SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 4, 2007

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Saxe, Marlow, McGuire, Kavanagh, JJ.

621 Marie Olko, Index 601312/04
Plaintiff-Respondent,

-against-

Citibank, N.A.,
Defendant-Appellant.

Zeichner Ellman & Krause LLP, New York (Barry J. Glickman of counsel), for appellant.

Goetz Fitzpatrick LLP, New York (Susan M. Pascale of counsel), for respondent.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered December 27, 2005, after a jury trial, awarding plaintiff the total sum of $300,701, affirmed, with costs.

In this action to recover the principal sum plus interest on a certificate of deposit, plaintiff presented evidence of the certificate of deposit, thus shifting the burden to defendant bank to establish the defense of payment, and, based on the evidence before it, the jury fairly concluded that that burden had not been met (*cf. Rosenstock v Dessar*, 109 App Div 10, 12, 13-14 [1905]). The court's charge was proper and did not misrepresent the testimony of the bank officer. Nor did the

court's remarks and questions constitute the type of prejudicial interference that warrants reversal; rather, they served to clarify the testimony (*see Les S. Thompson & Co., LLP v Lucille Murray Child Dev. Ctr., Inc.*, 13 AD3d 120 [2004]; *Delcor Labs., Inc. v Cosmair, Inc.*, 263 AD2d 402 [1999], *lv denied* 94 NY2d 761 [2000]). It was not error to refuse to admit certain uncertified exhibits offered by defendant. Finally, contrary to defendant's contention, the complaint was not subject to dismissal by reason of laches, since plaintiff presented the CD immediately upon discovery. We have considered defendant's remaining arguments and find them unavailing.

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

McGUIRE, J. (dissenting)

I respectfully dissent as I would reverse and direct a new trial in the belief that defendant Citibank did not receive a fair trial due to the cumulative effect of various errors committed by the judicial hearing officer who presided over the trial.

On May 15, 1987, plaintiff's mother, Janina Tobolka, opened a certificate of deposit with defendant in her name jointly with plaintiff; the amount of the certificate was $127,000 and its maturity date was May 16, 1988. At the time, Mrs. Tobolka was living in a fifth floor bedroom of the townhouse in Manhattan that plaintiff and her husband owned. Tobolka's health began to decline in the fall of 1989 after she fell and broke her hip, and she died in September 1994. In December 2002, plaintiff discovered the certificate of deposit in a shoe box in a closet in the bedroom her mother had occupied. Plaintiff had not previously had any knowledge of the account. Plaintiff's efforts to find out what had happened to the certificate eventually resulted in a letter from Citibank to the deceased Mrs. Tobolka stating that it had completed its investigation, that it retained records for seven years and that "[y]ou've indicated that the account was closed in 1988." Plaintiff thereafter commenced this action to recover the principal sum of the certificate of deposit plus interest.

At trial, plaintiff testified to the foregoing and that Mrs. Tobolka died without any assets as essentially all of her money had been spent on her care, including hip replacement surgery and treatment for uterine cancer. Mrs. Tobolka, according to plaintiff, had checking and savings accounts and plaintiff's "guess" was that she withdrew "[a] couple of hundred thousand" dollars from her mother's accounts to pay for her medical and home care. Prior to breaking her hip in the fall of 1989, Mrs. Tobolka was taking care of herself financially; she was "coherent" and "knew what she was doing."

On its case, defendant elicited testimony from a bank employee that during the period from 1987 through 1990 there was no requirement that when a customer engaged in a transaction involving an account that was documented by a passbook, as was the certificate of deposit opened by Mrs. Tobolka, the teller actually note the transaction in the passbook. With the computer system in place at the bank's branches, a customer could effect a transaction with the aid of a teller through a deposit or withdrawal slip. Asked by the judicial hearing officer what a customer with a passbook CD would have to do to get the money, the witness responded as follows:

> A: Basically, the depositor has to fill out a withdrawal slip; show identification; we'll go to the files, make sure the signature's okay and everything's okay, and we'll issue a check or deposit it to another account.

> [JHO]: And do you do nothing with respect to the passbook?
>
> A: If they don't have the . . .
>
> [JHO]: Assume they have the passbook; what do you do?
>
> A: We could take the passbook from them, make the withdrawal . . .
>
> [JHO]: Let's assume they forgot to bring it that day, would you ask them to come back and bring the passbook?
>
> A: If they forgot it, yes.
>
> [JHO]: So if the passbook is available, you would want to get it from the depositor before you closed the account; is that correct?
>
> A: That's correct.

Defendant also elicited testimony that its record retention policy was seven years, that it investigated plaintiff's allegations after she came to a branch with the passbook in December 2002, and that it had been unable to locate any documents relating to the account. Two other aspects of the evidence warrant mention. First, defendant's employee testified that "when a CD matures, a client is sent a notice approximately thirty days prior to that, and if they don't do anything, the CD would roll over for an additional term at the rate then." Second, defendant introduced two records from the New York State Department of Taxation and Finance. One of the records stated that for 1990, Mrs. Tobolka's tax return reported income of

$8,472, with no interest income. The other record stated that for the years 1991 through 1994, no income tax returns for Mrs. Tobolka had been located.

Obviously, the tax records were important to the position of the defense that Mrs. Tobolka had received the funds from the account and deposited the money in other accounts, and that the money had then been used for her care. In this regard, the tax records supported both the argument that Mrs. Tobolka reported no interest income in 1990 because the funds on deposit had been withdrawn and thus were not generating interest, and the argument that Mrs. Tobolka filed no income tax returns in the following year because she was no longer earning interest on such a substantial sum.

The jury first learned about the tax records from the judicial hearing officer shortly before summations. Rather than neutrally relate their content, the judicial hearing officer instructed the jury as follows:

> [JHO]: We have two documents that were recently received in evidence. The first is a certificate from the New York State Department of Taxation and Finance, which indicates that they made a search for tax records for Mrs Tobolka for the years 1991, '2, '3 and '4. *Those are the years -- based on the evidence -- of her declining health.* And they could find no tax returns that she filed for those years.

The comment in italics clearly was not proper. There was evidence that Mrs. Tobolka's health had been in decline during

those years and thus plaintiff had an evidentiary basis for an argument seeking to minimize the significance of the records. But the judicial hearing officer had no business making the argument for plaintiff. In her brief, plaintiff writes that the "inference" that no tax returns were filed because of failing health was "[c]ertainly . . . an inference that the jury could draw or not draw on its own." That, of course, is exactly the point. By drawing it for the jury, the judicial hearing officer intruded on the function of the jury to the detriment of defendant on an issue that was significant to the defense.

After thus downplaying the significance of the certificate, if not dismissing it outright, the judicial hearing officer immediately went on to refer to the other record from the Department of Taxation and Finance as follows: "They did find, *I guess,* what they keep as a computer record, *I guess,* of a tax return that she filed in 1990 which reflects that she reported of $8,427 . . . [and] she reported no interest . . . ." Although the italicized expressions of uncertainty carried less potential for prejudice to defendant, they were gratuitous. Whether they were intended to suggest that the "computer record" was of uncertain reliability cannot be determined on this record. It is enough to note that these expressions of uncertainty could have been so interpreted by the jury and were unnecessary.

During his summation, counsel for defendant referred the

jury's attention to the Taxation and Finance records, urging that they were significant and reminding the jury he had "touched" upon the records in his opening. He got only one sentence into his argument, however, before he was cut off by the judicial hearing officer.

> [Counsel]: If the CD continued to be effective, it would have accrued interest.
>
> [JHO]: Well, that's not clear from the record, counsel, either. The CD contains the following language: I'll read it to the jury. It says: "No interest will be paid on this certificate after the maturity. At maturity" –- and the maturity date is May 16, 1988 -- "At maturity, if Citibank has received no other instructions in writing from the account owner, the account then on deposit will be placed in a day-to-day savings account."
>
> We have no evidence as to what interest if any, a day-to-day savings account provides.
>
> Let's move on.
>
> [Counsel]: Judge . . . .
>
> [JHO]: Counselor, continue with your argument.

In the first place, there was a very good reason for the absence of any objection to the argument that "[i]f the CD continued to be effective, it would have accrued interest." That is, the argument was grounded squarely in the evidence. Neither party had previously drawn the jury's attention to the language in the CD that the judicial hearing officer read to the jury. As defendant pointed out in thereafter objecting to the court's interruption and instructions, by the express terms of the CD

that language was inapplicable to a CD with a term of one year or less, like the one Mrs. Tobolka opened. Although the judicial hearing officer corrected his error in a subsequent instruction, the judicial hearing officer's erroneous and unprompted interruption of defendant's attorney's summation was prejudicial to defendant.[1]

In his instructions to the jury, the judicial hearing officer summarized plaintiff's evidence and advanced an argument that plaintiff's counsel had not made on his summation. Plaintiff, according to the judicial hearing officer, was relying:

> to some extent on the testimony of the bank officer who my recollection is testified that if someone who had a passbook -- a CD passbook account came in, they would, in essence, take the passbook away or make some notation in the passbook. And if someone came in without the passbook, they would send them home to get the passbook. Although we may be living in a computer age, at least the testimony of the bank officer was that the passbook had some significance and an effort would be made to obtain it.

Contrary to this instruction, plaintiff did not make any such argument. The error, moreover, goes beyond a failure to summarize in a neutral fashion the actual positions of the

---

[1]Consistent with the erroneous interruption of defendant's counsel's summation, the court charged the jury that "we have no evidence as to what interest, if any, this type of day-to-day savings account would earn. So you have to determine whether the bank has sustained the burden of proof."

parties. The judicial hearing officer did not recount accurately the testimony of the bank employee, and indeed misstated the witness' answers to hypothetical questions he posed. Thus, the witness stated only that a customer would be asked to come back and bring the passbook "[i]f they forget it, yes" and that the bank would want to get the passbook from the depositor before closing the account if the passbook was "available." Contrary to the judicial hearing officer's instructions to the jury, the witness by no means broadly stated that "if someone came in without the passbook, they would send them home to get the passbook." In fact, as noted above, it was clear from the witness' testimony that a customer could close out a certificate of deposit account without the passbook. Significantly, no subsequent effort was made by the judicial hearing officer to correct this error when defendant objected to it and contended that the judicial hearing officer "committed reversible error in your references to [the bank employee's] supposed testimony about requiring an individual to go home and get his passbook." Rather, the judicial hearing officer erroneously insisted, "[t]hat's exactly what he said" (*see Blaize v City of New York*, 80 AD2d 594, 595 [1981] [trial court obligated to marshal the evidence in an accurate and balanced manner], citing *Gilhooly v Piciocchi*, 45 AD2d 961 [1974]; *see also Theodoropoulos v New York City Health & Hosps. Corp.*, 90 AD2d 792 [1982]).

Another instruction by the judicial hearing officer was prejudicial to defendant. As noted, in response to plaintiff's inquiry, Citibank sent a letter addressed to Mrs. Tobolka, who had died years earlier. In his summation, plaintiff's counsel hardly mentioned the letter, referring only to the "unsigned" "form letter" sent "to [Mrs.] Tobolka some ten months after [plaintiff] makes initial inquiry . . . ." Nonetheless, the judicial hearing officer saw fit not only to mention the letter in his instructions to the jury, he editorialized about it as follows: "And you had this somewhat interesting -- and perhaps it tells us how large corporations operate -- this form letter addressed to the woman who died eight years before or nine years before, indicating that she had advised the bank, presumably in 2003, that she had withdrawn the funds in 1988. Indeed, that's the bank's position." To have referred to the letter was at best gratuitous, but the reference to "how large corporations operate" and the sarcastic aside ("presumably in 2003") were as uncalled for as they are improper.

Moreover, the judicial hearing officer interfered excessively in the questioning of the witnesses. Nearly half of the questions asked on cross-examination of the bank witness (some 13 of 30 questions) were posed by the judicial hearing officer. More importantly, to the extent information favorable to plaintiff was elicited on cross-examination of the bank

witness, it was elicited by the judicial hearing officer's questions, not by plaintiff's counsel's questions.[2] Nearly half of all the questions asked of plaintiff on direct and cross-examination (some 47 of 107 questions) were posed by the judicial hearing officer. Consistent with his overall lack of neutrality, the judicial hearing officer voiced both an approving and sympathetic comment during plaintiff's testimony.

This excessive intervention into the questioning of the witness is all the more unfortunate given that this Court has reversed verdicts in several other cases this judicial hearing officer presided over as a trial judge (*see Taromina v Presbyterian Hosp.,* 242 AD2d 505 [1997]; *Campbell v Rogers & Wells,* 218 AD2d 576 [1995]; *Harding v Noble Taxi Corp.,* 182 AD2d 365 [1992]; *Schaffer v Kurpis,* 177 AD2d 379 [1991]), including one in which the questioning did not display bias or prejudice (*Campbell,* 218 AD2d at 579). Plaintiff's case was far from a strong one, as it required the jury to accept that although Mrs. Tobolka had been taking care of herself financially and "knew what she was doing" at least until she broke her hip in the fall of 1989, she inexplicably forgot about more than $125,000 in the

[2]At one point, the judicial hearing officer asked the witness if, as far as he knew, records were ever lost at Citibank. When the witness responded, "No. Not that I know of," plaintiff's counsel began to ask, "You don't know . . .," only to be cut off by the judicial hearing officer, who commented, "He knows of no records that were lost." Regardless of intonation, this editorial comment was not appropriate.

certificate of deposit after its maturity in May 1988, and that Citibank somehow and for some reason kept the money. Because the cumulative effect of the judicial hearing officer's conduct and errors may well have been outcome determinative, I would reverse and direct a new trial.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

698 Alejandro Agurto, Sr., etc., et al.,
Plaintiffs-Respondents,

-against-

Nestor S. Dela, et al.,
Defendants-Appellants,

Curt M. Buckler,
Defendant,

Santos Lopez, et al.,
Defendants-Respondents. Index 21526/03

Eisenberg & Kirsch, Liberty (Michael D. Wolff of counsel), for appellants.

Molod Spitz & DeSantis, P.C., New York (David B. Owens of counsel), for Agurto respondents.

Finder and Cuomo, LLP, New York (Sara R. David of counsel), for Lopez respondents.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered September 21, 2006, which, to the extent appealed from as limited by the briefs, denied the motion by defendants-appellants Dela and Quiroa for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as against these defendants. The Clerk is directed to enter judgment accordingly.

Under the circumstances of this case, including the lapse of time, we find, as a matter of law, that, even assuming without deciding that Dela was negligent in the operation of the vehicle

owned by Quiroa and that Dela's negligence was a proximate cause of the first accident, it cannot reasonably be inferred that such negligence was a proximate cause of the second accident (*see Ventricelli v Kinney Sys. Rent A Car*, 45 NY2d 950 [1978]). At most, that negligence merely furnished a condition or occasion for the occurrence of the accident (*see Sheehan v City of New York*, 40 NY2d 496, 503 [1976]). The second accident occurred approximately 10 minutes later when defendant Lopez, the operator of a fourth vehicle, entered the expressway's right shoulder to avoid a slowing 18-wheel tractor-trailer, striking and killing one of the plaintiffs and injuring another, both of whom were standing on the shoulder. This second accident was a superseding or intervening event severing whatever causal connection there might have been between any negligence of Dela and plaintiffs' injuries (*see Mahmood v Pinto*, 17 AD3d 641 [2005]; *Jackson v Noel*, 299 AD2d 456 [2002]). Accordingly, the motion for summary judgment dismissing the complaint against Dela and Quiroa should have been granted.

In light of this determination, we do not reach the remaining arguments on appeal.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Mazzarelli, J.P., Sullivan, Sweeny, Malone, Kavanagh, JJ.

833 Carl E. Person, et al., Index 601074/05
Plaintiffs-Appellants,

-against-

Michael A. Einhorn,
Defendant-Respondent,

Clark E. Alpert, et al.,
Defendants.

Carl E. Person, New York, appellant pro se and for appellants.

Michael A. Einhorn, respondent pro se.

Appeal from order, Supreme Court, New York County (Richard B. Lowe III, J.), entered March 2, 2006, which sua sponte dismissed the complaint upon defendant Michael Einhorn's motion, pursuant to CPLR 3211(a)(2), to dismiss the second cause of action as to plaintiff Carl Person only and to stay the action pending arbitration, unanimously dismissed, without costs.

There is no right of appeal from an order entered sua sponte (*Sholes v Meagher*, 100 NY2d 333 [2003]). The proper procedure should have been for the plaintiff to move to vacate the order and appealed as of right if that motion was denied (CPLR 5701[a][3]). Given questions surrounding the status of the arbitration hearing, this procedure ensures that the appeal will be made on a

suitable record after counsel have had an opportunity to be heard (*Davidson v Regan Fund Mgt.*, 15 AD3d 172 [2005]).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1600-
1600A The People of the State of New York, Ind. 6993/03
Respondent, 1649/04

-against-

Mark L. Bilus,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry Jamieson of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

Judgments, Supreme Court, New York County (Budd G. Goodman, J. at plea; Richard D. Carruthers, J. at sentence), rendered on or about January 20, 2006, convicting defendant of criminal possession of stolen property in the fourth degree and forgery in the second degree, and sentencing him, as a second felony offender, to consecutive terms of 2½ to 5 years and 2 to 4 years, respectively, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, both orally and in writing (*see People v Ramos*, 7 NY3d 737 [2006]), which forecloses review of his excessive sentence claim. The court expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not treat that right as one of the rights

automatically forfeited by a guilty plea (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]; *compare People v Moyett*, 7 NY3d 892 [2006]). On the contrary, the court clearly informed defendant that he would not be allowed to accept the plea offer unless he also chose to waive his right to appeal. Were we to find otherwise, we would nevertheless find no basis for reducing the sentence (*see People v Callahan*, 80 NY2d 273, 285 [1992]).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1601 The People of the State of New York, Ind. 4636/04
Respondent,

-against-

Jamar Williams,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Peter Theis of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (David M. Cohn of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered January 27, 2006, convicting defendant, after a jury trial, of two counts each of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 11 years, unanimously affirmed.

The court properly exercised its discretion when it discharged a selected but unsworn juror and replaced her with an alternate, after jury selection had been completed and no prospective jurors remained. The juror had a scheduling conflict involving a funeral, and the record demonstrates that she was not fit for jury service in that the conflict would make it difficult for her to focus on the trial (*see People v Velez*, 255 AD2d 146 [1998], *lv denied* 93 NY2d 858 [1999]). Defendant's argument that the standard for discharging a sworn juror pursuant to CPL 270.35

should apply here is unpreserved (*see People v Davis*, 292 AD2d 168, 169 [2002], *lv denied* 98 NY2d 674 [2002]), and we decline to review it in the interest of justice. Were we to review this claim, we would reject it (*see People v Velez*, 255 AD2d 146, *supra*). In any event, even under the sworn juror standard, the court had ample basis for discharging the juror.

The court properly admitted as excited utterances the nontestifying declarant's statements to a 911 operator that he had just encountered two armed intruders in his apartment building. The evidence, including suppression hearing testimony upon which the court relied without objection, established that the declarant was still under the influence of the stress of that incident (*see People v Johnson*, 1 NY3d 302 [2003]). The admission of the excited utterances did not violate defendant's right to confrontation, since the statements were primarily made "to enable police assistance to meet an ongoing emergency" (*Davis v Washington*, 547 __ AD3d __, 126 S Ct 2266, 2273 [2006]; *People v Bradley*, 8 NY3d 124 [2006]; *People v Smith*, 37 AD3d 333, 334 [2007], *lv denied* 8 NY3d 950 [2007]).

For the reasons stated in our decision in *People v Lemos* (34 AD3d 343 [2006], *lv denied* 8 NY3d 924 [2007]), we find unpreserved defendant's argument that the court unlawfully imposed a mandatory surcharge and fees when it did so only in writing, and we decline to review it in the interest of justice.

Were we to review it, we would find it without merit.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1602 In re Jessica Lee D.,

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

- - - - -

Ali C.,
Respondent-Appellant,

Harlem-Dowling-Westside Center,
Petitioner-Respondent.

_____

Geoffrey P. Berman, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose, LLP, New York (Ian C. Schaefer of counsel), Law Guardian.

_____

Appeal from order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about May 31, 2006, which, insofar as appealed from, upon respondent-appellant's default, terminated his parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for purposes of adoption, unanimously dismissed, without costs.

The order of disposition from which respondent purports to appeal was entered upon his default at the dispositional hearing,

and therefore is not appealable (CPLR 5511; *Matter of Reuben Doulphus R. Jr.*, 11 AD3d 398 [2004], *lv dismissed in part and denied in part* 4 NY3d 759 [2005]).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1603 Ruchama Gamiel, Index 603887/02
Plaintiff-Appellant, 590268/04

-against-

Curtis & Riess-Curtis, P.C., et al.,
Defendants-Respondents.

[And a Third-Party Action]

Ruchama Gamiel, appellant pro se.

Traub Eglin Lieberman Straus LLP, Hawthorne (Gerard Benvenuto of counsel), for respondents.

Order, Supreme Court, New York County (Leland DeGrasse, J.), entered July 26, 2006, which denied plaintiff's motion to vacate her default, unanimously modified, on the law, the facts and in the exercise of discretion, the default vacated with respect to the sixth and seventh causes of action, and otherwise affirmed, without costs.

Plaintiff's affidavit was conclusory (*see Murray Hill Invs. v Parker Chapin Flattau & Klimpl*, 305 AD2d 228, 229 [2003]), and failed to set forth the requisite "but for" causation with respect to her legal malpractice claims (*see Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 218-219 [2007]), a deficiency not remedied by her attorney's affirmation. However, we find that plaintiff sufficiently set forth the merit of her claims concerning overbilling and the withholding of her files to

preclude summary resolution of those claims (*see Batra v Office Furniture Serv.*, 275 AD2d 229 [2000]).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1604 The People of the State of New York, Respondent, Ind. 7631/02

-against-

Frank Graham, Defendant-Appellant.

Darius Wadia, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), and Curtis Mallet-Prevost, New York (Anting Wang of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J. at suppression hearing; Micki A. Scherer, J. at plea; Charles H. Solomon, J. at sentence), rendered October 14, 2003, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 5 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. His only claim that survives this waiver is his challenge to the voluntariness of his plea (*see People v Byrne*, 37 AD3d 179 [2007]). However, since defendant did not move to withdraw his plea, and since this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), his challenge to the validity of his plea is unpreserved and we decline to review it in the interest of justice. Were we to review this claim, we would conclude that

defendant's plea was knowing, intelligent and voluntary. The court fully advised defendant of the consequences of his plea, and of any breach of his plea agreement.

Defendant's valid waiver of his right to appeal forecloses review of his suppression claim, including interest of justice review (*People v Seaberg*, 74 NY2d 1, 9-10 [1989]). His claim relating to his right to be present at legal arguments in connection with his suppression motion is not only foreclosed by this waiver, but by the guilty plea itself (*see People v Hansen*, 95 NY2d 227 [2000]; *People v Taylor*, 65 NY2d 1 [1985]). Were we to find otherwise, we would find both claims without merit.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1604A The People of the State of New York, Ind. 2787/03
Respondent,

-against-

Frank Graham,
Defendant-Appellant.

Darius Wadia, New York, for appellant.

Judgment, Supreme Court, Bronx County (John N. Byrne, J.), rendered September 29, 2003, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, unanimously affirmed.

In view of our affirmance of defendant's New York County conviction, there is no basis for reversal.

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

ENTERED: OCTOBER 4, 2007

CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1605-
1606 The People of the State of New York, Ind. 2282/04
Respondent,

-against-

Robert Haigler,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Joan Sudolnik, J.), rendered March 16, 2005, convicting defendant, after a jury trial, of three counts of robbery in the first degree and sentencing him, as a second felony offender, to concurrent terms of 20 years to life, unanimously affirmed.

The court properly admitted evidence of telephone calls made to two prosecution witnesses on the eve of trial. There was ample proof, including credible voice recognition testimony and circumstantial evidence, to establish that defendant was the maker of the calls (*see People v Lynes*, 49 NY2d 286, 291-293 [1980]; *People v Hamilton*, 3 AD3d 405 [2004], *mod on other grounds* 4 NY3d 654 [2005]), and these serious attempts at witness tampering were highly probative of defendant's consciousness of guilt. In addition, there was a sufficient foundation upon which the People could make a fair argument that these calls influenced

a third witness to change his testimony to make it more favorable to defendant. The court properly exercised its discretion in denying defendant's belated mistrial motion made when a witness, in recounting these phone calls, made reference to plea negotiations involving defendant. A curative instruction would have sufficed to prevent any prejudice, but defendant declined that remedy, insisting only on the unwarranted remedy of a mistrial (*see People v Santiago*, 52 NY2d 865 [1981]; *People v Young*, 48 NY2d 995 [1980]).

Although the prosecutor made a summation comment that inaccurately stated the evidence, this error did not deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). The prosecutor's summation remark that defendant had engaged in manipulative behavior constituted fair comment on the evidence (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]). Defendant's remaining summation claim is unpreserved and we decline to review it in the interest of justice. Were we to review this claim, we would reject it.

For the reasons stated in our decision in *People v Lemos* (34 AD3d 343 [2006], *lv denied* 8 NY3d 924 [2007]), we find unpreserved defendant's argument that the court unlawfully imposed a mandatory surcharge and fees when it did so only in writing, and we decline to convict in the interest of justice.

Were we to review it, we would find it without merit.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1607-
1608 The People of the State of New York, Ind. 5523/03
Respondent,

-against-

Eric Crowder,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Laura Burde of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Joan C. Sudolnik, J.), rendered March 11, 2005, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the third degree, and criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 4½ to 9 years, unanimously affirmed.

The court properly denied defendant's midtrial and postverdict motions to dismiss the indictment on the ground that it was allegedly based on perjured testimony. While one of the People's grand jury witnesses gave incorrect testimony about the recovery of drugs from defendant's person, defendant has not established that this testimony was perjurious, as opposed to being honestly mistaken. In any event, there was no impairment

of the integrity of the grand jury proceeding to warrant dismissal (*see* CPL 210.35[5]; *People v Darby*, 75 NY2d 449, 455 [1990]). Rather than being based entirely on false testimony (*compare People v Pelchat*, 62 NY2d 97 [1984]), the indictment was supported by ample competent evidence (*see People v Davis*, 256 AD2d 200, 201 [1998], *lv denied* 93 NY2d 898 [1999]; *see also People v Crawford*, 277 AD2d 44 [2000], *lv denied* 96 NY2d 799 [2001]).

For the reasons stated in our decision in *People v Lemos* (34 AD3d 343 [2006], *lv denied* 8 NY3d 924 [2007]), we find unpreserved defendant's argument that the court unlawfully imposed a mandatory surcharge and fees when it did so only in writing, and we decline to review it in the interest of justice. Were we to review it, we would find it without merit.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1609 The People of the State of New York, Respondent, Ind. 7889/00

-against-

Alfred Dancy, Defendant-Appellant.

Laura R. Johnson, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 7, 2003, convicting defendant, after a jury trial, of murder in the second degree, criminal possession of a weapon in the second degree and two counts of criminal possession of a weapon in the third degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenges in question were not pretextual. This finding is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). Defendant did not preserve his claim that the court should have required the prosecutor to provide race-neutral explanations for

challenges to additional panelists (*see People v James*, 99 NY2d 264 [2002]), and we decline to review it in the interest of justice.

The court properly declined to provide a circumstantial evidence charge, since defendant's guilt was established, in part, by direct evidence (*see People v Daddona*, 81 NY2d 990 [1993]; *People v Cedeno*, 175 AD2d 767 [1991], *lv denied* 79 NY2d 854 [1992]). Even if we were to find that the court should have delivered a circumstantial evidence charge, its absence was harmless because the evidence "was overwhelming and there simply is no reasonable possibility, let alone significant probability that the jury would have acquitted here if the circumstantial evidence charge had been given" (*People v Brian*, 84 NY2d 887, 889 [1994]).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1610 Lourdes Ruiz, Index 26218/02
Plaintiff-Respondent,

-against-

The New York City Transit Authority, et al.,
Defendants-Appellants.

Steve S. Efron, New York (Renee L. Cyr of counsel), for appellants.

Myers & Galiardo, LLP, New York (Christopher D. Galiardo of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Edgar G. Walker, J.), entered July 6, 2006, which, upon a jury verdict in plaintiff's favor, awarded $350,000 for past pain and suffering and $750,000 for future pain and suffering over a period of 34 years, plus interest, costs and disbursements, unanimously modified, on the facts, to the extent of vacating the jury's award for past and future pain and suffering and remanding the matter for a new trial solely on the issue of such damages and otherwise affirmed, without costs, unless plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to a reduction of the award for past pain and suffering to $100,000 and for future pain and suffering to $200,000, and to entry of an amended judgment in accordance therewith.

Plaintiff, a passenger on a bus owned and/or operated by defendants, was injured when the driver brought the vehicle to a

sudden stop, causing her to fall to the floor. She underwent surgery for a fractured right ankle, involving open reduction and internal fixation with a plate and screws, and remained in the hospital for a week. The $1.1 million award deviates materially from reasonable compensation for this injury to the extent indicated (*see* CPLR 5501[c]). The 46-year-old plaintiff experienced an uncomplicated recovery, with few limitations other than inability to walk for long periods of time and some occasional pain that she treats with over-the-counter medication (*see e.g. Uriondo v Timberline Camplands, Inc.*, 19 AD3d 282 [2005], *lv denied* 6 NY3d 704 [2006]; *Clark v N-H Farms, Inc.*, 15 AD3d 605 [2005]).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1611 In re Family Offense Proceeding

- - - - -

Elizabeth R. E.,
Petitioner-Respondent,

-against-

Doundley A. E.,
Respondent-Appellant.

_____

Ronald Cohen, Wilmington, NC, for appellant.

Bryan J. Hutchinson, Bronx, for respondent.

_____

Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about July 27, 2006, which denied respondent's motion to vacate an order of protection, unanimously affirmed, without costs.

Respondent, who seeks to vacate the order of protection on the ground that petitioner suborned perjury at the hearing, submits the affidavit of a witness at the hearing stating that his testimony against respondent was false. The affidavit was purportedly sworn to before a notary in Jamaica, but lacked the authenticating certificate required by CPLR 2309(c). Although such a defect can be corrected nunc pro tunc (*see Moccia v Carrier Car Rental, Inc.*, 40 AD3d 504 [2007]), respondent has at

no time offered to do so. Accordingly, we affirm (*cf. id.* at 504-505; *see Mercantile Natl. Bank of Chicago v Wismer*, 48 Misc 2d 275, 276 [App Term 1st Dept 1965]).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1612-
1613-
1614 212 Investment Corporation, et al., Index 603029/04
Plaintiffs-Respondents-Appellants,

-against-

Myron Kaplan, et al.,
Defendants,

Alan Stark,
Defendant-Appellant-Respondent,

Kaplan, Nathan & Co.,
Nominal Defendant.

_____

Martin Clearwater & Bell LLP, New York (Nancy A. Breslow of counsel), for appellant-respondent.

Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York (Sanford I. Weisburst of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Herman Cahn, J.), entered August 31, 2005, which, to the extent appealed from as limited by the briefs, denied defendant Stark's motion to dismiss the complaint, but dismissed on statute of limitations grounds the claims for unjust enrichment pertaining to acts occurring prior to September 15, 1998, and for gross negligence, waste, diversion of opportunity and legal malpractice pertaining to acts occurring prior to September 15, 2001, unanimously modified, on the law, the claims for unjust enrichment, gross negligence, waste, diversion of opportunity and legal malpractice reinstated in their entirety, and otherwise affirmed, with costs in favor of

plaintiff, payable by defendant Stark. Order, same court and Justice, entered March 22, 2006, which denied Stark's motion to renew, unanimously affirmed, with costs in favor of plaintiff, payable by defendant Stark.

Plaintiff limited partners allege that Stark, the partnership attorney, was, unbeknownst to them, also the personal attorney of defendant Myron Kaplan, a member of the limited liability company that is the partnership's general partner, and that Stark fraudulently concealed from the partnership an investigation into improper trading by defendant Barbara Kaplan, the partnership's stockbroker, who was also Myron's sister. The investigation by the New York Stock Exchange (NYSE) concluded that Barbara had engaged in improper trading to the detriment of the partnership, for the benefit of Myron's personal account.

In moving to renew the denial of his motion to dismiss, Stark submitted deposition testimony from the NYSE investigation which, he argued, demonstrated that a member of the limited liability company that was the general partner was aware of Barbara Kaplan's improper trading, and there could thus be no fraudulent coverup as alleged in the complaint. The motion to renew was properly denied, as the new facts submitted would not have changed the prior determination (CPLR 2221[e]; *Montero v Elrac, Inc.*, 16 AD3d 284 [2005]). The deposition testimony did not establish that the general partner was aware of an

investigation into Barbara's improper conduct.

We agree with plaintiffs' contention that the statutes of limitations on their claims for gross negligence, waste, diversion of opportunity and attorney malpractice are subject to tolling under the continuous representation doctrine. The continuous representation doctrine applies to toll the relevant statute in cases involving the provision of professional services. As explained by the Court of Appeals in *Greene v Greene* (56 NY2d 86, 94-95 [1982]), a client cannot reasonably be expected to assess the quality of the professional service while it is in progress. However, the continuous representation must be in connection with the particular transaction that is the subject of the action, and not merely over the course of a general professional relationship (*see Zaref v Berk & Michaels*, 192 AD2d 346, 347-348 [1993]; *see also Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1 [2007]). In the instant case, contrary to the IAS court's finding, the continuous representation doctrine is applicable because plaintiffs allege that Stark represented the partnership in connection with the NYSE investigation, but instead of notifying the partnership of the charges against Barbara Kaplan, he worked with the Kaplans to derail the investigation and cover up their wrongdoing (*see Corless v Mazza*, 295 AD2d 848 [2002]). Moreover, the "open repudiation" doctrine tolls the statute of limitations on the

unjust enrichment claim, which seeks equitable relief in the form of restitution (*see Matter of Kaszirer v Kaszirer*, 286 AD2d 598, 599 [2001]; *Westchester Religious Inst. v Kamerman*, 262 AD2d 131 [1999]).

Plaintiffs established standing by demonstrating that a demand by the general partner, the limited liability company of which Myron Kaplan owned a 50% share, would have been futile (*see Allison Publs. v Mutual Benefit Ins. Co.*, 197 AD2d 463, 464 [1993]).

We have considered all remaining arguments for affirmative relief and find them without merit.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1615 The People of the State of New York, Respondent, Ind. 2927/03 2720/04

-against-

Pablo Toribio, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Beth S. Lyons of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Elizabeth M. Harris of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael A. Corriero, J.), rendered March 31, 2005, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of 2 to 4 years concurrent with a term of 1⅓ to 4 years for violation of probation, unanimously affirmed.

Defendant's sufficiency claim is unpreserved and we decline to review it in the interest of justice. Were we to review this claim, we would find that the verdict was based on legally sufficient evidence. We further find that the verdict and was not against the weight of the evidence. There is no basis for disturbing the jury's determinations concerning credibility and identification (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

The identifying officer had an ample opportunity to observe defendant, and he provided a detailed and accurate description.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1617 The People of the State of New York, Respondent, Ind. 3727/03

-against-

Leroy Williams, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bryan C. Hughes of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered May 23, 2006, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him to a term of 13 years, unanimously modified, on the law, to the extent of vacating the provision for 3 years' post-release supervision and remanding for further proceedings regarding the imposition of a period of post-release supervision, and otherwise affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248 [2006]). The record establishes that defendant clearly understood that he was making an unrestricted waiver.

Defendant also claims that his sentence was defective in that a provision for a period of post-release supervision was contained in the court's commitment sheet but not in its oral pronouncement of sentence. In this case, the duration of the

required period of post-release supervision was within the court's discretion (*see* Penal Law § 70.45[1][f]). Although the court promised defendant a three-year period, and the court clerk included that provision on the commitment sheet, the court did not address post-release supervision at sentencing. In these circumstances, imposition of such a term was not ministerial. Furthermore, we conclude that imposition of a discretionary sentencing provision subsequent to the court's oral sentence is a defect that survives a waiver of the right to appeal (*compare People v Thomas*, 35 AD3d 192 [2006], *lv denied* 8 NY3d 850 [2007]).

Defendant's claim that the duration of an order of protection was incorrectly calculated is unreviewable on the present record (*see People v Montilla*, 37 AD3d 281 [2007]).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1618 Christopher Spierer, et al., Index 08024/87
Plaintiffs-Appellants,

-against-

Bloomingdale's, a division of
Federated Department Stores, Inc., et al.,
Defendants,

Sternberger Warehouse, Ltd., et al.,
Defendants-Respondents.

Ian C. Anderson, New York, for appellants.

Thomas D. Hughes, New York (Richard Rubinstein of counsel), for Sternberger respondents.

Gilroy Downes Horowitz & Goldstein, New York (Thomas Dillon of counsel), for Milton Goris Delivery Service, respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered February 14, 2006, which, to the extent appealed from, granted the motions by the Sternberger and Milton Goris defendants for summary judgment dismissing the complaint against them, unanimously affirmed, with costs.

This is a personal injury action for damages from injuries allegedly sustained as a result of exposure to toxic chemicals in mattresses manufactured by defendant Simmons and purchased from defendant Bloomingdale's. The evidence was sufficient to establish, prima facie, that the alleged defective condition of the mattresses was not due to the negligence of the storage and

delivery companies (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Plaintiffs' other theories of liability, which were not pleaded or raised before the trial court and are thus not preserved for appellate consideration (*see MacKay v Misrok*, 215 AD2d 734 [1995]), are without merit.

Respondents' motions were timely and not barred by the requirement in CPLR 3212(a) that a motion for summary judgment be brought within 120 days after filing of a note of issue, as the court's order of August 13, 2004 reserved defendants' right to file such motions up to 60 days after completion of discovery.

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

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1619 Yoon Y. Park, et al., Claim 85525
Claimants-Appellants,

-against-

The State of New York,
Defendant-Respondent.

Ruskin Moscou Faltischek, P.C., Uniondale (Douglas J. Good of counsel), for appellants.

Andrew M. Cuomo, Attorney General, Albany (Victor Paladino of counsel), for respondent.

Judgment of the Court of Claims of the State of New York (Alan C. Marin, J.), entered on or about October 20, 2006, after trial, dismissing claimants' claim, unanimously affirmed, with costs.

The court properly held that the cooperation agreement, by which claimant Lincoln Medical Laboratory Center, Inc. (Lincoln) was issued a valid Medicaid provider number to allow it to participate in an undercover operation to expose Medicaid fraud, did not contemplate that claimants would retain the difference of payments by the Department of Social Services (DSS) under the Medicaid program less the necessary expenses of the undercover operation. The agreement is clear on its face that the valid provider number furnished to Lincoln was not for the purpose of operating a for-profit business, and that the provider number would be suspended following the operation. The record also

establishes that claimant Park was paid a salary, rent and all necessary expenses in relation to the operation, and the agreement set forth that the consideration granted to Park for his cooperation was that "the Office of the Deputy Attorney General for Medicaid Fraud Control will inform any individual or agency that you designate of the extent and character of your cooperation." There is no reasonable interpretation of the agreement that would permit claimants to retain the profits of the undercover operation (*see Greenfield v Phillies Records, Inc.,* 98 NY2d 562, 569-570 [2002]), particularly in light of the fact that the vast majority, if not all, of the testing performed during the undercover operation was pursuant to fraudulent Medicaid claims.

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

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1620 The People of the State of New York, Respondent, Ind. 1983/05

-against-

Andres Cabrera, Defendant-Appellant.

Edward M. Kratt, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Dennis Rambaud of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy L. Kahn, J. at suppression hearing; Brenda Soloff, J. at plea and sentence), rendered February 7, 2006, convicting defendant of criminal possession of a controlled substance in the fourth degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). We find nothing implausible

about the undercover officer's account of the circumstances under which he made an observation of drugs in open view.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1621-
1621A-
1621B In re Morgan Carol-Ann F. and Others,

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

Kawana Yvette C.,
Respondent-Appellant,

Catholic Home Bureau,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Magovern & Sclafani, New York (Megan Eiss-Proctor of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose, LLP, New York (Cynara Hermes of counsel), Law Guardian.

_____

Orders of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered October 10, 2006, which, after a hearing, terminated respondent mother's parental rights based on findings of permanent neglect, and transferred rights of guardianship and custody to petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Respondent failed to preserve her objection to the petitions on jurisdictional grounds, and thus may not raise the issue on appeal (*see Matter of Kimberly Vanessa J.*, 37 AD3d 185 [2007]). In any event, the petitions contain the requisite detail alleging that the agency exercised diligent efforts to strengthen the

relationship between respondent and her children before seeking an order of permanent neglect. Even if they did not, petitioner cured any pleading defect by presenting clear and convincing evidence at the hearing that it had indeed exercised such diligent efforts by repeatedly encouraging respondent to seek and complete domestic violence counseling (*id.*).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1622 In re Shawn Scott, Index 116393/05
Petitioner,

-against-

The New York State Racing
and Wagering Board,
Respondent.

_____

Lackey Hershman, L.L.P., Dallas, TX (Deborah Deitsch-Perez of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Diana R.H. Winters of counsel), for respondent.

_____

Determination of respondent New York State Racing and Wagering Board, dated July 26, 2005, which, after an evidentiary hearing, refused to issue petitioner a track management license, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Kibbie F. Payne, J.], entered June 26, 2006) dismissed, without costs.

In this article 78 proceeding, which was properly transferred to this Court pursuant to CPLR 7804(g), the determination of respondent to refuse to grant petitioner a track management license is supported by substantial evidence, including several misstatements contained in petitioner's financial disclosure. Requiring prospective track managers to demonstrate the accurate keeping of records is justified in the sport of horse racing on which betting is legal and where there

is potential for illegality, and petitioner's failure to so demonstrate was a sound reason for determining that he lacks the experience, character and general fitness such that his participation in "harness racing or related activities would be inconsistent with the public interest, convenience or necessity, or with the best interests of racing generally" (Racing, Pari-Mutuel Wagering and Breeding Law § 309[2][e][ii]; *Bonacorsa v Van Lindt*, 129 AD2d 518, 520 [1987], *affd* 71 NY2d 605 [1988]). Additionally, the findings of the hearing officer that petitioner deliberately misrepresented certain of his financial holdings, are entitled to considerable deference, and lend further support to the determination. Petitioner's arguments that he was the victim of selective enforcement, or that respondent demonstrated an inherent bias towards him, are not supported by the evidence. Nor do we find the refusal to issue petitioner a permanent track management license to be shocking to our sense of fairness.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1623 Hector Vasquez, Index 17837/05
Plaintiff-Respondent,

-against-

Pablo Hernandez,
Defendant,

Aristedes Rivera,
Defendant-Appellant.

Richard T. Lau & Associates, Jericho (Kathleen E. Fioretti of counsel), for appellant.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucy Billings, J.), entered May 11, 2007, which, to the extent appealed from, denied so much of defendant Rivera's motion for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, without costs, the motion granted in its entirety, and the complaint dismissed against Rivera. The Clerk is directed to enter judgment accordingly.

The evidence submitted with Rivera's motion established that he had the right of way when defendant Hernandez made a left-hand turn in front of his vehicle. Since plaintiff offered no competent evidence of Rivera's negligence for the occurrence of the accident, summary judgment should have been granted,

dismissing the complaint against that defendant (*see Murchison v Incognoli*, 5 AD3d 271 [2004].

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1624N Baruch, LLC, Index 103501/06
Plaintiff-Appellant,

-against-

587 Fifth Avenue, LLC, care of
Sol Goldman Investments, LLC,
Defendant-Respondent.

Nesenoff & Miltenberg, LLP, New York (Andrew T. Miltenberg of counsel), for appellant.

Judith M. Brener, New York (Reena Malhotra of counsel), for respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered July 18, 2006, which, in an action arising out of the issuance of a Department of Buildings (DOB) violation directing defendant building owner to immediately remedy an unsafe exterior building wall, denied plaintiff net lessee's motion for a *Yellowstone* injunction, unanimously reversed, on the law and the facts, with costs, and the motion granted.

It appears that plaintiff, once advised of DOB's October 2005 notices reciting the "hazardous" condition of the building's wall and directing "immediate" performance of specified work to protect the sidewalk and public and make the wall safe, did precisely that, hiring the necessary contractors and obtaining the necessary permits to perform the specified work and remedy the problems with the wall, which, according to plaintiff's contractor, turned out to involve not simply isolated cracks or a

single falling stone but significant structural deterioration of the facade and external walls. That the repair work had not been completed by the time of plaintiff's February 26, 2006 notice to cure does not show, as the motion court found, that plaintiff is unable to satisfy its lease obligation "promptly" to complete repairs. Nor, as defendant argues, is such inability shown by plaintiff's failure, in its March 15, 2006 order to show cause, to provide details of the steps it took after DOB's February 14, 2006 notice, cited by defendant as the basis of its notice to cure and requiring its filing of a certificate describing the work that had been done to correct the still open October violation. This argument, like the motion court's unduly literal reading of the word "promptly" in the lease, misses the larger realities of the extensive renovation work undertaken by plaintiff in the wake of the October notices. Such work by its nature is ongoing and, upon this record, does not appear susceptible of completion within the four to five-month time period framed by defendant's notice to cure and plaintiff's order to show cause. What is important is that plaintiff immediately took substantial steps to cure the violation and is actively

working toward that end (*see TSI W. 14, Inc. v Samson Assoc., LLC*, 8 AD3d 51 [2004]). We are satisfied that plaintiff is acting as "promptly" given the nature of the hazard and the work required to remedy it.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

Andrias, J.P., Sullivan, Catterson, McGuire, Malone, JJ.

1625
[M-3809] In re Alvin Peterson,
Petitioner,

-against-

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

_____

Alvin Peterson, petitioner pro se.

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

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

_____

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

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

1626 The People of the State of New York, Ind. 11895/94
Respondent,

-against-

Pedro Santana,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Gayle Pollack of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

Order, Supreme Court, New York County (Micki A. Scherer, J.), entered on or about April 7, 2006, which denied defendant's motion for resentencing under the 2005 Drug Law Reform Act, unanimously affirmed.

The court correctly denied defendant's motion on the ground that he was less than three years from his parole eligibility date when he filed the motion, and we decline defendant's invitation to revisit our holding to that effect in *People v Bautista* (26 AD3d 230 [2006], *appeal dismissed* 7 NY3d 838 [2006]). Since defendant was clearly ineligible, as a matter of

law, for resentencing, there was no reason for the court to assign counsel or conduct a hearing.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1627 The People of the State of New York, Ind. 4269/04
Respondent,

-against-

Jose Otero Luna,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Gayle Pollack of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered January 31, 2006, convicting defendant, after a jury trial, of two counts of burglary in the first degree and three counts of robbery in the second degree, and sentencing him to terms of 15 years on each burglary conviction and 10 years on each robbery conviction, all to run concurrently, unanimously affirmed.

Defendant did not preserve his Confrontation Clause claim and we decline to review it in the interest of justice. In any event, we find any error to be harmless beyond a reasonable doubt (*see People v Hamlin*, 71 NY2d 750, 758 [1988]) in view of the overwhelming evidence of defendant's guilt, including his confession.

Defendant received effective assistance under the state and

federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Even if his counsel had obtained exclusion of the implied hearsay evidence at issue, there is no reasonable possibility that the outcome of the trial would have been different.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1628 Irwin Selinger, Index 350342/05
Plaintiff-Appellant,

-against-

Alicia Zizzo Selinger,
Defendant-Respondent.

Michael N. Klar, Carle Place, for appellant.

The Law Firm of Steven J. Mandel, P.C., New York (Donald T. Ridley of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Harold B. Beeler, J.), entered December 11, 2006, which, to the extent appealed from, granted defendant wife's motion for summary judgment declaring that the funds in her Wachovia account are her separate property, unanimously affirmed, with costs.

The court properly granted defendant's motion for summary judgment. Prior to their marriage, the parties, who each had significant assets, entered into a prenuptial agreement, pursuant to which they agreed to waive any rights in and to the other's separate property, including gifts of land to the other as long as the gift was either evidenced in writing or "such records or the title of the donated property must have been changed into the name of the donee party." During the course of the marriage, the parties sold the home that plaintiff owned prior to the marriage and which had been solely in plaintiff's name, and purchased a house in Long Island with legal title to that house being placed

solely in defendant's name. By deeding the house to defendant, plaintiff memorialized in writing a gift to his wife pursuant to the clear terms of the prenuptial agreement, and accordingly, the proceeds from the sale of the house, totaling approximately $3.4 million and placed in defendant's Wachovia account, are her separate property. Plaintiff's reliance on an agreement executed by the parties on their first anniversary fails to raise an issue of fact as to his intent because the agreement was admittedly unenforceable and cannot be considered as evidence (*see K. v B.*, 13 AD3d 12, 15 [2004], *lv dismissed* 4 NY3d 776 [2005]). Regardless, plaintiff's position that he never intended to give defendant the Long Island home is unavailing because neither the parties' valid prenuptial agreement nor New York law requires that a gift of land from a husband to a wife be evidenced by a writing explicitly stating the husband's intent (*see Weigert v Schlesinger*, 150 App Div 765, 768-769 [1912], *affd* 210 NY 573 [1914]).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1629 Jaqueline Gonzalez, an infant by her mother and natural guardian, Maria Betancourt, et al., Plaintiffs, -against- Curt Realty LLP, et al., Defendants/Third-Party Plaintiffs-Appellants, -against- The City of New York, et al., Third-Party Defendants-Respondents. Index 111189/00 591311/03

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Ana Marie Sulit of counsel), for appellants.

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

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 24, 2007, which, in an action for lead paint injuries allegedly sustained by infant plaintiff while residing in an building owned and managed by third-party plaintiffs (collectively landlord), and a third-party action by landlord alleging that the infant's injuries were sustained in a municipal park owned and operated by third-party defendants (collectively the City), insofar as appealed from as limited by the briefs, granted the City's motion for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

The City made a prima facie showing of entitlement to

judgment dismissing the third-party complaint with the testimony of the infant's mother that the infant, on her occasional, supervised visits to the park, played only in the water and in plastic-bucket swings attached to a painted steel frame with swivels and unpainted metal chains, and never had any contact with the items in the park that were tested positive for lead by landlord's expert, namely, a slide handrail, a swing set beam support and a toddler play area gate and fence. Landlord's opposition adduced no evidence of any such contact, and instead emphasized, through its expert, that the sudden spike in the infant's blood lead level was much more likely to have been caused by just a single contact with the high levels of lead he found in the park than by the low level of lead found in the apartment, which was barely above allowable limits and promptly abated. The argument was properly rejected by the motion court as speculative absent evidence of contact with the slide, beam, gate or fence. As the motion court also aptly held, that the City's method of scraping and painting the playground equipment may have caused lead to contaminate the soil under the swings where plaintiff played raises no material issues of fact absent evidence that plaintiff played in that soil and that the soil itself was tested for lead and found positive.

The City made an additional prima facie showing of entitlement to judgment with the testimony of its employees that

it had no prior notice of a lead paint condition in the park. Landlord's reliance on *Chapman v Silber* (97 NY2d 9 [2001]) to raise an issue of fact in this regard is misplaced. *Chapman* set out a five-pronged test for deciding, in the absence of a local law, whether an issue of fact exists as to a landlord's notice of a dangerous lead paint condition in an apartment (*id.* at 15). Assuming that such test can be applied outside of the landlord/tenant relationship, and to exterior or publicly owned locations, there is no evidence here tending to satisfy the prong of the test requiring the defendant's awareness of peeling paint on its premises (*see id.* at 21).

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

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1630 The People of the State of New York, Ind. 4304/04
Respondent,

-against-

Cindell Rock,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (John Schoeffel of counsel), and Arnold & Porter LLP, New York (J. Alex Brophy of counsel), for appellant.

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

Judgment, Supreme Court, New York County (James A. Yates, J. at hearing; Charles J. Tejada, J. at jury trial and sentence), rendered September 13, 2005, convicting defendant of assault in the second degree, and sentencing him, as a second felony offender, to a term of 7 years, unanimously affirmed.

The court properly found, by clear and convincing evidence, that although the showup was unduly suggestive, the two eyewitnesses could make in-court identifications of defendant based upon their independent recollection of the incident itself, and not on the suggestive procedure (*see generally People v Adams*, 53 NY2d 241, 251 [1981]). Initially, we note that it is clear from the context that when the hearing court referred to the showup as creating a substantial likelihood of irreparable misidentification, it was only ruling on the admissibility of the showup itself, and had not yet considered the issue of

independent source. In any event, we do not find any such likelihood, because the suggestiveness of the showup was outweighed by other factors. Both the victim and the eyewitness had ample opportunity to view defendant under good lighting conditions, at close range, and both had strong reasons to focus on his face (*see People v Williams*, 222 AD2d 149, 153 [1996], *lv denied* 88 NY2d 1072 [1996] ["even a matter of a few seconds may be sufficient for independent source purposes"]). Of critical significance was the unusually high degree of focus both women placed on defendant, due to his strange and frightening behavior and demeanor. Moreover, their descriptions of defendant were sufficiently specific to demonstrate that they had ample opportunity to view him. Each description emphasized defendant's most distinctive feature, which was his muscularity, and the evidence explains the women's inability to notice defendant's tattoos.

The court properly exercised its discretion in placing reasonable limits on defendant's cross-examination of witnesses and elicitation of expert testimony, and defendant received ample scope in which to explore all relevant matters. Defendant's assertion that the People elicited implied hearsay is without merit. To the extent that defendant is raising constitutional claims with regard to the trial court's evidentiary rulings, such claims are unpreserved and we decline to review them in the

interest of justice. Were we to review them, we would reject them.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1631 The People of the State of New York, Ind. 3812/00
Respondent,

-against-

Victor Brito,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Claudia S. Trupp of counsel), for appellant.

Victor Brito, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Alexis Pimentel of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered June 20, 2002, convicting defendant, after a jury trial, of two counts of murder in the second degree, and sentencing him to concurrent terms of 25 years to life, unanimously affirmed.

The jury's verdict was not against the weight of the evidence. There is no basis for disturbing the jury's determinations concerning issues of credibility, including the weight to be given the backgrounds of the People's multiple witnesses and any inconsistencies in their testimony (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

The court's instruction on prior inconsistent statements was sufficient to convey to the jury that it could, if so inclined, reject the testimony of a witness on the basis of the witness's

failure to reveal facts on a previous occasion. Accordingly, it was not error for the court to refuse defendant's request for a specific instruction on the concept of omissions.

Defendant's claims of prosecutorial misconduct are unpreserved and we decline to review them in the interest of justice. Were we to review them, we would find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). Similarly, defense counsel's failure to make specific objections to the alleged misconduct did not cause defendant any prejudice and did not deprive him of effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters

outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Defendant's remaining pro se claims are without merit.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1632 In re Derek C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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

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

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about January 3, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of assault in the second and third degrees and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's findings were supported by sufficient evidence and were not against the weight of the evidence. The evidence established that appellant, with intent to prevent a police officer from performing a lawful duty, caused injury to the officer (Penal Law § 120.05[3]). There was a sufficiently direct link between appellant's continuous struggle to break free from the officer's hold and the officer's ensuing elbow injury, which occurred when the officer performed a tripping maneuver in order

to subdue appellant (*see e.g. People v Morrow*, 261 AD2d 279 [1999], *lv denied* 93 NY2d 1023 [1999]). As he felt his grip slipping on the struggling appellant, the officer warned appellant that he would have to "take him down" if the appellant continued to resist. The officer performed a tripping maneuver, which caused both the officer and appellant to fall, and resulted in the injury. Given the officer's warning to appellant, the injury was clearly a foreseeable result of appellant's own behavior.

The evidence also supported the finding that appellant recklessly injured the officer (Penal Law § 120.00[2]). We have considered and rejected appellant's remaining arguments.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1633 The People of the State of New York, Ind. 1353/00
Respondent,

-against-

Luis De La Cruz,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at hearing; Ronald A. Zweibel, J. at jury trial and sentence), rendered January 17, 2001, as amended April 15, 2005, convicting defendant of criminal sale of a controlled substance in the first and second degrees, and sentencing him, as a second felony offender, to concurrent terms of 12 years and 6 years to life, respectively, unanimously affirmed.

The court properly denied defendant's suppression motion. The showup identification by an experienced undercover officer, who had familiarized himself with defendant's appearance over the course of an investigation, was not unduly suggestive even though it occurred nearly three months after the last drug transaction between them (*see People v Quinones*, 292 AD2d 239 [2002], *lv denied* 98 NY2d 701 [2002]; *People v Pipersburg*, 273 AD2d 77 [2000], *lv denied* 95 NY2d 892 [2000]). The officer had observed

defendant at close range in good lighting for prolonged periods, had conversed with him, and knew him by his street name.

Giving deference to the trial court's ability to observe demeanor, we conclude that it properly granted the prosecutor's challenge for cause to a prospective juror, since the panelist lacked the ability to evaluate police testimony fairly and impartially. Although the prospective juror stated that he could be fair, his assurances were invariably qualified by references to his predispositions; under the circumstances, it was best to disqualify him (*see People v Oliveri*, 29 AD3d 330, 331 [2006], *lv denied* 7 NY3d 792 [2006]).

Evidence of an uncharged crime evidence was properly admitted to explain how the undercover officer knew to page defendant for a later drug transaction and to assist the jury in understanding the relationship between defendant, who was charged with acting in concert, and his accomplices (*see People v Allende*, 38 AD3d 470, 471-472 [2007], *lv denied* 9 NY3d 839 [2007]; *People v Alicea*, 33 AD3d 326, 327 [2006], *lv denied* 7 NY3d 923 [2006]). Defendant's claim with regard to the court's failure to give a promised limiting instruction is unpreserved

and we decline to review it in the interest of justice (*see People v Baro,* 236 AD2d 307 [1997], *lv denied* 89 NY2d 1032 [1997]).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1634-
1634A In re Pearl M. and Another,

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

Evelyn A., et al.,
Respondents-Appellants,

Commissioner of the Administration for
Children's Services of the City of New York,
Petitioner-Respondent.

_____

Anne Reiniger, New York, for Evelyn A., appellant.

Lisa H. Blitman, New York, for Jesse M., appellant.

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about May 11, 2005, which, upon a fact-finding determination that respondents mother and father neglected the subject children and that respondent father sexually abused Pearl M. and derivatively abused Evan M., placed the subject children in the custody of petitioner Administration for Children's Services for a period of 12 months, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal otherwise dismissed as moot, without costs.

The appeal from the dispositional order is moot. The terms

of the order have expired and subsequent orders terminating respondents' parental rights freeing the children for adoption have been entered (*Matter of Vivian OO.*, 34 AD3d 1084 [2006]; *Matter of Clifford J.*, 238 AD2d 244 [1997]). Were we to review the merits, we would find that a preponderance of the evidence supported the determination that it was not in the best interests of the children to be returned to their parents.

The finding of neglect against respondent mother was supported by a preponderance of the evidence, including testimony and documentary proof establishing that she misused alcohol, failed to comply with a treatment program, and caused fires in the home, including one while the children were present (Family Court Act § 1012[f][i][B]). The finding of neglect against respondent father was established by evidence that he knew of the mother's alcohol abuse and other dangerous tendencies, but failed to take steps to protect the children (*see Matter of Kimberly M.*, 262 AD2d 237 [1999]).

The finding that the father sexually abused his daughter and derivatively abused his son was also supported by a preponderance of the evidence (Family Court Act § 1012[e][iii]; § 1046[b][i]). The daughter's out-of-court statements were corroborated by a child sexual abuse expert, who, after evaluating the child over several sessions, concluded that she had been abused. Such corroboration included assessing the child's demeanor and

language and the consistency of her statements over time, as well the child's demonstrations of the father's actions with an anatomically correct doll (*Matter of Jaclyn P.*, 86 NY2d 875 [1995], *cert denied* 516 US 1093 [1996]; *Matter of J.S.*, 215 AD2d 213 [1995], *lv denied*, 86 NY2d 706 [1995]). Contrary to the father's contentions, he received adequate notice of the charges against him and his counsel was not curtailed during the cross-examination of petitioner's key witness.

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

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1635 The People of the State of New York, Ind. 461/04
Respondent,

-against-

John Malaussena,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jacob Kaplan of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered September 6, 2005, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly denied defendant's request for an intoxication charge, since the evidence, viewed most favorably to defendant, was insufficient to cast doubt on his homicidal intent on that basis (*see People v Gaines*, 83 NY2d 925, 927 [1994]; *People v Rodriguez*, 76 NY2d 918, 920 [1990]; *People v Manning*, 1 AD3d 241 [2003], *lv denied* 1 NY3d 630 [2004]). While there was evidence of defendant's alcohol or cocaine consumption, there was no evidence that could raise a reasonable doubt as to whether his faculties were so impaired at the time of the crime that he could not have formed the requisite intent.

The court properly denied defendant's motion to suppress

statements. His statements made prior to *Miranda* warnings were not the product of custodial interrogation, because a reasonable innocent person in defendant's position would not have thought he was in custody (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]; *People v Dillhunt*, 41 AD3d 216 [2007]). In any event, the only statements that defendant made to the police prior to the administration of *Miranda* warnings had no inculpatory value within the context of the case (*see People v Prater*, 258 AD2d 600 [1999], *lv denied* 93 NY2d 1005 [1999]).

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves a matter outside the record concerning strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]) when his attorney requested the court to charge second-degree manslaughter as a lesser included offense, but not first-degree manslaughter. Counsel could have been employing a plausible strategy in seeking to limit the conviction to a class C felony

in the event the jury did not find that he acted with intent to kill.

M-4672 ***People v Malaussena***

Motion seeking leave to file pro se supplemental brief denied.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1638-
1638A In re Izkel Robert E. and Another,

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

Robert E.,
Respondent-Appellant,

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

_____

Geoffrey P. Berman, New York, for appellant.

Magovern & Sclafani, New York (Megan Eiss-Proctor of counsel), for respondent.

_____

Orders of disposition, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about July 10, 2006, which, upon findings of permanent neglect, terminated respondent father's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The findings of permanent neglect are supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). Despite the diligent efforts of petitioner agency to encourage and strengthen the parental relationship, which included providing the father with referrals to parental skills, domestic violence and drug rehabilitation programs, inviting him for service plan reviews, and scheduling visits with the children during times

that he was not incarcerated, the father did not complete the requisite programs, and his repeated periods of incarceration did not relieve him of his obligation to plan for the children's future (*see Matter of Amani T.*, 33 AD3d 542 [2006]).

The evidence at the dispositional hearing was preponderant that the best interests of the children would be served by terminating the father's parental rights so as to facilitate the children's adoption by their foster mother with whom they have lived most of their lives (*see Matter of Star Leslie W.,* 63 NY2d 136, 147-148 [1984]). The circumstances presented do not warrant a suspended judgment.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1639 The People of the State of New York, Ind. 3321/99
Respondent,

-against-

Andre O'Neal,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Simpson Thacher & Bartlett LLP, New York (Courtenay Browne of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Alexis Pimentel of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered May 15, 2001, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 8 to 16 years, unanimously affirmed.

The court properly declined to charge criminal possession of a controlled substance in the seventh degree as a lesser included offense, since there was no reasonable view of the evidence, viewed in a light most favorable to defendant, to support a finding that defendant's possession was without intent to sell (*see People v Tineo*, 16 AD3d 165 [2005], *lv denied* 4 NY3d 857 [2005]) *People v Henry*, 272 AD2d 238 [2000], *lv denied* 95 NY2d 890 [2000]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1642 Colin A. Brewster, et al., Index 24833/03
Plaintiffs-Respondents,

-against-

FTM Servo, Corp., et al.,
Defendants,

Angel Hernandez,
Defendant-Appellant.

Richard T. Lau & Associates, Jericho (Kathleen E. Fioretti of counsel), for appellant.

Allen D. Springer, Brooklyn, for respondents.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered April 26, 2007, which denied the motion by defendant Hernandez (and the cross motion by the remaining defendants) for summary judgment dismissing the complaint with respect to plaintiff Colin Brewster on the ground that said plaintiff had not suffered a serious injury, unanimously reversed, on the law, without costs, and the motion granted, and, upon a search of the record, the cross motion granted as well. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Based on Brewster's admission at deposition of his involvement in another automobile accident prior to this one, and the unavailability of the medical records for that case, defendant Hernandez served a supplemental notice for discovery

and inspection, requesting that Brewster provide written authorization allowing defendants to obtain the relevant records. When Brewster failed to comply with that demand and ensuing court directives, including a so-ordered stipulation, Hernandez moved for summary dismissal of Brewster's portion of the complaint for refusal to supply the court-ordered discovery, as well as the failure to demonstrate serious injury as defined by Insurance Law § 5102(d).

CPLR 3126 authorizes sanctions against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). Brewster's unexplained noncompliance with a series of court-ordered disclosure mandates over a period of nearly two years sufficiently created an inference of willful and contumacious conduct (*see Santoli v 475 Ninth Ave. Assoc., LLC*, 38 AD3d 411, 415 [2007]; *Jones v Green*, 34 AD3d 260 [2006]). The persistent failure to submit medical records relating to Brewster's previous automobile accident warranted dismissal of his portion of the complaint, since such material was necessary to ascertain whether any of his purported injuries might have been caused by that earlier accident.

Aside from his failure to abide with court-mandated disclosure, Brewster conceded at his deposition that he had sustained injuries to his neck, back and shoulder in a prior automobile accident. Once a defendant has presented evidence of a pre-existing injury, even in the form of an admission made at a deposition (*see Alexander v Garcia*, 40 AD3d 274 [2007]), it is incumbent upon the plaintiff to present proof to meet the defendant's asserted lack of causation (*see Baez v Rahamatali*, 6 NY3d 868 [2006]; Pommells v Perez, 4 NY3d 566, 574 [2005]). Brewster's submissions totally ignored the effect of his previous mishap on the purported symptoms caused by latest accident. The fact that Hernandez's expert discerned some minor loss of motion in Brewster's lumbar spine is irrelevant where the objective tests performed by this physician were negative, and Brewster had testified to a pre-existing injury in that part of his body (*see Style v Joseph*, 32 AD3d 212, 214 [2006]; *Montgomery v Pena*, 19 AD3d 288, 289-290 [2005]). Furthermore, not only did Brewster testify that he returned to work only a week after the accident, but there is no indication of any daily activity he could not perform as a result of this accident.

Upon search of the record, summary judgment is also granted to defendants FTM Servo Corp. and Hill against Brewster (*see Seaton v Budget Rent A Car*, 21 AD3d 792 [2005]) because the issue of serious injury is identical as it relates to all defendants,

notwithstanding their failure to pursue an appeal (*see Friedman v City of New York*, 307 AD2d 227 [2003]).

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1643 Doundley A. E.,
Plaintiff-Appellant,

-against-

Elizabeth R. E.,
Defendant-Respondent.

Ronald Cohen, Wilmington, NC, for appellant.

Bryan J. Hutchinson, Bronx, for respondent.

Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered January 26, 2007, which granted defendant summary judgment on her counterclaim for divorce on the ground of cruel and inhuman treatment, unanimously affirmed, without costs.

Even assuming the court had intended not to grant defendant's motion for leave to serve a second amended verified answer, summary judgment appears not to have been based on the incident newly alleged in that pleading. The court instead relied on the 2005 family offense proceeding, whose findings of fact did not encompass the latest incident. Even if the motion court had considered the fourth alleged incident, that would have been proper, since defendant's sworn and specific, nonconclusory fact allegations in that pleading would have constituted a factual showing in evidentiary form, which could properly be

considered on a motion for summary judgment (*compare Panaccione v Acher*, 30 AD3d 989, 991 [2006], *with McFarland v Michel*, 2 AD3d 1297, 1299 [2003]). In deciding defendant's summary judgment motion herein, the court properly considered findings that the same Justice had made in the family offense proceeding, in which defendant's application for an order of protection was granted, and properly gave preclusive effect to those findings (*see Paccione v Paccione*, 202 AD2d 224 [1994]). By means of those findings, defendant sufficiently demonstrated, with a high degree of proof, that plaintiff's conduct so endangers her physical or mental well-being as to render it unsafe or improper for her to resume cohabiting with him (*cf. Gross v Gross*, 40 AD3d 448 [2007]).

Plaintiff's argument that the findings of fact and conclusions of law of the court in the family offense proceeding were obtained by fraud are made in this action for the first time in his reply brief, and we decline to consider it. Were we to consider that argument, we would reject it.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1644 The People of the State of New York, ex rel. Pedro Guillont, Petitioner-Appellant, Index 1578/05

-against-

Warden, Rikers Island Correctional Facility, Respondent,

New York State Division of Parole, Respondent-Respondent,

Steven Banks, The Legal Aid Society, New York (Bonnie C. Brennan of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Cecelia C. Chang of counsel), for New York State Division of Parole, respondent.

Appeal from order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered July 28, 2005, which dismissed the petition for a writ of habeas corpus, unanimously dismissed as moot, without costs.

The appeal is moot in light of petitioner's release to parole supervision (*People ex rel McGann v Ross*, 91 NY2d 865 [1997]; *People ex rel. Abreu v Warden, Rikers Island Correctional Facility,* 37 AD3d 353 [2007], *lv denied* 8 NY3d 811 [2007]). Petitioner's arguments that the appeal is not moot are

unavailing. Were we not dismissing the appeal, we would affirm.

M-4582 ***Peo. ex rel. Pedro Guillont v Warden, Rikers Island***

Motion to dismiss denied, as unnecessary.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

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

1645 The People of the State of New York, Ind. 5667/03
Respondent,

-against-

Steven Perez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Richard Nahas of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about June 16, 2005, unanimously affirmed. No opinion. Order filed.

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

1646 Mildred Stewart, Index 28529/03
Plaintiff-Appellant,

-against-

Schulte Roth & Zabel LLP,
Defendant-Respondent.

Mildred Stewart, appellant pro se.

Schulte Roth & Zabel LLP, New York (Holly H. Weiss of counsel), for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet, J.), entered July 26, 2006, which, in an action for employment discrimination based on race, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, an African-American hired by defendant law firm as a paralegal, failed to adduce evidence responsive to defendant's showing that its termination of plaintiff was based on well-documented, ongoing poor performance reviews by many of the attorneys for whom plaintiff worked (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629, 631 [1997]). Plaintiff's evidence does not address these performance reviews, but instead focuses on the transfer of some of her cases to her only similarly situated co-worker, a Caucasian, thereby reducing her billable hours and denying her credit for work she performed. Although informed of defendant's anti-discrimination policies, including a

requirement that discrimination complaints be reported to certain individuals, plaintiff, while employed, never complained that this shifting of work was discriminatory, and even now does not show circumstances permitting an inference that it was. Defendant's reason for terminating plaintiff was not insufficient billable hours or an unwillingness to work, but the poor quality of her work and an inability to accept suggestions that might improve her work. There is no evidence tending to show that the poor performance reviews were inaccurate, much less the product of collusion among the reviewing attorneys to supply a pretext for race discrimination. We have considered plaintiff's claims of hostile work environment and retaliation and find them also without merit.

M-4854 ***Stewart v Schulte Roth & Zabel LLP***

Motion seeking leave to unseal documents denied.

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

ENTERED: OCTOBER 4, 2007

_____

CLERK

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

1647N-
1647NA AIU Insurance Company, et al., Index 603159/05E
Plaintiffs-Appellants,

-against-

The Robert Plan Corporation, et al.,
Defendants-Respondents.

- - - - -

The Robert Plan Corporation, et al.,
Counterclaim Plaintiffs-Respondents,

-against-

American International Group, Inc., et al.,
Counterclaim Defendants-Appellants.

_____

Cahill Gordon & Reindel, LLP, New York (Edward P. Krugman and Adam Zurofsky of counsel), for appellants/appellants.

Kostelanetz & Fink, LLP, New York (Brian C. Willie of counsel), for respondents/respondents.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered December 27, 2006, which, upon reargument, adhered to a prior order, same court and Justice, entered August 11, 2006, granting the motion of defendant The Robert Plan (TRP) Corporation for a preliminary injunction compelling plaintiff AIU Insurance Company (AIU) to give it access to certain claims and actuarial information, unanimously affirmed, with costs. Appeal from the August 11, 2006 order unanimously dismissed, without costs, as superseded by the appeal from the December 27, 2006 order.

The court properly determined that TRP demonstrated that it

was entitled to injunctive relief and compelled AIU to provide TRP with access to the information being sought. The relevant agreement between the parties is clear that TRP was to have access to the data that pertained to policies it had administered even after termination of the agreement, and the court appropriately declined to adopt the interpretation of the agreement set forth by AIU because such an interpretation would strain the language of the contract beyond its reasonable and ordinary meaning (*Consolidated Edison Co. v United Coastal Ins. Co.*, 216 AD2d 137 [1995], *lv denied* 87 NY2d 808 [1996]). TRP also established that it would be irreparably harmed if not provided with the information, which was critical to its business, and in light of the difficulty and uncertainty in calculating the future damages it would suffer as a result of AIU's breach of the agreement (*see Pfizer Inc. v PCS Health Systems, Inc.*, 234 AD2d 18 [1996]). A balancing of the equities, as well as the need to preserve the status quo between the parties, further warrants the relief granted by the court.

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

ENTERED: OCTOBER 4, 2007

_____
CLERK

THE FOLLOWING MOTION ORDERS WERE ENTERED AND FILED ON OCTOBER 4, 2007

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

M-4868X Oduor v Huggins

Appeal withdrawn.

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

M-4869X Heleno v Joseph Sarlo Construction Co., Inc.

Appeal withdrawn.

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

M-4874 In the Matter of Fauntleroy v Kelly

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

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

M-4916 Magnani v 1472 Broadway, Inc. - New York Elevator & Electrical Corporation, doing business as and also known as New York Elevator Company, Inc.

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

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

M-4914X Halpern v Avon Products, Inc., doing business as Avon Salon & Spa

Appeal and cross appeal withdrawn.

Lippman, P.J., Tom, Marlow, Gonzalez, Malone, JJ.

M-4597 In the Matter of S., Enrique v D., Genell M. (And another action)

Time to perfect appeal enlarged to the February 2008 Term.

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

M-4489 Gary Weiss, Inc. v Gemasia, Inc.

Leave to prosecute appeal as a poor person denied.

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

M-4155 People v Chatelain, Billy

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

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

M-4418 People v Encarnacion, Gabriel

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

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

M-4431 People v Delarosa, Jose

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

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

M-4483 People v Medina, Adrian

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

Tom, J.P., Williams, Buckley, Gonzalez, Sweeny, JJ.

M-3955 Graham v New York City Housing Authority
M-4069

Leave to appeal to the Court of Appeals denied.

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

M-4242 Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.
M-4313

Leave to appeal to the Court of Appeals denied.

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

M-4472 People v Fernandez, Pablo

Transcription of minutes directed, as indicated; motion otherwise denied.

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

M-4586 Thom v Jazquez

Appeal deemed withdrawn.

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

M-4518 Shmueli v NRT New York, Inc., doing business as The Corcoran Group

Time to perfect appeal enlarged to the February 2008 Term.

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

M-4685 In the Matter of S., Linda v S., Adegoke

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

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

M-4714 People ex rel. Simons, Alphonso v Warden

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

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

M-4387 In the Matter of S., Jeanne v S., Salvatore

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

Andrias, J.P., Saxe, Marlow, Nardelli, Williams, JJ.

M-4218 Serval v Vorburger

Vacatur of order denied.

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

M-1621 People v Reynoso, Robinson

Writ of error coram nobis denied.

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

M-3253 In the Matter of P., Lashina –- Administration for Children's Services

Leave to prosecute appeal as a poor person granted, as indicated. (See M-3676, decided simultaneously herewith.)

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

M-3676 In the Matter of P., Lashina –- Administration for Children's Services

Leave to prosecute appeal as a poor person granted, as indicated. (See M-3253, decided simultaneously herewith.)

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

M-4220 People v Perez, Riqui, also known as Perez, Rique

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

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

M-4258 People v Blanco, Daniel

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

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

M-4269 People v Munneilyn, Jason, also known as Harrison, Troy

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

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

M-3844 Robinson v Friedman Management Corp. - Slavin (And other actions)

Stay granted to the extent indicated; appellant directed to perfect appeal for the February 2008 Term.

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

M-3679 Riverside Syndicate, Inc. v Munroe

Leave to appeal from the Appellate Term granted, as indicated.

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

M-3647 Scott v Beth Israel Medical Center, Inc.

Leave to appeal to the Court of Appeals denied.

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

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

M-4755 Morayo Atinuke DaSilva, admitted on 7-13-1998, at a Term of the Appellate Division, First Department

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

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

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

M-4897 Suzanne Nichols, also known as Suzanne Youssef, admitted on 7-12-93, at a Term of the Appellate Division, Second Department

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

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

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

M-4961 Bruce Stuart Pailet, admitted in 1986, at a Term of the Appellate Division, Second Department

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

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

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

M-4969 Carolyn Cole Durst, admitted on 3-12-1997, at a Term of the Appellate Division, Second Department

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

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

M-2859 In the Matter of Zoilo I. Silva, a suspended attorney:

Respondent's name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to May 30, 2007. Opinion Per Curiam. All concur.

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

M-3140 In the Matter of Steven C. Cunningham, (admitted as Steven Christie Cunningham), an attorney and counselor-at-law:

Respondent's name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to June 15, 2007. Opinion Per Curiam. All concur.

The Following Orders Were Entered And Filed On October 2, 2007:

Lippman, P.J., Tom, Marlow, Gonzalez, Malone, JJ.

M-4753 Walker v Hughes Hubbard & Reed, LLP

Appellate briefs, previously filed by counsel, deemed withdrawn; plaintiff's time to perfect appeals enlarged to the May 2008 Term, as indicated.

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

M-4570 J. Christopher Flowers v 73rd Townhouse, LLC

Dismissal of cross appeal denied.

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

M-4903 Alpha Manhattan, LLC v Ona Manhattan House, LLC
(And another action)

Stay granted on condition undertaking posted, as indicated. Clerk directed to calendar appeal for hearing in the first week of the November 2007 Term.

McGuire, J.

M-5179 People v Allen, Brandon

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