

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**DECEMBER 8, 2009**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, McGuire, Acosta, JJ.

4932           The People of the State of New York,           Ind. 3492/02  
                  Respondent,   177/03

-against-

Norman Schonfeld,  
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered October 29, 2004, convicting defendant, after a jury trial, of criminal possession of stolen property in the second degree (five counts), criminal possession of stolen property in the third degree (two counts), grand larceny in the first degree, grand larceny in the second degree (nine counts), grand larceny in the third degree, scheme to defraud in the first degree, perjury in the first degree (three counts), forgery in the second degree (eleven counts), criminal possession of a forged instrument in the second degree (six counts), and

sentencing him, as a second felony offender, to an aggregate term of 16 to 32 years and ordering him to pay \$5,966,389.61 in restitution, modified, as a matter of discretion in the interest of justice, to reduce the sentence on the count of grand larceny in the first degree to an indeterminate term of from 8 1/2 to 17 years and to direct that the sentences for each of the counts of perjury in the first degree run concurrently with the sentences imposed on all other counts, and otherwise affirmed.

The court properly imposed restitution without a hearing. No such hearing is required unless a defendant requests one, or the record lacks sufficient evidence to support a restitution finding (Penal Law § 60.27[2]). Since defendant did not request a hearing until more than a month after the court calculated the amount of restitution and imposed sentence, the request was clearly untimely (*see People v Seader*, 278 AD2d 26 [2000], *lv denied* 96 NY2d 806 [2001]). Furthermore, the amount of restitution ordered was based upon sufficient evidence of loss, adduced during the trial (*see People v Consalvo*, 89 NY2d 140, 144 [1996]).

Under the particular circumstances presented herein, we find the sentence excessive to the extent indicated. Among the circumstances warranting a reduction in the sentence are the nonviolent nature of defendant's criminal conduct, defendant's

age -- he was 63 at the time of trial -- and the need to ensure that the sentence not be disproportionate to the sentence imposed for similar crimes. In this latter regard, we agree with the dissenter that the "fairness of the criminal justice system requires . . . some measure of equality in the sentences meted out to defendants who commit the same or similar crimes" (*People v Pedraza*, 25 AD3d 394, 397 [2006, Tom, J., dissenting], *lv denied* 7 NY3d 760 [2006]).

All concur except Tom and Acosta, JJ. who dissent in a memorandum by Tom, J. as follows:

TOM, J. (dissenting)

Defendant's sentence was not unduly harsh and was clearly warranted under the circumstances of this case. The majority's rationale for sentence reduction is devoid of the mention of legitimate mitigating factors that warrant leniency and, by failing to enforce a penalty that serves as a means of deterring others who might be similarly tempted, sends the wrong message to an industry in which trust is essential to the everyday conduct of business.

By Wall Street standards, where losses due to fraudulent schemes are measured in the tens of billions of dollars, this one is not large, involving only some \$6 million. But the damages sustained by its victims, among whom is defendant's own son, are extensive and reach beyond mere financial loss to include the erosion of trust that is the foundation which underlies the entire system of commerce in diamonds. In a business where millions of dollars are committed on a handshake and where a dealer's inventory can be carried off in the heel of a shoe, a particularly high premium is placed on personal integrity, and the extent to which defendant profited by his deceit is a poor measure of the damage to the reputation of those dealers whose misplaced trust inadvertently injured and threatened the livelihood of many others. The damage inflicted by defendant is

compounded by the inappropriately lax penalty imposed as a result of the majority's reduction of his sentence.

Defendant gained an extensive knowledge of the diamond business, beginning work in the industry in 1956 and, in 1974, forming his own company, Norman Schonfeld Inc. The corporation dissolved in 1980, leaving its creditors with losses totaling some \$4 million. As a result, defendant was, by his own admission, "a controversial figure in the diamond industry" and resorted to the use of a pseudonym. Adopting the name Norman Baker "for the public," defendant became a co-owner of Sidco Jewelry, a jewelry manufacturing company located on Fifth Avenue in Manhattan in February 1999. Defendant's son, Ariel, then 27 years old, joined the firm as a salesman. Although Ariel had no experience in the diamond business, defendant taught his son how to sell jewelry. Defendant told Ariel that he was obliged to employ a pseudonym because he was reputed to have been involved with "some sort of diamond scam" in the past.

Defendant's capacity to commit fraud is not simply a matter of reputation. On March 31, 2000, he was convicted of third degree grand larceny in a scheme involving fictitious mortgages, in which he promised a business associate a return of 24% on an investment of \$200,000. Defendant received a sentence of five years' probation and was ordered to make restitution in the

amount of his victim's investment.

Around this time, defendant told Ariel that he was selling his interest in Sidco to his partner, and Ariel was dismissed as a salesman. Defendant then suggested to his son that they develop a business to give Ariel a "future" in the diamond trade. In June 2000, Anaka Design Ltd. was incorporated, with Ariel listed as its president. Defendant ran the company's operations, this time adopting the pseudonym "Norman Miller," and instructed Ariel to refer to him as a "family friend" who was helping Ariel "learn the industry," warning that if his involvement in the business and his family relationship ever became known, "no one would ever do business" with Ariel. Defendant paid Ariel a weekly salary in cash and controlled the business records and bank account statements, which Ariel never reviewed. Defendant obtained what Ariel described as "false references" from persons who purported to have had dealings with Anaka Design that Ariel could provide to diamond brokers to obtain stones on consignment or, in the parlance of the trade, "on memo."

Using a list furnished by defendant designating which diamond suppliers to use (and which to avoid using), Ariel began contacting brokers, providing them with the references defendant had obtained and telling them, as defendant had instructed, that Ariel was seeking diamonds Anaka would fabricate into jewelry for

a "very high end clientele." By making payment for diamonds within the time provided under the terms of the various consignment memos, Anaka developed a reputation as an ideal client, which enabled it to purchase ever more valuable stones and extend the time for payment.

In February 2001, defendant sent Ariel to a diamond and jewelry trade show in Orlando, Florida. There, he was approached by one Moshe Rabinowitz, who explained that he operated a company called Flextrade International, which dealt in precious metals. Rabinowitz stated that he was interested in purchasing diamonds and gave Ariel his business card. After returning to New York, Ariel gave the card to defendant. Some time later, defendant informed Ariel that Rabinowitz had placed an order for more than \$5 million in large diamonds and produced a list of credit references provided by Rabinowitz which, defendant stated, he had checked out.

Using several lists of diamonds defendant had written out, Ariel collected the stones from various suppliers and brought them to defendant at Anaka's office. When the order was complete, defendant told Ariel to deliver the diamonds to Rabinowitz in London. On May 6, 2001, Ariel took a parcel of diamonds from the safe at Anaka's office, secreted them in his underwear and flew to London. He did not declare the diamonds

upon arrival. Two days later, Rabinowitz met Ariel at his hotel and took him to an office with the name "Flextrade" on the door. There, Ariel gave him a package of memos, which Rabinowitz compared with the stones. On defendant's instructions, Ariel left the diamonds with Rabinowitz. Two days later, Rabinowitz delivered to Ariel, at his hotel, signed copies of the memos, a letter of guaranty and nine postdated checks totaling nearly \$6.8 million. Upon his return to New York, Ariel was instructed by defendant to deliver the checks to Anaka's attorney, Kenneth Aronson, for expedited collection. According to Aronson, the checks were ultimately rejected by the bank as "forged or fraudulent."

That same month, Anaka, defendant and Ariel were sued by a number of Anaka's suppliers for payment or the return of diamonds delivered on memo. At his deposition, defendant falsely testified that he played no role in obtaining from the suppliers the diamonds that had been sold to Rabinowitz of Flextrade International and that he had no reason to suspect that the checks received from Flextrade were "anything but good."

In late August 2001, Ariel was arrested and charged with grand larceny for using his position with Anaka to steal diamonds. Ariel was originally represented by Aronson, whom defendant provided with the names of persons who might provide

bail, including one Maurice Rico, described as a family friend. No bail money was forthcoming, and Ariel remained under detention at Rikers Island.

In the fall of 2001, defendant asked Vincent Sampieri, a childhood friend and fellow diamond dealer, to have certain diamonds graded by the Gemological Institute of America (GIA). Over the next few months, Sampieri obtained a number of GIA certificates, which he returned to defendant, who then paid for them. Sampieri also sold several diamonds obtained from defendant and arranged for approximately a half dozen others to be recut. In March 2002, Sampieri was arrested by a detective investigating Anaka. Police recovered several diamonds that, upon comparison with GIA reports, were determined to be stones that had been provided by Anaka's suppliers and subsequently recut.<sup>1</sup>

In June 2002, a detective followed defendant as he traveled by subway from his apartment in Manhattan to a bank in Woodside Queens. There, defendant deposited \$2,000 in cash into Maurice

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<sup>1</sup> On December 6, 2002, Sampieri pleaded guilty to criminal possession of stolen property in the third degree and was sentenced to 6 months' incarceration and 5 years' probation.

Rico's bank account. Defendant was arrested on July 1, 2002.<sup>2</sup>

Meanwhile, the attorney representing Anaka in the civil litigation was promised a partial payment by Rabinowitz for the diamonds received by Flextrade. The attorney was told that Rabinowitz had sold the diamonds to Asian dealers, who had not yet paid for them. In June 2002, the attorney flew to Israel to meet with Rabinowitz, obtaining his confession of judgment and some identifying documents, including a driver's license.

After returning to New York, the attorney gave a copy of the license to Ariel's attorney. When it was shown to Ariel, he recognized that the person depicted in the license photograph was merely Maurice Rico disguised behind a thick goatee, dark hair and glasses. An August 2001 warrant application indicates that a New York City detective contacted the real Moshe Rabinowitz, an Israeli diamond merchant, and was informed that the latter had never been to Orlando, Florida, was not in London in early May 2001 and had never heard of Ariel or Norman Schonfeld, Anaka Design or Flextrade International.

Police obtained a warrant and conducted a search of Rico's Florida apartment, where they recovered checks of the same type

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<sup>2</sup> At the time of his arrest, defendant was still on probation from his prior conviction of third degree grand larceny in connection with the fraudulent scheme involving fictitious mortgages.

as the checks given to Anaka by Flextrade. On Rico's computer they found letters from Rabinowitz to his lawyer and from Rabinowitz to Ariel, as well as software to print checks for Flextrade, among other entities. In addition, airline records divulged that Rico had made several trips to Tel Aviv, including a two-week stay in March 2002. Finally, account records showed that a \$2,000 deposit in Rico's name had been made at a bank in Queens on June 4, 2002 by defendant.<sup>3</sup>

Ariel had been in jail for over a year by the time he was shown the license supposedly belonging to Rabinowitz in late 2002. Shortly thereafter, Ariel began a series of meetings with an Assistant District Attorney, ultimately entering into a cooperation agreement. On January 31, 2003, Ariel pleaded guilty to grand larceny in the first degree in satisfaction of the indictments against him. He turned over two letters received during his pretrial incarceration from defendant that discussed "the hypothetical return of diamonds in return for a plea deal." The letters indicated that defendant had refused the Assistant District Attorney's demand to place the diamonds in escrow before any discussion of a negotiated sentence because those

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<sup>3</sup> On March 16, 2004, Rico pleaded guilty to forgery in the second degree (11 counts) and scheme to defraud (2 counts) and was sentenced to 2 to 4 years' incarceration.

"hypothetical diamonds" were his only "hypothetical ace."

Defendant's jury trial lasted nearly eight weeks with over 50 witnesses appearing for the People. Included among the items the People introduced into evidence were voluminous invoices and memos detailing the value of each diamond stolen by defendant. Testifying on his own behalf, defendant continued to adhere to his story that he and Anaka had been swindled by Flextrade. On August 10, 2004, following three days of deliberations, the jury convicted defendant of all 40 submitted counts.

Following his conviction, defendant used the "hypothetical diamonds" and a purportedly serious medical condition to delay and manipulate the sentencing process. The People submitted a restitution order indicating that the amount defendant owed 11 diamond suppliers whom he had defrauded was \$5,966,389.61. Defendant in a letter to the court dated October 25, 2004 stated that he wished to return "the considerable amounts of stolen merchandise" in his possession and provide the District Attorney's office with memos documenting the money owed to Anaka for stones that had been sold. Defendant offered his assistance with any recovery efforts and requested that sentencing be adjourned from 10 days to two weeks to permit him to deliver the stolen property.

At the adjourned sentencing on October 29, 2004, counsel

requested a further two-week adjournment both to give defendant time to turn over the diamonds in his possession and to permit his client to undergo surgery scheduled for November 18, 2004. The People opposed any adjournment as a mere delaying tactic, noting that defendant had made a similar offer to return the diamonds prior to trial in exchange for a negotiated plea.

The court adjudicated defendant a second felony offender and, after reminding defendant that he had been warned sentencing would not be further adjourned, denied the motion and proceeded with sentencing. The People noted that defendant had not only stolen nearly \$6 million but had violated the trust of his victims, who "lost their reputation" and suffered "financially, emotionally, [and] physically." Moreover, defendant made his son, Ariel, "the fall guy," resulting in Ariel's conviction of a felony.

Observing that the evidence of defendant's scheme to steal millions of dollars was overwhelming and that there was no question based on his October 25 letter that defendant had perjured himself at trial in an attempt to deceive the court and jury, the court imposed a cumulative sentence of incarceration of from 12½ to 25 years on the charges arising out of the theft of the diamonds, to run consecutively with concurrent terms of 3½ to 7 years imposed for first-degree perjury and violation of

probation, for an aggregate sentence of 16 to 32 years. The court further informed the parties that absent a dispute by defendant warranting an immediate hearing as to the amount of restitution, it was prepared to sign the restitution order. However, the court adjourned the execution of sentence so that defendant could have the scheduled surgery.

In December, defendant moved for a further extension of the execution of sentence to late January 2005 because his surgery had been purportedly postponed to an indeterminate date. He further maintained that he had caused to be delivered to the District Attorney's office some \$2 million in diamonds in addition to memoranda of accounts receivable in a like amount and, therefore, that the restitution claimed by the District Attorney "must be substantially offset."

The People opposed these requests, noting that restitution had been determined at sentencing. They emphasized that accounts receivable are merely debts, not the goods or cash required to satisfy the restitution order.

On February 8, 2005, defendant moved to reduce his sentence to the minimum of 4½ to 9 years. Defendant argued that the 16-to-32-year aggregate sentence amounted to a "death sentence" because of his "serious medical problems." Defendant also argued that his 16-to-32 year sentence was much more severe than the 2

to 4 years meted out to codefendant Rico. He also pointed to the restitution he had already paid as proof of his rehabilitation.

After hearing argument, the court stated that "[t]he evidence at trial left no question . . . that [defendant] was the prime mover" behind the scheme to defraud the diamond dealers, finding that defendant had received "an appropriate sentence."

On February 22, 2005, prior to executing sentence, the court again heard argument on sentencing. Defendant repeated his request for a reduction in sentence and sought another adjournment of execution of sentence, stating that his surgery was now scheduled for March 17, 2005. Defendant also pointed to his restitution of some \$2 million in diamonds as evidence that the victims were "a lot better off" with his help than they would be once he was in prison. The court denied defendant's requests, stating that the restitution order was "based upon the hard evidence in the case," that defendant's sentence was the result of his own actions, and that defendant might receive his surgery faster once in the custody of the State Department of Correctional Services. Accordingly, the court reimposed the sentence it had previously set.

It is axiomatic that this Court is vested with plenary power to modify a sentence "without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]). However, that power

should be exercised only where the sentence is "unduly harsh or severe under the circumstances" (*id.*). In determining whether a sentence is appropriate, the factors to be considered are deterrence, rehabilitation, retribution, and isolation (see *People v Notey*, 72 AD2d 279, 282 [1980]). In imposing sentence upon a particular defendant, a court should consider

"the harm caused or contemplated by the defendant, the excuse or provocation, if any, for the defendant's conduct, the restitution which may compensate for the harm done, the prior criminal history of the defendant, the likelihood of recurrence of the defendant's conduct, and whether imprisonment would result in excessive hardship to the defendant" (*id.* at 283, citing Model Penal Code § 7.01[2]).

The record before us does not support the conclusion that defendant is unlikely to engage in future fraudulent conduct. He has a long history as a con artist preying on members of the general public. His earlier diamond business was dissolved in 1980 resulting in \$4 million in losses to creditors. As a result, he used an alias to hatch further scams. In 2000, he was convicted of larceny in a scheme involving sale of fictitious mortgages. While he was serving a sentence of five years' probation, including \$200,000 in restitution, defendant concocted the instant convoluted plan to steal millions of dollars of diamonds from dealers. This is his second fraud conviction,

committed while still on probation following his first such conviction, and the second time his operation of a diamond business has left suppliers with losses in the millions of dollars.

Defendant is a fraud and recidivist with no qualms about casting blame on others, including his own son, to save his own neck. The die was cast when Ariel was used as the front man to set up Anaka. If the scam failed, Ariel would be the fall guy, leaving defendant in the clear. At defendant's arraignment, counsel told the court that defendant's son, Ariel, has "a serious learning disability. He is dyslexic." Counsel nevertheless told the court:

"His son formed Anaka, I think, in June of 2000. My client has no equitable interest in Anaka and out of the 11 merchants that my colleague refers to on the other indictment involving his son Mr. Norman Schonfeld did not engage in any transaction with them to obtain diamonds. There were no negotiations. No meetings. He was not at all involved in any of that. As I say, he does not have a proprietary interest in Anaka."

Defendant did nothing to make restitution or otherwise keep his son out of jail, leaving him incarcerated for over a year. Defendant found the fruits of his illegal activities to be more important than the freedom of his own son. As a result of entering a guilty plea, Ariel has become a convicted felon.

Defendant has destroyed his son's reputation and ruined his livelihood, without reservation or apparent regret.

Defendant prolonged his day of reckoning by perjuring himself at civil depositions in 2001 and at his criminal trial in 2004. He indirectly admitted to his perjury in his October 25<sup>th</sup> letter to the court offering the return of stolen merchandise in an attempt to have his sentence reduced. Defendant's purported remorse and efforts at restitution came only after he was convicted, as part of his last-ditch effort to reduce his sentence and "open the jail door."

In the weeks following defendant's conviction, the scammed merchants sent 13 letters to the court requesting that defendant be given the maximum sentence allowed by law. The victims complained about the impact of defendant's theft on their lives, family and businesses, and also about the need to deter such conduct in an industry in which trust and handshakes remain vital. Even if defendant did not have a history of fraudulent activity, the extent of the fraud and its impact on those who were victimized justify a lengthy period of imprisonment as a means of deterring similar conduct by others. As a result of defendant's fraud, the reputation of the victims and the goodwill of their businesses have been ruined, causing huge losses that may never be recovered. Many of the businesses built their

goodwill on a lifetime of laborious work, which defendant's mendacity destroyed in a matter of days. A short sentence will not serve to deter fraud and larceny in an industry vulnerable to this type of crime, where diamonds and other precious stones are commonly transferred by merchants based on a tradition of trust and honesty. The unduly short sentence advocated by the majority sends the wrong message to other prospective criminals by permitting defendant to enjoy the fruits of his crime.

Significantly, defendant has failed to account for the roughly \$4.5 million worth of diamonds that have not been returned.

Rather than protect the diamond industry and deter similar criminal activity, a short sentence will encourage prospective criminals to trade a short sentence for a return of millions of dollars.

The majority's reference to defendant's age is inapposite. While a defendant's health is a relevant factor in assessing the propriety of sentence, age, standing alone, is not (see e.g. *People v Cyr*, 119 AD2d 901 [1986], *lv denied* 68 NY2d 756 [1986]; *People v Notey*, 72 AD2d 279 [1980], *supra*). As this Court has stated, "It is patent that unless incarceration would probably cause defendant's death, he should be made to serve his sentence" (*People v Browarnik*, 42 AD2d 953, 953 [1973] [heart condition]).

With respect to unsubstantiated protestations of supposedly

fragile health, "the mere speculation that due to his advanced age or his prior health problems, the defendant might suffer harm if incarcerated, does not suffice to warrant a modification of the sentence imposed" (*People v Chesnard*, 175 AD2d 254, 255 [1991]). Defendant has, according to the record, been in need of imminently scheduled surgery for the last six or seven years. As this Court stated in *People v Baghai-Kermani* (221 AD2d 219, 220 [1995]), "A modification [of sentence] based on a defendant's deteriorating health must be based on medical proof which convincingly establishes that incarceration would have an extremely deleterious impact." Here, defendant's "poor health" argument is based entirely on unsupported statements by counsel; defendant has not submitted a single medical record or affidavit from a physician to support the notion that imprisonment will have an unduly harmful impact on his health. Defendant has been in custody since his arrest, and in the seven years that have ensued, there is no indication that he has ever undergone surgery (see *Browarnik*, 42 AD2d at 953 ["despite defendant's condition at the time of conviction he has survived for some three years"]; cf. *Notey*, 72 AD2d at 281-282). Nor is there proof of any medical condition that would render the period of incarceration imposed tantamount to a "death sentence," as defendant has repeatedly claimed (see *Baghai-Kermani*, 221 AD2d at 221 [1995])

[incarceration not shown to be life-threatening absent evidence of brain tumor's malignancy]). Defendant's only documented pathology is a pathological disregard for the truth, as evinced by his multiple perjury convictions. Moreover, should objective medical testing establish that defendant is afflicted with a potentially deadly condition, he may apply for medical parole under Executive Law § 259-r (*id.*).

Defendant's contention that his offense should be treated leniently because it is a white-collar crime is unsupported by any reference to case law, reflecting its utter lack of merit. In effect, defendant asks this Court to apply a double standard of punishment in favor of those convicted of financial crimes. He also asks this Court to overlook the fact that he was convicted of a previous such crime and was on probation from that conviction at the time of his arrest. Finally, the nonviolent nature of the crime is overshadowed by "the immensity of the fraud" and the devastating impact on defendant's victims, warranting the imposition of a severe sentence as a means of deterring "others who might be tempted, and as a reflection of community condemnation of the conduct of the defendant" (*Notey*, 72 AD2d at 284 [Medicaid fraud]).

While defendant complains that his coconspirator, Rico, received a disproportionately low sentence for his part in the fraudulent enterprise, defendant concedes that "he certainly deserved a greater sentence than Rico." Rico, likewise a second felony offender, was convicted of a less serious offense. He pleaded guilty to the top count in the indictment against him, forgery in the second degree, a class D felony (Penal Law § 170.10), while defendant was convicted of, inter alia, grand larceny in the first degree, a class B felony (Penal Law § 155.42). In addition, Rico's role in the scheme was relatively minor, being limited to the forging of checks and, at defendant's instance, making trips to Israel to impersonate Moshe Rabinowitz.

Defendant, on the other hand, with his extensive experience in the diamond business, was the mastermind and motive force that guided the entire scheme to defraud Anaka's suppliers. Not only is defendant a second felony offender due to his conviction of third degree grand larceny in connection with the sale of fictitious mortgages, he previously operated a diamond brokerage business that caused some \$4 million in losses to its creditors, with the result that defendant, by his own admission, "was a controversial figure in the diamond industry." It was defendant who formed Anaka, using his son to obtain diamonds on consignment and to spirit over \$5 million in stones to London, where they

simply disappeared. In view of defendant's pivotal role in the crime, it cannot be said that the sentence imposed by Supreme Court is "unduly harsh or severe" (*Delgado*, 80 NY2d at 783; *cf. People v Pedraza*, 25 AD3d 394, 398 [2006, Tom, J., dissenting], *lv denied* 7 NY3d 760 [2006] [reduced sentence of 23 years to life imposed despite "a lack of credible evidence to personally connect defendant to the acts comprising arson and attempted murder and the victim sustained no significant physical harm"]).

Review of the record thus indicates that, under all the circumstances, the sentence imposed by Justice Carruthers was warranted (*see People v Barzge*, 244 AD2d 213, 214 [1997], *lv denied* 91 NY2d 889 [1998]). The present scheme to defraud resulted in some 40 counts being submitted to the jury, on all of which defendant was found guilty, including grand larceny in the first, second and third degrees, forgery, criminal possession of stolen property and perjury. The fraud was committed against separate individuals and entities. Indeed, the sentence imposed was "relatively lenient" (*id.*) inasmuch as Justice Carruthers was not obligated to have the bulk of the prison terms run concurrently, as he did, instead of consecutively (Penal Law § 70.25[1]).

Defendant has shown no remorse for the fraud he committed or the injury to his victims including his own son. When the fraudulent scheme began to unravel in 2001, defendant left his son holding the bag. He then perjured himself at trial in an attempt to avoid conviction. It was only after being convicted that he offered to return a portion of the stolen merchandise in an attempt to barter a shorter sentence but still has not accounted for an additional \$4.5 million in stolen diamonds. After sentencing, defendant continued to deceive the court to delay execution of the sentence advancing unsubstantiated medical ailments to bargain for a lesser sentence.

Even with the foregoing background, the majority sees fit to reduce defendant's aggregated prison term of 16 to 32 years to 8½ to 17 years, making defendant soon eligible for parole.

At defendant's arraignment, the Assistant District Attorney told the court that defendant

"is well known in the diamond community as a con artist. In fact, that is, not only in the diamond community, but in the community at large. He is a con artist. That is what he does for a living. And I assume that he will attempt to con the Court."

The record demonstrates that these words were prescient. The proceedings in this matter establish that defendant has engaged in confidence schemes, successfully duping victims both within

and outside the diamond community. The majority's disposition of this appeal demonstrates that defendant has been no less successful in his attempt to deceive this Court.

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

ENTERED: DECEMBER 8, 2009

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CLERK

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

1322N Gerald Phillipps, Index 111645/07  
Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,  
Defendants-Appellants.

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Steve S. Efron, New York, for appellants.

Law Offices of Alan M. Greenberg, P.C., New York (Jeremy A.  
Hellman of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.),  
entered July 23, 2008, which, to the extent appealed from as  
limited by the briefs, denied defendants' motion to dismiss the  
complaint for failure to serve an adequate notice of claim,  
unanimously affirmed, without costs.

Plaintiff stated in the notice of claim that "[o]n or about  
the 17<sup>th</sup> day of January 2007," while a passenger on a bus owned  
and operated by defendants, which "was being operated on Fifth  
Avenue at or near the bus stop at the[] Southwest corner of 33<sup>rd</sup>  
Street in Manhattan, said bus stopped and then went forward and  
then abruptly came to as final stop[, causing plaintiff] to be  
propelled in said bus and to violently hit the floor thereby  
sustaining severe permanent personal injuries." As courts may  
look to the evidence adduced at a hearing pursuant to General

Municipal Law § 50-h to determine the sufficiency of a Notice of Claim (see *D'Alessandro v New York City Tr. Auth.*, 83 NY2d 891, 893 [1994]), we recount the relevant evidence from the hearing in this case. Plaintiff, who was 84 years old at the time of the accident, testified that he was on his way to visit a friend who lived on 33rd Street between Fifth and Sixth Avenues and had transferred at 49th Street and Fifth Avenue from a crosstown bus. He then "took a Fifth Avenue bus that went downtown" but did not know the number of the bus. The bus, however, "was one of those relatively modern buses that has a[n] . . . elevated backside." As the bus approached the stop at 33rd Street, plaintiff got up from his seat. After the bus stopped and the doors opened, when plaintiff was about a foot from the front door preparing to exit, it "jerked forward violently," and plaintiff fell on his back in the aisle. At the time of the fall, plaintiff had been holding only his cane. Plaintiff was helped up and off the bus by other passengers. Believing he had only a bruise, he walked to his friend's apartment, which was five minutes away. After five or ten minutes, however, the pain was so bad he took a taxi to the hospital. He had broken five ribs and punctured a lung, and was admitted to the hospital.

In relevant part, the statute requires that a notice of claim set forth "the time when, the place where and the manner in

which the claim arose" (General Municipal Law § 50-e[2]).

"Reasonably read, the statute does not require those things to be stated with literal nicety or exactness" (*Brown v City of New York*, 95 NY2d 389, 393 [2000] [internal quotation marks omitted]). Rather, "[t]he test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable the city to investigate" (*id.* [internal quotation marks omitted]); "[n]othing more may be required" (*id.* [internal quotation marks omitted]). Finally, as we recently stated, "municipal authorities have an obligation to obtain the missing information if that can be done with a *modicum of effort* rather than rejecting a notice of claim outright" (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 69 [2007]).

Under these circumstances, the notice of claim was not insufficient due to plaintiff's inability to state whether the bus was an M1, M2, M3 or M4 or to recall any identifying information regarding the bus driver (*cf. Hudson v New York City Tr. Auth.*, 19 AD3d 648, 649 [2005] [notice of claim not insufficient where plaintiff provided the time and location of accident, the route number of the bus that collided with her vehicle, and the manner in which her claim arose but incorrect information regarding the bus number]). In contending that the notice of claim was insufficient, defendants argued that it would

be overly burdensome for them to "search for bus operators for a 30 minute span on all four bus routes alleged in plaintiff's bill of particulars." Notably, however, this claim of prejudice was not supported by any factual information bearing on either the number of buses that would have stopped at 33rd Street and Fifth Avenue during this time period or the number of those buses that were of the type identified by plaintiff. Of course, "prejudice will not be presumed" (*Goodwin*, 42 AD3d at 68). Given the conclusory character of this claim of prejudice, and that defendants did not make the necessary showing of an attempt to investigate the accident (*id.*), defendants failed to meet their burden of demonstrating prejudice. We note, moreover, that defendants conceded that plaintiff acted in good faith.

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

ENTERED: DECEMBER 8, 2009

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CLERK

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

5311-

5311A-

5311B Ferrante Immobiliare, LLC, et al., Index 108089/06  
Plaintiffs-Appellants-Respondents,

-against-

Guido A. Pace, et al.,  
Defendants.

- - - - -

Guido A. Pace, et al.,  
Third-Party Plaintiff,

-against-

Vanguard Construction and Development Co., Inc.,  
Third-Party Defendant-Respondent-Appellant.

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Ellenoff Grossman & Schole, LLP, New York (Gabriel Mendelberg of  
counsel), for appellants-respondents.

Stein Riso Mantel, LLP, New York (Gerard A. Riso of counsel), for  
respondent-appellant.

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Order, Supreme Court, New York County (Helen E. Freedman,  
J.), entered July 2, 2008, which granted plaintiffs' motion to  
reargue their prior motion for leave to amend the complaint to  
add third-party defendant Vanguard Construction and Development  
Co., Inc. as a party defendant, and, upon reargument, granted the  
motion to the extent of permitting plaintiffs to assert a claim  
against Vanguard for breach of warranty or installation of  
defective materials, unanimously affirmed, without costs. Appeal  
from order, same court and Justice, entered December 4, 2007

which granted Vanguard's motion to dismiss the third-party complaint, unanimously dismissed, without costs, as academic. Appeal from order, same court and Justice, entered May 16, 2008, which denied plaintiffs' motion for leave to amend, unanimously dismissed, without costs, as superseded by the appeal from the July 2, 2008 order.

Plaintiffs argue that because Vanguard never substantially completed its work under the contract, the statute of limitations never commenced to run, and that the March 30, 2005 settlement agreement does not necessarily mark the accrual date of their negligence and breach of contract claims since neither a "Certificate of Substantial Performance" nor a final Certificate of Payment has ever been issued by the architect Pace as required by the original contract. These arguments are without merit.

In their original complaint, in which the claims of negligence and breach of contract were only alleged against defendant-architect Pace and defendant-engineer Goldman Copeland Associates, and in which the general contractor, Vanguard, was not a named party, plaintiffs admitted that "[b]y late 2003, Vanguard completed the Project and the Firm moved into the remaining space at the Premises." Subsequently, however, in their proposed amended complaint seeking to add breach of contract and negligence claims against Vanguard, plaintiffs, for

obvious reasons, omit such allegation and allege instead that "[b]y late 2003, the Firm moved into the remaining space at the Premises, while work on the HVAC, plumbing and electrical systems was ongoing," which work "was never substantially completed."

Article 14 of the standard AIA agreement with Vanguard defines substantial completion as "the stage in the progress of the Work when the Work . . . is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use." It further provides that final payment will be made after the architect issues a Certificate of Substantial Completion and a final Certificate for Payment in which it states that it had determined to the best of its knowledge that the work had been completed in accordance with the terms and conditions of the contract. According to § 14.5.1 of the contract, the architect's final Certificate for Payment constitutes a further representation that the conditions precedent to Vanguard's being entitled to final payment of the entire balance found to be due it have been fulfilled.

Although the March 30, 2005 settlement agreement does not state when Vanguard's obligations under the contract are deemed substantially (or entirely) complete, or that Vanguard was otherwise absolved from all of its remaining responsibilities

under the contract, the settlement agreement stresses that Vanguard, which had already completed or abandoned the project, was to receive its final payment under the contract. The settlement agreement also does not indicate that Vanguard has any further obligations under the contract.

Further, it is clear that after the architect Pace advised plaintiffs on January 20, 2005 that Vanguard was unwilling to return to the work site to actually do some unspecified work and that Pace would sign off on the project "when all the issues are resolved," plaintiffs and Vanguard bypassed the architect (whom plaintiffs later sued for breach of contract and negligent design and supervision) and entered into the March 30, 2005 settlement agreement in which they agreed that plaintiffs would pay Vanguard \$13,500 "as final payment under the Agreement." In the agreement, plaintiffs stated that, as of that date, they were "unaware of any defects or negligence in connection with the Project," while they retained their rights, if any, with respect to any claims based upon any subsequently discovered defects in workmanship.

Thus, the statute of limitations on plaintiffs' negligence and breach of contract claims, which arguably accrued as early as late 2003, clearly began to run, at the latest, on March 30, 2005, the date of execution of their settlement agreement with

Vanguard, which expressly provided that in consideration for the settlement plaintiffs would pay Vanguard the sum of \$13,500 "as final payment under the Agreement" (see *Amedeo Hotels Ltd. Partnership v Zwicker Elec. Co.*, 291 AD2d 322, 323 [2002]). The original agreement with Vanguard provides, in pertinent part, that "[f]inal payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor where [] the Contractor has fully performed the Contract." Therefore, inasmuch as the parties charted their own course and agreed to dispense with the architect's approvals preliminary to final payment under the original contract, there is no need to determine whether Vanguard's work was "substantially complete" within the meaning of that agreement.

Moreover, although the motion court, in its July 2, 2008 order, found that plaintiffs interposed their proposed negligence claim on March 25, 2008 when they filed their motion to amend the complaint, plaintiffs' filing of a supplemental summons and amended complaint on March 25, 2008 did not toll the three-year statute of limitations for negligence claims, since they failed to secure leave of the court or a stipulation signed by counsel for the parties (see CPLR 1003). Plaintiffs did not seek leave to amend the complaint until April 7, 2008, when their order to show cause was signed. Although the motion court erroneously

found that its prior order dismissing the third-party complaint, in which it found that the negligence claim was time barred, constituted the law of the case as to plaintiffs, plaintiffs' subsequent failure to timely move to amend their complaint renders that issue academic and, since the order to show cause could not have been submitted prior to April 2, 2008, the date of its supporting affirmation and affidavit, there is no need to determine when it was actually submitted.

Contrary to Vanguard's contention, plaintiffs' breach of contract claim is not precluded by the settlement agreement, which removed 14 enumerated items from the scope of the parties' agreement (the "excluded work") and precluded plaintiffs from suing Vanguard in respect of those items, but expressly preserved plaintiffs' claims for negligence and breach of warranty or defects in connection with the "included work." To the extent the motion court's order may be read to limit the relevant language, the settlement agreement, which preserved all claims for "defects, including, but not limited to, latent defects, and warranties for work remaining in the scope of the work under the Agreement," is controlling and dispositive of the issue. Whether the items alleged to be defective fall within the category of "excluded work" or "included work" is a factual determination that cannot be made on this record.

Finally, in view of the court's determination in its July 2, 2008 order that plaintiffs' proposed negligence claim against Vanguard was untimely, albeit for the wrong reason, i.e. the law of the case, plaintiffs' appeal from the December 4, 2007 order, to the extent it granted Vanguard's motion to dismiss the third-party complaint on the ground that the negligence claim was untimely, is academic. In light of our disposition, it is unnecessary to reach the parties' remaining contentions.

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

ENTERED: DECEMBER 8, 2009

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CLERK

Andrias, J.P., Sweeny, Nardelli, Richter, Abdus-Salaam, JJ.

1197            Digna Diaz,  
                  Plaintiff-Appellant,

Index 6282/06

-against-

C-Town Supermarket,  
                  Defendant-Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (John A. Barone, J.), entered on or about June 19, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 30, 2009,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED:    DECEMBER 8, 2009

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CLERK

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1545-

1546 In re Kendra C.R.,

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

Charles R.,  
Respondent-Appellant,

Abbott House Family Services, Inc.,  
Petitioner-Respondent.

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Law Office of Florian Miedel, New York (Florian Miedel of  
counsel), for appellant.

Law Office of Jeremiah Quinlan, Hastings-on-Hudson (Daniel  
Gartenstein of counsel), for respondent.

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Order of disposition, Family Court, Bronx County (Douglas E.  
Hoffman, J.), entered on or about February 29, 2008, which  
revoked a suspended judgment entered on a finding of permanent  
neglect, terminated respondent father's parental rights to the  
child and committed the child's custody to the Commissioner of  
Social Services and the petitioning agency for the purpose of  
adoption, unanimously affirmed, without costs. Purported appeal  
from oral ruling, same court and Judge, on November 21, 2007,  
which terminated parental and visitation rights, unanimously  
dismissed, without costs, as nonappealable, and, in any event, as  
subsumed in the appeal from the order of disposition.

On March 4, 2005, respondent admitted having permanently

neglected the child and consented to entry of a suspended judgment. The preponderance of the evidence in the latest proceedings clearly established that respondent materially violated the terms of that suspended judgment. His admitted drug use during the period in question was sufficient to warrant revocation of the suspension (see *Matter of Angel P.*, 44 AD3d 448 [2007]; *Matter of Tiffany R.*, 7 AD3d 297 [2004]). Drug abuse is a major obstacle to unification with a child, and was compounded in this case by respondent's conviction for sale of a controlled substance. His failure to secure housing was also a material violation of the terms of the suspended judgment, and constituted independent grounds for revocation (see *Matter of Fynn S.*, 56 AD3d 959, 961 [2008]; *Matter of Frederick MM.*, 23 AD3d 951, 953 [2005]).

The court may terminate parental rights after a finding of noncompliance with a suspended judgment (see *Matter of Jennifer VV.*, 241 AD2d 622 [1997]). At the time of the dispositional hearing, more than 2½ years after respondent's consent to the suspended judgment, he still was not ready to take care of the child. His proposed solution of having the paternal grandmother take temporary custody ignored her own medical needs and her reluctance to take on that role, as well as the child's preference for adoption by the foster mother. In light of these

circumstances, the court properly found the child's best interests called for transfer of her custody and guardianship to the agency (see Family Ct Act § 631; *Matter of Star Leslie*, 63 NY2d 136, 147-148 [1984]; *Matter of Travis Devon B.*, 295 AD2d 205 [2002]).

**M-5274      *In re Kendra C.R.***

Motion seeking leave to supplement record and other related relief denied.

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

ENTERED:    DECEMBER 8, 2009

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CLERK

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1550 In re Matthew W.,  
Petitioner-Appellant,

-against-

Meagan R.,  
Respondent-Respondent.

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Paul D. Stone, Tarrytown, for appellant.

Steven N. Feinman, White Plains, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Heather L. Kalachman of counsel), Law Guardian.

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Order, Family Court, Bronx County (Sarah P. Cooper, Referee), entered on or about August 4, 2008, which, inter alia, awarded custody of the subject child to respondent mother, unanimously modified, on the facts, to eliminate the provision requiring the father to notify the mother of the address and phone number of any home other than the father's where the child stays during visitation with the father, and otherwise affirmed, without costs.

No basis exists to disturb the court's finding that while the parties are both fit to act as custodial parent on most counts (*see Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]), the ability to nurture a relationship between the child and the noncustodial parent tips the scales in favor of the mother (*see*

*Victor L. v Darlene L.*, 251 AD2d 178, 179 [1998], *lv denied* 92 NY2d 816 [1998]; *Matter of Osbourne S. v Regina S.*, 55 AD3d 465 [2008]). Evidence of the father's hostility toward the mother and intentional undermining of her role in the child's life is ample, including his maligning the mother in the child's presence, his failure to abide by the court's directive that there be telephone contact between the child and mother while the child was staying with the father, and his enrolling the child in a school in Westchester County without consulting the mother and without providing the school with the mother's contact information. The father's claim that the Law Guardian, who recommended that custody be given to the mother, and who was substituted in the proceeding after the father had rested his case and the court-appointed psychologist had testified, did not review the testimony that was taken prior to her substitution is pure speculation; moreover, the claim was not raised at the hearing and therefore is not preserved. The record also supports the court's decision not to follow the custody recommendation of the court-appointed psychologist since, as fully explained by the court, the persuasive force of the expert's testimony was diminished by evidence relating to the mother's rehabilitation and the father's hostility toward the mother, which evidence was generated after the expert's interview of the parties,

preparation of her report, and testimony about that report early on in this protracted hearing (see *Zelnik v Zelnik*, 196 AD2d 700, 702 [1993]; *Matter of Hopkins v Wilkerson*, 255 AD2d 319 [1998]). We have considered the father's other arguments and find them unavailing, except to the extent of the indicated modification.

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

ENTERED: DECEMBER 8, 2009

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CLERK



wound on his hand. Defendant claimed he had been scratched by his girlfriend, and the girlfriend confirmed by telephone that she had recently inflicted a minor scratch, but the officer reasonably concluded that a scratch could not have caused defendant's condition, and that he was lying. In addition, the police found a bloody knife under a bench in defendant's immediate vicinity, and defendant's clothing matched the description given by the victim. Given all this evidence, the severely wounded victim's statement that this was "not the guy" did not negate probable cause, and the police acted reasonably in not treating it as an exoneration (*see People v Smith*, 63 AD3d 510 [2009], *lv denied* 13 NY3d 749 [2009]; *People v Roberson*, 299 AD2d 300 [2002], *lv denied* 99 NY2d 619 [2003]).

The hearing court, which suppressed defendant's initial statement to police for lack of timely *Miranda* warnings, correctly found attenuation with regard to both of defendant's subsequent statements, given the lengthy passage of time, and the changes in location and interrogators (*see People v Paulman*, 5 NY3d 122, 130-134 [2005]; *see also Missouri v Seibert*, 542 US 600 [2004]). The continued presence of a particular detective was insignificant because he was not involved in the questioning; his role was limited to such matters as transporting defendant and asking him if he needed anything. We have considered and

rejected defendant's remaining arguments concerning the alleged involuntariness of his statements.

Since the issue was never litigated at trial, the court properly denied defendant's request to submit to the jury the issue of the voluntariness of his statements (see e.g. *People v Scurlock*, 33 AD3d 366 [2006], *lv denied* 7 NY3d 928 [2006]). In any event, there is no reasonable possibility that, had it been instructed on the issue of voluntariness, the jury would have found either of the statements involuntary.

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

ENTERED: DECEMBER 8, 2009

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CLERK



conference was set, provided a reasonable excuse for his failure to appear at the May 25 conference, namely, that the May 25 date was not set forth in the April 20 conference order, and that he either did not hear the May 25 date orally announced at the April 20 conference, or, if he heard it, he forgot it because he neglected to write it down (see *Mediavilla v Gurman*, 272 AD2d 146 [2000]). The delay caused by plaintiff's failure to appear on two occasions for court-ordered depositions was neither protracted nor prejudicial, and defendants' claims of longstanding, protracted, deliberate, willful and contumacious disregard of disclosure orders are not otherwise borne out by the record.

Plaintiff's affidavit in support of the motion made a sufficient showing of merit by providing details concerning the date, time, and location of the accident and the manner in which it occurred, and asserting that it had been continuously raining on the day of the accident, that the floor outside of defendants' premises leading up to the escalator was wet from the rain, and that no measures were taken to absorb the rainwater or to prevent it from being tracked into the vestibule and then onto the escalator steps. We reject defendants' argument that plaintiff's affidavit should be discounted as an attempt to create a new theory of liability not found in the pleadings. Throughout her

complaint, amended complaint, and bill of particulars plaintiff consistently alleged that defendants were negligent not only in their maintenance and operation of the escalator itself but also in their maintenance of the entranceways and floor leading up to the escalator steps. We also reject defendants' argument that a prior order by another justice precludes plaintiff's claims. The prior order, which granted a motion for summary judgment dismissing a third-party complaint against the Metropolitan Transportation Authority, determined that the escalator was not the property of the MTA but rather the Transit Authority. While such determination likely precludes plaintiff from proving that defendants were responsible for the operation and maintenance of the escalator, it does not preclude her from proving that defendants were responsible for the maintenance of the floor leading up to the escalator. That issue has not been litigated, and, at least in the present context, it appears that it should be (see *Levy v New York City Hous. Auth.*, 287 AD2d 281 [2001] [showing of merit necessary on motion to vacate a 22 NYCRR 202.27

default something less than what is necessary in opposition to a motion for summary judgment]).

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

ENTERED: DECEMBER 8, 2009

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CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1663- Tonya Anderson,  
1664- Petitioner-Respondent,  
1665-  
1666 -against-

Hal H. Harris,  
Respondent-Appellant.

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Hal H. Harris, appellant pro se.

Tonya Anderson, respondent pro se.

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Order, Family Court, Bronx County (Andrea Masley, J.), entered on or about July 11, 2008, which denied respondent's objections to an order of the Support Magistrate, dated April 21, 2008, dismissing with prejudice respondent's supplemental petition for a downward modification of his child support obligation and upwardly modifying his child support obligation to \$342 bi-weekly, and which brings up for review an order, same court (Marian R. Shelton, J.), entered on or about January 17, 2006, which, inter alia, (i) denied respondent's objection to a October 11, 2005 ruling of a Support Magistrate denying his motion to vacate his March 3, 2005 default, and (ii) remanded this matter for a hearing to determine child support based on the child's needs or standard of living, whichever was higher, unanimously modified, on the law and the facts, respondent's objections granted to the extent of remanding this matter to

Family Court for a recalculation of his income, to include any reduction due to the amount of court-ordered child support provided to his two sons who are not subjects of the instant action, and to determine whether his income would fall below the poverty level, and otherwise affirmed, without costs. Order, Family Court, Bronx County (Lori Sattler, J.), entered on or about January 15, 2008, which denied respondent's objection to a decision, dated July 12, 2007, denying his motion to recuse Support Magistrate Robert Mulroy, unanimously affirmed, without costs. Order, same court (Andrea Masley, J.), entered on or about March 17, 2009, which denied respondent's objection to the Support Magistrate's October 3, 2008 decision and fact-finding and October 8, 2008 order to the extent that it directed a money judgment in favor of petitioner, and dismissed as premature his objection to the extent that it challenged the finding of a willful violation of and the recommendation of incarceration, unanimously affirmed, without costs.

Family Court properly ordered child support to be based upon the needs or standard of living of the child, whichever was greater (see Family Court Act § 413[1][k]). Respondent defaulted by appearing more than two hours late on March 3, 2005. The Support Magistrate reasonably concluded that respondent's default was not excusable (see CPLR 5015[a][1]). Respondent's claim that

he did not have to appear until 11:30 a.m. is refuted by petitioner's adjourn slip indicating that the March 3 hearing was for 9:15 a.m., and respondent failed to produce his adjourn slip.

Respondent objected on the ground that the April 21, 2008 support order would reduce his income below the poverty level (see Family Court Act § 413[1][d]), but Family Court failed to determine respondent's income. If one accepts respondent's tax return for 2005 (the most recent tax return before the April 2008 support order, as respondent requested extensions for his 2006 and 2007 returns), he would be below the poverty level after paying \$342 biweekly (\$8,892 per year). Neither the Support Magistrate nor Family Court accepted the income shown in the tax return, which they were entitled to do (see *e.g. Matter of Childress v Samuel*, 27 AD3d 295, 296 [2006]). While exercising its discretion to impute income to respondent (see *e.g. Family Court Act § 413[1][b][5][v]*), the court was "required to provide a clear record of the source from which the income is imputed and the reasons for such imputation" (*Matter of Kristy Helen T. v Richard F.G.*, 17 AD3d 684, 685 [2005]) and "the record is not sufficiently developed to permit appellate review" (*id.*). When calculating respondent's income, the court should deduct the child support that respondent provided to his two sons who are

not the subject of the instant action (see Family Court Act § 413[1][b][5][vii][D]).

The Support Magistrate was not “interested” within the meaning of Judiciary Law § 14. “In the absence of statutory grounds, the decision upon a recusal motion is a discretionary one . . . and should not be disturbed unless the moving party can point to an actual ruling which demonstrates bias, which appellant does not do here” (*Yannitelli v D. Yannitelli & Sons Constr. Corp.*, 247 AD2d 271, 271 [1998], *lv dismissed* 92 NY2d 875 [1998] [internal quotation marks, emendations, and citations omitted]).

Respondent’s contention that the purge amount set in the October 2008 order (\$18,000) is excessive is premature because the purge amount is part of the Support Magistrate’s recommendation of incarceration, which is subject to confirmation by Family Court (see Family Court Act § 439[a]). Since Family Court will determine whether respondent is below the poverty line, we note that “[w]here the non-custodial parent’s income is less than or equal to the poverty income guidelines amount for a single person . . . unpaid child support arrears in excess of five hundred dollars shall not accrue” (Family Court Act § 413[1][g]).

Respondent’s argument that the contempt proceeding against

him for violating a support order should have been dismissed because he was never served with the violation petition is unavailing. In open court on May 12, 2005, respondent's attorney said that petitioner could serve her with the petition; respondent, who was in court, did not disagree. On June 13, 2005, respondent's attorney received the petition, as respondent himself admitted in paragraph 5(c) of his affidavit, sworn to on July 11, 2005.

Respondent's contention that due process was violated lacks merit. "Due process is satisfied so long as a party receives reasonable notice of a claim and an opportunity to be heard" (*Matter of Stone v Stone*, 218 AD2d 824, 825-826 [1995], *lv dismissed* 87 NY2d 843 [1995]). Respondent received both.

We also reject respondent's argument that the contempt proceeding should have been dismissed because the Support Magistrate did not decide his motion to dismiss within 60 days. The 60-day deadline in CPLR 2219(a) is "precatory . . . so that a decision rendered after the expiration of the allotted time is still a valid one" (Siegel, *Practice Commentaries*, McKinney's *Cons Laws of NY*, Book 7B, CPLR C2219:2).

We have considered respondent's remaining arguments, to the extent they are preserved and properly before us on this appeal, and find them devoid of merit.

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

ENTERED: DECEMBER 8, 2009

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CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1667-

1668-

1668A Barrett Japaning, Inc.,  
Plaintiff-Respondent,

Index 102165/06

-against-

Anna Bialobroda,  
Defendant-Appellant,

Sebastien Klotz, et al.,  
Defendants.

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Anna Bialobroda, appellant pro se.

Zane and Rudofsky, New York (Edward S. Rudofsky of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered June 6, 2008, to the extent appealed from, enjoining defendant Bialobroda from having persons unrelated to her (other than one roommate) occupy the fifth floor apartment and directing all but one of the co-residents to vacate the premises, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 27, 2008, to the extent that order granted plaintiff's motion for summary injunctive relief, unanimously dismissed, without costs, as subsumed in appeal from judgment. Appeal from order, same court and Justice, entered October 30, 2006, to the extent it dismissed Bialobroda's seventh and eight counterclaims, unanimously

dismissed, without costs, as untimely taken.

Regardless of whether or not the building is covered by the Multiple Dwelling Law, the so-called roommate law (Real Property Law § 235-f[3]) permits only one occupant in the subject apartment in addition to the lawful tenant and family. While this statute was not intended to provide a remedy for landlords (see *Capital Holding Co. v Stravrolakes*, 242 AD2d 240, 243 [1997], *affd* 92 NY2d 1009 [1998]), the landlord may enforce a lease clause where, as here, it is consistent with the statute (see *Roxborough Apts. Corp. v Becker*, 296 AD2d 358 [2002]). There was no evidence that Bialobroda and her roommates constituted a nontraditional "family" with a long-term relationship, and characterized by emotional and financial commitment and interdependence (see *Braschi v Stahl Assoc. Co.*, 74 NY2d 201, 211 [1989]).

Bialobroda's appeal from the 2008 judgment does not bring up for review the 2006 order, since she seeks to challenge only so much of that order as dismissed her seventh and eighth counterclaims. An appeal from a judgment encompasses any nonfinal determination that necessarily affects the judgment (CPLR 5501[a][1]; see Siegel, NY Prac § 530, at 910 [4<sup>th</sup> ed]; 12 Weinstein-Korn-Miller, NY Civ Prac ¶ 5501.03 [2d ed]). The judgment dealt solely with Bialobroda's roommate claims, and was

not affected by the 2006 ruling dismissing -- with finality (see *Burke v Crosson*, 85 NY2d 10, 16 [1995]) -- her counterclaims for breach of warranty of habitability and discrimination.

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

ENTERED: DECEMBER 8, 2009

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CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1669-

1669A

Christine Yuen,  
Plaintiff-Respondent,

Index 114841/06

-against-

Edwin Yuen K. Wong, et al.,  
Defendants-Appellants.

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Joseph D. Manno, Staten Island, for appellants.

Eugene A. Gaer, New York, for respondent.

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Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered June 24, 2008, awarding plaintiff the total sum of \$225,332.59, pursuant to an order, same court and Justice, entered June 17, 2008, which granted plaintiff's motion for summary judgment, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In opposition to plaintiff's showing that defendants executed the promissory note and defaulted in payment (see *Alard, L.L.C. v Weiss*, 1 AD3d 131 [2003]), defendants' evidence was

insufficient to raise a triable issue of fact concerning any of the payments they claim should be credited against the note.

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

ENTERED: DECEMBER 8, 2009

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CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1672 In re Lovenia V.,

A Person Alleged to be  
a Juvenile Delinquent,  
Appellant.

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Presentment Agency

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

Michael A. Cardozo, Corporation Counsel, New York (Kristin M.  
Helmers of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Juan M.  
Merchan, J.), entered on or about September 8, 2008, which  
adjudicated appellant a juvenile delinquent, upon a fact-finding  
determination that she committed acts which, if committed by an  
adult, would constitute the crimes of attempted assault in the  
second and third degrees and menacing in the second degree, and  
placed her on probation for a period of 12 months, unanimously  
modified, on the law, to the extent of vacating the finding as to  
attempted assault in the third degree and dismissing that count  
of the petition, and otherwise affirmed, without costs.

The court's finding was based on legally sufficient evidence  
and was not against the weight of the evidence. Appellant's  
conduct in chest-butting her teacher, swinging at him hard enough  
to cause a scratch, and then continuing to kick and lash out for

several minutes supported an inference that she intended to cause physical injury (see e.g. *Matter of Jose B.*, 47 AD3d 461 [2008]), especially since relatively minor injuries causing moderate, but "more than slight or trivial pain" may constitute physical injury (*People v Chiddick*, 8 NY3d 445, 447 [2007]; see also *People v Guidice*, 83 NY2d 630, 636 [1994]). The evidence also supported the finding as to second-degree menacing, in that appellant placed the victim in reasonable fear of physical injury (see *Matter of Tjay T.*, 34 AD3d 1060, 1061 [2006]) by threatening him with an umbrella, which, under the circumstances, was a dangerous instrument (see *People v Dones*, 279 AD2d 366 [2001], *lv denied* 96 NY2d 799 [2001]).

The charge of attempted third-degree assault should have been dismissed as a lesser included offense of attempted second-degree assault.

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

ENTERED: DECEMBER 8, 2009

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CLERK



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

1675           JFK Holding Company, LLC, et al.,           Index 110582/08  
                  Plaintiffs-Respondents,

-against-

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

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Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris  
of counsel), for appellants.

Kasowitz Benson Torres & Friedman LLP, New York (Michael J. Bowe  
of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling,  
J.), entered May, 13, 2009, which denied defendants' motion to  
dismiss the complaint pursuant to CPLR 3211(a)(1) and (7),  
unanimously reversed, on the law, without costs, and the motion  
granted. The Clerk is directed to enter judgment in favor of  
defendants dismissing the complaint.

Although, on a motion to dismiss pursuant to CPLR 3211, the  
court must "accept the facts as alleged in the complaint as true,  
accord plaintiffs the benefit of every possible favorable  
inference, and determine only whether the facts as alleged fit  
within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83,  
87-88 [1994]),

[i]t is well settled that bare legal conclusions and  
factual claims, which are either inherently incredible  
or flatly contradicted by documentary evidence . . .

are not presumed to be true on a motion to dismiss for legal insufficiency . . . and that when the moving party offers matter extrinsic to the pleadings, the court need not assume the truthfulness of the pleaded allegations, but rather is required to determine whether the opposing party actually has a cause of action or defense, not whether he has properly stated one (*O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 154 [1993]).

Here, plaintiffs leased to The Salvation Army certain premises to be used as a homeless shelter. The lease provided that it was entered into solely to fulfill the obligations of The Salvation Army to defendant Department of Homeless Services ("DHS") under a separate services agreement and further permitted termination in the event the City terminated the services agreement upon payment of a termination fee and restoration of the premises to the same condition in which it was let. There is no language incorporating the services agreement into the lease. Article 9 of the services agreement provided only that, if the City terminates the services agreement prior to expiration of the lease and DHS elects not to cause the lease to be assigned, the DHS was obligated either (1) to continue payment of the required lease payments or (2) pay The Salvation Army the applicable termination payment. The \$10 million termination payment was paid to The Salvation Army which forwarded the funds to plaintiff in payment of its lease termination fee.

Plaintiff commenced this action alleging that the City

breached an oral contract in which the City agreed to assume and honor all the outstanding obligations under the lease, including but not limited to all rent, payment and restoration obligations, in exchange for which plaintiffs agreed to forgo an immediate legal action against The Salvation Army and DHS.

Defendants' dismissal motion should have been granted. While the City disputes the existence of the claimed oral agreement to forego legal action, even if such agreement had been made it would have been invalid and unenforceable since, pursuant to NY City Charter §§ 394(b) and 328(a), any enforceable agreement with the City must be in writing, approved as to form by the Corporation Counsel, and registered with the Comptroller (see *Granada Bldgs. v City of Kingston*, 58 NY2d 705, 708 [1982]; *Infrastructure Mgt. Sys. v County of Nassau*, 2 AD3d 784, 786 [2003]). Nor was there evidence that the lease was assumed by the City and, contrary to plaintiffs' contention, estoppel does not generally lie against municipalities (see *Matter of Parkview Assocs. v City of New York*, 71 NY2d 274, 282 [1988], cert denied 488 US 801 [1988]).

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

ENTERED: DECEMBER 8, 2009

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CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1677-

1678           In re Gregory L.B.,  
                  Petitioner-Respondent,

-against-

Magdalena G.,  
Respondent-Appellant.

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Howard M. Simms, New York, for appellant.

Rosemary Rivieccio, New York, for respondent.

Steven N. Feinman, White Plains, Law Guardian.

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Order, Family Court, New York County (Elizabeth Barnett, Referee), entered on or about March 4, 2008, which, inter alia, granted petitioner father's petition to modify an earlier order awarding joint legal custody of the subject child to the parties, with sole physical custody of the child to respondent mother and visitation to the father, and awarded the father sole legal and physical custody with visitation to the mother, and which denied the mother's petition for sole custody of the child, unanimously affirmed, without costs.

The record establishes that following the issuance of the joint custody order in March 2004, the mother wilfully violated multiple court orders by unilaterally deciding, inter alia, the child's education and medical needs, and also by continuously

interfering with the father's visitation rights. The mother, unlike the father, did not cooperate with the attempts by a court appointed social worker and psychologist to facilitate the parties' co-parenting arrangement, and her conduct and attitude indicated a continued unwillingness to support and encourage a relationship between the father and his son (see e.g. *Matter of Mildred S.G. v. Mark G.*, 62 AD3d 460 [2009]). Accordingly, the court's conclusion that an award of sole custody to the father would be in the best interests of the child was supported by a sound and substantial basis in the record, and is entitled to deference (see *Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]).

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

ENTERED: DECEMBER 8, 2009

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CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1680 Sarit Shmueli, Index 104824/03  
Plaintiff-Respondent,

-against-

NRT New York, Inc., doing business as  
The Corcoran Group,  
Defendant-Appellant.

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Bragar Wexler Eigel & Squire, PC, New York (Lawrence P. Eigel of  
counsel), for appellant.

Sarit Shmueli, respondent pro se.

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Judgment, Supreme Court, New York County (Michael Stallman,  
J. and a jury), entered January 5, 2007, awarding plaintiff  
compensatory damages of \$400,000 plus prejudgment interest, and  
punitive damages of \$1,200,000 plus postverdict interest,  
unanimously modified, on the law, to vacate the award of punitive  
damages, and otherwise affirmed, without costs.

The award of compensatory damages is supported by the weight  
of the evidence showing that when defendant, a real estate  
brokerage firm, terminated its association with plaintiff, a real  
estate broker, defendant converted plaintiff's customer list and  
other information that she had stored on the computer that  
defendant had provided to her, and that plaintiff's resulting  
loss of commissions amounted to \$400,000. We vacate the award of  
punitive damages because defendant's practice of precluding a

terminated employee from having access to its computer system does not evince a high degree of moral turpitude (see *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]).

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

ENTERED: DECEMBER 8, 2009

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CLERK



establishes that the lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990] *cert denied* 498 US 833 [1990]). Defendant was not noticeably younger than the other participants, and the police successfully concealed anything distinctive about defendant's hairstyle by having all the participants wear hats.

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

ENTERED: DECEMBER 8, 2009

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CLERK



for further proceedings consistent herewith.

In this commercial landlord-tenant action, plaintiff's delivery of the lease was established by, inter alia, defendants' assignment of the lease and their letters attempting to cancel it (see 51 AD3d 428 [2008]), as well as plaintiff's deposit of the security deposit, delivery of a key to the premises, provision of the lease to defendants' liquor license counsel, invoicing of defendants and rejection of their attempt to cancel the lease. The foregoing acts and words manifested the intent to convey the interest in the leased premises (see *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 512 [1979]).

The court's finding that Ghatanfard's obligations under the guaranty ended three months after plaintiff's receipt of the notice of termination was consistent with the court's prior ruling (see 51 AD3d at 428), as conceded by defendants at trial. Moreover, the guaranty's clear language provided that any termination would not be effective until three months after plaintiff's receipt of the termination notice. To interpret the guaranty otherwise would render the provision delaying the effective date of termination meaningless, in contravention of rules of contractual construction (see *RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [2007]; *Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64, 69 [1999]). In finding that

plaintiff failed to establish that it did not receive the termination notice on December 3, 2003, the trial court credited the testimony of defendants' counsel as to service and appropriately found that plaintiff's forensic expert's testimony that it was "highly probable" the document was created on a later date was insufficient to meet its burden.

Furthermore, the lease provided plaintiff with the authority to "use, apply or retain the whole or any part of the security [deposit] to the extent required for the payment of any rent and additional rent . . ." Accordingly, nothing prevented plaintiff from applying the security deposit to the arrears, but the interest on the arrears should not have been calculated prior to the application of a credit for the security deposit.

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

ENTERED: DECEMBER 8, 2009

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CLERK

Tom, J.P., Nardelli, Renwick, Freedman, Roman, JJ.

1684N-

1684NA-

1684NB United States Fidelity & Guaranty Index 604517/02  
Company, et al.,  
Plaintiffs-Respondents,

-against-

Excess Casualty Reinsurance Association, et al.,  
Defendants-Appellants,

American Re-Insurance Company, et al.,  
Defendants.

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Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York (Michael B. Carlinsky of counsel), for appellants.

Simpson Thacher & Bartlett LLP, New York (Mary Kay Vyskocil of counsel), for respondents.

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Orders, Supreme Court, New York County (Richard B. Lowe, III, J.), entered October 21, 2008, January 9, 2009 and January 23, 2009, which, inter alia, denied defendants-appellants' (reinsurers) motion to compel plaintiff (cedant) to disclose attorney-client communications, unanimously affirmed, with costs.

Our prior decision in *American Re-Insurance Co. v United States Fid. & Guar. Co.* (40 AD3d 486, 492-493 [2007]) held that cedant's waiver of the attorney-client privilege was limited to communications between its officer, James Kleinberg, and Robert Omrod, the in-house lawyer whose advice Kleinberg disclosed at his EBT, regarding preparation of cedant's re-insurance bill.

Our citation to *Kirschner v Klemons* (2001 US Dist LEXIS 17863, 2001 WL 1346008 [SDNY 2001]) ought to have made it clear that, based on cedant's representation that it did not intend to use "advice of counsel" as a defense, our finding of waiver did not extend to cedant's communications with any other attorneys concerning this subject matter. In view of cedant's concession, however, that it will not raise the "advice of counsel" defense and make any reference to attorney-client communications by cedant at the trial, we agree that the court should not permit cedant to raise this defense to reinsurers' claims, or refer to any such communications.

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

ENTERED: DECEMBER 8, 2009

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CLERK

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

1685N Neftali Mendoza,  
Plaintiff-Appellant,

Index 115242/03

-against-

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

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Bader Yakaitis & Nonnenmacher, LLC, New York (John J. Nonnenmacher of counsel), for appellant.

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

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered December 17, 2007, which granted plaintiff's motion to strike defendants' answer only to the extent of directing defendants to disclose requested discovery materials within 45 days or be precluded from contesting liability, unanimously affirmed, without costs.

The drastic sanction sought by plaintiff was properly denied for failure to show that defendants' delays in meeting its disclosure obligations were willful and contumacious (see *Mangual v New York City Tr. Auth.*, 48 AD3d 212 [2008]).

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

ENTERED: DECEMBER 8, 2009

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CLERK



unlawful arrest, because the police had probable cause to believe defendant had driven while intoxicated, based on such factors as the odor of alcohol on his breath, his slurred speech, his uncooperative behavior, and the fact that he had evidently caused a very serious traffic accident. Under the circumstances, defendant's Alco-Sensor reading, which was slightly below the legal limit, was far from conclusive, and it did not undermine probable cause. We have considered and rejected defendant's remaining arguments concerning the blood test, including those contained in his pro se supplemental brief.

We reject defendant's challenge to the sufficiency of the evidence supporting his conviction of reckless endangerment in the first degree. Defendant's egregious conduct, viewed as a whole, supported the conclusion that he acted with the culpable mental state of depraved indifference to human life (*see People v Feingold*, 7 NY3d 288 [2006]; *People v Mooney*, 62 AD3d 725 [2009], *lv denied* \_\_ NY3d \_\_, 2009 NY LEXIS 3447 [2009]).

The record does not establish that defendant's sentence was

based on any improper criteria, and we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 8, 2009

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CLERK



The referee found that the process server "at best, was sloppy, and at worst, was untruthful." And, having provided an incorrect address for defendant, plaintiff appears to have made insufficient efforts to locate the correct address.

As to the interest of justice standard, while plaintiff moved promptly for an extension of time in response to defendant's motion to dismiss, she failed to show either that her cause of action was meritorious or that there was no prejudice to defendant (*see Leader* at 105-106). There is no evidence that defendant had notice of the action at any time before the end of the 120-day period for making service (*see Yardeni v Manhattan Eye, Ear & Throat Hosp.*, 9 AD3d 296, 297-298 [2004], *lv denied* 4 NY3d 704 [2005]). In light of the foregoing, the fact that the statute of limitations has expired does not warrant an extension (*see Leader* at 107; *Okoh v Bunis*, 48 AD3d 357 [2008]).

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

ENTERED: DECEMBER 8, 2009

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CLERK



impartial and follow the court's instructions (*compare People v Valdivia*, 65 AD3d 950, 950 [2009], with *People v Sarubbi*, 61 AD3d 493, 493 [2009]).

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

ENTERED: DECEMBER 8, 2009

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CLERK



day of his accident, he observed approximately six inches of ice in some spots of the parking lot did not create a material issue of fact (see *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 360-361 [2007]; *Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 141 [2002] [defendant "was under no obligation to monitor the weather to see if melting and refreezing would create an icy condition"]; *Cason-Payano v Damiano*, 58 AD3d 472 [2009]).

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

ENTERED: DECEMBER 8, 2009

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CLERK



increased risk to public safety, and warrants the upward departure (see *People v Buss*, 44 AD3d 634, 635 [2007], *affd* 11 NY3d 553 [2008]).

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

ENTERED: DECEMBER 8, 2009

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CLERK

Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1698-

1699 In re Anahys V., and Another,

Children Under the Age  
of Eighteen Years, etc.,

John V.,  
Respondent-Appellant,

Katherine O.,  
Respondent,

New York City Administration for  
Children's Services,  
Petitioner-Respondent.

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Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for ACS respondent.

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

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about December 12, 2008, which, upon a fact-finding determination that respondent father sexually abused the subject children, placed the children in the custody of the Commissioner of Social Services until the completion of the permanency hearing scheduled for January 29, 2009, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal otherwise dismissed, without costs.

The children's out-of-court statements were corroborated by hospital records noting the older child's noticeable change in demeanor when talking about respondent; the testimony of the expert in child psychology who found that the child's disclosures were consistent with prior disclosures to others and that her narrative was spontaneous and lacked the "robotic" quality of coached children; and therapy records revealing the child's repeated declarations that respondent had abused her and her sister, and her continued anger at respondent, fear of him, and nightmares and other symptoms (see e.g. *Matter of Jaclyn P.*, 86 NY2d 875 [1995], cert denied sub nom. *Papa v Nassau County Dept. of Social Servs.*, 516 US 1093 [1996]; *Matter of Shirley C.-M.*, 59 AD3d 360 [2009]; *Matter of Keisha McL.*, 261 AD2d 341 [1999]). Although the younger child's verbal limitations and lack of detail render her statement insufficient alone to support a finding of sexual abuse, the statements of the children were cross-corroborative, given the similarity of their accounts of respondent's conduct and the older child's repeated statements that respondent had touched her sister in the same way as he had touched her (see e.g. *Matter of Nicole V.*, 71 NY2d 112, 124 [1987]).

The court properly admitted the expert's report into evidence without redacting the statements of the children's

foster mother, since these statements were admitted not for their truth but to show the information on which the expert relied in forming his opinion (see *Rivera v City of New York*, 200 AD2d 379 [1994]).

Respondent's challenge to the court's denial of his request for an adjournment of the dispositional hearing is academic, as the order of disposition has expired by its own terms (see *Matter of Vincent L.*, 46 AD3d 395, 396 [2007]). In any event, respondent admittedly was not in a position to take custody of the children, and the court properly determined that he could contest the issue of visitation at the permanency hearing.

We have reviewed respondent's remaining contention and find it unavailing.

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

ENTERED: DECEMBER 8, 2009

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CLERK



Andrias, J.P., Saxe, Sweeny, Moskowitz, Abdus-Salaam, JJ.

1703-

1703A

Kenneth DeRiggi,  
Plaintiff-Respondent,

Index 104300/07

-against-

Edward Brady, et al.,  
Defendants-Appellants,

Mark Saad, et al.,  
Defendants.

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David E. Frazer, New York, for appellants.

Abraham, Lerner & Arnold, LLP, New York (Frank P. Winston of  
counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner  
Kornreich, J.), entered April 1, 2009, which granted plaintiff's  
motion pursuant to CPLR 3126 to strike defendants' answer and  
counterclaims, unanimously affirmed, with costs. Order, same  
court and Justice, entered July 2, 2009, which, to the extent  
appealable, denied defendants' motion to renew or to vacate the  
April 1 order, unanimously affirmed, with costs.

Defendants' unexplained failure to comply with several  
disclosure orders, the last of which explicitly advised that  
defendants' answer would be struck if compliance were not  
forthcoming, was willful and contumacious and warranted the

extreme sanction of striking of their answer (see *Zletz v Wetanson*, 67 NY2d 711 [1986]; *Helms v Gangemi*, 265 AD2d 203, 204 [1999]). We have considered defendants' other contentions and find them unavailing.

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

ENTERED: DECEMBER 8, 2009

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CLERK



Two Hour Retraction Letter" in which she stated her willingness to voluntarily remain at the hospital. In a prior appeal, we affirmed the denial of plaintiffs' motion for summary judgment because an issue of fact was raised as to whether she consented to all or part of the alleged 14-day unlawful confinement (see 15 AD3d 264 [2005]).

Defendant has established its prima facie entitlement to judgment as a matter of law by showing that the confinement was privileged (see Mental Hygiene Law § 9.39; see also *Tewksbury v State of New York*, 273 AD2d 376 [2000], lv denied 95 NY2d 766 [2000]). The evidence, which included the testimony of the psychiatrist who treated plaintiff during her stay at the hospital, as well as the affirmation of a psychiatrist who reviewed and evaluated plaintiff's records and performed examinations of plaintiff, demonstrated that plaintiff had a qualifying "mental illness" for emergency admission under Mental Hygiene Law § 9.39, and that defendant did not depart from good and accepted medical standards in admitting and treating plaintiff.

In opposition, plaintiff failed to raise a triable issue of fact and her challenges to the admissibility of defendant's evidence are unavailing. Plaintiff did not produce an expert medical affirmation to rebut the conclusions of the

aforementioned psychiatrists, nor did she show that an issue of fact existed, particularly in light of her affidavit in which she said that she "went to the hospital voluntarily," and the "Seventy-Two Hour Retraction Letter," wherein she stated her willingness to remain at the hospital.

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

ENTERED: DECEMBER 8, 2009

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CLERK



conclusion that plaintiff's actual income and financial resources were substantially greater than he reported in tax returns and financial statements (see *Wildenstein v Wildenstein*, 251 AD2d 189 [1998]; *Jose R.D. v Elisabeth R.D.*, 197 AD2d 457 [1993]). The amount awarded is substantially less than defendant requested, and corresponds with the amount plaintiff paid voluntarily for several months following the separation, before threatening to cut off all support. Plaintiff shows no exigency which would warrant departure from the general rule that an aggrieved party's remedy for perceived inequities in a pendente lite award is a speedy trial (see *Sumner v Sumner*, 289 AD2d 129 [2001]).

Whether or not plaintiff stipulated to the appointment of a financial evaluator to appraise the family-controlled business, of which he is chief executive officer, and regardless of his claims that he has no ownership interest in the company and that the company is not marital property, in light of the evidence of the commingling of plaintiff's personal finances with the company's finances, the court properly appointed an appraiser to conduct an audit to enable it to determine the equitable distribution of marital assets and an award of maintenance (see *Pechman v Pechman*, 303 AD2d 479 [2003]; *Gellman v Gellman*, 160 AD2d 265, 267 [1990]). Given the large discrepancy in the parties' respective incomes and the nature of the issues in

dispute, there is no basis for interfering with the award of interim counsel fees and the appraiser's fee (see generally *Charpie v Charpie*, 271 AD2d 169, 173 [2000]).

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

ENTERED: DECEMBER 8, 2009

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CLERK



notice of her claim, but she also failed to establish a reasonable excuse for failing to meet the statutory deadline. Petitioner possessed the Big Apple Map reflecting defects at the subject location, and while she asserts that the delay in filing a timely notice of claim was attributable to the fact that she was awaiting documents from the Department of Transportation, those records were not necessary to the composition and timely filing of a notice of her claim (see *Potts v City of N.Y. Health & Hosps. Corp.*, 270 AD2d 129 [2000]).

Petitioner also failed to establish the absence of prejudice to the City, as photographs of the accident location taken by petitioner shortly after the accident depict the sidewalk in its original condition, while photographs taken by her investigator after the expiration of the 90-day period reveal that repairs had been made. Had timely notice been filed, the City may have been able to perform an inspection of the sidewalk in its original condition (compare *Matter of Gerzel v City of New York*, 117 AD2d 549, 551-552 [1986]).

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

ENTERED: DECEMBER 8, 2009

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CLERK

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

5001           The RGH Liquidating Trust, etc.,           Index 600057/06  
                  Plaintiff-Respondent,

-against

Deloitte & Touche LLP, et al.,  
Defendants-Appellants.

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Kramer Levin Naftalis & Frankel LLP, New York (Michael J. Dell of  
counsel), for appellants.

Gage Spencer & Fleming LLP, New York (G. Robert Gage, Jr. of  
counsel), for respondent.

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Order, Supreme Court, New York County (Karla Moskowitz, J.),  
entered on or about November 13, 2007, modified, on the law, to  
grant the motion to the extent of dismissing the claims asserted  
on behalf of holders of bonds issued by Reliance, and otherwise  
affirmed, without costs.

Opinion by Friedman, J. All concur.

Order filed.

**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**DECEMBER 8, 2009**

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

M-5282X     Second Saint Matthew Baptist Church v Robinson-Traore,  
              also known as Robinson - Homeside Lending, Inc. -  
              Federal National Mortgage Association

M-5283X     Zone One New York, Inc. v Ali

M-5284X     Bodtman v Living Manor Love, Inc.

M-5303X     Kessler v 215 East 68<sup>th</sup> Street, L.P. - Rudin Management  
              Co., Inc.

              Appeals withdrawn.

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

M-5300     Gwynn v Soriano

              Appeal, previously perfected for the January 2010 Term,  
              withdrawn.

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

M-5280X     Art Capital Group, LLC v Getty Images, Inc.

              Appeal and cross appeal withdrawn.

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

M-2662 People ex rel. Meyers, Edward v Warden

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

Gonzalez, P.J., Tom, Friedman, Sweeny, JJ.

M-4914 People v Fagan, Mustafa

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

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

M-4911 People v Clark, Christopher, also known as Cruz, Angel

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

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

M-4415 In the Matter of S., Jacelyn and R., Jonathan -  
Commissioner of Social Services of the City of New York

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

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

M-4917 Lopez v 724 Management LLC

Stay and related relief denied.

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

M-5020 Graham-Jones v 170 East 92<sup>nd</sup> Street Owners Corp.

Motion deemed withdrawn.

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

M-5163 Broady v New York State Education Department

Time to perfect appeal enlarged to the March 2010 Term,  
as indicated.

Gonzalez, P.J., Saxe, McGuire, Acosta, Roman, JJ.

M-4630 People v Temple, Warren

Counsel substituted.

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

M-5125 People v Santiago, Benjamin

Enlargement of time to file pro se supplemental brief  
denied.

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

M-4309 In the Matter of R., Jeremy, R., Katelyn, P., Ransis, -  
Administration for Children's Services

Leave to prosecute appeal as a poor person granted, as  
indicated (See M-4621, decided simultaneously herewith).

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

M-4621 In the Matter of P., Ransis Sr. v P., Maria

Leave to prosecute appeal as a poor person granted, as  
indicated (See M-4309, decided simultaneously herewith).

Tom, J.P., McGuire, DeGrasse, Richter, Manzanet-Daniels, JJ.

M-5047 People v Lineberger, Barry

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., Friedman, Nardelli, Buckley, Richter, JJ.

M-4525

M-4565 Brecker v 295 Central Park West Inc. - Rudin Management  
M-4685 Company, Inc.

Appeal from order entered on or about February 5, 2009  
dismissed unless perfected for the March 2010 Term (M-4525). Stay  
granted; appeals consolidated on condition said consolidated  
appeals perfected for the March 2010 Term, as indicated (M-4565).  
Enlargement of record on appeal denied, without prejudice to  
addressing issue on appeal (M-4685).

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

M-4994 Martin v The City of New York

Time to perfect appeal enlarged to the May 2010 Term.

Tom, J.P., McGuire, DeGrasse, Richter, Manzanet-Daniels, JJ.

M-5054 Garber v Lynn - Stolzenberg, doing business as  
Toothsavers - Perez

Time to perfect appeal enlarged to the April 2010 Term.

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

M-2995 Sport Rock International, Inc. v American Casualty  
Company of Reading PA

Leave to appeal to the Court of Appeals granted, as  
indicated (See M-3018, decided simultaneously herewith.)

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

M-3018 Fieldston Property Owners Association, Inc. v Hermitage  
Insurance Company, Inc.; Hermitage Insurance Company,  
Inc. v Fieldston Property Owners Association, Inc. -  
Federal Insurance Company

Leave to appeal to the Court of Appeals granted, as  
indicated (See M-2995, decided simultaneously herewith.)

Mazzarelli, J.P., Moskowitz, Acosta, Freedman, Richter, JJ.

M-4657

M-4741 In the Matter of M., Shae Tylasia I. - The New York Foundling Hospital

Dismissal of appeal denied (M-4657); leave to prosecute appeal as a poor person granted, as indicated (M-4741).

Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

M-4433 In the Matter of B., Fernando Alexander - Leake and Watts Services, Inc.

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

Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

M-4400 In the Matter of W., Lah De, W., Joseph, W., Justice, W., Lahsai and T., Phoenix - Administration for Children's Services of the City of New York

M-4402 In the Matter of B., Tottianna and B., Destiny - Commissioner of Social Services of the City of New York

M-4419 In the Matter of A., Natheal

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

Mazzarelli, J.P., Andrias, Moskowitz, Renwick, Richter, JJ.

M-4249 In the Matter of S., Elzbieta v S., Adam

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

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

M-4690 National Union Fire Insurance Company of Pittsburgh, PA  
v State of New York

Time to perfect appeal enlarged to the March 2010 Term,  
as indicated.

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

M-4907 In the Matter of Buric v Kelly

Time to perfect appeal enlarged to the April 2010 Term,  
as indicated.

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

M-5032 Estate of Rad - Rad

Time to perfect appeal enlarged to the April 2010 Term,  
as indicated.

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Roman, JJ.

M-4946 People v Perez, Victor

Counsel substituted.

Andrias, J.P., Sweeny, Nardelli, Catterson, DeGrasse, JJ.

M-4936 In the Matter of H., Anastasia Linda - The Children's  
Aid Society

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

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

M-4898 Gass v Gass

Dismissal of purported appeal denied, with leave to renew, as indicated.

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

M-4990 In the Matter of F., Edward v G., Karima

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

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

M-4482 In the Matter of Lechar Realty Corp. v Lawitts - Lechar Realty LLC - Lloyd

Motion deemed withdrawn.

Renwick, J.

M-4940 People v Mickens, Shawndale

Leave to appeal to this Court denied.

Tom, J.P., Mazzairelli, Saxe, Friedman, McGuire, JJ.

M-2783 In the Matter of Hanna Z. Hanna  
(admitted as Hanna Zaki Hanna),  
a suspended attorney:

Motion to vacate order of suspension and/or alternative relief denied. No opinion. All concur.

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

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

M-5281 Sandeep Qusba, admitted on 3-16-1995,  
at a Term of the Appellate Division,  
Fourth Department

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

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

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

M-5295 Bernard Charles Daley, admitted on 1-22-1990,  
at a Term of the Appellate Division,  
First Department

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

Saxe, J.P., Sweeny, Catterson, Moskowitz, JJ.

M-2092 In the Matter of George S. Balis  
(admitted as George Steven Balis),  
a suspended attorney:

Respondent disbarred and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to June 15, 2006. Opinion Per Curiam. All concur.

**The following orders were entered and filed on December 3, 2009:**

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

M-5001 Bellamy v Bellamy

Leave to appeal to this Court denied, as indicated.  
Motion otherwise denied.

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

M-5318 Scott v Rockaway Pratt, LLC

Stay of proceedings, including trial, granted.

Tom, J.P., McGuire, DeGrasse, Richter, Manzanet-Daniels, JJ.

M-5008 People v Smith, Jerry

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

Mazzarelli, J.P., Moskowitz, Acosta, Freedman, Richter, JJ.

M-4998 Cornell University v Gordon

Reargument denied.

Friedman, J.P., Sweeny, Freedman, Abdus-Salaam, JJ.

M-5297 Cooper Square Realty, Inc. v Building Link, LLC  
CPLR 5704(a) relief denied.

Friedman, J.P., Sweeny, Freedman, Abdus-Salaam, JJ.

M-5167 Selora v Jacobson  
Stay of trial denied.

Friedman, J.P., Sweeny, Freedman, Abdus-Salaam, JJ.

M-5168 Abrams v Pecile

Stay denied; the interim relief granted by an order of a Justice of this Court, dated November 12, 2009, vacated.

**The following order was entered and filed on December 4, 2009:**

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Roman, JJ.

M-5369 People v Peavey, Debra

Leave to prosecute appeal as a poor person granted to the extent indicated; stay of execution granted by an order of a Justice of this Court entered on November 25, 2009 continued, as indicated.