and absent a finding

of contempt -- a finding that would be premised on a determination by Supreme Court that the husband was able to satisfy those obligations but nonetheless unjustifiably refused to pay -- we cannot assume that he is in effect a contemnor. Nor can we assume that denying the application for a stay would induce compliance.

Although the parties assume that this Court has the authority to grant relief to the husband pending the determination of his appeal, whether this Court has that authority is not clear. The order from which the husband appeals is prohibitory, rather than executory, in character, and CPLR 5519 does not authorize the court to which an appeal is taken to stay such an order (see *Matter of Pokoik v Dept. of Health Servs. of County of Suffolk*, 220 AD2d 13, 14-15 [1996]; see also 200 Siegel's Practice Rev. 1 [Aug. 2008], citing *All American Crane Serv. v Omran*, motion no. 3228 [1st Dept August 12, 2008]). The provisions of CPLR 5518 are not applicable here either because this is not a "case specified in [CPLR] section 6301" (CPLR 5518). However, the absence of statutory authority is not dispositive as this Court has inherent authority beyond that conferred by CPLR 5518. As a panel of the Second Department has stated:

"Future acts which are not expressly directed by the order or judgment appealed from may nevertheless have the effect of changing the status quo and thereby defeating or impairing the efficacy of the order which will determine the appeal. In such cases, no automatic stay is available but the aggrieved party may apply to the appellate court to exercise ... its inherent power to grant a stay of such acts in aid of its appellate jurisdiction" (*Pokoik*, 220 AD2d at 16).

Similarly, as the Court of Appeals stated in *Matter of Schneider v Aulisi* (307 NY 376, 384 [1954]), "the Supreme Court has inherent power in a proper case to restrain the parties before it from taking action which threatens to defeat or impair its exercise of jurisdiction."

If left undisturbed, the order appealed would "defeat[] or impair[] the efficacy" of an order determining the appeal if that order were favorable to the husband's position. After all, if this Court grants the husband no relief pending the appeal, the appeal will become moot before it can be resolved on the merits. This Court could not issue an order that would alter the fact

that the husband had not traveled to Israel and England or affect the practical rights of the parties (see *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).¹ If this Court were to issue an order purporting to grant the husband permission to take the trip to Israel and England, the appeal also would be rendered moot before it could be resolved on the merits. Moreover, having traveled to Israel and England, there would be no reason for the husband to continue to prosecute the appeal. In short, whether we grant or deny the husband's application, the appeal will be rendered moot.

Of course, there is no order we can issue that would permit the husband to take the trip. Thus, despite our inherent authority to protect our jurisdiction, we cannot protect it in this case by issuing an order restraining one of the parties from taking an action that might defeat or impair our jurisdiction. Either we would have to issue an order directing Supreme Court to grant permission to the husband or we would have to issue our own order granting permission. The former would be tantamount to a summary reversal and the latter would be a summary reversal. In the absence of precedent supporting the proposition that we are authorized to do so, or necessitous circumstances involving a risk of public harm, I am loath to assume and exercise that authority.

¹It is possible, of course, that the husband might rely on the exception to the mootness doctrine for "important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable" (*Matter of Hearst Corp.*, 50 NY2d at 714). Needless to say, I express no opinion on the applicability of that exception.