SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 23, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Catterson, Moskowitz, Richter, JJ.

3398N Charlie Goodwin, Jr., et al., Index 25004/03
Plaintiffs-Appellants,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Pollack Pollack Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellants.

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about June 12, 2009, which, in an action for personal injuries sustained from a fall down a staircase in defendant's building, denied plaintiffs' motion to vacate a prior order that had dismissed the action pursuant to 22 NYCRR 202.27(b) for their attorney's failure to appear at a preliminary conference, unanimously reversed, on the law, without costs, the motion granted, and the complaint reinstated.

A court should vacate a default upon the showing of a meritorious claim and a reasonable excuse for failure to appear

(*Jones v New York City Hous. Auth.*, 13 AD3d 489 [2004]). The showing of merit necessary to vacate a 22 NYCRR 202.27 default is less than what is necessary for opposing a motion for summary judgment (*see Caso v Manmall, Inc.*, 68 AD3d 470, 472 [2009], citing *Levy v New York City Hous. Auth.*, 287 AD2d 281 [2001]). Plaintiffs' evidence, at this predisclosure stage - in particular, their attorney's affirmation attaching photographs described as "indicating the condition of the stairs at the time of plaintiff's accident," and depicting a staircase in a state of disrepair and containing debris - is sufficient to show a meritorious cause of action. The attorney's present inability to say who took the photographs and when they were taken is a curable defect that, at this juncture, should not result in dismissal of the action. Nor should the injured plaintiff's testimony at a General Municipal Law § 50-h hearing in October 2003, when he was unable to state what caused him to fall, be grounds for dismissal (*see Hecker v New York City Hous. Auth.*, 245 AD2d 131 [1997]). We note that the accident occurred fully a year prior to that testimony; that an amended notice of claim, filed through the same attorney in January 2003, just 10 days after the first notice, described the stairs as "broken/cracked/chipped [and] covered with debris" (42 AD3d 63, 65); and that plaintiffs have submitted evidence that the fall on

defendant's stairs was allegedly so severe that it not only caused the injured party's quadriplegia, but also adversely affected his ability to remember the accident.

Law office failure may constitute a reasonable excuse for a default (*see Dokmecian v ABN AMRO N. Am.*, 304 AD2d 445 [2003] [counsel inadvertently scheduled the wrong date for the preliminary conference]). Here, under the circumstances (including counsel's stressful preoccupation with the health of a close family member), a one-time default at a preliminary conference that plaintiffs had requested after remand from this Court should not result in dismissal of the action (CPLR 2005; *see Mediavilla v Gurman*, 272 AD2d 146, 148 [2000]), especially in light of the strong public policy in this State for disposing of cases on their merits (*see Hyde Park Motor Co., Inc. v Sucato,* 24 AD3d 724 [2005]).

This court is all too familiar with this case, having reversed Supreme Court's wrongful dismissal of the complaint once before for labeling a correction to the original notice of claim as a "second" notice (42 AD3d at 66). The lawsuit stemming from this eight-year-old accident has now survived two mistaken dismissals. No discovery has taken place. It is time for

discovery to commence and finish expeditiously so that plaintiffs' claims may be addressed on their merits.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3402 The People of the State of New York, Ind. 414/07
Respondent,

-against-

Basil Cocheekaran,
Defendant-Appellant.

_____

Murray Richman, Bronx, for appellant.

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered December 12, 2008, convicting defendant, upon his plea of guilty, of criminal sale of a firearm in the first degree, and sentencing him to a term of 12 years, unanimously affirmed.

Defendant, who was facing a maximum sentence of 25 years if convicted after trial, entered into a plea agreement where he was to receive no more than 16 years, but would be eligible for a much more lenient disposition if he complied with certain terms of the agreement. There was an extensive plea colloquy, in which the court, counsel, and the prosecutor thoroughly explained to defendant his duties under the agreement and the danger that if he could not fulfill those duties, he would receive the full sentence set forth. Defendant failed to produce the results

called for in the agreement, and received a 12-year sentence.

Prior to sentencing, defendant obtained new counsel and moved to withdraw his guilty plea on the ground that it was not knowing, intelligent or voluntary because he had not been effectively represented by prior counsel. At sentencing, after reviewing the relevant facts concerning the plea colloquy and subsequent events, the court denied defendant's motion to withdraw his guilty plea. The court found that defendant "was mature and intelligent enough to make the choices that he made" and that his plight was due to his own choices.

The record does not cast any legitimate doubt on the effectiveness of prior counsel. Defendant has not substantiated his assertion that, before advising his client to take the plea, prior counsel inadequately inquired into whether defendant was actually capable of complying with the plea conditions. Moreover, by accepting the plea after the court's thorough warnings, defendant implicitly agreed that he expected to be able to satisfy the plea conditions, and he assumed the risk that if he did not succeed he would lose the benefits of the agreement. "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal

cases" (*Hill v Lockhart*, 474 US 52, 56 [1985] [internal quotation marks omitted]). Regardless of whether another attorney might have advised against taking this plea, defendant has not shown that his counsel's advice was outside the required range of competence. We note, too, that the motion papers did not include any affidavit from either prior counsel or defendant, let alone one setting forth what defendant told prior counsel, what prior counsel told defendant or explaining why defendant had failed to fulfill his duties under the plea agreement. Under these circumstances, defendant did not establish that he received ineffective assistance of counsel in connection with his plea (*see generally People v Ford*, 86 NY2d 397, 404 [1995]).

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3668 The People of the State of New York, Ind. 4862/06
Respondent,

-against-

Richard Allende,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 13, 2009, resentencing defendant to a term of 25 years to life, to be served consecutively to a prior undischarged term of imprisonment, unanimously reversed, on the law, the judgment of resentence vacated and the original sentence reinstated.

In imposing sentence on defendant's murder conviction in 2007, the court failed to direct the sentence to run either concurrently or consecutively to defendant's undischarged term on a prior robbery conviction. Therefore, by operation of then-existing law (Penal Law § 70.25[1][a]), the sentences ran concurrently. As a result, the time defendant served under the robbery sentence was credited toward the murder sentence, and defendant became eligible for consideration for parole on the

murder sentence in 2009, although parole was denied. The court thereafter convened all parties, stated that it had intended the sentences to run consecutively and resentenced defendant accordingly.

However, the court's postjudgment statements of original intent did not permit the subsequent modification of defendant's sentence in violation of CPL 430.10, and the court did not have the inherent authority to make that change. "The authority to modify a lawful sentence that has commenced is limited to situations where the record in the case clearly indicates the presence of judicial oversight based upon an accidental mistake of fact or an inadvertent misstatement that creates ambiguity in the record." (*People v Richardson*, 100 NY2d 847, 853 [2003]).

We find no basis to distinguish *Richardson*. Initially, we note that this case, like *Richardson*, involved a conviction after trial rather than a negotiated plea. As in *Richardson*, the court and the prosecutor were aware of defendant's prior undischarged term at the time sentence was imposed on the murder conviction, but the court failed to announce whether the terms were to run consecutively or concurrently, and the court's silence rendered the two sentences concurrent.

At the original sentencing, the court made statements that evinced a desire that defendant be incarcerated for an extended

period. However, the court did not make a clerical or ministerial mistake, nor did it misspeak when it imposed sentence. Instead, it neglected to structure its sentence so as to carry out its apparent wish that defendant serve a lengthy period of imprisonment before being eligible for parole. *Richardson* and CPL 430.10 simply do not permit that kind of mistake to be corrected after a sentence begins.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3669 Community Counseling & Mediation Services, Plaintiff-Appellant, Index 603997/06

-against-

Richard Chera, et al., Defendants,

Long Island University, Defendant-Respondent.

_____

Loanzon Sheikh LLC, New York (Tristan Loanzon of counsel) and Crotty & Saland, LLP, New York (Elizabeth Crotty of counsel), for appellant.

Law Office of Vincent D. McNamara, East Norwich (Helen M. Benzie of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered December 23, 2009, which, upon reargument, denied plaintiff's motion to amend the complaint so as to add a cause of action for breach of contract, unanimously reversed, on the law, without costs, and the motion granted.

The motion court denied the motion to amend on the ground that plaintiff's proposed contract claim is duplicative of its trespass claim. A tort claim is not duplicative of a contract claim if it arises out of the violation of a legal duty that "spring[s] from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and

dependent upon the contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389.) Plaintiff's allegations that it agreed to allow defendant to install waste water pipes through particular areas of the space plaintiff leases, and that defendant agreed to be "responsible for all damage and or liability that arise" from work performed in the "rear of the [plaintiff's] leasehold," are sufficient to show a contract that, if upheld, would create a duty beyond that owed to a property owner, and would impose obligations, in particular, an undertaking of liability, that exceed the types of damages that plaintiff could recover for trespass (*see Cassata v New York New England Exch.*, 250 AD2d 491, 492 [1998] [trespass damages are ordinarily "limited to the value of the use and occupation to the owner or the damages to the freehold . . . [or] the value of the use to the [trespasser]"). Accordingly, the claims are not duplicative.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3670 In re Yolanda Lambert, Index 108305/08
Petitioner-Appellant,

-against-

Raymond W. Kelly, as Commissioner of the New York City Police Department, et al.,
Respondents-Respondents.

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Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered November 27, 2009, dismissing this proceeding, unanimously affirmed, without costs.

It is well settled that a probationary employee may be discharged without a hearing or statement of reasons, for any reason or no reason at all, in the absence of a showing that the dismissal was in bad faith, for a constitutionally impermissible purpose, or in violation of law (*Matter of Witherspoon v Horn*, 19 AD3d 250 [2005]). Moreover, the burden of proving bad faith is on the employee, and its mere assertion, without supporting evidence, does not satisfy that requirement.

Petitioner did not produce competent proof that she was terminated for an impermissible reason. In fact, the record

discloses a rational basis for the challenged determination. There is evidence that petitioner had committed numerous violations of NYPD regulations, and that the discharge was made in good faith. In particular, her illegally parked personal vehicle displayed an expired police parking permit that did not belong to her. She then used her position as an officer to try to get special treatment from the Marshal in retrieving the vehicle (*see Batista v Kelly*, 16 AD3d 182 [2005]).

There is no evidence that petitioner was dismissed in order to frustrate her receipt of vested interest retirement benefits.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3671-
3672-
3672A In the Matter of the Application of Karen Lind, et al. as Preliminary Executors for Discovery and Turnover of Property Pursuant to SCPA § 2103 in the Estate of

Ezra M. Greenspan,
Deceased.

- - - -

Karen Lind, et al.,
Plaintiffs-Appellants,

-against-

Edith Greenspan,
Defendant-Respondent,

Marcia Gordon,
Defendant.

- - - -

Karen Lind, et al.,
Petitioners-Appellants,

-against-

Edith Wolf Greenspan,
Respondent-Respondent.

Index 112223/06
File 4681/04

_____

Richard B. Lind, New York and Goldfarb Abrandt Salzman & Kutzin LLP, New York (Ira Salzman of counsel) for appellants.

Kantor, Davidoff, Wolfe, Mandelker Twomey & Gallanty, P.C., New York (Steven W. Wolfe and Lawrence A. Mandelker of counsel), for respondent.

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Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about June 30, 2009, which denied

petitioners' motion for leave to amend the petition to add a cause of action for conversion of assets held in a convenience account and a cause of action for the erroneous deposit of a $200,000 check into the account, unanimously affirmed, without costs. Appeal from order, same court and Surrogate, entered on or about March 19, 2010, which granted petitioners' motion purporting to seek reargument, and, upon reargument, adhered to the original determination, unanimously affirmed, without costs. Order, Supreme Court, New York County (Louis B. York, J.), entered July 20, 2009, which, to the extent appealed from, granted defendant Edith Wolf Greenspan's motion for summary judgment dismissing the causes of action for wrongful death and punitive damages, unanimously affirmed, without costs.

The Surrogate correctly found that the relation-back doctrine does not save the proposed amended petition from being barred by the statute of limitations. The original petition alleges a joint account and a fraudulent deposit of $200,000 into the account for the benefit of respondent, the surviving tenant thereof. The proposed amended petition alleges, contradictorily, a convenience account and a $200,000 deposit made by mistake. Thus, the original pleading does not give notice of the transactions or occurrences to be proved pursuant to the amended pleading (CPLR 203[f]).

In the absence of a challenge to the grant of petitioners' motion for reargument (*see DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [2005]), we will consider the arguments advanced therein. The Surrogate properly adhered to her original determination on the alternate ground of undue prejudice to respondent caused by petitioners' long delay in moving to amend, for which petitioners, who were aware of the potential for a claim involving a convenience account since at least December 2005, offered no excuse (*see Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290 [2004]).

Plaintiffs failed to raise an issue of fact in opposition to defendant's motion for summary judgment in the wrongful death action. Their medical expert offered only conclusory assertions and failed to address the findings of the medical examiner who performed the autopsy on the decedent (*see e.g. Lynn G. v Hugo*, 96 NY2d 306, 310 [2001]; *Abalola v Flower Hosp.*, 44 AD3d 522 [2007]).

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3673 Barbara Ann Stanislav, Index 101049/08
Plaintiff-Appellant,

-against-

William J. Papp, Jr.,
Defendant-Respondent,

Nancy Axelrod-Lamb,
Defendant.

_____

Becker & D'Agonstino, New York (Michael D'Agostino of counsel), for appellant.

Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for respondent.

_____

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered September 10, 2009, which granted defendant Papp's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was injured when she fell off a horse while on a date with defendant. She alleges that defendant was negligent in failing to properly warn her and appreciate her limited level of skill as a rider, and in failing to pay proper attention to her request that the horses proceed at a slow pace in a careful manner.

A finding of negligence may be based only upon a breach of a duty (*see Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347

[2001]). Plaintiff has provided no evidence or authority which supports her contention that defendant owed her a duty to insure that the horseback riding experience was safe. As a person with experience riding horses, plaintiff was aware that the risks of falling from a horse or a horse acting in an unintended manner are inherent in the sport (*see Kirkland v Hall*, 38 AD3d 497, 498 [2007]; *Kinara v Jamaica Bay Riding Academy, Inc.*, 11 AD3d 588 [2004]; *Freskos v City of New York*, 243 AD2d 364 [1997]; *Dalton v Adirondack Saddle Tours, Inc.*, 40 AD3d 1169, 1171 [2007]). Defendant's conduct was not so unique or reckless as to create an additional unanticipated risk for plaintiff.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3674 The People of the State of New York, Ind. 4472/03
Respondent,

-against-

Michael Paulin,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered December 19, 2005, convicting defendant, after a jury trial, of gang assault in the first degree and two counts of attempted murder in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 15 years, unanimously affirmed.

Defendant's challenges to the legal sufficiency of the evidence are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We also find that 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 determinations concerning credibility, and its weighing of possible inferences as to defendant's mental culpability. The

requisite intent for each of the attempted murder convictions could be readily inferred from defendant's actions, viewed as a whole and in context of the entire incident (*see generally People v Getch*, 50 NY2d 456, 465 [1980]). With regard to the gang assault conviction, which involved a third victim who died in the incident, defendant's intent to seriously injure that victim could be inferred on either of two valid theories. First, the evidence supports the conclusion that defendant personally stabbed the deceased victim; although, in performing weight of evidence review, we may consider the fact that the jury acquitted defendant of the homicide counts (*see People v Rayam*, 94 NY2d 557, 563 n [2000]), we find, after reviewing all the evidence, that the mixed verdict does not warrant a different conclusion. Second, the evidence supports the alternative conclusion that defendant shared his companions' intent to seriously injure the deceased victim.

The People established a sufficient chain of custody for a knife allegedly discarded by defendant in a store near the scene of the crime and found to contain the blood of the deceased victim. The totality of the evidence provided a reasonable assurance of the identity and unchanged condition of the knife (*see People v Julian*, 41 NY2d 340, 342-343 [1977]), and the inconsistencies cited by defendant went to the weight and not the

admissibility of the evidence (*People v Hawkins*, 11 NY3d 484, 494 [2008]). The jury could have reasonably found that, despite conflicting recollections by two officers of fast-paced events that occurred two years before they testified at trial, and a paperwork error by one of them, the knife was actually recovered in the store by one of these officers, who handed it to the other officer for vouchering. To the extent that defendant is arguing that the admission of the knife violated his right of confrontation, that claim is without merit.

Defendant also makes a Confrontation Clause argument with regard to the voucher. He asserts that the portion of the voucher that states the location where the knife was found was testimonial evidence in the context of the case. He also asserts that, even though the voucher was made by an officer who testified that he obtained the information at issue, along with the knife itself, from another testifying officer, the information actually came from a nontestifying detective. Although defendant made a generalized Confrontation Clause argument at trial, it was insufficient to alert the court to this particular issue or permit the People to address it (*see e.g. People v Tutt*, 38 NY2d 1011, 1013 [1976]). Therefore, this claim

is unpreserved and we decline to review it in the interest of justice. In any event, any error in the admission of the voucher was harmless.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3675 Austen Ugweches, Index 314650/05
Plaintiff-Appellant,

-against-

Tatjana Nehhozina Ugweches,
Defendant-Respondent.

_____

Austen Ugweches, appellant pro se.

Sanctuary for Families, Center for Battered Women's Legal Services, New York (Kara M. Bellew of counsel), for respondent.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered January 21, 2010, which denied plaintiff's motion to vacate or modify a judgment of divorce entered following his default, unanimously affirmed, without costs.

While a liberal approach toward vacating defaults in matrimonial proceedings is warranted because of the important public policy of determining those actions on their merits, "it is still incumbent upon a party seeking vacatur to establish both a reasonable excuse for the default and a meritorious defense" (*Estate of Allen v Allen*, 258 AD2d 423 [1999]; *see also Gass v Gass*, 42 AD3d 393, 396 [2007]). Plaintiff's explanation for his decision to flee the country after being convicted of a felony, which resulted in his defaulting in the instant action, is not reasonable. Nor did he present a meritorious defense to

defendant's counterclaim for divorce, or evidence otherwise warranting modification of the judgment. Accordingly, his motion was properly denied.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3676 In re Angelo Quinto, et al., Index 112266/09
Petitioners-Appellants,

-against-

New York City Department of Housing Preservation and Development, et al.,
Respondents-Respondents.

_____

Jonathan S. Roller, Brooklyn for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered November 17, 2009, which, inter alia, denied petitioners' application to annul the determination of respondent New York City Department of Housing Preservation and Development (HPD) denying petitioners succession rights to the subject Mitchell-Lama apartment and dismissed the proceeding, unanimously affirmed, without costs.

The determination that petitioners did not sustain their burden of establishing an entitlement to succession rights to petitioner Angelo Quinto's parents' apartment had a rational basis. Petitioners' submissions were insufficient to rebut the presumption created by the failure to include either petitioner in the income affidavit for 2001 (*see e.g. Matter of Miney v Donovan*, 68 AD3d 876, 877 [2009]), and HPD was entitled to

consider the inconsistencies contained in other documents submitted and the fact that petitioners provided a different address as their place of residence on tax returns filed during the relevant period (*see* 28 RCNY 3-02[n][4]*; Matter of Hochhauser v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288 [2008]; *Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406 [2007]). Furthermore, petitioners may not invoke the doctrine of estoppel to "prevent HPD from executing its statutory duty to provide Mitchell-Lama housing only to individuals who meet the specified eligibility requirements" (*Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 779 [2008]; *Miney*, 68 AD3d at 878).

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3677 Sidikat Kasumu, Index 402030/04
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

_____

Allen & Overy, LLP, New York (Nicholas E. Mitchell of counsel), for appellant.

Lisa M. Comeau, Garden City (Marie R. Hodukavich of counsel), for respondent.

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered September 22, 2009, which, in an action for personal injuries, granted plaintiff's motion to vacate the default judgment dismissing the action and restored the action to the trial calendar, unanimously reversed, on the law, without costs, the motion denied and the default judgment reinstated. The Clerk is directed to enter judgment accordingly.

A plaintiff attempting to vacate a default judgment must establish both a reasonable excuse for the default and a meritorious cause of action (*see Carroll v Nostra Realty Corp.*, 54 AD3d 623 [2008], *lv dismissed* 12 NY3d 792 [2009]). While the determination as to whether a party has established a reasonable excuse usually rests within the sound discretion of the motion

court, here, the court improvidently exercised such discretion. The conduct of plaintiff's counsel in failing to appear for jury selection was only the latest in a series of defaults and non-appearances over the course of the litigation that should not be excused (*see e.g. Dayton Towers Corp. v Katz*, 208 AD2d 494 [1994], *appeal dismissed* 85 NY2d 934 [1995]).

Furthermore, plaintiff's motion was untimely, as it was brought more than one year after entry of the judgment and service of the notice of entry. While the court does retain the inherent power to excuse an untimely motion to vacate (*see e.g. Hunter v Enquirer/Star, Inc.*, 210 AD2d 32, 33 [1994]), there exists no basis to do so in light of the pattern of neglect demonstrated by plaintiff's counsel.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3678 The People of the State of New York, Ind. 4927/08
Respondent,

-against-

Gary Sanders,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

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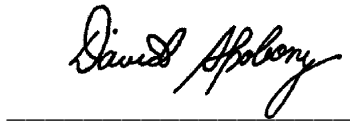
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Arlene Silverman, J. at plea; Renee White, J. at sentence), rendered on or about June 23, 2009,

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: NOVEMBER 23, 2010



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CLERK

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

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3682-
3683 In re Spencer Isaiah R., etc.,

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

SCO Family of Services,
Petitioner-Respondent,

Michelle J.,
Respondent,

Spencer R. Sr.,
Respondent-Appellant.

_____

John J. Marafino, Mount Vernon, for appellant.

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

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

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Appeal from dispositional order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about August 3, 2009, which, after a fact-finding hearing, inter alia, terminated respondent's parental rights and held that pursuant to Domestic Relations Law § 111(1)(d), he is not a parent whose consent is required before freeing his child for adoption, and, in the alternative, held that pursuant to Social Services Law § 384-b, respondent abandoned the subject child, unanimously dismissed, without costs, as it fails to challenge the Family Court's

threshold determination that respondent is not a consent father.

A proceeding to terminate parental rights on the ground of abandonment may only be brought against a parent whose consent to the child's adoption is required under Domestic Relations Law § 111 (1) (Social Services Law § 384-b(4)(b); *Matter of Christy R.*, 183 AD2d 434 [1992]; *Matter of William B.*, 47 AD3d 983 [2008], *lv denied* 11 NY3d 702 [2008]). Here, Family Court made the threshold determination that respondent father's consent was not required prior to adoption, but also made an alternative finding that he abandoned the subject child. On appeal, respondent father challenges only the alternative finding of abandonment. Accordingly, he has abandoned any appellate challenge to Family Court's threshold determination that his consent to adoption was not required (*Matter of Tristram K.*, 65 AD3d 894 [2009]; *Matter of Breeyanna S.*, 52 AD3d 342 [2008], *lv denied* 11 NY3d 711 [2008]). In so doing, respondent father obviates any need for this Court to address his challenge to the finding of abandonment.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3684N "The New York State Workers' Compensation Board," etc., et al., Plaintiffs-Respondents, Index 601679/08

-against-

Classic Insurance Agency, et al., Defendants-Appellants.

_____

Keidel, Weldon & Cunningham, L.L.P., White Plains (Stephen Cunningham and April Forbes of counsel), for appellants.

Stalker Vogrin Bracken & Frimet, LLP, New York (Michael J. Frimet of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Debra A. James, J.), entered February 23, 2010, which granted plaintiffs' motion to substitute the New York State Workers' Compensation Board as the plaintiff in this action in place and stead of Compensation Risk Managers, LLC, unanimously dismissed, without costs, as taken from a nonappealable order.

No appeal as of right lies from the court's order granting substitution pursuant to CPLR 1018 since it does not affect a substantial right of defendants within the meaning of CPLR 5701(a)(2)(v). In any event, were we to sua sponte grant leave to appeal, we would affirm. Since, the authority to administer the Trust's workers' compensation claims and provide risk management services was transferred to the Workers' Compensation

Board subsequent to commencement of the instant action, the court properly substituted it as the appropriate plaintiff (*see Good Old Days Tavern v Zwirn*, 259 AD2d 300 [1999]).

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Catterson, JJ.

3054 CMMF, LLC, Index 601924/09
M-2430 Plaintiff-Appellant-Respondent
M-2546

-against-

J.P. Morgan Investment
Management Inc., et al.,
Defendants-Respondents-Appellants.

- - - -

The Securities Industry and
Financial Markets Association,
Amicus Curiae.

_____

Oliver & Hedges, LLP, New York (Richard I. Werder, Jr. of counsel), for appellant-respondent.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Richard A. Rosen of counsel), for respondents-appellants.

Wilmer Cutler Pickering Hale and Dorr LLP, New York (Lori A. Martin of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 11, 2009, which granted defendants' motion to the extent of dismissing the second and third causes of action and limiting the first cause of action, and denied dismissal of the fourth cause of action, unanimously affirmed, with costs.

Defendant J.P. Morgan and its broker, defendant Ufferfilge, were hired to oversee and manage plaintiff's discretionary investment account. Plaintiff and Morgan entered into an Investment Management Agreement (IMA) which, inter alia, gave

Morgan "complete discretion and authority . . . to make . . . sales, exchanges, investments or reinvestments or to take any action that it deems necessary or desirable in connection with the assets in the Account."

The IMA required Morgan to provide monthly statements to plaintiff setting forth the property in the portfolio as well as past transactions. It also contained a disclaimer of liability, stating, inter alia, that Morgan did not guarantee the success of any investment and would not be liable to plaintiff for any losses suffered in the account unless caused by negligent or willful misconduct by Morgan. The agreement also set out the investment guidelines to be followed.

Plaintiff subsequently suffered heavy losses in its account when the financial industry went through the subprime mortgage meltdown and the ensuing crisis. Plaintiff alleged that defendants breached the terms of the investment contract as well as their fiduciary duties by saturating plaintiff's portfolio with nonagency collateralized mortgage obligations and asset-backed securities. The complaint further alleged defendants' failure to provide plaintiff with accurate information as to the assets in its portfolio and their value, as well as adequate investment advice, and that their misleading of plaintiff as the value and marketability of the securities held in its investment

account.

The court granted defendants' motion to dismiss to the extent of limiting the cause of action for Morgan's breach of contract to the factual issue of violation of the investment sector guidelines, dismissing the causes of action for breach of fiduciary duty and negligence as duplicative of the breach of contract claims, and denied dismissal of the claim for negligent misrepresentation.

At the outset, we grant the motion by the Securities Industry and Financial Markets Association to file an amicus curiae brief, and we have considered the arguments raised therein in arriving at our decision.

The court correctly limited the breach of contract cause of action to the allegation that Morgan violated the sector diversification guidelines set forth in the investment contract. An investment manager with discretionary authority cannot be held liable under a breach of contract theory for failure to achieve an investment objective (*see Vladimir v Campbell Cowperthwait*, 42 AD3d 413, 415 [2007]).

The court also properly declined to bar dismissal of the causes of action for negligence, breach of fiduciary duty and negligent misrepresentation on the theory that they "mimic" the Martin Act (General Business Law art 23-A) and are thus preempted

by the provisions of that statute. In *Assured Guaranty (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, __ AD3d __ [Appeal No. 3053, decided simultaneously herewith]), we held that while no private right of action may be based on the Martin Act (*see CPC Intl. v McKesson Corp.*, 70 NY2d 268, 276-277 [1987]; *see also Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 245 [2009]), "there is nothing in the plain language of the Martin Act, its legislative history or appellate level decisions in this State that supports defendant's argument that the act preempts otherwise validly pleaded common-law causes of action" (__ AD3d __). Indeed, we also observed that where the facts as alleged in a complaint fit within a cognizable legal theory and are not precluded by the Martin Act because they do not rely entirely on alleged omissions from filings required by the Martin Act and the Attorney General's implementing regulations (*Board of Mgrs. of Marke Gardens Condominiums v 240/242 Franklin Ave., LLC*, 71 AD3d 935, 936 [2010]), "such action will be permitted to proceed and a motion to dismiss predicated on a Martin Act preemption theory will be properly denied" (*Assured Guaranty*, __ AD3d at __). The key therefore, is whether the causes of action in question "fit within a cognizable legal theory" without relying wholly on the provisions of the Martin Act. In this case, that test has been met.

We grant the Attorney General's motion for judicial notice of certain memoranda of law filed in *People v Merkin* (Sup Ct, NY County, Index No. 450879/09) (*see RGH Liquidating Trust v Deloitte & Touche LLP*, 71 AD3d 198, 207 [2009] [a court may take judicial notice of court records and files]). *Merkin* involved an action by the Attorney General for breach of fiduciary duty. The defendants there moved to dismiss, arguing that such claims were preempted by the Martin Act. While acknowledging that some courts held that common-law claims brought by private plaintiffs were preempted by the Martin Act, the Attorney General distinguished those cases as they were brought by private parties, rather than by the state's Attorney. Indeed, in a footnote, the Attorney General argued, as they do here, that "the breach of fiduciary duty claims are wholly independent of the Martin Act and are not preempted," citing *Scalp & Blade v Advest, Inc.*,(281 AD2d 882, 883 [2001]) and *Carbona v Babylon Cove Dev., LLC* (54 AD3d 79 [2003]).

Here, the court correctly determined that plaintiff's causes of action for negligence and breach of fiduciary duty are not precluded by the Martin Act. That turned out to be a pyrrhic victory, since the court went on to properly dismiss those claims as being duplicative of the breach of contract cause of action (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382,

389 [1987]). Moreover, the motion court correctly denied defendants' motion to dismiss the cause of action for negligent misrepresentation, which was properly pleaded and is not precluded by the Martin Act.

It is well established that a cause of action alleging "negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Furthermore, "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" *(Kimmell v Schaefer,* 89 NY2d 257, 263 [1996]).

Here, plaintiff's complaint provided specific allegations as to: (1) misrepresentations regarding the number of collateralized mortgage obligations in its portfolio; (2) use of meaningless and misleading ratings as an indicator of the portfolio's health in the context of subprime securities; (3) misrepresentation as to which real estate backed securities in the portfolio were

collateralized; and (4) misleading pricing information regarding liquidation of the portfolio's assets and that the service they used was experiencing problems in accurately pricing securities due to the mortgage crisis. The complaint then clearly stated that plaintiff relied upon the information provided by defendants, and was damaged as a result of the misrepresentations. Since there remain questions of fact as to whether the information defendants provided was incorrect and whether plaintiff justifiably relied thereon, defendants' motion to dismiss was properly denied.

Nor do we find any merit to defendants' claim that the court erred in not dismissing plaintiff's entire breach of contract claim. It is well settled that "In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]) and the plaintiff will be accorded "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Here, defendants argue that the classification of securities they used comports with industry practice, and that any deviations from sector limits as set forth in the agreements resulted from plaintiff's withdrawal of funds. They also argue that plaintiff's contractual period of limitations ran, further

prompting dismissal of this claim. However, the record does not contain any of the monthly statements or portfolio securities holdings reports, rendering it impossible to ascertain what information was provided. Moreover, defendants' arguments are fact-based, particularly with respect to their assertion regarding the effect plaintiff's withdrawal of funds from its account had on deviating from the sector limits, thus precluding the dismissal.

We have reviewed the parties' remaining contentions and find them unavailing.

M-2430 &
M-2546 CMMF LLC v J.P. Morgan Investment

Motion seeking leave to file amicus curiae brief and motion for judicial notice granted.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3313 Vincenzo Badalamenti, et al., Index 26464/03
Plaintiffs-Respondents-Appellants,

-against-

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

G.A.L. Manufacturing Corporation,
Defendant-Appellant-Respondent.

_____

London Fischer, LLP, New York (Brian A. Kalman of counsel), for appellant-respondent.

Shayne, Dachs, Corker, Sauer & Dachs, Mineola (Jonathan A. Dachs of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 14, 2010, which, insofar as appealed from as limited by the briefs, granted defendant G.A.L. Manufacturing Corporation's summary judgment motion to the extent of dismissing the failure to warn claim, and denied the motion to the extent it sought dismissal of the design defect, negligence, and breach of warranty claims, unanimously modified, on the law, to reinstate plaintiff's failure to warn claim, and otherwise affirmed, without costs.

Plaintiff Vincenzo Badalamenti, an elevator mechanic's helper employed by nonparty Nouveau Elevator, was injured on April 7, 2003 while working on an elevator car at Lincoln

Hospital. Plaintiff needed to turn off the power to two elevator cars to install an electrical cover underneath one of the cars. Plaintiff testified at his deposition that he thought he had put the safety pit switch on each car in the down position, which would have cut the power to the elevator's motor and ensured that the car could not move up or down. The safety pit switch, which was manufactured by defendant G.A.L. Manufacturing Corporation (G.A.L.), operates much like a toggle light switch. If it is in the up position then power is being delivered to the elevator's motor. If it is in the down position then power should be cut off and the elevator should not be able to move. The safety pit switch overrides any other mechanism of cutting off power or turning on power to the elevator's motor. Plaintiff's leg was crushed when, as he was working on one car, the adjoining car suddenly began to move downward towards the basement.

Plaintiff brought this products liability action, asserting, inter alia, claims of design defect, negligence, breach of warranty and failure to warn. G.A.L. sought summary judgment dismissing the complaint in its entirety. The motion court declined to dismiss the design defect, negligence and breach of warranty claims, but dismissed the failure to warn claim. Defendant and plaintiff respectively appeal and cross appeal from the motion court's order.

The motion court properly determined that G.A.L. did not satisfy its initial burden of establishing, prima facie, that its product was not defective when it left its control; that the incident was caused by something other than a design defect in the switch; that a safer device could not have been designed; and that the alleged defect was not a proximate cause of plaintiff's injuries (see *Adams v Genie Indus., Inc.*, 14 NY3d 535 [2010]; *Speller v Sears, Roebuck & Co.*, 100 NY2d 38 [2003]). In its decision, the motion court focused on the fact that plaintiff had testified that the safety switch was in the fully down position when he was injured. The court properly concluded that based on this fact, it would be reasonable to infer that the switch was defective because the elevator should not have operated if the switch was down. Additionally, the motion court noted that defendant had failed to provide expert opinion on the issues of proximate cause, adequacy of design, and lack of a feasible alternative.

However, the motion court should not have dismissed the failure to warn claim. "A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]). Defendant's motion papers did not address the critical question of whether it had knowledge of

the latent dangers resulting from a foreseeable use of its switch. Defendant did not provide an affidavit from anyone associated with the company to show it was unaware of the possibility that the switch could appear to be down but still actually be capable of delivering power, such that the power is not cut off. Rather, defendant relied on an argument that the warning would have been superfluous because plaintiff testified that the switch was in the down position. This argument misses the mark because it fails to address the question of whether plaintiff should have been warned that the switch might actually be in some other position.

Even if defendant had met its prima facie burden on knowledge, plaintiff raised an issue of fact through the deposition testimony of G.A.L.'s executive vice president, Herbert Glaser. He testified that the safety switch was not designed to prevent a user from positioning it incorrectly, i.e. in some other position than fully up or fully down. He further explained that the safety switch did not make a locking sound when it was in either the fully up or fully down position. Glaser testified that power will continue to be provided to the elevator's motor if the safety switch is not in the fully up or fully down position, allowing the car to move. Based on this evidence it could reasonably be inferred that G.A.L. knew or

should have known of the danger its switch posed.

In dismissing the failure to warn claim, the motion court incorrectly focused on an accident which had occurred four months prior in the same location. John Neary, an elevator mechanic also employed by Nouveau, was killed while working under an elevator car in which he thought he had cut off the power by putting the safety switch, also manufactured by G.A.L., in the down position. Although the motion court analyzed whether the two accidents were substantially similar, this question is irrelevant. There is no evidence in the record that the Neary accident was reported to G.A.L. prior to plaintiff's accident. Therefore, substantially similar or not, the Neary accident could not have provided G.A.L. with notice. Nonetheless, because defendant did not meet its burden on this motion, the failure to warn claim should not have been dismissed.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Friedman, Richter, Manzanet-Daniels, JJ.

3321-
3322 The People of the State of New York, SCI. 43054C/07
Appellant,

-against-

Arcadio Guzman,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Lily Goetz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Richard Lee Price, J.), entered on or about May 13, 2009, which granted defendant's suppression motion, unanimously reversed, on the law and the facts, and the motion denied.

Contrary to the hearing court's determination, the record establishes that the arresting officer, based on her direct observations, reasonably concluded that defendant's car was double-parked, warranting the immediate stop of the car for that infraction (*see Whren v United States*, 517 US 806 [1996]; *People v Robinson*, 97 NY2d 341 [2001] [traffic stop comports with State Constitution where officer has probable cause to believe motorist has committed a traffic violation, even if officer's primary motivation is to conduct another investigation]). The fact that

defendant was seated behind the wheel of a double-parked vehicle was a sufficient predicate to justify the officer's approach, and the ensuing events, namely, that defendant suddenly drove forward 20 to 25 feet, only provided greater cause. Since the initial stop was proper, defendant was not entitled to suppression of the evidence obtained as a result of the stop.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3362N Probate Proceeding,
Will of Rocky H. Aoki,
also known as Hiroaki Aoki,
Deceased.
- - - - - -
Keiko Ono Aoki, File 2604/08
Petitioner-Respondent,

-against-

Kana Aoki Nootenboom et al.,
Respondents-Objectants-Appellants,

Jennifer Burke Crumb,
Respondent-Objectant.

_____

Holland & Knight LLP, New York (Joseph P. Sullivan of counsel), for appellants.

Rosenberg Feldman Smith, LLP, new York (Richard B. Feldman of counsel), for respondent.

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Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered December 28, 2009, which, in a probate proceeding, to the extent appealed from, denied objectants' motion to extend the end date for disclosure to October 15, 2010 and to delete limitations on the number and identity of the persons to be deposed, unanimously affirmed, without costs.

It appears that appellants, who assert that trial preparation, "particularly with respect to the objection of undue influence, requires extensive, time consuming and unpredictable

discovery," are on the "proverbial 'fishing expedition'" (*Matter of Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 342 [1997]). For example, when objectants asked to depose specific witnesses, they were given a fair opportunity to do so, but now claim a need to depose some of the hundreds of people listed in the decedent's funeral sign-in book and address book, which, we note, have been in their possession since March and October 2009, respectively. The challenged restrictions on disclosure are reasonable (*see Jenkins v McKeithen*, 395 US 411, 429 [1969]; CPLR 3103[a]). We have considered appellants' other arguments and find them unavailing.

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

NARDELLI, J. (dissenting)

Since I believe that the original discovery schedule, which called for a termination of discovery within 45 days of the order, unduly constrained the objectants from proceeding in an efficacious and orderly manner, I dissent.

Inasmuch as the Court has the power to substitute its discretion for that of the trial court in discovery matters (*see Andon v 302-34 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]), I believe, at this juncture, it would be provident to grant objectants leave to request, within 20 days of this order, those items of discovery they contend are still outstanding, and to direct that such discovery, including depositions, be completed within 45 days thereafter. Upon completion of such discovery, leave to reargue the order granting summary judgment should be granted.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3685 The People of the State of New York, Respondent, Ind. 4837/08

-against-

Richard Ryant,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered March 25, 2009, convicting defendant, after a jury trial, of criminal possession of stolen property in the fourth and fifth degrees, and auto stripping in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

Testimony that the police found two blackened glass pipes in defendant's backpack constituted irrelevant and prejudicial evidence of an uncharged crime, and the prosecutor's summation comments on this evidence were also improper. However, we find that these errors were harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). The police arrested defendant immediately after a witness saw a

person meeting defendant's particularized description breaking into the the victim's car. Defendant had the victim's wallet, and the circumstances clearly established that he stole the wallet from the car and did not merely find it.

Defendant's arguments concerning other evidence of uncharged crimes are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we similarly find that any error was harmless.

We have considered and rejected defendant's ineffective assistance of counsel claim.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3686 Dana Grogan, et al., Index 112008/03
Plaintiffs-Appellants,

-against-

Gamber Corporation doing business
as Milford Plaza Hotel, et al.,
Defendants-Respondents.

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Greenberg & Merola, LLP, New York (Hayley Greenberg of counsel), for appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Judith J. Gische, J.), entered October 29, 2009, which, in an action for personal injuries, denied plaintiffs' motion pursuant to CPLR 5015(a)(1) for relief from a judgment dismissing their complaint, unanimously dismissed, without costs.

On December 10, 2009, this Court dismissed, for failure to perfect, plaintiffs' consolidated appeal from (1) the September 19, 2008 judgment (Jacqueline W. Silbermann, J.), dismissing their complaint pursuant to a directive (Ira Gammerman, J.H.O.) that judgment dismissing the complaint be entered because of their failure to proceed to trial, and (2) the February 24, 2009 order (Judith J. Gische, J.), denying plaintiffs' motion pursuant to CPLR 5015(a)(1) for relief from the judgment because of, inter

alia, their failure to provide affidavits of merit. In July 2009, plaintiffs again moved for relief from the judgment, this time submitting affidavits of merit. In the order on appeal, the court denied the motion because, inter alia, plaintiffs failed to offer "any explanation why the affidavits were not presented on the original motion."

An appeal that has been dismissed for failure to prosecute bars, on the merits, a subsequent appeal as to all questions that could have been raised on the earlier appeal had it been perfected (*Bray v Cox*, 38 NY2d 350, 353-355 [1976]; *Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 754, 755-756 [1999]). Thus, on this appeal plaintiffs may not challenge the judgment dismissing their action or the denial of their motion for relief from that judgment. As this is the only relief plaintiffs seek, the appeal is dismissed.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3687-
3687A Belkis Bejaran, Index 16107/05
Plaintiff-Appellant,

-against-

Lourdes Perez, et al.,
Defendants-Respondents.

_____

Fotopoulos, Rosenblatt & Green, New York (Dimitrios C. Fotopoulos of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered September 16, 2009, which granted defendants' motion for summary judgment dismissing the complaint for lack of a serious injury, unanimously modified, on the law, the motion denied and the complaint reinstated only to the extent that the serious injury claim is based on inability to perform usual and customary activities for at least 90 of the 180 days following the accident, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered December 22, 2009, which denied plaintiff's motion to renew and reargue, unanimously dismissed, without costs, as academic with regard to renewal, and as taken from a nonappealable order with regard to reargument.

The reports of defendants' experts, based on examinations

performed more than two years after the accident and addressed only to the permanency of plaintiff's injuries, failed to make a prima facie showing that plaintiff had not sustained a 90/180 injury (*see Alexandre v Dweck*, 44 AD3d 597 [2007]; *Loesburg v Jovanovic*, 264 AD2d 301 [1999]). Nor did defendants submit any other evidence to show that plaintiff did not sustain such an injury. However, the court properly granted summary judgment with respect to alleged permanent injury and significant limitations, since plaintiff's experts failed to respond sufficiently to defendant's evidence on those claims.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3692 Stephanie R. Cooper, P.C., Index 109587/09
Plaintiff-Respondent,

-against-

Eileen Robert,
Defendant-Appellant.

_____

Sperber Denenberg & Kahan, P.C., New York (Jacqueline Handel-Harbour, of counsel), for appellant.

The Law Offices of Stephanie R. Cooper, PC, New York (Stephanie R. Cooper of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about February 19, 2010, which, to the extent appealed from as limited by the briefs, granted plaintiff leave to amend its complaint and partial summary judgment on the issue of liability on both its breach of contract and account stated claims, unanimously affirmed, with costs.

Ordinarily, a summary judgment motion brought prior to service of an answer should be dismissed as premature (*see Republic Natl. Bank of N.Y. v Luis Winston, Inc.*, 107 AD2d 581, 582 [1985]). Similarly, an amended complaint should ordinarily be followed by an answer (*see* CPLR 3025[d]). Nonetheless, the CPLR expressly confers upon nisi prius courts the power to dispense with responses to amended pleadings, in their discretion

(*see id.* [providing that no answer to an amended complaint is required "where otherwise prescribed by law or order of the court"]). Here, defendant had notice of the substance of plaintiff's contentions and ample opportunity to submit proof in opposition to its summary judgment application. The amended complaint merely corrected a technical defect relating to the separate enumeration of the complaint's causes of action (*see* CPLR 3014), and added no material substantive factual allegations. Under these circumstances, the motion court properly exercised its power, expressly provided under CPLR 3025(d), to dispense with an answer to the amended complaint prior to addressing plaintiff's summary judgment contentions (*see Armstrong v Peat, Marwick, Mitchell & Co.*, 150 AD2d 189 [1989]). It is noted that the motion court could just as easily have disregarded the purely technical defect in plaintiff's complaint, denied the cross motion to dismiss on those technical grounds, and then gone on to address the merits of plaintiff's summary judgment motion based on the original complaint. Insisting upon permitting defendant to serve an answer to the amended complaint here would have been a waste of time and judicial resources (*see Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 [2001]). We emphasize that defendant did join issue on plaintiff's original complaint, and had ample opportunity to submit evidence and

contest plaintiff's submissions.

On the merits, plaintiff established a prima facie entitlement to summary judgment on its claim of account stated by showing that it generated detailed monthly invoices and mailed them to defendant on a regular basis in the course of its business (*see Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539, 539 [2009]; *American Express Centurion Bank v Williams*, 24 AD3d 577, 577 [2005]). Defendant's conclusory denial of receipt of some number of those invoices does not suffice to rebut the presumption of delivery established by plaintiff's comprehensive proof (*see American Express*, 24 AD3d at 578; *Northern v Hernandez*, 17 AD3d 285, 286 [2005]). Nor do defendant's allegations of oral objections, with no specificity as to the time of those objections or the content of the conversations in which they were made, suffice to raise issues of fact as to an account stated (*see Berkman*, 58 AD3d at 539; *Zanani v Schvimmer*, 50 AD3d 445, 446 [2008]).

The motion court correctly held that discrepancies in the total amounts claimed due by plaintiff precludes full summary judgment at this time. Instead, as the court directed, there should be an immediate trial on damages in order to determine the total amount due on the invoices submitted (*see Salans Hertzfeld*

Heilbronn Christy & Viener v Between Bread E., 290 AD2d 381 [2002]; *Davis Markel & Edwards v Solomon*, 204 AD2d 182 [1994]).

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3693 The People of the State of New York, Ind. 2067/07
Respondent,

-against-

Robert Williams,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Cyrus R. Vance, District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered July 24, 2008, convicting defendant, after a jury trial, of attempted murder in the first degree (2 counts), rape in the first degree (2 counts), robbery in the first degree (2 counts), burglary in the first degree (2 counts), kidnapping in the first degree, arson in the second degree, assault in the first degree (5 counts), attempted assault in the first degree (2 counts), assault in the second degree, criminal sexual act in the first degree (8 counts) and predatory sexual assault (12 counts), and sentencing him, as a second violent felony offender, to an aggregate term of 422 years to life, unanimously affirmed.

The court properly exercised its discretion when it directed that defendant be kept in restraints during the trial.

Restraints are permissible when "justified by a state interest specific to a particular trial" (*Deck v Missouri*, 544 US 622, 629 [2005]), and the court makes "a sufficient inquiry to satisfy itself of the facts that warrant the restraint" (*People v Buchanan*, 13 NY3d 1, 4 [2009]). In the first place, defendant's prior conduct both while at liberty and in custody, and the charged conduct in the present case, were all exceptionally violent. Furthermore, while incarcerated on the present charges, defendant displayed a pattern of dangerous and violent behavior that continued until shortly before trial, causing the Department of Correction to take special precautions. Defendant argues that he never became violent in a courtroom; however, given the information before it, the court was not obligated to wait for such an event to happen. In addition, the court minimized the prejudicial impact of the restraints by directing the use of coverings that limited their visibility to the jury.

As to each count, the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established defendant's guilt of attempted first-degree murder under a witness-elimination theory (Penal Law § 125.27[1][a][v]). Under the facts presented, the victim was a witness to a crime "committed on a prior occasion" within the

meaning of that statute (*see People v McIntosh*, 53 AD3d 1, 4-6 [2008], *lv denied* 11 NY3d 833 [2008]). While defendant restrained, and periodically abused, the victim over a period of 19 hours at a single location, the jury could have reasonably concluded that this period had several distinct phases or stages, and that at least by the final stage defendant had formed an intent to kill the victim in order to prevent her from reporting the crimes he committed at the earlier stages.

The evidence also established attempted first-degree murder under a theory of "depraved infliction of extreme physical pain" (Penal Law § 125.27[1][a][x]). The jury could have reasonably found that the only explanation for defendant's extreme violence toward the victim was that he "relished" doing so within the meaning of the statute.

We have considered and rejected defendant's challenges to one of the first-degree assault convictions, including his claim that it was based on an allegedly duplicitous count.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3695 John Downey, Index 117110/04
Plaintiff, 590039/09

-against-

10 Realty Co., LLC,
Defendant.
- - - -
10 Realty Co., LLC,
Third-Party Plaintiff-Appellant,

-against-

Greater New York Mutual Insurance Company,
Third-Party Defendant-Respondent.

_____

Curan, Ahlers, Fiden & Norris, LLP, White Plains (Charles B. Norris of counsel), for appellant.

Thomas D. Hughes, New York (Richard Rubinstein of counsel), for respondent.

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Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered August 20, 2009, which granted the motion by third-party defendant Greater New York Mutual (GNYM) to dismiss the third-party complaint, unanimously affirmed, without costs.

GNYM had no duty to defend or indemnify its insured in the negligence action. According to the complaint, bill of particulars and deposition testimony in the underlying tort action, plaintiff sued for injuries that allegedly occurred in October -- or, at the very earliest, August -- of 2002, which was

outside the insurance policy period that ended on July 1 of that year (*see Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]; *Fire & Cas. Ins. Co. of Conn. v Solomon*, 50 AD3d 340 [2008]). Plaintiff's alleged exposure to mold during the policy period did not trigger any duty to provide coverage thereafter, as New York follows the "injury-in-fact" test which "rests on when the injury, sickness, disease or disability actually began and . . . requires the insured to demonstrate actual damage or injury during the policy period" (*Continental Cas. Co. v Employers Ins. Co. of Wausau*, 60 AD3d 128, 148 [2008], *lv denied* 13 NY3d 710 [2009]); *cf. American Home Prods. Corp. v Liberty Mut. Ins. Co.*, 748 F2d 760, 765 [2d Cir 1984], *modfg* 565 F Supp 1485, 1497 [SD NY 1983]).

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

ENTERED: NOVEMBER 23, 2010

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, JJ.

3696 Santa Baez, Index No. 24173/05
Plaintiff-Respondent,

-against-

Ende Realty Corp.,
Defendant-Appellant.

Ende Realty Company LLC,
Defendant.

_____

Annette G. Hasapidis, South Salem for appellant.

Michael T. Sucher, Brooklyn for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about September 14, 2009, which denied defendant Ende Realty Corp.'s motion to vacate a default judgment, unanimously affirmed, without costs.

Defendant's failure to keep a current address on file with the Secretary of State, as required by Business Corporation Law § 306, does not constitute a "reasonable excuse" for its default, and therefore vacatur of the default judgment pursuant to CPLR 5015 is not warranted (*see Lawrence v Esplanade Gardens*, 213 AD2d 216 [1995]; *Associated Imports v Amiel Publ.*, 168 AD2d 354 [1990], *lv dismissed* 77 NY2d 873 [1991]).

Nor is vacatur pursuant to CPLR 317 warranted, given defendant's failure to make the required showing of lack of

notice. Defendant claimed that it had no knowledge of the personal injury action or the ensuing related fraudulent conveyance action because the postal service did not deliver mail to the address of its office, located on its premises. However, plaintiff demonstrated that during the years that the actions were pending his attorneys mailed papers related to the actions to defendant at its office on the premises on 27 occasions and that none of these mailings were returned to sender as undeliverable or otherwise. As the motion court found, the assertion by defendant's principal that she received none of these mailings was not credible (*see Matter of Allstate Ins. Co. [Patrylo]*, 144 AD2d 243, 246 [1988]). Furthermore, despite the argument advanced on appeal, defendant failed to request a hearing below. Finally, mere denial of receipt is insufficient to controvert plaintiff's evidence of mailing.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3697 The People of the State of New York, Ind. 4121/06
Respondent,

-against-

Amauris Torres,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Richard L. Price, J.), rendered February 9, 2009, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree, and sentencing him to a term of 6 years with 5 years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to 4½ years, and otherwise affirmed.

The record does not establish a valid waiver of the 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: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3699 Fortress Credit Corp., et al., Index 601579/08
Plaintiffs-Respondents,

-against-

Hudson Yards, LLC, et al.,
Defendants,

Baruch Singer,
Defendant-Appellant.

_____

Sukenik, Segal & Graff, P.C., New York (Douglas Segal of counsel), for appellant.

Sills Cummis & Gross, P.C., New York (Mitchell D. Haddad of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 18, 2009, as amended by order, same court and Justice, entered November 13, 2009, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment on their claims for foreclosure and a conditional deficiency judgment against defendant-appellant guarantor (defendant), and dismissed defendant's counterclaims, unanimously affirmed, with costs.

Plaintiffs met their prima facie burden by producing the mortgage documents and undisputed evidence of default, namely, nonpayment and a transfer of the mortgaged property without plaintiffs' prior consent; in addition, plaintiffs showed that

defendant signed a personal guaranty as additional collateral for the note. Thus, the burden shifted to defendant to raise a triable issue of fact regarding his affirmative defenses to foreclosure (*see Red Tulip LLC v Neiva*, 44 AD3d 204, 209-210 [2007], *lv denied* 13 NY3d 709[2009]). Defendant's affirmative defenses, however, are precluded by the guaranty, which waived all defenses and counterclaims except actual payment and performance in full, which defendant has not alleged (*id.*). It does not avail defendant that his defense -- plaintiffs' alleged tortious interference with a potential sale of the mortgaged property for an amount in excess of the outstanding mortgage obligations -- arose after the waiver had been executed (*see Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 [2009]). In any event, defendant's allegations of interference lack evidentiary support (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004]). We have considered defendant's other arguments and find them unavailing.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3700 The People of the State of New York, Dkt. 055220C/07
Respondent,

-against-

Jose Rivera,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Eileen Koretz, J.H.O.) rendered June 18, 2009, convicting defendant, after a nonjury trial, of harassment in the second degree and sentencing him to a conditional discharge with community service, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's course of conduct, viewed as a whole, supports the inference that, regardless of whether he also intended to resist arrest, his action was intended to harass, annoy, or alarm the arresting officer.

Defendant's remaining contentions are unavailing (*see People v Correa*, 15 NY3d 213 [2010]).

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3701 Ellen Oxman, Index 350213/04
Plaintiff-Appellant,

-against-

John Craig Oxman,
Defendant-Respondent.

_____

Alter & Alter LLP, New York (Stanley Alter of counsel), for appellant.

Blank Rome LLP, New York (Jay D. Silverstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saralee Evans, J.), entered on or about November 6, 2009, which denied plaintiff's motion for legal fees incurred in filing a post-judgment petition to modify a stipulated settlement, unanimously affirmed, without costs.

In 2007, plaintiff petitioned to modify the stipulated custody provisions of a Parenting Agreement that had been incorporated in the judgment of divorce. The subject matter of that petition was resolved in an Amended Parenting Agreement in 2009, the final paragraph of which stipulated that "Both Parents agree that the Mother's attorney may petition the court for the payment of legal fees resulting from this litigation." A paragraph in the original Parenting Agreement that survived the

amended agreement, under which plaintiff now claims fees and costs, applies not to this type of proceeding -- a change in circumstances, warranting a change in child custody -- but rather to where one party has breached the agreement. There was not even an allegation of breach here. Even if there had been, recovery of counsel fees would, under the relevant language of the original agreement, be available only if the party seeking relief "substantially prevail[ed]" in her application, which was not the case here.

We have considered plaintiff's remaining contention and find it unavailing.

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3704N In re Progressive Preferred Insurance Company, Petitioner-Appellant, Index 260172/09

-against-

Tara Williams, etc., Respondent,

Esurance Insurance Company, Proposed Additional Respondent-Respondent,

Barbara T. Milan, Proposed Additional Respondent.

_____

Kaplan, Hanson, McCarthy, Adams, Finder & Fishbein, Yonkers (Michael A. Zarkower of counsel), for appellant.

Law Offices of Curtis, Vasile P.C., Merrick (Roy W. Vasile of counsel), for Esurance Insurance Company, respondent.

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Order, Supreme Court, Bronx County (Lucy Billings, J.), entered on or about December 2, 2009, which, to the extent appealed from as limited by the briefs, denied without a hearing the petition to permanently stay an uninsured motorist arbitration, unanimously affirmed, without costs.

Petitioner's own submissions showed that the policy previously issued to the driver of the offending vehicle by Esurance had in fact been terminated before the accident, and that a hearing was not required to explore the possibility that such coverage was not properly canceled (*see Matter of Allstate*

Ins. Co. v Holloway, 272 AD2d 539 [2000]). The notice of termination included "a statement that proof of financial security is required to be maintained continuously throughout the registration period" (Vehicle and Traffic Law § 313[1][a]). Petitioner was not entitled to a hearing based on its unsupported claim that the legend in the notice was printed in less than 12-point type, in violation of the statute (*see Matter of Eagle Ins. Co. v Peguero*, 299 AD2d 294 [2002]).

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

ENTERED: NOVEMBER 23, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Catterson, JJ.

3053-
M-2455 Assured Guaranty (UK) Ltd., etc., Index 603755/08
Plaintiff-Appellant,

-against-

J.P. Morgan Investment Management Inc.,
Defendant-Respondent.

- - - -

Attorney General of the State of New York,
Amicus Curiae,

Securities Industry and Financial Markets Association,
Amicus Curiae.

_____

Wollmuth Maher & Deutsch LLP, New York (William A. Maher of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton, & Garrison, LLP, New York (Richard A. Rosen of counsel), for respondent.

Andrew M. Cuomo, Attorney, General, New York (Richard Dearing of counsel), for Attorney General of the State of New York, amicus curiae.

Wilmer Cutler Pickering Hale and Dorr LLP, New York (Lori A. Martin of counsel), for Securities Industry and Financial Markets Association, amicus curiae.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 29, 2010, modified, on the law, to reinstate the contract claims based on defendant's alleged violation of Delaware Insurance Code Chapter 13 that accrued on or after June 26, 2007, as well as claims for breach of fiduciary duty and gross negligence that accrued on or after that date, and otherwise affirmed, without costs. Motion to take judicial notice granted.

Opinion by Sweeny, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
John W. Sweeny, Jr.,
James M. Catterson, JJ.

3053
M-2455
Index 603755/08

_____x

Assured Guaranty (UK) Ltd., etc.,
Plaintiff-Appellant,

-against-

J.P. Morgan Investment Management Inc.,
Defendant-Respondent.

- - - -

Attorney General of the State of
New York,
Amicus Curiae,

Securities Industry and Financial
Markets Association,
Amicus Curiae.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 29, 2010, which, granted defendant's motion pursuant to CPLR 3211 to dismiss the complaint.

Wollmuth Maher & Deutsch LLP, New York (William A. Maher, Vincent T. Chang and Randall R. Rainer of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (Richard A. Rosen, John F. Baughman, Farrah R. Berse and Jennifer K. Vakiener of counsel), for respondent.

Andrew M. Cuomo, New York (Richard Dearing, Barbara D. Underwood and Richard C. Weisz of counsel), for Attorney General of the State of New York, amicus curiae.

Wilmer Cutler Pickering Hale and Dorr, LLP, New York (Lori A. Martin of counsel), for Securities Industry and Financial Markets Association, amicus curiae.

SWEENY, J.

This appeal raises several issues, the most significant being whether common-law causes of action for breach of fiduciary duty and gross negligence are preempted by New York State's Martin Act (General Business Law §§ 352-359). This is a pure question of law and one that has generated a significant amount of discussion, both on the state and federal levels.

The facts are as follows:

Nonparty Scottish Re (U.S.) Inc., a U.S. based life reinsurance company, had reinsured numerous life insurance policies having policy issue dates in 2004. The reinsured pool consisted of 373,725 life insurance policies with an aggregate insured amount of approximately $36.7 billion.

Scottish Re had established and maintained substantial capital reserves, known as economic reserves, which it determined would ensure its ability to meet potential projected obligations under its reinsurance agreements. These reserves are typically funded from the initial premium payment from the ceding insurer and the future net cash flows from the reinsurance agreement. Moreover, since these policies had guaranteed level premiums, Scottish Re was subject to regulations which required it to maintain an even higher level of capital reserves, known as excess reserves, above and beyond its economic reserves.

So as not to have to maintain these reserves, Scottish Re (U.S.) decided to cede substantially all of its 2004 term life reinsurance liability to another reinsurer. To that end, it formed Orkney Re II PLC and turned over its term life insurance reinsurance liabilities to that company.

Orkney raised the money for its reserves by issuing bonds and preference shares. The bonds included Series A and D notes. Scottish Re (U.S.)'s parent, Scottish Re Group Ltd., purchased all of the preference shares and Series D notes. These notes were convertible into Orkney shares once the Series A and B note holders were paid in full.

Plaintiff, a subsidiary of Assured Guaranty Ltd., guaranteed Orkney's payments to the Series A note holders. On December 21, 2005, Orkney and defendant entered into an investment management agreement. Plaintiff is a third-party beneficiary of the agreement and was entitled to enforce Orkney's rights and remedies thereunder.

The investment guidelines for Orkney's (1) Excess Reserve Portfolio in the Reinsurance Trust Account and (2) Additional Funding Account had a stated goal of obtaining reasonable income while providing a "high level of safety of capital." Plaintiff alleges that the parties' understanding was that defendant would manage the two accounts "to no wider than a conservative 40 basis

point spread," i.e. 40 basis points more than Orkney would have received if the portfolios had been invested in U.S. Treasuries.

The guidelines further provided that up to 60% of the two accounts could be invested in home equity loan asset-backed securities (ABS) and up to 50% could be invested in mortgage-backed securities (MBS). However, plaintiff alleges that the aforesaid class limits did not authorize or instruct investment in any asset class at the maximum level if such investment would not meet the overall objectives of providing a high level of safety of capital for each account.

Subject to the investment guidelines, defendant had "complete discretion and authority" in its investment decisions over Orkney's accounts, including "investing in securities and other property of the type normally deemed appropriate for trust funds. The parties acknowledged that defendant was free to "make different investment decisions with respect to each of its clients" and such action would not be construed as a breach of defendant's duties to plaintiff. The agreement specifically stated that defendant did not guarantee future performance of the accounts or the success of the overall management of the accounts.

Although the agreement is governed by New York law, it provides that, "with respect to the assets held in the

Reinsurance Trust Account, investment must be made in compliance with . . . Chapter 13 of the Delaware Insurance Code."

Defendant provided monthly statements to plaintiff and Orkney which listed the assets in each of the accounts and indicated their type (e.g., ABS-Home Equity Loans; ABS - Alternative A [Alt A][1] Loans; CMOs [collateralized mortgage obligations]).

The agreement provides:

> Except with respect to any act or transaction of [defendant] as to which [Orkney] shall object in writing to [defendant] within a period of ninety (90) days from the date of receipt of any statement from [defendant], [defendant] . . . shall upon the expiration of such period be released and discharged from any liability or accountability to [Orkney] and any of its agents or representatives as respects the propriety of acts, omissions, and transactions to the extent shown in such statement.

The complaint alleges that in August 2007, the monthly statement provided by defendant showed "precipitous declines" in value of the assets in the subject portfolios. Plaintiff alleges, inter alia, that defendant knew of the substantial risks associated with subprime and Alt-A mortgage-backed securities but "concealed them from and failed to disclose them to" plaintiff.

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[1]Alt-A borrowers "present materially greater default risk than do prime borrowers."

In fact, the complaint alleges that in August 2007, plaintiff raised "objections to Orkney being overexposed to risky subprime and Alt-A mortgage-backed securities." It alleges that defendant continued to advise plaintiff's financial officers that "the assets in the Accounts provided a high level of safety, were 'money good,' and that Orkney should retain the assets rather than sell them."

On September 24, 2007, Orkney exercised its contractual right to amend the investment guidelines and directed defendant to make all future investments "in cash, cash equivalents, money market securities or AAA-rated obligations" of government agencies.

Plaintiff commenced this action in December 2008, and amended its complaint on May 13, 2009. Defendant moved to dismiss the various causes of action pursuant to CPLR 3211(a)(1) and (7).

The IAS court granted defendant's motion, finding that plaintiff's breach of fiduciary duty and gross negligence claims were preempted by the Martin Act. It also dismissed plaintiff's breach of contract claim because plaintiff failed to dispute that defendant's investment never exceeded the percentages set forth in the investment guidelines and did not allege adequate facts to support the allegation that defendant acted with gross negligence

or willful misconduct. It further found that defendant did not violate Chapter 13 of the Delaware Insurance Code.

We first turn to the issue of whether common-law causes of action for breach of fiduciary duty and gross negligence are preempted by the provisions of the Martin Act. General Business Law Art 23-A, §§ 352-359, commonly referred to as the Martin Act[2], "authorizes the Attorney General to investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York State" (*Kerusa Co.LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 243 [2009]). As originally enacted, the statute only authorized the Attorney General to bring actions to enjoin imminent frauds and failed to address fraudulent activities that had been already completed. This omission was addressed by amendment in 1923[3] which extended the Attorney General's authority to enjoin completed frauds. The statute continued to evolve and subsequent amendments gave the Attorney General to power to seek receiverships[4], and restitution for investors who were the victims of fraudulent activities[5].

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[2]L 1921 ch 649

[3]L 1923 ch 600

[4]L 1925 ch 239

[5]L 1976 ch 559

Perhaps the most significant amendment to the Martin Act occurred in 1955 with the enactment of section 352-c[6] which gave the Attorney General the power to bring criminal proceedings predicating culpability on mere conduct, absent any proof of scienter or criminal intent (*see State of New York v Rachmani Corp.*, 71 NY2d 718, 725 n6 [1988]; *Caboara v Babylon Cove Dev.,LLC* 54 AD3d 79, 81 [2008]).

The act was again amended in 1960 to add section 352-e[7] to address an investment activity unknown at the time of the statute's original enactment - "the offer and sale of cooperative apartments ('coops') and condominiums" (Kaufman, Introduction and Commentary Overview, McKinney's Cons Law of NY, Book 19, General Business Law art 23-A, at 9). The goal of this amendment was to prevent fraud in the offer and sale of these new real estate products by requiring extensive disclosure of relevant factors that formed the basis of the particular project in question.

The "hybrid" nature of the statute, which now governs "two distinct and critical areas of the economy - the securities and real estate marketplaces" (*id.)* - has created two sets of regulations which in turn has spawned a whole body of case law.

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[6]L 1955 ch 553

[7]L 1960 ch 987

Over the years, the cases tended to blur the lines between these two sectors of the economy with the result that, on the question of preemption, many courts, erroneously in our view, have taken the position that the Martin Act preempts long standing common-law causes of action (*see e.g. Nanopierce Tech., Inc. v Southridge Capital Mgmt., LLC* , 2003 U.S. Dist. LEXIS 15206 *6 [SD NY 2003]; *Independent Order of Foresters v Donaldson, Lufkin & Jenrett*, 919 F Supp 149, 153 [1996]).

The plain language of the Martin Act does not explicitly preempt all common-law claims. "The general rule is and long has been that 'when the common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by the statute.'" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 324 [1983]; *see also Caboara,* 54 AD3d at 83; McKinney's Cons Laws of NY, Book 1, Statutes § 301[b]). "Although it is within the competence of the Legislature to abolish common-law causes of action . . . there is no express provision to that effect in the statute, notwithstanding numerous amendments of the [Taylor] law" (*Burns Jackson* at 331]. The principle stated in *Burns Jackson* regarding preemption of common-law rights is similarly applicable to the Martin Act.

There is no question that a private action cannot be

maintained based upon the provisions of the Martin Act (*see CPC Intl. v McKesson Corp.*, 70 NY2d 268, 276-277 [1987]; *see also Kerusa Co. LLC*, 12 NY3d at 245). The fact "[t]hat no new per se action was contemplated by the Legislature does not, however, require us to conclude that the traditional, though more limited, forms of action are no longer available to redress injury resulting from violation of the statute" (*Burns Jackson* at 331). Thus, the fact that there is no private right of action under a statute does not automatically mean that the statute preempts common-law causes of action. *CPC Intl.* did not explicitly address whether the Martin Act preempted common-law claims based on the same facts that would allow the Attorney General to bring an action. In fact, the court, giving the complaint its "most favorable intendment," permitted the plaintiff to proceed on its claim for common-law fraud (70 NY2d at 286). Moreover, *Kerusa* prohibited a private right of action "when the fraud is predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act . . . and the Attorney General's implementing regulations" (12 NY3d at 239), a holding consistent with *Burns Jackson* (70 NY2d at 330). The *Kerusa* court went on to find that the allegations in the plaintiff's complaint for common-law fraud were indistinguishable from its Martin Act claims and were thus merely "a backdoor private cause

of action to enforce the Martin Act" (12 NY3d at 245). However, the issue of preemption of common-law causes of action was not directly addressed in either case, although many courts, particularly federal courts, have misinterpreted those cases to find such preemption of common-law causes of action arising from facts which would support a Martin Act claim.

Both state and federal courts have consistently and properly held that where a pleading is drafted in such a way as to cast what is clearly an obligation under the Martin Act as a common-law cause of action, that complaint would constitute, in effect, a prohibited private action based upon the provisions of the Martin Act and are preempted by the statute (*see Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.,* 65 AD3d 1284, 1287 [2009], *appeal dismissed* 15 NY3d 742 [2010]; *Breakwaters Townhomes Assn. Of Buffalo v Breakwaters of Buffalo,* 207 AD2d 963 [1994]; Rego *Park Gardens Owners v Rego Park Gardens Assoc.,* 191 AD2d 621, 622 [1993]; *Eagle Tenants Corp. v Fishbein*, 182 AD2d 610, 611 [1992]; *Horn v 440 E. 57th Co.*, 151 AD2d 112, 120 [1989]; *Revak v SEC Realty Corp,* 18 F3d 81, 90 [2d Cir 1994]). However, these decisions neither held nor implied that the Martin Act preempts properly pleaded common-law causes of action. The Second Department has read *Kerusa* to mean that where the facts as alleged in a complaint "fit within a cognizable

legal theory, and are not precluded by the Martin Act, as they do not 'rely entirely on alleged omissions from filing required by the Martin Act and the Attorney General's implementing regulations,'" such action will be permitted to proceed and a motion to dismiss predicated on a Martin Act preemption theory will be properly denied (*Board of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave., LLC,* 71 AD3d 935, 936 [2010] [citations omitted]).

The Fourth Department, prior to the *Kerusa* decision, held that there is nothing in the Martin Act which precludes a plaintiff from bringing a common-law claim for breach of fiduciary duty "based on such facts as might give the Attorney General a basis for proceeding civilly or criminally against a defendant under the Martin Act" so long as generally accepted pleading standards are met (*Scalp & Blade v Advest, Inc.,* 281 AD2d 882, 883 [2001]).

We are mindful of the fact that, in recent years, a majority of the federal courts in the Southern District of New York have held that, except for fraud, the Martin Act forecloses any private common-law causes of action (*see e.g. Castellano v Young & Rubicam, Inc.,* 257 F3d 171, 190 [2d Cir 2001] [Martin Act preempts breach of fiduciary duty claim]; *Barron v Igolnikov*, 2010 U.S. Dist. LEXIS 22267, *13-15 [SD NY 2010] ["There is no

implied private right of action for any claim covered by the Martin Act," in that case, a gross negligence claim]; *see also Nanopierce Tech., Inc.,* 2003 U.S. Dist. LEXIS 15206 [SD NY 2010] ["allowing private litigants to pursue common law claims 'covered' by the Martin Act would upset the Attorney General's exclusive enforcement power"]). However, not all courts in the Southern District have a similar view (*see e.g. Louros v Kreicas*, 367 F Supp 2d 572, 595-596 [SD NY 2005] [Martin Act does not bar breach of fiduciary duty claim]; *Cromer Fin. Ltd. v Berger,* 2001 US Dist LEXIS 14744 [2001] [Martin Act does not preempt gross negligence claim]). Indeed, in an exhaustive analysis of this issue, Judge Victor Marrero of the Southern District of New York argues cogently and forcefully that, to hold that the Martin Act preempts properly pleaded common-law actions actually serves to "leave [] the marketplace arguably less protected than it was before the Martin's Act passage, which can hardly have been the goal of its drafters" *(Anwar v Fairfield Greenwich Ltd.*, 2010 U.S. Dist. LEXIS 78425 *59 [2010]). Indeed, the Attorney General, in his amicus brief filed on this appeal, argues that "the purpose or design of the Martin Act is in no way impaired by private common-law claims that exist independently of the statute, since statutory actions by the Attorney General and private common-law actions both further the same goal, namely,

combating fraud and deception in securities transactions."

The decision in *Anwar* meticulously traces the decisional journey from actions that undisputedly are preempted by the Martin Act to those that are merely "covered" by the Act. The Court distinguished the decisions of New York State courts which, when carefully read in context with the legislative history of the Martin Act, do not address the issue of preemption vis-a-vis common-law rights of action. Nor do they go as far as the Federal courts have in applying a blanket preemption to cases "covered by" the Martin Act. The court observed that "[w]hen 'violation of' swelled to 'covered by', the specific became general." The result was a significant expansion of the rule of the state courts "which had only dismissed claims relying solely on real estate regulations promulgated by the Attorney General under the Martin Act and had never preempted any causes of action that existed independent of the Martin Act" (2010 U.S. Dist. LEXIS 78425, *40).

In fact, New York State courts seem to be moving in the opposite direction from their federal brethren on the issue of preemption. The Second Department determined that "[n]o case from the Court of Appeals holds that the Martin Act . . . abrogated or supplanted an otherwise viable private cause of action whenever the allegations would support a Martin Act

violation" and reversed the dismissal of the plaintiffs' common-law fraud and breach of contract causes of action (*Caboara* 54 AD3d at 82; *see also Board of Mgrs. of Marke Gardens Condominium,* 71 AD2d at 936).

We grant the Attorney General's motion to take judicial notice of certain memoranda of law filed in *People v Merkin* (Sup Ct, NY County, Index No. 450879/09) (*see RGH Liquidating Trust v Deloitte & Touche LLP*, 71 AD3d 198, 207 [2009] [a court may take judicial notice of court records and files]). *Merkin* involved an action brought by the Attorney General against those defendants for breach of fiduciary duty. The defendants moved to dismiss, arguing that the breach of fiduciary duty claims were preempted by the Martin Act. While acknowledging that some courts held that common-law claims brought by private plaintiffs were preempted by the Martin Act, the Attorney General argued those cases were distinguishable as they were brought by private parties and as such, do not apply to actions brought by the Attorney General. Indeed, in a footnote, the Attorney General argued, as he does here, that "the breach of fiduciary duty claims are wholly independent of the Martin Act and are not preempted" (citing *Scalp & Blade,* 281 AD2d 882 and *Caboara,* 54 AD3d 79). We therefore reject defendant's argument that the position taken by the Attorney General in *Merkin* judicially

estops him from urging that plaintiff's tort claims in this case are not preempted by the Martin Act.

The Attorney General argues in his amicus brief that the Martin Act was intended to supplement, rather than supplant existing causes of action. We note that there is nothing in the act or its legislative history, despite a number of amendments, that indicates any intention on the part of the Legislature to replace common-law causes of action by this legislation. Moreover, there has been no convincing argument advanced that would warrant a finding that private litigation, properly pleaded, impinges on the otherwise exclusive prosecutorial authority of the Attorney General. Since it is conceded that common-law fraud claims are not preempted by the Martin Act, and that such litigation, however voluminous, does not impair the Attorney General's ability to perform his mission under the act, it flies in the face of logic to preclude other valid common-law causes of action in the securities area, most of which would rely on the same facts and documents required for a successful fraud action.

In short, there is nothing in the plain language of the Martin Act, its legislative history or appellate level decisions in this State that supports defendant's argument that the act preempts otherwise validly pleaded common-law causes of action.

This decision is consistent with the general rule of statutory construction "that a clear and specific legislative intent is required to override the common law" (*Hechter v New York Life Ins. Co.*, 46 NY2d 34, 39 [1978]; *Belco Petroleum Corp. v AIG Oil Rig,* 164 AD2d 583, 589 [1991]).

We next take up defendant's argument that plaintiff's claims are barred because neither plaintiff nor Orkney objected to any of defendant's investments in the accounts in writing within 90 days, as required by section 7(d) of the contract.

There is no question that parties may agree to a statute of limitations shorter than that set forth in the CPLR, provided that the agreement is in writing and the shortened period is reasonable (*see* CPLR 201; *Brintec Corp. v Akzo, N.V.*, 171 AD2d 440 [1991]). Such an agreement bars tort claims - including claims for gross negligence - as well as contract claims (*see Par Fait Originals v ADT Sec. Sys., Northeast,* 184 AD2d 472 [1992]).

Applying this principle to this case, we find the 90-day limit set forth in section 7(d) of the parties' investment management agreement (IMA) to be reasonable as a matter of law (*see Wayne Drilling & Blasting v Felix Indus.*, 129 AD2d 633, 634 [1987]). While plaintiff claims that it raised an objection to defendant in August 2007, that objection, if it could be characterized as such, was admittedly oral. The contract clearly

requires objections to be in writing. We do not, however, accept defendant's argument that plaintiff did not object in writing until it filed the current action in December 2008. Drawing all inferences in plaintiff's favor, as we must on a motion to dismiss (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]), we deem the September 24, 2007 amendment to the IMA's investment guidelines to be a written objection by the customer (Orkney) to defendant's acts and transactions, especially in light of plaintiff's August 2007 oral communications to defendant. Therefore, claims that accrued before June 26, 2007 (90 days prior to September 24) are barred (*see Buccino v Continental Assur. Co.*, 578 F Supp 1518, 1522 [SD NY 1983]).

Defendant next argues that section 14(b) of the IMA bars plaintiff's contract claim because that claim does not sufficiently allege gross negligence. This argument is without merit. "[T]here is no requirement that a complaint anticipate and overcome every defense that might be raised in opposition to a cause of action" (*Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 245 [2007]). Moreover, "when deciding whether to grant a motion to dismiss pursuant to CPLR 3211, [a court] must take the allegations asserted within a plaintiff's complaint as true and accord plaintiff the benefit of every possible inference" (*see Samiento v World Yacht Inc.*, 10 NY3d 70,

79 [2008]). Here, plaintiff alleges that defendant invested substantially all of the Excess Reserve Portfolio and Additional Funding Account in subprime and Alt-A MBS, even though (1) it knew that such assets were risky and that it was reducing its own exposure to them and (2) the portfolio/account's goal was "a high level of safety of capital. Plaintiff also alleges that, by investing in subprime and Alt-A MBS, defendant favored one client (Scottish Re Group) over another (Orkney). Since gross negligence consists of "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]), plaintiff's allegations in the complaint are sufficient to survive a motion to dismiss.

Contrary to defendant's next argument, Delaware Insurance Code (18 Del C) § 1323 is not limited to individual mortgages. The plain language of § 1323(a) refers to "bonds, notes or other evidences of . . . trust representing first or second liens upon real estate." When the drafters of the Delaware Insurance Code wanted to make specific reference to individual mortgages, they did so (*see e.g.* § 1323[a][4] ["No mortgage loan upon a leasehold . . ."]). Moreover, assuming arguendo, the investments at issue are, as defendant argues, corporate obligations under section 1309, defendant's documentary evidence does not conclusively

establish that it complied with § 1308 which imposes restrictions on the types of corporate obligations in which an insurer may invest (*see McCully v Jersey Partners, Inc.*, 60 AD3d 562 [2009]; *see also Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). That plaintiff did not specifically allege defendant's failure to comply with section 1308 is not fatal to its claim (*Leon*, 84 NY2d at 88; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]; *Kraft v Sheridan*, 134 AD2d 217, 218 [1987]).

We reject defendant's claim that it owes no duty to plaintiff. As a guarantor of certain of Orkney's obligations, plaintiff sues in Orkney's right as well as its own. Since defendant had discretionary authority to manage Orkney's investment accounts, it owed Orkney a fiduciary duty of the highest good faith and fair dealing (*see Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107 [2005]).

With respect to plaintiff's gross negligence claim, "[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]). An investment advisor may be considered a professional (*see Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 463 [2007]).

With respect to the issue of whether plaintiff's tort claims duplicate the contract claims, neither the breach of fiduciary duty claim nor the gross negligence claim is duplicative of the contract claim (*id.*; *Rodin Props.-Shore Mall v Ullman*, 264 AD2d 367, 368-369 [1999]).

Nor are plaintiff's tort claims barred by the economic loss rule, which denies the purchaser of a defective product a tort action against sellers, manufacturers, installers and servicers for purely economic losses sustained as a result of the defective product (*see Hydro Invs. v Trafalgar Power*, 227 F3d 8, 16 [2d Cir 2000]; *Bristol-Myers Squibb, Indus. Div. v Delta Star*, 206 AD2d 177, 181 [1994]). Even were we to apply the economic loss rule beyond defective products, "the better course is to recognize that the rule allows . . . recovery [for economic loss] in the limited class of cases involving liability for the violation of a professional duty" (*Hydro Invs.*, 227 F3d at 18).

We have considered the parties remaining arguments and find them to be unpersuasive.

Accordingly, the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 29, 2010, which, granted defendant's motion pursuant to CPLR 3211 to dismiss the complaint, should be modified, on the law, to reinstate the contract claims based on defendant's alleged violation of

Delaware Insurance Code Chapter 13 that accrued on or after June 26, 2007, as well as claims for breach of fiduciary duty and gross negligence that accrued on or after that date, and otherwise affirmed, without costs.

M-2455 - Assured Guaranty (UK) Ltd. v J.P. Morgan Investment Management, Inc.

Motion to take judicial notice of certain memoranda of law filed in *People v Merkin* (Sup Ct, NY County, Index No. 450879/09) granted.

All concur.

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

ENTERED: NOVEMBER 23, 2010

CLERK