



where he would be assisted by a community organization in trying to find employment. This was insufficient as a matter of law to meet the People's burden of showing, by clear and convincing evidence, that defendant's living situation was inappropriate (see Correction Law § 168-n[3]; *People v Ruddy*, 31 AD3d 517 [2006], *lv denied* 7 NY3d 714 [2006]), and defendant should not have been assessed 10 points under risk factor 15 (inappropriate living or employment situation).

Since the point assessment for risk factor 15 was the only assessment at issue, there was no need for the court to make findings as to any other matters.

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

ENTERED: NOVEMBER 6, 2008

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CLERK

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

4051 In Re Johnny G., Jr.,

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

MercyFirst,  
Petitioner-Appellant,

Johnny G., Sr.,  
Respondent-Respondent.

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Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for  
appellant.

Joseph V. Moliterno, Scarsdale, for respondent.

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

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Order, Family Court, Bronx County (Allen Alpert, J.),  
entered on or about August 16, 2007, which denied petitioner  
agency's application to terminate respondent father's parental  
rights to the subject child, and dismissed the petition,  
unanimously modified, on the facts and in the exercise of  
discretion, to the extent of reinstating the first cause of  
action of the petition, and otherwise affirmed, without costs,  
and the matter remanded to Family Court for a new fact finding  
hearing.

The subject child, born in September 1997, has been in  
foster care since October 1998. The instant petition was filed  
in 2005 on the grounds that respondent is presently and for the  
foreseeable future unable, by reason of mental illness, to

provide proper and adequate care for the child (Social Services Law § 384-b[4][c]) and that the child is permanently neglected (§ 384-b[4][d]). Following a fact-finding hearing, Family Court ordered the petition dismissed because the agency had not met its burden of proof on the permanent neglect ground. Family Court further noted that the agency presented no evidence with respect to the mental illness ground. The agency's failure to present such evidence is not explained in the record before this Court.

The record contains a report of an August 16, 2005 clinical examination of respondent by Dr. Adam Bloom, a psychologist affiliated with Family Court's Mental Health Services. Respondent was receiving outpatient psychiatric care at the time of the examination. The report recites "an Axis I DSM IV diagnosis of Schizoaffective Disorder, and Axis II Diagnoses of Borderline Intellectual Functioning/Antisocial Personality traits" reached by Dr. Raagas of the New Horizon Counseling Center in October 2003. Dr. Bloom noted a history of inpatient psychiatric care at St. Vincent's Hospital and Queens Hospital Center. He observed apparent organic difficulties and speech and language impairment marked by respondent's difficulties in retrieving words and expressing himself in a clear and logical fashion. According to the report, respondent sustained an injury in the 1980s which rendered him comatose for a year. Dr. Bloom indicated that respondent presented with labile mood patterns and

became angry at times during the interview. Indeed, respondent acknowledged that his psychiatric treatment was for "Anger issues, I can't explain it." During the examination, respondent reported that he was compliant with the prescription for only one of two prescribed medications. Dr. Bloom could not opine as to whether respondent meets the criteria for mental illness under the statute. He deferred a formal recommendation pending the receipt of treatment records from Harlem Hospital, St. Vincent's Hospital, Queens Hospital Center, New Horizon Counseling Center and EDNY Counseling Services.

According to undisputed evidence, respondent angrily shoved the then-six-year-old subject child during a June 2004 supervised visit because the child was resistant to entering the visitation room at the agency. The best interests of the child require judicial consideration of the mental illness ground in light of respondent's conduct at the time of the visit, coupled with the psychiatric history noted above. Family Court did correctly determine, however, that the agency failed to establish by clear and convincing evidence that the child had been neglected for at least one year prior to the filing of the petition (Social Services Law § 384-b[7][a]). Accordingly, the new fact-finding hearing should focus on the issue of whether respondent is presently and for the foreseeable future unable, by reason of

mental illness, to provide proper and adequate care for the child within the meaning of § 384-b[4][c].

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

ENTERED: NOVEMBER 6, 2008

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have concluded that the same rule exists today" (*People v Graves*, 76 NY2d 16, 20 [1990]).

Defendant's claim that the evidence was legally insufficient to establish that he gained entry into the apartment building by means of trick, artifice or misrepresentation is not preserved for review. At the close of the People's case, defendant argued only that the People had failed to make out a prima facie case on both the burglary and robbery charges. After defendant rested without presenting evidence, he renewed his motion to dismiss but limited his argument to the contention that his identity had not been established. Accordingly, having failed to alert the People and the court to this alleged deficiency in the proof, defendant's challenge to the sufficiency of the evidence is not preserved for review (*People v Gray*, 86 NY2d 10, 20-21 [1995]).

Nor did defendant object to the court's instructions on the elements of burglary in the second degree. The Court instructed the jury as follows:

"There is a crime called burglary where it is - it is a crime if somebody enters a building unlawfully intending to commit a crime in the building, whether or not they ultimately commit a crime in the building.

"The elements are: Entering the building, that is, a dwelling. It can be the entire apartment building as opposed to an individual apartment within the greater structure.

"Enter unlawfully. *That means without permission, no lawful reason to be there.*

"To enter unlawfully a dwelling intending to commit a crime in there, whether or not once you get in there, anything strikes your fancy.

"The crime of burglary is completed if you enter a building that's a dwelling unlawfully, intending to commit a crime in there. Those are the elements. Each element has to be proven beyond a reasonable doubt.

"If the People prove each element beyond a reasonable doubt, you must convict. You have no choice.

"If the People fail in any one or all of them, you must acquit. You have no choice" (emphasis added).

The court then went on to instruct the jury concerning robbery and stealing. We quote the rest of the instructions in full because they are relevant to our decision to exercise our interest of justice jurisdiction. The court concluded its instructions as follows:

"With regard to the burglary, it can be any crime. The People don't have to prove what crime. It could be one or more crimes. It's essentially a crime of opportunity. I go in there. Anything that I'm going to do: Rape, rob, pillage, or plunder, you'll see if there's anything of interest. If not, I'll leave.

"Elements are established. The burglary charge has been established. The elements to burglary are that on or about May 21<sup>st</sup> in New York County, the defendant unlawfully entered the building at the address about which you heard testimony. The defendant did so knowingly, and that the defendant did so intending to commit a crime in the building.

"And the fourth is that the building is a dwelling."

As defendant did not object to any aspect of these instructions, the sufficiency of the evidence must be assessed in light of the elements of the crime of burglary in the second

degree as they actually were defined by the charge, regardless of any error in the charge (see *People v Sala*, 95 NY2d 254, 260 [2000]). Given the highlighted portion of the charge, the jury reasonably could have concluded that the element of unlawful entry was established simply by proof that defendant had no lawful reason to be in the apartment building. As the jury only could have concluded that defendant had "no lawful reason to be there," the evidence was legally sufficient and the verdict convicting defendant of burglary in the second degree was not against the weight of the evidence.

We nonetheless exercise our interest of justice jurisdiction and reverse the burglary conviction for several, interrelated reasons. First, the highlighted portion of the charge was manifestly incorrect as it effectively relieved the People of the obligation to prove that defendant had unlawfully entered the apartment building (*cf. People v Konikov*, 160 AD2d 146, 151 [1990], *lv denied* 76 NY2d 941 [1990] [observing in a case in which the People contended that the defendant had entered a dwelling by artifice or trick that the jury was never instructed to consider that theory of unlawful entry and, "accordingly, the People's assertion that the defendant obtained permission to enter through a deception is not supported by a jury finding . . ."] [internal quotation marks omitted]).

Second, although we need not and do not decide the issue, we

have grave doubts about whether defendant properly could have been convicted of the burglary charge if the jury had been correctly instructed. The People's evidence was that the victim unlocked and opened the outer door of the building, stepped into the vestibule after closing and locking the outer door and opened the inner door. Before she walked through the door, she heard a knock on the outer door. The man who knocked on the door - she subsequently identified defendant as that man - "[l]ook[ed] [her] in the eye, and he pointed down to the lock." The victim had been living in the building for only two months and so she looked at him "to see if I recognized him - possibly - maybe he might live in the building." According to the victim, defendant "looked like he had a look on his face like he belonged there. And so I just opened the door for him." The only other evidence bearing on the issue of whether defendant entered the building by artifice or trick is the testimony of the victim that defendant "didn't give me a look that made me feel like I had to be afraid. [He] looked, by the look on [his] face through the window, it looked kind of matter-of-fact, 'you need to open the door.' But - I obviously live there - but without saying that, of course."

The gesture defendant made in pointing to the lock is tantamount to a verbal request that she open the door. Obviously, such a request alone would not be sufficient to establish that defendant entered by means of an artifice or

trick. Nor would the absence of a threatening look be sufficient. Thus, if defendant did enter by means of an artifice or trick, it could only be on account of the victim's impression that defendant "had a look on his face like he belonged there." A "look" on his face that "looked kind of matter-of-fact" and conveyed to her that he was saying "you need to open the door." Suffice it to say, as noted above, we have grave doubts that a jury reasonably could have concluded on the basis of this unelaborated-upon testimony about the look on defendant's face that the People had proven beyond a reasonable doubt that defendant gained entry into the building by artifice or trick. We do not think it appropriate, however, to exercise our interest of justice jurisdiction and assess the sufficiency of the evidence as if the court had correctly instructed the jury on unlawful entry by artifice, trick or deception. Although it may well be improbable that the People could have elicited additional relevant evidence if defendant had made a timely and specific objection that the proof was lacking in this respect, it would not be fair to the People to assume that no such evidence could have been elicited.

Third, we can conceive of no possible strategic reason that might explain either defense counsel's failure to make such a specific objection focusing on an obvious and critical issue or counsel's failure to protest the highlighted, clearly erroneous

instruction. Finally, we of course are troubled by the court's additional instruction to the effect that the elements of the burglary charge "are established[;] [t]he burglary charge has been established." In fairness to the trial court, we note that on her summation defense counsel did not challenge the sufficiency of the evidence as to any of the elements of the burglary and robbery charges, and argued only that the People had failed to prove identity beyond a reasonable doubt. Nonetheless, defense counsel did not expressly concede that any of the elements had been established. Absent such a concession, the trial court should not have instructed the jury that the elements of the burglary charge had been established.

Accordingly, we exercise our interest of justice jurisdiction to review the court's instructions on the elements of the burglary charge, find that those instructions deprived defendant of a fair trial and direct a new trial on the burglary charge in the event the People believe it appropriate to retry defendant on that charge. With respect to the robbery conviction, the evidence was legally sufficient and the verdict was not against the weight of the evidence. There is no basis for disturbing the jury's determinations concerning identification and credibility. The victim had ample basis to observe defendant before he robbed her, she gave the police a

generally consistent and accurate description and identified defendant just three days after the crime when she saw him walking on the street.

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

ENTERED: NOVEMBER 6, 2008

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CLERK

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

4324N-

4324NA Desteny Escalet, an Infant by her Mother and Natural Guardian,  
Melissa Quinonez,  
Plaintiff-Respondent, Index 24546/06  
17054/07

-against-

New York City Housing Authority,  
Defendant-Appellant.

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Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for appellant.

Salzman & Winer, New York (Mitchell G. Shapiro of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about January 8, 2008, which denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint. Appeal by defendant from order, same court (John A. Barone, J.), entered June 18, 2007, which granted plaintiffs' motion for leave to file a late notice of claim, unanimously dismissed, without costs, as academic.

The infant plaintiff was injured when she fell from the top of a fence that was approximately 10 to 12 feet tall. The fence surrounded a grass area that was not a designated play area. Although the fence was locked, plaintiff gained access to the area where the accident occurred by crawling through a hole in

the fence that had allegedly been in existence for more than five years. Plaintiff fell from a different section of the fence after climbing it to retrieve a ball that had become lodged there. Plaintiff does not assert that the portion of the fence from which she fell was defective. Instead, she claims that the presence of the hole facilitated the accident by failing to prevent her from accessing the grass area in the first place.

The complaint should have been dismissed because the connection between defendant's alleged neglect of the fence and plaintiff's injury is too attenuated to conclude that, even accepting the allegations in the complaint as true, defendant's malfeasance proximately caused the accident. Rather, the presence of the hole in the fence "merely furnished the condition or occasion for the occurrence of the event rather than one of its causes" (*Sheehan v City of New York*, 40 NY2d 496, 503 [1976]). The law draws a "sharp distinction" between such a facilitating condition and an act that is a proximate cause of an accident (*Lee v New York City Hous. Auth.*, 25 AD3d 214, 219 [2005]).

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

ENTERED: NOVEMBER 6, 2008

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discretion (see *People v Knight*, 87 NY2d 873 [1995]; *People v Whalen*, 59 NY2d 273, 278-279 [1983]), and we find that the court, which delivered a thorough charge on identification, properly exercised its discretion when it declined to add language specifically directing the jury's attention to the cross-racial aspect of the victim's identification of defendant (see *People v Applewhite*, 298 AD2d 136 [2002], *lv denied* 99 NY2d 625 [2003]).

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). After the prosecution explained its reasons for the challenges at issue, defense counsel remained silent and raised no objection when the court accepted these reasons as nonpretextual. Thus, despite ample opportunity to do so, defendant failed to preserve his substantive objections to the court's ultimate ruling (see *People v Smocum*, 99 NY2d 418, 423-424 [2003]; *People v Allen*, 86 NY2d 101, 111 [1995]), and we decline to review them in the interest of justice. Defendant also failed to preserve his claim that, in arriving at its ruling, the court failed to follow the proper *Batson* procedure, and we likewise decline to review it. As an alternative holding, we also reject all of defendant's substantive and procedural claims on the merits. Viewed in context, the court's ultimate determination was a proper ruling, under step three of *Batson*, that the prosecutor's race-neutral reasons were nonpretextual, and the court implicitly made the

appropriate factual findings (see *People v Brown*, 17 AD3d 283, 284-285 [2005], *lv denied* 5 NY3d 804 [2005]). These findings are supported by the record and entitled to great deference (see *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). While the court may have used the wrong nomenclature in describing its step-three ruling, that does not entitle defendant to a new trial.

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

ENTERED: NOVEMBER 6, 2008

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CLERK

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

4475 Kelly Kim, et al., Index 101406/07  
Plaintiffs-Respondents,

-against-

Sydney R. Coleman, M.D.,  
Defendant-Appellant.

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McAloon & Friedman, P.C., New York (Timothy J. O'Shaughnessy of  
counsel), for appellant.

DeSimone, Aviles, Shorter & Oxamendi LLP, New York (Louise M.  
Cherkis of counsel), for respondents.

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Order, Supreme Court, New York County (Sheila Abdus-Salaam,  
J.), entered January 16, 2008, which, in an action for medical  
malpractice, granted defendant's motion pursuant to CPLR  
3211(a)(8) to dismiss the complaint to the extent of ordering a  
traverse hearing, unanimously affirmed, without costs.

A traverse hearing was properly ordered in light of the  
conflicting accounts provided by plaintiff's process server, and  
defendant and his office manager, regarding how and whether  
service was properly effectuated upon defendant (see *Ananda  
Capital Partners v Stav Elec. Sys.* [1994], 301 AD2d 430 [2003]).

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

ENTERED: NOVEMBER 6, 2008

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premises through a negligently maintained entrance" (*Burgos*, 92 NY2d at 551).

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

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

ENTERED: NOVEMBER 6, 2008

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CLERK

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

4477            In re Elijah F., etc.,  
  
                  A Dependent Child Under  
                  the Age of Eighteen Years, etc.,  
  
                  Edgar F., etc.,  
                                  Respondent-Appellant,  
  
                  Donna Denise M.,  
                                  Respondent,  
  
                  Catholic Guardian Society and  
                  Home Bureau,  
                                  Petitioner-Respondent.

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Steven N. Feinman, White Plains, for appellant.

Magovern & Sclafani, New York (Marion C. Perry of counsel), for  
Catholic Guardian Society and Home Bureau, respondent.

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Order of disposition, Family Court, Bronx County (Douglas E.  
Hoffman, J.), entered on or about May 30, 2006, which, insofar as  
appealed from, upon a fact-finding determination of permanent  
neglect made at inquest upon respondent father's default,  
terminated the father's parental rights to the subject child and  
committed custody and guardianship of the child to petitioner  
agency and the Commissioner of Social Services for the purpose of  
adoption, unanimously affirmed, without costs.

A preponderance of the evidence demonstrated that  
termination of the father's parental rights was in the child's  
best interests. The child is doing well in his preadoptive home,  
where he has lived virtually his entire life and his foster

parents tend to his many special needs and wish to adopt him (see *Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]). Contrary to the father's contention, the circumstances presented do not warrant a suspended judgment. Although he has obtained employment and taken steps to address his drug problem, the record shows that the father will not be able to assume responsibility for the child in the near future, particularly where he fails to fully understand the child's special needs or possess the ability to address them (see *Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *Matter of Jazminn O'Dell P.*, 39 AD3d 235 [2007]).

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

ENTERED: NOVEMBER 6, 2008

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CLERK

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

4478-

4478A Ernest Poree,  
Plaintiff-Appellant,

Index 17979/05

-against-

Gregory Bynum,  
Defendant-Respondent.

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Adam D. White, New York, for appellant.

Gregory Bynum, Jr., respondent pro se.

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Judgment, Supreme Court, Bronx County (Nelson S. Roman, J.), entered November 14, 2007, dismissing the complaint for lack of personal jurisdiction, unanimously reversed, on the law and the facts, without costs, and the complaint reinstated. Appeal from order, same court and Justice, entered on or about October 25, 2007, which, to the extent appealable, denied plaintiff's motion to renew his prior motion for default, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The traverse hearing was warranted where the parties' conflicting affidavits disputed whether service had properly been effected (*see Anello v Barry*, 149 AD2d 640, 641 [1989]). Plaintiff submitted an affidavit stating that substituted service had been made on defendant's mother at the address confirmed as defendant's through records at the Department of Motor Vehicles. Defendant denied that he lived at that address, even though it was listed as such on his driver's license, and he submitted an

affidavit from his mother denying that she received process on his behalf. Nevertheless, plaintiff did demonstrate, by a preponderance of the evidence, that proper service was made (see *Cadle Co. v Nunez*, 43 AD3d 653 [2007]). The process server testified at the hearing that he personally served defendant's mother with the summons and complaint at the officially listed address, and then mailed a copy to the same address. Defendant's statements that he did not live at that address, and that neither he nor his mother was ever served with papers, were not corroborated by any evidence. His mother's affidavit acknowledged that she spoke to the process server but denied that she accepted process on defendant's behalf; however, defendant failed to call his mother to testify at the hearing. In light of defendant's vague and uncorroborated statements about his address at the time of service, the process server's failure to produce his log book at the hearing, which was assertedly destroyed in a car accident, did not warrant a rejection of the latter's testimony. Plaintiff's motion for a default judgment was properly denied in light of defendant's affidavit raising a

potentially meritorious defense (see e.g. *Spira v New York City Tr. Auth.*, 49 AD3d 478 [2008]).

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

ENTERED: NOVEMBER 6, 2008

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CLERK

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

4479-

4479A-

4479B In re Roger Guerrero B., and Others,

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

Phyllis B., etc.,  
Respondent-Appellant,

Abbott House,  
Petitioner-Respondent.

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Dora M. Lassinger, East Rockaway, for appellant.

Jeremiah Quinlan, Hastings on Hudson, for respondent.

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

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Orders, Family Court, Bronx County (Allen G. Alpert, J.),  
entered on or about April 10, 2007, which, after neglect and  
dispositional hearings, determined that respondent mother had  
permanently neglected the subject children, terminated her  
parental rights, and awarded custody and guardianship to  
petitioner for the purpose of adoption, unanimously affirmed,  
without costs.

The finding of permanent neglect is supported by clear and  
convincing evidence that despite petitioner's diligent efforts,  
respondent, during the relevant statutory period, failed to  
maintain contact with her children and failed to address the  
problems leading to their placement, thus failing to plan for

their future (Social Services Law § 384-b[7][c]). The record demonstrates that respondent continued to use drugs during the relevant period, failed to avail herself of the services and therapy referred to her by petitioner, and maintained only sporadic contact with the children (see generally *Matter of Justin Lemont R.*, 45 AD3d 445 [2007]).

The record at the dispositional hearing supported, by a preponderance of the evidence, the conclusion that the children's best interests would be served by termination of respondent's parental rights (see *Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; Family Court Act § 631) so as to facilitate adoption by their maternal grandfather, with whom they have lived most of their lives and with whom they maintain a positive relationship. Despite respondent's commendable but belated efforts to comply with therapy and drug counseling (see *Matter of Saraphina Ameila S.*, 50 AD3d 378 [2008]), the record does not warrant a suspended judgment as being in the children's best interests (*Matter of Jazminn O'Dell P.*, 39 AD3d 235 [2007]).

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

ENTERED: NOVEMBER 6, 2008

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CLERK

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

4480 Donald Pressley, Index 603220/06  
Plaintiff-Respondent,

-against-

Paul Alexander Shneyer,  
Defendant-Appellant,

Paul A. Shneyer, P.C.,  
Defendant.

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Arshack, Hajek & Lehrman, PLLC, New York (Kevin C. Petkos of  
counsel), for appellant.

Norman L. Faber, New York, for respondent.

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Order, Supreme Court, New York County (Edward H. Lehner,  
J.), entered July 11, 2007, which, insofar as appealed from,  
denied defendant's motion pursuant to CPLR 3211(a)(8) to dismiss  
the complaint as against him in his individual capacity,  
unanimously affirmed, without costs.

Plaintiff satisfied the burden of establishing personal  
jurisdiction over defendant by service pursuant to CPLR 308(2).  
At the traverse hearing, the process server testified that he  
delivered the summons with notice to a suitable person at  
defendant's place of business, and that this person accepted the  
documents before handing them back and directing him to place  
them in defendant's mailbox (*see Cowan, Liebowitz & Latman v New  
York Turkey Corp.*, 111 AD2d 93 [1985]). The process server also  
stated that the following day he mailed a copy of the summons

with notice to defendant's place of business. There is no basis for disturbing the court's findings as to the credibility of the process server (see *Schorr v Persaud*, 51 AD3d 519 [2008]).

Furthermore, although plaintiff failed to list the individual defendant's name on the mailing envelope, this did not render service on him invalid, since the summons gave ample notice to defendant, an attorney, that he was being sued in his individual capacity (see *Albilia v Hillcrest Gen. Hosp.*, 124 AD2d 499 [1986]).

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

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

ENTERED: NOVEMBER 6, 2008

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CLERK





granted to the extent of dismissing the claim under Labor Law § 241-a, the cross motion granted on plaintiff Angamarca's claim pursuant to § 240(1), and otherwise affirmed, without costs.

During the construction of a townhouse, Angamarca fell from the roof and was discovered lying on the second floor of the building. Although no one witnessed the fall, and the injured worker had no recollection of what happened, there was strong circumstantial evidence (see *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550 [1998]) that he probably fell through an improperly covered skylight hole in the roof. Just prior to the fall, Angamarca and a coworker were on the roof near the opening. There were only three pieces of plywood at the scene, two of which covered the two openings in the roof. More wood had been requested, and was being sent up by lift.

Deposition testimony indicated that the holes were generally covered by plywood sheets nailed on, but it was not unusual for the plywood to be removed from the openings. The principal of Angamarca's employer was told that the injured party had fallen through the skylight, and another individual testified that he came upon the injured worker lying on some plywood. Defendants asserted that Angamarca was likely the sole proximate cause of his injuries, and suggested that he toppled off the nearby lift, rather than falling through an opening in the roof. However, there was no evidence that Angamarca had been seen on the lift

prior to the accident, or even that the lift was on the roof at the time. Angamarca further submitted an expert affidavit stating that the nature of his injuries was consistent with having fallen through the skylight opening, rather than from the lift.

Under these circumstances, defendants have not established the existence of a triable issue of fact. Angamarca produced admissible prima facie evidence he was injured after a fall through the skylight opening and had not been provided with any safety device or equipment to afford him proper protection from such an elevation-related hazard, thereby entitling him to summary judgment as to liability on his claim under Labor Law § 240(1) (see *Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363 [2007]). In opposition, defendants offered only unsupported speculation as to an alternative explanation for the injury.

The court should have summarily dismissed Angamarca's claim pursuant to Labor Law § 241-a, which was enacted to protect those engaged in hazardous work near "elevator shaftways, hatchways and stairwells in buildings under construction or demolition." Notwithstanding its proximity to a stairwell, the skylight opening fit none of these descriptions, and § 241-a thus does not apply.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: NOVEMBER 6, 2008

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CLERK

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

4483 Nazario Leon, Index 16194/05  
Plaintiff-Respondent,

-against-

St. Vincent De Paul Residence,  
Defendant-Appellant.

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Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner and Judy C. Selmecci of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

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Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered on or about January 26, 2008, which, insofar as appealed from as limited by the briefs in this action for medical malpractice, denied defendant's motion to vacate the note of issue and extend its time to move for summary judgment, unanimously affirmed, without costs.

The motion court properly exercised its discretion in denying defendant's motion, which was made seven months after the note of issue was filed and based on the assertion that the note of issue inaccurately stated that all discovery was complete when defendant had not taken plaintiff's deposition or conducted an independent medical examination of him. As the court recognized, a deposition of plaintiff would be futile considering that he suffered from advanced dementia, and the record shows that defendant deposed plaintiff's daughter, who held his power of

attorney and was involved in his life and health care.

Furthermore, defendant waived its right to any other discovery by failing to comply with the discovery deadlines set forth in the court's compliance order, which contained a waiver clause (see *Quintanna v Rogers*, 306 AD2d 167 [2003]; *Mateo v City of New York*, 282 AD2d 313 [2001]).

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

ENTERED: NOVEMBER 6, 2008

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CLERK



growers. Among the purchasers' employees implicated in the investigation was Anthony Spinale, who was charged with nine counts of making cash payments to an inspector to influence the outcome of inspections of fresh fruit and vegetables conducted at both plaintiffs' businesses. Spinale pleaded guilty to one felony count in the U.S. District Court for the Southern District of New York, and was sentenced to five years' probation, 12 months' home confinement and a \$30,000 fine.

Shortly after the inspectors were arrested, the USDA notified growers and their associations that they may have been victims of the bribery scheme. By mid-2001, after filing informal complaints, Agri and Horwath each had filed a formal complaint with the USDA seeking reparations pursuant to the Perishable Agricultural Commodities Act, 1930 (PACA) (7 USC § 499a *et seq.*), and, in 2002, by order of the Secretary of Agriculture, they were awarded reparations in the sums of \$8,263 and \$3,880.50, against plaintiffs G&T and Tray-Wrap, respectively, plus interest and filing fees. Plaintiffs appealed the reparations awards to the federal court. Ultimately, Agri and Horwath agreed to dismiss their reparations complaints and vacatur of the reparations awards.

In June 2003, the USDA filed an administrative complaint against plaintiffs for violating PACA by Spinale's acts of bribery in 1999. Although the complaint was dismissed following

a hearing before an administrative law judge, a judicial officer reversed that decision and revoked plaintiffs' PACA licenses, and the U.S. Court of Appeals for the Second Circuit affirmed (*G&T Term. Packaging Co., Inc. v United States Dept. of Agric.*, 468 F3d 86, 88 [2d Cir 2006], *cert denied* \_\_\_ US \_\_\_, 128 S Ct 355 [2007]).

Plaintiffs commenced the instant action shortly after the federal actions based on Agri's and Horwath's reparations complaints were dismissed pursuant to stipulation.

To establish a cause of action for malicious prosecution, a plaintiff must show the elements of commencement or continuation of a judicial proceeding, malice, want of probable cause, and the successful termination of the precedent action in the plaintiff's favor (see *Martin v City of Albany*, 42 NY2d 13, 16 [1977]; *Ellman v McCarty*, 70 AD2d 150, 155 [1979]; see also *Chappelle v Gross*, 26 AD2d 340, 341 [1966]). In their opposition to defendants' motions for summary judgment, plaintiffs attempted to raise factual issues as to probable cause and malice. However, they pointed to issues, such as the quality of the produce, that were relevant to the proceedings before the USDA, but not to the instant action. Moreover, contrary to their contention, the indictment of Anthony Spinale constituted probable cause for Agri and Horwath to file their complaints with USDA (see *Jenkins v City of New York*, 2 AD3d 291 [2003]; see also *Koam Produce, Inc.*

*v DiMare Homestead, Inc.*, 329 F3d 123 [2d Cir 2003]; *G&T Terminal Packaging*, 468 F3d 86 [2d Cir 2006]). In any event, the proceedings outlined above did not end in plaintiffs' favor (see *Levy's Store, Inc. v Endicott-Johnson Corp.*, 272 NY 155, 162 [1936]).

As to their abuse of process cause of action, plaintiffs failed to raise an issue of fact as to defendants' "intent to do harm without excuse or justification" or "use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]).

Finally, in considering Spinale's affidavit, the motion court correctly subjected it to severe scrutiny in light of his conviction for an act of dishonesty and untrustworthiness (see *People v Hodge*, 141 AD2d 843, 846 [1988], *lv denied* 72 NY2d 1046 [1988]).

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

ENTERED: NOVEMBER 6, 2008

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product of police interrogation (see *People v Lawrence*, 25 AD3d 498 [2006], *lv denied* 6 NY3d 835 [2006]). The detectives' words and actions relating to the recovery and securing of a loaded revolver were incidental to the arrest and were neither intended nor reasonably likely to elicit an incriminating statement (*id.*; see also *People v Arriaga*, 309 AD2d 544 [2003], *lv denied* 1 NY3d 624 [2004]; *People v Smith*, 298 AD2d 182 [2002], *lv denied* 99 NY2d 585 [2003]).

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (see *People v Hayes*, 97 NY2d 203 [2002]). The court only permitted inquiry as to a limited portion of defendant's extensive record, and the convictions at issue were neither stale nor unduly prejudicial. To the extent that defendant is raising a constitutional claim relating to the *Sandoval* issue, such claim is both unpreserved and without merit.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: NOVEMBER 6, 2008

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Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

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companies. On March 1, 2004, Wachovia bought Seibels securities for its account, after which those securities underwent a 1000-to-1 reverse stock split. In attempting to close its position by selling those shares, Wachovia claimed that it "mistakenly" short sold the new securities, which had a new trading symbol and a starkly different value. Wachovia commenced this action to rescind the transaction on the basis of unconscionability, unilateral mistake and unjust enrichment, and sought the imposition of a constructive trust.

The record establishes that the court applied the appropriate standards on the motions to dismiss and properly determined that the allegations in the complaint were insufficient to defeat said motions (*see e.g. Matter of Sud v Sud*, 211 AD2d 423, 424 [1995]). A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made, i.e., "some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988] [internal quotation marks and citations omitted]). Even assuming that somehow a "trap" was set into which Wachovia fell, the complaint does not establish that Wachovia was coerced in any way to enter into that specific transaction. Rather, Wachovia placed an unsolicited market order

in an attempt to cover its short position in Seibels shares, and absent any aggravating factors which indicate an inequity in bargaining power, price alone will not support a finding of substantive unconscionability (see *Hertz Corp. v Attorney-General of State of N.Y.*, 136 Misc 2d 420, 425 [1987]).

Wachovia also failed to establish a right of recovery on the basis of unilateral mistake, as the complaint failed to allege facts that would sufficiently establish that its purported unilateral mistake was caused by fraudulent conduct on the part of any of respondents, and that the mistake occurred despite Wachovia's exercise of due diligence (see *Gaylords Natl. Corp. v Arlen Realty & Dev. Corp.*, 112 AD2d 93, 96 [1985]; *Bailey Ford v Bailey*, 55 AD2d 729, 730 [1976]). There is no indication in the record that Wachovia, a sophisticated investor, undertook further investigation to ascertain why the stock symbol it initially entered into its computer system was rejected prior to the subject transaction (see *G & G Invs. v Revlon Consumer Prods. Corp.*, 283 AD2d 253 [2001]).

The record does not support Wachovia's allegations of injustice or unjust enrichment, but only supports a finding that Wachovia made a costly error due to its own conduct (see *Tompers v Bank of Am.*, 217 App Div 691, 694 [1926]). Furthermore, a party claiming entitlement to a constructive trust must establish: "(1) a confidential or fiduciary relation, (2) a

promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment" (*Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940 [1980]), and here, the absence of a fiduciary relationship between these sophisticated entities defeats any entitlement to a constructive trust (see *SNS Bank v Citibank*, 7 AD3d 352, 354 [2004]; *Nathan W. Drage, P.C. v First Concord Sec.*, 4 Misc 2d 92, 99 [2000]).

We have considered Wachovia's remaining arguments, including that the motion court made incorrect findings of fact, and find them unavailing.

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asserting defendant's legal malpractice (see *Weiss v Manfredi*, 83 NY2d 974, 976-977 [1994]; *Savattere v Subin Assoc.*, 261 AD2d 236, 236 [1999]).

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witness identified defendant in court only because he was sitting at the defense table. We have considered and rejected defendant's remaining arguments on this issue, including his claim that he was unfairly surprised by the prosecutor's application to introduce the photo identification.

The court responded meaningfully to notes from the deliberating jury (see *People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 301-302 [1982], cert denied 459 US 847 [1982]). Any delay in responding to the jury's notes was occasioned by the lack of clarity of the requests and the extensive discussions between the parties and the court regarding the appropriate responses. Although the court directed readbacks of testimony that were somewhat broader than the precise information requested by the jury, this was appropriate because the additional information clarified confusing testimony and provided a complete answer to the jury's inquiries. Defendant has not established that he was prejudiced either by the delay or by the content of the readback (see *People v Agosto*, 73 NY2d 963, 966 [1989]; *People v Lourido*, 70 NY2d 428, 435 [1987]; *People v Perez*, 15 AD3d 284 [2005], lv denied 4 NY3d 884 [2005]).

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (see *People v Prochilo*, 41 NY2d 759, 761 [1977]). The evidence established a

lawful automobile stop, based on a sufficient description of the car and its occupants.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: NOVEMBER 6, 2008

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CLERK

Gonzalez, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4494 Ruth B., a Minor, by Encarnacion Index 109144/04  
Maldonado, etc., 590977/06  
Plaintiff-Respondent,

-against-

Whitehall Apartment Co., LLC, et al.,  
Defendants-Appellants.

[And a Third Party Action]

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Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for appellants.

Madeline Lee Bryer, P.C., New York (Jonathan I. Edelstein of counsel), for respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered April 22, 2008, which, to the extent appealed from as limited by the briefs, denied so much of defendants' motion as sought summary judgment dismissing the third cause of action, unanimously affirmed, without costs.

Plaintiff, by her mother, commenced this action against defendant owners of the apartment building in which plaintiff and her family resided to recover damages for injuries she sustained when she was sexually assaulted by third-party defendant Avila in an elevator in the building. The complaint contained three causes of action; the first two were based on defendants' alleged negligence in failing to maintain a properly functioning self-locking door to the building, and the third was premised on defendants' alleged assumption and breach of a duty to plaintiff

to maintain and monitor security cameras in the elevator in which plaintiff was assaulted. With respect to the third cause of action, plaintiff's mother claimed that employees of the building, including the superintendent, told her prior to the assault that the elevator was equipped with a security camera that was constantly monitored on the premises and that she need not worry about plaintiff's safety when she was in the building.

Defendants moved for summary judgment dismissing the complaint, relying on plaintiff's deposition testimony. Plaintiff, among other things, opposed the motion and noted that defendants had not addressed her third cause of action. Supreme Court granted those portions of the motion seeking summary judgment dismissing the first two causes of action and denied that aspect of the motion that sought dismissal of the third. Defendants appeal from that portion of the order that denied summary judgment dismissing the third cause of action.

Defendants failed to make a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's third cause of action. In their motion papers, defendants failed to address this cause of action and submitted no evidence that demonstrated the absence of triable issues of fact with respect to it. Since defendants failed to meet their initial burden on the motion with respect to that cause of action, the portion of the motion seeking dismissal of it must be denied regardless of

the sufficiency of plaintiff's opposition (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Even in addressing the third cause of action for the first time in their reply papers -- which is generally impermissible -- defendants failed to submit any evidence supporting their contention that they were entitled to summary judgment dismissing that cause of action.

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

ENTERED: NOVEMBER 6, 2008

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CLERK

Gonzalez, J.P., McGuire, DeGrasse, Freedman, JJ.

4497 Brian J. Hunter, Index 602791/04  
Plaintiff-Appellant,

-against-

Deutsche Bank AG, New York Branch,  
Defendant-Respondent.

- - - - -

Eric L. Race, 602792/04  
Plaintiff-Appellant,

-against-

Deutsche Bank AG, New York Branch,  
Defendant-Respondent.

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Thompson Wigdor & Gilly LLP, New York (Andrew S. Goodstadt of  
counsel), for appellants.

Sidley Austin LLP, New York (Cliff Fonstein of counsel), for  
respondent.

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Order, Supreme Court, New York County (Karla Moskowitz, J.),  
entered on or about November 16, 2007, which, in actions arising  
out of defendant's refusal to pay bonuses, granted defendant's  
motion for summary judgment dismissing the complaints,  
unanimously affirmed, with costs.

Plaintiffs' claims for breach of contract lack merit in view  
of the unambiguous language of their contracts and the employee  
handbook plainly making bonus awards solely and completely a  
matter of defendant's discretion (*see Kaplan v Capital Co. of  
Am.*, 298 AD2d 110, 111 [2002], *lv denied* 99 NY2d 510 [2003]; *cf.*  
*Caruso v Allnet Communication Servs.*, 242 AD2d 484, 484-485

[1997]). Language that bonuses would be contingent on criteria such as performance and profitability cannot be interpreted as a limitation on defendant's discretion, since doing so would render the clear language of discretion meaningless (see *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The claims for breach of the implied covenant of good faith and fair dealing, even assuming they can coexist in this context with a right of unfettered discretion (*but cf. Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304-305 [1983]), are not supported by any evidence of bad faith (see *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 303 [2003]). The claims for unjust enrichment and quantum meruit are not viable since an express contract governs the subject matter (see *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]). Unpaid bonuses do not constitute "wages" under Labor Law § 193 (see *Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 224 [2000]), plaintiffs' "commission" nomenclature notwithstanding.

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

ENTERED: NOVEMBER 6, 2008

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CLERK

Gonzalez, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4498 In re Latricia M.,

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

Edward M.,  
Respondent-Appellant,

Tiffany A.,  
Respondent,

Cardinal McCloskey Services,  
Petitioner-Respondent.

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Nancy Botwinik, New York, for appellant.

David H. Berman, Larchmont, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (William H. Roth of counsel), Law Guardian.

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Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about July 23, 2007, which, to the extent appealed from, determined that respondent father's consent was not required for the adoption of the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent argues that he was entitled to a hearing on his motion to be deemed a consent father although he failed to object sufficiently to the lack of a hearing when the court made its determination based on the motion papers that were submitted

(see *Matter of Jamize G.*, 40 AD3d 543 [2007], *lv denied* 9 NY3d 808 [2007]). We need not determine whether respondent thereby waived this argument as the record shows that the court subsequently heard evidence on the issue and properly denied the motion. Although respondent formally acknowledged paternity, established paternity by means of blood testing, and maintained that he provided financial support to the child during the first four months of her life, he admittedly discontinued financial support following the child's placement in foster care. Respondent's motion to be deemed a consent father triggers application of the parental responsibility criteria set forth in Domestic Relations Law § 111(1) (*Matter of Jamize G.*, 40 AD3d at 544; see *Matter of Raquel Marie X.*, 76 NY2d 387 [1990], *cert denied sub nom. Robert C. v Miguel T.*, 498 US 984 [1990]), and while respondent maintained weekly visitation with the child, there is clear and convincing evidence that he otherwise failed to meet his obligations under the statute.

The court's determination that it would be in the child's best interests to free her for adoption is supported by a preponderance of the evidence (see *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). There is no indication that respondent is capable of financially or emotionally caring for his daughter, and the record shows that the child has thrived in

her preadoptive home, which she shares with her sibling, and where she has developed a strong bond with her foster mother.

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

ENTERED: NOVEMBER 6, 2008

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Gonzalez, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4502           The People of the State of New York,           Index 250713/07  
              ex rel Arthur Artis, etc.,  
                  Petitioner-Appellant,

-against-

Warden, Rikers Island Correctional  
Facility, et al.,  
Respondents-Respondents.

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Arthur Artis, appellant pro se.

Andrew M. Cuomo, Attorney General, New York (Laura R. Johnson of  
counsel), for respondents.

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Order, Supreme Court, Bronx County (Barbara F. Newman, J.),  
entered December 18, 2007, which denied petitioner's application  
for a writ of habeas corpus, unanimously affirmed, without costs.

Petitioner's rights under Executive Law § 259-i(3)(c)(i) and  
(iii) were not violated by the fact that the written notice of  
his preliminary parole revocation hearing was incorrectly dated,  
where he was in fact given the notice on the same day that the  
warrant was executed and the hearing was in fact conducted within  
15 days thereafter (*cf. People ex rel. Thompson v Warden of  
Rikers Is. Correctional Facility*, 41 AD3d 292 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER  
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detectives are supported by substantial evidence (see 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 181 [1978]; Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231-232 [1974]), including the testimony of the lieutenant who required petitioner's assistance at the scene. No basis exists to disturb the hearing officer's findings of credibility (see Matter of Berenhaus v Ward, 70 NY2d 436 [1987]).

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

ENTERED: NOVEMBER 6, 2008

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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.

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

ENTERED: NOVEMBER 6, 2008

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CLERK

Gonzalez, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4507 Robert Peck, Index 109367/05  
Plaintiff-Respondent-Appellant,

-against-

2-J, LLC, et al.,  
Defendants-Appellants-Respondents,

Van Brody Architect, P.C.,  
Defendant-Respondent.

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Billig Law, P.C., New York (Darin S. Billig of counsel), for  
appellants-respondents.

RAS Associates, PLLC, White Plains (Luis F. Ras of counsel), for  
respondent-appellant.

Milber Makris Plousadis & Seiden, Woodbury (Thomas M. Fleming II  
of counsel), for Van Brody Architect, P.C., respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman,  
J.), entered February 14, 2008, which, in an action for personal  
injuries sustained in a fall allegedly caused by inadequate  
lighting on stairs in commercial premises owned by and leased to  
defendants-appellants, insofar as appealed from, granted  
plaintiff's motion (1) to vacate a prior order dismissing the  
complaint because of plaintiff's failure to appear at a pre-note  
of issue court conference, and (2) for summary judgment on the  
issue of liability, to the extent of vacating the prior order,  
and denied defendants-appellants' cross motion for summary  
judgment dismissing the complaint as against them, unanimously  
modified, on the law, to grant defendant premises owner summary

judgment dismissing the complaint as against it, and otherwise affirmed, except the owner's appeal from that portion of the order that granted vacatur as to it unanimously dismissed as academic, without costs. The Clerk is directed to enter judgment dismissing the complaint as against defendant 2-J, LLC.

Plaintiff's default was properly vacated on a showing by his attorney that a prior court order had erroneously scheduled the conference on a day of the week other than Tuesday, the one day reserved for conferences under the court's part rules, and the attorney's subsequent miscalendaring of the re-scheduled date. We note that the prior order scheduled the conference for Monday, June 25, 2005, the default was taken on June 26, plaintiff's attorney learned of the default on June 27 when he appeared in court for the conference, and plaintiff expeditiously moved to vacate the default by motion dated June 30. With respect to the merits, plaintiff's deposition testimony submitted in support of the motion to vacate was not unduly vague, and plaintiff's expert's affidavit that asserts that inadequate lighting caused plaintiff's fall was based on light measurement readings and was not speculative; thus those submissions were not contradicted by plaintiff's reply. The other possible causes of plaintiff's fall that defendants posit merely raise issues of fact. However, the out-of-possession defendant owner could not be liable for the claimed inadequate lighting, despite its right to reenter under

the lease, because the defendant tenant controlled the lighting level at its restaurant, and inadequate lighting does not constitute a significant structural or design defect that violates a specific statutory building code provision (see *Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 497 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: NOVEMBER 6, 2008

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based each group's relative share of the building's total rent roll. Under Code § 2529.10, DHCR's Commissioner was required to make any allocation determination in accordance with the new provision "unless undue hardship or prejudice result[ed] therefrom" (see also 9 NYCRR 2527.7). Regulations § 2208.9 is to the same effect albeit without express reference to undue hardship or prejudice. Under Regulations § 2202.4(c)(4)(vi), which also went into effect during the pendency of the owner's PAR, no MCI rent increase shall be granted unless the application therefor was filed no later than two years after the completion of the installation or improvement. Assuming petitioner, a rent stabilized tenant, has standing to challenge the portion of DHCR's order that relates to rent controlled tenants, DHCR did not act arbitrarily by applying the allocation provision but not the time-bar provision. The finding that application of the allocation provision would not cause petitioner undue hardship, prejudice or deprive him of a vested interest is rationally supported by, inter alia, the circumstance that there was no prior existing enactment governing the subject but at best only a generally followed practice (see *Matter of Versailles Realty Co. v New York State Div. of Hous. & Community Renewal*, 76 NY2d 325, 330 [1990]). The finding that application of the time-bar provision would cause the owner undue hardship is rationally supported by the circumstance that there was no time bar for

recovering MCI costs when the work was done and when the owner applied for the MCI increase. We have considered petitioner's other arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: NOVEMBER 6, 2008

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the sexual abuse, a foster child living in petitioner's home. Petitioner's claims that she was forced by inexperienced counsel and the Housing Authority to enter into the stipulation in the prior matter, and that the prior matter was based on unfair charges, are not reviewable in this proceeding and are barred by the four-month statute of limitations for review of a final determination (CPLR 217[1]; see *Matter of Folks v New York City Hous. Auth.*, 27 AD3d 270, 271 [2006], *lv denied* 7 NY3d 709 [2006]; *Matter of Sanchez v Martinez*, 293 AD2d 292, 294 [2002], *lv denied* 99 NY 2d 502 [2002], *lv denied* 99 NY 2d 502 [2002]). The penalty of termination does not shock our conscience, particularly in view of the serious consequences of petitioner's noncompliance with the stipulation (*cf. Folks; Sanchez*).

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

ENTERED: NOVEMBER 6, 2008

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

3545-

3545A Bernadette Gotay,  
Plaintiff-Respondent-Appellant,

Index 102210/02

-against-

David Breitbart,  
Defendant-Respondent,

Michael Handwerker, et al.,  
Defendants-Appellants-Respondents,

Handwerker, Honschke, Marchelos  
& Gayner, et al.,  
Defendants.

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Furman, Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for Michael Handwerker, appellant-respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Richard E. Lerner of counsel), for Steve Marchelos; Handwerker, Honschke and Marchelos; and Neil Honschke, appellants-respondents.

Gerald J. Mondora, White Plains, for respondent-appellant.

Goodman & Jacobs, LLP, New York (Thomas J. Cirone of counsel), for David Breitbart, respondent.

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Orders, Supreme Court, New York County (Joan A. Madden, J.), entered January 25, 2007, and July 30, 2007, affirmed, without costs.

Opinion by Lippman, P.J. All concur except Friedman, J. who dissents in part in an Opinion.

Order filed.

**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**NOVEMBER 6, 2008**

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

M-5012X In the Matter of the Estate of Diaz

M-5013X Russeck Fine Art Group, Inc. v Theodore B. Donson, Ltd.  
(And a third-party action)

M-5014X Bel Canto Society, Inc. v Whitehurst & Clark Book  
Fulfillment, Inc.

Appeals withdrawn.

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

M-4958 Cupi v Martinez - St. Christophers, Inc. - Estate of  
Cupi

Appeal, previously perfected for the October 2008 Term,  
withdrawn.

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

M-4937 Antongiorgi v Golden Eagle, Inc. - Delosangeles  
(And another action)

M-4938 Senzon v Anjac Corp. - Wedemier

M-5002 PL Diamond LLC v Becker-Paramount, LLC - Paramount  
Diamond Holdings LLC

Appeals, previously perfected for the November 2008,  
Term withdrawn.

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

M-4879 Orix Financial Services, Inc. formerly known as  
Orix Credit Alliance, Inc. v Spence Logging Company,  
Inc.

Appeal, previously perfected for the December 2008  
Term, withdrawn.

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

M-4550 Abead Realty v Carmen

Appeal dismissed.

Lippman, P.J., Mazzarelli, Williams, Buckley, Renwick, JJ.

M-4684 People v Banshoshan, Yves

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

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

M-4724 In the Matter of Daniels v New York City Housing  
Authority

Leave to prosecute appeal as a poor person denied.

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

M-4608 People v Ortiz, Adrian, also known as Ortiz, Adnan

Motion deemed withdrawn.

Lippman, P.J., Mazzairelli, Williams, Buckley, Renwick, JJ.

M-4687 CS Plumbing v Action Nissan Inc. - Pinnacle Nissan,  
LLC, doing business as White Plains Nissan

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

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

M-4497 Foster v Alfred S. Friedman Management Corp. - Odemene

Appeals and cross appeal consolidated, as indicated;  
time to perfect same enlarged to the April 2009 Term, as  
indicated.

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

M-4163 Glatzer v Bear, Stearns & Co., Inc.  
(And another action)

Time to perfect appeals enlarged to the February 2009  
Term, as indicated. Clerk directed to calendar appeals for  
hearing together in said Term. Motion otherwise denied.

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

M-4667 Albunio v City of New York - New York City Police  
M-4753 Department  
(And another action)

Time to perfect consolidated appeals enlarged to the  
March 2009 Term; consolidated appeals dismissed unless perfected  
for said Term, as indicated.

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

M-4678 Allstate Insurance Company v Belt Parkway Imaging, P.C.

Time to perfect appeal enlarged to the February 2009 Term.

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

M-4739 Broadway-Leonard Development, LLC v Russo

Time to perfect consolidated appeals and cross appeal enlarged to the March 2009 Term, as indicated.

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

M-4182 Kaspi v Fairway Operating Corp.

Enlargement of time to perfect appeal denied.

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

M-4767 Kaye v Trump  
(And another action)

Appeals consolidated, as indicated; Clerk directed to calendar same for the January 2009 Term.

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

M-4728 People v Martinez, Alex

Appeal deemed withdrawn.

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

M-4750 People v Hidalgo, Victor

Appeals deemed withdrawn.

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

M-4079 Liberato v Ship-Gol Ltd.

M-4877

Motion and appeal deemed withdrawn.

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

M-4915 Hasan v Naz

(And another action)

Leave to prosecute appeal as a poor person and related relief denied.

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

M-4681 People v Denson, Raymond

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

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

M-4528 People v Ortiz, Carlos, also known as Otero, Osvaldo

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

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

M-4517 People v Morales, Vanessa

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

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

M-3938 People v Jenkins, James

Writ of error coram nobis denied.

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

M-4803 People v Pineyro, George

Time to perfect appeal enlarged to the March 2009 Term.

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

M-4513 In the Matter of C., Gregory L. v S. Nyree

Leave to withdraw as counsel granted, as indicated; time to perfect appeal enlarged to the March 2009 Term. Motion otherwise denied.

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

M-4580 Wathne Imports, Ltd. v PRL USA, Inc.

Appeals consolidated, as indicated.

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

M-4752 In the Matter of Schachter v Sofasa LLC, doing business  
as DIAMCO Trading Co.

Stay denied.

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

M-4584 Canfi USA Inc. v Dusica Dusica, Inc.

Stay denied.

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

M-4491 Torres v Lenox Hill Hospital - Estate of Villacis

Appeals deemed withdrawn.

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

M-3271 Lee v City of New York

M-3625

Appeal from order entered March 25, 2008 (mot. seq.  
no. 006) dismissed, as indicated; cross motion denied.

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

M-4484 People v Leak, Daniel

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

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

M-4467 People v Harrison, Anthony, also known as Harrison, A.

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

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

M-4270 People v Williams, Matthew

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

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

M-4826 Long v Sowande

Time to perfect appeal enlarged to the February 2009 Term.

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

M-4353 In the Matter of F., Jaffa Wally - Episcopal Social Services - W., Thelma Lynn - F., Selvin, also known as F., Selvin, Sr.

Substitution of law guardian granted, as indicated; appeal adjourned to the February 2009 Term.

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

M-3629 Brady v City of New York

Reargument or other relief denied.

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

M-4747 People v Woods, Charles

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

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

M-4669 Santos v Ford Motor Company - Estate of Santos

Time to perfect appeals enlarged to the February 2009 Term.

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

M-4740 Wiesel v 310 East 46 LLC

Time to perfect appeal enlarged to the February 2009 Term.

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

M-4462 Khotyanova v New York Community Hospital

Leave to prosecute appeal as a poor person denied.

Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-5017 Milberg Weiss LLP v Kallas

Stay granted on condition appeal perfected for the February 2009 Term, as indicated (See M-5027, M-5028 and M-5029 decided simultaneously herewith).

Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-5027 Kallas v Weiss

Stay granted on condition appeal perfected for the February 2009 Term, as indicated (See M-5017, M-5028 and M-5029 decided simultaneously herewith).

Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-5028 Bershad v Kallas

Stay granted on condition appeal perfected for the February 2009 Term, as indicated (See M-5017, M-5027 and M-5029 decided simultaneously herewith).

Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-5029 Schulman v Kallas

Stay granted on condition appeal perfected for the February 2009 Term, as indicated (See M-5017, M-5027 and M-5028 decided simultaneously herewith).

Gonzalez, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

M-4815 A-1 Entertainment LLC v 27<sup>th</sup> Street Property LLC

Preliminary appellate injunction denied.

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

M-4275 In the Matter of Stuart G. Fish,  
an attorney and counselor-at-law:

Respondent suspended from the practice of law in the State of New York, effective the date hereof, until such time as disciplinary matters pending before the Committee have been concluded and until further order of this Court. Opinion Per Curiam. All concur.

**The following orders were entered and filed on October 30, 2008**

Lippman, P.J., Saxe, Friedman, Sweeny, Acosta, JJ.

M-4453 Escobar v Guzman - Polanco

Stay of trial granted.

Tom, J.P., Saxe, Williams, Catterson, Moskowitz, JJ.

M-4659 In the Matter of Williams v Donovan  
M-4727

Vacatur of stay granted unless proceedings perfected for the February 2009 Term and petitioner continues to make rent payment. Leave to prosecute proceedings as a poor person granted to the extent indicated. Petitioner permitted to dispense with certain fees, as indicated.

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

M-4039 People ex rel. Hill, Renata v Warden

Motion granted to extent of continuing relief granted by an order of a Justice of this Court dated August 19, 2008 on condition appeal perfected for the January 2009 Term.

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

M-4780 Life Receivables Trust v Goshawk Syndicate 102 at  
Lloyd's - Life Settlement Corporation, doing business  
as Peachtree Life Settlements

Stay granted on condition appeals perfected for the  
February 2009 Term, as indicated.

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

M-4964 French v Schiavo

Defendants directed to serve and file brief no later  
than November 3, 2008 for the December 2008 Term; plaintiff  
directed to serve and file brief no later than November 13, 2008;  
defendants directed to serve and file reply brief no later than  
November 21, 2008, as indicated.

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

M-3911 Danica Plumbing & Heating LLC, now known as Danica  
Group LLC v 3536 Cambridge Avenue, LLC

Stay granted on condition appeal perfected for the  
February 2009 Term, as indicated.

Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-4872 JT Magen v Hartford Fire Insurance Company

Appellants directed to file supplemental record, as  
indicated.

**The following order was entered and filed on October 31, 2008**

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

M-4566      Concord Village Owners, Inc. v Trinity Communications  
M-4733      Corp. - Time Warner Cable of New York City - Time  
Warner, Inc. - Trinity Communications Corp. - Central  
Locating Service, Ltd.

Appeal taken by Time Warner adjourned to the January 2009 Term, for which Term respective appellants directed to perfect their appeals. Clerk directed to calendar appeals for hearing together in said Term. Motion and cross motion otherwise denied.

**The following order was entered and filed on November 3, 2008**

Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

M-4925      551 West Chelsea Partners, LLC v 556 Holding LLC  
Appellant's reply appendix deemed filed.