

2011 WL 12477978 (N.Y.A.D. 1 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, First Department, New York.

Wilfredo LOPEZ, Plaintiff-Appellant,
v.
Richard A. FENN, Defendant-Respondent,
and
JPMORGAN CHASE & CO., MERRILL LYNCH, Pierce,
Fenner & Smith Inc. and Redden's Funeral Home, Defendants.

No. 2009-603781.
April 20, 2011.

To Be Argued By:
Edward P. Gilbert

Brief for Defendant-Respondent

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*1 PRELIMINARY STATEMENT

Charles E. Whipple (“Decedent”) died on February 20, 2009. Since his death, Plaintiff-Appellant Wilfredo Lopez (“Appellant”), a friend of the Decedent's, has expressed his dissatisfaction with what was left to him under Decedent's Will and via joint accounts by engaging in a seemingly endless stream of meritless litigation. Indeed, Appellant has filed actions in four different courts concerning everything from Decedent's bank accounts and real property to the interment of Decedent's ashes. This appeal represents more of Appellant's frustration over the terms of Decedent's Will which was admitted to probate nearly two years ago.

As the Executor of Decedent's Estate, Defendant-Respondent Richard A. Fenn (“Respondent”) has been forced to deal with Appellant's litigious whims in courts from Patchogue to Riverhead to the Surrogate's Court of New York County. In this case, however, Appellant sued Respondent in his individual capacity in an effort to further harass Respondent; indeed, the Complaint in this action is utterly meritless. Respondent prevailed on a motion to dismiss whereby the trial court (Rakower, J.) dismissed nineteen out of twenty causes of action against Respondent. The one remaining cause of action against Respondent for alleged conversion of a bank account is well on its way to being dismissed on summary *2 judgment because, as explained more fully below Respondent possessed a valid power of attorney in connection with the allegedly converted bank account.

After having nearly all of his claims against Respondent dismissed by the trial court, Appellant comes to this Court with more baseless facts and meritless, if not frivolous, arguments. Rather than rely on facts, Appellant litters his brief with spurious and irrelevant accusations against everyone from Respondent and his attorneys to Appellant's former counsel. Appellant's desperation on this appeal is evidenced by his smear campaign against Respondent by cherry picking irrelevant facts alleged to impugn the integrity of Respondent and prejudice the Court's view of this case.

Once Appellant's unsupported and irrelevant allegations are swept aside, a review of his Appellant's brief in support of reinstatement of four causes of action reveals that his arguments are tissue thin:

- The trial court properly dismissed Appellant's conversion cause of action relating to Decedent's Merrill Lynch investment account. Documentary evidence -- not a single letter as Appellant would have this Court believe -- utterly refuted Appellant's conversion claim. Moreover, Appellant's new factual spin on his conversion claim, raised for the first time on appeal, also fails to state a claim.

- Appellant wholly failed to adequately plead a claim for intentional infliction of emotional distress ("IIED"). Appellant's attempt to overrule well settled First Department case law based on his disproved claim that he was Decedent's *3 domestic partner must be rejected.

- The trial court properly dismissed Appellant's right of sepulcher claim based on the doctrine of collateral estoppel. Indeed, the Surrogate's Court previously decided that Appellant had no right to control the disposition of Decedent's ashes.

- Appellant's prima facie tort claim was also correctly dismissed. Although the trial court properly relied on Appellant's failure to plead special damages as grounds for dismissal, additional grounds also existed that warranted dismissal of Appellant's desperate "catch all" claim.

Appellant's appeal of the trial court's decision to quash a subpoena served on a non-party attorney is similarly meritless. In connection with Appellant's one remaining cause of action, Appellant sought discovery from Harold Krainin, Esq., on the express ground that he drafted a power of attorney that Respondent allegedly used to convert funds from a bank account owned by Decedent at Morgan Chase bank. However, after it became clear that the power of attorney draft by Mr. Krainin was not the operative power of attorney, the trial court properly quashed the third party subpoena. Appellant's continued quest to depose and seek discovery from Mr. Krainin is consistent with Appellant's scorched earth, litigious practices.

Accordingly, Respondent respectfully submits that the orders of the Supreme Court, New York County, at issue on this appeal, entered on or about July 15, 2010, December 14, 2010 and February 2, 2011, should be affirmed.

***4 QUESTIONS PRESENTED**

1. Was the trial court's decision to dismiss Appellants claim for conversion pursuant to [CPLR 3211\(a\)\(1\)](#) warranted?

Answer: Yes. The trial court correctly dismissed Appellant's claim for conversion in connection with a Merrill Lynch investment account based on the multiple pieces of documentary evidence presented by Respondent.

2. Was it proper for the trial court to not rule on Appellant's new contention that his claim for conversion was actually two distinct conversion claims?

Answer: Yes. Appellant's newly concocted conversion claim is being argued for the first time on this appeal and is, in any event, meritless.

3. Did the trial court properly dismiss Appellant's claim for prima facie tort?

Answer: Yes. Appellant failed to adequately plead special damages. Moreover, additional reasons for dismissal existed and easily could have supported the trial court's decision to dismiss Appellant's "catch-all" prima facie tort claim.

4. Did the trial court properly dismiss Appellant's right of sepulcher claim based on issue preclusion?

Answer: Yes. Appellant had a full and fair opportunity to litigate his claim that he was Decedent's domestic partner before the Surrogate Court. The Surrogate's Court rejected Appellant's false allegations and, as a result, the trial court properly dismissed the right of sepulcher claim based on the doctrine of collateral estoppel.

***5** 5. Did the trial court properly dismiss Appellant's claims for the intentional infliction of emotional distress ("IIED")?

Answer: Yes. Well settled First Department case law supported the trial court's dismissal of all of Appellant's IED claims including the one IIED claim relevant to this appeal, Appellants seventeenth cause of action.

6. Following the trial court's dismissal of nineteen out of twenty causes of action against Respondent, did the trial court properly quash a non-party subpoena served on an attorney who has absolutely no knowledge relevant to Appellant's one remaining claim?

Answer: Yes. The non-party attorney had no involvement in the drafting or execution of the power of attorney at issue with respect to Appellant's one remaining claim for conversion. As such, the subpoena amounted to no more than a fishing expedition designed to harass both Respondent and the non-party.

STATEMENT OF FACTS

A. The Relationship Between Decedent and Appellant Lopez

On February 20, 2009, the Reverend Dr. Charles E. Whipple, died at the age of 95. Respondent had been a friend of Decedent's for more than 20 years. (R. 106). Respondent was also friends with Decedent's life partner, Charles Harmon. (R. 107). Decedent and Charles Harmon were life partners from 1960 until Charles Harmon's death in 1997. (R. 107). Thereafter, Decedent interred Mr. Harmon's ashes at Saint Clement's Church, Philadelphia, and caused a stone to be ***6** carved for an adjoining crypt to receive his own ashes after his death. (R. 107).

As Decedent grew older, he required assistance with day-to-day tasks such as cooking, gardening, cleaning and traveling, (R. 107). When Decedent broke his hip in 2003, Appellant stayed, at times, at Decedent's home at 8 Perry Street in Manhattan to help care for him. (R. 107). Appellant, who stayed on the second floor at 8 Perry Street, paid no rent or use and occupancy for his use of the 8 Perry Street property. (R. 107).

As Decedent grew older, Appellant began to intimidate Decedent in order to coerce Decedent to transfer monies to him. (R. 108). Indeed, Appellant began to wheel the wheelchair-bound Decedent around Manhattan from bank to bank, closing down accounts. (R. 108). This conduct was revealed when Decedent and Appellant were summoned to appear at JP Morgan Chase ("Chase") offices for a meeting to discuss suspect activity (e.g., closing of accounts, withdrawals of large sums of money) in Decedent's accounts at Chase. (R. 108).

On August 20, 2008, Respondent received the following voicemail from Alex Constantine, a bank officer at Chase:

Dr. Whipple is at the bank, AGAIN with Wilfredo Lopez and I believe his aide as well and he is requesting with the branch manager over there to have \$300,000,00 moved from one account to the other, so this is becoming a nightmare really for everybody, and let me tell you that ***7** at this time the Branch Manager said she doesn't believe he is all there mentally and that he doesn't even know where he is at this point and it would make sense for you to speak to the courts because at this point he is obviously going to be a danger to his own financial situation. I believe he is acting on what Wilfredo is telling him to do.

(R. 108, 124).

In the summer of 2008, at Decedent's request, Respondent appeared at a meeting at Chase along with Decedent and Appellant. (R. 108). The meeting was attended by three Chase officers, including Mr. Constantine and an **elder abuse** specialist. Chase called the meeting because of suspicious activity relating to Decedent's Chase account because of Appellant's actions. (R. 108).

B. The Chase and Merrill Lynch Accounts

Appellant's Complaint alleges that Respondent caused \$300,000 to be withdrawn from a Chase account. Appellant's Complaint also alleges that Decedent withdrew \$565,907.86 in February 2007 but that Respondent is somehow to be blamed for this withdrawal because of his alleged "confidential relationship" with Decedent. (R. 47).

All of the changes made to the titles of Decedent's Chase accounts were made by Decedent and not Respondent. (R. 109). All of the withdrawals made were made at the direction and authorization of Decedent. (R. 109). Respondent ***8** was not a signatory on the Chase accounts. (R. 109).

Appellant also alleges in his Complaint that on October 16, 2008, Respondent caused \$725,000 to be wired out of a Merrill Lynch account to deprive Appellant of the benefit of Decedent's intention to provide for him. (R. 49), Appellant specifically alleges that said sum was transferred to an HSBC bank account that Respondent jointly held with the Decedent. (R. 49).

Appellant's allegations with respect to the Merrill Lynch accounts are demonstrably false. In or about October 2008, Decedent, not Respondent, caused \$725,000 to be wired out of his Merrill Lynch account to an HSBC IOLA escrow account held by the law firm of Morrison Cohen LLP. (R. 109). Decedent withdraw this amount from the Merrill Lynch account for the purpose of (a) providing Morrison Cohen LLP with funds to be disbursed to lawyers in the State of Maine; and (b) to pay Morrison Cohen's bills in connection with Decedent's defense of a Maine lawsuit. (R. 109).

An October 1, 2008 letter from Decedent to G. William Haas (the "October 28 Letter"), a Morrison Cohen partner, notes that Decedent "is arranging to wire \$670,749.05 to" Morrison Cohen's escrow account and he instructed Mr. Haas to release (a) \$600,000 to the law firm of Smith Elliot Smith & Garmey, P.A. in connection with the settlement of the Maine lawsuit; and (b) \$70,749.05 to ***9** Morrison Cohen for payment of legal fees and costs incurred. (R. 125).

Ultimately, the wire transfer received from Decedent's Merrill Lynch account was \$725,000. Morrison Cohen's ledger entries evidenced (a) the \$725,000 wire transfer from Merrill Lynch into Morrison Cohen's HSBC IOLA (Interest on Lawyer Account-Escrow); (b) a \$600,000 wire transfer from Morrison Cohen's escrow account to Smith Elliot Smith & Garmey, P.A., as attorneys; and (c) a check (No. 2532) in the amount of \$70,749.05 to Morrison Cohen in accordance with Decedent's instructions. (R. 126).

Again, all of these transfers were directed by the Decedent, not Respondent. (R. 110).

C. Decedent's Will and the Subsequent Storm of Litigation

As stated, Decedent died on February 20, 2009, a resident of New York County, New York. (R. 110). Pursuant to the terms of the Decedent's Last Will and Testament of Charles Everett Whipple dated February 5, 2008 and a Codicil dated July 8, 2008 (collectively, "Will") Respondent was appointed the Executor of Decedent's estate ("Estate"). (R. 127). Letters Testamentary were issued to Respondent as Executor on August 4, 2009. (R. 145). The Will was admitted to probate by the Surrogate's Court of New York County on August 4, 2009. Letters Testamentary were issued to Respondent as Executor on August 4, 2009. (R. 145).

***10** For the purpose of this appeal, the pertinent provisions of the Will are paragraphs "FORTY-FOURTH" and "THIRTY-EIGHTH."

As set forth in the preamble and Section (c) of paragraph “FORTY-FOURTH” of the Will, the Will authorizes Respondent, inter alia, to “dispose of” 8 Perry Street or any interest in 8 Perry Street:

My Executor shall, without regard to any statutory or judicial restrictions otherwise applying to Executors, have the following powers and discretions in addition to any conferred by law... To sell, at public or private sale, mortgage, lease for any period, alter, improve or otherwise dispose of any real property or interest in real property at any time forming part of my estate or any trust fund hereunder.

(R. 135).

Under the Will, specifically paragraph “THIRTY-EIGHT,” upon the death of Decedent, Appellant is to receive a life estate in Decedent's house in Cherry Grove, Fire Island, New York:

the land and building together with the content thereof, that I own at 30 Bay View Walk and Summer Walk, Cherry Grove, Fire Island, Suffolk County, State of New York [the “Cherry Grove Property”] ... to have and hold for his life upon the conditions: (1) that he pay the taxes and assessments of all kinds thereon levied or to be levied; (2) keep the buildings in good repair and adequately insured against fire and other hazards; (3) pay the necessary expenses connected therewith and appertaining thereto, whether for the preservation thereof or otherwise; and (4) occupy same at least six months of ***11** each year during his life.

(R. 132).

Pursuant to subparagraph C of paragraph “THIRTY-EIGHT” three charities, the Cherry Grove Memorial Fund (to establish the Whip-Poor-Will Memorial Account), Cherry Grove Dune Fund and Doctors' House (collectively, the “Charities”) are given ownership of the Cherry Grove Property, subject to Appellant's life estate. (R. 132).

With regard to 8 Perry Street, in his role as Executor, Respondent was forced to institute an ejectment action on behalf of the Estate against Appellant. The ejectment action is styled as The Estate of Charles Everett Whipple, by Richard A. Fenn as Executor v. Wilfredo Lopez, New York County Supreme Court, Index No. 114852/09 (the “Ejectment Action”). (R. 150-156).

In response to the Ejectment Action, Appellant claimed that he was Decedent's “domestic partner” and that he has resided at 8 Perry Street for more than 20 years. Appellant has also proffered a purported letter to Respondent from Decedent dated August 13, 2007 (the “Purported August 2007 Letter”) -- the letter contains an alleged suggestion that Appellant be permitted, as a “favor,” to remain at 8 Perry Street until the building was sold.

Until the Purported August 2007 Letter was produced by Appellant's ***12** counsel in or about June 2009, Respondent had never seen the letter and, to date, had never seen an original copy. (R. 162). The Purported August 2007 Letter is not referenced in the Will. (R. 127-144).

Decedent made substantial provisions for Appellant in the form of joint accounts and a bequest under his Will of a life estate in the Cherry Grove Property. (R. 132). Had Decedent intended to give any further benefits to Appellant, he clearly could have done so. The Will makes no mention of Appellant in connection with 8 Perry Street. (R. 127-144). Moreover, the contention in Appellant's Complaint that he has lived at 8 Perry Street since 1987 is utterly false. Indeed, Appellant's New York State Voter Registration record reveals that his “Residential Address” is 1986 Grand Avenue, Apt 1E, Bronx New York and that he has consistently voted as a Bronx resident since 1996. (R. 163). Further, Appellant's license from the New York State Education Department also confirms his residence as Bronx, New York, not 8 Perry Street. (R. 163-165).

With regard to the Cherry Grove Property, Appellant has taken the position that he owns the Cherry Grove Property in fee simple, rather than have a life estate interest under the terms of the Will. In support of his assertion that he is the fee simple owner of the Cherry Grove Property, Appellant has engaged in non-stop litigation. (R. 114).

***13** First, Appellant commenced an action in the Civil Court of the City of New York, County of New York, Landlord/Tenant Part, Index No. L&T 09/71603 relating to his claim that he was unlawfully ejected from the parlor floor of 8 Perry Street in June 2009. That action was settled and the case was dismissed with prejudice. (R. 166-170).

Second, on or about June 23, 2009, Appellant commenced an action in the Suffolk County District Court, Sixth District (“Landlord/Tenant Court”) styled as *Wilfredo Lopez v. The Estate of Charles E. Whipple, et al.*, Index No. BRLT-09-2155 (the “Landlord/Tenant Action”). (R. 171-172). In the Landlord/Tenant Action, Appellant alleged that, since June 20, 2009, he had been illegally evicted and wrongfully denied access to the Cherry Grove Property. (R. 171-172).

Because the Landlord/Tenant Action concerned property owned by the Decedent's estate, on or about July 10, 2009, Respondent was forced to file a motion in the Landlord/Tenant Action seeking dismissal of the action or transfer of the action to the Surrogate's Court pursuant to [Surrogate's Court Procedure Act \(“SCPA”\) §205](#) (R. 115).

Third, on or about July 7, 2009, Appellant commenced a proceeding in the Surrogate's Court of New York County (“Surrogate's Court Action”). (R. 173-183).

***14** Fourth, on July 15, 2009, Appellant commenced yet another action, this time in the Supreme Court of the State of New York, Suffolk County (the “Suffolk County Action”). In the Suffolk County Action, Lopez filed a Verified Complaint, pursuant to N.Y. Real Property Actions and Proceedings Law (“RPAPL”), to, inter alia, compel a determination of claims relating to the Cherry Grove Property. (R. 184-188).

On or about July 20, 2009, Respondent brought a motion, under an order to show cause, in the New York County Surrogate's Court for the purpose of, inter alia, removing the Landlord/Tenant Action to the Surrogate's Court and consolidating the Landlord/Tenant Action and the Suffolk County Action, with the Surrogate's Court Action, in the New York Surrogate's Court. (R. 115-116).

On July 27, 2009, the Honorable Surrogate Troy K. Webber ordered that all of the actions relating to the Cherry Grove Property would be heard in the Surrogate's Court. (R. 116).

Appellant's counsel then filed an Amended Petition in Surrogate's Court which encompassed all of Appellant's claims regarding the Cherry Grove Property. (R. 189-297). Appellant's Amended Verified Petition asserts claims that are also being asserted in this action against Respondent including a cause of action against, among others, the Estate and Respondent, seeking an order declaring him ***15** the owner in fee simple absolute of the Cherry Grove Property; a claim against Respondent for damages concerning the alleged wrongful lockout of Appellant from the Cherry Grove Property; and a claim against Respondent for an accounting of rents received since February 2009 for Cherry Grove under a lease executed by Decedent in 2008. (R. 189-207).

D. Claim Relating to Decedent's Ashes

On or about October 28, 2009, Appellant filed a motion, by order to show cause, in the Surrogate's Court, seeking an order enjoining Respondent from disposing of Decedent's remains (the “Ashes Motion”). (R. 117). Appellant's motion was prompted by Respondent notifying him about the date of the church service scheduled for the placing of one-third of Decedent's ashes at St. Clements Church in Philadelphia, Pennsylvania in the crypt Decedent purchased during his lifetime. (R. 117).

Decedent requested that his funeral be held at the Church of St. Mary the Virgin, in New York City, and that his body be cremated. (R. 117). Decedent requested that the ashes be disposed of in three parts. (R. 117). The first part was to be spread on the dunes at Cherry Grove, Fire Island, New York, and that was done. Respondent informed Appellant about the Cherry Grove ceremony in advance and Appellant attended the ceremony. (R. 117). At no time prior to the ***16** Fire Island ceremony did Appellant object or say one word to Respondent in order to prevent the ceremony from taking place. (R. 117).

The second part of Decedent's ashes were to be placed in the floor of the crypt chapel at the St. Clement's Church, Philadelphia, where a place had been prepared during Decedent's lifetime and where Decedent had already arranged to have a stone carved with his name and date of birth. (R. 118). Importantly, Decedent was to be interred next to his life partner, the late Charles Harmon. (R. 118).

As part of the Ashes Motion, Appellant characterized himself as “the decedent's surviving domestic partner” in order to assert authority to dispose of Decedent's remains under a provision of the N.Y. Public Health Law. (R. 233). However, significant documentary evidence exists that completely refutes Appellant's contention. Decedent's Will refers to Appellant as being given a bequest “in appreciation of his friendship and his services to me” and further notes Appellant's residence as being at 1986 Grand Avenue, Bronx, New York (R. 127). Further, funeral instructions Decedent left, at the sixth paragraph on the second page, describes Appellant as “Wilfredo Lopez, a special friend, presently residing at 1986 Grand Ave Apt 1E, Bronx NY...He has known me for over 10 years and is a frequent visitor at 8 Perry St... (R. 257).

***17** The remaining one-third part of Decedent's ashes is to be disposed of at his burial plot at St. Mary's Church, Falmouth, Maine, where Decedent had prepared a monument prepared during his lifetime. (R. 118, 243-260).

On October 30, 2009, the Surrogate's Court heard argument on the Ashes Motion and directed that the Philadelphia disposition of one-third of the Decedent's ashes would go forward after December 4, 2009. Critically, the Court ordered that Respondent, not Appellant, was to retain the last one-third of the Decedent's ashes. (R. 261). Appellant never sought relief from the Surrogate's Order or appealed. (R. 119).

E. The Trial Court Dismisses Nineteen Out Of TWENTY Causes of Action Against Respondent

On or about March 23, 2010, Respondent filed a motion to dismiss the claims against him in Appellant's Complaint pursuant to [CPLR 3211\(a\)\(1\), \(4\), \(5\) and \(7\)](#) and [Surrogate's Court Procedure Act § 205](#). (R. 104-105). By Decision and Order, entered on July 2, 2010, Justice Eileen E. Rakower, dismissed nineteen out of the twenty causes of action against Respondent. (R. 11-20). The sole remaining claim against Respondent, Appellant's fifth cause of action, was for conversion of the Chase bank account (R. 17).

F. The Krainin Subpoena

Following the trial court's decision on the motion to dismiss, Appellant ***18** served wildly broad discovery requests including wholly irrelevant non-party subpoenas. (R. 591, 592). Indeed, Appellant's discovery requests indicated that he was proceeding with discovery as though all of his claims had survived dismissal. As a result, Respondent was forced to file a motion to quash the non-party subpoenas and for a protective order. (R. 589-590). Included among the subpoenas Respondent sought to quash was a subpoena served on non-party Harold Krainin, Esq. (“Mr. Krainin”), an attorney who currently represents Respondent in his role as Executor of the Estate of Charles E. Whipple. (R. 622, 659, ¶15). Mr. Krainin was also friends with Decedent for nearly thirty years and was Decedent's attorney for more than twenty years. *Id.* Appellant's subpoena requested that Mr. Krainin produce “[a]ll non-privileged records concerning Rev. Charles E. Whipple, Wilfredo Lopez, and/or Richard A. Fenn” and a privilege log of all other records. (R. 622).

Respondent moved to quash the subpoena because, inter alia, Mr. Krainin was a non-party and did not have relevant documents or testimony related to Appellant's one remaining claim relating to the Chase account. (R. 589-604). In opposition, Appellant argued that the Krainin Subpoena was relevant because Mr. Krainin drafted a power of attorney for Mr. Whipple in 2005 which Appellant claimed was the operative power of attorney giving Mr. Fenn authority over the ***19** Chase account. (R. 647).

In 2003, Decedent executed a power of attorney (the “2003 Power of Attorney”) which granted Respondent authority to manage the Chase account on Decedent's behalf. (R. 65-66). All actions taken by Respondent with regard to the Chase account were

taken pursuant to the 2003 Power of Attorney. (R. 654, 113). The 2003 Power of Attorney was effective immediately and stated that “[t]his Power of Attorney will survive any other power or authority I shall give to the agent(s) or any of them, except to the extent that I expressly restrict or revoke any of the powers or authorities I grant. This Power of Attorney shall not be affected in the event that I become disabled or incompetent. [sic]” (R. 65-66).

In 2005, Mr. Krainin did indeed draft a durable power of attorney for Mr. Whipple (the “2005 Power of Attorney”). (R. 667-669). It included a springing mechanism, such that, in order for the durable power of attorney to have been effective, a written statement was required from a physician certifying that Decedent was unable to conduct his affairs in a competent manner. (R. 667-668). However, the certification never took place and the 2005 Power of Attorney -- the power of attorney drafted by Mr. Krainin -- never became effective. (R. 655, ¶4)

By Decision and Order dated January 31, 2011, and entered on February 2, 2011, the trial court granted Respondent's motion to quash the Krainin subpoena.

***20 ARGUMENT POINT I THE DISMISSAL OF THE CONVERSION CAUSE OF ACTION RELATING TO THE MERRILL LYNCH ACCOUNT, PURSUANT TO CPLR 3211(A)(1), WAS FULLY WARRANTED**

Appellant's Complaint alleges that Respondent “caused \$725,000 to be wired out of the Merrill Lynch account to deprive [Appellant] of the benefit of [Decedent's] intention to provide for him.” (R. 49). Further, the Complaint alleges that the \$725,000 from the Merrill Lynch account “was transferred to an HSBC bank account that [Respondent] jointly held with [Decedent].” (R. 49).

The trial court dismissed Appellant's conversion claim relating to the Merrill Lynch account, finding that “with respect to the Merrill Lynch account (the sixth cause of action) is flatly contradicted by documentary evidence demonstrating that [Decedent], rather than [Respondent], removed the \$725,000 in order to pay a settlement and legal expenses in connection with a lawsuit in Maine.” (R. 17).

As explained below, the trial court relied on multiple documents to support its decision to dismiss the Merrill Lynch account conversion claim. Regardless of the standard to be applied by the Court, be it an “utterly refute” standard or a “flatly contradicted” standard, the evidence presented to the trial court was more *21 than sufficient to refute Appellant's claims which amount to bald faced lies.

Further, Appellant's argument that there was an independent conversion claim overlooked by the trial court should also be rejected. To begin, Appellant's argument is being made for the first time on this appeal and, accordingly, should be summarily dismissed by the Court. Nevertheless, even if the Court were to consider the argument, it is meritless and would not withstand a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7).

A. Appellant's Merrill Lynch Conversion Claim Was Properly Dismissed Because It Was Utterly Refuted By Documentary evidence

(i) The Documentary Evidence Utterly Refuted Appellant's Conversion Claim

“Conversion occurs when a defendant exercises unauthorized dominion over personal property in interference with plaintiff's legal title or superior right of possession.” *LoPresti v. Terwilliger*, 126 F.3d 34, 41 (2d Cir. 1997) (applying New York law). Appellant's conversion claim relating to the Merrill Lynch account was properly dismissed based on the documentary evidence demonstrating that Decedent took all of the actions complained of in the Complaint, not Respondent. Respondent simply did not exercise control over the Merrill Lynch account and the evidence is unequivocal that monies from the Merrill Lynch account did not go to an account held by Respondent.

*22 Pursuant to [CPLR 3211\(1\)](#), a motion to dismiss on the basis of a defense founded on documentary evidence may be granted “only where the documentary evidence utterly refutes [the complaints] factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mutual Life Ins. Co.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 865 (2002); *DKR Soundshore Oasis Holding Fund Ltd. v. Merrill Lynch Int'l*, 80 A.D.3d 448, 914 N.Y.S.2d 145 (1st Dep’t 2011).¹

The documentary evidence conclusively established that all of the actions taken with respect to the Merrill Lynch account were taken by Decedent, not Respondent. Moreover, the documentary evidence utterly refuted Appellant’s allegation that the money in the Merrill Lynch account was wired to a bank account in which Respondent had an interest. Appellant’s allegations in that regard proved to be an outright lie.

The documentary evidence presented to the trial court included the following: (1) the October 2008 Letter from Decedent to G. William Haas, a Morrison Cohen partner. In the letter, Decedent noted that he, not Respondent, *23 arranged to wire \$670,749.05 to” Morrison Cohen’s escrow account and he instructed Mr. Haas to release (a) \$600,000 to the law firm of Smith Elliot Smith & Garmey, P.A. in connection with the settlement of the Maine lawsuit; and (b) \$70,749.05 to Morrison Cohen for payment of legal fees and costs incurred. (R. 125); and (2) a copy of Morrison Cohen’s ledger entries, business records, evidencing (a) the \$725,000 wire transfer from Merrill Lynch into Morrison Cohen’s HSBC IOLA (Interest on Lawyer Account-Escrow); (b) a \$600,000 wire transfer from Morrison Cohen’s escrow account to Smith Elliot Smith & Garmey, P.A., as attorneys; and (c) a check (No. 2532) in the amount of \$70,749.05 to Morrison Cohen in accord with Decedent’s instructions. (R. 126).

Thus, contrary to Appellant’s allegations that the proceeds from the Merrill Lynch account were transferred to an HSBC account that Respondent purportedly held with Decedent, the foregoing documentary evidence utterly refuted (and flatly contradicted) Appellant’s allegations. All of the transfers relating to the Merrill Lynch account were directed by Decedent, not Respondent. (R. 109-110).

(ii) The Trial Court’s Decision Was Appropriate Even Under the Second Department’s *Fontanetta v. Doe* Decision

On appeal, Appellant complains that the October 2008 Letter is not appropriate documentary evidence under the Second Department decision in *24 *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 86, 898 N.Y.S.2d 569, 575 (2d Dep’t 2010), which stated that only unambiguous and undisputed evidence can be considered “documentary” for [CPLR 3211\(a\)\(1\)](#) purposes. Appellant’s complaints should fall on deaf ears.

First, the *Fontanetta* decision is a Second Department decision that is not controlling in this Court.

Second, even if this Court finds *Fontanetta* to be persuasive authority, it was appropriate for the trial court to dismiss the Merrill Lynch account conversion claims and to consider the October 2008 Letter as documentary evidence even under the Second Department’s holding in *Fontanetta*.

Notably, the trial court did not base its decision solely on the October 2008 Letter. (R. 16). The trial court also was presented with additional documentary evidence: business records from Morrison Cohen demonstrating that it received funds from Decedent’s Merrill Lynch account. (R. 126). This evidence entirely negated Appellant’s allegation that the funds were wired to an account held by Respondent. Of course, Appellant makes no mention of these non-hearsay business records on appeal.

The October 2008 Letter corroborates the Morrison Cohen business records and vice-versa. Indeed, the October 2008 Letter is fully corroborated by the Morrison Cohen ledger entries evidencing that the wire transfers did not go to an *25 account controlled by Respondent but went, instead, to settle a lawsuit and to pay for legal fees incurred in connection with that lawsuit. This corroboration confirms the unambiguous and undisputed nature of the October 2008 Letter² thereby satisfying *Fontanetta*.³

(iii) Appellant's Admissibility Arguments Are Meritless

In a further effort to attack the October 28 Letter, Appellant cobbles together a string of arguments concerning the admissibility of the letter. Each argument is meritless.

First, Appellant argues that the trial court should not have considered the October 28 Letter because it amounts to hearsay. Of course, documents that courts have held to be “documentary evidence” under [CPLR 3211\(a\)\(1\)](#), such as trust agreements, wills, deeds, contracts, mortgages, often contain hearsay. See *Fontanetta*, 898 N.Y.S.2d at 575; *Matter of Casamassima v. Casamassima*, 30 A.D.3d 596, 818 N.Y.S.2d 233 (2d Dep’t 2006) (trust agreement qualifies as “documentary evidence”); *26 *Webster v. State*. No. M-65923, 2003 N.Y. Misc. LEXIS 2009 (N.Y. Ct. Cl. Jan. 30, 2003) (“The term “documentary evidence” as referred to in [CPLR 3211\(a\)\(1\)](#) typically means judicial records such as judgments and orders or out-of-court documents such as contracts, deeds, wills, and/or mortgages...”).

Second, Appellant's conclusory claims concerning the authenticity of the October 28 Letter, including unsupported claims concerning the genuineness of the signature, must be rejected. It is important to note that Appellant did not provide the trial court with an affidavit from anyone with personal knowledge to support his contention that the October 28 Letter was not genuine. Instead, Appellant only posited speculation in the legal briefs filed with the trial court. (R. 422, 542). If a plaintiff could defeat a motion for dismissal pursuant to [CPLR 3211\(a\)\(1\)](#) simply by alleging, through unsupported and conclusory averments made in legal briefs, that a signature was inauthentic, it would essentially eviscerate [CPLR 3211\(a\)\(1\)](#). The law is clear that unsupported allegations from an attorney, be it in the form of a legal brief or in the form of an attorney's affirmation, may not be used when the attorney was not a witness with knowledge. *Becker v. Elm Air Conditioning Corp.*, 143 A.D.2d 965, 533 N.Y.S.2d 605 (2d Dep’t 1988). Surely Appellant, who claims to be Decedent's domestic partner of over 20 years, had the ability to attest to the authenticity of the signature affixed to the October 28 Letter. Tellingly, *27 however, Appellant remained silent. Appellant's claims concerning authenticity of the October 28 Letter should be rejected out of hand.

Finally, Appellant's citations to the Dead Man's Rule ([CPLR § 4519](#)) and the Best Evidence Rule are inapposite. To begin, as pointed out in Appellant's Brief (“App. Br.”), [CPLR § 4519](#) only applies in a trial context. App. Br. at 31 n.21. The Best Evidence Rule also is an evidentiary rule applied at trial. See *Schozer v. William Penn Life Ins. Co.*, 84 N.Y.2d 639, 620 N.Y.S.2d 797 (1994). It is standard practice to attach copies, not originals, to affidavits when filing motions to dismiss. At no point did Appellant -- either in connection with the motion to dismiss or on Appellant's failed motion to reargue -- ask for or subpoena an original copy of the October 28 Letter. Accordingly, both the Dead Man's Rule and the Best Evidence Rule are irrelevant to the appeal of a decision on a [CPLR 3211](#) motion to dismiss.

B. Appellant's New Factual Spin On His Conversion Claim, Argued for The First Time On Appeal, Fails To State A Cause Of Action

Appellant argues, for the first time on appeal, that his conversion claim relating to the Merrill Lynch account, entitled “A Sixth Cause of Action Against Defendant Fenn Conversion” in the Complaint (R. 54), is really two distinct claims. The first claim, addressed above, related to Appellant's allegation that *28 Respondent converted funds contained within the Merrill Lynch account. However, Appellant now asserts that the sixth cause of action also alleges a second conversion claim relating to the fact that Respondent (allegedly) had Appellant's name removed from the Merrill Lynch account in 2007. App. Br. at 20-25. Appellant's new spin on the facts contained in the Complaint must be rejected both procedurally and substantively.

(i) The Court Should Not Consider Appellant's New Conversion Theory

Appellant did not raise this new version of the Merrill Lynch conversion claim in connection with Respondent's motion to dismiss. Because Appellant failed to raise this issue below, it is unpreserved for appellate review and should not be considered

by this Court. *Shinn v. Catanzaro*, 1 A.D.23d 195, 767 N.Y.S.2d 88 (1st Dep't 2003). Had Appellant made this argument before the trial court, Respondent could have factually countered Appellant's newly minted conversion theory. Accordingly, this Court should not even consider Appellant's conversion theory relating the allegation that Respondent had Appellant's name removed from the Merrill Lynch account. See *Travelers Indem. Co. v. Levy*, 195 A.D.2d 35, 41, 606 N.Y.S.2d 167 (1st Dep't 1993) (issues should not be first raised on appeal where new argument "could have been countered factually had they been made before the IAS Court"); *29 *Douglas Elliman-Gibbons & Ives, Inc. v. Kellerman*, 172 A.D.2d 307, 568 N.Y.S.2d 389 (1st Dep't 1991) (appellate court should not consider different theories if proof might have been offered to refute those theories in the court below).

(ii) Appellant's New Conversion Theory Is Subject to Dismissal Pursuant to CPLR 3211(a)(7) for Failure to State a Cause of Action

Even if the Court were to consider Appellant's new conversion claim concerning the removal of Appellant's name from a Merrill Lynch account, the claim should still be dismissed pursuant to CPLR 3211(a)(7) for failure to state a cause of action.⁴

According to New York law, "[c]onversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." *Peters Griffin Woodward, Inc. v. WCSC, Inc.*, 88 A.D.2d 883, 452 N.Y.S.2d 599, 600 (1st Dep't 1982). New York courts routinely dismiss conversion claims where a plaintiff fails to plead that the defendant exercised control over the funds in question. See, e.g., *Industrial Bank of Latvia v. Baltic Fin. Corp.*, No. 93 Civ. 9032, 1994 U.S. Dist. LEXIS 8580 (S.D.N.Y. June 24, 1994); *Old Republic Nat'l Title Ins. Co. v. Cardinal Abstract Corp.*, 14 A.D.3d 678, 680, 790 N.Y.S.2d 143, 145 (2d Dep't 2005) (conversion claim should have *30 been dismissed where "complaint fails to allege facts establishing that the appellants had title, possession, or control over any money or property allegedly converted")

Here, the Complaint contains no allegations that Respondent assumed dominion and control over the Merrill Lynch account. Moreover, there are no allegations in the Complaint that any of the alleged actions taken by Respondent with respect to the Merrill Lynch account were unauthorized. In fact, paragraph 36 of Appellant's Complaint acknowledges that Respondent was fully authorized to take action with respect to the Merrill Lynch account (i.e., "[Respondent] through his authority under the power of attorney...") (R. 48). Accordingly, Appellant's alternate theory of conversion does not fit within any cognizable legal theory for a claim for conversion and, therefore, Appellant's conversion claim would have been properly dismissed even if brought to the trial court's attention. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974 (1994) (Court's role on a motion to dismiss pursuant to CPLR 3211(a)(7) is to determine "whether the facts as alleged fit within any cognizable legal theory.")

C. This Court Should Ignore Appellant's References to the Newman Affidavit

In his brief, Appellant repeatedly cites to the Affidavit of Richard Newman In Support of Motion to Set Aside Probate Decree, dated June 29, 2010 (the *31 "Newman Affidavit"). (R. 525-530). The Newman Affidavit was not submitted to the trial court in connection with Respondent's motion to dismiss; rather, it was submitted by Appellant in connection with Appellant's failed motion to reargue and/or renew. (R. 517). The Newman Affidavit⁵ should not be considered by this Court and should be deemed irrelevant for multiple reasons.

First, it is axiomatic that new facts may not be submitted or considered by the trial court in connection with a motion to reargue. *James v. Nestor*, 120 A.D.2d 442, 502 N.Y.S.2d 27 (1st Dep't 1986). Because the Newman Affidavit could not be considered by the trial court in connection with respect to the motion to reargue, it should not be considered on this appellate review.

Second, Appellant failed to proffer any reason, let alone a valid reason, for his failure to submit the Newman Affidavit in connection with the underlying motion to dismiss. A motion to renew "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 shall contain reasonable justification for the failure to present such facts on the prior motion.” [CPLR § 2221\(e\)](#) (2010). “Renewal is granted sparingly, and only *32 in cases where there exists a valid excuse for failing to submit the additional facts on the original application[]; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.” [Beiny v. Wynvard](#), 132 A.D.2d 190,210, 522 N.Y.S.2d 511,524 (1st Dep’t 1987). Thus, even if Appellant could proffer a valid reason for failing to bring this “evidence” to the trial court in connection with the underlying motion practice, his submission was still untimely given that the Newman Affidavit was not submitted to the trial court for nearly three full months after the date it was executed. (R. 517, 530). Again, because the trial court should not have considered the Newman Affidavit, neither should this Appellate Court.

Third, the Newman Affidavit contained no “new” facts. Essentially, the Newman Affidavit (falsely) alleges that Respondent exerted undue influence over Decedent prior to Decedent’s death. However, Appellant’s motion to dismiss opposition papers were littered with the allegation that Respondent exerted undue influence over Decedent. (R. 405, 406). The arguments asserted in the Newman Affidavit were certainly not new and, therefore, should not have been considered by the trial court or by this Court on appeal.⁶

***33 POINT II APPELLANT’S RIGHT OF SEPULCHER CLAIM WAS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL**

Appellant contends that he possessed the right of sepulcher pursuant to [New York Public Health Law § 4201\(2\)\(ii-a\)](#) which provides that a decedent’s surviving domestic partner shall have the right to control the disposition of the decedent’s remains. The trial court properly dismissed Appellant’s right of sepulcher cause of action pursuant to the doctrine of collateral estoppel because Appellants rights in this regard had already been fully litigated -- and his claims rejected - in the Surrogate’s Court.

Collateral estoppel precludes relitigation of issues where the “identical issue” that is to be decided in the current .gation was “necessarily” decided in a prior action, and where the party to be precluded from relitigating the issue “had a full and fair opportunity to contest the prior determination.” [Kaufman v. Eli Lilly Co.](#), 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 588 (1985).

*34 Here, the doctrine of collateral estoppel precludes all of Appellant’s claims concerning the disposition of Decedent’s remains including Appellant’s right of sepulcher claim. On or about October 28, 2009, Appellant filed a motion, by order to show cause, in the Surrogate’s Court, seeking an order (a) enjoining Respondent from disposing of Decedent’s remains (the “Ashes Motion”) and (b) compelling Respondent to deliver Decedent’s remains to Appellant. (R. 222-225). In the Ashes Motion, similar to the argument made in this case, Appellant argued that during Decedent’s life, Appellant was Decedent’s domestic partner and, accordingly, pursuant to [New York Public Health Law § 4201](#), Appellant possesses the exclusive right to control the disposition of Decedent’s remains. (R. 234-237). Appellant specifically asked the Surrogate’s Court to direct Respondent to deliver Decedent’s remains to him. (R. 225).

In response to the Ashes Motion, Respondent filed an affidavit in which he noted that the documentary evidence completely refuted Appellant’s contention that he was Decedent’s domestic partner. For example, Appellant erroneously contends that he lived with Decedent for more than 22 years prior to Decedent’s passing. App. Br. 4. Appellant’s contention is clearly untrue: among other things, Decedent Will refers to Lopez as being given a bequest “in appreciation of his friendship and his services to me” and further notes Appellant’s residence as being *35 at 1986 Grand Avenue, Bronx, New York (R. 127). Further, Decedent’s funeral instructions describes Lopez as “Wilfredo Lopez, a special friend, presently residing at 1986 Grand Ave Apt 1E, Bronx New York.... He has known me for over 10 years and is a frequent visitor at 8 Perry St....” (R. 257).

On October 30, 2009, the Surrogate’s Court heard argument on the Ashes Motion and directed that the Philadelphia disposition of the Decedent’s remains would take place after December 4, 2009. Further, the Court, on November 9, 2009, specifically ordered that Respondent, not Appellant, was to retain the last one-third of the Decedent’s ashes (R. 261).

Thus, Appellant already had a full and fair opportunity to present evidence concerning Respondent's actions with regard to the disposition of Decedent's remains. All of Appellant's arguments were made to the Surrogate's Court and, nevertheless, the Surrogate's Court expressly permitted Respondent to retain Decedent's remains and allowed Respondent to inter one-third of Decedent's remains at St. Clement's Church in Philadelphia in accord with Decedent's expressed wishes. As such, the Surrogate's Court expressly rejected Appellant's claim that he was Decedent's domestic partner - the very same issue Appellant alleges in connection with his right of sepulcher claim. Had the Surrogate decided otherwise, Decedent's remains would have been turned over to Appellant. Notably, *36 Appellant never sought relief from the Surrogate's Court Order or appealed the decision in any way. (R. 119). The doctrine of collateral estoppel, therefore, precluded Appellant's cause of action for right of sepulcher. Accordingly, the trial court's dismissal of Appellant's claim must be affirmed.

Alternatively, the trial court also could have dismissed the right of sepulcher claim pursuant to [Section 205\(1\) of the SCPA](#) which reads as follows:

The surrogate's court of any county has jurisdiction over the estate of a decedent who was a domiciliary of the state at the time of his death, disappearance or internment. The proper venue for proceedings relating to such estates is the county of the decedent's domicile at the time of his death, disappearance or internment.

[SCPA § 205\(1\)](#).

The Surrogate's Court is, of course, particularly well-suited and equipped to adjudicate the claim asserted here concerning the disposition of Decedent's remains (or any other of Decedent's property Appellant is attempting to grab). See, e.g., [Johnson v. Stafford](#), 18 A.D.3d 324, 794 N.Y.S.2d 646 (1st Dep't 2005) (issues relating to fraudulent transfer of property affecting distribution of estate assets were "within the particular expertise of Surrogate's Court"); [Peekskill Cmty. Hosp. v. Sayres](#), 88 A.D.2d 657, 450 N.Y.S.2d 527 (2d Dep't), appeal dismissed, 58 N.Y.2d 601, 458 N.Y.S.2d 1025 (1982) ("[w]herever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in the *37 Surrogate's Court"); [Conejero v. LaJam](#), 190 Misc. 2d 393, 395, 738 N.Y.S.2d 539, 541 (N.Y. Sup. Ct. Queens Co, 2002) ("the Surrogate's Court is peculiarly suited to administer the proceeds of an approved settlement and is the 'preferred' forum."); [People v. Ekinici](#), 191 Misc. 2d 510, 516, 743 N.Y.S.2d 651, 656 (N.Y. Sup. Ct. Kings Co. 2002) ("In general the Surrogate's Court is the preferred forum to entertain claims against an estate.").

Obviously recognizing that issues relating to the Decedent's remains are more appropriate for the Surrogate's Court, Appellant already litigated these issues in the Surrogate's Court in October 2009 and the Surrogate's Court issued an Order directing that the remainder of Decedent's remains stay in Respondent's possession. There can be no dispute that the Surrogate's Court is the appropriate and preferred forum to resolve issues relating to Decedent's Estate. Appellant's right of sepulcher claim plainly did not belong in the Supreme Court. Dismissal of this claim was required pursuant to [SCPA § 205](#).

***38 POINT III APPELLANT'S CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WERE PROPERLY DISMISSED PURSUANT TO WELL SETTLED FIRST DEPARTMENT PRECEDENT**

A. THE TRIAL COURT CORRECTLY DISMISSED ALL OF APPELLANT'S CLAIM FOR IIED BECAUSE APPELLANT FAILED TO ALLEGE EXTREME AND OUTRAGEOUS CONDUCT AS A MATTER OF LAW

Appellant asserted seven claims of intentional infliction of emotional distress ("IIED") against Respondent, all of which the court properly dismissed as matter of law for failing to allege extreme and outrageous conduct "beyond all possible bounds of decency." (R. 18). Appellant seeks to restore only his seventeenth cause of action for IIED (see App. Br. at 17, n. 14), a "catch-all" which alleges that "Fenn's conduct in connection with his constant campaign against the personal and financial interests of Plaintiff, taken in totality of the effort, is extreme and outrageous conduct." (R. 59).

Intentional infliction of emotional distress under New York law has four elements, none of which are pleaded (or present) here; (i) extreme and outrageous conduct; (ii) intent to cause severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) resulting severe emotional distress. *Bender v. City of New York*, 78 F.3d 787, 790 (2d Cir. 1996). With regard to the first element, “liability has been found only where the conduct has been so *39 outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122, 596 N.Y.S.2d 350, 353 (1993) (citations omitted). The standard for extreme and outrageous conduct is extremely difficult to satisfy and plaintiffs are rarely able to show it. *Ponticelli v. Zurich Am. Ins. Group*, 16 F. Supp. 2d 414, 440 (S.D.N.Y. 1998). Emphasizing a plaintiffs heavy pleading burden, the Court of Appeals once observed that “of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous.”

The “emotional distress” suffered by the Appellant must have been “so severe that no reasonable man could be expected to endure it.” *Simon v. Unum Group*, No. 07 Civ. 11426 (SAS), 2008 U.S. Dist. LEXIS 47719, at 14 (S.D.N.Y. June 18, 2008), *ing Wiener v. Unumprovident Corp.* 202 F. Sup 2d 116, 122 (S.D.N.Y. 2002). Mere threats, annoyance's or other petty oppressions, no matter how upsetting, are insufficient to constitute the tort of intentional infliction of emotional distress.” *Colina v. One E. River Place Realty Co.*, No. 99 Civ. 5173 (DC), 2000 U.S. Dist. LEXIS 11728, at *17 (S.D.N.Y. Aug. 15, 2000), quoting, *40 *Walther v. Maricoa Inv., Corp.*, No. 97 Civ. 4816. 1998 U.S. Dist. LEXIS 15592, at *11-12 (S.D.N.Y. Sept. 30, 1998) (citation omitted); *Seltzer v. Bayer*, 272 A.D.2d 263, 709 N.Y.S.2d 21 (1st Dep 2000) Conduct that causes inconvenience and embarrassment or places a person in an uncomfortable situation for a protracted time is not sufficient. *Associates First Capital v. Crabill*, 51 A.D.3d 1186, 857 N.Y.S.2d 799 (3d Dep't 2008), appeal denied, 11 N.Y.3d 702, 864, N.Y.S.2d 389 (2008); *Reno v. Mellon*, No. 109856/08, 2009 N.Y. Misc. LEXIS 1562 (N.Y. Sup. Ct. N.Y. Co. Mar. 27 2009).

Appellants IIED claims are based upon the following factual allegations: Fenn allegedly exerted influence over Decedent in order to deprive Appellant of and/or convert the Chase bank accounts (R. 47, ¶¶ 25-33; R. 56, ¶¶ 123-127 Fenn allegedly exerted influence over Decedent in order to deprive Appellant of and/or convert the Merrill Lynch account (R. 48-49, 34-46; R. 57, 128-132); Fenn allegedly improperly caused Appellant to be deprived of the use of 8 Perry Street (R. 50-51, ¶¶ 61-62; R. 57-58, ¶¶ 133-137); Fenn allegedly improperly caused Appellant to be deprived of the use of Cherry Grove (R. 49, ¶¶ 47-52; R. 58, ¶¶ 138-142); Fenn allegedly influenced Decedent to enact a codicil to his will that denied Appellant a bequest (R. 50, ¶¶ 53-57; R. 58, ¶¶ 143-147); Fenn allegedly denied Appellant the right to dispose of Decedent's remains as he saw fit (R. 50, ¶¶ 59-60; R. 59, 148-152); and Fenn allegedly has taken all of foregoing *41 actions to deny Appellant benefits of Decedent estate that are allegedly due to him, R. 59, 153-157). Essentially all of these claims allege that Fenn has acted to deprive Appellant of the pecuniary benefits he allegedly anticipated from Decedent. Whether taken individually, or together, none of the alleged acts rise to the level of conduct necessary to sustain an IED claim as a matter of law.

Justice Rakower's decision dismissing Appellant's claims for IED is supported by *Plaza v. Estate of Wisser*, 211 A.D.2d 111, 626 N.Y.S.2d 446 (1st Dep't 1995), a case which remains good law, is directly on point, and requires dismissal of all of Appellant's IIED claims. In *Plaza*, the plaintiff alleged that he continuously lived with the decedent in a monogamous relationship for over six years, when the decedent died from AIDS related complications. *Id.* at 114-15. Just as in the case at bar, after the decedent's passing, the plaintiff brought claims for breach of fiduciary duty and intentional infliction of emotional distress against the decedent's executors (in that case, the decedent's parents) as a result of: (1) their alleged refusal to allow him to attend or participate in the decedent's burial or funeral; (2) conveyance of the decedent's condominium apartment in violation of the decedent's alleged assurances to plaintiff that he could continue residing there; and (3) and the conveyance of the decedent's real property and denial of financial support to the Plaintiff even though he was allegedly promised such. *Id.* at 116. In *42 affirming the lower court's dismissal of these IIED claims, the first Department expressly found that “White these allegations reflect conduct which may have caused distress and anxiety to Plaintiff, they can hardly be said to allege conduct which is ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’” *Id.* at 120, quoting *Howell*, 81 N.Y.2d at 122.

The three allegations asserted in *Plaza* embrace the totality of Appellant's IIED claim and requires its dismissal. First, Respondent's alleged conduct with regard to the Chase Bank Accounts, the Merrill Lynch Accounts, 8 Perry Street and the Cherry Grove Property are not any more "extreme or outrageous" than the parents actions in *Plaza*. Likewise, the parents' actions in denying the *Plaza* plaintiff the right to attend the decedent's funeral, requires the dismissal of Appellant's IED claim to the extent it relates to the handling of the Decedent's remains against his wishes. Appellant in the instant case was free to attend the funeral of the Decedent.

Contrary to Appellant's misleading and tangential statements, neither the First Department in the *Plaza* decision nor the trial court analyzed or addressed whether or not plaintiff had standing to bring a claim for IIED as the decedent's *43 same-sex partner.⁷ It simply was not a relevant issue for the First Department to address, nor was it relevant in the instant case to the disposition of Appellant's claims for IIED. Nonetheless, Appellant argues that Justice Rakower's decision was based on Appellant's lack of standing as the alleged domestic partner of Decedent, and claims that the law relating to "more traditional relationships" would be different. This simply is not true.

First, neither *Plaza* nor the instant case is predicated on whether or not the plaintiff is next of kin. Compare *Massaro v. Charles J. O'Shea Funeral Home, Inc.*, 292 A.D.2d 349, 738 N.Y.S.2d 384 (2d Dep't 2002) (cited by Appellant, holding that decedent's son, as next-of-kin, was permitted to bring an action involving the mishandling of a corpse).

Second, *Plaza* has been applied to heterosexual couples as well. *Scher v. Scher*, 19 Misc. 3d 134A, 862 N.Y.S.2d 811 (N.Y. Sup. Ct. Kings Co. 2008). In *Scher*, plaintiff, a widow, brought a claim for IIED against defendants alleging that they removed her husband to defendants home during a period when she was hospitalized and "refused to permit any communication between plaintiff and her husband or to provide her with any information regarding his medical condition." *Id.* Plaintiff further alleged that, following her husband's death, defendants failed "to advise plaintiff of [her husband's] funeral arrangements" and they allegedly "converted various articles of personal property from decedent's apartment and transferred money from his bank accounts to themselves." *Id.*

On a motion to reargue the court's prior dismissal of plaintiff's claim for IIED on summary judgment, the court held that: Even accepting the truth of plaintiff's allegations regarding what defendants did or failed to do, the underlying conduct was not so shocking and outrageous that it exceeded all reasonable bounds of decency. This threshold of outrageousness is so difficult to reach that, of the intentional infliction of emotional distress claims considered by the Court of Appeals, "everyone has failed because the alleged conduct was not sufficiently outrageous" (*Howell v New York Post Co.*, 81 NY2d 115, 122, 612 N.E.2d 699, 596 N.Y.S.2d 350 [1993] [citations omitted]) ... Here defendants' failure to advise plaintiff of decedent's funeral arrangements is not so extreme in degree as to go beyond all possible bounds of decency (see *Plaza v Estate of Wisser*, 211 AD2d 111, 626 N.Y.S.2d 446 (1995)).

*45 *Id.* Appellants' claim that *Plaza* has been implicitly overruled is simply incorrect. Whatever changes may have occurred in New York law, one still must allege conduct so shocking and outrageous that it exceeds all reasonable bounds of decency in order to avoid dismissal of a claim for IIED.

To the extent Appellant's claim for IIED to the extent is based on allegations of undue influence over Decedent's finances, the courts have consistently held that this allegation is not sufficiently outrageous. In *Zeff v. Weissman*, 209 A.D.2d 612, 613, 619 N.Y.S.2d 113, 115 (2d Dep't 1994), the Second Department affirmed the dismissal of an IED claim predicated on allegations that the defendants in that case exerted undue influence over the plaintiff's grandmother and her bank accounts, depriving them of an inheritance. *Id.* at 612-13. The allegation, as stated by the *Zeff* Court, "was not sufficiently extreme or outrageous to support such a cause of action." *Id.* at 613; see also *Simon v. 160 W. End Ave. Corp.*, 7 A.D.3d 318, 775 N.Y.S.2d 851 (1st Dep't 2004) (allegations that cooperative tried to use undue influence over decedent to prevent her from transferring cooperative apartment to Appellant not sufficiently outrageous to support IED claim); *Cunningham v. Security Mut. Ins. Co.*, 260 A.D.2d 983, 689 N.Y.S.2d 290 (3d Dep't), appeal dismissed, 94 N.Y.2d 796, 700 N.Y.S.2d 423 (1999) (insurance companies failure to honor

an agreement with Appellant, failing *46 to compensate her, leaving her without a home, adequate possessions or funds for over a year, coupled with accusations she committed arson and submitted false statements under oath, insufficient to sustain claim of IHED.

Appellants allegations are not any more shocking or extreme than those of the plaintiffs in *Plaza*, her or *Zeff*. Accordingly, Appellants II claim was properly dismissed.

B. Appellant's IHED Claim is Encompassed By Other Torts and Must Be Dismissed

In Appellant's seventeenth cause of action for IHED, there are no specific allegations of conduct, but rather, it just incorporates allegations from other paragraphs of the Complaint, summing up by alleging that "Fenn's conduct in connection with his constant campaign against the personal and financial interests of Plaintiff, taken in totality of the effort, is extreme and outrageous conduct." (R. 59, ¶54). Since Appellant did not even bother to allege separate instances of conduct, it is clear that each of the IHED claim's factual allegations are encompassed within his other (dismissed) conversion and breach of fiduciary duty claims and therefore were properly dismissed. See *Baliva v. State Farm Mut. Auto. Ins. Co.*, 286 A.D.2d 953, 954, 730 N.Y.S.2d 655, 657 (4th Dep' 2001) (IHED claims do not lie where, as here, "the conduct complained of falls well within the ambit of other traditional tort liability.")

***47 C. Appellant's IHED Cause of Action is Also Time Barred to the Extent it Incorporates the Eleventh, Twelfth, and Thirteenth Cause of Action**

Claims for IHED are subject to a one year statute of limitations. CPLR § 215(3) (2010); *Brasseur v. Speranza*, 21 A.D.3d 297, 800 N.Y.S.2d 669 (1st Dep't 2005). For purposes of an IHED claim, the statute begins to run from the date of the "last actionable act." *Colina*, 2000 U.S. Dist. LEXIS 11728, at *18 (citations omitted).

To the extent Appellant's claim for IHED is based on his eleventh, twelfth, and thirteenth causes of action which include allegations in connection with the Chase bank accounts, the Merrill Lynch account, or 8 Perry Street, even accepting the allegations of the Complaint as true, the "last actionable act" for each of these claims occurred over one year before the Complaint was filed on December 17, 2009. The last actionable act with regard to the Chase accounts for IHED allegedly took place in either June or July of 2008 (R. 47, ¶¶ 30-32). The last actionable act with regard to the Merrill Lynch account allegedly took place on October 26, 2008 (R. 49, 43). The last actionable act with regard to 8 Perry Street allegedly took place in July of 2008 (R. 50, ¶ 54). Accordingly, to the extent Appellant's claim is based on these allegations are time-barred and must be dismissed. CPLR § 215(3).

***48 D. Appellant's Claim For IHED is Barred by Collateral Estoppel to The Extent it Incorporates Appellant's Sixteenth Cause of Action**

To the extent the IHED claim Appellant seeks to reinstate incorporates his sixteenth cause of action for IHED concerning "Fenn's conduct in connection with disposition of Rev. Whipple's remains," the doctrine of collateral estoppel precludes the claim. (R. 59, ¶ 149). As discussed in Point II, supra, Appellant already had a full and fair opportunity to present evidence concerning Respondent's actions with regard to the disposition of Decedent's remains in the Surrogate's Court. Appellant's claims were rejected and, therefore, the doctrine of collateral estoppel precludes all of Appellant's claims concerning the disposition of Decedent's remains including Appellant's claim for IHED.

POINT IV THE TRIAL COURT CORRECTLY DISMISSED APPELLANT'S CLAIM FOR PRIMA FACIE TORT

Appellant's twentieth cause of action against Respondent asserted the “catch-all” claim of prima facie tort alleging, without the required specificity, that “should [Respondent's] acts have been deemed lawful,” Respondent “caused [Appellant] special damages regarding the use and possession of the Chase accounts, the Merrill Lynch account, 8 Perry Street, Cherry Grove and the disposition of [Decedent's] remains.” (R. 61, ¶ 168 & 171).

***49** The trial court correctly held that Appellant “failed to sufficiently allege special damages.” (R. 19). See *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143, 490 N.Y.S.2d 735 (1985); *Lynch v. McQueen*, 309 A.D.2d 790, 765 N.Y.2d 645 (2d Dep't 2003). Here, the Complaint merely states that Respondent caused Appellant “special damages” no itemization or specificity was provided whatsoever. (R. 61, ¶ 171, 172). “Damages pleaded... without any attempt at itemization, must be deemed allegations of general damages.” *Leather Dev. v. Dun & Bradstreet, Inc.*, 15 A.D.2d 761, 224 N.Y.S.2d 513 (1st Dep't 1962), aff'd, 12 N.Y.2d 909, 237 N.Y.S.2d 1007 (1963). Contrary to Appellant's claims, his listing of categories of damages does not allow for readily quantifiable damages. He alleges that he suffered the loss of the proceeds in the Chase account and Merrill Lynch account but he doesn't state on what date the balance of those accounts should have been calculated or the amount of proceeds he should have been entitled to. The “fair market value for the use and occupancy” of 8 Perry Street and Cherry Grove are both speculative and variable figures, as is the rental income from Cherry Grove.

Moreover, Appellant's “grab bag” approach fails for many other reasons:

- The documentary evidence demonstrates that Fenn took no actions with regard to the Chase accounts or the Merrill Lynch account (R. 125, 126, 665-666);

- *50** ● Claims relating to 8 Perry Street they were fully resolved in the Ejectment Action (R. 150-156);

- Claims relating to the Cherry Grove Property must be dismissed pursuant to [SCPA § 205](#) (see Point II);

- Claims relating to the disposition of Decedent's remains are properly before the Surrogate's Court ([SCPA § 205](#)) and in fact, have already been decided by the Surrogate's Court (see Point II).

“Prima facie tort should not become a ‘catch-all’ alternative for every cause of action which cannot stand on its legs.” *Belsky v. Lowenthal*, 62 A.D.2d 319, 323, 405 N.Y.S.2d 62, 65 (1st Dep't 1978), aff'd, 47 N.Y.2d 820, 418 N.Y.S.2d 573 (1979). Appellant's prima facie tort claim is the paradigm of a cause of action deserving of dismissal; indeed, there are myriad reasons why Appellant's prima facie tort claim was properly dismissed.

POINT V THE TRIAL COURT PROPERLY QUASHED APPELLANT'S SUBPOENA DIRECTED TO NON-PARTY HAROLD KRAININ, ESQ.

Appellant improperly seeks discovery from Harold Krainin, Esq., Decedent's counsel for more than two decades. Appellant subpoenaed Mr. Krainin for a deposition and to produce documents. Namely, Appellant requested that Mr. Krainin produce “[a] ll non-privileged records concerning Rev. Charles E. Whipple, Wilfredo Lopez, and/or Richard A. Fenn” and a privilege log of all other records. (R. 622).

***51** The central reason proffered by Appellant to support the relevancy of the Krainin Subpoena - the allegation that Mr. Krainin drafted the “operative” power of attorney from Charles E. Whipple to Mr. Fenn relating to the Chase account (R. 647, ¶ 20) -- is utterly false and is flatly contradicted by the relevant power of attorney itself, as the court correctly held. (R. 40-42). Circularly, since the power of attorney Mr. Krainin drafted is irrelevant to Appellant's claims, Appellant seeks discovery from Mr. Krainin to again try to show that Mr. Krainin drafted the operative power of attorney and, thus, establish a relevant reason for his testimony. The court correctly prevented Appellant from subjecting a non-party to a fishing expedition.

A. The Trial Court Correctly Held That The 2003 Power of Attorney was the Operative Power of Attorney Throughout the Relevant Time Period

In March 2003, Decedent appointed Respondent as attorney in fact with respect to the handling and management of the Chase account. (R. 665-666). The 2003 Power of Attorney took immediate effect and included language stating that “[t]his Power of Attorney will survive any other power or authority I shall give to the agent(s) or any of them, except to the extent that I expressly restrict or revoke any of the powers or authorities I grant. This Power of Attorney shall not be affected in the event that I become disabled or incompetent. [sic]” Subsequently, *52 in June 2005, Decedent executed a Power of Attorney appointing Respondent as Decedent's attorney-in-fact to act on Decedent's behalf in a wide variety of matters in the event that Decedent was properly certified as unable “to conduct [his] affairs in a competent manner.” (R. 667-669). There is no evidence that Decedent was ever certified to be incompetent and Decedent continued to rely on Respondent to act through the 2003 Power of Attorney. (R. 654-5, ¶ 3-4).

As the trial court correctly stated, “As a general rule, an attorney in fact's authority may be revoked by the principal either expressly or impliedly through words or conduct which are inconsistent with the continuation of authority.” (R. 41), *citing Zaubler v. Picone*, 100 A.D.2d 620, 621, 473 N.Y.S.2d 580, 582 (2d Dep't 1984) (citing Restatement (Second) of Agency 2d, § 119 (1958)). In *Zaubler*, the Second Department held both earlier and later powers of attorney remained effective where there was no indication that the principal intended to revoke the earlier power of attorney and the two documents did not contradict one another. *Id.*

Applying the law to the instant case, Justice Rakower held:

The 2005 power does not expressly revoke or otherwise limit Fenn's authority under the 2003 power. Moreover, there is nothing inconsistent between the 2003 power, which gave Fenn authority to act on Whipple's behalf with respect to the Chase account; and the 2005 power, *53 which would give Fenn expansive powers to act on Whipple's behalf on virtually all matters in the event that Whipple was duly certified to be unable to conduct his affairs in a competent manner. The aforementioned powers speak for themselves.

(R. 41).

As the trial court found, “the aforementioned powers speak for themselves.” Nonetheless, Appellant tries to advance a tortured reading in which Decedent impliedly revoked the 2003 Power of Attorney by arranging for the powers in the 2005 Power of Attorney to only take effect if Decedent were incompetent. There is no support in the record for this reading. First, just two years earlier Decedent had empowered Respondent to handle the Chase accounts in the 2003 Power of Attorney that stated that it would survive unless expressly limited or revoked. This language indicated Decedent's intention that the Power of Attorney should survive unless he stated otherwise. Second, there is no evidence that Decedent ever expressed to anyone any secret intention or desire to revoke the 2003 Power of Attorney. Third, in the 2005 Power of Attorney, Decedent granted Respondent expansive powers over all of Decedent's affairs in the event that Decedent was unable to take care of them himself, which belies the idea that Decedent intended to limit or rescind Respondent's authority over the a single Chase account.

The cases cited by Appellant are neither applicable to the facts of this case, *54 nor are they binding precedent on this Court. In *Whiting*, the court held that an earlier power of attorney, granting authority to one person, was impliedly revoked when the principal executed a second power of attorney giving authority to two people. *Whiting v. Marine Midland Bank-Western*, 80 Misc. 2d 871, 887-888, 365 N.S.2d 628 (N.Y. Sup. Ct. Cattaraugus Co., 1975). Because the first power of attorney did not contain language as to its duration or survival, the court held that a reasonable time for termination of the first power was at the execution of the second power of attorney. *Id.* at 888. By contrast, in the 2003 Power of Attorney, Decedent indicated his intent that the 2003 Power of Attorney should survive unless expressly revoked or restricted. *Id.* Moreover, in *Whiting*, the agent

attempted to exercise authority under the second power of attorney, which the court found to be a “manifestation of consent on her part to a termination of the former power of attorney.” *Id.* at 888. Here, there was no such evidence of termination.

Appellant fails to cite any cases that further his argument that Decedent's execution of the 2005 Power of Attorney demonstrated some secret intent to revoke the 2003 Power of Attorney. Appellant instead relies on cases in which a principal expressly revoked an agent's authority or else took actions that unmistakably contradicted a previous grant of authority such that the two could not *55 be reconciled. *In Ryan, Beck & Co., LLC*, an investor unquestionably revoked a broker's authority when he informed the broker that he was moving his accounts to another brokerage firm, told the broker not to make any further transactions, and then removed the funds from his accounts with the broker. *Ryan, Beck & LLC v. Fakih*, 268 F. Supp. 2d 210, 214-215, 226 (E.D.N.Y. 2003). *In re Aig-Nathan Knitwear, Inc.*, members of a creditors committee gave power of attorney to one committee and subsequently left that committee, joining another and giving the second committee powers of attorney. *In re Aig-Nathan Knitwear, Inc.*, 153 F. Supp. 580, 582 (S.D.N.Y. 1957). The powers of attorney could not be granted to both committees and the conflicting powers of attorney “directly necessitated” the court's conclusion that the grantors revoked the earlier grant. *Id.* *In re Univ. Hosp.*, a principal executed a living will/power of attorney and, shortly after, told the agents she designated that she did not understand the implications of the document relating to the disconnection of life support and discontinuance of treatment. *In re Univ. Hosp. of the State Univ. of N.Y. Upstate Med. Univ.*, 194 Misc. 2d 372, 375, 754 N.Y.S.2d 153 (N.Y. Sup. Ct. Onondaga Co. 2002). If she had understood, she told them she probably would not have signed it. *Id.* Based on evidence that clearly contradicted the living will and evidenced her intention to revoke it, the court held that “there [was] little doubt that [the principal] by her *56 actions, revoked the living will”. *Id.* at 379. In *N.I.R.B.*, the court held that powers of attorney were revoked where they were expressly revoked despite not following a technical revocation procedure involving written notices sent by registered mail by a particular date. *N.L.R.B. v. Marcus Trucking Co.*, 286 F.2d 583(2d Cir. 1961).

Thus, none of these cases are relevant. There is no evidence that Decedent ever expressed any desire to revoke the 2003 Power of Attorney. Nor did Decedent's execution of the 2005 Power of Attorney evidence any intention to revoke the 2003 Power of Attorney because the two were consistent with one another and clearly reconcilable. The 2003 Power of Attorney did not survive because Decedent failed to follow some technical rules for revoking it. He simply did not manifest any intent to restrict or revoke the 2003 Power of Attorney by executing the 2005 Power of Attorney. As the court below held, the 2005 Power of Attorney does not expressly restrict or limit the 2003 Power of Attorney, and “there is nothing inconsistent between the 2003 power, which gave Fenn authority to act on Whipple's behalf with respect to the Chase account; and the 2005 power, which would give Fenn expansive powers to act on Whipple's behalf on virtually all matters in the event that Whipple was duly certified to be unable to conduct his affairs in a competent manner.” (R. 41).

***57 B. The Trial Court Correctly Quashed Appellant's Subpoena of a Non-party Because Appellant Seeks Irrelevant and Privileged Information**

Appellant improperly seeks extensive disclosure from Mr. Krainin, a non-party, who was counsel to Decedent and now is co-counsel to Respondent as executor of Mr. Whipple's estate. Without placing any temporal limitations on his requests. Appellant requests that Mr. Krainin produce “[a]ll non-privileged records concerning Rev. Charles E. Whipple, Wilfredo Lopez, and/or Richard A. Fenn” and a privilege log of all other records. (R. 622). Despite the fact that it is crystal clear that the 2003 Power of Attorney was drafted by Chase bank and not Mr. Krainin, Appellant claims he needs to make inquiry of Mr. Krainin about a whole host of irrelevant issues including Krainin's knowledge about the 2003 Power of Attorney. See App. Br. at 55.

The trial court correctly quashed the Krainin subpoena. Appellant's purported theory as to why information from Mr. Krainin was needed -- the fact that Mr. Krainin drafted the 2005 Power of Attorney -- was utterly refuted upon Respondent's presentation of the operative power of attorney, the 2003 Power of Attorney.

Mr. Krainin drafted the 2005 Power of Attorney, which the court correctly held to be irrelevant. It never became effective, nor was it the operative power of *58 attorney relating to management of the Chase account. Circularly, since the power of attorney Mr. Krainin drafted is irrelevant to Appellant's claims, Appellant seeks discovery from Mr. Krainin to try again to

show that the 2005 Power of Attorney revoked the 2003 Power of Attorney, thus justifying the subpoena after the fact. But there is nothing but conjecture and speculation to suggest Mr. Krainin has any evidence that would support Appellant's theory. Appellant cannot point to anything other than the 2005 Power of Attorney itself as a reason to suspect that Mr. Krainin has any evidence which would impact the 2003 Power of Attorney's effectiveness. Appellant is on a fishing expedition and simply wants to harass Respondent's attorney.

Subpoenas which seek documents that are neither relevant nor material will be routinely quashed. *DataSafe, Inc. v. American Express*, 2 A.D.3d 224, 224, 769 N.Y.S.2d 30, 30 (1st Dep't 2003) (affirming order quashing subpoenas seeking documents not relevant to underlying action from a non-party). Because Appellant seeks irrelevant documents and deposition testimony from a non-party relating largely to a 2005 Power of Attorney that did not govern the claims at issue, the trial court properly quashed Appellant's subpoena.

*59 CONCLUSION

For the foregoing reasons, the orders of the Surrogate's Court should be affirmed.

Footnotes

- 1 Appellant makes much of the trial court's holding that the documentary evidence "flatly contradicted" Appellant's conversion claim relating to the Merrill Lynch account. (R. 17). Of course, the Court of Appeals decision in *Goshen* uses the term "utterly refutes." *Goshen*, 98 N.Y.2d at 326. However, this is a distinction without a difference. Under either standard, the documentary evidence unequivocally refuted Appellant's conversion claim.
- 2 It bears noting that letters are frequently considered "documentary evidence" in motion to dismiss cases decided pursuant to CPLR 3211(a)(1). See, e.g., *N.Y. Cmty. Bank v. Snug Harbor Square Venture*, 299 A.D.2d 329, 749 N.Y.S.2d 170 (2d Dep't 2002) (dismissing action pursuant to CPLR 3211(a)(1) based on a letter).
- 3 All of this documentary evidence is also corroborated by Respondent's affidavit in which he avers that he did not authorize the transfer from Decedent's Merrill Lynch account to Morrison Cohen's IOLA account. (R. 110).
- 4 Respondent moved to dismiss Appellant's Complaint on multiple grounds including CPLR 3211(a)(1), (4), (5) and (7) and Surrogate's Court Procedure Act §205. (R. 104).
- 5 The Newman Affidavit is acknowledged rather than verified, and is accordingly not in proper affidavit form, but for ease of description is referred to in this brief as the "Newman Affidavit."
- 6 The Newman Affidavit was certainly not the only irrelevant and improper citation in Appellant's brief. Appellant also takes an irrelevant, unnecessary and wholly unsupported stab at Respondent's counsel, Morrison Cohen LLP, when he asserts that Morrison Cohen should not have represented Decedent in connection with a lawsuit pen in Maine (the "Maine Action" because of an alleged conflict based on the religious affiliation of a Morrison Cohen partner. App. Br. at 10 n.8. Because the Maine Action was related to Decedent's work for an Episcopal Church diocese in Maine, Appellant argues that the Morrison Cohen partners service as a board member of a New York Episcopal Church diocese somehow conflicted Morrison Cohen. Appellants' spurious allegation is utter nonsense. The parties to the Maine Action were Decedent and another individual, and no entity of the Episcopal Church was a party. No Morrison Cohen attorney has any affiliation whatsoever with the Episcopal Diocese of Maine or any parish located in Maine, (R. 424-427). The suggestion that the religious affiliation of any partner of Morrison Cohen would influence the firm's handling of litigation is offensive (although typical of Appellants' sharp litigation practices).
- 7 Appellant cites to a number of legislative changes and court cases relating to the evolving legal landscape for same-sex oriented individuals and couples: N.Y. Workers' Comp. L. § 4 (surviving domestic partners of 9/11/01 attacks deemed spouses); N.Y. Pub. Health 48 L. § 4201 (burial rights for surviving domestic partners); N.Y. Exec. L. § 296(1) (sexual orientation nondiscrimination act in employment, housing, etc.); 2010 Session Laws of N.Y., Ch. 34 (amending law to permit no fault divorce); see also 49 U.S.C.S. § 40101(9/11 benefits for surviving domestic partners); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (ND. Cal. 2010) (federal constitution requires same sex couples be permitted to marry); *Log Cabin Republicans v. U.S.* 716 F. Supp. 2d 884 (CD. Cal. 2010) (striking the military's don't discriminate); *Gill v. Office of Personnel Mgmt.* 699 F. Supp. 2d 374 (D. Mass. 2010) (federal denial of recognition/benefits to same sex spouses unconstitutional). While interesting and perhaps educational, none of these citations have anything to do with the reasoning in the Plaza case or the instant case and none of these citations lend any support to Appellant's IIED claim on the facts alleged.

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