

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III
Justice

PART 56

CRT

INDEX NO. 601052/09

-v-

MOTION DATE 4/15/11

Merkin

MOTION SEQ. NO. 008

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMP. NYSG MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

RICHARD B. LOWE III

Dated: 7/26/11

[Signature] J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

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CRT INVESTMENTS, LIMITED, and MORTIMER  
ZUCKERMAN,

Plaintiffs,

- against -

J. EZRA MERKIN, GABRIEL CAPITAL  
CORPORATION, BDO SEIDMAN, LLP, and  
BDO TORTUGA f/k/a BDO CAYMAN ISLANDS,  
Defendants.

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**RICHARD B. LOWE III, J.:**

In this action to recover monetary damages for alleged fraud, negligent misrepresentation/misstatement, gross negligence, and aiding and abetting fraud, plaintiffs move, pursuant to CPLR 2221 (e), for leave to renew that portion of this court's May 5, 2010 Decision and Order, which dismissed Count 2 of the amended complaint against defendants J. Ezra Merkin (Merkin) and Gabriel Capital Corporation (GCC). For the reasons stated below, plaintiffs' motion for leave to renew is granted, and upon renewal, Merkin and GCC's motion to dismiss Count 2 is denied. Count 2 is reinstated to the amended complaint.

**Background**

CRT is a Cayman Islands corporation owned by the Mortimer B.

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Zuckerman Charitable Remainder Trust (Trust), with Mortimer B. Zuckerman (Zuckerman) as director. Plaintiffs allege that they commenced this action after sustaining millions of dollars in losses as the result of investments in Ascot Fund Limited (Ascot) and Gabriel Capital Partners, L.P. (Gabriel), which were controlled and run by Merkin and GCC. See Amended Complaint, ¶¶ 9-12.

Count 2 of the amended complaint relates to plaintiff CRT's alleged \$25 million investment in Ascot, and alleges that such "claim arises under the law of the Cayman Islands." According to plaintiffs, for tax purposes, CRT invested monies in Ascot, which then purchased limited partnership interests in Ascot Partners, L.P. (Ascot Partners). *Id.*, ¶ 33. Plaintiffs allege that, despite being told otherwise, and unbeknownst to them, Ascot Partners and Gabriel were largely or wholly invested in the Ponzi scheme run by Bernard L. Madoff (Madoff).

Plaintiffs allege that they were given the Ascot Partners Offering Memorandum (Offering Memorandum) and the subscription agreement for Ascot (subscription agreement), and that Zuckerman reviewed those documents prior to investing. According to the complaint, the Offering Memorandum falsely misrepresented that "[a]ll decisions with respect to the management of the capital of the Partnership are made exclusively by ... Merkin," the sole shareholder and president of GCC. *Id.*, ¶ 24. Additionally, it

falsely represented that the fund "will make investments through third-party managers," including that it "may delegate investment discretion" to "money managers." *Id.*, ¶ 25.

Further, plaintiffs allege that Zuckerman was told by Merkin that the Ascot family of funds would be a good vehicle for CRT, because it had a "conservative, diversified philosophy and nature." *Id.*, ¶ 21.

Finally, plaintiffs allege that disclosures in the Offering Memorandum and the subscription agreement indicated that differing entities were to be used to serve as executing broker, clearing broker, and custodian for the securities that have been bought or sold. *Id.*, ¶ 28. Plaintiffs allege that these statements were false or misleading, because from its inception, Ascot Partner's sole investment strategy was to invest all of its funds with Madoff, and that the executing and clearing brokers were Madoff, who also had custody of the securities.

Merkin and GCC filed a motion to dismiss Counts 1 and 2 of the amended complaint in July 2009. As respects Count 2, defendants contended that: (1) the Martin Act pre-empted plaintiffs' negligent misrepresentation and gross negligence claims, (2) the amended complaint failed to state a claim for negligent misrepresentation or gross negligence, and (3) the amended complaint failed to state a cause of action against GCC. On May 5, 2010, this court issued a Decision and Order, whereby

Count 2 (CRT's claim against Merkin and GCC for negligent misrepresentation or misstatement and gross negligence) was dismissed.

In the instant motion, plaintiffs seek leave to renew based upon new law, which they contend is contained within the Appellate Division, First Department's November 23, 2010 decision in *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Management Inc.* (80 AD3d 293 [1st Dept 2010]). According to plaintiffs, contrary to this court's Decision and Order, the Appellate Division in *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Management Inc.* held that the Martin Act does not pre-empt gross negligence and negligent misrepresentation claims, which necessitates reinstatement of Count 2 of the amended complaint.

#### **Discussion**

Pursuant to CPLR 2221 (e), an intervening clarification of the law can be the basis of a motion to renew. See *Roundabout Theatre Co., Inc. v Tishman Realty & Constr. Co., Inc.*, 302 AD2d 272 (1st Dept 2003).

Subsection (e) of CPLR 2221 states that the motion to renew:

(1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion.

The decision in *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Management Inc.*, which is specifically identified in plaintiffs' motion, was not handed down until after this court's May 5, 2010 Decision and Order.

Additionally, plaintiffs have demonstrated that there has been a change in the law effected by the First Department's November 23, 2010 decision. Not only did the First Department hold that the Martin Act does not pre-empt common-law claims in *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Management Inc.*, but decisions published since November 23, 2010 have reiterated and further clarified this position. See *Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607 (1st Dept 2011); *Silver Oak Capital L.L.C. v UBS AG*, 82 AD3d 666 (1st Dept 2011).

Because this court's May 5, 2010 Decision and Order dismissed Count 2 of the amended complaint due to the prevailing law at that time, i.e, the Martin Act pre-empted plaintiffs' claims, which has since been changed, and plaintiff's motion is styled as a motion to renew due to that change in the law, all three prongs of CPLR 2221 (e) have been met.

Merkin and GCC assert, however, that leave to renew should not be granted. First, they contend that the instant motion is untimely, in that plaintiffs waited three months after the *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Management Inc.* decision was handed down (until very shortly before the close of

discovery) to seek renewal.

Alternatively, the defendants urge this court to stay this motion, and hold it in abeyance until the Court of Appeals has the opportunity to rule on the appeal in *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Management Inc.*

Neither of defendants' contentions are persuasive. This court first notes that the date for the close of discovery has been extended far beyond the submission date of the instant motion, and that both Merkin and GCC have had ample opportunity to incorporate what they know has been the change in the law into their litigation strategy as it pertains to discovery.

Further, *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Management Inc.* is the law in the First Department, and there is no authority for this court to stay this motion until the Court of Appeals reviews the First Department's ruling in *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Management Inc.*, if it does so at all. See *Somoza v Pechnik*, 3 AD3d 394 (1st Dept 2004); see also *Pierre Associates Inc. v Citizens Cas. Co. of New York*, 32 AD2d 495 (1st Dept 1969).

Therefore, leave to renew that portion of this court's May 5, 2010 Decision and Order that dismissed Count 2 of the amended complaint is granted.

Upon renewal, this court now considers whether Count 2, which was dismissed in its May 5, 2010 Decision and Order, should

be reinstated. Merkin and GCC contend that this court should not reinstate Count 2 of the amended complaint, because the claims fail to state a claim for either negligent misrepresentation or misstatement or gross negligence (CPLR 3211 [a] [7]). Defendants are correct that on their original motion to dismiss Count 2, this court limited its inquiry to the fact that such claims were pre-empted by the Martin Act, and that a complete examination of Merkin and GCC's assertions that Count 2 fails to state a claim is now in order herein.

A complaint should be given a liberal construction when considering a motion to dismiss under CPLR 3211 (a) (7), with any factual allegations taken as true. See *Leon v Martinez*, 84 NY2d 83 (1994). A court considering such a motion is limited to determining "whether the facts, as alleged, fit within any discernible legal theory." *Sheila C. v Povich*, 11 AD3d 120, 122 (1st Dept 2004); see also *CBS Corp. v Dumsday*, 268 AD2d 350 (1st Dept 2000).

Count 2 of the amended complaint asserts claims of negligent misrepresentation or misstatement and gross negligence on behalf of CRT against Merkin and GCC. The allegation clearly states that, "[t]his claim arises under the law of the Cayman Islands," and relates only to CRT's investment in Ascot. The count alleges that Merkin and GCC owed a duty to CRT, a duty that was breached, and as a direct, foreseeable and proximate result, CRT sustained



damages. CRT appears to seek "general and incidental", as well as punitive, damages in Count 2.

Although it is plaintiffs that move to have Count 2 reinstated, and they have not proffered any arguments that the claims in the count are sufficient under Cayman Islands' law to entitle them to reinstatement, defendants have not properly attempted to show entitlement to dismissal under CLPR 3211 (a) (7). Both plaintiffs and defendants have improperly discussed New York law in maintaining their positions regarding plaintiffs' negligent misrepresentation/misstatement and gross negligence claims. This despite the fact that Count 2 clearly states that the law of the Cayman Islands applies to the claims.

Whether or not Count 2, as it appears in the amended complaint, is legally sufficient to make a claim under Cayman Islands' law cannot be determined from the arguments before the court. Despite the fact that neither plaintiffs nor defendants have briefed this issue, this court will not allow them any more time to do so.

Defendants have been given two opportunities to show this court that Count 2 fails to make a claim under Cayman Islands' law and have failed to address it in either original motion to dismiss or in the instant motion to renew. The summons and complaint in this action were filed in May 2009, with the first motion to dismiss filed later that month. An amended complaint

followed, and another motion to dismiss later that year and submitted early in 2010. This court rendered its Decision and Order on May 5, 2010. The Notice of Motion in the instant motion was then filed in February 2011 and fully briefed. The court will not waste any more time or its resources allowing defendants a third bite at the apple by allowing any further briefing in this matter. Should the defendants continue to believe that Count 2 does not state a claim, there will be sufficient opportunity for defendants to address this on summary judgment.

Therefore, as to Count 2 of the amended complaint, defendants' motion to dismiss is denied and Count 2 is reinstated.

#### **Order**

Accordingly, it is hereby

ORDERED that plaintiffs' motion for leave to renew that portion of J. Ezra Merkin and Gabriel Capital Corporation's motion seeking dismissal of Count 2 of the amended complaint is granted; and it is further

ORDERED that, upon renewal, this court vacates that portion of its May 5, 2010 Decision and Order that dismissed Count 2 of the amended complaint; and it is further

ORDERED that J. Ezra Merkin and Gabriel Capital Corporation's motion to dismiss Count 2 of the amended complaint is denied; and it is further

ORDERED that Count 2 is reinstated to the amended complaint.

Dated: July 26, 2011

ENTER:

A handwritten signature in black ink, consisting of a large, stylized loop at the top and several vertical strokes below it.

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J. S. C.