SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 22, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1019 The People of the State of New York, Respondent, Ind. 6212/04

-against-

Billy Chatelain, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Cahill Gordon & Reindel LLP, New York (Whitney M. Smith of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; John Cataldo, J. at jury trial and sentence), rendered January 4, 2007, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4½ to 9 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant's arguments that the arresting officer should have issued a summons rather than arresting defendant and conducting a

search incident to that arrest are unpreserved (*see People v Tutt*, 38 NY2d 1011 [1976]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. Having observed defendant drive a vehicle with a suspended license (*see* Vehicle and Traffic Law §§ 509[1]; 511[1][a]), the officer had probable cause to arrest him, and we conclude that issuance of a summons would not have been a practicable alternative to arrest (*see People v Troiano*, 35 NY2d 476, 478 [1974]; *People v Peterson*, 245 AD2d 815, 817 [1997]).

Defendant's contention that the police improperly searched a closed bag contained in defendant's pants at the time of his arrest is also unpreserved (*see People v Colon*, 46 AD3d 260, 263 [2007]), and we likewise decline to review it in the interest of justice. As an alternative holding, we also reject defendant's claim on the merits since the bag was in his grabbable area and the circumstances justified inspection of the bag's contents (*see People v Smith*, 59 NY2d 454 [1983]; *People v Wylie*, 244 AD2d 247 [1997], *lv denied* 91 NY2d 946 [1998]).

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

ENTERED: SEPTEMBER 22, 2009

CLERK

Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1020 Maria DeLeon, Index 8793/04
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

Neil G. Borg, New York, for appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondent.

Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered November 28, 2007, which granted defendant's motion for summary judgment dismissing the complaint and denied as moot plaintiff's cross motion for summary judgment on the issue of liability or, in the alternative, to strike defendant's answer for failure to comply with discovery orders, unanimously affirmed, without costs.

The two-tenths-inch height differential between the surface of the bathroom floor covered by tiles and the surface of the floor where tiles were missing, which plaintiff cited in her notice of claim, bill of particulars and deposition testimony as the cause of her accident, was de minimis (*see Gaud v Markham*, 307 AD2d 845, 845-846 [2003]).

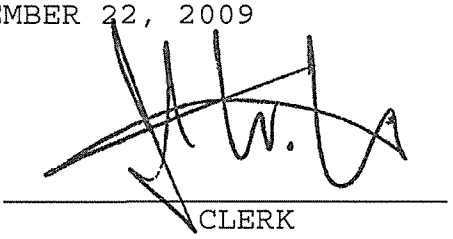
Plaintiff's argument advanced in her opposition affidavit that the two-inch height differential between the bathroom floor and the adjacent hallway floor was a contributing cause of her

fall went beyond mere amplification of the facts and offered a new and distinct theory of liability that contradicted her previous position, thus creating "only a feigned issue of fact" insufficient to defeat summary judgment *(see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 382-383 [2007] [internal quotation marks and citation omitted]).

Plaintiff's argument that it was not the two-tenths-inch height differential but some other "hole" in the bathroom floor that caused her fall is presented for the first time on appeal and will not be considered by this Court (*see e.g. Omansky v Whitacre*, 55 AD3d 373, 374 [2008]). Were we to consider the argument, we would reject it as wholly unsupported by the record.

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

ENTERED: SEPTEMBER 22, 2009



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Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1022 The People of the State of New York, Ind. 3593/05
Respondent,

-against-

Angel Mendez,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

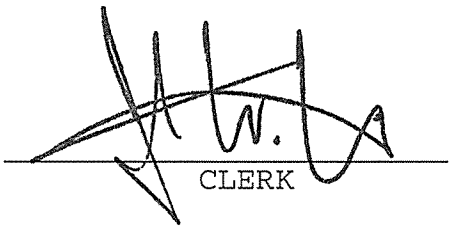
Robert M. Morgenthau, District Attorney, New York (Sheila O'Shea of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about February 9, 2005,

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

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

ENTERED: SEPTEMBER 22, 2009



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

Gonzalez, P.J., Andrias, Catterson, Acosta, JJ.

1023 In re Continental Casualty Company, etc., Petitioner-Appellant, -against- Tibor Lecei, Respondent-Respondent. Index 103754/06

London Fischer LLP, New York (James Walsh of counsel), for appellant.

Menagh & Falcone, P.C., New York (Joseph S. Hubicki of counsel), for respondent.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 4, 2009, which denied petitioner's motion to reject the Special Referee's report that at the time of the accident respondent was "occupying" his employer's vehicle within the meaning of the supplemental underinsured motorist provision of the employer's insurance policy, granted respondent's motion to confirm the report, and dismissed the petition to stay arbitration, unanimously affirmed, with costs.

The Special Referee's finding that respondent was "occupying" the truck within the meaning of the policy is substantiated by respondent's testimony that he was alighting from the truck when he was struck by a passing motorist. Contrary to petitioner's contention, the evidence supports the conclusion that respondent was "still vehicle-oriented" at the

time he was injured (*see Matter of Rice v Allstate Ins. Co.*, 32 NY2d 6, 11 [1973]). There is no basis to disturb the Special Referee's credibility findings regarding the hearing testimony and prior inconsistent statements of respondent's coworker (*see Kardanis v Velis*, 90 AD2d 727, 727 [1982]).

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

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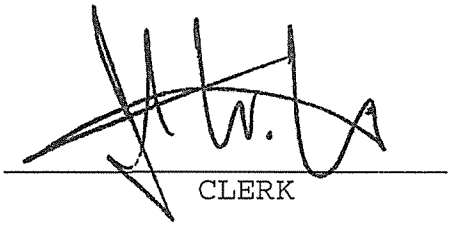

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Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1024 In re Vladlena Belolipskaia,
Petitioner-Appellant,

-against-

Mathias Guerrand,
Respondent-Respondent.

Jody N. Gerber, New York, for appellant.

Robert S. Michaels, P.C., New York (Robert S. Michaels of counsel), for respondent.

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about March 10, 2008, which denied petitioner's objection to an earlier Support Magistrate's order denying her second motion to amend the caption on an order of filiation, unanimously reversed, on the law, without costs, the objection sustained and the caption amended to include respondent's alias of Guerrand-Hermes.

The court should not have denied the motion for petitioner's failure to file timely objections to the Support Magistrate's order. The time to file such objections begins to run on service of that order with notice of entry (*Matter of Commissioner of Social Servs. [Obremski] v Dietrich*, 208 AD2d 474 [1994]), which concededly never took place. Moreover, given that respondent stated his name as Guerrand-Hermes on his tax returns and his passport, and the child may have an interest in various trusts or other assets relating to the Hermes family, the court should have

conformed respondent's name on the order of filiation to match that of the child (*see Matter of J.O.T.*, 120 Misc 2d 817 [1983]).

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

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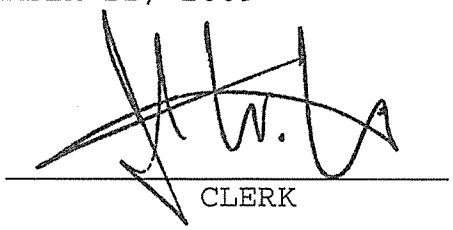

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Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1025 The People of the State of New York, Ind. 9058/95
Respondent,

-against-

David Garcia,
Defendant-Appellant.

Moskowitz Book & Walsh, LLP, New York (Susan J. Walsh of counsel), for appellant.

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

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about August 8, 2008, which, to the extent appealed from, denied an evidentiary hearing on defendant's CPL 440.30(1-a) motion for DNA testing, unanimously affirmed.

The People presented detailed affidavits by the detectives and the prosecutor, based on personal knowledge, setting forth their diligent but unsuccessful efforts to locate certain items recovered in 1995 from the scene of a homicide. This satisfied the People's burden to show that the evidence on which forensic DNA testing was to be performed could no longer be located and

was thus no longer available for testing (*see People v Pitts*, 4 NY3d 303, 311-312 [2005]).

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

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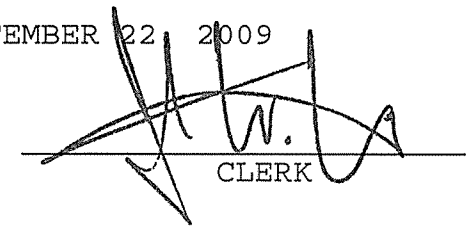

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Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1026 Luis Jara, Index 17558/07
Plaintiff-Respondent,

-against-

J. Salinas-Ramirez,
Defendant-Appellant.

Buratti, Kaplan, McCarthy & McCarthy, Yonkers (Jeffrey A. Domoto of counsel), for appellant.

The Law Offices of Harold Solomon, Rockville Centre (Harold Solomon of counsel), for respondent.

Order, Supreme Court, New York County (John A. Barone, J.), entered on or about March 15, 2009, which, in an action for personal injuries arising out of a hit-and-run accident, insofar as appealed from, denied defendant's motion for summary judgment on the issue of whether his vehicle was involved in the accident, unanimously affirmed, without costs.

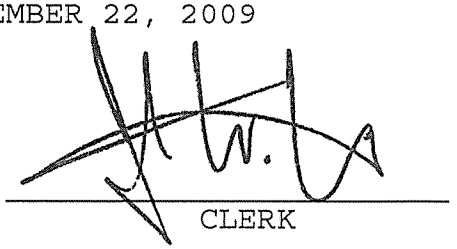
Plaintiff testified at deposition that after being hit by a dark-colored van, he followed the van for about three blocks, "not even a minute," and then called the police and returned to the scene, where he was approached by two persons, a man and woman, who both told him that they wrote down the license plate number of the van. Plaintiff further testified that the man gave plaintiff a piece of paper with the license plate number on it, and then left without giving plaintiff his name; that the woman stayed with plaintiff and verbally gave the license plate number

to the police when they arrived approximately ten minutes later; and that the number that the woman gave the police was the same as the number that the man had written on the piece of paper. There is no dispute that the license plate number allegedly given to the police belongs to a blue and gray van registered to defendant. Plaintiff no longer has the piece of paper given to him by the man; while plaintiff does have the woman's name, he has not been able to locate her; and there is no police accident report in the record. For present purposes, i.e., defendant's motion for summary judgment, plaintiff's testimony regarding the statements allegedly made by the two witnesses identifying the license plate number of the offending vehicle was sufficiently corroborated by his other testimony, accurately describing the offending vehicle as a dark-colored van and asserting that the woman made her statement to the police at the scene of the accident 10 minutes after the accident, to invoke the "present sense impression" exception to the hearsay rule and raise a triable issue of fact as to whether defendant's vehicle was involved in the accident (*see People v Brown*, 80 NY2d 729, 737 [1993] [corroboration required for present sense impression exception "will depend on the particular circumstances of each case and must be left largely to the sound discretion of the trial court"]; *cf. People v Smith*, 267 AD2d 407, 408 [1999] [911 call made after robber left scene sufficiently contemporaneous to

be admitted under present sense impression exception]). The foregoing is not to be understood as a ruling that these hearsay statements regarding the offending vehicle's license plate number are to be admitted at trial.

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

ENTERED: SEPTEMBER 22, 2009



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Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1030 Board of Education of the City School District of the City of New York,
Petitioner-Respondent,

-against-

Alexis Grullon,
Respondent-Appellant. Index 405372/07

Wolf & Wolf, LLP, Bronx (Edward H. Wolf of counsel), for appellant.

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

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered March 18, 2008, which, in a proceeding by petitioner Board of Education pursuant to Education Law § 3020-a(5) to vacate or modify the hearing officer's decision suspending, for six months, respondent teacher's employment with petitioner, denied respondent's cross motion to dismiss the petition for lack of personal jurisdiction, unanimously affirmed, without costs.

Respondent should be estopped from asserting that he was never served at his actual dwelling place or usual place of abode as required by CPLR 308(2), and that the court therefore lacks personal jurisdiction over him. Such estoppel arises by virtue of the fact that, consistent with numerous documents that respondent filed with petitioner over the course of his 10-year employment by petitioner, the request for a hearing pursuant to Education Law § 3020-a that respondent signed to initiate the

hearing presently under review listed as his residence the very address where the process was allegedly served. Respondent represents that the address listed in these documents and the affidavit of service is the residence of his mother, and does not dispute that he never notified petitioner that he had moved out of that apartment. Under the circumstances, it does not avail respondent that petitioner does not have a rule requiring its employees to advise it of a change of address, or that potential defendants ordinarily have no affirmative duty to keep those who might sue them abreast of their whereabouts (*see Feinstein v Bergner*, 48 NY2d 232, 241-242 [1979]). If at the time respondent requested a section 3020-a hearing he was living in his mother's apartment, as he represented in the request, his failure to advise petitioner that he had moved out of that apartment at the time the hearing officer issued his decision amounted to conduct that was calculated to prevent petitioner from learning his new address (*see id.* at 241) within the short, 10-day period that petitioner had under section 3020-a(5) to commence the instant proceeding after receiving the hearing officer's decision. Nor does it avail respondent that a driver's license issued to him during the pendency of the hearing listed another apartment as his residence; petitioner's attorney demonstrates that the above 10-day period was inadequate time to obtain confirmation of respondent's address from the Department of Motor Vehicles.

Petitioner's attorney also shows that after the hearing officer's decision he did undertake to search various public records that are available on the internet, and it appears to be undisputed that current voter registration records also list respondent's mother's apartment as respondent's residence.

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

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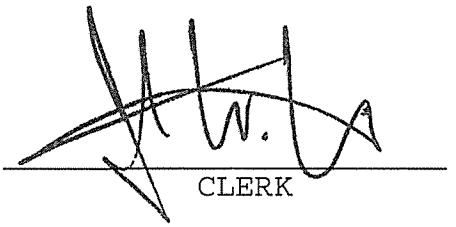

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Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1031 Margie Fernandez, Index 22724/04
Plaintiff-Respondent-Appellant,

-against-

Oumarou Niamou, et al.,
Defendants-Appellants-Respondents.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for Oumarou Niamou and Odienne Transport Services Inc., appellants-respondents.

Law Office of Vincent P. Crisci, New York (David Weiser of counsel), for Doris Lanier and Sharee Lanier, appellants-respondents.

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

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 17, 2008, which, insofar as appealed and cross-appealed from, granted defendants' motion for summary judgment dismissing all of plaintiff's threshold claims under Insurance Law § 5102[d] except her loss of fetus claim, unanimously modified, on the law, to reinstate plaintiff's threshold claims with respect to the permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system categories of serious injury within the meaning of Insurance Law § 5102[d], and otherwise affirmed, without costs.

We agree with the motion court that defendants failed to demonstrate their prima facie entitlement to judgment as a matter of law with respect to plaintiff's claim for loss of her fetus, and as a result, that the burden never shifted to plaintiff to raise a triable issue of fact with respect to that claim (*cf. Gilphilin v Ware*, 205 AD2d 353 [1994]).

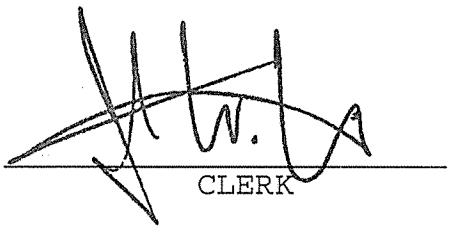
Furthermore, defendants made a prima facie showing that plaintiff did not sustain a 90/180-day injury. That plaintiff missed more than 90 days of work is not determinative (*see Uddin v Cooper*, 32 AD3d 270, 271 [2006], *lv denied* 8 NY3d 808 [2007]), and no evidence in the record suggested that plaintiff was prevented from performing substantially all of the material acts that constituted her usual and customary daily activities for 90 days during the 180 days following the accident (*Ortiz v Ash Leasing*, Inc., 63 AD3d 556 [2009]).

With respect to the permanent consequential limitation of use and significant limitation of use categories, there was a contradiction in the reports of defendants' experts. While one expert stated that any changes in plaintiff's lumbar and cervical spines were degenerative, the other expert not only failed to find any degenerative changes, but failed to rule out the

possibility that plaintiff did, in fact, sustain a traumatic injury to her neck in the accident. Accordingly, we modify the order.

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

ENTERED: SEPTEMBER 22, 2009



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Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1032 The People of the State of New York, Ind. 444/08
Respondent,

-against-

David Davey,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (John B.F. Martin of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered August 11, 2008, convicting defendant, after a jury trial, of promoting prison contraband in the first degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's decision to credit the prosecution's case and discredit the defense case.

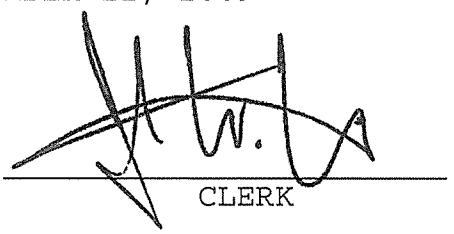
Defendant's challenges to the People's impeachment use of a statement for which CPL 710.30 notice had not been provided, including defendant's claim that the prosecutor exceeded the scope of the court's ruling on this subject, are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits, since the

use of the statement constituted proper impeachment of a defense witness (*see People v Campney*, 252 AD2d 734, 737 [1998]). We have considered and rejected defendant's claim that his trial counsel rendered ineffective assistance regarding this matter.

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 22, 2009



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Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1033 The People of the State of New York, Ind. 2475/02
Respondent,

-against-

Charles Woods,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered on or about January 16, 2009, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

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

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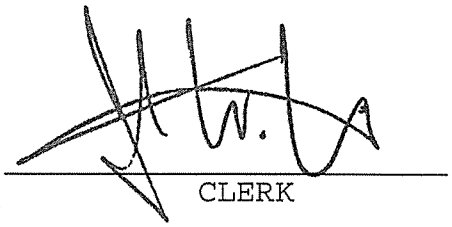

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Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1034 Cook & Associates Realty, Inc., Index 603642/04
Plaintiff-Appellant,

-against-

Christopher Chestnutt, et al.,
Defendants-Respondents.

Theodore R. Bohn, New York, for appellant.

Ira Greene, Brooklyn, for respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered August 5, 2008, which, following a nonjury trial, granted judgment to defendants dismissing the complaint, unanimously reversed, on the law and the facts, with costs. The Clerk is directed to enter judgment in plaintiff's favor in the amount of $31,250 as against defendant Christopher Chestnutt.

In this breach of contract action to recover the remainder of a broker's commission, plaintiff was retained by defendant Chestnutt (the principal of defendant Teddy's International, Inc.) to locate a commercial space suitable for his restaurant. After finding a space that was suitable to Chestnutt, Cook drafted an offer letter, in which Cook referred to Chestnutt as its customer. Thereafter, Chestnutt signed a commission agreement which provided for a commission of $40,000 upon his entering into a contract of sale for the space, to be paid in monthly installments.

However, after negotiations outside of plaintiff's presence, Chestnutt, as an individual, entered into a Membership Purchase Agreement, whereby he purchased a controlling interest in L-Ray, a corporation which was operating a restaurant at the space which had been located by plaintiff. The Membership Purchase Agreement allowed Chestnutt to obtain the long-term lease to the space without entering into a contract of sale as was originally contemplated. In addition, the Membership Purchase Agreement specifically noted that Chestnutt had retained Cook as the broker for the transaction and indemnified L-Ray for any broker commission owed. After paying the first few monthly installments of plaintiff's commission, totaling $8,750, Chestnutt ceased payments and this action ensued.

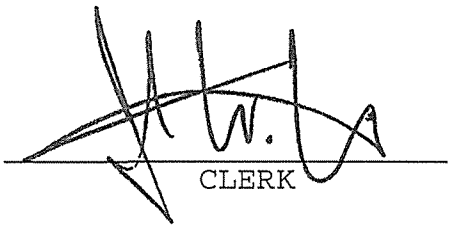
The commission agreement does not establish that defendant Teddy's International, Inc. was an intended party to the contract. While Chestnutt entered the commission agreement on behalf of "El Teddy's" (a trade name for defendant Teddy's International, Inc.), he did not fully disclose the identity of the principal he was purportedly representing (*see I. Kaszirer Diamonds v Zohar Creations*, 146 AD2d 492 [1989]). Indeed, there was no full disclosure that Chestnutt was acting solely as an agent for Teddy's International, Inc. and defendants failed to offer any evidence to establish that Chestnutt was acting on behalf of a corporation. To the contrary, the parties' course of

conduct revealed Chestnutt's intention to be personally bound. Chestnutt was referred to as the customer in the offer letter and plaintiff always personally dealt with Chestnutt over a period of months. Moreover, Chestnutt acknowledged his intention to be personally bound in the Membership Purchase Agreement, stating that he had retained Cook as the broker in connection with the transaction.

Plaintiff may also recover under the theory of account stated since Chestnutt never objected within a reasonable time to the invoices he received for the commission (*Ruskin, Moscou, Evans & Faltischek v FGH Realty Credit Corp.*, 228 AD2d 294 [1996]) and made partial payment thereon.

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

ENTERED: SEPTEMBER 22, 2009



Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1035 The People of the State of New York, Ind. 25/96
Respondent,

-against-

Armando Villanueva, etc.,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

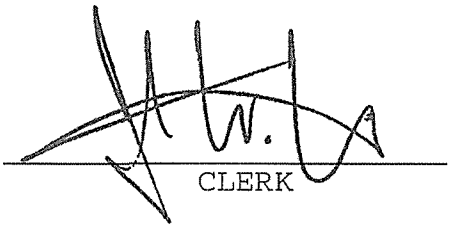
Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered March 28, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of 1 to 3 years, unanimously affirmed.

The court properly granted defendant's motion for specific performance of the plea agreement only to the extent of sentencing defendant in accordance with the fair and reasonable recommendation of leniency made by the People, and properly concluded that defendant had forfeited the even more favorable disposition he might have earned had he complied with all the terms of the agreement. Defendant did not preserve his claim that he was entitled to a hearing concerning the reasons for his failure to appear voluntarily at sentencing (*see People v Anonymous*, 59 AD3d 215 [2009], *lv denied* 12 NY3d 850 [2009]), and

we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The requirements of due process were satisfied when the sentencing court "conduct[ed] an inquiry sufficient to conclude that a violation of the plea agreement occurred" (*People v Valencia*, 3 NY3d 714, 715 [2004]) and provided defendant with a reasonable opportunity to present his explanations for the violation. Defendant failed to appear for sentencing, never communicated with the court or his attorney about his alleged inability to come to court, and was returned involuntarily 10 years later. The record before the court also supported a finding that defendant violated a second condition of the plea agreement by committing a crime prior to sentencing, notwithstanding that he subsequently pleaded guilty to a violation in satisfaction of the misdemeanor charges (*see People v Delgado*, 45 AD3d 496 [2007]).

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

ENTERED: SEPTEMBER 22, 2009



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Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1037 The People of the State of New York, Ind. 30040/08
Respondent,

-against-

Julius Arps,
Defendant-Appellant.

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

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

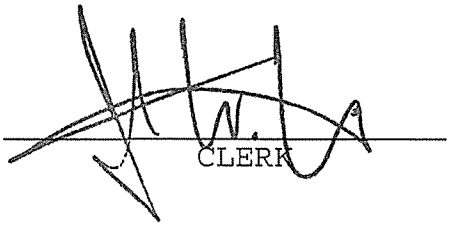
Order, Supreme Court, New York County (Arlene R. Silverman, J.), entered June 11, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

While defendant challenges the court's assessment of points under certain risk factors, he concedes that the court properly assessed sufficient points to qualify him as a level two sex offender, but requests a discretionary downward departure. Since defendant made no such application to the hearing court, that claim is unpreserved. In any event, we find no basis for such a

departure (*see generally People v Guaman*, 8 AD3d 545 [2004]). We have considered and rejected defendant's remaining arguments.

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

ENTERED: SEPTEMBER 22, 2009



Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1038N County Glass & Metal Installers, Inc., Plaintiff-Appellant, Index 602939/07

-against-

Pavarini McGovern, LLC, et al., Defendants,

Alumicor Corp., Defendant-Respondent.

Tesser & Cohen, New York (Stephen Paul Winkles of counsel), for appellant.

Goetz Fitzpatrick LLP, New York (Thomas S. Finegan of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 12, 2008, which granted defendant Alumicor's motion to stay this action and compel arbitration of its dispute with plaintiff, unanimously affirmed, with costs.

In February 2005, plaintiff entered into a contract with defendant property owner Glass House and defendant construction manager Pavarini, in connection with the construction of a building at 330 Spring Street in Manhattan, to supply and install on the building a glass curtain wall, manufactured by Alumicor. Five months later, plaintiff and Alumicor agreed in writing to arbitrate their disputes.

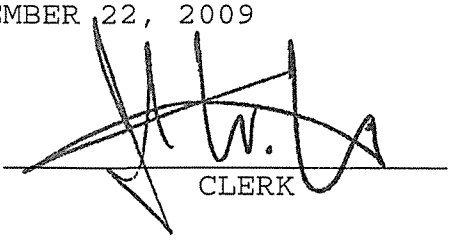
Pavarini and Glass House subsequently claimed that the glass curtain wall leaked, and refused to pay a portion of the amount

due to plaintiff under the contract. Plaintiff filed a mechanic's lien, and thereafter commenced this action against Pavarini and Glass House. After Pavarini and Glass House interposed counterclaims alleging defects in the glass curtain supplied by Alumicor, plaintiff amended its complaint to add Alumicor as a defendant. Alumicor then moved to stay this action and compel arbitration.

"Where arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where, as here, the determination of issues in arbitration may well dispose of nonarbitrable matters" (*Cohen v Ark Asset Holdings*, 268 AD2d 285, 286 [2000]; *see also RAD Ventures Corp. v Gotthilf*, 6 AD3d 415 [2004]). By first arbitrating the issue of whether the glass curtain wall was defective, before addressing the respective liabilities of the remaining parties regarding installation of the wall and construction delays, the interests of judicial economy will be served, and potentially inconsistent results may well be avoided.

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

ENTERED: SEPTEMBER 22, 2009



Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1039N Jose A. Santos, Index 8092/05
Plaintiff-Respondent,

-against-

Frank Nicolas, et al.,
Defendants-Appellants.

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for appellants.

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

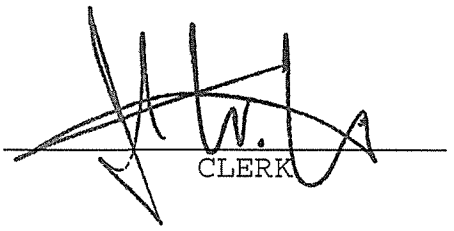
Appeal from order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered on or about May 12, 2009, which granted plaintiff's motion to preclude the testimony of defendants' proposed expert witness, unanimously dismissed, without costs.

An evidentiary ruling made before trial is generally reviewable only in connection with the appeal from the judgment rendered after trial (*Weatherbee Constr. Corp. v Miele*, 270 AD2d 182 [2000]). Accordingly, no discrete appeal lies from an order granting plaintiff's motion to preclude proposed expert testimony (*Rodriguez v Ford Motor Co.*, 17 AD3d 159, 160 [2005]). Since the order defendants seek to challenge was nothing more than an evidentiary ruling, it did not go to the merits of the case (*cf. Matter of City of New York v Mobil Oil Corp.*, 12 AD3d 77 [2004]).

Were we to reach the merits of the appeal, we would affirm. At the *Frye* hearing (*Frye v United States*, 293 F 1013 [DC Cir 1923]) to determine the admissibility of proffered expert witness testimony opining on the causation of plaintiff's personal injuries, defendants failed to establish that this expert's theory was generally accepted in the scientific community. The exclusion of such testimony was thus a provident exercise of the court's discretion (*see Coratti v Wella Corp.*, 56 AD3d 343 [2008]).

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

ENTERED: SEPTEMBER 22, 2009



Gonzalez, P.J., Andrias, Catterson, Richter, JJ.

1040 In re Robert H. Haggerty, Index 601740/03
[M-3007] Petitioner,

-against-

Hon. Doris Ling-Cohan, etc.,
Respondent.

Robert H. Haggerty, petitioner pro se.

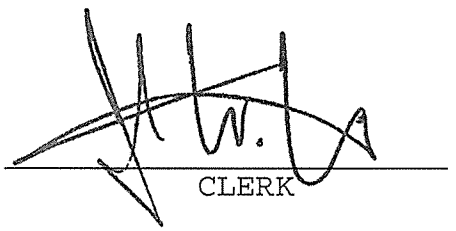
Andrew M. Cuomo, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: SEPTEMBER 22, 2009



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

1546 Health Insurance Plan of Greater New York, Plaintiff-Respondent, Index 603843/01

-against-

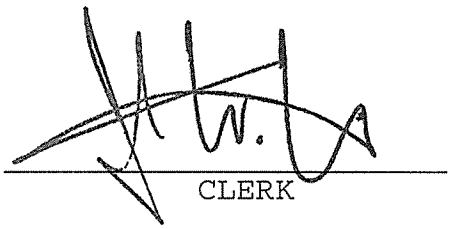
New York Network Management, LLC, Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Helen E. Freedman, J.), entered on or about November 17, 2006,

And said appeal 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 3, 2007,

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

ENTERED: SEPTEMBER 22, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
Eugene Nardelli
James M. Catterson
Karla Moskowitz, JJ.

128
Index 601376/07

x

CSAM Capital, Inc., et al.,
Petitioners-Respondents,

-against-

Ronald S. Lauder, et al.,
Respondents-Appellants.

x

Respondents appeal from an order of the Supreme Court, New York County (Herman Cahn, J.), entered January 25, 2008, which granted the petition and dismissed the arbitration proceeding commenced by them.

Daniel R. Solin, New York and Cohen Kinne Valicenti & Cook LLP, Pittsfield, MA (Kevin M. Kinne and David E. Valicenti of counsel), for appellants.

Manatt, Phelps & Phillips, LLP, New York (Mathew S. Rosengart and Arunabha Bhoumik of counsel), for respondents.

CATTERSON, J.

This proceeding arises out of an arbitration brought by the appellant investors against CSAM Capital, Inc., the general partner of a high-risk exchange fund, and allegedly related entities (hereinafter referred to as "CSAM"), alleging, inter alia, fraud in relation to the loss of their investments in the fund. The investors appeal from an order dismissing their claims as time-barred. Because we find that the investors could not have known of the fraud they allege, we reinstate their claim for arbitration.

The appellants are limited partners in DLJ Emerging Growth Partners, L.P., an exchange fund[1] (hereinafter referred to as the

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[1]In its brief, CSAM explains that,

> "Exchange funds are investment vehicles that permit wealthy investors to obtain immediate, tax-free diversification of highly-appreciated positions in a single security by receiving limited partnership interests in a pool of securities in exchange for the investor's single security. After investors contribute securities to an exchange fund, they no longer own those securities outright. Rather, in exchange for their contributions, they own a percentage interest in the fund, which is comprised of a 'basket' of the securities contributed by the fund's other limited partners/investors.
>
> "Exchange fund investors do not incur capital gains taxes upon contribution of their securities to a fund. Thus, they are effectively able to diversify tax free. The minimum required investment is typically one million dollars."

"fund"), having joined in 1999 and 2000. Prior to joining, the appellants received a private placement memorandum (hereinafter referred to as the "PPM") and a subscription booklet. The PPM underscored the high-risk nature of the fund, explaining that it was particularly risky because it contained newly emerging, high-technology dot-com stocks with little or no operating histories. The PPM said that an "active hedging strategy" would be implemented to mitigate the substantial risks inherent in the fund. According to the PPM, this hedging strategy would be overseen and implemented by 13 officers and directors having "*extensive experience*" and "*significant expertise in the design and use of the sophisticated hedging techniques* [...] " (emphasis added).

Additionally, the subscription booklet provided that any claims would be settled by arbitration, and that the agreement "shall be governed, construed, and enforced in accordance with the laws of the State of New York."

It is undisputed that, in March 2000, the fund had a total asset value of over $254 million, but had only engaged in one $30 million value hedge. After the hedge expired in May 2000, the fund did not engage in any further hedging. It is further undisputed that by September 2002, the fund had lost more than 90% of its value - approximately $240 million.

In the meantime, in July 2001, two of the appellants, James and Debbie Heller,[2] wrote a letter (hereinafter referred to as the "Heller letter") to John Paolella, Director of Exchange Fund Products for CSAM LLC. The Hellers said that their investment had been "decimated," and sought an explanation for a "series of irresponsible, wrong headed [sic], misguided and disastrous decisions by the fund managers def[ying] any definition of prudent financial management," suggesting that the cause was "gross mismanagement [...] and a breach of the fund management's fiduciary responsibility."

Paolella replied with a four-page letter dated August 17, 2001 (hereinafter referred to as the "Paolella letter"), outlining the reasoning behind the fund's investment decisions. The letter concluded as follows:

> "[T]he [f]und was structured to accommodate new and relatively untested companies of the so-called 'new economy.' Unfortunately, the extreme down turn [sic] in the valuations of 'new economy' securities paralleled the [f]und's downturn. In trimming the portfolio to meet margin calls, we endeavored to retain positions in those companies that had, in the General Partner's view, the greatest chance of survival and future growth. We hope that the [f]und will regain some of its lost value in the years to come.

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[2]Although the Hellers are among the appellants in this case, the record reflects that they acted independently in writing their 2001 letter to CSAM.

> "We hope that you now have a better understanding of the decisions that were made in the management of this [f]und. Although we understand your disappointment with the [f]und's performance thus far, we believe we have nevertheless discharged our duty as a fiduciary."

In 2004, the appellants received a consolidated financial statement (hereinafter referred to as the "CFS") dated December 31, 2003. The CFS disclosed that, in February 2003, a limited partner had commenced an arbitration "proceeding asserting '[c]laims for breach of contract, breach of fiduciary duty, misrepresentation, and gross negligence' in connection with [CSAM's] management and operation of the Partnership." The CFS further stated that CSAM was defending the matter, and believed it to be without merit. The record does not reflect any attempt made on behalf of the appellants to investigate this claim further.

Also in 2004, two other investors, Dixon and Carol Doll, filed an arbitration statement of claim (hereinafter referred to as the "Doll SOC"). The record does not include factual evidence that the appellants were informed of this arbitration at that time. Moreover, although the Doll SOC included several counts of fraudulent misrepresentation in connection with the operation of the fund, it contained no claims or assertions relating to the qualifications of the fund's directors.

On November 7, 2006, Hugh M. Neuburger, whom the PPM had named as one of the 13 experts who would implement the fund's hedging strategy, testified at the Doll arbitration hearings. He admitted that he was one of only two of the named individuals who were actually involved in the fund's hedging strategy. He further testified that neither he nor the second individual had any prior hedging experience whatsoever, and that he had derived his knowledge of hedging techniques exclusively from books and articles.

The appellants filed their demand for arbitration five months later on April 9, 2007. Their statement of claim asserted 16 separate counts, including fraudulent misrepresentation of hedging expertise. Subsequently, CSAM filed this article 75 petition seeking to stay or dismiss the arbitration proceeding on the grounds that the appellants' claims were time-barred.

Supreme Court agreed and dismissed all the appellants' claims as barred by the statute of limitations. The court cited to Rostuca Holdings v. Polo (231 A.D.2d 402, 646 N.Y.S.2d 812 (1st Dept. 1996)), correctly noting that the statute of limitations period for fraud "is the longer of six years from the wrongful conduct or two years from when the party knew, or should have discovered, the fraud." The court then found that the appellants were put on notice of the alleged fraud by the drastic

losses evident at the end of 2002, and thus that they should have commenced the arbitration action within two years of that date.

The court relied on our determination in Ghandour v. Shearson Lehman Bros. (213 A.D.2d 304, 624 N.Y.S.2d 390 (1995), lv. denied, 86 N.Y.2d 710, 635 N.Y.S.2d 947, 659 N.E.2d 770 (1995)), in which we found that, "the substantial losses sustained by the accounts under the circumstances [...] was sufficient to place plaintiffs on notice of the potential fraud." 213 A.D.2d at 306, 624 N.Y.S.2d at 392. The court thus concluded in the instant case that:

> "the loss of such a drastic amount - over 90% of the [f]und's value - put the investors on notice of the potential fraud as of late 2002. Even if the investors did not have actual knowledge of the alleged fraud at that time, they were aware of the fact of the significant loss, from which fraud could be reasonably inferred. Thus since more than two years have passed since the investors could have discovered the alleged fraud, the statute of limitations has run and the fraud claim should be dismissed."

The court further found that the Hellers had actual notice of the alleged fraud by July 2001, as evidenced by the Heller letter, which charged the fund's managers with gross mismanagement.

On appeal, the appellants argue, first, that under the Federal Arbitration Act (hereinafter referred to as the "FAA"),

the applicability of the statute of limitations is for the arbitrator, not the court, to determine. See 9 USC § 2. Second, they assert that Supreme Court erred in relying on Ghandour; that Ghandour does not stand for the proposition that a drastic decline in account values is inquiry notice of alleged fraud as a matter of law; and that, even with reasonable diligence, they could not have discovered CSAM's fraudulent misrepresentation of its hedging expertise more than two years before the date they commenced arbitration proceedings. We agree with the appellants' latter assertions.

As a threshold matter, the applicability of the statute of limitations is properly a question for the court. The appellants correctly observe that their claims arise from a transaction in interstate commerce and, therefore, fall under the FAA. 9 USC § 2. However, the FAA requires that courts respect the agreements of parties to arbitrate, including agreements as to what law governs the arbitration procedures. Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ. 489 U.S. 468, 475-76, 109 S. Ct. 1248, 1254 (1989). "A choice of law provision, which states that New York law shall govern both the agreement and *its enforcement*, adopts as binding New York's rule that threshold Statutes of Limitations questions are for the courts." Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners

Corp., 4 N.Y.3d 247, 253, 793 N.Y.S.2d 831, 835, 826 N.E.2d 802, 806 (2005) (internal quotation marks and citation omitted). Because the subscription booklet contained such a provision, we find that New York courts have authority to rule on the applicability of the statute of limitations. CPLR 7502(b).

Although the appellants attempt to marshal federal precedent to support their contention that the statute of limitations is not a matter for the courts to resolve (see e.g. Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114 (2d Cir. 1991)), they are unable to point to any binding authority for their position.

Although Supreme Court was correct in considering the timeliness of the appellants' claims, it erred in interpreting Ghandour to stand for the proposition that a significant loss of value *automatically* puts investors on notice of fraud. In Ghandour, we limited the ruling to the unique circumstances of that case, which included evidence that the plaintiff had made the same investments as his brother, and that his brother had learned of the fraud and commenced a timely action six years earlier.[3] 213 A.D.2d at 306, 624 N.Y.S.2d at 392. Indeed, in a

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[3]The dissent argues that the earlier claims brought against CSAM make this case indistinguishable from Ghandour. However, in Ghandour the plaintiff's claim was identical to that which his brother had already prevailed upon. In the instant case, the fraudulent misrepresentation of hedging expertise was not asserted by any party prior to 2006.

subsequent ruling this Court held that even an investor's loss of "almost all of its investments" was insufficient to "disclose a sufficient basis for imputing a knowledge of the fraud." Saphir Intl. SA v. UBS PaineWebber Inc., 25 A.D.3d 315, 316, 807 N.Y.S.2d 58, 60 (1st Dept. 2006) (internal quotation marks and citation omitted).

Moreover, under the circumstances of the instant case, knowledge of fraud cannot be imputed to the investors as a result of the losses they experienced. Even were we to assume that the appellants in this case are particularly sophisticated investors, the standard is an objective one based on a person of ordinary intelligence. Ghandour, 213 A.D.2d at 305-06, 624 N.Y.S.2d at 392; Watts v. Exxon Corp., 188 A.D.2d 74, 76, 594 N.Y.S.2d 443, 444 (3d Dept. 1993). Here, the record reflects that the appellants were warned that the fund was particularly risky because it contained newly-emerging, high-technology dot-com stocks with little or no operating histories. This alone should defeat an assumption that the loss in value would necessarily cause a person of ordinary intelligence to infer fraud, rather than the obvious inference of high risk. Although the fund's hedging strategy was intended to protect investors' portfolios, the record reflects that the background materials sent to the appellants nevertheless underscored the extremely risky nature of

the appellants' investment. The record also reflects that the losses occurred during a significant downturn in the technology sector, further supporting a finding that at a time of widespread losses the appellants reasonably could have assumed that their losses were not necessarily the product of fraud.

Further, contrary to the findings of the court below, we do not find that the Heller letter could be considered evidence of actual knowledge of fraud. The letter did not allege any facts constituting fraud; rather, it simply proves the uncontested fact that the Hellers suspected mismanagement by CSAM. "[M]ere suspicion will not suffice as a ground for imputing knowledge of the fraud." K & E Trading & Shipping v. Radmar Trading Corp., 174 A.D.2d 346, 347, 570 N.Y.S.2d 557, 558 (1st Dept. 1991)(internal quotation marks and citations omitted).

In fact, the exchange between the Hellers and Paolella demonstrates that the appellants could not have discovered the fraud through the exercise of reasonable diligence. The Heller letter sought an explanation for the losses the fund had experienced, satisfying the duty of inquiry even under Supreme Court's erroneous reading of Ghandour. In response to this inquiry, Paolella explained the rationale for the fund's actions and expressed a hope that the fund would recoup some of its losses moving forward. At the very least, the Paolella letter

conveyed a representation that qualified people were acting purposefully in managing the fund. This provided no further grounds from which a reasonable person would necessarily infer fraud.

It is well settled that if a party "'omits [an] inquiry *when it would have developed the truth*, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.'" Prestandrea v. Stein, 262 A.D.2d 621, 622, 692 N.Y.S.2d 689, 691 (2nd Dept. 1999), quoting Higgins v. Crouse, 147 N.Y. 411, 416, 42 N.E. 6, 7 (1895) (emphasis added). This is not what happened here. Even though the losses continued through September 2002, the fact that the Paolella letter contained non-fraudulent explanations for the fund's actions suggests that reasonable diligence would not have revealed any evidence of fraud to the appellants at that time. See also M&A Oasis v. MTM Assoc., 307 A.D.2d 872, 873, 764 N.Y.S.2d 9, 11 (1st Dept. 2003) (claims not time-barred when "plaintiff had demanded information about [a] mortgage after becoming aware of its existence in late 1998, but defendants refused to provide such information until early 2000").

CSAM's assertion that arbitrations commenced by other investors provided notice of the fraud is also unpersuasive. The respondents claim that the arbitrations begun by other investors

in February 2003 (hereinafter referred to as the "2003 arbitration") and by investors Dixon and Carol Doll in May 2004 (hereinafter referred to as the "Doll arbitration") started the statute of limitations running on the claims of fraudulent misrepresentation of hedging expertise. To trigger the statute of limitations, it must "conclusively appear that [the appellants] had knowledge of facts" from which fraud could be inferred. Trepuk v. Frank, 44 N.Y.2d 723, 725, 405 N.Y.S.2d 452, 453, 376 N.E.2d 924, 926 (1978). Because there is no evidence in the record showing the appellants' contemporaneous knowledge of the Doll arbitration, it is immaterial to determining when the statute of limitations began to run.

However, the record reflects that the appellants were informed of the 2003 arbitration. The 2003 CFS alerted them that a proceeding had been initiated asserting "claims for breach of contract, breach of fiduciary duty, misrepresentation, and gross negligence." There is no evidence that the appellants inquired further into the factual basis behind these allegations. Given that the appellants bear the burden of proof in showing that they exercised reasonable diligence, we find they were on notice that they may have been defrauded by misrepresentations of the fund's "active hedging strategy" upon receipt of the 2003 CFS. See Endervelt v. Slade, 214 A.D.2d 456, 457, 625 N.Y.S.2d 210, 211

(1st Dept. 1995).

Nonetheless, this was insufficient notice of the fraudulent misrepresentation of the fund directors' expertise. The exchange between Heller and Paolella focused exclusively on how the fund was carrying out its hedging strategy, and did not contemplate the possibility that it had misrepresented the qualifications or expertise of its directors. Neither of the two arbitrations commenced alleged fraudulent misrepresentation of hedging expertise. The 2003 arbitration was concluded without uncovering any evidence of this act of fraud. It was only following Neuburger's admissions that the Doll SOC was amended to reflect a new claim of fraud based on the facts he disclosed. Because one arbitration did not uncover this fraud at all, and another did not unearth the facts constituting the fraud until it reached the discovery stage, we do not find that reasonable diligence on behalf of non-parties to the arbitration could have revealed this fraud.

The respondents correctly observe that "[i]t is knowledge of facts not legal theories that commences the running of the two-year limitations period." TMG-II v. Price Waterhouse & Co., 175 A.D.2d 21, 23, 572 N.Y.S.2d 6, 8 (1st Dept. 1991), lv. denied, 79 N.Y.2d 752, 580 N.Y.S.2d 199, 588 N.E.2d 97 (1992). In TMG-II, this Court held that when the plaintiffs had knowledge of facts

suggesting fraud, the discovery of new information about the same fraudulent act did not toll the statute of limitations. 175 A.D.2d at 23, 572 N.Y.S.2d at 8. In contrast, there was no information regarding the misrepresentation of the directors' hedging expertise prior to Neuburger's testimony. This is an entirely separate fraudulent act, and not merely an additional aspect of a previously alleged fraud.

Because even those parties who exhibited "reasonable diligence" and commenced arbitration proceedings did not learn of the fraudulent misrepresentation of the directors' expertise until November 7, 2006, it is apparent that the appellants could not have discovered this information prior to that date. Therefore, when they filed their demand for arbitration five months later on April 9, 2007, they were well within the two-year statute of limitations.

Accordingly, the order of the Supreme Court, New York County (Herman Cahn, J.), entered January 25, 2008, which granted the petition and dismissed the arbitration proceeding commenced by the respondents should be reversed, on the law, with costs, the petition denied and the matter remanded for arbitration.

All concur except Tom, J.P. who dissents in an Opinion.

TOM, J.P. (dissenting)

Appellants are investors who, between September 1999 and June 2000, contributed securities to DLJ Emerging Growth Partners, L.P., an exchange fund managed by respondent CSAM Capital, Inc., the fund's general partner. An exchange fund permits an investor to contribute a highly appreciated position in a single security in exchange for a limited partnership interest in the pool of securities contributed by all of the investors, with the result that each investor obtains immediate, tax-free diversification (since the contributions of stock are not subject to capital gains taxes).

While the fund initially performed well, in July 2001, two of the appellants wrote to complain that their investment had been "decimated" due to "gross mismanagement of the Fund." By September 2002, the fund had lost 90% of its original value.

In February 2003, one of the fund's limited partners, represented by the same counsel as appellants herein, brought an arbitration claim against CSAM Capital based on "a false representation . . . that the Fund's hedging strategy would ensure that she did not lose more than 20% of her investment in the Fund." The investor eventually received an award of over $1 million.

In July 2004, another limiter partner, the Doll family trust

fund, also represented by the same counsel, filed an arbitration claim alleging, inter alia, that respondents fraudulently induced it to invest in the fund by misrepresenting material facts upon which it relied to its detriment. Specifically, the statement of claim, dated July 23, 2004, alleged that respondents

> "sold the Fund to prospective investors by representing that the Fund would hedge the Fund to protect against downside risk, flatten short term volatility and prevent margin calls as a key investment strategy. Respondents knew when they made this representation, however, that . . . the Fund could not use hedging to provide any meaningful downside risk protection because of the large percentage of restricted stock in the Fund's portfolio. Similarly, the Fund could not use hedging to flatten short term volatility or prevent margin calls. These facts were not disclosed to the investors."

The Doll trust's claims alleging fraud in the inducement, misrepresentation as to the fund's active hedging strategy and breach of fiduciary duty as a result of the failure to hedge the fund were ultimately dismissed in an interim decision issued by the arbitration panel.

Appellants served a demand for arbitration in April 2007, alleging that they were fraudulently induced to invest in the fund due to respondents' misrepresentation of their hedging experience and expertise. The question dividing this Court is whether the arbitration proceedings were untimely brought, as

Supreme Court decided, because they were commenced more than two years from the time appellants "could with reasonable diligence have discovered" the asserted fraud (CPLR 213[8]).

Similar to the claim of the Doll family trust, appellants' statement of claim alleges that "to induce Claimants and other investors to invest in the Fund," respondents promised to "engage in an 'active hedging strategy' in the management of the Fund" and represented that "hedging decisions would be made by people with 'significant expertise' in the design and use of sophisticated hedging techniques." Likewise, the Doll claim alleged that "Respondents fraudulently selected and held securities in the Fund based solely upon their own self-interest, with the goal of increasing their own fees," while the claim filed by appellants herein alleges "inappropriate conduct for the purpose of generating commissions and fees . . . including their handling of the Fund's qualifying investments." In short, appellants' statement of claim does little more than restate the main allegations of the Doll family trust claim. Indeed, the Doll trust's 2004 arbitration proceeding explicitly questioned the "integrity, experience and skill of the Fund's managers" and alleged "fraud in the marketing and management" of the fund.

If other limited partners were aware, in 2003 and 2004, respectively, that the hedging strategies the fund promised to

employ had been misrepresented, appellants, similarly situated limited partners, were also in a position to have known of the misrepresentation made as to the effectiveness of CSAM's hedging activities and the skill and experience of the fund's managers. Furthermore, it does not require a particularly astute observer to deduce that if a supposedly hedged trading position loses some 90% of its value, the hedging employed was acutely ineffective or completely nonexistent. Alternatively stated, the loss of more than 90% of the fund's value by September 2002, albeit during a volatile market, despite the promoted "active hedging activity," placed the fund's investors on inquiry notice as to whether the purported hedging strategy was being pursued, as promised, by individuals possessing the requisite skill (*see Rite Aid Corp. v Grass*, 48 AD3d 363, 364 [2008]; *Ghandour v Shearson Lehman Bros.*, 213 AD2d 304, 305-306 [1995], *lv denied* 86 NY2d 710 [1995]). The commencement of two timely arbitration proceedings by other investors, of which arbitrations appellants were aware, alleging fraudulent inducement as a result of the misrepresentation of hedging activities obviates the need to inquire whether the fund's investors had sufficient information to enable them to advance a contemporaneous fraudulent misrepresentation claim.

In view of these facts, this Court's decision in *Ghandour* is not readily distinguishable. Similarly, in *Ghandour*, the

respondent claimants made the same investment as made by other limited partners who brought timely arbitration claims several years earlier. In sum, I agree with the majority to the extent that the loss of the bulk of an investment is merely one factor indicating that the claimant should have known of the alleged fraud; however, I strongly disagree that appellants lacked sufficient knowledge of the alleged fraud in connection with purported hedge positions by 2004 to have asserted a claim for fraudulent inducement and to have been put on notice of that fraud by reason of the devastating losses sustained by the fund.

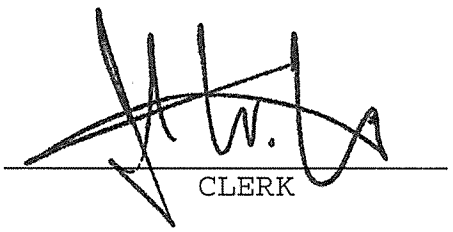
Appellants make much of the fact that proof of the fund's misrepresentation of its managers' hedging experience was not received until November 7, 2006 — when Hugh Neuberger testified that none of the persons responsible for implementing the fund's hedging strategy had any experience in the design and use of sophisticated hedging techniques — with the result that the arbitration panel permitted the statement of claim to be amended to conform to the new evidence. It remains, however, that the Doll trust's original statement of claim alleged fraudulent inducement as a result of misrepresentation regarding the fund's use of hedging. Furthermore, the test of whether a claim for fraud has been timely pursued is measured from the time the claimant should have *discovered* the potential fraud, not the time

at which the claimant has acquired actual *proof* that fraud was perpetrated (*see Erbe v Lincoln Rochester Trust Co.*, 3 NY2d 321, 326 [1957]). The claim advanced by the Doll trust in 2004 conclusively demonstrates that appellants "had knowledge of facts from which the fraud could reasonably be inferred" (*Trepuk v Frank*, 44 NY2d 723, 725 [1978]).

Accordingly, the order should be affirmed.

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

ENTERED: SEPTEMBER 22, 2009



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