SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 13, 2007

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Marlow, Sweeny, McGuire, Malone, JJ.

8799 The People of the State of New York, Respondent, Ind. 2358/98

-against-

Sylvester Dandridge,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered February 8, 1999, convicting defendant, after a jury trial, of five counts of offering a false instrument for filing and one count of attempted grand larceny in the third degree, and sentencing him to concurrent terms of 6 months on each count, affirmed.

After being permitted to represent himself, defendant indicated on two occasions in late September 1998 that he was trying to hire a particular attorney to represent him at trial. On October 6, 1998, defendant asked for an adjournment to October 30 so that he could try and obtain the funds necessary to hire

the attorney. Although the court granted the adjournment, it warned defendant that the case would go forward on October 30 even if defendant did not have counsel. Nonetheless, when a person in the audience on October 30 stated that the Moorish Science Temple, of which defendant was a member, would provide defendant with an attorney and defendant stated that he would need between four and six weeks to obtain a lawyer, the court granted an adjournment to December 7. On that date, the court denied defendant's motion to be represented by a lawyer whose license to practice law had been suspended and adjourned the case to December 16. On that date, defendant said that an attorney named George Lewis had said he would be appearing in court that day. When Mr. Lewis did not appear after a second call, the court adjourned the case to December 18 and directed defendant to inform his attorney that the trial would start that day. In addition, the court expressly warned defendant that the adjournment was "the last adjournment for the defense." On December 18, however, defendant appeared with an attorney, Sabrina Shraff, who immediately requested an adjournment. The court denied that request and jury selection commenced with defendant representing himself.

Under these circumstances, defendant's claim that the trial court abused its discretion by refusing the request for an

adjournment on December 18 is meritless (*see People v Arroyave*, 49 NY2d 264, 271-272 [1980] [a defendant's request to substitute counsel made on the eve of trial may be denied if the defendant has been accorded a reasonable opportunity to retain counsel of his own choosing before that time, and that when a defendant has been given such an opportunity, "it is incumbent upon the defendant to demonstrate that the requested adjournment has been necessitated by forces beyond his control and is not simply a dilatory tactic"]). Here, defendant was given more than a reasonable opportunity to retain counsel of his choosing and fell far short of demonstrating that the December 18 request was not a dilatory tactic.

Neither prior to nor during the trial did defendant ever contest venue with respect to any of the counts of the indictment. Accordingly, defendant's appellate claim that with respect to three counts the People failed to prove, pursuant to CPL 20.40 (2)(c), that his conduct had a particular effect on New York County has been waived (*see People v Greenberg*, 89 NY2d 553, 556 [1997] ["[f]ailure to request a jury charge on venue . . . amounts to waiver"]; *People v Lowen*, 100 AD2d 518, 519 [1984], *lv denied* 62 NY2d 808 [1984] [issue of venue "was waived by the failure to raise the point by pretrial motion"]). Similarly unavailing is defendant's claim that the trial court failed to make appropriate inquiry of a sworn juror who had approached the

court and indicated that she did not know if she could be fair and impartial in light of something the juror did not want to speak about in open court. At no point did defendant object to the inquiry that the trial court did make or request additional inquiry. Accordingly, his appellate claim is not preserved for review (*see People v Hicks*, 6 NY3d 737, 739 [2005] [no question of law regarding claimed inadequacy of trial court's inquiry of sworn juror preserved for review "[i]n the absence of a protest to the scope or intensity of the court's inquiry"]), and we decline to review it in the interest of justice.

Although defendant presented no defense and no evidence on his own behalf, the prosecutor, during the course of his summation, referred to the shifting theories defendant had advanced in the so-called affidavits of facts he submitted with his W-4's and amended returns on the non-taxability of his wages as a New York City correction officer and told the jury that "if the defendant believed any of these things, . . . even a mistaken belief as to the law, as Judge Wetzel will instruct you, would not be a defense for him." Defendant did not object to this contention by the prosecutor or to the portion of the trial court's charge to the jury in which the court instructed the jury that "a person is not relieved of criminal liability for conduct because he engages in that conduct under the mistaken belief that it does not as a matter of law constitute an offense."

Nonetheless, defendant now complains that the prosecutor's contention and the court's instruction were improper.

To convict him of the false instrument charges the People were required to prove defendant's knowledge that the written instruments contained a false statement and defendant's intent to defraud the City and State; similarly, the attempted grand larceny charge required proof that defendant intended to deprive the State of its property. Defendant now argues for the first time on appeal that his good faith belief in the legality of his conduct negated these essential mens rea elements, and the prosecutor's contention and the court's instruction deprived him of a fair trial and of his right to present a defense.

However, having voiced no objection at trial, defendant has failed to preserve either complaint for review (CPL 470.05[2]; *People v Balls*, 69 NY2d 641 [1986], and we decline to review them in the interest of justice. Were we to review such claims, we would find them to be without merit. "While defendant may disagree with existing tax laws, or with their generally accepted interpretations, there was no evidence that defendant honestly misunderstood his duties under those laws as they currently stand (*see Cheek v United States*, 498 US 192, 202 n 8 [1991])" (*People v Maseda*, 39 AD3d 226 [2007], *lv denied* 9 NY3d 847 [2007]). Thus, neither the common-law rule on mistake of law nor the statutory exception in Penal Law § 15.20(2) apply to the facts of

this case. The challenged comments were generally responsive to the pro se defendant's summation comment suggesting that he was being prosecuted merely for "disagreeing" with the tax authorities and his explanations why he purported to owe no taxes.

Finally, defendant challenges the sufficiency and weight of the evidence, essentially arguing that his "openly, clearly and precisely express actions" are inconsistent with the mens rea elements of the false instrument and attempted grand larceny crimes. The sufficiency claim, however, has not been preserved for review by a timely argument specifically directed at the alleged insufficiency (*see People v Gray*, 86 NY2d 10, 19 [1995]). Moreover, defendant's challenges to the sufficiency and weight of the evidence must be assessed in light of the elements of the crimes as they were charged to the jury without exception (*see People v Dekle*, 56 NY2d 835, 837 [1982]; *People v Noble*, 86 NY2d 814, 815 [1995]. When so assessed, defendant's challenges are without merit.

All concur except McGuire, J. who concurs in a separate memorandum:

McGUIRE, J. (concurring)

Although I agree with the majority in all other respects, I respectfully disagree with its discussion of defendant's contention that under the common-law exception to the general rule that a mistake of law is no defense, his good-faith belief that he did not owe taxes negated the specific mens rea elements of the crimes for which he was convicted.

Defendant advances two claims of error in this regard. First, he claims that the prosecutor erred in arguing on summation that if defendant believed the various theories he had advanced as to the non-taxability of his wages, "even a mistaken belief as to the law, as Judge Wetzel will instruct you, would not be a defense for him." Second, he claims that Judge Wetzel erred when he instructed the jury that "a person is not relieved of criminal liability for conduct because he engages in that conduct under the mistaken belief that it does not as a matter of law constitute an offense."

I agree with the majority that neither of these claims of error is preserved for review on account of defendant's failure to voice any, let alone a timely and specific, objection (*see* CPL 470.05[2]; *People v Balls*, 69 NY2d 641, 642 [1986]). I also agree that we should not review them in the interest of justice (*cf. People v Dekle*, 56 NY2d 835, 837 [1982]). I disagree with the majority, however, with regard to what it goes on to say.

For the reasons stated below, I would say no more.

Whether defendant or the People are correct on the merits is an unresolved and significant issue of law. The two cases the People cite in support of their position that the common-law exception applies only to negative a specific intent that is premised on knowledge of the law, *People v Marrero* (69 NY2d 382 [1987]) and *People v Weiss* (276 NY 384 [1938]), do not so hold. Nor do the People claim that either case so holds. Indeed, as defendant stresses, language in *Marrero* actually supports his position that the common-law exception applies to negative a specific intent regardless of whether that mens rea is premised on knowledge of the law. Thus, as the Court stated, "[w]e conclude that the better and correctly construed view is that the defense [of mistake of law] should not be recognized, except where specific intent is an element of the offense or where the misrelied-upon law has later been properly adjudicated as wrong" (69 NY2d at 391).

Although my own research hardly has been exhaustive, I am not aware of any authority that squarely supports the People's position other than the authority they cite, Justice Donnino (*see* Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law article 15, at 75-76 ["where a crime requires a specific intent premised on knowledge of the law, a mistaken, good-faith belief that the conduct was authorized by law may be

properly considered to negate the requisite culpable mental state"]).

This unresolved question of law raises constitutional issues. As the Supreme Court stated in a similar context, one also involving the prosecution of an individual for not paying income taxes, "it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty, and forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision" (*Cheek v United States,* 498 US 192, 203 [1991]; *see also People v Chesler,* 50 NY2d 203 [1980]).

Particularly given the constitutional dimension to defendant's contention regarding the scope of the common-law exception, it would not be appropriate to reach the merits unnecessarily. "We are bound by principles of judicial restraint not to decide constitutional questions unless their disposition is necessary to the appeal" (*Matter of Clara C. v William L.,* 96 NY2d 244, 250 [2001] [internal quotation marks omitted]).

For some unstated reason, the majority determines not to reject defendant's claims solely on preservation grounds. Instead the majority goes on to state that if it were to review the claims "we would find them to be without merit." Despite the phrase "without merit," I do not understand the majority to have

decided the core issue of law underlying both claims: whether the common-law exception applies to negative a specific intent regardless of whether that mens rea is premised on knowledge of the laws. Rather, I understand the majority to have decided only that it need not reach that issue of law because of a factual conclusion it makes about the evidence.

Thus, by way of explanation of its statement that "we would find them to be without merit," the majority immediately goes on to assert that there "was no evidence that defendant honestly misunderstood his duties under [the applicable tax] laws," and that for this reason neither the common-law nor the statutory exception "*apply to the facts of this case*" (emphasis added). Nor does the next sentence -- addressing only the prosecutor's summation comments and not the court's instruction to the jury -- state or suggest anything about the scope of the common-law exception with regard to specific intent crimes. Moreover, of course, it would be wholly gratuitous of the majority to purport to resolve the novel and substantial question of law defendant presses if it believed that in any event the evidence shows that defendant did not have a mistaken belief that his conduct was lawful. That the majority does not purport to resolve this question also seems evident from the absence of any discussion of *People v Marrero* (69 NY2d 382) or any other authority bearing thereon. A novel and substantial question of law would not be

resolved in an off-hand and conclusory fashion. Still, it is unfortunate that the majority does not unequivocally state that it leaves the issue for another day.

Finally, I disagree with the majority's assertion that there is "no evidence" that defendant had a good faith belief in the legality of his conduct. Notably, the People do not make any such assertion in their brief. That reflects no want of advocacy. To the contrary, there was ample evidence -- including various letters sent by defendant explaining his income tax filings or his legal position and the open or brazen character of his actions -- from which a rational juror might conclude that defendant had such a good faith belief. That is not to say that the evidence on this score was persuasive. But the majority is wrong to assert there was *no* such evidence.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

8960 Robert Vinci, Index 16367/01
Plaintiff-Appellant,

-against-

Ford Motor Company,
Defendant-Respondent.

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Leslie Trager, New York, for appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Peter J. Fazio of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered August 24, 2005, on a jury verdict in defendant's favor, reversed, on the facts and the law, without costs, the judgment vacated, and the matter remanded for a new trial.

Although the issue of the admissibility of defendant's crash test video is unquestionably a close call, we conclude that its admission was a proper exercise of discretion despite certain dissimilarities between the accident condition and the conditions under which the test was conducted.

We further conclude, however, that the trial court's refusal to permit plaintiff's expert to testify as a rebuttal witness with respect to the crash test video warrants reversal. Contrary to the trial court's ruling, plaintiff could not have been expected to introduce testimony regarding the video during his expert's direct testimony since the video, a defense exhibit, had

not even been admitted into evidence at that point.

The dissent offers no defense of the trial court's ruling but instead notes that the better course would have been to permit plaintiff's expert to testify in rebuttal. The dissent nevertheless declines to direct a new trial because it concludes that plaintiff has not demonstrated that the outcome of the trial would have been different had the testimony been permitted "in light of the extensive cross-examination of the defense experts." However "extensive" those cross-examinations were, the simple fact is that the defense experts did not concede on cross-examination the validity of plaintiff's many objections to the crash test video. Plaintiff's expert, however, would have testified not only about the dissimilarities between the test conditions and those at the time of the accident but also about numerous errors and discrepancies he observed in the video.

Specifically, plaintiff asserts that his expert would have testified that defendant utilized a dummy in the crash test that was designed for frontal impact crashes rather than rear impact crashes and failed to dress the dummy in a winter coat, both of which affected the dummy such that its movement would not mimic that of plaintiff's at the time of the accident. He would have further testified that defendant failed to comply with industry standards requiring that the crash test vehicle be subjected to a frame test prior to the crash test in order to determine the

actual measurements of the impact of the crash; that the video revealed that the seat belt did not function properly; that the speed of the vehicle utilized in the test was far less than that claimed by defendant (8.3 miles per hour rather than 12.7 miles per hour); that the timing was off; and that the use of flash timers as opposed to synchronized timers was insufficient.

Only "[b]y effective exploitation of the dissimilarities between the [video] and the [accident]" could plaintiff have minimized the significance to be attached to the crash test video (*Uss v Town of Oyster Bay*, 37 NY2d 639 [1975]). Plaintiff was deprived of this opportunity, and thus it was an abuse of discretion for the trial court to deny plaintiff the right to present rebuttal testimony on this key issue (*see Eisner v Daitch Crystal Dairies*, 27 AD2d 921 [1967]).

It also was error for the court not to qualify plaintiff's expert as an expert in the three fields in which plaintiff sought to have him qualified, i.e., occupant kinematics, speed determinations and seatbelt mechanics. In the absence of an objection or even voir dire by defendant regarding plaintiff's expert's qualifications, the trial court found that plaintiff's expert was qualified to render opinion testimony only in the area of occupant kinematics. The trial court failed to provide an explanation for its ruling or make clear to plaintiff's counsel at the outset of counsel's examination of the witness that the

court was declining to admit the witness as an expert in the additional fields. Although the court subsequently stated that plaintiff failed to establish the witness' expertise in these additional areas, the record reflects otherwise.

The dissent erroneously believes that the court's ruling affected only the timing and not the content of the expert's testimony. In fact, although plaintiff's expert ultimately did testify on redirect to his speed determinations, the court's ruling completely precluded him from presenting the underlying calculations explaining his speed determinations (*see generally Tamara B. v Pete F.*, 146 AD2d 487 [1989]). Thus, on an important issue, one the dissent does not mention, plaintiff was able to offer only conclusory testimony from his expert. This was a vital issue in the case and defendant was unfairly able to exploit the court's ruling by noting during summation that plaintiff had failed to provide any such calculations.

We note that the court's charge was consistent with the rule that a violation of a regulation or ordinance is only some evidence of negligence (*Elliott v City of New York*, 95 NY2d 730 [2001]).

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

BUCKLEY, J. (dissenting in part)

I agree that the trial court properly exercised its discretion in admitting defendant's crash test reenacting the accident in this product liability case. Evidence of experiments is properly admissible so long as the proponent establishes a substantial similarity between the conditions under which the experiments were conducted and the conditions at the time of the accident, particularly where the opponent has an unrestricted opportunity to cross-examine (*see Styles v General Motors Corp.*, 20 AD3d 338, 339 [2005]). While the test conditions were not identical, there was sufficient similarity to permit the inference that the results of the reenactment -- which used the same vehicles with the same seatbelt configurations, based on plaintiff's expert's data and a responsible approximation of what was known about the underlying accident -- shed light on what occurred. Plaintiff was given the opportunity for cross-examination to exploit any alleged dissimilarities.

Although the better course would have been to allow plaintiff to recall his expert as a rebuttal witness with respect to the crash test (*see e.g. Herrera v V.B. Haulage Corp.*, 205 AD2d 409, 410 [1994]), I do not believe that plaintiff demonstrated that the outcome of the trial would have been different had the evidence been admitted (*see* CPLR 2002; *Frias v Fanning*, 119 AD2d 796, 797 [1986]), in light of the extensive

cross-examination of the defense experts, during which plaintiff's counsel did in fact bring out all the issues which plaintiff claims the expert would have raised. In addition, the witness was not qualified as an expert in the field of accident reconstruction. *Uss v Town of Oyster Bay* (37 NY2d 639 [1975]), relied on by the majority, supports the conclusion that plaintiff's rights were sufficiently protected that the jury verdict should not be disturbed. In *Uss*, the Court held that any harm in allowing certain evidence, in that case an in-court demonstration, was cured by "affording plaintiffs' counsel unrestricted opportunity for cross-examination," by which counsel could make an "effective exploitation of the dissimilarities between the [reconstruction] and the [accident]" and thus "minimize the significance to be attached to the demonstration" (*id.* at 641). In *Eisner v Daitch Crystal Dairies* (27 AD2d 921 [1967]), also cited by the majority, this Court did rule that the trial court should have permitted certain rebuttal testimony; however, the bases for reversal and a new trial were improper statements by the trial court in the presence of the jury and an inadequate jury charge, not the exclusion of the rebuttal witness.

While the trial court declined to admit plaintiff's expert as an expert in the fields of speed determinations and seatbelt mechanics, the expert did ultimately testify with respect to both

issues, which plaintiff could exploit in summation, and the fact that he did so on redirect, rather than on direct, did not affect the outcome of the trial.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

816 John Lucente, Index 26386/03
Plaintiff-Respondent, 85558/06

-against-

Riverbay Corporation, et al.,
Defendant-Appellant,

Marion Scott Real Estate, Inc.,
Defendant.

[And a Third Party Action]

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Armienti, DeBellis & Whiten, LLP, New York (Vanessa M. Corchia of counsel), for appellant.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondent.

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Appeal, as limited by the briefs, from that part of the order of Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered on or about December 1, 2006, which denied defendants' motion to consolidate this action with another pending in Bronx County, unanimously dismissed, without costs, as moot.

This court dismissed *Viera v Riverbay Corp.* (__ AD3d __, 2007 NY Slip Op 8116 [1st Dept 2007]), the action with which defendants seek consolidation.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

Mazzarelli, J.P., Friedman, Marlow, McGuire, Malone, JJ.

1202-
1202A-
1202B American BankNote Corporation, et al.,
Plaintiffs-Respondents,

-against-

Hernan Daniel Daniele, et al.,
Defendants-Appellants.

Index 115446/05

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Bernard D'Orazio, New York, for appellants.

Andrews Kurth LLP, New York (Lynne M. Fischman Uniman of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered March 2, 2006, which, to the extent appealed from, denied defendants' motion to dismiss on grounds of forum non conveniens, granted plaintiffs leave to take jurisdictional discovery and ordered an evidentiary hearing on the jurisdictional issue, affirmed, with costs. Orders, same court and Justice, entered August 16 and September 12, 2006, which granted plaintiffs' respective motions for an extension of time to serve the summons and complaint and for an order of attachment, affirmed, with costs.

The motion court properly denied defendants' motion to dismiss for forum non conveniens after considering the relevant

factors (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]; *Bank Hapoalim [Switzerland] Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 [2006]). Factors militating in favor of permitting plaintiffs to proceed in New York include that the relevant documents are in English and located in New York or New Jersey, key witnesses who conducted the forensic investigation that brought to light defendants' alleged wrongdoing reside in the New York metropolitan area, and other witnesses who will testify concerning defendants' impropriety are located in the United States, France, and India, making an Argentine forum no more convenient for these witnesses than New York. Further, New York is, plaintiffs contend, where defendant Daniele met with plaintiffs on a regular basis, where, during such meetings, he made false representations and false assurances regarding the status of Transtex's operations, and where defendants' bank accounts, allegedly a central part of the claimed fraudulent scheme and the means to siphon money stolen from plaintiffs, are located. Given these allegations, defendants' claims that all relevant witnesses are in Argentina and that all relevant documents, also in Argentina, are in Spanish and would have to be translated if litigated in New York are insufficient to "meet their heavy burden of demonstrating that plaintiffs' selection of New York as the forum for the within litigation is not in the

interest of substantial justice" (*Anagnostou v Stifel*, 204 AD2d 61, 61 [1994]; *see also Mionis v Bank Julius Baer & Co.*, 9 AD3d 280, 282 [2004]). That the parties in this action are nonresidents, unduly relied upon by the dissent, is one, but only one, factor that may show inconvenience (*Bank Hapoalim*, 26 AD3d at 287). "[A] defendant's 'heavy burden' remains despite the plaintiff's status as a nonresident" (*id.* at 287, *citing Mionis and Anagnostou*). Defendants' assertion that they would experience significant hardship defending this action is mere speculation, given, inter alia, affidavits and documentation alleging that defendants stole more than two million dollars. Contrary to the dissent, in so ruling, we make no assumptions as to the veracity of either party's claims. Further, "[t]he fact that some documentary and testimonial evidence will have to be translated from [Spanish] into English does not render it more difficult for defendants to proceed in New York, and the courts of this State are fully capable of applying [Argentine] law, should such law be found governing in this case" (*Mionis*, 9 AD3d at 282; *see also Intertec Contr. A/S v Turner Steiner Intl., S.A.*, 6 AD3d 1, 6 [2004]).

Plaintiffs' pleadings, affidavits and accompanying documentation made a "sufficient start" to warrant further

discovery on the issue of personal jurisdiction (*see Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]; *Edelman v Taittinger, S.A.*, 298 AD3d 301 [2002]). The allegation that defendants used their New York bank account to further their misdeeds may be sufficient to establish long-arm jurisdiction over defendants (*see Indosuez Intl. Fin. v National Reserve Bank*, 98 NY2d 238, 247 [2002]; *Banco Ambrosiano v Artoc Bank & Trust*, 62 NY2d 65, 72-73 [1984]; *Banco Nacional Ultramarino, S.A. v Chan*, 169 Misc 2d 182, 188-189 [1996], *affd* 240 AD2d 253 [1997]). In addition, plaintiffs alleged that defendant Daniele traveled to New York to conduct business for plaintiffs, and that he contracted to provide goods for clients in New York. Defendants' denial of this jurisdictional allegations warranted the court's holding in abeyance the motion to dismiss for lack of jurisdiction pending a hearing (CPLR 2218; *see e.g. Matter of Preferred Mut. Ins. Co. [Fu Guan Chan]*, 267 AD2d 181 [1999]).

The court appropriately exercised its discretion in granting plaintiffs an extension of time pursuant to CPLR 306-b to serve the summons and complaint. Plaintiffs demonstrated good cause for the extension by showing that they diligently attempted to serve defendants, and that an extension was warranted in the

interest of justice (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]; *Lippett v Education Alliance*, 14 AD3d 430 [2005]; *Matthews v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 303 AD2d 327 [2003]).

The court properly found plaintiffs had produced sufficient evidentiary facts demonstrating probable success on the merits to justify an order of attachment (CPLR 6212[a]; *see Considar, Inc. v Redi Corp. Establishment*, 238 AD2d 111 [1997]; *see also Olbi USA v Agapov*, 283 AD2d 227 [2001]).

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

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

McGUIRE, J. (dissenting)

I disagree with the majority's conclusion that Supreme Court properly denied that aspect of defendants' motion seeking dismissal of the complaint on the ground of forum non conveniens. Accordingly, I respectfully dissent.

Plaintiff American BankNote Corporation (ABN) is a Delaware corporation with its principal place of business in New Jersey. Plaintiff ABN South America (ABN SA) is a wholly owned subsidiary of ABN with its principal place of business in New Jersey. Plaintiff Transtex SA (Transtex), a wholly owned subsidiary of ABN, is an Argentine company operating entirely in Argentina.

Plaintiffs commenced this action for breach of fiduciary duty, fraud and misappropriation against defendant Hernan Daniel Daniele, a resident of Argentina and the former President and CEO of Transtex, and his wife, defendant Diana Virginia Fernandez Rosas, for "aiding and abetting" her husband's alleged tortious conduct. According to the complaint, on or about November 1, 2005, plaintiffs discovered that Daniele, with the help of Rosas and other co-conspirators, undertook a course of conduct designed to steal plaintiffs' business as well as funds owed to plaintiffs. Specifically, plaintiffs allege, among other things, that defendants created two corporations that compete with plaintiffs' businesses, and that defendants misappropriated, converted or otherwise stole funds belonging to plaintiffs. On

the same date that they commenced this action, plaintiffs moved, by order to show cause, for an order of attachment of defendants' property in New York and obtained an order temporarily restraining several bank accounts defendants maintained at Citibank and HSBC.

Defendants cross-moved to dismiss the complaint on the grounds of lack of personal jurisdiction -- asserting there was no basis for personal jurisdiction and improper service -- and forum non conveniens. Daniele submitted an affidavit in which he averred that he had been in New York only two times, on business trips in December 1999 and July 2005, and that those trips had no connection with plaintiffs' causes of action. Rosas asserted that she had never been in New York. In opposition, plaintiffs argued that a basis for personal jurisdiction exists because, according to plaintiffs, defendants used New York bank accounts, including accounts at Citibank and HSBC, to deposit significant amounts of the money they allegedly stole from plaintiffs. With regard to the forum non conveniens issue, plaintiffs relied on the affidavit of Patrick Gentile, Executive Vice President and Chief Financial Officer of ABN, who averred that Daniele regularly traveled to New York to conduct business and was in regular contact with ABN personnel in New York and New Jersey. Gentile also asserted that many witnesses involved in the investigation that brought to light defendants' alleged misdeeds

reside in the New York metropolitan area.

Supreme Court found that plaintiffs had made sufficient allegations regarding defendants' contacts with New York to warrant a hearing on the issue of whether a basis for exercising personal jurisdiction over defendants existed and ordered jurisdictional discovery to proceed. Thus, the court held in abeyance the first aspect of defendants' cross motion to dismiss pending the hearing. However, Supreme Court concluded that defendants failed to demonstrate that the action should be dismissed on the ground of forum non conveniens, and denied the second aspect of defendants' cross motion.

In my view, even assuming that personal jurisdiction over defendants was obtained, dismissal is warranted because New York is not a convenient forum for this action. "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just" (CPLR 327[a]). "The doctrine [of forum non conveniens] rests, in large part, on considerations of public policy and . . . our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York" (*Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 [1972] [internal quotation marks and citation omitted]; *see*

Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 478 [1984] ["our courts are not required to add to their financial and administrative burdens by entertaining litigation which does not have any connection with this State"], *cert denied* 469 US 1108 [1985]). The factors a court should consider in evaluating a motion to dismiss on the ground of forum non conveniens include: (1) the burden on the New York courts, (2) the potential hardship to the defendant, (3) the unavailability of an alternative forum in which plaintiff may bring suit, (4) the extent to which the parties to the action are nonresidents, (5) whether the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction, (6) the location of potential witnesses and any relevant documents, and (7) the potential applicability of foreign law (*see Islamic Republic*, 62 NY2d at 479-480; *Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 177-178 [2004]; *see also Bewers v American Home Prods. Corp*, 99 AD2d 949 [1984], *affd* 64 NY2d 630 [1984]; *World Point Trading PTE v Credito Italiano*, 225 AD2d 153 [1996]).

Here, the causes of action asserted by plaintiffs do not have a "substantial nexus with New York" (*Silver*, 29 NY2d at 361). This dispute is between three related foreign corporations and the former CEO of one of those entities who worked in Argentina. The causes of action arise from conduct occurring

principally, if not exclusively, in Argentina (*see Millicom Intl. Cellular v Simon*, 247 AD2d 223 [1998] [order granting motion to dismiss on forum non conveniens grounds affirmed where, among other things, "the crucial events underlying the action occurred" in foreign country]) and Argentine law will all but certainly apply (*see Satz v McDonnell Douglas Corp.*, 244 F3d 1279 [11th Cir 2001] ["possibility" that District Court would have to apply Argentine law important factor in considering motion to dismiss on grounds of forum non conveniens]; *see also Neuter Ltd. v Citibank*, 239 AD2d 213 [1997]).[1]

None of the parties are residents of New York; ABN is a Delaware corporation with its principal place of business in New Jersey, ABN SA's principal place of business is in New Jersey, Transtex is an Argentine company operating entirely in Argentina, and defendants are both residents of Argentina (*see Blueye Nav. v Den Norske Bank*, 239 AD2d 192 [1997]). Both of the businesses that plaintiffs contend defendants created to compete with plaintiffs' businesses were incorporated in and have their

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[1]"In the context of tort law, New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation. The greater interest is determined by an evaluation of the facts or contacts which . . . relate to the purpose of the particular law in conflict. Two separate inquiries are thereby required to determine the greater interest: (1) what are the significant contacts and in which jurisdiction are they located; and, (2) whether the purpose of the law is to regulate conduct or allocate loss" (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994] [internal quotation marks and citation omitted]).

principal offices in Argentina. The vast majority (if not all) of the nonparty witnesses do not reside in New York (*see Tilleke & Gibbins Intl. v Baker & McKenzie*, 302 AD2d 328 [2003]; *Union Bancaire Privee v Nasser*, 300 AD2d 49 [2002]), and plaintiffs fail to identify a single material witness who does reside in this State (*see Brinson v Chrysler Fin.*, __ AD3d __, 2007 NY Slip Op. 06617 [2d Dept. 2007] [in opposition to defendants' evidence indicating that numerous witnesses resided outside of New York State, plaintiff did not identify any nonparty witnesses who resided in New York]).

Gentile averred that "many key witnesses, including almost everyone involved in the investigation [into defendants' alleged tortious conduct], reside in New York or the metropolitan area." Although Gentile went on to identify seven such individuals, including himself, he did not indicate which of these witnesses reside in New York and which reside outside New York but in the metropolitan area. In any event, the presence in New York of one or a small number of witnesses would not be sufficient to keep this action in New York, especially since these individuals appear to be witnesses not to the alleged improper conduct but to the subsequent investigation into the conduct. Thus, the testimony these witnesses may provide regarding their investigation is peripheral compared to evidence regarding the allegedly tortious conduct itself, which occurred principally (if

not exclusively) in Argentina (*see SMT Shipmanagement & Transp. Ltd. v Maritima Ordaz C.A.*, 2001 WL 930837, *8 [SD NY 2001, Lynch, J.], *affd sub nom. David J. Joseph Co. v M/V BALTIC*, 64 Fed Appx 259 [2d Cir 2003]; *see also Oil Basins Ltd. v Broken Hill Proprietary Co. Ltd.*, 613 F Supp 483, 489 [SD NY 1985]). Moreover, although plaintiffs and the majority rely on the presence in the New York metropolitan area of, as the majority puts it, "key witnesses who conducted the forensic investigation that brought to light defendants' wrongdoing," plaintiffs provide no reason to conclude that these investigators could testify on a non-hearsay basis to anything relevant.

Moreover, a substantial portion of the documents relevant to this action are located in Argentina, Transtex's place of business, and are in Spanish. Defendants, who live approximately 5,000 miles away from New York City, would experience substantial hardship if forced to defend this action (*see Mollendo Equip. Co. v Sekisan Trading Co.*, 56 AD2d 750 [1977], *affd* 43 NY2d 916 [1978]; *Wentzel v Allen Mach.*, 277 AD2d 446, 447 [2000] [order denying motion to dismiss on ground of forum non conveniens reversed and motion granted where, among other things, defendants would have to travel 3,000 miles to defend New York action]).

Gentile's averment that Daniele "regularly travel[ed] to New York to conduct business" is bereft of any supporting detail and unsupported by any other evidence. Moreover, it is undisputed

that Daniele's wife has never been to New York. Of course, that Daniele may have traveled to New York in the past, regardless of the frequency of such visits, is hardly relevant in ascertaining whether New York is a convenient forum for the present action.

That defendants maintain bank accounts at Citibank and HSBC is an insufficient basis to accept jurisdiction over plaintiffs' causes of action. Defendants opened these accounts in Argentine branches of those banks, and defendants assert that they maintain "U.S. dollar accounts because of financial turmoil in [Argentina] . . . [and] [a]ll deposits into th[o]se accounts were made by wire transfer initiated from the branch[es] located in Argentina." Daniele averred that on the two occasions he was in New York he did not make any deposits into the accounts. Plaintiffs' conclusory and uncorroborated claims that defendants deposited into those accounts funds belonging to plaintiffs, and that Daniele, while in New York, conducted transactions with respect to those accounts at Citibank and HSBC, i.e., that the accounts were central to defendants' alleged tortious conduct, are insufficient to establish that plaintiffs' causes of action have a substantial nexus with New York (*Silver*, 29 NY2d at 361). That a foreign citizen maintains bank accounts with international banks that have branches or offices in New York, standing alone, should not be sufficient to guarantee that New York will exercise jurisdiction over a dispute relating in some way to the accounts

(*see A & M Exports v Meridien Intl. Bank*, 207 AD2d 741 [1994]). Rather, the existence of such accounts must be considered along with all other relevant circumstances surrounding the action (*see Islamic Republic*, 62 NY2d at 479 ["the court, after considering and balancing the various competing [private and public] factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not"]).

Although the majority contends, albeit in passing, that I "unduly rel[y]" on the nonresident status of the parties, it acknowledges the relevance of that factor. The majority, however, ignores or gives virtually no weight to two other relevant factors, that the transactions out of which plaintiffs' causes of action arose occurred in Argentina, and the applicability of Argentine law (*see Islamic Republic of Iran*, 62 NY2d at 479-480). The majority concludes that it is "mere speculation" that defendants will experience hardship in defending this action in New York "given, inter alia, affidavits and documentation alleging that defendants stole more than two million dollars." Apparently, the majority first assumes that defendants stole $2 million from plaintiffs, and then assumes that defendants possess part or all of those funds and can utilize them to defend this action. The first assumption rests solely on affidavits from plaintiffs' employees, and ignores defendants' averment that they did not divert funds from

plaintiffs. The second assumption rests on nothing, and ignores defendants' averment that they do not have the resources to defend this action in New York. The majority claims that it "make[s] no assumptions as to the veracity of either party's claims." But if that is so, there is no reason for the majority to refer to "affidavits and documentation alleging that defendants stole more than two million dollars." In any event, that individual citizens of another nation -- let alone one located thousands of miles from New York -- with virtually no connection to New York would experience significant hardship defending a lawsuit in New York cannot reasonably be doubted. Notably, apart from referring to these "affidavits and documentation," the majority provides no other reason to doubt that defendants would experience such hardship.[2]

At bottom, this matter has "no substantial nexus with New

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[2] *Yoshida Print. Co. v Aiba* (213 AD2d 275 [1995]), cited by Supreme Court, does not support the majority's disposition of this appeal. In *Yoshida*, this Court affirmed the denial of the motion of the defendant, a New York resident, to dismiss on the ground of forum non conveniens, stating that "[n]either the fact that plaintiff is a Japanese corporation, whose witnesses may speak Japanese, nor the potential necessity of applying Japanese law, renders New York an inconvenient forum." The Court noted that the plaintiff offered to make the witnesses available at no cost to the defendant and that "[a]ny need to translate documents into English does not warrant a contrary result." Here, however, defendants' cross motion is supported by much more than the applicability of foreign law and the need for translation of documents and testimony, including the non-New York residence of all of the parties and the significant hardship defendants would experience by having to defend this action in New York.

York" (*Silver*, 29 NY2d at 361), and after balancing all of the relevant factors, I believe that this action "would be better adjudicated elsewhere" (*Islamic Republic*, 62 NY2d at 479), namely Argentina, an adequate, alternative forum (*see Warter v Boston Secs.*, 380 F Supp 2d 1299, 1311 [S D Fla 2004] [collecting cases holding that Argentina is an adequate forum]).

Accordingly, I would reverse, grant that aspect of defendants' cross motion seeking dismissal of the complaint on the basis of forum non conveniens and dismiss the complaint. In light of my conclusion that dismissal is appropriate on the ground of forum non conveniens, I need not reach defendants' contentions regarding the issue of personal jurisdiction.[3]

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

ENTERED: NOVEMBER 13, 2007

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CLERK

[3]While there is some authority supporting the proposition that a court may not reach the issue of forum non conveniens when an unresolved question exists regarding whether the court has jurisdiction over the defendants (*Edelman v Taittinger, S.A.*, 298 AD2d 301, 303 [2002]), I would follow the United States Supreme Court's unanimous decision in *Sinochem Intl. Co. Ltd. v Malaysia Intl. Shipping Corp.* (___US___, 127 S Ct 1184, 1192 [2007] [a trial "court . . . may dispose of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant"]).

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

1495 Young S. Chun, et al., Index 603944/04
Plaintiffs-Respondents,

-against-

Yoram Ginach, P.C., etc., et al.,
Defendants,

Hanna Franco,
Defendant-Appellant.

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Harriette N. Boxer, New York, for appellant.

Jae W. Chun, New York, for respondent.

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Order, Supreme Court, New York County (Karen S. Smith, J.), entered August 1, 2006, which, in an action to recover a 10% down payment on a residential real estate transaction, inter alia, granted plaintiffs buyers' motion for summary judgment, unanimously reversed, on the law, without costs, defendant-appellant seller's motion for summary judgment granted to the extent of finding that plaintiffs were in default, and the matter remanded for further proceedings consistent herewith.

Supreme Court granted plaintiffs' motion on the grounds that the subject contract lacked an express liquidated damages clause, and that defendant failed to adduce any evidence of damages caused by plaintiffs' failure to attend the closing. We reverse. Defendant established that plaintiffs breached their contractual obligation to purchase the property, and therefore is entitled to summary judgment on that claim. However, since the contract

contains no clause entitling defendant to liquidated damages, we remand for a hearing on whether the down payment retained exceeds defendant's actual damages, a burden that plaintiffs, as the buyer, must bear (*see Maxton Bldrs. v Lo Galbo,* 68 NY2d 373, 382 [1986]).

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

ENTERED: NOVEMBER 13, 2007

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

1761-
1762 Olga Gonzalez, Index 26510/97
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.
- - - - - - - -
Robert A. Cardali & Associates, LLP,
Outgoing-Respondent.

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Gerard J. White, P.C., Rockville Centre (Gerard J. White of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for City of New York, respondent.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for Robert A. Cardali & Associates, LLP, respondent.

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Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered July 7, 2005, awarding plaintiff the principal sum of $20,000 for past and future pain and suffering, based upon a jury verdict finding plaintiff 90% liable and defendant 10% liable, unanimously affirmed, without costs. Order, same court and Justice, entered April 19, 2006, which denied plaintiff's motion to compel outgoing counsel to execute a Change of Attorney form and transfer its litigation file prior to reimbursement of said counsel's out-of-pocket disbursements, unanimously affirmed, without costs.

In this personal injury action resulting from a trip and fall on a two-inch sidewalk differential, it cannot be said that

the verdict as to apportionment of liability was against the weight of the evidence. "A verdict should not be set aside unless the evidence so preponderates in favor of the moving party that the verdict could not have been reached upon any fair interpretation of the evidence" (*Galimberti v Carrier Indus.*, 222 AD2d 649 [1995]). The question as to whether a verdict is against the weight of the evidence "involves what is in large part a discretionary balancing of many factors," and for a court to conclude that, as a matter of law, a jury verdict is not supported by sufficient evidence requires a finding that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards,* 45 NY2d 493, 499 [1978]). The jury properly took into account various factors, including the "evidence concerning the time of day, lighting, the condition of the sidewalk, and plaintiff's ability to observe the condition" (*Hodges v City of New York,* 195 AD2d 269, 270 [1993]). Its determination cannot, as a matter of law, cannot be said to have contravened the "no valid line of reasoning" standard of *Cohen*.

The size of the award for past and future pain and suffering, where plaintiff underwent three knee procedures and would eventually require a total knee replacement, did not deviate materially from what would be considered reasonable

compensation or constitute an improper compromise (*cf Rivera v City of New York*, 253 AD2d 597, 599-600 [1998]). The failure to award past or future medical expenses was not unreasonable, as neither plaintiff nor her two physicians testified regarding such expenses.

Plaintiff's outgoing attorney had the right to a retaining lien. Absent evidence of discharge for cause, the court properly refused to order that attorney to turn over the file before plaintiff had fully repaid the attorney's disbursements (*Tuff & Rumble Mgt. v Landmark Distribs.*, 254 AD2d 15 [1998].

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

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

ENTERED: NOVEMBER 13, 2007

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Mazzarelli, J.P., Marlow, Sullivan, Gonzalez, McGuire, JJ.

1823N-
1824N 85 Fifth Ave. 4th Floor, LLC, Index 601082/06
Plaintiff-Appellant,

-against-

I.A. Selig, LLC et al.,
Defendants-Respondents,

John Does, et al.,
Defendants.

_____

Kane Kessler, P.C., New York (Jeffrey H. Daichman of counsel), for appellant.

Krass, Snow & Schmutter, P.C., New York (Eric Lesser of counsel), for I.A. Selig, LLC, respondent.

Cantor, Epstein & Degenshein, LLP, New York (Robert I. Cantor of counsel), for Ian Selig, respondent.

Braverman & Associates, P.C., New York (Andreas E. Theodosiou of counsel), for The Old Glory Real Estate Corporation, Michael Salzhauer, Robert Mannheimer, Jaime Inclan, Claudia Catania and D. Nardone, respondents.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 10, 2006, which denied plaintiff's motion for a preliminary injunction, vacated a temporary restraining order, and granted motions by defendants to dismiss the complaint, unanimously modified, on the law, to reinstate the first, fourth and sixth causes of action, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered March 26, 2007, which, insofar as appealable, denied plaintiff's motion to renew, unanimously dismissed as academic,

without costs.

Plaintiff purchaser alleges that the board, of which defendant seller's principal was a member, rejected plaintiff's application to purchase the subject cooperative unit and contemporaneously amended the cooperative's by-laws to provide for the possibility of a residential conversion that would increase the market value of the unit. This states a cause of action against the seller for breach of contract based on a violation of the covenant of good faith and fair dealing, and we accordingly reinstate the first cause of action (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *cf. Matter of Y & O Holdings (NY) v Board of Mgrs. of Exec. Plaza Condominium*, 278 AD2d 173, 174 [2000]). However, as the implied duty arises from the contract, there is no reason to reinstate the separately pleaded cause of action for breach of the implied duty.

Plaintiff does not, however, have a cause of action for breach of contract against the cooperative. That plaintiff, who alleges that the board unreasonably withheld its consent to the sale in breach of the lease, is not a third-party beneficiary of the lease with standing to assert such a breach is clear from the lease itself, which permits only a seller to bring an action challenging the withholding of consent (and then only a declaratory judgment action, not a breach of contract action), as

well as from case law (*see Woo v Irving Tenants Corp.*, 276 AD2d 380 [2000]). However, we reject the arguments of the individual board members that the fourth cause of action for tortious interference with contract should be dismissed on the ground that plaintiffs' contract with the seller was not breached and because the actions alleged to have interfered with the contract were specifically contemplated by the contract. We note that although the complaint does not allege that the board member defendants intentionally procured the seller's breach (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 425 [1996]), no contention was made on the motion to dismiss or on this appeal that this cause of action is defective for this reason, and we will not dismiss it nostra sponte on this ground (*see Roland Pietropaoli Trucking, Inc. v Nationwide Mut. Ins. Co.*, 100 AD2d 680-681 [1984]). Restatement of the first and fourth causes of action entails reinstatement of the sixth cause of action for an injunction directing the seller and the board to transfer the shares and proprietary lease. Whether the business judgment rule will protect the board's members cannot be decided at this juncture (*cf. Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 10 [2006]).

Plaintiff's fifth cause of action was properly dismissed since New York does not recognize civil conspiracy as an independent cause of action (*Steier v Schreiber*, 25 AD3d 519 [2006]).

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

ENTERED: NOVEMBER 13, 2007

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

1826-
1827-
1828 Eda Ferman, etc., Index 110004/04
Plaintiff-Respondent,

-against-

Parkton Associates, et al.,
Defendants-Appellants.

Appeal from orders, Supreme Court, New York County (Howard G. Leventhal, Special Referee), entered on or about August 29, 2006, and same court (Richard B. Lowe III, J.), entered January 17, 2007 and February 9, 2007, unanimously withdrawn in accordance with the terms of the stipulation of the parties hereto. No opinion. Order filed.

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

1956 In re Nadine Fluellen, Index 108269/05
Petitioner-Appellant,

-against-

John F. Hanley, as Commissioner of the City of New York Office of Labor Relations, et al.,
Respondents-Respondents.

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Nadine Fluellen, appellant pro se.

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

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Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered June 20, 2006, which granted respondents' motion to dismiss the petition brought pursuant to CPLR article 78 to annul respondents' determination terminating petitioner's employment, and dismissed the petition, unanimously affirmed, without costs.

The collective bargaining agreement between petitioner's union and the Health and Hospitals Corporation required her to avail herself of a four-step grievance procedure in connection with the disciplinary proceeding commenced against her. Her failure to proceed through the final step of the procedure precludes her from commencing this article 78 proceeding (*see Plummer v Klepak*, 48 NY2d 486, 489-490 [1979]). Furthermore, her participation in the second and third steps of the grievance procedure without objection, notwithstanding her union's

objection to the procedure during the first step, indicates her acquiescence to it.

Supreme Court should not have ignored petitioner's argument that respondents improperly "converted" a proceeding to determine her medical fitness into a disciplinary proceeding, as this issue was raised in opposition to respondents' motion to dismiss, and not for the first time in her reply. Nevertheless, petitioner fails to adequately explain how this "conversion" claim assists her argument that she was not required to exhaust the grievance procedure. Indeed, petitioner could have raised this claim in the context of the disciplinary proceeding, and did so.

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

ENTERED: NOVEMBER 13, 2007

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

1958-
1959 Hermenegildo Carino, et al., Index 20969/03
Plaintiffs-Appellants-Respondents,

-against-

Webster Place Associates, LP, et al.,
Defendants-Respondents-Appellants.

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Paul F. McAloon, New York, for appellants-respondents.

Jeffrey S. Shein & Associates, P.C., Syosset (Frank A. Polacco of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered March 29, 2006, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment on their Labor Law § 240(1) cause of action and denied defendants' cross motion for summary judgment seeking dismissal of plaintiffs' Labor Law § 200 and § 240(1) claims, unanimously modified, on the law, plaintiffs' motion granted, and that part of defendants' cross motion seeking dismissal of the Labor Law § 200 cause of action granted, and otherwise affirmed, without costs.

Plaintiff was entitled to partial summary judgment on his Labor Law § 240(1) cause of action, where he was injured when he fell from a ladder while in the course of removing an eight-foot high fence at a construction site. Regardless of the method employed by plaintiff to remove the fence, the ladder provided to

him was not an adequate safety device for the task he was performing and was a proximate cause of the fall and resulting injuries (*see Ben Gui Zhu v Great Riv. Holding, LLC.*, 16 AD3d 185 [2005]; *Dunn v Consolidated Edison Co. of N.Y., Inc.*, 272 AD2d 129 [2000]).

Dismissal of the Labor Law § 200 cause of action was warranted since there is no evidence that defendants exercised supervision or control over plaintiff's work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Dalanna v City of New York*, 308 AD2d 400 [2003]).

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1960 Lisa Cresson, Index 113633/05
Plaintiff-Appellant,

-against-

New York University College of Dentistry,
Defendant-Respondent.

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Joel M. Kotick, New York, for appellant.

Jones Hirsch Connors & Bull P.C., New York (Steven H. Kaplan of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered May 22, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint on the basis that it was commenced beyond the 2½-year statute of limitations for an action alleging dental malpractice was appropriate (CPLR 214-a). Defendant established through documentary evidence that following plaintiff's last scheduled appointment on March 4, 2003, it placed plaintiff on notice of its decision to discontinue treating her and that she was to pursue outside consultation for her orthodontic complaints, and there is no basis upon which to find that defendant anticipated providing further orthodontic

services to plaintiff (*see Plummer v New York City Health & Hosps. Corp.*, 98 NY2d 263, 267-268 [2002]). Accordingly, the commencement of this action on September 28, 2005 was untimely.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1961 In re Violeta P.,

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

Mercedes Francisca P.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

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Order, Family Court, New York County (Sara P. Schechter, J.), entered on or about November 30, 2004, which, after a fact-finding determination, terminated respondent mother's rights to the subject child and transferred custody and guardianship to the New York City Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Permanent neglect may be found where a parent fails to acknowledge the problem that led to foster care placement in the first place (*Matter of Alpacheta C.*, 41 AD3d 285 [2007]). Notwithstanding respondent's completion of classes in parenting skills and anger management, and therapy sessions, there was clear and convincing evidence that she had failed to plan for her

child's future (*see* Social Services Law § 384-b[7]). The court was in the best position to make this evaluation (*Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]). The determination as to the child's best interests, in furtherance of finding her a permanent home, was supported by a preponderance of evidence highlighting the current positive environment of a foster mother who desires to adopt.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1963 Martin Ewens, Index 106107/05
Plaintiff-Respondent,

-against-

Shisher K. Roy, et al.
Defendants-Respondents,

Charles Murphy,
Defendant,

Daniel C. Baatz, et al.,
Defendants-Appellants.

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Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for Heber Alvarez, respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered March 27, 2007, which, insofar as appealed from, denied defendants-appellants' motion for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the complaint and all cross claims dismissed as against appellants. The Clerk is directed to enter judgment accordingly.

Defendants-respondents' vehicle, a taxi, hit appellants' vehicle in the rear, propelling it forward into the rear of defendant's vehicle, which was stopped at a red light. Appellants moved for summary judgment, arguing that nothing in the record supports a nonnegligent explanation for the taxi's

rear-ending their vehicle; the taxi's owner responded through his attorney, arguing that the record raises an issue of fact as to whether appellants' vehicle suddenly stopped short without warning. But even if appellants' vehicle did stop suddenly in front of the taxi, there is no evidence that the taxi's driver was unable to see the red light ahead, or other evidence that might tend to explain his failure to keep a safe distance away from appellants' vehicle (*see Mitchell v Gonzalez*, 269 AD2d 250 [2000]; *compare Singh v Sanders*, 286 AD2d 256 [2001]).

M-5051 Ewens v Shisher K. Roy, et al.

Motion seeking an order for a stay denied as acamedic.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1964 Gryphon Domestic VI, LLC, et al., Index 603315/02
Plaintiffs-Respondents,

Warner Mansion Fund,
Plaintiff,

-against-

APP International Finance Company, et al.,
Defendants-Appellants.

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Schnader Harrison Segal & Lewis LLP, New York (Kenneth R. Puhala of counsel), for appellants.

Cleary Gottlieb Steen & Hamilton LLP, New York (Deborah M. Buell of counsel), for respondents.

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Judgment, Supreme Court, New York County (Helen E. Freedman, J.), entered February 24, 2006, on default of certain notes, to plaintiff Gryphon against the APP/Lontar/Asia defendants in the principal sum of $9,683,695, to plaintiff OCM II against APP/Lontar/Asia in the principal sum of $72,406,578, to OCM II against the Indah Kiat defendants in the principal sum of $25,402,604, to plaintiff OCM III against APP/Lontar/Asia in the principal sum of $52,649,728, to OCM III against Indah Kiat in the principal sum of $24,052,517, to plaintiff Columbia against APP/Lontar/Asia in the principal sum of $2,699,817, to Columbia against Indah Kiat in the principal sum of $696,016, to plaintiff Gramercy against APP/Lontar/Asia in the principal sum of $23,463,982, and to Gramercy against Indah Kiat in the principal sum of $51,577,248, unanimously affirmed, with costs.

Defendants' procurement of judgments in Indonesia was in bad faith. They deliberately erected legal impediments to the enforcement of this Court's orders with respect to indentures governed by New York law (*see e.g.* 41 AD3d 25 [2007]). Principles of comity will not prevent summary judgment in plaintiffs' favor under these circumstances.

Defendants' interpretation of the "no action" clause is unpersuasive, given the language of the indentures. These sophisticated parties could have included a requirement in the notes that any request or demand by an agent on a noteholder's behalf be accompanied by written proof of agency, but they did not. Nor did they indicate that the absence of a writing accompanying such a demand would be "insufficient" under its provisions. The trustee believed the demand to be genuine, even in the absence of a writing establishing the agency relationship.

There is no basis for further discovery. We have considered defendants' remaining arguments and find them without merit.

M-5318 ***Gryphon Domestic VI, LLC, et al. v APP Int'l Fin. Co., et al.***

Motion seeking leave to supplement the record denied.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1965 The People of the State of New York, Respondent, Ind. 3888/04

-against-

Jerry Rivera, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Alfred Lorenzo, J. at plea and Seth Marvin, J.), rendered on or about January 20, 2006 unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1966 Andrew Cruz, Index 15966/02
Plaintiff-Appellant,

-against-

Montefiore Medical Center,
Defendant-Respondent.

_____

Gardiner & Nolan, Brooklyn (William Gardiner of counsel), for appellant.

Law Offices of Michael E. Pressman, New York (Steven H. Cohen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 7, 2006, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, a security guard, was chasing a suspicious man in defendant hospital's parking garage when he slipped and fell on a stairway. In support of the motion, defendant presented deposition testimony from its supervisory employees to the effect that they had no knowledge of any prior complaints or incidents concerning the condition of the stairs, and from plaintiff, who admitted that he never personally complained about the condition of the stairs and was not holding the handrails as he began running down them. This satisfied defendant's prima facie burden of demonstrating that it did not create or have notice of an unsafe condition on the stairs. Plaintiff's opposition consisted

of affidavits from himself and his expert to the effect that, as alleged in his bill of particulars, the non-skid surface of the step on which he slipped was worn off and the nosing of the stairway treads had become polished and slippery because of pedestrian use and lack of maintenance. This was insufficient to raise an issue of fact as to whether defendant had notice of the slippery condition of the stairs.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1967 The People of the State of New York, Ind. 56315C/04
Respondent,

-against-

Rafael A. Colon, etc.,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered on or about January 9, 2006, unanimously affirmed. No opinion. Order filed.

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

1969 The People of the State of New York, Ind. 2487/04
Respondent,

-against-

Lerome Hilson,
Defendant-Appellant.

_____

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

Robert M. Morgenthau, District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about March 28, 2005, unanimously affirmed. No opinion. Order filed.

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

1972 The People of the State of New York, ex rel. Harry Goldberg, Petitioner-Appellant, Index 2679/05

-against-

Warden, Rikers Island Correctional Facility, Respondent-Respondent.

_____

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

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

_____

Order, Supreme Court, Bronx County (Thomas Farber, J.), entered February 10, 2006, which denied petitioner's application for a writ of habeas corpus and dismissed the proceeding, unanimously affirmed, without costs.

As petitioner is no longer in the custody of respondent Warden and could not be immediately released, the remedy of habeas corpus is unavailable (*see People ex rel. Brown v N.Y. State Div. of Parole*, 70 NY2d 391, 398 [1987]). Nevertheless, this proceeding is not moot because, inter alia, it affects parole time credited to petitioner. Therefore, we consider the matter as a proceeding pursuant to CPLR article 78 (*see* CPLR 103[c]).

The petition was properly denied on the ground that the preliminary parole revocation hearing was timely scheduled for

November 28, 2005, and was adjourned for the legitimate reason that petitioner was confined for medical reasons (*see People ex rel. Moore v Warden*, 36 AD3d 494 [2007]). Respondent Division of Parole also acted "energetically and scrupulously" in rescheduling the hearing for December 5, 2005, when it learned of petitioner's release from that confinement (*see People ex rel. Burley v Warden*, 70 AD2d 518, 519 [1979], *lv denied* 48 NY2d 602), and petitioner has not cited any prejudice from the short delay.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1974N Albert Cheng, M.D., et al., Index 604083/01
Plaintiffs,

Robert Scher, M.D.,
Plaintiff-Appellant,

-against-

Oxford Health Plans, Inc., et al.,
Defendants-Respondents.

_____

Whatley Drake & Kallas LLC, New York (Edith M. Kallas of counsel), for appellant.

Sullivan & Cromwell LLP, New York (Marc De Leeuw of counsel), for respondents.

_____

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered on or about December 5, 2006, which granted defendants' motion to vacate the Clause Construction Award dated March 7, 2006, pursuant to which an American Arbitration Association panel had found that the parties' arbitration clause permitted class arbitration, and remanded to the panel for further proceedings, unanimously reversed, on the law, with costs, the motion denied and the award reinstated.

Even beyond the grounds set forth in the Federal Arbitration Act (9 USC § 10[a]) -- whose standard, the parties agree, governs our judicial review -- a trial court may vacate an arbitration award "if it exhibits a 'manifest disregard of the law'" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480 [2006], *cert dismissed* __ US __, 127 S Ct 34 [2006]). A court may find an

award to be in manifest disregard of the law if the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and that legal principle was well defined, explicit and clearly applicable to the case (*id.*, 6 NY3d at 481; *see Folkways Music Publs. v Weiss*, 989 F2d 108, 112 [2d Cir 1993]). But the "manifest disregard" standard rarely results in vacatur because it is limited to those "rare occurrences of apparent 'egregious impropriety' on the part of the arbitrators" (*Wien & Malkin*, 6 NY3d at 480), which requires "more than a simple error in law or failure by the arbitrators to understand or apply it;" in other words, it must be "more than an erroneous interpretation of the law" (*Duferco Intl. Steel Trading v T. Klaveness Shipping A/S*, 333 F3d 383, 389 [2d Cir 2003]).

Here, the panel's majority did not state certain law as controlling and then deliberately ignore it, but instead, after analyzing case law offered by both sides (including *Flynn v Labor Ready, Inc.*, 6 AD3d 492 [2004] and *Harris v Shearson Hayden Stone*, 82 AD2d 87 [1981], *affd* 56 NY2d 627 [1982]), concluded that defendants could not successfully demonstrate that New York law prohibited class arbitrations under this 1998 agreement that predated *Green Tree Fin. Corp. v Bazzle* (539 US 444 [2003]). The court did point to case law prohibiting class arbitrations in 1998, but even if this had constituted an error or mistake of law on the part of the majority arbitrators, such an error does not

reach the level of manifest disregard to justify vacatur (*Wien & Malkin*, 6 NY3d at 481; *see e.g. Westerbeke Corp. v Daihatsu Motor Co.*, 304 F3d 200, 217 [2d Cir 2002]; *Collins & Aikman Floor Coverings Corp. v Froehlich*, 736 F Supp 480, 487 [SD NY 1990]).

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

ENTERED: NOVEMBER 13, 2007

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

1975-
1976-
1977 The People of the State of New York, SCI 1566/01
Respondent, 2055/02
2342/04

-against-

Anthony McKenzie,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx County (Lawrence H. Cunningham of counsel), for respondent.

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Judgments, Supreme Court, Bronx County (Laura Safer-Espinoza, J.), rendered on or about June 20, 2006, unanimously affirmed. No opinion. Order filed.

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

1978 85th Columbus Corp., Index 570525/06
Petitioner-Respondent,

-against-

Steven Cooperman, etc.,
Respondent-Appellant.

_____

Penn Proefriedt Schwarzfeld & Schwartz, New York (Sharyn A. Tritto of counsel), for appellant.

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

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Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered December 21, 2006, which reversed an order, Civil Court, New York County (Michelle D. Schreiber, J.), dated December 21, 2005, granting tenant's motion to dismiss the petition in a nonprimary residence summary holdover proceeding, and reinstated the petition, unanimously affirmed, without costs.

Appellate Term correctly determined that the notice of nonrenewal was timely served. While a landlord serving a 10-day notice to cure by mail must factor an additional five days into the cure period (*ATM One, LLC v Landaverde*, 2 NY3d 472 [2004]), there is no requirement that a landlord add five days to service by mail of a 90/150-day notice of nonrenewal (*21 West 58th Street*

Corp. v Foster, __ AD3d __ [2007]; *Skyview Holdings, LLC v Cunningham*, 13 Misc 3d 102 [2006]).

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1980-
1980A In re Milan N., etc., and Another,

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

Lucia N.,
Respondent-Appellant,

SCO Family of Services, et al.,
Petitioners-Respondents.

_____

Anne Reiniger, New York, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for SCO Family of Services, respondent.

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

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Orders of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about March 15, 2006, which, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The court properly determined that under the circumstances presented, petitioner agency was excused from its usual obligation to encourage the parental relationship inasmuch as further efforts to reunite the family would not be in the best interests of the children. These circumstances included

allegations against the mother of sexual abuse involving the two young children, an order of protection requiring the mother to stay away from her daughter, a court order denying the mother's request for visitation, the mother's conviction for endangering the welfare of a child, and a report by a mental health expert who concluded that contact between the mother and children would be detrimental to the emotional well-being of the children (Social Services Law 384-b[7][a]; *Matter of Joseluise Juan M.*, 302 AD2d 219 [2003], *lv denied* 100 NY2d 508 [2003]; *Matter of Kasey Marie M.*, 292 AD2d 190 [2002]). The findings of permanent neglect were supported by clear and convincing evidence. The mother's denial of accountability established that she failed to gain insight into the cause of her children's extended placement in foster care and thus, failed to plan meaningfully for their future (*see Matter of Alpacheta C.*, 41 AD3d 285 [2007]; *Matter of Galeann F.*, 11 AD3d 255 [2004], *lv denied* 4 NY3d 703 [2005]).

The court properly concluded that it was in the children's best interests to terminate the mother's parental rights so as to facilitate the children's adoption by their foster mother with whom they have a close relationship, have lived with for the majority of their lives, and who has tended to the children's

emotional and psychological needs (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]). The circumstances presented do not warrant a suspended judgment.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1981 The People of the State of New York, Ind. 6335/05
Respondent,

-against-

Harry Charles,
Defendant-Appellant.

_____

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

Robert M. Morgenthau, District Attorney, New York County (Sheryl Feldman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about May 17, 2006, unanimously affirmed. No opinion. Order filed.

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

1982 Marcus Colon, Index 22975/04
Plaintiff-Respondent,

-against-

Yen Ru Jin,
Defendant-Appellant.

_____

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for appellant.

Mansour, Winn, Kurland & Warner, LLP, Lake Success (Stephen G. Winn of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 17, 2006, which denied defendant's motion to vacate the note of issue, unanimously affirmed, without costs.

Defendant failed to demonstrate any unusual or unanticipated circumstances warranting vacatur of the note of issue more than three months after it was served on him (*see* 22 NYCRR 202.21[d], [e]). A lack of diligence in seeking discovery does not constitute such circumstances (*Marks v Morrison*, 275 AD2d 1027 [2000]). The record discloses that defendant failed to avail himself of several opportunities to conduct plaintiff's deposition and medical examination prior to the deadline set forth in the court's compliance conference order, thereby waiving

any right he had to additional discovery (*see Rosenberg & Estis, P.C. v Bergos*, 18 AD3d 218 [2005]).

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1983 Beryl Edgecomb, Index 102262/03
Plaintiff-Appellant,

-against-

Ixat Transit, Inc., et al.,
Defendants-Respondents.

_____

The Law Firm of Steven J. Mandel, P.C., New York (James Nemia of counsel), for appellant.

The Sullivan Law Firm, New York (Timothy M. Sullivan of counsel), for Sisters Transit, Inc. and Traore Kassoum, respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 4, 2006, which, insofar as appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the complaint for lack of a serious injury, unanimously affirmed, without costs.

Plaintiff's claims of permanent and significant injuries were properly rejected where, in opposition to defendants' prima facie showing of no such injuries, plaintiff offered no explanation why she did not seek any treatment starting nine months after the accident (*see Pommells v Perez*, 4 NY3d 566, 574 (2005). Plaintiff's claim of a 90/180 injury was properly rejected for lack of evidence showing that the injuries she

sustained were serious enough to keep her from working out of her home as she had been at the time of the accident.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1986 The People of the State of New York, Ind. 59248C/04
Respondent,

-against-

Mark Jenkins,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx County (Kayonia L. Whetstone of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered on or about May 11, 2006, unanimously affirmed. No opinion. Order filed.

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

1987 In re Annex Hotel, Index 117588/06
Petitioner,

-against-

New York State Division
of Human Rights, et al.,
Respondents.

_____

Frank & Associates, P.C., Farmingdale (Peter A. Romero of counsel), for petitioner.

Caroline J. Downey, Bronx (Michael K. Swirsky of counsel), for New York State Division of Human Rights, respondent.

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Determination of respondent Commissioner of State Division of Human Rights dated September 26, 2006, finding petitioner hotel liable for the allegedly hostile work environment to which its co-owner allegedly subjected the complainant, and awarding the complainant $250,000 for mental anguish and humiliation, unanimously annulled, on the law, without costs, the petition (transferred to this Court by order of the Supreme Court, New York County [Nicholas Figueroa, J.], entered April 2, 2007) granted, and the underlying administrative complaint dismissed.

We annul for two reasons. First, the inexplicable 17-year delay between the filing of the complaint and respondent's final order caused substantial prejudice to petitioner, whose key witness, the person who allegedly committed the sexual harassment, died before his testimony was taken (*see Matter of Sarkisian Bros. v State Div. of Human Rights*, 48 NY2d 816, 818

[1979]). Second, respondent lacked jurisdiction. As found by the Administrative Law Judge who presided over the hearing, the complainant's testimony established that she was employed by petitioner hotel's owners, a husband and wife, as a housekeeper in their private residence, cleaning their home, doing their laundry, shopping and cooking, and walking their dog. She was clearly their domestic employee, not an employee of the hotel covered by the Human Rights Law. "Although the term 'domestic service' is not defined in the Human Rights Law, it is apparent that the Legislature did not intend to extend its reach into private homes and to subject private employment relationships of the most personal kind to governmental control" (*Matter of Thomas v Dosberg*, 249 AD2d 999, 1000 [1998]). The fact that the complainant was paid by checks drawn on the hotel's account or occasionally did some filing or cleaning in the hotel's office, which was located in the same building as the private residence in which she was employed, is insufficient to establish that she was an employee of the hotel, given her testimony to the contrary.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1988 Citigroup Global Markets, Inc., Index 604205/05
Plaintiff-Appellant,

-against-

Metals Holding Corporation,
Defendant-Respondent,

Amir P. Weissfisch,
Defendant-Appellant.

_____

Schupbach, Williams & Pavone LLP, Garden City (Arthur C. Schupbach of counsel), for Citigroup Global Markets, Inc., appellant.

Gibson, Dunn & Crutcher LLP, New York (Mark B. Holton of counsel), for Amir P. Weissfisch, appellant.

Philip Rosenbach, New York, for respondent.

_____

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered July 27, 2006, which, to the extent appealed from as limited by the briefs, dismissed Citigroup Global Markets, Inc. (CGM)'s complaint and Weissfisch's cross claim against defendant Metals Holding Corporation (MHC), pursuant to an order, same court and Justice, entered June 8, 2006, which granted MHC's motion to dismiss the complaint and cross claim on the ground of forum non conveniens, unanimously affirmed, with costs.

The court balanced the appropriate factors and properly exercised its discretion in dismissing the action pursuant to the principle of forum non conveniens (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1985]). This interpleader action,

in which CGM seeks relief pursuant to CPLR 1006, lacks a substantial connection to New York, as it primarily concerns the disputed ownership by Weissfisch and MHC, a foreign national and a foreign corporation, respectively, of assets in an investment account that is the subject of extensive litigation in forums outside New York State. Furthermore, the interpleader action cannot be determined without reference to the underlying issue of ownership – the very issue that is already being litigated abroad. Indeed, there is a risk that conflicting rulings will be issued by courts of different jurisdictions (*see World Point Trading v Credito Italiano*, 225 AD2d 153, 161 [1996]).

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

M-5301 ***Citigroup Global Markets, Inc. v Metals Holding Corporation, et al.***

Motion seeking leave to reconsider and, thereupon, to supplement the record, and to strike certain portions of the reply brief granted to the extent of supplementing the record upon reconsideration, and otherwise denied.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1990 The People of the State of New York, Ind. 53649C/04
Respondent,

-against-

Angel Colon,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered on or about September 8, 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, with notice of entry.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1992 Decana Inc., et al., Index 604247/02
Plaintiffs-Appellants, 590776/04

-against-

Spyro C. Contogouris, et al.,
Defendants,

North Fork Bank, et al.,
Defendants-Respondents.

[And a Third-Party Action]

_____

Watson Farley & Williams, New York (John G. Kissane of counsel), for appellants.

Lazer, Aptheker, Rosella & Yedid, P.C., Melville (Joseph C. Savino of counsel), for North Fork Bank, respondent.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Thomas E. Fox of counsel), for Eastside Holdings LLC, respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered April 6, 2007, which granted defendants-respondents mortgagees' motion to strike plaintiffs' jury demand, unanimously reversed, on the law, with costs, the motion denied, and the matter remanded for a jury trial.

Plaintiffs' claims seeking rescission of defendants' mortgages, although equitable in nature, are triable by jury (CPLR 4101[2]; RPAPL 1501[5]), absent a waiver. All the equitable relief sought by plaintiffs in addition to RPAPL article 15 rescission is incidental to the latter, and thus did not result in a waiver. More particularly, the requested

injunctive relief, which seeks to prevent the mortgagees from commencing foreclosure proceedings, is incidental to the RPAPL article 15 relief since its purpose and effect would be simply to maintain the status quo pending determination of the validity of the mortgages; indeed, if the mortgages are declared void, injunctive relief would seem to be unnecessary (*see Lillianfeld v Lichtenstein*, 181 Misc 2d 571 [1999]). The constructive trusts that plaintiffs seek to impose against assets allegedly wrongfully diverted are incidental to the monetary relief sought in the causes of action for fraud, conversion, unjust enrichment and breach of fiduciary duty (*see Greenfield v Philles Record*, 243 AD2d 353 [1997]). The requested declaration, that defendant corporate officer was the "alter ego" of one of defendant mortgagees, is incidental to plaintiffs' ability to collect on diverted assets once the mortgages are declared void.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1994 William Harding, et al., Index 403443/05
Petitioners-Appellants,

Helen Gibbons,
Petitioner,

-against-

Judith Calogero, as Commissioner of the
New York State Division of Housing and
Community Renewal,
Respondent-Respondent,

207 Realty Associates, LLC,
Intervenor-Respondent-Respondent.

_____

The Legal Aid Society, New York (Steven Banks of counsel), and Proskauer Rose LLP, New York (Conor Malinowski of counsel), for appellants.

Gary R. Connor, New York (Sandra A. Joseph of counsel), for DHCR, respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for 207 Realty Associates, LLC, respondent.

_____

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered May 10, 2006, which denied the tenants' petition seeking to annul the determination of respondent agency (DHCR) granting intervenor landlord's application for a rent increase based on unique or peculiar circumstances, unanimously affirmed, without costs.

The agency determination to increase petitioners' maximum rents (*see* 9 NYCRR § 2202.3[a][1], § 2202.7) had a rational basis

(*see Matter of Ansonia Residents Assn. v New York State Div. of Hous. & Community Renewal*, 75 NY2d 206 [1989]). DHCR's methodology for computing comparable regulated rents in the area was neither arbitrary nor capricious. That the calculation could have been performed differently is of no moment, as DHCR has broad discretion in setting rents to effectuate the laws governing rent regulation (*Matter of Santo v New York State Div. of Hous. & Community Renewal*, 272 AD2d 334 [2000]). The comparable rents proposed by petitioners were not accompanied by documentary substantiation to show how they were calculated, nor did they state whether the rents submitted included subsidies they had received; furthermore, the comparable apartments submitted were substantially smaller than the subject apartments and provided too small a sample (*see Matter of Parcel 242 Realty v New York State Div. of Hous. & Community Renewal*, 215 AD2d 132, 134 [1995], *lv denied* 86 NY2d 706 1995]). Nor were petitioners' due process or other rights denied when DHCR conducted the calculation based on its own records without providing petitioners advance notice of the methodology it used (*see Matter of Goldman v NYSDHCR*, 6 AD3d 197 [2004]). While the methodology used has been affirmed in other cases, this does not establish that DHCR has created an inflexible rule removing that agency's discretion, and so DHCR was not obliged to follow the rule-making procedures set forth in the State Administrative Procedure Act

(*see Matter of Alca Indus. v Delaney*, 92 NY2d 775 [1999]; *Matter of DeJesus v Roberts*, 296 AD2d 307, 310 [2002]). DHCR did retain discretion to accept intervenors' comparability study or the owner's study, or to apply any other reasonable methodology. It also expressly considered the hardship on intervenor-tenants (9 NYCRR § 2202.3[a][1]) in phasing the increased rents in over four years.

We have examined petitioners' remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1995N 207 Realty Associates, LLC, Index 105825/01
Petitioner-Respondent,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

Elgenia Mitchell, et al.,
Intervenor Respondents-Appellants,

Helen Gibbons,
Intervenor-Respondent.

_____

The Legal Aid Society, New York (Steven Banks of counsel), and Proskauer Rose LLP, New York (Conor Malinowski of counsel), for appellants.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for 207 Realty Associates, LLC, respondent.

Gary R. Connor, New York (Sandra A. Joseph of counsel), for DHCR, respondent.

_____

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered April 14, 2006, which, to the extent appealed from, denied intervenors' motion to vacate a 2001 order of the same court and Justice that had annulled the determination of respondent agency (DHCR) denying petitioner landlord's application for rent increases based on unique and peculiar circumstances and remanded for a comparability study consistent with granting the application for an adjustment of the maximum rent, unanimously affirmed, without costs.

Intervenors' assertion of fraud, misrepresentation or other

misconduct (CPLR 5015[a][3]) was insufficient to vacate the prior order. There is no reason to disturb the court's determination that a member of petitioner had not deliberately withheld information regarding his involvement, 10 years earlier, with the mortgagee of that building. In any event, this member's prior involvement with the mortgagee would have had no effect on the prior order, since there is no evidence to support intervenors' assertion that this member's connection with the mortgagee constituted a unique or peculiar circumstance materially affecting the setting of the maximum rent (9 NYCRR § 2202.7). The mortgagee was under no obligation to undertake the costly actions advocated by intervenors to cure these prior circumstances, and the evidence demonstrates only that the mortgagee acted properly for the entire time it held the mortgage.

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

ENTERED: NOVEMBER 13, 2007

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CLERK

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

1996
[M-4104&
M-4594] In re Second Avenue LLC,
Petitioner,

-against-

The City of New York, et al.,
Respondents.

Proceeding brought pursuant to Eminent Domain Procedure Law article 2 discontinued, as indicated. All concur. No opinion. Order filed.

Saxe, J.P., Nardelli, Buckley, Gonzalez, Sweeny, JJ.

365 Probate Proceeding,
Will of Victoria Falk,
Deceased.
- - - - - - - - - -
Joseph Fashing, et al., File 4612/02
Petitioners-Appellants,

-against-

Pavel Hillel, et al.,
Objectants-Respondents.

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Bashian & Farber, LLP, White Plains (Annette G. Hasapidis of counsel), for appellants.

Seth Rubenstein, P.C., Brooklyn (Nora S. Anderson of counsel), for respondents.

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Decree, Surrogate's Court, New York County (Kristin Booth Glen, J.), entered February 2, 2006, affirmed, without costs.

Opinion by Nardelli, J. All concur.

Order filed.

Saxe, J.P., Friedman, Marlow, Sullivan, McGuire, JJ.

1090 LaSalle Bank National Association, etc., Plaintiff-Appellant, Index 603339/03

-against-

Nomura Asset Capital Corporation, et al., Defendants-Respondents.

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Munsch Hardt Kopf & Harr, P.C., Dallas, TX (David C. Mattka of the Texas Bar, admitted pro hac vice, of counsel), for appellant.

Dreier LLP, New York (Marc S. Dreier of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered September 8, 2006, as amended by order entered October 26, 2006, modified, on the law, to the extent of vacating the determination that plaintiff's failure to mitigate damages was a complete bar to recovery, and the matter remanded for a calculation of damages, and otherwise affirmed, without costs.

Opinion by Saxe, J.P. All concur.

Order filed.

THE FOLLOWING MOTION ORDERS WERE ENTERED AND FILED ON NOVEMBER 13, 2007

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

M-5747X Enriquez v Modell, also known as Modell's Sporting Goods

Appeal withdrawn.

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

M-5423 (D.C. #6) People v Batista, Carlos

M-5488 (D.C. #39) McGriff, Kenneth, also known as Coleman, Ricky

M-5499 (D.C. #47) Rodriguez, David

M-5501 (D.C. #51) Smith, James

M-5510 (D.C. #60) Zheng, Fei Zhou

M-5679 (D.C. #61) Walsh, Eugene

Upon the Court's own motions, appeals dismissed.

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

M-5426 (D.C. #8) People v Brenman, Michael

M-5427 (D.C. #9) Camacho, Luis Grueso

M-5462 (D.C. #22) Fields, Ernest

M-5468 (D.C. #25) Frempong, Julian

Upon the Court's own motions, time to perfect appeals enlarged to the February 2008 Term.

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

M-5481 (D.C. #35) People v Jackson, Valeressa

M-5483 (D.C. #36) Keitt, Devin

M-5494 (D.C. #44) Perry, Joseph, also known as Johnson, William

M-5495 (D.C. #45) Ramnarain, Sanjev

M-5497 (D.C. #46) Randolph, Reginald

M-5498 (D.C. #48) Rodriguez, Roberto

M-5500 (D.C. #49) Sabinon, Esteban

M-5503 (D.C. #52) Sow, Yusuf, also known as Sow, Yusef

M-5504 (D.C. #53) Suarez, Victor

M-5505 (D.C. #54) Tejada, Elias

M-5507 (D.C. #56) Vassell, Franklyn

Upon the Court's own motions, time to perfect appeals enlarged to the February 2008 Term.

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

M-5557 Becovic v Poisson & Hackett

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

Lippman, P.J., Andrias, Nardelli, Gonzalez, Kavanagh, JJ.

M-5566 Landaverry v The City of New York

CPLR 5704(a) relief and stay of trial denied.

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

M-5147 Calabro v Fleishell

Stay granted; appeal from order of the Supreme Court entered February 6, 2007 withdrawn.

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

M-4601 Property Clerk, New York City Police Department v Ber

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

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

M-5212 Santiago v The City of New York

Time to perfect appeal enlarged to the May 2008 Term.

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

M-4940 People v Anderson, Ayana

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

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

M-4979 People v Romero, William

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

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

M-5273 People v Nichols, Zwadie

Extension of time to file pro se supplemental brief granted for the March 2008 Term, to which Term appeal adjourned, as indicated.

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

M-5249 Rosengarten v Hott

Certain pages of record on appeal deemed stricken, as indicated; Clerk directed to maintain consolidated appeals on this Court's calendar for the January 2008 Term, and the stay granted by order of this Court on August 9, 2007 (M-3343) continued, as indicated.

Tom, J.P., Mazzarelli, Friedman, Sullivan, Nardelli, JJ.

M-4769 People ex rel. Williams-Bey, T. v New York City Department of Corrections

Writ of habeas corpus denied.

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

M-5173 People v Warner, Alex, also known as White, Tony

Appeal deemed withdrawn.

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

M-5135 People v McCarthy, Edward

The order of this Court entered November 16, 2006 (M-5067) recalled and vacated, as indicated; time to perfect appeal enlarged to the March 2008 Term; poor person relief previously afforded continued.

Mazzarelli, J.P., Sullivan, Nardelli, Williams, JJ.

M-1698 People v Campos, Genaro

Extension of time to file notice of appeal and related relief denied. (See M-1729 and M-3556, decided simultaneously herewith.)

Mazzarelli, J.P., Sullivan, Nardelli, Williams, JJ.

M-1729 People v Campos, Genaro

Writ of error coram nobis denied. (See M-1698 and M-3556, decided simultaneously herewith.)

Mazzarelli, J.P., Sullivan, Nardelli, Williams, JJ.

M-3556 People v Campos, Genaro

Writ of error coram nobis denied. (See M-1698 and M-1729, decided simultaneously herewith.)

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

M-5029 In the Matter of O., Tiara Ibel --
Catholic Home Bureau for Dependent Children

Appeal deemed withdrawn.

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

M-5245 People v Peterson, Anthony

Writ of error coram nobis and poor person relief denied.

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

M-5525 Hernandez v New York City Transit Authority

Time to perfect appeal enlarged to the February 2008 Term.

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

M-5266 In the Matter of The City of New York v Novello

Time to perfect appeal enlarged to the March 2008 Term.

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

M-5286 Bellaro v Lin

Time to perfect appeal enlarged to the March 2008 Term.

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

M-5285 People v Gomez, Angelo

Time to perfect appeal enlarged to the March 2008 Term.

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

M-5331 People v Toppy, Cherese

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

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

M-5366 In re: New York City Asbestos Litigation - Rosenberg v Alpha Wire Company

Stay of trial denied.

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

M-5267 In the Matter of New York State Urban Development Corporation, doing business as Empire State Development Corporation v The 42nd Street Development Project - Site 8 South

Motion deemed withdrawn.

Friedman, J.P., Williams, Gonzalez, Sweeny, McGuire, JJ.

M-5283 People v Aguero, Michael

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

Friedman, J.P., Marlow, Williams, Buckley, McGuire, JJ.

M-3505 In re Board of Managers of the 225 East 57th Street Condominium v Campaniello Real Estate

Reargument granted, and upon reargument, original determination adhered to; leave to appeal to the Court of Appeals denied.

Friedman, J.P., Marlow, Nardelli, Buckley, Kavanagh, JJ.

M-5159 In re Finkelstein v Kelly

Leave to appeal to the Court of Appeals denied.

Sullivan, J.P., Nardelli, Buckley, Catterson, Kavanagh, JJ.

M-5260 People v Teresa-Taussicaucci, Maria, also known as Taussi-Casucci, Maria Teresa

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

Andrias, J.

M-5643 People v Raosto, Vincent

Leave to appeal to this Court granted, as indicated.

Andrias, J.

M-5176 People v Zigler, Paul

Leave to appeal to this Court denied.

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

M-3581 In the Matter of Nicholas Paul Altomerianos,
a suspended attorney:

Reinstatement denied. No opinion. Order filed.

Tom, J.P., Mazzarelli, Friedman, Sullivan, Nardelli, JJ.

M-4060 In the Matter of Arthur L. Schwartz,
M-5043 an attorney and counselor-at-law:

Respondent disbarred and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to January 4, 2006. Cross motion to resign as an attorney and counselor-at-law denied. Opinion Per Curiam. All concur.

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

M-2856 In the Matter of Jeanette G. Stewart
(admitted as Jeanette Geneva Stewart),
a suspended attorney:

Order of suspension issued by this Court on May 30, 2002 (M-1792) recalled and vacated; respondent suspended as an attorney and counselor-at-law in the State of New York, effective the date hereof, for an indefinite period and until further order of this Court, as indicated. Opinion Per Curiam. All concur.