



State Assigned Risk Plan as a condition to cancellation pursuant to Vehicle and Traffic Law § 313 (Manual of the New York Automobile Insurance Plan, § 18.2[9][b] [April 1, 2004 Distribution]), it failed to establish that, as required by Vehicle and Traffic Law § 313(2)(a), it filed a copy of the notice of cancellation with the Department of Motor Vehicles within 30 days of the effective date of the cancellation. In the latter regard, Central Mutual relied on a copy of an "insurance activity expansion" it had downloaded from the Department of Motor Vehicles' Web site. The copy was not certified pursuant 4518(c), and Central Mutual did not attempt to prove at the hearing its office procedures, if any, for transmitting notices of cancellation to the Department of Motor Vehicles. Thus, there is no proof of an office practice and procedure followed by Central Mutual in the regular course of its business such as might raise a presumption that its notice of cancellation relating to the offending vehicle was received by the Department of Motor Vehicles within 30 days of the cancellation (*cf. Matter of Liberty Mut. Ins. Co. v Morrissey*, 203 AD2d 93 [1994]). Nor does the face of the expansion plainly indicate when the notice of cancellation was received by the Department of Motor Vehicles.<sup>1</sup> Accordingly, the expansion should not have been

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<sup>1</sup>In pertinent part, i.e., insofar as it appears to relate to cancellation, the document states: "TODAY'S DATE IS 02/03/06 . . . REF: 683697705146 . . . ACTIVITY: CANCELLATION . . . EFF

received as evidence of a section 313 cancellation unless so patently trustworthy in that respect as to be self-authenticating, which it is not (*cf. Elkaim v Elkaim*, 176 AD2d 116 [1991], *appeal dismissed* 78 NY2d 1072 [1991]). Central Mutual's failure to show that it had timely filed the notice of cancellation renders the cancellation ineffective as against persons other than the named insured and members of the latter's household (Vehicle and Traffic Law § 313[3]; *see Matter of Progressive Northeastern Ins. Co. v Barnes*, 30 AD3d 523 [2006]).

The Decision and Order of this Court entered herein on June 28, 2007 is hereby recalled and vacated (*see* M-3743 & 4371, decided simultaneously herewith).

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

ENTERED: DECEMBER 18, 2007

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CLERK

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DATE 05/18/2005 [this is about three weeks before the accident]  
. . . INS: 240 NY CENT MUT FIRE INS CO ... POL#: T582722 [this  
reflects the policy in question] . . . SUB/SENT: 05/25/2005 . . .  
SOURCE: EDI . . . REASON: NONE . . . DOC ID: NONE."

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

1859 In re Jerwin R.,

A Person Alleged to be  
a Juvenile Delinquent,  
Appellant.

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Presentment Agency

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Kenneth M. Tuccillo, Hastings-On-Hudson, for appellant.

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

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Order, Family Court, Bronx County (Alma Cordova, J.),  
entered on or about June 26, 2006, which, after a violation of  
probation hearing, revoked an order of disposition, same court  
and Judge, entered on or about October 3, 2005, which had  
adjudicated appellant a juvenile delinquent upon a fact-finding  
determination that he committed acts which, if committed by an  
adult, would constitute the crimes of grand larceny in the fourth  
degree, criminal possession of stolen property in the fourth and  
fifth degrees and petit larceny, and had placed him on probation  
for a period of up to 18 months, and instead placed him with the  
Office of Children and Family Services for a period of up to 18  
months, unanimously affirmed, without costs.

The court's determination that appellant violated the  
conditions of his probation to an extent warranting revocation is  
supported by a preponderance of the evidence (*see Matter of  
Anthony U.*, 39 AD3d 424 [2007]). Appellant failed to comply with

his probation conditions, which included attending school and a drug program. The court properly concluded that placement in a limited secure facility for up to 18 months was the least restrictive alternative consistent with the needs of appellant and the community, where probation had already failed, and both the Department of Probation and the Mental Health Services recommended placement (see *Matter of Tiffany H.*, 19 AD3d 176 [2005]).

The fact-finding court properly denied appellant's motion to suppress identification testimony. The show-up identification procedure was justified by its close spatial and temporal proximity to the crime, and was not unduly suggestive (see *People v Gatling*, 38 AD3d 239, 240 [2007], *lv denied* 9 NY3d 865 [2007]).

The court's fact-finding determination was supported by legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing its determinations concerning identification and credibility (see *People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim and witness had ample opportunity to observe appellant and they provided reliable identification testimony.

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

ENTERED: DECEMBER 18, 2007

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CLERK

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

1287 Janet Hyman, et al., Index 600709/06  
Plaintiffs-Respondents,

-against-

The New York Stock Exchange, Inc., et al.,  
Defendants-Appellants.

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Wachtell, Lipton, Rosen & Katz, New York (Paul Vizcarrondo of counsel), for The New York Stock Exchange, Inc., appellant.

Dechert LLP, New York (Andrew Joshua Levander of counsel), for John A. Thain, appellant.

Liddle & Robinson, L.L.P., New York (Ethan A. Brecher of counsel), for respondents.

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Order, Supreme Court, New York County (Charles Ramos, J.), entered January 10, 2007, which, insofar as appealed from as limited by the briefs, denied defendants' joint motion to dismiss plaintiffs' remaining cause of action for breach of fiduciary duty, unanimously reversed, on the law, with costs, the motion granted, and the complaints dismissed. The Clerk is directed to enter judgment accordingly in favor of defendants dismissing the complaints.

The following factual allegations are taken predominantly from plaintiff Hyman's amended complaint. On December 2, 2004, The New York Stock Exchange's (the Exchange) management advised its board of directors that it was exploring the possibility of acquiring other "domestic and non-U.S. cash equities and options trading arenas." At that meeting, the board authorized

management to continue exploration of these business avenues.

On January 6, 2005, defendant John Thain, the Chief Executive Officer of the Exchange, advised the board that management had been contacted by nonparty Archipelago Holdings, Inc. (Archipelago)<sup>1</sup> about a possible merger.

At a February 3, 2005 "town hall" meeting, Thain discussed with members the possibility of converting the Exchange from a not-for-profit corporation into a public, for-profit company. While no mention was made of the ongoing merger discussions with Archipelago, Thain allegedly made a statement that "indicated that a conversion of the Exchange from a not-for-profit corporation into a for-profit corporation was a mere theoretical possibility."

On February 10, 2005, the Exchange and Archipelago entered into a mutual confidentiality agreement concerning their ongoing negotiations.

On February 15, 2005, the Exchange publicly announced the formation of a committee to explore the conversion of the Exchange into a for-profit corporation.

On March 1, 2005, plaintiffs Hyman and Rittmaster sold their Exchange memberships for \$1,500,000 and \$1,475,000, respectively,

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<sup>1</sup> Archipelago operates the Archipelago Exchange, the first all-electronic stock exchange in the United States.

at a blind auction administered by the Exchange.<sup>2</sup> The next day, plaintiff Lief sold her membership for \$1,500,000.

On April 20, 2005, the Exchange's board of directors unanimously voted to approve and adopt a merger agreement with Archipelago. Following the announcement of the merger agreement, the selling price of memberships increased dramatically, in amounts ranging from \$2,400,000 on April 25, 2005 to \$4,000,000 on December 1, 2005. Previously, in the period between August 3, 2004 and January 10, 2005, the price had decreased from \$1,350,000 to \$1,000,000. Thus, the plaintiffs sold their memberships as the price began to rebound on the strength of the conversion exploration announcement, but before the price increases accelerated because of the merger announcement.

In separate complaints, plaintiffs alleged, inter alia, that the Exchange and Thain breached their respective duty to disclose, prior to plaintiffs' sales of their Exchange memberships, the existence of merger negotiations between the Exchange and Archipelago, and that had there been full disclosure of the possibility of the merger, they would not have sold their seats in March 2005.

Defendants moved to dismiss all three complaints on the grounds of lack of specificity (CPLR 3013, 3016[b]), a defense

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<sup>2</sup>Under the blind auction, a selling member does not know to whom he or she is selling the membership.

founded upon documentary evidence (CPLR 3211[a][1]), and failure to state a cause of action (CPLR 3211[a][7]). While the Exchange maintained that it owes its seatholders no fiduciary duties, Thain argued that he fulfilled any fiduciary duties he owed to plaintiffs and that the business judgment rule shielded the decision to keep the merger negotiations confidential. In opposition, plaintiffs claimed that the public announcements prior to the Archipelago announcement were incomplete and/or misleading since they merely suggested the possibility of a conversion into a for-profit corporation. Further, they claimed that between March 1, 2005 and April 15, 2005, nonparty Thomas Caldwell, a member of the Exchange, and his son sponsored the purchase of five seats when Caldwell was on the committee exploring the possibility of the Archipelago merger.

The motion court should have dismissed the first cause of action for breach of fiduciary duty as against the Exchange. Contrary to the premise of that cause of action, it is well settled that a corporation does not owe fiduciary duties to its members or shareholders (see *Kavanaugh v Kavanaugh Knitting Co.*, 226 NY 185, 194 [1919] ["no trust relation ordinarily exists between the stockholders . . . and the corporation"]; *Gates v BEA Assoc.*, 1990 WL 180137, \*6, 1990 US Dist LEXIS 15299, \*18 [SD NY 1990] ["[u]nder New York law, a corporation does not owe fiduciary duties to its shareholders"]). As the Exchange

correctly argues, to recognize a fiduciary relationship between the corporation and its shareholders would lead to the confounding possibility that a shareholder of a corporation could bring a derivative action on behalf of the corporation against the corporation itself.

Thain's motion to dismiss the cause of action for breach of fiduciary duty against him should have been granted as well. Plaintiff's bare allegations that Thain "indicated" that a conversion from a not-for-profit corporation into a for-profit public corporation was "a mere theoretical possibility," fails to satisfy the pleading requirements of CPLR 3016(b) (see *Brown v Wolf Group Integrated Communications, Ltd.*, 23 AD3d 239 [2005]). Since two of the plaintiffs allege that they were privy by telephone to Thain's statements, they should have been able to recite with more specificity Thain's actual words or actions that are alleged to have been misleading.

We note that the complaints do not allege insider trading by Thain or anyone else, and the motion court erred in alluding to "the possibility of insider trading" by persons not named in this

action as part of its rationale for sustaining this cause of action.

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

ENTERED: DECEMBER 18, 2007

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degree of discretion it possessed" (*People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]) where defendant, while on probation, was re-arrested for his significant role in multiple bank robberies, participation in a scheme to deposit stolen checks into a fraudulent account, the selling of stolen money orders, and the transportation and distribution of cocaine between New York and Pennsylvania. "The Legislature could have made resentencing automatic, or it could have required a finding of extraordinary circumstances in order to deny resentencing, but it did not do either" (*id.*). Under the circumstances, defendant's evidence of rehabilitation while incarcerated was insignificant in light of the factors militating against resentencing (*People v Salcedo*, 40 AD3d 356, 357 [2007], *lv dismissed* 9 NY3d 850 [2007]).

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

ENTERED: DECEMBER 18, 2007

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CLERK

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

1397-

1398

1398A Mark Mehlman,  
Plaintiff-Respondent,

Index 27036/02

-against-

592-600 Union Avenue Corp.,  
Defendant-Appellant.

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Noel W. Hauser and Associates, New York (Noel W. Hauser of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Merril S. Biscone of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about January 17, 2007, which granted plaintiff's motion for summary judgment on its first cause of action for specific performance, unanimously reversed, on the law, without costs, the motion denied, and, upon a search of the record, summary judgment granted to defendant dismissing the complaint. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered September 15, 2006, which denied defendant's motion to strike plaintiff's jury demand, and order, same court (Lucy Billings, J.), entered January 23, 2006, which, to the extent appealed from, denied defendant's cross motion for summary judgment based on lack of standing, unanimously dismissed as academic, without costs.

On or about March 5, 2002, defendant seller entered into a

contract to sell the property located at 592-596 Union Avenue in Bronx, New York, to plaintiff buyer, identified in the contract as "nominee for a Limited Liability company to be formed." The agreed-upon purchase price was \$1,897,632.90, with a closing scheduled for May 2002 and an outside closing date of October 7, 2002.

Upon execution of the contract, buyer ordered a title report which revealed three judgments against seller amounting to more than \$675,000. The title report further reflected an outstanding mortgage on the property in the sum of \$550,000. Seller attempted to cure the outstanding judgments, but was able to eliminate only the largest one of approximately \$450,000, leaving two judgments totaling over \$200,000. Seller received at least two adjournments of the closing to resolve these title issues, and, in a July 26, 2002 letter from seller's counsel to buyer, indicated a readiness to close, now that a title insurance representative had agreed to "a two-year escrow for [the] two judgments against the [p]remises." However, the judgments were not paid prior to the closing date.

On September 10, 2002, seller wrote to buyer advising him that it had already expended the contractually required sum to eliminate the judgments against the property, and that pursuant to Section 13.02 of the contract, buyer was required to exercise one of two options: either cancel the contract and receive a

refund of its down payment and reimbursement of title costs or take the property subject to the title defects, with a modest credit. By letter dated September 24, 2002, buyer "rejected" seller's letter in its entirety and unilaterally set a closing date of October 7, 2002, with time being of the essence against seller. Buyer's counsel argued that seller's July 26, 2002 letter, which acknowledged the title company's agreement to an escrow arrangement for the two unpaid judgments, had effectively amended the contract of sale to constitute *seller's* agreement to set up the escrow and close by August 2002.

On October 7, 2002, buyer's counsel appeared at the designated closing place and made a formal record that buyer was ready, willing and able to close the purchase that day, and that he was in possession of three checks totaling the required payments under the contract. The checks were identified by buyer's counsel as "bank or certified checks," but were not shown to seller's counsel or principal, who were also present. Seller's counsel refused to close, invoking section 13.02 of the contract, which, according to seller, gave buyer a choice of either terminating the contract or taking the property subject to the title defects. No closing occurred.

In October 2002, buyer commenced the instant action against seller seeking specific performance of the contract of sale and damages associated with the seller's failure to close. Seller

answered and counterclaimed for an order declaring that it was entitled to retain buyer's down payment. Subsequently, both parties moved for summary judgment, which the court denied, finding triable issues as to the correct interpretation of the contract.

Following discovery, buyer moved to amend the complaint to add a cause of action for breach of contract based on seller's failure to properly cancel the contract pursuant to paragraph 7 of the contract rider, which provided that notwithstanding any inconsistent provision in the contract, seller "shall be responsible to pay monetary liens, fines, interest, and penalties in liquidated damages arising out of the violations noted or issued against the premises on or before the closing date, provided, however, that seller's liability with respect thereto shall not exceed \$10,000.00 in the aggregate." Paragraph 7 further provided that if the aggregate amount of liens, fines, and penalties exceeded \$10,000.00, seller could either pay such higher amount or cancel the contract by written notice to purchaser. Buyer argues that in light of seller's admitted failure to satisfy all liens prior to closing, seller should have canceled the contract pursuant to paragraph 7, and that, having failed to do so, its refusal to close constituted a default which, according to paragraph 8 of the rider, authorized the remedy of specific performance.

Seller did not oppose buyer's motion to amend, but instead cross-moved for summary judgment on the grounds that buyer lacked standing to sue and that buyer was not ready, willing and able to purchase the property since the checks presented at closing did not comply with the terms of the contract. In the first order appealed, entered January 23, 2006, the motion court granted buyer's unopposed motion to amend, but denied seller's cross motion for summary judgment. The court found that buyer had standing to sue, and that because seller's principal did not observe the checks at closing, there was insufficient evidence to establish as a matter of law that buyer was not ready, willing and able to purchase the property. The court further ruled that seller may have waived any objection to the form of payment by not objecting earlier, and, alternatively, that seller's reliance on section 13.02 as its excuse for nonperformance may have constituted an anticipatory breach, thereby obviating buyer's obligation to prove its readiness to purchase.

Seller then moved to strike buyer's jury demand. In the second order appealed, entered September 15, 2006, the court denied seller's motion to strike, finding that buyer's claim for damages for breach of contract justified a jury trial.

Finally, in June 2006, buyer again moved for summary judgment on its cause of action for specific performance based on seller's failure to properly cancel the contract pursuant to

paragraph 7 of the rider. Buyer argued that paragraph 7 controlled over any conflicting provision, such as section 13.02, and that paragraph 7 required seller to either pay all "liens, fines, interest and penalties" or cancel the contract, and in this case seller did neither.

Seller opposed the motion, arguing that buyer's reliance on paragraph 7 of the rider was misplaced, since that paragraph was limited to "liens, fines, interests and penalties" that arose out of violations issued by government authorities, and had no application to judgments held by private parties. Seller also reiterated its argument that buyer lacked standing to sue.

In the third order appealed, entered January 17, 2007, the court granted buyer's motion for summary judgment on its claim for specific performance, apparently on the basis that seller failed to properly cancel the contract pursuant to paragraph 7 of the rider and therefore was in breach of the contract by refusing to close on October 7, 2007.

On appeal, seller argues that the motion court misinterpreted the contract by holding that paragraph 7 of the rider superseded section 13.02. Seller contends that its inability to satisfy the judgments prior to closing justified its invocation of section 13.02 and gave buyer the choice to either cancel the contract or accept the property with the title defects, and that by not choosing either course, buyer breached

the contract. Seller alternatively argues that even if its invocation of section 13.02 or refusal to close could be seen as an anticipatory breach, buyer still would not be entitled to specific performance, due to its inability to demonstrate that it was ready, willing and able to close. As we agree with both arguments, we reverse and dismiss the complaint.

In support of its argument that it acted in conformity with the terms of the contract, seller relies on section 13.02, which provides, in pertinent part:

"If the Seller shall be unable to convey title to the Premises at the Closing in accordance with the provisions of this contract . . . Purchaser, nevertheless, may elect to accept such title as Seller may be able to convey with a credit against the monies payable at the Closing equal to the reasonably estimated cost to cure the same (up to the Maximum Expense described below) but without any other credit or liability on the part of the Seller. If Purchaser shall not so elect, Purchaser may terminate this contract and the sole liability of the Seller shall be to refund the Downpayment to Purchaser and to reimburse Purchaser for the net cost of title examination . . . . Upon such refund and reimbursement, this contract shall be null and void and the parties hereto shall be relieved of all further obligations and liability other than any arising under Section 14. Seller shall not be required to bring any action or proceeding or to incur any expense in excess of the Maximum Expense specified in Schedule D (or if none is so specified, the Maximum Expense shall be one-half of one percent of the Purchase Price) to cure any title defect or to enable Seller to otherwise comply with the provisions of this contract . . . ."

As may be seen from the above, seller was perfectly within its rights in invoking section 13.02 once it determined that it had expended the "Maximum Expense" amount designated in the contract. The Maximum Expense amount established seller's maximum liability for attempting to eliminate title defects prior to closing, and once that maximum was met, section 13.02 expressly limited buyer's remedies to two options: cancel the sale and receive a refund of down payment and title costs or take the property subject to the title defects, with a maximum credit of the Maximum Expense amount, which in this case the parties agree was .5% of the purchase price, or \$9,844.16. Buyer elected neither of these remedies, but instead unilaterally set a time-of-the-essence closing and demanded that seller bear the burden of establishing escrow accounts for the two outstanding judgments. Given that section 13.02 expressly limits seller's liability to the Maximum Expense amount "without any other credit or liability on the part of the Seller," buyer's insistence that seller establish escrow accounts for these judgments was itself a breach of the agreement.

"When a contract for the sale of real property contains a clause specifically setting forth the remedies available to the buyer if the seller is unable to satisfy a stated condition, fundamental rules of contract construction and enforcement require that we limit the buyer to the remedies for which it

provided in the sale contract" (*101123 LLC v Solis Realty LLC*, 23 AD3d 107, 108 [2005]). In *101123 LLC*, which also involved a contract for the sale of a building, the parties' contract expressly limited the buyer's remedies in the event the seller was unable to deliver the premises free of tenants to taking the property as is or rescinding the contract, and further precluded specific performance unless the seller willfully defaulted. When the seller did not remove a tenant and invoked the contract provision, the buyer sued for specific performance. This Court affirmed the dismissal of the complaint after trial, ruling that the contract must be enforced as written to "limit the buyer to the remedies that were specifically delineated in the sale contract" (*id.* at 112). The same result is required here.

The motion court erred in finding that paragraph 7 of the rider superseded section 13.02. The clear and unambiguous language of paragraph 7 demonstrates that it is only applicable to "liens, fines, interest and penalties . . . arising out of the violations noted or issued against the Premises on or before the Closing Date." We reject buyer's argument that the above-mentioned liens or penalties would include a judgment against seller obtained by a private party. Such interpretation would render the phrase "arising out of the violations noted or issued against the Premises" meaningless.

In short, because seller acted within its rights pursuant to

section 13.02 of the contract, it is buyer, not seller, who breached the contract by failing to cancel the contract or take the property subject to the judgments (*101123 LLC* at 112; *Maxton Bldrs. v Lo Galbo*, 68 NY2d 373, 378 [1986] [buyer bargained for limited right to cancel and failure to properly exercise it constituted a breach]). Accordingly, buyer's breach renders its complaint deficient as a matter of law, and, upon a search of the record, we grant summary judgment to seller dismissing the complaint. In light of this holding, it is unnecessary to reach seller's additional arguments concerning buyer's alleged lack of standing and invalid tender.

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

ENTERED: DECEMBER 18, 2007

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CLERK

Andrias, J.P., Buckley, Catterson, Malone, Kavanagh, JJ.

1505N Board of Managers of the Warren House Condominium, etc.,  
Plaintiff-Respondent, Index 102058/01

-against-

Lilo Pike,  
Defendant-Appellant.

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Kuby & Perez, New York (George Wachtel of counsel), for  
appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Kristine L.  
Grinberg of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling,  
J.), entered February 13, 2007, which, in an action by a  
condominium board seeking ejectment of a unit owner for creating  
a nuisance, insofar as appealed from, denied defendant's motion  
to compel plaintiff's (1) consent to defendant's renting of the  
unit and (2) removal from its books and records of defendant's  
purported obligation to pay the sum of money representing its  
legal costs incurred in prosecuting this action, unanimously  
modified, on the law and the facts, to direct that plaintiff  
remove such purported obligation from its books and records, and  
to remand for further proceedings consistent herewith, and  
otherwise affirmed, without costs.

Plaintiff condominium board denied defendant unit owner's  
request to rent her unit because, it claims, defendant owes it  
attorneys' fees it incurred in prosecuting this action, as well

as unpaid common charges. It appears that on February 26, 2003, upon defendant's failure to appear for trial, judgment was pronounced in plaintiff's favor and a hearing directed on the issue of its attorneys' fees; that hearing was held on April 11, 2003, also in defendant's absence. On April 23, 2003, a judgment was entered permanently enjoining defendant's occupancy of the unit and her ejectment therefrom on findings that she had created a nuisance and violated the condominium's bylaws; that judgment, although reciting that an inquest had been held, contained no directives for the payment of money. On May 1, 2003, a judgment awarding plaintiff \$21,832.46 in attorneys' fees was issued but never entered. Finally, on September 23, 2003, an order was entered granting a motion by defendant to vacate a default. While the record does not contain the moving papers, and the court's handwritten decision indicates only that a motion to vacate a default judgment was being granted on condition that defendant pay plaintiff's motion costs, plaintiff's opposition papers indicated that the motion was addressed only to the April 23 judgment. The decision underlying the order on appeal indicates that the May 1 judgment is still viable.

We hold that the vacatur order of September 23, which concededly nullified the underlying findings in the April 23 judgment that defendant was a nuisance and in violation of the condominium's bylaws, necessarily nullified as well the award of

attorneys' fees in the May 1 judgment, notwithstanding that it did not specify that both judgments were being vacated. Although two separate judgments were issued, it was defendant's single default in appearing for trial that resulted in the court granting all of the relief sought by plaintiff. Thus, the award of attorneys' fees cannot be included as part of the unpaid common charges owed by defendant to the condominium, and asserted by plaintiff as a reason for denying defendant permission to rent her unit. Nor does section 9.4 of the condominium's bylaws, which requires a unit owner to immediately reimburse the condominium for all costs it incurs in removing or curing a "violation, breach, or default" of the bylaws, and deems such costs to be additional common charges, entitle plaintiff, at this juncture, before there has been a judicial determination of any such violation, breach or default, to condition its consent to rent on payment of its attorneys' fees (*see Board of Mgrs. of the Amherst Condominium v CC Ming (USA) Ltd. Partnership*, 17 AD3d 183, 185-186 [2005]).

Issues as to whether, and to what extent, there are any unpaid common charges (beyond those claimed as attorneys' fees

and litigation costs) preclude, at this stage, the granting of a directive that plaintiff permit defendant to rent her condominium unit, and we accordingly remand.

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

ENTERED: DECEMBER 18, 2007

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plea survives defendant's waiver of his right to appeal (*People v Seaberg*, 74 NY2d 1, 10 [1989]). We further note that, on the specific issue whether an appeal waiver precludes appellate review of a court's failure to advise a defendant pleading guilty that the bargained-for sentence will be followed by a specific period of mandatory post-release supervision, the Court of Appeals in *People v Louree* appears to have implicitly rejected such a claim (8 NY3d 541 [2007], *revg* 28 AD3d 680 [2006]).

This determination renders defendant's remaining arguments academic. However, we caution that, in the event defendant again chooses to plead guilty to second-degree assault under Penal Law § 120.05(2), the court should specifically ascertain that defendant admits causing physical injury by means of a deadly weapon or a dangerous instrument.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 18, 2007

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CLERK



January 5, 2005 application for accidental disability retirement (ADR). Petitioner argues that the aforementioned events either precipitated the development of a latent problem or aggravated a pre-existing psychiatric condition that had not manifested itself in the eight years of full duty service immediately prior to September 12 and 13, 2001, with the exception of one week in 1999 when she was reassigned from patrol duty and her firearms removed while she suffered depression after learning that her mother was diagnosed with cancer. She further alleges that the record shows a lack of any indication that either the Medical Board or respondent Board of Trustees considered the fact of her service without incident for the eight years prior to September 2001.

Petitioner's ADR application was carefully considered on three separate occasions by the Medical Board and respondent. In each instance, accidental disability retirement benefits were denied, although the third determination ended in a tie vote, which results in an award of ordinary disability benefits.

The trial court properly declined to annul respondent's determination and remand for reconsideration on the issue of the claimed causal connection between petitioner's psychiatric disability and her alleged line-of-duty injury. Court of Appeals decisions involving the circumstance of a tie vote by respondent on an ADR application hold that a reviewing court may only disturb such finding if it determines as a matter of law that

causation is established, i.e., that the disability was the natural and proximate result of a line-of-duty accident. Respondent's determination must stand if the record contains any credible evidence of lack of causation (*Matter of Meyer v Board of Trustees of the N.Y. City Fire Dept.*, 90 NY2d 139 [1997]).

Upon review of the record considered by respondent, it is clear that causation as alleged by petitioner was not established as a matter of law. Indeed, for her initial evaluation by the Board she provided "very little documentation" because her psychotherapist, who had treated her for four years, did not submit a report (when questioned about this, her response was "he doesn't do such reports"), and no formal report was submitted by her then-current treating psychiatrist. Rather, the record tends to establish, with a great deal of credible evidence by way of the Medical Board's interview of petitioner and evaluation of her medical records and employment history in the NYPD, that petitioner's disability was caused by what the trial court termed her "long-standing personality disorder." This was found to consist of overdependence, paranoia, borderline traits, depression and acting out with rage. This condition, whose existence went back approximately 10 to 15 years before the alleged causal events, is extensively documented in psychiatric test results and evaluations included in the record. The Medical Board found that after petitioner's initial enrollment and

resignation from the Police Academy in 1985, her acute anxiety and "personality traits incompatible with the demands and stresses of the duties of [a] police officer" were the basis for several rejections of her attempts to re-enroll. Even when she was eventually reappointed, her psychological fitness was pointedly questioned.

Administrative Code of City of NY § 13-252 and the relevant case law provide that ADR should be granted only where the applicant is physically or mentally incapacitated for duty as a natural and proximate result of a line-of-duty accident. The applicant has the burden of proving each element of her claim. The Medical Board is the sole determiner of whether the applicant has the injury claimed and whether the injury incapacitates the applicant from the performance of her duties, and its determination on these issues is binding on the Board of Trustees of the Police Pension Fund. Where the Medical Board concludes that the applicant is disabled, it must make a recommendation to the Board of Trustees as to whether the disability was "a natural and proximate result of an accidental injury received in such city-service"; the Board of Trustees must then make its own determination as to the Medical Board's recommendation on causation (§ 13-168[a]; *Matter of Canfora v Board of Trustees of Police Pension Fund*, 60 NY2d 347 [1983]). The Board of Trustees determination as to causation may not be disturbed by a court as

lacking rational basis or as arbitrary and capricious if it is based on "substantial evidence," defined in this context as based on "some credible evidence" (*Canfora*, 60 NY2d at 351).

Inasmuch as the Board of Trustees' determination that petitioner's disability was not caused by any accidental line-of-duty injury is rationally based upon substantial evidence, is not arbitrary, capricious, an abuse of discretion or contrary to law, and the record before us does not as a matter of law support petitioner's theory of causation, we are obliged to affirm.

We note that although petitioner asserts both her service on September 12, 2001 and her subsequent humiliation, harassment and taunting by co-workers were the line-of-duty accidents that caused her disability, the record contains statements by her that indicate she felt the latter to be more significant than the former. For example, before the Medical Board in September 2005 she stated, "it was at the scene of the World Trade Center when I was badly humiliated in front of the other officers by being handcuffed and from then on I was harassed . . . I was told that I shouldn't be an officer and that's my flashback. This is the one that bothers me the most. The officer who put the handcuffs on me ruined my life, that's why I cannot be a full time police officer." However, this theory of causation does not meet the definition of "accident" adopted by the Court of Appeals in this

context in *Matter of Lichtenstein v Board of Trustees of Police Pension Fund* (57 NY2d 1010, 1012 [1982] [“sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact”], internal quotation marks and citation omitted), and thus does not support her claim (see *Matter of Baird v Kelly*, 25 AD3d 311, 313 [2006], *lv denied* 7 NY3d 707 [2006]).

We further note that in addition to petitioner’s aforementioned initial lack of documentation substantiating her claim and her odd explanation for such omission, the record also suggests that the documentation she subsequently provided from Dr. Chece (dated August 20, 2005) was obtained by her attorney, despite her denial of that fact to the Medical Board. It is also interesting that as of September 8, 2003, the NYPD Psychological Evaluation Section (PES) adjudged petitioner fit for full-duty status, recommended the return of her firearms, and closed her case. PES subsequently refused to support her application for psychiatric disability retirement.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: DECEMBER 18, 2007

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the police. Officer Ohuche testified that it looked like there had been a fight in the room, which was disheveled, with glass cups knocked over and liquid spilled on the floor.

After spending some time attempting to calm the situation, the officers convinced defendant to leave the apartment. But before he did, Otero produced a facially valid order of protection in her favor and against defendant and demanded that he be arrested. Defendant never stated to the police that he had not been served with the order, nor did he verbally protest that he had not violated it. His aggressive conduct escalated, and the officers called for backup support.

Officer Rubio and her partner arrived. Soon after they entered the apartment, defendant ran toward the kitchen, and Otero said "watch out, he might pick up a knife." Officers Ohuche and Rubio both testified that any chase into a kitchen presents a safety hazard to the police. In their attempt to restrain defendant, Rubio was injured.

An essential element of assault in the second degree is that a defendant's acts were committed with intent to prevent an officer from "performing a lawful duty" (Penal Law § 120.05[3]). The People were thus required to prove that the police had been acting lawfully, i.e. that they had probable cause when they arrested defendant during the course of this confrontation (see *People v Milhouse*, 246 AD2d 119 [1998]). The People were not

required to prove that defendant had actually violated the order of protection by committing the crime of harassment or other offenses (see *People v McDermott*, 279 AD2d 361 [2001], *lv denied* 96 NY2d 803 [2001]). Here, there was probable cause to believe the order of protection, which was the predicate for the officers' attempt to arrest defendant that resulted in the struggle that injured Officer Rubio, had been violated. Defendant's aggressive actions in the presence of the officers, the distraught condition of Otero, as well as the disheveled condition of the apartment amounted to probable cause to believe that defendant had harassed, menaced, intimidated or otherwise threatened Otero. Moreover, her warning about a knife presented a safety situation for the officers, and they acted lawfully in attempting to restrain defendant. It was during this altercation that Officer Rubio sustained her injuries.

Accordingly, the People satisfied their burden in the first instance of proving the legality of the police conduct by demonstrating adequate probable cause to arrest defendant (see *People v Thomas*, 291 AD2d 462, 463 [2002]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: DECEMBER 18, 2007

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CLERK

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

1979 Sindi Schorr, Index 350104/02  
Plaintiff-Respondent,

-against-

Peter Schorr,  
Defendant-Appellant.

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Joseph P. Dineen, Garden City, for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Adam John  
Wolff of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jacqueline W.  
Silbermann, J.), entered October 5, 2006, insofar as appealed  
from as limited by the briefs, awarding plaintiff 50% of the  
marital property, monthly maintenance of \$6,500 for five years,  
and counsel fees of \$100,000, unanimously modified, on the facts,  
plaintiff awarded 40% and defendant 60% of the marital property,  
and otherwise affirmed, without costs. The matter is remanded to  
Supreme Court for entry of an amended judgment consistent  
herewith.

Plaintiff's contributions to defendant's business interests,  
which accounted for a substantial portion of the marital assets,  
were modest (see *Arvantides v Arvantides*, 64 NY2d 1033, 1034  
[1985]; *Naimollah v De Ugarte*, 18 AD3d 268, 269 [2005]; cf.  
*Niland v Niland*, 291 AD2d 876, 877 [2002]). Accordingly, and  
giving full consideration to plaintiff's contributions as a  
homemaker (*Arvantides*, 64 NY2d at 1034), we modify the equitable

distribution award as indicated above.

The maintenance award to plaintiff was appropriate in light of the evidence regarding the parties' standard of living during the marriage, plaintiff's career sacrifices during the marriage, defendant's substantially superior financial circumstances, and plaintiff's demonstrated inability to meet her living expenses and need for time to establish herself in her new career. Contrary to defendant's suggestion, plaintiff's receipt of the distributive award does not obviate the need for maintenance (see *Kohl v Kohl*, 24 AD3d 219, 221 [2005]).

The award of \$100,000 in counsel fees, representing approximately one-half of plaintiff's counsel fees at the time of trial, was justified by the financial disparity between the parties and defendant's discovery misconduct resulting in unnecessary escalation of litigation costs (see *Kurtz v Kurtz*, 1 AD3d 214 [2003]).

Defendant was properly precluded from offering evidence at trial as to any financial issues because of his failure to timely comply with discovery requests concerning his businesses and to pay the fees of the expert appointed to value his business interests; such conduct resulted in the expert being unable to submit a complete report of the value of defendant's business interests at trial (see *Perell v Krause*, 277 AD2d 213 [2000]). Because the various business interests could not be parsed from

the other financial issues in the case, to have limited the preclusion order only to testimony challenging the valuation of his business interests by the expert would have allowed defendant to benefit from his concealment of critical information regarding his assets and income.

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

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: DECEMBER 18, 2007

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CLERK

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

1989           The People of State of New York,           Index 75069/05  
              ex rel. Lonnie Epps,  
                  Petitioner-Appellant,

-against-

Warden, Riker's Island Correctional  
Facility, et al.,  
Respondents-Respondents.

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Steven Banks, The Legal Aid Society, New York (Nancy E. Little of  
counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Robert C. Weisz of  
counsel), for respondents.

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Order, Supreme Court, Bronx County (Caesar D. Cirigliano,  
J.), entered October 31, 2005, which dismissed this proceeding  
for a writ of habeas corpus challenging the revocation of  
petitioner's parole, unanimously affirmed, without costs.

Petitioner failed to exhaust his administrative remedies.  
The errors he claims were committed at the parole revocation  
hearing could have been remedied by means of an administrative  
appeal (*People ex rel. Charleston v New York State Div. of  
Parole*, 280 AD2d 348 [2001]). It does not avail petitioner to  
argue that the alleged errors are of constitutional dimension

(see *People ex rel. Bratton v Mellas*, 28 AD3d 1207, 1207-1208 [2006], *lv denied* 7 NY3d 705 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: DECEMBER 18, 2007

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CLERK

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

1993 Ira Blutreich, et al., Index 105235/06  
Plaintiffs-Respondents,

-against-

Amalgamated Dwellings, Inc.,  
Defendant-Appellant.

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Rosen & Livingston, New York (Peter I. Livingston of counsel),  
for appellant.

Fred L. Seeman, New York, for respondents.

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Order, Supreme Court, New York County (Robert D. Lippmann, J.), entered September 8, 2006, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for removal of a summary holdover proceeding pending in the Civil Court and consolidated it with the instant declaratory action, unanimously reversed, on the law, without costs, plaintiff's motion denied and defendant's cross motion granted to the extent that the stay is vacated.

On January 5, 2006, defendant's board of directors voted to terminate the Blutreichs' proprietary lease, and thereafter served a notice of termination on them. It then commenced a holdover proceeding in Civil Court. In response, the Blutreichs commenced the underlying Supreme Court declaratory judgment action, and moved for removal and consolidation, obtaining a TRO staying the holdover proceeding and any other acts to remove them. Defendant cross-moved to vacate the stay, and to have the

Supreme Court action randomly reassigned.

The motion court's grant of the motion and denial of the cross motion, to the extent defendant sought to vacate the stay, constituted an improvident exercise of its discretion.

The claims asserted by the Blutreichs in the Supreme Court action are essentially founded upon the assertion that the termination of their lease was in bad faith and not in accordance with the cooperative corporation's governing documents. These contentions may be interposed as defenses in the context of the holdover proceeding, and therefore Civil Court is the preferred forum for this dispute (see *Spain v 325 West 83<sup>rd</sup> Owners Corp.*, 302 AD2d 587 [2003]).

The Blutreichs' allegation, which the motion court accepted as fact, that the current holdover proceeding was commenced in retaliation for the Blutreichs' prevailing in their opposition to Amalgamated's prior action, does not warrant consolidation here. If the Blutreichs prevail in the holdover proceeding, they will still be entitled to seek any additional relief to which that determination entitles them, possibly including the permanent injunction and award of money damages they include in their prayer for relief. However, the results of the prior litigation do not in themselves support the motion court's assessment of

defendant's motivation for the present holdover proceeding so as to justify the removal of the holdover proceeding to Supreme Court.

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

ENTERED: DECEMBER 18, 2007

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CLERK

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

2104           The People of the State of New York,           Ind. 7862/87  
                  Respondent,

-against-

Eliezer Cintron,  
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

Robert J. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

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Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about August 4, 2006, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

We agree with the motion court (13 Misc 3d 833), as well as the Second Department (*People v Taylor*, 42 AD3d 13 [2007], *appeal dismissed* 9 NY3d 887 [2007]), that the provision requiring persons convicted of certain nonsexual abduction-related crimes to register as sex offenders is constitutional. Furthermore, the statute is constitutional as applied to this defendant (see *People v Cassano*, 34 AD3d 239 [2006], *lv denied* 8 NY3d 804 [2007]).

Defendant did not preserve his claim that he does not qualify as a sex offender because, on the effective date of the statute in 1996, he was not incarcerated or on parole or

probation for an offense subject to registration. Even if we were to conclude that this claim presents a question of law that defendant may raise for the first time on this civil appeal (see *Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209-210 [1996], *lv denied* 88 NY2d 811 [1996]), we would find that since defendant's unlawful imprisonment sentence merged with his longer concurrent sentence for first-degree drug possession (see *People v Ramirez*, 89 NY2d 444, 450 [1996]), he was still incarcerated for a offense covered by the Sex Offender Registration Act on its effective date.

The court properly exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level.

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ENTERED: DECEMBER 18, 2007

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CLERK

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

2151           Volutu Ventures, LLC, derivatively           Index 118051/04  
              on behalf of Harbour Entertainment,  
              Inc.,  
              Plaintiff-Appellant,

-against-

Jenkins & Gilchrist Parker Chapin LLP,  
Defendant-Respondent,

Harbour Entertainment, Inc.,  
Defendant.

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Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Ross J. Ellick of counsel), for appellant.

Arnold & Porter LLP, New York (Stewart D. Aaron of counsel), for respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered June 13, 2006, which granted the motion of defendant Jenkins & Gilchrist Parker Chapin LLP (Jenkins) to dismiss the complaint for failure to state a cause of action, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiff Volutu Ventures LLC (Volutu), suing derivatively on behalf of defendant Harbour Entertainment, Inc. (Harbour), alleges that Harbour retained Jenkins to represent it in applying, through its partly owned subsidiary, Stapleton Studios LLC (Stapleton), to the New York City Economic Development Corporation (EDC) for a long-term lease of waterfront property located in Staten Island, where it planned to develop an

entertainment complex including a motion picture studio, marina and hotel. Voluto alleges that, unbeknownst to those Harbour shareholders who were not also shareholders of Stapleton, Jenkins advised the chairman of the board of directors of Harbour that his son, Marlowe Walker III (Bob Walker), could be involved in the project and in negotiations with the EDC, notwithstanding that he had been permanently barred from the securities industry by the NASD in 1991 and had pleaded guilty to criminal offenses involving violations of the federal securities laws in October 2001, and that his regulatory and criminal history did not have to be disclosed. Voluto alleges that Jenkins' advice was improper and that, but for the improper advice, Harbour would not have invested \$2 million through Stapleton in permanent improvements to the site, and that when the City ultimately terminated Stapleton's occupancy and ceased negotiations, it cited the concealment of Bob Walker's criminal history as a reason for the termination.

The motion court erred in finding that because it was undisputed that other factors, including Stapleton's inability to raise necessary financing, contributed to the failure of the project, Voluto would be unable as a matter of law to prove "but for" causation of the loss. The pleadings permit the inference that the proximate cause of the loss was the legal malpractice (see *Lappin v Greenberg*, 34 AD3d 277, 278 [2006]). The evidence

that other factors contributed to the loss raises an issue of fact that may not be determined at the pleading stage (see *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-271 [2004]; see also *National Enters. Corp. v Dechert Price & Rhoads*, 246 AD2d 481, 482 [1998]).

Jenkins' alternative arguments are unavailing. Jenkins failed to submit evidence sufficient to establish, as a matter of law, that in advising the concealment from the City of the criminal conviction of a de facto principal of a corporation seeking to undertake a major development project with the City it did not depart from the requisite standard of care in the legal community (see *Bistricher v Singer, Bienenstock, Zamansky, Ogele & Selengut, LLP*, 14 AD3d 468, 469 [2005]; *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 284 [1999]). Nor did Jenkins establish that Voluta lacked standing to bring a derivative action because the malpractice was alleged to have started before Voluta acquired shares in Harbour. Voluta alleges that the malpractice continued through the spring and summer of 2002, after it had invested, while Harbour continued to advance monies to Stapleton based on Jenkins' improper advice.

Finally, Voluta demonstrated the futility of a demand on the board of directors of Harbour by alleging that the chairman of

the board was Bob Walker's father and that he dominated two of the other four members of the board (see Business Corporation Law § 626(c); *Bansbach v Zinn*, 1 NY3d 1, 9 [2003]).

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new crime (see *People v Valles*, 21 AD3d 855 [2005], lv denied 6  
NY3d 760 [2005]).

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ENTERED: DECEMBER 18, 2007

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

2209 Terry F. Davies,  
Plaintiff-Appellant,

Index 350772/01

-against-

Naomi Anne Davies,  
Defendant-Respondent.

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Terry F. Davies, appellant pro se.

Alicia Kaplow, New York, for respondent.

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Order, Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered on or about December 6, 2005, which granted defendant's motion for a judgment of arrears, and denied plaintiff's cross motion to be relieved of all financial obligations under the parties' judgment of divorce, unanimously affirmed, without costs.

The judgment of arrears, which enforces plaintiff's obligation under the parties' stipulation of settlement, incorporated into their divorce judgment, to pay a portion of a distributive award in installments, was properly awarded with interest, costs and attorneys' fees, and without a hearing, in the absence of any explanation whatsoever by plaintiff for his failure to apply to the court for relief from the judgment of divorce prior to the accrual of the arrears (Domestic Relations Law § 244; § 237[c]; § 238; see *Levy v Levy*, 272 AD2d 207, 208 [2000]). Concerning the award of attorneys' fees, we note that

plaintiff is liable therefor not only under sections 237(c) and 238 (*id.*), but also under the stipulation. Defendant's alleged defamation of plaintiff and other harmful contacts with his professional colleagues, even if breaches of the stipulation's non-interference clause (*see Lesesne v Lesesne*, 292 AD2d 507, 508-509 [2d Dept 2002]), do not explain his failure to make a pre-accrual application or otherwise constitute a defense to this section 244 proceeding (*see Matter of Dox v Tynon*, 90 NY2d 166, 172 [1997]; *Shedler v Shedler*, 32 Misc 2d 290 [1961], *affd* 15 AD2d 810 [1962], *affd* 12 NY2d 828 [1962]; nor can such alleged defamation and breach of the stipulation be entertained as counterclaims (*cf. Dox, id.*). Similarly unavailing is plaintiff's claim that the stipulation was fraudulently induced by defendant's false representation that she was unable to return to work; moreover, that claim is undermined on the merits by the stipulation's several merger clauses (*see Luftig v Luftig*, 239 AD2d 225, 226-227 [1997]). There is no merit to plaintiff's claim that defendant waived her right to payment of the distributive award, where defendant sent plaintiff a notice of default only five months after the first default in payment (*cf. Kott v Kott*, 16 AD2d 941 [1962], *affd* 14 NY2d 971 [1964]), and commenced the instant proceeding only 16 months after such

default (*compare Miller v Miller*, 156 AD2d 164 [1989]; *Friedman v Excel*, 116 AD2d 433 [1986]).

**M-5759      *Davies v Davies***

Motion seeking stay denied.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: DECEMBER 18, 2007

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

2210           The People of the State of New York,           Ind. 2052/03  
                                Respondent,

-against

          Jeanyll Rosenberg,  
                        Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Julie Paltrowitz of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at suppression hearing; James A. Yates, J. at jury trial and sentence), rendered May 19, 2004, convicting defendant of robbery in the first and second degrees, and sentencing him to concurrent terms of 10 years, unanimously affirmed.

Defendant failed to preserve his legal sufficiency argument, and we decline to review it in the interest of justice. Were we to review this claim, we would find the verdict supported by legally sufficient evidence. We also find that it was not against the weight of the evidence. On the contrary, we conclude there was overwhelming evidence of defendant's guilt, including that he was arrested in possession of an unusual shotgun used in this robbery. There is no basis for disturbing the jury's determinations concerning identification and credibility (see *People v Bleakley*, 69 NY2d 490, 495 [1987]). Any discrepancies

in the identifying witness's description of defendant were readily explained, and they were not sufficiently significant to render the identification unreliable.

Although the victim's identification of the codefendant, who was not on trial, was not relevant to any material issue and should have been excluded, the error was harmless (see *People v Jenkins*, 305 AD2d 287 [2003], *lv denied* 100 NY2d 621 [2003]).

The court properly denied defendant's motion to suppress identification testimony. The record supports the hearing court's finding that, in both the photo array and the lineup, there was no readily apparent or sufficiently significant difference between defendant's appearance and that of the fillers to cause him to be wrongly singled out for identification (see *People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Defendant's assertion that another person may have influenced the witness's identification of defendant rests only on speculation.

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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: DECEMBER 18, 2007

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

2213-

2213A In re Ashley Lisa D., and Another,

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

Pradeline B.,  
Respondent-Appellant,

Episcopal Social Services, et al.,  
Petitioners-Respondents.

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Lawrence A. Salvato, New York, for appellant.

Magovern & Sclafani, New York (Mary Jane Sclafani of counsel),  
for Episcopal Social Services, respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia S.  
Colella of counsel), Law Guardian.

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Orders of disposition, Family Court, Bronx County (Gloria  
Sosa-Lintner, J.), entered February 8, 2005, which terminated  
respondent mother's parental rights to the subject children and  
committed their custody and guardianship to petitioners for the  
purpose of adoption, upon a fact-finding determination of  
permanent neglect, unanimously affirmed, without costs.

The record amply demonstrates that petitioner agency  
satisfied its statutory obligation to exert diligent efforts to  
encourage and strengthen the parental relationship. By making  
appropriate referrals and counseling respondent to comply with  
programs she was already involved in at the time the children  
were placed with the agency, and scheduling and facilitating

regular visitation, the agency expended the requisite diligent efforts to reunite the family (see *Matter of Galeann F.*, 11 AD3d 255 [2004], *lv denied* 4 NY3d 703 [2005]). Respondent's lack of success in fulfilling the requirements for the return of her children was not the result of the agency's failure to exert diligent efforts, but rather of the mother's failure to cooperate and avail herself of the multitude of programs and services offered to her. Respondent's claim that she has special needs the agency should have addressed in a different manner was not developed at the fact-finding hearing, and consequently, there was no proof at that hearing that the agency knew of and failed to address that situation. In fact, the agency caseworker testified that respondent manifested no signs of such difficulties.

The Family Court properly excluded from evidence the VIPS (Very Intensive Preventive Services program) closing summary and a psychological evaluation by an unnamed preparer, as these documents do not fall under the business record exception to the hearsay rule (see *Matter of Bronstein-Becher v Becher*, 25 AD3d 796, 797 [2006]).

We have considered respondent's remaining arguments and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER  
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these claims nonjusticiable.

Any claim against defendant Association for breach of its obligation of fair representation is barred by the appropriate statute of limitations (CPLR 217[2]).

Finally, any attempt by plaintiff to circumvent any of these procedural hurdles by intimated allegations of discrimination is unavailing. The allegations of the complaint offer no specifics on any discrimination claim, and nothing in the papers submitted in opposition to the motion for dismissal is any more enlightening. In any event, the complaint would properly be dismissed for failure to state a cause of action.

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

ENTERED: DECEMBER 18, 2007

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

2217-

2217A Dr. Luis Vargas Garmendia, et al., Index 117763/04  
Plaintiffs-Respondents-Appellants,

-against-

Brian O'Neill, et al.,  
Defendants-Appellants-Respondents.

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Allen & Overy LLP, New York (Louis B. Kimmelman of counsel), for  
Brian O'Neill, Joseph M. Martin, JPMorgan Chase & Co. and  
Chemical Overseas Holdings, Inc., appellants-respondents.

Shearman & Sterling LLP, New York (Henry Weisburg of counsel),  
for David C. Mulford, George B. Weiksner and Credit Suisse,  
appellants-respondents.

Shalov Stone Bonner & Rocco LLP, New York (Ralph M. Stone of  
counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Karla Moskowitz, J.),  
entered March 15, 2007, which, inter alia, granted plaintiffs'  
cross motion to renew and, upon renewal, adhered to the order,  
same court and Justice, entered April 13, 2006, granting  
defendants' motion to dismiss on the ground of forum non  
conveniens and denying plaintiffs' motion to compel discovery,  
and granted defendants' motion for reargument of that portion of  
the order which, as one condition of dismissal, required  
defendants to "consent to the full faith and credit of any  
judgment that plaintiffs obtain and pay it," and, upon  
reargument, adhered to the order, unanimously modified, on the  
law, to replace the quoted language with the phrase, "consent

that any judgment plaintiffs obtain shall be enforceable in New York as provided in CPLR Article 53," and otherwise affirmed, without costs. Appeal from the April 13, 2006 order, unanimously dismissed, without costs, as superseded by the appeal from the subsequent order.

Plaintiffs allege that defendants breached their duty under the laws of Uruguay to protect Banco Comercial, one of that country's oldest and largest banks, from fraudulent conduct in which two of its inside directors allegedly engaged, and which drained the bank of its assets precipitating its collapse. The court properly dismissed the action after defendants showed it would be better litigated in Uruguay (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). Uruguay has an interest in adjudicating claims involving its own banking institutions (*see Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 295 [2005], *lv denied* 6 NY3d 703 [2006]), and, given that much of the evidence - for example, evidence in the custody of the government of Uruguay and testimony and documents from the bank's external auditors - is located in Uruguay, litigating in New York would present a hardship to defendants (*see Continental Ins. Co. v Polaris Indus. Partners*, 199 AD2d 222, 223 [1993]).

The court also properly declined to adjourn the motion to dismiss until after completion of discovery. Plaintiffs failed

to show that the requested discovery could adduce facts establishing New York as a proper forum for the action (see *de Enamorado v Central Am. S.S. Agency*, 160 AD2d 182 [1990]).

The imposition of the above-quoted condition of dismissal is not consistent with the CPLR mechanism for enforcement of foreign country money judgments (*Network Fin. Inc. v JPMorgan Chase & Co.*, 41 AD3d 254, 255 [2007]).

We have considered plaintiffs' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: DECEMBER 18, 2007

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We have considered and rejected defendant's remaining arguments, including his ineffective assistance of counsel claim.

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

ENTERED: DECEMBER 18, 2007

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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: DECEMBER 18, 2007

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entirely irrelevant (see generally *People v Williams*, 81 NY2d 303, 312-315 [1993]). We note that the prosecutor never made any arguments that could be viewed as opening the door to such evidence. In any event, defendant was still able to place this alleged conduct before the jury at several junctures, including his own testimony and his cross-examination of the victim. We find no violation of defendant's right to confront witnesses and present a defense (see *Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). Finally, were we to find any error, constitutional or otherwise, we would find it harmless in view of the overwhelming evidence of defendant's guilt, including defendant's taped admissions which demonstrate convincingly his sexual conduct with this 13-year-old victim.

We see no reason to remand this case for a determination as to whether the People made an incomplete disclosure of *Rosario* material, since there is no evidence suggesting that the People violated their disclosure obligations, and since defendant abandoned any such objection by failing to pursue it at a time

when it could have been easily resolved (see *People v Tamayo*, 222 AD2d 321 [1995], *lv denied* 88 NY2d 886 [1996]).

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action, like the prior one, was time-barred.

Both actions arose out of the same contract, were based on the propriety of the same letter, and sought the same damages. The current claim, which arises out of the same transaction, is derivative of the original and previously asserted, thus warranting dismissal (see *O'Brien v City of Syracuse*, 54 NY2d 353 [1981]).

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plea assertion of innocence contained in the presentence report (see e.g. *People v Pantoja*, 281 AD2d 245 [2001], lv denied 96 NY2d 905 [2001]).

Defendant did not preserve his claim that an interpreter should have been present at his sentencing (see *People v Ramos*, 26 NY2d 272 [1970]) and we decline to review it in the interest of justice. Were we to review this claim, we would find the sentencing minutes demonstrate that defendant was able to speak and understand English, notwithstanding his use of an interpreter at other proceedings.

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different position even had the attorneys properly perfected that interest (*see Lory v Parsoff*, 17 AD3d 541, 545 [2005]). As a result, the court properly dismissed the claim for legal malpractice for failure to make out a prima facie claim of damages.

The trial court did not err in declining to allow plaintiffs to amend their complaint to assert one of the claims against the general partnership that preceded the defendant firm, as doing so would have prejudiced the individual defendant at the late stage at which plaintiffs made their application to amend (*see Rodriguez v Terence Cardinal Cooke Health Care Ctr.*, 4 AD3d 147 [2004], *lv denied* 4 NY3d 703 [2005]).

We have considered plaintiffs' remaining arguments and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER  
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the sum disputed by the parties would disturb the status quo, we modify to the extent indicated.

We have considered the arguments raised by defendant on the cross appeal and find them unavailing.

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misapprehension by the court of the corrupt legal standard (*cf.*  
*People v Delgado*, 80 NY2d 780 [1992]).

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

2249 Harry Eagle, Index 109877/03  
Plaintiff-Respondent,

-against-

Chelsea Piers, L.P., et al.,  
Defendants-Appellants-Respondents,

Majestic Voyages, Inc.,  
Defendant-Respondent-Appellant.

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Rivkin Radler LLP, Uniondale (Melissa M. Murphy of counsel), for appellants-respondents.

Bennett, Giuliano, McDonnell & Perrone, LLP, New York (Joseph J. Perrone of counsel), for respondent-appellant.

Barasch McGarry Salzman & Penson, New York (Dominique Penson of counsel), for respondent.

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Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered May 4, 2006, which denied the motion of defendants Chelsea Piers, L.P. and Chelsea Piers Management, Inc. (collectively Chelsea) and the cross motion of defendant Majestic Voyages, Inc. (Majestic) for summary judgment dismissing the complaint, and which denied that part of Chelsea's motion for summary judgment on their cross claims against Majestic for common-law and contractual indemnification, and which granted so much of Chelsea's motion for summary judgment on their cross claim against Majestic for breach of contract, unanimously modified, on the law, to the extent of granting Chelsea conditional summary judgment on the cross claim for contractual

indemnification, and otherwise affirmed, without costs.

Plaintiff commenced this action against Chelsea and Majestic for injuries he allegedly sustained when he was caused to fall off his bicycle while riding over a water hose stretched along the bicycle/pedestrian pathway of Pier 60 at Chelsea Piers. Majestic owned a vessel that was docked at the pier at the time of plaintiff's accident pursuant to a lease with Chelsea, and ran the garden-type hose from the vessel across the subject pathway to a water supply inside the pier's motor vehicle parking area.

Denial of Chelsea and Majestic's applications for summary judgment was appropriate since a garden hose strewn across a paved bicycle path is not a risk inherent to the sport of bicycling in an urban area, and thus, the doctrine of assumption of risk does not serve as a bar to plaintiff's action (*see Morgan v State of New York*, 90 NY2d 471, 484 [1997]). Nor was Chelsea entitled to summary judgment on the ground of lack of notice since there are triable issues concerning whether Chelsea was aware of Majestic's recurrent, dangerous practice of improperly placing the hose across the subject bicycle path (*see O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 106-107 [1996]).

The court also properly granted so much of Chelsea's motion for summary judgment on their cross claim against Majestic for breach of contract. It is undisputed that Majestic failed to name Chelsea as an additional insured under its liability policy

as it was required to do pursuant to the parties' lease (see *Inchaustegui v 666 5<sup>th</sup> Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]; *Taylor v Gannett Co.*, 303 AD2d 397, 399 [2003]).

However, the court improperly denied that branch of Chelsea's motion for summary judgment on their cross claim against Majestic for contractual indemnification. Chelsea established that the right to indemnification was based upon an express contract (see *Cunningham v Alexander's Kings Plaza, LLC*, 22 AD3d 703, 707 [2005]), and an award of conditional summary judgment on the cross claim is appropriate. In view of this conclusion, there is no need to address Chelsea's request for summary judgment on the cross claim for common-law indemnification.

We have considered the parties' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: DECEMBER 18, 2007

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CLERK

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

2251 Jennifer McHugh,  
Petitioner-Appellant,

Index 105629/06

-against-

Matthew Weissman,  
Respondent-Respondent,

Carolyn Seltzer, et al.,  
Respondents.

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Scheichet & Davis, P.C., New York (David I. Scheichet of counsel), for appellant.

Lori Nevias, Lynbrook, for Weissman respondent.

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Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered April 4, 2007, which, to the extent appealed from, denied petitioner's motion for counsel fees and granted respondent Weissman's cross motion for a declaration that the contested property does not belong to the subject trust, unanimously modified, on the law, the request for a declaratory judgment denied, and otherwise affirmed, without costs.

Respondents defaulted in answering the petition commencing a special proceeding pursuant to CPLR 7701. In seeking to hold respondents in contempt for failing to abide by the order directing an accounting, petitioner also moved to enjoin respondents from disposing of real property that petitioner maintains is property of the trust, real property previously owned by the decedent, the mother of petitioner and respondent

Weissman. Despite the absence of a request by petitioner for declaratory relief, or an answer or other pleading by Weissman containing a request for such relief, Weissman cross-moved for a declaration that petitioner is not entitled to any portion of the real property. Given Weissman's failure to assert his claim for declaratory relief in some form of pleading, Supreme Court erred in granting that aspect of the cross motion (*see Seplow v Century Op. Co.*, 56 AD2d 515, 516 [1977]). Moreover, even assuming Weissman's request for declaratory relief was proper, he cross-moved for declaratory relief before joinder of issue (*see Durkin v Durkin Fuel Acquisition Corp.*, 224 AD2d 574, 575 [1996]). Since petitioner does not challenge herein the denial of the relief she sought, there is no basis for granting her counsel fees.

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Defendant's argument with respect to a second panelist is unpreserved (*see People v Smocum*, 99 NY2d 418, 423-424 [2003]), and we decline to review it in the interest of justice. Were we to review this claim, we would similarly reject it.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: DECEMBER 18, 2007

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

2254-

2255

In re Jeffrey Solomon,  
Petitioner-Appellant,

Index 109661/06

Zane and Rudofsky,  
Petitioner,

-against-

The Department of Buildings of the  
City of New York, et al.,  
Respondents-Respondents.

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

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

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Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered November 13, 2006, which, insofar as appealed from, denied the petition brought pursuant to CPLR article 78 for an order: (i) directing respondent to either grant petitioner-appellant's application for a master electrician license without any further hearing, or to promulgate rules of procedure to govern the Master Electrician Licensing Board (MELB) hearings, and (ii) barring MELB from investigating the quality of petitioner's supervision by a master electrician for the requisite statutory period of time, and directing MELB to consider only petitioner's character and fitness as an applicant, and order, same court and Justice, entered January 30, 2007, granting petitioner's motion to reargue and, upon reargument,

adhering to its prior determination, unanimously affirmed, without costs.

We disagree with petitioner's argument that by considering the sufficiency of petitioner's supervision by a master electrician for the requisite period, MELB would be acting in excess of its jurisdiction (CPLR 7803[2]). Administrative Code of the City of New York § 27-3009(c) empowers and requires MELB to, inter alia, "investigate the character and fitness of all applicants for licenses who shall have passed the required examination and shall report to the commissioner the results of such examination," and Administrative Code § 27-3010(a) sets forth the qualifications of such applicant, including that the applicant be of "good moral character," and have seven and a half years of experience under the supervision of a licensed master electrician. Administrative Code § 27-3009(c) does not limit MELB's review of petitioner's application for a master electrician's license to petitioner's "moral character," but rather, "[t]he responsibility for seeing to it that a license is not given to an incompetent or unfit applicant is placed on the [MELB]" (*Matter of Tchernoff v Davidson*, 36 AD2d 527, 527 [1971]), and such responsibility necessarily includes the duty to evaluate whether petitioner has satisfied the prerequisites for the license, including the minimal period of satisfactory supervision by a master electrician. Although MELB may not add

requirements not stated in the statute (see e.g. *Matter of Sullivan v Miele*, 226 AD2d 308 [1996]), it is not precluded from evaluating the sufficiency of the requisite supervision, so long as that evaluation is not arbitrary, capricious, irrational or unlawful.

The court properly determined that the MELB was not required to promulgate rules of procedure governing its investigatory hearing into petitioner's license application. New York City Charter § 1046(b) is not applicable to such hearings, but applies only where the agency is conducting an "adjudication" or "appeal," whereas the hearings at issue are investigations by MELB, resulting in recommendations to the Commissioner (Administrative Code § 27-3009), and not adjudications. Nor is the absence of promulgated rules violative of petitioner's due process rights inasmuch as he does not possess a property right in the license he seeks compared to the license holder facing revocation or suspension of a license (see *Matter of M.S.B.A. Corp. v Markowitz*, 23 AD3d 390, 391 [2005]).

We further reject petitioner's argument that he is entitled to have his license application considered under the standards existing before certain modifications to the statutes in 2003. Just as a reviewing court rules on the basis of the law in effect at the time of the decision (see *Matter of Demisay, Inc. v Petito*, 31 NY2d 896, 897 [1972]), "a change of law pending an

administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation" (*Ziffrin, Inc. v United States*, 318 US 73, 78 [1943]). Applications are generally determined based on the law as it exists at the time of the decision, and petitioner's stated reasons for relying on the outdated standards do not warrant a different conclusion.

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

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prejudice to a new action (see CPLR 5013). We have considered plaintiff's other arguments and find them to be unavailing.

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well as during the plea proceedings and by way of the commitment sheet.

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ENTERED: DECEMBER 18, 2007

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

2262 Shirley Marcus, Index 113775/03  
Plaintiff-Appellant,

-against-

Namdor, Inc., et al.,  
Defendants-Respondents.

[And a Third-Party Action]

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Joelson & Rochkind, New York (Kenneth Joelson of counsel), for  
appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Michael Lenoff  
of counsel), for Namdor, Inc. and Gristede's Foods NY, Inc.,  
respondents.

Kral Clerkin Redmond Ryan Perry & Girvan, LLP, Smithtown (James  
V. Derenze of counsel), for The Great Atlantic & Pacific Tea  
Company, Inc., respondent.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Jessica  
L. Rothman of counsel), for Ansonia Associates Limited  
Partnership, respondent.

---

Order, Supreme Court, New York County (Judith J. Gische,  
J.), entered August 2, 2006, which, to the extent appealed from,  
granted defendants' motions for summary judgment dismissing the  
complaint, unanimously affirmed, without costs.

The 80-year-old plaintiff fell while exiting a Gristede's  
supermarket on a February evening in 2003. She testified at her  
deposition that she "took a step and there was a slope and I lost  
my balance and went down, fell," and that she had lost her  
balance due to the "uneven pavement" and the "incline of the  
slope." The court properly found, upon consideration of all the

evidence, defendants had sufficiently established that the condition cited by plaintiff as the cause of her injury was too trivial to be actionable (see *Trincere v County of Suffolk*, 90 NY2d 976 [1997]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: DECEMBER 18, 2007

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

2263 In re Jovany Isaac Benjamin M.,

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

Joyce M., a/k/a Kim T.,  
Respondent-Appellant,

-against-

The Children's Aid Society,  
Petitioner-Respondent.

---

Louise Belulovich, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of  
counsel), for respondent.

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

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Order, Family Court, Bronx County (Carol Stokinger, J.),  
entered on or about December 12, 2005, which, upon a finding of  
permanent neglect, terminated respondent mother's parental rights  
and committed custody and guardianship of the subject child to  
petitioner and the Commissioner of the Administration for  
Children's Services for the purpose of adoption, unanimously  
affirmed, without costs.

Clear and convincing evidence supported the court's  
determination that respondent mother permanently neglected her  
child by failing to plan for his future (see Social Services Law  
§ 384-b[7][a]; *Matter of Shareal Stacy S.*, 17 AD3d 251 [2005]).  
Although the agency diligently endeavored to encourage a

meaningful relationship between mother and child by, inter alia, arranging for visitation referring respondent for services and providing her guidance in finding suitable housing, respondent failed to offer a viable plan for the child's future (see *Matter of Star Leslie W.*, 63 NY2d 136 [1984]). A fair preponderance of the evidence demonstrated that termination of her parental rights so as to facilitate adoption, rather than suspending judgment, was in the child's best interests (*Matter of Maryline A.*, 22 AD3d 227 [2005]).

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Reform Act. We have considered and rejected defendant's remaining arguments.

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

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leaving the program without permission and failing to return (see *People v Outley*, 80 NY2d 702, 712 [1993]).

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**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**DECEMBER 18, 2007**

Lippman, P.J., Mazzairelli, Marlow, Catterson, Kavanagh, JJ.

M-5625 People v Perez, Ramón

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

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

M-4975 Sherman Nagle Realty Corp. v Felipe

Leave to appeal from the Appellate Term denied.

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

M-5575 Inwood Hill Medical P.C. v Utica Mutual  
Insurance Company

Leave to appeal from the Appellate Term denied.

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

M-3743 In re Progressive Classic Insurance Company  
M-4371 v Kitchen

Reargument granted and, upon reargument, the decision and order of this Court entered on June 28, 2007 (Appeal No. 1460N) recalled and vacated and a new decision and order substituted therefor (See Appeal No. 1460N, decided simultaneously herewith); leave to appeal to the Court of Appeals denied; cross motion denied.

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

M-5749 Wigayshire v New York City Housing Authority

Motion deemed one for reargument and, as such, denied.

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

M-5811 People v Williams, McKinley

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

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

M-5725 Santana v The City of New York

Time to perfect appeal enlarged to the April 2008 Term.

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

M-5911 Abdul-Aziz v City of New York

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

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

M-5996 Art Capital Group, LLC v Rose

Appeals consolidated; time to perfect same enlarged to the April 2008 Term.

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

M-5873 Emmanuel v Sheridan Transportation Corp.  
- Heller

Appeals consolidated; time to perfect same enlarged to  
the April 2008 Term.

Tom, J.P., Friedman, Nardelli, Catterson, Malone, JJ.

M-4684 Marso v Novak

Leave to appeal to the Court of Appeals denied.

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

M-5356 Nordberg v The South Street Seaport Corporation

Reargument or other relief denied.

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

M-3568 Allstate Insurance Company v American Home  
Assurance Company

Reargument or other relief denied.

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

M-5456 Hodson v Wasserman

Leave to appeal from the Appellate Term denied.

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

M-5288 Estate of Valdez – Reyes v The City of New York

M-5934

Appeal dismissed.

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

M-5405 In the Matter of B., Shaun and B., Justin  
– Commissioner of the New York City Administration  
for Children's Services

Motion deemed withdrawn.

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

M-5401 People v Rojas, Cesar

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

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

M-2945 Seward Park Housing Corporation v Greater  
New York Mutual Insurance Company

Reargument denied.

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

M-5464 In the Matter of G., Jamize – Episcopal Social Services  
Appeal dismissed.

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

M-5640 People ex rel. Matos, Daniel v Warden  
Leave to prosecute appeal as a poor person granted, as  
indicated.

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

M-5068 In the Matter of P., Mykle Andrew – Catholic  
Home Bureau for Dependent Children  
Leave to prosecute appeal as a poor person granted, as  
indicated. (See M-5068A, decided simultaneously herewith.)

Buckley, J.

M-5068A In the Matter of P., Mykle Andrew – Catholic  
Home Bureau for Dependent Children  
Stay and other relief denied. (See M-5068, decided  
simultaneously herewith.)

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

M-5666 Abramovitz v 145 East 16<sup>th</sup> Street LLC  
Time to perfect appeal enlarged to the March 2008 Term.

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

M-5693      People v De La Cruz, Randal, also known as  
                 Oliveras-DeLaCruz, Randal

Time to perfect appeal enlarged to the April 2008 Term.

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

M-4779      Lamasa v Bachman

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

Andrias, J.P., Buckley, Catterson, Malone, Kavanagh, JJ.

M-4367      In the Matter of the People of the State of New York  
                 v Doe, John, also known as Williams, Anthony,  
                 also known as Harris, Anthony, also known as  
                 White, Frank

Moving papers deemed a timely notice of appeal.

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

M-5797      In the Matter of Maloney v Office of Court  
                 Administration

Motion denied, as indicated. (See the decision and  
order of this Court entered on November 15, 2007 [Appeal No.  
2014]).

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

M-4569      In re Reliance Insurance Company – GZA  
GeoEnvironmental, Inc. v New York State Liquidation  
Bureau

Leave to appeal to the Court of Appeals denied.

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

M-5614      Melendez, as Administrator of the Estate  
of Marrero v The City of New York

Appeals and cross appeal consolidated; defendant  
directed to perfect same for the April 2008 Term.

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

M-5754      Commercial Service of Perry, Inc.  
M-5997      v Permanent Foilage, Inc.

Appeal dismissed; reargument denied.

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

M-5334      People ex rel. Patterson, Trent v Warden

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

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

M-5216      Fishkin v Taras

Time to perfect appeals enlarged to the April 2008  
Term.

Saxe, J.P., Friedman, Williams, Catterson, Malone, JJ.

M-2834 People v Soba, Jose

Writ of error coram nobis or other relief denied.

Saxe, J.P., Williams, Buckley, Catterson, Malone, JJ.

M-3639 People v Hernandez, Francisco

Writ of error coram nobis denied.

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

M-4440 Perez v The City of New York – Torres

Leave to appeal to the Court of Appeals denied.

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

M-5397 W., Kevin, also known as B., Jeffrey  
v S., Stephanie Marie W.

Appeal from order entered on or about May 11, 2004  
dismissed, as indicated.

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

M-5583 People v Rios, Eli

M-5587 People v Randolph, Ronald

M-5623 People v Ross, William

M-5878 People v Thomas, Herman

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

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

M-5259 People v Feliz, Jose

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

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

M-5393 People v Greely, Courtney

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

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

M-5379 People v Jackson, Donisha A.

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

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

M-5542 Oxford Towers Co., LLC v Wagner

M-5662

Time to perfect appeal and cross appeal enlarged to the April 2008 Term, as indicated.

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

M-5269 Cosby v Law Offices of Stickel and Jennings

Caption modified; motion otherwise denied, as indicated (see M-4934 entered October 16, 2007, a copy of which is annexed hereto).

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

M-5582 People v Butts, William

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

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

M-5750 Sexter v Kimmelman, Sexter, Warmflash & Leitner

Motion deemed withdrawn, as indicated.

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

M-3892 Edelman v Chubb Indemnity Insurance Company  
v Phillips de Pury & Luxembourg

Reargument or other relief denied.

Lippman, P.J.

M-5959 People v Nachum, Gadi

Leave to appeal to this Court granted, as indicated.

Tom, J.

M-5835 People v Page, Tyreek

Leave to appeal to this Court denied.

Andrias, J.

M-5700 People v Lopez, Eduard  
Leave to appeal to this Court denied.

Andrias, J.

M-5897 People v Winston, Jamel  
Leave to appeal to this Court denied.

Williams, J.

M-5991 People v Soto, Pedro  
Leave to appeal to this Court denied.

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

M-4587 In the Matter of Berthold H. Hoeniger,  
a suspended attorney:

Respondent disbarred and his name stricken from the  
roll of attorneys and counselors-at-law in the State of New York,  
effective the date hereof. Opinion Per Curiam. All concur.

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

M-4363 In the Matter of Jeremiah J. Sheehan  
(admitted as Jeremiah Joseph Sheehan),  
a suspended attorney:

Respondent disbarred and his name stricken from the  
roll of attorneys and counselors-at-law in the State of New York,  
effective the date hereof. Opinion Per Curiam. All concur.

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

M-4837 In the Matter of Catherine M. Conrad,  
an attorney and counselor-at-law:

Respondent suspended from the practice of law in the State of New York, effective the date hereof, until such time as disciplinary matters pending before the Committee have been concluded and until further order of this Court. Opinion Per Curiam. All concur.

**The following order was**  
**entered and filed on December 13, 2007:**

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

M-5862 HRH Construction Corp. v Sorbara Construction Corp.  
Stay denied.