



address relevant factors, we would find that defendant was not prejudiced in any manner, since there is no indication that any special circumstances existed that would warrant such a departure (see *People v Douglas*, 18 AD3d 967, 968 [2005], *lv denied* 5 NY3d 710 [2005]; see also *People v Guaman*, 8 AD3d 545 [2004]).

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

ENTERED: NOVEMBER 29, 2007

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CLERK



in 2005. Since the statute providing for the imposition of the fee at issue took effect in 2004, there was no ex post facto violation (see e.g. *People v Rosich*, 170 AD2d 703, 704 [1991], *lv denied* 77 NY2d 1000 [1991]). Defendant's assertion that the crime was committed "in full" for ex post facto purposes in 2003 rests on speculation, and is contradicted by the accusatory instrument and plea allocution.

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

ENTERED: NOVEMBER 29, 2007

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CLERK

Lippman, P.J., Nardelli, Buckley, Gonzalez, Sweeny, JJ.

2231 Citi Management Group, Ltd., Index 7137/07  
Plaintiff-Appellant, 85834/07

-against-

Highbridge House Ogden, LLC,  
Defendant-Respondent.

- - - - -

Highbridge House Ogden LLC,  
Third-Party Plaintiff-Respondent,

-against-

Leslie M. Westreich, et al.,  
Third-Party Defendants-Appellants.

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Ganfer & Shore, LLP, New York (Steven J. Shore of counsel), for  
Citi Management Group, Ltd. and Morty J. Yashar, appellants.

Morrison Cohen LLP, New York (Edward P. Gilbert of counsel), for  
Leslie M. Westreich and Highbridge House Company L.P.,  
appellants.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of  
counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.),  
entered August 9, 2007, which denied the motions by plaintiff and  
third-party defendants to dismiss the counterclaim and the third-  
party complaint, respectively, unanimously affirmed, with costs.

At this stage of the litigation, defendant is permitted to  
plead in the alternative (see CPLR 3014). Based upon the varying  
allegations suggesting affirmative deception, the claims for  
breach of the implied covenant of good faith and fair dealing,

and for fraud, should not be dismissed as duplicative of the breach-of-contract cause of action at this juncture (*cf. Town House Stock LLC v Coby Hous. Corp.*, 36 AD3d 509 [2007]).

Given the contractual relationships between the parties and the potential application of the special facts doctrine, defendant has stated a cause of action in both its counterclaim and third-party action for fraudulent concealment (*see generally Mitschele v Schultz*, 36 AD3d 249 [2006]). In addition, a claim for tortious interference with prospective economic advantage in both pleadings may be sustained at this juncture in light of the allegations that “wrongful means” were utilized to prevent prospective tenant Daval from possessing the garage premises (*see Guard-Life v Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980]; *cf. Carvel Corp. v Noonan*, 3 NY3d 182 [2004]). Minimally, defendant is losing rent, and thus an “economic advantage,” with the passage of each day under the lease term.

The allegations of tortious conduct on the part of third-party defendants Yashar and Westreich may give rise to liability in their individual capacities (*see First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1999]). We perceive no basis for the dismissal of defendant’s first, second or third affirmative defenses (*see Riland v Todman & Co.*, 56 AD2d 350 [1977]). We

have considered appellants' remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 29, 2007

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CLERK



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

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

ENTERED: NOVEMBER 29, 2007

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CLERK

Lippman, P.J., Nardelli, Buckley, Gonzalez, Sweeny, JJ.

2233 Charlotte Harwin, et al., Index 121169/03  
Plaintiffs-Appellants,

-against-

Metropolitan Transportation  
Authority, et al.,  
Defendants-Respondents.

---

Koval, Rejtig & Dean, PLLC, Mineola (Mitchell Dranow of counsel),  
for appellants.

Wallace D. Gossett, New York (Steve S. Efron of counsel), for  
respondents.

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Order, Supreme Court, New York County (Nicholas Figueroa,  
J.), entered October 25, 2006, which granted defendants' motion  
to set aside the jury verdict in plaintiff's favor and dismissed  
the complaint, unanimously affirmed, without costs.

The court properly set aside the verdict and dismissed the  
complaint on the basis that plaintiff failed to establish a prima  
facie case of negligence against defendants in this matter, where  
plaintiff was injured when she was caused to fall when the subway  
car that she had just boarded departed the station in an  
allegedly sudden manner. Plaintiff's description of the incident  
at trial and the nature of her injuries were not sufficient to  
satisfy her requirement of showing that the train's departure  
from the station "caused a jerk or lurch that was 'unusual and

violent'" (*Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 830 [1995], quoting *Trudell v New York R.T. Corp.*, 281 NY 82, 85 [1939]). Rather, the record evidence demonstrates that plaintiff did not observe any other passenger fall, no other person is known to have complained about the movement of the subway car at the time of her fall, and plaintiff, who fell forward rather than backward, did not fall a significant distance (see *Golub v New York City Tr. Auth.*, 40 AD3d 581, 582 [2007]).

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: NOVEMBER 29, 2007

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CLERK





demonstrates that because of the lack of discovery conducted in the underlying action, it cannot be discerned whether NYCTA had actual notice of the defective condition. Nor did defendants establish that NYCTA lacked constructive notice of the condition on the subject platform. The certified climatological reports submitted by defendants, and unaccompanied by an expert opinion, were insufficient to demonstrate a lack of constructive notice inasmuch as the reports, evidencing temperature readings hovering around the freezing mark in the hours leading up to plaintiff's fall, were taken in neighboring counties, and are not dispositive as to the conditions at the site of plaintiff's fall in the Bronx (see *Ralat v New York City Hous. Auth.*, 265 AD2d 185, 186 [1999]).

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: NOVEMBER 29, 2007

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CLERK

Lippman, P.J., Nardelli, Buckley, Gonzalez, Sweeny, JJ.

2236 In re Shawndenise P.,

A Person Alleged to be  
a Juvenile Delinquent,  
Appellant.

- - - - -

Presentment Agency

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Howard M. Simms, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 22, 2006, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that she committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree and two counts of menacing in the third degree, and placed her with the Office of Children and Family Services for a period of up to 18 months, unanimously affirmed, without costs.

The court's findings were based on legally sufficient evidence and were 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's entire course of conduct, which included urging other

participants in the crime to hit one of the victims, established her accessorial liability (see *Matter of Juan J.*, 81 NY2d 739 [1992]; *Matter of Justice G.*, 22 AD3d 368 [2005]).

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

ENTERED: NOVEMBER 29, 2007

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CLERK



defendant in the prior case both worked for the Legal Aid Society. The record does not establish that a conflict existed, or that it operated to defendant's detriment or had a substantial relation to the conduct of his defense (*see Cuyler v Sullivan*, 446 US 335, 348-350 [1980]; *People v Harris*, 99 NY2d 202, 210-211 [2002])).

Defendant's other argument is unpreserved and we decline to review it in the interest of justice. Were we to review this claim, we would find it without merit.

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

ENTERED: NOVEMBER 29, 2007

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CLERK

Lippman, P.J., Nardelli, Buckley, Gonzalez, Sweeny, JJ.

2239-

2239A The People of the State of New York,  
Respondent,

SCI 3920/04  
48943C/05

-against-

Calvin Murray,  
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lawrence H. Cunningham of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John S. Moore, J.), rendered November 3, 2005, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of 1 to 3 years, and judgment, same court (Stephen L. Barrett, J. at plea; John S. Moore, J. at sentence), rendered November 3, 2005, as amended December 6, 2005, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a consecutive term of 2 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant youthful offender treatment (*see People v Drayton*, 39 NY2d 580 [1976]), especially since defendant committed a new crime while awaiting sentencing on his plea under the first

indictment, despite the court's warning that he would forfeit the opportunity for youthful offender treatment in the event of a new arrest.

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

ENTERED: NOVEMBER 29, 2007

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CLERK



stopped. Defendant failed to show it was just as likely that pedestrian traffic might have broken up the ice in that manner, rather than turning it into slush.

Defendant's witness testified that she was required to clean the landing if there was ice on it, and that the procedure would be to use a chopper. The witness having admitted engagement in snow and ice removal activities as part of her duties, the jury was permitted to reject her testimony that there was no ice on the day in question, which conflicted with defendant's own climatological reports, and infer from her and plaintiff's testimony that she did chop the ice, albeit improperly, making the condition more hazardous.

Since defendant was acting in a proprietary rather than governmental capacity, and its maintenance of the landing does not conflict or interfere with its governmental function or purpose, it was not error for the court to charge the jury on New York City Administrative Code § 16-123, notwithstanding the May 2000 amendment to Public Authorities Law § 1266(8) (L 2000, ch 61, pt 0, § 23) (*see Matter of Levy v City Commn. on Human Rights*, 85 NY2d 740 [1995]; *Huerta v New York City Tr. Auth.*, 290 AD2d 33 [2001], *appeal dismissed* 98 NY2d 643 [2002]; *Bogdan v New York City Tr. Auth.*, 2005 US Dist LEXIS 9317, \*14-19, 2005 WL 1161812, \*4-6 [SD NY]).

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

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

ENTERED: NOVEMBER 29, 2007

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CLERK

Lippman, P.J., Nardelli, Buckley, Gonzalez, Sweeny, JJ.

2241 Orsines Gomez, Index 20297/03  
Plaintiff-Respondent,

-against-

2355 Eighth Avenue, LLC,  
Defendant-Appellant.

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Doyle & Broumand, LLP, Bronx (Michael B. Doyle of counsel), for  
appellant.

Friedman, Friedman, Chiaravalloti & Giannini, New York (A. Joseph  
Giannini of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.),  
entered on or about July 10, 2006, which, to the extent appealed  
from as limited by the briefs, granted plaintiff's cross motion  
for summary judgment on the issue of liability on his Labor Law §  
240(1) claim, unanimously affirmed, without costs.

Plaintiff was injured when a temporary platform of plywood  
pieces laid across floor beams gave way under his weight,  
dropping him between the beams to shoulder level, with his feet  
dangling in the air above the basement floor. His uncontroverted  
deposition testimony established defendant's liability for  
providing an unsafe, elevated device within the meaning of §  
240(1) (see *Campisi v Epos Contr. Corp.*, 299 AD2d 4 [2002];  
*Becerra v City of New York*, 261 AD2d 188 [1999]). The fact that

the job site supervisor, who did not witness the accident, did not see the hazardous condition after the accident does not warrant denial of the cross motion.

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

ENTERED: NOVEMBER 29, 2007

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CLERK





count of the indictment (*see People v Foster*, 19 NY2d 150, 153 [1967]). Defendant's plea to a nonexistent crime is a jurisdictional defect rendering the plea a nullity, and the proper remedy is remand for further proceedings on the remainder of the indictment (*see People v Castillo*, 30 AD2d 1118 [2006], *affd* 8 NY3d 959 [2007]; *People v Trueluck*, 219 AD2d 490 [1995], *affd* 88 NY2d 546 [1996]). Defendant requests this Court to "deem" his plea to be a plea to reckless endangerment in the first degree, rather than vacating the conviction and reinstating the other counts of the original indictment. However, since the conviction was on a jurisdictionally defective count, defendant's suggested remedy would be unlawful.

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

ENTERED: NOVEMBER 29, 2007

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CLERK







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

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

ENTERED: NOVEMBER 29, 2007

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CLERK



the failure to have served a timely notice of claim (see *Harris v City of New York*, 297 AD2d 473 [2002], *lv denied* 99 NY2d 503 [2002]), infant plaintiff should not be deprived of a remedy, where, as here, the record evidence demonstrates that appellants' possession of the medical records sufficiently constituted actual notice of the pertinent facts, and that they would not be substantially prejudiced by the delay (see *De La Cruz v New York City Health & Hosps. Corp.*, 13 AD3d 130 [2004]). Plaintiffs submitted affirmations from a physician establishing that the medical records, on their face, evinced that appellants failed to provide infant plaintiff with preventive care against lead poisoning (compare *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]), and appellants' argument that the delay would prejudice them in defending the action because of the inability to reconstruct events and conversations is unconvincing (*Moody v New York City Health & Hosps. Corp.*, 29 AD3d 395 [2006]; *Matter of McMillan v City of New York*, 279 AD2d 280 [2001]).

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

ENTERED: NOVEMBER 29, 2007

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CLERK



prejudiced by the brief delay.

We also affirm the court's dismissal of the article 78 proceeding. While the court erred in stating that dismissal was mandated because petitioner was challenging the methodology and "[t]hat issue must be resolved in an [a]rticle 7 proceeding" (see *Matter of Averbach v Bd. of Assessors of the Town of Delhi*, 176 AD2d 1151, 1152 [1991] [an article 78 proceeding is appropriate where the challenge is to the method of assessment]) petitioner's assertions regarding the methodology were conclusory and based on speculation (see *Matter of Bd. of Mgrs. of the Greens of N. Hills Condominium v Board of Assessors of the County of Nassau*, 202 AD2d 417, 419 [1994], *lv denied* 83 NY2d 757 [1994]).

Petitioner's exclusive remedy for the allegedly improper assessment of his property was a proceeding pursuant to article 7 of the Real Property Tax Law (*Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 204 [1991]). An examination of petitioner's article 78 challenges to the purportedly invalid methodology employed by respondents in arriving at the market and assessed values of recently renovated properties in tax class one, demonstrates that "the crux of [petitioner's] claim is the alleged individual overvaluation of his property" (*Matter of Cassos v King*, 15 AD3d 758, 759 [2005]).

The court also correctly determined that the article 78 proceeding was untimely. Pursuant to New York City Charter § 165 and § 165-a, the subject tax roll became final on May 25, 2003, and the four-month statute of limitations commenced running on that date (see *Matter of Averbach v Board of Assessors of the Town of Delhi*, 176 AD2d at 1153). This petition was filed on or about October 31, 2003, well beyond the expiration of the statutory period .

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

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

ENTERED: NOVEMBER 29, 2007

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CLERK



venirepersons for cause or by consent (see e.g. *Johnson v California*, 545 US 162, 173 [2005]; *People v Hernandez*, 75 NY2d 350, 356 [1990], *affd* 500 US 352 [1991]; *People v Claudio*, 10 AD3d 531, 533 [2004], *lv denied* 4 NY3d 829 [2005]). Moreover, the prosecutor exercised a total of eight peremptory challenges, using half of them to eliminate the four Hispanic panelists, whereas the percentage of Hispanics in the voir dire was slightly over 10%. In these circumstances, defendant's numerical argument was sufficient to raise an inference of discrimination even though it was not accompanied by any other evidence.

Accordingly, we remand for completion of the *Batson* proceedings so that the People can offer ethnicity-neutral reasons for these challenges.

**M-2188      *People v Steve Rosado***

Motion seeking leave to terminate assignment of counsel and other related relief denied.

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

ENTERED: NOVEMBER 29, 2007

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CLERK



justice" dictated denial of resentencing (see e.g. *People v Salcedo*, 40 AD3d 356 [2007], *lv dismissed* 9 NY3d 850 [2007]; *People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]).

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

ENTERED: NOVEMBER 29, 2007

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CLERK



defendant was arrested on new charges. The sentencing court did not rely merely on the fact that defendant had been rearrested. Instead, it read the grand jury minutes relating to the new charges and properly determined that defendant had committed a crime, thus violating his plea agreement. In any event, we note that defendant subsequently pleaded guilty under the new indictment.

The court did not rely on any impermissible factors in sentencing defendant to 7 years, and we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 29, 2007

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CLERK

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

2190-

2190A Mohammed Z. Rahman,  
Plaintiff-Appellant,

Index 108233/04

-against-

Jenna R. Domber, et al.,  
Defendants,

Matiul Islam, et al.,  
Defendants-Respondents.

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

Reardon & Sclafani, P.C., Tarrytown (Michael V. Sclafani of  
counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling,  
J.), entered April 5, 2006, which granted the motion of  
defendants Matiul Islam and Budget Rent-A-Car for summary  
judgment dismissing the complaint, unanimously reversed, on the  
law, without costs, the motion denied, and the complaint  
reinstated. Order, same court and Justice, entered August 8,  
2006, insofar as it denied plaintiff leave to serve a  
supplemental bill of particulars, unanimously reversed, on the  
facts, without costs, and such leave granted; appeal from that  
portion of the order which denied plaintiff's motion to renew  
defendants' motion for summary judgment, unanimously dismissed as  
academic, without costs.

Contrary to defendants' contention, the untimeliness of their summary judgment motion is properly before this Court, the issue having been included in plaintiff's notice of appeal (see *Hale v Hale*, 16 AD3d 231, 233 [2005]).

The motion was served 21 days after the 30-day deadline imposed for such dispositive motions in the case scheduling order. Defendants did not claim that they were unaware of the deadline and offered no reason for failing to seek an extension of time to file the motion (see generally *Cabibel v XYZ Assoc., L.P.*, 36 AD3d 498 [2007]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 282 [2006]). Nor did the court make an explicit finding that good cause existed for defendants' delay (see generally *Perini Corp. v City of New York (Department of Env'tl. Protection)*, 16 AD3d 37, 39-40 [2005]; *Farkas v Farkas*, 40 AD3d 207, 209 n 3 [2007]). Under the circumstances, the court erred in reaching the merits of the motion (*Brill v City of New York*, 2 NY3d 648, 650 [2004]).

In view of plaintiff's allegation of lost time from work in his initial bill of particulars, his deposition testimony concerning his employment, and the printout of his earnings that he served upon defendants, a supplemental bill of particulars incorporating a claim for past and future loss of earnings should

have been permitted (see *Sahdala v New York City Health & Hosps. Corp.*, 251 AD2d 70, 70 [1998]).

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

ENTERED: NOVEMBER 29, 2007

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CLERK

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

2191-

2191A In re Breeyanna S.,

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

Sidney S.,  
Respondent-Appellant,

Necola F.,  
Respondent,

Administration for Children's Services,  
Petitioner-Respondent.

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Howard M. Simms, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson  
of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Sara P.  
Schechter, J.), entered on or about June 27, 2006, which revoked  
a suspended judgment in favor of respondent father, upon a  
finding that respondent violated conditions of the suspended  
judgment, and placed the subject child with the Commissioner of  
Social Services until the permanency hearing scheduled for  
December 19, 2006, unanimously affirmed insofar as it revoked the  
suspended judgment, and the appeal otherwise dismissed as moot,  
without costs. Appeal from permanency hearing order, same court

and Judge, entered on or about June 27, 2006, continuing the child's placement with the Commissioner of Social Services until the permanency hearing scheduled for December 19, 2006, unanimously dismissed as moot, without costs.

Revocation of the suspended judgment was appropriate, where a preponderance of the evidence established that respondent violated conditions of the suspended judgment (*see Matter of Francisco Anthony C.F.*, 305 AD2d 410 [2003]). Respondent withheld information that he had previously been found to have committed physical and sexual abuse upon another child of his, and such information was critical to the agency's ability to provide appropriate supervision during the time that the child was released to his care. Not only did respondent neglect to provide this information, he failed to accept responsibility for the majority of the acts of abuse that he was found to have committed.

Respondent's appeal from the court's June 27, 2006 permanency hearing order is rendered moot by the fact that the order appealed from was superseded by subsequent permanency hearing orders, which continued the child's placement in foster care (*see Matter of Jabarry W*, 24 AD3d 218, 219 [2005], *lv denied* 6 NY3d 711 [2006]). Were we to consider the merits of respondent's appeal from this order, we would find that the

evidence established that the child's continued placement in foster care was in her best interests.

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

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

ENTERED: NOVEMBER 29, 2007

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CLERK



also had several infractions while in prison (see e.g. *People v Salcedo*, 40 NY3d 356 [2007], *lv dismissed* 9 NY3d 850 [2007]; *People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]).

Defendant's argument that he was denied a "meaningful" hearing is unpreserved and we decline to review it in the interest of justice. Were we to review the issue, we would find that defendant was brought before the court and given an opportunity to be heard, which is all that the statute requires (see L 2005, ch 643, § 1; *People v Figueroa*, 21 AD3d 337, 339 [2005], *lv denied* 6 NY3d 753 [2005]). Moreover, at the time of the hearing, the defense had already made written submissions in support of resentencing.

In view of the foregoing, we find it unnecessary to decide any other issues.

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

ENTERED: NOVEMBER 29, 2007

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CLERK



was no reason for the court to assign counsel or conduct a hearing (see *People v Santana*, \_\_ AD3d \_\_, 841 NYS2d 875 [2007]).

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

ENTERED: NOVEMBER 29, 2007

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CLERK

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

2195 Russian Samovar, Inc. doing business Index 117705/05  
as Samovar SCH Food Service doing  
business as Papoo's Restaurant, et al.,  
Plaintiffs-Respondents,

-against-

Transit Worker's Union of America, et al.,  
Defendants,

Metropolitan Transit Authority,  
Defendant-Appellant.

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Proskauer Rose LLP, New York (Neil H. Abramson of counsel), for  
appellant.

Iannuzzi and Iannuzzi, New York (John Nicholas Iannuzzi of  
counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.),  
entered December 12, 2006, which, to the extent appealed from,  
denied the motion of defendant Metropolitan Transit Authority  
(MTA) to dismiss the second amended complaint for failure to  
state a cause of action and to meet the requisite notice and  
pleading requirements, unanimously reversed, on the law, without  
costs, the motion granted and the complaint dismissed. The Clerk  
is directed to enter judgment accordingly.

Plaintiff businesses allege economic injury due, inter alia,  
to improper negotiation tactics by the MTA, which purportedly  
resulted in the December 2005 New York City Transit strike.

Plaintiffs failed to comply with the prerequisite pleading and notice of claim requirements of Public Authorities Law § 1276(1) and (2). Contrary to the court's finding, the MTA adequately raised this point in its motion to dismiss, specifically in the affidavit of its Manager of Legal Support Services. This provided plaintiffs with the opportunity to respond, and also preserved the argument for appellate review (*see Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 69-70 [2002]).

Plaintiffs' further claim that the MTA committed an unspecified intentional tort by addressing pension issues in its collective bargaining negotiations fails to state a cause of action. There is no private cause of action against the MTA under the Taylor Law; only such private causes may be brought as existed at common law (*see Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314 [1983]), which did not include an intentional tort for employer bargaining conduct. Even if the unspecified intentional tort claim could be based upon employer conduct, it would be limited to unlawful conduct, and the actions of the MTA herein did not constitute such "extreme provocation" as might detract from the union's responsibility for engaging in

the strike (*New York Tr. Auth. v Transport Workers Union of Am., AFL-CIO*, 35 ADd3d 73, 90 [2006]).

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

ENTERED: NOVEMBER 29, 2007

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CLERK





juror's credibility. Furthermore, the mere fact that the juror mistakenly returned to the courtroom on the morning after she was selected, instead of reporting to the central jury room as instructed, was no indication that she was unable to follow the court's directions.

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

ENTERED: NOVEMBER 29, 2007

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CLERK



nontestifying members of the same police field team. "[T]he only rational explanation of how defendant came to be arrested" (*People v Johnson*, 281 AD2d 183 [2001], *lv denied* 96 NY2d 903 [2001]) is that members of the field team heard the radio communication and apprehended defendant on that basis.

Defendant's other argument is unpreserved and we decline to review it in the interest of justice. Were we to review this claim, we would find no basis for reversal.

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

ENTERED: NOVEMBER 29, 2007

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CLERK

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

2199            E & M Advertising West/Camelot            Index 603424/05  
                 Media, Inc.,  
                 Plaintiff-Respondent,

-against-

Vertical Lend, Inc. doing  
business as Mortgage Warehouse, Ltd.,  
Defendant-Appellant.

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Law Offices of Neil H. Greenberg & Associates, Westbury (Justin M. Reilly of counsel), for appellant.

Arnold E. DiJoseph, New York, for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 18, 2007, which, inter alia, granted plaintiff's motion to strike defendant's answer, to conduct an inquest on papers, and to preclude defendant from relying at the inquest on documents belatedly produced to plaintiff, unanimously reversed, on the facts, without costs, the motion denied and defendant's answer reinstated, on condition that defendant produce David Peskin for deposition within 30 days after service of a copy of this order.

The court erred in striking the answer, because plaintiff did not conclusively show that defendant acted willfully, contumaciously or in bad faith (*see Dauria v City of New York*, 127 AD2d 459, 460 [1987]). While defendant did not produce its

president for a deposition despite having been directed to do so, it produced a witness, on the date scheduled for the president's deposition, who it represented had more knowledge than the president concerning the transactions at issue, and offered to produce the president if plaintiff disagreed that the witness was suitable. Moreover, there was some confusion on the part of both parties whether the directive to produce the president was ever reduced to an order. We note further that there was no showing that the president was the only suitable witness. Indeed, there is no indication that plaintiff even designated the president in a notice of deposition (see CPLR 3106[d]).

Nor was it conclusively shown that defendant's delay in responding to plaintiff's discovery demand was willful or contumacious. After its initial counsel withdrew, defendant's new counsel responded to the demand promptly after the new deadline that had been imposed upon his appearance in the action. Furthermore, plaintiff did not establish that the documents produced by defendant after the expiration of the discovery deadline were not, as defendant's counsel represented, first identified during preparation for defendant's deposition, which plaintiff had agreed to schedule for a date subsequent to the discovery deadline.

In light of our determination, we need not reach the arguments on appeal regarding the inquest.

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

ENTERED: NOVEMBER 29, 2007

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CLERK



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

2201 In re Hector V.,

A Person Alleged to be  
A Juvenile Delinquent,  
Appellant.

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Presentment Agency

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

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

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Order of disposition, Family Court, Bronx County (Alma  
Cordova, J.), entered on or about January 5, 2007, which  
adjudicated appellant a juvenile delinquent, upon a fact-finding  
determination that he had committed acts, which, if committed by  
an adult, would constitute the crimes of sexual abuse in the  
first degree (two counts), and placed him on probation for a  
period of up to 18 months, unanimously modified, on the law, to  
the extent of vacating the finding as to sexual abuse in the  
first degree by forcible compulsion and dismissing that count of  
the petition, and otherwise affirmed, without costs.

Viewing the evidence in the light most favorable to the  
presentment agency, we find the evidence was legally insufficient  
to establish that appellant used forcible compulsion to compel

the victim to accede to his acts of sexual abuse (see Penal Law § 130.00[8]). There was no evidence that appellant overpowered the victim or used any express or implied threat of force (compare e.g. *People v Yeaden*, 156 AD2d 208 [1989], *lv denied* 75 NY2d 872 [1990]). However, the evidence supports the court's finding of sexual abuse in the first degree involving a person under the age of 11, and that finding 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]).

The court properly permitted the six-year-old victim to give sworn testimony, based on her voir dire responses (see *People v Nisoff*, 36 NY2d 560, 565-566 [1975]; *People v Cordero*, 257 AD2d 72 [1999], *lv denied* 93 NY2d 968 [1999]).

Appellant's hearsay argument is unpreserved and we decline to review it in the interest of justice. Were we to review this claim, we would reject it.

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

ENTERED: NOVEMBER 29, 2007

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CLERK







judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: NOVEMBER 29, 2007

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CLERK



judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: NOVEMBER 29, 2007

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CLERK

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

2206            Quantum Corporate Funding, Ltd.,            Index 106867/06  
                  etc.,  
                  Plaintiff-Respondent,

-against-

Southwestern Bell Telephone, LP,  
Defendant-Appellant.

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Rabin Panero & Herrick, White Plains (Kathryn L. Bedke of  
counsel), for appellant.

The Law Office of Peter Seideman, Port Washington (Salamon Davis  
of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische,  
J.), entered April 10, 2007, which denied defendant's motion to  
dismiss the complaint for lack of personal jurisdiction,  
unanimously affirmed, with costs.

Dismissal of the complaint was appropriately denied in this  
action where plaintiff is seeking payment allegedly due under the  
assignment of a factoring agreement. Accepting plaintiff's  
allegations as true on this pre-answer motion to dismiss (*see EBC  
I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]), upon  
forwarding to defendant's designated branch manager an estoppel  
certificate that, inter alia, declared that it was subject to New  
York law, jurisdiction and venue, plaintiff was instructed to  
contact a senior reports clerk, who subsequently executed the

estoppel certificate on behalf of defendant. Contrary to defendant's argument that this clerk lacked the authority to sign the document and therefore, the forum selection provision contained therein was unenforceable, it cannot be said, as a matter of law, that defendant's branch manager did not possess the authority to inform plaintiff that it needed to obtain the estoppel certificate from the senior reports clerk, particularly where plaintiff had previously procured an estoppel certificate from the same clerk without protest (*see Federal Ins. Co. v Diamond Kamvakis & Co.*, 144 AD2d 42, 47 [1989], *lv denied* 74 NY2d 604 [1989]). Accordingly, there are factual issues as to whether the clerk had the apparent authority to execute the estoppel certificate on defendant's behalf and whether plaintiff's reliance thereon was reasonable (*see 11 Duke Street, Ltd. v Ryman*, 280 AD2d 429 [2001]; *Arol Dev. Corp. v Whitman & Ransom*, 215 AD2d 145, 146 [1995]), which cannot be resolved at this early stage of the proceedings.

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

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

ENTERED: NOVEMBER 29, 2007

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CLERK

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

2207N American Theatre for the  
Performing Arts, Inc.,  
Plaintiff-Appellant,

Index 603735/03

-against-

Consolidated Credit Corporation, et al.,  
Defendants-Respondents.

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Agulnick & Gogel, LLC, New York (Peter M. Agulnick of counsel),  
for appellant.

Seyfarth Shaw LLP, New York (David M. Monachino of counsel), for  
Consolidated Credit Corporation, The Moinian Group and Joseph  
Moinian, respondents.

Epstein Becker & Green, P.C., New York (Ralph Berman of counsel),  
for The Jack Parker Corporation, respondent.

Marcus Attorneys, Brooklyn (Andrew Morris Weltchek of counsel),  
for Manhattan Theatre Club, respondent.

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Order, Supreme Court, New York County (Karla Moskowitz, J.),  
entered May 26, 2006, which, to the extent appealable and as  
limited by plaintiff's brief, denied plaintiff's motion for  
renewal of a prior order that had denied leave to serve an  
amended complaint, unanimously affirmed, with costs.

A request to amend a pleading, regardless of the statutory  
imperative that it be freely granted (CPLR 3025[b]), requires an  
examination of the underlying merit to determine if there is  
evidentiary proof that could be considered on a motion for

summary judgment (*Nab-Tern Constructors v City of New York*, 123 AD2d 571, 572 [1986]). Affirmance is warranted here because there is no showing of merit to the amended pleadings. None of the proposed additional parties was a signatory to the original contract; the fraud claim is simply a recast breach-of-contract claim; and the civil-conspiracy-to-commit-fraud claim fails because of the lack of viability for the fraud claim.

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

ENTERED: NOVEMBER 29, 2007

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CLERK

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

80 JPMorgan Chase Bank, N.A., etc., Index 108221/05  
Petitioner-Respondent,

-against-

Motorola, Inc.,  
Respondent-Appellant.

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Kirkland & Ellis, LLP, Chicago, IL (Nader R. Boulos, of the  
Illinois Bar admitted pro hac vice of counsel), for appellant.

Foley & Lardner LLP, New York (Robert A. Scher of counsel), for  
respondent.

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Judgment, Supreme Court, New York County (Sheila Abdus-  
Salaam, J.), entered October 11, 2005, reversed, on the law and  
the facts, with costs, the petition denied, and the proceeding  
dismissed.

Opinion by Friedman, J. All concur.

Order filed.

**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**NOVEMBER 29, 2007**

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

M-5936 People v Glover, Dwayne

M-5938 Ponce v Gaseteria Oil Corp.

M-5933X TexGold Inc. v Carneal

M-5960X Rosado v Manhattan and Bronx Surface Transit Operating Authority - Discount Auto Leasing

M-5961X Cicconi v McGinn, Smith & Co., Inc.

M-5962X Global Asset Management, Inc. v Rose Realty Corp.

M-5963X DWHK Recovery Company Ltd. v Daeha Company Limited - Daewoo Engineering & Construction Co., Ltd.

M-5964X Repko v Tishman Construction Corporation of New York - Regional Scaffolding & Hoisting Co., Inc.

Appeals withdrawn.

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

M-5439 (D.C. # 18) People v Davis, George

Upon the Court's own motion, appeal dismissed.

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

M-5413 (D.C. # 2) People v Algarin, Jose, also known as  
M-5827 Algarin, Jose Albarin

Upon the Court's own motion and upon papers filed,  
appeal deemed withdrawn.

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

M-5937 Wireless Capital Partners, LLC v New Cingular Wireless  
Services, Inc., successor by merger to AT&T Wireless  
Services, Inc.

Appeal, previously perfected for the December 2007  
Term, withdrawn.

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

M-5477 (D.C. # 32) People v Hylton, Micael A.

M-5479 (D.C. # 33) People v Jackson, Andre

M-5480 (D.C. # 34) People v Jackson, John

M-5511 (D.C. # 59) People v Zuniga, Lenny

Upon the Court's own motion, time to perfect appeals  
enlarged to the March 2008 Term, as indicated.

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

M-5589 People v Burwell, Clarence

Leave to file pro se supplemental brief granted for the  
April 2008 Term, to which Term appeal adjourned, as indicated.

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

M-5564 People v Liggan, Stacy

Enlargement of time to file pro se supplemental brief granted for the April 2008 Term, to which Term appeals adjourned, as indicated.

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

M-5552 People v Rodriguez, Calvin

Counsel substituted.

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

M-5617 People v Billups, William, also known as  
Haqq, Muhammad

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

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

M-5618 People v Galarza, Robert

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

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

M-5619 People v Santana, Julio

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

Lippman, P.J., Mazzairelli, Friedman, Marlow, Buckley, JJ.

M-5086 In the Matter of W., Female, also known as W., Winter  
-- St. Vincent's Services, Inc.

Leave to prosecute appeal as a poor person denied, as indicated; appeal dismissed.

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

M-5544 In the Matter of Ahmed v New York City Health and  
Hospitals Corp.

Leave to prosecute proceeding as a poor person denied; proceeding dismissed.

Lippman, P.J., Mazzairelli, Sullivan, Nardelli, Sweeny, JJ.

M-5664 Ponce De Leon Federal Bank v Adovasio

Time to perfect appeals enlarged to the March 2008 Term; Clerk directed to calendar appeals for hearing together in the March 2008 Term.

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

M-6103 Metus v Ladies Mile Inc.  
(And a third-party action)

Stay of trial granted on condition appeal perfected for the April 2008 Term.

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

M-5203 People v O'Kane, David, also known as  
O'Kane, David A., also known as  
Okane, David

Counsel substituted; appellant's brief deemed  
withdrawn.

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

M-5354 Tirado v Elrac, Inc., doing business as Enterprise  
Rent-a-Car

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

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

M-5720 In the Matter of H., Helen v T. Christopher

Preference granted to the extent of maintaining  
appeals on this Court's calendar for the January 2008 Term; Clerk  
directed to place said appeals on the calendar for hearing during  
the first week of the January 2008 Term.

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

M-5419 Moreira v Park

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

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

M-5516 People v Mercedes, Teofilo

Time to perfect appeal enlarged to the April 2008 Term.

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

M-5515 People v Rauf, Abdul

Time to perfect appeal enlarged to the April 2008 Term.

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

M-5554 In the Matter of L.A., M.D., M.P.H. v Novello

Time to perfect appeal enlarged to the June 2008 Term.

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

M-5351 People v Almanzar, Rafael

Appeal dismissed.

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

M-5271 Floyd v Rollin F. Johnson Trucking Inc.

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

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

M-5517 People v Matthey, Anthony

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

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

M-5209 People v Holmes, Darnell

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

Saxe, J.P., Sullivan, Williams, Friedman, Marlow, JJ.

M-3811 People v Dushain, Carl

Reargument denied.

Lippman, P.J.,

M-5561 People v Romero, Robert

Leave to appeal to this Court denied.

Friedman, J.

M-3747 People v Byrd, Darrell

Leave to appeal to this Court and other relief denied.

Friedman, J.

M-4953 People v Partee, Cedric  
Leave to appeal to this Court denied.

Sweeny, J.

M-5562 People v Simmons, Chad  
Leave to appeal to this Court denied.

Catterson, J.

M-4867 People v Simmons, Donnie  
Leave to appeal to the Court of Appeals and other relief granted, as indicated.

Catterson, J.

M-3284 People v Sanchez, Eddie  
Leave to appeal to this Court denied.

**The Following Orders Were Entered And Filed On November 27, 2007:**

Lippman, P.J., Nardelli, Buckley, Gonzalez, Sweeny, JJ.

M-5776 Cohen v Lenoble

Stay granted by order of a Justice of this Court, dated October 31, 2007, continued upon conditions undertaking posted and appeal perfect for the March 2008 Term, as indicated.

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

M-5956 Bombardier Capital Inc. v Schoenbold Sporn Laitman &  
Lometti, P.C.

Stay granted on condition appeal perfected for the  
March 2008 Term, as indicated.

Lippman, P.J., Nardelli, Buckley, Gonzalez, Sweeny, JJ.

M-5646 In the Matter of Doe, John

Stay denied.

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

M-5706 Kwitny v Westchester Towers Owners Corp.

Stay of trial granted.