SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 8, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3636 The People of the State of New York, Ind. 4208/05
Respondent,

-against-

Elias Tejada,
Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about May 19, 2006, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level two sex offender adjudication. The court properly assessed points under the risk factor for relationship with the victim. Defendant and the victim were clearly strangers at the time of the sex crime, since his Internet exchanges with the victim over the course of three days

did not rise to the level of any manner of acquaintanceship. In any event, to the extent defendant established a relationship, this was for the primary purpose of victimization, which was an alternative basis for the assessment under the guidelines. The court properly assessed points under the factor for alcohol abuse, since defendant's own admission was sufficient to establish that factor (*see e.g. People v Reyes*, 48 AD3d 267 [2008]), and properly assessed points under the factor for lack of supervised release, even though this was a matter beyond defendant's control (*see People v Lewis*, 37 AD3d 689, 690 [2007], *lv denied* 8 NY3d 814 [2007]).

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

ENTERED: MAY 8, 2008

CLERK

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

3637 Ricardo Pichardo, Index 18217/04
Plaintiff-Appellant-Respondent, 84222/04
85261/06

-against-

Urban Renaissance Collaboration
Limited Partnership, et al.,
Defendants-Respondents-Appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Diane Toner of counsel), for appellant-respondent.

Quirk and Bakalor, P.C., New York (Jeanne M. Boyle of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered March 2, 2007, which denied the parties' respective motions for summary judgment, unanimously modified, on the law, plaintiff granted summary judgment as to liability on his common law negligence and Labor Law § 200; § 240(1) and § 241(6) claims, and otherwise affirmed, without costs.

Plaintiff established that violation of Labor Law § 240(1) was a proximate cause of his accident. Defendants' argument that failure to provide an appropriate safety device was either impracticable under the circumstances or would not have prevented the accident is unavailing (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]). However, the IAS court erroneously ruled that the testimony of the general contractor's president, Azziz, raised issues of fact as to how the accident happened. Azziz merely testified that he did not recall whether

there was a hole in the floor for debris disposal, and "usually I don't let them make the hole." Defendants failed to set forth a conflicting theory with supporting evidentiary material, other than mere speculation as to how the accident occurred, sufficient to raise a triable issue of fact (*see Wasilewski v Museum of Modern Art*, 260 AD2d 271 [1999]). This is not a case where the mechanism by which a worker suffered injury is obtuse or subject to conflicting explanation. Plaintiff fell through a large hole in the floor that was several stories deep. In light of Azziz's testimony that he was on the site on a daily basis, his inability to remember a six-foot-wide hole that extended from the fifth floor through to the basement is simply incredible.

Summary judgment is also appropriate on the Labor Law § 241(6) claim where, even though a defense of comparative negligence is raised, insufficient evidentiary proof is offered to raise a triable issue in response to the plaintiff's prima facie entitlement to judgment as a matter of law (*see Keena v Gucci Shops*, 300 AD2d 82, 83 [2002]). Again, Azziz's testimony that he was unaware of the disposal of debris through the six-foot-wide hole cut into the flooring by the employees of his own demolition subcontractor was insufficient to create a triable issue of fact.

There are no issues of fact as to the subcontractor's exercise of the requisite degree of control over the

injury-producing work. Thus, in these circumstances, summary judgment should have been granted to plaintiff on the claims for Labor Law § 200 and for common-law negligence.

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

ENTERED: MAY 8, 2008

CLERK

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

3638 The People of the State of New York, Ind. 2824/06
Respondent,

-against-

Rehana Beepat,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about December 5, 2006, unanimously affirmed. No opinion. Order filed.

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

3639 Marcin Kaminski, Index 106087/05
Plaintiff-Appellant, 590825/05

-against-

Carlyle One, et al.,
Defendants-Respondents.

[And a Third Party Action]

Perecman & Fanning, P.L.L.C., New York (David H. Perecman of counsel), for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered June 21, 2007, which, to the extent appealed from as limited by the brief, upon reargument, denied plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) and § 241(6), and granted defendants' cross motion for summary judgment dismissing plaintiff's claims under § 240(1) and § 241(6), unanimously modified, on the law, plaintiff's motion for partial summary judgment granted as to his Labor Law § 240(1) claim and defendants' cross motion denied as to that claim, and otherwise affirmed, without costs.

Plaintiff was injured when he attempted to realign a side panel of the sidewalk bridge he and his coworkers were constructing and the panel gave way and fell to the ground, taking him with it. Defendants' failure to provide plaintiff

with any safety device to protect him against the risk of a fall created by his need to lean over the side of the bridge to nail in the side panels leads to liability under Labor Law § 240(1) (*see Felker v Corning Inc.*, 90 NY2d 219, 224 [1997]; *Oliveira v Dormitory Auth. of the State of New York*, 292 AD2d 224 [2002]; *Lightfoot v State of New York*, 245 AD2d 488 [1997]). Contrary to defendants' contention, coworkers are not a safety device contemplated by the statute.

Industrial Code (12 NYCRR) § 23-5.1(j); § 23-1.15; § 23-1.7(b) and 23-1.22(c)(2) are not applicable to this case.

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

ENTERED: MAY 8, 2008

CLERK

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

3640 Marylyn R. Dunn, Index 112784/04
Plaintiff-Appellant,

-against-

Astoria Federal Savings and
Loan Association, et al.,
Defendants-Respondents.

Kaiser Saurborn & Mair, P.C., New York (Daniel J. Kaiser of counsel), for appellant.

Jackson Lewis LLP, Melville (Roger H. Briton of counsel), for Astoria Federal Savings and Loan Association, George L. Engelke, Jr. and Gary T. McCann, respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered January 30, 2007, which, insofar as appealed from, granted defendants' motions for summary judgment dismissing plaintiff's causes of action for retaliatory termination and sexual harassment/hostile work environment, unanimously affirmed, without costs.

Plaintiff was terminated from her employment as a secretary for defendant Javitz at defendant Astoria Federal Savings and Loan Association after it was discovered from a third party that she forged Javitz's signature on a credit card authorization letter for her son. Following her termination, plaintiff brought this action alleging that her firing was, in fact, retaliation for threatening to bring a sexual harassment claim against Javitz.

The motion court properly granted summary judgment in favor of defendants dismissing the retaliatory termination cause of action where the evidence establishes that plaintiff did not complain to anyone at the bank, including Astoria's Human Resource Department, about Javitz's alleged wrongful conduct and thus, there are no triable issues of fact as to her employer's knowledge of the alleged harassment (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]). Nor are there triable issues of fact that plaintiff's complaint to defendant Javitz caused Astoria to terminate her. Furthermore, the overwhelming evidence of plaintiff's forgery, provided a legitimate, non-discriminatory basis for her termination (*id.*).

Dismissal of plaintiff's sexual harassment/hostile work environment claim was also appropriate, since plaintiff failed to avail herself of Astoria's anti-discrimination policy of which she was aware (*see Burlington Indus. Inc. v Ellerth*, 524 US 742, 765 [1998]; *Faragher v City of Boca Raton*, 524 US 775, 807-808 [1998]). Contrary to plaintiff's contention that this affirmative defense is unavailable in light of her termination, the evidence establishes that plaintiff's termination was not retaliatory.

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: MAY 8, 2008

CLERK

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

3641 The People of the State of New York, Respondent, Ind. 1419/03

-against-

Anthony Lewis, Defendant-Appellant.

Stanley Neustadter, New York (David S. Beller of counsel), for appellant.

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

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered February 28, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony offender, to a term of 4½ to 9 years, unanimously affirmed.

The court properly denied defendant's request for an agency charge since there was no reasonable view of the evidence, viewed most favorably to defendant, to support such an instruction. Nothing in the police testimony supported an agency defense (*see People v Herring*, 83 NY2d 780 [1994]), and, according to defendant's testimony, he did nothing at all to participate in the drug transaction or act as anyone's "agent." Defendant's testimony, if credited, would support a conclusion that his only

involvement was to "identify a local purveyor of narcotics" (*People v Rosario*, 193 AD2d 445, 446 [1993], *lv denied* 82 NY2d 708 [1993]), which would not constitute participation in the crime in any capacity, including that of a purchaser's "agent."

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

ENTERED: MAY 8, 2008

CLERK

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

3643 Henry Loheac, P.C., Index 21926/06
Plaintiff-Respondent,

-against-

Children's Corner Learning Center, et al.,
Defendants-Appellants.

Ellen Rothstein, New York, for appellants.

Paul B. Bercovici, Scarsdale, for respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered April 11, 2007, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss causes of action for an account stated, quantum meruit and unjust enrichment, unanimously modified, on the law, the claim for account stated limited to $25,815.27, and otherwise affirmed, without costs.

Plaintiff's allegations are supported by documentary evidence and easily withstand contradiction by any extrinsic evidence submitted in support of defendants' motion. Plaintiff was not precluded from bringing an action for breach of contract and, as alternative theories, quantum meruit and unjust enrichment (*see Ellis v Abbey & Ellis*, 294 AD2d 168, 170 [2002], *lv denied* 98 NY2d 612 [2002]; Siegel, McKinney's CPLR Practice Commentary C3002:5]). There is a dispute as to the scope of work intended by the original oral contract and whether plaintiff is

owed money outside the scope of that agreement (*see American Tel. & Util. Consultants v Beth Israel Med. Ctr.*, 307 AD2d 834 [2003]).

There is no merit to the argument that the claim for an account stated should be dismissed for lack of a timely demand for payment or rendering of account, as such assertions are refuted by the evidence of record (*see Morrison Cohen Singer & Weinstein v Ackerman* (280 AD2d 355 [2001]). However, the claim for an account stated should be limited to $25,815.27, the amount demanded before the dispute over the work was made known; defendants' inaction has raised an issue as to constructive assent.

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

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

ENTERED: MAY 8, 2008

CLERK

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

3644 Cem Cengiz Uzan, Index 105996/06
Plaintiff-Appellant,

-against-

Telsim Mobil Telekomunikasyon Hizmetleri A.S., et al.,
Defendants-Respondents.

Baker Botts L.L.P., Washington, D.C. (Richard P. Sobiecki, of the District of Columbia Bar, admitted pro hac vice, of counsel), for appellant.

Salans, New York (Claude D. Montgomery of counsel), for respondents.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered November 14, 2007, in defendants' favor, unanimously affirmed, with costs.

Plaintiff - a shareholder and former officer of defendant Telsim (a Turkish telecommunications company) - was one of the defendants in *Motorola Credit Corp. v Uzan* (274 F Supp 2d 481 [SD NY 2003], *affd in part, vacated in part* 388 F3d 39 [2d Cir 2004], *cert denied* 544 US 1044 [2005]), wherein a very large judgment was entered against him. He brought the instant action against Telsim for contribution and indemnification, asserting various tort claims against the remaining defendants (the Telsim directors).

The motion court properly dismissed this action for lack of personal jurisdiction (*see* CPLR 3211[a][8]). Plaintiff contends

that New York has general jurisdiction over Telsim (CPLR 301), and hence, the relevant time period is "the time when the action was commenced" (*Lancaster v Colonial Motor Frgt. Line*, 177 AD2d 152, 156 [1992]). Most of the points on which plaintiff relies, such as Telsim's defense of an action in United States District Court for the Southern District of New York and its negotiation of a loan with the New York branch of a Swiss bank, predate the commencement of this action. Simply defending an action does not constitute "doing business" (Business Corporation Law § 1301[b][1]; *see Andros Compania Maritima S.A. v Intertanker Ltd.*, 714 F Supp 669, 675 [SD NY 1989]). The equipment purchase and finance agreements that Telsim entered into predate this action, and they have nothing to do with New York: the other parties were non-New York corporations, the agreements were for the purchase of equipment to be used in Turkey, governed by Swiss law, and called for arbitration in Switzerland. Plaintiff does not allege when Telsim entered into roaming agreements, nor does he allege any connection with New York. In any event, roaming agreements do not constitute doing business for the purpose of conferring general jurisdiction (*see Estate of Ungar v Palestinian Auth.*, 400 F Supp 2d 541, 551 [SD NY 2005]). In sum, plaintiff has failed to show that as of the commencement of this action, Telsim was engaged in "a continuous and systematic course

of 'doing business'" in this state (*see Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 [1990]).

Plaintiff contends that New York has specific (i.e., long-arm) jurisdiction over the remaining defendants pursuant to CPLR 302(a)(3)(ii). He claims he was injured within this state when the Telsim directors prevented him from satisfying the *Motorola* judgment by procuring an order of the Southern District Court for his arrest should he enter the state. This argument has two flaws. First, "the situs of the injury for long-arm purposes is where the event giving rise to the injury occurred, not where the resultant damages occurred" (*Marie v Altshuler*, 30 AD3d 271, 272 [2006]). The Telsim directors' post-August 2005 refusal to grant a constructive trust over Telsim's shares occurred in Turkey, not New York. Second, the federal court did not order plaintiff arrested as a result of the Telsim directors' actions; that order was based partly on the litigation activities of plaintiff and his family in Turkey (*see Motorola*, 274 F Supp 2d 481; *Motorola Credit Corp. v Uzan*, 2003 US Dist LEXIS 111, 2003 WL 56998 [SD NY]). To the extent the arrest order was based on plaintiff's failure to deposit certain Telsim shares into the court's registry, it was on May 9, 2002 that the court ordered plaintiff to deposit the shares (*see Motorola Credit Corp. v Uzan*, 322 F3d 130, 134 [2d Cir 2003]), the arrest order was issued on July 31, 2003 (*see Motorola*, 274 F Supp 2d 481, 582), and the Telsim

directors were not appointed until February 2004.

In light of our disposition, we need not reach the parties' remaining arguments.

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

ENTERED: MAY 8, 2008

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

3646 The People of the State of New York, Ind. 4286/02
Respondent,

-against-

Benjamin Franklin,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (John Byrne, J. at plea; John Collins J. at sentence), rendered on or about February 23, 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: MAY 8, 2008

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

3648 Felix Rivera, Index 106680/05
Plaintiff-Respondent,

-against-

The Beer Garden, Inc., doing business as The Roxy,
Defendant-Appellant.

Morris, Duffy, Alonso & Faley, LLP, New York (Barry M. Viuker of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for respondent.

Order, Supreme Court, New York County (Carol Edmead, J.), entered April 12, 2007, which denied defendant's motion to dismiss the complaint as time-barred and granted plaintiff's cross motion to the extent of amending the caption and authorizing service of the amended summons and complaint nunc pro tunc, unanimously affirmed, without costs.

Plaintiff was injured in August 2002 at a nightclub popularly known as The Roxy. The summons and complaint were filed in May 2005, within the applicable three-year statute of limitations for personal injury, but misnamed The Roxy Roller Rink, Inc. as the defendant. Alerted to its mistake, in September 2005 plaintiff effected service of the original summons and a supplemental summons and amended complaint on defendant.

We reject Beer Garden's argument that the action is time-barred as against it because the supplemental summons and

amended complaint naming it was not filed until after the statute of limitations had run. The original summons and complaint were timely filed. Leave to amend to correct defendant's name was properly granted, even after the statute of limitations had run, because of evidence that defendant, who was aware it was the intended defendant, had in fact been served and would not be prejudiced by granting the amendment (CPLR 305[c]; *Manocchio v Wohlfeil*, 206 AD2d 908 [1994]).

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

ENTERED: MAY 8, 2008

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

3649N In re Gregorio Lucero, Index 17852/06
Petitioner-Respondent,

-against-

New York City Industrial
Development Agency,
Respondent-Appellant.

Zisholtz & Zisholtz, LLP, Mineola (Stuart S. Zisholtz of counsel), for appellant.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 26, 2007, which granted petitioner's application to serve a late notice of claim, unanimously affirmed, without costs.

In support, petitioner asserted that he was working in a warehouse sublet by his employer from a company that had leased it from respondent agency when a concrete ramp on which he was transporting materials collapsed. It appears that while hospitalized for about seven weeks following the accident, petitioner retained an attorney who failed to file a notice of claim, and that about five months after his discharge from the hospital, petitioner retained a new attorney who made the instant application two months later, or about nine months after the accident. In opposition, respondent asserted that it "never had notice of the alleged occurrence," but did not indicate what

records it keeps in the ordinary course of business of accidents like this, and whether those records were searched. No basis exists to disturb the motion court's rejection of what it aptly described as respondent's "bald claim" of no notice. It is incredible that respondent had no notice of the collapse of a large concrete structure inside its building, and of the personal injuries sustained by petitioner, where an ambulance and the Fire Department responded to the scene. We have considered and rejected respondent's other claims.

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

ENTERED: MAY 8, 2008

CLERK

Tom, J.P., Williams, Catterson, Acosta, JJ.

3618 The People of the State of New York, Ind. 4763/05
Respondent,

-against-

Paul Buskirk,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

Order, Supreme Court, New York County (William A. Wetzel, J.), entered on or about July 20, 2007, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant did not establish any special circumstances warranting a downward departure from his risk level (*see People v Guaman*, 8 AD3d 545 [2004]). Defendant's record shows not only a past history of serious sex crimes, but recent evidence of a continuing predisposition toward sexual activity with children.

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

ENTERED: MAY 8, 2008

CLERK

Tom, J.P., Williams, Catterson, Acosta, JJ.

3619 New Hampshire Insurance Company, as subrogee of Links Club, Inc., Plaintiff-Respondent, Index 119031/06

-against-

Maria Serena Bartha, Individually, et al., Defendants-Appellants,

Maria Serena Bartha, etc., et al., Defendants.

Brief Carmen & Kleiman, LLP, New York (Adria De Landri of counsel), for appellants.

Clausen Miller, P.C., New York (Robert A. Stern of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered September 19, 2007, which, to the extent appealed from, denied the individual defendants' motion to dismiss the complaint as against them for failure to state a cause of action, imposed costs upon their counsel, and granted plaintiff's cross motion for leave to amend the complaint to add certain allegations against the individual defendants, unanimously reversed, on the law, with costs, defendants' motion granted, the imposition of costs vacated, and plaintiff's cross motion denied.

In the matrimonial action brought by defendant Cordula Bartha against her then-husband, the decedent herein, this Court held, inter alia, that a certain townhouse constituted marital property and that therefore Cordula was entitled to share in its

value (*see Bartha v Bartha*, 15 AD3d 111, 115-117 [2005]). On or about July 10, 2006, the decedent, unwilling to accept that the townhouse was marital property, set off an explosion on the premises that destroyed the building and caused fatal injuries to himself. There followed numerous lawsuits against the decedent's estate by individuals and entities seeking damages for injury to persons or property due to the decedent's wrongful conduct in blowing up the house. Plaintiff New Hampshire Insurance Company commenced the instant action on behalf of its insured, the Links Club, not only as against the estate but also as against Cordula Bartha and the couple's two daughters, one of whom had been appointed administrator of the estate, in their individual capacities.

Irrespective of any viable claims that plaintiff might have against either the decedent's estate or defendant Consolidated Edison arising out of the decedent's conduct in destroying his property, it has none as against any of the individual defendants. Cordula Bartha had been divorced from the decedent for several years, and neither she nor the couple's two daughters had resided with him since October 2001. None of them had either authority to control the decedent's actions (*see Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988]) or a relationship with the Links Club that required them to protect it

from the conduct of others (*see Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 233 [2001]). Contrary to plaintiff's contention, the decision in the matrimonial action, while it had the effect of making Cordula an owner of the townhouse, did not render her liable for the decedent's conduct. Indeed, her position was akin to that of an out-of-possession judgment creditor who neither maintained nor controlled the premises where an injury-causing event occurred (*see Moran v Regency Sav. Bank, F.S.B.*, 20 AD3d 305, 306 [2005]).

In the absence of a viable cause of action against the individual defendants, plaintiff should not have been afforded leave to amend its complaint (*see Wieder v Skala*, 168 AD2d 355 [1990]).

In the circumstances presented, particularly as the record discloses no noncompliance with any judicial directive, the imposition of costs upon defendants' counsel was improper.

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

ENTERED: MAY 8, 2008

CLERK

Tom, J.P., Williams, Catterson, Acosta, JJ.

3620-
3621 In re Devante S., and Others,

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

John H.,
Respondent-Appellant,

-against-

Administration for Children's Services,
Petitioner-Respondent.

Michael S. Bromberg, Sag Harbor, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

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

Order of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about January 8, 2007, which, upon a fact-finding determination that respondent father had neglected his children, released the children to their mother's custody under petitioner's supervision for a period of 12 months, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Court Act § 1046[b][I]) showing that respondent inflicted excessive corporal punishment on his children (*see* Family Court Act § 1012[f][i][B]). The children's

out-of-court statements were cross-corroborating (*see Matter of Nicole V.*, 71 NY2d 112, 124 [1987]). Further, the court credited the caseworker's testimony concerning respondent's angry behavior during and after a home visit and the children's apparent fearfulness in his presence. The court also appropriately considered a past adjudication of neglect against respondent that was based upon a finding of excessive corporal punishment involving the use of a belt against a toddler, as well as his current failure to follow agency recommendations (*see generally Matter of Evelyn B.*, 30 AD3d 913, 915-917 [2006], *lv denied* 7 NY3d 713 [2006]), and his failure to testify, from which the court was entitled to draw the "strongest negative inference" (*Matter of Nicole H.*, 12 AD3d 182, 183 [2004]).

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

ENTERED: MAY 8, 2008

Tom, J.P., Williams, Catterson, Acosta, JJ.

3622 The People of the State of New York, Ind. 850/02
Respondent,

-against-

James Devonish,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered on or about July 27, 2006, unanimously affirmed. No opinion. Order filed.

Tom, J.P., Williams, Catterson, Acosta, JJ.

3624 Cynthia Altmann, Index 7399/04
Plaintiff-Appellant,

-against-

Michael Molead, M.D., et al.,
Defendants,

Bobby J. Johnson, M.D., et al.,
Defendants-Respondents.

Sanocki Newman & Turret, LLP, New York (David B. Turret of counsel), for appellant.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for Bobby J. Johnson, M.D., respondent.

Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains (Edward J. Guardaro, Jr. of counsel), for Luis F. Stiller, M.D. and Bronx Lebanon Hospital Center, respondents.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital, respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson J.), entered March 20, 2007, which granted the motion by defendants Stiller and Bronx Lebanon for summary judgment dismissing the complaint as against them and also granted summary judgment to nonmoving defendants Johnson and St. Barnabas, unanimously affirmed, without costs.

In response to the prima facie showing by Stiller and Bronx Lebanon, in this medical malpractice action, based on the hospital records, deposition testimony and the affirmation of an expert in emergency medicine, plaintiff failed to raise an issue

of fact. The affirmation of plaintiff's expert was insufficient to contradict defendants' expert testimony that plaintiff was appropriately diagnosed with bronchitis given her symptoms. His claim that defendants should have detected plaintiff's endocarditis was conclusory and unsupported by the record (*see Wong v Goldbaum*, 23 AD3d 277 [2005]). Summary judgment was also properly granted to defendants Johnson and St. Barnabas upon a search of the record (CPLR 3212[b]).

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

ENTERED: MAY 8, 2008

Tom, J.P., Williams, Catterson, Acosta, JJ.

3625 The People of the State of New York, SCI 4542/06
Respondent,

-against-

Felipe Espiritusanto,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Jessica A. Yager of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Edward A. Jayetileke of counsel), for respondent.

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered on or about October 16, 2006, unanimously affirmed. No opinion. Order filed.

Tom, J.P., Williams, Catterson, Acosta, JJ.

3626 The People of the State of New York, Ind. 2219/04
Respondent,

-against-

Jorge Ballesteros,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Christian J. Klossner of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered on or about August 31, 2005, unanimously affirmed. No opinion. Order filed.

Tom, J.P., Williams, Catterson, Acosta, JJ.

3627-
3628 In re Bernard Kufeld, etc., Index 92211/06

- - - - -

Michael Peskowitz,
Petitioner-Appellant,

-against-

Bernard Kufeld,
Respondent-Respondent.

- - - - -

Michael Peskowitz,
Petitioner-Respondent,

-against-

Bernard Kufeld,
Respondent-Appellant.

Marcus, Gould & Sussman, LLP, White Plains (Marianne L. Sussman of counsel), for appellant/respondent.

Steven B. Cottler, Valhalla, for respondent/appellant.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered on or about November 28, 2007, which, upon reargument of a prior order, denied so much of a motion by Peskowitz for review of Kufeld's medical and psychiatric records by a court-appointed evaluator as sought retention by the evaluator of an independent medical and psychiatric expert to examine Kufeld himself, unanimously modified, on the law, the relief sought by the evaluator granted, and otherwise affirmed, without costs. Appeal from the prior order, entered on or about July 19, 2007, unanimously dismissed, without costs, as superseded by this

appeal from the later order.

In this guardianship proceeding, the IAS court providently exercised its discretion in granting the court evaluator's application to review the medical records of Kufeld, the alleged incapacitated person (AIP), notwithstanding the physician-patient privilege (*see* Mental Hygiene Law § 81.09[d]). Given the assertions of incapacity in the AIP's self-petition, which was subsequently withdrawn, and the original court evaluator's report, as well as the allegations, in the affidavits of the AIP's nephew (Peskowitz) and driver, of duress and coercion directed against the AIP, the court properly determined that "such records are likely to contain information which will assist the court evaluator in completing his or her report to the court" (*id.*; *see Matter of Daniel TT.*, 39 AD3d 94, 98 [2007]). Although such records may not be admissible at a hearing due to the physician-patient privilege unless the AIP has affirmatively placed his medical condition in issue (*see Matter of Rosa B.-S.*, 1 AD3d 355, 356 [2003]; *Matter of Q.E.J.*, 14 Misc 3d 448 [2006]), the privilege is nonetheless waived when a court evaluator seeks to review the records under § 81.09(d) (*see People v Sinski*, 88 NY2d 487, 491-492 [1996]). While the original court evaluator did not testify and was not subject to cross-examination, the IAS court did not err in considering the original court evaluator's report, which was never admitted in evidence, when determining

the current court evaluator's motion (*see* Mental Hygiene Law § 81.12[b]).

The IAS court improperly modified its original order to deny the court evaluator's application to retain an independent medical and psychiatric expert to examine the AIP. Contrary to the court's determination, Mental Hygiene Law § 81.09(c)(7) does not prohibit such examinations (*see* Kassoff, Elder Law & Guardianship in NY [West Prac Series] § 12:147; § 12:149; *Daniel TT.*, 39 AD3d at 98).

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

ENTERED: MAY 8, 2008

CLERK

Tom, J.P., Williams, Catterson, Acosta, JJ.

3630 The People of the State of New York, Ind. 3034/04
Respondent,

-against-

Billy Richardson,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about February 18, 2005, 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: MAY 8, 2008

Tom, J.P., Williams, Catterson, Acosta, JJ.

3631 Belrose Fire Suppression, Inc., Index 602279/04
Plaintiff-Appellant,

-against-

Stack McWilliams, LLC, et al.,
Defendants-Respondents.

Mastropietro-Frade, LLC, New York (Manny A. Frade of counsel), for appellant.

Stroock & Stroock & Lavan, LLP, New York (Kevin L. Smith of counsel), for respondents.

Order, Supreme Court, New York County (Leland DeGrasse, J.), entered on or about June 7, 2007, which, to the extent appealed from as limited by the briefs in this action for breach of contract, granted defendants' motion to reargue and, upon reargument, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

The court did not improvidently exercise its discretion in granting defendants' motion for reargument and determining that it had overlooked or misapprehended the relevant facts, and mistakenly arrived at its prior decision granting plaintiff partial summary judgment as to liability under the construction contract (*see* CPLR 2221[d]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]). Where a party fails to provide

notice as required under a contract, "it is irrelevant whether the [terminating party] did, in fact, have the requisite cause to terminate the plaintiff's employment" (*Kalus v Prime Care Physicians, P.C.*, 20 AD3d 452, 454 [2005]; *see Scudder v Jack Hall Plumbing & Heating*, 302 AD2d 848, 850-51 [2003]). Here, however, the record shows that there are triable issues regarding the validity and timeliness of defendants' notice of termination, as well as whether plaintiff abandoned the project which, if later proven true, would remove defendants' obligation to comply with the notice provision of the contract (*see U.S. Steel v M. Dematteo Constr. Co.*, 315 F3d 43, 50 [2002]). Under these circumstances, the motion court properly found that the issues raised by the complaint and counterclaims were so inextricably interwoven that denial of summary judgment was warranted (*see Boston Concessions Group v Criterion Ctr. Corp.*, 200 AD2d 543, 544-545 [1994]).

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: MAY 8, 2008

Tom, J.P., Williams, Catterson, Acosta, JJ.

3633 The People of the State of New York, Ind. 3355/02
Respondent,

-against-

Ronald Massagli,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Bari Kamlet of counsel), for respondent.

Judgment of resentence, Supreme Court, Bronx County (Joseph Fisch, J.), rendered July 8, 2004, convicting defendant, upon his plea of guilty, of violation of probation, and resentencing him to a term of 5 to 15 years, unanimously modified, on the law, to the extent of vacating the restitution order and remanding for a hearing on restitution, and otherwise affirmed.

Although defendant agreed to make restitution of the amount in question, he made no statement to support the amount of restitution ordered by the court and the record is bereft of any basis for the award (*see People v Consalvo*, 89 NY2d 140 [1996]). Furthermore, this defect in the sentence presents a question of law notwithstanding defendant's failure to request a restitution hearing (*People v Fuller*, 57 NY2d 152, 156 [1982]; *People v White*, 282 AD2d 396, 397 [2001]).

However, we find nothing unlawful about the violation of

probation adjudication and the prison sentence. While the record does not establish that defendant made a valid waiver of his right to appeal from that sentence on the ground of excessiveness, we perceive no basis for reducing it.

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

ENTERED: MAY 8, 2008

CLERK

Tom, J.P., Williams, Catterson, Acosta, JJ.

3634N In re Lancer Insurance Company, Index 13175/06
Petitioner-Respondent,

-against-

Chaitram Lackraj,
Respondent-Appellant,

Security Insurance Company of Hartford,
Additional Respondent-Respondent,

Atlantic Express Transportation, et al.,
Additional Respondents.

Samuel Katz, New York, for appellant.

Theodore A. Stamas, Carle Place, for Lancer Insurance Company, respondent.

Schindel, Farman, Lipsius, Gardner & Rabinovich LLP, New York (David BenHaim of counsel), for Security Insurance Company of Hartford, respondent.

Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about February 27, 2007, granting the petition to stay arbitration, unanimously affirmed, with costs.

Arbitration of respondent Lackraj's uninsured motorist claim against petitioner was properly stayed. The offending vehicle, a bus, did not meet the definition of an "uninsured motor vehicle" within the meaning of Insurance Law § 3420(f)(1), notwithstanding the fact that the policy insuring the vehicle had a large

deductible and the owner became insolvent (*see Matter of Fireman's Fund Ins. Co. v Wisham*, 2005 NY Misc LEXIS 160, 2005 WL 263957).

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

ENTERED: MAY 8, 2008

CLERK

Tom, J.P., Williams, Catterson, Acosta, JJ.

3635N 109TH and First Avenue Corp., Plaintiff-Respondent, Index 106579/07 590526/07

-against-

2113 First Avenue, LLC, Defendant-Appellant.

[And a Third Party Action]

Kucker & Bruh, LLP, New York (Louis L. Nock of counsel), for appellant.

Solomon & Bernstein, New York (Joel Bernstein of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered December 4, 2007, which granted plaintiff's motion for a *Yellowstone* injunction, unanimously affirmed, with costs.

The affidavits of plaintiff's principal and an engineer submitted in support of the motion, together with corroborative Department of Buildings records, indicate that plaintiff has made efforts, albeit slowly over a nine-year period, to comply with its lease obligation to obtain a certificate of occupancy for the car wash improvements that defendant made to the premises years before the commencement of the subject lease. It thus sufficiently appears that plaintiff, who allegedly purchased from defendant the "good will" of the car wash business and its fixtures at the time the lease was signed, and eventually, following several applications to the Department of Buildings,

obtained alteration approvals in August 2007, has the requisite desire and ability to cure the alleged default (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514-515 [1999]; *TSI W. 14, Inc. v Samson Assoc., LLC*, 8 AD3d 51, 52-53 [2004]). We have considered defendant's other arguments and find them unavailing.

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

ENTERED: MAY 8, 2008

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

3647 Chong Sim Kim, et al., Index 103145/03
Plaintiffs-Appellants,

-against-

Carlos Amaya,
Defendant.

Chrysler Financial,
Defendant-Respondent,

Yoon & Kim LLP, New York (Jay H. Kim of counsel), for appellants.

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Dennis J. Monaco of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 29, 2007, which, insofar as appealed from as limited by the briefs, granted the motion of defendant Chrysler Financial for summary judgment dismissing the complaint on the ground that plaintiff Chong Sim Kim did not sustain a serious injury as defined by Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant established a prima facie entitlement to summary judgment by submitting affirmed reports of a neurologist and an orthopedist, who reviewed plaintiff's prior medical records, examined her and performed objective tests before concluding that plaintiff was neurologically intact, had no meaningful limitation of use of her cervical or lumbar spine, and that the findings on the MRI films and x-rays were degenerative in nature and not the

result of the subject car accident (*see Gaddy v Eyler*, 79 NY2d 955 [1992]).

Plaintiff's opposition failed to raise a triable issue of fact as to whether a serious injury was sustained within the meaning of the Insurance Law. The affirmed report from the physician who examined plaintiff more than three years after the accident, fails to provide a causal connection between the alleged injuries and the accident (*see Montgomery v Pena*, 19 AD3d 288, 289-290 [2005]), and does not account for the degenerative changes that the MRI films revealed (*see Mullings v Huntwork*, 26 AD3d 214, 216 [2006]). Plaintiff also failed to provide a reasonable explanation as to why she terminated treatment at the end of 2002 (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]). Furthermore, plaintiff did not raise a triable issue of fact in the form of competent objective evidence substantiating her 90/180-day claim (*see Johnson v Marriott Mgt. Servs. Corp.*, 44 AD3d 450 [2007]).

The cause of action for intentional infliction of emotional distress was properly dismissed because the allegations upon

which the claim is based are not "sufficiently outrageous" to support the cause of action (*see Howell v New York Post Co.*, 81 NY2d 115, 122 [1993]).

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

ENTERED: MAY 8, 2008

CLERK

Friedman, J.P., Nardelli, Buckley, Catterson, McGuire, JJ.

284 The People of the State of New York, Ind. 1428/02
Respondent,

-against-

Ronald Moye,
Defendant-Appellant.

Anthony L. Ricco, New York, for appellant.

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

Judgment, Supreme Court, New York County (John A.K. Bradley, J.), rendered June 16, 2004, reversed, on the law, the judgment vacated and the matter remanded for a new trial.

Opinion by Catterson, J. All concur except Nardelli and McGuire, JJ. who dissent in an Opinion by McGuire, J.

Order filed.

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 May 8, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Angela M. Mazzarelli
John W. Sweeny, Jr.
Karla Moskowitz
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 2824/06
Respondent,

-against- 3638

Rehana Beepat,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about December 5, 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.

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 May 8, 2008.

Present - Hon. Peter Tom, Justice Presiding
Milton L. Williams
James M. Catterson
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 2219/04
Respondent,

-against- 3626

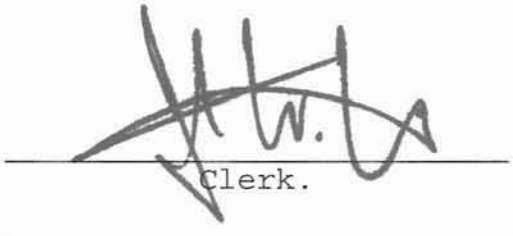
Jorge Ballesteros,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered on or about August 31, 2005,

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.

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 May 8, 2008.

Present - Hon. Peter Tom, Justice Presiding
Milton L. Williams
James M. Catterson
Rolando T. Acosta, Justices.

The People of the State of New York, SCI 4542/06
Respondent,

-against- 3625

Felipe Espiritusanto,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about October 16, 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.

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 May 8, 2008.

Present - Hon. Peter Tom, Justice Presiding
Milton L. Williams
James M. Catterson
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 850/02
Respondent,

-against- 3622

James Devonish,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered on or about July 27, 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.