SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 30, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11603 The People of the State of New York, Respondent, Ind. 888/10

-against-

Michael Gray,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered September 27, 2011, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree and criminal trespass in the second degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of six years, unanimously affirmed.

The court properly exercised its discretion in permitting expert testimony that the packaging and quantity of the drugs recovered from defendant was consistent with possession by a seller and inconsistent with mere personal use. This testimony

was precisely within the scope of expert evidence permitted under *People v Hicks* (2 NY3d 750 [2004]). There is no merit to defendant's suggestion that *Hicks* was overruled by *People v Williams* (20 NY3d 579, 585 [2013]).

We reject defendant's challenge to the weight of the evidence supporting the unlawful entry element of criminal trespass. The evidence supports the inference that defendant knew he was not licensed or privileged to be in the lobby of a Housing Authority building where he was neither a resident nor an invitee.

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11604 Nadine Hunter-Williams, Index 304741/10
Plaintiff-Respondent,

-against-

Daughters of Jacob Geriatric Center,
Defendant-Appellant.

_____

KL Rotondo & Associates, White Plains (Kathi Libby Rotondo of counsel), for appellant.

Silbowitz, Garafola, Silbowitz, Schatz & Frederick, LLP, New York (Jill Savedoff of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about September 27, 2012, which, upon granting defendant's motion for leave to renew its prior motion for summary judgment dismissing the complaint, adhered to the prior order denying the motion, unanimously affirmed, without costs.

In this action for personal injuries, plaintiff alleges that she slipped and fell on a staircase in defendant's building due to a wet substance that she did not see because the lighting was inadequate. She further alleges that she was unable to stop her fall because there was no handrail on the bottom part of the staircase where she fell. Defendant failed to satisfy its burden of demonstrating that it did not have actual or constructive notice of the allegedly insufficient lighting condition. The parties' respective experts disagree on whether the lighting was

adequate. There is no basis for finding that the handrail was inadequate as it was in complete compliance with the applicable Building Code. There is an issue of fact as to whether plaintiff's fall was caused by inadequate lighting.

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11605-
11605A-
11605B In re Alliyah C., etc., and Others,

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

Colleen C., etc., et al.,
Respondents-Appellants,

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

_____

Patricia W. Jellen, Eastchester, for Colleen C., appellant.

Geoffrey P. Berman, Larchmont, for Santiago C., appellant.

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

Kenneth Walsh, New York, attorney for the child Alliyah C.

Steven N. Feinman, White Plains, attorney for the children Octavia C. and ZaMyiah C.

_____

Orders, Family Court, Bronx County (Jane Pearl, J.), entered on or about May 7, 2012, which upon a finding of permanent neglect by the respondent mother and abandonment by the respondent father, terminated respondents' parental rights to the subject children and committed custody and guardianship of the children to petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence established that respondent

father failed to visit or communicate with the children for the six-month period immediately preceding the filing of the petition, which gave rise to a presumption of abandonment (*see Matter of Jasiaia Lew R. (Aylyn R.)*, 101 AD3d 568 [1st Dept 2012]). Petitioner agency provided credible evidence that during the relevant time period, respondent father never visited the children at the agency, and never contacted the agency concerning the children. Rather, the evidence showed that the father failed to respond to the agency's attempts to contact him. Moreover, during that time, although the father apparently drove the mother to the scheduled visits with the children at the agency, he did not go into the agency or participate in the visits. He explained that he chose not to participate in the visits because he did not get along with the mother's other two daughters who were present. Although the father now claims that he asked the mother to convey his love to the children and that he paid for the majority of the items that the mother brought to give to the children, including candy, juice, shoes, and toys, his claims are unsubstantiated. Moreover, the court's rejection of such testimony is entitled to deference (*id.* at 569).

As to the mother, the evidence supports the Family Court's finding that the agency demonstrated, by clear and convincing evidence, that it had exercised diligent efforts by scheduling

visits and implementing a service plan that included referrals to individual mental health counseling and assistance in finding suitable housing. The finding of permanent neglect was supported by clear and convincing evidence that, despite such diligent efforts, the mother had failed to complete individual counseling or to obtain housing. Rather, the mother offered only multiple, uncorroborated and inconsistent excuses for her noncompliance (*see e.g. Matter of Darryl Clayton T. [Adele L.]*, 95 AD3d 562, 562-563 [1st Dept 2012]; *Matter of Marah B. [Lee D.]*, 95 AD3d 604, 605 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]; *Matter of Tanisha Shabazz A. [Latisha G.]*, 91 AD3d 482, 483 [1st Dept 2012]).

The finding that termination of respondents' parental rights was in the subject children's best interests was supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 143-144 [1984]; *Matter of Anthony P. [Shanae P.]*, 84

AD3d 510, 511 [1st Dept 2011]; *Matter of Roger Guerrero B.*, 56 AD3d 262, 262-263 [1st Dept 2008], *lv denied* 12 NY3d 704 [2009]; *Matter of Racquel Olivia M.*, 37 AD3d 279, 280 [1st Dept 2007], *lv denied* 8 NY3d 812 [2007]).

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11606-
11607 W & W Glass, LLC,
Plaintiff-Appellant-Respondent,

-against-

1113 York Avenue Realty Company LLC, et al.,
Defendants-Respondents-Appellants,

Pacific Lawn Sprinklers, et al.,
Defendants,

Sota Glazing, Inc.,
Defendant-Respondent-Respondent.

Index 101723/09

Schnader Harrison Segal & Lewis LLP, New York (Theodore L. Hecht of counsel), for appellant-respondent.

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for respondents-appellants.

Rich, Intelisano & Katz, LLP, New York (Steven C. Cramer of counsel), for respondent-respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 14, 2012, which, to the extent appealed from, granted plaintiff's motion for summary judgment as against defendant 1113 York Avenue Realty Company LLC on its causes of action for breach of contract and account stated and awarded plaintiff damages plus pre-judgment interest at the statutory rate of 9%, denied defendants York and 60th Street Development LLC's (together, the York defendants) cross motion for summary judgment declaring that plaintiff's and defendant Sota Glazing,

Inc.'s mechanic liens were void for willful exaggeration, and sub silentio denied plaintiff's motion for sanctions against the York defendants for frivolous conduct, unanimously modified, on the law, to increase the pre- and post-judgment interest rate on the award of damages to plaintiff on its account stated claims to 12% from 9%, and otherwise affirmed, without costs. Order, same court and Justice, entered March 27, 2013, which, to the extent appealed from, denied plaintiff's motion for resettlement of the November 14, 2012 order to include sanctions against the York defendants, to increase the pre- and post-judgment interest rate to 12% from 9%, to deem the York defendants jointly and severally liable for the judgment, and to provide for foreclosure against 60th Street's parcel, unanimously affirmed as to the joint and several liability and foreclosure determinations, and appeal therefrom otherwise dismissed, without costs, as academic in light of the foregoing.

Contrary to the York defendants' contention, plaintiff's and Sota's filing of duplicate liens on the total amount due on their invoices for each of two separately owned parcels that comprised a single development site did not constitute willful exaggeration of the liens (Lien Law §§ 39; 39-a). Lien Law § 4 "expressly recognizes that the sum of all liens filed may be greater than the amount remaining unpaid" (*Matter of 101 Park Ave. Assoc. v*

Trane Co., 99 AD2d 428 [1st Dept 1984], *affd* 62 NY2d 734 [1984]; *see also generally Matter of Niagra Venture v Sicoli & Massaro*, 77 NY2d 175, 181-182 [1990]). Defendants do not contend that the amount stated in any particular lien filed against either of the parcels exceeds the value of the actual labor and equipment provided by plaintiff or Sota to the project.

The record shows that plaintiff sent monthly requisitions for payment to the York defendants, in accordance with the parties' agreement, and that the York defendants failed to timely object to the requisitions. Plaintiff is entitled to interest at the rate of 1% per month on any overdue requisition (*see* General Business Law §§ 756-a; 756-b).

Plaintiff argues that defendant 60th Street should have been held jointly and severally liable with York for the money judgment and that the judgment should provide for conditional foreclosure against 60th Street's parcel in the event that the York defendants' filed undertaking becomes compromised. However, the parties' agreement provides that York will be individually liable for any unpaid overdue invoices, and there is no evidence that the York defendants' filed undertaking or the value of York's parcel alone would be insufficient to satisfy the judgment

(*see* Lien Law § 19[4]; *see generally Morton v Tucker*, 145 NY 244 [1895]; *Sanco Mech., Inc. v DKS Gen. Contrs. & Constr. Mgrs., Inc.*, 34 AD3d 271 [1st Dept 2006]).

We find no reason to disturb the court's exercise of discretion in not awarding sanctions.

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

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11608-
11609 Index 652389/11

Twin Securities, Inc., et al,
Plaintiffs-Respondents,

-against-

Advocate & Lichtenstein, LLP, et al.,
Defendants-Appellants,

T&M Protection Resources, LLC,
Defendant.

_____

Hinshaw & Culbertson LLP, New York (Philip Touitou of counsel), for Advocate & Lichenstein, LLP and Jason A. Advocate, appellants.

Lynch Daskal Emery LLP, New York (Bernard Daskal of counsel), for Linda Simon, appellant.

Morrison Cohen LLP, New York (Danielle C. Lesser of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 26, 2012, which denied the motions of defendants Advocate & Lichtenstein, LLP, Jason A. Advocate (collectively Advocate) and Linda Simon to dismiss the complaint as against them, unanimously reversed, on the law, with costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

The motions to dismiss should have been granted since plaintiffs failed to state causes of action for misappropriation of trade secrets, conversion, trespass to chattel or replevin.

During the course of a matrimonial action, defendant Simon and her attorneys, defendants Advocate, took and copied the computer hard drive of Linda's husband, which plaintiffs allege contained, inter alia, plaintiffs' trade secrets. Three days after the husband's attorney demanded the return of the computer, it was given back. Assuming that the computer's hard drive included such trade secrets, plaintiffs have failed to sufficiently allege that defendants used those trade secrets to gain an advantage over plaintiffs (*cf. CBS Corp. v Dumsday*, 268 AD2d 350, 353 [1st Dept 2000]). The second cause of action for conversion also fails since plaintiffs have not sufficiently alleged damages.

The cause of action alleging trespass to chattel is also not viable since there is no indication that the condition, quality or value of the computer, its hard drive, or any of the information on the computer was diminished as a result of defendants' duplication of the hard drive (*see "J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215 [1st Dept 2005]). Finally,

the replevin claim fails since plaintiffs have not sufficiently alleged that defendants continued to wrongfully retain the computer or plaintiffs' proprietary information contained therein (*see Batsidis v Batsidis*, 9 AD3d 342 [2d Dept 2004]).

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11610 John McGinness, et al., Index 150278/12
Petitioners-Appellants,

-against-

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

_____

Law Offices of Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered May 30, 2012, which denied the petition for leave to file a late notice of claim, unanimously affirmed, without costs.

Petitioners failed to explain their delay in filing the notice of claim (*see* General Municipal Law § 50-e[1][a]; [5]; *Matter of Casale v City of New York*, 95 AD3d 744 [1st Dept 2012]; *Matter of Grant v Nassau County Indus. Dev. Agency*, 60 AD3d 946 [2d Dept 2009]). While they claim that the injured petitioner's incapacity prevented him from obtaining counsel from the date of the incident, June 24, 2011, until his surgery in September 2011, they do not explain the approximately two-month delay in filing the notice of claim after they obtained counsel in October 2011, or the delay until February 2012 in seeking leave to file an untimely notice.

Petitioners also failed to show that respondents acquired actual knowledge of the essential facts constituting their claim (General Municipal Law § 50-e[5]). While, as petitioners contend, respondents' "internal reports and records contain[ed] the exact details of the incident," there are no factual allegations in the contemporaneous written statements of the injured petitioner's coworkers or, indeed, in petitioner's own written statement that would constitute a claim of negligence on respondents' part (*see Matter of Casale*, 95 AD3d at 745). Thus, contrary to petitioners' contention, respondents' records do not rebut the inference of prejudice that arises from petitioners' eight-month delay in serving the notice of claim (*see id.*).

We note, moreover, that petitioners' cause of action is without merit (*see Caldwell v 302 Convent Ave. Hous. Dev. Fund Corp.*, 272 AD2d 112 [1st Dept 2000]). Petitioners failed to allege facts that would establish that respondents had a special

duty to the injured petitioner to protect him from an assault (*see Bonner v City of New York*, 73 NY2d 930 [1989]; *Pascucci v Board of Educ. of City of N.Y.*, 305 AD2d 103 [1st Dept 2003]).

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11612- Ind. 3395/11
11612A The People of the State of New York, 2623/11
Respondent,

-against-

Keith Rivers, etc.,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about October 6, 2011,

Said appeals having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: JANUARY 30, 2014

CLERK

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

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11614 The People of the State of New York, Respondent, Ind. 6325/09

-against-

Lawrence Elliot, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered December 7, 2010, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 15 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to 12 years, and otherwise affirmed.

The record does not establish a valid waiver of defendant's right to appeal. We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11616- Index 103297/08
11617-
11618 Suarna Mehulic,
Plaintiff-Appellant,

-against-

New York Downtown Hospital,
Defendant-Respondent.

_____

Suarna Mehulic, appellant pro se.

Epstein Becker & Green, P.C., New York (Robert D. Goldstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered June 28, 2013, which denied plaintiff's motion to vacate a confidentiality agreement, unanimously affirmed, without costs. Orders, same court and Justice, entered May 23, 2012, which granted defendant's motions to seal all confidential information previously submitted to the court by plaintiff and for injunctive relief prohibiting plaintiff from disseminating discovery material in violation of the parties' confidentiality agreement, unanimously affirmed, without costs.

In this health-care whistleblower action, plaintiff, a second-year resident at defendant hospital, claims, inter alia, that defendant retaliated against her for complaining about patient care, and ultimately terminated her employment. On

January 29, 2009, the parties, by their attorneys, entered into a Confidentiality Agreement in order "to permit the discovery of information deemed confidential" and "preserve any privilege that may attach to a document produced pursuant to this Stipulation . . . against other parties." The agreement defined confidential information as including information concerning the "performance of a medical or quality assurance review function" and patients' medical conditions, and allowed the parties to designate information and deposition testimony as confidential. Confidential information was only to be disclosed to "Qualified Persons" and to be used only for this litigation, except as otherwise provided, and required that any papers filed with the court which contained confidential information be "filed under seal." The agreement also provided a method by which a party could challenge the designation of information as confidential or disclose confidential information to another party.

Plaintiff now seeks to vacate the Confidentiality Agreement on the ground that her former counsel exceeded his authority by entering into the agreement. Plaintiff maintains that she only authorized her former attorney to enter into a confidentiality agreement relating to the medical or quality assurance analysis of a particular patient, and that she did not learn that he exceeded this authority until February 2010. Regardless,

plaintiff is still bound by the agreement as her former attorney entered into the same with "apparent authority" (*see Hallock v State of New York*, 64 NY2d 224, 231-232 [1984]). At the time that her attorney entered into the Confidentiality Agreement, he had already been representing plaintiff for several months, during which time he had filed an amended complaint, entered into a preliminary conference order, served discovery demands, and discussed confidentiality designations with defense counsel and plaintiff. Such conduct clothed plaintiff's former counsel in apparent authority to enter into the subject stipulation, which involved a "procedural or tactical decision[]" in the management of litigation (*id.* at 230).

Moreover, plaintiff's failure to move to vacate the Confidentiality Agreement for over three years after learning of its existence, and for more than nine months after being told by the court below of the need for such a motion in order to disavow the effects of the agreement, estops her from denying her obligations thereunder (*see Hallock* at 230-231*; Clark v Bristol-Myers Squibb & Co.*, 306 AD2d 82, 85 [1st Dept 2003]; *1420 Concourse Corp. v Cruz*, 175 AD2d 747, 749-750 [1st Dept 1991]).

The court properly continued a prior temporary restraining order which prevented plaintiff from disseminating information produced during discovery which had been designated by defendant

as confidential or privileged and issued a sealing order herein. In addition to being protected from disclosure to third parties by the Confidentiality Agreement, the information at issue implicated the protections of Education Law § 6527(3) and Public Health Law § 2805-m, to the extent that it related to a medical or a quality assurance review function (*see Logue v Velez*, 92 NY2d 13, 16-17 [1998]; *Bernholc v Kitain*, 294 AD2d 387, 388 [2d Dept 2002]).

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

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11619 In re Marelyn Dalys C.-G.,

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

Marcial C.,
Respondent-Appellant,

Administration for Children's Services
Petitioner-Respondent.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

_____

Order of fact-finding and disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about January 10, 2013, which, to the extent appealed from, after a hearing, found that respondent abused and neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the determination that respondent abused the child by committing offenses against her defined in Penal Law article 130 (*see* Family Court Act §§ 1012[e][iii], [f][i][B]; 1046[b][I]). The court found the child's testimony at the hearing credible, notwithstanding any alleged inconsistencies, and we see no basis for disturbing that

finding (*see Matter of Irene O.*, 38 NY2d 776 [1975]). The child's testimony is competent evidence of abuse, and need not be corroborated by evidence of serious physical injury or other evidence (*Matter of Christina G. [Vladimir G.]*, 100 AD3d 454 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). In any event, it was corroborated by the caseworker's testimony as to the out-of-court statements by the child's stepsister and stepbrother (*see Matter of Tiara G. [Cheryl R.]*, 102 AD3d 611 [1st Dept 2013], *lv denied* 21 NY3d 855 [2013]; *see also Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659 [1st Dept 2013]).

The determination that respondent neglected the child by inflicting excessive corporal punishment on her (*see* Family Court Act § 1012[f][i][B]) is also supported by a preponderance of the evidence. The child's testimony was sufficient to support the determination (*see Matter of Dayanara V. [Carlos V.]*, 101 AD3d 411 [1st Dept 2012]). In any event, it was corroborated by the caseworker's testimony that the child's stepbrother said he saw respondent beat the child on June 13, 2012, leaving bruises on her face, and that he had seen respondent beat her on previous occasions, and the caseworker's testimony that he observed a bruise on the child's face on June 19, 2012 (*see Matter of Tiara G.*, 102 AD3d at 611-612; *Matter of Ameena C. [Wykisha C.]*, 83 AD3d 606 [1st Dept 2011]). The fact that a beating of the

severity described by the child and her stepbrother occurred only once does not negate the finding of neglect (*Matter of Cevon W. [Talisha W.]*, 110 AD3d 542 [1st Dept 2013]).

The court properly drew a negative inference against respondent since, after petitioner established its prima facie case, respondent failed to meet his burden of explaining his conduct and rebutting the evidence against him (*see Matter of Ashley M.V.*, 106 AD3d at 660).

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11620 The People of the State of New York, Respondent, Ind. 2158/01 10/05

-against-

Gabriel Vargas, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about February 14, 2012, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the motion. Resentencing "involves a complex balancing of several sets of compelling and in some respects competing concerns" (*People v Sosa*, 18 NY3d 436, 442 [2012]), requiring the "exercise of judicial discretion to determine whether relief to an eligible applicant is in the end consonant with the dictates of substantial justice" (*id.* at 443), and courts may deny the applications of persons who "have shown by their conduct that they do not deserve relief from their sentences" (*People v Paulin*, 17 NY3d 238, 244 [2011]). Defendant's very extensive

criminal record, including convictions of felonies committed while incarcerated, along with his serious prison disciplinary infractions outweighed the positive factors he cites.

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11621 Zacarias Perez, et al., Index 14974/88
Plaintiffs-Appellants,

-against-

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

_____

Teperman & Teperman, LLC, New York (Jeffrey Lessoff of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 19, 2012, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court providently exercised its discretion in dismissing the complaint on the grounds of laches (*see Garcia v City of New York*, 72 AD3d 505, 507 [1st Dept 2010], *appeal dismissed* 15 NY3d 918 [2010]; *Reynolds v Snow*, 10 AD2d 101, 111 [1st Dept 1960], *affd* 8 NY2d 899 [1960]). The record demonstrates that the inordinate delays in this case, arising from a 1984 motor vehicle accident and commenced 28 years ago, are attributable to plaintiffs and their counsel, and that due to

the passage of time, defendants' ability to mount a defense has been significantly prejudiced (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003], *cert denied* 540 US 1017 [2003]; *Matter of Linker*, 23 AD3d 186, 189 [1st Dept 2005]).

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11622 Rosa Gomez, Index 300087/10
Plaintiff-Respondent,

-against-

J.C. Penny Corporation, Inc.,
Defendant-Appellant.

_____

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac and Dawn C. DeSimone of counsel), for appellant.

Raphaelson & Levine Law Firm, P.C., New York (Jason S. Krakower of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 20, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff alleges that she slipped and fell on water near the bottom of an escalator going from the third to the second floor while shopping in a J.C. Penney store. Plaintiff does not contend that defendant created the wet condition, but alleges that it had actual or constructive notice of it through the presence of its employees in the area.

Defendant established prima facie that it did not have actual notice by presenting evidence that, before the accident, the department supervisor who was responsible for the area was

unaware of the alleged wet condition and that the loss prevention officer had received no complaints about the area (*see Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010]). The testimony of the department supervisor also demonstrated prima facie that defendant lacked constructive notice of the condition, since she testified that she conducted an inspection of the entire second floor, including the area where plaintiff fell, within the hour preceding plaintiff's accident, and saw no wet or dangerous condition, except some hangers, which she picked up (*see Evangelista v Church of St. Patrick*, 103 AD3d 571 [1st Dept 2013]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500-501 [1st Dept 2008]). While the department supervisor's testimony wavered as to the exact time that she inspected the "specific" spot where plaintiff fell, her testimony over all was clear that she had started the floor inspection about an hour before the accident and inspected the area near the escalator about one-half hour before plaintiff fell. Further, plaintiff's own testimony that she had passed by the same area within the hour preceding her accident and had not noticed any water on the floor also demonstrates that the water spot was not "visible and apparent" and did not "exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy

it" (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Viera v Riverbay Corp.*, 44 AD3d 577 [1st Dept 2007]; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510 [1st Dept 2004]).

In opposition, plaintiff presented no evidence sufficient to raise an issue of fact as to actual or constructive notice, but only speculated that an employee she noticed standing near the bottom of the escalator may have seen the spot of water before plaintiff fell (*see Gordon*, 67 NY2d at 838; *Berger*, 10 AD3d at 512).

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11623 The People of the State of New York, Ind. 2780/00
Respondent,

-against-

Kiyion Pickering, etc.,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered April 4, 2012, resentencing defendant to a term of 18 years, with four years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621 [2011]), and we perceive no basis for reducing that term.

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

ENTERED: JANUARY 30, 2014

CLERK

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11624N Tower Insurance Company of New York, Index 106183/11
Plaintiff-Respondent,

-against-

The Estate of Darnley DeCosta
c/o Sydney Gordon, etc.,
Defendant-Appellant,

Lawrence Bennett, et al.,
Defendants-Respondents.

[And A Third-Party Action]

_____

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant.

Mound Cotton Wollan & Greengrass, New York (Labe C. Feldman of counsel), for Tower Insurance Company of New York, respondent.

Jeffrey I. Schwimmer, New York, for Bennett respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 13, 2012, which, inter alia, denied appellants' motion seeking the appointment of a guardian ad litem (GAL) for Sydney Gordon, without prejudice to seeking such relief pursuant to Article 81 of Mental Hygiene Law, unanimously affirmed, without costs.

As an initial matter, the court did not neglect to consider appellants' application for a GAL pursuant to CPLR 1201, but expressly denied the motion. The court properly denied the motion, without a hearing, as appellants' moving papers were

insufficient to make a prima facie demonstration of the need for the appointment of a GAL for Sydney Gordon (*see Roach v Benjamin*, 78 AD3d 468 [1st Dept 2010]; *Urban Pathways v Lublin*, 227 AD2d 186 [1st Dept 1996]).

In their initial papers, appellants submitted affidavits from counsel and Gordon's family, which generally described an elderly man with some memory loss and difficulties managing a multiple dwelling. They did not indicate that Gordon was incapable of prosecuting or defending his rights. Conspicuously absent were any medical records supporting appellants' position. Respondents, on the other hand, submitted the record of Gordon's most recent doctor visit, which did not support appellants' position, as, among other things, Gordon's treating physician expressly concluded that Gordon did not need a guardian and was able to handle his own affairs. Even the medical records by the same physician of earlier examinations, submitted for the first time in appellants' reply papers, were insufficient.

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

ENTERED: JANUARY 30, 2014

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10755-
10755A The People of the State of New York,
Respondent,

Ind. 20066/10

-against-

Jerald Miller,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian R. Pouliot of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Analisa Torres, J.), rendered September 10, 2010, convicting defendant, upon his plea of guilty, of attempted criminal contempt in the second degree, and sentencing him to a conditional discharge with community service, unanimously reversed, on the law, and the information dismissed in the interest of justice. Appeal from order, same court and Justice, entered on or about June 1, 2011, which denied defendant's CPL 440.10 motion to vacate his conviction, unanimously dismissed as academic.

Defendant contends that his guilty plea should be vacated because he was not informed of any of his constitutional rights under *Boykin v Alabama* (395 US 238 [1969]). The only question that the judge asked was whether "anybody force[d him] to plead

guilty." While it has been held that no "uniform mandatory catechism" is required at a plea (*cert denied sub nom Robinson v New York*, 393 US 1067 [1969]; *People v Tyrell*, __ NY3d __, 2013 NY Slip Op 08288, *4 [2013]), the court's failure to inform defendant of any of his *Boykin* rights is an error of constitutional dimension mandating reversal (*id.* at *5).

We note that defendant fulfilled the conditions of his sentence.

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

ENTERED: JANUARY 30, 2014

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10776 Marques Fernandez, an Infant by His Mother and Natural Guardian, Ruth De Los Santos, Plaintiff-Appellant, Index 111669/07

-against-

Joel Moskowitz, M.D., et al., Defendants-Respondents.

_____

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

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for Joel Moskowitz, respondent.

Heidell Pittoni Murphy & Bach LLP, New York (Daniel S. Ratner of counsel), for New York University Medical Center, respondent.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered December 19, 2011, which, insofar as appealed from, denied plaintiff's motion to renew his earlier motion to renew defendants' summary judgment motions, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries he allegedly sustained during his prenatal care and delivery. On a prior appeal, this Court reversed the denial of defendants' motion for summary judgment dismissing the complaint. We did so on the grounds that plaintiff failed to establish a hypoxic-ischemic brain injury. His experts failed to refute the normal results of the MRIs

relied on by defendants' experts or explain plaintiff's early normal development and that he did not exhibit signs of delay until he was two years old. Nor did plaintiff show that his developmental delays were unrelated to his genetic visual impairment (85 AD3d 566 [1st Dept 2011]).

Plaintiff contends that our dismissal of the complaint was a "new fact" as considered in CPLR 2221(e)(2), and that he should have been allowed to renew the summary judgment motion to proffer the results of a new diagnostic test and expert's affidavit which, he believes, would probably have persuaded this Court to affirm Supreme Court's denial of summary judgment (CPLR 2221[e][2]). Plaintiff misconstrues the posture of the case. Because the motion court had denied defendants' summary judgment motion, plaintiff as the prevailing party was never entitled to seek renewal of that motion (*see e.g. Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545 [1983] [where the successful party obtained the full relief sought, it has no ground for appeal [or renewal], even if that party disagrees with the particular findings, rationale or the opinion supporting the order below in its favor]). Moreover, judgment was entered on July 1, 2011, dismissing the complaint, and plaintiff's recourse was to seek to vacate our decision and judgment based on the existence of the new diagnostic test and expert's affidavit (CPLR

5015[a][2]).

The motion court properly denied plaintiff's motion to renew the earlier motion seeking renewal of the motion for summary judgment. There are no new facts submitted that would entitle him to renew a motion in which he had prevailed.

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

ENTERED: JANUARY 30, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11285 In re Laura Horne, Index 401427/11
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for appellant.

Laura Horne, respondent pro se.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered August 27, 2012, granting the petition to annul the determination of respondent New York City Housing Authority (NYCHA), dated February 9, 2011, which terminated petitioner's tenancy based upon a finding that she violated a permanent exclusion stipulation, to the extent of remanding the matter to NYCHA for the imposition of a lesser penalty, unanimously vacated, on the law, without costs, the petition treated as one transferred to this Court for de novo review, and, upon such review, the challenged determination confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78, dismissed.

Since [t]he issue of substantial evidence, although not specifically stated, was clearly raised in the instant petition"

(*Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 AD3d 388, 390 [1st Dept 2006]), we will "treat the substantial evidence issues de novo and decide all issues" (*Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1st Dept 1992]).

The finding by respondent that petitioner violated the stipulation requiring her to permanently exclude her grandson from the subject apartment is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]). An investigator for NYCHA found the grandson, scantily clad, hiding in a closet in the apartment, and petitioner admitted that she had permitted him to enter the apartment to visit her.

The penalty of lease termination does not shock our sense of fairness, notwithstanding petitioner's advanced age and numerous health problems. The record shows that petitioner allowed her grandson into the apartment after he had been excluded on the basis of drug-related activity at a time that he was residing in petitioner's apartment without authorization (*see Matter of Cruz v New York City Hous. Auth.*, 106 AD3d 631 [1st Dept 2013]). The Hearing Officer reasonably found that since petitioner had received a total of five probationary periods, and NYCHA had

previously declined to terminate the tenancy when petitioner violated a permanent exclusion order pertaining to a different person, further probation would be an ineffective sanction (*see Matter of Wooten v Finkle*, 285 AD2d 407, 409 [1st Dept 2001]).

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

ENTERED: JANUARY 30, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11522 Robert C. Johnson, et al., Index 106706/10
Plaintiffs-Respondents,

-against-

Outdoor Installations, LLC,
Defendant,

The Trustees of Columbia University
in the City of New York,
Defendant-Appellant.

_____

Rivkin Radler LLP, Uniondale (Merril S. Biscone of counsel), for appellant.

Goldberg & Carlton, PLLC, New York (Gary M. Carlton of counsel), for respondents.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 25, 2013, which, inter alia, denied defendant The Trustees of Columbia University's (Columbia) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

While employed as a police officer by the New York City Police Department, plaintiff Robert Johnson was injured on property owned by Columbia. Months before a sidewalk shed and coordinate lights had been installed by Outdoor Installations, LLC, a scaffolding contractor, at the location where the complaint alleges that Johnson ran into a support pole during the lawful pursuit of a fleeing suspect.

Supreme Court properly denied Columbia's motion. At the time of the accident, New York City Building Code (Administrative Code of City of NY tit 28, ch 33) § 3307.6.5(2) required that "[t]he underside of sidewalk sheds shall be lighted at all times either by natural or artificial light," and that "[t]he level of illumination shall be the equivalent of that produced by 200 watt, 3400 lumen minimum, standard incandescent lamps." The only evidence concerning the illumination level was the testimony of Columbia's resident manager who, when asked to "estimate the wattage of how much light the fixture illuminated," replied, "100 watts."

Viewing the record in a light most favorable to plaintiffs, as we must at this procedural juncture (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105 [2006]; *Kosovrasti v Epic [217] LLC*, 96 AD3d 695 [1st Dept 2012]), a question of fact exists as to whether Columbia fulfilled its obligation to maintain light fixtures in compliance with former NY City Building Code § 3307.6.5 (*see Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 552 [1st Dept 2012]). The extent to which Columbia's failure to inspect the lighting on a nightly basis contributed to Johnson's injuries presents a question of fact warranting denial of the

motion (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]; *Dickert v City of New York*, 268 AD2d 343 [1st Dept 2000]).

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

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

ENTERED: JANUARY 30, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11575-
11576-
11576A

Index 651287/11

Those Interested Underwriters
At Lloyd's, London, etc.,
Plaintiff/Defendant-Appellant-Respondent,

-against-

Bristol-Myers Squibb Company, et al.,
Defendants/Plaintiffs-Respondents-Appellants.

_____

Cross appeals having been taken to this Court by the above-named parties from orders of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about May 16, 2012, and order, same court and Justice, entered November 29, 2012,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 10, 2014,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JANUARY 30, 2014

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10150 Basis Yield Alpha Fund (Master), Index 652996/11
Plaintiff-Respondent,

-against-

Goldman Sachs Group, Inc., et al.,
Defendants-Appellants.

_____

Boies, Schiller & Flexner LLP, New York (Philip M. Bowman of counsel), for appellants.

Lewis Baach PLLC, New York (Bruce R. Grace of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 19, 2012, modified, on the law, to the extent of granting that part of the motion seeking to dismiss the causes of action for negligent misrepresentation, unjust enrichment and rescission, and otherwise affirmed, without costs.

Opinion by Renwick, J. All concur except DeGrasse, J. who concurs in a separate Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Dianne T. Renwick
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

10150
Index 652996/11

_____x

Basis Yield Alpha Fund (Master),
Plaintiff-Respondent,

-against-

Goldman Sachs Group, Inc., et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 19, 2012, which, insofar as appealed from, denied their motion to compel arbitration or, in the alternative, to dismiss the causes of action for fraud, fraudulent inducement, fraudulent concealment, negligent misrepresentation, unjust enrichment, and rescission.

Boies, Schiller & Flexner LLP, New York (Philip M. Bowman, Jonathan D. Schiller and Thomas Ling of counsel), for appellants.

Lewis Baach PLLC, New York (Bruce R. Grace, Eric L. Lewis and Courtney L. Weiner of counsel), for respondent.

RENWICK J.

This is a case of a Wall Street firm (Goldman Sachs) being accused of selling mortgage-backed securities it knew to be "junk" and then betting against the same securities as the 2007 financial crisis unfolded. Specifically, plaintiff, Basis Yield Alpha Fund (Basis), a fund managed by an Australian hedge fund, Basis Capital Fund Management, commenced this action against several Goldman Sachs-related entities over investments in subprime mortgage-linked securities that contributed to the fund's demise.[1] The transactions took place on April 17 and June 13, 2007, with the sale of a security issued by a collateralized debt obligation (CDO) known as Point Pleasant 2007-1, Ltd., as well as Basis's entry into two credit default swaps that referenced securities from a similar CDO known as Timberwolf 2007-1, Ltd. Basis, which financed these transactions with loans from Goldman, reportedly lost $67 million when the bank began making margin calls on the products shortly after selling them to Basis. The margin calls quickly forced Basis into insolvency.

Initially, in 2010, Basis commenced an action for federal

[1] Plaintiff brings this action against defendants Goldman Sachs Group, Inc., Goldman Sachs & Co., Goldman Sachs International and Goldman Sachs & Partners Australia Pty. Ltd. (collectively referred to as Goldman).

securities fraud and common law fraud against Goldman in the US District Court for the Southern District of New York. In an order dated July 21, 2011, the court dismissed the case on the ground that the underlying transactions were not domestic securities transactions and, therefore, are not subject to federal securities laws. The District Court declined to exercise supplemental jurisdiction over the remaining state law claims and dismissed the case without prejudice. In late 2011, Basis commenced this action against Goldman for: (1) common law fraud; (2) fraudulent inducement; (3) fraudulent concealment; (4) breach of contract; (5) negligent misrepresentation; (6) breach of the implied covenant of good faith and fair dealing; (7) unjust enrichment; and (8) rescission. The factual allegations in the complaint are similar to those made in the federal action.

In lieu of answering the complaint, Goldman moved for an order compelling arbitration pursuant to the New York Convention and CPLR 7503(a) or, in the alternative, dismissing the complaint for failure to state a cause of action (CPLR 3211[a][7]). Supreme Court denied the motion to compel arbitration, as well as the motion to dismiss with respect to the causes of actions alleging fraud, negligent misrepresentation, unjust enrichment

and rescission.[2]

As a threshold consideration, we examine Goldman's contention that the motion court improperly denied its motion to compel arbitration. Goldman does not challenge the motion court's refusal to compel arbitration pursuant to the New York Convention.[3] We note, however, that the motion court properly held that the purported document containing an arbitration clause did not meet the writing requirements of the New York Convention, which defines an "agreement in writing" to include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams (see New York Convention, Article II[2])). The document, which was attached to an e-mail, was never signed by Basis, nor referred to in any exchange of correspondence between the parties.

Goldman also fails to satisfy the heavy burden of demonstrating that arbitration should be compelled pursuant to

---

[2] The court granted that portion of defendants' motion seeking to dismiss the claims of breach of contract and breach of the implied covenant of good faith and fair dealing, which are not at issue on this appeal.

[3] The New York Convention is formally known as the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The United States acceded to the New York Convention in 1970 and implemented its provisions by enacting Chapter 2 of the Federal Arbitration Act. (Federal Arbitration Act, 9 USC § 201-208 [1980]).

CPLR Article 75. As the Court of Appeals has stated, "[A] party will not be compelled to arbitrate . . . absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit and unequivocal" (*Matter of Waldron* (Goddess), 61 NY2d 181, 183 [1984] [internal quotation marks and citations omitted]). An arbitration clause in an unsigned agreement may be enforceable but only "when it is evident that the parties intended to be bound by the contract" (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 373 [2006]).

Here, there is a substantial question as to whether the parties agreed to arbitrate. In support of its motion to compel arbitration, Goldman relied on a mandatory arbitration clause set forth in a document entitled "General Terms and Conditions" that was attached to a November 10, 2006 email. Goldman claims to have sent the email to Basis in connection with the latter's opening of a trading account with Goldman. It is, however, undisputed that the document was never signed by anyone from Basis. More importantly, the director of Basis's managing entity swore in an affidavit that Basis never entered into the arbitration agreement Goldman proffers.

Since the record does not affirmatively establish a valid obligation to arbitrate the issues raised herein, we must examine

Goldman's alternative argument seeking dismissal of the action. With regard to the fraud allegations, Goldman argues that plaintiff failed to state a cause of action because the element of reasonable reliance is precluded as a matter of law by the disclaimer and disclosure in the offering circulars. We do not find that such argument is procedurally precluded by the fact that "Goldman's motion was made under CPLR 3211(a)(7)." The concurring opinion incorrectly maintains that Goldman cannot rely on documentary evidence (the disclaimer and disclosure in the offering circulars) because a CPLR 3211(a)(7) motion is limited to a review of the pleadings.

The motion court examined the purported documentary evidence, albeit over plaintiff's objections, but concluded that it did not bar the fraud claims. Plaintiff, however, has abandoned such procedural argument by failing to raise it on appeal (*see Matter of Raqiyb v Fischer*, 82 AD3d 1432, 1433, n [3rd Dept 2011], *citing Matter of Ifill v Fischer*, 72 AD3d 1367, n [3rd Dept 2010]). Instead, in its opening paragraph of the argument section opposing Goldman's motion to dismiss the fraud claims, plaintiff simply comments:

> "Goldman's argument on appeal strays far beyond addressing the sufficiency of the allegations. Instead, Goldman seeks to play on a field of *disputed issues of fact*. But this provides no basis for dismissing this Complaint. That is particularly the case here when this

> Complaint is based not just on well-pleaded allegations, but on inculpatory Goldman documents disclosed in prior proceedings [emphasis added]."

Thus, on this appeal, plaintiff does not claim that this Court is "procedurally" precluded from examining the documentary evidence at issue because Goldman moved to dismiss under CPLR 3211(a)(7). Rather, plaintiff appears to be arguing that the documentary evidence simply raises "disputed issues of fact," which, as plaintiff correctly asserts, is not enough for a dismissal under CPLR 3211(a)(7).

In any event, the concurrence's contention that this Court is limited to the pleadings, when reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), is not a completely accurate statement of the law. What the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading "will seldom if ever warrant the relief [the defendant] seeks u*nless [such evidence] conclusively establishes that plaintiff has no cause of action*" (*Rovello v Orofino Realty Co, Inc*, 40 NY2d 633, 636 [1976] [emphasis added]; *see also Guggenheim v Ginzburg*, 43 NY2d 268 [1977]).

A CPLR 3211(a)(7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in

which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim (*see Rovello*, 40 NY2d 633; *Guggenheim*, 43 NY2d 268; *see also Board of Managers of Fairways at N. Hills Condominiums v Fairways at N. Hills*, 150 AD2d 32 [2d Dept 1989]).[4]

When documentary evidence is submitted by a defendant "the standard morphs from whether the plaintiff has stated a cause of

---

[4] In his concurring opinion, Justice DeGrasse argues that factual allegations presumed to be true on a CPLR 3211(a)(7) motion may be properly negated by an affidavit but not by documentary evidence. This distinction makes no sense. On a motion, the only possible way that documentary evidence can be submitted to the court is by way of affidavit. Thus, an affidavit from an individual, even if the person has no personal knowledge of the facts, may properly serve as the vehicle for the submission of acceptable attachments which provide evidentiary proof in admissible form, like documentary evidence. In such situations, the affidavit itself is not considered evidence; it merely serves as a vehicle to introduce documentary evidence to the court. Our judgment as to the conclusive nature of the adduced evidence should not depend on such an artificial distinction. The key should be whether the evidence adduced conclusively negates an element of the cause of action. Here, the documentary evidence defendants allege is dispositive was in fact submitted via affidavit. Thus, even under the concurrence's view, it was properly considered.

action to whether it has one" (John R. Higgitt, *CPLR 3211[A][7]: Demurrer or Merits-Testing Device?*, 73 Albany Law Review 99, 110 [2009]). As alleged here, if the defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate (*see e.g. Constructamax, Inc. v Dodge Chamberlin Luzine Weber, Assoc. Architects, LLP*, 109 AD3d 574 [2d Dept 2013]; *Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851–852 [2d Dept 2012]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]; *Board of Managers of Fairways at N. Hills Condominiums,* 150 AD2d 32).

Thus, there is no procedural impediment to evaluating the merits of Goldman's motion to dismiss the fraud claims. To make a prima facie claim of fraud, a complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]). Even in the absence of any affirmative misrepresentation or any fiduciary obligation, a party may be liable for nondisclosure where it has special knowledge or information not attainable by plaintiff, or when it has made a misleading partial disclosure (*see Williams v Sidley*

Austin Brown & Wood, L.L.P., 38 AD3d 219, 220 [1st Dept 2007]; *L.K. Sta. Group, LLC v Quantek Media, LLC*, 62 AD3d 487, 493 [1st Dept 2009]).

In this case, plaintiff's theory of fraud does not rest upon a single decisive event which manifestly demonstrates Goldman's wrongdoing, but on a series of interrelated events which, viewed as whole, portray the alleged fraudulent scheme. In essence, plaintiff alleges that in 2007, the Point Pleasant and Timberwolf securities were designed primarily not just as instruments to earn returns for Goldman's clients but to solve a huge internal problem Goldman then faced: its enormous financial exposure to residential mortgage-backed securities (RMBS). Specifically, the complaint asserts:

> "By no later than late 2006, based on its extensive involvement in and detailed knowledge of the subprime residential home mortgages market, Goldman, at its highest levels, had arrived at the informed and firm view that the value of securities in this market would likely go into sharp decline in the near future. This situation presented both a problem and an opportunity for Goldman. The problem was that Goldman held a large portfolio of such securities, which would decline in value as the market fell, and Goldman needed to offload these securities onto third parties. The opportunity was the potential profit that Goldman could make by shorting such securities. Goldman devised a plan that both addressed its problem and took advantage of its opportunity. Putting profits before integrity and acting to the detriment of its own clients, Goldman constructed a number of new CDO offerings in early 2007 based on securities Goldman deliberately selected for their poor quality and likely failure -- many from its own inventory -- and marketed them aggressively to its clients while at the

> same time shorting the market in order to profit at its clients' expense. Goldman used these new CDOs as one vehicle for shorting the market. The Point Pleasant and Timberwolf offerings were a key part of this Goldman strategy, and provided a vehicle for Goldman to unload its toxic inventory and to profit from the decline in value of the very securities it was recommending that its clients purchase."

On these facts, plaintiff claims that Goldman engaged in a fraudulent scheme. The fraud claims sufficiently detail the allegations relating to Goldman's internal valuation of the securities and the independence of the underlying asset selection process. They also allege that Goldman's interests were not really aligned with the fund's interests. Goldman does not dispute that these allegations, as amplified in the thirty-page complaint, are sufficiently detailed to state a fraud cause of action of common law fraud (affirmative representation and inducement) and fraudulent concealment. Instead, Goldman argues that plaintiff cannot establish the element of reasonable reliance (an element of both affirmative representation and concealment) as a result of the disclosures and disclaimers in the offering circulars for the Point Pleasant and Timberwolf securities.

The law is abundantly clear in this state that a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the

particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge (*Danann Realty Corp. v Harris*, 5 NY2d 317, 323 [1959]; *MBIA Ins. Corp v Merryl Lynch*, 81 AD3d 419 [1st Dept 2011]; *Capital Z Fin. Servs. Fund II, L.P. v Health Net, Inc.*, 43 AD3d 100, 111 [1st Dept 2007]). Accordingly, only where a written contract contains a specific disclaimer of responsibility for extraneous representations, that is, a provision that the parties are not bound by or relying upon representations or omissions as to the specific matter, is a plaintiff precluded from later claiming fraud on the ground of a prior misrepresentation as to the specific matter *(see e.g. Silver Oak Capital L.L.C. v UBS AG*, 82 AD3d 666, 667 [1st Dept 2012]; *Steinhardt Group v Citicorp*, 272 AD2d 255, 256). In other words, in view of the disclaimer, no representations exist and that being so, there can be no reliance (*HSH Nordbank AG v UBS AG*, 95 AD3d 185, 201 [1st Dept 2012]).

In this case, Goldman argues that the disclaimers and disclosures in the offering circulars are sufficiently specific and applicable to information that was either misrepresented or undisclosed. First, Goldman points out that the offering circulars required the purchaser to disclaim reliance on "any advice, counsel or representation "whether oral or written of

[the sellers] . . . other than in this offering circular" and concomitantly advised the purchaser to "consider and assess for themselves the likely rate of default of the references obligations. . . ." Secondly, Goldman points out that the offering circulars disclose that "[a]ccording to recent reports, the residential mortgage in the United States has experienced a variety of difficulties and change in economic conditions that may adversely affect the performance and Market of RMBS." Thirdly, Goldman points out that the offering circulars disclosed that an affiliate "will act as the sole Synthetic Security counterparty," which would "create a conflict of interest," and that it would be purchasing credit protection from the CDOs.

These disclaimers and disclosures, in our view, fall well short of tracking the particular misrepresentations and omissions alleged by plaintiff. As indicated, plaintiff alleges that Goldman structured, marketed and sold the Point Pleasant and Timberwolf CDOs with the intent of reducing its long term exposure to subprime risk by betting against them. The complaint further alleges that Goldman not only knew that it was selling toxic assets (based upon Goldman's internal valuation of the securities and its involvement in the underlying asset selection process) to its clients and failed to disclose those sales to investors, but that Goldman also sought to profit from its own

actions. Yet, the aforementioned disclosures simply provide boilerplate statements regarding the speculative and risky nature of investing in mortgaged-backed CDOs and the possibility of market turns. If plaintiff's allegations are accepted as true, there is a "vast gap" between the speculative picture Goldman presented to investors and the events Goldman knew had already occurred.

Nor did Goldman's disclosure that it was taking a "short" position[5] in the securities (as indicated by the disclosure that an affiliate would be acting as a "CDO counterparty" and purchasing credit protection from the CDOs) remedy this "vast gap" of information. Undoubtedly, such disclosures would have been sufficient to alert a purchaser of mortgage-backed securities that the seller would attempt to earn a profit by exploring "arbitrage" positions in the market.[6] Plaintiff,

---

[5] Short selling is a method of profiting when security prices fall. If you are "short" a security, it means that you expect the price to go down. Thus, in practical terms, going short can be considered the opposite of the conventional practice of "going long," whereby an investor profits from an increase in the price of the asset (see Larry Harris, Trading and Exchange: Market Microstructure for Practitioners, 41 [2012]).

[6] In economics and finance, arbitrage is the practice of taking advantage of a price difference between two or more markets: striking a combination of matching deals that capitalize upon the imbalance, the profit being the difference between the market prices (see *The Limits of Arbitrage*, Andrei, Robert, Shleifer and Vishny, Journal of Finance 52: 35-55 [1977];

however, is alleging more than the fact that Goldman was a mere "contrarian" looking to capitalize on over-priced long RMBS bets that would be unprofitable when the housing prices collapsed, contrary to the general belief at the time that prices would continue to perpetually rise. Again, plaintiff claims that Goldman had more than a profit motive. As exhaustively explained in the complaint, plaintiff claims that Goldman not only structured, marketed and sold Point Pleasant and Timberwolf CDOs, but that it did so with the intent to rid itself of long term exposure to subprime mortgages, and to profit by selling them to its clients and betting against its own long term position.

Even if the disclaimers and disclosures were to be viewed as sufficiently specific, "a purchaser may not be precluded from claiming reliance on misrepresentations of facts peculiarly within the seller's knowledge" (*Steinhardt Group Inc.*, 272 AD2d at 256, *citing Tahini Invs. v Bobrowsky*, 99 AD2d 489, 490 [2d Dept 1984]; *see Danann*, 5 NY2d at 322*; China Dev. Indus. Bank v Morgan Stanley & Co.*, Inc., 86 AD3d 435, 436 [1st Dept 2011]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1st Dept 1996]).

In this case, plaintiff alleges that because of what Goldman knew from its role as an underwriter and because of what the

---

Convergence Trading with Wealth Effects, Wei and Xiong, The Journal of Financial Economics 62: 247–292 [2001]).

mortgage investigations conducted on its behalf (Clayton report) revealed, Goldman had access to nonpublic information regarding the deteriorating credit quality of subprime mortgages. These allegations are supported by quotes from Goldman-authored documents, complete with dates and names, expressing derogatory remarks about the CDOs. These allegations are more than adequate to allege the peculiar knowledge exception to the disclaimer bar. While evidence may ultimately demonstrate that Goldman did not have any special knowledge upon which it relied or which plaintiff could have ascertained by exercising reasonable diligence, "these are issues which are inappropriate to determine, as a matter of law, based solely on the allegations of the complaint" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 [1st Dept 2003]); see *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419 [1st Dept 2011]).

The principal case upon which Goldman relies in support of its disclaimer bar argument, *HSH Nordbank AG v UBS AG* (95 AD3d 185), does not mandate a different result. *Nordbank* involved a plaintiff, HSH, that entered into a credit default swap with the defendant, UBS, in which, like here, the plaintiff assumed the risk of losses on a $2 billion portfolio of mortgaged-backed securities related to the US market.

Nordbank is inapposite here for two significant reasons.

First, unlike here, *in Nordbank* the disclaimers and disclosures were sufficiently specific to the particular type of information allegedly misrepresented. In *Nordbank* "the core subject of the complained-of-representations was the reliability of the credit ratings used to define the permissible composition of the reference pool" (*Nordbank*, 95 AD3d at 196). Yet, the disclaimers and disclosures "relate directly or indirectly to the reliability of credit ratings in the relevant market" (*id.* at 199). In view of the disclaimer, this Court held that no representation existed, and thus, there could not have been any reliance (*id.*).

Secondly, in *Nordbank,* this Court found that the alleged misrepresentation did not concern facts peculiarly within the seller's knowledge. On the contrary, the reliability of the credit ratings could have been ascertained from reviewing market data or other publicly available information (*id.*). Indeed, the allegations of the complaint itself established that HSH could have uncovered any misrepresentation of the risk of the transaction through the exercise of reasonable due diligence within the means of a financial institution of its size and sophistication (*id.*).

Here, however, neither the complaint nor the documentary evidence establishes plaintiff's peculiar knowledge of the misrepresentations and omissions. In this regard, this case is

more akin to *China Dev. Indus. Bank v Morgan Stanley & Co., Inc.* (86 AD3d 435). There, the plaintiff's fraud claims were based on facts strikingly similar to those alleged here with regard to mortgage-backed securities. The plaintiff alleged that the seller of credit default swaps, Morgan Stanley, fraudulently disposed of "troubled collateral (i.e., predominantly residential mortgage-backed securities)" (*China Dev.*, 86 AD3d at 436). This Court refused to dismiss the fraud claims based on certain disclaimers because, like here, the pleadings sufficiently alleged that the seller possessed peculiar knowledge of the facts underlying the fraud (*id.; cf. MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 291-292 [1st Dept 2011] [court sustained the sufficiency of a fraud claim based on alleged misrepresentations "concerning the origination and quality of the mortgage loans underlying" mortgage-backed securities]).

In sum, we find that the motion court properly declined to dismiss the fraud claims since the disclaimers and disclosures in the offering circulars do not preclude, as a matter of law, plaintiff's claim of justifiable reliance on Goldman's misrepresentations and omissions. Of course, discovery will flesh out whether Goldman's misrepresentations and omissions were the reasons plaintiff invested in Point Pleasant CDOs and Timberwolf credit default swaps, or instead whether plaintiff

merely entered into a bad deal.

We find, however, that the remaining claims should have been dismissed. The negligent representation cause of action should have been dismissed because there is no allegation in the complaint of a relationship of trust and confidence between the parties (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180-181 [2011]). Likewise, the unjust enrichment cause of action should have been dismissed because the Point Pleasant and Timberwolf transactions were governed by written agreements. The theory of unjust enrichment is one created in law in the absence of any agreement (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). Finally, the motion court should have also dismissed the rescission cause of action because the complaint fails to allege the absence of "a complete and adequate remedy at law" (*see Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]).

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 19, 2012, which, insofar as appealed from, denied defendants' motion to compel arbitration or, in the alternative, to dismiss the causes of action for fraud, fraudulent inducement, fraudulent concealment, negligent misrepresentation, unjust enrichment, and rescission, should be modified, on the law, to the extent of granting that

part of the motion seeking to dismiss the causes of action for negligent misrepresentation, unjust enrichment and rescission, and otherwise affirmed, without costs.

All concur except DeGrasse, J. who concurs in a separate Opinion:

DEGRASSE, J. (concurring)

This appeal is from an order denying a dispositive motion by defendants Goldman Sachs Group, Inc., Goldman Sachs & Co., Goldman Sachs International, and Goldman Sachs & Partners Australia Pty. Ltd. (collectively referred to as Goldman). As relevant to this appeal, the motion was for an order compelling arbitration, or, in the alternative, dismissing the claims for fraud, negligent misrepresentation and unjust enrichment for failure to state a cause of action (CPLR 3211[a][7]). Although I have no quarrel with the result reached by the majority, I write separately primarily because, for reasons discussed later in this writing, the majority opinion employs an inapt analysis in its discussion of the facial sufficiency of the fraud cause of action.

Plaintiff, Basis Yield Alpha Fund (Master) (BYAFM), alleges that it was defrauded by Goldman's materially false statements and omissions in connection with an April 17, 2007 sale of a security issued by a collateralized debt obligation (CDO) known as Point Pleasant 2007-1, Ltd. as well as BYAFM's June 13, 2007 entry into two credit default swaps that referenced securities from a similar CDO known as Timberwolf 2007-1, Ltd. BYAFM claims to have lost approximately $10 million in the Point Pleasant transaction and $56 million in the Timberwolf credit default

swaps as a result of Goldman's conduct.

Preliminarily, I agree that the motion court properly denied the application to compel arbitration pursuant to CPLR 7501. For reasons outlined by the majority, the record supports the conclusion that there was no written agreement to arbitrate within the contemplation of CPLR 7501. Goldman, as the party seeking arbitration, has the burden of establishing an agreement to arbitrate (*see e.g. Siegel v 141 Bowery Corp.,* 51 AD2d 209, 212 [1st Dept 1976]). As BYAFM argues, Goldman fails to lay a foundation for the "General Terms and Conditions (GTC)," the document which it proffered as an agreement to arbitrate. Goldman submitted the GTC as an exhibit to the affirmation of its counsel who did not claim to have personal knowledge of the document, its source or its significance. Nor was the GTC qualified as a business record. As such, there is no evidentiary foundation for the GTC and, for that matter, any of the documents submitted in support of Goldman's motion. Therefore, the unsworn documents proffered by Goldman have no probative value given the absence of such an evidentiary foundation (*cf. Tobin Const. Co. v Hardy Const. Co.,* 64 AD3d 1206 [4th Dept 2009]). Goldman correctly cites *Olan v Farrell Lines* (64 NY2d 1092 [1985]), for the proposition that an attorney's affidavit may be used as a vehicle for submitting evidence. Such evidence, however, must be

in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). For example, the proof found sufficient in *Olan* consisted of "evidentiary proof in admissible form" that happened to be "placed before the court by way of an attorney's affidavit" (*Olan*, 64 NY2d at 1093). Contrary to Goldman's argument, a document lacking evidentiary foundation does not become admissible by mere attachment to an attorney's affirmation. Although the majority finds "a substantial question as to whether the parties agreed to arbitrate," I would go further by saying that Goldman failed to make a prima facie showing on this issue on the basis of the lack of an evidentiary foundation for the GTC.

I now turn to the motion to dismiss the fraud claim for failure to state a cause of action. In sustaining the complaint, the court held as follows:

> "There are two categories of representations at issue: representations of fact and expressions of opinion. The representations of fact include Goldman's representations to BYAFM about its internal marks, the manner in which the reference securities were selected, and Goldman's position as a real counterparty. BYAFM has properly pled all elements of fraud as to these representations with substantial detail."

The thrust of Goldman's argument regarding the sufficiency of the fraud claim is based on our holding in *HSH Nordbank AG v UBS AG* (95 AD3d 185 [1st Dept 2012]), a case cited or referenced 68

times in the briefs before us. In its opening brief, Goldman argues:

> "In *HSH Nordbank*, this Court, addressing substantively identical allegations, held that a CDO investor failed to state a claim because reasonable reliance was precluded as a matter of law by substantially identical *express disclaimers of reliance and disclosures in the offering materials* [emphasis added]. The trial court erred in failing to follow this binding precedent."

The disclaimers and disclosures referred to by Goldman are set forth in offering circulars that it claims were issued to BYAFM.

In *HSH*, we dismissed a fraud cause of action pursuant to CPLR 3211(a)(1) and (7), citing undisputed documentary evidence that the plaintiff in that case did not rely on the defendant's advice, assented to inherent conflicts of interest and was warned of risks in the underlying transaction (*HSH*, 95 AD3d at 188). It should be noted that *HSH* involved a motion to dismiss the complaint on the basis of a defense founded upon documentary evidence (CPLR 3211[a][1]) and for failure to state a cause of action (CPLR 3211[a][7]; *HSH*, 95 AD3d at 192). In this case, Goldman's motion was made under CPLR 3211(a)(7) only. The difference is significant and should be dispositive of Goldman's challenge to the fraud causes of action.

CPLR 3211(a)(1) may be invoked where it is claimed that "documentary evidence utterly refutes plaintiff's factual allegations conclusively establishing a defense as a matter of

law" (*see Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002] [citation omitted]). On the other hand, as recently stated by the Court of Appeals, a motion under CPLR 3211(a)(7) "limits us to an examination of the pleadings to determine whether they state a cause of action" (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013], citing *Rovello v Orfino Realty Co.*, 40 NY2d 633 [1976]). Therefore, contrary to what the majority holds today, the disclaimers and disclosures in the offering circulars and other documents Goldman relies upon are of no moment for purposes of this CPLR 3211(a)(7) motion. As BYAFM aptly argued below, there was no basis for the motion court to consider documents outside the complaint at this stage of the proceeding.

Contrary to what the Court held in *Miglino*, the majority posits that it "is not a completely accurate statement of the law" to say "that this Court is limited to the pleadings, when reviewing a motion to dismiss pursuant to CPLR 3211(a)(7) . . ." The majority goes on to partially quote *Rovello* as saying that "evidence in an affidavit used by a defendant to attack the sufficiency of a pleading 'will seldom if ever warrant the relief [the defendant] seeks *unless* [such evidence] *conclusively establishes* that plaintiff has no cause of action'" (*see Rovello*, 40 NY2d at 636). It is unclear how this partial quotation

supports the majority's position. It does, however, distort what the Court of Appeals said in *Rovello* by conflating evidence with affidavits. To be precise, the *Rovello* Court said: "It seems that after the amendment of 1973 *affidavits* submitted by the defendant will seldom if ever warrant the relief he seeks unless too the *affidavits* establish conclusively that plaintiff has no cause of action [emphases added]" (*id.*). Here, the majority overlooks the fact that affidavits and documentary evidence have two different roles for purposes of CPLR 3211(a) motions (*see Regini v Board of Mgrs. of Loft Space Condominium*, 107 AD3d 496, 497 [1st Dept 2013]; *Fontanetta v John Doe 1*, 73 AD3d 78, 85 [2d Dept 2010]). As stated by the Court of Appeals:

> "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*see e.g. Heaney v Purdy*, 29 NY2d 157). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orfino Realty Co.*, *supra*, at 635) . . . (*Leon v Martinez*, 84 NY2d 83, 88 [1994])"[1]

---

[1]It is unfortunate for stare decisis that this distinction, articulated by the Court of Appeals, "makes no sense" to the majority. Moreover, the majority's thesis that a CPLR 3211(a)(7) motion may be supported by documentary evidence is unsupported, if not belied, by the cases it cites. For example, the underlying motions, like the motion in *HSH*, were made under CPLR 3211(a)(1) as well as (a)(7) in *Constructamax, Inc. v Dodge Chamberlin Luzine Weber, Assoc. Architects, LLP* (109 AD3d 574 [2nd Dept 2013]), *Rabos v R & R Bagels & Bakery* (100 AD3d 849 [2nd Dept 2012]) and *Kliebert v McKoan* (228 AD2d 232 [1st Dept

The majority also sidesteps a threshold issue regarding the purported Timberwolf offering circular that it has decided to consider with respect to the instant CPLR 3211(a)(7) motion. As stated in its brief, BYAFM categorically denies that it ever entered into any contract that references or incorporates the Timberwolf offering circular and it does not reference or rely upon the same in its complaint. Goldman, in no position to argue otherwise, does not touch upon BYAFM's assertion in its reply brief. Like the GTC submitted in support of the motion to compel arbitration, the offering circular lacks an evidentiary foundation because it is merely annexed to counsel's affirmation (*cf. J.K. Tobin Const. Co., Inc. v Hardy Const. Co., Inc.*, 64 AD3d at 1206, 1206). Nevertheless, without resolving the issue, the majority unnecessarily passes upon the legal effect of a document that lacks foundation in the record.

As the majority notes, BYAFM's objection to the use of documentary evidence was waived because it was not set forth in its respondent's brief. The discussion, however, does not end there. The issue is not beyond our review since it was briefed

---

1996], *lv denied* 89 NY2d 802 [1996]). *Board of Managers of the Fairways of N. Hills Condominiums v Fairways at N. Hills* (150 AD2d 32 [2nd Dept 1989] involves a motion for summary judgment. The motion in *Skillgames, LLC v Brody* (1 AD3d 247 [1st Dept 2003]) was made on the basis of an affidavit as opposed to documentary evidence.

before the motion court.

> "The fact that a party abandons or fails to urge a particular line of reasoning does not prevent an appellate court from sustaining such contention for that very reason. The appellate court is not required to reject a contention sound in its ultimate conclusion because the path followed in reaching it is different from the one marked out in the argument of counsel before it" (10A Carmody-Wait 2d § 70:490, citing *Morris Plan Co. of New York v Globe Indem. Co.*, 253 NY 496 [1930]).

As we stated in *Fenton v Consolidated Edison Co. of N.Y.* (165 AD2d 121 [1st Dept 1991], *lv denied* 78 NY2d 856 [1991]), "[T]he fact that [the appellant] limited the scope of its appeal is of no moment since [the respondent] is entitled to have the determination affirmed on any ground he properly raised before the IAS court" (*id.* at 125). As BYAFM challenged Goldman's use of purported documentary evidence below, our review is not circumscribed by the arguments made in its respondent's brief. In this case, the better course would have been to disregard the proffered documentary evidence and construe CPLR 3211(a)(7) as narrowly as the Court did in *Miglino*. This is especially true because no foundation for the Timberwolf offering circular has been established (*see Miglino*, 20 NY3d at 351).

In my view, the complaint is sufficient to withstand Goldman's CPLR 3211(a)(7) motion insofar as it alleges a scheme devised and executed for the specific purpose of defrauding BYAFM

by selling the Point Pleasant security and the Timberwolf credit default swaps for more than they were worth (*see e.g. CPC Intl. v McKesson Corp.*, 70 NY2d 268, 286 [1987]). The fraud cause of action is also sustainable to the extent that it is alleged that Goldman falsely stated that it had only one mark (opinion of value) for each of its securities in response to BYAFM's inquiry regarding same. Notwithstanding the arm's length nature of the transactions described in the complaint, such a false representation is actionable since Goldman, having assumed to respond to BYAFM's inquiry, was "under a duty to 'speak fully and truthfully'" (*see e.g. Atlantic Bank of N.Y. v Carnegie Hall Corp.*, 25 AD2d 301, 305 [1st Dept 1966]). I am in accord with the dismissal of the negligent misrepresentation, unjust enrichment and rescission causes of action for the reasons given by the majority.

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

ENTERED: JANUARY 30, 2014

CLERK