

the alleged insufficiency now raised on appeal (*People v Jean-Baptiste*, 38 AD3d 418, 420 [2007], *lv denied* 9 NY3d 877 [2007], quoting *People v Gray*, 86 NY2d 10, 19 [1995]). In this case, as defendant concedes, defense counsel's motion to dismiss was a general one, in which he asserted that "the People have failed to [make out] a prima facie case on any of the counts." As a result, defendant's claim that his conviction is not supported by legally sufficient evidence is not preserved for our review, and we decline to review it in the interest of justice. We also reject defendant's argument that his conviction was against the weight of the evidence as we are presented with no basis for disturbing the jury's determinations concerning the credibility of the building security supervisor's testimony (see *People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Stapkowitz*, 40 AD3d 435 [2007], *lv denied* 9 NY3d 882 [2007]). Finally, we are unpersuaded by defendant's contention that his sentence is harsh and excessive, and are satisfied that the trial court considered all of the relevant circumstances, including defendant's

purported drug addiction and his lengthy criminal history (see *People v Butler*, 16 AD3d 915 [2005], *lv denied* 5 NY3d 786 [2005]).

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

ENTERED: DECEMBER 20, 2007

CLERK

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

1787-

1787A

1787B Springwell Navigation Corp.,
Plaintiff-Respondent,

Index 600743/05

-against-

Sanluis Corporación, S.A.,
Defendant-Appellant.

Jonathan A. Willens, New York for appellant.

Kasowitz Benson Torres & Friedman LLP, New York (Michael M. Fay
of counsel), for respondent.

Judgment, Supreme Court, New York County (Bernard J. Fried,
J.), entered January 25, 2007, awarding plaintiff damages in the
principal amount of \$443,750, unanimously reversed, on the law,
with costs, summary judgment granted to defendant and the action
dismissed. The Clerk is directed to enter an amended judgment
accordingly. Appeals from order, same court and Justice, entered
December 19, 2006, which granted plaintiff's motion for summary
judgment and denied defendant's cross motion for summary
judgment, and from order, same court and Justice, entered
December 12, 2005, to the extent it denied defendant's cross
motion to dismiss the complaint for failure to state a cause of
action, unanimously dismissed, without costs, as subsumed in the
appeal from the ensuing judgment.

Plaintiff was the beneficial holder of a \$1 million interest in an Unrestricted Global Note issued by defendant. The court properly found that as such, plaintiff had no right to sue upon an indenture agreement for interest payments (see *MacKay Shields v Sea Containers*, 300 AD2d 165 [2002]), since that document specifically reserved that right to the registered holder of the Note. However, the court erred in finding that plaintiff had a right to sue on the Note itself, inasmuch as plaintiff was not the holder of a negotiable instrument (see *Caplan v Unimax Holdings Corp.*, 188 AD2d 325 [1992]; cf. *Friedman v Airlift Intl.*, 44 AD2d 459 [1974]). Nor is there any basis for its finding that a right to sue for interest payments is bestowed upon plaintiff by the Trust Indenture Act of 1939, whose purpose was to prevent majority investors from taking collective action to make amendments to an indenture affecting the rights of other holders (see *In re Board of Directors of Multicanal S.A.*, 307 BR 384, 388-389 [SD NY 2004]).

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: DECEMBER 20, 2007

CLERK

Department, and defendant City of New York (City) entered into a benefits agreement, which was renewed or extended throughout the period at issue. Pursuant to the agreement, the City would pay specified annual sums for each full-time police officer into the PBA's Health and Welfare Fund, which in turn was responsible for providing certain supplementary benefits to the police officers. In addition, the City agreed to contribute \$75 per year for each full-time police officer to a separate PBA Civil Legal Representation Fund (Legal Fund).

The agreement set forth a formula to calculate the City's pro rata monthly obligations to the Welfare Fund and the Legal Fund. Specifically, section 2(c) of the agreement stated that every 28 days the City would pay a pro rata share ($28/365$) of the annual amount due each police officer, reduced by $1/365$ for each day an officer was on less than full pay status during that 28-day period, multiplied by the number of officers on the City's payroll.

Audits by the Police Department and City Comptroller revealed that, from April 1, 2000 to March 29, 2002, the City overpaid \$524,087.71 to the Legal Fund, due to an incorrect rate of payment (i.e., a pro rata amount based on more than \$75 per year); the calculations of the number of employees and the number of days worked is not contested. The City requested a return of

the funds, but the PBA refused, arguing that the agreement expressly absolved it from any obligation to return overpayments. The City withheld the disputed amount from subsequent payments to the Legal Fund, and the PBA thereafter commenced this action for breach of contract; the City counterclaimed for restitution. Both parties moved for summary judgment, on the ground that the agreement was clear and unambiguous, although they urged diametrically opposed interpretations. Specifically, the PBA asserted that the City is not entitled to any reimbursement for overpayments, for any reason, while the City maintained that the agreement merely bars recovery of overpayments based on an incorrect count of covered employees or the days that they were on full duty status. We find the pertinent provisions of the agreement to be plagued with ambiguity, requiring the denial of summary judgment to both parties.

As noted *supra*, section 2(c) of the agreement sets forth the method for calculating the City's periodic contributions to the Legal Fund. Section 2(d)(I) states:

The City and the [PBA] agree that payment of the gross applicable amount computed as provided in section 2(c) will constitute full and complete payment to the [PBA] for that twenty-eight (28) day cycle. The [PBA] shall have ninety (90) days from receipt of such payment to reconcile the City payroll, as defined in section 2(c) above, with its own records, and report such errors to the City. If such errors are not reported to the City

within the prescribed ninety (90) day period, the [Legal] Fund will not receive a retroactive contribution for the period prior to the time such error is reported to the City. The [Legal] Fund, however, will be required to provide the appropriate benefits to such employee(s) even if a time period exists in which the Fund did not receive City contributions.

Section 2(c) defines "City payroll" as "the list provided by the Office of Payroll Administration, or any other list accepted by the parties to this Agreement, which is used to calculate the number of covered employees for whom payment to the [Legal] Fund should be made."

Section 2(d)(ii) of the agreement provides:

In the event that a covered employee is included on the City payroll, but the City does not submit payment on behalf of such employee, the [PBA] shall be entitled to a contribution on behalf of such employee, if the [PBA] reports such errors to the City within ninety (90) days of receipt of the payment for that twenty-eight (28) day cycle in which the omission occurred. As such, the [PBA] will not be required to return overpayments to the City, and the City will not be required to pay to the [PBA] any underpayments, except in this referenced instance and as stated above in paragraph 2(d)(I). The foregoing will not be construed to bar adjustments resulting from correction or errors made pursuant to section 12 of this Agreement [concerning the definition of covered employees, including the addition and deletion of covered titles].

Section 2(d)(I) allows the PBA 90 days to reconcile the "City payroll," defined as the number of covered employees, with its own records, and report any errors. Thus, that section

contemplates a scenario in which the City's records reflect fewer employees than the PBA claims. Similarly, section 2(d)(ii) affords the PBA 90 days to report a failure of the City to tender contribution on behalf of an employee who is listed on the City's payroll. Thus, both sections 2(d)(I) and 2(d)(ii) seem to concern errors in counting the number of employees.

In contrast to section 2(d)(ii), which sets forth the condition under which the PBA "shall be entitled" to recover a specific type of underpayment, section 2(d)(I) does not expressly grant the PBA a right of recovery, but rather states that the PBA shall be precluded from recovering a certain type of underpayment if not reported within 90 days. The phrasing of section 2(d)(I), expressly barring recovery of underpayments in one particular circumstance, suggests that recovery of underpayments, and possibly overpayments, is otherwise available.

The PBA emphasizes the statement in section 2(d)(ii) that "the [PBA] will not be required to return overpayments to the City, and the City will not be required to pay to the [PBA] any underpayments, except in this referenced instance and as stated above in paragraph 2(d)(I)." That phrase can be read, as the PBA argues, as an absolute bar to the City's recovery of overpayments, since there are no express provisions for the return of overpayments in either the "referenced instance" or

"paragraph 2(d)(I)." However, if indeed that was the intent, it would have been far easier to state that under no circumstances would the City be entitled to recover any overpayments to the PBA, whatever the reason for the overpayment, rather than use such circumlocutory language. Moreover, the PBA essentially ignores the introductory clause, "as such," thereby violating the canon of contract interpretation that every clause and word should be given meaning (see *Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d 583, 594 [2001]). The clause "as such" refers to the previous sentence, and thus what follows appears to be limited by, or explanatory of, that preceding sentence. Such a construction could support the City's interpretation of the provision as setting forth the sole instances for recouping overpayments or underpayments based on incorrect headcounts, but not affecting the recovery of payments based on other errors.

In addition, the next sentence of section 2(d)(ii) states, "the foregoing will not be construed to bar adjustments resulting from correction of errors made pursuant to section 12 of this Agreement [pertaining to the addition and deletion of different categories of employees]." That can be viewed as just adding one more category for which the return of overpayments or underpayments is permitted, as if the second sentence of section

2(d)(ii) read: the PBA will not be required to return overpayments to the City, and the City will not be required to pay the PBA any underpayments, except in this referred instance, and as stated above in paragraph 2(d)(I), and to make adjustments resulting from correction of errors made pursuant to section 12 of this agreement. However, rather than including that category of erroneous payments in the list of overpayments and underpayments that may be recovered, the agreement states that the restrictions on recoupments do not apply to the correction of errors pertaining to section 12. Although no other types of errors were expressly enumerated as surviving the restrictions on the recovery of overpayments and underpayments, it may be that, because section 12 entails issues of counting employees, the parties believed it was necessary to specify that the adjustment of errors concerning section 12 remained unaffected, but the availability of recovery for other errors would be self-evident. Indeed, the City argues that special provisions regarding errors resulting from the counting of employees and days they were on full pay status were necessary because those numbers are in constant flux, and thus miscalculations and disputes between the parties could be expected.

Section 10 of the agreement provides, in pertinent part:
"Neither underpayments nor overpayments resulting from the

application of sections 2(c), 2(d)(I) and 2(d)(ii) shall be subject to arbitration, or any right of recovery in any other forum." The PBA reads section 10 as confirming its interpretation of sections 2(c), 2(d)(I) and 2(d)(ii). However, as the City argues, underpayments and overpayments based on incorrect headcounts are not errors "*resulting from* application of sections 2(c), 2(d)(I) and 2(d)(ii) [emphasis added]," and thus do not appear to be barred by section 10.

For all of the foregoing reasons, the ambiguities of the agreement do not permit a construction as a matter of law, and therefore summary judgment must be denied both parties. Since the meaning and extent of the contract have yet to be established, we decline to address the City's arguments regarding common-law recoupment and public policy.

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

ENTERED: DECEMBER 20, 2007

CLERK

Lippman, P.J., Andrias, Nardelli, Gonzalez, Kavanagh, JJ.

2016 Marilyn Moore, Index 6075/04
Plaintiff-Respondent,

-against-

793-797 Garden Street Housing
Development Corporation, et al.,
Defendants-Appellants.

Leahey & Johnson, P.C., New York (Peter J. Johnson, Jr. of
counsel), for appellant.

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

Order, Supreme Court, Bronx County (Wilma Guzman, J.),
entered on or about June 8, 2006, which denied defendants' motion
for summary judgment dismissing the complaint, unanimously
affirmed, without costs.

The court properly denied the motion for summary judgment in
this action where plaintiff allegedly was caused to fall when,
while descending a marble staircase, the stair upon which she
stepped moved from its base. Defendants failed to satisfy their
initial burden of establishing a lack of notice as a matter of
law inasmuch as their witness had no personal knowledge of the
condition of the allegedly defective step, and defendants offered
no evidence from their employees who were regularly at the
property and dealt with tenant complaints, and could have

testified regarding the absence of any complaints about the subject step and when it was last inspected or repaired (see *Porco v Marshalls Dept. Stores*, 30 AD3d 284 [2006]; *Joachim v 1824 Church Ave.*, 12 AD3d 409, 410 [2004]). Furthermore, the record evidence including plaintiff's testimony that she complained to the superintendent that the steps were uneven and had broken chips, and that steps in the vicinity of the accident had been patched and grouted, and were the subject of violations issued by the Department of Housing Preservation and Development, raise triable issues regarding whether defendants had notice of the condition that caused plaintiff to fall (see *O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106 [1996]).

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

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

ENTERED: DECEMBER 20, 2007

CLERK

the wall, were inherently unstable and unsafely stored, in violation of Industrial Code (12 NYCRR) § 23-2.1(a)(1) (see *Lehner v Dormitory Auth. of State of N.Y.*, 221 AD2d 958 [1995]). As such, the Santos motion for dismissal of the Labor Law § 241(6) claim against him was properly denied.

It is undisputed that Santos did not obtain prior written consent for this work, in violation of the lease terms, and that 3440 LLC did not learn of the renovation until after plaintiff's accident. Accordingly, the § 241(6) claim was properly dismissed as against 3440 LLC (see *Sanatass v Consolidated Inv. Co., Inc.*, 38 AD3d 332 [2007]).

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

MARLOW, J. (dissenting in part)

I agree with the majority that the motion of defendant 3440 LLC to dismiss plaintiff's Labor Law § 241(6) claim against it was properly granted.

The regulation on which plaintiff relies to assert a Labor Law § 241(6) claim against defendant Santos governs the proper and safe storage of building materials in a "passageway, walkway, stairway or other thoroughfare" (12 NYCRR 23-2.1[a][1]). It is uncontested that plaintiff's accident occurred in an open work space. Consequently, I would also grant the motion of defendant Santos for summary judgment dismissing plaintiff's § 241(6) claim against it (see *Burkoski v Structure Tone, Inc.*, 40 AD3d 398,382 [2007]; *Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 159-160 [2005]).

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

ENTERED: DECEMBER 20, 2007

CLERK

absence was harmless because the evidence "was overwhelming and there simply is no reasonable possibility, let alone significant probability that the jury would have acquitted here if the circumstantial evidence charge had been given" (*People v Brian*, 84 NY2d 887, 889 [1994]).

Defendant did not preserve his argument that the court improperly admitted negative identification evidence. Although the court interrupted defendant's objection before he could articulate it, defendant subsequently did nothing to alert the court as to why he was objecting. Moreover, he conveyed the impression that his only objection to the line of questioning at issue was that the prosecutor was leading the witness. We decline to review defendant's present claim in the interest of justice. Were we to review it, we would find that the evidence was sufficiently relevant to warrant its admission, and that its probative value outweighed any possible prejudicial effect (see *People v Wilder*, 93 NY2d 352, 357-358 [1999]).

Defendant's pro se claims are without merit.

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

ENTERED: DECEMBER 20, 2007

CLERK

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

2374 In re Albert Esposito,
Petitioner,

Index 110434/06

-against-

Raymond Kelly, as Police Commissioner
of The City of New York, et al.,
Respondents.

La Pietra and Krieger, P.C., White Plains (Louis C. La Pietra of
counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon
of counsel), for respondents.

Determination of respondent's License Division, dated March
31, 2006, which, after a hearing, revoked petitioner's license to
carry a pistol, unanimously confirmed, the petition denied and
the proceeding (transferred to this Court by order of Supreme
Court, New York County [Walter Tolub, J.], entered October 31,
2006) dismissed, without costs.

In view of the uncontroverted evidence that petitioner was
arrested for multiple counts of possession of marijuana, that
marijuana was found in his car, and that he violated the
conditions of his license by failing to notify the License
Division of his arrest, the revocation of petitioner's license

may not be judicially disturbed (see *Ricatto v Kelly*, 303 AD2d 240 [2003]). Petitioner's argument that the penalty of revocation shocks the conscience is without merit (see *Matter of Robinson v Ward*, 181 AD2d 585 [1992]).

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

ENTERED: DECEMBER 20, 2007

CLERK

matched the description given in the radio transmission, he was entitled under the fellow officer rule to arrest defendant (see *People v Ketcham*, 93 NY2d 416 [1999]).

The court properly denied defendant's request for a charge on the defense of temporary and lawful possession since there was no reasonable view of the evidence, viewed in a light most favorable to defendant (*People v Steele*, 26 NY2d 526, 529 [1970]), to support such a charge. Even under defendant's version of the events, his conduct was "utterly at odds with any claim of innocent possession" (*People v Williams*, 50 NY2d 1043, 1045 [1980]; see also *People v Snyder*, 73 NY2d 900, 901-02 [1989]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 20, 2007

CLERK

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

2376 Sylvia B.,
Petitioner-Respondent,

-against-

Nelson R.,
Respondent-Appellant.

Frederic P. Schneider, New York, for appellant.

Steven N. Feinman, White Plains, for respondent.

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about September 22, 2006, which awarded custody of the parties' child to petitioner mother, unanimously reversed, on the law, without costs, and the matter remanded for a hearing.

While a court need not conduct a hearing where a change in custody is sought upon speculative and frivolous reasons (*David W. v Julia W.*, 158 AD2d 1, 6-7 [1990]), here, a family offense petition was filed. The infant child himself is alleged to have reported that petitioner struck him with a belt and metal buckle five times, causing bruising and soreness to the right arm and wrist. A full and comprehensive hearing was required to

determine whether the totality of the circumstances warranted modification of the custody order in the best interests of the child (*Matter of Gant v Higgins*, 203 AD2d 23 [1994]).

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

ENTERED: DECEMBER 20, 2007

CLERK

they saw it change lanes without signaling (see *People v Robinson*, 97 NY2d 341, 348-349 [2001]; *People v Rice*, 44 AD3d 247). After turning on their lights and siren, the officers observed defendant shifting his body to his left, leading them to believe he might be concealing something. As they approached the car, they saw defendant turning to his left two more times. Given defendant's movements, the police possessed, at least, the necessary founded suspicion to inquire if defendant had any weapons or contraband in his possession (see e.g. *People v Joseph*, 38 AD3d 403 [2007], lv denied 9 NY3d 866 [2007]; *People v Crespo*, 292 AD2d 177 [2002], lv denied 98 NY2d 709 [2002]). When defendant answered that he possessed cocaine, the police properly searched him and found a small amount of cocaine. Once the officers discovered the drugs, they were justified in searching the back seat under the automobile exception, since there was reason to believe that defendant's bags contained additional drugs or a weapon, especially given defendant's prior furtive movements (see *People v Langen*, 60 NY2d 170 [1983], cert denied 465 US 1028 [1984]; *People v Belton*, 55 NY2d 49, 55 [1952]; *People v Faines*, 297 AD2d 590, 595 [2002], lv denied 99 NY2d 558 [2002]). Accordingly, the police lawfully obtained the pistol that they found in one of the bags.

Defendant's challenge to the sufficiency of the evidence

establishing that he possessed the weapon is unpreserved (see *People v Gray*, 86 NY2d 10 [1995]), and we decline to review it in the interest of justice. Were we to review this claim, we would find that the evidence of possession was overwhelming. There is no basis for disturbing the jury's determinations concerning credibility (see *People v Bleakley*, 69 NY2d 490, 495 [1987]). The driver of the livery cab testified that he had just checked his car on his break, finding no items left by any other passenger, and that defendant was his first and only customer after his break. He saw defendant enter the car carrying at least one bag, and the bags in the back seat were next to defendant when the police pulled the car over. Under these circumstances, the evidence clearly supported the conclusion that the bags belonged to defendant. We likewise reject defendant's claim that the verdict was against the weight of the evidence.

The jurisdiction of New York County was established by a preponderance of the evidence (see *People v Greenberg*, 89 NY2d 553, 555-556 [1997]). The court charged the jury that it could find jurisdiction if defendant either possessed the contraband in New York County, or within 500 yards of the county line (CPL 20.40 [4][c]). Defendant clearly possessed the contraband in New York County, as the police had followed the car from Manhattan

into Bronx County. Moreover, the officers measured the distance from the county line to the area of defendant's arrest, and found it to be within 500 yards.

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

ENTERED: DECEMBER 20, 2007

CLERK

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

2379 Neil Bachrow, et al., Index 8696/04
Plaintiffs-Respondents, 84055/04

-against-

Turner Construction Corporation, et al.,
Defendants/Third-Party Plaintiffs-Respondents,

-against-

Lowy & Donnath, Inc.,
Third-Party Defendant-Appellant.

- - - -

United States Fire Insurance Company,
amicus curiae

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for appellant.

London Fischer LLP, New York (John E. Sparling of counsel), for Turner Construction Company, Montefiore Medical Center and The Children's Hospital at Montefiore, respondents.

Carroll, McNulty & Kull LLC, New York (Ann M. Odelson of counsel), Amicus Curiae.

Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered August 2, 2006, which in a third-party action by a construction site's owner and general contractor (collectively Turner) against plaintiff injured construction worker's employer (Lowy), insofar as appealed from as limited by the briefs, granted Turner's motion for summary judgment on its second cause of action for breach of contract to procure insurance, and denied Lowy's cross motion to sever such cause of action and consolidate

it with an action commenced by Turner against Lowy's general liability insurer (U.S. Fire) for a declaration that U.S. Fire is obligated to defend and indemnify Turner in this action, unanimously reversed, on the law and the facts, without costs, Turner's motion for summary judgment on the second cause of action denied, and such cause of action severed and consolidated with the declaratory judgment action.

The motion court correctly held that the subcontract between Turner and Lowy required Lowy to procure insurance covering Turner for all liabilities arising out of Lowy's work, including liabilities resulting from Turner's own acts of negligence; that the insurance Lowy procured limited Turner's coverage to liabilities caused by Lowy's negligent acts or omissions; and that Lowy therefore breached the subcontract (see *Kinney v Lisk Co.*, 76 NY2d 215, 218-219 [1990], citing, inter alia, *Roblee v Corning Community Coll.*, 134 AD2d 803 [1987], *lv denied* 72 NY2d 803 [1988]). Nor is there any evidence that Turner ratified the insurance Lowy procured. Accordingly, Turner is entitled to recover any losses caused by this breach of contract, including its liability to plaintiff and costs of defending this action (see *Kinney, id.* at 219; *Roblee, id.* at 805). Nevertheless, the motion court's grant of summary judgment was premature, as it has yet to be determined that Lowy's failure to procure the agreed-

upon insurance caused Turner any losses. Such causal relationship would be lacking in the event the declaratory judgment action determines that U.S. Fire was not given timely notice of the claim (see *U.S. Pack Network Corp. v Travelers Prop. Cas.*, 42 AD3d 330 [2007]).

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

ENTERED: DECEMBER 20, 2007

CLERK

While the father alleged facts sufficient to warrant a hearing based on a change in circumstances (see *David W. v Julia W.*, 158 AD2d 1, 6-7 [1990]), he failed, at that hearing, to substantiate the allegations with sufficient evidence to warrant a change in custody (see *Matter of Isaac C. v Veronica R.*, 18 AD3d 327 [2005]). The father was properly required to demonstrate a change of circumstances as to all three children, as the birth of the third child subsequent to the original petition did not defeat the court's jurisdiction (*Primavera v Primavera*, 195 Misc 942, 945 [1949]).

The order of protection is moot because the two-year period it was to be in effect has now expired (see *Wibrowski v Wibrowski*, 256 AD2d 172 [1998]). In any event, we note that the father consented to the entry of the order of protection in favor of the mother.

M-5180 - Valentina V. v Jamal A.

Motion seeking leave for poor person and other related relief denied.

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

ENTERED: DECEMBER 20, 2007

CLERK

General Business Law (GBL) § 683 and § 687 on the ground that the disclaimers at issue fell outside the ambit of those disclaimers barred by GBL § 687(4) and (5) because they were not contained in a mere boilerplate section of the parties' franchise agreement. Similarly, defendants' affirmative defenses should be dismissed to the extent that they rely on waivers barred by the Franchise Act (*see generally Draper v Georgia Props.*, 230 AD2d 455, 457-458 [1997], *affd* 94 NY2d 809 [1999]).

The court correctly held that reliance is an element of a fraud claim under the Franchise Act, which refers to "artifice to defraud" (GBL § 687[2][a]) and "fraud" (GBL § 687[2][c]). Subsumed in the definition of "fraud" is the notion of reliance, since a plaintiff must show reliance to sustain a fraud claim (*see e.g. Shisgal v Brown*, 21 AD3d 845, 846 [2005]). However, issues of fact exist as to the extent and reasonableness of plaintiff's reliance on defendants' alleged oral misrepresentations. Furthermore, as GBL § 683 requires that an offering prospectus be registered with the Attorney General prior to the offer or sale of franchises, plaintiff properly alleged that defendants' representations, which were not contained in the prospectus, ran afoul of GBL § 683.

However, the court correctly dismissed plaintiff's common-law fraud claims. The disclaimers were not generalized

boilerplate exclusions, but were contained in a separate rider, which plaintiff's principal read and initialed, stating specifically that she was not relying on any representations by defendants (see *Citibank v Plapinger*, 66 NY2d 90, 94 [1985]; *General Bank v Mark II Imports*, 293 AD2d 328 [2002]).

The court also correctly dismissed plaintiff's claims for breach of contract, as it is uncontroverted that plaintiff failed to provide written notice of any breach pursuant to Article 18.2 of the franchise agreement (see e.g. *F. Garofalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80 [2000], *lv dismissed* 95 NY2d 825 [2000]).

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

ENTERED: DECEMBER 20, 2007

CLERK

agency defense (see *People v McBride*, 272 AD2d 200 [2000], *lv denied* 95 NY2d 868 [2000]); *People v Moultrie*, 267 AD2d 181 [1999], *lv denied* 94 NY2d 951 [2000]; *People v Shaw*, 214 AD2d 472 [1995], *lv denied* 86 NY2d 802 [1995]).

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

ENTERED: DECEMBER 20, 2007

CLERK

(Lien Law § 19[6]; see *Northeast Restoration Corp. v K & J Constr. Co.*, 304 AD2d 306 [2003]).

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

ENTERED: DECEMBER 20, 2007

CLERK

As the People concede, since the crime was committed in 1996, before the effective date of the legislation (Penal Law § 70.45) providing for post-release supervision, such supervision was incorrectly added to defendant's sentence. Since this issue involves the substantive illegality of the sentence, it survives defendant's waiver of his right to appeal.

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

ENTERED: DECEMBER 20, 2007

CLERK

called the apprehended buyer as a witness in support of his agency defense. However, the jury had ample basis upon which to discredit the buyer's testimony, which was undermined by, among other things, observations made by the police and the significant quantity of drugs recovered from defendant. The police testimony established the elements of resisting arrest.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 20, 2007

CLERK

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

2389-

2390-

2390A Lombard & Co., Inc.,
Plaintiff-Respondent,

Index 110816/95

-against-

German De La Roche,
Defendant-Appellant.

- - - -

Arthur B. Calcagnini, Jr.,
Additional Defendant-Respondent.

Harry H. Wise, III, New York for appellant.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (David A. Beke of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered October 18, 2006, which, in an action in which defendant counterclaims against plaintiff, a corporation, and its principal and sole shareholder (herein, plaintiffs) for an accounting of an alleged joint venture, inter alia, upon reargument, granted plaintiffs' motion for summary judgment dismissing the counterclaim, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered December 12, 2005 and May 25, 2007, unanimously dismissed, without costs, as taken from nonappealable orders.

Defendant cannot recover on a claim that he and the individual plaintiff entered into a joint venture to be set up

and run through the corporate defendant's structure (see *Weisman v Awnair Corp. of Am.*, 3 NY2d 444 [1957] [individuals cannot carry on a joint venture through a corporate structure]).

Although *Weisman* has been qualified so as not to preclude members of a preexisting joint venture from "acting as partners between themselves and as a corporation to the rest of the world" (*Matter of Hochberg v Manhattan Pediatric Dental Group, P.C.*, 41 AD3d 202, 204 [2007]), here there was no preexisting joint venture that later spawned the creation of a corporation in which aspects of the joint venture could survive. Rather, the corporate plaintiff was formed long before the alleged joint venture was allegedly formed pursuant to an oral agreement of which the court discerned no proof. We have considered defendant's remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 20, 2007

CLERK

interest of justice. Were we to review these claims, we would find that some of the prosecutor's comments during her opening statement and summation should have been avoided, including her unnecessary emphasis on the fact that the incident took place on Christmas and a few months after the September 11, 2001 terrorist attacks, but that there was no pattern of inflammatory remarks warranting reversal (see *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for a reduction of sentence.

As the People concede, since the crime was committed prior to the effective date of the legislation (Penal Law § 60.35[1][a][v], [former (1)(e)]), providing for the imposition of a DNA databank fee, that fee should not have been imposed.

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

ENTERED: DECEMBER 20, 2007

CLERK

waiver in which he stated that he agreed to give up his right to appeal because he was receiving a favorable plea and sentence agreement (see *People v Ramos*, 7 NY3d 737 [2006]). In any event, were we to find the waiver to be unenforceable, we would reject the suppression claim on the merits.

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

ENTERED: DECEMBER 20, 2007

CLERK

Lippman, P.J., Marlow, Williams, Gonzalez, JJ.

2395 In re Vincent L. and Others,

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

Vincent L., Sr.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

Anne Reiniger, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M.
Griffin of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Jody
Adams, J.), entered on or about February 8, 2005, which, upon a
fact-finding determination that respondent-father derivatively
abused and neglected the subject children, placed the children in
the custody of petitioner New York City Administration for
Children's Services for a period of 12 months and denied
respondent's request for visitation, unanimously affirmed insofar
as it brings up for review the fact-finding determination, and
the appeal otherwise dismissed, without costs.

The court's finding of derivative abuse and neglect was
supported by a preponderance of the evidence. Respondent's

admitted sexual abuse of four other children under the age of 14 with whom he had a paternal and close relationship between 1996 and 1999 demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to the subject children (see *Matter of Vincent M.*, 193 AD2d 398, 404 [1993]). Further, respondent, carrying a knife, threatened to kill himself, the children's mother and the three subject children, and took the youngest child from the mother and transported him to another borough. Additionally, respondent assaulted the mother in open court.

Respondent's challenge to the court's denial of his request for visitation and photographs is academic, as the order of disposition has expired by its own terms (see *Matter of Fred Darryl B.*, 41 AD3d 276, 277 [2007]). In any event, the denial was warranted, given, inter alia, the children's ages, the distance that they would have to travel to visit respondent in prison, respondent's failure to engage in rehabilitative services, his repeated threats of violence, and his erratic and disruptive behavior throughout the proceedings, which evinced an

impaired level of judgment (see *Gregory C. v Nyree S.*, 16 AD3d 142, 143 [2005], *lv denied* 5 NY3d 702 [2005]).

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

ENTERED: DECEMBER 20, 2007

CLERK

a full opportunity to advance his claim of innocence, which was unsupported and contradicted by the plea allocution.

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

ENTERED: DECEMBER 20, 2007

CLERK

defendant interrupted a discussion of discovery matters by stating "I don't want this lawyer." The trial court immediately admonished defendant for interrupting and emphatically informed him there would be no reassignment of counsel, citing the facts that defendant had already had two such substitutions and that the case was ready for trial. The court stated it would not discuss this subject further, and concluded by asking defendant if he had "any questions?"

The timing of defendant's request and his history of changing attorneys were important considerations, and the request may well have been a frivolous delaying tactic. Nevertheless, the court had no basis to completely cut off the discussion without hearing any explanation (*see People v Sides*, 75 NY2d 822 [1990]; *People v Bryan*, 31 AD3d 295 [2006]). Indeed, the court had at a minimum the obligation to determine whether defendant had any valid reason to request a new attorney. The court clearly understood defendant's interruption to be an application for new counsel and unequivocally denied it. Under these circumstances, defendant was under no obligation to pursue his application any further (*see People v Mezon*, 80 NY2d 155, 161 [1992]). Finally, when the court asked defendant if he had any questions, this did not, given the context, offer defendant an opportunity to elaborate on his request for new counsel.

On remand, defendant is not entitled to a *Mapp/Dunaway* hearing. Before the motion court, defendant failed to raise a factual issue regarding the legality of his arrest. On appeal, defendant asserts that the court improperly denied the motion on the ground of lack of standing (see *People v Burton*, 6 NY3d 584 [2006]). However, the motion court's decision did not articulate that basis, and the People did not oppose the motion on that ground.

The fact that defense counsel did not move to reopen the *Wade* hearing based on evidence developed at trial did not deprive defendant of effective assistance. We express no opinion on the merits of any CPL 710.40(4) application that might be made prior to retrial.

To the extent that defendant's pro se supplemental brief can be interpreted as challenging the sufficiency and weight of the evidence or the validity of the indictment, those claims are without merit. Our remand for a new trial renders his other pro se claims academic.

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

ENTERED: DECEMBER 20, 2007

CLERK

Lippman, P.J., Marlow, Williams, Gonzalez, JJ.

2400 The People of the State of New York,
Respondent,

Ind. 585/01

-against-

Jose Alea,
Defendant-Appellant.

Richard M. Weinstein, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about September 8, 2006, which denied defendant's motion to be resentenced pursuant to the 2005 Drug Law Reform Act, unanimously affirmed.

The court properly found that "substantial justice" dictated that defendant's application be denied (L 2005, ch 643, § 1). Defendant was a member of a large-scale narcotics and firearms selling organization, who was personally involved in a number of sales to undercover officers, and we find no basis for disturbing the court's determination that, in view of the seriousness of defendant's crimes, resentencing was inappropriate (see e.g. *People v Vasquez*, 41 AD3d 111 [2007], lv dismissed 9 NY3d 870 [2007]).

Defendant did not preserve his challenge to the

constitutionality of the resentencing procedure and we decline to review it in the interest of justice. Were we to review this claim, we would find it without merit. Defendant asserts that the denial of resentencing was based on factual findings, as to which he had a constitutional right to a jury trial. However, defendant's original sentence was based solely on his guilty plea and his prior convictions, and any resentencing under the DRLA would not enhance his sentence but would reduce it (*compare Apprendi v Jew Jersey*, 530 US 466 [2000]). In any event, consideration of "any facts or circumstances relevant to the imposition of a new sentence," including a defendant's "institutional record of confinement," as authorized by the statute (L 2005, ch 643, § 1), is indistinguishable from the court's traditional role in considering relevant factors for the purpose of choosing an appropriate sentence within the statutory range (*cf. People v Rosen*, 96 NY2d 329, 335 [2001]).

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

ENTERED: DECEMBER 20, 2007

CLERK

evidence that he was an unfit parent (see *Zima v Aguirre-Cotliar*, 21 AD3d 828 [2005]), or, for that matter, any indication that continued custody with him was not in the best interests of the child, the application for modification should have been summarily denied.

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

ENTERED: DECEMBER 20, 2007

CLERK

of those orders.

The court properly imposed consecutive sentences for the separate and distinct crimes of criminal sexual act in the third degree and falsifying business records in the first degree. An element of the latter crime is that a defendant's "intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof" (Penal Law § 175.10). However, criminal sexual act is not, by definition, an essential element of first-degree falsifying business records. Furthermore, a conviction of that crime does not require the actual commission of the crime the defendant intended to conceal (*People v McCumiskey*, 12 AD3d 1145 [2004]). Therefore, even if, according to his plea allocution, defendant falsified the records at issue for the purpose of concealing the sex crime to which he also pleaded guilty, consecutive sentences were permissible (see Penal Law § 70.25[2]; *People v Laureano*, 87 NY2d 640, 643 [1996]).

We perceive no basis for reducing the sentence.

As the People concede, the expiration date on the orders of protection is erroneous since it was calculated without taking into account the jail time credit to which defendant is entitled. Although defendant failed to raise this issue before the sentencing court, we reach this issue in the interest of justice.

As the People also concede, since the crime was committed

prior to the effective date of the legislation (Penal Law § 60.35 [1][b]), providing for the imposition of a supplemental sex offender fee, that fee should not have been imposed.

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

ENTERED: DECEMBER 20, 2007

CLERK

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

2405 Eurycleia Partners, LP, et al., Index 600704/06
Plaintiffs-Respondents,

-against-

Seward & Kissel, LLP,
Defendant-Appellant,

American Express Tax & Business Services, Inc.,
now known as RSM McGladrey, et al.,
Defendants.

- - - - -

2406 Eurycleia Partners, LP, et al., Index 600704/06
Plaintiffs-Respondents,

-against-

American Express Tax & Business
Services, Inc., now known as RSM
McGladrey,
Defendant-Appellant,

Seward & Kissel, LLP, et al.,
Defendants.

Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (Gerard E. Harper of counsel), for Seward & Kissel LLP appellant.

Andrews Kurth LLP, New York (Arthur D. Felsenfeld of counsel), for American Express Tax & Business Services Inc. appellant

Reed Smith LLP, New York (Lance Gotthoffer of counsel) for respondents.

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered May 30, 2007 and August 16, 2006, which, in these consolidated appeals, denied defendants-appellants' motions to dismiss the complaints, unanimously reversed, on the law, with

costs, the motions granted, and the complaints dismissed as against them. The Clerk is directed to enter judgment accordingly.

In this action arising out of a hedge fund fraud, plaintiffs seek to recover from the fund's outside professionals, including defendants-appellants Seward & Kissel, LLP (S&K), its legal counsel, and American Express Tax and Business Services, Inc., n/k/a RSM McGladrey (TBS), its designated auditor, alleging fraud and conspiracy to commit fraud, fraudulent misrepresentation and conspiracy to commit fraudulent misrepresentation, breach of fiduciary duty, negligent misrepresentation, and recklessness and gross negligence against both, and aiding and abetting fraudulent inducement, fraudulent misrepresentation and breach of fiduciary duty against S&K only.

Affording the pleadings a liberal construction, accepting the allegations of the complaints as true and according plaintiffs the benefit every possible favorable inference (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]), we conclude that plaintiffs have not pleaded any valid causes of action against either S&K or TBS.

Plaintiffs allege that S&K and TBS knowingly made numerous material misrepresentations of fact and omitted numerous other material facts, of which they had superior knowledge, to induce

plaintiffs to invest in or remain invested in the fund, and that plaintiffs justifiably relied upon such misrepresentations and omissions. They allege that S&K prepared the fund's offering memorandum, listed itself therein as counsel, and invited prospective investors to rely upon its legal opinions, and that therefore S&K is liable for the statements contained in the memorandum concerning the fund's investment strategy, which allegedly were false at the time that they were made.

However, plaintiffs do not allege that S&K made any representation, fraudulent or otherwise, to them (see *National Westminster Bank v Wechsel*, 124 AD2d 144, 147 [1987], lv denied 70 NY2d 604 [1987]). As disclosed in the offering memorandum, S&K's legal advice to the fund was solely related to the fund's formation and to tax law, and plaintiffs do not challenge either the propriety of the fund's formation or the tax advice. They complain solely about the representations made by the fund - not by S&K - about its investment plans, its auditor, and the financial documents it intended to provide to its investors.

Plaintiffs allege that S&K knew and failed to impart to them that the fund had amassed a significant position in a certain entity in violation of the offering memorandum, had failed to make required filings with the Securities and Exchange Commission, and had not in fact retained TBS as its auditor.

However, an omission does not constitute fraud unless there is a fiduciary relationship between the parties (*SNS Bank v Citibank*, 7 AD3d 352, 356 [2004]). As counsel to the fund, not to the investors, S&K's fiduciary responsibility was to the fund, not to plaintiffs (see generally *Briarpatch Ltd., L.P. v Frankfurt, Garbus, Klein & Selz, P.C.*, 13 AD3d 296, 297 [2004], *lv denied* 4 NY3d 707 [2005]).

Plaintiffs fail to allege any facts from which it could be inferred that S&K not only had actual knowledge of a breach of fiduciary duty by the fund but also rendered "substantial," rather than inadvertent, assistance to the fund (see *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101 [2006], *lv denied* 8 NY3d 804 [2007]).

Plaintiffs also fail to allege privity or a relationship "so close as to approach that of privity" between themselves and S&K so as to state a cause of action for negligent misrepresentation (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 424 [1989]). In any event, as indicated, they do not allege any false representation made to them by S&K (see *Eiseman v State of New York*, 70 NY2d 175, 187 [1987]).

Plaintiffs' claim of recklessness and gross negligence amounts to a malpractice claim against S&K and fails to state a cause of action because S&K was not their counsel and therefore

owed them no duty.

With respect to TBS, plaintiffs allege that the offering memorandum stated that TBS had been appointed as the fund's auditor and that, although TBS knew that this statement was false and that investors would rely on it, TBS took no steps to correct the misstatement or to require the fund to correct it. In other words, plaintiffs do not allege that TBS itself made a false representation of any material fact in the offering memorandum or that it played any role in the preparation of the memorandum or that it acted with any intent to defraud (see *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Furthermore, in the absence of a fiduciary relationship with plaintiffs, TBS was not required to correct a misstatement that it did not make (see generally *Blake v Ford Motor Co.*, 41 AD3d 150, 150-151 [2007]).

Plaintiffs further allege that in June and July of 2005 TBS falsely represented to certain plaintiffs, orally and in writing, that it was the fund's auditor and would be conducting an audit. However, these plaintiffs purchased their investments between December 1, 2004 and June 1, 2005, and therefore could not have relied on such alleged misrepresentations in doing so (see *P. Chimento Co. v Banco Popular de Puerto Rico*, 208 AD2d 385, 386 [1994]). Nor could they have been induced by TBS's alleged misrepresentations to remain in the fund, because only a week

after TBS's alleged oral communication, and before its alleged written communication, they gave notice of their intent to redeem their investments in the fund. Furthermore, there is no allegation in the complaint that any other plaintiffs were misled by TBS into believing that it would be auditing the fund's books and records.

Plaintiffs' remaining claims against TBS are equally defective for lack of privity or because of the absence of a fiduciary obligation on TBS's part to plaintiffs, or both.

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

ENTERED: DECEMBER 20, 2007

CLERK

Lippman, P.J., Marlow, Williams, Gonzalez, JJ.

2407-

2407A Pamela Weadick, et al.,
Plaintiffs-Appellants,

Index 600127/03

-against-

Carol Anne Herlihy,
Defendant-Respondent.

Fred L. Seeman, New York, for appellants.

Kellner Herlihy Getty & Friedman, LLP, New York (Carol Anne Herlihy of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 4, 2007, which, upon defendant's motion to renew, granted summary judgment dismissing the second and third causes of action and awarded defendant costs and sanctions in an amount to be determined at a hearing, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 9, 2007, which, upon defendant's motion to reargue the renewal motion, included fees within the scope of the Referee's hearing, unanimously dismissed as abandoned, without costs.

Defendant's renewed motion for summary judgment was timely brought after prompt additional discovery was conducted. Legally recorded telephone tapes from plaintiff Tullock's employer, a brokerage house, indicated that the proposed co-venture between

plaintiffs and defendant, an attorney, to purchase a half interest in the building in which they all resided was at an impasse as to the venture's acceptable terms, and that plaintiffs had begun to actively investigate other avenues, including other investors, to make the purchase. The newly discovered tapes tended to refute Tullock's categorical denial of any discussion he might have had with the seller regarding an independent purchase arrangement prior to the date defendant expressly terminated the venture, which had been a substantial basis for the prior denial of summary judgment (16 AD3d 223, *lv denied* 5 NY3d 707). Defendant, who had conducted negotiations on behalf of the co-venture with the seller's attorney, as well as participated in the drafting of the proposed contract of sale, uncovered further information from depositions and plaintiff Weadick's participation in an unrelated loft proceeding, which contradicted plaintiffs' assertions that they had not been fully informed of the venture's contract negotiations, and which demonstrated that defendant had not, as previously argued, ordered a title report of the subject property solely in her own name prior to the date she terminated her relationship with the co-venture. Given that defendant had been denied summary judgment for dismissal of the second (breach of fiduciary duty) and third (constructive trust) causes on the original motion due

to issues of fact based on plaintiffs' misrepresentations and misleading information, her renewal motion was properly entertained (see *Cohoes Realty Assoc. v Lexington Ins. Co.*, 292 AD2d 51 [2002]). Contrary to plaintiffs' argument, the new evidence obtained through additional discovery was material to plaintiffs' claim that defendant had wrongfully diverted a business opportunity to herself when she purchased the property interest within two weeks time after she terminated the venture. The new evidence demonstrated that defendant had upheld her fiduciary duty to keep plaintiffs apprised of the venture's contract developments, did not undertake to divert the opportunity to herself prior to termination, and did not abandon plaintiffs until she learned they were looking to other sources to effectuate the purchase on their own or in conjunction with other investors. There was no evidence that defendant, during the attempted negotiation of the purchase on behalf of the co-venture, had engaged in dishonesty or otherwise breached her fiduciary obligations to plaintiffs (see *Matter of Gupta*, 38 AD3d 445 [2007]). The venture failed to materialize because of mutual disagreement over its terms, and as such, no opportunity could be diverted from it. Moreover, defendant openly terminated the agreement and advised that the parties could separately pursue a purchase of the property interest. No evidence was offered to

show that defendant had secured financing to enable her to separately purchase the contested property interest before she terminated the venture. The motion court heard the parties on oral argument and found that plaintiffs had the cash to bid for the subject property interest, but that plaintiffs apparently elected to purchase the other portion of the building from a separate owner shortly thereafter.

Defendant's detailed motion request for costs and sanctions provided plaintiffs with ample notice of defendant's claim for such relief. Plaintiffs had a reasonable opportunity to be heard on the sanctions issue. The decision of the court upon which sanctions were based sufficiently set forth the reasons for the imposition of sanctions.

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

ENTERED: DECEMBER 20, 2007

CLERK

design to gain a tactical advantage; and defendant's claims of prejudice regarding his plea and sentence are based on speculation.

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

ENTERED: DECEMBER 20, 2007

CLERK

Lippman, P.J., Marlow, Williams, Gonzalez, JJ.

2410 Michiel Schuit,
Plaintiff-Appellant,

Index 603299/06

-against-

Tree Line Management Corp.,
doing business as The Treeline Companies,
Defendant-Respondent.

Bernard D'Orazio, New York, for appellant.

Bond, Schoeneck & King, PLLC, Garden City (Mark N. Reinharz of
counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried,
J.), entered on or about February 20, 2007, which granted
defendant's motion pursuant to CPLR 3211(a)(7) to dismiss
plaintiff's Labor Law article 6 and quantum meruit causes of
action, unanimously affirmed, with costs.

The court correctly found that plaintiff, defendant's
director of acquisitions and senior vice president, was employed
as an executive and therefore has no cognizable claim under Labor
Law § 198 (see Labor Law § 190[7]) (see *Gottlieb v Kenneth D.
Laub & Co.*, 82 NY2d 457 [1993]). Plaintiff's contention that he
was not an executive is inconsistent with the allegations of his
complaint and his title and employment contract and therefore
insufficient to avoid dismissal of the cause of action (see
LeBreton v Weiss, 256 AD2d 47, 48 [1998]).

The existence of an enforceable contract covering the disputed issue of plaintiff's compensation precludes his recovery in quantum meruit (see *Zito v Fischbein, Badillo, Wagner & Harding*, 35 AD3d 306, 307 [2006]).

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: DECEMBER 20, 2007

CLERK

victim (see e.g. *People v Thomas*, 26 AD3d 241 [2006], *lv denied* 6 NY3d 898 [2006]; *People v Bierenbaum*, 301 AD2d 119, 150 [2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]; *People v Saunders*, 210 AD2d 164 [1994], *lv denied* 84 NY2d 1038 [1995])). The probative value of this evidence outweighed any prejudicial effect.

We perceive no basis for reducing the sentence.

Defendant's remaining contentions 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: DECEMBER 20, 2007

CLERK

demonstrating such impropriety as to overcome the deference normally given to arbitration awards.

Petitioners seek to overturn the award on the ground of procedural impropriety, alleging violations of NASD rules. However, examination of those allegations reveals they either were not raised previously or were not so substantial as to warrant vacatur.

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

ENTERED: DECEMBER 20, 2007

CLERK

Lippman, P.J., Marlow, Williams, Gonzalez, JJ.

2415N Clarendon National Insurance Company, Index 603196/04
 Plaintiff-Respondent,

-against-

David Le, etc.,
 Defendant,

Alina Briano,
 Defendant-Appellant.

Steven Wildstein, P.C., Great Neck, for appellant.

Schindel, Farman, Lipsius, Gardner & Rabinovich LLP, New York
(Ira S. Lipsius of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.),
entered October 13, 2006, which, upon granting defendant Briano's
motion to vacate a default judgment, granted summary judgment to
plaintiff insurer and declared the policy it had issued to
defendant Le void, relieving it of any obligation to defend or
indemnify Le in the underlying action brought by Briano against
Le and others, unanimously reversed, on the law, with costs,
judgment vacated, and the matter remanded for further proceedings
consistent herewith.

The refusal to afford Briano an opportunity to discover
whether plaintiff's efforts to locate Le, the driver in the truck

allegedly causing the accident, had been directed at the wrong person, was improper (see *Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 168-169 (1967)).

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

ENTERED: DECEMBER 20, 2007

CLERK

Tom, J.P., Andrias, Marlow, McGuire, Malone, JJ.

9418 Jumax Associates,
 Plaintiff-Appellant,

Index 603954/02

-against-

350 Cabrini Owners Corp.,
 Defendant-Respondent.

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of
counsel), for appellant.

Hoey, King, Toker & Epstein, New York (David S. Kasdan of
counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III,
J.), entered January 25, 2006, which, in an action between
plaintiff sponsor and defendant residential cooperative involving
their respective rights to the building's roof, granted
defendant's motions for summary judgment dismissing the complaint
and declaring on its counterclaim that it is the owner of "any
transferrable development rights" to the roof, modified, on the
law, to deny defendant's motion for summary judgment on its
counterclaim, the above declaration vacated, and otherwise
affirmed, without costs.

Defendant's claim to the roof fails insofar as it is based
on adverse possession because there is no evidence that defendant
had ever claimed such right before September 1995, when it
entered into the license agreement with Cellular Telephone

Company (Cel-Tel), less than 10 years before the commencement of this action in October 2002 (see *Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 [1996]). Accordingly, we vacate the declaration that defendant is the owner of "any" transferable roof rights. However, defendant is entitled to summary judgment dismissing the complaint, which seeks past and future income from the Cel-Tel license agreement, based on its affirmative defenses of waiver and estoppel. In this regard, the record establishes that although plaintiff was represented on defendant's Board, and indeed was in a position of Board leadership, during the time that the Cel-Tel license agreement and amendments adding antennas and increasing monthly fees were negotiated, discussed and executed, plaintiff never asserted the roof rights reserved for it in the 1986 offering plan until a February 2002 meeting of the Board. As it appears that the offering plan and its amendments were always in plaintiff's possession and thus readily available for plaintiff's consultation and review, we find, as a matter of law, that plaintiff's failure to assert its right to the proceeds of the licence agreement evinced a knowing intent not to claim such right (see *General Motors Acceptance Corp. v Clifton-Fine Cent. School Dist.*, 85 NY2d 232, 236 [1995]). Contrary to the dissent, we do not find it persuasive that one of plaintiff's partners could not recall, and another partner was unaware, that

plaintiff had retained the roof rights, particularly in light of plaintiff's February 14, 1985 certification submitted with the offering plan plainly stating, inter alia, that it had read the entire offering plan (*cf. Baumann v Citizens Trust Co. of Binghamton*, 248 App Div 9, 18 [1936], *mod on other grounds* 249 App Div 369 [1937], *affd* 276 NY 623 [1937]). Enforcement of the right to the proceeds of the license agreement at this juncture would also work an injustice on defendant, which, justifiably relying on plaintiff's forbearance, has been acting on the reasonable belief that such enforcement would not be sought (see *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 106 [2006]).

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

McGUIRE, J. (dissenting in part)

This appeal involves a dispute between defendant 350 Cabrini Owners Corp. (the co-op), a cooperative apartment building, and the co-op's sponsor, Jumax Associates (Jumax), over the rights to the roof of the building, which, pursuant to the offering plan executed in March 1986, were retained by Jumax. Jumax is a partnership that was originally composed of Irwin Kallman and Edwin Lax. Irwin Kallman served as president of Jumax and as a member of its board of directors. He also served on the co-op's board of directors. His son, Jonathan Kallman, became a partner of Jumax in 1996. He also was a member of the co-op's board of directors, serving as both president and vice president.

In September 1995, the co-op entered into a license agreement (the agreement) with Cellular Telephone Company (Cel-Tel) permitting Cel-Tel to install and operate antennas and related equipment on the roof of the building in exchange for a monthly fee. Although both Irwin and Jonathan Kallman served as representatives of Jumax on the co-op's board of directors, Jumax did not assert any rights to the roof area or to the monthly payments from Cel-Tel until February 26, 2002. Jumax asserts that Irwin Kallman forgot about the retention of the roof rights and that Jonathan Kallman was unaware of it.

Jumax commenced the instant action claiming that it is

entitled to past and future income from the agreement based on its retention of the rights to the roof. The co-op moved for summary judgment dismissing the complaint, asserting that Jumax's claims are barred by, among other things, the doctrines of waiver and estoppel. The co-op also moved for summary judgment on its first counterclaim, which seeks a judgment declaring that the co-op is the sole and exclusive fee owner of the premises with the sole and exclusive right to lease, license or otherwise benefit from its ownership of the roof and roof areas. Supreme Court granted the co-op's motion for summary judgment dismissing the complaint, granted the co-op's separate motion for summary judgment on its first counterclaim, and declaring in the latter regard that the co-op has "rights to the roof and roof areas, and any transferable development rights, and shall have the right to transfer same without restriction of any kind." This appeal by Jumax ensued.

I agree with the majority that Supreme Court erred in granting the co-op summary judgment on its first counterclaim since the co-op failed to establish, as a matter of law, that it adversely possessed the roof rights. I disagree, however, with the majority's conclusion that Supreme Court properly granted the co-op's motion for summary judgment dismissing the complaint, a conclusion that rests upon the majority's determination that, as

a matter of law, Jumax waived its right to collect income from the roof rights and also should be estopped from enforcing its rights to the roof.

With respect to the issue of waiver, the Court of Appeals has stated:

"A waiver is an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the party would have enjoyed. It is the voluntary act of the party, and does not require or depend upon a new contract, new consideration, or an estoppel It is essentially a matter of intention. *Negligence, oversight, or thoughtlessness does not create it. The intention to relinquish the right or advantage must be proved.* Occasionally it is proved by the express declaration of the party, or by his undisputed acts or language so inconsistent with his purpose to stand upon his rights as to leave no opportunity for a reasonable inference to the contrary. Then the waiver is established as a matter of law. Commonly, it is sought to be proved by various species of proofs and evidence, by declarations, by acts and by non-feasance, permitting differing inferences and which do not directly, unmistakably or unequivocally establish it. Then it is for the jury to determine from the facts as proved or found by them whether or not the intention existed" (*Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34, 37 [1917] [emphasis added]). See *Bono v Cucinella*, 298 AD2d 483, 484 (2002) ("the question of whether waiver has occurred is generally a question left to the finder of fact").

In *Byer v City of New York* (50 AD2d 771 [1975]), this Court reversed the dismissal of a complaint on the ground of waiver and estoppel finding that Special Term's determination "that the plaintiff had relinquished a right that, although unknown to him, ought to have been known since it was a right vested by statute

and he is an attorney" was contrary to law. This finding was based upon the principle that "[a] waiver is an intentional relinquishment" that "cannot be created by '[n]egligence, oversight or thoughtlessness'" (*id.* at 771, quoting *Alsens*, 222 NY at 37).

As is evident, *Byer* is right on point. Here, Irwin Kallman stated that he did not recall that Jumax had retained the roof rights and Jonathan Kallman stated that he was unaware that Jumax had done so in the offering plan. Thus, contrary to the majority's position, it is not dispositive that the Kallmans knew or should have known that Jumax owned the roof rights. Jumax's knowledge, be it actual or implied, and its inaction, show "[n]egligence, oversight [and] thoughtlessness," but do not necessarily establish an intentional relinquishment of known rights. Accordingly, there is a triable issue of fact regarding whether Jumax intentionally relinquished its right to collect past income from the roof rights that precludes an award of summary judgment on this issue.

With respect to estoppel, the Court of Appeals has explained:

"[t]he purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the

doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). See also *River Seafoods, Inc. v JPMorgan Chase Bank*, 19 AD3d 120, 122 (2005) ("the party seeking estoppel must demonstrate a lack of knowledge of the true facts; reliance upon the conduct of the party estopped; and a prejudicial change in position").

Here, the co-op failed to make a prima facie showing of entitlement to judgment as a matter of law. The co-op cannot claim that it did not have knowledge of the fact that Jumax retained the rights to the roof as such fact was stated in the offering plan. Nor can the co-op establish a prejudicial change in its position as it has not relied to its detriment on Jumax's failure to assert its rights earlier. To the contrary, it benefitted by receiving the income from the contract with Cel-Tel.

The majority's resolution of this appeal leaves Jumax in a curious position. In reversing the grant of summary judgment to the co-op on its first counterclaim, the majority correctly recognizes that the co-op failed to demonstrate that it owned the roof by virtue of adverse possession. Although in this respect the majority recognizes, at least implicitly, that Jumax is the owner of the roof, the majority nonetheless permanently deprives

Jumax, both retroactively and prospectively, of all the economic benefits of a significant ownership right.

Accordingly, I would deny the co-op's motion for summary judgment dismissing the complaint and, on the co-op's motion for summary judgment on its first counterclaim, would declare Jumax the owner of "any transferrable development rights" to the roof, and remand the matter for a trial on the issue of whether Jumax waived its right to collect past income from the roof rights (see *e.g. 600 W. 115th St. Corp. v 600 W. 115th St. Condominium*, 180 AD2d 598 [1992]).

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

ENTERED: DECEMBER 20, 2007

CLERK

Gonzalez, J.P., Sweeny, McGuire, Malone, Kavanagh, JJ.

9-

9A Peter Schorr, et al.,
Plaintiffs-Appellants,

Index 605647/00

-against-

Stuart Steiner,
Defendant-Respondent.

Joseph P. Dineen, Garden City, for appellants.

Aronwald & Pykett, White Plains (William Aronwald of counsel),
for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.),
entered April 23, 2004, which, to the extent appealed from as
limited by the briefs, denied plaintiffs' motion for partial
summary judgment and implicitly denied their request for leave to
replead to assert direct claims, and order, same court and
Justice, entered March 11, 2005, which, pursuant to CPLR 3211,
dismissed the second amended complaint, unanimously modified, on
the law, to the extent of granting Star Meth leave to assert
direct claims against defendant, and otherwise affirmed, without
costs.

Plaintiffs' motion for summary judgment on their breach of
fiduciary claim against defendant, a former Star Meth employee,
was properly denied. As the motion court found, questions of
fact exist, inter alia, as to whether plaintiff Peter Schorr

ratified defendant's fraudulent payroll scheme when, after discovering it six years before commencement of this action, he gave defendant a raise instead of firing him and whether, given each plaintiff's differing testimony, the oral assignment by their respective fathers, the founders and sole shareholders of now-dissolved Star Meth, gave plaintiffs the right to pursue claims on behalf of Star Meth.

The second amended complaint, to the extent it purported to assert a derivative claim, was also properly dismissed. On its face, it clearly did not comply with the court's directive limiting the complaint to derivative claims only. Not only did the second amended complaint impermissibly seek relief on behalf of the individual plaintiffs, as reflected in the caption and the wherefore clause, it added a new party, Star Meth, as a plaintiff, to the caption. Substantively, the individual plaintiffs' lack of legal capacity to pursue a derivative action was demonstrated by, inter alia, their failure to adduce any evidence that (1) they were either Star Meth shareholders or "beneficial" owners at the time of the alleged fraud and when they commenced this action (Business Corporations Law § 626[a],[b]; see *Pessin v Chris-Craft Indus.*, 181 AD2d 66, 70 [1992]), and (2) that Star Meth considered and refused to bring this action in its own name (Business Corporation Law § 626[c]).

Supreme Court erred, however, in denying plaintiffs' request for leave to allow Star Meth to assert direct claims against defendant. Both the complaint and first amended complaint provided defendant with notice that Star Meth allegedly sustained damages as a result of defendant's conduct. No new facts or theories were injected by plaintiffs' requests that Star Meth be permitted to assert direct claims against defendant. Thus, defendant would not sustain any prejudice as a result of the amendment (*see Watts v Wing*, 308 AD2d 391, 392 [2003]). Moreover, plaintiffs demonstrated that Star Meth's proposed direct claims are potentially meritorious. Star Meth, a dissolved corporation, may prosecute this action, which seeks to recover damages sustained prior to its dissolution, as part of the course of winding up its affairs (*Business Corporation Law* § 1005, 1006; *see Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243, 246 [2007]).

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

ENTERED: DECEMBER 20, 2007

CLERK

substantial sum in defendant Voluto Ventures and loaned an additional amount to an affiliate of that entity. At about the same time, King looking to buy a new residence, became interested in a Manhattan brownstone. Undertaking to negotiate this transaction on King's behalf, Kotowski contacted his attorney, a partner at defendant Kurzman Eisenberg, to ask the firm to represent King in the anticipated purchase. Kotowski then negotiated with the owner of the property, but the parties were never able to reach an agreement on the price.

When Kurzman Eisenberg learned that the mortgages on the property were in foreclosure, it suggested that King buy the mortgages herself, in part to strengthen her negotiating position. King thereupon purchased the mortgages, but several days after Kurzman Eisenberg submitted to the court a proposed judgment of foreclosure, the owner entered into a contract of sale with a third party. Thereafter, the owner redeemed the mortgages held by King, resulting in a profit to her of \$150,000.

Kotowski then urged King to invest the proceeds from the satisfaction of the mortgages in Voluto, which she did. Nevertheless, she subsequently developed doubts as to this venture, and ended up losing most of the funds she had invested in or loaned to Voluto. This action ensued against, among others, Voluto, Kotowski and Kurzman Eisenberg.

The eighth and ninth causes of action respectively allege breach of fiduciary duty and legal malpractice by Kurzman Eisenberg and the individual defendant attorney. Following discovery, these defendants moved for summary judgment dismissing these causes of action. The court correctly dismissed the eighth cause of action but erred in not dismissing the ninth cause of action as well.

In order to prevail on a claim for legal malpractice, a party must establish that the attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community, that such negligence was a proximate cause of the loss in question, and that actual damages were sustained (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *Brooks v Lewin*, 21 AD3d 731, 734 [2005], *lv denied* 6 NY3d 713 [2006]). Proximate cause requires a showing that "but for" the attorney's negligence, the plaintiff would either have been successful in the underlying matter or would not have sustained any ascertainable damages (*AmBase Corp.*, 8 NY3d at 434; *Brooks*, 21 AD3d at 734).

The moving defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing the legal malpractice claim on the ground that their alleged negligence in recommending the parallel strategy of purchasing the mortgages

was not a proximate cause of plaintiffs' damages, i.e., the recommendation did not prevent King from acquiring the property. In opposition, plaintiffs failed to raise a triable issue of fact. Specifically, plaintiffs failed to demonstrate the existence of a triable issue of fact regarding whether but for the moving defendants' advice to purchase the mortgages, King would have successfully negotiated with the seller and acquired the property. At bottom, plaintiffs offer nothing but mere speculation in this regard.

The motion court properly granted defendants' motion for summary judgment dismissing plaintiffs' claim for breach of fiduciary duty, which is predicated upon the alleged failure of Kurzman Eisenberg to inform King of the conflict of interest created by its dual representation of herself and Voluta/Kotowski, and its subsequent furthering of the interest of Voluta/Kotowski. However, King has acknowledged that she invested the proceeds from the satisfaction of the mortgages in Voluta at the recommendation of Kotowski, not Kurzman Eisenberg. Consequently, plaintiffs' contention that had Kurzman Eisenberg advised King to seek other legal opinion, she would have been protected from her ill-considered investment in Voluta, is entirely speculative, particularly in view of her history of

investing in Voluta strictly upon the recommendation of Kotowski
and without seeking any other opinion.

Plaintiffs' remaining contentions are without merit.

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

ENTERED: DECEMBER 20, 2007

CLERK

Petitioner 92 LP and Building Management Co., Inc. d/b/a Bristol Management Co., Inc. (92 LP) is the owner and landlord of the residential building designated as 412 East 55th Street, New York, New York. Apartment 3D, which residence is at the core of this matter, is subject to regulation under the New York City Rent Stabilization Law and Code. Patricia Moore was the tenant of the apartment pursuant to a lease which ran from March 1979 to February 1981, at a rate of \$520.87 per month. Ms. Moore subsequently renewed the lease, effective March 1, 1981, at a monthly rent of \$583.30.

Robert Klimecki began renting the apartment commencing August 1, 1981, although he never resided therein, but instead, pursuant to an agreement he had with the then owner-landlord, rented the apartment to commercial entities for use by their employees or officers. Initially, Klimecki entered into a three-year vacancy lease, which he subsequently renewed for a two-year period effective August 1, 1984. Andrea Bunis leased the apartment in early 1986 and, since it had not been occupied by a rent-stabilized tenant for five years, the prior owner determined the rent by applying the Rent Guidelines Board increases for a three-year vacancy and two-year renewal lease, and arrived at a monthly rent of \$903.62.

Bunis, on May 8, 1987, filed an overcharge complaint with

respondent State of New York Division of Housing and Community Renewal (DHCR). The prior owner submitted an answer in June 1987, and provided a chart of the rental history of the apartment, which indicated how the rent was calculated. The DHCR, inexplicably, served a second copy of the complaint on the prior owner in 1990, and the owner again provided the DHCR with an answer and rent history for the apartment. Bunis, in response to the owner's allegation that she had been employed by the building's managing agent and had access to all of the apartment's records and the method of calculation, denied that she had any managerial responsibility and alerted the DHCR to the fact that Klimecki was listed as the tenant of four different apartments as of April 1, 1984.

The matter then lay dormant for approximately three and one-half years, during which time the building was sold to 92 LP. The DHCR, in April 1994, paradoxically served a third copy of the complaint on 92 LP, to which 92 LP served an answer. The DHCR, in October 1994, requested that 92 LP provide evidence regarding the apartments leased to Klimecki and, after some additional correspondence, the Rent Administrator denied the complaint, finding no overcharge.

Bunis thereafter filed a Petition for Administrative Review (PAR) and, after a series of adjournments granted to 92 LP,

issued an order, dated April 1, 1999, granting the PAR. The DHCR found, in part, that the Rent Regulation Reform Act of 1997 (RRRA), which was applicable to all pending cases, prohibited the examination of rental events occurring more than four years prior to the filing of a complaint. As a result, the DHCR employed May 8, 1983 as the base rent date and, by using "the court approved DHCR default procedure,"¹ arrived at \$416.56 as the lawful stabilization rent as of the date of occupancy of Bunis. The DHCR opined that it found the owner in default because it failed to provide an explanation as to why Klimecki was leasing four apartments in the building at the same time and, "[i]n the absence of such explanation, it must be considered that the owner had defaulted in its obligation to provide a rental history showing the lawful rent on the base date of May 8, 1983." The DHCR also concluded that treble damages were not warranted since the owner could have surmised, in good faith, that it had properly calculated the rent by using the last stabilized rent.

Bunis and 92 LP commenced separate Article 78 proceedings challenging different aspects of the DHCR's order, and Supreme Court remitted the matter to the DHCR for further proceedings,

¹Pursuant to the default procedure, the rent of the subject apartment is set as of the date of occupancy at the lowest stabilized rent for an apartment in the same building, containing the same number of rooms, as of that date.

including an oral hearing. At the hearing, which was conducted between June 2001 and March 2002, Klimecki testified, inter alia, that he rented the apartments, furnished them, and sublet them to various corporate entities. Klimecki provided utilities, house cleaning and linens and it was left undisputed that he did not, and never intended to, use the subject apartment as his primary residence.

The Administrative Law Judge (ALJ) issued a report, dated October 27, 2003, in which she recommended, inter alia, that the DHCR Commissioner render an order stating that there was no proof an initial rent registration (RR-1) form had been served upon Bunis, or filed with the DHCR, and that treble damages were not warranted because 92 LP had rebutted the presumption of willfulness.

The Deputy Commissioner, by order and opinion dated February 25, 2004, granted Bunis's PAR, in part, and as in the prior order, established the initial rent using the default formula and directed 92 LP to refund overcharges in the amount of \$58,169.89. The Commissioner declined to impose treble damages, although he did conclude that Klimecki was an illusory tenant.

92 LP subsequently commenced the proceeding at bar, alleging that Klimecki's tenancy was not illusory, but was exempt from rent stabilization due to the fact that it was a non-primary

residence and that his subtenants were exempt because they were commercial tenancies. 92 LP also maintained that the RRRA was inapplicable since it did not take effect until 10 years after the rent overcharge complaint was filed, and because the DHCR had unreasonably and negligently delayed processing this proceeding. 92 LP concluded that the law existing at the time of the complaint was, therefore, applicable and, accordingly, there was no overcharge.

Supreme Court denied the petition and dismissed the proceeding, holding that the DHCR's determination was neither arbitrary nor capricious, nor without a rational basis. Supreme Court found that 92 LP failed to demonstrate the delay in this matter was due to the negligent or willful conduct of the DHCR and, absent such a showing, the law in effect at the time of the determination applies. Supreme Court determined that, in any event, the four-year cut-off date set forth in the RRRA may not be waived. Supreme Court further found that, given Klimecki's testimony, his lease of the apartment in question was clearly illusory. 92 LP appeals and we now affirm.

It is a long-standing, well-established standard that the judicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without

a rational basis in the administrative record (see *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]; *Matter of Cohen v State of New York*, 2 AD3d 522, 525 [2003]), and "once, it has been determined that an agency's conclusion has a 'sound basis in reason' . . . the judicial function is at an end" (*Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 514 [1997], quoting *Matter of Pell*, 34 NY2d at 231; see also *Matter of Smith v New York State Div. of Hous. and Community Renewal*, 27 AD3d 1063 [2006]). Indeed, the determination of an agency, acting pursuant to its authority and within the orbit of its expertise, is entitled to deference (*Matter of Salvati v Eimicke*, 72 NY2d 784, 791 [1988]; *Matter of Tockwotten Assoc. v New York State Div. of Hous. and Community Renewal*, 7 AD3d 453, 454 [2004]), and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record (*Matter of Tolliver v Kelly*, 41 AD3d 156, 158 [2007], lv denied 9 NY3d 809 [2007]; *Awl Indus., Inc. v Triborough Bridge & Tunnel Auth.*, 41 AD3d 141, 142 [2007]). Moreover, it is also well settled that an agency's interpretation of the statutes and regulations it is responsible for administering is entitled to

great deference, and must be upheld if reasonable (*New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d 75, 80-81 [2006]; *Matter of ATM One, LLC v New York State Div. of Hous. and Community Renewal*, 37 AD3d 714 [2007]; see also *Matter of Herzog v Joy*, 74 AD2d 372, 375 [1980], *affd* 53 NY2d 821 [1981] ["an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight"]).

Initially, we can discern no reason, nor are we presented with a viable one, to disturb that branch of the DHCR's determination which found that Klimecki's lease of the apartment constituted an illusory tenancy. In *Matter of Badem Bldgs. v Abrams* (70 NY2d 45, 52-53 [1987]), the Court of Appeals defined an illusory tenancy as a

"residential leasehold created in a person who does not occupy the premises for his or her own residential use and subleases it for profit, not because of necessity or other legally cognizable reason [citations omitted]. Such tenancies are condemned because they permit the unscrupulous to use the provisions of the rent stabilization laws for financial gain, at the expense of those entitled to the laws' protections to obtain living quarters at reasonable cost, and thereby frustrate the laws' purposes. Thus, both the courts and the administrative agencies charged with overseeing rent stabilization have readily formulated remedies to prevent the use of illusory

tenancies . . .” (see also *Matter of Primrose Mgt. Co. v Donahoe*, 253 AD2d 404, 405 [1998]). Accordingly, any such lease is not merely voidable, but void as against public policy (*Drucker v Mauro*, 30 AD3d 37 [2006], *lv dismissed* 7 NY3d 844 [2006]; *Aurora Sportswear Group Ltd. v Eng*, 29 AD3d 445, 446 [2006]).

In this matter, in view of the testimony of Klimecki, during which he admitted that he never occupied the apartment but, instead, leased it solely for the purpose of re-leasing it, at a profit, to corporate entities to use as temporary housing for their employees, we can only agree with the DHCR’s determination that Klimecki’s tenancy falls squarely within the definition of an illusory tenancy. Moreover, 92 LP’s argument that the tenancy was not illusory but, rather, was exempt from the rent stabilization law because the sub-tenants were commercial entities is not only meritless, but consists of nothing more than a shallow, transparent attempt to legitimize a scheme designed to subvert the statutory protections of the rent stabilization law in order to realize a profit (see generally *Matter of 20 West 76th St. v New York State Div. of Hous. and Community Renewal*, 306 AD2d 6 [2003]).

Finally, 92 LP takes issue with the DHCR’s application of the four-year limitations period set forth in the RRRA in establishing a base rent date of May 8, 1983. 92 LP maintains

that if the DHCR had processed the initial complaint promptly,² and adjudicated the matter within a reasonable time, it would have found that the rent for the apartment was properly calculated. In that regard, we observe that the Court of Appeals has unequivocally stated that “[t]he Legislature specifically directed that the RRRRA of 1997 apply to *all* cases pending before the DHCR (*Matter of Gilman v New York State Div. of Hous. and Community Renewal*, 99 NY2d 144, 149 [2002]; *see also Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d 397, 401 [2005]), and that the purpose behind this Legislative enactment was to alleviate the burden on honest landlords of having to retain rent records ad infinitum, and not to immunize dishonest ones from compliance with the law (*Thornton v Baron*, 5 NY3d 175, 181 [2005]); *Matter of Gilman*, 99 NY2d at 149). Moreover, rather than establishing a new statute of limitations, the RRRRA merely “clarified and reinforced the four-year statute of limitations [already]

²While we find the DHCR’s approximately eight-year delay in reaching its initial determination, during which time it served the rent-overcharge application three times on two different owners, to be shocking, and its decision to not so much as address this delay in its submissions to this Court to be disturbing, we note that it has been acknowledged that the DHCR, during this time period, had a substantial backlog of cases, with over 26,000 cases pending in 1992, which number had purportedly been reduced to 2,000 pending overcharge proceedings by May 2002 (*see Matter of Gilman v New York State Div. of Hous. and Community Renewal*, 99 NY2d 144, 152 n1 [2002, Graffeo, J., dissenting]).

applicable to rent overcharge claims (see Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516[a])” (*Thornton*, 5 NY3d at 180).

In the matter at bar, despite the DHCR’s inordinate delay, we decline to disturb its application of the RRRA in rendering its determination. We reach this conclusion not only in view of the Court of Appeals pronouncement that the RRRA applies to “all” cases pending before the agency, but also in light of the public policy considerations raised with regard to the Rent Stabilization Law and the clearly illegal tenancy which sought to circumvent them.

We further note that the Deputy Commissioner, in his decision and order of April 1, 1999, which determined the first PAR, applied the four-year limitations period embodied in the RRRA, but then went on to hold that:

“In any event, it was not proper for the Rent Administrator to allow guideline and vacancy rent increases during the period of time the subject apartment was rented to Mr. Klimecki as a non primary resident. The prior owner allowed Mr. Klimecki to rent four apartments in the subject premises (at least three of which were rented pursuant to non primary residence leases) during the same period of time and it is obvious that the purpose of such rentings was to secure higher rentals from unregulated tenants. An owner should not benefit from this type of renting by receiving rent stabilized guideline and vacancy allowances to cover the period when

the apartment is being utilized as a non primary residence ... The situation here of a non primary resident tenant is analogous to an apartment being vacant for a period of time so there is no reason to permit guideline rent increases when the subject apartment is not being utilized by a rent stabilized tenant."

In sum, the Deputy Commissioner declined to look back to the last rent-stabilized tenant's rent in order to determine that there was no overcharge because of the status of Klimecki's tenancy and, in that regard, we find that the DHCR's determination was neither arbitrary nor capricious, nor without a rational basis.

To the extent that the dissent finds our result is unjustly imposed at the expense of an owner that purchased the building five years after the rent overcharge complaint was filed, we note that it was simply a matter of due diligence for 92 LP to have determined, when it purchased the building, that not only was there a rent overcharge proceeding pending before the DHCR, but that one tenant, in a rent stabilized building, was warehousing apartments in order to circumvent the Rent Stabilization Law and Code and realize an illegal profit for both himself and the prior owner.

We have considered 92 LP's remaining arguments and find them to be without merit.

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

KAVANAGH, J. (dissenting)

Because DHCR has not offered any reasonable explanation to account for why it took almost 17 years to finally decide a tenant's rent overcharge complaint, and because the impact from that delay has undeniably produced a result that is so manifestly unfair to the building's owner, I must respectfully dissent.¹

The relevant facts have been fairly stated by the majority and are not the subject of any meaningful dispute. They lead to one inescapable conclusion: had DHCR promptly processed this matter and rendered a decision within a reasonable period of time after the complaint of overcharge was first filed, it would have undoubtedly confirmed its earlier finding that the rent charged the tenant under this lease was lawful. Because of the unconscionable amount of time it took the agency to process this complaint, the agency felt compelled to apply a statute to this proceeding which was enacted a full decade after the proceeding was commenced, and as a result it reversed its earlier

¹The overcharge complaint was filed by the tenant on May 8, 1987. DHCR issued a decision in favor of the owner eight years later on October 5, 1995. The tenant promptly filed a PAR which was not decided by the agency until four years later on April 1, 1999. Appeals were taken from that determination and DHCR's request that the matter be referred back to it for further proceedings on "all pending issues" was granted. On February 25, 2004, or almost 17 years after the complaint was first filed, the Deputy Commissioner finally issued the decision that is the subject of this appeal.

determination and ruled that the rent charged the tenant did not comply with the Rent Stabilization Law. All that had changed between DHCR's initial finding in favor of the owner and its decision four years later in favor of the tenant, was the enactment of the RRRRA of 1997 and the application of that statute's four-year look-back limitation to this proceeding. All of the evidence upon which this decision was based remained the same.

There can be no doubt but that DHCR's neglect of its administrative responsibilities is the reason why it took so long to decide this matter.² Its conduct throughout these proceedings from the moment it first received the complaint until it rendered its final decision has been characterized by prolonged and unexplained delays for which it bears full responsibility. In fact, during the 17-year period that this matter has been

²At oral argument for the first time, counsel for DHCR, in a response to a question of the court, stated that there had been some 30,000 cases pending before the agency during this period suggesting that this was the reason for the prolonged delay in processing this matter. At no time in any of the submissions to this Court or in the motion court has the agency ever made that argument or in any way attempted to justify its delay on the grounds that its pending caseload prevented it from more promptly processing the matter. The failure to make that argument precludes the agency from making it now (*Matter of Eastern Pork Prods. Co. v New York State Div. Of Hous. & Community Renewal*, 187 AD2d 320 [1992]).

pending, both the owner and the tenant have been forced on separate occasions to initiate CPLR article 78 proceedings against the agency in an effort to compel it to do what it is otherwise legally obligated to do. In addition, for no apparent reason, the agency served this complaint on the owner no less than three separate times (May 1987, September 1990 and April 1994) and on each occasion, required the owner to file an answer even though the claim contained in the complaint was the same and answers to it were already on file with the agency. Nearly two years after the tenant appealed the Rental Administrator's initial determination in favor of the owner, DHCR acknowledged by a letter dated August 7, 1991 that it still had not assigned the matter within the agency for appropriate review or determination.³ Finally, more than two years after DHCR asked the court below to return the matter to it for further proceedings on "all pending issues," the Commissioner on February 25, 2004 issued a final decision in favor of the tenant. Seventeen years to process such a matter is an unconscionable

³While the owner asked for numerous adjournments after the tenant filed for PAR, those adjournments were necessary to reconstruct the rental history of the premises during the time that the petitioner was not in possession. In addition, all of these adjournments pre-dated DHCR's actual assignment of this matter within the agency for internal review and appeared to have played no part in any of the delays incurred in properly processing this matter.

amount of time to do what by law the agency is legally obligated to do, and where that delay has resulted in such a profound prejudice to one of the parties, it should not be sanctioned by this Court in the form of an award to the tenant.

I am well aware that an administrative determination must be upheld if in fact it has a rational basis for the determination (*Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363 [1999]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]), and that a "court may not substitute its judgment for [that of the administrative agency] unless the decision is arbitrary and unreasonable and constitutes an abuse of discretion" (*id.*, 232 [internal quotation marks and citation omitted]). Moreover, an agency's reasonable interpretation of the statutes and regulations it administers is entitled to substantial deference (*Matter of Salvati v Eimicke*, 72 NY2d 784, 791 [1988]).

It is also recognized that "[a]dministrative delay will not defeat the agency, absent a showing that the delay was willful or a result of negligence'" (*Matter of Evans v New York State Div. of Hous. & Community Renewal*, 284 AD2d 193, 193 [2001], quoting *Matter of Estate of Goldman v New York State Div. Of Hous. & Community Renewal*, 270 AD2d 169, 169 [2000]). If there is a

change in the applicable law while a matter is pending before an agency, that law will be applied unless the delay encountered in processing the matter was unreasonable and the result of administrative neglect (*id.* at 169). However, where the agency is responsible for the delay and it appears that there is no justification for it, pre-existing law may be applied (*Matter of Amsterdam-Manhattan Assoc. v Joy*, 42 NY2d 941, 942 [1977]). This is especially so where a party which has in all respects acted appropriately throughout the proceeding would be severely prejudiced by the change in the law. Here, no one has seriously argued that DHCR did not take too long to decide this matter or that petitioner has not been profoundly prejudiced by the application of the change in the law. It is also beyond question that if this ruling is allowed to stand, it will result in a substantial windfall for the tenant.⁴ An experienced real estate professional, she agreed to the rent set by the lease presumably because she believed it was a fair figure to pay for this apartment.⁵ Now she seeks an order which would set the rent for

⁴In addition to this award, it must be noted that tenant, as a result of a dispute with petitioner, stopped paying rent in March 1993, and as of July 31, 1996 owed \$41,600.00 in back rent.

⁵The tenant, when she signed the lease, was a property manager employed by the firm that managed this building for the former owner. She also has lectured at NYU on "Techniques And Operation of Property Management."

this apartment at a figure less than half of what she agreed to pay in the lease, and significantly less than what was paid in 1981 by the last stabilized tenant to occupy the apartment.⁶

All of this is to be imposed at the expense of an owner that purchased this building five years after the rent overcharge complaint was filed - and who did not profit nor was in any way involved in the activities of the prior tenant who last occupied the apartment. Petitioner's good faith belief that the rent it charged the tenant was lawful has never been seriously challenged in this proceeding - in fact, DHCR by not requiring the petitioner to pay treble damages has concluded that any violation of the Rent Stabilization Law by petitioner was neither wilful nor deliberate.⁷

This finding, simply stated, ought to be reversed. Had the agency promptly addressed this matter and processed the rent overcharge complaint within a reasonable period of time, it would have applied the law that existed prior to the enactment of the

⁶On April 1, 1979, the stabilized rent for this premises was \$520.87. Two years later it was increased to \$583.30.

⁷In *Matter of Perl binder v New York City Conciliation & Appeals Bd.* (67 NY2d 697 [1986]), DHCR deemed the sub-tenant the prime tenant based on an illusory tenancy and calculated the proper stabilized rent by applying RGB guideline orders to increase the rent paid by the previous stabilized tenant. It was this method that was utilized to calculate the tenant's rent in this proceeding.

RRRA of 1997 - and confirmed its initial finding that the rent charged this tenant was lawful. Its ultimate determination that a rent overcharge existed is based entirely upon its decision to apply a statute to this proceeding that was enacted long after the proceeding was commenced. And the only reason this provision is at all relevant to this proceeding is because it took DHCR so long to process this matter and decide this complaint. Therefore, Supreme Court should have granted the petition, vacated DHCR's determination and remanded the matter back to the agency with a direction that the complaint of overcharge be determined in accordance with the law that existed prior to the enactment of the RRRA of 1997.

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

ENTERED: DECEMBER 20, 2007

CLERK

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

1739 In re Rashaun S.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.

- - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Lisa B. Freedman of counsel), for appellant.

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

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about June 26, 2006, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts, which, if committed by an adult, would constitute the crimes of unlawful imprisonment in the second degree and menacing in the third degree, and placed him on probation for a period of 1 year, affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the court's determinations concerning credibility (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

Appellant and another youth grabbed the victim's leg and prevented him from leaving a school bathroom as he tried to crawl toward the door in an effort to escape. Appellant continued to

pull on the victim's leg while the other youth touched the victim's pants in the genital area and engaged in other offensive behavior. This conduct constituted restraint (see Penal Law § 135.00[1]; *Matter of Darryl W.*, 24 AD3d 134 [2005]), and also placed the victim in fear of his safety. The evidence does not support appellant's assertion that this behavior was just a childish prank. We also note that the evidence established that appellant was accessorially liable for the acts of his companion (see Penal Law § 20.00).

All concur except McGuire and Kavanagh, JJ.
who dissent in separate memoranda as follows:

KAVANAGH, J. (dissenting in part)

Because I do not believe that appellant's actions, even viewed in their worst light, measure up to the crime of unlawful imprisonment in the second degree, I must respectfully dissent.

Both appellant and the victim were, at the time of the incident, 11-year-old students attending fifth grade at the same elementary school. According to the victim, at approximately 2:00 p.m on January 9, 2006, he left his classroom to use the bathroom located five to ten feet down the hall. As he was about to wash his hands, appellant and Jamel S., another fifth grade student attending the same school, entered the bathroom. Jamel stated, "Yeah, [you're] in the bathroom all by [your]self." Believing that something was about to happen, the victim ran inside a nearby stall and closed the door, but was unable to lock it. Jamel opened the door and grabbed the victim by his shirt. As Jamel was pulling him from the stall, the victim slipped on some water and fell to the floor. Jamel then said "let's go duck [the victim's] head in the toilet." The victim at that point was turned over on his stomach and was crawling toward the bathroom door. Jamel grabbed one of the victim's legs and appellant grabbed the other, and both began to pull the victim toward the urinal. At that point, Jamel flipped the victim onto his back, grabbed the victim's penis over his clothes and began making

"huffing noises." The victim then hit appellant and Jamel's hands and knocked them off of his legs, pulling himself from their grasp. He then got up and ran out of the bathroom. According to the victim, the entire episode happened within one minute.

Appellant's testimony cast the entire episode in a different light. Appellant acknowledges pushing the victim after he bumped into appellant. Appellant also admits pulling on the victim's leg, but says he did so in order to open the bathroom door to leave the bathroom. However, both the victim and appellant's testimony are consistent to the extent that they state that what happened in the bathroom involved a minimum of physical contact, which took place over a very brief period of time. Neither makes the case that what transpired constituted a substantial interference with the victim's movements because he was not transferred against his will to another place or confined to that location for any meaningful period of time.

Even considering the evidence as to what occurred in the bathroom in a light most favorable to the presentment agency (see *Matter of Carlique P.*, 42 AD3d 367 [2007]; *Matter of Marie K.*, 19 AD3d 149 [2005]), it simply failed to establish a prima facie case of unlawful imprisonment. A person is guilty of unlawful imprisonment in the second degree when "he restrains another

person" (Penal Law § 135.05). To restrain a person is "to restrict a person's movements intentionally and unlawfully in such manner as to interfere *substantially* with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences . . . without consent and with knowledge that the restriction is unlawful. A person is so moved or confined 'without consent' when such is accomplished by . . . physical force, intimidation or deception" (Penal Law § 135.00[1] [emphasis added]).

The acts of appellant and Jamel, while obnoxious and immature, amount to nothing more than horseplay among fifth graders and do not constitute a substantial interference with the victim's liberty interest. It involved a minimal amount of physical contact which constituted no more than a shove which may have caused the victim to fall, and a pull on the victim's leg while he was on the bathroom floor. These contacts over such a brief period of time simply did not measure up to a substantial interference with the victim's freedom of movement - instead it was a schoolyard-type confrontation which lasted for a very brief moment in time and is not the sort of conduct which this statute was enacted to criminalize (*compare People v Peters*, 1 AD3d 270 [2003], *lv denied* 1 NY3d 632 [2004][an assailant's actions in binding his victims' mouths, hands and feet with tape, placing a

plastic bag over a victim's head, and placing the other victim inside a cardboard box constituted a restraint])(*compare Matter of Darryl W.*, 24 AD3d 134 [2005] [defendant's physical restraint preventing his victim from leaving a classroom]). While I agree that appellant's behavior cannot be condoned, it does not measure up to contacts of so significant a duration or impact as to constitute an unlawful restraint.¹

While I reluctantly agree with the majority that the charge of menacing in the third degree has been established by the credible evidence presented below, I am convinced that this entire episode was nothing more than an obnoxious prank perpetrated by two eleven-year-old children in a schoolyard-type setting. A full-scale prosecution for juvenile delinquency in Family Court and all that such action entails strikes me as being totally out of proportion with what actually occurred. I simply cannot believe that the interest of justice would not have been better served by having the entire matter addressed within the school system in an appropriate disciplinary proceeding.

¹Moreover, had appellant raised the argument, we could have concluded that the unlawful imprisonment charge merged with the menacing conviction (*see People v Peters*, 1 AD3d at 271).

McGUIRE, J. (dissenting)

I agree with Justice Kavanagh that the evidence was legally insufficient to establish the restraint element of the unlawful imprisonment charge and, with one exception, join in his opinion. I note, too, that one can easily conceive of a myriad of situations in which children or teenagers might grab the arm or leg of another child or teenager and pull him or her a short distance for a similarly brief period of time for some playful or obnoxious reason. Provided only that the "victim" did not consent to the "restraint," the majority's view of the restraint element compels the conclusion that the crime of unlawful imprisonment has been committed in these situations. The exception is that I respectfully disagree both with Justice Kavanagh and the majority with respect to the sufficiency of the evidence to support the menacing charge. In my opinion, even assuming a rational trier of fact could conclude that the victim was in fact placed "in fear of . . . imminent . . . physical injury" (Penal Law § 120.15), no rational trier of fact could conclude that appellant had the requisite mens rea - the intent, i.e., the "conscious objective" (Penal Law § 15.05[1]), of

causing the victim to be placed "in fear of . . . imminent . . . physical injury" (Penal Law § 120.15).

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

ENTERED: DECEMBER 20, 2007

CLERK

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

1930 The People of the State of New York, Ind. 6879/04
 Respondent,

-against-

Todd Johnson,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York
(Jonathan M. Kirschbaum of counsel), and Caren Rotblatt, for
appellant.

Robert M. Morgenthau, District Attorney, New York (Rena Paul of
counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White,
J.), rendered April 11, 2006, convicting defendant, after a jury
trial, of robbery in the second degree, and sentencing him, as a
second felony offender, to a term of 9 years, unanimously
affirmed.

At about 10:45 p.m., a citizen informant driving a van
approached Officer Gallagher and his fellow officers, all of whom
were in a parked and unmarked vehicle, and pointed to defendant
and his two companions, all three of whom had walked past the
vehicle a "couple of seconds" before the informant approached the
officers. The informant told them that the three men had "just
robbed someone down the block." Officer Gallagher asked the
informant, "The three guys who just walked by the car? Those

three guys?" When the informant answered "yes," Officer Gallagher told him to remain where he was. The officers drove down the block, exited the vehicle, identified themselves as police officers, and told defendant and the other two men to "get on the ground." Although one of the men complied with the direction, defendant and the other man fled. After a chase, defendant was apprehended and a search of his person uncovered, among other things, one \$50 bill and three Metrocards.

The close and difficult question presented on this appeal is whether the more reasonable inference is that the informant spoke from personal knowledge when he reported that defendant and his companions had "just robbed someone down the block" (see e.g. *People v Ransdell*, 254 AD2d 63 [1998], *lv denied* 92 NY2d 1037 [1998]). To be sure, the informant's account lacked any detailed description of the alleged robbery from which it might be inferred that he had seen it (see *People v Parris*, 83 NY2d 342, 350 [1994]). Nonetheless, as between the only two possibilities -- the informant saw the robbery occur moments before or was told the robbery occurred moments before -- the more reasonable conclusion under all the circumstances, including that the informant stopped his vehicle to make his report to individuals he believed to be police officers, is that the informant was reporting what he had just seen rather than what he had just been

told. Accordingly, we find that the record provided sufficient basis to conclude that the informant's statement was based on personal knowledge and provided the officers with probable cause to arrest defendant.

When deliberations began, the parties agreed in response to an inquiry by the court that the exhibits could be brought into the jury room if the jury requested them. Although the record otherwise makes no mention of it, a note from the jury that was marked Court Exhibit 2 was sent about an hour after deliberations began requesting "all evidence pertaining to this case."

Defendant claims for the first time on appeal that this note was a "substantive" one that neither the court nor the parties ever saw and, in any event, that the court failed to comply with the procedures mandated by CPL 310.30 (see *People v O'Rama*, 78 NY2d 270 [1991]) in assertingly doing nothing in response to the note.

We reject this claim as defendant failed to make a record in the trial court that is sufficient to permit appellate review (see *People v Kinchen*, 60 NY2d 772, 773-774 [1983]). Moreover, as we stated in rejecting for this reason a claim that the trial court had violated the principles of *People v O'Rama* in its response to a jury note, "[a] presumption of regularity attaches to judicial proceedings and may be overcome only by substantial

evidence" (*People v Rodriguez*, 11 AD3d 350 [2004], *lv denied* 4 NY3d 802 [2005]). On the existing record, the more reasonable conclusion is that the jury's request for the "evidence" was in fact a ministerial request for the exhibits. It is unlikely that the jury would have immediately sought a readback of all the testimony given that the court had just finished advising the jury that when requesting a readback of testimony, it should "consider carefully what specific portions" of the testimony would be helpful "rather than asking for all of the testimony to be read back." It also is unlikely that the jury would have silently acquiesced in its request being ignored for no apparent reason. In fact, the jury's request for the "evidence" was never reiterated, and the jury subsequently requested a limited readback.

The motion to consolidate the two indictments was properly granted. To the extent that defendant claims that consolidation deprived him of his due process right to a fair trial, he did not raise this claim before Supreme Court and thus it is not preserved for our review (CPL 470.05[2]). Defendant was charged under indictment No. 6879/04 with two theories of robbery, that he robbed Phil Simmons while aided by another person (of which defendant was convicted), and that he caused physical injury to Simmons during the robbery (of which defendant was acquitted),

and was charged under indictment No. 2716/05 with criminal possession of stolen property for possessing two Metrocards purchased with a credit card stolen from Raul Ruiz. On the particular facts of this case, the evidence that defendant possessed stolen Metrocards was material and admissible as evidence-in-chief in connection with the trial on the charges relating to the robbery of Simmons, and evidence of that robbery was material and admissible as evidence-in-chief in connection with the trial on the stolen property charges. Accordingly, and because proof of each crime was easily segregable in the minds of the jurors, the trial court did not improvidently exercise its discretion in ordering the consolidation of both indictments pursuant to CPL 200.20(2)(b) and 200.20(4) (see *People v Lane*, 56 NY2d 1, 7-8 [1982]; *People v McCall*, 13 AD3d 197, 198 [2004], *lv denied* 4 NY3d 833 [2005]). That defendant was acquitted of the stolen possession charges is further indication that defendant suffered no prejudice "by the consolidation and that the jury was able to segregate the evidence as it related to each charge" (*People v McNeil*, 39 AD3d 206, 208 [2007]).

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

ENTERED: DECEMBER 20, 2007

CLERK

be in breach of the restrictive covenant in plaintiff's lease, (3) granted the hotel's cross motion for summary judgment dismissing Landau's first (contribution and indemnification) and third (breach of license agreement) cross claims against the hotel, and (4) denied Landau's cross motion to dismiss the hotel's four cross claims against Landau for breach of license, indemnification, contribution and attorney fees; with respect to defendant hotel, (A) denied its cross motion to dismiss plaintiff's first (breach of lease) and fifth (injunctive relief) causes of action against it, (B) denied its cross motion to dismiss Landau's second cross claim (legal expenses) against it, and (C) granted plaintiff summary judgment on its first cause of action (breach of the restrictive covenant); and with respect to plaintiff, (I) denied its motion for summary judgment on its fifth cause of action (injunctive relief against Landau), (ii) granted the hotel's cross motion to dismiss the second (breach of lease), third (fraudulent misrepresentation) and fourth (interference with business) causes of action, and (iii) granted Landau's cross motion to dismiss the fifth cause of action (injunctive relief), unanimously modified, on the law, Landau's motion to dismiss the hotel's cross claims granted; the hotel's motion to dismiss the first and fifth causes of action granted; and otherwise affirmed, without costs.

Order, same court and Justice, entered December 7, 2006, insofar as it denied third-party defendant HST's motion to dismiss the third-party complaint, and granted plaintiff's motion to assert claims against HST, the hotel's successor in interest, unanimously affirmed; appeal from so much of said order as denied Landau's motion for *Yellowstone* relief unanimously dismissed as academic in view of the foregoing, all without costs.

In May 1999, the hotel entered into an agreement with Landau, which sells high quality costume jewelry in stores throughout the United States, allowing Landau to use space in the hotel to sell its jewelry. A significant portion of Landau's jewelry employs some degree of 14k gold in conjunction with synthetic stones. Section 1(a) of the license limited Landau's sale to "high quality costume jewelry" and other high quality merchandise.

Approximately 10 months after the Landau license was executed, the hotel entered into a lease with plaintiff permitting plaintiff to use its store space at the hotel for merchandise such as "jewelry, time pieces, gifts, health and beauty aids, cultured pearls, tobacco product and candy and for no other purpose." This agreement contained a restrictive covenant whereby the hotel promised that as long as the plaintiff-tenant was not in default under the lease, the hotel

agreed to not rent any other space in the hotel "for the sale and/or display of Karat Gold Jewelry, watches and cultured pearls."

Plaintiff's principal was given a copy of the Landau lease, and personally visited Landau's store in the hotel prior to signing its lease. During that visit plaintiff's principal was able to view the merchandise Landau had on display, including costume jewelry earrings that incorporated 14k gold settings with synthetic stones.

Four years after entering into its lease with the hotel, plaintiff commenced this action complaining that the merchandise on sale in Landau's space violated the restrictive covenant in its lease. Plaintiff seeks damages from the hotel, as well as a permanent injunction against both the hotel and Landau seeking to halt the sale of some of its jewelry.

Supreme Court erred by granting plaintiff summary judgment on its first cause of action against the hotel on the grounds that Landau's operation and some of the jewelry it had for sale constituted a breach of the restrictive covenant in plaintiff's lease. The restrictive covenant by its terms is expressly prospective in that it provides that the hotel "will not rent" competing space, and as such constitutes an expression of future intention and a prohibition of future action. The fact that it

is conditioned upon plaintiff not defaulting in its obligations under the license is evidence that the restrictive covenant only became effective during the lease term, and was not intended to apply to uses that predate plaintiff's lease agreement with the hotel.

Moreover, plaintiff took possession with full knowledge not only of the specific provisions contained in Landau's license, but also with the type of merchandise that Landau had for sale in its operation in the hotel's lobby. As such plaintiff's claim against the hotel for damages and/or injunctive relief must be dismissed (*see Danish Maid v South Bay Ctr.*, 11 AD2d 768 [1960]; *see generally* Annotation, *Validity, Construction, and Effect of Lessor's Covenant against Use of his Other Property in Competition with the Lessee-Covenantee*, 97 ALR2d 4).

Additionally, the claim against Landau was properly dismissed because Landau's license predated plaintiff's lease, and as such, Landau cannot be held to have notice of or be subject to it (*see Key Drug Co. v Luna Park Realty Assoc.*, 221 AD2d 598 [1995]).

Plaintiff's contention that its claim for injunctive relief against Landau should survive because Landau was on notice of the terms of the restrictive covenant in plaintiff's lease when Landau commenced a "new" term of its license in July 2002 is

belied by the record. This agreement between Landau and the hotel merely amended the existing May 1999 license by extending its term and relocating Landau's operation in a different part of the hotel's lobby. As to all other particulars, the May 1999 agreement continued in effect, and governed the rights of the parties in regard to Landau's operation in the hotel lobby.

In addition, the record warrants a finding that Landau was selling merchandise as contemplated by its license with the hotel. Hyman, Landau's owner, testified that Landau had for years been selling products that incorporated 14k gold settings in combination with synthetic stones, as well as earrings that had 14k posts for hypoallergenic purposes. Landau's expert testified that once a precious metal is combined with something synthetic like a synthetic stone, it is considered "costume jewelry," and Landau's merchandise was, by industry standards, high quality costume jewelry. He also testified that jewelry such as that being sold by Landau was commonly classified at industry trade shows and by department stores as costume jewelry, and sold as such. Plaintiff's expert offered a differing opinion regarding the classification of costume and fine jewelry, but while he was experienced as an importer and wholesaler of "fine jewelry," he was not a retailer, and offered no testimony regarding the jewelry Landau was selling in its store in the

hotel's lobby.

The hotel's cross claims against Landau should have been dismissed. Because the motion court correctly dismissed the fifth cause of action for injunctive relief against Landau, there is no claim remaining that would prevent Landau from exercising and fulfilling its rights under the May 1999 license. Once the claim against Landau for breach of license is dismissed, the other claims, for indemnification, contribution and attorneys' fees, must fall.

The motion to dismiss the third-party complaint, and plaintiff's motion to amend, were properly granted insofar as HST is the hotel's successor in interest. In light of this disposition, the *Yellowstone* application is academic.

We have considered the parties' other arguments for affirmative relief and find them without merit.

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

ENTERED: DECEMBER 20, 2007

CLERK

Saxe, J.P., Friedman, Sweeny, McGuire, Malone, JJ.

1985 Michael Boccia, et al., Index 22957/04
Plaintiffs-Appellants,

-against-

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

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

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Debra
A. Adler of counsel), for respondents.

Order, Supreme Court, Bronx County, (Yvonne Gonzalez, J.),
entered October 6, 2006, which denied plaintiff's motion for
partial summary judgment on his cause of action under Labor Law §
240(1), unanimously affirmed, without costs.

Summary judgment in plaintiff's favor is precluded by an
issue of fact as to whether plaintiff fell off the ladder
because, as plaintiff claims, it "shifted" or "slipped" due to
water, mud, concrete mortar, and other debris on the ground, or
because, as defendants claim, plaintiff slipped on the ladder due
to "wet concrete" or "wet cement" on his boots (*compare McCormack
v Helmsley-Spear, Inc.*, 233 AD2d 203 [1996] with *Cruz v Turner
Constr. Co.*, 279 AD2d 322 [2001]). That issue is raised by the
accident reports prepared by plaintiff's foreman in plaintiff's
presence on the basis of information provided by plaintiff

stating that plaintiff slipped on the ladder due to a wet substance on his boots (see *Buckley v J.A. Jones/GMO*, 38 AD3d 461 [2007]; *Antenucci v Three Dogs, LLC*, 41 AD3d 205, 206 [2007]).

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

ENTERED: DECEMBER 20, 2007

CLERK

change of circumstances warranting a modification of child support inasmuch as when, while not attending college, the majority of the child's time was spent at petitioner's residence in Pennsylvania (see *Tryon v Tryon*, 37 AD3d 455, 457 [2007]; *McMillen v Miller*, 15 AD3d 814 [2005]). The Support Magistrate's finding that the child's testimony was credible despite his expressed concerns as to the effect his testimony would have on his relationship with his parents, is entitled to deference (see *Matter of Childress v Samuel*, 27 AD3d 295, 296 [2006]). The Support Magistrate also properly determined that regardless of any change in circumstances, petitioner was obligated to continue to support his son (see *Rocchio v Rocchio*, 213 AD2d 535, 537 [1995]), including paying 100% of the educational expenses.

We have considered appellant's remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 20, 2007

CLERK

Tom, J.P., Friedman, Williams, McGuire, Kavanagh, JJ.

2268N The Cadle Company,
 Plaintiff-Appellant,

Index 112723/06

-against-

James Lisa,
 Defendant-Respondent.

Vlock & Associates, P.C., New York (Steven P. Giordano of
counsel), for appellant.

Order, Supreme Court, New York County (Marylin G. Diamond,
J.), entered February 7, 2007, which denied plaintiff's motion
for summary judgment in lieu of complaint with leave to renew,
and sua sponte transferred the action to Civil Court, New York
County, unanimously modified, on the law, the transfer vacated,
and the matter remanded to Supreme Court, New York County, for
consideration of the merits of the motion, and otherwise
affirmed, without costs.

Plaintiff moved for summary judgment pursuant to CPLR 3213
to domesticate a \$13,230.05 judgment obtained in Superior Court
of New Jersey upon defendant's default. Supreme Court, in
essence, transferred the matter to Civil Court pursuant to CPLR
325(d). While Supreme Court may, in its discretion, remove an
action without consent to Civil Court where it appears that the
amount of damages sustained may be less than demanded, Supreme

Court may only do so where Civil Court would have jurisdiction but for the amount of damages demanded (CPLR 325[d]). Where, as here, Civil Court may not have personal jurisdiction over the defendant, Supreme Court should not have transferred the action pursuant to CPLR 325(d) (see Siegel, NY Practice § 27, at 30 [4th ed]; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C:325.4, at 362-363; see also *Rochester Tele. Corp. v Kirchner*, 97 Misc 2d 725, 726-727 [Sup Ct, Monroe County 1978; Pine, J.] ["While the Rochester City Court would have had jurisdiction over the subject matter of the instant action, service of process on the defendant in Massachusetts could not have secured personal jurisdiction by Rochester City Court over the defendant. Plaintiff's removal motion is therefore denied" (footnote omitted)]).

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

ENTERED: DECEMBER 20, 2007

CLERK

Mazzarelli, J.P., Saxe, Sullivan, Catterson, Kavanagh, JJ.

1640-

1641 Eleanor Duffy,
Plaintiff-Respondent,

Index 120794/02

-against-

Dr. James M. Vogel, et al.,
Defendants-Appellants.

Aaronson, Rappaport, Feinstein, & Deutsch, LLP, New York (Anthony J. Connors of counsel), for Dr. James M. Vogel and James M. Vogel, M.D., P.C., appellants.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for Dr. Allan J. Jacobs, appellant.

Jonathan M. Landsman, New York for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered March 7, 2007, reversed, on the law, without costs, plaintiff's motion to set aside the verdict denied and the verdict reinstated. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Opinion by Kavanagh, J. All concur except Sullivan and Catterson, JJ. who dissent in an Opinion by Catterson, J.

Order filed.

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

1932 Lisa C. Green,
Plaintiff-Appellant,

Index 600420/03

-against-

William Penn Life Insurance
Company of New York,
Defendant-Respondent.

Thomas Torto, New York for appellant.

Bleakley Platt & Schmidt, LLP, White Plains (Robert D. Meade of
counsel), for respondent.

Judgment, Supreme Court, New York County (Harold Beeler,
J.), entered June 29, 2006, reversed, on the law, without costs,
and plaintiff awarded the principal amount of the policy, plus
statutory interest from the date of the insured's death. The
Clerk is directed to enter judgment accordingly.

Opinion by Saxe, J. All concur except Andrias, J.P. and
Nardelli, J. who dissent in an Opinion by Andrias, J.P.

Order filed.

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

2091 In re Albert Milton K., Jr.,

A Dependent Child Under The
Age Of Eighteen Years, etc.,

St. Vincent's Services, Inc.,
Petitioner-Respondent,

Albert Milton K.,
Respondent-Respondent.

- - - -

Tamara Steckler,
Law Guardian,
Appellant.

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel),
for St. Vincent's Services, Inc., respondent.

Neal D. Futerfas, White Plains, for Albert Milton K., respondent.

Order, Family Court, New York County (Susan K. Knipps, J.),
entered on or about June 27, 2005, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
DECEMBER 20, 2007

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

M-6196X Navarone Productions, N.V. v HSBC Gibbs Gulf Insurance
Consultants Limited - Sony Pictures Entertainment, Inc.
(And other actions)

M-6266X Pompey v Benscome - Atkins

M-6280X Stamack, Inc. v Romero

M-6281X Lowman v AKS 183rd St. Realty Corp.

6294X Extell West 45th LLC v Swamm International, Inc., also
known as Swamm Int'l Inc.

M-6308 People v Williams, Ronald

M-6320X Jankowitz v Allen Realty Co., LLC
(And a third-party action)

M-6372X Marina Towers Associates, L.P. v Gulf Insurance Company

M-6378X Tecon Oil Services Limited v Bayerische Hypo-Und
Vereinsbank

Appeals withdrawn.

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

M-6375 People v Quinones, Jose
 Appeal deemed withdrawn.

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

M-6374 People v Pizarro, Angel L., also known as Pizarro,
 Angel L.
 Appeal deemed withdrawn.

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

M-6256 Seibel v Von Furstenberg

M-6295 Andrewson Corp. v Naglaa R.E. Corp.

M-6305 AY Bank Limited (In Liquidation) v JPMorgan Chase &
 Co.

M-6332 Brown v Konckier - Parfums Jacques Bogart, S.A., also
 known as Jacques Bogart S.A.

M-6368 Kuncer v Wyeth (formerly known as American Home
 Products Corporation)

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

Lippman, P.J., Andrias, Nardelli, Gonzalez, Kavanagh, JJ.

M-5028 In the Matter of M., Latricia - Administration for
Children's Services

Leave to prosecute appeal as a poor person granted,
as indicated. (See M-5028A, decided simultaneously herewith.)

Gonzalez, J.

M-5028A In the Matter of M., Latricia - Administration for
Children's Services

Stay denied. (See M-5028, decided simultaneously
herewith.)

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

M-6230 Fields v Fields
(and another action)

Vacatur denied, as indicated.

Lippman, P.J., Friedman, Sullivan, Gonzalez, Catterson, JJ.

M-5539 People v Rawlings, Doniell

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

Lippman, P.J., Mazzarelli, Andrias, Buckley, Sweeny, JJ.

M-5752 People v Myers, Brian

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

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

M-6025 People v Keno, James

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

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

M-5533 In the Matter of Z., Marco and Z., Maria v M., Jorge Luis

Appeal dismissed, as indicated.

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

M-5940 People v Mercado, Enrique

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

Tom, J.P., Friedman, Williams, McGuire, Kavanagh, JJ.

M-5828 People v Diaz, Angel

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

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

M-5952 People v Chatelain, Billy

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

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

M-5854 Pandian v The New York City Health and Hospitals
Corporation

M-5902 People v Rivera, Miguel

M-5903 People v Hernandez, Esmeraldo

M-5904 People v Alvarado, Andrea

M-6007 In the Matter of Naimoli v Kelly

Time to perfect appeals enlarged to the April 2008
Term.

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

M-6069 The New York Racing Association, Inc. v New York City
Off-Track Betting Corporation

Time to perfect appeal enlarged to the May 2008 Term.

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

M-5804 Kuhn v Sugar Reef Inc., doing business as Global 33
(And other actions)

Time to perfect appeal enlarged to the May 2008 Term.

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

M-5595 Stawski v Stawski

Leave to appeal to the Court of Appeals denied.

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

M-5966 Capogrosso v Metropolitan Dental Associates, D.D.S.

Leave to withdraw as counsel granted; time to perfect
appeal enlarged to the May 2008 Term and the motion otherwise
denied.

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

M-5665 In the Matter of K., Tristram - Commissioner for
Children's Services of the City of New York
(And other actions)

Motion deemed withdrawn.

Tom, J.P., Friedman, Williams, McGuire, JJ.

M-5520 People ex rel. Amelio P. Marino on behalf of
Velayuthampillai, Sivapalاسri

Reduction of bail denied.

Mazzarelli, Marlow, Williams, Catterson, JJ.

M-4691 In the Matter of W., Aaron Tyrell, also known as W.,
Aaron; R., Faith; B., Karen; B., Shakkia and H.,
Shyheim - Commissioner of Social Services

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

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

M-4248 People v Cumberland, Robert

Writ of error coram nobis denied.

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

M-3927 People v Robertson, Damon, also known as Robertson,
Damien

Writ of error coram nobis and other relief denied.

Andrias, J.P., Nardelli, Gonzalez, Sweeny, Malone, JJ.

M-5650 Bradley v Ibex Construction, LLC
(And other actions)

Time to perfect appeals enlarged to the April 2008
Term.

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

M-6247 Mihelis v i.park Lake Success LLC
(And other actions)

Stay of trial granted.

Andrias, J.P., Nardelli, Gonzalez, Sweeny, Malone, JJ.

M-5687 Vilomar v 490 East 181 Street Housing Development
Fund Corporation

Time to perfect appeal enlarged to the April 2008
Term.

Andrias, J.P., Nardelli, Gonzalez, Sweeny, Malone, JJ.

M-5840 In the Matter of Gomez v Triborough Bridge
and Tunnel Authority

Leave to prosecute appeal as a poor person denied,
with leave to renew, as indicated; time to perfect appeal
enlarged to the May 2008 Term; motion otherwise denied.

Saxe, J.P., Friedman, Sweeny, McGuire, Malone, JJ.

M-5308 McClarence v Gougler

Notice of appeal deemed timely filed; time to perfect
appeal enlarged to the May 2008 Term.

Saxe, J.P., Friedman, Sweeny, McGuire, Malone, JJ.

M-5119 Lamot v The City of New York

Time to perfect appeal enlarged to the April 2008
Term.

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

M-3638 People v Dixon, Echo, also known as Dixon, Edio,
also known as Dixon, Echo Westley

Writ of error coram nobis denied.

Friedman, J.P., Sullivan, Buckley, Malone, JJ.

M-5644 In the Matter of C., Nehemiah - Cardinal McCloskey
Services

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

Friedman, J.P., Nardelli, Gonzalez, McGuire, Malone, JJ.

M-5031 In re Pantelidis v New York City Board of Standards
M-5157 and Appeals

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

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

M-5905 People v Johnson, Patreese

Leave to prosecute appeal as a poor person granted
to the extent indicated.

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

M-6015 Metro Masons, Inc. v RFD 425 Fifth Avenue, LLC

Time to perfect appeal enlarged to the May 2008 Term.

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

M-5946 Villanueva v Kahn

Time to perfect appeal enlarged to the April 2008
Term.

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

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

M-6108 Adam Kenneth Block, admitted on 3-23-1994,
at a Term of the Appellate Division,
Second Department

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

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

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

M-6437 Patrice Christine Alfano, admitted on 4-25-1990,
at a Term of the Appellate Division,
Second Department

Motion for reinstatement granted and respondent
reinstated as a retired attorney in the State of New York,
as indicated. No opinion. All concur.

Friedman, J.P., Marlow, Nardelli, Sweeny, Malone, JJ.

M-4765 In the Matter of Andres M. Aranda
(admitted as Andres Manuel Aranda),
a suspended attorney:

Petition for reinstatement granted to the extent of referring the matter to the Committee to designate a Hearing Panel to conduct a hearing, as indicated. No opinion. All concur.

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

M-5214 In the Matter of Arthur Lewis Glatman,
an attorney and counselor-at-law:

Respondent publicly censured. Opinion Per Curiam.
All concur.

Sullivan, J.P., Buckley, Gonzalez, Sweeny, Kavanagh, JJ.

M-2055 In the Matter of Albert S. Lefkowitz
M-2910 (admitted as Albert Solon Lefkowitz),
an attorney and counselor-at-law:

Respondent suspended from the practice of law in the State of New York for a period of three months, effective January 22, 2008; cross motion denied. Opinion Per Curiam. All concur.

The following order was entered and filed on December 18, 2007:

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

M-6179 In the Matter of Sands v The State of New York

Time to file respondent's brief enlarged to on or before January 9, 2008 and appellant's reply brief to be served and filed on or before January 18, 2008, for the February 2008 Term, to which Term appeal adjourned.

The following order was entered and filed on December 19, 2007:

Friedman, J.P., Marlow, Sullivan, McGuire, JJ.

M-6417 Wechsler v Wechsler

Clarification granted to the extent of issuing a corrected decision and order of this date (Appeal No. 1094); vacating the information subpoena with restraining notice served by plaintiff's counsel upon counsel for defendant-appellant on condition that on or before December 31, 2007, defendant-appellant's counsel posts an undertaking, all as indicated; costs denied.