



and otherwise affirmed. The matter is remanded to Supreme Court, New York County for further proceedings upon defendant's application for resentencing.

We find the specified resentence excessive to the extent indicated.

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

ENTERED: OCTOBER 16, 2007

---

CLERK



EDPL 103(C), and therefore lack standing to seek relief under EDPL 207 (see *Matter of City of New York*, 306 NY 278, 282 [1954]). Any lingering concern that plaintiffs may have in this regard ought to have been allayed by defendant's main argument herein that plaintiffs do have standing (see *Gale P. Elston, P.C. v Dubois*, 18 AD3d 301, 303 [2005] [doctrine of judicial estoppel]).

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

ENTERED: OCTOBER 16, 2007

---

CLERK



information to the issue of guilt or innocence" (*People v Waver* 3 NY3d 748, 750 [2004]). Defendant did not demonstrate that knowledge of the officer's shield number was inadequate to permit effective investigation and cross-examination (see *People v Granger*, 26 AD3d 268 [2006], *lv denied* 6 NY3d 894 [2006]; *People v Solares*, 309 AD2d 502 [2003], *lv denied* 1 NY3d 581 [2003]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 16, 2007

---

CLERK



negotiated plea and failing to argue for even greater leniency, "this is not a case where the alleged ineffectiveness of counsel goes to the voluntariness of defendant's plea and waiver of appeal." (*People v Parilla*, 8 NY3d 654, 660 [2007]). In any event, defendant's ineffective assistance argument is unreviewable on direct appeal because it involves matters outside the record (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards.

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

ENTERED: OCTOBER 16, 2007

---

CLERK



constituted fair comment (see *People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]). Defendant's remaining summation claims are unpreserved and we decline to review them in the interest of justice. Were we to review these claims, we would reject them.

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

ENTERED: OCTOBER 16, 2007

---

CLERK



to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see *Thompson v Abbasi*, 15 AD3d 95, 97 [2005]).

Plaintiff failed to meet that burden because his expert's report, dated nearly three years after his last treatment of plaintiff, does not satisfactorily explain why plaintiff terminated treatment. Therefore, notwithstanding the objective medical proof offered by plaintiff, "when additional contributory factors interrupt the chain of causation . . . -- such as a gap in treatment . . . or a preexisting condition -- summary dismissal of the complaint may be appropriate" (see *Pommells v Perez*, 4 NY3d 566, 572 [2005]). Not only was there an unexplained gap in treatment of nearly three years, but plaintiff also had a pre-existing shoulder injury, which was not sufficiently addressed.

We have considered plaintiff's remaining contentions and find them without merit.

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

ENTERED: OCTOBER 16, 2007

---

CLERK

Lippman, P.J., Andrias, Marlow, Buckley, Catterson, JJ.

1717 In re Jason Adonise M., Jr.,

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

Jason Luis M.,  
Respondent-Appellant,

Graham-Windham Services to  
Families and Children,  
Petitioner-Respondent,

Maryluz M.,  
Respondent.

---

Mary Ellen Sweeney, New York, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of  
counsel), for respondent.

George E. Reed, Jr., White Plains, Law Guardian.

---

Order of disposition, Family Court, Bronx County (Sidney  
Gribetz, J.), entered on or about August 25, 2003, which, after a  
fact-finding hearing, terminated respondent's parental rights and  
transferred custody and guardianship rights over the subject  
child to petitioner Graham-Windham Services and the Commissioner  
of the New York City Department of Social Services for the  
purpose of consenting to adoption, unanimously affirmed, without  
costs.

The record reveals the agency met its burden of showing that  
despite its diligent efforts, respondent father permanently

neglected his child within the definition of Social Services Law § 384-b(7)(a). The statute requires only reasonable attempts, by means of a diligent undertaking; the agency's efforts met that standard (*see Matter of Sheila G.*, 61 NY2d 368, 385 [1984]).

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

ENTERED: OCTOBER 16, 2007

---

CLERK



an arrestee throughout these interactions. The police met defendant at his probation officer's office under circumstances that were not coercive in any respect (see *People v Baird*, 155 AD2d 918 [1989], *lv denied* 75 NY2d 963 [1990]), and they asked him to accompany them to discuss a matter they were investigating. Defendant agreed, then rode unrestrained in an elevator with his wife and the officers. Still unrestrained, defendant rode in the officers' car to the precinct, where they brought him to an interview room. He remained unrestrained, and was left alone for a period until an officer arrived and placed photographs of other suspects in the incident on the table. Defendant stated that he knew the men depicted. Placing the photographs on the table neither rendered the interview custodial nor constituted a form of interrogation. Furthermore, there was nothing incriminating about merely knowing these other men. Another officer then advised defendant of his *Miranda* rights, and there is no basis for suppression of his subsequent statements.

We have considered and rejected defendant's remaining arguments on the suppression issue.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 16, 2007

---

CLERK



an assumed name. Under the circumstances, his evidence of rehabilitation while incarcerated was insignificant in light of the factors militating against resentencing (see *People v Salcedo*, 40 AD3d 356, 357 [2007], *lv dismissed* 9 NY3d 850 [2007]).

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

ENTERED: OCTOBER 16, 2007

---

CLERK



directly relevant to probable cause (see *People v Suphal*, 7 AD3d 547 [2004], *lv denied* 3 NY3d 682 [2004]) and tended to clarify a matter the court had misapprehended (see *People v Tirado*, 266 AD2d 130 [1999], *lv denied* 94 NY2d 867 [1999]). Furthermore, there was no risk of tailoring, bad faith by the People or prejudice to defendant (see *People v Widgeon*, 303 AD2d 330 [2003], *lv denied* 100 NY2d 589 [2003]).

The court properly declined to suppress any of the various fruits of defendant's arrest, since the evidence established probable cause. While the descriptions provided by the multiple witnesses were in some respects different from each other, and from defendant's actual appearance, these discrepancies were insignificant in light of the circumstantial evidence that also contributed to the probable cause possessed by the arresting officer (see e.g. *People v Santos*, 41 AD3d 324 [2007]). This included evidence that defendant, when found and arrested on the premises where the crime had occurred that day, had a scratch on his face, and that the victim had reported scratching her assailant's face.

The court properly exercised its discretion in its rulings regarding defendant's efforts to introduce a videotape of a television program, and these rulings did not deprive him of a

fair trial or the right to present a defense (see *Crane v Kentucky*, 476 US 683, 689-690 [1986]; compare *Chambers v Mississippi*, 410 US 284 [1973]). Defendant was convicted of dragging a 13-year-old patient out of her hospital room and brutally attacking her. A hospital surveillance videotape depicted defendant entering the pediatric area of the hospital at 7:23 A.M.. The victim recalled that at the time of the attack she had been watching a certain news program, and that her assailant entered her room, watched the sports segment of the program, and then attacked her. On the morning that the court intended to charge the jury, defendant produced a videotape of the television program, in which a clock appears on the screen and shows that the sports segment aired at 7:19 A.M. Defendant offered this tape in an effort to show that he was not the perpetrator, because he allegedly did not arrive in the pediatric area until 7:23 A.M.

Under the circumstances of the case, the court properly ruled that the tape was not self-authenticating, and properly refused to receive it in evidence without authentication as to the accuracy of the time depicted. This ruling was not hypertechnical, because, as indicated above, this tape had no relevance, and would have been very misleading, unless the time

appearing on the screen was precisely correct (see *People v Shelley*, 103 Misc 2d 1087, 1089 [App Term 2d Dept 1980][in a case turning on the precise time of an event, "if the People intended to rely on the [radio] broadcast to verify the exact time, proof should have been submitted as to the accuracy of the station's time check."]).

We also find that the court properly exercised its discretion in denying defendant's request for a continuance in order to attempt to authenticate the tape (see *People v Foy*, 32 NY2d 473, 476 [1973]). The request was made very late in the trial and would have caused significant delay. Furthermore, defendant was only seeking to obtain some sort of letter of authenticity instead of a live witness, and such a letter would not necessarily have been sufficient to authenticate the tape.

In any event, the television videotape was not critical to defendant's defense. Even assuming that the tape accurately shows that the sports segment aired at 7:19, this would hardly exclude defendant as the perpetrator. There are other plausible explanations, including that the victim was mistaken in her recollection of what was on television at the time in question, or that the clock feature on the hospital surveillance video had not been set correctly.

Were we to find that the court erred in excluding the tape

or in denying the continuance, we would find such errors to be harmless beyond a reasonable doubt. To describe the evidence in this case as overwhelming would be an understatement, given the multiple witness identifications, as well as DNA, fingerprint and other circumstantial evidence that conclusively established defendant's identity as the assailant.

The court properly imposed consecutive sentences for defendant's separate and distinct sexual acts (see Penal Law § 70.25 [2]; *People v Laureano*, 87 NY2d 640, 643 [1996]). The sexual abuse, during which defendant viciously punched the victim as he held her against a wall and after which she passed out, occurred in one part of a room. When she awoke, defendant had pulled down her pants and straddled her, while she was on the floor in another part of the room, and tried to forcibly penetrate her.

Defendant did not preserve his claims that the procedure by which the court determined that he was eligible for consecutive sentences, and the procedure under which he was sentenced as a persistent violent felony offender, violated the principles of *Apprendi v New Jersey* (530 US 466 [2000]), and we decline to review them in the interest of justice. Were we to review these

claims, we would find each of them without merit (see *People v Lloyd*, 23 AD3d 296, 298 [2005], *lv denied* 6 NY3d 755 [2005]; *Almendarez-Torres v United States*, 523 US 224 [1998]).

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

ENTERED: OCTOBER 16, 2007

---

CLERK

Lippman, P.J., Andrias, Marlow, Buckley, Catterson, JJ.

1722-

1723-

1723A In re Mentora Monique B., and Others

Children Under the Age of  
Eighteen Years, etc.,

Benita B.,  
Respondent-Appellant,

Concord Family Services, et al.,  
Petitioners-Respondents.

---

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of  
counsel), for appellant.

Law Offices of James M. Abramson, New York (Dawn M. Orsatti of  
counsel), for respondents.

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

---

Orders of disposition, Family Court, New York County (Sara  
P. Schechter, J.), entered on or about January 13, February 23  
and April 4, 2005, which terminated respondent mother's parental  
rights to the subject children and committed their custody and  
guardianship to petitioner agencies and the Commissioner of the  
Department of Social Services for purposes of adoption,  
unanimously modified, on the law and the facts, the dispositions  
as to Ebony M. and Imani B. vacated in their entirety, the  
disposition as to Mentora Monique B. vacated only with respect to  
her placement, the matter remanded for re-opened dispositional

hearings with respect to all three children, and otherwise affirmed, without costs.

The evidence at the fact-finding hearing established, by clear and convincing evidence, that petitioners exerted diligent efforts to encourage and strengthen the parental relationship, but that respondent nonetheless failed to visit the children regularly or plan for their future within the meaning of Social Services Law § 384-b(7)(a).

The agencies involved in this case (including another agency with custody of two more of respondent's children, not at issue on this appeal) maintained contact with one another and coordinated their efforts to strengthen the parental relationship between respondent and the children. Concord regularly scheduled bi-weekly visitation between respondent and the children, except for Mentora, who refused to see her mother.

Nevertheless, respondent failed either to visit the children consistently or to plan for their return. She missed 75% of her scheduled visits with them. Despite a finding of severe sexual abuse committed by an invitee of respondent's then paramour, she continued to deny responsibility. She refused to accept any referrals for the first 7 to 12 months after the children's placement, and thereafter failed to appear for two scheduled mental health examinations at Bellevue Hospital. It is clear

from the record that respondent failed to comply with what she termed "two perfunctory referrals" because of her refusal to acknowledge the problems that led to the children's placement. She did not submit to a mental health evaluation until August 2003, almost two years after their placement. After learning that respondent admitted, during such examination, having previously abused alcohol, Concord referred her to an Alcoholics Anonymous program. She failed to attend this program despite being informed that such failure could result in termination of her parental rights. She also failed to inform the agency of her history of PCP abuse dating back to age 13, and her continued use until as recently as August 2004.

Respondent's argument that Community Counseling and Mediation failed to exercise diligent efforts is unavailing. That agency was not required to duplicate the efforts of Concord, which had case-planning responsibility (*see Matter of Joshua J.*, 196 AD2d 719 [1993]).

However, changed circumstances warrant remand for a re-opened dispositional hearing with respect to all three children. According to petitioners and the law guardian, during the pendency of these proceedings, the foster mother of Ebony and Imani passed away, and these children are currently residing in the non-kinship foster home of family friends. These children

(currently 13 and 14) are uncertain as to whether they wish to be adopted, and the foster parents are uncertain as to whether they wish to adopt them.

Similarly, Mentora has since been removed from the home of her pre-adoptive foster mother and has had two children of her own, who are also in foster care. Mentora is currently residing in a mother-child group home. The agency plan is for her to be placed with a previous foster parent with whom Mentora has maintained contact, and with whom she has expressed a desire to be placed. Although we affirm the termination of respondent's parental rights as to Mentora, no evidence was adduced at the hearing regarding the fitness of this individual as a foster parent, so the matter must be remanded for a new dispositional hearing as to Mentora as well, on this limited issue of her placement.

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

ENTERED: OCTOBER 16, 2007

---

CLERK



facts that led her to believe that the panelist had answered a question untruthfully. The other challenge at issue based on demeanor was specifically articulated and legitimate. Defendant's argument concerning the procedure employed by the court in resolving the *Batson* application is unpreserved and we decline to review it in the interest of justice. Were we to review this claim, we would find it without merit.

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

ENTERED: OCTOBER 16, 2007

---

CLERK

Lippman, P.J., Andrias, Marlow, Buckley, Catterson, JJ.

1725 William D. McGarty, Index 120421/02  
Plaintiff-Appellant,

-against-

The City of New York,  
Defendant-Respondent.

---

Shandell, Blitz, Blitz & Bookson, LLP, New York (Stewart G. Milch of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

---

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered January 12, 2007, which granted defendant's cross motion to dismiss the complaint for failure to file a timely notice of claim, unanimously affirmed, without costs.

Executive Order 113.7 (9 NYCRR 5.113.7), temporarily suspending, inter alia, local laws and ordinances establishing limitations of time for the filing or service of, inter alia, any notice or process "that the court lacks authority to extend through the exercise of discretion," does not apply to notices of claim required as a condition precedent to suit against defendant under General Municipal Law § 50-I. As the motion court explained, the Executive Order does not apply because "the statutory framework has built into it a mechanism by which a court can exercise its discretion" to extend the 90-day period

for filing a notice of claim (General Municipal Law § 50-e[5];  
*cf. CB Richard Ellis v JLC Holdings*, 306 AD2d 870 [2003]).

Plaintiff's service of a late notice of claim without court leave  
91 days after accrual of his claim was a nullity (*Wollins v New  
York City Bd. of Educ.*, 8 AD3d 30, 31 [2004]), and his failure to  
seek a court order excusing such lateness within one year and 90  
days after accrual of his claim requires dismissal of the action  
(*see id.*, citing, *inter alia*, *Hochberg v City of New York*, 99  
AD2d 1028 [1984], *affd* 63 NY2d 665 [1984]). We have considered  
plaintiff's other contentions and find them unavailing.

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

ENTERED: OCTOBER 16, 2007

---

CLERK

Lippman, P.J., Andrias, Marlow, Buckley, Catterson, JJ.

1726-

1727 In re Angel P., etc., and Another,

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

Cynthia G.-P, etc.,  
Respondent-Appellant,

Eugene Otis, P.,  
Respondent,

Family Support Systems Unlimited, Inc.,  
Petitioner-Respondent.

---

Nancy Botwinik, New York, for appellant.

John R. Eyerman, New York, for Family Support Systems Unlimited,  
Inc., respondent.

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

---

Orders of disposition, Family Court, Bronx County (Sidney  
Gribetz, J.), entered on or about April 15, 2005, which, to the  
extent appealed from, upon findings of permanent neglect,  
terminated respondent mother's parental rights to the subject  
children and committed custody and guardianship of the children  
to petitioner agency and the Commissioner of Social Services for  
the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the findings of  
permanent neglect against respondent mother based on her failure

to plan for her children's future, as well as to maintain substantial and continuous contact with the children, for a period of more than one year (Social Services Law § 384-b[7][a]). Despite the diligent efforts of petitioner agency to strengthen the parental relationship, which included providing the mother with referrals to parenting skills classes, addressing her substance abuse problems and scheduling regular visitation, the mother failed, during the statutorily relevant time period, to complete the requisite programs and remain drug free (see *Matter of Tiffany R.*, 7 AD3d 297 [2004]), and her visits with the children were sporadic at best (see *Matter of Emily A.*, 216 AD2d 124 [1995]). Notably, during the last three months of the permanent neglect period, the mother failed to visit the children or maintain contact with the agency, which explains the sparse entries in the agency's progress notes during that period of time.

At the dispositional hearing, the agency sustained its burden of proof by establishing by a preponderance of the evidence that the best interests of the children would be served by terminating the mother's parental rights so as to facilitate the children's adoption by their foster mother, who has cared for the children for most of their lives and addressed their special

needs (see *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The circumstances presented do not warrant a suspended judgment. Although the mother had completed several of the requisite programs by the time of the dispositional hearing, she remained uncooperative about random drug testing and failed to consistently attend an out-patient drug program.

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

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

ENTERED: OCTOBER 16, 2007

---

CLERK



arising from defendant lessor's refusal to comply with its contractual obligation to consent to an assignment of the lease under the circumstances herein, thus making it impossible for the lessee to perform under its contract to assign the premises to plaintiff (*Kravtsov v Thwaites Terrace House Owners Corp.*, 267 AD2d 154, 155 [1999]; *cf. Maruki, Inc. v Lefrak Fifth Ave. Corp.*, 161 AD2d 264, 268 [1990]). We further find that plaintiff's allegation that defendant withheld consent to the assignment for the wrongful and illegal purposes of extorting a \$9 million consent fee was sufficient to plead a cause of action for tortious interference with business relations, and reinstate the second cause of action on that basis, as well as on the ground that defendant's action may amount to the sort of extreme and unfair economic pressure considered wrongful under *Guard-Life Corp. v Parker Hardwood Mfg. Corp.* (50 NY2d 183 [1980]; *cf. Carvel Corp. v Noonan* (3 NY3d 182, 191-193 [2004])).

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

ENTERED: OCTOBER 16, 2007

---

CLERK



the instant motor vehicle accident. The affidavit of plaintiff's chiropractor failed to demonstrate that the cervical disc herniations or any other injury plaintiff suffered were causally related to the accident and were not, instead, related to a prior injury or degenerative condition (see *Shinn v Catanzaro*, 1 AD3d 195, 198 [2003]). Plaintiff also failed to explain the two-to-three-year gap in her treatment (*Pommells v Perez*, 4 NY3d 566, 574 [2005]).

Defendants similarly made a prima facie showing that plaintiff did not sustain a non-permanent injury which prevented her from performing substantially her usual and customary daily activities for not less than 90 days during the 180 days immediately following her accident (Insurance Law § 5102[d]). Defendants' submissions included the opinion of the neurologist, plaintiff's medical records and a copy of plaintiff's bill of particulars in which she stated that she was only confined to bed for two weeks following the accident (see *Copeland v Kasalica*, 6 AD3d 253 [2004]). In opposition, plaintiff failed to provide objective, admissible evidence of the persistence of her injury during the statutorily relevant period, and her subjective statements are insufficient to create a triable issue regarding whether she sustained a serious injury under the 90/180-day category (see *Nelson v Distant*, 308 AD2d 338, 339-340 [2003]).

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

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

ENTERED: OCTOBER 16, 2007

---

CLERK



damages representing, in large part, the fair rental value of the premises (CPLR 2201).

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

ENTERED: OCTOBER 16, 2007

---

CLERK

Lippman, P.J., Andrias, Marlow, Buckley, Catterson, JJ.

1732N Harold Galper, Index 103886/05  
Plaintiff-Respondent,

-against-

Jeffrey Burkes, D.D.S.,  
Defendant-Appellant.

---

Kolenovsky, Spiegel & Caputo, LLP, New York (Jonathan M. Cooper of counsel), for appellant.

Debra S. Reiser, New York, for respondent.

---

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered on or about May 18, 2007, which denied defendant's motion pursuant to CPLR 2201 requesting a stay of the civil action pending resolution of the criminal charges against defendant, unanimously affirmed, without costs.

The IAS court properly exercised its discretion in determining that the criminal action, involving, among other things, defendant-dentist's alleged illegal sale of prescriptions for controlled substances to a *different* patient, and the instant civil action, involving defendant's purportedly negligent placement of implants in *plaintiff's* mouth, are not related for purposes of the stay motion (*cf.*, *Britt v International Bus Servs.*, 255 AD2d 143 [1998]). Defendant contends that reference to the deposition testimony of defendant's former partner, who

described his observations of defendant's apparently impaired demeanor during the time period in which the alleged malpractice occurred, would be unduly prejudicial to the defense of the civil action in that defendant would be compelled to invoke his Fifth Amendment right against self-incrimination. However, as the motion court noted, the indictment does not include any charges related to drug use by defendant. In any event, a court need not permit a defendant to avoid the difficulty of choosing between presenting evidence in his or her own behalf and asserting his or her Fifth Amendment rights by staying a civil action until a pending criminal prosecution has been terminated (see *Access Capital, Inc. v. DeCicco*, 302 AD2d 48, 53 [2002], citing *Steinbrecher v Wapnick* (24 NY 2d 354, 365, rearg denied 24 NY2d 1038); see also *Matter of Kopf*, 169 AD2d 428, 429 [1991]). Finally, we note that plaintiff's judicial estoppel argument is without merit.

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

ENTERED: OCTOBER 16, 2007

---

CLERK

Mazzarelli, J.P., Friedman, Buckley, Sweeny, McGuire, JJ.

8539 James Owen, individually and Index 600455/04  
as a shareholder of Starpoint  
Publishing Corp., etc.,  
Plaintiff-Respondent,

-against-

Lindsay Hamilton, et al.,  
Defendants-Appellants.

---

Norman A. Olch, New York, for appellants.

Tofel & Partners, LLP, New York (Robert L. Tofel of counsel), for  
respondent.

---

Order, Supreme Court, New York County (Charles E. Ramos,  
J.), entered September 12, 2005, which granted plaintiff's motion  
for summary judgment on the issue of liability on his causes of  
action for waste of corporate opportunity (second cause of  
action) and breach of fiduciary duty (third cause of action), and  
denied defendants' cross motion for summary judgment dismissing  
the complaint, unanimously modified, on the law, the motion  
denied, and those aspects of defendants' cross motion seeking  
summary judgment dismissing the second and third causes of action  
and the claim for punitive damages granted, and otherwise  
affirmed, with costs in favor of defendants payable by plaintiff.

Defendant Starpoint Publishing Corp. (Starpoint) publishes  
"Winning Points," a periodical that provides information for

sports handicappers. During most of the 1990s, plaintiff served as president of Starpoint and held a substantial portion of its shares (approximately 40%). In 1999, plaintiff was removed as president and replaced by defendant Lindsay Hamilton, who was also one of Starpoint's four directors. Around the time plaintiff was replaced, Mr. Hamilton purchased a portion of the shares plaintiff owned. As a result, Mr. Hamilton owned 51% of the shares, defendant Edward Bomze, another director, owned 30% and plaintiff owned the remaining 19%. Simultaneously with the sale, plaintiff entered into an employment agreement with Starpoint pursuant to which plaintiff received, among other things, a yearly salary through June 2007. At some point in 1999, plaintiff entered into another agreement, a shareholders' agreement, pursuant to which he agreed not to "interfere in any manner with the management, operation and control of [Starpoint]," and to vote his shares "as directed by [Mr.] Hamilton."

In 2001 Richard Bomze, Edward Bomze's brother, decided to sell a publication that he owned called "Sports Reporter." Like Winning Points, Sports Reporter provided information to sports handicappers. Richard Bomze informed his brother's wife, Gail Bomze, a Starpoint director, that Sports Reporter was for sale. Edward and Gail Bomze subsequently relayed that information to

Mr. Hamilton. Mr. Hamilton proposed to Starpoint's board of directors that he and his wife, Linda, another director of Starpoint, purchase Sports Reporter and move its operations to Starpoint's office. By operating both Starpoint and Sports Reporter out of the same office, the entities could share expenses and thereby reduce Starpoint's operating costs. Each member of the board -- Mr. Hamilton, Mrs. Hamilton, Edward Bomze and Gail Bomze -- approved of the Hamiltons' purchase of Sports Reporter, reasoning that the reduction in expenses would be beneficial for Starpoint, which was in a precarious financial state. The Hamiltons subsequently purchased Sports Reporter for \$450,000. Plaintiff did not learn of the transaction until after it was consummated.

Plaintiff commenced this action against Mr. Hamilton, Edward Bomze, Starpoint and Sports Reporter, asserting causes of action for unjust enrichment, waste of corporate opportunity and breach of fiduciary duty. Plaintiff moved for summary judgment on the issue of liability on his causes of action for waste of corporate opportunity and breach of fiduciary duty. Defendants cross-moved for summary judgment dismissing the complaint. Supreme Court granted the motion and denied the cross motion.

Defendants assert two principal grounds for reversal: Starpoint itself was unable to purchase Sports Reporter, and

Starpoint's board of directors approved of the transaction, i.e., consented to the Hamiltons' purchase of Sports Reporter. With respect to the latter, defendants also assert that the board's determination is insulated from judicial review by the business judgment rule.

The first argument can be disposed of with dispatch. While some authority supports defendants' contention that a director cannot be liable for usurping a corporate opportunity where the corporation would have been unable to avail itself of the opportunity (see *Moser v Devine Real Estate, Inc. [Florida]*, 42 AD3d 731 [3d Dept 2007], citing *DiPace v Figueroa*, 223 AD2d 949 [3d Dept 1996] [transaction could not be considered corporate opportunity where sellers unequivocally averred that they would not have sold assets at issue to corporation]; see also 4A West's NY Prac. Series, Commercial Litig. in NY State Cts. § 80:7 [2d ed Haig]), we have consistently held to the contrary. In *Foley v D'Agostino* (21 AD2d 60 [1964]) we stated the following principle, which we have repeatedly affirmed:

"the fact that the competing business undertaken presented itself in the form of a corporate opportunity which the corporation was financially unable or for other reasons unwilling to undertake should be no excuse for an officer undertaking it individually. Despite the corporation's inability or refusal to act it is entitled to the officer's undivided loyalty" (*id.* at 68 [internal quotation marks and citation omitted]; see *Bankers Trust Co. v Bernstein*, 169 AD2d

400 [1991]; *Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241 [1989]; *Robert N. Brown Assoc. v Fileppo*, 38 AD2d 515 [1971]).

Accordingly, neither Richard Bomze's unwillingness to sell Sports Reporter to Starpoint nor Starpoint's alleged financial inability to avail itself of the opportunity had it been offered is a valid defense to plaintiff's action.

Defendants' second argument -- that Starpoint's board of directors approved of the transaction -- warrants more attention. A director may avoid liability for usurping a corporate opportunity where the board of directors consents to the director's conduct (see *Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665 [1993]; *Commodities Research Unit (Holdings) v Chemical Week Assoc.*, 174 AD2d 476 [1991]; *Bankers Trust Co.*, *supra*; *Alexander & Alexander of N.Y.*, *supra*; *Robert N. Brown Assoc.*, *supra*; 4A West's NY Prac. Series, *supra*, § 80:8; see also *Miller Mfg. Co. v Zeiler*, 72 AD2d 338 [1980], *lv denied* 50 NY2d 894 [1980]).<sup>1</sup>

---

<sup>1</sup>A board of directors cannot consent to a transaction that is void, such as waste of corporate assets, use of corporate funds to discharge personal obligations, distribution of surplus earnings under guise of additional salaries to directors and officers, transfer of assets without consideration, payment of a false claim, and payment of excessive investment fees to directors (*Aronoff v Albanese*, 85 AD2d 3, 4-5 [1982]). Plaintiff, however, does not claim on appeal that defendants engaged in any of these forbidden acts. Rather, plaintiff claims that defendants usurped a corporate opportunity, a transaction

Here, prior to the consummation of the transaction, each member of Starpoint's board of directors -- Mr. Hamilton, Mrs. Hamilton, Edward Bomze and Gail Bomze - was aware of and approved of the sale of Sports Reporter to the Hamiltons. To be sure, Edward and Gail Bomze mentioned to Mr. Hamilton that Richard Bomze was interested in selling Sports Reporter, and they did so because they wanted Mr. Hamilton to purchase Sports Reporter. Each of the directors knew, before the Hamiltons purchased Sports Reporter, that Starpoint was in serious financial trouble; Starpoint was losing money annually, facing increased competition and lacked the resources to improve its product, Winning Points.

Of course, neither of the Hamiltons could cast a vote in favor of the transaction. Both of these directors "receive[d] a direct financial benefit from the transaction which is different from the benefit to shareholders generally" (*Marx v Akers*, 88 NY2d 189, 202 [1996]). They were, therefore, interested directors who were disqualified from consenting to the transaction. Neither Edward nor Gail Bomze, however, received a direct financial benefit from the sale of Sports Reporter to the

---

that can be ratified (*Commodities Research*, 174 AD2d at 477 ["The corporate opportunity doctrine provides that a corporate fiduciary may not, *without consent*, divert and exploit for his own benefit any opportunity that should be deemed an asset of the corporation"] [emphasis added]).

Hamiltons that was different from the benefits to the shareholders generally (*id.*; *Shapiro v Rockville Country Club, Inc.*, 22 AD3d 657, 659 [2005], *lv denied* 6 NY3d 705 [2006]). Pursuant to the 1999 shareholders' agreement, Edward received a \$66,000 per year salary. This additional interest of Edward in Starpoint's success did not render him an interested director in the transaction. While plaintiff asserts that Edward and Gail were "conflicted," plaintiff does not support this conclusory assertion with any evidence that they received a direct financial benefit from the sale which was different from the benefits to the shareholders generally. Moreover, there is no evidence that Edward and Gail Bomze were controlled or dominated by the interested directors (*see Park Riv. Owners Corp. v Bangser Klein Rocca & Blum, LLP*, 269 AD2d 313 [2000]; 3 Fletcher, *Cyclopedia of Corporations* § 941 [2002]). Thus, Edward and Gail Bomze were not interested directors and their consent to the transaction is binding on the corporation (*see Business Corporation Law* § 713[a][1]; *Rapoport v Schneider*, 29 NY2d 396, 402 [1972]).

The business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate

furtherance of corporate purposes" (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979]).<sup>2</sup> Here, Edward and Gail Bomze did not "passively rubber-stamp the decision[]" of the Hamiltons to purchase Sports Reporter (*Ault v Soutter*, 204 AD2d 131, 131 [1994], quoting *Barr v Wackman*, 36 NY2d 371, 381 [1975]). Rather, they considered Starpoint's financial condition and the potential benefits to it of an expenses-sharing relationship with Sports Reporter. Notably, it was Edward and Gail Bomze, the disinterested directors, who approached Mr. Hamilton with the idea for him to purchase Sports Reporter because they believed that transaction could help Starpoint avoid financial collapse. Thus, the decision of Edward and Gail Bomze to consent to the Hamiltons' purchase of Sports Reporter was taken in furtherance of Starpoint's interests, was within the scope of the board's authority and was taken in good faith (see *Barbour v Knecht*, 296 AD2d 218, 224 [2002]; see also *Auerbach*, 47 NY2d at 629).

The business judgment rule, however, does not foreclose judicial inquiry into the decision of a board of directors where the board acted in bad faith, e.g., deliberately singled out an individual for harmful treatment (*Barbour v Knecht*, 296 AD2d at 224; *Smukler v 12 Lofts Realty*, 178 AD2d 125, 125 [1991]), or the

---

<sup>2</sup>Contrary to plaintiff's assertion, defendants raised the business judgment rule before Supreme Court.

transaction is tainted by fraud (see *10 E. 70th St. v Gimbel*, 309 AD2d 644 [2003]; 4A West's NY Prac. Series, *supra*, § 75:36). However, plaintiff presented no evidence raising a triable issue of fact in this regard. Thus, Supreme Court should have granted that aspect of defendants' cross motion seeking summary judgment dismissing plaintiff's cause of action for waste of corporate opportunity.<sup>3</sup>

For similar reasons, Supreme Court should have granted that aspect of the cross motion seeking summary judgment dismissing the cause of action for breach of fiduciary duty. Defendants made a prima facie showing that the disinterested directors acted within the scope of their authority and in good faith, and plaintiff failed to raise a triable issue of fact (see *Kimeldorf v First Union Real Estate Equity & Mtge. Invs.*, 309 AD2d 151, 156-159 [2003]; *Hochman v 35 Park W. Corp.*, 293 AD2d 650, 651-652 [2002]; *Sirianni v Rafaloff*, 284 AD2d 447, 448 [2001]; *Sherry Assoc. v Sherry-Netherland, Inc.*, 273 AD2d 14, 14-15 [2000]).

We take no position on plaintiff's remaining cause of

---

<sup>3</sup>Of course, the tension between the fiduciary duties owed by the Hamiltons as directors of Starpoint and their ownership of a competitor of Starpoint is apparent. On this appeal, however, plaintiff only presses his causes of action for waste of corporate opportunity and breach of fiduciary duty based on usurpation of a corporate opportunity.

action, unjust enrichment, since neither party specifically addressed it on appeal. We note, however, that plaintiff has no claim for punitive damages. Defendants' alleged conduct does not "demonstrat[e] a high degree of moral turpitude and wanton dishonesty ... imply[ing] criminal indifference to civil obligations to the public" (*Parker v Crown Equip. Corp.*, 39 AD3d 347, 348 [2007]; see *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]).

***M-1871 - Owen v Hamilton, et al.,***

Motion seeking leave to enlarge the record granted.

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

ENTERED: OCTOBER 16, 2007

---

CLERK



and Justice, entered December 8, 2005, which denied plaintiff Kerusa's motion to serve a second amended complaint, unanimously modified, on the law and the facts, to permit plaintiffs to assert claims for common-law fraud and to permit Kerusa to assert a claim of gross negligence against defendant W10Z/515 Real Estate Limited Partnership (the sponsor), and otherwise affirmed, without costs.

The Martin Act (General Business Law art. 23-A) does not preclude a private party from prosecuting an otherwise valid common-law fraud claim in connection with the sale of securities whenever the alleged fraudulent conduct is such that the Attorney General would be authorized to bring an action against the defendant under the Martin Act (*see Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq. - 14th St. Assoc.*, 190 AD2d 636, 637 [1993] [upholding claim of fraud in the sale of condominium units brought against sponsor who allegedly knowingly and intentionally advanced a misrepresentation in the offering plan]; *Horn v 440 E. 57th Co.*, 151 AD2d 112, 117-118 [1989] [upholding fraud and breach of warranty claims where it could be argued that the Martin Act was written in the parties' contract for the sale of stock in a cooperative via a warranty against material omissions and misrepresentations in offering statement and its amendments]).

To be sure, some support for the contrary conclusion -- that such claims are barred by the Martin Act -- appears in the case law (see *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 285 AD2d 244 [2001], *affd on other grounds* 98 NY2d 144 [2002]; *Thompson v Parkchester Apts. Co. (Thompson II)*, 271 AD2d 311 [2000]; *167 Hous. Corp. v 167 Partnership*, 252 AD2d 397 [1998]; *Thompson v Parkchester Apts. Co. [Thompson I]*, 249 AD2d 68 [1998], *lv dismissed* 92 NY2d 946 [1998]; *15 E. 11th Apt. Corp v Elghanayan*, 220 AD2d 295 [1995], *lv dismissed* 87 NY2d 1050 [1996]). *Whitehall Tenants Corp. v Estate of Olnick* (213 AD2d 200 [1995], *lv denied* 86 NY2d 704 [1995]) is the apparent progenitor of this line of authority. In that case, this Court affirmed a judgment dismissing a fraud claim brought by a cooperative against a sponsor notwithstanding a jury verdict in favor of the cooperative. First, this Court noted the holding of *CPC Intl. v McKesson Corp.* (70 NY2d 268 [1987]) that there is no private right of action under the Martin Act. This Court then stated that although *CPC Intl. v McKesson Corp.* "does not foreclose a cause of action for common-law fraud, private plaintiffs will not be permitted through artful pleading to press any claim based on the sort of wrong given over to the Attorney-General under the Martin Act" (213 AD2d at 200 [internal

quotation marks omitted).<sup>1</sup> This Court viewed the common-law fraud claim as an example of such impermissible "artful pleading" because there was no evidence of reliance by the allegedly defrauded shareholder or intent to defraud by the sponsor (*id.* at 200-201).

In this regard, *Whitehall Tenants Corp.* makes good sense, and so the sins of its descendants cannot be blamed on it. To prevail on a claim of fraudulent practices under the Martin Act, the Attorney General need not allege or prove either scienter or intentional fraud (*State of New York v Rachmani Corp.*, 71 NY2d 718, 725 n 6 [1988]). Accordingly, to prevent an end run around the rule prohibiting a private right of action under the Martin Act, a private plaintiff cannot be permitted to bring a cause of action that, although styled as one for common-law fraud, lacks proof of an essential element of common-law fraud.

The reasoning of *Whitehall Tenants Corp.*, however, has

---

<sup>1</sup>In *Thompson I*, this Court stated that "there is still a private cause of action for common-law fraud" (249 AD2d at 68), even as it immediately went on to state that "'private plaintiffs will not be permitted through artful pleading to press any claim based on the sort of wrong given over to the Attorney-General under the Martin Act'" (*id.* at 68-69, quoting *Whitehall Tenants Corp.*, *supra*). Similarly, this Court stated in *511 W. 232nd Owners Corp.* that "[w]hile private plaintiffs may maintain common-law fraud claims, plaintiffs are not permitted to disguise claims which rightfully belong to the Attorney General as their own" (285 AD2d at 248).

erroneously been extended to cases in which there is no legitimate reason to question at the pleading stage the ability of the plaintiff to prove all of the essential elements of common-law fraud. Thus, the decisions of this Court after *Whitehall Tenants Corp.* appear to regard as an example of the "artful pleading" first decried in *Whitehall Tenants Corp.* every claim of common-law fraud arising out of conduct that could have been the basis for an action by the Attorney General. Certainly none of those decisions suggest a principled basis for identifying those claims of common-law fraud that would not be regarded as such impermissible ploys.

When a plaintiff pleads all the elements of fraud with particularity, no end run around the Martin Act would be entailed by granting the plaintiff an opportunity to prove the truth of the allegations. But to throw the plaintiff out of court merely because the Attorney General would be entitled to relief under the Martin Act on the strength of the same allegations, or a subset of those allegations, makes no sense. The Martin Act, of course, "was enacted to protect the public from fraudulent exploitation" (*Badem Bldgs. v Abrams*, 70 NY2d 45, 54 [1987]) and "has a broad remedial purpose to protect the public interest" (*State of New York v Fine*, 72 NY2d 967, 969 [1988]). To construe the Martin Act to have abolished the right of purchasers of

condominium and cooperative interests (and purchasers of other securities) to sue sellers for common-law fraud is to give the Martin Act a construction that is antithetical to its remedial purpose. Nor does anything in the text of the Martin Act lend any support to such a construction.

Moreover, no decision of the Court of Appeals supports this construction of the Martin Act. In fact, in *CPC Intl. v McKesson*, the Court upheld a claim of common-law fraud that was based on the same financial projections that constituted the crux of the Martin Act claim the Court dismissed (70 NY2d at 284-286). In *Vermeer Owners v Guterman* (78 NY2d 1114 [1991]), the Court confirmed that no private right of action was authorized under section 352-e of the Martin Act, which governs real estate offerings. Although the Court also dismissed the plaintiffs' common-law fraud claim, it did so because the plaintiffs failed to establish an essential element of common-law fraud, namely, reliance, not because that claim was barred by the Martin Act (78 NY2d at 1116).<sup>2</sup>

---

<sup>2</sup>More recently, the Court of Appeals made note of the issue in *511 W. 232nd Owners Corp. (supra)*. In the course of affirming on the sponsor's appeal, the Court noted that "[p]laintiffs and plaintiffs' amici, including the Attorney General, argue that the Attorney General does not have exclusive jurisdiction to prosecute Martin Act violations and that the Appellate Division erred in holding that plaintiffs had no standing to prosecute their fraud causes of action" (98 NY2d at

For these reasons, the Martin Act does not bar plaintiffs' causes of action for common-law fraud. Moreover, defendants' contention that the second amended complaints do not allege the requisite "active concealment" is without merit (see *Bethka v Jensen*, 250 AD2d 887 [1998]; *17 E. 80th Realty Corp v 68th Assoc.*, 173 AD2d 245 [1991]; *Stambovsky v Ackerly*, 169 AD2d 254 [1991]; see also *Junius Constr. Corp v Cohen*, 257 NY 393 [1931]), as is their contention that the fraud claims impermissibly duplicate the plaintiffs' contract claims (see *First Bank of Ams. v Motor Car Funding, Inc.*, 257 AD2d 287 [1999]). Finally, defendants' arguments premised on the law of the case doctrine also are without merit as the allegations of the second amended complaints are not the same as the allegations of the earlier pleadings that the IAS Court found to be lacking in particularity.

With respect to the Kramer plaintiffs' claim for diminution damages, given defendants' concession in their brief that the order appealed from does not bar that claim, the Kramers will not be harmed by the motion court's refusal to permit them to add allegations about the diminution in the value of their unit.

---

151 n 3). This argument however, was one the Court could not address because plaintiffs had not cross-moved for leave to appeal (*id.*).

Concerning the Kramer plaintiffs' claim that the construction defendants aided and abetted the Zeckendorfs' alleged breaches of fiduciary duty, we reject the Kramers' argument that on a motion to amend the complaint, a defendant may only challenge the merits of a proposed new cause of action. Nor is the opposing construction defendant, Jaros, Baum & Bolles, being given a second bite at the apple, since it does not appear that it had previously moved to dismiss the Kramers' aiding and abetting claim in the first amended complaint. On the merits, the Kramers' second amended complaint contains no facts from which one can infer Jaros' -- or any other construction defendant's -- knowledge and assistance of the Zeckendorfs' breach of fiduciary duty during the relevant time period, i.e., the duration of the initial, sponsor-dominated Board of Managers (see *Kaufman v Cohen*, 307 AD2d 113, 125-126 [2003]).

Regarding plaintiff Kerusa's claim for gross negligence against the sponsor, defendants did not argue before the motion court that Kerusa had no such cause of action; rather, they argued that Kerusa had no cause of action for gross negligence against the other defendants. Similarly, the motion court stated that "there is no allegations [sic] of duty of care owed to Kerusa by the Sponsor defendants (*other than the sponsor itself*)" (emphasis added), but then denied Kerusa's motion for leave to

add a gross negligence claim against the sponsor. Since Kerusa's proposed second amended complaint contains sufficient factual allegations to support the inference that the sponsor intentionally acted unreasonably in the face of a known or obvious risk highly likely to result in harm (see *Maltese v Westinghouse Elec. Corp.*, 89 NY2d 955, 956-957 [1997]), Kerusa should be allowed to add a claim of gross negligence against the sponsor, and we modify accordingly. We note that the Kramer plaintiffs' first amended complaint (the operative complaint in that case) contains allegations of gross negligence that the motion court permitted to stand, and that defendants did not appeal from the partial denial of their motion to dismiss the first amended complaint.

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

ENTERED: OCTOBER 16, 2007

---

CLERK



the Bronx. The testimony of the undercover detective at trial established the following: that she had handed \$10 in prerecorded buy money to a man who crossed the street to a parking lot where he handed defendant the money; that defendant took the money, took some keys from his pocket, went to the passenger side of a van parked on the lot; and that when defendant returned, he placed a small object in the individual's hand. The detective further testified that the individual walked back to her and handed her two clear ziploc bags of crack cocaine from the same hand that she had observed receiving the small objects from defendant.

The detectives who subsequently arrived on the scene testified at trial that they detained the defendant and searched him recovering \$185, including the ten dollars of pre-recorded money, and a set of keys. They used the keys to open the van by unlocking a sliding door that was padlocked. The detectives testified that upon opening the sliding door to the back of the van, they saw two bags of what appeared to be powder cocaine on a stool. Lab tests subsequently confirmed the powder to be one kilogram of cocaine.

Jose Paulino, who was arrested with the defendant, testified for the defense. He stated that, on the day of the arrest, he

was helping defendant clear the lot which defendant rented and used for his refrigeration and air conditioner repair business and also to park cars. According to Paulino, at about 1:00 p.m., Jimmy Simms, a mechanic who had four of five cars parked on the lot, arrived to work on a car. Simms had keys to the van where police later found the kilo of cocaine. Simms opened the van, and retrieved tools from inside. Simms, along with another man, worked on a pickup truck in the lot and left after a few hours to get parts.

During voir dire, defense counsel had indicated that he wanted to call Simms to testify about his possession of the keys to the van and his access to the van. The prosecutor indicated that if Simms testified he would face arrest. Simms stayed on the defense list, but defense counsel rested without calling him. Prior to summations, however, defense counsel moved to reopen his case to call Simms as a witness. According to defense counsel, Simms had contacted him the previous night to tell him that he had a conversation with the prosecutor. He said that she had informed him she needed answers to two questions and that Simms could leave her office regardless of his answers. Simms responded "yes" when asked whether he had keys to the van and whether he entered it on the date of defendant's arrest. Defense counsel told the court that Simms had previously refused to

testify at trial for fear of prosecution; and that, in a constructive possession case, the jury should hear whether anyone other than the defendant had dominion or control over the area. He further argued that the testimony would not be cumulative, since Paulino's testimony was uncorroborated and the prosecution would likely argue in summation that he was not credible.

The prosecutor opposed the motion. She argued, *inter alia*, that two people can have joint possession of drugs, and, in any event, the only issue was who had dominion and control over the drugs at the time the undercover detective saw defendant enter the truck. The court denied defense counsel's application to reopen its case because the court felt the testimony would not be exculpatory, and thus not helpful to the defendant. The court also assured defense counsel that the prosecutor would not contest that Simms had a key to the van or that he had accessed it earlier in the day.

Subsequently, on summation, the prosecutor in fact went on to do exactly as defense counsel had surmised. The prosecutor withdrew her concession that Simms had keys and had accessed the van on the day in question and argued that defendant was the only one with the keys.

Defense counsel's objection was sustained and the court instructed the jury that "[t]here was some testimony that some

other person had a key to that [truck] and it was conceded by the district attorney that some other fellow, Jimmy something, had the key." Undaunted, the prosecutor then continued summation by challenging Paulino's testimony that Simms entered the van where the drugs were found, arguing that he had gone into a *different* truck to get his tools. The prosecutor further characterized the testimony as "incredible" and as lies to protect defendant since Paulino and defendant were long-time friends.

Defendant was subsequently found guilty and the court imposed a minimum sentence of 15 years to life for criminal possession of a controlled substance in the first degree, and a concurrent sentence of 1 to 3 years for criminal sale in the third degree. On May 16, 2006, the sentence was reduced to a determinate 9 years, plus 5 years of post-release supervision pursuant to the Drug Law Reform Act of 2004.

On appeal, defendant asserts that the court's refusal to let him call a key witness violated his due process right to a fair trial. Defendant further argues that reopening his case would not have prejudiced the People since the request was made the next morning after the defense rested. Defendant asserts that, therefore, his conviction should be reversed.

As a threshold matter, it is well established that the right of a criminal defendant to call witnesses of his own choosing is a

fundamental ingredient of the due process of law (*People v Williams* 81 NY2d 303, 312 [1993]). It is equally well settled that absent a showing that an offer of proof was made in bad faith no court should completely preclude a witness from testifying for the defense (*People v Arroyo* 162 AD2d 337, 339 [1990], *affd* 77 NY2d 947 [2001]).

The People assert nevertheless that, even if the court erred on this issue, it was harmless error since the evidence against defendant was so overwhelming that Mr. Simms' testimony would not have changed the outcome of the verdict.

This Court disagrees. A conviction for constructive possession of a controlled substance requires legally sufficient proof that a defendant exercised dominion or control over the property by a sufficient level of control over the area in which the contraband is found (see Penal Law § 10.00[8]; *People v Manini*, 79 NY2d 561, 573 [1992]). While the issue of legal sufficiency is not before this Court, we find that because of the paucity of evidence in this case, additional testimony from Mr. Simms could have created, at the very least, reasonable doubt about defendant's guilt on the criminal possession count. Therefore, the court's error in refusing to reopen the case was not harmless (see *People v Mason*, 263 AD2d 73, 77 [2000], citing *People v Crimmins*, 36 NY2d 230, 237 [1975] [error is harmless

only if harmless beyond reasonable doubt and no reasonable possibility exists that error might have contributed to defendant's conviction]).

In this case, the evidence of defendant's dominion or control over the area where the cocaine was found amounts to one uncontroverted fact that defendant had keys to the padlock on the van. The prosecutor highlighted this fact as follows: "when someone exercises what's called dominion and control over an object, they have the ability to get the object. How do we know the defendant exercised dominion and control? Because he had the key to the van on his personal key ring...."

However, there was no evidence adduced at trial that defendant owned, rented or had any possessory interest in the van (see *People v Pearson*, 75 NY2d 1001 [1990]).

There was no evidence that defendant kept any of his belongings in the van.

There was no evidence that defendant had, at any time that day, gone into the back of the van where the kilo of cocaine was found.

There was no evidence that the crack cocaine that defendant retrieved from the passenger side of the van came from the powder cocaine found inside the van.

Further, had Simms been permitted to testify, his testimony would have corroborated Paulino's testimony and established that defendant was not the only one with a key to the van but that Simms also had one. Moreover his testimony would have prevented the prosecution from challenging Paulino's credibility on the issue, and from making the mendacious statement that only defendant had the key on his key ring.

Further, Simms' testimony would have corroborated and thus highlighted two salient facts: that Simms stored his tools in the back of the van, and that, earlier on the day of defendant's arrest, he had retrieved the tools from that part of the van where the kilo of cocaine was subsequently discovered.

While it is true that two people can have joint possession and joint dominion and control (*People v Tirado*, 38 NY2d 955, 956 [1976] ["possession if joint is no less possession"]), in this case, the lack of evidence against defendant combined with Simms's testimony could have established that defendant only had access, like others on the lot that day, but not the dominion or control required to establish constructive possession.

In *People v Olivo* (120 AD2d 466 [1986]), a case with a similar fact pattern, this Court distinguished access from dominion or control. There, a defendant was convicted of possession of a shotgun after police found a shotgun in plain

view in the back of a car at defendant's automobile repair shop. Defendant was arrested along with one of his employees and another individual present at the time. No ownership papers were found for the car. At trial, the People suggested that defendant's motive for possession of the shotgun was to protect the area where he conducted alleged drug transactions.

In that case, this Court held that, "[a]n inference of possession cannot be placed upon so slender a reed as the access a defendant shared with other adults who also could have owned the property" (*id.* at 466-467, citing *People v Vastola*, 70 AD2d 918 [1979]). In similar cases where convictions for possession of guns were obtained based on theories of constructive possession, New York courts have held that, where those guns were found in areas occupied by several people and where no one individual could be said to have dominion and control of the weapon "the People have a heavy burden in establishing constructive possession" (*People v Brown*, 181 AD2d 1041, 1042 [1992], quoting *Vastola*, 70 AD2d at 918; see also *People v Rodwell*, 246 AD2d 916 [1998]). In *Brown*, the court reversed defendant's conviction because there, the circumstantial proof that defendant was resident of the apartment where the gun was found "did not exclude to a moral certainty every reasonable hypothesis of innocence" (*Brown*, 181 AD2d at 1042).

Likewise, in this case, had Simms testified and corroborated the challenged testimony of defense witness Paulino, it is unlikely that the People would have met their heavy burden of establishing constructive possession by defendant. The fact that Simms would probably have denied knowledge of the cocaine, as the prosecutor surmised, should have been an issue of credibility for the jury, and not a foregone conclusion on which the court ruled. Consequently, we find that the trial court erred and violated defendant's due process right to a fair trial when it refused to allow the defense to reopen its case and call Simms as a witness.

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

ENTERED: OCTOBER 16, 2007

---

CLERK

Mazzarelli, J.P., Andrias, Gonzalez, Catterson, Malone, JJ.

964 State of New York Insurance Department, Liquidation Bureau, etc.,  
Plaintiff-Respondent, Index 401446/03

-against-

Generali Insurance Company,  
Defendant-Appellant,

Continental Insurance Company/CNA  
Insurance Company,  
Defendant.

---

Milton M. Witchel, P.C., New York (Bernard S. Epstein of  
counsel), for appellant.

Armienti, DeBellis & Whiten, LLP, New York (Vanessa Corchia of  
counsel), for respondent.

---

Order, Supreme Court, New York County (Shirley Werner  
Kornreich, J.), entered on or about April 12, 2006, which, in  
this action seeking contribution for plaintiff's defense and  
settlement of the underlying personal injury claim, to the extent  
appealed from, granted plaintiff's cross motion for summary  
judgment as against defendant Generali Insurance Company and  
directed that judgment be entered against Generali in the amounts  
of \$23,302.42 and \$210,191.08, plus interest, affirmed, without  
costs.

In 1993, two children and their mother instituted an action  
to recover damages caused by their exposure to lead paint. Rosan

Realty Corp., an owner of the premises where the alleged exposure occurred, was named as a defendant. During Rosan's ownership of the premises, it was insured for the risk at issue by Generali for 5.5 months, and by Transtate Insurance Company for 10.2 months. The coverage provided by the two insurers was discontinuous, and for much of the risk period at issue in the lawsuit there was no coverage. Following the lawsuit's commencement, Transtate notified Generali of the claim(s) against the insured, but Generali disclaimed any defense or indemnification obligation under its policy and, accordingly, did not participate in the litigation or its settlement. Inasmuch as Transtate had become insolvent, plaintiff Liquidation Bureau, acting through Transtate on behalf of the now-defunct Rosan, paid both the entire cost of the defense and Rosan's share of the settlement. It thereafter brought this action, seeking partial reimbursement of the defense and indemnification costs it had borne from Generali. The motion court determined that Generali should reimburse plaintiff for half of the defense costs and that, although the insurers' respective indemnification obligations should be prorated according to the length of time each covered the risk, the insurers should, according to their respective rates of proration, together bear responsibility for that portion of the settlement covering the period when there was

no insurance coverage. Generali takes issue with these allocations, urging that both its defense and indemnification obligation should have been prorated according to its time on the risk, and that the insured should bear its own defense and indemnification costs, on a prorated basis, for the period during which the risk at issue went uninsured.

We reject Generali's proposed defense cost allocation as inequitable. It is now undisputed that Generali was in fact obligated to defend its insured. Having unjustifiably disclaimed that obligation and left plaintiff to absorb all of the defense costs, Generali may not now have its defense obligation finely tailored to its "time on the risk," particularly where the insured is defunct and there is no reasonable possibility that it will bear any share of the defense costs. Under the circumstances, we see no reason to disturb the motion court's determination to allocate the defense costs equally between plaintiff and Generali.

With respect to indemnification, although it is true that "time-on-the-risk" has been employed to prorate insurers' respective obligations (see *Consolidated Edison Co. of New York v Allstate Ins. Co.*, 98 NY2d 208 [2002]; *Serio v Public Serv. Mut. Ins. Co.*, 304 AD2d 167, 168 [2003]), the cited cases do not involve settlements pertaining to risks extending over uninsured

periods, and, indeed, no authority is advanced supporting the utilization of the kind of strict proration advocated by Generali in a situation where there are lapses in insurance coverage and the insured is not a viable entity. Significantly, the Court of Appeals stated in *Consolidated Edison, supra*, that its reliance on "time-on-the-risk" proration in that case did "not foreclose pro rata allocation among insurers by other methods" and that "this is not the last word on proration" (98 NY2d at 225). Under the particular circumstances presented, in which plaintiff, in the face of Generali's unjustified refusal to honor its obligations, bore nearly the entire costs of defending and settling the underlying claim against the defunct insured, covering lengthy periods for which there was no applicable coverage, the proration formula employed by the motion court was manifestly fair and should stand.

Generali's remaining arguments are unavailing.

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

CATTERSON, J. (dissenting)

In 1993, the underlying personal injury action was instituted on behalf of two infants to recover damages caused by their exposure to lead paint. Rosan Realty Corp. (hereinafter referred to as "Rosan"), an owner of the premises where the alleged exposure occurred, was named as a defendant. Two insurers, Generali Insurance Company (hereinafter referred to as "Generali") and Transtate Insurance Company (hereinafter referred to as "Transtate") covered the premises during Rosan's ownership from March 1988 to July 1992, when Rosan's interest was extinguished by foreclosure. The corporation itself was dissolved in 1994.

Following the lawsuit's commencement, Transtate notified Generali of the claim against the insured but Generali disclaimed any defense or indemnification obligation under its policy and, accordingly, did not participate in the litigation or its settlement. Inasmuch as Transtate had become insolvent, plaintiff Liquidation Bureau, acting through Transtate on behalf of the now-defunct Rosan, paid both the entire cost of the defense and Rosan's share of the settlement of \$600,000.

Subsequently, Transtate brought this action against Generali seeking partial reimbursement of the defense costs of \$46,604.84, and the indemnification costs it had borne. The motion court

established that of the 50.7 months of total period of risk that Rosan had owned the premises, the property had been insured for 15.7 months, of which Generali was the insurer for 5.5 months and Transtate for 10.2 months. The motion court also found that the property was uninsured for 35 months.

The motion court determined that Generali should reimburse plaintiff for half of the defense costs and that, although the insurers' respective indemnification obligations should be prorated according to the length of time each covered the risk, the insurers should, according to their respective rates of proration, together bear responsibility for that portion of the settlement covering the period when there was no insurance coverage. It thus determined that Generali's share of the defense costs was 50% or \$23,302.42 on the grounds of the overarching duty to defend. It also calculated Generali's pro rata share of the settlement at \$210,191.08.

In effect, the court used plaintiff's formula for the ratio of time on the risk (in Generali's case, 5.5 months) to the time the premises had been insured overall (15.7 months) and not as a ratio to the total time that Rosan had owned the property (50.7 months), which would have amounted to \$65,088.76 as Generali's prorata share.

On appeal, Generali takes issue with these allocations,

urging that both its defense and indemnification obligations should have been prorated according to its straight time on the risk, and that the insured should bear its own defense and indemnification costs, on a prorated basis, for the period during which the risk at issue went uninsured.

As to the defense cost allocation, we reject Generali's proposal as inequitable. It is now undisputed that Generali was in fact obligated to defend its insured. Having disclaimed that obligation and left plaintiff to absorb all of the defense costs, Generali may not now have its defense obligation finely tailored to its "time-on-the-risk," particularly where the insured is defunct and there is no reasonable possibility that it will bear any share of the defense costs. Under the circumstances, we see no reason to disturb the motion court's determination to allocate the defense costs equally between plaintiff and Generali.

With respect to indemnification, however, a strict "time-on-the-risk" standard has been employed to pro rate insurers' respective obligations. See *Consolidated Edison Co. of New York v. Allstate Ins. Co.*, 98 N.Y.2d 208, 746 N.Y.S.2d 622, 774 N.E.2d 687 (2002); *Serio v. Public Serv. Mut. Ins. Co.*, 304 A.D.2d 167, 168, 759 N.Y.S.2d 110, 111 (2003). While the cited cases do not involve settlements pertaining to risks extending over uninsured periods, and, while the motion court may be accurate in

characterizing the instant case as one of first impression in the state courts, nevertheless, similar issues determined in the federal courts offer useful guidance. For example, in *Stonewall Insurance Company v. Asbestos Claims Management*, (73 F.3d 1178 (2nd Cir. 1995)), the Court, addressing the issue of allocation between an insured and its carriers with respect to periods of exposure where there was no insurance, held that:

"A fair method of allocation appears to be one that is related to both time on the risk and the degree of risk assumed. When periods of no insurance reflect a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable." (Internal citation marks omitted).

In *U.S. Fidelity & Guaranty Co. v Treadwell Corp.*, (58 F. Supp.2d 77 (S.D.N.Y. 1999)), the Court, citing *Stonewall*, applied the "proration to the insured" approach to the "time-on-the-risk" method of allocating liability for indemnity and defense costs between an asbestos installer and its liability insurance carriers. The Court held that liability for continuous asbestos-related injuries would be allocated between comprehensive general liability insurers and the insured, as a self-insurer, during the periods it had no insurance, on a pro rata basis, according to the years on the risk, reasoning as follows:

"Treadwell made a decision to go without insurance for the years prior to 1967, and this decision should have

consequences. Otherwise, Treadwell would receive the same treatment as an identically situated company that chose to purchase insurance for the full period.”

...

Accordingly, Treadwell is obligated to contribute towards payment of the Asbestos Claims based on the number of years it was uninsured.” *Id.* at 104-105.

In the instant case, appellant contends that, since the record reveals that Rosan was uninsured during the bulk of the period of risk, the compelling inference is that its decision to carry no insurance was a conscious one. The argument is persuasive, especially as Transtate does not point to any evidence in the record suggesting otherwise or that Rosan was unable to obtain coverage. Likewise, plaintiff’s assertion that the foregoing federal cases did not involve insureds who were no longer viable entities is a weak attempt to distinguish them. As appellant contends, Rosan was still a viable corporation at the time of the commencement of the action, and remained so for another fourteen months. Generali, thus, asserts that Transtate had ample opportunity to seek contribution from Rosan.

In any event, the viewpoint that to rule in Generali’s favor would simply encourage insurers to disclaim coverage and sit on the sidelines is less compelling than the viewpoint that to pro-

rate Generali's share of the settlement to cover the uninsured portion of the risk period will encourage entities like Rosan to be even less diligent about insurance coverage.

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

ENTERED: OCTOBER 16, 2007

---

CLERK



against the City, the driver, and the vehicle's owner.

Plaintiffs claim that the City was negligent in its duty to keep the premises in a reasonably safe condition in that it failed to maintain aluminum guardrails throughout the parking lot. Supreme Court found an issue of fact as to whether the City was negligent in designing or maintaining the curb line in the area of the accident.

We reverse. A municipality is not an insurer of the safety of its roadways (*Tomassi v Town of Union*, 46 NY2d 91, 97 [1978]). Nonetheless, it has a nondelegable duty to design, construct and maintain its roadways adequately and in a reasonably safe condition (*id.*, see also *Friedman v State of New York*, 67 NY2d 271, 283 [1986]). That duty is satisfied, as it is here, when the thoroughfare is reasonably safe for those who obey the rules of the road (*Tomassi*, 46 NY2d at 97).

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

ENTERED: OCTOBER 16, 2007

---

CLERK

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

1549 Elizabeth Joseph, Index 14045/04  
Plaintiff-Respondent,

-against-

Pitkin Carpet, Inc.,  
Defendant-Appellant.

---

Law Office of Max W. Gershweir, New York (Jennifer B. Ettenger of counsel), for appellant.

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

---

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about June 27, 2006, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

At approximately 7:00 a.m. on December 15, 2003, plaintiff slipped and fell on the sidewalk abutting defendant's premises. At her deposition, plaintiff testified that the accident occurred when one (or both) of her feet slipped on a portion of the sidewalk that was partially covered by snow and partially cleared. Plaintiff had traversed the same sidewalk twice on the afternoon before the accident, the second time at 2:00 p.m. At that time, plaintiff noticed that the majority of the sidewalk in

the area where she would later slip and fall was "bare," i.e., was not covered with snow, but patches of snow were present. Plaintiff also noticed on the day before the accident that "part" of the sidewalk had been shoveled; she observed shovel marks in the snow on the sidewalk. When asked to approximate the amount of snow on the sidewalk on the afternoon before the accident, plaintiff could only state "not much."

As plaintiff acknowledged, snow fell on December 13. Based on its custom and practice, defendant attempted to remove the snow from the sidewalk. No snow fell between the cessation of the December 13 storm and approximately 10:00 p.m. the following evening, when another snowfall occurred. Plaintiff did not know when the December 14 storm tapered off; however, it ceased before she left her apartment on the morning of December 15, approximately 15 minutes before she fell.

Plaintiff commenced this action against defendant, claiming that defendant's snow removal efforts on December 13 were incomplete and made the sidewalk more dangerous than had defendant not taken any action at all. Defendant moved for summary judgment dismissing the complaint on the ground, among others, that its snow removal efforts did not make the condition of the sidewalk more hazardous. Supreme Court denied the motion, and this appeal followed.

Absent a statute to the contrary, one who attempts to remove snow from a sidewalk is not subject to liability simply because he or she failed to remove all of the snow (*Sanders v City of New York*, 17 AD3d 169, 169 [2005], citing *Spicehandler v City of New York*, 303 NY 946 [1952], affg 279 App Div 755 [1951]). However, one may be held liable if his or her snow removal efforts made the sidewalk more dangerous, i.e., increased the hazard posed by the snow (*Sanders, supra*; *Glick v City of New York*, 139 AD2d 402 [1988]). Here, defendant made a prima facie showing that its snow removal efforts did not exacerbate the condition of the sidewalk. The evidence submitted by defendant -- the affidavit and deposition testimony of its proprietor and the deposition testimony of plaintiff -- establishes that defendant's snow removal efforts on December 13 were simply incomplete; defendant failed to remove *all* of the snow that was on the sidewalk. That evidence also establishes that defendant did not make the sidewalk any more hazardous as a result of its snow removal efforts (*cf. e.g. Santiago v New York City Hous. Auth.*, 274 AD2d 335 [2000] [snow piled on both sides of pathway melted, re-froze and formed icy condition]; *Rector v City of New York*, 259 AD2d 319 [1999] [preexisting ice exposed as a result of defendant's snow-clearing efforts]). To the contrary, following defendant's December 13 snow removal efforts, most of the sidewalk was clear

and no ice was present.

In opposition, plaintiff, who offered only her attorney's affirmation in response to the motion, failed to raise a triable issue of fact. Plaintiff's claim that defendant's snow removal efforts made the condition of the sidewalk more hazardous is unsupported by any evidence, constitutes rank speculation and is insufficient to defeat defendant's motion for summary judgment (see *Williams v KJAEL Corp.*, 40 AD3d 985 [2007]; *Zabbia v Westwood, LLC*, 18 AD3d 542 [2005]; *Nadel v Cucinella*, 299 AD2d 250 [2002]; *Yen Hsia v City of New York*, 295 AD2d 565 [2002]; see also *Bonfrisco v Marlib Corp.*, 30 AD2d 655 [1968], *affd* 24 NY2d 817 [1969]).

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

ENTERED: OCTOBER 16, 2007

---

CLERK

Mazzarelli, J.P., Sullivan, Sweeny, Malone, Kavanagh, JJ.

828-

829 In re H.O. Realty Corporation,  
Petitioner-Appellant,

Index 112661/04

-against-

State Of New York Division of  
Housing and Community Renewal,  
Respondent-Respondent,

Wael Haggiagi,  
Intervenor-Respondent.

---

Berman & Frumkin, LLP, New York (Jacob Frumkin and Michael T. Fois of counsel), for appellant.

David B. Cabrera, New York (Jeffrey G. Kelly of counsel), for respondent.

Murray Shactman, New York, for Wael Haggiagi, respondent.

---

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about May 12, 2006, modified, on the law, to the extent of reinstating the petition insofar as it challenges treble damages, and otherwise affirmed, without costs, and the matter remitted to Supreme Court for further proceedings as to the issues of willfulness and treble damages.

Opinion by Kavanagh, J. All concur except Mazzarelli, J.P. and Sweeny, J. who dissent in an Opinion by Sweeny, J.

Order filed.

**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**OCTOBER 16, 2007**

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

M-5239X Rothchild v Tutela

M-5242X Hughes v 419 West 55<sup>th</sup> Street Building Owners, LLC - -  
Aum Architectural and Construction, Ltd.  
(And another action)

M-5243X LaCourt v Albert Einstein College of Medicine

M-5244X Dallas-Stephenson v Waisman

Appeals withdrawn.

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

M-4941 People v Borges, George

M-4944 Brown, Robert

M-4947 Johnson, Darnell

M-4974 Mason, William

M-4966 McAlpin, Chris

M-4957 Velazquez, Jose

M-4955 Nobles, Greg

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

Lippman, P.J., Tom, Marlow, Gonzalez, Malone, JJ.

M-4791 Kagan v BFP One Liberty Plaza

Appeal from order of Supreme Court, New York County, entered on or about January 12, 2007 dismissed; consolidation denied, as indicated; time to perfect appeal from order entered on or about November 9, 2006, enlarged to the January 2008 Term.

Lippman, P.J., Tom, Marlow, Gonzalez, Malone, JJ.

M-4678 People ex rel. Allen, William v Warden

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

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4888 Hatcher v Columbia Presbyterian Hospital

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

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4859 People v Darbasie, Steven

Extension of time to file pro se supplemental brief granted for the February 2008 Term, to which Term appeal adjourned, as indicated. Motion otherwise denied.

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-5126 Thomas v Northeast Theatre Corp.

Time to perfect appeal enlarged to the February 2008 Term.

Tom, J.P., Mazzarelli, Andrias, Williams, McGuire, JJ.

M-3373 Fedoff v Fedoff

Reargument or other relief denied.

Tom, J.P., Mazzarelli, Friedman, Sullivan, Nardelli, JJ.

M-4332 Abreu v New York City Housing Authority

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

Tom, J.P., Mazzarelli, Friedman, Sullivan, Nardelli, JJ.

M-5033 Joremi Enterprises, Inc. v Lobel

Stay denied.

Tom, J.P., Mazzarelli, Friedman, Sullivan, Nardelli, JJ.

M-4701 In the Matter of A., Damian Richard - Concord Family Services

Appeal dismissed unless perfected for the February 2008 Term, as indicated.

Tom, J.P., Mazzarelli, Marlow, Sullivan, JJ.

M-3156 People v Kemp, Delroy

Reargument denied.

Tom, J.P., Andrias, Sullivan, Williams, Gonzalez, JJ.

M-3801 New York Real Estate Institute, Inc. v Edelman  
Reargument denied.

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

M-5036 Melcher v Apollo Medical Fund Management L.L.C.  
Stay of trial denied.

Tom, J.P., Saxe, Buckley, Gonzalez, Malone, JJ.

M-2138 People v Delacruz, Julian  
Writ of error coram nobis denied.

Tom, J.P., Marlow, Nardelli, Gonzalez, Kavanagh, JJ.

M-4742 United Pickle Products Corp. v Prayer Temple Community  
Church  
Reargument denied.

Tom, J.P., Sullivan, Williams, Buckley, Malone, JJ.

M-540 In the Matter of B., Marie; D., Marvin; D., Marlisa -  
Abbott House  
Motion deemed withdrawn.

Tom, J.P., Mazzarelli, Friedman, Sullivan, Nardelli, JJ.

M-4934 Cosby v Law Offices of Stickel, Rice and Jennings

Leave to prosecute appeal as a poor person denied;  
Clerk directed to accept no further motions or applications in  
this action from plaintiff without prior leave of the Court.

Mazzarelli, J.P., Andrias, Friedman, McGuire, Malone, JJ.

M-2756 In re Greichel v New York State Division of Housing and  
Community Renewal

Reargument or other relief denied.

Mazzarelli, J.P., Andrias, Friedman, McGuire, Malone, JJ.

M-3813 Pearson v New York City Health and Hospitals  
M-4508 Corporation (Harlem Hospital Center)

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

Mazzarelli, J.P., Andrias, Nardelli, Williams, Gonzalez, JJ.

M-3466 Prime Income Asset Management Inc. v American Real  
Estate Holdings, L.P.

Reargument or other relief denied.

Mazzarelli, J.P., Andrias, Gonzalez, Catterson, Malone, JJ.

M-3092 Manrique v New York-Presbyterian Hospital

Leave to appeal to the Court of Appeals denied.

Mazzarelli, J.P., Friedman, Gonzalez, Catterson, Malone, JJ.

M-2637 Gryphon Domestic VI, LLC v APP International Finance Company, B.V. - Indah Kiat International Finance Company B.V.

Reargument or other relief denied.

Mazzarelli, J.P., Williams, Sweeny, Catterson, Kavanagh, JJ.

M-4654 People v Rosa, Anthony

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

Mazzarelli, J.P., Marlow, Sullivan, Gonzalez, McGuire, JJ.

M-4858 Schirmer v Athena-Liberty Lofts, LP - Burgess Steel,  
M-5022 LLC - On-Par Contracting Corp. - HP Electrical Designs  
(And other actions)

Stay of trial granted; appeal adjourned to the December 2007 Term.

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

M-3108 People v Pabón, Jerry

Writ of error coram nobis denied, as indicated.

Andrias, J.P., Saxe, Friedman, Nardelli, Malone, JJ.

M-3648 Kudrov v Laro Services Systems, Inc.

Leave to appeal to the Court of Appeals denied.

Andrias, J.P., Saxe, Marlow, Nardelli, Williams, JJ.

M-4318 Minton v The Wings Club

M-4526 Reargument or other relief denied.

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

M-4820 Tung v Levy

Time to perfect proceeding enlarged to the January 2008 Term.

Saxe, J.P., Marlow, Sweeny, McGuire, Kavanagh, JJ.

M-4168A In the Matter of C., Ibrahima - Hlass

Leave to prosecute appeal as a poor person granted, as indicated. (See M-4168, decided simultaneously herewith).

McGuire, J.

M-4168 In the Matter of C., Ibrahima - Hlass

Leave to appeal to this Court granted. (See M-4168A, decided simultaneously herewith).

Saxe, J.P., Marlow, Nardelli, Sweeny, Catterson, JJ.

M-4652 In re Duncan v Kelly

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

Saxe, J.P., Marlow, Williams, Sweeny, Malone, JJ.

M-4814 In the Matter of Mankarios v New York City Taxi and  
Limousine Commission

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

Saxe, J.P., Marlow, Williams, Sweeny, Malone, JJ.

M-4699 Butt v Bovis Lend Lease LMB, Inc.

Stay of trial granted.

Marlow, J.P., Williams, Gonzalez, Catterson, McGuire, JJ.

M-3851 People v Eubanks, Isaac

Reargument denied.

Saxe, J.

M-3358 People v Siao-Pao, Leopold

Leave to appeal to this Court denied.

Saxe, J.

M-3546 People v Forson, Samuel

Leave to appeal to this Court denied.

Saxe, J.

M-3566 People v Byrd, Terry  
Leave to appeal to this Court denied.

Saxe, J.

M-3573 People v Rivera, Miguel  
Leave to appeal to this Court denied.

Saxe, J.

M-3613 People v Johnson, Dewright  
Leave to appeal to this Court denied.

Saxe, J.

M-3786 People v Dushain, Carl  
Leave to appeal to this Court denied.

Malone, J.

M-4677 People v Green, Anthony  
Leave to appeal to the Court of Appeals dismissed, as  
indicated.

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

M-1426 In the Matter of Nancy Burton,  
a disbarred attorney:

Reargument or leave to appeal to the Court of Appeals  
denied. No opinion. All concur.

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

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

M-5155 Michael James Culver, admitted on 9-19-91,  
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.

**The following orders were entered and filed on October 11, 2007:**

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4285 Caceres v Ciampa Organization  
Stay of trial granted.

Lippman, P.J., Andrias, Williams, Buckley, Malone, JJ.

M-4825 Myers v The New York City Transit Authority  
Time to perfect appeal enlarged to the February 2008  
Term.

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

M-4954 People v Thomas, Wesley

Pro se supplemental brief deemed filed for the January 2008 Term, to which Term appeal adjourned.

Saxe, J.P., Marlow, Williams, Sweeny, Malone, JJ.

M-4698 Metropolitan Steel Industries, Inc., doing business as  
Steelco v Perini Corporation  
(And a third-party action)

Stay previously afforded appellant continued on condition appellant posts undertaking and that appeal be perfected for the February 2008 Term. Clerk directed to calendar appeal for hearing in first week of said Term, as indicated.