SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 3, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Tom, Nardelli, Catterson, Moskowitz, JJ.

2892 James Kosavick, et al., Index 116685/05
Plaintiffs-Appellants,

-against-

Tishman Construction Corp.
of New York, et al.,
Defendants-Respondents.

Hach & Rose, LLP, New York (Philip S. Abate of counsel), for appellants.

Cascone & Kluepfel, LLP, Garden City (Kimberly A. Wolf of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 17, 2007, which denied plaintiffs' motion for partial summary judgment on the issue of liability under Labor Law § 240(1), reversed, on the law, without costs, the motion granted and the matter remanded for further proceedings.

It is uncontradicted that plaintiff, while performing demolition work, was injured when both he and the unsecured A-frame ladder he was standing on were suddenly struck by a section of pipe he had cut, causing him to fall. Plaintiff had not been provided with adequate safety devices that could be used at the location in question nor was anyone holding the ladder.

Plaintiff's claims encompass both a falling object and a fall from an elevation due to inadequate safety devices.

It is uncontested that plaintiff was struck by an unsecured pipe and that he then either fell from the ladder that he was standing on or the ladder itself failed. Addressing the latter scenario first, once a plaintiff makes a prima facie showing that the ladder he was using collapsed, there is a presumption that the ladder was an inadequate safety device (*Panek v County of Albany*, 99 NY2d 452, 458 [2003]). Similarly, his testimony that he was struck by the pipe constitutes a prima facie showing that the appropriate safety device was not used. The burden then shifts to defendant to establish that "there was no statutory violation and that plaintiff's own acts and omissions were the sole cause of the accident" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]).

We observe that this is not merely a negligence action, that the Labor Law and decisional authority impose a greater burden on the defendants, and that public policy protecting workers requires that the statutes in question be construed liberally to afford the appropriate protections to the worker.

Thus, to defeat summary judgment in this case based on violations of the Labor Law, defendant would necessarily have to establish that plaintiff "had adequate safety devices available; that he knew both that they were available and that he was

expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). The record fails to establish that there is an issue of material fact on several of the *Cahill* sole proximate cause factors.

Primarily, there is simply no evidence of record that plaintiff chose not to use an available safety device. Indeed, plaintiff's explanation for his failure to use a chain to secure the pipe prior to cutting through it for removal was that there was no place to attach the chain. At no point does Michael Martin, the president of plaintiff's employer, specifically state that plaintiff was told to use a chain to secure the pipe and that he had "no good reason not to do so" (*id.*). Furthermore, defendants point to no evidence of record that, like the plaintiffs in *Cahill* and *Blake*, plaintiff explicitly refused to use the available safety devices (see *Quattrocchi v F. J. Sciame Constr. Corp.*, 44 AD3d 377, 381-382 [2007]).

We reject the proposition posited by defendants, and accepted by the dissent, that generic statements of the availability of safety devices are sufficient to create an issue of fact that plaintiff was the sole proximate cause of his injury.

Plaintiff specifically testified that although he had used

the devices to secure pipes while he was cutting them, at this particular location "[t]here was no place to put a chain." The testimony of Martin, offered by defendant, simply does not controvert this. Martin testified that he did not know if plaintiff was instructed to use any specific safety device, or if safety devices were present at the location of the accident on the day in question. Furthermore, although Martin maintained that plaintiff should have "put up an anchor on the ceiling and tied off," he did not "know the exact spot" where the accident occurred. Martin offered only the conclusion that "[a]nyplace in a room is feasible to tie off" (emphasis added). Of course, Martin was referring to plaintiff anchoring his own safety line, not a chain fall securing the errant pipe. Thus, contrary to the view of the dissent, Martin could not say with any certainty that at the location of the accident, plaintiff either could have "tied off" or that the pipe could have been secured.

Furthermore, Martin was specifically asked if he instructed plaintiff to tie off at the location of the accident or if he knew anyone who directed plaintiff to tie off. He repeatedly responded either "no" or "I don't know." This testimony alone removes the case from the ranks of *Cahill* and *Blake*.

Finally, it is beyond cavil that the failure to properly secure a ladder so as to hold it steady and erect during its use

constitutes a violation of Labor Law § 240(1) *(see Montalvo v J. Petrocelli Constr., Inc.,* 8 AD3d 173, 174 [2004]); *Dasilva v A.J. Contr. Co.,* 262 AD2d 214 [1999].

All concur except Tom and Nardelli, JJ. who dissent in a memorandum by Nardelli, J. as follows:

NARDELLI, J. (dissenting)

I respectfully dissent and find that the motion court correctly determined that issues of fact exist as to whether plaintiff was the sole proximate cause of his injuries, thereby precluding partial summary judgment in his favor on his Labor Law § 240(1) claims.

Labor Law § 240(1) provides that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

It is settled that not every fall from a ladder gives rise to an award of damages to the injured party under Labor Law § 240(1) (*Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 50 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003]), and it is still necessary for a plaintiff to demonstrate that the statute was violated, and that the violation proximately caused his/her injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [2007]). Thus, where a plaintiff's own actions are the sole proximate cause of the

accident, liability under section 240(1) does not attach (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Cahill*, 4 NY3d at 39). Moreover, if adequate safety devices are made available to the worker, but the worker does not use or misuses them, there is no liability (*Robinson*, 6 NY3d at 554-555; *Tonaj v ABC Carpet Co.*, 43 AD3d 337, 338 [2007]).

In the matter at bar, plaintiff contends that he could not secure the section of pipe he was cutting because it was not feasible to use the safety devices in the area where he was working. In sharp contrast, Michael Martin, the president of Northeast Medical Services, plaintiff's employer, testified that safety equipment, including roustabouts,[1] chain blocks, rigging and safety harnesses, were available to plaintiff at the particular site where plaintiff was working. Martin further testified that he was familiar with the area in which plaintiff was cutting pipe and that the use of safety harnesses anywhere in that room was feasible. In addition, Martin stated that he had previously observed plaintiff utilizing the safety harnesses on that demolition project.

With regard to the majority, I cannot agree that Martin's inability to identify the "exact spot" in the room where the accident occurred is somehow pivotal, since "anyplace" in the

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[1]A roustabout was described by Martin as a device which is placed beneath pipe that is being cut in order to secure it so it does not slip or fall when it is being removed.

room would seem to encompass all of the exact spots. At the very least, it just raises an issue for the jury. Moreover, the majority's emphasis on Martin's statement that "[a]nyplace in a room is feasible to tie off" (emphasis added) is unavailing for, when that statement is viewed in the context of the questions being asked of Martin at that point in his deposition, it appears clear that the discussion is concerning the room where plaintiff was working. In any event, such perceived discrepancy is another issue for the trier of fact.

Accordingly, I find that an issue of fact exists as to whether plaintiff was provided with adequate safety devices and declined to use them, which actions, or lack thereof, were the sole proximate cause of his injuries. Moreover, I find the majority's reliance on *Montalvo v J. Petrocelli Constr., Inc.* (8 AD3d 173 [2004]) and *Dasilva v A.J. Contr. Co.* (262 AD2d 214 [1999]) to be misplaced, for in those cases it was specifically found that no safety devices were available, which is not the case herein. I would, therefore, affirm the order of the motion court.

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

ENTERED: APRIL 3, 2008

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3269-
3270 In re Na'Quana J.,

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

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

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

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about September 11, 2007, which adjudicated appellant a juvenile delinquent, upon her admission that she committed an act which, if committed by an adult, would constitute theft of services, and placed her with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent rather than a person in need of supervision (*see e.g. Matter of Rosemary R.*, 29 AD3d 309 [2006]; *Matter of Jade Q.*, 41 AD3d 327 [2007]), in view of her serious drug abuse, truancy problems, gang involvement, general

misbehavior and history of running away from home and from residential facilities.

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

ENTERED: APRIL 3, 2008

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3271 The People of the State of New York, Respondent, Ind. 2257/05

-against-

Chimar Bowman, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J. at suppression hearing; Edward J. McLaughlin, J. at plea and sentence), rendered January 5, 2006, convicting defendant of robbery in the second and third degrees, attempted robbery in the second degree and sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, respectively, unanimously affirmed.

The hearing court properly denied defense counsel's request for a new CPL 730 exam, which was based on defendant's inappropriate behavior at the hearing. Likewise, there was no need for the plea court to make any further inquiry into defendant's mental condition. Nothing in the record casts doubt on defendant's mental competency (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878, 881 [1995]), and

there is no indication that anything about defendant's mental state impaired the voluntariness of his plea or his waiver of the right to appeal. Three months prior to the suppression hearing, a prior court had found defendant competent after a thorough CPL 730 hearing, where the court credited psychiatric testimony that defendant's bizarre behavior was entirely feigned as a means of avoiding trial. The psychiatrist had testified that, among other things, defendant would pretend to have hallucinations. There is no reason to believe that the finding of malingering was incorrect, or that, at the time of the suppression hearing, defendant had somehow ceased malingering and become genuinely incompetent.

After sufficient inquiry (*see People v Frederick*, 45 NY2d 520 [1978]), the court properly denied defendant's meritless motion to withdraw his guilty plea. The record establishes the voluntariness of the plea (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). There was no need for the court to assign new counsel for the plea withdrawal application, since there was no merit to defendant's attacks on his attorney, and counsel's comments in response to defendant's motion were "not adverse to defendant's interests and did not influence the court's decision to deny defendant's motion" (*People v Castro*, 242 AD2d 445 [1997], *lv denied* 90 NY2d 1010 [1997]).

Defendant's written waiver, his colloquy with the plea

court, and his extensive consultations with his attorney establish a valid and enforceable waiver of the right to appeal (see *People v Ramos*, 7NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248 [2006]). To the extent that, at sentencing, defendant claimed the waiver was not knowing and voluntary, that claim is contradicted by the plea minutes. This waiver forecloses review of defendant's suppression and excessive sentence claims. As an alternative holding, we reject them on the merits.

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

ENTERED: APRIL 3, 2008

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3272-
3272A Elul Diamonds Co. Ltd., et al., Index 115640/06
Petitioners-Appellants,

-against-

Z Kor Diamonds, Inc., et al.,
Respondents-Respondents,

G.I. Trading, Inc., et al.,
Respondents.

Law Offices of Emanuel R. Gold, Forest Hills (Emanuel R. Gold of counsel), for appellants.

Kamerman & Soniker, P.C., New York (Martin Klein of counsel), for Z Kor Diamonds, Inc. and Israel Kornbluh, respondents.

Judgment, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 2, 2007, confirming an arbitration award in favor of respondent Z Kor Diamonds in the principal sum of $185,226.65, plus counsel fees and costs, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 12, 2007, which, upon renewal/reargument, adhered to a prior order denying the petition to vacate the arbitration award and granting respondents' cross motion to confirm that award, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The scope of judicial review of an arbitration proceeding is extremely limited (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 371 [2004]). An arbitration award will be

upheld so long as the arbitrator offers barely colorable justification for the outcome reached (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* __ US __, 127 S Ct 34 [2006]), and will be vacated only where it is totally irrational or exceeds a specifically enumerated limitation on the arbitrator's power (*Merrill Lynch, Pierce, Fenner & Smith v Benjamin,* 1 AD3d 39, 43 [2003]).

The motion court properly found that the arbitrators rationally concluded they had jurisdiction to arbitrate the dispute between the parties. Although there was no direct transaction between petitioner Elul Diamonds and respondent Z Kor Diamonds in New York, it was reasonable for the arbitrators to conclude that the dispute between the parties arose from the consignment transaction in New York. Nor was it irrational for the arbitrators to conclude that the failure of the other diamond bourses to object to the arbitration constituted their consent to jurisdiction, as appears to be the customary practice. In any event, petitioners waived these claims by having their counsel appear at the arbitration, where she advanced substantive legal arguments unrelated to jurisdictional objections (*see Matter of Naroor v Gondal*, 17 AD3d 142 [2005], *appeal dismissed* 5 NY3d 757 [2005]; *Matter of Smullyan [SIBJET S.A.]*, 201 AD2d 335 [1994]).

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

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

ENTERED: APRIL 3, 2008

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3273 Flatbush Pacific Development Corp., Index 601970/06
Plaintiff-Appellant,

-against-

Jay Markowitz, et al.,
Defendants-Respondents.

Edward S. Kanbar, New York, for appellant.

Jay S. Markowitz, respondent pro se.

Davidoff Malito & Hutcher, LLP, Garden City (Michael G. Zapson of counsel), for Michael G. Zapson, respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered January 10, 2007, which granted defendants' cross motion to dismiss the complaint, unanimously affirmed, with costs.

Even if there were an escrow agreement, plaintiff's allegation that it was the intended beneficiary of such agreement was conclusory (*see e.g. Peabody v Northgate Ford, Inc.*, 16 AD3d 879, 881 [2005]; *Sterritt v Heins Equip. Co.*, 114 AD2d 616 [1985]). The complaint thus failed to state a cause of action against either the alleged escrow agent, who flatly denied ever holding funds in escrow, or the attorney who represented one of

the parties at the closing.

We decline to impose sanctions against plaintiff.

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

ENTERED: APRIL 3, 2008

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3275 The People of the State of New York, Respondent, Ind. 2097/05 5328/05

-against-

Susan Gramson, Defendant-Appellant.

Michael K. Bachrach, New York, for appellant.

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

Judgment, Supreme Court, New York County (Renee A. White, J. on pretrial motions; Ruth Pickholz, J., at jury trial and sentence), rendered August 2, 2006, convicting defendant of money laundering in the second degree and two counts of promoting prostitution in the third degree, and sentencing her to an aggregate term of 5 years' probation, unanimously affirmed.

The suppression court properly denied defendant's challenge to the search warrant. The premises to be searched were sufficiently described so that there was no reasonable possibility that the wrong premises would be searched. Although the affiant in the search warrant application described the place to be searched as the second and third floor of a certain building, while the building contained a lower duplex with two floors and an upper duplex with two floors, it is clear that the affiant did not count the ground floor as the first floor, but

began counting on the second floor (*see People v Traymore*, 241 AD2d 226 [1998], *lv denied* 92 NY2d 907 [1998]). Thus, by his method, he accurately described the two floors of the upper duplex. Moreover, as it was the same detective who applied for and executed the warrant, there was no possibility that the wrong premises would be searched (*see People v Rodriguez*, 254 AD2d 95 [1998]; *People v Graham*, 220 AD2d 769, 772 [1995], *lv denied* 89 NY2d 942 [1997]). For these same reasons, the affiant's description of the safe on the "second floor" did not create a reasonable possibility that the wrong safe would be searched.

Furthermore, the warrant repeatedly stated the address to be searched, which was the address of the upper duplex. The lower duplex had a different address and a different entrance. The warrant also clearly stated that it was defendant's premises which were to be searched, which "allowed police to ascertain the target [premises] by minimal inquiry at the site, without there being anything but the remotest possibility that the wrong place would be searched" (*People v Fahrenkopf*, 191 AD2d 903 [1993] [internal quotation marks and citation omitted]).

We also reject defendant's staleness arguments. "Information may be acted upon as long as the practicalities dictate that a state of facts existing in the past, which is sufficient to give rise to probable cause, continues to exist at the time the

application for a search warrant is made." (*People v Clarke*, 173 AD2d 550, 550 [1991]; *see also*, *People v Munoz*, 205 AD2d 452 [1994], *lv denied* 84 NY2d 870 [1994]). Here, the search warrant application made clear that defendant's prostitution enterprise was an ongoing, continuous enterprise (*see People v Villanueva*, 161 AD2d 552, 553 [1990]).

We also find that the warrant was supported by probable cause. A presumption of validity attaches to a warrant (*People v Castillo*, 80 NY2d 578, 585 [1992], *cert denied* 507 US 1033 [1993]). Evaluation of whether probable cause exists in a warrant affidavit should be based on all the facts and circumstances viewed together (*People v Bigelow*, 66 NY2d 417, 423 [1983]), and the affidavit should not be read in a hypertechnical manner, but considered in the light of everyday experiences (*People v Traymore*, 241 AD2d at 229-230). Here, defendant advertised her services in the "adult" section of a magazine and offered "escort services" on her Web sites (*see United States v Kinzler*, 55 F3d 70, 71 [2d Cir 1995] [escort services are generally fronts for prostitution]). Phone calls to contact numbers revealed that appointments to this purported massage parlor could only be made from a phone linked to a verifiable home or business, or by persons who had previously used the service and had a private code. One officer was expressly told over the phone that sex could be obtained for money, and others

were hung up on when they failed to recite a proper code. The affiant could rely on these assertions by fellow officers (*see People v Robinson*, 8 AD3d 131, 133 [2004], *lv denied* 3 NY3d 680 [2004]). Furthermore, surveillance of the premises demonstrated activity consistent with a brothel. These facts were sufficient to establish probable cause, "which does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place..." (*People v Bigelow*, 66 NY2d at 423).

We have considered and rejected defendant's remaining suppression claims, including her arguments regarding the need for a *Darden* hearing (*People v Darden*, 34 NY2d 177, 181 [1974]), a *Franks/Alfinito* hearing (*Franks v Delaware*, 438 US 154 [1978]; *People v Alfinito*, 16 NY2d 181 [1965]), or any other type of hearing.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they rely primarily on factual assertions outside the record, including matters about which appellate counsel claims to have personal knowledge (*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]).

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

ENTERED: APRIL 3, 2008

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3276 In re James Andersen, Index 100632/06
Petitioner-Respondent,

-against-

Joel I. Klein, Chancellor of the
New York City Board of Education,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), appellant.

Mark Gimpel, New York, for respondent.

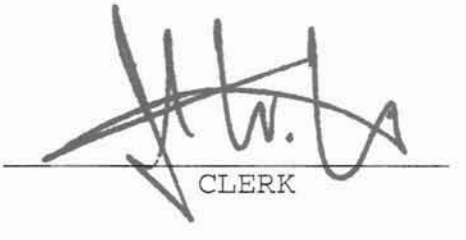
Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered December 8, 2006, inter alia, expunging respondent Board of Education's 2004 year-end unsatisfactory rating of petitioner probationary teacher, and directing respondent to revoke petitioner's discontinuance and implement his reinstatement, unanimously reversed, on the law, without costs, the petition denied and the proceeding dismissed.

On June 8, 2004, petitioner's principal gave petitioner a year-end rating of unsatisfactory and recommended discontinuance of petitioner's probationary service. By letter dated October 29, 2004, respondent's Local Instructional Superintendent affirmed the discontinuance effective that day. Petitioner's time to seek judicial review of the discontinuance began to run upon his receipt of the October 29, 2004 letter, and was not postponed or tolled by the administrative review completed by the

same Local Instructional Superintendent on September 16, 2005 when, after considering a March 2005 report of a three-member committee designated by the Chancellor, he reaffirmed the discontinuance (*see Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 766-767 [1988]). Accordingly, the proceeding, which was commenced in January 2006, more than four months after petitioner's receipt of the October 29, 2004 letter, is time-barred to the extent it challenges the discontinuance and seeks reinstatement (*see Matter of Johnson v Board of Educ. of City of N.Y.*, 291 AD2d 450 [2002]). While respondent concedes that the proceeding is timely to the extent it challenges the June 2004 year-end unsatisfactory rating (*see id.*, citing, inter alia, *Matter of Bonilla v Board of Educ. of City of N.Y.*, 285 AD2d 548 [2001]), the rating is rationally supported by evidence that petitioner was unable to control his classroom, namely, the principal's reports of his observations of petitioner's classroom (*see generally Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]).

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

ENTERED: APRIL 3, 2008



CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3277 The People of the State of New York, Respondent, Ind. 3473/04

-against-

Henry O'Kieffe, Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Robert Seewald, J.), rendered on or about May 18, 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.

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: APRIL 3, 2008

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3278-
3279 The People of the State of New York, Respondent, Ind. 3418/05

-against-

Odell Pearson,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Allen J. Dickerson of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Mark E. Bini of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered April 12, 2006, as amended June 12, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 6 years, unanimously affirmed.

The verdict was not against the weight of the evidence. To the extent that defendant is claiming that the evidence failed to disprove an agency defense, we note that defense counsel expressly waived that defense, and the court gave no such instruction to the jury; we are required to review the weight of the evidence in light of the court's charge (*see People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Noble*, 86 NY2d 814, 815 [1995]). In any event, the evidence established defendant's guilt beyond a reasonable doubt, and his agency claim is entirely

without merit (*see e.g. People v Vaughan*, 300 AD2d 104 [2002], *lv denied,* 99 NY2d 633 [2003]). There is no significant difference between the fact pattern in this case and the scenario presented in *People v Herring* (83 NY2d 780 [1994]), where the Court of Appeals found that the evidence did not warrant submission of the agency defense to the jury.

The record indicates that defense counsel chose not to pursue an agency defense because it would open the door to evidence of defendant's prior record for selling drugs. The court had expressly stated that if defendant raised an agency defense the prior sales would be admissible. Defendant now claims that his attorney rendered ineffective assistance by failing to make further efforts to persuade the court to exclude the prior record as a matter of discretion. This claim is unreviewable on direct appeal because the present record is inadequate to evaluate counsel's strategic choice, and we reject defendant's argument to the contrary (*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 could have reasonably concluded that the court had no intention of permitting him to raise an agency defense without

also permitting the People to rebut it with admissible evidence of defendant's prior record, and that further efforts to pursue the matter would have been futile. Furthermore, defendant was not prejudiced by the absence of an agency defense, which, as noted, was completely unsupported by the evidence.

Defendant's remaining argument is without merit.

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

ENTERED: APRIL 3, 2008

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3280 Andrew Gering, Index 350060/03
Plaintiff-Respondent,

-against-

Charisse Tavano,
Defendant-Appellant.

Thomas D. Shanahan, New York, for appellant.

Cohen Hennessey Bienstock & Rabin, P.C., New York (Bonnie E. Rabin of counsel), for respondent.

Judgment, Supreme Court, New York County (Rosalyn Richter, J.), entered May 1, 2006, granting plaintiff a divorce on the ground of cruel and inhuman treatment, and bringing up for review orders, same court and Justice, entered on or about March 6, 2006 and August 29, 2005, which, respectively, to the extent appealed from as limited by the briefs, denied defendant's motion to set aside the jury verdict of cruel and inhuman treatment and to reopen the financial trial, and denied her motion to dismiss the complaint alleging cruel and inhuman treatment, unanimously modified, on the law and the facts, to increase the duration of the maintenance award to three years, and otherwise affirmed, without costs.

The verdict of cruel and inhuman treatment was supported by legally sufficient evidence, which included evidence of defendant's denigrating comments about plaintiff's religious background, accusations of infidelity, and interference with

plaintiff's relationship with the children and evidence of plaintiff's anxiety, depression, headaches and stomach aches resulting therefrom (*see Stoothoff v Stoothoff*, 226 AD2d 209 [1996]; Domestic Relations Law § 170[1]).

The court properly charged the jury on cruel and inhuman treatment and did not improperly alter its charge after the parties' summations (*see e.g. Rios v Rios*, 34 AD2d 325, 326-327 [1970], *affd* 29 NY2d 840 [1971]; CPLR 4110-b; PJI 5:3).

Plaintiff showed a reasonable excuse for not filing the complaint alleging cruel and inhuman treatment until approximately two years after the commencement of this divorce action (CPLR 3012[d]). The parties had stipulated that the issue of fault was resolved and that plaintiff would "take the divorce" on the ground of constructive abandonment. However, defendant objected to that ground two years later, after the inquest. Defendant was not prejudiced by the delay, since plaintiff's summons with notice indicated that he sought a divorce on the grounds of both constructive abandonment *and* cruel and inhuman treatment (*see generally Lyons v Lyons*, 187 AD2d 415 [1992]). Contrary to defendant's contention, plaintiff was not required to submit an affidavit of merit (*see Guzetti v City of New York*, 32 AD3d 234, 234 [2006]).

The court properly based its imputation of income to plaintiff on his admission that he took money from his business

for personal expenses and failed to report it on his income tax returns (*cf. Cohen v Cohen*, 294 AD2d 184 [2002] ["inconsistent, illogical and evasive" testimony supported adverse inference of hiding assets and deliberately reducing income]). Defendant failed to establish that plaintiff misrepresented the amount he took from the business or that the court's imputation of income was inadequate (*see* CPLR 5015[a][3]; *Blackman v Blackman*, 131 AD2d 801, 805 [1987]).

With respect to defendant's financial condition, her failure to disclose her bank statements and various transfers of real property among herself, her family members and third parties justified an adverse inference against her (*see* 22 NYCRR 202.16[k][5][i]; *Wildenstein v Wildenstein*, 251 AD2d 189 [1998]).

The amount of the maintenance award of $2,000 a month was properly based upon the court's finding of defendant's failure to comply with discovery and disclose real estate transactions and bank statements and the family's pre-divorce standard of living. However, the one-year duration of the award is inadequate to the extent indicated given the circumstances of the case (*Hartog v Hartog*, 85 NY2d 36 [1995]; *Brager v Brager*, 277 AD2d 136 [2000]; *Summer v Summer*, 85 NY2d 1014; Domestic Relations Law § 236[B][6][a]).

The court articulated its reasons for setting the child

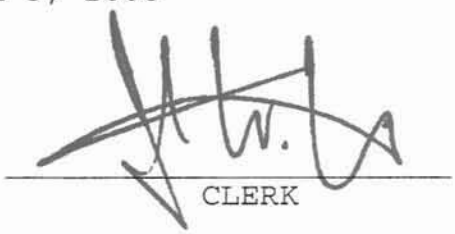
support obligation at 25% of $150,000 (Domestic Relations Law § 240[1-b][c][3], [f]) and was not required to apply the statutory percentage to the entire portion of the parties' combined income in excess of $80,000 (*see Matter of Culhane v Holt*, 28 AD3d 251, 252 [2006]). Given the evidence of defendant's own substantial assets, the court properly required her to contribute 13% during the first year and 14% thereafter (*Anonymous v Anonymous*, 286 AD2d 585, 586 [2001], *lv denied* 97 NY2d 611 [2002]). The court's determination not to require plaintiff to pay for the children's private school or college education was not an improvident exercise of discretion (*see Manno v Manno*, 196 AD2d 488, 491-492 [1993]).

The award to defendant of a 15% interest in plaintiff's business was proper, given her failure to contribute to the business, lack of cooperation with respect to discovery of her own assets, and receipt of temporary maintenance (*see Arvantides v Arvantides*, 64 NY2d 1033, 1034 [1985]).

We decline to award plaintiff costs.

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

ENTERED: APRIL 3, 2008



CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3281 The City School District of the City of New York, et al., Petitioners-Appellants

Index 401146/06

-against-

Rochelle Lorber, Respondent-Respondent.

Michael A. Cardozo, Corporation Counsel, New York (Ann E. Scherzer of counsel), for appellants.

James R. Sandner, New York (Antonio M. Cavallaro of counsel), for respondent.

Judgment, Supreme Court, New York County (Leland DeGrasse, J.), entered December 12, 2006, denying petitioners' motion to vacate an arbitration award, confirming the award and dismissing the petition, unanimously affirmed, without costs.

In light of the arbitrator's conclusions that respondent, a teacher in the New York City school system for more than 23 years, had successfully undergone treatment for her addiction and that she was "fit to teach," the arbitration award imposing a fine equivalent to two months' salary, rather than termination, was not irrational and did not violate strong public policy (*see Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]; *Appeal of Dubner*, 33 Ed Dept Rep 192 [1993]); *cf. City School Dist. of City of N.Y. v Campbell,* 20 AD3d 313, 314 [2005]). Appellants' reliance on *Campbell* is misplaced. The petitioner in that case, a tenured teacher and the head of a program targeting

"at risk" students and providing counseling for those with substance abuse problems, was arrested with one bag of marijuana on his person while sitting in a vehicle with ten bags of what later turned out to be cocaine. He was charged with criminal possession of a controlled substance in the third degree and criminal possession of marijuana in the fifth degree. This Court vacated, as irrational, the hearing officer's determination that while Campbell was guilty of possessing the amount of drugs with which he was charged, he should be returned to his "former or similar position . . . if he successfully completes" a drug treatment program (20 AD3d at 314), finding that the determination "essentially, would allow [petitioner] to be placed back into a position where he would administer a program designed to discourage drug use among students" (*id.*). In *Campbell,* the petitioner was charged with possession with intent to sell, whereas there was no allegation in this case that petitioner's possession was for other than personal use. Moreover, as the IAS court in this case noted, the *Campbell* court "stopped short of finding that Campbell's drug conviction warranted the categorical termination of his employment in the school system."

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

ENTERED: APRIL 3, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 3, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Peter Tom
John T. Buckley
Karla Moskowitz, Justices.

x

The People of the State of New York, SCI 1177/06
Respondent,

-against- 3282

Ilaina Rosario,
Defendant-Appellant.

x

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ethan Greenberg at plea; John P. Collins at sentence), rendered on or about February 22, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTER:

Clerk.

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3283 Derrick Martinez, Index 22541/02
Plaintiff-Appellant, 83291/03

-against-

National Amusements, Inc. doing business as Whitestone Multiplex Cinemas, et al.,
Defendants-Respondents.

[And A Third Party Action]

Arnold E. DiJoseph, New York, for appellant.

John W. Manning, Tarrytown, for National Amusements, Inc., respondent.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Andrea A. Brochetelli of counsel), for Security Enforcement Bureau, Inc., respondent.

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about December 14, 2006, dismissing the amended complaint and all cross claims, and bringing up for review an order of the same court and Justice entered April 25, 2006, which granted defendants' motions for summary judgment, unanimously affirmed, without costs.

Plaintiff was assaulted on March 8, 2002, while at a Bronx movie theater owned and operated by defendant National Amusements, which had hired defendant Security Enforcement Bureau to provide on-premises security. As to plaintiff's claim against the latter, it has long been the rule that the duty of care owed by a contractor does not extend to noncontracting third parties

(*Moch Co. v Rensselaer Water Co.*, 247 NY 160 [1928]), absent exceptional circumstances not applicable here (*see Church v Callanan Indus.*, 99 NY2d 104 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). The facts in this record do not bring plaintiff within any of the exceptions to the general rule of no duty of care owed by a contractor to a noncontracting party (*Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253 [2007]).

In general, plaintiff failed to raise a triable issue of fact as to the foreseeability of his assault. Defendants were not insurers of plaintiff's safety (*Maheshwari v City of New York,* 2 NY3d 288, 294 [2004]). The record is devoid of any evidence of prior assaults at the theater, and none is suggested in witness testimony. Accordingly, National had no reason to anticipate the assault, nor any special duty to take preventive measures. Absent evidence of any prior similar criminal activity at the theater, the attack on plaintiff was neither a normal or foreseeable occurrence nor preventable in the normal course of events.

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

ENTERED: APRIL 3, 2008

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3284 The People of the State of New York ex rel. Michael Wise, Petitioner-Appellant, Index 403192/06

-against-

New York State Division of Parole, Respondent-Respondent.

Steven N. Feinman, White Plains, for appellant.

Andrew M. Cuomo, Attorney General, New York (Hannah Stith Long of counsel), for respondent.

Order, Supreme Court, New York County (Robert H. Straus, J.), entered September 28, 2006, which denied a writ of habeas corpus, unanimously affirmed, without costs.

Assuming, as petitioner asserts, that he was never served with the three-day notice of preliminary revocation hearing required by Executive Law § 259-i[3](c)(iii), it does not follow that he was denied due process, or that the entire parole revocation was otherwise rendered fatally defective, where he appeared for the hearing with counsel and did not object thereto, request an adjournment to prepare therefor or contend that he lacked adequate notice of the basis for the parole violation or

was otherwise prejudiced (*People ex rel. Williams v Walsh*, 241 AD2d 979 [1997], *lv denied* 90 NY2d 809 [1997]).

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

ENTERED: APRIL 3, 2008

CLERK

Lippman, P.J. Tom, Buckley, Moskowitz, JJ.

3285N James Bermel, Index 101588/06
Plaintiff-Respondent,

-against-

Jason Dagostino,
Defendant-Appellant.

Rivkin Radler, LLP, Uniondale (Melissa M. Murphy of counsel), for appellant.

Weiss & Rosenbloom, P.C., New York (Andrea Krugman Tessler of counsel), for respondent.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered March 21, 2007, which, in an action for personal injuries, denied defendant's motion to compel plaintiff to appear for independent medical examinations (IME), unanimously reversed, on the law and the facts, without costs, and the motion granted.

The record reveals that prior to and following the filing of the note of issue, defendant made numerous unanswered requests for medical records documenting plaintiff's preexisting condition from plaintiff's treating physician. The lack of response prevented defendant from scheduling the subject IMEs in a timely fashion inasmuch as the medical records were necessary to determine whether there was a causal relationship between plaintiff's current condition and defendant's alleged negligence. When defendant did receive the medical records approximately one month after the expiration of a stipulation signed by the parties

granting defendant additional time for discovery, he promptly sought to schedule the IMEs, but plaintiff refused to cooperate. Under these circumstances, we find that defendant demonstrated unusual and unanticipated circumstances so as to warrant granting the relief requested (*see* 22 NYCRR 202.21[d]; *Urena v Bruprat Realty Corp.*, 179 AD2d 505 [1992]; *Williams v Long Island College Hosp.*, 147 AD2d 558 [1989]), and that plaintiff will not be prejudiced by having to appear for the IMEs (*see Acevedo v New York City Tr. Auth.*, 294 AD2d 310 [2002]).

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

ENTERED: APRIL 3, 2008

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3286N Keila Lisandro, etc., et al., Index 112763/04
Plaintiffs-Respondents,

-against-

New York City Health and
Hospitals Corporation
(Metropolitan Hospital Center), et al.,
Defendants-Appellants.

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

Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell Gittin of counsel), for respondents.

Order, Supreme Court, New York County (Charles J. Tejada, J.), entered October 7, 2005, which, insofar as appealed from as limited by the briefs, granted infant plaintiff's motion to file a late notice of claim, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in allowing the infant plaintiff to file a late notice of claim (General Municipal Law § 50-e[5]). The lack of a causative nexus between the delay and plaintiff's infancy is not fatal by itself (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 538 [2006]). Here, the record establishes that defendant hospital's possession of the available medical records constituted actual notice of the pertinent facts, and plaintiff submitted affirmations from physicians establishing that the available medical records, on their face, evinced that defendants failed to provide the infant

plaintiff with proper care (*see* Bayo v Burnside Mews Assoc., 45 AD3d 495 [2007]). Furthermore, defendants' claim that the delay would be prejudicial because of the inability to locate witnesses was insufficient (*see Moody v New York City Health & Hosps. Corp. [Renaissance Health Care Network]*, 29 AD3d 395 [2006]).

At this juncture, we need not consider the implications of defendant hospital's destruction or loss of a portion of the pertinent medical records.

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

ENTERED: APRIL 3, 2008

CLERK

Lippman, P.J., Tom, Buckley, Moskowitz, JJ.

3287N Ralph J. Sorrentino, Petitioner-Appellant, Index 107136/06

-against-

Michael Weinman, et al., Respondents-Respondents.

Coggan & Tarlow, New York (Jay M. Coggan of counsel), for appellant.

Schindler Cohen & Hochman, New York (Lisa C. Cohen of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered January 19, 2007, which, insofar as appealed from, denied petitioner's application to vacate an arbitration award, and granted respondents' cross motion to confirm the award, unanimously affirmed, with costs.

The court properly found that there were no grounds upon which to vacate the arbitration award (*see Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]). Petitioner failed to demonstrate fraud on respondents' part, much less any that was not discoverable upon exercise of due diligence prior to or during the hearing, and that was material to his case (*see Imgest Fin. Establishment v Shearson Lehman Hutton*, 172 AD2d 291 [1991]; CPLR 7511[b][1][I]). Indeed, petitioner raised the arguments that respondents concealed the identity of a potential witness and

failed to produce material information, which the arbitration panel rejected, and there exists no basis to disturb the panel's determination. Furthermore, contrary to petitioner's contention that the panel so imperfectly executed its power that a final and definite award was not made (CPLR 7511[b][1][iii]), the subject determination was clear that petitioner had not proved his claim and was not entitled to damages. That the panel denied respondents' motion for a directed verdict at the conclusion of the hearing does not warrant a different conclusion.

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

ENTERED: APRIL 3, 2008

CLERK

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

2432 Tower Insurance Company of New York, Index 102527/06
Plaintiff-Appellant,

-against-

Lin Hsin Long Co., etc., et al.,
Defendants-Respondents.

Law Office of Max W. Gershweir, New York (Joseph S. Wiener of counsel), for appellant.

Larry Dorman, P.C., Astoria, (Michael S. Murphy of counsel), for Lin Hsin Long Co. respondent.

Levine & Slavit, New York (Ira S. Slavit of counsel), for Charlotte Theodoratos respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered September 7, 2007, which denied plaintiff's motion for summary judgment declaring that it is not obligated to defend or indemnify defendant Lin Hsin Long Co., t/a Hunan Ritz Restaurant (the insured), in an action commenced against it by defendant Charlotte Theodoratos, reversed, on the law, without costs, the motion granted and summary judgment awarded to plaintiff declaring that it is not obligated to defend or indemnify the insured in the lawsuit commenced against it by Theodoratos. The Clerk is directed to enter judgment accordingly.

Plaintiff issued a commercial general liability policy to the insured, a restaurant, that was to provide coverage for the insured's premises from February 3, 2004 through February 3,

2005. The policy contained a provision requiring the insured, "as soon as practicable," to provide notice to plaintiff of an "occurrence" that may result in a claim.

On January 29, 2005, Theodoratos slipped and fell near the women's restroom on the lower level of the insured's premises. Theodoratos was removed from the premises on a stretcher and transported by ambulance to a hospital. Employees of the insured were present when the accident occurred, were aware of the accident and offered assistance to Theodoratos. The manager of the insured, while not present when the accident occurred, was informed of the accident the day it occurred by other employees of the insured. Based on the information imparted to him by the employees, the manager has asserted in this litigation that he believed that the accident was "caused by [Theodoratos'] own actions," that no claim would be asserted against the insured and that "no further action" was required.

Approximately two and a half weeks after the accident, Theodoratos retained counsel to represent her in connection with the accident. Shortly after being retained, counsel requested the name and address of the licensee of the premises where the accident occurred from both the Westchester County Department of Health and the State Liquor Authority (SLA), and a copy of the police report regarding the accident generated by the New Rochelle Police Department. By a letter dated March 3, 2005, the

SLA provided counsel with the name and address of the insured.

Counsel sent a letter dated March 8, 2005 to the insured, notifying it that Theodoratos had sustained personal injuries on the premises as a result of the insured's negligence, and "suggest[ing] that [the insured] forward th[e] letter to [its] insurance carrier so that they [sic] may investigate th[e] occurrence and advise us as to what disposition they [sic] intend on making on this claim." After receiving no response from the insured, counsel sent a follow-up letter dated April 11, 2005. Counsel observed that he had not been contacted by the insured's insurance carrier despite his "suggestion that [the insured] forward [the March 8] letter to [the insurance carrier]," and stated that "[i]n view of the time element, a prompt response from your insurance company would be appreciated." Counsel had no further contact with the insured, and did not undertake any efforts to identify the insured's insurance carrier or notify the insurance carrier of the accident.

Plaintiff did not receive notice of the accident until October 21, 2005, when it received from either the insured or the insured's broker a copy of the summons and complaint in Theodoratos' personal injury action, which was commenced on July 12, 2005. Following its investigation of the accident, plaintiff, by a letter dated November 17, 2005, disclaimed coverage on the ground that neither the insured nor Theodoratos

timely notified plaintiff of the accident. Plaintiff commenced this action seeking a declaration that it has no duty to defend or indemnify the insured in Theodoratos' action. Supreme Court denied plaintiff's motion for summary judgment on the complaint, and this appeal ensued.

Where a liability insurance policy requires that notice of an occurrence be given "as soon as practicable," such notice must be accorded the carrier within a reasonable period of time (*Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 743 [2005]). "The duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement" (*Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [2002]). "'[W]here there is no excuse or mitigating factor, the issue [of reasonableness] poses a legal question for the court,' rather than an issue for the trier of fact" (*SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1998], quoting *Hartford Acc. & Indem. Co. v CNA Ins. Cos.*, 99 AD2d 310, 313 [1984]).

Here, plaintiff established as a matter of law that the insured failed to give plaintiff notice of the accident within a reasonable period of time. The accident involved a patron who slipped and fell on a floor on the insured's premises and had to be removed from the premises on a stretcher and placed in an

ambulance. Moreover, the insured, through its employees (*see Public Serv. Mut. Ins. Co. v Harlen Hous. Assoc.*, 7 AD3d 421 [2004]), knew about the accident on the day it occurred. Thus, although the duty to give notice arose on the day of the accident, the insured did not give plaintiff notice until almost nine months after it occurred -- an unreasonable delay as a matter of law (*see id.*; *DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344, 346 [2004], *lv denied* 3 NY3d 608 [2004]; *Paramount Ins. Co.*, 293 AD2d at 238, 241).

Seeking to avoid the consequences of its failure to give notice to plaintiff within a reasonable period of time, the insured asserts that it had a reasonable, good faith belief that the accident would not result in liability (*see Great Canal Realty Corp.*, 5 NY3d at 743). As a matter of law, however, this excuse fails for the reasons just discussed -- the insured's employees were aware of the accident, it involved a patron who slipped and fell on the insured's premises and the patron had to be removed by stretcher and transported by ambulance (*see Paramount Ins. Co.*, 293 AD2d at 240-241; *SSBSS Realty Corp.*, 253 AD2d at 585; *see also DiGuglielmo*, 6 AD3d at 346; *Rondale Bldg. Corp. v Nationwide Prop. & Cas. Ins. Co.*, 1 AD3d 584 [2003]). Moreover, the manager's professed belief that the accident was Theodoratos' own fault is insufficient to raise a triable issue of fact with respect to whether the insured had a reasonable,

good-faith belief that the accident would not result in liability. As Justice Sullivan stated in *Paramount Ins. Co.* (293 AD2d at 240):

> "the requirement of prompt notice of any occurrence that 'may result in a claim' should not be interpreted in a way that the insurer is compelled to relinquish its right to prompt notice and all the benefits that accrue therefrom - a timely investigation and the opportunity, if appropriate, to dispose of the claim in its early stages, an opportunity that might be irretrievably lost in the case of delayed notice - by placing undue emphasis on the liability assessment of one not trained or even knowledgeable in such matters."

Similarly, no triable issue of fact exists regarding the adequacy of the efforts of Theodoratos' counsel to ascertain the identity of plaintiff and notify it of the accident. An injured party, such as Theodoratos, has an independent right to notify an insurance carrier of an accident (*see* Insurance Law § 3420[a][3]). However, "the injured party is required, in order to rely upon that provision, to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer" (*Steinberg v Hermitage Ins. Co.*, 26 AD3d 426, 428 [2006]; *see also Lauritano v American Fid. Fire Ins. Co.*, 3 AD2d 564, 568 [1957], *affd* 4 NY2d 1028 [1958] ["When the injured party has pursued his [or her] rights with as much diligence as was reasonably possible the statute shifts the risk of the insured's delay to the compensated risk-taker who can initially accept or reject those for whom it will bear such risks" (internal

quotation marks omitted)]. Stated differently, "where the injured person proceeds diligently in ascertaining coverage and in giving notice, he [or she] is not vicariously charged with any delay by the assured" (*Jenkins v Burgos*, 99 AD2d 217, 221 [1984]; *see National Grange Mut. Ins. Co. v Diaz*, 111 AD2d 700, 701 [1985]).

Here, the evidence establishes as a matter of law that Theodoratos neither exercised reasonable diligence in attempting to ascertain the identity of plaintiff nor notified it of the accident. With regard to the latter, it is undisputed that Theodoratos did not give any notice to plaintiff; the belated notice received by plaintiff was supplied by the insured when it or its broker forwarded to plaintiff the summons and complaint in Theodoratos' action. Since Theodoratos did not assert her own right to provide notice, but rather relied on the insured to do so, her rights are derivative of the insured's (*see Mount Vernon Fire Ins. Co. v Harris*, 193 F Supp 2d 674, 679 [ED NY 2002]). *Appel v Allstate Ins. Co.* (20 AD3d 367 [2005]), *Denneny v Lizzie's Buggies* (306 AD2d 89 [2003]) and *Cirone v Tower Ins. Co. of N.Y.* (39 AD3d 435 [2007], *lv denied* 9 NY3d 808 [2007]), cited by the dissent, are distinguishable. In both *Appel* and *Denneny*, the injured party provided some form of belated notice to the insurance carrier. In *Cirone*, the Court found that the injured party's action to recover insurance proceeds pursuant to

Insurance Law § 3420(a)(2) was not barred based upon her failure to give written notice to the carrier because the insured provided notice of the accident to the carrier and the injured party's counsel, upon being contacted by the carrier, provided the carrier information regarding the accident.

With regard to the issue of reasonable diligence, shortly after the accident, Theodoratos' counsel made inquiries with both the Westchester County Department of Health and the SLA, seeking *the name and address of the licensee* of the premises where the accident occurred; no request for information regarding the insurer of the licensee was requested from these agencies or anyone else. The plain language of the requests shows that Theodoratos' counsel was seeking to ascertain the identity of the licensee of the premises, not the licensee's insurer, and thus these requests do not evince reasonable diligence by Theodoratos' counsel in seeking to identify plaintiff. For the same reasons, the mere request for a copy of the police report regarding the accident generated by the New Rochelle Police Department does not evince reasonable diligence.

Even more importantly, however, Theodoratos' counsel's letter to the insured simply "suggest[ed]" that the insured forward the letter to its insurance carrier. Counsel's subsequent letter stated only that "a prompt response from [the insured's] insurance company would be appreciated." Neither

letter is sufficient to raise a triable issue of fact regarding whether Theodoratos exercised reasonable diligence. Indeed, the undisputed fact that Theodoratos' counsel never even requested from the insured the name of its insurance carrier (nor undertook additional efforts to identify the carrier) compels the conclusion that Theodoratos did not exercise reasonable diligence.

In sum, Supreme Court erred in denying plaintiff's motion because no triable issue of fact exists regarding whether the insured or Theodoratos provided timely notice of the accident to plaintiff. In light of our conclusion that plaintiff is entitled to summary judgment on that ground, we do not pass on plaintiff's remaining arguments in favor of reversal.

All concur except Mazzarelli, J.P. and Andrias, J. who dissent in part in a memorandum by Andrias, J. as follows:

ANDRIAS, J. (dissenting in part)

On January 29, 2005, Charlotte Theodoratos slipped and fell near the bottom of the stairs leading to the bathroom in the Hunan Ritz restaurant and was removed from the restaurant by ambulance on a stretcher, which was enough to trigger the restaurant's obligation under the subject policy to notify plaintiff insurer of Ms. Theodoratos's potential claim as soon as practicable (*see Zadrima v PSM Ins. Cos.*, 208 AD2d 529 [1994], *lv denied* 85 NY2d 807 [1995]). We therefore agree that the restaurant failed to comply with that obligation when, despite two letters from Ms. Theodoratos's attorney suggesting that it forward her claim to its insurer, it did not notify plaintiff until October 2005, when it forwarded the summons and complaint that had been served on the Secretary of State in July. We disagree, however, with the majority's conclusion that Ms. Theodoratos and her attorney failed to exercise reasonable diligence in attempting to ascertain plaintiff's identity for purposes of independently placing it on notice of her claim pursuant to Insurance Law § 3420(a)(3).

It is well settled that in exercising this independent right to give notice to the insurer, an injured party should not be charged vicariously with the insured's delay and that, in determining the reasonableness of such notice, the notice required is measured less rigidly than that required of the

insured and the sufficiency thereof is governed not by the mere passage of time but by the means available therefor (*Appel v Allstate Ins. Co.*, 20 AD3d 367, 368-369 [2005]). Thus, "[w]here, as here, the insurer does not dispute receiving notice from its insured, the only issue with respect to the injured party [is] whether the efforts of the injured party to facilitate the providing of proper notice were sufficient in light of the opportunities to do so afforded [her] under the circumstances" (*id.* at 369, [internal quotation marks and citations omitted]. That Ms. Theodoratos never provided plaintiff with formal, written notice of the claim does not necessarily relieve plaintiff of its duty to indemnify the restaurant, inasmuch as plaintiff did eventually receive notice of the claim from the restaurant (*see Cirone v Tower Ins. Co. of N.Y.*, 39 AD3d 435, 436 [2007], *lv denied* 9 NY3d 808 [2007]).

While Ms. Theodoratos and her attorney might possibly have done more (phone calls, personal visit, etc.), the case law does not so hold, nor can we say as a matter of law that their efforts were inadequate. They sent their first claim letter to the restaurant on March 8, 2005, shortly after they ascertained its corporate identity, and a follow-up letter on April 11, 2005 asking for a prompt response. When they received no response to those letters, they finally got the restaurant's attention by filing their summons and verified complaint with the Westchester

County Clerk on July 12, 2005 and serving it on the Secretary of State on July 18, 2005 pursuant to Business Corporation Law § 306(b). Presumably the Secretary of State promptly sent a copy of the process to the restaurant, as required by the statute. Nevertheless, it was not until shortly after October 10, 2005, when plaintiff notified it that service on the Secretary of State had been made in July, that the restaurant notified plaintiff of Ms. Theodoratos's claim. However, even though the restaurant's notice may have been untimely as to it, that does not foreclose a finding that Mrs. Theodoratos's efforts were sufficient under the circumstances and the notice was timely as to her. Unlike automobile accidents, where it is easier to find the insurer of the offending vehicle, in order to ascertain the name of the restaurant's insurer some cooperation from the restaurant was required (cf. *Cirone*, 39 AD3d 435, *supra*). While this is not a case where the restaurant affirmatively misled the injured party (*see Denneny v Lizzie's Buggies*, 306 AD2d 89 [2003]), the restaurant nevertheless did nothing in response to the letters.

Thus, the motion court properly denied plaintiff's motion for summary judgment on its claim for a declaratory judgment that it is entitled to disclaim coverage, finding an issue of fact as to whether Ms. Theodoratos made diligent efforts to ascertain plaintiff's identity and independently give it notice of her claim. It should be left to the finder of fact to weigh the

restaurant's failure to contact plaintiff until after it was served with process, and determine whether any further effort by Ms. Theodoratos to communicate with the restaurant would have been futile.

The motion court also correctly found a triable issue of fact as to whether, as plaintiff claims, it had effectively cancelled the policy almost a year before the accident for nonpayment of premiums. For present purposes, plaintiff's claim that it has no record of ever receiving or cashing the restaurant's check is rebutted by the affidavit of the restaurant's principal that he mailed a check for the premium prior to the cancellation date as corroborated by the restaurant's check logbook. Moreover, the invoice sent by plaintiff to the restaurant for pre-cancellation earned premiums was not clear that the policy had been cancelled, and the fact that plaintiff sent no further invoices to the restaurant relating to the subject policy is not dispositive.

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

ENTERED: APRIL 3, 2008

CLERK

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

3247 The People of the State of New York, Respondent, SCI 2402/04

-against-

Ronald Cubino, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered April 1, 2005, convicting defendant, after a jury trial, of burglary in the second degree (three counts), criminal possession of stolen property in the fifth degree and possession of burglar's tools, and sentencing him, as a persistent violent felony offender, to an aggregate term of 22 years to life, unanimously modified, on the law, to the extent of reducing the conviction under the third count of the indictment to criminal trespass in the second degree and reducing the sentence thereon to a term of 1 year, and, as a matter of discretion in the interest of justice, to the extent of reducing the sentences on the remaining burglary convictions to concurrent terms of 16 years to life, and otherwise affirmed.

With respect to the third count, the evidence was legally insufficient to establish the element of intent to commit a

crime. Although the People need not specify what crime a defendant intended to commit, in order to elevate criminal trespass to a burglary, the proof must show a defendant intended to commit some other crime contemporaneous with the trespass (*People v Mahboubian*, 74 NY2d 174, 193 [1989]). The evidence relating to the third count clearly established that when defendant entered the basement at issue his intent was to find a hiding place after having committed one of the other two burglaries at a nearby building. Defendant was apprehended as he sat hiding behind a door in that basement. There is no evidence that he intended to commit any other crime in the building at issue, and passively hiding from police is not a crime under these circumstances.

Since the court's reasonable doubt instruction cannot be viewed as expressly shifting the burden of proof, the narrow exception to the preservation requirement does not apply (*People v Thomas*, 50 NY2d 467, 471-472 [1980]), and we decline to review defendant's unpreserved challenge to that instruction in the interest of justice. As an alternative holding, we also reject it on the merits. The reasonable doubt charge, viewed as a whole adequately conveyed the appropriate principles (*see People v Cubino*, 88 NY2d 998 [1996]; *People v Antommarchi*, 80 NY2d 247, 251-252 [1992]).

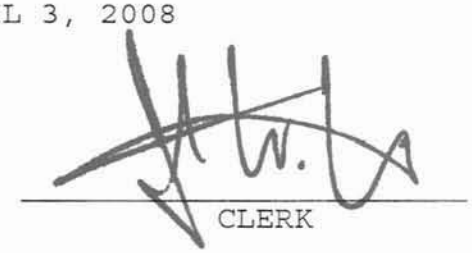
During defendant's confession to one of the burglaries, he

volunteered that "these types of burglaries are classified as violent." Defendant sought to redact this phrase on the ground that it constituted evidence that he had a criminal history; however, we find that argument to be without merit (*see e.g. People v Flores*, 210 AD2d 1 [1994], *lv denied* 84 NY2d 1031 [1995]). Defendant's remaining contentions regarding this evidence, including his constitutional claim, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Defendant's constitutional challenge to the procedure under which he was sentenced as a persistent violent felony offender is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Rosen*, 96 NY2d 329 [2001], *cert denied* 534 US 899 [2001]; *Almendarez-Torres v United States*, 523 US 224 [1998]). We find the sentence excessive to the extent indicated. Our modification results in a new aggregate term of 16 years to life.

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

ENTERED: APRIL 3, 2008



CLERK

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

3248-
3248A-
3248B Countrywide Insurance Company, Index 101527/04
Plaintiff-Appellant,

-against-

563 Grand Medical, P.C., as assignee
of Robert Alford,
Defendant-Respondent.

Thomas Torto, New York (Jason Levine of counsel), for appellant.

Gary Tsirelman, Brooklyn, for respondent.

Judgment, Supreme Court, New York County (Helen E. Freedman, J.), entered January 30, 2007, awarding defendant the principal sum of $12,638.96, and bringing up for review an order, same court and Justice, entered May 25, 2006, which granted defendant's motion for summary judgment on its claim for first-party no-fault insurance benefits, and an order, same court and Justice, entered May 30, 2006, which in effect granted plaintiff's motion for reargument and, upon reargument, adhered to its prior determination, unanimously reversed, on the law, without costs, the judgment vacated, and defendant's motion for summary judgment denied. Appeal from the order entered May 30, 2006 unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant medical provider established prima facie its entitlement to judgment as a matter of law by demonstrating that

the necessary billing documents were mailed to and received by plaintiff insurer and that payment of the no-fault benefits was overdue (*see* Insurance Law § 5106[a]; 11 NYCRR 65-3.8[a][1]; *New York & Presbyt. Hosp. v Countrywide Ins. Co.*, 44 AD3d 729, 730 [2007]). However, in opposition to the motion, plaintiff raised a triable issue of fact whether the claimed benefits were properly denied for lack of medical justification. Plaintiff was not required to set forth the medical rationale in the prescribed denial of claim form (*see A.B. Med. Servs., PLLC v Liberty Mut. Ins. Co.*, 39 AD3d 779 [2007]). Nor is a nurse's review denying no-fault claims for lack of medical necessity per se invalid (*see Channel Chiropractic, P.C. v Country-Wide Ins. Co.*, 38 AD3d 294, 295 [2007]).

Plaintiff waived its objection to defendant's standing (*see Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co.*, 9 NY3d 312, 320 [2007]).

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

ENTERED: APRIL 3, 2008

CLERK

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

3249 Mark Hynes, Index 604046/00
Plaintiff-Appellant,

-against-

Sonido, Inc.,
Defendant-Respondent.

The Law Offices of Anatta Levinksy, P.C., Brooklyn (Robert M. Shafran of counsel), for appellant.

The Law Offices of Stuart A. Jackson, P.C., New York (Christelle Clement of counsel), for respondent.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered February 9, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

On February 10, 1997, the parties signed an agreement reading in its entirety: "IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN SONIDO, INC. AND MARK T. HYNES, THAT SONIDO, INC., WILL PAY MARK T. HYNES, TEN PERCENT '10(%)' OF ALL SALES MADE AND PAID FOR VIA THE INTERNET, OF MUSIC, VIDEOS, ART, WORDS AND ADVERTISEMENT."

We reject plaintiff's expansive interpretation upon an examination of the intent of the parties within the four corners of the agreement, as well as the circumstances under which it was executed. Considering the allegation in the complaint of breach by failure to pay the percentage of income from internet sales,

the circumstances under which the agreement was executed and the relationship between the parties, the relevant contract term -- "10% of all income from sales made by the internet" -- is unambiguous. Indeed, under plaintiff's proffered interpretation of the agreement, he would be entitled to a percentage of not only the sales made by defendant, but also of any royalties received. Such an arrangement is clearly not contemplated by the plain language of the agreement.

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

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

ENTERED: APRIL 3, 2008

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

3250 The People of the State of New York, Respondent, Ind. 3923/06

-against-

Bobby Sinkler, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about December 19, 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.

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: APRIL 3, 2008

CLERK

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

3251 Continental Casualty Co., et al., Index 603746/03
Plaintiffs-Appellants,

-against-

AON Risk Services Companies, Inc., et al.,
Defendants-Respondents.

Nixon Peabody LLP, Buffalo (Laurie Styka Bloom of counsel), for appellants.

Dechert LLP, New York (Rodney M. Zerbe of counsel), for respondents.

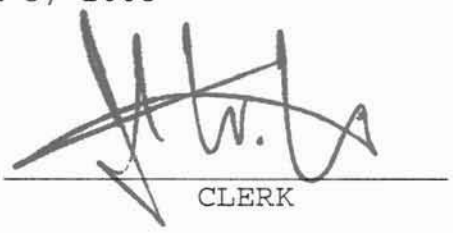
Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered March 13, 2007, dismissing the complaint and bringing up for review an order, same court and Justice, entered January 24, 2007, which granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment on their indemnification claim, unanimously affirmed, with costs.

Plaintiffs' claims against insurance broker defendant AON Risk Services, Inc. of New York (AON NY) for failing to deliver to their nonparty insured the terms and conditions of its insurance policy were properly dismissed for failure to state a cause of action. While an insurance broker sometimes acts as agent for the insurer so that its acts are treated as the acts of the insurer (*Guardian Life Ins. Co. of Am. v Chemical Bank*, 94 NY2d 418, 423 [2000]), there is no evidence of action on plaintiffs' part from which it can be inferred that they

entrusted AON NY with delivering the policy documents or authorized it to represent them for any other purpose (see *Travelers Ins. Co. v Raulli & Sons, Inc.*, 21 AD3d 1299, 1300 [2005]; *Indian Country v Pennsylvania Lumbermens Mut. Ins. Co.*, 284 AD2d 712, 714-715 [2001]). Plaintiffs' claim for common-law indemnification fails for the same reason. Nor is there any evidence that AON NY exercised discretionary functions on plaintiffs' behalf or possessed superior expertise on which plaintiffs relied so as to give rise to a fiduciary duty (*see Philan Ins. v Hall & Co.*, 215 AD2d 112, 112-113 [1995]). Plaintiffs' claim for professional malpractice is also time-barred (*see Mauro v Niemann Agency*, 303 AD2d 468, 469 [2003]).

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

ENTERED: APRIL 3, 2008



CLERK

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

3252 The People of the State of New York, Respondent, Ind. 2198/05

-against-

Coss Marte, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheila O'Shea of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J. on motions; Rena K. Uviller, J. at plea and sentence), rendered September 21, 2005, convicting defendant of criminal possession of a controlled substance in the fourth degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

The court properly denied defendant's suppression motion without granting a hearing. Defendant's vague and conclusory submission was insufficient either to raise a claim that he discarded the drugs at issue as a reaction to unlawful police

conduct or to advance any other basis for suppression (*see People v Kolon*, 37 AD3d 340, 341 [2007], *lv denied* 8 NY3d 947 [2007]; *People v Coleman*, 191 AD2d 390, 392 [1993], *affd* 82 NY2d 415, 432-433 [1993]).

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

ENTERED: APRIL 3, 2008

CLERK

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

3253-
3253A Commercial Electrical Contractors, Inc., etc., Plaintiff-Appellant, Index 602893/02

-against-

Pavarini Construction Co., Inc., Defendant-Respondent,

Museum of American Folk Art, et al., Defendants.

[And Other Actions]

McDonough Marcus Cohn Tretter Heller & Kanca, L.L.P., New Rochelle (Mark J. Sarro of counsel), for appellant.

Welby, Brady & Greenblatt, LLP, White Plains (Gerard P. Brady of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered August 23, 2007, which, upon reargument, adhered to a prior order granting defendant Pavarini's motion for partial summary judgment dismissing claims for damages due to delay, unanimously affirmed, without costs. Appeal from the prior order, same court and Justice, entered March 16, 2007, unanimously dismissed, without costs, as superseded by the appeal from the later order.

Pavarini, a general contractor, contracted with plaintiff, an electrical subcontractor, to perform work on a project in Manhattan. The prime contract was incorporated by reference in the subcontract, and both contained no-damages-for-delay clauses.

Plaintiff seeks to recover damages due to inordinate delays allegedly caused by defendant's improper scheduling and organization of subcontractors, changes to the work, and failure to provide temporary heating. This conduct allegedly constituted gross negligence and was unanticipated.

No-damages-for-delay clauses are unenforceable if the delays were caused by the contractor's bad faith or its willful, malicious, or grossly negligent conduct; were uncontemplated; were so unreasonable that they constitute intentional abandonment of the contract; or resulted from breach of a fundamental obligation of the contract *(see Corrino Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]). Plaintiff alleged that work was delayed because defendant failed to provide temporary heat as planned when the building was not enclosed during the winter months, permitted sugarblasting of the concrete walls with high pressure water when plaintiff was scheduled to perform electrical work, made changes to the switchgear room, and failed to schedule the work of the different trades in an organized manner. Plaintiff at various points claimed the delay was anywhere between 8 and 20 months long.

Plaintiff has failed to raise a triable factual issue that the delays cited are exempt from the no-damages-for-delay clause. No evidence was presented that the conduct alleged was the result of defendant's gross negligence or willful misconduct. Instead,

the conduct amounted to nothing more than inept administration or poor planning, which falls within the contract's exculpatory clause (*see S.N. Tannor, Inc. v A.F.C. Enters.*, 276 AD2d 363 [2000]).

It was reasonably foreseeable that there would be changes to the work, such as a reduction in the size of the switchgear room, and delays of the type alleged. The prime contract made clear that the owner retained the right to make changes or modifications, and included a procedure to deal with delays. Furthermore, the delay alleged was not long enough to qualify as abandonment of the contract on these facts (*see Corrino*, 67 NY2d at 312-313).

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

ENTERED: APRIL 3, 2008

CLERK

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

3257 In re Jean Nelson Lumsby, et al., Petitioners, Index 102196/07

-against-

Shaun Donovan as Commissioner, and The New York City Department of Housing Preservation and Development, et al., Respondents.

Wilmer Hill Grier, Brooklyn, for petitioners.

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

Kagan Lubic Lepper Lewis Gold & Colbert, LLP, New York (Fran I. Lawless of counsel), for 158 St. Riverside Drive Housing Co., Inc., respondent.

Determination of respondent agency, dated November 27, 2006, to issue a certificate of eviction, unanimously confirmed, the petition denied, and this proceeding (transferred to this Court by order of Supreme Court, New York County [Marcy L. Kahn, J.]), entered on or about May 10, 2007, dismissed, without costs.

The finding that petitioner mother Jean Nelson Lumsby did not maintain the subject apartment as her primary residence for many years is supported by substantial evidence (*see Matter of Shi Yi Ting v New York City Dept. of Hous. Preserv. & Dev.*, 29 AD3d 470 [2006]). Since the mother was not occupying the apartment during the relevant period, petitioner Collette Lumsby

could not establish succession rights through her (*see Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406 [2007]).

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

ENTERED: APRIL 3, 2008

CLERK

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

3262 The People of the State of New York, Respondent, Ind. 3744/05

-against-

Maurice Harmon, Defendant-Appellant.

Marianne Karas, Armonk, for appellant.

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

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered December 7, 2005, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record including attorney-client consultations and the attorney's plea-bargaining strategy, with particular reference to his concession of his client's second felony offender status (*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 (*see People v Ford*, 86 NY2d 397, 404 [1995]), and that he has not shown that any potential conflict between himself and his attorney operated on the defense or

caused him any prejudice (*see People v Abar*, 99 NY2d 406, 411 [2003]).

After sufficient inquiry (*see People v Frederick*, 45 NY2d 520 [1978]), the court properly denied defendant's motion to withdraw his guilty plea. The only ground defendant asserted was that he took the plea "under false pretenses he would be eligible for shock parole," apparently referring to a shock incarceration program (*see* Correction Law art 26-A). The court correctly determined that this claim was contradicted by the plea allocution, where defendant expressly disclaimed any off-the-record promises. Furthermore, there was no need for the court to assign new counsel for the plea withdrawal application.

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

ENTERED: APRIL 3, 2008

CLERK

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

3263 Eleanor Duffy, Index 120794/02
Plaintiff-Appellant,

-against-

Dr. James M. Vogel, et al.,
Defendants-Respondents,

Dr. Allan J. Jacobs,
Defendant.

Jonathan M. Landsman, New York, for appellant.

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

Order, Supreme Court, New York County (Stanley L. Sklar, J.), entered October 13, 2006, which, to the extent appealed from, granted the Vogel defendants' motion for summary judgment as to all medical malpractice claims arising from treatment prior to March 24, 2000, unanimously affirmed, without costs.

Plaintiff failed to satisfy her burden of demonstrating the existence of triable issues of fact as to the applicability of the continuous treatment doctrine to toll the statute of limitations (*Cox v Kingsboro Med. Group*, 88 NY2d 904 [1996]) with respect to her malpractice claims against the Vogel defendants arising before her last visit to Dr. Vogel on March 24, 2000. Neither the continuing relationship between physician and patient nor the continuing nature of a diagnosis is sufficient to satisfy

that burden (*see Ganess v City of New York*, 85 NY2d 733 [1995]; *Nykorchuck v Henriques*, 78 NY2d 255 [1991]). Plaintiff conceded that Dr. Vogel never told her during any office visit to schedule another appointment, and her visits to him were few and far between, failing to establish continuity and initiation of a timely return related to the initial problem (*Curcio v Ippolito*, 63 NY2d 967 [1984]; *see also Young v New York City Health & Hosps. Corp.*, 91 NY2d 291 [1998]).

M-1291 - *Duffy v Dr. James M. Vogel, et al.*

Motion seeking leave to add to respondents' supplemental record and for other and further related relief granted.

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

ENTERED: APRIL 3, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 3, 2008.

Present - Hon. David B. Saxe, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Rolando T. Acosta, Justices.

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The People of the State of New York, Ind. 554/06
Respondent,

-against- 3265

Roland Nelson,
Defendant-Appellant.

---x

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee White, J.), rendered on or about September 28, 2006,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTER:

Clerk.

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

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

3266N Dong-Pyo Yang, etc., Index 600477/06
Plaintiff-Respondent,

-against-

75 Rockefeller Café Corp., et al.,
Defendants,

Empire State Capital Corp.,
Defendant-Appellant.

Capell Vishnick LLP, Lake Success (Andrew A. Kimler and Avrohom Gefen of counsel), for appellant.

Melvin B. Berfond, New York (Michael Konopka of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered June 20, 2007, which, insofar as appealed from, granted plaintiff's motion for a preliminary injunction enjoining defendant Empire State Capital Corp. (Empire), from taking any action seeking to sell, transfer, encumber, mortgage, lien or otherwise attempt to hypothecate any shares of defendant 75 Rockefeller Café Corp. pending hearing of the matter, and extended a temporary restraining order staying a proposed special meeting of shareholders, unanimously affirmed, with costs.

The court exercised its discretion in a provident manner in granting plaintiff-shareholder's application for preliminary injunctive relief upon his clear showing of a likelihood of success on the merits of his claims that a corporate loan made by Empire was unauthorized by the corporation, that plaintiff would

suffer irreparable injury unless the relief sought was granted, and that the balancing of the equities lies in favor of plaintiff and the corporation (*see W.T. Grant Co. v Srogi,* 52 NY2d 496, 517 [1981]; *Faberge Intl. v DiPino*, 109 AD2d 235, 240 [1985]). The record evidence also establishes that Empire would not suffer injury as a result of the order maintaining the status quo with respect to corporate management and control pending litigation of the merits of plaintiff's individual and derivative claims (*see Walker & Zanger v Zanger,* 245 AD2d 144 [1997]). Furthermore, the court reasonably interpreted the guaranty and pledge agreements as precluding Empire from exercising control over pledged shares of stock absent evidence of a default by the corporation.

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

ENTERED: APRIL 3, 2008

CLERK

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

3267N J. Richard Cohen, et al., Index 601871/07
Plaintiffs-Appellants,

-against-

Paul LeNoble, et al.,
Defendants-Respondents,

Cole Realty Corp.,
Defendant.

Davis & Gilbert LLP, New York (Guy R. Cohen of counsel), for appellants.

Richard L. Yellen & Associates, LLP, New York (Richard L. Yellen of counsel), for Paul LeNoble and Gail LeNoble, respondents.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Christopher R. Gette of counsel), for The Clarett Group LLC and Daniel Hollander, respondents.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered October 29, 2007, which denied plaintiffs' motion for a preliminary injunction against defendants Paul and Gail LeNoble transferring their shares of Cole Realty Corp. to defendants Clarett Group LLC or Daniel Hollander or any other person or entity ineligible to be a shareholder of a Subchapter S corporation, unanimously affirmed, with costs.

As there are no restrictions on the disposition of shares in the subject close corporation's corporate documents, the LeNobles

have the right to sell to Clarett or to whomever they wish (*see Borden v Guthrie*, 23 AD2d 313, 319 [1965], *affd* 17 NY2d 571 [1966]; *Leviton Mfg. Co. v Blumberg*, 242 AD2d 205, 207-208 [1997]). That the sale will result in the corporation's loss of Subchapter S status, and will thus have an adverse financial impact on plaintiffs, does not warrant the injunctive relief they seek given no showing of fraud or other breach of fiduciary duty (*see Zetlin v Hanson Holdings*, 48 NY2d 684, 685 [1979]). Plaintiffs also do not show irreparable harm (*see Sterling Fifth Assoc. v Carpentille Corp.*, 5 AD3d 328, 329 [2004] ["[l]ost profits and tax benefits, however difficult to compute they may be, are clearly compensable with money damages"]), and the equities do not balance in their favor.

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

ENTERED: APRIL 3, 2008

CLERK

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

3268N Metropolitan Steel Industries, Inc. doing business as Steelco, Plaintiff-Respondent, Index 104341/02 590519/02

-against-

Perini Corporation, et al., Defendants-Appellants.

[And A Third-Party Action]

Peckar & Abramson, P.C., New York (Richard L. Abramson of counsel), for appellants.

Milber Makris Plousadis & Seiden, LLP, White Plains (Mark Seiden of counsel), for respondent.

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered August 17, 2007, which denied defendants-appellants' motion to vacate the information subpoena and restraining notices served by plaintiff, and for a preliminary injunction enjoining plaintiff from issuing any further restraining notices, unanimously affirmed, with costs. Plaintiff granted leave to settle a new judgment awarding it the base contract amount of $576,441 plus interest, costs and disbursements, and severing the claim for unpaid extra work.

The court properly denied appellants' motion for a preliminary injunction enjoining respondent from serving further restraining notices since appellants failed to establish a likelihood of success on the merits, irreparable injury absent the grant of injunctive relief, and that the balance of the

equities tips in their favor (*OraSure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348 [2007]). Indeed, on a prior appeal, we affirmed respondent's "entitlement to the contract balance, with prejudgment interest thereon from November 6, 2001" (36 AD3d 568, 569 [2007]). Therefore, appellants could not establish a likelihood of success on the merits of their contention that they do not owe respondent at least $576,441, the contract balance, plus interest. Additionally, the balance of equities does not tip in appellants' favor, as respondent has not been paid the contract balance for over six years. Since appellants failed to establish a likelihood of success on the merits and that the balance of the equities tips in their favor, both necessary elements for preliminary injunctive relief, we need not address the issue of whether they demonstrated that they would sustain irreparable injury absent injunctive relief (*see Zodkevitch v Feibush*, __ AD3d __, 2008 NY Slip Op 2631).

Furthermore, contrary to appellants' position, they are not entitled to an offset because of an interim payment they made towards respondent's extra work.

In light of the apparent confusion that has resulted during the course of the proceedings and for the sake of clarity, respondent is hereby granted leave to settle a new judgment to the extent indicated.

We have considered appellants' remaining contention and find it without merit.

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

ENTERED: APRIL 3, 2008

CLERK