SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 14, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3680 In re Robert M. Scarano, Jr., Index 103455/10
Petitioner,

-against-

The City of New York, et al.,
Respondents.
- - - - - -
AIA New York State, Inc.,
The Bronx Chapter of the AIA,
AIA Brooklyn Chapter,
The Long Island Chapter of AIA,
The Staten Island Chapter of the AIA,
The New York Society of Architects,
The Society of American Registered
Architects and the Architects Council
of New York City, Inc.,
Amici Curiae.

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Zetlin & De Chiara, LLP, New York (Raymond T. Mellon of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for respondents.

The Marantz Law Firm, Rye (Neil G. Marantz of counsel), for amici curiae.

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Determination of respondent Commissioner of the New York City Department of Buildings (DOB), dated March 3, 2010, which adopted the recommendation of the Administrative Law Judge (ALJ)

that petitioner, among other things, be prohibited from filing any papers with DOB pursuant to Administrative Code of the City of New York § 28-211.1.2, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Paul Wooten, J.], entered June 18, 2010) dismissed, without costs.

While we find no support for some of the findings of the ALJ, we agree that petitioner's actions in submitting misleading photographs, falsely certifying that all objections had been resolved, and claiming entitlement to extra floor area resulting from a nonexistent community facility are supported by substantial evidence and warrant the finding that DOB can no longer rely on him to submit honest paperwork. Thus, there was a basis for prohibiting him from submitting further documents to DOB.

Although this matter was brought pursuant to CPLR article 78, we exercise our authority under CPLR 103(c), and in this particular case, nostra sponte convert the petition to a declaratory judgment action and address petitioner's constitutional claims (*see Matter of Medicon Diagnostic Labs. v Perales*, 74 NY2d 539, 544 [1989] [noting that the Appellate Division had sua sponte converted the article 78 proceeding to a

declaratory judgment action]; *Matter of Oglesby v McKinney*, 28 AD3d 153, 158 [2006], *affd* 7 NY3d 561 [2006] ["this (article 78) proceeding should be converted, sua sponte, to a declaratory judgment action"]).

Petitioner's challenge to the constitutionality of Administrative Code of the City of New York § 28-211.1.2 on equal protection grounds is unavailing. The statute treats all persons equally, as DOB may refuse to accept filings from any person found to have made a false statement in a submission to DOB, and does not create a distinction between similarly situated persons. Notably, the statute does not focus on the person's place of business, but rather, focuses on whether the person files documents with DOB. Although the statute applies only to persons filing in New York City, territorial uniformity of the laws within the state is not constitutionally required (*Matter of Colt Indust. v Finance Adm'r of City of N.Y.*, 54 NY2d 533 [1982], *appeal dismissed* 459 US 983 [1982]). In any event, there is a rational basis for this code provision because the City has a legitimate interest in promoting public safety by eliminating the filing of false information related to the construction and repair of buildings in New York City.

Petitioner's due process argument also is without merit. Although petitioner has a constitutionally protected interest in

his professional license, he does not have any protected interest in the ability to file with DOB. Moreover, his license was not revoked by the proceedings below, only his ability to file papers with DOB in New York City was affected. Indeed, other architects within petitioner's firm may still file with DOB.

Even if petitioner had a constitutionally protected interest in the ability to file with DOB, he was afforded proper notice and an opportunity to be heard. Indeed, petitioner received an eight-day hearing before an ALJ, during which he was able to present two expert witnesses and cross-examine the respondents' witnesses.

Lastly, the overbreadth and First Amendment arguments need not be addressed because they were not raised by petitioner before the agency or in this proceeding, but rather, were raised for the first time by the amici curiae in this proceeding.

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

ENTERED: JULY 14, 2011

Elba Iris Castro
DEPUTY CLERK

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4548 The People of the State of New York, Respondent, Ind. 481/08

-against-

Reginald Herbin, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Denise Fabiano of counsel), and Simpson Thacher & Bartlett LLP, New York (Taamiti Bankole of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered March 10, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Although defendant's expert testified that the knife possessed by defendant could be opened by pressing a thumb disk, he also testified that he observed the officers release the blade simply by flicking the knife with their wrists, which satisfies the definition of a gravity knife

(*see People v Neal*, 79 AD3d 523, 524 [2010]).

Contrary to defendant's claim, the statutory prohibition of possession of a gravity knife (Penal Law § 265.01[1]; *see also* Penal Law § 265.02[1] [elevating to felony]) is not unconstitutionally vague. The statute defines a gravity knife as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device" (Penal Law § 265.00[5]). This language provides notice to the public and clear guidelines to law enforcement as to the precise characteristics that bring a knife under the statutory proscription (*see People v Stuart*, 100 NY2d 412, 420-421 [2003]).

The court properly exercised its discretion in precluding a physics professor from offering expert testimony concerning the meanings of several physics concepts. The proposed testimony would likely have confused the jury by defining centrifugal force inconsistently with the statutory definition of a gravity knife, and by introducing other physics terms that are not pertinent to the elements of the offense. Moreover, the court adequately instructed the jury as to the definition of a gravity knife such that any technical knowledge outside the ken of the typical juror was unnecessary (*see People v Taylor*, 75 NY2d 277, 288 [1990]).

The court also correctly instructed the jury that, to convict defendant of criminal possession of a weapon in the third degree, it was required to find that he knew he possessed a knife, but did not have to know it was a gravity knife (*see Neal*, 79 AD3d at 524; *People v Best*, 57 AD3d 279, 280 [2008], *lv denied* 12 NY3d 756 [2009]; *see also People v Wood*, 58 AD3d 242, 253 n 5 (2008), *lv denied* 12 NY3d 823 [2009]).

The court properly rejected defendant's other requests for jury instructions. The proposed instructions would have added new elements to the definition of gravity knife. That is the province of the Legislature, not the courts.

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

ENTERED: JULY 14, 2011

Elba Iris Castro
DEPUTY CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4755 Ann Marie Tierney, as Executrix of the Estate of Angelina Trotta, Deceased,
Plaintiff-Respondent,

-against-

Leonard Girardi, M.D., et al.,
Defendants,

David B. Messinger, M.D., et al.,
Defendants-Appellants.

Index 101150/07

Vouté, Lohrfink, Magro & Collins, LLP, White Plains (Laura K. Silverstein of counsel), for appellants.

Jayne L. Brayer, Bronx, for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered May 25, 2010, which, inter alia, denied defendants-appellants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this medical malpractice action, plaintiff, as executrix of the estate of Angelina Trotta, alleges that defendants deviated from the standard of care by failing to administer an anticoagulant to the decedent upon her development of atrial fibrillation, following heart surgery (cardiac catheterization), causing her to suffer a stroke, which led to her disability, and death at the age of 81. Preliminarily, we reject defendant Dr. Messinger's argument that he was not obligated to care for

decedent once he finished performing the cardiocatheterization on her. Dr. Messinger continued to owe a duty of care because he established a doctor-patient relationship with decedent, consulted with her, her family, and the cardiologist concerning her treatment following the cardiocatheterization, and continued to monitor her condition (*see Cregan v Sachs*, 65 AD3d 101, 110 [2009]). We find, however, that defendants demonstrated, through the affidavits of their experts, their entitlement to judgment as a matter of law dismissing the complaint on the ground that the treatment provided to decedent by defendant doctors comported with good and accepted medical practice. For instance, defendants' experts opined that it was appropriate to treat the atrial fibrillation with certain medications because anticoagulation would have presented an inordinate risk of bleeding, given, among other things, the decedent's prior medical condition.

The burden shifted to plaintiff to demonstrate the existence of a triable issue of fact. The IAS court properly excused plaintiff's procedural oversights, including the untimely filing of her expert's affirmation, where there was no showing that plaintiff acted in bad faith or that the late filing prejudiced defendants, and where the court permitted defendants to respond to the supplementary affidavit (*see* CPLR 2001; 2004;

3101[d][1][i]; *St. Hilaire v White*, 305 AD2d 209, 210 [2003]). Plaintiff's submissions raised a triable issue of fact as to whether defendants departed from the proper standard of care. Accordingly, defendants' motion for summary judgment was properly denied.

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

ENTERED: JULY 14, 2011

Elba Iris Castro
DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Moskowitz, Freedman, JJ.

5051-
5052 Frank Cusumano, et al., Index 115389/05
90032/07
Plaintiffs, 590032/09

-against-

Extell Rock, LLC, et al.,
Defendants,

Regions Facility Services, Inc.,
Defendant-Appellant.

[And Another Action]

Hard Rock Café International (USA), Inc.,
Second Fourth-Party Plaintiff-Appellant,

-against-

Twin City Fire Insurance Company,
Second Fourth-Party Defendant-Respondent.

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Steven L. Levitt & Associates, P.C., Williston Park (James J. Daw, Jr. of counsel), for Regions Facility Services, Inc., appellant.

Jones Hirsch Connors & Bull P.C., New York (Steven H. Kaplan of counsel), for Hard Rock Café International (USA), Inc., appellant.

Rivkin Radler LLP, Uniondale (Stuart M. Bodoff of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered May 3, 2010, dismissing the second fourth-party complaint, and bringing up for review an order, same court and Justice, entered April 9, 2010, which, inter alia, granted the

motion of second fourth-party defendant Twin City Fire Insurance Company (Twin City) for summary judgment dismissing the second fourth-party complaint and denied the cross motion of second fourth-party plaintiff Hard Rock Café International, Inc. (Hard Rock) for summary judgment declaring that Twin City's disclaimer of coverage is invalid and that Hard Rock is an additional insured under the Twin City insurance policy, unanimously modified, on the law, to the extent of striking therefrom the decretal paragraph dismissing the complaint and substituting therefor a provision declaring that Twin City has no duty to defend and indemnify Hard Rock in the underlying action, and as so modified, affirmed, without costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The subject insurance policy issued by Twin City to defendant-appellant Regions Facility Services, Inc. (Regions) provided coverage to additional insureds when "you have agreed, in writing, in a contract or agreement that another person or organization be added as an additional insured . . ." As the Construction Agreement, which named Hard Rock as an additional insured was not signed by either Regions or Hard Rock, and the Work Authorization was only signed by Regions, and the signature page, which included a signature line for Hard Rock to sign, was

not signed at the time of the accident, we agree with the court that Hard Rock was not entitled to additional insured status (*see Nicotra Group, LLC v American Safety Indem. Co.*, 48 AD3d 253 [a legal document signed by one party is not considered to be executed as that term is used in an insurance policy]; *see also National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 571 [2006]).

We further find that the policy was not ambiguous as to who was required to sign the agreement. As both the Work Authorization and the Construction Agreement contained signature lines meant for Hard Rock and Regions, we find no ambiguity exists as to who was required to sign an agreement naming Hard Rock as an additional insured (*see Rodless Props., L.P., v Westchester Fire Ins. Co.*, 40 AD3d 253 [2007], *lv denied* 9 NY3d 815 [2007]).

The judgment is modified to the extent indicated because although the court properly determined that Twin City had no duty to defend and indemnify Hard Rock, dismissal of the second fourth-party complaint was not the appropriate procedural course. Rather, the court should have issued a declaration in favor of Twin City (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989] ["when a court resolves the merits of a declaratory judgment action against the plaintiff, the proper course is not

to dismiss the complaint, but rather to issue a declaration in favor of the defendants"]; *Lanza v Wagner*, 11 NY2d 317, 334 [1962], *appeal dismissed* 371 US 74 [1962], *cert denied* 374 US 901 [1962]).

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

ENTERED: JULY 14, 2011

Elba Iris Castro
DEPUTY CLERK

Gonzalez, P.J., Tom, Andrias, Moskowitz, Freedman, JJ.

5061 The People of the State of New York, Ind. 6167/05
Respondent,

-against-

Alexander Hall,
Defendant-Appellant.

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Mischel & Horn, P.C., New York (Richard E. Mischel of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at suppression motion; Ruth Pickholz, J. at jury trial and sentence), rendered November 8, 2007, convicting defendant of manslaughter in the second degree, assault in the third degree (two counts) and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 5 to 15 years on the manslaughter count, 1 year on the assault counts and 15 years on the weapon count, unanimously affirmed.

At about 3:30 A.M. on the morning of October 12, 2005, defendant and three of his friends, after spending the night drinking at a club, were involved in an altercation with a club promoter, which ended with the arrival of police. As they walked to their cars, one of defendant's friends was hit on the head with a broken bottle, sustaining a cut. Records of cell tower

transmissions disclosed that defendant and one companion first drove south toward his apartment but, at 4:02 A.M., headed back north toward the club. At 4:08 A.M., calls placed from both men's phones were relayed from a cell tower located to the north of the club. Defendant's call was received by one of his friends riding in the other car, who related that defendant had stated that he was on his way back to the club.

At about 4:10 A.M., defendant opened fire on a group of club patrons who had just left the club and remained in front of the establishment after its 4:00 A.M. closing time. One bullet struck Tabitha Perez, the mother of a seven-year-old boy, piercing her lung and causing her death. Another round struck Ruben Batista, a homeless man, in the leg, shattering a bone. A third victim, Jeremy Soto, was injured by a bullet that passed through his calf and another that grazed his finger. The parties stipulated that a call was made to 911 at 4:11 A.M., and cell phone records revealed that a call made from defendant's phone at 4:13 A.M. was handled by a cell tower at 179th Street, just north of the club, located between 176th and 177th Streets. Defendant was identified as the shooter at a lineup by a witness who had described him as young, with dark hair and a light complexion, dark eyes and distinctive, arched eyebrows.

Some nine months later, as the result of an unrelated

narcotics investigation, police arrested defendant's traveling companion on the night of the shootings, recovering a .357 magnum revolver. While the condition of the bullets that struck the victims did not permit them to be matched to the gun, a ballistics expert testified that the weapon was capable of firing those rounds.

Defendant was indicted for murder in the second degree for causing the death of Tabitha Perez, assault in the first degree for causing serious physical injury to Jeremy Soto, assault in the first degree for causing serious physical injury to Ruben Batista, and criminal possession of a weapon in the second degree for possessing a loaded pistol with intent to use it unlawfully against another, all on or about October 12, 2005. The murder and assault counts alleged that defendant had acted with depraved indifference to human life.

The jury acquitted defendant of murder in the second degree but found him guilty of manslaughter in the second degree. Similarly, the jury acquitted defendant of both counts of assault in the first degree but found him guilty of assault in the third degree. The jury found defendant guilty of criminal possession of a weapon in the second degree.

The court properly denied defendant's motion to suppress historical cell site location information (CSLI) for calls made

over his cell phone during the three-day period surrounding the shootings. These records were obtained by court order under 18 USC § 2703(d), which does not require that the People establish probable cause or obtain a warrant. Even if a cell phone could be considered a "tracking device" under 18 USC § 3117(b) to the extent that it permits the tracking of movement, the People are not thereby precluded from obtaining CSLI records pursuant to § 2703 (*see In re Application of United States for Order Directing Provider of Elec. Communication Serv. to Disclose Records to Govt.*, 620 F3d 304, 308-310 [3d Cir 2010]; *In re Applications of United States for Orders Pursuant to Title 18, United States Code, Section 2703(d)*, 509 F Supp 2d 76, 79-80, n 8 [D Mass 2007]).

Obtaining defendant's CSLI without a warrant did not violate the Fourth Amendment because, under the Federal Constitution, defendant had no reasonable expectation of privacy while traveling in public (*see e.g. United States v Knotts*, 460 US 276, 281 [1983]; *In re Application*, 620 F3d at 312). Defendant's argument for suppression under the New York State Constitution (*see People v Weaver*, 12 NY3d 433, 445 [2009]) is unpreserved (*see e.g. People v Garcia*, 284 AD2d 106, 108 [2001], *lv denied* 97 NY2d 641 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

Although *Weaver* requires the police to obtain a warrant supported by probable cause for the installation of a global positioning system device, it does not address the matter of CSLI records. Additionally, in *Weaver* the device was used to track the defendant's movements for 65 days, as opposed to a mere 3 days in the instant case. To the extent that prolonged surveillance might require a warrant under federal law (*see United States v Maynard*, 615 F3d 544 [DC Cir 2010], *cert denied* __ US __, 131 S Ct 671 [2010]), we find that three days of CSLI records does not constitute a protracted surveillance.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). On the contrary, the evidence of defendant's guilt was overwhelming. There is no basis for disturbing the jury's determinations concerning credibility and identification. The People's case included an eyewitness's identification, defendant's confession to two civilians, his partly incriminating statements to police, and compelling circumstantial evidence.

Since there was extensive evidence connecting defendant to the crime besides the identification, the trial court properly exercised its discretion in denying defendant's request to call an expert on eyewitness identification (*see People v Abney*, 13 NY3d 251, 269 [2009]). The trial court properly exercised its

discretion in admitting computer-generated evidence and denying defendant's request to permit the jury to visit the crime scene. Defendant's challenge to the court's charge is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. In any event, any error in regard to the court's discretionary determinations and its jury charge was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We find the sentence not excessive under the circumstances of this case.

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

ENTERED: JULY 14, 2011

Elva Iris Castro
DEPUTY CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2177-
2177A Joan C. Siegel, as Administrator of the Estate of Jerome Siegel,
Plaintiff-Appellant,

-against-

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

Empire City Subway Company (Limited), etc.,
Defendant-Respondent.

[And a Third-Party Action]

Empire City Subway Company (Limited),
Second Third Party Plaintiff,

-against-

Westmoreland Construction, Inc.,
Second Third Party Defendant-Respondent.

Index 102930/02
590948/04

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

Conway, Farrell, Curtin & Kelly, P.C., New York (Darrell John of counsel), for Empire City Subway Company (Limited), respondent.

Hannum Feretic Prendergast & Merlino, LLC, New York (Beth A. Kennelly of counsel), for Westmoreland Construction, Inc., respondent.

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Order, Supreme Court, New York County (Karen Smith, J.), entered May 2, 2008, which granted the motion of defendant Empire City Subway Company (Limited) for summary judgment dismissing the complaint and cross claims as against it and second third-party

defendant Westmoreland Construction's cross motion for summary judgment dismissing the second third-party complaint, unanimously affirmed, without costs. Order, same court and Justice, entered October 10, 2008, which insofar as appealable, denied plaintiffs' motion for renewal, unanimously affirmed, without costs.

Plaintiff's decedent was injured on May 7, 2001 when he fell in the roadway while crossing at the intersection of 68th Street and York Avenue in Manhattan. He commenced the instant personal injury action alleging that defendants, Empire City Subway Company (ECS) and Westmoreland Construction, Inc. (Westmoreland), who had previously performed work in that area, negligently maintained the roadway and/or created the defective condition that caused his fall.[1]

At his deposition, the decedent testified that he stepped onto uneven pavement, but did not recall looking down, and did not see any defect in the roadway. The decedent testified that although he began to cross in the designated crosswalk, he changed direction to walk diagonally when he saw an opportunity to cross to a different corner.

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[1]The decedent died on March 14, 2010 and there is no indication that his death is related to this accident which occurred nine years prior. Joan C. Siegel was appointed as Administrator of his estate on November 17, 2010 and was subsequently substituted as a plaintiff in this case.

The decedent testified as to the general direction he was walking and the side of the street where he fell, but not the actual path he took through the intersection. When asked to identify the defect in a photograph of the roadway, he said, "I am not sure. I'm really not sure." However, in a second photograph, he circled two depressions or cracks. He testified that he was able to identify the defect in the second photograph because he recognized the approximate location where he fell on the eastern side of the street.

A local manager of operations at defendant ECS testified at deposition that ECS performed conduit installation work at the intersection and retained Westmoreland to excavate a two-foot-wide trench, install fiber optic cable, and restore the roadway in September 1997 and April 1998. He further testified that markings on the asphalt indicated that Consolidated Edison utilities run under the purported defect identified by plaintiff, and that ECS's conduit runs parallel and adjacent to the defect. He further testified that the purported defect, described by Westmoreland as a "sink hole," could have been caused by any occurrence that disturbed the sub base of the roadway including a water main break, sewer problems, or soil compaction.

Defendant Westmoreland submitted evidence that there had been a water main leak at the intersection four months prior to

the date of plaintiff's accident. The president of Westmoreland testified that the "sink hole" did not appear to be part of the ECS trench.

Although evidence established that the depression or cracks were subsequently patched, a court-ordered search for post-accident repair records from both ECS and Westmoreland showed that the repair was not performed by either defendant. A representative of defendant City of New York testified at deposition that when restoration paving work is found to be defective, including "sinkage," the City issues a request for corrective action to the permittee. The City's representative further testified that a search of its records showed that there were no corrective action requests made in connection with restoration work in the area where the decedent's accident allegedly occurred.

On December 17, 2007, ECS moved for summary judgment dismissing the complaint and all cross claims against it. Four days later, Westmoreland cross-moved for summary judgment dismissing the second third-party complaint.

On May 2, 2008, the motion court granted ECS's and Westmoreland's motions on the grounds that plaintiff failed to raise a triable issue of fact because he was unable to identify the defect, and failed to submit evidence that properly

authenticated his photographs. Plaintiff moved to reargue and renew, but the motion was denied on September 22, 2008.

For the reasons set forth below, the motion court correctly determined that defendants are entitled to summary judgment dismissal of the complaints against them. It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury (*see Rudner v New York Presbyt. Hosp.*, 42 AD3d 357 [2007]; *Reed v Piran Realty Corp.*, 30 AD3d 319 [2006], *lv denied* 8 NY3d 801 [2007]; *Fishman v Westminster House Owners, Inc.*, 24 AD3d 394 [2005]). In this case, the decedent's deposition testimony indicated that he circled the defect in the photograph based on his recognition of the approximate location where he fell -- not his recognition of the defect itself. This basis for identification of the defect amounts to the type of "rank speculation" that generally warrants summary judgment dismissal (*see e.g. Kane v Estia Greek Rest.*, 4 AD3d 189 [2004]; *Burnstein v Mandalay Caterers*, 306 AD2d 428 [2003]).

Even had the decedent positively identified the "sink hole" as the defect that caused him to fall, he nevertheless failed, in

opposition to defendants' summary judgment motions, to raise a triable issue of fact as to whether defendants caused or created the defect (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). A plaintiff's "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a defendant's motion for summary judgment (*id.* at 562).

In the instant case, plaintiff argues that the proximity of the ECS conduit to the alleged defect raises questions as to whether defendants' work caused the defect. This argument is unpersuasive, particularly in light of the three years that elapsed between the installation of the conduit and the decedent's fall. Plaintiff's unsupported assertion that it could have been defendants' conduit rather than that of Consolidated Edison or the water main break that caused the purported defect is mere conjecture and fails to raise a triable issue of fact (*see e.g. Ortner v City of New York*, 50 AD3d 475 [2008]; *Flores v City of New York*, 29 AD3d 356 [2006]; *DiPierro v City of New York*, 25 AD3d 306 [2006]; *Robinson v City of New York*, 18 AD3d 255 [2005]; *Hallas v New York Univ.*, 259 AD2d 444 [1999]).

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

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

ENTERED: JULY 14, 2011

Elba Iris Castro
DEPUTY CLERK

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

3698 Sarbjeet Kaur, etc., et al., Index 117142/07
Plaintiffs-Respondents,

-against-

American Transit Insurance Company, et al.,
Defendants,

Baker, McEvoy, Morrissey & Moskovits, P.C.,
Defendant-Appellant.

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Steinberg & Cavaliere, LLP, White Plains (Ronald W. Weiner of counsel), for appellant.

Sivin & Miller, LLP, New York (Edward Sivin of counsel), for respondents.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered on or about January 5, 2010, which denied defendant Baker, McEvoy, Morrissey & Moskovits, P.C.'s motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to the extent of searching the record and granting partial summary judgment in favor of plaintiff on the issue of defendant Baker, McEvoy, Morrissey & Moskovits, P.C.'s successor liability, and otherwise affirmed, with costs.

On March 3, 2003, Major Singh was injured when he was struck by a car owned by Gladys Towncars, Inc. (Gladys) and operated by Jose Grullon. On April 7, 2003, Singh and his wife, Sarbjeet Kaur, commenced a personal injury action against Gladys and

Grullon claiming damages in the amount of $5 million. Upon the failure of Grullon's insurer, American Transit Insurance Company (ATIC), to answer or appear in the suit, Supreme Court, Bronx County (Norma Ruiz, J.), entered a default judgment on April 6, 2005, against Gladys and Grullon in the amount of approximately $5.4 million. On July 5, 2007, this Court reduced the judgment to approximately $3.6 million and otherwise affirmed (42 AD3d 313 [2007]).

Plaintiff Kaur, who was appointed temporary receiver of the judgment debtors Gladys and Grullon with respect to the causes of action possessed by Gladys and Grullon, brought the instant action on March 3, 2008, alleging, inter alia, legal malpractice.[1] Plaintiff claims that ATIC's in-house counsel, Norman Volk & Associates, P.C. (Volk) failed to represent Gladys and Grullon in accordance with good and accepted legal principles and practices. Plaintiff further asserts that Baker, McEvoy, Morrissey & Moskovits, P.C. (BMMM) is liable as Volk's successor for the alleged malpractice.

By notice of motion dated September 12, 2008, BMMM moved for

[1]In her complaint, the plaintiff alleges that ATIC, whose policy limit was $100,000, refused to pay any portion of the award. However, the motion court noted that the plaintiff settled and discontinued the action in May 2009 as against ATIC and Norman Volk, John McEvoy, Ronit Moskovits, Luis Munoz, individually, and Russo, Keane & Toner, LLP.

summary judgment dismissing the complaint against it on the grounds that it is not a successor to Volk, and has not merged or consolidated with Volk. In support, Ronit Moskovits, a partner at BMMM, submitted an affidavit stating that none of the principals of BMMM were principals of Volk, BMMM had not represented Gladys or Grullon in the underlying action, and BMMM had not assumed any of Volk's liabilities.

In opposition, plaintiff provided, among other documents, BMMM's October 2005 ex parte application to Supreme Court, New York County, requesting that BMMM be substituted for Volk as counsel in ATIC's 10,000 pending lawsuits, and the October 12, 2005 substitution order. In support of that application, John McEvoy, a partner at BMMM, submitted an affirmation, which states in pertinent part:

> "I am associated with the law firm of Norman Volk & Associates, P.C., the primary counsel assigned by [ATIC] to represent and defend the their policyholders and insureds in several thousand actions each year.
>
> . . .
>
> "I am also a partner in the law firm of [BMMM], a newly formed firm, established to assume and continue the representation and defense of the policyholders and insureds of [ATIC], necessitated by the pending retirement of Norman Volk from his position as Attorney of Record and from the daily practice of law.

. . .

> "[Volk's] exclusive area of practice is in the representation of policyholders and insureds of [ATIC]."

In the application, Volk and BMMM also requested that the court direct substitution without requiring that Volk's clients execute individual consents, thereby insuring "uninterrupted defense in the thousands of actions." McEvoy affirmed:

> "[E]ach of the partners in [BMMM] are presently and have been employed by [Volk] for several years and it is the intent of [BMMM] to hire the majority of attorneys and staff members presently employed by [Volk]. Additionally, [BMMM] will be maintaining the same address and telephone number as [Volk]."

Affirmations by Norman Volk and each of the partners at BMMM consenting to the substitution were also attached to the application.

Plaintiff also attached a decision in an unrelated 2006 receivership case in which, similar to this case, a receiver was assigned to proceed against ATIC and Volk for indemnification and legal malpractice. In that case, BMMM was identified as Volk's "successor counsel," and, under "Appearances of Counsel," Volk was listed as "Norman Volk & Associates, P.C., now known as Baker, McEvoy, Morrisey & Maskovitz [*sic*]" (*Konvalin v Tan Hai Ying*, 13 Misc 3d 287, 288 [Sup Ct, Queens County 2006]).

By decision and order dated December 31, 2009, the motion

court denied BMMM's motion for summary judgment, finding that there are unresolved factual issues as to whether BMMM is a "mere continuation" of Volk's practice or whether BMMM "de facto merged with" Volk. For the following reasons, we find that BMMM's substitution for Volk in pending actions and its representations to the court that, essentially, Volk's attorneys would continue to work exclusively as counsel for ATIC at the same address and phone number but under a different name, establish as a matter of law that BMMM is a "mere continuation" of Volk.

Generally, a corporation that acquires the assets of another is not liable for the torts of its predecessor (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]). However, an acquiring corporation may be liable as a successor if it is a "mere continuation" of the predecessor corporation (*id.* at 245). Such liability is imposed because "a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]).

The analysis for "mere continuation" should be "flexible" and "ask[] whether, in substance, it was the intent of [the successor] to absorb and continue the operation of [the predecessor]" (*Societe Anonyme Dauphitex v Schoenfelder Corp.*,

2007 WL 3253592, *5, 2007 US Dist LEXIS 81496, *13-14 [SD NY 2007], quoting *Miller v Forge Mench Partnership, Ltd.*, 2005 WL 267551, *7, 2005 US Dist LEXIS 1524, *23 [SD NY 2005] [internal quotations and citations omitted]). Relevant factors include transfer of management, personnel, physical location, good will and general business operation (*see NTL Capital, LLC v Right Track Rec., LLC*, 73 AD3d 410, 411 [2010] citing *Societe Anonyme Dauphitex*, 2007 WL 3253592 at *5-6, 2007 US Dist LEXIS 81496 at *14-16).

In this case, it is clear that the attorneys who worked at Volk continued to work exclusively as counsel for ATIC under BMMM. McEvoy affirmed that all of BMMM's partners had been attorneys at Volk, that BMMM would hire a majority of Volk's employees, and BMMM would maintain the same office location and phone number as Volk. He further stated that BMMM was formed for the express purpose of assuming and continuing Volk's business.

BMMM's argument that it cannot be a "mere continuation" because Volk survived the transaction "as a distinct, albeit meager, entity" (*Schumacher*, 59 NY2d at 245) is unavailing. John McEvoy affirmed that Volk's entire caseload consisted of its representation of ATIC, and that Volk was retiring as ATIC's attorney of record and from daily practice. Thus, when BMMM was substituted for Volk, Volk's business was effectively ended (*cf.*

Schumacher, 59 N.Y.2d at 245; *see also Woodson v American Tr. Ins. Co.*, 292 AD2d 160 [2002]).

Furthermore, proof that Volk remained registered as a corporation in New York State, which is the only documentation submitted by BMMM to show Volk's survival, does not raise a triable issue of fact as to whether in substance, BMMM absorbed all of Volk (*see Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [2001][the continued legal existence of prior business does not preclude successor liability "(s)o long as the acquired corporation is shorn of its assets and has become, in essence, a shell"]).

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

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

ENTERED: JULY 14, 2011

Elba Iris Castro
DEPUTY CLERK

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3948 Stephanie L. Berardo, as Surviving Spouse and as Administratrix of the Estate of Francis Lindner, et al., Plaintiffs-Respondents, Index 6630/01

-against-

Jacques Guillet, et al., Defendants-Appellants.

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Ullman, Furhman & Platt, P.C., Morristown, NJ (Jeffrey D. Ullman of counsel), for appellants.

Hill, Betts & Nash LLP, New York (Mary T. Reilly of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alan J. Saks, J.), entered September 30, 2009, which, in an action to collect on a judgment rendered 10 years ago, denied defendants' motion to vacate a judgment entered on their default in responding to plaintiffs' motion for summary judgment, reversed, on the law, the facts and in the exercise of discretion, without costs, the judgment vacated, and the matter remanded for further proceedings.

Given "the strong public policy of this State to dispose of cases on their merits, the motion court improvidently exercised its discretion in denying defendants' motion to vacate the default order" (*Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633 [2009] [citation omitted]), made upon a showing of excusable

default and a meritorious defense (*Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413 [2011]). Defendants demonstrated that their failure to oppose summary judgment was not willful (*see DaimlerChrysler Insur. Co. v Seck*, 82 AD3d 581 [2011]), and that they had no knowledge of the summary judgment motion or that their attorney, Mr. Deutsch, was so ill that he was unable to defend the motion.

Regarding reasonable excuse, Ms. Turchin, the counsel who represented defendants on their motion to vacate, and who had obtained stipulations to adjourn the summary judgment motion while acting of counsel for that limited purpose, affirmed to the motion court that Mr. Deutsch had requested that she obtain the adjournments because he was seriously ill. She was surprised to learn that the motion had been granted on default because he told her he had obtained an additional adjournment. According to Ms. Turchin, a few months after the summary judgment motion was granted on default, the 86-year old counsel of record died from heart disease and kidney failure. While plaintiffs' counsel denied that an additional adjournment was granted, plaintiffs did not contest the seriousness of Mr. Deutsch's medical condition at the time the motion was filed.

In denying the motion to vacate the default judgment, the motion court merely focused on plaintiffs' denial that there was

a consent adjournment, and evidently did not consider that the default was inadvertent, apparently caused by the ultimately fatal illness of counsel of record which negatively impacted his ability to defend the summary judgment motion and/or caused his law office failure, leading to the granting of plaintiffs' motion by default in an action that had been vigorously litigated.

Defendants have shown the "existence of a possibly meritorious defense" (*Tat Sang Kwong v Budge-Wood Laundry Serv.*, 97 AD2d 691 [1983]; *compare JP Morgan Chase Bank, N.A. v Bruno*, 57 AD3d 362 [2008]) in this action which seeks to pierce the corporate veil, by submission of their verified answers that deny the allegations pertinent to such a claim, and by their affidavits in support of the motion to vacate the judgment entered by default.

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

TOM, J.P. (dissenting)

A motion to vacate a default judgment is addressed to the sound discretion of the court (*Alliance Prop. Mgt. & Dev. v Andrews Ave. Equities*, 70 NY2d 831, 832 [1987]), and no abuse there of has been established here. Defendants failed to demonstrate both a reasonable excuse and a meritorious defense to warrant vacating their default (*see Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454 [2010], *lv dismissed* 15 NY3d 863 [2010]), which they attribute to their former counsel, Lawrence E. Deutsch, now deceased. Indeed, the record discloses that plaintiffs consented to two prior adjournments of their summary judgment motion, each of which was memorialized in a written stipulation signed by defendants' current counsel. Defendants' excuse that they had been misled by a purported oral agreement presumably obtained by Mr. Deutsch to adjourn the dispositive motion for a third time is unsubstantiated by the requisite stipulation (CPLR 2104) or a probative affirmation. It rests entirely on current counsel's account of a conversation with the deceased attorney. Having obtained two prior adjournments upon written stipulation, counsel concedes that she had been informed by plaintiffs' attorney that they would not consent to any further delay in the proceedings. Yet she now maintains that she was informed by Mr. Deutsch that he had obtained a further

adjournment and that it had been obtained orally, despite the parties' practice of memorializing stipulated adjournments in a signed writing. This contention is hearsay and must be discounted.

To the extent defendants urge that Mr. Deutsch was too sick to oppose the motion, such assertion is likewise devoid of evidentiary support (*see Legend Travel & Tours, Inc. v Continental Airlines, Inc.*, 24 AD3d 112 [2005]; *DeSimone v Barry, Bette & Led Duke*, 252 AD2d 948 [1998]). There is no indication that any health issue sufficiently serious to impair his ability to represent defendants' interests was evident to opposing counsel, present counsel or defendants themselves. Defendants reason post hoc ergo propter hoc that because Mr. Deutsch died in August 2008, his poor health was the cause of their default on May 5th. This suggestion is unsupported by medical evidence and conclusory.

Regarding a meritorious defense, contrary to defendants' argument raised for the first time on appeal, a verdict exonerating them of liability in the prior wrongful death action in which certain corporate defendants were found to be liable for negligence, does not warrant application of the doctrine of res judicata in this action seeking to pierce the corporate veil of entities closely held by the individual defendants. The

necessary elements of proof and evidence required in each of the two actions vary so materially as to preclude application of the doctrine in this action (*see First Capital Asset Mgt. v N.A. Partners*, 260 AD2d 179 [1999], *lv denied* 93 NY2d 817 [1999]). Defendants' contention that the complaint is insufficiently pleaded is also asserted for the first time on appeal. Contrary to that contention, evidentiary material viewed in conjunction with the pleadings, including deposition testimony of individual defendants/sole shareholders of defendant corporate entities, supports a finding that plaintiffs had indeed adequately pleaded a claim for piercing the corporate veil (*see Simplicity Pattern Co. v Miami Tru-Color Off-Set Serv.*, 210 AD2d 24 [1994]; *see also Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341 [1996]). Apart from defendants' bald denial of the allegations of the complaint and counsel's recitation that "the defendants have a meritorious defense," the moving papers provided the motion court with no basis upon which to assess the merits of the purported defense.

While there is a preference in law that cases be decided on their merits, it does not dispense with the need for a reasonable excuse for a default in appearance and a meritorious defense to the action. While the preference may be invoked "where the proffered excuse is less than compelling" (*Catarine v Beth Israel*

Med. Ctr., 290 AD2d 213, 215 [2002]), it has no application where the excuse is without evidentiary support and the merits of the defense are unstated. It is particularly inappropriate in a case such as this, in which plaintiffs have been obliged to make numerous applications to the courts in the attempt to overcome defendants' dilatory tactics and evasive and obstructionist conduct during the two actions. Finally, it cannot be said that vacating defendants' default would not result in prejudice to plaintiffs, whose attempt to collect on a judgment that was entered in August 2000 will be further delayed.

Accordingly, the order should be affirmed.

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

ENTERED: JULY 14, 2011

Elba Iris Castro
DEPUTY CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Román, JJ.

5359 The People of the State of New York, Respondent, Ind. 6839/99

-against-

Mohammed Alaouie, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and Chadbourne & Parke LLP, New York (Keith Levenberg of counsel), for appellant.

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

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Order, Supreme Court, New York County (Eduardo Padró, J.), entered March 4, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the application. Regardless of whether it sometimes used terminology other than "dictated," the court expressly relied on the applicable standard (*see People v Marti*, 81 AD3d 418 [2011]), and it properly considered appropriate criteria. Uncontested information about defendant's very serious pattern of violent behavior while incarcerated dictated denial of his motion (*see e.g. People v Flores*, 50 AD3d 1156 [2008], *lv dismissed* 10 NY3d 934 [2008]).

When the court announced that it was deciding the motion on

the parties' written submissions, defendant did not object or identify any factual disputes requiring an evidentiary hearing. Accordingly, defendant did not preserve his argument that the court conducted an inadequate hearing on his motion (*see People v Soler*, 45 AD3d 499 [2007]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. While the better practice would be to expressly offer defendant an opportunity to be heard, there was no dispute as to the primary facts that led the court to deny resentencing (*see People v Robinson*, 45 AD3d 442 [2007], *lv dismissed* 10 NY3d 815 [2008]; *People v Burgos*, 44 AD3d 387, 387 [2007], *lv dismissed* 9 NY3d 990 [2007]).

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

ENTERED: JULY 14, 2011

Elba Iris Castro
DEPUTY CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5390 The People of the State of New York, Ind. 5780/99
Appellant,

-against-

Robert Haulsey,
Defendant-Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Bruce Allen, J.), entered on or about November 24, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 30, 2011,

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

ENTERED: JULY 14, 2011

Elba Iris Castro
DEPUTY CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román, JJ.

5034 Ambac Assurance UK Limited, etc., Index 650259/09
Plaintiff-Appellant,

-against-

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

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Shapiro Forman Allen & Sava LLP, New York (Michael I. Allen of counsel), for appellant.

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

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 25, 2010, reversed, on the law, with costs, and the motion to dismiss the complaint denied.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
Rolando T. Acosta
Sheila Abdus-Salaam
Nelson S. Román, JJ.

5034
Index 650259/09

_____x

Ambac Assurance UK Limited, etc.,
Plaintiff-Appellant,

-against-

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

Plaintiff appeals from an order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 25, 2010, which granted defendant's motion to dismiss the complaint.

Shapiro Forman Allen & Sava LLP, New York (Michael I. Allen and Yoram Miller 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.

CATTERSON, J.

In this breach of contract action, the plaintiff seeks to recover damages for the loss of more than $1 billion from investment accounts created to fund notes it guaranteed. The plaintiff alleges that the defendant, investment manager J.P. Morgan Investment Management Inc., failed to manage the accounts. Instead, defendant continued to hold toxic subprime securities in the accounts while its corporate parent, J.P. Morgan Chase, reduced its exposure to the same type of securities based on its knowledge that they "could go up in smoke."

We are asked to determine if the plaintiff's allegations are sufficient to survive a CPLR 3211 motion to dismiss where the plaintiff concedes that the defendant adhered to the contractual limitations on purchasing subprime securities.

The undisputed facts of the case are as follows: The plaintiff, Ambac Assured U.K., guaranteed timely payment of principal and interest for certain notes issued by Ballantyne, a special purpose vehicle established to reinsure term life insurance policies. To capitalize itself and finance the required reserves, Ballantyne issued more than $2 billion in securities.

On May 2, 2006, Ballantyne and the defendant entered into an investment management agreement (hereinafter referred to as the

"IMA") pursuant to which defendant agreed to act as the investment advisor for $1.65 billion of the proceeds raised by Ballantyne via its sale of the notes.[1] Pursuant to the IMA, Ballantyne opened two accounts: the Reinsurance Trust Account and the Pre-Funded Account over which the defendant had full investment authority subject to the investment guidelines.

The guidelines state that the goal of the investment policy "is to *obtain reasonable income* while providing a *high level of safety of capital*" (emphasis added). They identify the nature, quality and diversification requirements of the investments and contain specific limitations for investments on the basis of sectors and ratings.

The guidelines set forth the percentage of account assets which could be invested in each class and sector. Accordingly, permitted securities included home equity loan asset-backed securities (hereinafter referred to as "HELOS") and mortgage-backed securities like Alt-A's (hereinafter referred to as "MBS"). These securities required ratings of "A" through "AAA," and could not exceed percentages of 60% and 50% of the accounts, respectively.

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[1]Plaintiff is a third-party beneficiary of the IMA and is entitled to enforce Ballantyne's rights thereunder.

The IMA also contains a "Discharge of Liability" provision which states that the defendant does not guarantee the future performance of the accounts or any specific level of performance. It further states that the defendant shall have no liability for any losses "except to the extent such [l]osses are judicially determined to be proximately caused by the *gross negligence or willful misconduct* of [defendant] (emphasis added)." While the IMA is governed by New York law, it further requires that investments be made in compliance with Chapter 13 of the Delaware Insurance Code.

As of May 2006, the defendant began purchasing securities for the accounts. The record reflects that as of January 2007, approximately 30% of the assets in each account was invested in MBS, and approximately 59% of assets in both accounts was invested in HELOS. Subsequently, the accounts began sustaining losses. On December 28, 2007, after the accounts suffered significant losses, the guidelines were modified to require the defendant to seek approval from Ballantyne and the plaintiff before buying or selling assets for the accounts. The amended guidelines contained the same investment goal as the original guidelines, namely, obtaining "reasonable income while providing a high level of safety of capital."

Approximately, one year later, in October 2008, Ballantyne terminated the defendant as its investment advisor. By this time, the accounts allegedly had lost $1 billion of the $1.65 billion entrusted to the defendant just 30 months earlier. Ballantyne subsequently failed to make scheduled payments under the notes, and the plaintiff's guarantees were called upon.

In or about June 2009, the plaintiff commenced this action on behalf of Ballantyne seeking damages arising from the defendant's alleged breaches of the IMA, and of Chapter 13 of the Delaware Insurance Code. The plaintiff also alleges a breach of fiduciary duty, and a tort cause of action in gross negligence.

The plaintiff's allegations stem from an article in Fortune magazine, published in September 2008 in which J.P. Morgan Chase CEO, Jamie Dimon, was quoted as having concluded as early as October 2006 that the subprime securities market "could go up in smoke." He was further described as having instructed his subordinates to "watch out for subprime," directing the head of securitized products to "sell a lot of our positions." Shawn Tully, Fortune, *Jamie Dimon's Swat Team, How J.P. Morgan's CEO*

and his crew are helping the big bank beat the credit crunch, September 2, 2008.[2]

The plaintiff alleges that the defendant continued to purchase and hold such subprime securities as the HELOS and MBS in Ballantyne's accounts even after J.P. Morgan Chase had "evidence about the growing risk of collapse of the [s]ubprime [s]ecurities market."[3] Hence, the plaintiff alleges that the defendant breached the agreement by failing to manage the accounts in accordance with the stated objective of seeking a "reasonable income and a high level of safety of capital."

The defendant made a pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). It argued, inter alia, that the breach of contract claim should be dismissed because the defendant had complied with the guidelines, and did not act with gross negligence or willful misconduct or violate the Delaware Insurance Code. The defendant further argued that

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[2] The article states that "J.P. Morgan mostly exited the business of securitizing subprime mortgages when it was still booming, shunning now notorious instruments such as SIVs (structured investment vehicles) and CDOs (collateralized debt obligations)."

[3]The article also indicates that any information available to J.P. Morgan Chase would have been made available to its affiliates. It states: "The Dimon team...mine every part of the business for detailed information - especially data that point to trouble - then share it at warp speed throughout the corporation."

Dimon's statements, as reported in Fortune, did not concern the type of securities at issue here. It also argued that the tort claims were pre-empted by the Martin Act.[4]

The court granted the motion dismissing the complaint, and noted, inter alia, that the plaintiff had conceded that the defendant had not exceeded the percentage limitations contained in the guidelines. The court, relying on our determination in Guerrand-Hermès v Morgan & Co. (2 A.D.3d 235, 769 N.Y.S.2d 240 (1st Dept. 2003), lv. denied, 2 N.Y.3d 707, 781 N.Y.S.2d 288, 814 N.E.2d 460 (2004)), held that "[m]erely alleging failure to pursue an investment objective, where defendant actually followed the specific diversification requirements contained in the Guidelines that were intended to implement that objective, is not sufficient to set forth a claim for breach of contract."

The court further found that statements made by Dimon concerning the market, as reported in Fortune and MarketWatch articles, referred to collateralized debt obligations (CDOs) and mortgage lending, and did not concern the type of mortgage-backed

[4]This issue is not argued by the parties on appeal in light of this Court's decisions in Assured Guar. (U.K.) Ltd. v. J.P. Morgan Inv. Mgt. Inc., 80 A.D.3d 293, 915 N.Y.S.2d 7 (1st Dept. 2010), lv. granted, N.Y. Slip Op. 64361[u](1st Dept. 2011) and CMMF, LLC v. J.P. Morgan Inv. Mgt. Inc., 78 A.D.3d 562, 915 N.Y.S.2d 2 (1st Dept. 2010), but defendant reserved its right to so argue, if appropriate, following consideration of the issue by the Court of Appeals.

securities at issue here.

We now reverse and reinstate the complaint in its entirety. We find that, at this stage of the pleadings the motion court should have accepted the plaintiff's allegations as true, given the plaintiff the benefit of every possible inference, and simply ascertained whether plaintiff's allegations evidenced a cognizable cause of action. See Assured Guar.(UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc., 80 A.D.3d 293, 915 N.Y.S.2d 7 (1st Dept. 2010), lv. granted, N.Y. Slip Op. 64361[u] (1st Dept. 2011), supra, citing Samiento v. World Yacht Inc., 10 N.Y.3d 70, 79, 854 N.Y.S.2d 83, 87, 883 N.E.2d 990, 994 (2008). For the reasons set forth below, we further find that the motion court erred in failing to conclude that the plaintiff's allegations are sufficient to sustain a breach of contract claim.

As a threshold matter, we reject the motion court's observation that the basis for the plaintiff's allegations, namely, CEO Dimon's statements in Fortune did not concern the type of securities held in the subject accounts. For the same reasons, we also reject the defendant's reiteration, on appeal, that the articles are not evidence of the defendant's knowledge about the subject securities because the securities referred to in the article are SIVs and CDOs which were never purchased for the accounts.

We are not required to determine at this stage if, at the time of the events described in the complaint, there was a distinction for investment purposes between the Dimon-referenced CDOs (the underlying value of which was based on subprime mortgages)[5] and the securities in the subject accounts which were home equity loan asset-backed securities and mortgage-backed securities allegedly also comprised of subprime loans. As the plaintiff asserts, and as the articles in the record establish, Dimon's concern embraced the entire mortgage market, including mortgage lending and mortgage products. Particularly relevant is the following excerpt from Fortune :

> "One red flag came from the mortgage servicing business... [I]n October 2006, the chief of servicing said that late payments on subprime loans were rising at an alarming rate. The data showed that loans originated by competitors like First Franklin and American Home were performing three times worse than J.P. Morgan's subprime mortgages. 'We concluded that underwriting standards were deteriorating across the industry' says Dimon."

[5]A fact established in the record by defendant's exhibit, an article titled, "Turmoil in the Financial Markets," which states as follows: "The credit crisis arose from losses in mortgage loans... Many of these loans were 'subprime' loans... Mortgage originators sold the home loan mortgages to others, including off balance sheet entities created by investment banks. These entities issued structured notes called collateralized debit [sic] obligation[s] (CDOs), secured by groups of home mortgage loans."

This, the article states, led to his team "mostly exiting the business of securitizing subprime mortgages" with the result that in late 2006, J.P. Morgan Chase "started slashing its holdings of subprime debt. It sold more than $12 billion in subprime mortgages that it had originated."

The plaintiff's breach of contract claim rests on the allegation that while J.P. Morgan was actively divesting itself of the risky subprime mortgages it had originated, the defendant was doing nothing about riskier subprime mortgages originated by others and held in the subject accounts.[6] In other words, that the defendant continued to invest in securities which it knew were entirely incompatible with plaintiff's investment objective and stated goal to "obtain reasonable income while providing a high level of safety of capital."

Precedent, therefore would appear to mandate a finding that the plaintiff, at the very least, has sufficiently alleged gross negligence as a basis for its breach of contract claim. See Assured Guar. (U.K.) Ltd. v. J.P. Morgan Inv. Mgt. Inc., 80 A.D.3d at 305, 915 N.Y.S.2d at 16 (plaintiff's stated goal was

[6]These apparently included -- as reflected in the record though not noted by the plaintiff -- mortgages originated by the above-named competitor First Franklin, whose defaults were apparently known to J.P. Morgan Chase in October 2006 to be three times worse than its own, but which were still being held for the accounts at the time of amended guidelines in December 2007.

"reasonable income while providing a high level of safety of capital", but defendant invested "substantially all" of the assets in subprime securities which it knew were risky), citing Colnaghi, U.S.A. v. Jewelers Protection Servs., 81 N.Y.2d 821, 823-824, 595 N.Y.S.2d 381, 383, 611 N.E.2d 282, 284 (1993) (gross negligence consists of conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing").

This is entirely consistent with our holding in Assured. The defendant in this case misapprehends our holding by relying merely on the decretal paragraph in Assured.[7] The defendant thus argues that Assured mandates dismissal of a breach of contract claim where an investment manager has discretionary authority, and is in compliance with the contractual diversification requirements.

This is error. The omission in the decretal paragraph is not reflective of the holding. In Assured, we simply did not address the issue that the defendant raises here, viz., that

[7]Compare Assured, 80 A.D.3d at 305, 915 N.Y.S.2d at 16 (plaintiff's contract claim sufficiently alleges gross negligence to survive a motion to dismiss) with Assured, 80 A.D.3d at 306, 915 N.Y.S.2d at 17 (order "should be modified [...] to reinstate the contract claims based on alleged violation of Delaware Insurance Code Chapter 13 that accrued on or after June 26, 2007, as well as its claims for breach of fiduciary duty and gross negligence [...]and otherwise affirmed).

compliance with the sector and ratings limitation provision forecloses a breach of contract action. To the extent that it was silent as to this argument, no principle was enunciated.

Nor does our ruling in CMMF, LLC v. J.P. Morgan Inv. Mgt. Inc. (78 A.D.3d 562, 915 N.Y.S.2d 2 (2010)) help the defendant as to this issue. In that case, this Court sustained a breach of contract cause of action on the basis of the plaintiff's allegations that the defendant breached the sector and ratings limitations provision of the agreement. CMMF, 78 A.D.3d at 563, 915 N.Y.S.2d at 5. That determination, however, does not stand for the proposition that the provision *must* be allegedly violated in order for a plaintiff's breach of contract claim to survive. It simply means, the Court did not need to reach the issue we are now asked to determine.

Here, the defendant asserts – and the plaintiff concedes – that the subject subprime securities did not exceed the percentages set forth in the agreement -- even after the guidelines were amended. Thus, contends the defendant, the motion court properly dismissed the breach of contract claim finding that defendant had followed the "specific diversification requirements."

Notwithstanding its concession, the plaintiff asserts that the motion court erred in its ruling because it ignored

fundamental principles of contract construction. We agree. See e.g. Greenfield v. Philles Records, 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 569, 780 N.E.2d 166, 170 (2002)(well established that unambiguous contracts must be interpreted in accordance with their plain meaning); see also Two Guys from Harrison-N.Y. v. S.F.R. Realty Assoc., 63 N.Y.2d 396, 403, 482 N.Y.S.2d 465, 468, 472 N.E.2d 315, 318 (1984); 150 Broadway N.Y. Assoc. L.P. v. Bodner, 14 A.D.3d 1, 6, 784 N.Y.S.2d 63, 66 (1st Dept. 2004) (contracts must be construed to "avoid an interpretation that would leave contractual clauses meaningless") (internal quotation marks and citations omitted).

In this case, the motion court overlooked the plain meaning of the IMA by misreading the *limitations* provision as a *requirements* provision. Indeed, the defendant's argument that the accounts, at any one time, did not hold more than the 50 to 60% of subprime Alt-A mortgage securities *as permitted* by the IMA suggests that the distinction between "limitation" and "requirement" still eludes the defendant.

The plain meaning of "limitations" connotes a point beyond which a party may not proceed. It is not a target that a party is obligated to meet which would instead constitute a "requirement." Accordingly, any reliance by the motion court or defendant on our determination to dismiss the breach of contract

claim in Guerrand-Hermes v. Morgan & Co. (2 A.D.3d 235, 769 N.Y.S.2d 240 (2003), supra) is misplaced. The facts and contract language are distinguishable. In that case, there were, indeed, specific "investment guidelines diversification requirements" that were intended to implement the objective. Guerrand-Hermes, 2 A.D.3d at 238, 769 N.Y.S.2d at 244. The investment management agreement provided, inter alia, that $18 million was to be invested in a leveraged portfolio of emerging market debt securities. Moreover, the plaintiff acknowledged that he understood there were risks associated with investing in emerging markets, and that investment in such markets "can lead to losses of principal, including all of the $18 million equity invested, or more." 2 A.D.3d at 236, 769 N.Y.S.2d at 241.

In this case, there were no specific requirements as to investing in any particular types of securities. Certainly, there was no warning or any acknowledgement that all assets could be lost. The diversification provision listed HELOS and Alt-A's as securities in which the defendant was permitted to invest, *up to* certain percentage limits of the account assets. However, the diversification provision did not *require* the defendant to invest in them at all.

The plaintiff asserts therefore, that adhering to the maximum contractually permitted percentages despite "seismic

changes to the economy, to world markets and J.P. Morgan's own internal conclusion[s] [about an impending financial meltdown in the housing market]," suggests the very opposite of managing the accounts and exercising discretion as to whether the securities should be held at all. We agree.

Action or non-action in accordance with a provision that *limits* rather than mandates certain actions does not immunize defendant from a breach of contract claim when that action/non-action is egregiously at odds with the stated contractual requirement that defendant pursue the investment objective of reasonable income and high level of safety of capital. As the plaintiff correctly asserts, the motion court's holding that there was no breach of agreement so long as the defendant did not exceed the maximums stated in the sector and ratings provisions would allow the defendant to insulate itself from liability by closing its eyes to known risks, and so would render the contract's stated goal of "a high level of safety of capital" impermissibly meaningless. See e.g. Two Guys From Harrison-N.Y., 63 N.Y.2d at 403, 482 N.Y.S.2d at 468.

Contrary to the defendant's argument, plaintiff's claim is not based on the allegation of failure to achieve -- no matter how strenuously the defendant attempts to recast the allegations so that it can then cite to precedent mandating dismissal of the

complaint on such basis. See CMMF, LLC, 78 A.D.3d at 563, 915 N.Y.S.2d at 5 (no breach of contract claim may be sustained based on a failure to achieve an investment objective where investment manager has discretionary authority), citing Vladimir v. Cowperthwait, 42 A.D.3d 413, 839 N.Y.S.2d 761 (1st Dept. 2007).

That the defendant failed to achieve the goal of reasonable income and high safety of capital is undisputed, as is the foreclosure of plaintiff's pursuit of a claim on that basis. See CMMF, LLC, at 563, 915 N.Y.S.2d at 5. Here, however, the plaintiff's claim rests on the allegations that, notwithstanding its adherence to certain limitations, the defendant failed to manage the accounts in accordance with the agreed upon objective. Had it done so, plaintiff asserts, it might have followed the path taken by JP Morgan Chase to divest itself of securities based on subprime mortgages before the losses turned catastrophic.[8] Instead, as the defendant concedes, the accounts were for the most part invested by January 2007, "with minimal subsequent account activity" until Ballantyne closed the accounts

[8]At oral argument, defendant argued that management of the accounts included its assessment of whether to sell, or whether securities would regain their value. For purposes of the defendant's motion to dismiss, we reject that theory of management in view of the plaintiff's allegations that J.P. Morgan's concerns in October 2006 led to it divesting itself of similar securities when subprime securities were still being held in the subject accounts 15 months later.

almost two years later. As such the plaintiff's allegations are sufficient to sustain a breach of contract claim. See Sergeants Benevolent Assn. Annuity Fund v. Renck, 2004 WL 5278824 (Sup. Ct, N.Y. County 2004)(plaintiffs' breach of contract claim upheld against defendant investment brokerage on allegations that defendant would not have lost $27 million had it pursued the conservative investment plan required by the contract), rev'd on other grounds, 19 A.D.3d 107, 796 N.Y.S.2d 77 (1st Dept 2005); see also Scalp & Blade v. Advest, Inc., 281 AD2d 882, 883 [4th Dept 2001].

We reject the defendant's contention that Sergeants Benevolent Assn. Annuity Fund is distinguishable. The defendant argues that, in that case, defendant breached the agreement to pursue "conservative capital appreciation" by investing in highly volatile, risky tech, communications and internet stocks which were not permitted by any provision of the contract. We find this argument unpersuasive for the reasons already stated above. Whether permitted or not, once the defendant acquired information about the riskiness of subprime securities it was also aware that such securities were incompatible with the stated investment objective of the accounts.

The plaintiff has also sufficiently alleged that defendant breached the Delaware Insurance Code. 18 Del C. § 1305(4)

provides: "An insurer shall not at any [one] time have more than 50% of its assets invested in obligations under § 1323 of this title, exclusive of that portion of such obligations guaranteed or insured by an agency of the United States government." Obligations under § 1323(a) are "bonds, notes or other evidences of indebtedness secured by first or second mortgages," and are not limited to individual mortgages. Therefore, section 1323 covers more than 50% of the securities contained in the accounts. See Assured, 80 AD3d at 305, 915 N.Y.S.2d at 16.

We further reject the defendant's argument that it complied with § 1308 of the Delaware Code, and that compliance with any section is sufficient to render an investment compliant with the Code. The defendant maintains that the securities at issue met the requirements contained in § 1308, as they were all rated "A" or higher by Standard and Poor's, or "A2" or higher by Moody's at the time of purchase. However, the statements of record only reflect holdings in the accounts as of two dates, May 31, 2006 and January 31, 2007, and do not, on their face, establish any regulatory compliance. Thus, defendant has failed to demonstrate conclusively, through documentary evidence, that it complied with this section.

The defendant has not established entitlement to dismissal of plaintiff's claims as time-barred. Section 7(d) of the IMA

provided that the plaintiff was obligated to "object in writing" as "to any act or transaction [...] within a period of ninety (90) days from the date of receipt of any statement" from the defendant. The holding in Assured is not applicable here since the plaintiff did not initially assert that the amended guidelines (in writing) constituted an objection as they did in Assured (80 A.D.3d at 304, 915 N.Y.S.2d at 15); nor does the record reflect that Ballantyne made a prior oral objection that resulted in the amended guidelines. In any event, whereas the amended guidelines in Assured restricted the defendant making future investments in cash equivalents, no such restriction applied here, but on the contrary included the list of the permitted securities.

However, as the motion court correctly noted, the plaintiff's claims are based on defendant's failure to manage the accounts in accordance with the investment objective rather than upon any specific act or transaction. Hence, they are based on conduct that would not have shown on any statement, namely, that defendant failed to follow a course of action with respect to the accounts despite its awareness of the declining subprime securities market and its own divestiture of such securities. Such knowledge, which is the cornerstone of the plaintiff's allegations, is not a fact which would be evident in the

statements. Thus, the defendant has not established entitlement to pre-answer dismissal on the ground that the action is time-barred.

Finally, assuming, arguendo, that the appeal pending in the Court of Appeals affirms this Court's finding that plaintiff's tort claims for gross negligence and breach of fiduciary duty are not preempted by New York General Business Law § 352 *et seq.* (the Martin Act), we find that neither are they duplicative of the breach of contract claim. See Assured, 80 AD3d at 306, 915 N.Y.S.2d at 17.

Accordingly, the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 25, 2010, which granted defendant's motion to dismiss the complaint, should be reversed, on the law, with costs, and the motion denied.

All concur.

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

ENTERED: JULY 14, 2011

Elva Iris Castro
DEPUTY CLERK

Saxe, J.P., Catterson, Acosta, Abdus-Salaam, Román JJ.

5035 The People of the State of New York, Ind. 2962/08
Respondent,

-against-

Jason Pagan,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered December 10, 2009, affirmed.

Opinion by Abdus-Salaam, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
Rolando T. Acosta
Sheila Abdus-Salaam
Nelson S. Román, JJ.

5035
Ind. 2962/08

_____x

The People of the State of New York,
Respondent,

-against-

Jason Pagan,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Marcy L. Kahn, J.), rendered December 10, 2009, convicting him, after a jury trial, of attempted murder in the second degree, assault in the first degree and two counts of criminal possession of a weapon in the second degree.

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen and Eleanor J. Ostrow of counsel), for respondent.

ABDUS-SALAAM, J.

Defendant, convicted of attempted murder in the second degree, assault in the first degree and two counts of criminal possession of a weapon in the second degree, claims that his due process rights were violated when the court admitted *Molineux*[1] evidence of defendant's membership in the Latin Kings gang. We find that the evidence should not have been admitted, but that the error was harmless.

The court admitted portions of two recorded telephone calls. In one call, defendant said that he had been a Latin Kings member for four years. The second call was a conversation with defendant's aunt, during which he told his aunt to tell her boyfriend that defendant would take care of the boyfriend's problem with another person because defendant was "trying to get some status."

While the court reasoned that these conversations were probative because they would demonstrate an aspect of intent and motive, and "flesh out the background of what happened," we agree with defendant that these conversations lacked any probative value in view of the trial testimony, discussed infra, which

[1]*People v Molineux* (168 NY 264 [1901]).

clearly established intent and motive (*compare People v Edwards*, 295 AD2d 270 [2002], *lv denied* 99 NY2d 557 [2002] [evidence of defendant's gang membership was highly relevant to explain why defendant would attack an individual for no apparent reason]). Furthermore, to the extent that these conversations had any probative value, the court abused its discretion in admitting this evidence because such value was outweighed by potential prejudice (*see generally People v Ventimiglia*, 52 NY2d 350, 359-360 [1981]). Nonetheless, for the reasons stated below, we find the error to be harmless.

The victim, Carlos Salome, testified at trial that in the early hours of May 10, 2008, he was working his 10 P.M. to 5 A.M. shift as a bouncer at Sing Sing Karaoke, a Lower East Side bar. At approximately 4 A.M., as he was checking two people's IDs at the door, he saw a fight erupt on the street between two groups -- a group of apparently drunk white men who had just left Arrow, the bar next door, and a group of four Hispanics, two men and two women, who had been walking by. According to Salome, the fight began after one of the white men directed a remark to the Hispanic group, "[L]ook at that drunk mother f***er," and a member of the Hispanic group replied, "[W]hat the f*** did you say white prick?" The Hispanic group attacked the white group and they engaged in a "little brawl." Salome and an Arrow

bouncer named Travis intervened to break them up, Travis separating the Hispanics and Salome separating the white men. During the brawl, Salome noted that defendant was one of the Hispanic men. Salome recognized defendant from an incident at Sing Sing Karaoke months earlier, when defendant had tried to enter the bar using a fake ID card.[2]

The combatants eventually dispersed, but approximately 5 to 10 minutes later, the Hispanic group returned and again attacked the white men. Salome observed that defendant was one of the attackers. He also noticed that a "white skinny girl" (whom he later heard was the fiancee or wife of one of the white men) was involved in the fight, jumping on the back of a Hispanic man and pulling off his hat. Once again, Salome and Travis, now joined by a third bouncer from a club down the street, intervened to break up the fight. Salome displayed his security badge, identified himself as a bouncer who worked at the club and urged the groups to "leave it alone" and "please go home." Salome testified: "That's when the Hispanic girl, she be facing me,[said], '[F]*** the police, I don't give a f*** about the

[2]During the prior encounter, Salome stood just a few feet from defendant and looked at his face, while defendant spent about 10 minutes trying to persuade Salome to admit him to the bar despite not having any valid ID showing that he was 21 years old.

police.' I told her listen, I am not a cop, I am a bouncer, I am a security guard. I'm not an officer at all. I'm a security officer that works as a bouncer, but I am not a cop I stated to them. At that time she said, '[F]*** the police.'" Eventually, the Hispanic group left and the white men left in a cab.

Approximately 5 to 10 minutes after the second fight ended, two Hispanic men, one of whom was identified by Salome as defendant, and a Hispanic woman whom Salome had seen earlier, returned. Defendant walked by Salome and stared. Salome told the Hispanic group that the white group had left in a cab and that they should go home. Both defendant and the woman responded, "[F]*** the police." Salome testified that he made eye contact with defendant during this conversation, which lasted about two or three minutes. The two men and the woman crossed to the other side of the street. Then, the white woman emerged from Sing Sing Karaoke, extremely drunk and wobbling. Salome felt immediate concern because he had mistakenly told the Hispanics that everyone had gone home. According to Salome, the Hispanic woman pointed to the white woman and said, "[N]o, f*** that, there goes that bitch, let's get her."

Salome observed defendant and the other man crouch behind two plastic newspaper dispensers across the street, about 30 feet

away. Defendant then produced a gun and pointed it in Salome's direction. The other man did not have anything in his hands. Salome heard two "loud bangs" that sounded like gunshots, and then a third one. After the third shot, as Salome describes it, "I stated in my head, in my head I was thinking I'm not going to jump in front of this lady. I have five kids, but I wasn't thinking with my head, my body reacted in a different way. After the third shot, I ran and jumped in front of the lady and I picked her up to throw her back in the establishment, I was struck." Salome was shot in the chest and grievously injured.

After the shooting, Detective Joseph Lombardi responded to Sing Sing Karaoke and interviewed witnesses. Salome was not able to speak to Lombardi at that time. The police distributed flyers about the shooting, and received an anonymous call that a woman, subsequently identified as Elizabeth Sullivan, had information about the fight leading up to the shooting. On May 19th, Lombardi spoke to Ms. Sullivan and Jerry Hrebluk in their fifth-floor apartment on the southwest corner of Avenue A and Sixth Street. They told Lombardi that on the night of the shooting, they had been home and heard a fight break out on Avenue A. They looked out their window and observed that defendant and other Hispanic men were fighting with a group of white men. Both

Sullivan and Hrebluk recognized defendant, whom they knew as "Jason," from their years of living in the neighborhood. They provided Lombardi with an address for Jason, and told him that Jason's mother's name is Lucy. They told Lombardi that after they saw the commotion, they moved away from the window. When they later heard gunshots they were no longer looking out the window and did not see who was shooting.[3]

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[3]Before trial, the court conducted a *Sirois* hearing (*see Matter of Holtzman v Hellenbrand*, 92 AD2d 405 [1983]) at which Sullivan, Hrebluk and Detective Lombardi testified. Sullivan testified that defendant's mother Lucy had twice approached her and called her a snitch and warned that there would be repercussions. At the hearing, Sullivan and Hrebluk denied ever having identified Jason as the man involved in the fight. Detective Lombardi testified that Hrebluk had told him that Sullivan was afraid for her life, that both of them were scared because they know Jason is a Latin King, and that they told Lombardi they didn't want to testify and that they were changing their story to say that someone who "looked" like Jason was involved in the fight. The court determined that Sullivan and Hrebluk were "unavailable" and that defendant's misconduct had caused their unavailability. Consequently, Lombardi was permitted to testify to the out-of-court statements made by these witnesses. He also testified about what Sullivan had reported to him about her two encounters with defendant's mother Lucy. The court instructed the jurors that this testimony was introduced for the limited purpose of proving that defendant had a consciousness of guilt. The court instructed that the jury first needed to determine whether they believed that the threats occurred, and if so, they needed to decide whether the threats demonstrated defendant's consciousness of guilt. The court charged that if the jurors found defendant's conduct was solely motivated by consciousness of guilt, they could consider the evidence for that limited purpose only, but if they found that there were two inferences that could be drawn from the conduct, they were required to draw the inference of lack of guilt.

After Lombardi met with Salome on May 28, 2008, and based upon the information gathered from Salome, Sullivan, and Hrebluk, defendant became the suspect. Lombardi learned that defendant was living in Phoenix House, a residential drug facility in the Bronx, and arranged for defendant to meet with him at the 9th Precinct. Defendant was given *Miranda* warnings and agreed to speak to Lombardi. The detective showed defendant a photograph of Sing Sing Karaoke, and asked if defendant knew where the place was located. Defendant said that it was a bar up the street from where he lived. Lombardi then showed defendant a photograph of the window at the bar, and when asked if he knew what that was, defendant responded, "[O]h, they look like bullets." Finally, Lombardi showed him a photograph of Carlos Salome in the hospital with tubes all over him and asked if defendant knew who that was. Defendant said, "[O]h, shit, oh shit, that is Carlos, what happened, he got shot, did he break up a fight or something?" Prior to defendant making these statements, Lombardi had not mentioned Carlos Salome's name or told defendant that he was investigating a shooting, but had only told defendant that he was investigating a case. At the end of the conversation, defendant said to Lombardi, "I know Carlos, why would I shoot Carlos? He is my boy."

Later that day, Salome and Heriberto Collado (a man who worked as a bouncer at a different bar on the same block, and who had been on the street the night of the shooting), viewed a lineup. Salome identified defendant, and had no doubt in his mind that defendant was the man who had shot him. Collado selected a filler as the person who had been involved in the fight.

The defense offered an alibi defense, calling two employees of Phoenix House. Defendant had entered that facility shortly before the crime was committed. According to the employees, who worked the night shift, they conducted a nightly roll call at approximately 11:30 P.M. After the residents were required to retire to their rooms, the employees performed hourly room and bed counts, using a flashlight while standing by the rooms to look inside to see whether there was a body in the bed. They did not wake the residents or touch them, or necessarily look at the residents' faces. There was no security guard at the facility. According to these employees, the Phoenix House records from May 9-10, 2008 showed that defendant attended the roll call and that all residents were present for the head counts.

On rebuttal, the People called Alan Williamson, the director of Phoenix House. He had been the deputy director in May 2008.

He testified that Phoenix House was "not a prison setting" and that there were "several occasions" when people had left the facility without authorization "through multiple ways." Williamson testified that there were at least seven or eight exits to the building, and that a resident, despite having no authorization to do so, could exit through the front door (which was staffed by a fellow resident), climb over a wall, or descend a fire escape.

The trial court erred in admitting the taped phone conversations as *Molineux* evidence because the circumstances of the crime manifested the shooter's motive and intent. The evidence showed that Salome took an instrumental role in breaking up the fights between the Hispanic group and the white men. As is pointed out by the People in their brief, the jury could have easily inferred that defendant was angry at Salome for his involvement, or was enraged at Salome when defendant saw the white woman emerge from the bar after Salome had told defendant and the others who returned with defendant, that all of the white group had gone home. The evidence also raised the real possibility that after the Hispanic woman yelled out to get the "bitch," defendant intended to shoot the white woman but instead shot Salome when he stepped in front of her.

Thus, there was no sound reason for admitting the conversations in order to, as the trial court stated, "flesh out the background of what happened." Although the court cited *People v Edwards* (295 AD2d 270 [2002], *lv denied* 99 NY2d 557 [2002]) and *People v Tai* (224 AD2d 328 [1996], *lv denied* 88 NY2d 942 [1996]) in support of its ruling, the circumstances in those cases are starkly distinct from those here.

In *Edwards*, evidence of gang membership and expert testimony that the gang to which defendant belonged engaged in random ritual slashings was highly relevant to explain "why defendant, for no apparent reason, would suddenly attack a fellow occupant of a holding cell who had never seen defendant before" (295 AD2d at 271). Here, there was an obvious explanation for why, considering the events that had transpired prior to the shooting, defendant would want to harm Salome and/or the white woman. Likewise, in *Tai*, evidence of defendant's gang associations was highly probative of motive and intent "given his apparent lack of personal hostility towards the victims" (224 AD2d at 328). In contrast, defendant's personal hostility towards Salome and/or the white woman is easily understood given the circumstances preceding the shooting.

As noted by defense counsel in the appellate brief, "[T]he

crime itself was 'senseless' only in the sense that all violent crime is. In fact, its genesis was sadly all-too-common – a toxic mix of drunken and race-tinged insults that unfortunately escalated with the use of weapons." This is distinct from the situation in *People v Wilson* (14 AD3d 463 [2005], *lv denied* 4 NY3d 857 [2005]), where evidence of gang affiliation was highly probative of motive and central to understanding an otherwise unexplained assault.

Despite the trial court's erroneous admission of the telephone conversations, we find the error harmless. "An error may be found harmless where 'the proof of defendant's guilt, without reference to the error, is overwhelming' and where there is no 'significant probability . . . that the jury would have acquitted the defendant had it not been for the error'" (*People v Gillyard*, 13 NY3d 351, 356 [2009] [citation omitted]). Here, the prosecution presented the complainant's uncontested account of the shooting and his identification of defendant as the perpetrator (*id.*; *compare People v McKinney*, 24 NY2d 180, 185 [1969] [defendant denied assaulting the complainant and the resolution of defendant's guilt hinged on whether the jury believed the complainant's or defendant's version of events]). There was also proof that Salome had two encounters with

defendant merely minutes before the shooting; that Salome recognized defendant from a prior encounter months earlier when Salome, a bouncer whose job it is to closely examine IDs, had a 10 minute face-to-face conversation with defendant; that neighbors had seen defendant involved in the fight preceding the shooting, thus placing defendant at the scene in conflict with his alibi defense; that defendant had intimidated these witnesses to make them "unavailable" to testify, evincing a consciousness of guilt; and that defendant made incriminating statements to Detective Lombardi when shown the pictures of Salome in the hospital, showing his knowledge of the events leading up to and including the shooting.

We do not see any likelihood that the jury would have acquitted defendant if it had not heard the improperly admitted conversations (*see People v Arafet*, 13 NY3d 460, 468 [2009]). Furthermore, the court's repeated and extensive instructions to the jury concerning the limited purpose of the Molineux evidence minimized the potential for prejudice[4] (*see*

[4] The potential for prejudice was also minimized in the jury selection process, during which the jurors were vetted by being informed that there would be evidence that defendant is a member of the Latin Kings, and asked if this would impact on their ability to not prejudge the case and to be impartial in assessing the evidence. Those prospective jurors who indicated a problem were discharged.

People v Hutchinson, 179 AD2d 679 [1992], *lv denied* 79 NY2d 1002 [1992]; *see also People v Tai*, 224 AD2d at 329). Thus, we conclude that the error was harmless (*Arafet* at 466-468).

Regarding defendant's other arguments, 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 credibility determinations.

The court properly denied defendant's challenge for cause to a prospective juror. The panelist's responses, when taken in context and viewed as a whole, did not cast doubt on his ability to reach a fair and impartial verdict (*see People v Chambers*, 97 NY2d 417, 419 [2002]). The gist of the panelist's position, even if inartfully stated, was that while he disapproved of gang members, this view would not affect his ability to decide the case solely on the evidence. We note that defendant did not avail himself of the opportunity to ask followup questions.

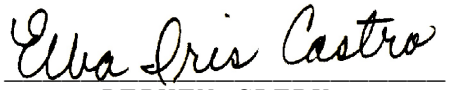
Defendant's remaining arguments regarding the evidence of gang membership, including his constitutional claims, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Accordingly, the judgment of the Supreme Court, New York County (Marcy L. Kahn, J.), rendered December 10, 2009, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 23 years should be affirmed.

All concur.

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

ENTERED: JULY 14, 2011



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