

and otherwise affirmed, without costs.

The court properly denied the motion of Sundaresan, a neurosurgeon, for summary judgment dismissing the malpractice claim arising from care rendered before April 11, 2005 on the basis of a lack of a duty of care. The record presents triable issues as to whether a physician-patient relationship existed as of the evening of April 10th by virtue of a telephone consultation between Dr. Sundaresan and the other individual defendant neurosurgeon, Dr. Holtzman. While the issue of whether a physician owes a duty of care is a question of law, whether a physician-patient relationship exists is generally an issue of fact (*Raptis-Smith v St. Joseph's Med. Ctr.*, 302 AD2d 246, 247 [1st Dept 2003]; *Cogswell v Chapman*, 249 AD2d 865, 866 [3rd Dept 1998]). To overcome a motion for summary judgment on the issue of whether a physician-patient relationship exists, "[i]t is not necessary that a [physician] see, examine, take a history of or treat a patient" (*Raptis-Smith*, 302 AD2d at 247). Indeed, plaintiffs have overcome summary judgment on the existence of a physician-patient relationship in cases where the moving physician had formulated plans in conjunction with other medical professionals who later relied on those recommendations (*Scalisi v Oberlander*, 96 AD3d 106, 123 [1st Dept 2012]), and where there was testimony that the physician consulted with a nurse midwife

concerning the treatment of the plaintiff (*Santos v Rosing*, 60 AD3d 500 [1st Dept 2009]).

Here, there is an issue of fact as to whether the April 10, 2005 telephone conversation between Dr. Holtzman and Dr. Sundaresan gave rise to a physician-patient relationship between Dr. Sundaresan and plaintiff. Both doctors testified that, during this conversation, Dr. Holtzman told Dr. Sundaresan that he was transferring a patient from Cabrini Medical Center, where Dr. Holtzman was the on-call and consulting neurosurgeon, to codefendant Lenox Hill Hospital, where Dr. Sundaresan was an attending neurosurgeon, because Cabrini does not perform MRIs on weekends. Both doctors further testified that they discussed that the patient was an achondroplastic dwarf with multiple medical conditions, although Dr. Sundaresan recalled discussing an acute case of cauda equina syndrome (CES) while Dr. Holtzman remembered being unsure whether plaintiff had CES, conus medullaris syndrome, or a combination of the two.

Both doctors understood that Dr. Sundaresan would consult on the patient and perform surgery together with Dr. Holtzman, as the two doctors had done more than 100 times since the early 1980s, and Dr. Holtzman testified that the collective plan was that Dr. Sundaresan would be the chief surgeon for plaintiff. Dr. Sundaresan testified that they "would both accept

responsibility for the surgery.” Dr. Holtzman also testified that “we were trying to transfer [plaintiff] to Lenox Hill” (in part, because Sundaresan “had not seen [plaintiff] yet”), “[w]e both felt” that the MRI and medical evaluation was important, and another purpose of the transfer was “for evaluation by both of us.” From the above testimony, a jury could reasonably infer that both doctors expressly contemplated treating plaintiff as part of the surgical team managing his care and that during the April 10th conversation, they jointly planned to perform surgery pending the results of the tests.

Dr. Sundaresan relies on *Sawh v Schoen* for the premise that a physician who merely discusses a patient’s condition does not assume the duty to accurately advise and verify that his advice has been followed, and is not liable in medical malpractice (215 AD2d 291, 292-293 [1st Dept 1995]). In *Sawh*, the physician had no recollection of ever discussing the condition and the “[p]laintiff's entire theory of liability [was] that a member physician who attends group staff meetings at which a patient's care is discussed thereby assumes liability for any deviation from accepted medical practice in the course of treatment rendered by his associates” (*id.*). Here, plaintiff has put forth testimony by both physicians that they had a detailed conversation regarding his conditions, during which they planned

for a surgery to be performed jointly by both of them. This certainly rises above the "rank speculation" of the plaintiff in *Sawh*, where the court noted that "[m]erely pointing to circumstances in which a defendant physician might have undertaken joint management of the patient's care is not sufficient" (*id.* at 293).

Dr. Sundaresan also relies on *Burtman v Brown*, which correctly expressed that "the question is whether the physician owes a duty under the circumstances of a particular scenario" (97 AD3d 156, 162 [1st Dept 2012]). While the circumstances in that case were not in dispute, because the patient's faulty memory could not raise a triable issue to controvert the documentary evidence, as noted above, the circumstances of the particular scenario here *are* in dispute, raising a triable issue of fact sufficient to overcome Dr. Sundaresan's motion.

The cause of action alleging lack of informed consent as against Sundaresan should have been dismissed. Plaintiff never addressed the argument that the claim should be dismissed, and the record establishes that it was the other individual defendant

neurosurgeon, who is not party to this appeal, who explained the procedure to plaintiff and obtained his consent (see *Brady v Westchester County Healthcare Corp.*, 78 AD3d 1097, 1099 [2d Dept 2010]).

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and other abdominal symptoms, he diagnosed her with irritable bowel syndrome (IBS), without referring her for an abdominal CT scan or a gastrointestinal (GI) work-up (which would have included the scan), so as to exclude other conditions, and that these diagnostic tests would likely have detected the presence of the tumor in the upper left quadrant of the abdomen. Due to this failure, the tumor was not definitively identified until March 2002, when the decedent returned from her native Jamaica with a positive abdominal sonogram, and Dr. Conte immediately referred her for a CT scan, which confirmed the mass. Plaintiff's expert also opined that, based on this extended delay, the decedent was deprived of the opportunity for a cure, defined as five years' survival without the disease, insofar as her tumor was much smaller at the time of her first complaints and would likely have been completely surgically resectable and amenable to treatment. By the time of the eventual surgery in May 2002, the tumor had become so massive, and invaded so many organs, that it was only partially resected, and, despite several years of oncological treatment, the decedent died in September 2007.

While the defense took the position that the decedent failed to inform Dr. Conte of complaints that would have justified his directing a GI work-up or abdominal scan, the jury was entitled to reject Dr. Conte's testimony to that effect, and to accept

instead the decedent's assertion, recorded in her videotaped deposition testimony, that she reported complaints of excruciating stomach pain at each visit. Similarly, the jury could reject Dr. Conte's testimony that he first palpated an abdominal mass in September 2001 and advised the decedent to undergo GI testing, and that she steadfastly refused to do so; that testimony, too, was flatly contradicted by the decedent's deposition testimony.

The dissent concludes that the weight of the evidence establishes that nothing in Dr. Conte's conduct could have caused the decedent's early death, since nothing he could have done would have prevented her death at that time. It emphasizes the defense evidence asserting that the decedent's tumor was of a particular type, an EGIST (extra-gastrointestinal stromal tumor), which generally evades early detection when small and asymptomatic, and only causes symptoms once it grows large (which it does quickly). According to this theory, any CT scan or GI work-up ordered by Dr. Conte in February 2001 would have had no impact on the development of her tumor and her eventual death.

However, the testimony offered by Dr. Conte and defense experts in this regard is not absolute fact, but merely evidence that the jury was free to disregard if other, contrary evidence was more convincing. Both plaintiff's expert and the radiologist

who interpreted the March 2002 CT scan testified unequivocally that the tumor was of a different type, a GIST (gastrointestinal stromal tumor), which originated in the gastrointestinal tract and would have produced symptoms very early on, while it was smaller and much more amenable to resection and treatment. The jury was also informed of a report by the decedent's doctor at a cancer treatment facility stating that the surgeon's and the pathologist's diagnosis of the more fatal tumor was incorrect, and that the other diagnosis rendered by plaintiff's expert and the first radiologist was correct. In addition, there are multiple instances in the decedent's records of the surgeon's and another of the decedent's oncologists' referring to the tumor as the more treatable GIST-type that causes early symptoms and can be effectively treated.

The dissent suggests that plaintiff's expert oncologist was shown to be wrong because if the tumor had been a GIST, the decedent would have been in substantial pain between February 2001 and September 2001, and "would have followed Dr. Conte's advice in September and October 2001 and submitted to an intestinal work-up." However, the decedent stated that she was in substantial pain and that Dr. Conte did not give her any such advice, ultimately leading her to obtain a second opinion when she went to Jamaica in March 2002.

"The question of whether a verdict is against the weight of the evidence is discretion-laden, and the critical inquiry is whether the verdict rested on a fair interpretation of the evidence" (*Gartech Elec. Contr. Corp. v Coastal Elec. Constr. Corp.*, 66 AD3d 463, 480 [1st Dept 2009], *appeal dismissed* 14 NY3d 748 [2010]). On this record, we conclude that the Supreme Court erred in setting aside the verdict as against the weight of the evidence, because it cannot be said that the jury could not have reached its verdict upon any fair interpretation of the evidence (see *Bennett v Wolf*, 40 AD3d 274 [1st Dept 2007], *lv denied* 9 NY3d 818 [2008]). The jury was entitled to resolve in plaintiff's favor the conflict between the decedent's and Dr. Conte's testimony as to the nature and timing of her complaints and whether he later made referrals for CT scans that she declined.

The dissent observes that in granting defendants' CPLR 4404(a) motion, the trial court differed from the jury regarding the relative credibility of the decedent and plaintiff's expert, as opposed to that of Dr. Conte and his experts. However, since in our view, a "fair interpretation of the evidence" supports the jury's verdict, the trial court's contrary assessment does not justify a new trial.

This case essentially came down to a battle of the experts

with respect to the standard of care and the type of tumor at issue and whether it could have caused symptoms at the time of the alleged departure, thus raising an issue of credibility peculiarly within the province of the jury (see *Briggins v Chynn*, 204 AD2d 158 [1st Dept 1994]), whose determination should be afforded great deference (*Nicastro v Park*, 113 AD2d 129, 136 [2d Dept 1985]).

Insofar as Dr. Conte has challenged the sufficiency of the evidence underpinning the awards of compensation to the decedent's adult children, we find that the testimony as to the nurture, care, and guidance provided by the decedent to all of the children, in particular the care-taking services rendered to her handicapped son, was adequate to support their respective awards (see e.g. *Gonzalez v New York City Hous. Auth.*, 77 NY2d 663 [1991]; *Zygmunt v Berkowitz*, 301 AD2d 593 [2d Dept 2003]). We further note that defendant does not challenge the \$325,000 award for the decedent's pain and suffering.

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

FREEDMAN, J. (dissenting)

I would affirm the trial court's order under CPLR 4404(a) setting aside the jury verdict against defendant Salvatore Conte, M.D., and directing a new trial. I believe the verdict was against the weight of the evidence as to the only issue submitted to the jury, namely, whether Dr. Conte should have ordered a CT scan for plaintiff's decedent, Hermine Browne, when he saw her on February 17, 2001, and, if so, whether Dr. Conte's failure to order the test substantially contributed to the decedent's death from cancer in September 2007 and her pain and suffering before her demise.

After a CT scan in March 2002, the decedent was diagnosed with an extra-gastrointestinal stromal tumor (EGIST), a rare type of cancer arising in the retroperitoneum and other soft abdominal tissue surrounding the gastrointestinal tract. In this action for medical malpractice and wrongful death, plaintiff claims that Dr. Conte was negligent when he failed to order a CT scan in February 2001 because the EGIST could have been diagnosed then and because an earlier diagnosis could have reduced her pain and suffering before death and might have prolonged her life.

After a lengthy trial, the jury returned a 5-1 verdict against Dr. Conte, finding that he departed from accepted standards of medical care by not ordering the CT scan and that

such departure was a proximate cause of the decedent's injuries. Curiously, and somewhat inconsistently, the jury unanimously found in favor of Philip Klepper, M.D., a pulmonologist who also did not order a CT scan for the decedent when he saw her in July 2001. The jury awarded plaintiff a total of \$800,000 in damages, which included \$325,000 for the decedent's pain and suffering and economic loss damages for family members that totaled \$475,000.

Dr. Conte moved under CPLR 4404(a) for an order setting aside the jury verdict and directing a new trial. The trial court granted the motion, finding that the verdict was against the weight of the evidence.

The following was adduced at trial: Beginning in 1987, the decedent regularly saw defendant Dr. Salvatore Conte, an internist, for a number of routine ailments, including high blood pressure, irritable bowel syndrome (IBS), and shortness of breath. After a 21-month hiatus, from May 1999 to February 2001, during which the decedent saw another doctor, she returned to Dr. Conte and thereafter saw him regularly. According to Dr. Conte's examination notes and trial testimony, at the February 2001 visit, the decedent, then 58, presented with increased blood pressure and decreased hearing, and complained of anxiety and, in her own words, "abdominal gas." Dr. Conte performed a comprehensive physical examination including abdominal palpation,

and performed and ordered various laboratory tests, including an EKG, a chest X ray, a spirometry test, and an audiogram. Dr. Conte's notes indicated that the decedent's abdomen was soft and her lungs were clear, but she had a number of chronic medical problems, including elevated cholesterol and IBS. For the decedent's abdominal discomfort, Dr. Conte prescribed Pamine, a drug used to treat ulcers, and recommended a change of diet.

Two weeks later, on March 3, 2001, the decedent reported to Dr. Conte that she felt much better, and did not complain about abdominal discomfort. Dr. Conte again palpated her abdomen and found it soft. Thereafter the decedent visited Dr. Conte on April 27, May 12, May 26, June 23, and August 8, 2001. Dr. Conte's examination notes for those visits indicated that her abdomen remained soft and non-tender. On the May 12 visit, Dr. Conte referred her to Dr. Klapper because he was concerned about breathing difficulties. Dr. Klapper performed a battery of pulmonary function tests in July 2001 and January 2002, all of which were negative.

On September 21, 2001, Dr. Conte for the first time detected a non-tender "fullness" in the left upper quadrant of the decedent's abdomen. Dr. Conte's notes and trial testimony indicated that he could not determine the mass's size or dimension, but he informed the decedent about it and referred her

to a gastroenterologist for testing, including a CT scan and abdominal sonogram. However, the decedent refused the referral. On October 5 and December 5, 2001, and January 16 and February 16, 2002, Dr. Conte continued to detect abdominal fullness, but, according to his notes, the decedent refused his repeated advice that she go for a full gastrointestinal work-up, including a CT scan.

In his January 16, 2002 notes, Dr. Conte described the fullness as a non-tender "questionable mass." On February 16, Dr. Conte noted that the abdomen was still soft, but the mass was palpable.

On March 20, 2002, the decedent saw a gynecologist in Jamaica who performed a sonogram and detected an abdominal mass. When the decedent returned from Jamaica, she provided the sonogram results to Dr. Conte, who in March 26 referred her for a CT scan with contrast, which detected a large mass. The radiologist who interpreted the CT scan results, Dr. Ralph Lichenstein, reported that the mass "possibly arose from [the] posterior wall of the stomach," which would classify the mass as a gastrointestinal stromal tumor (GIST), a type of cancer that grows directly from the gastrointestinal tract and is much more common than an EGIST.

After the diagnosis, Dr. Conte referred the decedent to Dr.

Robert Plummer, a general surgeon, who first saw the decedent on March 28 and referred her for an endoscopy and colonoscopy. Neither test detected any mucosal disease or other evidence of a tumor within the gastrointestinal tract, but they detected an external mass causing pressure on the decedent's stomach. On May 6, 2002, Dr. Plummer performed an exploratory laparoscopy to examine the tumor, and removed a large portion of it. Dr. Plummer testified with a reasonable degree of medical certainty that the tumor was an EGIST that grew from the retroperitoneum, and not a GIST growing from the stomach or other vital organs. The pathologist who biopsied the tumor, Dr. James Pullman, also diagnosed an EGIST.

Following the May 2002 surgery, Dr. Plummer referred the decedent to an oncologist for treatment of an EGIST arising from the retroperitoneum. In fact, the decedent sought a second opinion from Memorial Sloan-Kettering Cancer Center after her surgery; the examination note indicated an "impression" that the tumor "apparently ar[ose] from the retroperitoneum."

The oncologist treated the decedent until her death in September 2007, 6½ years after February 2001.

Plaintiff presented the decedent's videotaped deposition testimony. The decedent testified that, at each visit with Dr. Conte from February 2001 onward, she complained to him of

excruciating stomach pain. The decedent further testified that Dr. Conti did not advise her at the September 2001 visit that he had palpated an abnormality in her abdomen and did not advise her to undergo GI testing.

Plaintiff also presented one expert witness, oncologist Barry Singer, M.D., in support of her one claim that Dr. Conte's failure to order a CT scan in February 2001 was a departure that proximately caused either greater morbidity or earlier death. Although plaintiff's expert disclosure stated that in Dr. Singer's opinion Dr. Conte was liable for not taking steps to diagnose or rule out an EGIST, at the trial Dr. Singer testified that the decedent suffered from a GIST, and insisted that it could have been detected in February 2001. This testimony by Dr. Singer, who had never treated the decedent or any other patient suffering from an EGIST, conflicts with the conclusion of the decedent's surgeon, attending pathologist, and oncologist that she suffered from an EGIST. The difference is significant because, as the jury learned through extensive testimony, a GIST grows directly from the gastrointestinal tract and implicates the organs' nerve endings. Typically, a GIST is diagnosed when smaller because it implicates the organs' nerves and often causes excruciating pain, blockage, and bleeding. An EGIST, which arises in soft tissue, generally evades early detection when

small because it is ordinarily an asymptomatic, "silent" tumor. An EGIST tends to grow quickly, however, and generally does not begin to cause serious symptoms until it is already very large. Accordingly, the nature of the decedent's tumor is relevant to whether Dr. Conte's failure to order a CT scan could have been a departure, let alone could have caused earlier death or additional morbidity.

The court properly found that the verdict against Dr. Conte was against the weight of the evidence presented. Generally, a jury verdict should not be set aside under CPLR 4404(a) unless it could not have been reached "on any fair interpretation of the evidence" (e.g. *Nicastro v Park*, 113 AD2d 129, 134 [2d Dept 1985] [internal quotation marks omitted]). Even if the prevailing party proffers legally sufficient evidence, the verdict may still be set aside if the evidence as a whole weighs heavily in the losing party's favor (see *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). A trial court's determination that the verdict is against the weight of the evidence "is essentially a discretionary and factual determination" within the scope of the court's professional judgment (*Yalkut v City of New York*, 162 AD2d 185, 188 [1st Dept 1990]; see *Fisk v City of New York*, 74 AD3d 658 [1st Dept 2010]).

The majority asserts that the decedent's deposition

testimony creates an issue of fact whether, at the critical February 2001 visit and thereafter, the decedent complained to Dr. Conte of excruciating stomach pain. However, the trial judge who heard the evidence clearly disbelieved the decedent's testimony about this excruciating pain because of the overwhelming evidence that Dr. Conte was a thorough physician who would not have ignored a patient's complaint of severe pain. Dr. Conte took detailed written notes during the decedent's visits. In none of his notes does Dr. Conte indicate that she had excruciating stomach pain. Instead, Dr. Conte's notes indicate that in February 2001 the decedent complained of abdominal gas, for which he prescribed medication, and at the next visit in March 2001 she reported feeling much better. Moreover, Dr. Conte took measures to address a number of the decedent's conditions, including prescribing medication for elevated blood pressure and cholesterol levels, and referring her to a pulmonologist for medical tests in connection with breathing problems.

The majority also finds that the decedent's testimony raises an issue whether, in September 2001, Dr. Conte advised her to undergo GI testing after he palpated an abdominal mass, although his notes indicate that he did. But that issue is irrelevant. The only question before the jury was whether Dr. Conte committed malpractice by failing to order a CT scan when he saw the

decedent in February 2001.

The trial court, having heard all the testimony, was also more than justified in discounting Dr. Singer's opinion because it conflicted in a number of ways with the bulk of the evidence that was introduced at trial. The decedent's treating surgeon, pathologist, and oncologist and plaintiff's own expert, according to his expert disclosure, all indicated that the decedent suffered from an EGIST, in contrast with Dr. Singer's finding that she suffered from a GIST.

Dr. Singer maintained at trial that the decedent had a diagnosable GIST in February 2011, but in that case the decedent would have followed Dr. Conte's advice in September and October 2001 and submitted to an intestinal work-up. The decedent's testimony that she informed Dr. Conte that she was in great pain but he did not advise her to have an intestinal work-up is, as already noted, simply not credible.

Moreover, Dr. Singer did not show with reasonable medical certainty that the departure was a proximate cause of the decedent's injuries (see *Rivera v Greenstein*, 79 AD3d 564, 568 [1st Dept 2010]; *Alvarado v Miles*, 32 AD3d 255, 257 [1st Dept 2006], *affd* 9 NY3d 902 [2007]). "Competent medical proof as to

causation . . . is essential" (*Rivera* at 568; *Stanski v Ezersky*, 228 AD2d 311, 312 [1st Dept 1996], *lv denied* 89 NY2d 805 [1996]), and an expert's "conclusory assertions and mere speculation that a doctor could have discovered the condition and successfully treated the patient" is insufficient (*Rivera* at 568).

Here, Dr. Singer offered no evidence that if Dr. Conte had recommended a CT scan or a sonogram in February 2001, slightly more than a year earlier than the May 2002 CT scan, the decedent would have had a better outcome. Dr. Singer speculated that, with earlier detection, the decedent might have lived longer and Dr. Plummer could have entirely removed the tumor, but he also acknowledged that the tumor could recur. Dr. Singer further testified that if the tumor had been diagnosed and resected earlier, and the decedent had been treated with the drug Gleevec, she would have lived five years without symptoms. However, as was demonstrated, Gleevec was unavailable until 2002, and in any event the decedent lived more than six years after Dr. Conte's alleged departure.

For the reasons set forth above, I would not disturb the trial court's provident exercise of its discretion in setting aside the verdict and ordering a new trial.

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doctrine for the period before December 6, 2004, because defendant's treatment of the decedent before that date was not for "the same, illness, injury or condition" that gave rise to this action (CPLR 214-a; see *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291 [1998]; *Chestnut v Bobb-McKoy*, 94 AD3d 659, 661 [1st Dept 2012]). The decedent presented with myriad symptoms, including chest tightness after walking uphill, anemia, tooth complaints, heartburn, and gastrointestinal complaints; he did not present with symptoms typical of pulmonological problems, such as coughing or wheezing, his chest was clear on x-ray, and the tightness in his chest was consistent with his cardiac history.

However, defendants' motion for summary judgment was properly denied with respect to plaintiff's wrongful death claim. That claim is not time-barred, since the statute of limitations was tolled (see EPTL 5-4.1). While defendants offered a prima facie showing that Lipton did not depart from accepted medical practice by failing to perform diagnostic scans, since such scans were not warranted by the decedent's presenting symptoms, a question of fact was created by the expert opinion offered by plaintiff (see *Cruz v St. Barnabas Hosp.*, 50 AD3d 382 [1st Dept 2008]). Plaintiff's expert asserted that the failure to order a pulmonary work-up, including a CT scan, constituted a deviation

from the standard of care, in view of the decedent's presenting symptoms of persistent chest complains *coupled with* his past history of testicular cancer, his past radiation treatment, his past history of smoking, and his family history, which was significant for lung and throat cancer -- additional risk factors that increased his risk of lung cancer; the expert further asserted that within a reasonable degree of medical certainty, a CT scan at that time would have revealed the primary lung cancer at an early stage. These adequately detailed assertions were sufficient to defeat summary judgment, since they were predicated on specific factual evidence, and were not merely speculation (see *Deutsch v Chaglassian*, 71 AD3d 718, 719 [2d Dept 2010]).

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an impartial manner. Since, as the arbitrator found, petitioner has a 15 year unblemished record as a high school teacher and the conduct for which she was charged was completely unrelated to her professional work, we find that the fine imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness (see *Principe v New York Dept. of Education*, 94 AD3d 431 [1st Dept 2012]; *affd* 20 NY3d 963 [2012]; see also *Matter of Diefenthaler v Klein*, 27 AD3d 347 [1st Dept 2006]) and reduce it accordingly.

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

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Tom, J.P., Andrias, Renwick, DeGrasse, Gische, JJ.

10303 Sarit Shmueli,
Plaintiff-Appellant,

Index 104824/03

-against-

NRT New York, Inc., doing business
as The Corcoran Group,
Defendant-Respondent.

Sarit Shmueli, appellant pro se.

Bragar Eigel & Squire, P.C., New York (Justin A. Kuehn of
counsel), for respondent.

Appeal from order, Supreme Court, New York County (Paul
Wooten, J.), entered May 31, 2012, which, insofar as appealed
from as limited by the briefs, granted defendant's motion to
eliminate postjudgment statutory interest after August 17, 2010,
unanimously dismissed, without costs.

The order on appeal has been, in relevant part, vacated by
an order of the same court and Justice, entered April 29, 2013,
and made upon reargument.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JUNE 11, 2013


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Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

10316 Olga Ortiz, Index 101007/02
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for
appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of
counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower,
J.), entered March 21, 2012, after a jury trial, awarding
plaintiff the principal amounts of \$300,000 for past pain and
suffering over 11 years and \$100,000 for future pain and
suffering over 10 years, unanimously affirmed, without costs.

Plaintiff was injured in October 2000, when she slipped on a
broken concrete step and fell down the stairway of a subway
station. Plaintiff was diagnosed with lumbar radiculopathy, and
an injury to her coccyx. Plaintiff's injuries are permanent,
cause her severe pain, and inhibit her from engaging in such
normal activity as bending, walking, lifting and sitting.
Plaintiff's orthopedic surgeon referred her to a spinal surgeon
to explore the possibility of removing her coccyx, as her pain
never subsided. Under these circumstances, the awards for past

and future pain and suffering do not deviate materially from what is reasonable compensation (see e.g. *Rutledge v New York City Tr. Auth.*, 103 AD3d 423 [1st Dept 2013]; *James v Farhood*, 96 AD3d 503 [1st Dept 2012]; *Turuseta v Wyassup-Laurel Glen Corp.*, 91 AD3d 632 [2d Dept 2012]).

It is noted that while defendant argued that plaintiff had sustained prior injuries to her back, plaintiff's orthopedic surgeon opined that plaintiff's back condition was "significantly exacerbated" by her fall, as "the fall caused compression of the discs, causing the disc to expand into the nerve." Defendant's own medical expert examined plaintiff, and defendant did not call its expert as a witness to rebut the findings of plaintiff's orthopedic surgeon.

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Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

10317-

10318 In re Moona C., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Charlotte K.,
Respondent-Appellant,

The Administration for Children's
Services,
Petitioner-Respondent.

Carol Lipton, Brooklyn, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L.
Zaleon of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia
Colella of counsel), attorney for the children, Moona C. Amal K.
and Nadia K.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim
Nothenberg of counsel), attorney for the child Robina C.

Order of disposition, Family Court, New York County (Jody
Adams, J.), entered on or about October 26, 2009, which, to the
extent it brings up for review the order of fact-finding, entered
on or about May 1, 2009, determining, after a hearing, that
respondent mother neglected the subject children, unanimously
affirmed, without costs. Appeal from the fact-finding order,
unanimously dismissed, without costs, as subsumed in the appeal
from the dispositional order.

Respondent's challenge to an interim order suspending her visitation with the children is not before this Court because no appeal was taken from that order and the issue was rendered moot by her consent to entry of a final order of disposition providing for supervised visitation with the children (*see Matter of Sandra G. v Victor P.*, 71 AD3d 588 [1st Dept 2010], *lv dismissed* 15 NY3d 862 [2010]; Family Court Act § 1030). In any event, the determination to suspend visitation had a sound and substantial basis in the record (*see Matter of Latisha C. [Wanda C.]*, 101 AD3d 1113 [2d Dept 2012]).

The Family Court properly permitted one of the children, Robina C., to testify at the fact-finding hearing *in camera*. The court properly balanced respondent's due process rights with the emotional well-being of the child by permitting the child to testify outside of respondent's presence but subject to contemporaneous cross-examination by respondent's attorney following consultation with respondent (*see Matter of Giannis F. [Vilma C. - Manny M.]*, 95 AD3d 618, 618 [1st Dept 2012]; *Matter of Hadja B.*, 302 AD2d 226 [1st Dept 2003]). The affidavit of the social worker submitted in support of the application sufficiently established the potential trauma to the child, which would likely interfere with her ability to testify accurately and

without inhibition concerning the allegations of excessive corporal punishment (*see id.*). While respondent asserts that the social worker lacked sufficient experience or expertise, those factors go to the weight to be accorded the opinion, not its admissibility, and respondent offered no evidence in opposition.

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Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

10319 In re 445 East 80th Street Index 110389/11
 Tenants Association, etc.,
 Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

Clermont York Associates,
Intervenor-Respondent-Respondent.

Collins, Dobkin & Miller, LLP, New York (Timothy L. Collins of
counsel), for appellant.

Gary R. Connor, New York (Kathleen Lamar of counsel), for New
York State Division of Housing and Community Renewal, respondent.

Horing Welikson & Rosen P.C., Williston Park (Niles C. Welikson
of counsel), for Clermont York Associates, respondent.

Judgment, Supreme Court, New York County (Peter H. Moulton,
J.), entered April 12, 2012, denying the petition to annul the
determination of respondent New York State Division of Housing
and Community Renewal (DHCR), dated July 14, 2011, which granted
intervenor-respondent owner's application for a major capital
improvement (MCI) rent increase based upon the installation of
new windows, and dismissing the proceeding brought pursuant to
CPLR article 78, unanimously affirmed, without costs.

DHCR's finding, that other than a few apartments where
defective window installations were found, the remaining

apartments were subject to an MCI rent increase based on the window installations, was rational (see *Matter of Ansonia Residents Assn. v New York State Div. of Hous. & Community Renewal*, 75 NY2d 206, 213-214 [1989]). The record contains no objective evidence of pervasive defects and thus no basis to deny the rent increase (see *Matter of Langham Mansions, LLC v New York State Div. of Hous. & Community Renewal*, 76 AD3d 855, 858 [1st Dept 2010]). Moreover, DHCR providently exercised its discretion in inspecting only those apartments identified by petitioner in the earlier rounds of testing as having defective window installations (see *Matter of 219 E. 69th St. Tenants Assn. v New York State Div. of Hous. & Community Renewal*, 86 AD3d 434 [1st Dept 2011]).

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

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

ENTERED: JUNE 11, 2013


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period and opined that her injuries had fully resolved and that she was not disabled (see *Jeffers v Style Tr. Inc.*, 99 AD3d 576, 578 [1st Dept 2012]).

In opposition, plaintiff raised an issue of fact by submitting evidence that she did not go to work and received disability benefits for over 90 days during the 180 days following her accident, as well as medical reports of her treating physician and of a radiologist who found objective MRI evidence of injury to her cervical spine and left knee. Plaintiff's treating physician found continuing range of motion limitations in her cervical spine and left knee throughout the relevant period, which prevented her from working and performing regular daily activities during the relevant time period, and rendered her totally disabled (see *Pannell-Thomas v Bath*, 99 AD3d 485, 485-486 [1st Dept 2012]; *Williams v Tatham*, 92 AD3d 472, 473 [1st Dept 2012]). This opinion was not merely conclusory or "too general" to raise an issue of fact (see *Blake v Portexit Corp.*, 69 AD3d 426, 426-427 [1st Dept 2010]). In addition, plaintiff's physician opined that plaintiff's cervical and knee injuries were caused by the accident, in light of her young age and absence of prior history of similar injuries, thereby raising an issue of

fact as to causation (see *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). The documents showing that plaintiff received disability insurance payments during the relevant period, although not submitted in admissible form, can properly be considered in opposition to defendant's motion for summary judgment because they were not the only evidence submitted on the issue of plaintiff's disability during the relevant period (see *Rivera v Super Star Leasing, Inc.*, 57 AD3d 288 [1st Dept 2008]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JUNE 11, 2013


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costs.

Plaintiff police officer was injured when he slipped off a sidewalk "step-off" extending four feet into the sidewalk area from the building line of landlord Ann-Gur's corner-lot building and the entrance to commercial tenant Almanzar's bodega.

Plaintiffs' General Municipal Law § 205-a claim, predicated upon Administrative Code of City of NY §§ 27-127 and 27-128 (since repealed and recodified at Administrative Code § 28-301.1), and, belatedly, 34 RCNY 2-09(f), should be dismissed as against Almanzar, because these statutory provisions are not applicable to lessees (*Zvinys v Richfield Inv. Co.*, 25 AD3d 358, 360 [1st Dept 2006], *lv denied* 7 NY3d 706 [2006]). Contrary to Ann-Gur's contention, Almanzar raised this ground for dismissal in the motion court.

Ann-Gur's cross claims against Almanzar for contribution and indemnification also should be dismissed. The lease provided that Ann-Gur was responsible for all structural repairs to the premises, and obligated Almanzar to indemnify Ann-Gur only for losses arising out of his or his agents' negligent acts or omissions or in connection with his occupation of the sidewalk. There is no evidence that plaintiff's injuries arose in connection with negligence on the part of Almanzar or his agents or any occupation by him of the sidewalk. Nor, contrary to Ann-

Gur's contention, does Almanzar's undertaking to sweep, remove snowfall from and paint the sidewalk entitle it to common-law indemnification in connection with the instant plaintiff's injuries.

While Ann-Gur is not entitled to contribution or indemnification by Almanzar, its cross claim for breach of contract based on Almanzar's failure to name it as an additional insured on his general liability policy is viable to the extent of out-of-pocket damages caused by the breach, i.e., the purchase cost of the insurance Ann-Gur procured for itself, the premiums and any additional costs such as deductibles, co-payments, and increased future premiums (see *Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111 [2001]; *Cucinotta v City of New York*, 68 AD3d 682 [1st Dept 2009]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JUNE 11, 2013


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my letters, informed this office that you are willing to assume the risk of seeking to vacate your plea, there are no issues that can be raised on your appeal." The letter also conflicted with the brief, in which counsel stated that defendant has not responded to her letter advising him about the risks involved in seeking to vacate his plea.

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

ENTERED: JUNE 11, 2013

A handwritten signature in black ink, appearing to read "Susan R. Jones", is written over a horizontal line.

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

10323-

Index 115785/10

10324 Benjamin Gonzalez, an Infant by
his Mother & Natural Guardian,
Gracie Toyer, et al.,
Plaintiffs-Appellants,

-against-

New York City Housing Authority,
Defendant-Respondent,

Haks Engineers, Architects and
Land Surveyors, P.C., et al.,
Defendants.

The Feinsilver Law Group, P.C., Brooklyn (Steven I. Roth of
counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J.
Lawless of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.),
entered January 9, 2012, which, to the extent appealed from,
granted defendant New York City Housing Authority's (NYCHA)
motion to dismiss the complaint and all cross claims asserted
against it, and denied plaintiffs' cross motion for leave to
amend the notice of claim and to amend the complaint as against
NYCHA, unanimously reversed, on the law and the facts, without
costs, defendant's motion denied, and plaintiffs' cross motion
granted. Order, same court and Justice, entered June 21, 2012,
which granted NYCHA's motion to dismiss plaintiffs' amended

complaint as against it, and granted NYCHA's motion to impose sanctions and costs against plaintiffs to the extent of awarding NYCHA \$1,000, unanimously reversed, on the law, without costs, the motion denied, and the award of sanctions vacated.

In this personal injury action arising from the then eleven-year-old plaintiff's fall through the scaffolding surrounding one of NYCHA's buildings at the Rangel Houses complex in Manhattan, plaintiffs' notice of claim listed the wrong street address as the site of the accident. However, at his statutory hearing, held five months after the accident, when shown photographs of the incorrect building and the correct adjacent building, the infant plaintiff identified the correct location of the accident. Further, it was undisputed that the infant plaintiff did not live at the Rangel Houses, but was only playing there with other children, that all of the buildings in the complex look similar, and that the scaffolding at issue was one structure that connected the two adjacent buildings, rather than two separate scaffolding structures. Under the circumstances, plaintiffs should have been allowed to correct the notice of claim pursuant to General Municipal Law § 50-e(6), as the mistake was not made in bad faith and NYCHA was not prejudiced by the inaccurate

notice (see *Portillo v New York City Tr. Auth.*, 84 AD3d 535, 535-536 [1st Dept 2011]; *Phillipps v New York City Tr. Auth.*, 68 AD3d 461 [1st Dept 2009]).

NYCHA failed to meet its burden of demonstrating prejudice, as the record does not indicate that NYCHA sent someone to investigate the scene of the accident or examine the scaffold either before or after it had been apprised of the correct location (see *Phillipps*, 68 AD3d at 463). Although, in support of NYCHA's motion, its investigator averred that his company was still trying to ascertain which construction company was responsible for erecting and maintaining the scaffolding that connected the two buildings, he did not explain why NYCHA could not access its own records to identify the proper company, or how the delay in obtaining the correct location contributed to any purported difficulty (see *Lord v New York City Hous. Auth.*, 184 AD2d 406, 407-408 [1st Dept 1992]).

Under the circumstances we find the award for sanctions unwarranted.

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

ENTERED: JUNE 11, 2013


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plaintiff fell and that as soon as he observed the rain, he requested that mats be placed on the lobby floor just moments prior to plaintiff's fall (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; see *Garcia v Delgado Travel Agency*, 4 AD3d 204 [1st Dept 2004]). Defendants additional submission of an unaffirmed report from a weather reporting company, not accompanied by any certified weather records or admissible climatological reports, cannot be considered (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In opposition, plaintiff raised a question of fact by submitting an affidavit from a nonparty witness stating that when she arrived at the building approximately 30 minutes before plaintiff's accident, "it was raining and the lobby floor was uncovered and slippery" (see *Jones v New York City Hous. Auth.*, 293 AD2d 371 [1st Dept 2002]; *Spitzer v 2166 Bronx Park E. Corps.*, 284 AD2d 177 [1st Dept 2001]). In light of the conflicting evidence, there is an issue of fact as to the

reasonableness of the steps taken by defendants to address the alleged slippery condition prior to plaintiff's accident (see *Dabbagh v Newmark Knight Frank Global Mgt. Servs., LLC*, 99 AD3d 448, 449 [1st Dept 2012]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JUNE 11, 2013

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CLERK

the provision of care to her.

We note that in any event plaintiffs failed to raise an issue of fact as to the negligence of a nonparty resident who, according to their general surgery expert, failed to take certain action during the course of a second surgery, since the expert did not say that this failure was a deviation from the accepted standard of care (see *e.g. Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]).

The hospital also failed to establish prima facie that defendant Green is not its employee and that therefore it cannot be held vicariously liable for Green's acts and/or omissions (see *e.g. Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). Green testified that he was an employee of the hospital, where he had privileges and maintained a private practice. The hospital's claim on appeal that Green merely had "an administrative title" there and "saw Ms. Collins at Dr. Bitan's request in his capacity as a private attending physician," is unsupported by the record.

The lack of informed consent claim against the hospital should be dismissed because the record shows that defendant Bitan informed Ms. Collins of the risks associated with the surgery and told her that a vascular surgeon would be on hand, and obtained her written consent, and there is no evidence that the hospital was required by the nature of the surgery to obtain her further

consent "or to verify in some other way that the surgeon had done his duty" (see *Fiorentino v Wenger*, 19 NY2d 407, 415 [1967]).

Plaintiffs' claim that the hospital negligently granted privileges to the individual defendants should be dismissed because there is no evidence that the hospital had any reason to question the doctors' qualifications. Indeed, plaintiffs did not oppose defendants' motion as to this claim.

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

ENTERED: JUNE 11, 2013


CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

10329 & Promerica Financial Corporation, Index 650082/12
M-2646 Plaintiff-Appellant,

-against-

Inmoholdings Inc., et al.,
Defendants-Respondents.

Bilzin Sumberg Baena Price & Axelrod LLP, Miami, FL (Marty Steinberg of the bar of the State of Florida, admitted pro hac vice, of counsel), for appellant.

Foley & Lardner, LLP, New York (Yonaton Aronoff, and William E. Davis of the bar of the State of Florida, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 15, 2012, which, to the extent appealed from as limited by the briefs, granted defendants Banco de la Produccion S.A. (Produbanco) and Rodrigo Paz Delgado's motion to dismiss the complaint as against Produbanco for lack of personal jurisdiction, and granted their motion and defendants Inmoholdings, Inc. and Aberlardo Pachano Bertero's motion to dismiss the first cause of action, unanimously affirmed, with costs.

Defendant Produbanco is not a signatory to the letter of intent (LOI) that contains the forum selection clause. The LOI contemplates a sale to plaintiff of some 58% of the shares of Produbanco by certain shareholders. It is clear from the nature

of the transaction that Produbanco has no obligations and no rights implicated in it. Thus, Produbanco cannot be bound by the forum selection clause (see *Tate & Lyle Ingredients Ams., Inc. v Whitefox Tech. USA, Inc.*, 98 AD3d 401 [1st Dept 2012]).

The absence of a signed stock purchase agreement is fatal to plaintiff's first cause of action, which alleges breach of that agreement, since the parties expressly stated in the LOI that they were not to be bound to complete the transaction absent a definitive, executed and delivered agreement (see *Brause v Goldman*, 10 AD2d 328, 332 [1st Dept 1960], *affd* 9 NY2d 620 [1961]).

M-2646 - *Promerica Financial Corporation v Inmoholdings Inc., et al.*

Motion to strike portions of plaintiff's reply brief denied.

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

ENTERED: JUNE 11, 2013



CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Gische, JJ.

10330 Morris Faulk, Index 7237/07
Plaintiff-Appellant,

-against-

Rockaway One Company, LLC,
Defendant-Respondent,

Guardsman Elevator Co., Inc.,
et al.,
Defendants.

Jonathan I. Edelstein, New York, for appellant.

Patrick J. Crowe, Melville, for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered December 30, 2011, which, after a framed issue hearing, found that defendant Rockaway One Company LLC had established its affirmative defense of Workers' Compensation exclusivity and dismissed the complaint as against Rockaway, unanimously affirmed, without costs.

Plaintiff Morris Faulk alleges he was injured during the course of his employment as a security guard employed by Pelican Management Inc. (Pelican), and assigned to Wavecrest Gardens, which is owned by defendant Rockaway.

The court's finding that Rockaway demonstrated that plaintiff was its special employee (see *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 [1991]) is supported by a fair

interpretation of the evidence (see *Lolik v Big V Supermarkets*, 86 NY2d 744 [1995]), and could be reached by a rational factfinder, based on a valid line of reasoning and permissible inferences (see *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). The proof adduced at the hearing demonstrated that plaintiff, although paid by Pelican, worked under the direct supervision and control of defendant Rockaway at the Wavecrest Gardens property, with defendant possessing the plenary right to have plaintiff discharged, to dictate his work hours, wages, vacation schedule, work assignments, award severance and vacation pay. Rockaway issued the uniforms, supplies and the access cards to the buildings, and supervised and evaluated plaintiff's work (see *Ugijanin v 2 W. 45th St. Joint Venture*, 43 AD3d 911, 913 [2nd Dept 2007]; *Ramirez v Miller*, 41 AD3d 298 [1st Dept 2007], *lv dismissed* 10 NY3d 784 [2008]).

Although plaintiff may have received his paycheck from Pelican, Pelican acted as the administrative entity for Rockaway. Further, both testimonial and documentary evidence showed that the funds for the security staff's salary were administratively charged to Rockaway's account by Pelican (see *Morato-Rodriguez*, 88 AD3d at 549).

As the foregoing established that plaintiff was a special employee of defendant, this action against defendant to recover

for injuries sustained by plaintiff in the course of his employment is barred by Workers' Compensation Law § 11 (see *Paulino v Lifecare Transp.*, 57 AD3d 319 [1st Dept 2008]).

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

THIS CONSTITUTES THE DECISION AND ORDER
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the risk factors for use of violence and sexual contact, the RAI did not adequately account for the extreme egregiousness of defendant's conduct (see e.g. *People v Guasp*, 95 AD3d 608 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]).

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

ENTERED: JUNE 11, 2013

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CLERK

accepting plaintiff's allegations and evidence to be true, the evidence shows only that plaintiff stayed with her mother in Bronx County for a brief period of time while she was having marital problems with her husband, who remained in Georgia with the couple's daughters.

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

ENTERED: JUNE 11, 2013


CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

10334N-

Index 650280/12

10335N In re Cantor Fitzgerald & Co.,
Petitioner-Respondent,

-against-

Andrew Pritchard,
Respondent-Appellant.

The Watanabe Law Firm, LLC, New York (William K. Watanabe of
counsel), for appellant.

Saul Ewing LLP, New York (Ryan L. DiClemente of counsel), for
respondent.

Order, Supreme Court, New York County (Charles E. Ramos,
J.), entered October 12, 2012, which, upon reargument, granted so
much of petitioner's petition to vacate a FINRA arbitration panel
award as sought to vacate the award of attorneys' fees to
respondent in the amount of \$326,402.32 and, sua sponte, revoked
the pro hac vice status of respondent's counsel, Brendan J.
O'Rourke, unanimously reversed, on the law, with costs, the
petition denied, the award of attorneys' fees confirmed, and the
pro hac vice status of counsel reinstated. Appeal from amended
order, same court and Justice, entered April 11, 2012,
unanimously dismissed, with costs, as superseded by the appeal
from the order entered October 12, 2012.

The record is devoid of any evidence that Mr. O'Rourke

misrepresented any facts to the motion court. Therefore, the court abused its discretion in, sua sponte, revoking his pro hac vice status (see *J.G. Wentworth S.S.C. Ltd. Partnership v Serio*, 33 AD3d 761, 761-762 [2d Dept 2006]; see also *Perkins v Elbilialia*, 90 AD3d 543, 544 [1st Dept 2011]).

The court also abused its discretion in vacating the arbitration panel's award of attorneys' fees to respondent. Although the contract between the parties contained a unilateral fee provision that might normally have precluded the panel from considering the issue (see *Matter of UBS Warburg [Auerbach, Pollack & Richardson]*, 294 AD2d 245, 246 [1st Dept 2002], *lv dismissed* 98 NY2d 728 [2002], *lv denied* 100 NY2d 504 [2003]), here, by both word and action, petitioner acquiesced to the panel's consideration of the issue (see *Matter of Goldberg v Thelen Reid Brown Raysman & Steiner LLP*, 52 AD3d 392, 392-393 [1st Dept 2008], *lv denied* 11 NY3d 749 [2008]; see also *Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 [1st Dept 1991]). Specifically, in the arbitration, respondent's statement of claim included a request for attorneys' fees. Petitioner also requested attorneys' fees in its answer, amended answer, pre-hearing brief and opening statement but did not object to respondent's request or point to the Employment Agreement limitation. During closing argument and in its post-hearing

brief, petitioner did not question the panel's jurisdiction to award attorneys' fee, although it alluded to the Agreement. Accordingly, petitioner was bound by the panel's interpretation of the provision, no matter how faulty, so long as it was not "completely irrational" (*Transparent Value, L.L.C. v Johnson*, 93 AD3d 599, 601 [1st Dept 2012] [internal quotation marks omitted]).

Here, the panel's interpretation was not "completely irrational" (*id.*). Indeed, the relevant provision does not state that fees could only be awarded to petitioner; rather, it states only that, in the event petitioner prevails, respondent "shall pay" such fees. Further, as already stated above, petitioner agreed that the panel could determine the issue. The panel interpreted the meaning of the provision in accordance with the governing rules issued by FINRA, which allows for an award of

attorneys' fees and based its award "pursuant to the parties' joint request made orally at the hearing and in their post-hearing submission briefs."

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

ENTERED: JUNE 11, 2013


CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

10336N-

Index 106839/11

10337N Jasleen Singh-Mehta,
Plaintiff-Appellant,

-against-

Paul Drylewski, et al.,
Defendants-Respondents,

David W. Shipper, etc., et al.,
Defendants.

Marc E. Elliott, P.C., New York (Marc E. Elliott of counsel), for
appellant.

Lambert & Shackman, PLLC, New York (Thomas Lambert of counsel),
for respondents.

Order, Supreme Court, New York County (Joan M. Kenney, J.),
entered on or about September 28, 2012, which, to the extent
appealed from as limited by the briefs, denied plaintiff's motion
to file an amended complaint and to renew and reargue a prior
order, same court and Justice, entered June 8, 2012, which denied
her motion to vacate an order entered on default on May 15, 2012,
unanimously affirmed, with costs.

In this action for the return of a down payment on a real
estate contract, the motion court properly denied plaintiff's
motion to vacate her default. Even assuming that plaintiff's
conclusory and perfunctory allegations of law office failure
constitute a reasonable excuse for her default, she failed to

demonstrate that she has a meritorious defense (see CPLR 5015 [a][1]; *Brown v Suggs*, 38 AD3d 329 [1st Dept 2007], *Perez v New York City Hous. Auth.*, 47 AD3d 505 [1st Dept 2008]).

Specifically, plaintiff failed to refute defendants' allegations that she breached the contract by refusing to disclose and verify her assets to the cooperative board despite its repeated requests.

Upon her motion for leave to renew, plaintiff did not establish that her new allegations of fact, including the allegation that defendants fraudulently induced her to waive a mortgage contingency clause knowing that the cooperative board would ultimately reject her application, were unknown to her at the time of the prior motion (see CPLR 2221[e]; *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Additionally, since plaintiff's proposed amended complaint does not allege that she complied with the cooperative board's requests for disclosure and

verification of her assets, the motion court did not abuse its discretion in denying her motion to file an amended complaint (see CPLR 3025[b]).

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

ENTERED: JUNE 11, 2013


CLERK

Friedman, J.P., DeGrasse, Richter, Feinman, JJ.

9165-
9166-
9167-
9168-
9169

Index 652930/10
650526/11

VisionChina Media Inc., et al.,
Plaintiffs-Appellants,

-against-

Shareholder Representative
Services, LLC, et al.,
Defendants-Respondents,

NIFSMBC-V2006S1 Investment
Limited Partnership, et al.,
Defendants.

- - - - -

Shareholder Representative
Services, LLC, et al.,
Plaintiffs-Respondents-Appellants,

-against-

VisionChina Media Inc., et al.,
Defendants-Appellants-Respondents.

- - - - -

Shareholder Representative
Services, LLC, et al.,
Plaintiffs-Respondents,

-against-

VisionChina Media Inc., et al.,
Defendants-Appellants.

Arnold & Porter, LLP, New York (Charles G. Berry of counsel), for
appellants/appellants-respondents.

Cahill Gordon & Reindel LLP, New York (Thomas J. Kavalier of
counsel), for respondents/respondents-appellants.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 3, 2011, affirmed, without costs. Order, same court and Justice, entered November 4, 2011, reversed, on the law and the facts, with costs, and the motion denied. Order, same court and Justice, entered June 15, 2012, reversed, on the law and the facts, with costs, the motion to confirm denied and the motion for summary judgment granted. Order, same court and Justice, entered on or about August 13, 2012, reversed, on the law and the facts, with costs, and the motion denied.

Opinion by Feinman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Leland G. DeGrasse
Rosalyn H. Richter
Paul G. Feinman, JJ.

9165-9166-9167-9168-9169
Index 652930/10
650526/11

x

VisionChina Media Inc., et al.,
Plaintiffs-Appellants,

-against-

Shareholder Representative
Services, LLC, et al.,
Defendants-Respondents,

NIFSMBC-V2006S1 Investment
Limited Partnership, et al.,
Defendants.

- - - - -

Shareholder Representative
Services, LLC, et al.,
Plaintiffs-Respondents-Appellants,

-against-

VisionChina Media Inc., et al.,
Defendants-Appellants-Respondents.

- - - - -

Shareholder Representative
Services, LLC, et al.,
Plaintiffs-Respondents,

-against-

VisionChina Media Inc., et al.,
Defendants-Appellants.

x

VisionChina Media Inc. and Vision Best Limited appeal from the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered November 3, 2011, which, to the extent appealed from, granted defendants' motion to dismiss the first, third, and fourth causes of action in *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, and granted plaintiffs' motion to dismiss the first, third, fourth, and fifth counterclaims in *Shareholder Representative Servs., LLC v VisionChina Media Inc.* pursuant to CPLR 3211; the order of the same court and Justice, entered November 4, 2011, which, in *Shareholder*, granted plaintiffs' motion to attach defendants' assets; and the order of the same court and Justice, entered on or about August 13, 2012, which granted the *Shareholder* plaintiffs' motion to compel defendants to transfer \$60 million into New York and to extend the time period to perfect their levies. Cross appeals from the order of the same court and Justice, entered June 15, 2012, which, to the extent appealed from as limited by the briefs, granted the *Shareholder* plaintiffs' motion to confirm two ex parte orders of attachment and denied their motion for partial summary judgment on their first and second causes of action and reinstated the previously dismissed fifth counterclaim as an affirmative defense.

Arnold & Porter, LLP, New York (Charles G. Berry, Stewart D. Aaron and Ian Jay of counsel), for appellants/appellants-respondents.

Cahill Gordon & Reindel LLP, New York (Thomas J. Kavalier of counsel), for respondents/respondents-appellants.

Mintz & Gold LLP, New York (Steven G. Mintz and Terence W. McCormick of counsel), for Oak Investment Partners XII, Limited Partnership, respondent/respondent-appellant.

Akin Gump Strauss Hauer & Feld LLP, New York (David M. Zensky and Brian T. Carney of counsel), for Gobi Partners, Inc., Gobi Fund, Inc., and Gobi Fund II, L.P., respondents/respondents-appellants.

Spears & Imes LLP, New York (Linda Imes and Charlita Mays of counsel), for Sierra Ventures, IX, LP, respondent.

FEINMAN, J.

In 2010, VisionChina Media, Inc. (VisionChina) and its wholly owned subsidiary Vision Best Limited (collectively, the buyers) acquired their then competitor, nonparty Digital Media Group Company Limited (DMG), from that company's shareholders and/or officers (the sellers). VisionChina is one of the largest out-of-home digital mobile television advertising networks in the People's Republic of China (PRC). It uses digital mobile technology to deliver advertising content to displays on public transportation systems across that country. DMG operated a digital media advertising network, and sold advertisements on a network of television screens across public transportation systems throughout the PRC.

Merger negotiations first commenced in 2008, but were unsuccessful because the buyers believed DMG, which had never turned a profit, was overpriced. They recommenced in the summer of 2009 when the buyers received oral representations that DMG had significantly improved its financial condition. On September 26, 2009, the buyers entered into a letter of intent to purchase, with the closing to occur on October 15, 2009, subject to a 21-day due diligence period. During due diligence, the buyers were provided with DMG's audited financial statements for the years 2006 through 2008. They were also given unaudited financial

statements for January 1, 2009 to August 31, 2009 (the Management Accounts). The audited statements confirmed that DMG had never made a profit, and the Management Accounts bore out the sellers' representations that in 2009 there was increasing net income and decreasing losses. The buyers were also told that by September DMG had met or exceeded its costs, and that this upward trend would continue into the fourth quarter, the industry's peak season.

The Management Accounts and the oral representations were allegedly material in the buyers' decision to acquire DMG. The parties entered into an agreement on October 15, 2009, when they were provided with the unofficial September 2009 figures showing greater net revenues than expenses. The closing date was November 16, 2009; on this date the parties signed an Amended and Restated Agreement and Plan of Merger, wherein on January 2, 2010 (the Effective Time), DMG would be merged into one buyer's wholly owned subsidiary, and the buyers would acquire all of DMG's assets, including all electronically stored data. The buyers could terminate the agreement prior to the Effective Time if "any of the representations and warranties [of the sellers] herein become untrue or inaccurate"

The buyers covenanted that on the closing date, they would deposit \$29,350,000 and shares into escrow as the "Effective Time

Escrow Amount," which would be released at the Effective Time. They further covenanted that at the Effective Time, they would issue and deliver to the sellers \$100 million as initial consideration, consisting of cash and shares, and that on the next two anniversaries of the closing date, two deferred payments of another \$30 million each comprised of cash and shares would be delivered. Of the initial consideration, the buyers would deposit nearly \$50 million and shares into three separate escrow accounts, including an Indemnity Escrow Fund, and a segregated expense fund. Any amounts not subject to indemnity obligations would be disbursed to the shareholders after the first anniversary date.

The sellers warranted that both the audited financial statements and the Management Accounts were "true and complete" and prepared in accordance with industry standards (GAAP). Between the closing date and the Effective Time, sellers covenanted not to "transfer or dispose of. . . any property, rights, businesses or assets (including Intellectual Property)." They would make reasonable efforts to provide a report by the accounting firm of Ernst & Young (E&Y report) concerning the Management Accounts by December 31, 2009. In the event they did not, the buyers could retain \$2 million in the Indemnity Escrow Fund until receipt of the E&Y report.

The sellers would indemnify the buyers for any losses arising from their representations and warranties, upon a "claim notice" made by the buyers no later than November 16, 2010. This was the buyers' sole remedy after the January 2, 2010 Effective Date. The maximum shareholder liability for claims of breach of contract and fraud would be based on the number of shares held.

According to the sellers' complaint and the buyers' corresponding answer with defenses and counterclaims, the buyers timely funded the various escrow accounts, and at the Effective Time the buyers authorized the release of \$100 million in initial consideration. The E&Y report was provided to the buyers a week early, nine days before the Effective Time. The E&Y report showed that DMG's revenue for the first eight months of 2009 was considerably lower, and its losses considerably higher, than the sellers had orally represented and as stated in the Management Accounts, and that DMG was on a downward trend. Nonetheless, the merger was completed on January 2, 2010. No later than April 2010, when the computer servers were physically transferred from the former DMG's custody to the buyers' custody, the buyers discovered that the electronic data stored on the former DMG servers had been wiped clean, and were not recoverable.

On November 16, 2010, the buyers served a claim notice that DMG's accounts receivable and other revenues had been overstated,

as revealed in the E&Y report, and that the Management Accounts had not been prepared, as warranted, in accordance with GAAP. They claimed \$2,785,633 in losses. No claims of fraud or breach of contract as to the lost data were made. The buyers did not make the first \$30 million deferred payment on November 16, 2010, and did not pay the second in 2011.

Notwithstanding the fact that the parties' principal places of business are in China, as is that of DMG, pursuant to the choice of law and forum selection clauses of the merger agreement, the buyers and the sellers commenced separate lawsuits in New York. The buyers' complaint alleged four causes of action: fraudulent inducement, breach of contract, unjust enrichment, and a declaration that the sellers were not entitled to any further payments. The sellers' complaint alleged breach of contract and anticipatory breach of contract among other claims. In the latter action, the buyers' answer included five counterclaims, four mirroring those in their complaint and another alleging breach of contract based on the missing electronic files.

As the result of several motions and cross motions, and to the extent relevant here, the motion court granted the sellers' pre-answer motion to dismiss the buyers' complaint except for their breach of contract claim based on the accounts receivable

discrepancies, and also the buyers' identical counterclaims in the sellers' action. The sellers were denied summary judgment on their complaint's first two causes of action alleging breach of contract for the buyers' failure to pay the two deferred payments in 2010 and 2011. They were granted two orders of attachment, totaling \$60 million; the orders were subsequently confirmed. The buyers' fifth counterclaim in the sellers' action, for breach of contract based on failure to turn over the electronic data, was dismissed as time-barred but later reinstated under the doctrine of equitable recoupment as an affirmative defense to the sellers' claims of breach of contract. The buyers' cross motion to vacate or modify the previous orders, or for a hearing on the amount of the undertaking, was denied, although the court sua sponte directed the sellers to deposit \$500,000 in addition to the \$500,000 undertaking they initially posted. The buyers were directed by order entered about August 13, 2012, to transfer \$60 million in U.S. currency or "readily convertible" currency, by August 21, 2012, into the ultimate care of the New York City Sheriff's office, or to "provide such other security as [the sellers] may consent to in writing."

These appeals and cross appeals followed. We agree with the motion court that, except for the buyers' breach of contract claim based on the accounts receivable discrepancies, the buyers'

complaint should be dismissed, as should the buyers' counterclaims premised on the same theories in the sellers' action. We reverse the motion court's orders to the extent they denied the sellers summary judgment on their claims for the deferred payments. In our view, the two attachments were improperly granted and confirmed, and we therefore reverse those orders, as well as the order to compel the transfer of assets.

I. The Buyers' Litigation

The buyers appeal from the pre-answer dismissal of their claim and counterclaim of fraudulent inducement, which the motion court found both duplicative of their breach of contract claim and insufficiently pleaded (CPLR 3211[a][7]), as well as the causes of action and counterclaims alleging unjust enrichment and for a declaratory judgment.

On a motion to dismiss pursuant to CPLR 3211, the court accepts as true the facts as alleged in the complaint and submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). "Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law."

(*Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 246 [1st Dept 2000]).

As noted above, the buyers did not give timely notice of their claim of fraudulent inducement. Under the agreement, providing notice to the sellers within one year of the closing date was the exclusive post-closing remedy. Although the buyers offer several reasons why the contractual one-year limitation period should be ignored and their fraud claim permitted to proceed, none are persuasive. Most particularly, they argue that under *Towers Realty Corp. v Fox* (278 App Div 74 [1st Dept 1951]), because they partially performed by setting aside monies and shares in escrow, and did not receive the E&Y report revealing the allegedly fraudulent misstatements until several weeks later, their continued performance in allowing the merger to proceed at the Effective Time did not waive any claim of fraud.

It is well established that a contract induced by fraudulent representation is voidable, and that the defrauded party has several remedies.

"On discovery of the fraud . . . (1) He [or she] may rescind the contract by promptly tendering back all that he [or she] has received under it. He [or she] may then bring an action at law upon the rescission to recover back what he [or she] has paid, or (2) defend an action brought against him [or her] on the contract, setting forth the fraud and rescission as a defense. (3) He [or she]

may bring an action in equity for rescission These remedies are based upon a disaffirmance of the contract, in which the party rescinding or desiring to rescind in effect says, you have induced me to enter into this contract by fraud. I offer you what I received. Give me back that which you received, or if that be impossible pay me its value. (4) He [or she] may affirm the contract and sue for his [or her] damages. (5) If sued upon the contract, he [or she] may counterclaim his [or her] damages.”

(*Wood v Dudley*, 188 App Div 136, 140 [1st Dept 1919] [internal citations omitted]). The defrauded party may not, however, affirm the transaction by continuing to perform, keep the property and also recover the costs of acquiring and maintaining it (*Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.*, 88 AD2d 461, 466 [2d Dept 1982]).

In *Towers Realty*, *Clearview Concrete*, and indeed any claim alleging fraud, the plaintiff must always sufficiently allege the elements of fraud, prior to analysis by the court as to whether the plaintiff's conduct had waived the fraud and if not, the proper method of calculating damages. Here, the motion court properly found that the buyers failed to sufficiently allege a claim of fraud.

The elements of fraud are a misrepresentation or a material omission of fact which was known to be false by the defendant, made for the purpose of inducing the other party to rely upon it,

justifiable reliance of the other party on the misrepresentation or omission, and injury (see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). In this case, the buyers have not sufficiently alleged justifiable reliance.

“[R]eliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud” (*Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]). What constitutes reasonable reliance is “always nettlesome” because it is so fact-intensive (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 155 [2010] [internal quotation marks omitted]). Sophisticated investors must show they used due diligence and took affirmative steps to protect themselves from misrepresentations by employing what means of verification were available at the time (see e.g. *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194-195 [1st Dept 2012]).

The Court of Appeals has held that in contract negotiations between sophisticated entities, the justifiable reliance prong of a claim of fraud can be sufficiently alleged where the plaintiff “has gone to the trouble” of insisting on a written agreement that includes warranties that certain facts are true (*DDJ Mgt.*, 15 NY3d at 154). Here, the buyers argue that their complaint withstands the test set forth in *DDJ Mgt.* because the merger agreement contains such warranties and they were therefore

justified in relying on those terms without undertaking additional investigation.

However, the buyers' reliance on *DDJ Mgt.* is misplaced. First, here the buyers were well aware of DMG's financial problems in earlier years. Second, the agreement negotiated between the buyers and sellers included, in addition to the warranties referenced by the buyers, the provision that the buyers would receive, prior to the Effective Time, the E&Y report pertaining to the figures for the first eight months of 2009, and a provision that upon finding any of the representations or warranties to be untrue or inaccurate before the Effective Date, the buyers could terminate the agreement. Thus, the buyers negotiated terms that would have allowed them to discover the alleged fraud and to cancel the agreement but they then failed to take advantage of these terms. Moreover, the documentary evidence which allegedly reveals the fraud, that is, the E&Y report, was undisputably in the buyers' possession within the one-year contractually negotiated period for making a claim against the sellers, but the buyers chose not to make a notice of claim. For these reasons, the branch of the sellers' motion to dismiss the claim and counterclaim alleging fraud was properly decided (CPLR 3211[a]).

As the claim and counterclaim of fraudulent inducement were

properly dismissed, the motion court also correctly dismissed the cause of action and counterclaim seeking a declaration that the buyers are not obligated to pay the remaining consideration. The cause of action and counterclaim sounding in unjust enrichment were also properly dismissed, because a valid contract "generally precludes recovery in quasi contract for events arising out of the same subject matter" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]). In light of the foregoing, the buyers' other arguments need not be considered.

II. The Sellers' Litigation

A. Breach of Contract

Sellers cross-appeal from the denial of partial summary judgment as to their first two causes of action alleging breach of contract based on the buyers' failure to pay the two deferred payments in 2010 and 2011.

"Summary judgment must be granted if the proponent makes a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010] [internal quotation marks omitted]).

To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2)

plaintiff performed, (3) defendant failed to perform, and (4) damages (see *Noise In The Attic Prods., Inc. v London Records*, 10 AD3d 303, 307 [1st Dept 2004]).

The motion court correctly concluded that the sellers had established their breach of contract claims, but erred in holding that summary judgment was not appropriate because of the buyers' affirmative defense pertaining to the missing electronic data. Article 4 of the merger agreement provides that the sellers were to remain responsible for the electronic data and other DMG property between the Closing date of November 16, 2009 and the Effective Time of January 2, 2010. The averments by VisionChina's director of information technology, Jun Liu, are that *after the Effective Time*, he had access to the former DMG servers and *at that time*, "all seemed in order." As Liu establishes that the data existed as of the January 2, 2010 merger date, the buyers have no affirmative defense to the breach of contract claims, and the sellers should be granted summary judgment. Accordingly, the branch of the June 15, 2012 order which denied sellers' motion for summary judgment as to their first and second causes of action based on the buyers' failure to pay the two deferred considerations and which reinstated the buyers' previously dismissed fifth counterclaim as an affirmative defense to these claims should be reversed.

B. Attachment

The remainder of the issues on appeal in the sellers' litigation are raised by the buyers, who seek vacatur of the orders of attachment.

An order of attachment directs the sheriff to take constructive and sometimes actual hold of a defendant's property, so that it can be applied to the plaintiff's judgment in the action, should the plaintiff prevail (Siegel, NY Prac § 313 at 499 [4th ed. 2005]; CPLR article 62). The plaintiff must show a viable cause of action and the probability that it will succeed on the merits, that one or more grounds exist for attachment as set forth in CPLR 6201, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff (CPLR 6212; see *Considar, Inc. v Redi Corp. Establishment*, 238 AD2d 111 [1st Dept 1997]).

Attachment is a "harsh" remedy, and is construed narrowly in favor of the party against whom the remedy is invoked (*Penoyar v Kelsey*, 150 NY 77, 80 [1896]; *DLJ Mtge. Capital, Inc. v Kontogiannis*, 594 F Supp 2d 308, 319 [ED NY 2009]). Whether to grant a motion for an order of attachment rests within the discretion of the court (see *Morgenthau v Avion Resources, Ltd.*, 11 NY3d 383, 387 [2008] [no abuse of discretion when court declined to confirm the attachment orders]). Here, the motion

court found that the sellers met the statutory standards to be awarded an attachment, and that the ground for attachment was based on the buyers being "foreign corporation[s] not qualified to do business in the state" (CPLR 6201[1]; CPLR 6212[a]).

In addition to establishing that a defendant subject to the court's personal jurisdiction meets the statutory requirements for an attachment, the party seeking attachment must demonstrate an identifiable risk that the defendant will not be able to satisfy the judgment (*Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 310-311 [2010]; *Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 538 [2009]). The risk should be real, "whether it is a defendant's financial position or past and present conduct" (*Ames v Clifford*, 863 F Supp 175, 177 [SD NY 1994]; see also *General Textile Printing & Processing Corp. v Expromtorg Intl. Corp.*, 862 F Supp 1070, 1073 [SD NY 1994]). The court may consider the defendant's history of paying creditors (see *Habitations Ltd. v BKL Realty Sales Corp.*, 160 AD2d 423, 424 [1st Dept 1990]), or a defendant's stated or indicated intent to dispose of assets (see *County Natwest Sec. Corp., USA v Jesup, Josephthal & Co.*, 180 AD2d 468, 469 [1st Dept 1992]).

Here, the motion court cited *ITC Entertainment, Ltd. v Nelson Film Partners* (714 F2d 217, 220 [2d Cir 1983]), and reasoned that "New York courts have long recognized that

provisions for attachment against nonresidents are based on the assumption that there is much more propriety in requiring a debtor, whose domicile is without the state, to give security for the debt, than one whose domicile is within" (internal quotation marks omitted). The motion court was further persuaded that attachment was needed based on statements made in the buyers' SEC filings that (1) "our PRC counsel has advised us that the PRC does not have treaties with the United States or many other countries providing for the reciprocal recognition and enforcement of legal judgments"; (2) it "may also be difficult . . . to enforce in U.S. courts judgments obtained in U.S. courts," and (3) "substantially all of our assets are located outside of the United States." The court concluded that "an eventual ruling in the [s]ellers' favor may [] prove to be worthless in the absence of a prejudgment order of attachment."

In our view, the *ITC* decision relied on by the motion court is very different factually from the case at bar, and not on point. The *ITC* defendants, who were not domiciled within New York, did not have sufficient assets to satisfy a \$2.7 million judgment, the defendants' general partner was "soon" to receive "highly liquid assets" that might be invested in a manner that "would make enforcement of *ITC*'s judgment difficult," and the general partner had "conducted business in a less than exemplary

manner" (714 F2d at 219 [internal quotation marks omitted]). In contrast, here there is no evidence that the buyers lack sufficient assets if a judgment is rendered against them. Nor is there evidence that the buyers have hidden or will choose to hide or otherwise dispose of their assets.

There must be more than a showing that the attachment would, in essence, be "helpful" (*Founders Ins. Co. Ltd. v Everest Natl. Ins. Co.*, 41 AD3d 350, 351 [1st Dept 2007]). Here, while it may be true that many foreign parties "experience difficulties when dealing with" the PRC's State Administration of Foreign Exchange (S.A.F.E.), the entity that ultimately approves the conversion of Renminbi (PRC's currency) into foreign currency for remittance out of China, there is nothing in the record showing that S.A.F.E., if applied to, would deny approval to the buyers to pay \$60 million.

An attachment is "frequently used when the creditor suspects that the debtor is secreting property or removing it from New York" (*Koehler v Bank of Bermuda Ltd.*, 12 NY3d at 538). In *Elton Leather Corp. v First Gen. Resources Co.* (138 AD2d 132 [1st Dept 1988]), attachment was appropriate where it was uncontested that the defendants had received but not paid for the goods, and there was proof that they were in financial trouble and were poised to move to dismiss the complaint on jurisdictional grounds. In

contrast, in *Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd.* (5 Misc 3d 285 [Sup Ct, NY County 2004]) involving nondomiciliary Hong-Kong based defendants not qualified to do business in New York State, the court found no need for an attachment of assets because the plaintiffs had failed to demonstrate "a real identifiable risk that the defendants will be unable to satisfy any judgment obtained by plaintiffs," for instance that the defendants "would conceal or convert any of their assets were it not for an attachment order, or that they would be unlikely to satisfy the potential judgment" (*id.* at 301).

We conclude that, on the extant record which consists of competing affidavits, the grant of an attachment and its confirmation was an abuse of discretion. "[T]he mere fact that defendant is a non-domiciliary residing without the State of New York is not sufficient ground for granting an attachment" (*TAGC Mgmt., LLC v Lehman*, 842 F Supp 2d 575, 586 [SD NY 2012] [internal quotation marks omitted]). The sellers have shown no evidence that the buyers lack sufficient assets, or that they will choose to hide or otherwise dispose of their assets. We note that no hearing was held at which the credibility of the buyers' averments regarding their financial status and resources could be evaluated. At most, the sellers' affidavits establish that there is potentially a significant amount of bureaucracy

involved in obtaining the assets as converted funds. This is not, in itself, sufficient to order an attachment. The orders of the motion court granting and confirming the orders of attachment, and granting discovery to aid in attachment, as well as the order that the buyers transfer assets into New York State, should therefore be reversed.

Finally, the buyers' remaining arguments concerning violation of the act of state doctrine and principles of comity are rendered academic, but if we were to consider them, we would find them unpersuasive.

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered November 3, 2011, which, to the extent appealed from, granted defendants' motion to dismiss the first, third, and fourth causes of action in *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, and granted plaintiffs' motion to dismiss the first, third, fourth, and fifth counterclaims in *Shareholder Representative Servs., LLC v VisionChina Media Inc.* pursuant to CPLR 3211, should be affirmed, without costs. The order of the same court and Justice, entered November 4, 2011, which, in *Shareholder*, granted plaintiffs' motion to attach defendants' assets, should be reversed, on the law and the facts, with costs, and the motion denied. The order of the same court and Justice, entered June 15, 2012, which, to

the extent appealed from as limited by the briefs, granted the *Shareholder* plaintiffs' motion to confirm two ex parte orders of attachment and denied their motion for partial summary judgment on their first and second causes of action and reinstated the previously dismissed fifth counterclaim as an affirmative defense, should be reversed, on the law and the facts, with costs, the motion to confirm denied and the motion for summary judgment granted. The order of the same court and Justice, entered on or about August 13, 2012, which granted the *Shareholder* plaintiffs' motion to compel defendants to transfer \$60 million into New York and to extend the time period to perfect their levies, should be reversed, on the law and facts, with costs, and the motion denied.

All concur.

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

ENTERED: JUNE 11, 2013


CLERK