SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 27, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Friedman, DeGrasse, Freedman, JJ.

9559 The People of the State of New York by Andrew W. Cuomo, etc., Plaintiff-Appellant, Index 453388/09

-against-

Charles Schwab & Co., Inc., Defendant-Respondent.

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Eric T. Schneiderman, Attorney General, New York (Brian A. Sutherland of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Faith E. Gay of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 31, 2011, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a)(7), deemed appeal from judgment, same court and Justice, entered April 4, 2012, dismissing the complaint, and, so considered, said judgment unanimously modified, on the law, to deny the motion as to the second and third causes of action insofar as they are based upon conduct that took place prior to September 5, 2007, and otherwise affirmed, without costs.

This is an enforcement action brought by the Attorney General under the Martin Act (General Business Law art 23-A) and

General Business Law § 349 as well as Executive Law § 63(12). The Martin Act causes of action are based on General Business Law § 352-c(1)(a), which, where applicable, prohibits fraud, concealment, suppression or false pretense, and General Business Law § 352-c(1)(c), which prohibits false representations or statements to induce or promote the issuance, purchase or sale of securities within or from the State. It is alleged in the complaint that defendant, Charles Schwab & Co., Inc. (Schwab), a registered securities broker-dealer, engaged in fraudulent and deceptive conduct in the sale of auction rate securities (ARS) to the investing public. The Attorney General asserts that Schwab misrepresented ARS to its customers as safe, liquid investments while concealing the fact that they were complex financial instruments with significant, inherent and increasing liquidity risks.

An explanation of the Attorney General's claims requires a description of the ARS market, which is set forth in the complaint as follows:

> "17. Auction rate securities are long-term bonds issued by municipalities, corporations and student loan companies, or perpetual equity instruments issued by closed end mutual funds, which pay variable interest rates that reset periodically through a bidding process known as a Dutch auction. The auctions also serve as the mechanism by which auction rate securities are bought and sold.

"18. At a Dutch auction, bidders generally state the number of auction rate securities they wish to purchase and the minimum interest rate they are willing to accept. Bids are ranked, from lowest to highest, according to the minimum interest rate specified by each bidder. The lowest interest rate required to sell all of the auction rate securities available at auction, known as the 'clearing rate,' becomes the rate payable to all holders of that particular security until the next auction. Depending on the structure of the auction rate security specified in the offering documents, auctions are typically held every 7, 28 or 35 days.

"19. When there are an insufficient number [*sic*] of buyers participating in an auction to purchase all of the securities being offered for sale, the auction 'fails' and typically no orders to buy or sell are fulfilled. As auction rate securities can only be bought or sold when auctions clear, the most immediate and obvious consequence of an auction failure is that current holders of that issue of auction rate securities are unable to sell their holdings, and suffer a loss of liquidity. If auctions fail repeatedly, investors are left with no option but to hold the securities to maturity - potentially as long as 30 years, or in the case of auction rate preferred securities, perpetually - with no ability to access their money.

"20. During the period when auctions are not clearing, investors are paid a default rate of interest, called a 'fail rate,' which is specified in the origination documents.

"21. Until February 2008, underwriter broker-dealers generally supported the auction rate securities market by systematically purchasing auction rate securities into their own inventories in order to make up for shortfalls in natural demand that would have, in the absence of such support, caused the auctions for those securities to fail. These proprietary bids placed by the underwriter broker-dealers for their own accounts were known as 'support bids.'

> "22. The underwriter broker-dealers were under no legal obligation to place such support bids, and could refrain from doing so at any time in their sole discretion."[1]

The complaint alleges that Schwab became aware of failures in the ARS market and associated liquidity risks as early as August 2007. In February 2008, broker-dealers had stopped making support bids, causing a wholesale failure in the market for ARS. At that time, Schwab directed that its sales force advise its customers that ARS did not carry a 100% certainty of liquidity. Accordingly, investors who had purchased ARS from Schwab found themselves holding investments that were not as liquid as they had been purportedly led to believe.[2] The complaint alleges that "Schwab persistently failed to disclose, or made representations that concealed, the risk that customers could lose liquidity should auctions fail."

In dismissing the Martin Act causes of action, the court concluded that the "misrepresentations alleged were true when made and the complaint contains no allegations that ARS were

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[1]The complaint's description of the ARS market is consistent with one given by the Second Circuit in *Wilson v Merrill Lynch & Co., Inc.* (671 F3d 120, 123-124 [2d Cir 2011]).

[2]In referring to this history, the court suggested that it was treating the motion as one for summary judgment pursuant to CPLR 3211(c). Such treatment would not have been permissible as the record does not reflect that the parties were given notice as required by the statute.

liquid at a time when they were illiquid." The court based this conclusion on its own finding that there had been no failures in the auctions in the 20 years preceding August 2007. In reaching this conclusion, the court erroneously engaged in an evaluation of the merits of the Martin Act causes of action. On a motion to dismiss for failure to state a cause of action, it is not the function of the court to evaluate the merits of the case (*Khan v Newsweek, Inc.*, 160 AD2d 425, 426 [1st Dept 1990]). The court also found that the complaint did not allege facts from which it could be inferred that Schwab made any actionable representations after September 5, 2007, the date of the first failure of a class of ARS sold by Schwab. We conclude that the second and third causes of action, which are based on the Martin Act, should not have been dismissed.

The crux of the Martin Act causes of action is that Schwab's brokers, employees and managers misled its customers by variously representing ARS as "safe, low risk, highly liquid investments, or cash management alternatives, or similar to money market funds" without disclosing that the liquidity of these instruments was dependent on the successful operation of the Dutch auctions. We find the Martin Act causes of action to be sufficiently pleaded given the fact that the statute is remedial and should be broadly construed in order to attain its beneficent purpose (*see*

People v Lexington Sixty-First Assoc., 38 NY2d 588, 595 [1976]). Under the statute, the word "fraud" is broadly defined so as to embrace even acts which "*tend* to deceive or mislead the purchasing public" [emphasis added](*id.* [citation omitted]). Based on this standard, the complaint sets forth actionable Martin Act claims notwithstanding the absence of a specific allegation that Schwab represented ARS to be liquid at times when they were illiquid. We note that analogous representations regarding ARS have been found to be sufficiently material to be actionable within the context of an enforcement proceeding by the Securities and Exchange Commission (*see SEC v Morgan Keegan & Co.*, 678 F3d 1233 [11th Cir 2012]). Notwithstanding the Martin Act's liberal pleading standard, the complaint does not allege any facts from which it can be reasonably inferred that Schwab engaged in actionable conduct after September 5, 2007, when the first failure of Schwab-issued ARS occurred.

The court correctly rejected Schwab's argument that the Martin Act does not embrace fraudulent transactions involving customers who were not residents of the State. As noted above, General Business Law § 352-c(1)(c) proscribes fraudulent representations to induce or promote the issuance, purchase or sale of securities within or from the State. The necessary nexus with New York is established by allegations that many of the

transactions that gave rise to the actionable conduct set forth in the complaint occurred here (*see e.g. In re Wachovia Equity Sec. Litig.*, 753 F Supp 2d 326, 381 n 50 [SD NY 2011]; *In re Beacon Assoc. Litig.*, 745 F Supp 2d 386, 433 [SD NY 2010]). Specifically, the complaint alleges that the ARS sold by Schwab to its customers were underwritten and/or managed by New York based financial institutions, that Schwab transmitted its customers' buy, sell and hold orders to the trading desks of financial institutions located in New York and that the substantial majority of the auctions of the ARS were held in New York.

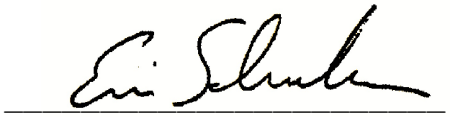
The first cause of action was properly dismissed inasmuch as Executive Law § 63(12), upon which it is based, does not create independent claims, but merely authorizes the Attorney General to seek injunctive and other relief on notice prescribed by the statute in cases involving persistent fraud or illegality (*see State of New York v Cortelle Corp.*, 38 NY2d 83, 86 [1975]). Also, the fourth cause of action is not maintainable inasmuch as General Business Law § 349 does not apply to securities

transactions (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268 [1st Dept 2003]).

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

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

ENTERED: AUGUST 27, 2013



DEPUTY CLERK

Andrias, J.P., Moskowitz, Freedman, Manzanet-Daniels, Feinman, JJ.

9779 The People of the State of New York, Dkt. 71337C/07
Respondent,

-against-

Jeffrey Johnson,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Harold Adler, J. at suppression hearing; Seth Marvin, J., at nonjury trial and sentencing), rendered January 21, 2010, convicting defendant of attempted criminal possession of a weapon in the fourth degree, and attempted possession of ammunition, and sentencing him to an unconditional discharge, reversed, on the law, defendant's suppression motion granted, and the accusatory instrument dismissed.

In a New York City Housing Authority building, which the testifying officer characterized as a "drug-prone" location, the officer observed defendant descending the stairs to the lobby. Upon seeing the police, defendant "froze," "jerked back," and appeared "as if he was going to go back up the stairs," although

he never retreated up the stairs.[1] The officer asked defendant to come downstairs, and defendant complied. The officer inquired whether defendant lived in the building, and defendant replied in the affirmative, whereupon the officer asked defendant to produce identification. Defendant immediately clarified that he was visiting his girlfriend, who lived in the building, and informed the officer that his identification was located in his pocket. As defendant moved his hands to retrieve it, the officer's partner grabbed defendant's left arm and pulled his hand behind his back, revealing a handgun inside defendant's coat pocket. The officer seized the gun and placed defendant under arrest.

When the prosecutor asked the officer why he had engaged defendant in conversation, the officer replied "It is a NYCHA building and we're allowed to ask anybody inside the building--" As the court sustained an objection, the officer interjected, "It is a prone drug [*sic*] location."

A request for information is authorized where there is an "objective, credible reason, not necessarily indicative of criminality," to initiate the level one encounter (*see People v Moore*, 6 NY3d 496, 498 [2006]). The circumstances herein did not

[1]The arrest paperwork omitted any mention of defendant attempting to go back upstairs. On cross, the officer explained that while defendant "attempted" to walk back up the stairs, he had never actually walked back up the stairs.

provide an objective credible reason for a level one request for information.

Presence in a high-crime or drug-prone location, without more, does not furnish an objective credible reason for the police to approach an individual and request information (*see People v McIntosh*, 96 NY2d 521, 526-527 [2001]). As we have observed, "[T]he reputation of a location, however notorious, does not provide a predicate for subversion of the Fourth Amendment" (*People v Marine*, 142 AD2d 368, 372 [1st Dept 1989]).

Nor does an individual's desire to avoid contact with police – even in a high-crime neighborhood – constitute an objective credible reason for making a level one inquiry (*Matter of Michael F.*, 84 AD3d 468 [1st Dept 2011]). In *Michael F.*, two uniformed officers patrolling in a "high-crime area," stopped their car and approached a group of young men, including the defendant, congregating on a street corner. When the officers exited the marked car and approached, the defendant "turned around, walked quickly away and looked back several times over the course of two minutes" (*id.* at 468). We held:

> "This did not justify the subsequent level one encounter, in which the testifying officer followed appellant in his police car, stopped the car, asked appellant to stop and asked him what he was doing. Appellant's conduct was ambiguous, and, in the circumstances presented, was no more than an exercise of his 'right to be let alone' in response to the

> initial approach of the other officers, rather than flight" (*id.*).

The People cite *People v Holmes* (81 NY2d 1056, 1058 [1993]) for the proposition that "[f]light . . . in conjunction with equivocal circumstances . . . might justify a police request for information." However, even if defendant's conduct on the staircase can be equated with flight – which is extremely doubtful, given the testimony that he simply stopped descending the stairs upon viewing the officers – there were no equivocal circumstances (*compare Holmes*, 81 NY2d at 1057 [defendant with unidentified bulge in right jacket pocket walks away upon seeing police]). The right of police to patrol inside NYCHA buildings does not eliminate the requirement that each level of intrusion be supported by the corresponding level of suspicion.

Although subsequent events led to an otherwise lawful stop and frisk, those events were the result of the unauthorized encounter. Accordingly, defendant is entitled to suppression because the police action was impermissible at its inception.

> All concur except Andrias, J.P. and Feinman, J. who dissent in a memorandum by Andrias, J.P. as follows:

ANDRIAS, J.P. (dissenting)

Defendant's abrupt, halting, and furtive movements provided the police with an objective credible reason for asking defendant if he was a resident of the New York City Housing Authority (NYCHA) building, and subsequent events led to a lawful stop and frisk. Accordingly, because defendant's suppression motion was correctly denied, I respectfully dissent, and would affirm the judgment convicting defendant of attempted criminal possession of a weapon in the fourth degree and attempted possession of ammunition.

The uniformed police officers entered the building to check on other officers stationed inside. As the officers made their way towards the lobby, they saw defendant descending the stairs. When defendant saw the officers, he froze, jerked back, began to retreat, then stopped and stood on the stairs. Based on defendant's reaction, and given the drug-prone nature of the building, the officers "suspected [defendant of] trespassing," and asked him to come down the stairs to "make sure if he lived in the building."

Defendant initially told the officers that he lived there. However, when asked for identification, he began to stutter, and changed his story to say that he was visiting his girlfriend. Although defendant stated that he had his identification in his

pocket, he began moving his hands "all over the place, especially around his chest area," which the officers interpreted to be threatening and indicative of possession of a weapon. To "take control of the situation" before it could "get out of hand," an officer grabbed defendant's left arm and brought it behind defendant's back, which caused defendant's open jacket to open up further and reveal a silver pistol in the netted interior coat pocket. One officer removed the pistol from the pocket, and another handcuffed defendant.

The New York Police Department is the lawful custodian of NYCHA apartment buildings, and its duties include keeping the buildings free of trespassers (*People v Williams*, 16 AD3d 151 [1st Dept 2005], *lv denied* 5 NY3d 771 [2005]). When the officers observed defendant in a drug-prone building and saw him freeze, jerk back and begin to retreat when he saw them, they reasonably suspected him of trespassing and had an objective credible reason to ask him whether he lived there, which constituted a level one request for information (*see People v Crawford*, 279 AD2d 267, 267 [1st Dept 2001] ["(the) defendant, upon exiting the ground floor apartment, looked at the officer and started walking up the staircase, whereupon he abruptly reversed course. The officer, therefore, had an 'objective credible reason' to ask defendant

whether he lived there"], *lv denied* 96 NY2d 799 [2001] ; *People v Lozado*, 90 AD3d 582, 583 [1st Dept 2011] ["Police officers conducting a nighttime vertical patrol of a Housing Authority building saw defendant coming up the stairs in a ninth floor stairwell. When defendant saw the police, he 'paused' and 'looked around,' displaying 'nervous' behavior. These circumstances provided an officer with an 'objective credible reason' to ask defendant where he was heading"], *lv denied* 18 NY3d 925 [2012] ; *People v Hendricks*, 43 AD3d 361 [1st Dept 2007] [Where building "had a history of drug activity and trespassing, and although defendant's activities were not necessarily indicative of criminality, the officer was warranted in making an inquiry to determine if defendant was legitimately in the building"]).

Matter of Michael F. (84 AD3d 468 [1st Dept 2011]), on which the majority relies, involved uniformed officers approaching a group of young men congregating on a street corner, not inside a NYCHA building. It is not dispositive of the right of the officers in this case, who were assigned to patrol NYCHA buildings, to make a level one request for information after they observed defendant engage in behavior that was inconsistent with that of a resident or guest when he saw them in the lobby. Nor is there any basis upon which to disturb the court's credibility

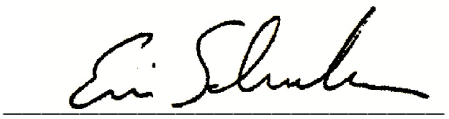
determinations, which are supported by the record (*see People v Tinort*, 272 AD2d 206 [1st Dept 2000], *lv denied* 95 NY2d 872 [2000]).

When defendant said that he lived in the building, the request to see his identification was reasonably tailored to address the officer's suspicion that defendant was trespassing. When defendant changed his story, stuttered, and began moving his hands "all over the place, especially around his chest area," although he had said his wallet was in his pocket, the officers reasonably interpreted defendant's actions to be indicative of possession of a weapon, and reasonably suspected that they were in danger of physical injury. This provided an objective basis for the frisk that resulted in the recovery of the loaded pistol concealed in defendant's interior jacket pocket (*see People v West*, 71 AD3d 435 [1st Dept 2010] ["defendant's presence in the lobby of a public housing apartment building known as a drug-prone location," the officer's observations of defendant's actions upon seeing the officer, defendant's responses to the arresting officer's reasonable inquiry as to defendant's reason to be there, and the "movement of defendant's hands to his bulging pockets" all justified the officer's decision to frisk him], *lv denied* 15 NY3d 758 [2010] ; *People v Robinson*, 278 AD2d 808, 809 [4th Dept 2000] ["when defendant was asked to produce

identification, his hand went first to his jacket pocket before he retrieved his wallet from the back pocket of his pants," which "provided the officers with a founded suspicion that criminal activity was afoot" and "established a reasonable suspicion that defendant posed a threat to their safety"] [internal quotation marks omitted], *lv denied* 96 NY2d 787 [2001]).

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

ENTERED: AUGUST 27, 2013



DEPUTY CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10045 The People of the State of New York, Ind. 946/06
Respondent,

-against-

Terrence Rodney,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lindey J. Ramistella of counsel), for respondent.

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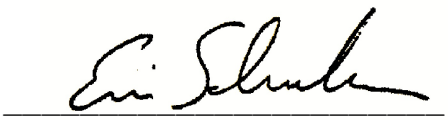
Appeal from judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered March 25, 2010, convicting defendant, after a jury trial, of manslaughter in the second degree, and sentencing him, as a second felony offender, to a term of 7 to 14 years, held in abeyance, and the matter remanded to the Supreme Court for a hearing consistent herewith.

The issue of whether the dismissal of the weapon charge against the witness affected the witness's cooperation in this prosecution is not ascertainable on this record. In addition, the witness's subjective belief whether such dismissal was a benefit may also bear upon the issue of bias, requiring further inquiry. A hearing is required to clarify the circumstances

surrounding the dismissal of the weapon charge and whether the witness believed he was receiving a favorable result as a consequence of his testimony in this case.

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

ENTERED: AUGUST 27, 2013



DEPUTY CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10046 Erez Tadmor, Index 111457/10
Plaintiff-Respondent,

-against-

New York Jiu Jitsu Inc.,
Defendant-Appellant.

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Cruser, Mitchell & Novitz, LLP, New York (Beth S. Gereg of counsel), for appellant.

Ogen & Sedaghati, P.C., New York (Eitan Alexander Ogen of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 13, 2012, which denied defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion is granted. The Clerk is directed to enter judgment accordingly.

The motion court erred when it denied defendant's motion for summary judgment where plaintiff allegedly suffered an injury to his left knee while sparring with another student in a mixed martial arts class. It is well established that the doctrine of assumption of risk generally applies where the plaintiff is injured while voluntarily participating in a sport or recreational activity, and the injury-causing event is a "known, apparent or reasonably foreseeable consequence of the participation" (*Turcotte v Fell*, 68 NY2d 432, 439 [1986]). The

participant engaging in a sport or recreational activity "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). Further, the assumption of risk doctrine considers the appreciation of risk measured "against the background of the skill and experience of the particular plaintiff" (*Maddox v City of New York*, 66 NY2d 270, 278 [1985]).

Here, at the moment of the alleged injury, it was plaintiff's first day in the advanced mixed martial arts class where he participated in a sparring match with a "stockier" opponent. However, plaintiff had participated in sparring sessions within the beginner classes for over a month and a half. Additionally, plaintiff's experience included service in the Israeli army between 1997 and 2000, where he fought in Lebanon. In 2002, plaintiff received 10 weeks of combat training. This training provided instruction on hand-to-hand attacks and defense against armed and unarmed attacks. Between 2005 and 2009, plaintiff was employed as an air marshal, where his training included "survival krav maga."

At the deposition, plaintiff answered questions about the application he filled out when he started taking classes with defendant. Plaintiff indicated that he wrote "yes" to prior

martial arts experience and wrote a description of that experience as "survival krav maga." Further, plaintiff explained "that was the name" of the training he received as an air marshal, which he later described as "fighting."

Given plaintiff's extensive training plus his experience in mixed martial arts, he had a full appreciation of the risks involved in fighting, punching, kicking and grappling during the mixed martial arts sparring sessions. While the dissent asserts that the trainer's assurances concealed or heightened the risk of injury here, it is important to note that plaintiff was exposed to the same risk of injury when he fought the "tall thin" student as well as the "stockier" student, i.e., before any alleged assurances were made. Plaintiff already lost a sparring match to the tall thin student in the advanced class. Then, he had an opportunity to observe the stockier student before entering the cage. His statements to the trainer noting the size difference between himself and the "stockier" opponent demonstrated his appreciation of the risk before sparring. Moreover, even though plaintiff asserts that the take down that allegedly caused his knee injury was an advanced maneuver, take downs were a reasonably foreseeable consequence of participating in the mixed

martial arts sparring session (*see e.g. Edelson v Uniondale Union Free School Dist.*, 219 AD2d 614 [2d Dept 1995]).

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

FEINMAN, J. (dissenting)

I respectfully dissent, because, in my view, the motion court, having identified a triable issue of material fact, properly denied defendant's summary judgment motion.

Plaintiff enrolled in beginner classes at defendant's martial arts academy in January 2010. Defendant's employee, Steve Williams, instructed plaintiff's classes, which included sparring sessions between students. In March 2010, Williams suggested that plaintiff try an advanced class. When plaintiff asked Williams if he would appropriately "fit there," Williams told him that he "shouldn't be worried. You'd be okay there."

On March 11, 2010, plaintiff attended his first advanced class, which Williams also instructed. During the class, plaintiff first sparred with a "tall thin guy" and lost. A "stocky guy" then sparred with the thin guy and won. Williams then instructed plaintiff to spar with the "stocky guy". Because the stocky guy looked "tougher," plaintiff told Williams, "It doesn't look like a match." Williams replied, "Don't worry about it" and "I got your back. He knows what he's doing. He's got the skills, the techniques to control himself." Plaintiff then proceeded to spar with the "stocky guy." According to plaintiff, the "stocky guy" used an unfamiliar, advanced maneuver to force plaintiff to the floor. Due to his resulting injuries, plaintiff

underwent two knee surgeries.

As the majority notes, plaintiff had received some martial arts training while serving in the Israeli army from 1997 through 2000. He also received training in defense against armed and unarmed attacks in 2002, prior to working as an air marshal from 2005 through 2009. However, plaintiff never received formal martial arts training. In addition, I cannot find sufficient support in the record for defendant's assertion, adopted by the majority, that plaintiff participated in survival krav maga. Indeed, he testified at his deposition to the contrary.

> "Q Have you ever heard of krav maga?
> A Yes. It's an Israeli martial arts.
> Q Did you ever participate in krav maga either here or in Israel?
> A No."

While he also testified that krav maga was "talked about" as part of his air marshal training, he explained that the training was called "fighting" and it was defendant's employee Sean who labeled it krav maga.

> "Q So, when you wrote 'survival krav maga,' is that what the training for air martial [sic] is called, or is survival krav maga something similar to the training?
> A We call it 'fighting,' but that's the closest name that Sean would recognize, krav maga. Again, I didn't fill this form [out] by myself."

This disputed detail, although not outcome dispositive, is, of

course, relevant to evaluation of the assumption of risk doctrine as it applies to this plaintiff's experience.

The motion court denied defendant's motion for summary judgment, finding that plaintiff, in opposition to defendant's motion, raised questions of fact as to whether plaintiff assumed the risk of injury through his participation in the advanced class. Specifically, the motion court found that questions of fact existed as to (1) whether the risk of injury to which plaintiff would be exposed by participating in the advanced class was known, apparent, or reasonably foreseeable; and (2) whether defendant exercised reasonable care to protect plaintiff from unassumed, concealed, or unreasonably increased risks.

"Summary judgment is a drastic remedy, to be granted only where the moving party . . . demonstrate[s] the absence of any material issues of fact" and where, "upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]; *see also Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492-493 [1st Dept 2012]). On a summary judgment motion, the court should draw all reasonable inferences in favor of the nonmoving party (*Vega*, 18 NY3d at 503).

A plaintiff who voluntarily participates in an athletic

event assumes the risk of "injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (*Turcotte v Fell*, 68 NY2d 432, 439 [1986]). Conversely, sport participants do *not* assume "concealed or unreasonably increased risks," and defendants have a duty to exercise care to eliminate these risks (*Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658 [1989]). A plaintiff's awareness of a risk should be assessed against the background of the skill and experience of the particular plaintiff (*Maddox v City of New York*, 66 NY2d 270, 278 [1985]). In all, "[t]he assumption of risk to be implied from participation in a sport with awareness of the risk is generally a question of fact for a jury" (*id.* at 279).

A defendant's motion for summary judgment based on assumption of risk should be denied if there are questions of fact as to whether the defendant concealed or unreasonably heightened the risk of harm beyond that usually inherent in the sport (*see Myers v Friends of Shenendehowa Crew, Inc.*, 31 AD3d 853, 854-855 [3d Dept 2006] [issue of fact as to whether the defendant unreasonably heightened the risk inherent in rowing by telling the plaintiff to "keep working" after she felt faint]; *Swan v City of New York*, 272 AD2d 394 [2d Dept 2000] [basketball player could not have assumed the risk of injury as a matter of

law because the hole in which he tripped was concealed by growing vegetation]).

Irish v Deep Hollow (251 AD2d 293 [2d Dept 1998]) is substantially on all fours with the present case. In *Irish*, the plaintiff, a novice horseback rider, participated in a horseback riding session offered by the defendant. When the plaintiff expressed her concern about participating in the session because she was inexperienced, the guide assured her that there would be no problem because the horses would be kept to a walking pace. Although the ride started at a walking pace, the guide caused the pace to be increased to a canter, at which time the plaintiff fell and sustained injury. The Second Department reversed the motion court's grant of summary judgment to the defendant, and held that "a question of fact [existed] as to whether the plaintiff assumed the increased risk of riding on a horse at a cantering pace *after being told* that the horse would only travel at a walking pace" (*id.* at 294 [emphasis added]).

Here, as in *Irish*, triable issues of fact exist as to whether plaintiff assumed the risk of injury by participation in an advanced take-down maneuver after being told by his instructor that the sparring session lacked such a risk. Similar to *Myers* and *Swan*, a triable issue of material fact exists as to whether defendant's conduct, including Williams's assurances, concealed

or unreasonably heightened the risk of injury inherent in the sport of martial arts.

Defendant argues that summary judgment should be granted because the risk of injury from participating in a martial arts sparring session was "perfectly obvious" to plaintiff. It cannot be said, as a matter of law, that the risk of injury by an advanced take-down maneuver was "perfectly obvious" to plaintiff mere seconds after his instructor assured him that he would protect him, the opponent would "control himself," and plaintiff should not "worry about it."

In concluding that plaintiff appreciated the risk of sparring, the majority cites plaintiff's prior sparring with the thin student, observing the "stocky" student's fight, and commenting on the size difference between the stocky student and himself. While these events do tend to show plaintiff's appreciation of the risk of injury, he did not *accept* that level of risk at that time. He expressed his concern about the "match" with that opponent and only accepted the risk of sparring with him once the instructor had reassured him. Just as in *Irish*, the amount of risk we may conclude as a matter of law that plaintiff actually assumed was reduced by these assurances.

The majority further concludes that, while the take-down executed here may have been an advanced maneuver, take-downs in

general are reasonably foreseeable consequences of sparring. However, this sort of categorical approach is not consistent with "unreasonably increased or concealed" risk jurisprudence (*Benitez* at 658 [internal quotation marks omitted]). For example, in *Irish*, the Court found that the plaintiff assumed the risk of injury from falling off a horse that was only walking, as her instructor assured her it would; she did not, as a matter of law, assume the risk of injury from falling off a horse that was cantering. Here, plaintiff assumed the risk of sparring with an opponent who would use "the skills, the techniques to control himself," not one using an advanced take-down maneuver.

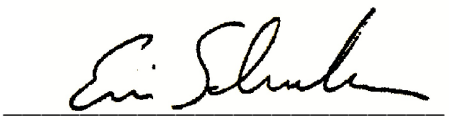
Additionally, the majority's reliance on *Edelson v Uniondale Union Free School Dist.* (219 AD2d 614 [2d Dept 1995]), is misplaced. The plaintiff in that case, a high school senior with three years of wrestling experience, was injured in a wrestling match against an opponent who was in a higher weight classification than the plaintiff. Unlike in this case, the *Edelson* plaintiff was informed prior to the match that he would be wrestling an opponent in a higher weight class and was never assured that he would be protected or that his opponent would "control himself." The Court determined that the defendant had not unreasonably increased or concealed the plaintiff's risk of injury merely by matching him with a heavier wrestler. Here, we

address a different question: whether defendant's *assurances* concealed or unreasonably heightened the risk of injury in a martial arts match with a more advanced opponent, such that the risk was not assumed by plaintiff. This, as correctly found by the motion court, is a factual question for the jury (*see Irish*, 251 AD2d at 294).

Accordingly, I would affirm the order of the motion court.

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

ENTERED: AUGUST 27, 2013



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Andrias, J.P., Saxe, DeGrasse, Feinman, JJ.

9341 Maro A. Goldstone, Index 604235/07
Plaintiff-Appellant,

Thomas R. Newman,
Plaintiff,

-against-

Gracie Terrace Apartment Corporation,
Defendant-Respondent.

_____

Duane Morris LLP, New York (Thomas R. Newman of counsel), for appellant.

Tarter, Krinsky & Drogin LLP, New York (Andrew N. Krinsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered October 9, 2012, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Leland G. DeGrasse
Paul G. Feinman, JJ.

9341
Index 604235/07

_____x

Maro A. Goldstone,
Plaintiff-Appellant,

Thomas R. Newman,
Plaintiff,

-against-

Gracie Terrace Apartment Corporation,
Defendant-Respondent.

_____x

Plaintiff Maro A. Goldstone appeals from an order of the Supreme Court, New York County (Debra A. James, J.), entered October 9, 2012, which, denied her motion for a preliminary injunction.

Duane Morris LLP, New York (Thomas R. Newman of counsel), and Ressler & Ressler, New York (Bruce Ressler of counsel), for appellant.

Tarter, Krinsky & Drogin LLP, New York (Andrew N. Krinsky and David J. Pfeffer of counsel), for respondent.

SAXE, J.

A cooperative shareholder suffered extensive property damage to her apartment when the 10,000-gallon water tank above her unit overflowed, causing flooding in her apartment and, thereafter, accumulations of toxic mold. The plan of renovation and repair proposed by the cooperative's board of directors would necessitate a 50-square-foot reduction in space of the apartment's more than 1,400 square feet. The shareholder objected to the proposal, claiming it violated the terms of the proprietary lease, and sought a preliminary injunction prohibiting the board from proceeding with its planned work. The motion court denied the application, and this appeal ensued.

Plaintiff Maro A. Goldstone has been a proprietary lessee of Penthouse B in defendant's co-op building at 605 East 82nd Street since 1972, when she and her former husband purchased the apartment. Plaintiff Thomas R. Newman is Ms. Goldstone's second husband and an occupant of the apartment. After the water tank overflowed and flooded plaintiffs' apartment in August 2003, and toxic mold was subsequently discovered, defendant cooperative corporation had a contractor gut the apartment's interior down to the cement, floors, ceilings and walls. Since then, the apartment has remained in uninhabitable condition.

Plaintiffs commenced this action in 2007, seeking damages

and equitable relief based on causes of action for breach of contract, breach of the warranty of habitability, constructive and actual eviction, and a variety of torts. In 2010, this court declared that plaintiffs were entitled to a 100% abatement of maintenance from the date the water damage began until the apartment was restored to habitable condition (73 AD3d 506 [1st Dept 2010]), and in 2011 the motion court granted plaintiffs summary judgment on their claims for breach of the warranty of habitability and breach of the lease obligation to make repairs.

In a motion made just before the present motion, defendant sought an injunction granting it access to the apartment to perform work. That motion was granted over plaintiffs' opposition, in which they made some of the same arguments raised in the present motion.

Plaintiff Goldstone then brought the motion under consideration here, challenging defendant's plan for the renovation of their apartment and seeking to prevent the work from proceeding. Plaintiff asserted that she and her husband gave defendant plans prepared by their architects in 2008 providing for a redesign of the exterior walls of the apartment to prevent water infiltration, and also provided bids from four qualified waterproofing contractors. However, rather than responding to that proposal, defendant had another engineer

prepare plans providing for waterproofing and facade repair work for the building, including the renovation of plaintiffs' apartment, that defendant asserted avoided the prohibitively expensive need to demolish all the exterior walls.

Plaintiff argued that defendant's plan would decrease the size of the interior of the apartment, in violation of her rights under the proprietary lease. Specifically, plaintiff asserted that by placing insulation on the apartment's interior, defendant's alterations would decrease the size of the interior and alter the apartment's configuration, because it would cause the loss of 2½ inches along every wall where the insulation was placed, which plaintiffs' expert calculated as a total loss of 50 square feet. Plaintiff stated that this alteration would reduce the hallway to a width smaller than that required by the Building Code, and that to maintain a hallway of the necessary width, the adjoining room would have to be decreased in size, and its interior partitions reconfigured, or new interior partitions installed, with new doors. These changes would, in turn, require alterations or adjustments or replacements of plaintiffs' storage and display units and their custom-designed kitchen countertops and built-ins.

Plaintiff relied on the foregoing assertions to contend that the reduction in the size and dimensions and the reconfiguration

of the partition in the living space would violate the terms of the proprietary lease, which defines "the apartment" as "the rooms in the building *as partitioned on the date of the execution of this lease . . .* together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned rooms, which are allocated exclusively to the occupant of the apartment" (emphasis added).

In opposition to plaintiff's motion, defendant did not dispute the opinions of plaintiffs' architects. Rather, it argued that (1) plaintiff could not show a likelihood of success on the merits because the board's decision as to how to make repairs was shielded by the business judgment rule, (2) plaintiff could not show irreparable harm because the reduction in space is de minimis (50 square feet in a more than 1,400- square-foot apartment) and could be compensated by a reduction in the maintenance charges if appropriate, and (3) the equities are balanced in defendant's favor because plaintiff's proposal would require the excessive alternative of demolishing the exterior walls, which would cause undue expense to all the shareholders, to whom the co-op owed a fiduciary duty.

The motion court denied plaintiff's motion to enjoin defendant from performing the contemplated repair work on the interior walls of the apartment, characterizing the resulting

diminution in the square footage of the apartment as de minimis and observing that the claimed injury would be compensable by money damages. We affirm.

Injunctive relief may only be awarded if the movant makes a clear showing of a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and that the balancing of the equities weighs in its favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Initially, we agree with plaintiff that her showing established the probable success on the merits of her claim that the repairs will constitute a breach of the proprietary lease, because defendant does not dispute the assertion by plaintiffs' expert that the plan will create a diminution of apartment space and necessitate some reconfiguration and alterations (*see Gracie Terrace Apt. Corp. v Goldstone*, 103 AD2d 699 [1st Dept 1984], *appeal dismissed* 63 NY2d 952 [1984]). Defendant's reliance on the business judgment rule (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]) is misplaced. The rule does not shield cooperatives from liability for breaches of contract (*see Whalen v 50 Sutton Place S. Owners*, 276 AD2d 356, 357 [1st Dept 2000]). "[W]hile it may be good business judgment to walk away from a contract, this is no defense to a breach of contract claim" (*Dinicu v Groff Studios Corp.*, 257 AD2d 218, 222-223 [1st

Dept 1999]). A breach of a tenant's proprietary lease by the cooperative's board of directors may be the best of the options open to the board, but that does not protect it from liability for that breach.

Nevertheless, we do not believe that plaintiff has made a clear showing of irreparable harm, or that the balance of the equities is in her favor. To establish irreparable harm, plaintiff relies not only on the loss of square footage, but also on the claim that the apartment will have to be reconfigured, which involves the moving of partitions and doors and will necessitate adjustments or replacements of many features of the apartment, such as built-in cabinetry. Initially, we find that any costs incurred in making alterations to built-in cabinetry or replacing structural items or components of the apartment or in addressing any other difficulties that are engendered by any necessary adjustments are largely compensable in money damages.

Beyond that, while we recognize that the anticipated diminution of square footage alone constitutes an injury, we agree with the motion court that in itself the injury is de minimis insofar as a claim of irreparable harm is made. We do not rely for this conclusion on *Eastside Exhibition Corp. v 210 E. 86th St. Corp.* (18 NY3d 617 [2012], *cert denied* __ US __, 133 S Ct 654 [2012]), since that case concerned a landlord's

alteration of leased commercial space, which raises different concerns from those raised by an alteration that reduces a residential tenant's leased space (*see Broadway 500 W. Monroe Mezz II LLC v Transwestern Mezzanine Realty Partners II, LLC*, 80 AD3d 483 [1st Dept 2011]; *Lombard v Station Sq. Inn Apts. Corp.*, 94 AD3d 717, 721 [2d Dept 2012]). Nevertheless, an alteration to residential quarters may be so minor that even though the tenant may be entitled to some form of compensation, a finding of irreparable harm is not warranted. Cases in which interference was sufficient to justify either injunctive relief or orders preventing the work from proceeding (*see e.g. Forest Close Assn., Inc. v Richards*, 45 AD3d 527, 529 [2d Dept 2007]; *Matter of Lite View, LLC v New York State Div. of Hous. & Community Renewal*, 97 AD3d 105 [1st Dept 2012]) do not preclude the possibility that interference in other circumstances may be so minimal as to fail to justify injunctive relief. Plaintiff failed to make a clear showing that the possible square footage reduction, a small fraction of the total footprint of the apartment, was more than de minimis. This conclusion, however, does not preclude compensation by other means.

Moreover, the balance of the equities does not weigh in plaintiff's favor. Although plaintiff proposed an alternative method of performing the work on the exterior, she failed to

respond to defendant's assertion that this method would entail substantial extra expenses that defendant was under a fiduciary duty to avoid imposing on the other cooperative shareholders (*see Bryan v West 81 St. Owners Corp.*, 186 AD2d 514 [1st Dept 1992]). The claimed impact to plaintiff of the planned modifications to her apartment, most of which will be compensable based on plaintiffs' breach of contract theory, is far outweighed by the expense to the co-op of demolishing and rebuilding exterior walls, especially when those walls have already been repaired and treated for waterproofing.

Plaintiff improperly raised her argument that defendant accorded her disparate treatment for the first time in her reply papers before the motion court (*see Caribbean Direct, Inc. v Dubset LLC*, 100 AD3d 510, 511 [1st Dept 2012]). In any event, no such claim was made out in the record before us.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered October 9, 2012, which denied plaintiff's motion for a preliminary injunction, should be affirmed, without costs.

All concur.

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

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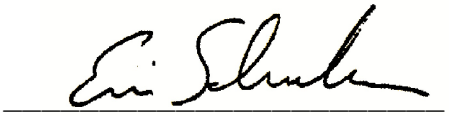

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