

(Alps), which is a closely held corporation. The only other shareholder and officer is nonparty Pashco Preldakaj. Alps owned an apartment building located at 3650 Bronx Boulevard. Both Agim and Lush maintain that they are employed full-time in jobs unrelated to the building or the corporation. They further assert that Pashco is solely responsible for maintaining the building and for hiring workers to perform services in and around the building.

In July, 2004, Pashco hired defendant Gjeloš Preldakaj, a relative, to refinish hardwood floors in the building. The refinishing project lasted nine days and plaintiffs claim that Pashco supervised and directed Gjeloš's work on a daily basis. They further assert that Pashco selected and purchased the materials which Gjeloš used. On July 7, 2004, Agim and Lush visited the building to inspect the refinishing work. They allege that fumes from a refinishing chemical ignited and exploded, causing them injury. Agim and Lush (and Agim's wife derivatively) commenced this action against Alps for negligence and the negligent hiring of Gjeloš. They named Gjeloš as a defendant in an amended complaint and specifically alleged *res ipsa loquitur* as a theory of liability against defendants.

After Alps appeared, but before any significant discovery had been conducted, it moved for summary judgment to dismiss the complaint. Alps argued that it could not be held liable for the

negligence of an independent contractor. It further asserted that as principals of Alps, Agim and Lush could not recover against Alps for negligence, since their status as principals made them responsible themselves for the breach of duty that led to the accident.

Plaintiffs cross-moved for summary judgment in their favor on the issue of liability. They argued that Agim and Lush could not be responsible for the accident in their capacities as principals in Alps because they did not supervise or otherwise participate in the floor refinishing work. They further argued that, pursuant to Multiple Dwelling Law § 78(1), Alps owed them a nondelegable duty to keep the building in good repair.

The motion court denied Alps' motion and found that a question of fact existed as to whether Alps was negligent in selecting, instructing or supervising Gjelosh. It also identified an issue of fact regarding the extent of Agim's and Lush's authority over the affairs of Alps. Additionally, the court denied plaintiffs' cross motion for summary judgment. It held that Multiple Dwelling Law § 78(1) is inapplicable to this case, stating that the statute relates to a building owner's duty to make repairs to an apartment.

Summary judgment was properly denied to all parties. As to Alps' liability to plaintiffs, a person is not precluded from bringing an action against a corporation simply because he is a

principal of the corporation. The determinative factor is whether the person's role in the affairs of the corporation involved ensuring the performance of the particular corporate duty whose breach he alleges caused his injury. If it did, the person is barred from maintaining the action (see *Zimmerman v Pokart*, 242 AD2d 202, 203 [1997]). Here, there are questions of fact as to whether Agim and Lush ceded all authority over building affairs to Pashco (see *Matter of Witherill*, 37 AD3d 879 [2007]), or whether they were in fact involved in the maintenance of the premises.

There is also a question of fact as to whether Gjelosh's status as an independent contractor shielded Alps from liability. The general rule is that a party may not be held liable for the negligent acts of its independent contractor (*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]). An exception exists where the party supervises the contractor, and does so negligently (see *Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]). Here, plaintiffs asserted that Pashco supervised Gjelosh's work. However, we reject plaintiffs' argument that the evidence of Alps' negligence in supervising the work is so overwhelming that they may be awarded summary judgment on a theory of *res ipsa loquitur*. To the contrary, the record has hardly been developed (see *Morejon v Rais Const. Co.*, 7 NY3d 203 [2006]). Nevertheless, the allegation that Pashco purchased the

chemicals that Gjelow used, taken together with the allegation that the chemicals ignited, creates an issue of fact as to whether Alps was negligent.

The motion court's interpretation of Multiple Dwelling Law § 78(1), that it only protects persons on the premises from a landlord's failure to repair a defect, but not from an affirmative act of negligence, is inaccurate. The statute was enacted to protect tenants, guests and invitees on the premises and to place liability on owners should they not keep the premises in a safe condition (*see Trimarco v Klein*, 56 NY2d 98, 105 [1982]). Nevertheless, there remains an issue of fact as to whether Agim and Lush were protected by the statute at the time of the accident. The admission by Agim and Lush that at the time of the accident they were at the building for no purpose other than to inspect the refinishing work suggests that they exercised some degree of supervision over the work. Depending on the extent of their supervision, they may have owed a duty to ensure that it was carried out in a safe manner. If Agim and Lush owed such a duty, they may not invoke Multiple Dwelling Law § 78(1)

(see *Zimmerman v Pokart*, 242 AD2d at 203). However, on this record, we cannot determine the extent of their involvement in the floor refinishing project.

THIS CONSTITUTES THE DECISION AND ORDER
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requirements. Defendant failed to make a record in the trial court that is sufficient to permit appellate review (*People v Johnson*, 2007 WL 4443251, 2007 NY App Div LEXIS 12791 [2007]).

The record demonstrates that the court, at least, fulfilled its "core responsibility" (*People v Kisoorn*, 8 NY3d 129, 135 [2007]) to notify counsel of the contents of each note by reading it in open court. The court did not prevent counsel from knowing the specific contents of the notes, or from suggesting different responses than those the court provided (compare *People v Starling*, 85 NY2d 509, 516 [1995], with *People v Cook*, 85 NY2d 928 [1995]). Furthermore, viewed in light of the presumption of regularity (see *People v Velasquez*, 1 NY3d 44, 48 [2003]), we conclude that the "pause in proceedings" in each instance was an off-the-record disclosure of the note to counsel, accompanied by an opportunity to be heard. This conclusion is reinforced by the fact that neither note was likely to have required much discussion by counsel. In one instance, the court provided a simple readback of testimony, and in the other the court delivered a legal instruction that was favorable to defendant. Our conclusion is also supported by the fact that immediately after the second "pause," the court said "All right, for the record . . .," and read the second note into the record, thus implying, given the other circumstances present, the existence of a prior unrecorded discussion.

Defendant's claim that his counsel provided ineffective assistance with regard to these matters is without merit.

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ENTERED: JANUARY 24, 2008

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

2589 Hortense Edwards,
Plaintiff-Appellant,

Index 112504/04

-against-

Jamaica Medical Center, et al.,
Defendants-Respondents.

Ballon Stoll Bader & Nadler, P.C., New York (Will Levins of
counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Ricki
E. Roer of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.),
entered July 5, 2006, which granted defendants' motion for
summary judgment dismissing the complaint, unanimously affirmed,
without costs.

Defendants in this age discrimination and retaliation action
presented valid reasons for plaintiff's discharge. In response,
plaintiff failed to raise a triable issue as to whether the
reasons offered for her termination were merely pretextual
(*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of
AFL-CIO*, 6 NY3d 265 [2006]; *Forrest v Jewish Guild for Blind*, 3
NY3d 295, 308 [2004]).

The record demonstrates that plaintiff's termination
resulted from her misuse of sick days, when she failed to appear
for work at defendant hospital facility (but *did* appear for her
evening shift at another job location on those days), after being

repeatedly warned that excess absences could lead to termination. Plaintiff's conclusory allegations of a discriminatory practice did not give rise to an inference that defendants engaged in a pattern or practice of attempting to replace older employees with younger, less qualified ones who would work on a per diem basis (see *Alvarado v Hotel Salisbury, Inc.*, 38 AD3d 398 [2007]).

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

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

2590-

2591 In re Jeffrey V.,

A Person Alleged to be
A Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

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

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

Order of disposition, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about October 26, 2006, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of menacing in the third degree, and placed him on probation for a period of 12 months, unanimously 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

identification and credibility (see *People v Bleakley*, 69 NY2d 490, 495 [1987]), including its resolution of conflicts in testimony.

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[1997], *lv denied* 91 NY2d 897 [1998])). In any event, nothing in the record suggests that the influence of alcohol prevented defendant from acting "knowingly."

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identification and credibility, including its evaluation of the victim's opportunity to observe defendant.

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

2595 The RGH Liquidating Trust, etc., Index 600057/06
 Plaintiff-Appellant,

-against-

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

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

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

Order, Supreme Court, New York County (Karla Moskowitz, J.),
entered September 29, 2006, which, to the extent appealed from,
dismissed plaintiff's fourth cause of action for fraudulent
conveyance and all causes of action asserted by plaintiff on
behalf of Reliance Group Holdings (RGH) and Reliance Financial
Services (RFS), unanimously affirmed, with costs.

The fourth cause of action for fraudulent conveyance was
properly dismissed for failure to plead lack of fair
consideration (see Debtor and Creditor Law §§ 272, 273). While
the complaint alleges deficiencies in the accounting and
actuarial work performed by defendants before RGH and RFS filed
for bankruptcy, it does not allege that defendants failed to
provide the services for which they were paid.

The causes of action asserted on behalf of RGH and RFS were
improperly dismissed as barred by the doctrine of judicial

estoppel. RGH and RFS and defendant Deloitte & Touche applied jointly to the bankruptcy court for an order authorizing RGH and RFS to retain Deloitte, and the order was granted based on the representations of RGH and RFS and Deloitte. Thus, it cannot be said that RGH and RFS obtained a "ruling in their favor" and adverse to Deloitte (see *Olszewski v Park Terrace Gardens, Inc.*, 18 AD3d 349, 350-351 [2005]; see also *In re BCP Mgt., Inc.*, 320 BR 265, 275-279 [D Del 2005]). Moreover, it was Deloitte that was in a position to know whether or not the representation that it was a "disinterested person" under the Bankruptcy Code (11 USC § 101[14]; § 1107[b]) was false (see generally *Rome v Braunstein*, 19 F3d 54 [1st Cir. 1994]).

However, plaintiff's fraud claims were properly dismissed as duplicative of its breach of contract claim, since they are based on alleged fraudulent misrepresentations related to defendants' obligation under their agreements with RGH and RFS to conduct audits of financial statements with reasonable care, and allege no misrepresentations collateral or extraneous to the agreements (*Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [2001]). The breach of contract claim is, as defendants correctly contend, in essence a claim of professional malpractice (as are all plaintiff's claims) (see *American Tissue, Inc. v Arthur Andersen LLP*, 275 F Supp 2d 398, 405 n 7 [SD NY 2003]), and was properly dismissed as barred by the three-year statute of limitations for

malpractice claims "regardless of whether the underlying theory is based in contract or tort" (CPLR 214[6]; *Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538 [2004]). This action, which alleges deficient accounting services in connection with audits and actuarial opinions issued in 1999-2000, was not commenced until January 6, 2006.

We have considered and rejected appellant's remaining contentions.

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the jury commenced deliberations prematurely. Since defendant consented to both the general procedure and the particular questions, these arguments are expressly waived, and we decline to review them in the interest of justice. As an alternative holding, we also reject these claims on the merits.

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ENTERED: JANUARY 24, 2008

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

2598-

2598A In re John P. McBride,
Petitioner-Respondent,

Index 117488/06

-against-

Robert Derector, P.E., P.C.,
Respondent-Appellant.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (David G. Ebert of counsel), for appellant.

Schnauffer & Metis, LLP, Hartsdale (Peter Metis of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered May 25, 2007, confirming an arbitration award in petitioner's favor in the principal amount of \$856,646.60 and denying respondent's cross motion to vacate the award, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about April 18, 2007, which directed the aforesaid judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Respondent failed to demonstrate that the arbitrator's award violated strong public policy, was irrational, or exceeded specifically enumerated powers (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]). The arbitrator's finding that petitioner's conduct did not warrant termination under the "for cause" provision of the parties' shareholder agreement is rationally based on the evidence. The arbitrator did not act

irrationally or exceed his powers in fashioning an award of damages for wrongful termination based on undisputed evidence concerning the value of petitioner's shares (see *Azrielant v Azrielant*, 301 AD2d 269 [2002], *lv denied* 99 NY2d 509 [2003]; *Integrated Sales v Maxell Corp. of Am.*, 94 AD2d 221 [1983]). The award does not violate public policy (see *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327-328 [1999]), nor constitute an unconscionable windfall for petitioner.

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Due Process Clause. Some 'stigma plus' must be shown before mere defamation will rise to the level of a constitutional deprivation '[I]n the context of defamation involving a government employee, defamation . . . is not a deprivation of a liberty interest unless it occurs in the course of dismissal or refusal to rehire the individual as a government employee or during termination or alteration of some other legal right or status . . .'" (*Aquilone v City of New York*, 262 AD2d 13, 13-14 1999), *lv denied* 93 NY2d 819 [1999], quoting *Martz v Incorporated Vil. of Valley Stream*, 22 F3d 26, 32 [2d Cir 1994]). While appellant, as MTA's Inspector General, has authority to investigate alleged abuses and frauds in the maintenance and operation of MTA's facilities, he does not have the authority to provide petitioner with the process he has requested or to reinstate him to his position with MTA (Public Authorities Law § 1279[4]). While petitioner proposes various remedial actions that appellant could have taken, including withdrawing or revising his report based upon his subsequent findings, recommending petitioner's reinstatement, and monitoring MTA's implementation of that recommendation (*see id.*), in the absence of statutory authority permitting appellant to provide the pre- or post-termination process to which petitioner alleges he was deprived, these proposed remedies relate only to the stigma caused by appellant's report, not the "plus" of termination

required to establish petitioner's due process claim (*Anemone v Metropolitan Transp. Auth.*, 410 F Supp 2d 255, 270 [SD NY 2006], citing *Velez v Levy*, 401 F3d 75 [2d Cir 2005]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JANUARY 24, 2008

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

2602-

2603 Nicholas J. Altebrando,
 Plaintiff-Appellant,

Index 603003/05

-against-

Charles J. Gozdziwski, et al.,
Defendants-Respondents.

Greenberg Traurig, LLP, New York (Jonathan E. Goldberg of
counsel), for appellant.

Aronauer, Re & Yudell, LLP, New York (Joseph Aronauer of
counsel), for respondents.

Judgment, Supreme Court, New York County (Sherry Klein
Heitler, J.), entered November 1, 2006, dismissing the amended
complaint pursuant to an order, same court and Justice, entered
October 24, 2006, which, in an action arising out of plaintiff's
expulsion as an equity partner in defendant firm, inter alia,
granted defendants' motion for summary judgment dismissing the
amended complaint, unanimously affirmed, with costs. Appeal from
aforesaid order unanimously dismissed, without costs, as subsumed
in the appeal from the judgment.

Plaintiff's expulsion was in accordance with the clear and
unambiguous language of the parties' partnership agreement
providing for the expulsion of an equity partner without cause by
unanimous vote of the remaining equity partners. Accordingly,
plaintiff's post-expulsion right to firm assets and profits, or
other forms of compensation, is governed by the agreement, and,

absent an allegation that defendants failed to provide the audits to which he is entitled under the agreement, he is not entitled to judicial relief in the form of a judicial accounting under Partnership Law § 44(1) (see *Raymond v Brimberg*, 99 AD2d 988 [1984], appeal dismissed 64 NY2d 755 [1985]; cf. *Hand v Kenyon & Kenyon*, 227 AD2d 137 [1996]). Nor is plaintiff entitled to an equitable buy-out or damages for breach of fiduciary duty, breach of contract or breach of the covenant of good faith and fair dealing (see *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 268 [2003]). To the extent plaintiff's breach of fiduciary duty claim involves breaches of duty owed the partnership by his co-partners, such breaches give rise only to a derivative action on behalf of the partnership (see *Sterling v Minskoff*, 226 AD2d 125 [1996]). No issues of fact are raised as to whether the expulsion was done in bad faith (see *Gelder Med. Group v Webber*, 41 NY2d 680, 684 [1977]). We have considered plaintiff's other arguments, including his claimed need for disclosure, and find them unavailing.

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establishes that defendant received effective assistance (see *People v Ford*, 86 NY2d 397, 404 [1995]).

Defendant's unpreserved challenge to the validity of his plea does not come within the narrow exception to the preservation requirement (see *People v Toxey*, 86 NY2d 725 [1995]; *People v Lopez*, 71 NY2d 662 [1988]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record establishes the voluntariness of the plea.

We perceive no basis to reduce the sentence.

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ENTERED: JANUARY 24, 2008

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

2605 Tower Insurance Company of New York, Index 112147/05
Plaintiff-Respondent,

-against-

Dyker Contractors, Inc.,
Defendant-Appellant,

C&S Land Holdings, LLC, et al.,
Defendants.

Composto & Composto, Brooklyn (Eric C. Bryant of counsel), for
appellant.

Max W. Gershweir, New York, for respondent.

Order, Supreme Court, New York County (Edward H. Lehner,
J.), entered September 13, 2006, which, to the extent appealed
from, granted plaintiff's motion for summary judgment declaring
that it had no duty to defend or indemnify defendant Dyker
Contractors, Inc. in an underlying personal injury action,
unanimously affirmed, without costs.

Dyker failed to raise a triable issue of fact whether its
belief in its nonliability was reasonable, so as to excuse its
nine-month delay in notifying plaintiff of the occurrence (see
White v City of New York, 81 NY2d 955, 957 [1993]). The injury
resulted from the collapse of a stairway at the job site at which
Dyker was general contractor, Dyker's foreman notified its
principal of the accident on the day it happened, and the injured

party appeared on site soon thereafter with his leg in a cast
(see e.g. *Pendill v Furry Paws, Inc.*, 29 AD3d 453 [2006]).

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

ENTERED: JANUARY 24, 2008

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

2606 Mai-Linh DeVirgilio,
Plaintiff-Respondent,

Index 122252/01

-against-

Feller Precision Stage Lifts, Inc., et al.,
Defendants,

Mamma Mia Broadway Limited Partners,
Defendant-Appellant.

Quirk and Bakalor, P.C., New York (Richard H. Bakalor of
counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

Judgment, Supreme Court, New York County (Marcy Friedman,
J.), entered January 2, 2007, upon a jury verdict, which, to the
extent appealed from as limited by the briefs, awarded plaintiff
\$1 million for future pain and suffering and \$500,000 for future
lost earnings, unanimously modified, on the law, to vacate the
award for future lost earnings, and otherwise affirmed, without
costs.

The then 25-year-old plaintiff, while working as a
stagehand, was injured when a "Genie lift" tipped over and fell
on her, causing her to sustain a crush fracture to her pelvis and
fibula, a fractured sacrum, and rib fractures. The evidence
demonstrated that she still suffered from pain, for which she
took painkillers up to five times a week, that she had an
increased risk of degenerative disease in her spine, as well as

an increased risk of arthritis, and that she suffered and would continue to suffer from post-traumatic stress disorder. The jury found that plaintiff's pain and suffering would continue for 53 years. The jury's award of \$1 million for future pain and suffering does not deviate materially from what would be reasonable compensation under the circumstances.

However, plaintiff failed to sustain her burden of establishing loss of wages with reasonable certainty (*see Man-Kit Lei v City Univ. of N.Y.*, 33 AD3d 467, 468 [2006], *lv denied* 8 NY3d 806 [2007]). She testified that she had returned to the job she held before the accident, at the same rate of pay. Further, the only evidence of future lost earnings was plaintiff's own unsubstantiated opinion concerning her potential income as a substitute stagehand (*see Harris v City of New York*, 2 AD3d 782, 783-784 [2003], *lv dismissed* 2 NY3d 758 [2004]).

We have considered and rejected defendant's remaining contentions.

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

ENTERED: JANUARY 24, 2008

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

2607 Jaime Carcana,
Plaintiff-Respondent,

Index 116419/04

-against-

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

The City of New York,
Defendant.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for appellants.

Asher & Associates, P.C., New York (Robert J. Poblete of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered May 29, 2007, which, to the extent appealed from, denied the motion of defendants New York City Housing Authority and Alliance Elevator Company to dismiss the complaint on the ground of plaintiff's failure to comply with three prior court orders directing her to respond to discovery requests, or, in the alternative, to direct plaintiff to provide all outstanding discovery by a date certain, unanimously modified, on the law and the facts, to grant defendants' motion to dismiss the complaint unless plaintiff provides, for in camera review, all outstanding discovery sought in the August 3, 2006 demands within 30 days of service of a copy of this order, and otherwise affirmed, without costs, and the matter remanded for further proceedings consistent herewith.

Defendants demonstrated that the documents and information sought in the discovery demands at issue may be material and necessary to the fair resolution of this action (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]). The records of plaintiff's doctors suggest that plaintiff's claims involve psychological and physical injuries that cannot be separated. Thus, defendants may be entitled to full disclosure of plaintiff's psychological history so as to determine, inter alia, which, if any, part of her claimed injuries is a result of the accident giving rise to this action and which is the manifestation of prior psychological conditions (see *Schechter v 210 E. 90th St. Owners*, 271 AD2d 224, 224-25 [2000]).

The matter is remanded to Supreme Court for an in camera review of the requested documents and a determination of the parties' competing claims of physician-patient privilege and waiver (see *Bluebird Partners v First Fid. Bank, N.J.*, 248 AD2d 219, 225 [1998], *lv dismissed* 92 NY2d 946 [1998]), and of the continued relevancy of such documents in light of plaintiff's withdrawal of her "psychological" claims.

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requirement for first-degree possession (see *People v Utsey*, 7 NY3d 398, 404 [2006]; *People v Quinones*, 22 AD3d 218 [2005], *lv denied* 6 NY3d 817 [2006]).

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ENTERED: JANUARY 24, 2008

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

2610N Trump Plaza Owners, Inc., Index 110351/03
Plaintiff-Respondent,

-against-

Dorothea M. Weitzner,
Defendant-Appellant.

- - - - -

2610NA Trump Plaza Owners, Inc.,
Plaintiff-Appellant,

-against-

Dorothea M. Weitzner,
Defendant-Respondent.

Kenneth J. Glassman, New York, for appellant/respondent.

Frederick Mehl, New York, for respondent/appellant.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 27, 2007, which granted plaintiff cooperative a preliminary injunction enjoining defendant tenant-shareholder from yelling and/or screaming in any common areas of the building located at 167 East 61st Street, New York, New York, or within her own apartment (39D), so as to be audible in other apartments or common areas of the building; threatening or harassing building occupants or the cooperative's employees; communicating in any manner with the occupants of apartment 39E; engaging in conduct that interferes with the rights and quiet enjoyment of other building occupants; and violating paragraph 18 of her proprietary lease and paragraph 5 of the House Rules appended to

the lease; and order, same court and Justice, entered June 27, 2007, which granted tenant's motion for summary judgment to the extent of dismissing the first, second and third causes of action of the complaint without prejudice, unanimously modified, on the law and the facts, the matter remanded to Supreme Court with direction to specifically set forth in the injunction the proscribed conduct and to order the cooperative to file an undertaking in an amount to be fixed by the court; the first, second and third causes of action of the complaint reinstated; and otherwise affirmed, without costs.

We find that, in voting to terminate the tenant's lease, the cooperative board acted for the purposes of the cooperative, within the scope of its authority, and in good faith (see *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]; see also *40 W. 67th St. v Pullman*, 100 NY2d 147, 154-155 [2003]), and that, for purposes of the preliminary injunction, the cooperative amply demonstrated the likelihood of succeeding on the merits, irreparable injury due to the tenant's refusal to cease her objectionable conduct, and the balance of equities tipping in the cooperative's favor (see *Doe v Axelrod*, 73 NY2d 748, 750 [1988]). However, the injunction does not indicate to the tenant specifically all the acts she is restrained from doing (see *Xerox Corp. v Neises*, 31 AD2d 195, 197-198 [1990]). Paragraph 18(b) of the proprietary lease and House Rule 5 merely

prohibit "unreasonable noises or anything that will interfere with the rights of other lessees or unreasonably annoy them," and "any disturbing noises" or anything "that will interfere with the rights, comfort or convenience of other owners," respectively. Additionally, the injunction does not require the cooperative to post an undertaking (see CPLR 6312[b]).

We further find that the dismissal without prejudice of the cooperative's causes of action seeking termination of the lease, ejectment, and a declaration that it may sell the tenant's shares at auction, on the ground that it failed to provide the tenant with notice at the address provided in the lease, was unwarranted. The record demonstrates that notice was sent to the tenant at her post office box, that she actually received the notice, and that the cooperative attempted to cure, after the action was commenced, by sending several letters to the tenant at both addresses (see generally *Rower v West Chamson Corp.*, 210 AD2d 7 [1994]; *East 82 v O'Gormley*, 295 AD2d 173 [2002]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JANUARY 24, 2008

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

2611N In re Robert Caridi,
 Petitioner-Respondent,

Index 118902/06

-against-

New York Convention Center
Operating Corporation,
Respondent-Appellant.

Fiedelman & McGaw, Jericho (Andrew Zajac of counsel), for
appellant.

Brecher, Fishman, Pasternack, Heller, Walsh & Tilker, P.C., New
York (Michael D. Neuman of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.),
entered May 3, 2007, which, in an action for personal injuries,
granted petitioner's motion for leave to serve a late notice of
claim, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in
allowing petitioner to file a late notice of claim more than
seven months after expiration of the 90-day filing requirement
(see General Municipal Law § 50-e[1][a]; [5]). Any alleged
prejudice to respondent is undermined by reason of the State
Police being on the scene at the time of the accident and
immediately conducting an investigation that included
interviewing witnesses and taking photographs of the location as
it existed at the time of the accident, which culminated in a

report readily available to respondent (*see Barnes v New York City Hous. Auth.*, 262 AD2d 46, 47 [1999], *lv denied* 95 NY2d 757 [2000]). The record evidence further establishes that the defective condition that caused petitioner to fall and injure his knee was highly transitory and respondent would have been unable to investigate even if the notice of claim was served within the prescribed statutory period (*see Gamoneda v New York City Bd. of Educ.*, 259 AD2d 348 [1999]; *Matter of Strauss v New York City Tr. Auth.*, 195 AD2d 322, 323 [1993]).

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

ENTERED: JANUARY 24, 2008

CLERK

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

2612

[M-6428] In re Leshontee Spencer,
Petitioner,

Ind. 2803/07

-against-

Hon. Brenda Soloff, etc., et al.,
Respondents.

Leshontee Spencer, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Roberta L. Martin of
counsel), for Hon. Brenda Soloff, respondent.

Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer
of counsel), for Robert M. Morgenthau, respondent.

Application for an order pursuant to article 78 of the Civil
Practice Law and Rules denied and the petition dismissed,
without costs or disbursements. All concur. No opinion. Order
filed.

Tom, J.P., Mazzarelli, Saxe, Marlow, Williams, JJ.

2054 Norma White,
Plaintiff-Respondent,

Index 6364/05

-against-

Carlos A. Diaz, et al.,
Defendants,

Manuel A. Nunez, et al.,
Defendants-Appellants.

Law Offices of Jeffrey S. Shein and Associates, P.C., Syosset
(Charles R. Strugatz of counsel), for appellants.

Alan A. Tarzy, New York, for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels,
J.), entered May 30, 2007, affirmed, without costs.

Opinion by Saxe, J. All concur.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
JANUARY 24, 2008

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

M-186 People v Brooks, Darryl

M-193 In the Matter of W., Lavaya – the Administration for
Children’s Services

M-220X Cummings v Schwartz – RN Realty, L.L.C.

M-221X Colon v Consolidated Edison Company of New York
– M.E.C. Construction Corp.

M-243X Iconoclast Advisers LLC. v Petro-Suisse Ltd.

M-244X Felten v A.W. Chesterton Co.

Appeals withdrawn.

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

M-177 Cordero v F & M Management Co. of NY, LLC.

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

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

M-185 Perrone v Federal Express Corp.

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

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

M-94 Nolan v City of New York

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

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

M-191 Burgman v The City of New York

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

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

M-6448 Jorgensen v New York Foundation of Senior Citizen Guardian Services, Inc.

Appeal dismissed, without prejudice to appeal taken from final judgment.

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

M-47 People v Billip, Alkim

M-48 People v Carmichael, Brian

M-50 People v Lewis, Kaid

M-52 People v Rodriguez, Reyes

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

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

M-53 People v Sarubbi, Philip

M-59 People v Washington, Jeffery,
also known as Washington, Jeffree

M-60 People v Vasquez, Carlos

M-62 People v Reyes, Earl

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

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

M-6671 People v Thompson, Hamilton

Time to perfect appeal enlarged to the June 2008 Term.

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

M-6539 People v Gumbs, Junior

Record on appeal enlarged, as indicated; time to perfect appeal enlarged to the June 2008 Term.

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

M-6058 People v Purdie, Sidney,
also known as Purdie, Sidney E.

Leave to file pro se supplemental brief and related relief denied. (See M-5894, decided simultaneously herewith.)

Marlow, J.

M-5894 People v Purdie, Sidney,
also known as Purdie, Sidney E.

Reargument denied. (See M-6058, decided simultaneously
herewith.)

Lippman, P.J., Mazzarelli, Gonzalez, Sweeny, McGuire, JJ.

M-6362A In the Matter of S., Fay Toby v S., Marc

Appeals consolidated. (See M-6362, decided
simultaneously herewith.)

Mazzarelli, J.

M-6362 In the Matter of S., Fay Toby v S., Marc

Stay denied. (See M-6362A, decided simultaneously
herewith.)

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

M-6683 Griffin v Starbucks Corporation

Time to perfect respective appeals enlarged to the
April 2008 Term.

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

M-6646 Goldberg v Thelen Reid Brown Raysman & Steiner, LLP

Appellant directed to perfect appeal for the June 2008
Term, as indicated.

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

M-6508 Second on Second Café, Inc. v Hing Sing Trading, Inc.
M-6669 Stay denied; sanctions denied.

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

M-6721 Winick Realty Group, Inc. v Austin & Associates
Stay denied.

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

M-6249 People v Diggins, Isaac
Reargument denied.

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

M-6296 Roura & Melamed v Wright
M-133 Stay denied; petitioner-appellant directed to deposit
disputed attorneys' fees into interest bearing money market
accounts, as indicated.

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

M-6703 In the Matter of W., Andrew – W., Thomasena,
also known as W., Thomasina – Administration for
Children's Services

Petitioner-appellant's brief stricken, with leave to
refile for the May 2008 Term, as indicated.

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

M-6747 People v Flores, Juan

Appeal deemed withdrawn.

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

M-6507 People v Marty, Noel

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

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

M-6293 People v Moreno, Ricardo

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

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

M-6655 People v Clark, Errol

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

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

M-6471 People v Reyes, Pedro

Enlargement of time to file notice of appeal and other relief denied.

Mazzarelli, J.P., Marlow, Williams, Catterson, JJ.

M-6364 Carrol v Initial Contract Services Inc.

M-5222A

Stay of trial denied, as indicated; appeal dismissed.

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

M-6335 In the Matter of A., Tonya v H., Hal

Stay and other relief denied; appeals dismissed, as indicated.

Andrias, J.P., Friedman, Williams, Buckley, Sweeny, JJ.

M-6742 In the Matter of Wooden v New York City Housing
Authority

Reargument and/or clarification denied; petitioner prohibited from filing any additional motions in this Court with respect to this proceeding without prior approval of this Court.

Andrias, J.P., Friedman, Williams, Buckley, Sweeny, JJ.

M-5982 21 West 58th Street Corp. v Foster

Reargument or other relief denied.

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

M-6612 People v Evans, Sharmecka,
also known as Evans, Sharkeeka

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

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

M-6613 People v Jacob, Michael

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

Tom, J.

M-6649 In the Matter of Watts v The Chancellor of the
City University of New York

Leave to appeal to this Court granted.

Tom, J.

M-5992 People v Sanchez, Lamar

Leave to appeal to this Court denied.

Tom, J.

M-6216 People v Farrell, Dennis

Leave to appeal to this Court denied.

Mazzarelli, J.

M-5766 People v Leary, Edward

Leave to appeal to this Court denied.

Andrias, J.

M-6170 People v Pratt, Anthony
M-6189 People v Fayton, Reginald
M-6245 People v Castillo, Elvis
Leave to appeal to this Court denied.

Andrias, J.

M-6424 People v Zigler, Paul
Reargument denied.

Saxe, J.

M-4894 People v McLaurin, Albert
Leave to appeal to this Court denied.

Nardelli, J.

M-4793 People v Calderon, Ricardo
Leave to appeal to this Court denied.

Nardelli, J.

M-5914 People v Rosa, Jose
Leave to appeal to this Court denied.

Gonzalez, J.

M-5246 People v Steadman, Andre
Leave to appeal to this Court denied.

Gonzalez, J.

M-5632 People v Vasquez, Julian
M-5846
Leave to appeal to this Court denied.

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

M-6251 In the Matter of Harvey B. Baum,
a disbarred 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.

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

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

M-6658 John E. Fogarty, admitted on 3-15-76,
at a Term of the Appellate Division,
First Department

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

The following orders were entered and filed
on January 22, 2008:

Lippman, P.J., Saxe, Nardelli, Williams, Moskowitz, JJ.

M-6512 In the Matter of Kunz v Brown

Stay denied.

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

M-6323 IDT Corp. v Tyco Group

Stay granted; leave to file present and future papers
under seal granted.

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

M-6468 People v Douehi, Richard, also known as
 Doueihy, Richard, also known as
 Doueili, Richard, also known as
 Doueini, Richard

Dismissal of appeal denied, with leave to renew should
appellant fail to perfect for the May 2008 Term, as indicated.

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

M-6754 Belmore-Gaillard v Gaillard

Leave to prosecute appeal from order entered on or
about December 3, 2007 as a poor person denied, with leave to
renew, as indicated; consolidation denied.