SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 6, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2271 The Commissioners of the State Insurance Fund,
Plaintiff-Appellant-Respondent,

-against-

Manual Ramos, et al.,
Defendants-Respondents-Appellants,

J.M.R. Concrete of Long Island Corp.,
Judgment-Debtor.

Index 402464/05

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Jan Ira Gellis, New York, for appellant-respondent.

Brian R. Hoch, White Plains, for Manuel Ramos and J.M.R. Concrete Corp., respondents-appellants.

Sullivan Gardner, PC, New York (Christopher Tumulty of counsel), for Lenny Pereira, respondent-appellant.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 14, 2009, which denied plaintiff's motion for summary judgment holding defendants liable for the judgment entered against the judgment-debtor and defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

A number of factors suggest that defendant corporation is the alter ego of the judgment debtor, including the use of

essentially the same name, the fact that the judgment debtor was not formally dissolved, and the overlap of employees, ownership, physical plant and equipment. In addition, the individual defendants collectively owned two-thirds of the judgment debtor. However, although plaintiff argues that the judgment debtor was "stripped of its assets," one of the individual defendants testified that equipment of the judgment debtor, including pumps, trucks and other vehicles, was purchased at fair market value. Moreover, the other principal of the judgment debtor has no ownership in defendant corporation. He testified that he made the decision to cease the judgment debtor's operations and that he so decided because the corporation was losing money and his health had declined. Furthermore, the individual defendants, the principals of defendant corporation, invested substantial sums in defendant corporation. On this record, whether the individual defendants sufficiently dominated the judgment debtor cannot be determined as a matter of law (*see Wm. Passalacqua Builders, Inc. v Resnick Devs. S., Inc.*, 933 F2d 131, 138-139 [1991]). Similarly, and particularly because it is not clear that the individual defendants knew of the liability to plaintiff, the record does not demonstrate conclusively the requisite wrongful

or unjust act toward plaintiff (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]).

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

ENTERED: JANUARY 6, 2011

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3818-
3818A Index 650327/09

DKR Soundshore Oasis Holding Fund Ltd.,
Plaintiff-Appellant,

-against-

Merrill Lynch International, et al.,
Defendants-Respondents.

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International Swaps and Derivatives Association, Inc.,
Amicus Curiae.

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Golenbock Eiseman Assor Bell & Peskoe LLP, New York (David J. Eiseman of counsel), for appellant.

Willkie Farr & Gallagher LLP, New York (Richard D. Bernstein of the Bar of the District of Columbia, admitted pro hac vice, and Mary Eaton of counsel), for respondents.

Allen & Overy LLP, New York (John Williams of counsel), for amicus curiae.

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Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 16, 2010, dismissing the complaint, and bringing up for review an order, same court and Justice, entered April 14, 2010, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously reversed, on the law, with costs, and the complaint reinstated. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

This appeal calls for an examination of the sufficiency of a notice issued pursuant to a credit default swap (CDS) derivative transaction. In a CDS a buyer makes periodic payments to a seller in exchange for the seller's credit protection in connection with the obligation of a third party. In the subject transaction, plaintiff DKR Soundshore Oasis Holding Fund Ltd. (Oasis) was the buyer and defendant Merrill Lynch International (Merrill International) the seller of credit protection against defined "credit events" relating to a certain debt obligation of Urban Corporation in the amount of JPY (Japanese yen) 1.5 billion. The parties' rights and obligations are governed by a standardized master agreement promulgated by the International Swaps and Derivatives Association, Inc.

This action stems from the novation to Oasis and Merrill International, respectively, of a CDS entered into by Riviera Holdings, as buyer, and Deutsche Bank AG, as seller. Pursuant to the initial transaction, Deutsche Bank would have been obligated to pay Riviera JPY 1.5 billion if before May 23, 2008, the contract's termination date, Urban experienced a credit event with respect to the subject debt obligation. One such credit event would have been the "[r]estructuring" of at least JPY 1 billion of Urban's unsubordinated debt. The agreement defined a restructuring as, among other things, "a postponement or other

deferral of a date or dates for either (A) the payment or accrual of interest or (B) the payment of principal or premium." Deutsche Bank's obligation to pay pursuant to the agreement was conditioned upon Riviera's delivery of a "credit event notice" (CEN) and a "notice of publicly available information" (NPAI).

On or about June 6, 2008, Riviera delivered to Deutsche Bank a combined CEN and NPAI along with an explanatory affidavit by Hidetoshi Seino, an analyst employed by Oasis, detailing what is claimed to be the triggering credit event. The initial transaction was novated to Oasis and Merrill International on or about June 12, 2008. Accordingly, on or about July 2, 2008, Oasis delivered to Merrill International a demand for payment set forth in a "notice of physical settlement." By letter of the same date, Merrill International asserted that Riviera's June 6, 2008 notice was invalid "insofar as a reasonable recipient of the notices would not be able to conclude from them that a Restructuring had occurred." Oasis brought this action upon Merrill International's refusal to make payment pursuant to the notice of physical settlement. The breach of contract cause of action and the claims for ancillary relief are based upon Merrill International's failure to settle the transaction pursuant to the notice of physical settlement. In support of their motion, defendants asserted that the purported insufficiency of Oasis's

June 6, 2008 notices conclusively resolves all factual issues and thereby disposes of Oasis's claims as a matter of law. The motion court granted defendants' motion, finding the said notices insufficient. We now reverse.

In the affidavit accompanying the June 6, 2008 notices, Seino stated that he had learned from an officer of Urban that the company had successfully sought to restructure its obligations in excess of JPY 1 billion except for its debts to two banks. In rendering its decision, the motion court noted that the affidavit did not set forth the actual amount that Urban had successfully restructured, as distinguished from the amount sought to be restructured. Accordingly, the court found Oasis's CEN and NPAI deficient on the ground that they did "no more than pointedly raise a question as to whether the events that they purport to report had, in fact, taken place."

On a CPLR 3211 motion, "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Moreover, a motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations,

conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Accordingly, the sufficiency of the subject notices must be evaluated in light of the requirements of the agreement.

The agreement provided that a CEN "must contain a description in reasonable detail of the facts relevant to the determination that a Credit Event has occurred." Similarly, the required "Publicly Available Information" is that which "reasonably confirms any of the facts relevant to the determination that the Credit Event . . . has occurred . . ." Hence, the standard of reasonableness must be applied to determine whether the CEN and the NPAI were in compliance with the agreement. "Reasonable" is defined as "fair, proper or moderate under the circumstances" (Black's Law Dictionary 1293 [8th ed 2004]). The reasonableness of notice is not an issue that lends itself to determination on a CPLR 3211 motion (*see Zuckerwise v Sorceron Inc.*, 289 AD2d 114, 115 [2001]).

We also reject defendants' argument that the CEN was deficient because it did not recite the precise date on which the credit event occurred. As we must give Oasis the benefit of every possible favorable inference, we note that the agreement's notice provision does not call for the same precision set forth in its definition of a credit event. As one commentator has opined, even an inaccuracy would not necessarily invalidate a CEN

"as long as it could subsequently be shown that a [credit event] had in fact occurred" (Firth, Derivatives Law and Practice § 16-120).

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

ENTERED: JANUARY 6, 2011

CLERK

Saxe, J.P., Friedman, McGuire, Abdus-Salaam, Román, JJ.

4004 The People of the State of New York, Ind. 1404/06
Respondent,

-against-

Jeffrey Bogan,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Rither Alabre of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered December 13, 2007, convicting defendant, after a jury trial, of two counts of criminal possession of a forged instrument in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 3 to 6 years, unanimously affirmed.

We reject defendant's claim that the verdict was against the weight of the evidence with regard to the element of knowledge (*see People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant's overall pattern of behavior when he passed two counterfeit bills and immediately thereafter, as well as evidence that the texture of these bills was noticeably different from that of genuine currency, warranted an inference that defendant

knew they were counterfeit (*see People v Johnson*, 65 NY2d 556, 562 [1985]).

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

ENTERED: JANUARY 6, 2011

CLERK

Saxe, J.P., Friedman, McGuire, Abdus-Salaam, Román, JJ.

4005 Queen Mother Dr. Delois Blakely, Index 115368/07
Plaintiff-Appellant,

-against-

Shirley Pitts, et al.,
Defendants,

Madison Park Investors LLC,
Defendant-Respondent.

_____

Queen Mother Dr. Delois Blakely, appellant pro se.

Tarter Krinsky & Drogin LLP, New York (Debra Bodian Bernstein of counsel), for respondent.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 13, 2009, which, in an action seeking, inter alia, to set aside an alleged fraudulent mortgage loan, denied plaintiff's motion to vacate a prior order, same court (Richard F. Braun, J.), entered August 22, 2008, dismissing the complaint for failure to appear at a compliance conference, unanimously affirmed, without costs.

The motion court's denial of plaintiff's motion was a provident exercise of discretion (*see generally Goldman v Cotter*, 10 AD3d 289, 291 [2004]). Although the illness that allegedly prevented plaintiff from attending the compliance conference could be considered a reasonable excuse (*see e.g. Frenchy's Bar & Grill v United Intl. Ins. Co.*, 251 AD2d 177 [1998]), plaintiff has failed to allege facts setting forth a meritorious cause of

action (*see M-Dean Realty Corp. v General Sec. Ins. Co.*, 6 AD3d 169, 171 [2004]).

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

ENTERED: JANUARY 6, 2011

CLERK

Saxe, J.P., Friedman, McGuire, Abdus-Salaam, Román, JJ.

4007 The People of the State of New York, Ind. 3759/08
Respondent,

-against-

Vincent Miller,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Renee A. White, J. at plea; Ronald A. Zweibel, J. at sentence), rendered June 18, 2009, as amended July 8, 2009, convicting defendant of burglary in the third degree, and sentencing him to a term of 2⅓ to 7 years, unanimously affirmed.

The requirements of due process were satisfied when the sentencing court conducted a thorough inquiry into the facts with respect to whether defendant absconded from a drug treatment program in violation of his plea agreement, and provided defendant with a reasonable opportunity to present his explanations, which the court properly rejected (*see People v Barnes*, 72 AD3d 516 [2010], *lv denied* 15 NY3d 747 [2010]).

We also perceive no basis for reducing the sentence as a matter of discretion in the interest of justice.

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

ENTERED: JANUARY 6, 2011

CLERK

Andrias, J.P., Friedman, McGuire, Abdus-Salaam, JJ.

4008 Henry Donald Cohen, Index 113906/08
Plaintiff-Appellant,

-against-

Hunter College, et al.,
Defendants-Respondents.

_____

Robert B. Davis, New York, for appellant.

Andrew M. Cuomo, Attorney General, New York (Patrick J. Walsh of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered November 6, 2009, which, in an action alleging unlawful termination in violation of Labor Law § 740, granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

The motion court correctly determined that plaintiff failed to plead that defendants violated a "law, rule or regulation" (Labor Law § 740[2][a]; *see Bordell v General Elec. Co.*, 88 NY2d 869 [1996]; *Connolly v Macklowe Real Estate Co.*, 161 AD2d 520 [1990]). Defendants' internal policies concerning workplace violence and emergency withdrawal of students are not rules or regulations promulgated to enforce a law.

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

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

ENTERED: JANUARY 6, 2011

CLERK

Saxe, J.P., Friedman, McGuire, Abdus-Salaam, Román, JJ.

4014 Santiago Rodriguez, Index 117827/05
Plaintiff-Appellant,

-against-

Freight Masters, Inc., et al.,
Defendants-Respondents.

_____

Miller & Miller, Brooklyn (Andrew R. Miller of counsel), for appellant.

Law Offices of James J. Toomey, New York (Evy L. Kazansky of counsel), for Freight Masters, Inc. and Steven S. January, respondents.

Andrew M. Cuomo, Attorney General, Albany (Julie S. Mereson of counsel), for Patricia A. Rydak, respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered on or about July 21, 2009, which granted the motion by defendants Freight Masters and January for summary judgment dismissing the complaint as against them, unanimously modified, on the law, without costs, to award summary judgment to defendant Rydak dismissing the complaint as against her, and otherwise affirmed.

Defendants' examining neurologists' affirmed medical reports, together with MRI studies and other medical treatment records, established prima facie that plaintiff sustained no serious injury. The medical experts found on examination that there were no limitations in plaintiff's range of motion in his

cervical, thoracic or lumbar spine (*see e.g. Atkinson v Oliver*, 36 AD3d 552 [2007]). They also concluded that the herniation at L5-S1, on which plaintiff's claim of serious injury is primarily based, was not causally related to the accident. This conclusion is supported by post-accident MRI studies conducted in 2003 and early 2004, as well as the experts' neurological findings. Indeed, plaintiff's own expert physician conclusorily averred only that the injuries that incurred on the date of the accident made plaintiff "more susceptible" to serious injury in the future.

As to a 90/180-day injury, plaintiff alleged in his first supplemental bill of particulars (verified by his attorney) that he was confined to his bed and cell at the Eastern Correction Facility for five months after the accident. However, he failed to substantiate his 90/180-day claim with medical proof (*see DeSouza v Hamilton*, 55 AD3d 352 [2008]). While his expert physician's report of his examination of plaintiff four years after the accident emphasized a surgically repaired herniated disc, MRI studies conducted in the first year after the accident indicated only a degenerative condition of the spine and no herniation.

Since the record presents no issues of fact, we modify the order to award summary judgment also to defendant Rydak (*see*

Rodless Props., L.P. v Westchester Fire Ins. Co., 40 AD3d 253, 255 [2007], *lv denied* 9 NY3d 815 [2007]).

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

ENTERED: JANUARY 6, 2011

CLERK

Saxe, J.P., Friedman, Abdus-Salaam, Román, JJ.

4015 Jeremy S. Pitcock, Index 107847/09
Plaintiff-Appellant,

-against-

Kasowitz, Benson, Torres
& Friedman, LLP, et al.,
Defendants-Respondents.

_____

Balestriere Fariello, New York (John G. Balestriere of counsel), for appellant.

Sullivan & Cromwell LLP, New York (Penny Shane and Sarah Stoller of counsel), for respondents.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered June 2, 2010, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the cause of action of the amended complaint alleging tortious interference with a contract, unanimously affirmed, with costs.

This is the second action filed in state court against defendant law firm for damages arising from the termination of plaintiff's partnership for alleged personal misconduct, and his later termination by his subsequent employer. In this action, plaintiff asserts that defendants interfered with his new employment contract by exchanging correspondence with the new law firm about a conflict of interest created by plaintiff's move (Conflict Letters). However, in the prior action, plaintiff already litigated the claim that defendants interfered with his new employment contract by circulating false and malicious

statements about him (*see* 74 AD3d 613 [2010]).

Plaintiff's attempt to embellish his claim does not alter the result that res judicata bars the current action, as the allegations concerning the Conflict Letters "arose from the same transaction or series of transactions" as his prior allegations (*see Marinelli Assoc. v Helmsley-Noyes Co., Inc.*, 265 AD2d 1, 5 [2000]). The Conflict Letters could have been discovered in time to assert them in the allegations of the prior complaint, and res judicata "applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]).

Equally unavailing is plaintiff's contention that res judicata does not apply because the court's decision with respect to the prior action was not a final determination on the merits. The court's dismissal of the prior action was not merely a dismissal for a technical pleading defect, but a dismissal manifestly on the merits, based on a finding that plaintiff's own admissions precluded him from prevailing on his cause of action against such defendants, regardless of what other facts he might allege (*see Lampert v Ambassador Factors Corp.*, 266 AD2d 124 [1999]).

Furthermore, even if the tortious interference with a contract cause of action was not barred by the doctrine of res judicata, plaintiff has failed to state such a claim. He has not

alleged, in nonconclusory language, the essential terms of the parties' contract, including the specific provisions upon which liability is predicated (*see Matter of Sud v Sud*, 211 AD2d 423, 424 [1995]). Nor has he alleged that the contract would not have been breached "but for" defendants' conduct (*Burrowes v Combs*, 25 AD3d 370, 373 [2006], *lv denied* 7 NY3d 704 [2006]). Indeed, plaintiff cannot claim that "but for" the Conflict Letters, he would not have been terminated inasmuch as he has already alleged that it was the defamatory statements that caused him to be fired.

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

ENTERED: JANUARY 6, 2011

CLERK

Saxe, J.P., Friedman, McGuire, Abdus-Salaam, Román, JJ.

4017-
4018 Ind. 3971/01

The People of the State of New York,
Respondent,

-against-

Frank Pagan,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Ethan Greenberg, J.), entered on or about March 5, 2009, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

We find no basis for a discretionary downward departure to level two (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant's criminal

history and pattern of sexual violence outweigh the mitigating factors he asserts.

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

ENTERED: JANUARY 6, 2011

CLERK

Saxe, J.P., Friedman, McGuire, Abdus-Salaam, Román, JJ.

4019N- Index 117013/09
4019NA Ithilien Realty Corp.,
Plaintiff-Respondent,

-against-

180 Ludlow Development LLC, et al.,
Defendants-Appellants.

_____

Gabay-Rafiy & Bowler LLP, New York (Anne Marie Bowler of counsel), for appellants.

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

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Orders, Supreme Court, New York County (Debra A. James, J.), entered July 2, 2010 and August 27, 2010, which granted plaintiff's motion for a preliminary injunction staying the cure period of defendants' notice to cure on the condition that plaintiff file an undertaking, and fixed the amount of the undertaking at $10,000, respectively, unanimously affirmed, with costs.

The court providently exercised its discretion in granting plaintiff preliminary injunctive relief since plaintiff demonstrated a likelihood of success on the merits, irreparable harm to its building if the relief were not granted, and that a balancing of the equities weighs in its favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]). The purported ventilation "violation" caused by defendants' construction of a cantilever over plaintiff's building was likely

not a violation of the Building Code or other law. Permitting defendants to install a mechanical ventilation system, which would consist of electric motors and a fan on the roof, external ventilation shafts with connections extending through the facade of the building into ten apartments, and interior exhaust fans, would permanently alter plaintiff's tenement building. While plaintiff's building is occupied, nothing in the record shows that defendants had resumed construction of its structure since it ceased work in November 2008. The undertaking in the nominal amount of $10,000 was "rationally related" to the potential damages that defendants would incur if the preliminary injunction proves to be unwarranted (*Madison/Fifth Assoc. LLC v 1841-1843 Ocean Parkway, LLC*, 50 AD3d 533 [2008]; *Visual Equities v Sotheby's, Inc.*, 199 AD2d 59 [1993])).

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

ENTERED: JANUARY 6, 2011

CLERK