

Hennegan's and DBAB's cross claims against it for common-law and contractual indemnification and for breach of contract, denied Hennegan's motion and Liberty's cross motion for summary judgment dismissing plaintiff's claims of common law negligence and violations of Labor Law § 200 as against them, and denied Hennegan's motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on a violation of Industrial Code (12 NYCRR) § 23-1.7(e)(2) as against it, modified, on the law, so as to deny Liberty's cross motion for summary judgment dismissing Hennegan's and DBAB's cross claims against it for contractual and common-law indemnification, grant Hennegan's and DBAB's motion for summary judgment on their cross claims against Liberty for contractual and common-law indemnification, and grant Hennegan's motion for summary judgment dismissing plaintiff's claims of common-law negligence and violations of Labor Law § 200 as against it, and otherwise affirmed, without costs.

Plaintiff's claims of common-law negligence and violations of Labor Law § 200 should have been dismissed as against Hennegan, the construction manager, because Hennegan did not exercise any control or supervision over the demolition work out of which the injury arose (*see Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [2005]).

However, the claims were properly sustained as against Liberty, the demolition subcontractor, as Liberty unquestionably

supervised the work out of which the claims arose. That the hazard at issue - debris accumulated as a result of the demolition - was readily observable does not absolve Liberty of liability, because the hazard was not inherent in the work being performed by plaintiff, an electrician, at the time of the accident (see *Bombero v NAB Constr. Corp.*, 10 AD3d 170, 171 [2004]). Similarly, plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.7(e)(2) was properly sustained as against both Hennegan and Liberty, because the debris was not an integral part of the work being performed by the plaintiff at the time of the accident (see *Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 65-66 [2004]).

DBAB, the owner, and Hennegan should have been granted summary judgment on their claim for contractual indemnification against Liberty, notwithstanding that the indemnification requirement was embodied in an agreement executed after the accident in question, as they submitted competent evidence sufficient to establish that the agreement was actually entered into before the accident date and that the parties intended that it apply as of when it was entered into, and none of the evidence was controverted by Liberty (see *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 371 [2005]). Furthermore, summary judgment should have been granted to DBAB and Hennegan on their claim for common-law indemnification against Liberty, since they

were free from active negligence and Liberty had direct control over the work giving rise to the injury (see *Rodriguez v Metropolitan Life Ins. Co.*, 234 AD2d 156, 156 [1996]).

Finally, we decline to review the court's dismissal of DBAB's and Hennegan's cross claim against Liberty for breach of contract based on Liberty's alleged failure to procure insurance, as that particular issue is not preserved for review.

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

ANDRIAS, J. (dissenting in part)

While I otherwise agree with the majority, I would further modify the order appealed from to dismiss plaintiff's claims of common-law negligence and violations of Labor Law § 200 as against Liberty Contracting Corp., the demolition subcontractor. Although Liberty unquestionably supervised the work out of which the claims arose, the hazard at issue - sheetrock debris accumulated during the ongoing interior demolition work - was "part of or inherent in" the work being performed at the time of the accident (see *Bombero v NAB Constr. Corp.*, 10 AD3d 170, 171 [2004], quoting *Gasper v Ford Motor Co.*, 13 NY2d 104, 110 [1963]). Similarly, plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.7(e)(2) should have been dismissed as against both Hennegan and Liberty, because plaintiff slipped on the accumulation of debris on the floor while stringing temporary lights to make sure the area being demolished was well lit. Unlike the debris in *Maza v University Avenue Development Corp.* (13 AD3d 65 [2004]), the case relied upon by the majority, the accumulation of debris here was clearly an integral part of the work being performed at the time of the accident, and the accumulation of debris was an unavoidable and inherent result of the ongoing demolition project (see *Bond v York Hunter Constr.*, 270 AD2d 112, 113 [2000], *affd* 95 NY2d 883 [2000]). This is not a situation where the debris was left at the work site overnight

or longer without being removed (see e.g. *Singh v Young Manor, Inc.*, 23 AD3d 249 [2005]). There was no evidence that it was allowed to accumulate over time, as was the case in *Maza* (13 AD3d at 65).

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

ENTERED: FEBRUARY 5, 2008

CLERK

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

2542 Naomi C.,
Petitioner-Appellant,

-against-

Russell A.,
Respondent-Respondent.

Bruce A. Young, New York, for appellant.

Russell A., respondent pro se.

Order, Family Court, New York County (Helen C. Sturm, J.), entered on or about August 9, 2007, which dismissed, without a hearing and without prejudice, the petition to modify an order of custody, unanimously affirmed, without costs.

Petitioner's contention that sufficient grounds exist to modify the parties' so-ordered stipulation is without merit; neither custody nor visitation should be changed without a hearing (*see e.g. David W. v Julia W.*, 158 AD2d 1, 6 [1990]; *Matter of Fischbein v Fischbein*, 55 AD2d 885 [1977]). However, Family Court was not required to hold a hearing here because petitioner failed to make the necessary evidentiary showing (*see David W.*, 158 AD2d at 7).

Although the court was warranted in dismissing the petition on its face, we point out that the questioning of the Law Guardian (now called Attorney for the Child) by the court is something that should not be repeated. With the parties present,

the court asked the Law Guardian, on the record, to discuss the position of the 10- year-old child regarding how well the current custody arrangement was working. Although the court was correct to disallow the "cross-examination" of the Law Guardian by petitioner's counsel, the court should not consider the hearsay opinion of a child in determining the legal sufficiency of a pleading in the first place. Most importantly, such colloquy makes the Law Guardian an unsworn witness, a position in which no attorney should be placed. "The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to . . . becoming a witness in the litigation" (Rules of the Chief Judge [22 NYCRR] § 7.2[b]).

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

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find it to be lawful. The bag had not been reduced to the exclusive control of the police, who acted reasonably to ensure their safety and that of bystanders (see *People v Smith*, 59 NY2d 454 [1983]; *People v Wylie*, 244 AD2d 247 [1997], lv denied 91 NY2d 946 [1998]).

During deliberations, the jury sent a note to the court asking for a re-reading of the elements of the crimes with which defendant was charged. The court informed the parties that "(t)hey have a note, they want elements." After the jurors were brought into the courtroom, the court responded to the jury's note by re-reading the elements of the crimes. Although the court should have followed the procedure outlined in *People v O'Rama* (78 NY2d 270, 277-278 [1991]), it at least fulfilled its "core responsibility" (*People v Kisoona*, 8 NY3d 129, 135 [2007]) to notify counsel of the contents of the note. The court did not prevent counsel from knowing the specific language of the note, or from suggesting different responses from those the court provided (compare *People v Starling*, 85 NY2d 509, 516 [1995], with *People v Cook*, 85 NY2d 928 [1995]). Accordingly, we do not find any mode of proceedings error that would be exempt from preservation requirements, and we decline to review defendant's claim in the interest of justice. Furthermore, viewed in light of the presumption of regularity (see *People v Velasquez*, 1 NY3d 44, 48 [2003]), we conclude that counsel was afforded the

opportunity to read the note and suggest a response before the jury entered the courtroom.

We perceive no basis for reducing the sentence.

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(see *People v Danton*, 27 AD3d 354 [2006], *lv denied* 7 NY3d 754 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court had a sufficient basis to conclude that the juror's absence would delay the trial by at least the statutory two hours (CPL 270.35[2][a]). Therefore, the court had discretion to replace him, and was under no obligation to delay the trial in hopes that he might have a speedy recovery (see *People v Jeanty*, 94 NY2d 507, 517 [2000]). Moreover, it would have made no sense to risk the possibility that the juror might infect other jurors (see *People v Neal*, 294 AD2d 869 [2002], *lv denied* 98 NY2d 700 [2002]; *People v Miranda*, 223 AD2d 728 729, [1996], *lv denied* 88 NY2d 882 [1996]).

Defendant did not preserve his claim that the court's failure to accept his guilty plea during trial violated his statutory right (CPL 220.10[2]; 220.60[1]) to plead guilty to the indictment (see *People v Mitchell*, 39 AD3d 375 [2007], *lv denied* 9 NY3d 867 [2007]), and we decline to review it in the interest of justice. As an alternative holding, we find that there is no indication on the record that defendant ever offered to plead guilty, unconditionally, to the entire indictment. Instead, the

transcript suggests, at most, that during trial defendant unsuccessfully sought to reopen plea negotiations.

We perceive no basis for reducing the sentence.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 5, 2008

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Lippman, P.J., Mazzairelli, Friedman, Sweeny, Moskowitz, JJ.

2688-

2689 Gregory G. Calabro, individually Index 100995/06
and as a shareholder of
Calabro & Fleishell, P.C., etc.,
Plaintiff-Appellant,

-against-

Thomas S. Fleishell,
Defendant-Respondent.

Gregory G. Calabro, New York (Ricardo M. Vera of counsel), for
appellant.

Thomas S. Fleishell & Associates, P.C., New York (Susan C.
Stanley of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner
Kornreich, J.), entered September 29, 2006, which, to the extent
appealed from as limited by the briefs, denied plaintiff's motion
for summary judgment on his third cause of action and for
dismissal of the third, fifth and sixth counterclaims, and, upon
search of the record, granted defendant summary judgment on
liability on the sixth counterclaim, unanimously modified, on the
law, the grant of summary judgment on the sixth counterclaim
vacated, and otherwise affirmed, without costs. Appeal from
order, same court and Justice, entered September 22, 2006, which
granted defendant's motion to direct plaintiff to effect a
rollover in a profit-sharing plan by a date certain, unanimously
dismissed, without costs, as moot.

The grant of summary judgment on the sixth counterclaim was

premature. There are factual issues as to whether plaintiff voluntarily abandoned the premises, and whether he was under any obligation, under these circumstances, to execute the surrender agreement.

Summary judgment was properly denied on the third cause of action. A claim for fraud cannot duplicate a claim for breach of fiduciary duty (see *Frydman & Co. v Credit Suisse First Boston Corp.*, 272 AD2d 236, 238 [2000]).

Plaintiff's attempt to assert waiver, estoppel and laches as defenses to the third counterclaim for recovery of excess profits cannot be evaluated until factual issues are resolved, including whether the parties actually agreed to a 50-50 split of profits after a third partner left. If not, the question whether defendant knew or should have known of plaintiff's purported self-dealing is still essential in determining whether estoppel, waiver or laches should apply.

The statute of frauds is unavailing as a defense to the fifth counterclaim for reimbursement of defendant's payment of expenses, since it has long been the rule that parol evidence can be admitted to demonstrate "uniform, continuous and well settled usage and custom pertaining to the matters embraced in [a] contract" (*Atkinson v Truesdell*, 127 NY 230, 234 [1891]). Evidence as to the parties' prior sharing of expenses would remove the counterclaim from the proscriptive effect of General

Obligations Law § 5-701(a)(2).

Inasmuch as the funds that were the subject of the September 22 order have been distributed, that issue is now moot (see *Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811 [2003], *cert denied* 540 US 1017 [2003]).

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ENTERED: FEBRUARY 5, 2008

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Lippman, P.J., Mazzairelli, Friedman, Sweeny, Moskowitz, JJ.

2690 ALJ Capital I, L.P., et al., Index 601591/06
Plaintiffs-Appellants,

-against-

The David J. Joseph Company,
Defendant-Respondent.

Richards Kibbe & Orbe LLP, New York (Brian S. Fraser of counsel),
for appellants.

Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Steven L.
Klepper of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.),
entered March 19, 2007, which, insofar as appealed from, granted
defendant's motion for summary judgment dismissing the complaint,
unanimously affirmed, with costs.

The complaint was properly dismissed on the ground that
plaintiffs failed to provide prompt written notice of a
"Disallowance," a condition precedent to their right to demand
repayment from defendant under the subject agreement. The giving
of such notice was always within plaintiffs' control, and,
despite the lack of explicitly conditional language, was
unmistakably required by the agreement's "Cure Period" provision
prior to the assertion of a claim for repayment (*see National
Fuel Gas Distrib. Corp. v Hartford Fire Ins. Co.*, 28 AD3d 1169
[2006]), *lv denied* 7 NY3d 713 [2006]). In any event, as the
motion court also found, the events cited by plaintiffs did not

constitute disallowances within the meaning of the agreement. We have considered plaintiffs' other arguments and find them unavailing.

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ENTERED: FEBRUARY 5, 2008

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the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: FEBRUARY 5, 2008

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Lippman, P.J., Mazzarelli, Friedman, Sweeny, Moskowitz, JJ.

2692 Esmie Taylor, Index 4615/04
Plaintiff-Respondent,

-against-

Wayne Taylor,
Defendant-Appellant.

Wayne J. Taylor, appellant pro se.

Judgment, Supreme Court, Bronx County (LaTia W. Martin, J.), entered September 5, 2006, after a nonjury trial, granting plaintiff a divorce on the ground of cruel and inhuman treatment, and awarding sole custody of the parties' children to plaintiff with supervised visitation to defendant, unanimously affirmed, without costs.

There was evidence that defendant physically assaulted plaintiff on numerous occasions over the course of their six-year marriage, causing physical injury. This violence resulted in frequent intervention by the police and by the Administration for Children's Services. Defendant was convicted of harassment for his conduct toward plaintiff. This evidence was sufficient to establish cruel and inhuman treatment (Domestic Relations Law § 170[1]; see e.g. *Meltzer v Meltzer*, 255 AD2d 497 [1998]). Plaintiff was not required to introduce medical evidence on the effects of defendant's behavior toward her (see *Bailey v Bailey*, 256 AD2d 1030, 1031 [1998]). There is no basis for disturbing

the court's assessment of the witnesses' credibility (see *Freas v Freas*, 33 AD3d 1069, 1070 [2006]).

The record amply supported the award of custody to plaintiff as being in the children's best interests. We have considered defendant's remaining arguments and find them unavailing.

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There is no basis for disturbing the jury's determinations concerning the credibility of defendant's witnesses (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's claim that his statement should have been suppressed on the ground of alleged unnecessary delay in his arraignment is a claim requiring preservation (*People v Ramos*, 99 NY2d 27 [2002]), and we decline to review this unpreserved claim in the interest of justice. In addition, defendant has failed to create a record adequate for review of the issue (*see People v Kinchen*, 60 NY2d 772 [1983]).

The court properly denied, without a hearing, defendant's CPL 440.10 motion alleging ineffective assistance of counsel (*see People v Ozuna*, 7 NY3d 913 [2006]). Defendant's claim that his attorney never advised him of his right to testify at trial is unsupported (*see CPL 440.30[4][d]*). Moreover, the trial transcript establishes that defendant was aware of his right to testify and chose not to exercise it (*see CPL 440.30[4][c]*).

We perceive no basis for reducing the sentence.

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merits.

Defendant's claim regarding the imposition of a mandatory surcharge and fees is without merit (see *People v Lemos*, 34 AD3d 343 [2006], *lv denied* 8 NY3d 924 [2007]).

We perceive no basis for reducing the sentence.

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ENTERED: FEBRUARY 5, 2008

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the catalogues are free for the taking and anyone can take as many as they desire and therefore, plaintiff cannot demonstrate a superior possessory right to the catalogues (*see Galtieri v Kramer*, 232 AD2d 369 [1996]). Furthermore, dismissal of the prima facie tort cause of action was proper where the evidence demonstrates that no reasonable jury could conclude that defendant was motivated solely by "disinterested malevolence" (*Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314, 333 [1983], quoting *American Bank & Trust Co. v Federal Bank*, 256 US 350, 358 [1921]), and where plaintiff failed to sufficiently establish that it sustained special damages (*see Vigoda*, 293 AD2d at 266). Plaintiff has raised no challenge to the court's dismissal of its fourth cause of action for a permanent injunction.

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

ENTERED: FEBRUARY 5, 2008

CLERK

Lippman, P.J., Mazzairelli, Friedman, Sweeny, Moskowitz, JJ.

2698 Olga Mangual, Index 105383/05
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

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

Order, Supreme Court, New York County (Robert D. Lippmann,
J.), entered August 28, 2006, which, in an action for personal
injuries, denied plaintiff's motion to strike defendant's answer
or to strike the answer unless defendant produced a design
engineer for deposition, and sua sponte precluded both parties
from using a design engineer at trial and directed defendant to
produce a cleaner who has knowledge of the staircase where the
accident occurred for deposition, unanimously modified, on the
law and the facts, to vacate the preclusion order, and otherwise
affirmed, without costs.

The court properly denied plaintiff's motion to strike
defendant's answer since there was no showing that defendant's
conduct during discovery was willful, contumacious or in bad
faith (CPLR 3126; see *Guzetti v City of New York*, 32 AD3d 234
[2006]). Defendant was not obligated in the first instance to
produce a witness of plaintiff's choosing for deposition (see
Faber v New York City Tr. Auth., 177 AD2d 321 [1991]), and its

offer to produce a cleaner at the subway station where plaintiff fell was reasonable under the circumstances. While there were no specific allegations in the complaint or bill of particulars that plaintiff's fall was due to negligent design of the staircase, there was no justification for the court's sua sponte preclusion order.

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 5, 2008

CLERK

Lippman, P.J., Mazzarelli, Friedman, Sweeny, Moskowitz, JJ.

2699-
2700

Adriana Vink,
Plaintiff-Appellant,

Index 122226/02

-against-

Chitranjan Ranawat, M.D., et al.,
Defendants-Respondents,

R. Reina, M.D., et al.,
Defendants.

Richard D. Kranich, New York, for appellant.

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York (Steven C. Mandell of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 20, 2006, which denied plaintiff's motion to vacate an earlier order that had sua sponte dismissed her action for failure to prosecute, unanimously affirmed, without costs.

Plaintiff did not establish a reasonable excuse for her default and a meritorious cause of action (*see Bollino v Hitzig*, 34 AD3d 711 [2006]; *Fink v Antell*, 19 AD3d 215 [2005]).

Plaintiff's dissatisfaction with the court's unappealed rulings denying the motion to amend her bill of particulars to allege new theories, and granting defendant's motion to limit expert testimony, cannot serve as a basis for her refusal to pick a jury (*see Archibald v Asia Five Eight, LLC*, 39 AD3d 366 [2007]). Nor could a meritorious claim be based on new theories that were disallowed by the court.

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

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

ENTERED: FEBRUARY 5, 2008

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Lippman, P.J., Mazzarelli, Friedman, Sweeny, Moskowitz, JJ.

2701 World City Foundation, Inc., et al., Index 114829/03
Plaintiffs-Respondents,

-against-

Vito Sacchetti, et al.,
Defendants-Appellants.

Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains
(Edward J. Guardaro, Jr. of counsel), for appellants.

Kramer & Dunleavy L.L.P., New York (Denise M. Dunleavy of
counsel), for respondents.

Order, Supreme Court, New York County (Joan A. Madden, J.),
entered July 19, 2006, which, insofar as appealed from, denied
defendants' (collectively landlord) motion for summary judgment
dismissing plaintiffs' (collectively tenant) causes of action for
breach of contract and intentional infliction of emotional
distress, unanimously modified, on the law, to dismiss the cause
of action for intentional infliction of emotional distress, and
otherwise affirmed, without costs.

Tenant occupied three apartments in landlord's building
pursuant to a so-called "master lease" with the prior landlord,
and eventually came to occupy six others, using them primarily as
the offices of plaintiff not-for-profit foundation. Tenant's
admitted lateness in paying rent resulted in landlord's
institution of a number of proceedings in Housing Court. The
motion court correctly found that the doctrine of collateral

estoppel precludes tenant's breach of contract claim with respect to apartment 202, based on Housing Court's prior determination, in a proceeding specific to that apartment, that it was not subject to the master lease. However, no such finding was made with respect to any of the other apartments in any of the other proceedings, and, although issues relating to the master lease were alluded to in tenant's affirmative defenses in various of the proceedings, they were never clearly raised and decided against tenant (*see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]). The dismissal of certain of tenant's affirmative defenses in one of the proceedings, on the ground that a tenant's entitlement to a lease renewal under the Rent Stabilization Law is not a defense to a nonpayment summary proceeding, does not support landlord's position that tenant's breach of the master lease has been decided, and indeed tends to support tenant's contrary position. Issues relating to the master lease, such as whether landlord failed to offer lease renewals in accordance with its terms, or charged rent above the 5% increase per year permitted thereunder, have yet to be addressed. Nor was there ever a need to address such issues where it has never been proven that the apartments, with the exception of 202, are subject to the master lease and not rent stabilization (*see Lukowsky v Shalit*, 110 AD2d 563, 566 [1985] [although successive actions all involved same sublease, res

judicata did not apply because “[e]ach presented a different gravamen of wrong and distinct cause of action requiring different elements of proof”). We modify to dismiss the claim for intentional infliction of emotional distress since landlord certainly was entitled to bring nonpayment proceedings upon tenant’s admitted failures to timely pay the rent, and since tenant’s other allegations fall short of the extreme, outrageous conduct necessary to that cause of action (see *Walentas v Johnes*, 257 AD2d 352, 353 [1999], *lv dismissed* 93 NY2d 958 [1999]; *Hartman v 536/540 E. 5th St. Equities, Inc.*, 19 AD3d 240 [2005]).

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

ENTERED: FEBRUARY 5, 2008

CLERK

Lippman, P.J., Mazzarelli, Friedman, Sweeny, Moskowitz, JJ.

2702 George Heath,
Plaintiff-Appellant,

Index 40555/78

-against-

John S. Wojtowicz, et al.,
Defendants-Respondents.

George Heath, appellant pro se.

Appeal from order, Supreme Court, New York County (Joan A. Madden, J.), entered August 1, 2007, which declined to sign plaintiff's proposed order to show cause, unanimously dismissed, without costs, as taken from a nonappealable paper.

The appeal is dismissed because the court's decision not to sign plaintiff's order to show cause seeking relief in connection with his alleged rights to royalties from the film *Dog Day Afternoon* based on funds allegedly due and owing to the late defendant John S. Wojtowicz is not appealable (CPLR 5701[a][2]; see *M & J Trimming v Kew Mgt. Corp.*, 254 AD2d 21 [1998]).

Were we not dismissing the appeal, we would find that where, as here, a recipient of public assistance benefits, in this case Wojtowicz, owns real or personal property at the time of his death, Social Services Law § 104 permits the seeking of recovery of benefits paid to the decedent within 10 years of death on a theory of implied contract (see *Matter of Bustamante*, 256 AD2d 463 [1998]). The applicable six-year statute of limitations runs

from the date of appointment of a fiduciary for the estate (*id.*), and thus, the court correctly determined that inasmuch as Wojtowicz passed away in 2006, the time period for enforcing the Human Resources Administration's lien against his property has not expired. Furthermore, plaintiff's challenges to the manner in which the subject royalties of the film are being distributed are precluded by the doctrine of res judicata (see *New York State Crime Victims Bd. v Abbott*, 247 AD2d 263 [1998], *lv dismissed* 92 NY2d 1001 [1998]; and see *New York State Crime Victims Bd. v Abbott*, 293 AD2d 372 [2002], *lv dismissed*, 98 NY2d 693 [2002]).

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

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

ENTERED: FEBRUARY 5, 2008

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Lippman, P.J., Mazzarelli, Friedman, Sweeny, JJ.

2703 Charles Cox, et al., Index 105193/00
Plaintiffs-Respondents,

-against-

Microsoft Corporation,
Defendant-Respondent,

Does 1 through 100, inclusive,
Defendants.

- - - - -

Louis F. Burke, P.C.,
Objector-Appellant.

Law Office of Christopher J. Gray, P.C., New York (Christopher J. Gray of counsel), for appellant.

Kirby McInerney LLP, New York (Daniel Hume of counsel), for Charles Cox and Old Factories, Inc., respondents.

Sullivan & Cromwell LLP, New York (Ryan C. Williams of counsel), for Microsoft Corporation, respondent.

Order and judgment (one paper), Supreme Court, New York County (Karla Moskowitz, J.), entered August 31, 2006, which approved as fair, reasonable and adequate the proposed settlement of this class action alleging monopolistic conduct by defendant Microsoft, unanimously affirmed, with costs.

The proposed settlement contains a release by every class member of all claims against Microsoft "relating in any way to any conduct, act or omission which was or could have been alleged in any of The Case [sic] and which arise from or relate to the purchase, use and/or acquisition of a license for a Microsoft Operating System and/or Microsoft Application . . . and where the

claims . . . relate to" antitrust, deceptive practices, unfair competition, unfair practices, price discrimination, trade regulation, or trade practices, or any other federal, state or common law similar thereto. The release expressly includes claims relating to conduct, acts or omissions that occurred on or before December 31, 2004 and excludes claims relating to conduct, acts or omissions that occurred after that date.

The objector to the proposed settlement contends that the release is excessively broad because it releases all claims under specified laws but is not limited to the identical factual predicate of this action, and because it extends two years past the date on which Microsoft began operating under significant restrictions of its anticompetitive behavior pursuant to the final judgment in *United States v Microsoft* (US Dist Ct, DC, November 12, 2002, 98 Civ 1232, Kollar-Kotelly, J., 2002), thereby effectively immunizing Microsoft from claims arising out of its conduct during that two-year period.

We reject both contentions. It was appropriate to extend the release until December 31, 2004, because the class that was certified by the court consists of those who indirectly acquired licenses for Microsoft operating system or applications software after May 18, 1994, and represents and includes purchasers after December 31, 2002. Claims based on a factual predicate different from the factual predicate of this action are not barred by the

release, because the release does not bar claims relating to conduct that was not alleged and could not have been alleged in this action.

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Convertibles (*cf. Rosenbach v Diversified Group, Inc.*, 39 AD3d 271 [2007]).

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ENTERED: FEBRUARY 5, 2008

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Lippman, P.J., Mazzairelli, Friedman, Moskowitz, JJ.

2706 Roberto Delos Santos, etc., et al., Index 400012/05
Plaintiffs-Appellants-Respondents, 107053/05

-against-

500 C.S. Realty Corp., et al.,
Defendants,

L.W.L. Associates, et al.,
Defendants-Respondents-Appellants.

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Roberto Delos Santos, etc., et al.,
Petitioners-Appellants-Respondents,

-against-

Walter Strauss, as Receiver,
Respondent-Respondent,

L.W.L. Associates, et al.,
Respondents-Respondents-Appellants.

Bader Yakaitis & Nonnenmacher, LLP, New York (Darlene S. Miloski of counsel), for appellants-respondents.

McGivney & Kluger, P.C., New York (Christopher A. Bacotti of counsel), for L.W.L. Associates, respondent-appellant.

Rivkin Radler LLP, Uniondale (Harris J. Zakarin of counsel), for J.R. Properties Ltd., respondent-appellant.

Walter Strauss, respondent pro se.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered May 11, 2007, which, insofar as appealed from, denied the petition of plaintiffs/petitioners to vacate an order, dated April 14, 1994, discharging respondent Strauss as receiver and dismissed the proceeding without prejudice to a motion by plaintiffs/petitioners in the mortgage foreclosure action for

leave to maintain the underlying action only against defendants L.W.L. Associates (LWL) and J.R. Properties Ltd. (JRP), and denied LWL's motion and JRP's cross motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The underlying action is based upon a claim of injuries suffered by the infant plaintiff as a result of lead paint poisoning in premises where Strauss had been appointed as receiver during a foreclosure proceeding. An action against a former receiver is not maintainable unless the order discharging the receiver is vacated and leave to prosecute the action is granted (see *Gadson v 1340 Hudson Realty Corp.*, 180 AD2d 582, 583 [1992]; see also *Copeland v Salomon*, 56 NY2d 222 [1982]). The court properly declined to vacate the order discharging Strauss with prejudice on the grounds of laches since Strauss would be at a significant disadvantage in defending the underlying action inasmuch as he was discharged from his receivership 11 years prior to the instant petition and had no notice of the underlying action (compare *Columbus Realty Inv. Corp. v G & S Winding Rd.*, 257 AD2d 592 [1999]). However, the court properly concluded that laches did not apply to the agents of Strauss, LWL and JRP, which, at separate times, were the managing agents of the premises during the receivership. LWL and JRP were aware of the underlying action from the time it was initially commenced and

had participated in discovery, and accordingly, are not prejudiced by the delay (see *149 Clinton Ave. N. v Grassi*, 51 AD2d 502, 506-507 [1976]).

The court also properly denied LWL and JRP's applications for summary judgment because of the existence of triable issues of fact as to whether either managing agent had the necessary control to support imposition of liability for nonfeasance in abating the lead paint condition (see *German v Bronx United in Leveraging Dollars*, 258 AD2d 251 [1999]).

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

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ENTERED: FEBRUARY 5, 2008

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for future lost earnings, \$21,000 for future medical expenses, and \$250,000 and \$500,000 for past and future loss of services, and the entry of an amended judgment in accordance therewith.

The City was clearly an improper party (see *Perez v City of New York*, 41 AD3d 378 [2007]), and its motion to dismiss should have been granted.

A fair interpretation of the evidence supports the jury verdict that the Board of Education was 100% liable for plaintiff teacher's injuries, and that the actions of neither the teacher nor the student were a substantial factor in causing the injury (*Cohen v Hallmark Cards*, 45 NY2d 493 [1978]). Evidence supported a finding that the Board of Education failed to comply with applicable industry standards governing the inspection and maintenance of a hydraulic controller on a school door that an eight-year-old emotionally disturbed student suddenly slammed against the side of the teacher's head. The teacher suffered a detached retina of the right eye, and notwithstanding nine surgical procedures, he eventually lost sight in that eye. The eye deteriorated to a discolored, opaque appearance, giving him continuous pain that was not likely to abate until such time as he elected to undergo the implantation of a false eye.

Uncontested evidence established that the hydraulic controller in question had been broken for over a year, and that the Board of Education received timely written and verbal notice

of such defect. There was also uncontested evidence that if the hydraulic controller had been operational, the door could not be slammed shut. This was a school for emotionally disturbed children, and the door in question was the sole entrance to a small room where particularly uncooperative or unruly children would be placed until they calmed down. Thus, the hydraulic controller was necessary to the safe operation of the door.

We find the damage awards excessive to the extent indicated. In addition to the loss of his right eye, the teacher had a pre-existing macular hole condition in his left eye that left him only peripheral vision in that eye. The result was extremely limited vision, which meant that he could no longer work. Nevertheless, we find the future pain-and-suffering award deviates materially from what would be reasonable compensation for the loss of an eye (*see e.g. Fresco v 157 E. 72nd St. Condominium*, 2 AD3d 326 [2003], *lv dismissed* 3 NY3d 630 [2004]). Plaintiffs offered no evidence of loss of society (*see Grant v City of New York*, 4 AD3d 158, 159 [2004]), but did provide evidence that the wife had assumed full responsibility for household chores, cooking, transportation for their young son, and helping her husband move about (*see e.g. Schultz v Turner Constr. Co.*, 278 AD2d 76 [2000]). As to the awards for future

lost earnings and medical expenses, plaintiffs acknowledge that the evidence supported those awards only to the extent that they have been reduced.

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

2594 Christine Lenzini, et al.,
Plaintiffs-Appellants,

Index 119665/03
105574/04

-against-

Alan A. Kessler, M.D., et al.,
Defendants-Respondents,

John Maggio, M.D.,
Defendant.

Law Office of Joseph M. Lichtenstein, P.C., Mineola (Joseph Lichtenstein of counsel), for appellants.

Martin Clearwater & Bell LLP, New York (Ellen B. Fishman of counsel), for Alan A. Kessler, M.D. and Hutson & Edersheim, M.D., P.C., respondents.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for East River Medical Imaging, Inc., Morton Schneider, M.D. and Alison B. Haimes, M.D., respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 3, 2006, which denied plaintiffs' posttrial motion to set aside the jury verdict in favor of defendants, unanimously affirmed, without costs.

Although a scientific text is inadmissible as hearsay when offered for its truth or to establish a standard of care, it may be introduced to cross-examine an expert witness where it has been demonstrated that the work is the type of material commonly relied upon in the profession and has been deemed authoritative by such expert (*Hinlicky v Dreyfuss*, 6 NY3d 636 [2006]; *cf. Matter of Yazalin P.*, 256 AD2d 55 [1998]). In the subject

medical malpractice trial, the court did not improvidently exercise its discretion in authorizing the use of certain material for impeachment purposes as against plaintiffs' expert witnesses. Plaintiffs' expert in radiology was, in that regard, questioned about a medical text he had brought to court, made notes thereon, and clearly deemed sufficiently authoritative notwithstanding that he may not have accepted everything contained in it. As for plaintiffs' expert in gynecology, he expressly recognized the reliability of the material about which he was cross-examined. Indeed, a physician may "not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative" where he has already relied upon the text and testified that "he agreed with much of it" (*Spiegel v Levy*, 201 AD2d 378, 379 [1994], *lv denied* 83 NY2d 758 [1994]). Moreover, the court delivered the appropriate limiting instructions.

A missing witness charge was properly delivered as to the patient's treating physicians, where plaintiffs failed to show those individuals were either unavailable or not under their control, and their testimony would be either cumulative or irrelevant (*see DeAngelis v New York Univ. Med. Ctr.*, 15 AD3d 185 [2005]). Also proper was the error-in-judgment charge, inasmuch as evidence was introduced at trial relating to the available

treatment options, and the critical issue was whether the patient's gynecologist had been negligent in electing to wait and observe her condition rather than undertaking immediate surgery.

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complainant for robbing him" did not raise such an issue, since defendant failed to allege any specifics regarding the alleged robbery or how that allegation would have negated probable cause for his arrest.

The court properly refused to charge unlawful imprisonment in the second degree as a lesser included offense of kidnapping in the second degree. There is no reasonable view of the evidence to support a finding that defendant committed the lesser crime, which requires a finding that defendant restrained the victim (see Penal Law § 135.00[1]; § 135.05), but not the greater crime, which requires a finding that defendant abducted him (see Penal Law § 135.00[2]; § 135.20). As relevant to this case, defendant abducted the victim within the meaning of Penal Law § 135.00(2) by restraining him "with intent to prevent his liberation by . . . threatening to use deadly physical force." The only reasonable view of the evidence was that defendant's threatened use of what appeared to be a real pistol and his restraint of the victim in a moving car constituted abduction and

not mere restraint (*see People v Gardner*, 28 AD3d 1221, 1222 [2006], *lv denied* 7 NY3d 812 [2006]; *People v Linderberry*, 222 AD2d 731, 734 [1995], *lv denied* 87 NY2d 975 [1996]).

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failed to challenge the constitutionality of the 1997 conviction when it was counted as a predicate conviction in 2004, or demonstrate good cause for such failure, he waived any future challenge to the 1997 conviction's constitutionality for sentence enhancement purposes (see *People v Crawford*, 204 AD2d 203 [1994], *lv denied* 84 NY2d 906 [1994]). We also reject defendant's claim on the merits.

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ENTERED: FEBRUARY 5, 2008

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

2658 Dennis Pantore, et al., Index 6913/04
Plaintiffs-Respondents,

-against-

Patchas Realty, LLC,
Defendant-Appellant,

Health Care Waste Services Corp., et al.,
Defendants-Respondents.

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of
counsel), for appellant.

Cartafalsa, Slattery, Turpin & Lenoff, Tarrytown (Judy L. Brown
of counsel), for Health Care Waste Services Corp. and NYESC
Acquisition Corp., respondents.

Order, Supreme Court, Bronx County (Mark Friedlander, J.),
entered September 15, 2006, which, to the extent appealed from,
denied the cross motion of defendant Patchas Realty, LLC for
summary judgment dismissing the complaint and cross claims
asserted against it, unanimously affirmed, with costs.

There is a triable issue of fact as to whether Patchas
negligently maintained the perimeter wall that collapsed onto
plaintiff. Although Patchas was on notice of prior instances of
trucks striking the wall and had installed I-beams and barriers
to strengthen certain areas of the wall and prevent trucks from

striking it again, it installed no such devices in the area of the wall where plaintiff's accident occurred (see *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [1980]).

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ENTERED: FEBRUARY 5, 2008

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

2659- The People of the State of New York, Ind. 4880/98
2659A Respondent, 4410/05

-against-

Antonio Reyes, a/k/a Jose Fermin,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York
(Gian S. King of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Michael S.
Morgan of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County
(Micki A. Scherer, J.), rendered on or about December 14, 2005,
and judgment, same court (Brenda Soloff, J.), rendered on or
about October 28, 2005, unanimously affirmed. No opinion. Order
filed.

personal injuries sustained by a worker at a construction site, insofar as appealed from as limited by the briefs, denied second third-party defendant lighting contractor's (HP) motion for summary judgment dismissing all cross claims as against it, and granted defendant/third-party plaintiff/second third party plaintiff site owner's (Lofts) motion for summary judgment on its indemnity claims against HP and third-party defendant steel subcontractor and plaintiff's employer Burgess) to the extent of finding that the amount Lofts paid in settlement of plaintiff's claim was reasonable, unanimously modified, on the law, to vacate the finding of reasonableness, and otherwise affirmed, without costs.

Plaintiff alleges that he fell into an unprotected hole at the site; the third-party actions, insofar as pertinent, allege that the accident was caused by inadequate temporary lighting at the site installed by HP; Lofts settled with plaintiff after plaintiff was granted partial summary judgment on the issue of Lofts' liability under Labor Law § 240(1). Concerning HP's motion, issues of fact as to whether inadequate lighting contributed to the accident are raised by, inter alia, plaintiff's testimony that the lighting conditions were "terrible" and that he did not see the hole when he looked toward it. Concerning the finding of reasonableness, Lofts bore the burden of demonstrating the reasonableness of the settlement

amount as against its indemnitors (see *Feuer v Menkes Feuer*, 8 AD2d 294, 299-300 [1959], citing, inter alia, *Dunn v Uvalde Asphalt Paving Co.*, 175 NY 214, 218 [1903]; see also *Chase Manhattan Bank v 264 Water St. Assoc.*, 222 AD2d 229, 231 [1995]). This Lofts chose not to do, instead choosing to argue that any challenge to reasonableness was waived by HP and Burgess. Only in its reply did Lofts purport to demonstrate reasonableness, submitting copies of plaintiff's bills of particulars and medical records and reports, and reports of jury verdicts. The motion court, which based its finding of reasonableness on its active involvement in the settlement and unspecified evidence supposedly showing that plaintiff's injuries prevent him from resuming his trade as an iron worker and that "his economic loss alone will be greater than the amount paid" by Lofts, erred in considering a factual argument, and associated materials, first made and submitted by Lofts in its reply (see *Migdol v City of New York*, 291 AD2d 201 [2002]). Nor does Lofts show waiver, a claim based on inaccurate assertions that Burgess and HP were present when the settlement was placed on the record but did not object to it. In fact, HP did object, seeking a stay, and Burgess was not

present. Lofts' argument that HP's and Burgess's failure to conduct disclosure concerning damages also constitutes a waiver was improperly raised for the first time in its reply papers.

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

2664-

2665 Travelers Casualty and Surety Company, Index 107138/06
Plaintiff-Respondent,

-against-

Honeywell International Inc.,
Defendant-Appellant,

American Re-Insurance Company, et al.,
Defendants,

Employers Insurance Company of Wausau,
et al.,
Defendants-Respondents.

Kirkpatrick & Lockhart Preston Gates Ellis LLP, New York (Michael J. Lynch of the Pennsylvania Bar, admitted pro hac vice, of counsel), for appellant.

Simpson Thacher & Bartlett LLP, New York (Andrew T. Frankel of counsel), for Travelers Casualty and Surety Company, respondent.

Seward & Kissel LLP, New York (Dale C. Christensen, Jr. of counsel), for Employers Insurance Company of Wausau and National Casualty Company, respondents.

White and Williams LLP, New York (Gregory T. LoCasale of counsel), for Republic Insurance Company, respondent.

Traub Lieberman Straus & Shrewsbury LLP, Hawthorne (Copernicus T. Gaza of counsel), for Evanston Insurance Company, respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Brett D. Goodman of counsel), for MidStates ReInsurance Corporation, respondent.

Hogan & Hartson LLP, New York (Victoria Zaydman of counsel), for Hartford Accident and Indemnity Company, First State Insurance Company, New England Reinsurance Corporation and Twin City Fire Insurance Company, respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered September 12, 2006, which denied defendant Honeywell's motion to dismiss the action on grounds of forum non conveniens or to stay the action until resolution of an action pending in New Jersey, unanimously affirmed, with costs. Order, same court and Justice, entered December 11, 2006, which, to the extent appealed from, denied Honeywell's motion to dismiss or stay the cross claims of defendants Employers of Wausau, Evanston, First State, Hartford Accident & Indemnity, MidStates Reinsurance, National Casualty, New England Reinsurance, Republic and Twin City Fire (the insurer defendants) on similar grounds, unanimously affirmed, with costs.

The common-law doctrine of forum non conveniens, now codified in CPLR 327, permits a court to dismiss an action when, in the interest of substantial justice, it should be heard in another forum. "The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation," among which are "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. . . . The court may also consider that both parties to the action are nonresidents [citation omitted] and that the transaction out of which the cause of action arose occurred primarily in a foreign

jurisdiction," (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]), although a defendant's "heavy burden" remains despite the plaintiff's status as a nonresident (*Bank Hapoalim [Switzerland] Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 [2006]).

Honeywell failed to demonstrate, in support of its motion to dismiss for forum non conveniens, that the interests of substantial justice would be served by moving the action to New Jersey. To the contrary, the record indicates that there is a substantial nexus between this action and New York, as most of the insurance policies at issue were issued, negotiated and brokered here (*see Continental Ins. Co. v Garlock Sealing Tech., LLC*, 23 AD3d 287 [2005]), and the circumstances giving rise to the underlying actions largely occurred here (*see Seneca Ins. Co. v Lincolnshire Mgt.*, 269 AD2d 274, 275 [2000]). Moreover, while the choice-of-law issues presented by this litigation have not yet been adjudicated, New York courts are capable of applying New Jersey law should that necessity arise (*see Yoshida Print. Co. v Aiba*, 213 AD2d 275 [1995]).

In view of this action's connection to New York, that branch of Honeywell's motion for dismissal on the ground that a similar

action is pending in New Jersey was properly denied (see CPLR 3211[a][4]; *San Ysidro Corp. v Robinow*, 1 AD3d 185, 187 [2003]).

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cooperation also amounted to failure to accept responsibility for his crimes, under the applicable risk factor.

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proceeding, petitioner argued that a penalty hearing to assess her fitness to teach was appropriate, and her request was granted.

In any event, there was no basis for vacating the award. A criminal defendant does not have a right to stay a related disciplinary proceeding pending the outcome of trial (*Matter of Watson v City of Jamestown*, 27 AD3d 1183 [2006]), and a stay is not required for the protection of her constitutional rights.

The penalty of termination was in accord with due process, supported by the record evidence, and is not shocking to our sense of fairness (see *Matter of Smith v Board of Educ. of Wantagh Union Free School Dist.*, 259 AD2d 704 [1999]).

Petitioner's misconduct compromised her ability to function in her job and constituted unacceptable behavior. Acts of moral turpitude committed in the course of public employment are an appropriate ground for termination of even long-standing employees with good work histories (see *Matter of Kelly v Safir*, 96 NY2d 32 [2001]).

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

2672 In re Association of Surrogates, Index 116468/06
 and Supreme Court Reporters,
 etc., et al.,
 Petitioners,

-against-

The State of New York Unified Court System,
Respondent.

Fulbright & Jaworski L.L.P., New York (Douglas P. Catalano of
counsel), for petitioners.

Michael Colodner, New York (Pedro Morales of counsel), for
respondent.

Determination of respondent State of New York Unified Court
System, dated July 6, 2006, which, after a hearing, found the
individual petitioner guilty of certain disciplinary charges and
terminated her employment as a Senior Court Reporter, unanimously
confirmed, the petition denied, and the proceeding brought
pursuant to CPLR article 78 (transferred to this Court by order
of the Supreme Court, New York County [Sheila Abdus-Salaam, J.],
entered January 2, 2007) dismissed, without costs.

Substantial evidence supports the hearing officer's
determination that petitioner committed the specified acts of
misconduct, i.e., chronic lateness and an off-duty act of
misconduct involving identity theft, which resulted in a criminal
conviction in New Jersey. Contrary to petitioner's contention
that Correction Law § 752 and § 753 prohibit respondent from

taking adverse employment action against her based on the conviction, the statutes permit such action where "there is a direct relationship between the criminal offense and the specific employment" (*Matter of Rosa v City Univ. of N.Y.*, 13 AD3d 162, 163 [2004], *lv denied* 5 NY3d 705 [2005]). The hearing officer rationally determined that there is a direct relationship between petitioner's criminal offense, which involved identity theft and credit card fraud, and her employment, in which, as an officer of the court (Judiciary Law § 290), she was charged with producing a true, accurate and complete record of court proceedings (see generally *Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 367 [1999]).

Substantial evidence also supports the hearing officer's findings that petitioner's supervisor repeatedly counseled her concerning her excessive lateness and that such lateness was disruptive to the operation of the court.

Under the circumstances, the penalty imposed is not so disproportionate to the proven offenses as to shock our sense of

fairness (see *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

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permanent residency in the apartment (see *Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289, 291 [2004]; and see *Matter of New York City Hous. Auth. Hammel Houses v Newman*, 39 AD3d 759 [2007]). There exists no basis to disturb the credibility determinations of the hearing officer, which were supported by the documentary evidence (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Nor is there any support for petitioners' claims of bias on the part of the hearing officer. Furthermore, contrary to petitioners' argument, they were afforded ample opportunity to be represented by counsel at the administrative hearing (see *Matter of Baywood Elec. Corp. v New York State Dept. of Labor*, 232 AD2d 553, 554 [1996]).

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

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defendants played a significant role in designating the locations where plaintiff could lay down equipment from the crane he operated, oversaw the cordoning off of dangerous areas with yellow caution tape, and employed coordinators to regularly walk the job site to inspect for safety issues and to take corrective measures. Since plaintiff was injured by tripping over a valve he alleged was not properly cordoned off, there is at least a triable issue of fact as to whether defendants had "the authority to control the activity bringing about the injury."

In light of the frequent inspection of the work site by defendants' employees during each shift, there is also a triable issue of fact as to defendants' notice of the dangerous condition.

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similarly de minimis deviation from the face of the document (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]).

Plaintiffs have not established a prima facie case, since their claim is based on an acceleration clause in a revolving credit agreement, thus requiring resort to an external document to define an event of default under the note (see *Manufacturers Hanover Trust v Hixon*, 124 AD2d 488 [1986]). Here, the credit agreement outlined several default events other than the mere failure to make payments (see *Technical Tape v Spray Tuck*, 131 AD2d 404, 406 [1987]), in particular, the closing of a real estate transaction in Maryland.

Even if plaintiffs had established prima facie entitlement to summary judgment, defendants also established triable issues of fact. Section 6 of the credit agreement defined a default as including any one or more of an enumerated list of events that "shall have occurred *and be continuing*" (emphasis added). In opposition to plaintiffs' motion for summary judgment, defendants raised issues of fact bearing on the delay of the closing. Drawing all reasonable inferences in favor of defendants (*Sosnoff v Carter*, 165 AD2d 486, 492 [1991]), the court correctly ruled

that an alleged breach of this condition could not form the basis for accelerated judgment.

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The fact that plaintiff's counsel recommended an attorney for defendant after she said she did not have one, and that this attorney had once worked in plaintiff's counsel's office as an intern during college, neither evinces undue influence nor demonstrates a conflict of interest on the part of defendant's counsel. Defendant was not required to use the referred attorney, nor was she pressured to do so. She admittedly had other legal resources to whom she could have turned, if only for an independent referral. Moreover, it is uncontested that defendant asked counsel no questions about the agreement. When counsel told defendant that the agreement appeared one-sided, she purportedly responded: "It's okay. I just want to get married." We find no reason to disturb the Referee's and the court's determination to credit counsel's testimony. Defendant admitted that she read the agreement before signing it, and while she did not understand the "legalese" (i.e., statutory references), she did understand that the parties' properties would remain separate. When asked if she understood the waiver of maintenance prior to signing the agreement, she answered, "I'm sure I did."

A failure to disclose financial matters, by itself, is not sufficient to vitiate a prenuptial agreement (see *Panossian v Panossian*, 172 AD2d 811 [1991]). There was no attempt by plaintiff to conceal or misrepresent the nature or extent of his

assets. In fact, defendant was personally acquainted with these assets. We also find nothing unconscionable about the agreement.

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

ENTERED: FEBRUARY 5, 2008

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

2681N Eliot Spitzer, Attorney General Index 401871/04
of the State of New York, etc.,
Plaintiff-Appellant,

-against-

Rick Schussel, et al.,
Defendants-Respondents.

Andrew M. Cuomo, Attorney General, New York (Justin R. Long of
counsel), for appellant.

Epstein Becker & Green, P.C., New York (John R. Sachs, Jr. of
counsel), for respondents.

Order, Supreme Court, New York County (Rosalyn Richter, J.),
entered September 18, 2006, which denied plaintiff's motion to
amend the complaint to assert two additional causes of action
against defendant Schussel individually, unanimously affirmed,
without costs.

Generally, leave to amend a pleading is freely granted in
the absence of prejudice or surprise to the opposing party. Mere
lateness is not a barrier to amendment. To establish prejudice,
which must be significant (*see Edenwald Contr. Co. v City of New
York*, 60 NY2d 957 [1983]), there must be some indication that the
opposing party will have been hindered in the preparation of its
case or prevented from taking some measure to support its
position (*see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18
[1981]). To conserve judicial resources, however, examination of
the underlying merit of the proposed amendment is mandated.

Where no cause of action has been stated to begin with, leave to amend will be denied (*see Nab-Tern Constructors v City of New York*, 123 AD2d 571 [1986]).

With regard to the proposed declaratory judgment, although no prejudice has been shown by defendants -- i.e. concerns about lack of discovery with respect to this claim could have been mitigated by the court (*see Masterwear Corp. v Bernard*, 3 AD3d 305, 307 [2004]), and mere lateness in seeking leave to amend is not a barrier to amendment -- the proposed cause of action lacks merit, and leave to amend should thus have been denied on this ground. In any event, the declaratory judgment cause of action is duplicative of the cause of action for an accounting in the original complaint, and is thus unnecessary and inappropriate (*see Apple Records v Capital Records*, 137 AD2d 50 [1988]). In addition, plaintiff premises his request to add the declaratory judgment claim on the potential for a breach of contract action asserted by defendant Schussel against the New Dance Group Studio. The hypothetical possibility that a lawsuit might be filed is not sufficiently immediate and real to constitute a justiciable controversy (*see Waterways Dev. Corp. v Lavelle*, 28 AD3d 539 [2006]).

With regard to plaintiff's proposed cause of action for violation of Executive Law § 63(12), which is premised on defendant Schussel's alleged filing of false financial reports on

behalf of the nonprofit New Dance Group Studio, the court improperly based its determination to deny leave to amend on the lateness in filing of the motion. This delay was due to the fact that plaintiff only received the information necessary to support such a claim during discovery; he cannot be faulted for waiting until critical depositions were completed. Assuming the motion was late, defendants once again failed to show actual prejudice, given that any concerns about the lack of discovery with respect to this claim could have been addressed by the motion court. However, the motion should have been denied because the claim lacks merit. Since the conduct at issue was for charitable purposes and defendant Schussel was not carrying on or conducting business, the § 63(12) claim cannot be maintained as a matter of law (see *Matter of Lefkowitz v Burden*, 22 AD2d 881 [1964]).

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plaintiffs resulted in an order entitling him to a charging lien to be determined on a quantum meruit basis. Plaintiffs' successor attorneys thereafter commenced a separate action against a third defendant, which was later consolidated with the instant action, and appellant claims that his charging lien covers the fund obtained by the successor attorneys in a settlement with the later-added defendant.

The successor attorneys committed no ethical violation in taking their fee from the settlement with the later-added defendant. While a charging lien does extend to settlement proceeds (*Costello v Kiaer*, 278 AD2d 50, 51 [2000]), it is enforceable only against the portion of the fund created in that action as a result of the attorney's efforts (see *Chadbourne & Parke, LLP v AB Recur Finans*, 18 AD3d 222, 223 [2005]), and not against the fruition of a distinct cause of action not resulting from his efforts (*City of Troy v Capital Dist. Sports*, 305 AD2d 715 [2003]). Here, the court found that appellant had not commenced the action against the later-added defendant, did not represent or appear on behalf of plaintiffs in that action, nor did he demonstrate that any of the work he performed resulted in the lawsuit against that defendant. Under these circumstances, appellant was entitled to recover in quantum meruit for services rendered in the action only as it involved the City, and he had no right to disqualify the successor attorneys.

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

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

ENTERED: FEBRUARY 5, 2008

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Mazzarelli, J.P., Friedman, Sweeny, Moskowitz, JJ.

2697 Patricia Gary,
Plaintiff-Appellant,

Index 105368/04

-against-

New York University, et al.,
Defendant-Respondents.

Patricia Gary, appellant pro se.

Nancy Kilson, New York, for respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered August 15, 2006, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In challenging the termination of her matriculation, along with allegations based on contract, tort and racial discrimination, the pro se plaintiff should have brought a proceeding under CPLR article 78, rather than this plenary action (see *Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *Bottalico v Adelphi Univ.*, 299 AD2d 443 [2002]). The court improperly determined that plaintiff's challenge to her termination was time-barred, since the action was timely commenced within four months after defendants had notified her by letter of their final and binding determination (CPLR 217[1]); however, it properly dismissed the challenge as beyond judicial review (see *Matter of Susan M. v New York Law School*, 76 NY2d 241, 246 [1990]).

Plaintiff failed to raise an issue of fact as to her cause of action for breach of contract. There is no indication that defendants failed to comply with their policies and procedures regarding termination (see *Benson v Trustees of Columbia Univ. in City of N.Y.*, 215 AD2d 255 [1995], *lv denied* 87 NY2d 808 [1996]).

The negligence claims of purported failure to provide adequate guidance or to allow plaintiff to register for classes were barred by her failure to exhaust administrative remedies (see *Gertler v Goodgold*, 107 AD2d 481, 489 [1985], *affd* 66 NY2d 946 [1985]). In any event, such claims are time-barred since the alleged inactions occurred more than four months prior to the commencement date of this action (see *Quintas v Pace Univ.*, 23 AD3d 246 [2005]).

We reject plaintiff's request for leave to establish a prima facie case of racial discrimination or a cause of action for intentional infliction of emotional distress. Plaintiff failed to submit any evidence warranting an inference of such discrimination on the part of the university or any of its employees (see *Bayon v State Univ. of N.Y. at Buffalo*, 2004 US Dist LEXIS 5036, *12, 2004 WL 625133, *2 [WD NY]). Furthermore, the claim for intentional infliction of emotional distress, based on comments made by the faculty prior to plaintiff's recommended termination in March 2003, was barred by the one-year statute of limitations (*Kourkoumelis v Arnel*, 238 AD2d 313 [1997]). In any

event, the faculty's conduct and comments regarding plaintiff's academic performance were not so extreme or "outrageous" as to constitute intentional infliction of emotional distress (see *Sheridan v Trustees of Columbia Univ. in City of N.Y.*, 296 AD2d 314, 315 [2002], *lv denied* 99 NY3d 505 [2003], *cert denied* 539 US 904 [2003]).

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

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

ENTERED: FEBRUARY 5, 2008

CLERK

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

1541 Edward Cohen, et al., Index 110800/05
Plaintiffs-Appellants,

-against-

Memorial Sloan-Kettering Cancer Center, et al.,
Defendants-Respondents.

David P. Kownacki, New York, for appellants.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of
counsel), for respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.),
entered January 5, 2007, modified, on the law, and plaintiffs'
cross motion for summary judgment on their Labor Law § 240(1)
claim granted, and as so modified, affirmed, without costs.

Opinion by Saxe, J. All concur except Friedman and McGuire,
JJ. who dissent in part in an Opinion by Friedman, J.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
FEBRUARY 5, 2008

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

M-45 The Charter Oak Fire Insurance Company v Font
 Appeal deemed withdrawn.

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

M-341 Hidalgo v 168th Street Development, L.P.
 (And a third-party action)

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

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

M-342 Dowdell v Sodexo, Inc.

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

Lippman, P.J., Mazzarelli, Friedman, Buckley, JJ.

M-6737 Mohamed v Defrin - Blanis

 Motion deemed withdrawn.

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

M-53A People v Sarubbi, Philip

Leave to prosecute appeal as a poor person granted,
as indicated. (The order of this Court entered on January 24,
2008 [M-53] recalled and vacated.)

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

M-374 People v Teresa-Taussicaucchi, Maria, also known as
Teresa-Taussi-Casucci, Maria

Counsel substituted.

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

M-375 People v Smith, Arenzo

Counsel substituted.

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

M-376 People v Dominguez, Luis

Counsel substituted.

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

M-7 People v Boateng, Osei

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

Lippman, P.J., Mazzarelli, Friedman, Sweeny, Moskowitz, JJ.

M-140 Ross v Nelson

 Plaintiff directed to correct error in record on appeal, as indicated.

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

M-5984 Estate of Savino - Savino v Precision Testing & Balancing, Inc.

 Stay granted on condition appellant continues to comply with the condition set forth in order of a Justice of this Court dated November 14, 2007 and on condition appeal perfected for the May 2008 Term, as indicated.

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

M-71 People v Nichols, Zwadie

 Enlargement of time in which to file a pro se supplemental brief granted for the June 2008 Term, to which Term appeal adjourned, as indicated.

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

M-6570 Brenner v Brenner

M-128

M-196 Stay denied; attorneys fees denied; sanctions and attorneys fees denied.

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

M-6153 Rodriguez v Saal - New York Organ Donor Network

M-95

Stay granted; dismissal of appeal denied.

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

M-102 People v Bowman, Edward

Time to perfect appeal enlarged to the May 2008 Term.

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

M-1 People v Chatelain, Billy

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

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

M-6718 In the Matter of Borkan v The State of New York

CPLR 5704(a) relief denied.

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

M-163 Beeber v Beeber

Stay denied.

Mazzarelli, J.P., Saxe, Friedman, Catterson, Acosta, JJ.

M-6269 Good Energy, L.P. v Kosachuk

M-92

Stay granted; costs and sanctions denied.

Mazzarelli, J.P., Saxe, Friedman, Catterson, Acosta, JJ.

M-90 People v Ochoa, Mark

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

Mazzarelli, J.P., Saxe, Friedman, Catterson, Acosta, JJ.

M-96 People v Sunter, Male

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

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

M-6507A People v Marty, Noel

Notice of appeal deemed timely filed; leave to
prosecute appeal as a poor person granted, as indicated.
(The order of this Court entered on January 24, 2008 [M-6507]
recalled and vacated.)

Mazzarelli, J.P., Saxe, Friedman, Catterson, Acosta, JJ.

M-6461 People v Wilson, Nathaniel

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

Mazzarelli, J.P., Saxe, Friedman, Catterson, Acosta, JJ.

M-32 Kalt v Ritman - HBS, Ltd.

This Court to take judicial notice of briefs filed in prior appeal, as indicated.

Andrias, J.P., Nardelli, Williams, McGuire, JJ.

M-20 Kuhn v American International Realty Corp.
(And other actions)

Appeal deemed withdrawn.

Andrias, J.P., Nardelli, Williams, Catterson, Moskowitz, JJ.

M-6510 Henkel v World Financial Properties - F.J. Sciame
Construction Co, Inc.
(And a third-party action)

Motion deemed withdrawn.

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-76 In the Matter of N., Annunkha - New York Foundling
Hospital

Leave to prosecute appeal as a poor person and other
relief denied.

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-6284 Gerling America Insurance Company v Transportation
Insurance Company

Time to perfect appeal enlarged to the September 2008
Term.

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-6562 Delhi Construction Corp. v The City of New York

Time to perfect appeal enlarged to the June 2008 Term.

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-6482 Abassi v 123 LaSalle Associates

Notice of appeal deemed timely filed, as indicated.

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-22 1050 Tenants Corp. v Lapidus

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

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-6478 Cipriani 200, LLC v 200 Fifth Avenue Owner LLC

 Preliminary appellate injunction and/or other relief
denied.

Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

M-150 Devore v Pfizer, Inc.; Hohendorf v Pfizer, Inc.;
 Norris v Pfizer, Inc.

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

Andrias, J.P., Friedman, Sweeny, Moskowitz, JJ.

M-79 The City of New York v Novello
M-299

 Proposed amici briefs annexed to exhibits deemed filed,
as indicated; movants directed to file additional 10 copies of
respective amici briefs with Clerk; time for oral argument
denied.

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

M-6606 In the Matter of Lawrence - Lawrence v Miller
Stay previously granted vacated, as indicated.

Buckley, J.

M-5116 People v Hunt, Wayne, also known as Johnson, Wayne
Leave to appeal to this Court denied.

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

M-5901 In re Attorneys Who Are in Violation of Judiciary
Law Section 468-a

Attorneys whose names are enumerated in the schedule attached to the Opinion Per Curiam suspended from the practice of law in the State of New York, effective March 6, 2008, and until the further order of this Court, as indicated. Opinion Per Curiam. All concur.

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

M-6222 In the Matter of Zelda E. Stewart,
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 the further order of this Court. Opinion Per Curiam. All concur.

The following orders were entered and filed on January 31, 2008:

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

M-5513 In the Matter of H., Brandon - Hale House Center,
 Inc.

 Leave to prosecute appeal as a poor person granted,
as indicated. (See M-513A, decided simultaneously herewith.)

Marlow, J.

M-5513A In the Matter of H., Brandon - Hale House Center,
 Inc.

 Stay denied. (See M-5513, decided simultaneously
herewith.)