SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 20, 2007

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2161 The People of the State of New York, Respondent, Ind. 3600/05

-against-

John Stone, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered January 17, 2006, convicting him, after a jury trial, of assault in the second degree, criminal mischief in the third degree and resisting arrest, and sentencing him, as a second felony offender, to an aggregate term of 4 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. There was ample evidence

that the police officer sustained a physical injury (see Penal Law § 10.00[9]; *People v Guidice*, 83 NY2d 630, 636 [1994]; *People v Chiddick*, 8 NY3d 445 [2007]), including the officer's testimony that he was cut and bleeding, was in pain, required stitches, suffered from increased migraines, and was absent from work for several days as a result of the incident.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2162-
2163 The People of the State of New York, Ind. 6601/03
Respondent,

-against-

Marvin Wilson,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Lucy Jane Lang of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered June 7, 2004, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him a term of 5 years, and order, same court and Justice, entered on or about August 23, 2005, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

After making a suitable inquiry, the court properly denied defendant's plea withdrawal motion (*see People v Frederick*, 45 NY2d 520 [1978]). Defendant was not entitled to a hearing on his unsupported claim that he failed to comprehend the plea proceedings due to alleged mental illness and side effects from

psychiatric medication (*see e.g. People v Rodriguez*, 302 AD2d 317 [2003], *lv denied* 99 NY2d 657 [2003]). During the plea allocution, defendant was completely lucid, and he specifically acknowledged that his medication did not affect his ability to understand the proceedings and enter a guilty plea.

Defendant was not denied his right to effective and conflict-free assistance of counsel on his plea withdrawal motion where his counsel reported to the court that defendant's psychiatrist had informed counsel there was no reason to question defendant's mental competency (*see People v Friedman*, 39 NY2d 463, 467-468 [1976]; *compare People v Rozzell*, 20 NY2d 712 [1967]).

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2165 In re Arriola Nicole S., etc.,

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

Shaniqua S., etc.,
Respondent-Appellant,

New York Foundling Hospital, et al.,
Petitioners-Respondents.

____

Patricia W. Jellen, Eastchester, for appellant.

Law Office of Jeremiah Quinlan, Hastings-on-Hudson (Daniel Gartenstein of counsel), New York Foundling Hospital, for respondent.

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

____

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about December 13, 2006, which, upon a finding of permanent neglect, terminated respondent’s parental rights to the subject child and committed the child’s guardianship and custody to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The agency demonstrated by clear and convincing evidence that it satisfied its statutory burden of making diligent efforts

to strengthen the parental relationship (*see* Social Services Law § 384-b[7][f]; *Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). These efforts included scheduling regular visitation between respondent and the child, referring respondent and encouraging her to attend parenting skills classes and to complete life skills training courses to overcome her disabilities, and actively advocating for her re-enrollment in a program after she had been expelled for non-attendance (*see Matter of Olivia F.*, 34 AD3d 234, 235 [2006]). Despite the agency's efforts, respondent failed, during the statutorily relevant period, to complete all requisite programs (*see Matter of Kimberly C.*, 37 AD3d 192 [2007], *lv denied* 8 NY3d 813 [2007]; *Matter of Angel P.*, __ AD3d__, 2007 NY Slip Op 7757, *1-*2 [1st Dept. 2007]). Further, during her irregular visitation, the mother failed to engage the child or show improvement in developing the skills needed to meet the child's physical and emotional needs.

The agency established by a preponderance of the evidence that the best interests of the child would be served by terminating respondent's parental rights so as to facilitate the child's adoption by the foster mother, thereby permitting the child to remain in the only home she has known, with her

biological brother, who has already been adopted by the foster mother (*see Matter of Dena Shamika A.*, 301 AD2d 464, 465 [2003]).

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2167 The People of the State of New York, Respondent, Ind. 1763/78

-against-

Leroy Woods, Defendant-Appellant.

____

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

Robert M. Morgenthau, District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

____

Order, Supreme Court, New York County (Ruth L. Sussman, J.), entered on or about February 10, 2005, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three sex offender adjudication. The risk factors at issue were supported by reliable evidence (*see* Correction Law § 168-n [3]; *People v Dort*, 18 AD3d 23, 25 [2005], *lv denied* 4 NY3d 885 [2005]), and we have considered and rejected defendant's arguments as to each factor at issue.

In any event, the record also supports the court's

alternative finding that defendant should be adjudicated a level three sex offender based upon the override for a recent threat to reoffend by committing a sexual or violent crime. Although defendant’s recent case was still pending at the time of the sex offender adjudication, the court did not rely on the fact of the arrest, but on reliable evidence establishing the underlying facts. We also reject defendant’s argument that this override is intended to encompass verbal threats only; an actual crime poses an equal, if not greater, risk than a verbal threat.

Defendant’s challenges to the choice of risk factors made by the Legislature and the Board of Examiners of Sex Offenders are both waived and without merit *(see People v Bligen*, 33 AD3d 489, [2006]; *People v Joe*, 26 AD3d 300 [2006], *lv denied* 7 NY3d 703 [2006]).

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2168 The People of the State of New York, Ind. 6029/02
Respondent,

-against-

Terrence Wood,
Defendant-Appellant.

____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered October 4, 2004, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second felony offender, to a term of 16 years, unanimously modified, on the law, to the extent of vacating the DNA databank fee, and otherwise affirmed.

Defendant received effective assistance of counsel 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]). Through cross-examination of the victim and two police witnesses, and in his summation, counsel placed great emphasis on the fact that the victim originally told the police he did not know who shot him. On appeal, defendant asserts that counsel

should also have made use of a police report that tended to undermine the prosecution’s explanation for the inconsistency. Even if we were to find that counsel should have made the additional efforts at issue, we would find that his failure to do so did not deprive defendant of a fair trial or cause him any prejudice (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]). The material at issue did not have such additional value as to create a reasonable possibility of a different verdict. Defendant’s additional claim that counsel should have requested a missing witness charge relating to the victim’s “friend” is without merit because none of the requirements for such a charge were present (*see generally People v Gonzalez*, 68 NY2d 424 [1986]).

Defendant’s arguments concerning the court’s limitation of his cross-examination of the victim are similar to arguments this court rejected on a codefendant’s appeal (*People v Winston*, 27 AD3d 279 [2006], *lv denied* 7 NY3d 765 [2006]), and we see no reason to reach a different result here.

We perceive no basis for reducing the sentence. Since the

crime was committed prior to the effective date of the legislation providing for the imposition of a DNA databank fee, that fee should not have been imposed.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2169 The People of the State of New York, Ind. 3236N/06
Respondent,

-against-

Gregory Roberts,
Defendant-Appellant.

____

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

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered on or about August 7, 2006, unanimously affirmed. No opinion. Order filed.

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

2170 The People of the State of New York, Respondent, Ind. 5223/05 6497/05

-against-

Frederick H. Leonard, Defendant-Appellant.

____

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

Robert M. Morgenthau, District Attorney, New York (Eric Rosen of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about September 15, 2006, convicting defendant, after a jury trial, of kidnapping in the second degree, robbery in the first and second degrees and criminal possession of stolen property in the fourth degree, and sentencing him, as a second violent felony offender, to an aggregate term of 16 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the jury’s determinations concerning identification and credibility (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). While he was being robbed and held captive in his car, the victim

had an extended opportunity to observe defendant. In addition, there was corroborating circumstantial evidence.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2171 The People of the State of New York, Ind. 1344/05
Respondent,

-against-

Darryl Marrant,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J. at suppression hearing; Ruth Pickholz, J. at jury trial and sentence), rendered September 21, 2005, convicting defendant of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony offender, to concurrent terms of 6 years and 2½ years, 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]). The officer's observations provided probable cause for defendant's arrest (*see People v Jones*, 90 NY2d 835 [1997]).

The court properly exercised its discretion in denying defendant's newly substituted lead counsel's request for additional preparation time, as well as his subsequent motion for a mistrial, and these rulings did not deprive defendant of a fair trial or effective assistance of counsel. At the beginning of the trial, a lead counsel and a junior counsel from the same defender organization represented defendant. At the end of jury selection, the lead counsel had a family emergency and another experienced attorney from the same organization entered the case. Although the new lead counsel received a half day to prepare, he unsuccessfully requested additional time. Under the particular circumstances, including the simplicity of the evidence and the involvement of the junior attorney, who was thoroughly familiar with the case, we find no basis for reversal. Defendant received a vigorous defense that comported with the state and federal standards for effective assistance (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). There is no indication that the lack of additional preparation time had any effect on the conduct of the

defense. Defendant was not prejudiced by the circumstance that counsel presented to the jury, in a belated fashion, a particular inconsistency involving grand jury minutes.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2172 St. Nicholas Cathedral of the Russian Orthodox Church in North America, Index 600236/05
Plaintiff-Appellant,

-against-

Travelers Property Casualty Insurance Company,
Defendant-Respondent,

JSC of Anatov, Inc., et al.,
Defendants.

____

Harvey Gladstein & Partners, LLC, New York (Ronald Yang of counsel), for appellant.

Putney, Twombly, Hall & Hirson LLP, New York (James M. Strauss of counsel), for respondent.

____

Order, Supreme Court, New York County (Herman Cahn, J.), entered June 26, 2006, which granted the motion of defendant Travelers Property Casualty Insurance Company (Travelers) to confirm the report of the Special Referee, and denied plaintiff's cross motion to vacate the report, unanimously affirmed, without costs.

Plaintiff seeks a declaration that Travelers is obligated to defend and indemnify it in connection with a pending action arising out of an accident that occurred on the sidewalk adjacent to its property on October 14, 2003. Despite a notice of

occurrence provision in its insurance policy, plaintiff did not notify Travelers about the accident until May 10, 2004, after receiving notice of a lawsuit from the injured person.

The evidence adduced before the Special Referee established that plaintiff was immediately aware of the accident, which occurred in front of its property while its contractor was performing work on its behalf, and that it was aware that a person was injured and was removed from the scene in an ambulance. Moreover, plaintiff discussed the accident internally and with others, and was familiar with the insurance policy's requirement to provide notice of an occurrence "as soon as practicable." Under the circumstances, plaintiff failed to establish the reasonableness of its belief that no claim would be asserted against it and hence of its seven-month delay in providing notice to Travelers (*see SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1998]). We are bound by the holding in *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 (2005) that the insurer need not demonstrate prejudice in a question of late notice, and therefore, the claim is barred by the terms of the policy.

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

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2173 In re Frantrae W. and Another,

Children Under the Age
of Eighteen Years, etc.,

Fred W.,
Respondent-Appellant,

Michelle W.,
Respondent,

Commissioner of Administration for
Children's Services,
Petitioner-Respondent.

____

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for Commissioner of Administration for Children's Services, respondent.

Lawyers for Children, Inc., New York (Hal Silverman of counsel), and LeBoeuf, Lamb, Greene & MacRae LLP, New York (Daphnée Saget Woodley of counsel), Law Guardian for Michelle W.

Tamara A. Steckler, The Legal Aid Society, New York (John Newbery of counsel), Law Guardian for Frantrae W.

____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about January 24, 2006, which found respondent father to have neglected and abused the children, unanimously affirmed, without costs.

Despite the serious nature of the charges, the Family Court's credibility determinations, based on sharply divergent

testimony, are entitled to deference (*see Matter of Benjamin L.*, 9 AD3d 153, 155 [2004]). The record supports the court's findings that appellant abused his older daughter by having sexual intercourse with her in 2003 and 2004. His argument that the older daughter's testimony was received without corroboration is not apt, since the court did not rely exclusively on her out-of-court testimony (*see* Family Ct Act § 1046[a][vi]). In any event, the older daughter's testimony was corroborated by that of a treating social worker, and in certain details by respondent stepmother. The record also supports the court's findings that appellant inflicted excessive corporal punishment on the older daughter.

The older daughter's recantation did not invalidate her original testimony outright (*see Matter of Richard SS.*, 29 AD3d 1118, 1123 [2005]). At most, it raised credibility questions as to her testimony (*see Matter of Kayla N.*, 41 AD3d 920, 922-923 [2007]), and the record supports the Family Court's resolution of those questions against crediting the recantation or disregarding the original testimony, based on findings that were made after the court carefully evaluated the child's sworn testimony (*see Matter of Stephanie R.*, 21 AD3d 417 [2005]). Appellant's

arguments as to the court's evidentiary rulings are without merit.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2174-
2175-
2176 Hugh O'Kane Electric Co., LLC, Index 600391/02
Plaintiff-Respondent,

-against-

MasTec North America, Inc.,
doing business as Wilde Construction,
Defendant-Appellant.

____

Goldberg Segalla LLP, Buffalo (Thomas M. Moll of counsel), for appellant.

Tunstead & Schechter, Jericho (Jeremy Kalina of counsel), for respondent.

____

Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered July 11, 2006, which, after a nonjury trial, awarded plaintiff damages in the amount of $2,467,517.76, plus interest in the amount of $1,098,214.41; order, same court and Justice, entered July 18, 2006, which found that defendant was barred by the doctrine of collateral estoppel from asserting the pay-when-paid provision of the contract between the parties; and order, same court and Justice, entered November 30, 2006, which denied defendant's motion to set aside the verdict, unanimously affirmed, with one bill of costs.

Contrary to defendant's contention, the trial court

correctly apprehended the question of fact to be determined at trial, in accordance with this Court's order (19 AD3d 126, 128 [2005]) and the parties' stipulation, as whether defendant should be estopped from asserting the pay-when-paid provision as an affirmative defense. The issue was not whether defendant specifically misrepresented the financial status of the project owner but whether it made misrepresentations that it knew were false regarding whether plaintiff would be paid for its work, thereby inducing plaintiff to continue working at the site at its own expense.

Although the trial court did not set forth the specific facts it deemed essential to its decision, as required by CPLR 4213(b), upon our independent factual review of the complete record (*see Matter of Allen v Black*, 275 AD2d 207, 209 [2000]; *Weckstein v Breitbart*, 111 AD2d 6, 8 [1985]), we find that the record supports the court's determination. Defendant repeatedly represented that plaintiff would be paid for the work it performed pursuant to the subcontract between the parties, when it was aware that the project owner, which was ultimately responsible for payment, was having serious financial difficulties and was millions of dollars in debt. In response to the assertion of plaintiff's representative that plaintiff would

cease working on the project if payment was not forthcoming, defendant repeated its assurances of payment, thereby inducing plaintiff to continue working on the project, expending additional money in materials and labor for which it was never paid. This evidence is sufficient under Florida law, which governed the subcontract, to establish that defendant should be estopped from enforcing the pay-when-paid provision of the contract (*see Florida Dept. of Health & Rehabilitative Servs. v S.A.P.*, 835 So 2d 1091, 1096-97 [Fla. 2002]; *Rinker Materials Corp. v Palmer First Natl. Bank and Trust Co. of Sarasota*, 361 So 2d 156 [Fla. 1978]).

The court properly awarded interest at a rate of 9% per annum from August 1, 2001. This is an action for breach of contract and not, as defendant asserts, an action sounding in quantum meruit (*see* CPLR 5001[a]).

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

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2177 The People of the State of New York, Ind. 5772/04
Respondent,

-against-

Patrick Sands,
Defendant-Appellant.

____

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

Patrick Sands, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered September 19, 2005, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of 8 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 6 years, and otherwise affirmed.

Defendant did not preserve his claim that his plea allocution was insufficient because the court did not inquire about a possible defense, and we decline to review it in the interest of justice. The narrow exception to the preservation rule explained in *People v Lopez* (71 NY2d 662, 665-666 [1988])

does not apply since defendant's factual allocution does not cast significant doubt on his guilt. The court's duty to inquire was not triggered by statements defendant may have made at junctures other than the plea proceeding itself (*see e.g. People v Blackwell*, 41 AD3d 121 [2007]; *People v Fiallo*, 6 AD3d 176 [2004], *lv denied* 3 NY3d 640 [2004]; *People v Negron*, 222 AD2d 327 [1995], *lv denied* 88 NY2d 882 [1996]). Were we to review this claim, we would find that defendant knowingly, intelligently and voluntarily pleaded guilty.

We find the sentence excessive to the extent indicated.

We have considered the claims raised in defendant's pro se supplemental brief and find them without merit.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2178 The People of the State of New York, Ind. 6128/03
Respondent,

-against-

Jose Rodriguez,
Defendant-Appellant.

Marianne Karas, Armonk, for appellant.

Robert M. Morgenthau, District Attorney, New York (Jung Park of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about June 23, 2006, resentencing defendant upon his conviction, upon his plea of guilty, of criminal possession of a controlled substance in the second degree, to a term of 5½ years, unanimously affirmed.

The court properly considered all the relevant factors in resentencing defendant pursuant to the Drug Law Reform Act (L 2005, ch 643), and we perceive no basis for reducing the sentence any further.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2179 The People of the State of New York, Respondent, SCI. 1126/05

-against-

Gregory Stewart,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (A. Kirke Bartley, J. at plea; Laura A. Ward, J. at sentence), rendered on or about April 4, 2005, unanimously affirmed. No opinion. Order filed.

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

2180 The People of the State of New York, Ind. 23612C/05
Respondent,

-against-

Edward Small, etc.,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (William Mogulescu, J.), rendered on or about November 17, 2006, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order, with notice of entry.

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

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2181 The People of the State of New York, Ind. 4312/03
Respondent,

-against-

Frank Staten,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Courtni Y. Burleson of counsel), for appellant.

Judgment, Supreme Court, Bronx County (Stephen Barrett, J.), rendered on or about May 19, 2004, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order, with notice of entry.

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

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2182N-
2183N A. Robert Giordano, as Co-Executor of the Estate of Arnold A. Brenhouse, Deceased,
Plaintiff-Appellant,

Index 24848/04

-against-

Dervish Berisha,
Defendant-Respondent,

Regency Acquisitions Corp.
Defendant.

____

McCarthy Fingar LLP, White Plains (Robert H. Rosh of counsel), for appellant.

____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered October 2, 2006, which granted plaintiff's motion to reargue a prior order, same court and Justice, entered on or about May 22, 2006, insofar as it denied plaintiff's motion for a default judgment and dismissed the complaint as against the individual defendant pursuant to CPLR 3215(c), and, upon reargument, adhered to its prior determination denying the motion for a default judgment on other grounds, unanimously modified, on the law, the facts, and in the exercise of discretion, to the extent of granting plaintiff leave to renew the motion for a default judgment upon proper papers, within 30 days of service of

a copy of this order, and otherwise affirmed, without costs. Appeal from order entered on or about May 22, 2006, unanimously dismissed, without costs, as superseded by the appeal from the order entered October 2, 2006.

The court initially denied plaintiff's motion for a default judgment and dismissed the complaint on the basis that the motion was not brought within one year after the individual defendant's default (CPLR 3215[c]). Upon reargument, the court determined that plaintiff's motion was in fact timely, but denied the motion on the ground that plaintiff's submissions were insufficient to support entry of a default judgment pursuant to CPLR 3215(f). This determination was correct inasmuch as plaintiff's motion papers, in this action where he is seeking monies allegedly due under a contract the decedent was assigned for heating oil deliveries and services provided to three buildings, failed to include the underlying contract and assignment, and the assignor's affidavit did not provide the particulars of the contract assigned to the decedent (*see Feffer v Malpeso*, 210 AD2d 60, 61 [1994]). However, under the circumstances presented, where plaintiff has actively pursued a resolution to the matter,

plaintiff is granted leave to reapply for a default judgment, on proper papers, as indicated (*Brown v Rosedale Nurseries*, 259 AD2d 256, 257 [1999]).

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

ENTERED: NOVEMBER 20, 2007

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

2185N In re Lancer Insurance Company, Index 6272/05
Petitioner-Respondent,

-against-

Lizette Rovira, et al.,
Respondents-Appellants,

United States Fire Insurance
Company, et al.,
Proposed Additional Respondents-Respondents,

Excellence Management Service Corp.,
Proposed Additional Respondent.

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Ofshtein & Ross, P.C., Brooklyn (Stuart K. Gechlik of counsel), for appellants.

Hammill, O'Brien, Croutier, Dempsey & Pender, P.C., Syosset (Anton Piotroski of counsel), for Lancer Insurance Company, respondent.

Carroll, McNulty & Kull, LLC, New York (Robert Seigal of counsel), for United States Fire Insurance Company, respondent.

Buratti, Kaplan, McCarthy & McCarthy, Yonkers (Michael A. Zarkower of counsel), for Chavies Powell and Progressive Casualty Insurance Company, respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered July 13, 2006, which denied the Rovira/Ramos respondents' motion to restore the matter to active status and to vacate an August 2005 order that had granted the petition on default and stayed arbitration, unanimously modified, on the law,

to the extent of granting so much of the motion as sought vacatur of default against respondent Ramos, and otherwise affirmed, without costs.

The excuse for the failure of Rovira and Ramos to appear for an August 1, 2005 framed-issue hearing is weak, asserting that the law office computer incorrectly listed the hearing as occurring in Nassau County, without any further explanation as to any other actions counsel took, such as appearing in Nassau County, or what they did upon discovery of the "computer glitch." Nevertheless, this amounts to law office failure, which is a recognized excuse for vacatur of a default (*see Barsel v Green*, 264 AD2d 649 [1999]). Moreover, the court apparently found sufficient merit to the demand for arbitration to schedule a framed-issue hearing. Given the strong public policy in favor of disposing of cases on the merits (*see Watt v Spencer*, 36 AD3d 440 [2007]; *Dokmecian v ABN AMRO N. Am.*, 304 AD2d 445 [2003]), we find the court improvidently exercised its discretion in denying the motion to vacate the default.

However, the court properly found that a Nassau County order, entered on default on November 29, 2000, which had permanently stayed the arbitration, was res judicata as to any claim by Lizette Rovira. The decedent Ramos had no capacity to

challenge the motion for the stay at that time or to later challenge the final judgment on default, and so had no full and fair opportunity to contest it (*see Zimmerman v Tower Ins. Co. of N.Y.*, 13 AD3d 137 [2004]). However, inasmuch as decedent died in 1999, prior to the commencement of any action or proceeding, severance was not necessary (*see Batista v Rivera*, 5 AD3d 308, 309 [2004]), and thus Rovira was not barred from fully and completely litigating the issue at that time. To the extent any conflict existed between the positions of Rovira and Ramos at that time, counsel should have moved to withdraw from the representation of one, so that Rovira's claim could go forward. To the extent no conflict existed, counsel should have gone forward with Rovira's claim. Whether or not the motion at that time expressly sought a permanent stay or only a temporary stay is irrelevant, as the order clearly and unequivocally stayed the matter permanently, and Rovira never sought to vacate the default, reargue or appeal.

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

ENTERED: NOVEMBER 20, 2007

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Andrias, J.P., Saxe, Nardelli, Sweeny, McGuire, JJ.

9740 IDT Corporation, Index 603710/04
Plaintiff-Respondent,

-against-

Morgan Stanley Dean Witter & Co., et al.,
Defendants-Appellants.

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Covington & Burling LLP, New York (David W. Haller of counsel), for appellants.

Bracewell & Giuliani LLP, New York (Michael D. Hess and David C. Albalah of counsel), and Grayson & Kubli P.C., McLean, Va, (Alan M. Grayson, of the District of Columbia Bar, admitted pro hac vice, of counsel), and Warren W. Harris and Glen A. Ballard, Jr., of the Texas Bar, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (Herman Cahn, J.), entered April 27, 2006, which, to the extent appealed from, denied defendants' motion to dismiss the first, second, fourth and fifth causes of action in the complaint for failure to state a cause of action, affirmed, without costs.

Plaintiff, a telecommunications company, alleges in its complaint that Morgan Stanley, its former investment banker, engaged in a variety of improper conduct in an effort to maximize the fees it collected, thereby breaching its fiduciary duty to plaintiff and causing it substantial financial harm in the process. The complaint asserts claims for breach of fiduciary

duty, tortious interference with contract, tortious interference with prospective business relations, misappropriation of confidential and proprietary business information, and unjust enrichment. Morgan Stanley's motion was granted only to the extent of dismissing the third cause of action for tortious interference with prospective business relations.

Morgan Stanley contends that all of the remaining claims are barred by collateral estoppel, which prevents a party from relitigating an issue previously decided against it in a proceeding where there was a fair opportunity to fully litigate the matter (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]), pointing to plaintiff's prior arbitration against Telefonica International, S.A. where, according to Morgan Stanley, the arbitrators decided critical issues that preclude plaintiff's present claims. In that arbitration, however, plaintiff never had an opportunity to conduct discovery on the extent of the damages it suffered due to Morgan Stanley's alleged tortious conduct (*see PenneCom B.V. v Merrill Lynch & Co.*, 372 F3d 488, 492-493 [2d Cir 2004]). Nor are plaintiff's remaining claims time-barred or insufficient to state causes of action. While Telefonica's breach of its memorandum of understanding with IDT was allegedly a result of Morgan Stanley's tortious

interference, no cause of action for such interference arose until plaintiff actually suffered damages, and such damages were not necessarily suffered at the time the contract was breached (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 96-97 [1993]). The equitable breach of fiduciary duty claim seeking disgorgement of $10 million is governed by a six-year limitations period (CPLR 213[1]; *Kaufman v Cohen*, 307 AD2d 113, 118 [2003]), and should not be dismissed at this stage of the litigation as "duplicative" of the unjust enrichment claim, when it properly serves as an alternative theory for the relief sought. Finally, the rule that an award for punitive damages must be limited to conduct directed at the general public applies in breach of contract cases, not tort cases for breach of fiduciary duty (*see Sherry Assoc. v Sherry-Netherland, Inc.*, 273 AD2d 14, 15 [2000]).

We have considered defendant's remaining arguments and find them unpersuasive.

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

McGUIRE, J. (dissenting)

The principal issues on appeal in this action brought by plaintiff-respondent IDT Corporation against defendants-appellants Morgan Stanley and Morgan Stanley & Co., Inc. (collectively, Morgan Stanley) center on the extent to which IDT's claims against Morgan Stanley are barred by either the doctrine of collateral estoppel on account of an earlier arbitration proceeding IDT brought against nonparty Telefonica International, S.A. or the statute of limitations.

In May 2001, IDT commenced an arbitration proceeding against Telefonica alleging that IDT had sustained over $2 billion in damages as a result of Telefonica's delays in performance and breaches of a memorandum of understanding (the MOU) that IDT and Telefonica entered into in August 1997 relating to a South American submarine cable network (the SAm-1 Network) that Telefonica expected to build. The MOU had three distinct components: (1) a capacity component, pursuant to which IDT had the right to purchase at least $100 million of capacity in the SAm-1 Network over a five-year period, with an option to purchase additional capacity, under certain favorable pricing conditions; (2) an equity purchase component, pursuant to which IDT had the right to purchase up to 10% of the equity in a company, "NewCo,"

that Telefonica would establish to "construct, establish, operate and maintain the [SAm-1] System and, directly or indirectly sell capacity on the System"; and (3) a joint venture component, pursuant to which Telefonica and IDT agreed to establish a joint venture company to develop and market certain products.

IDT alleges that Morgan Stanley, acting as Telefonica's investment banker in connection with the SAm-1 transaction, wrongly induced Telefonica to propose to IDT that it accept a 5% interest in an entity to be called Emergia, instead of a 10% interest in NewCo. In essence, IDT claims that Emergia was the entity contemplated by the MOU and that NewCo was denominated Emergia in an effort to persuade IDT to accept a smaller interest than the one to which it was entitled under the MOU. Thus, the complaint alleges that in July 2000, Morgan Stanley assured IDT that the value of a 5% interest in Emergia was far greater than the value of a 10% interest in NewCo.

Collateral estoppel prevents a party from "relitigat[ing] an issue that was previously decided against it" (*Singleton Mgt. v Compere,* 243 AD2d 213, 215 [1998]), and it "appl[ies] as well to awards in arbitration as [it does] to adjudications in judicial proceedings" (*Matter of America Ins. Co. [Messinger -- Aetna Cas, & Sur. Co.],* 43 NY2d 184, 189-190 [1977]). As is

clear from the 72-page decision issued by the arbitration panel, the panel found that: Telefonica did not breach the joint venture component of the MOU; Telefonica breached the equity purchase component of the MOU but IDT did not sustain any damages as a result of that breach; Telefonica breached the capacity purchase component of the MOU and IDT thereby sustained $16.9 million in damages; the breaches of the equity and capacity components occurred no earlier than October 2000; and IDT was agreeable to and benefitted from any pre-breach delay in the parties' performance under the MOU.

With the exception of its claim for unjust enrichment and punitive damages, all of IDT's claims against Morgan Stanley seek damages allegedly caused when Morgan Stanley induced Telefonica to delay performance under and breach the MOU. These claims are barred by the arbitration panel's findings that only one breach of the MOU by Telefonica caused IDT any damages and that the amount of those damages was $16.9 million (*Norris v Grosvenor Mktg. Ltd.,* 803 F2d 1281, 1286 [2d Cir 1986] [applying New York law and concluding in action alleging, inter alia, tortious interference with contract that plaintiff was collaterally estopped from relitigating issue decided against him in earlier arbitration proceeding he had commenced against a different party

for breach of contract]; *Guard-Life Corp. v Parker Hardware Mfg. Corp.,* 50 NY2d 183, 197-198 [1980] [amount of lost profits awarded to plaintiff in arbitration against contracting party for breach of contract is conclusive on plaintiff in subsequent action for tortious interference with contract seeking such profits]).[1]

IDT does not dispute that these adverse findings were made by the arbitration panel. Rather, its argument that collateral estoppel does not bar these claims is premised on the principle that the party to be precluded from relitigating an issue must have had a full and fair opportunity in the prior action or proceeding to contest the issue that was decided against it (*see Allied Chem. v Niagara Mohawk Power Corp.,* 72 NY2d 271, 276 [1988], *cert denied* 488 US 1005 [1989]), and the flexibility in the application of the doctrine that inheres in its equitable nature (*see Gilberg v Barbieri,* 53 NY2d 285, 291 [1981]). In particular, IDT relies on the Second Circuit's decision in *PenneCom B.V. v Merrill Lynch & Co.* (372 F3d 488 [2d Cir 2004]).

In *PenneCom,* the plaintiff, PenneCom, brought an action

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[1]Of course, as noted in *Guard-Life*, as compared to the damages that can be awarded for breach of contract, the damages that can be awarded for tortious interference with a contract are broader in scope (50 NY2d at 197 n 6).

against Merrill Lynch alleging that it had caused PenneCom $100 million in damages by tortiously interfering with a contract between PenneCom and Elektrim S.A., pursuant to which Elektrim agreed to purchase from PenneCom the shares of its subsidiary. In an earlier arbitration proceeding against Elektrim, PenneCom was awarded $38 million in fees and damages for Elektrim's breach of the contract. Merrill Lynch moved to dismiss the tortious interference claim, contending that it was barred by collateral estoppel because the arbitration award had determined that PenneCom's damages on account of the breach did not exceed $38 million (*id.* at 491-492).

The District Court granted Merrill Lynch's motion but the Second Circuit reversed. The linchpin in the court's decision was an allegation by PenneCom that went "to the very heart of whether its damages claims were fully and fairly adjudicated in the [arbitration] proceeding" (*id.* at 493); namely, that Merrill Lynch "presented fraudulent evidence on Elektrim's behalf during the arbitration" (*id.* at 490), and that this fraudulent evidence had "minimized the loss award" (*id.* at 489). The court, stressing that under the governing New York law collateral estoppel is an equitable doctrine and that "one 'who comes to

equity must come with clean hands'" (*id.* at 493, quoting *Amarant v D'Antonio,* 197 AD2d 432, 434 [1993]), concluded that PenneCom should be permitted to conduct discovery bearing on its contention that Merrill Lynch had "devised a fraudulent scheme to dupe the arbitrators ... as to the extent of loss incurred ... from Elektrim's breach" (*id.*).

According to IDT, *PenneCom* is "directly on point" because it alleges that "deceptions by Morgan Stanley were perpetrated on both IDT and the Arbitration Panel, and served to minimize falsely the loss caused to IDT by Telefonica's breach." Similarly, it alleges that "Morgan Stanley devised a fraudulent scheme to dupe both IDT and the Arbitration Panel as to the 'distinction' between NewCo and Emergia and the valuation of these companies." In support of these allegations, IDT does not point to any testimony at the arbitration hearing from anyone affiliated with Morgan Stanley. Rather, it relies on "slanted" projected valuations that Morgan Stanley had presented to it in July 2000, long before the arbitration proceeding was commenced, that it had subpoenaed from Morgan Stanley during discovery prior to the arbitration, and that thereafter were "submitted" (IDT does not state by whom) to the arbitration panel. IDT claims that these projected valuations misled the panel by suggesting a

"false distinction" between NewCo and Emergia and misrepresenting the relative projected valuations of the two entities, including by assigning a far greater value to a 5% interest in Emergia than a 10% interest in NewCo.[2] As in *PenneCom*, IDT maintains, the bar of collateral estoppel should not apply and it should be entitled to take discovery relating to these allegations.

PenneCom is irrelevant because IDT's claim that the arbitration panel was deceived is conclusively refuted by the panel's comprehensive 72-page decision. As for the supposed "false distinction" between NewCo and Emergia, the panel concluded that the two entities were distinct, vindicating Telefonica's position on what is in essence a question of law relating to the proper interpretation of the MOU. More critically, the panel expressly identified and discussed the four bases for this conclusion, none of which have anything to do with

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[2]IDT asserts as well that Morgan Stanley "willingly" produced the projected valuations in response to its subpoena and did so "knowing that these documents would be relied on by the arbitrators." Although IDT claims that the projected valuations "infected the arbitration panel's decision," it cannot claim that it was deceived by them. Indeed, as its complaint alleges, on the strength of these same projected valuations Morgan Stanley assured it in July 2000 that a 5% interest in Emergia was far superior to the 10% interest in NewCo that was IDT's right under the MOU. IDT, however, rejected the proposal that it accept the smaller interest in Emergia.

the allegedly deceptive valuations of NewCo and Emergia: (1) the text of the MOU; (2) the minutes of a July 2000 IDT board meeting indicating that IDT itself recognized that its right to invest in NewCo was not the same as a right to invest in Emergia; (3) the pre-dispute conduct of IDT and Telefonica; and (4) the equity arrangements between Telefonica and an unrelated entity, Tyco, which converted its right to a 15% interest in NewCo to a 6% interest in Emergia.

Nor does anything in the opinion even suggest that the panel credited the projection that NewCo's value would be approximately 13-15% of Emergia's projected value. To the contrary, in determining IDT's damages for Telefonica's breach of the equity purchase component of the MOU, the panel assessed NewCo's value at 45% of Emergia's value. Moreover, as would be expected of sophisticated arbitrators, the panel recognized that Morgan Stanley's July 2000 projected valuation was, if not tendentious, the product of a negotiation in which Morgan Stanley was acting for Telefonica. Thus, after noting that the July 2000 projection of NewCo's value was a small fraction of the value projected for Emergia, the panel stressed that those projections were "prepared by Telefonica and Morgan Stanley to be presented to IDT as part of the process of negotiating IDT's ownership percentage in

Emergia."

In short, the panel's decision refutes IDT's claim that the arbitration award was affected to its detriment by the ostensibly "slanted" projections. To avoid the collateral estoppel consequences of the panel's findings, the burden is on IDT to show that the award was so affected (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985]), but IDT offers only speculation and wholly conclusory assertions.

Related contentions by IDT also are meritless. Thus, IDT's protest that the arbitration panel "did not ... consider whether Morgan Stanley had acted tortiously in providing [the July 2000 projections] to IDT and urging IDT to rely upon it" is correct but beside the point. Contrary to the unstated premise of this protest, the economic damages IDT sustained as a result of Telefonica's breaches of the MOU are not affected let alone increased by Morgan Stanley's attempts to induce it, tortiously or otherwise, to rely on the projections. Nor is IDT persuasive in contending that delay damages "were not considered, much less awarded, by the arbitration panel." In fact, IDT did seek such damages, and the panel did not award any because it found that performance delays prior to the date of the breaches of the capacity and equity purchase components of the MOU were agreed to

and mutually beneficial to IDT and Telefonica. The panel found, in other words, that the delays did not constitute breaches of the MOU. These findings by the panel are unconnected to any alleged misconduct by Morgan Stanley and, as Morgan Stanley correctly argues, it is precisely these adverse findings that bar IDT from relitigating the same delay issues against Morgan Stanley.[3]

Accordingly, I would hold that IDT's claims, other than its unjust enrichment and punitive damage claims, are barred by collateral estoppel. Given my view that IDT's reliance on *PenneCom* is misplaced, I need not address Morgan Stanley's contention, which the majority implicitly rejects, that *PenneCom* is in any event inconsistent with New York case law. Suffice it

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[3]IDT makes a passing reference in its brief to another memorandum created by Morgan Stanley in May 2000, stating that the panel "expressly quotes, relies upon, and notes 'accord[]' with [this] fraudulent" memorandum. The complaint, however, makes no mention of that memorandum and IDT offers nothing in its brief to support or explain its alleged "fraudulent" character. Moreover, the excerpts from the memorandum quoted in the panel's decision have nothing to do with the fraudulent scheme alleged in the complaint, but instead concern the capacity of the cable used in the SAm-1 Network, possible capacity upgrades and the uncertainties attendant to attempting to derive valuations of hypothetical upgrades.

to say that the cases Morgan Stanley cites, such as *Jacobowitz v Herson* (268 NY 130 [1935]), *Altman v Altman* (150 AD2d 304 [1984], *lv denied* 74 NY2d 612 [1989]) and *Parker & Waichman v Napoli* (29 AD3d 396 [2006], *lv dismissed* 7 NY3d 844 [2006]), afford considerable if not decisive support for its argument that under New York law collateral estoppel cannot be avoided by a showing that the judgment or determinations in the prior proceeding were tainted by perjury or other "intrinsic fraud" (*Jacobowitz,* 268 NY at 133).

As for IDT's unjust enrichment claim, it should have been dismissed for independent reasons advanced by Morgan Stanley in its motion to dismiss. The unjust enrichment claim has two facets, one of which seeks to recover $10 million IDT paid to Morgan Stanley in accordance with an engagement letter relating to an unrelated transaction between IDT and AT&T. As Morgan Stanley argues, because the $10 million was paid pursuant to the express terms of the engagement letter, IDT cannot recover the $10 million under an unjust enrichment theory if the letter constitutes a valid and enforceable contract (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.,* 70 NY2d 382, 388 [1987]). According to IDT, the engagement letter is not a valid and enforceable contract because IDT was "coerced" and "extorted" by Morgan

Stanley into signing the engagement letter and paying the $10 million. However, "an agreement purportedly procured under duress must be promptly repudiated" (*Wujin Nanxiashu Secant Factory v Ti-Well Intl. Corp.*, 14 AD3d 352, 353 [2005]). Indisputably, the alleged extortion occurred no later than October 2000 when, according to IDT's complaint, IDT "paid the exorbitant $10 million fee to Morgan Stanley." Because IDT did not bring this action until November 2004, more than four years later, it must be deemed to have ratified the letter of engagement (*see Matter of Guttenplan*, 222 AD2d 255, 257 [1995] [agreement allegedly procured under duress "deemed to have been ratified" when petitioners "failed to take any action toward repudiation of the agreement for over two years after its execution"], *lv denied* 88 NY2d 812 [1996]).[4]

The other facet of IDT's unjust enrichment claim alleges that Morgan Stanley was unjustly enriched by fees it received from Telefonica and others. The failure to allege that Morgan Stanley's enrichment comes at IDT's expense, however, is fatal to

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[4]Neither in its complaint nor in its brief on appeal does IDT contend that it was under continuing duress, so as to suspend its obligation to repudiate (*Matter of Guttenplan*, 222 AD2d at 257).

this facet of the unjust enrichment claim (*see Colon v Teicher*, 8 AD3d 606, 607 [2004]).

As for IDT's claim for punitive damages, Morgan Stanley offers one argument (other than its argument based on the statutes of limitations applicable to the underlying tort claims) for its dismissal: the failure of the complaint to allege that the general public was harmed by Morgan Stanley's alleged misconduct. Such an allegation, however, is not essential to an award of punitive damages in a tort action (*see Ross v Louise Wise Servs. Inc.*, 8 NY3d 478, 489 [2007] ["Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations" (internal quotation marks and citations omitted; brackets in original)]; *Giblin v Murphy*, 73 NY2d 769, 772 [1988] [upholding award of punitive damages for breach of fiduciary duty; argument that "punitive damages award must be overturned because there was no harm aimed at the public generally" rejected on ground that "[p]unitive damages are allowable in tort cases such as this so long as the very high threshold of moral culpability is satisfied"]; *Don Buchwald & Assoc. v Rich*, 281 AD2d 329, 330 [2001] ["The limitation of an

award for punitive damages to conduct directed at the general public applies only in breach of contract cases, not in tort cases for breach of fiduciary duty"]).[5]

Because Morgan Stanley advances no other argument for dismissal of the punitive damages claim,[6] it should be upheld unless the underlying tort claims that remain (IDT's claims for tortious interference with contract, breach of fiduciary duty and misappropriation of confidential and proprietary business information) are barred by the applicable statutes of limitation. I respectfully disagree with Supreme Court and the majority that such claims are not so barred.

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[5]In *Steinhardt Group v Citicorp* (272 AD2d 255 [2000]), we upheld fraud causes of action but affirmed the dismissal of a claim for punitive damages. In doing so, we stated that "this was a private transaction" and the "absence of an allegation of egregious tort directed at the public at large justified the IAS Court's dismissal of the ad damnum for punitive damages" (*id.* at 257). In my view, this statement should be read to uphold the dismissal of the claim for punitive damages on the ground that it alleged neither the requisite level of moral culpability (i.e., an "egregious tort") nor conduct directed at the public generally.

[6]I would not consider Morgan Stanley's argument, advanced in its reply brief for the first time, that even if an allegation of public harm were not required, IDT fails to allege conduct rising "to the requisite level of wanton and willful wrongdoing" that would justify an award of punitive damages (*see Commissioners of State Ins. Fund v Concord Messenger Serv., Inc*. 34 AD3d 355 [2006]).

First, a claim for tortious interference with contract accrues not when the contract is breached, as does a breach of contract claim, but when an injury is sustained (*Kronos Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). When the injury is sustained, "rather than the wrongful act of the defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual" (*id.*). Alternatively put, "accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint" (*id.*). Regardless of exactly when, prior to May 25, 2001 (the date IDT commenced the arbitration against Telefonica), IDT sustained injury on account of the breach or breaches of the MOU that Morgan Stanley allegedly tortiously induced, IDT's tortious interference claim certainly accrued by May 25, 2001. After all, IDT alleged in its statement of claim that the MOU was a binding agreement, that it had been breached and that it had sustained injuries as a result.

Because IDT did not commence this action until November 5, 2004, more than three years after it commenced the arbitration against Telefonica, IDT's tortious interference claim is time barred (*see* CPLR 214[4]). The IAS court ruled otherwise, reasoning that "IDT could not have pled this cause of action until after the Arbitration Panel had determined that the MOU was

a valid and binding agreement." The IAS court cited no authority supporting this conclusion, and IDT cites none on this appeal.

Presumably, the IAS court was not of the view that the validity of a contract always must be established in a legal proceeding before a claim of tortious interference with the contract can accrue. Under such a view, after all, a tortious interference claim might not even accrue until long after, perhaps years after, the expiration of the six-year statute of limitations generally applicable to the underlying breach of contract action (CPLR 213[2]). Rather, the IAS court may have concluded that the validity of a contractual obligation must be established before a cause of action accrues for tortiously interfering with the contract only when, as here, the parties to the contract agree to arbitrate all issues relating to the contract, or at least all issues relating to its validity and binding character. If so, I disagree with that conclusion. In my view, the right of a nonparty to the contract to be free of the burdens of defending against an otherwise untimely claim of tortious interference with the contract should not be curtailed by the fortuity that the parties to the contract agreed to arbitration.

Although the majority does not endorse the IAS court's

rationale for concluding that the tortious interference claim was not time-barred, the reasoning offered by the majority is plainly flawed. According to the majority, IDT's "damages were not necessarily suffered at the time the contract was breached." That may be so, but it is besides the point. As noted, regardless of precisely when IDT sustained damages on account of Telefonica's breach of the MOU, IDT unquestionably sustained damages no later than May 25, 2001, more than three years before it commenced this action. After all, IDT alleged exactly that in the statement of claim it filed on that date. Accordingly, the majority's entire analysis rests on a principle -- that injury need not have been sustained at the same time as the breach -- that is entirely irrelevant.

As for IDT's claim for misappropriation of confidential information, Supreme Court correctly concluded that it is governed by a three-year statute of limitation (CPLR 214[4]; *see Demas v Levitsky,* 291 AD2d 653, 658 [2002], *lv dismissed* 98 NY2d 728 [2002]). Supreme Court erred, however, in concluding that there were issues of fact as to when IDT learned of Morgan Stanley's alleged misappropriation of confidential information. When IDT was injured by the alleged acts of misappropriation, "rather than [the date of] the wrongful act of defendant or

discovery of the injury by plaintiff, is the relevant date for marking accrual" (*Kronos,* 81 NY2d at 94). The injuries alleged with respect to this claim are essentially the same as those alleged in the tortious interference cause of action and thus this claim also is time-barred.

IDT's cause of action for breach of fiduciary duty has both legal and equitable components. The legal component, which seeks both compensatory and punitive damages based on Morgan Stanley's alleged breach of fiduciary duties owed to IDT, is governed by a three-year statute of limitations (*see Carlingford Ctr. Point Assoc. v MR Realty Assoc.,* 4 AD3d 179, 180 [2004]). This portion of the claim is time-barred for the same reason as the tortious interference and misappropriation claims, i.e., it accrued no later than May 25, 2001. Concerning the equitable component, it need not be determined whether IDT is correct in urging a six-year statute of limitations because, as limited by its brief, it seeks only the return of the $10 million fee that Morgan Stanley allegedly extracted from it by economic coercion. Accordingly, the claim is duplicative of IDT's cause of action for unjust enrichment (*see Fesseha v TD Waterhouse Investor Services, Inc.*, 305 AD2d 268, 269 [2003]; *William Kaufman Organization, Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [2000]), which, as

discussed above, should have been dismissed.

Finally, IDT’s contention that the equitable tolling doctrine applies with respect to its tortious interference and misappropriation claims is without merit as IDT fails to allege “subsequent and specific actions by defendants [that] kept [it] from timely bringing suit” (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006]).

Accordingly, I would reverse and grant the motion to dismiss in its entirety.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

Friedman, J.P., Marlow, Sweeny, Catterson, Malone, JJ.

401 Evelyn D. Giaccio, Index 127378/02
Plaintiff-Respondent,

-against-

179 Tenants Corp.,
Defendant-Appellant.

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Burns, Russo, Tamigi & Reardon LLP, Garden City (Arnold Stream of counsel), for appellant.

Todtman Nachamie Spizz & Johns, P.C., New York (Richard S. Ciacci of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy Friedman, J.), entered June 21, 2005, which, insofar as appealed from as limited by the briefs, denied defendant 179 Tenants Corp.'s motion for partial summary judgment dismissing the first cause of action sounding in negligence, unanimously reversed, on the law, without costs, the motion granted and the matter remanded for trial on the remaining causes of action.

Plaintiff contends that heat produced over a long period by a hot water pipe under her living room floor caused the wood sub-flooring to convert to pyrophoric carbon and spontaneously ignite, destroying her apartment. However, given the lack of complaints about heat or burning smells emanating from the floors

above the pipes, or evidence of any pyrophoric carbon found under the floorwood, in any of the other apartments on plaintiff's floor, plaintiff's prior complaints of fluctuating water temperatures could not have reasonably alerted defendant to the possibility of an unrelated fire hazard due to pyrolysis (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Absent actual or constructive notice of the latent defect, defendant had no duty to remove the floor wood "to discover what lay beneath it" (*Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 800 [2003]). Nor does the doctrine of res ipsa loquitur avail plaintiff to raise an inference of negligence where fire and incident reports and expert reports are conflicting as to how and where the fire started (*see Shaw v Bronfman*, 284 AD2d 267, 268 [2001], *lv dismissed* 97 NY2d 725 [2002]). Indeed, plaintiff's evidence does not even show that the fire was of a type that does not occur in the absence of negligence (*see Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]; *Shaw*, 284 AD2d at 268). In view of the foregoing, we need not consider defendant's remaining contention.

The Decision and Order of this Court entered herein on June 21, 2007 is hereby recalled and vacated (*see* M—3739 decided simultaneously herewith).

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2087 The People of the State of New York, Ind. 4642/02
Respondent,

-against-

Jose Mendez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Tracy L. Conn of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about August 5, 2005, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act(Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, the three risk factors that defendant challenges on appeal. The court based its findings concerning the underlying facts of defendant's conviction on "reliable

hearsay evidence" (Correction Law § 168-n [3]; *see also People v Dort*, 18 AD3d 23, 25 [2005], *lv denied* 4 NY3d 885 [2005]). We have considered and rejected defendant's remaining claims.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2088 The People of the State of New York, Ind. 5123/98
Respondent,

-against-

Julio Merejildo,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Karen M. Kalikow of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

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Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered February 3, 2006, which denied defendant's motion to be resentenced pursuant to the Drug Law Reform Act of 2005, unanimously affirmed.

One of the eligibility criteria for a defendant seeking resentencing on a class A-II felony conviction under the 2005 DLRA (L 2005, ch 643, §1) is that he or she must meet the merit time eligibility requirements of Correction Law § 803(1)(d). Correction Law §803(1)(d)(ii) provides that merit time is not available to any person serving an indeterminate sentence for, among other things, a violent felony.

In 2000, defendant was convicted of criminal possession of a controlled substance in the second degree and the violent felony

offense of criminal possession of a weapon in the third degree. He was sentenced to consecutive terms of eight years to life and two to four years. The motion court correctly concluded that because defendant is incarcerated pursuant to a judgment that includes a sentence for a violent felony, he is ineligible for merit time under Correction Law §803(1)(d)(ii) and, thus, ineligible for resentencing.

While defendant presently argues that the two to four year term imposed on his weapons conviction expired, at the latest, in 2004, so that at the time of the resentencing motion he was no longer serving a sentence for a violent felony, he did not preserve that argument and we decline to review it in the interest of justice. Were we to review this claim, we would reject it. Pursuant to Penal Law §70.30(1)(b), defendant's consecutive sentences are merged into a single aggregate sentence (*see People v Curley*, 285 AD2d 274 [2001], *lv denied* 97 NY2d 607 [2001]), with a term of ten years to life. The Penal Law

provision contradicts defendant’s argument that when a life sentence and a term other than life are served consecutively, the non-life term is necessarily served first.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2089 The City of New York, Index 401916/03
Plaintiff-Respondent,

-against-

General Star Indemnity Company,
Defendant-Appellant.

____

Marshall, Conway, Wright & Bradley, P.C., New York (Christopher T. Bradley of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered on or about July 19, 2006, granting plaintiff insured's motion for summary judgment, and declaring that defendant insurer is obligated to defend and indemnify plaintiff in a certain underlying action, unanimously reversed, on the law, without costs, the judgment vacated, and the motion for summary judgment denied.

While the motion court correctly held that the additional insured endorsement on which plaintiff relies is part of the policy under which plaintiff claims coverage, an issue of fact as to coverage is raised by ambiguities in the endorsement and the post-accident dating of the certificate of insurance issued to

plaintiff (*see Travelers Ins. Co. v Utica Mut. Ins. Co.*, 27 AD3d 456, 457 [2006]). Assuming coverage, an issue of fact also exists as to the timeliness of defendant's disclaimer of coverage (*see Dumet v TIG Ins. Co.*, 272 AD2d 111, 112 [2000]). Proof of the named insured's earlier receipt of plaintiff's claim letter does not establish concurrent receipt by defendant, who claims to have first received the claim letter in a fax sent 23 days before it issued its disclaimer.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2090 In re Pedro Jason William M., and Others,

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

Pedro M.,
Respondent-Appellant,

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

Elisa Barnes, New York, for appellant.

Magovern & Sclafani, New York (Mary Jane Sclafani of counsel), for respondents.

Anne Reiniger, New York, Law Guardian.

Order, Family Court, New York County (Susan K. Knipps, J.), entered November 17, 2005, which, after a hearing, determined that respondent was not a person whose consent to his children's adoption was required, unanimously affirmed, without costs.

Respondent's claim that Domestic Relations Law § 111(1)(d) is unconstitutional in imposing support and visitation obligations on unwed fathers but not on unwed mothers is without merit (*see Matter of Jonathan Logan P.*, 309 AD2d 576 [2003]). Also without merit is his argument that, in analyzing his constitutional claim, the court erred in considering the extent to which he visited his children when they were in foster care

(*see Matter of Raquel Marie X.*, 76 NY2d 387, 401 [1990], *cert denied sub nom. Robert C. v Miguel T.*, 498 US 984 [1990] ["The unwed father's protected interest requires both a biological connection and full parental responsibility; he must both be a father and behave like one"]).

Given the absence of evidence that respondent provided financial support according to his means and either visited the children at least monthly or, when visitation was not possible, communicated regularly with them or their custodians (Domestic Relations Law § 111(1)(d); *Jonathan Logan P.*, *supra*), the court correctly found that respondent never acquired a constitutionally protected interest in his children (*see Lehr v Robertson*, 463 US 248, 262 [1983]).

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2092 Michael Doddy, et al., Index 14891/92
Plaintiffs-Respondents,

-against-

The City of New York, et al.,
Defendants-Appellants.

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Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for appellants.

Calano & Culhane, LLP, New York (Thomas A. Culhane of counsel), for respondents.

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Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered December 6, 2006, which denied defendants' motion to dismiss the complaint as time-barred under General Municipal law § 50-i(1)(c), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Plaintiffs moved to file a late notice of claim on July 10, 1991, 8 days before the year-and-90-day statute of limitations expired. A decision granting the motion, deeming the notice of claim timely served, was entered on March 31, 1992. The statute of limitations, tolled for 265 days, ran anew as of that date, and plaintiffs were required to serve their summons and complaint

upon defendants on or before April 8, 1992 (*see* CPLR 204[a]; *Giblin v Nassau County Med. Ctr.*, 61 NY2d 67, 72 [1984]), which they did not do.

General Municipal Law § 50-i(3) provides that "Nothing contained herein or in section fifty-h of this chapter shall operate to extend" the year-and-90-day statute of limitations. Accordingly, the limitations period was not tolled by the 30-day waiting period imposed by § 50-i(1)(b) (*see Baez v New York City Health & Hosps. Corp.*, 80 NY2d 571 [1992]; *Cinqumani v County of Nassau*, 28 AD3d 699 [2006]; *Mercer v City of Mount Vernon*, 224 AD2d 402 [1996]).

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2093 The People of the State of New York, Ind. 1643/06
Respondent,

-against-

Macorel Nivol,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about August 4, 2006, unanimously affirmed. No opinion. Order filed.

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

2094 The People of the State of New York, Ind. 1430/03
Respondent,

-against-

William Coleman,
Defendant-Appellant.

Bahn Herzfeld & Multer LLP, New York (Richard L. Herzfeld of counsel), for appellant.

William Coleman, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Tracy L. Conn of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered May 27, 2004, convicting defendant, after a jury trial, of enterprise corruption, conspiracy in the fourth degree, burglary in the third degree, grand larceny in the second degree, and criminal possession of stolen property in the second degree, and sentencing him to an aggregate term of 11⅓ to 34 years, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). The court imposed

appropriate limitations on the prosecutor's inquiry into defendant's extensive criminal record. Defendant's theft-related convictions, although numerous, were highly relevant to his credibility.

The court did not unduly restrict defendant's cross-examination of witnesses (*see People v Corby*, 6 NY3d 231, 234-235 [2005]; *see also Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). Defendant's other complaints about the court's conduct of the trial, and his arguments concerning the discharge of a sick juror, are unpreserved and we decline to review them in the interest of justice. Were we to review these claims, we would find them without merit.

The court properly exercised its discretion in denying defendant's requests for appointment of an investigator and a sentencing mitigation expert. Defendant failed to demonstrate any necessity for such assistance, but asserted only vague and speculative reasons why these individuals could help his defense

(*see People v Dearstyne*, 305 AD2d 850, 852-853 [2003], *lv denied* 100 NY2d 593 [2003]; *People v Burgess*, 270 AD2d 158 [2000], *lv denied* 95 NY2d 794 [2000]).

We have considered and rejected defendant's pro se claims.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2095 The People of the State of New York, Respondent, Ind. 1430/03

-against-

Trevers Jackson,
Defendant-Appellant.

David Samel, New York, for appellant.

Trevers Jackson, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Tracy L. Conn of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered June 18, 2004, convicting defendant, after a jury trial, of enterprise corruption, conspiracy in the fourth degree, burglary in the second degree, grand larceny in the second degree, criminal possession of stolen property in the second degree, and two counts of perjury in the first degree, and sentencing him, as a persistent felony offender, to concurrent terms of 25 years to life, unanimously affirmed.

The court properly modified its *Sandoval* ruling to permit the People to inquire about three prior burglaries committed by defendant, when defendant's testimony misleadingly implied that he was a naive novice at the time a codefendant had propositioned

him to be a lookout in a burglary that the prosecutor had inquired into under the original *Sandoval* ruling (*see People v Salvadon*, 11 AD3d 334 [2004], *lv denied* 4 NY3d 767 [2005]; *People v Nieves*, 282 AD2d 342 [2001]). In any event, were we to find that the court erred by making this modification, we would find the error harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230, 240-242 [1975]).

The court properly permitted the prosecutor to impeach defendant's trial testimony by means of portions of his grand jury testimony, including significant omissions, since the circumstances were such as to raise a jury question as to whether there was an inconsistency (*see People v Bruno*, 34 AD3d 220 [2006], *lv denied* 8 NY3d 878 [2007]; *People v Montalvo*, 285 AD2d 384 [2001], *lv denied* 96 NY2d 941 [2001]; *compare People v Bornholdt*, 33 NY2d 75, 88 [1973], *cert denied sub nom. Victory v New York*, 416 US 905 [1974]). Defendant was free to argue that there was no inconsistency, and were we to find any error we would once again find it harmless.

The court properly admitted evidence that a jointly tried codefendant had threatened a witness during the trial. Such evidence was "highly probative" of that codefendant's

consciousness of guilt (*People v Rosario*, 309 AD2d 537, 538 [2003], *lv denied* 1 NY3d 579 [2003]), and the court's thorough instructions were sufficient to prevent any prejudice to defendant. The court also properly denied defendant's severance motion.

We perceive no basis for reducing the sentence. Defendant's sentencing as a discretionary persistent felony offender was constitutional (*see People v Rivera*, 5 NY3d 61 [2005], *cert denied* 546 US 984 [2005]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. Defendant's remaining pro se argument is unpreserved and we decline to review it in the interest of justice. Were we to review this claim, we would find it without merit.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2098 Chestnut Hill Partners, LLC, Index 602286/06
Plaintiff-Respondent-Appellant,

-against-

Peter Van Raalte, et al.,
Defendants-Respondents,

Corinthian Capital Group, LLC, et al.,
Defendants-Appellants-Respondents.

____

Kasowitz, Benson, Torres & Friedman LLP, New York (Michael A. Hanin of counsel), for appellants-respondents.

Fogel & Wachs PC, New York (Louis I. Fogel of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Helen E. Freedman, J.), entered March 16, 2007, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) to the extent of dismissing the complaint as against the individual defendants and denied the motion to the extent it sought dismissal of the complaint as against defendants Corinthian Capital Group, LLC (Corinthian) and Sabre Communications Holding, Inc. (Sabre), and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

The complaint alleges that plaintiff entered into a finder's fee agreement with nonparty Lincolnshire Management, Inc.

(Lincolnshire) for the acquisition of a target company, Sabre. Lincolnshire decided against acquiring the company and the individual defendants, who were former Lincolnshire employees, subsequently formed Corinthian, which later acquired Sabre. Under the circumstances, the court properly declined to dismiss the complaint as against Corinthian and Sabre since plaintiff adequately pleaded claims for unjust enrichment and in quasi contract. The sequence of events, together with the fact that Corinthian voluntarily tendered a check in the amount of $75,000 to plaintiff after it had closed on its purchase of Sabre, present sufficient facts to infer that defendants benefitted from plaintiff's actions in bringing the deal to the attention of Corinthian's principals *(see Bradkin v Leverton*, 26 NY2d 192, 197-198 [1970]). Although there was no written contract between plaintiff and defendants, the facts as alleged in the complaint suggest that the statute of frauds may not be an available defense (*id.* at 199*; see* General Obligations Law § 5-701[a][10]). The decision to dismiss the complaint as against the individual defendants, however, was appropriate since plaintiff failed to allege facts implying individual abuse of the privilege of doing

business in the corporate form resulting in harm (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]).

The court also properly denied plaintiff's cross motion to amend the complaint. Although leave to amend pleadings under CPLR 3025(b) is to be freely given, the speculative allegations set forth by plaintiff are insufficient to sustain a claim for either tortious interference with contract (*see Burrowes v Combs*, 25 AD3d 370, 373 [2006], *lv denied* 7 NY3d 704 [2006]; *Washington Ave. Assoc. v Euclid Equipment*, 229 AD2d 486, 487 [1996]), or misappropriation of confidential information (*see Precision Concepts v Bonsanti*, 172 AD2d 737, 738 [1991]).

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

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2099 The People of the State of New York, Ind. 3434/02
Respondent,

-against-

John Schlick,
Defendant-Appellant.

____

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

Robert M. Morgenthau, District Attorney, New York (Amyjane Rettew of counsel), for respondent.

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Judgment, Supreme Court, New York County (John A. K. Bradley, J.), rendered March 13, 2003, convicting defendant, after a nonjury trial, of grand larceny in the second degree and two counts of criminal possession of a forged instrument in the second degree, and sentencing him to an aggregate term of 2 to 6 years, unanimously affirmed.

Defendant was convicted of taking large sums of money from an elderly woman after she had become mentally incompetent. The court properly precluded, as irrelevant, evidence of defendant’s financial relationship with the victim prior to the period during which the crimes were allegedly committed. The proffered evidence, viewed most favorably to defendant, would have established, at most, that the victim made substantial gifts to

him while she was still competent. Defendant's alleged authority to spend the victim's money on himself while she was competent would not have given rise to any actual or implied authority to continue to incur such expenditures after the victim lost her mental capacity, or to a good faith belief in any such continued authority (*see generally People v Ricchiuti*, 93 AD2d 842, 844 [1983]). Even if defendant believed that the victim, had she remained competent, would have continued the pattern of gifts, this would not have entitled him to unilaterally take her money after she was no longer capable of choosing to give it away. There was no impairment of defendant's right to present a defense, since the evidence he sought to introduce did not support any valid defense.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2100 The People of the State of New York, Respondent, Ind. 1883/04, 5513/04

-against-

Hamed Doumbia, etc., Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Hilary Hassler of counsel), for respondent.

Judgments, Supreme Court, New York County (Bruce Allen, J.), rendered January 11, 2005, convicting defendant, upon his pleas of guilty, of criminal sale of a controlled substance in the fourth degree and criminal possession of a controlled substance in the third degree, and sentencing him to concurrent terms of 1 to 3 years, unanimously affirmed.

Defendant's unpreserved challenges to the validity of his pleas do not come within the narrow exception to the preservation requirement (*see People v Toxey*, 86 NY2d 725 [1995]; *People v Lopez*, 71 NY2d 662 [1988]), and we decline to review them in the interest of justice. Were we to review these claims, we would find that since defendant expressly stated that he spoke and understood English at the first plea proceeding, and indeed

demonstrated that fact, there was no reason to provide an interpreter at any of the plea and sentencing proceedings, even though the court provided an interpreter at defendant's request at the second plea proceeding (*see People v Montano*, 25 AD3d 323 [2006], *lv denied* 6 NY3d 851 [2006]). The record also refutes defendant's assertion that the court misinformed him about the immigration consequences of his plea (*see* CPL 220.50[7]; *Zhang v United States*, __F3d__, 2007 WL 3071644, 2007 US App LEXIS 24731 [2d Cir October 23, 2007]).

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2101 The People of the State of New York, Ind. 448/06
Appellant,

-against-

Darling Feliz,
Defendant-Respondent.

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

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

Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about June 26, 2006, which granted defendant's motion to suppress physical evidence and statements, unanimously reversed, on the law, the motion denied, and the matter remanded for further proceedings.

In a crime-prone area at night, police officers saw defendant running and repeatedly adjusting what appeared to be a large hard object at his waistband, suggestive of a firearm. These observations justified, at least, a common-law inquiry (*see e.g. Matter of Jamaal C.,* 19 AD3d 144, 145 [2005]), and the record does not support the hearing court's conclusion that only a request for information would have been permissible. Defendant's ensuing flight escalated the encounter and provided

reasonable suspicion of criminality justifying pursuit (*see People v Pines*, 281 AD2d 311 [2001], *affd* 99 NY2d 525[2002]). Therefore, the weapon that defendant discarded in the course of his flight, and his post-arrest statements, were lawfully obtained.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2103 The People of the State of New York, Ind. 7734/02
Respondent,

-against-

Rafael Figueroa,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered on or about March 5, 2004, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order, with notice of entry.

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

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2105 Kymberly Higgins-Barber, Plaintiff-Respondent, Index 109926/04 591279/04

-against-

Raffles International, et al.,
Defendants-Appellants.

[And a Third-Party Action]

Cartafalsa, Slattery, Turpin & Lenoff, New York (Raymond F. Slattery of counsel), for appellants.

The Cochran Firm, New York (Joseph S. Rosato of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered April 12, 2007, which, in an action for personal injuries sustained when a glass shower door fell on plaintiff while she was taking a shower at defendants' hotel, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

We reject defendants' argument that they cannot be held liable unless they had notice of the alleged defect in the shower door in plaintiff's particular room (citing, inter alia, *Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]). Even if defendants never received any complaints about this particular shower door, or regularly inspected this particular shower door,

as they assertedly did the shower doors in all of the rooms, and found no problems, issues of fact bearing on notice would exist, including the adequacy of defendants' inspection and maintenance procedures. Such issues are raised by defendants' acknowledgment that there had been at least 22 similar incidents involving identical shower doors in other rooms going back 10 years to the installation of identical doors in all of the hotel's rooms in the mid-1990s (*cf. Bido v 876-882 Realty, LLC*, 41 AD3d 311 [2007]), and by defendants' failure to adduce evidence in their initial moving papers as to the proper inspection and maintenance procedures for hotel shower doors (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Defendants' argument that the prior incidents are statistically insignificant given that the hotel has over 500 rooms is effectively countered not only by the affidavit of plaintiff's expert, who identified specific defects in the assembly of an identical shower door assertedly indicative of a dangerous design or installation defect warranting replacement, but also by the testimony of their own witness that beginning 10 months before plaintiff's accident, the hotel had begun replacing all the shower doors with shower curtains. Defendants' argument that there is no proximate cause between the alleged defects in the shower door and plaintiff's accident was

improperly raised for the first time in their reply papers before the motion court, and we decline to consider it (*see Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1992]).

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2106 The People of the State of New York, Ind. 535/06
Respondent,

-against-

Marcos Galarza,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Charles Solomon, J., at plea and sentence), rendered on or about March 13, 2007, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order, with notice of entry.

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

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2107-
2108 The People of the State of New York, Ind. 226/04
Respondent, 1737/05

-against-

Joyce Ramos,
Defendant-Appellant.

____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

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Judgments, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about July 15, 2005, unanimously affirmed. No opinion. Order filed.

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

2109N Marisol De Luna-Cole, et al., Index 110997/04
Plaintiffs-Respondents,

-against-

Lawrence Fink, et al.,
Defendants-Appellants.

____

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellants.

O'Hare Parnagian LLP, New York (Michael G. Zarocostas of counsel), for respondents.

____

Order, Supreme Court, New York County (Louis B. York, J.), entered April 1, 2007, which granted plaintiff's motion for summary judgment on the issue of liability, and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was assaulted during business hours, at a time when the building's lone doorman had left his post in the lobby, as was typical, to attend to other tasks and to take his lunch. The building's front door had been left open and the internal stairwell and elevator unlocked, as was also typical, while the doorman was away from his post. A video camera in the lobby operated only during non-business hours. In the several years preceding the assault on plaintiff, the area in which the

building is located experienced a high rate of crime, and multiple crimes, including theft, burglary and assault, and armed robbery, had been committed in the building. Only seven months earlier, defendants had posted a notice to their tenants in a neighboring building addressing security concerns in light of recent tenant complaints. Contrary to defendants' contention, the evidence establishes that "criminal conduct by a third person" was foreseeable and that defendants failed in their common-law duty to take "minimal precautions" to protect tenants therefrom (*see Mason v U.E.S.S. Leasing Corp.*, 96 NY2d 875, 878 [2001]).

The evidence further establishes that the perpetrator was an intruder who gained access to the premises through a negligently maintained entrance (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 551-552 [1998]). Plaintiff, a five-year tenant of the building, did not recognize her assailant, who had made no effort to conceal his identity, and no one in the building recognized the perpetrator either from the posted police sketch based on plaintiff's description or from defendants' own posted notice,

which also provided a detailed description. The building's unlocked and unmonitored front door was its only accessible, unalarmed entrance point.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2110
[M-5152] In re Francisco Martinez, Index 16248C/05
Petitioner,

-against-

Hon. Ceasar Cirigliano, JSC, et al.,
Respondents.

____

Alperin & Hufjay, Mount Vernon (Lewis E. Alperin of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Ceasar Cirigliano, respondent.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for Robert T. Johnson, respondent.

____

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

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

2135 The People of the State of New York, Ind. 6348/04
Respondent,

-against-

Leon Frierson,
Defendant-Appellant.

____

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

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered August 19, 2005, convicting defendant, after a nonjury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4½ to 9 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the court's determinations concerning credibility (*see*

People v Bleakley, 69 NY2d 490, 495 [1987]). The police account of the transaction was not implausible.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2136 The People of the State of New York, Ind. 619/05
Respondent,

-against-

Erik J. Drew, etc.,
Defendant-Appellant.

____

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

Robert M. Morgenthau, District Attorney, New York (Gina Mignola of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Brenda Soloff, J.), rendered January 26, 2006, convicting defendant, upon his plea of guilty, of criminal mischief in the third degree, and sentencing him to a term of 1 year, unanimously affirmed.

Defendant violated his plea agreement by being convicted of additional crimes while awaiting sentencing. He did not preserve his present argument that the court violated his due process rights by imposing an enhanced sentence, based on the breach of the agreement, without offering him the opportunity to withdraw his plea (*see e.g. People v Almestica*, 43 AD3d 797 [2007], and we decline to review it in the interest of justice. Were we to

review this claim, we would find it without merit. The court made clear to defendant the consequences of violating his plea agreement.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2137 AFCO Credit Corporation, Index 602041/04
Plaintiff-Respondent,

-against-

Zurich American Insurance Company,
Defendant-Appellant.

____

Scarola Ellis LLP, New York (Richard J.J. Scarola of counsel), for appellant.

Steven G. Legum, Mineola, for respondent.

____

Judgment, Supreme Court, New York County (Helen E. Freedman, J.), entered July 25, 2006, awarding plaintiff the principal amount of $338,472.06, unanimously reversed, on the law, without costs, plaintiff's motion for summary judgment denied and the matter remanded for further proceedings.

Plaintiff's assignor, a premium finance company, gave defendant insurance company proper notice of the premium financing arrangement between itself and defendant's insured. Defendant's failure to acknowledge the notice is of no moment, especially considering that it does not deny having received the notice. Furthermore, because plaintiff's assignor cancelled the relevant policies pursuant to the premium finance agreements before defendant was able to cancel them on its own, California

Insurance Code § 673(j) does not provide a defense to plaintiff's claim to the unearned premiums under the cancelled policies (*see Pacific Bus. Connections v St. Paul Surplus Lines Ins. Co.*, 150 Cal App 4th 517, 524; 58 Cal Rptr 3d 450, 454 [2007]).

However, summary judgment should not have been granted to plaintiff because an issue of fact exists with respect to whether defendant's insured owes monies payable into a "loss reimbursement fund," which debt would entitle defendant to an offset against the unearned premiums plaintiff seeks to recover. Defendant clearly raised this defense in Supreme Court, and, contrary to that court's interpretation of defendant's position, did not claim that the offset was related to premiums still owed by the insured for prior years' policies.

Finally, we note that defendant failed to preserve its argument that plaintiff lacks standing, and we decline to reach this issue.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2138 The People of the State of New York, Ind. 2869/05
Respondent,

-against-

Ray Rivera,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Dana Poole of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about August 3, 2006, unanimously affirmed. No opinion. Order filed.

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

2139-
2140 The People of the State of New York, Ind. 35/05
Respondent,

-against-

Gregory Robinson,
Defendant-Appellant.

____

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

____

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about April 12, 2006, which denied defendant's motion to be resentenced under the Drug Reform Law Act of 2005, unanimously affirmed.

In denying resentencing, the court complied with its procedural obligations. Defendant was brought before the court and given an opportunity to be heard, which is all that the statute requires (*see* L 2005, ch 643, §1; *People v Figueroa*, 21 AD3d 337, 339 [2005], *lv denied* 6 NY3d 753 [2005]). Furthermore, defense counsel had made written submissions in support of the motion, and there was no dispute as to the critical facts that

led the court to its conclusion that substantial justice dictated denial of resentencing (*see People v Burgos*, __AD3d__, 843 NYS2d 59 [2007]).

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2141-
2142-
2143-
2143A Wilmington Trust Company, etc., et al., Index 601192/03
Plaintiffs-Respondents,

-against-

Michael L. Strauss,
Defendant-Appellant,
- - - - -
Michael L. Strauss, etc., et al.,
Counterclaim-Plaintiffs-Appellants,

-against-

Bay View Franchise Mortgage
Acceptance Company, et al.,
Counterclaim-Defendants-Respondents,

FMAC Loan Receivable Trust 1997-C, et al.,
Counterclaim Defendants.

____

Orans, Elsen & Lupert LLP, New York (Leslie A. Lupert of counsel), for appellant.

Arnold & Porter LLP, New York (H. Peter Haveles, Jr. of counsel), for Wilmington Trust Company and Capmark Finance Inc., respondents.

Dewey & LeBoeuf LLP, New York (John F. Collins of counsel), for Bay View Franchise Mortgage Acceptance Company, Franchise Mortgage Acceptance Company and Joseph Wolnick, respondents.

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Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered February 1, 2007, dismissing defendant/counterclaim-plaintiff Michael L. Strauss's counterclaims against counterclaim

defendants Bay View Franchise Mortgage Acceptance Company (Bay View) and Joseph Wolnick, pursuant to an order, same court and Justice, entered October 31, 2006, which, to the extent appealed from as limited by the brief, granted Bay View and Wolnick's motion for summary judgment dismissing the counterclaims against them, and granted the motion of plaintiffs/counterclaim-defendants Wilmington Trust Company and Capmark Finance Inc. for summary judgment on the issue of liability under the second guaranty and to dismiss the counterclaims against them, unanimously affirmed, with costs. Appeal from the order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Judgment, same court and Justice, entered May 22, 2007, awarding plaintiffs judgment in the amount of $1,800,000, plus prejudgment interest, pursuant to an order, same court and Justice, entered May 4, 2007, which, to the extent appealed from as limited by the brief, directed that prejudgment interest be included in the judgment to be entered in plaintiffs' favor on the claim relating to the second guaranty, unanimously affirmed, with costs. Appeal from the order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

At issue are certain provisions of a loan restructuring

agreement (LRA) entered into between defendant/counterclaim-plaintiff Michael L. Strauss, the majority owner and director of counterclaim plaintiffs The Westwind Companies (collectively Westwind), which operated Burger King franchises, and, inter alia, counterclaim defendant Bay View, as servicer of the loan. Pursuant to the LRA, Bay View agreed, inter alia, to reduce the outstanding principal of a prior loan and to make a loan to Westwind in the amount of $2,600,000. The prior loan had been assigned to the trust plaintiffs as part of a securitization transaction. In connection with the LRA, Strauss also executed an Amended and Restated Guaranty Agreement, known as the Second Guaranty, pursuant to which he guaranteed repayment of $1,800,000 of the loan made on behalf of the trusts.

The original loan agreement required that all Westwind’s proceeds from sales and other receipts and revenues ultimately be deposited into a “concentration account” consisting of various segregated sub-accounts, and that the funds be distributed first to the sub-account for the payment of all amounts due the bank and second to the sub-account for the payment of all amounts due the lender (plaintiffs), only after which the remaining amounts would be transferred to the operating sub-account and made available to Westwind. The LRA reversed this order of priority

and required Westwind to pay its “Approved Budgeted Expenses,” which included the fees due under the franchise agreements with Burger King, *before* transferring funds to a “Payment Account” from which it would pay the parties identified in section 5.3, a “waterfall” provision that listed the parties in descending order of priority. However, after the execution of the LRA, Westwind continued to use a concentration account instead of the payment account, and plaintiffs continued to be paid before Burger King was paid.

When Westwind was unable to meet its obligations to Burger King, its assets were sold, and plaintiffs received $3 million toward the repayment of the loans. They commenced this action to recover, inter alia, on the $1,800,000 guaranty executed by Strauss. Strauss counterclaimed against the trusts and their servicer, Capmark, formerly known as GMAC Commercial Mortgage Corporation (GMAC), Bay View and Wolnick, a member of both Bay View’s and Westwind’s boards of directors, for, inter alia, breach of contract based on GMAC’s failure to pay Burger King before plaintiffs, and breach of fiduciary duty, and sought a judgment declaring that the original guaranty and the Second Guaranty were invalid and unenforceable.

Based on the unambiguous provisions of the LRA, the court

properly determined that plaintiffs and Bay View did not breach the agreement by failing to direct the bank to release the funds to pay Burger King. Pursuant to section 5.1(b), it was the responsibility of Westwind, not of plaintiffs or of Bay View, to pay Burger King. Pursuant to section 5.3, after Westwind's funds were transferred, the trusts had the absolute right to accept and apply these funds for repayment of Westwind's debts to them, without regard to whether Westwind had paid Burger King. Indeed, in transferring funds to the concentration account, Westwind implicitly represented that the funds were "net of budgeted expenses," including payments to Burger King.

Contrary to Strauss's contention that plaintiffs also breached the LRA by preventing Westwind from closing money-losing stores, section 10.2(c) of the LRA required Westwind to obtain GMAC's permission to close stores and provided that the decision rested in GMAC's sole discretion (*see State St. Bank & Trust Co. v Inversiones Errazuriz Limitada*, 374 F3d 158, 170 [2d Cir. 2004], *cert denied* 543 US 1177 [2005]). In any event, the court properly determined that GMAC did not improvidently exercise its discretion in refusing permission, particularly because the LRA also required Westwind to provide substitute collateral in connection with any restaurant closing and Westwind neither

alleged nor submitted evidence that it had offered to provide substitute collateral. Further, Strauss testified that Westwind could not afford to pay the costs of closing restaurants.

Strauss contends that since the $3 million plaintiffs received from the bankruptcy sale of Westwind's assets was more than his $1.8 million liability under the Second Guaranty, they should have applied the proceeds against the Second Guaranty, reducing his liability thereunder to zero, pursuant to the "waterfall" provision of the LRA. He concedes that the "waterfall" provision ceased to govern once an event of default occurred and the restructured notes were declared due and payable pursuant to section 12.2 but argues that nevertheless it should govern because the event of default was improperly caused by GMAC. We reject the argument that GMAC improperly caused the event of default.

The court properly dismissed the counterclaims against Wolnick since the record fails to support the contention that Wolnick breached a fiduciary duty or a duty of loyalty.

The court properly found that the Second Guaranty did not preclude an award of interest.

We have considered Strauss’ remaining contentions and find them without merit.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2144-
2144A-
2144B In re Justin Lemont R., and Others,

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

Sharon R.,
Respondent-Appellant,

Coalition for Hispanic Family Services,
Petitioner-Respondent.

____

Geoffrey P. Berman, New York, for appellant.

Law Offices of Raymond L. Colon, New York (Raymond L. Colon of counsel), for respondent.

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

____

Orders of disposition, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about June 30, 2006, which, to the extent appealed from, upon findings of permanent neglect, terminated respondent mother’s parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children’s Services for the purpose of adoption, unanimously affirmed, without costs.

The findings of permanent neglect were supported by clear

and convincing evidence (Social Services Law § 384-b[7][a]). The agency made the requisite diligent efforts, first by encouraging respondent to attend drug and parenting skills programs. Despite the diligent efforts of the agency, respondent failed to plan for her children's future, as the plan she devised was that of the children indefinitely remaining in foster care until her release from prison, which was not feasible *(see Matter of Shawn O.*, 19 AD3d 238, 239 [2005]; *Matter of Love Russell J.,* 7 AD3d 799, 800-801 [2004]).

The evidence at the dispositional hearing was preponderant that the best interests of the children would be served by terminating respondent’s parental rights so as to facilitate the children’s adoption by their maternal grandmother with whom they have lived for a substantial portion of their lives, have a very close bond and enjoy a positive relationship (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Daquan D.*, 18 AD3d 363 [2005]).

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2146 The People of the State of New York, Ind. 2260/06
Respondent,

-against-

Alexandra Krasnovsky,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered July 12, 2006, convicting defendant, upon her plea of guilty, of criminal sale of a controlled substance in the fourth degree, and sentencing her, as a second drug felony offender, to a term of 3½ years, unanimously affirmed.

Defendant argues that the sentencing court deprived her of effective assistance of counsel when it denied her attorney's request for an adjournment in order to permit him to further prepare for sentencing. However, this claim is unreviewable on direct appeal because the present record does not show what additional sentencing arguments counsel might have made had he received an adjournment (*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]). Counsel had represented defendant at her guilty plea, and attended the trial at which she was a cooperating prosecution witness, was knowledgeable about the case and made appropriate sentencing arguments (*compare e.g. People v Jones*, 15 AD3d 208 [2005]). The court based its sentence, which was considerably less than defendant's exposure under the plea agreement, on facts with which the court was thoroughly familiar, having presided over the related proceeding. The court properly exercised its discretion in denying the request for an adjournment, and there is no reason to believe that counsel could have persuaded the court to impose a more lenient sentence if he had received more time to prepare.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2147-
2147A Heinrich Wilcke, et al., Index 603034/05
Plaintiffs-Appellants,

-against-

Seaport Lofts, LLC, et al.,
Defendants,

Donald MacLeod, et al.,
Defendants-Respondents.

____

Sonnenschein Sherman & Deutsch LLP, New York (Robert N. Fass of counsel), for appellants.

Ruskin Moscou Faltischek, P.C., Uniondale (Joseph R. Harbeson of counsel), for Donald MacLeod and John Marshman, respondents.

Thomas P. Malone, New York, for Commerce Bank, N.A., respondent.

____

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered January 22, 2007, dismissing the complaint in its entirety, unanimously affirmed, with costs. Appeal from order, same court and J.H.O., entered December 18, 2006, which granted defendants' motion and cross motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

While the vote of the interested managers (who together owned 40.9% of the membership interests) was necessary for the approval of the transaction, making it incumbent upon the

interested parties to establish affirmatively that the transaction was fair and reasonable to the limited liability company at the time it was approved (*see* Limited Liability Company Law § 411[b]), the record evidence demonstrates that the transaction was indeed fair and reasonable. Independent appraisers valued the property at $4.4 and $4.8 million. These appraisers had access to relevant, objective information concerning the property (such as rent rolls), assumed a marketing period of nine months, and employed both a sales comparison and an income capitalization approach. Plaintiffs assert that the appraisals cannot be relied upon because they were obtained by the company's managers, citing *Beck v Manufacturers Hanover Trust Co.*, 218 AD2d 1 [1995]). This case differs from *Beck*, however, insofar as there was independent verification of the information relied upon, and no record evidence of the undervaluation of the property. Plaintiffs assert that a much higher value for the property could have been obtained had it been sold to a developer for conversion to condominiums. The Manzari affidavit, upon which plaintiffs rely, was, as the J.H.O. found, devoid of any factual support. In any event, the Miller Cicero appraisal did assume that the highest and best use for the property was condominium conversion.

The values of the bids submitted by plaintiffs, who themselves participated in the bidding process, confirmed that the sale price to Seaport was fair and reasonable. To the extent plaintiffs contend there was an implied duty imposed by the operating agreement that the property would not be sold except for fair market value, the evidence established that the price paid by Seaport was fair and reasonable, and equal to or greater than the appraised value.

In *Tzolis v Wolff* (39 AD3d 138 [2007], *lv granted* 2007 NY App Div LEXIS 6760), this Court recognized that members of limited liability companies have standing to bring a derivative action. Thus, the court erred to the extent it held that members of a limited liability company have no standing to bring a derivative action on behalf of the company. Nevertheless, the first and second causes of action necessarily fail since defendants did not breach either the operating agreement or their fiduciary duties.

Finally, as the judicial hearing officer noted with respect to the fourth cause of action, the dissolution of Voyager was properly authorized at the July 25, 2005 special meeting. In any event, plaintiffs have a remedy in case the liquidation process goes awry. The court dismissed plaintiffs' claim that they had

not been paid the proceeds from the sale, without prejudice to a new action if plaintiffs failed to receive the appropriate distributions.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2148 The People of the State of New York, Ind. 1087/05
Respondent,

-against-

David Jenkins,
Defendant-Appellant.

____

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

Robert M. Morgenthau, District Attorney, New York (Jessica Slutsky of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 17, 2006, convicting defendant, upon his plea of guilty, of sodomy in the first degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously modified, on the law, to the extent of deleting the provision for post-release supervision, and otherwise affirmed.

As the People concede, since defendant committed this crime prior to the effective date of Penal Law § 70.45, which provides for post-release supervision, his sentence is unlawful to the extent indicated. The court's allegedly premature designation of defendant as a "predicate" sex offender, was mere surplusage of no legal

significance, and defendant’s arguments on this issue are without merit. We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2149 The People of the State of New York, Ind. 300/02
Respondent,

-against-

Nathaniel Leary,
Defendant-Appellant.

____

Robert S. Dean, Center for Appellate Division, New York (Carl S. Kaplan of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered April 16, 2003, convicting defendant, after a jury trial, of two counts of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 4½ to 9 years, unanimously affirmed.

The court properly granted the People's reverse-Batson application (*Batson v Kentucky*, 476 US 79 [1986]; *People v Kern*, 75 NY2d 638 [1990], *cert denied* 498 US 824 [1990]). The record supports the court's express and implied findings (*see People v Payne*, 88 NY2d 172, 185 [1996]) that the race-neutral reasons provided by defense counsel for the peremptory challenges at issue were pretextual. These findings, based primarily on the

court’s assessment of counsel’s credibility, are entitled to great deference (*see People v Hernandez*, 75 NY2d 350, 356 [1990] *affd* 500 US 352 [1990]). With regard to all of the challenges at issue, counsel’s explanations were “outlandish or entirely evanescent” (*People v Payne*, 88 NY2d at 183). To the extent that defendant is challenging the procedures by which the court disposed of the application, such claim is unpreserved (*see People v Jenkins*, 302 AD2d 247, 248 [2003], *lv denied* 100 NY2d 583 [2003]), and we decline to review it in the interest of justice. Were we to review this claim, we would reject it (*see People v Hameed*, 88 NY2d 232, 237 [1996], *cert denied* 519 US 1065 [1997]; *People v Payne*, 88 NY2d at 184).

The court properly exercised its discretion in denying defendant’s mistrial motion made after an officer testified about possible uncharged sales that the court had excluded. The evidence was not so prejudicial as to deprive defendant of a fair trial. Since defendant abandoned his request for a limiting instruction, which the court had agreed but omitted to deliver, defendant’s present claim of error in that regard is unpreserved (*see People v Baro*, 236 AD2d 307 [1997], *lv denied* 89 NY2d 1032, [1997]), and we decline to review it in the interest of justice.

Were we to review this claim, we would find any error to be harmless.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2150 The People of the State of New York, Ind. 1158/03
Respondent,

-against-

Eugenio Severino,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

Order of resentence, Supreme Court, New York County (Micki A. Scherer, J.), rendered on or about March 27, 2006, unanimously affirmed. No opinion. Order filed.

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

2152 The People of the State of New York, Ind. 3731/05
Respondent,

-against-

Gregory Seth,
Defendant-Appellant.

____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jung Park of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about June 7, 2006, unanimously affirmed. No opinion. Order filed.

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

2153 The People of the State of New York, Ind. 4157/04
Respondent,

-against-

Frederick Sample,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 6, 2005, convicting defendant, after a jury trial, of grand larceny in the third degree, and sentenced him, as a second felony offender, to a term of 2¾ to 5½ years, with restitution, including a mandatory surcharge, in the total amount of $45,150, unanimously affirmed.

The portion of the prosecutor's summation to which defendant objected as "speculation" constituted a fair inference that could be drawn from the record (*see e.g. People v Taylor*, 249 AD2d 33 [1998]). Defendant's remaining claims of prosecutorial misconduct during cross-examination and summation are unpreserved and we decline to review them in the interest of justice. Were we to review these claims, 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]).

The court's limited questioning of defendant during his testimony did not deprive him of a fair trial. Although some of the inquiries could be viewed as unnecessary or irrelevant, the court's questions did not assist the People in proving their case or benefit them in any fashion, nor were the questions particularly hostile toward defendant's case (*see People v Melendez*, 31 AD3d 186, 197 [2006], *lv denied* 7 NY3d 927 [2006]). We conclude that the jury was not "prevented from arriving at an impartial judgment on the merits" (*People v Moulton*, 43 NY2d 944, 945 [1978]).

The record does not establish that defendant's sentence was based on any improper criteria, and we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2154 The People of the State of New York, Ind. 7158/04
Respondent,

-against-

Lemont Thomas,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Arlene Goldberg, J.), rendered on or about June 9, 2006, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order, with notice of entry.

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

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

ENTERED: NOVEMBER 20, 2007

____
CLERK

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

2155N Fernella George, et al., Index 6320/04
Plaintiffs-Appellants,

-against-

Grand Bay Associates Enterprise
Incorporated, et al.,
Defendants,

Additional Defendants added by the lower court
Marco Mendez, et al.,
Intervenors-Respondents.

____

G. Wesley Simpson, P.C., Brooklyn (G. Wesley Simpson of counsel), for appellants.

Solomon & Siris, P.C., Uniondale (Michael J. Siris of counsel), for respondents.

____

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered on or about May 4, 2006, which, insofar as appealed from as limited by the briefs, granted intervenors' motion to intervene pursuant to CPLR 1012(a)(3) and to dismiss the complaint pursuant to CPLR 3211(a)(1) and CPLR 5523, and granted the cross motion of defendant Grand Bay Associates Enterprise Inc. (Grand Bay) to the extent that plaintiffs were directed to pay $2,263 per month from April 2004 through such time as plaintiffs remain in possession of the subject property to be divided on pro rata basis between Grand Bay and intervenors,

unanimously affirmed, without costs.

The motion to intervene was properly granted in this action where plaintiffs seek cancellation and reformation of a deed to property purchased by intervenors. As purchasers of the subject property, intervenors had a real and substantial interest in the outcome of the litigation warranting their intervention (*see* CPLR 1012[a][3]; *Greenpoint Sav. Bank v McMann Enters.*, 214 AD2d 647, 648 [1995]). Additionally, the court properly dismissed the complaint for failure to state a cause of action since the action was barred by CPLR 5523. The record evidence establishes that intervenors were good-faith purchasers of the subject property and entitled to the protections afforded by CPLR 5523. Intervenors paid valuable consideration for the property and justifiably relied on an order cancelling plaintiffs’ notice of pendency, even though it had been entered on default (*Da Silva v Musso*, 76 NY2d 436 [1990]; *Aubrey Equities v Goldberg*, 247 AD2d 253 [1998], *lv denied* 92 NY2d 802 [1998]). Although plaintiffs successfully moved to vacate the default, intervenors had purchased the property prior to that time. However, the dismissal of the complaint was without prejudice to plaintiffs commencing an appropriate action against the initially named

defendants for money damages (*Da Silva v Musso*, 76 NY2d at 444; CPLR 5523).

Directing plaintiffs to pay Grand Bay and intervenors $2,263 per month from April 2004 through such time as plaintiffs remained in possession of the property was appropriate and in accordance with a prior court order with which plaintiffs did not comply. The amount represented the mortgage payments for the property and was to be divided on a pro rata basis between Grand Bay and intervenors.

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

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2156N Calderock Joint Ventures, L.P., Index 8055/94
Plaintiff-Respondent,

-against-

Bethlehem Mitiku, et al.,
Defendants,

Benyam Mitiku,
Defendant-Appellant.

____

Orenstein & Orenstein, L.L.C., New York (Keith S. Orenstein of counsel), for appellant.

Vlock & Associates, P.C., New York (Steven P. Giordano of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered October 17, 2006, which, inter alia, denied defendant Binyam Mitiku's motion to vacate a deficiency judgment, unanimously affirmed, without costs.

Twelve years after failing to answer or appear in the underlying mortgage foreclosure action, which resulted in a deficiency judgment and a wage garnishment order against him, appellant made a motion under CPLR 5015(a)(4) to vacate the judgment, alleging that service of process of the 1994 summons and complaint had not been properly effectuated in accordance with the "nail and mail" provision of CPLR 308(4). Finding the

record “replete with evidence of [appellant’s] lack of good faith and failure to timely assert his rights,” the court declined to exercise its discretion to vacate the judgment. We affirm, but for different reasons.

A court’s discretionary power under CPLR 5015(a) to relieve a party from a judgment should not be exercised where “the moving party has demonstrated a lack of good faith, or been dilatory in asserting its rights” (*Greenwich Sav. Bank v JAJ Carpet Mart*, 126 AD2d 451, 452 [1987]). Appellant argues that where relief is sought under CPLR 5015(a)(4) from a judgment that is void for lack of jurisdiction, there is no specified time limitation and no issue of discretion arises; a judgment or order granted in the absence of jurisdiction is a nullity that should be set aside unconditionally. Whatever the merit to this argument, such motion fails nonetheless because appellant has waived any objection to the court’s jurisdiction over him by making payments on the deficiency judgment under the wage garnishment order for

over a year before bringing this motion to vacate (*see Lomando v Duncan*, 257 AD2d 649 [1999]).

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2157N-
2157NA Larsen & Toubro Limited, Index 106534/02
Plaintiff-Respondent,

-against-

Millenium Management, Inc., et al.,
Defendants-Appellants.

Cardillo & Corbett, New York (James P. Rau of counsel), for appellants.

Watson, Farley & Williams (New York) LLP, New York (Neil A. Quartaro of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered April 17, 2006, which, inter alia, confirmed an arbitration award and directed that plaintiff recover against the individual defendants as guarantors of a promissory note, unanimously affirmed, with costs. Appeal from decision, same court and Justice, entered April 17, 2006, which granted plaintiff's motion to confirm the arbitration award and for summary judgment as against the individual defendants, unanimously dismissed, without costs.

Upon denying a motion to vacate or modify an arbitration

award, the court must confirm the award (CPLR 7511[e]; *Matter of American Fed. Group v AFG Partners*, 277 AD2d 119, 120 [2000], *lv denied* 96 NY2d 711 [2001]). The motion court's denial of the corporate defendants' motion to vacate the arbitration award against them was affirmed by this Court (37 AD3d 213 [2007]). There is no basis for the award not to be confirmed.

It is undisputed that the corporate defendants have not made the mandated payments under the promissory note and that the individual defendants are responsible for any unpaid amounts thereunder. Thus, the court properly granted plaintiff summary judgment against the individual defendants (*see Takeuchi v Silberman*, 41 AD3d 336, 336-337 [2007]).

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

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

ENTERED: NOVEMBER 20, 2007

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CLERK

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

2158
[M-5370] In re Saifuddin Abdus-Samad, Ind. 1661/07
Petitioner,

-against-

Hon. Micki Scherer, etc.,
Respondent.

____

Saifuddin Abdus-Samad, petitioner pro se.

Andrew M. Cuomo, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein of counsel), for respondent.

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

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

2159
[M-5362] In re Carol Sze Yue Kee, Index 300078/01
Petitioner,

-against-

Hon. Laura Visitación-Lewis, etc.,
Respondent.

____

Wong, Wong & Associates, P.C., New York (James Hong of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Susan Anspach of counsel), for respondent.

____

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

Tom, J.P., Andrias, Gonzalez, Malone, JJ.

894-
895 Matthew Serino, et al., Index 604396/02
Plaintiffs, 600150/05

-against-

Kenneth Lipper, et al.,
Defendants-Appellants-Respondents,

PricewaterhouseCoopers, LLP,
Defendant-Respondent-Appellant,

Abraham Biderman,
Defendant-Respondent

Lawrence Block, et al.,
Defendants.
\- - - - -
Lipper Holdings, LLC, et al.,
Plaintiffs-Respondents,

Kenneth Lipper,
Plaintiff-Appellant-Respondent,

-against-

PricewaterhouseCoopers LLP,
Defendant-Respondent-Appellant,

PricewaterhouseCoopers (Netherlands Antilles),
Defendant.

____

Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., New York (Jeremy H. Temkin of counsel), for Kenneth Lipper, appellant-respondent.

Bennett Jones LLP, New York (Alan P. Gardner of counsel), for Lipper Holdings, LLC and Lipper & Company, Inc., appellants-respondents/respondents.

Orrick, Herrington & Sutcliffe LLP, New York (J. Peter Coll, Jr. of counsel), for respondent-appellant.

Orans Elsen & Lupert LLP, New York (Ashley U. Menendez of counsel), for respondent.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered October 5, 2006, modified, on the law, to dismiss all of the Lipper parties' causes of action for malpractice in the *Holdings* action, and, in the *Serino* action, to reinstate the Lipper defendants' non-contribution cross claims against PwC and dismiss defendant Biderman's cross claim for fraud against PwC, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint in the *Holdings* action.

Opinion by Malone, J. All concur.

Order filed.

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

1223 The People of the State of New York, Ind. 6804/01
Respondent,

-against-

Dwight Giles,
Defendant-Appellant.

Susanna De La Pava, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Frank Glaser of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered March 24, 2003, affirmed.

Opinion by Sullivan, J. All concur except Saxe, J.P. and Kavanagh, J. who dissent in an Opinion by Kavanagh, J.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
NOVEMBER 20, 2007

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

M-5761X Louis-Dreyfus v Louis-Dreyfus

M-5763X Kass v Grais

M-5864X Gaguancela v Bernstein Management Corp. - Advanced Contracting Corp.

M-5865X Strategic Capital Partners, LLC v Ting

M-5866X Gangemella v Bowlmor Lane, doing business as Strike Long Island LLC

M-5867X Andujar v Yinan

M-5868X Collins v Riverbay Corporation

M-5869X Roman v The City of New York

M-5870X Frantz v DL Peterson Trust - Clerie

Appeals withdrawn.

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

M-5762 St. John v The City of New York - Consolidated Edison Company of New York, Inc.
(And a third-party action)

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

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

M-5755 Hui v East Broadway Mall, Inc.

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

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

M-5871X Benton v QRS II, Inc.

Appeal withdrawn. (See M-5872X, decided simultaneously herewith.)

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

M-5872X Benton v QRS II, Inc.

Appeal withdrawn. (See M-5871X, decided simultaneously herewith.)

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

M-5531 Esdaille v Whitehall Realty Company
(And another action)

Motion deemed withdrawn.

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

M-2660 Santiago v United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO

Motion deemed withdrawn, as indicated.

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

M-5675 In the Matter of The City of New York v Healthcare Subrogation Group, LLC

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

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

M-5136 Firestone v McKeown
M-5432

Time to perfect appeal enlarged to the March 2008 Term, as indicated (M-5136); dismissal of appeal denied, as indicated (M-5432).

Tom, J.P., Mazzarelli, Andrias, Williams, Buckley, JJ.

M-5571 People v Council, Marilyn Walwyn

Reargument denied.

Tom, J.P., Mazzarelli, Andrias, Williams, Buckley, JJ.

M-5572 People v Council, Roosevelt

Reargument denied.

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

M-5192 Hersch v DeWitt Stern Group, Inc.

Reargument or other relief denied. (See M-5396, decided simultaneously herewith.)

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

M-5396 Hersch v DeWitt Stern Group, Inc.

Leave to appeal to the Court of Appeals denied. (See M-5192, decided simultaneously herewith.)

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

M-5602 Ostro v Ostro

Stay denied.

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

M-5335 In the Matter of B., Perla - The Directors of the Coalition for Hispanic Family Services

Appeals adjourned to the January 2008 Term. Clerk directed to calendar appeals for hearing together in said Term.

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

M-5037 Leslie Dick Worldwide, Ltd. v Macklowe Properties, Inc.

Appeals consolidated; notices of appeals deemed corrected; time to perfect same enlarged to the March 2008 Term, as indicated.

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

M-4973 People v Thomas, Donnell, also known as Rodriguez, Raymond

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

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

M-4963 People v Nieves, Albert

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

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

M-5221 People v Padilla, Richard

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

Tom, J.P., Sullivan, Williams, Buckley, Malone, JJ.

M-3888 Yang v Chin

Reargument or other relief denied.

Mazzarelli, J.P., Andrias, Saxe, Sweeny, Malone, JJ.

M-6888 People ex rel. Clinton, Darrell v Warden
M-5207

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

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

M-5187 People v Alexander, Jean M., also known as Alexandre, Jean M.

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

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

M-5188 People v Cutter, Cary X.

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

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

M-5190 People v Hansen, Eduardo

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

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

M-4692 In the Matter of B., Karen; B., Shakkia N. - Family
M-4693 Support Systems Unlimited, Inc.

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

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

M-5222 Carrol v Initial Contract Services, Inc.

Appeal held in abeyance and matter remanded to Supreme Court, New York County, as indicated.

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

M-5454 People v Sunter, Male

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

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

M-5280 People v Ramirez, Gonzalo, also known as Ramirez, Luis Gonzalo

Appeal deemed withdrawn.

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

M-5279 People v Sierra, Cesar

Appeal deemed withdrawn.

Andrias, J.P., Saxe, Williams, Gonzalez, Kavanagh, JJ.

M-3154 Goonewardena v Hunter College

Reargument or other relief denied.

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

M-5712 Cheslow v Huttner

Stay denied.

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

M-5630 In the Matter of N., Daquan Darnell; N., Myles - Administration for Children's Services

Appeal as to Daquan Darnell N. withdrawn, as indicated; appeal with respect to Myles N., remains extant, said appeal having been perfected and calendared for hearing in January 2008 Term of Court.

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

M-4413 Foster v Kovner

Reargument or other relief denied.

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

M-5235 Tam v Long Island College Hospital

Appeal withdrawn.

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

M-5317 People v Santos, Diogenes

Appeal deemed withdrawn.

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

M-5289 In the Matter of P., Maiea — The Administration for Children's Services

Leave to respond to appeal as a poor person granted, as indicated; assigned counsel directed to file non-respondent father's brief for the March 2008 Term, to which Term appeal adjourned, as indicated.

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

M-4348 People v Pacheco, Rudy

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

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

M-4411 In the Matter of G., Mildred S. v G., Mark

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

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

M-5315 In the Matter of J., Baby Girl, also known as J., Pathjrie, also known as J., Pjetrit — Lutheral Social Services of Metropolitan New York, Inc.

Time to perfect appeal enlarged to the March 2008 Term.

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

M-6308 People v DiMaria, James

Writ of error coram nobis and other relief denied.

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

M-3565 People v Garcia, Victor

Reargument denied.

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

M-5386 People v Brown, Wendell

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

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

M-3399 In the Matter of D., Chelsea —
M-4400 D., Terry v Y., Julia, also known as Y., Judy

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

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

M-5553 The Vanderbilt Group, LLC v The Dormitory Authority of the State of New York

Time to perfect appeal enlarged to the April 2008 Term.

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

M-5530 Collela v Amchem Products, Inc. — DaimlerChrysler Corporation
(And another action)

Time to perfect appeal enlarged to the April 2008 Term.

Friedman, J.P., Marlow, Sweeny, Catterson, Malone, JJ.

M-3739 Giaccio v 179 Tenants Corp.

Reargument granted to the extent of recalling and vacating the decision and order of this Court entered on June 21, 2007 (Appeal No. 401) and issuing a new decision and order in clarification thereof. (See Appeal No. 401, decided simultaneously herewith.); leave to appeal to the Court of Appeals denied.

Friedman, J.P., Marlow, Sullivan, Sweeny, Catterson, JJ.

M-4959 Royal York Owners Corp. v Royal York Associates, L.P.
(And another action)

Leave to appeal to the Court of Appeals denied.

Marlow, J.P., Sullivan, Buckley, Catterson, McGuire, JJ.

M-4834 Muzferdyin v Mann

Reargument denied.

Lippman, P.J.

M-5328 People v Serrano, Angel

Leave to appeal to this Court denied.

Sweeny, J.

M-4986 People v Whitley, Darryl

Assignment of pro bono counsel denied, as indicated; leave to amend application granted and same adjourned to December 3, 2007, as indicated.

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

M-5311 In the Matter of Patrick Carmody,
a suspended attorney:

Application for reinstatement as an attorney and counselor-at-law in the State of New York granted only to the extent of referring this matter to a Hearing Panel for a report and recommendation, as indicated. 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-5629 John J. Cirigliano, admitted on 12-23-68,
at a Term of the Appellate Division,
First Department

Respondent reinstated as a retired attorney and counselor-at-law in the State of New York, effective the date hereof, as indicated. 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-5995 Andrew B. Anderson, III, admitted on 6-14-1983, 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.

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

M-4930 In the Matter of Morgan Kennedy (admitted as Morgan Kennedy III), an attorney and counselor-at-law:

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

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

M-2630 In the Matter of David J. Nuzzo (admitted as David James Nuzzo), an attorney and counselor-at-law:

Respondent suspended from the practice of law in the State of New York for a period of one year, effective December 20, 2007, and until further order of this Court. Opinion Per Curiam. All concur.

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

M-3349 In the Matter of Jerome E. Goldman
(admitted as Jerome Eugene Goldman),
an attorney and counselor-at-law:

Respondent's resignation accepted and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to June 25, 2007. Opinion Per Curiam. All concur.