

was within defendant's grabbable area at the time of her arrest for criminal trespass in connection with the police investigation of a burglary. Moreover, the police did not have exclusive control of the bag. The surrounding circumstances here support a reasonable belief in the existence of an exigency justifying a search of the bag, even though the officers did not explicitly testify at the suppression hearing that they feared for their safety (see *People v Batista*, 88 NY2d 650, 654 [1996]; *People v Bowden*, 87 AD3d 402, 405 [2001]).

The court properly denied defendant's application to reopen the hearing based on trial testimony. The court correctly determined that the search would still have been lawful under the additional facts revealed at trial.

The court properly exercised its discretion in denying defendant's challenges for cause to two prospective jurors. The colloquy between counsel, the court and each panelist, viewed as a whole, did not cast doubt on either panelist's ability to follow the court's instructions and render an impartial verdict (see *People v Roberson*, 249 AD2d 148, 149-50 [1st Dept 1988], *lv denied* 92 NY2d 904 [1998]).

The court conducted a thorough inquiry into allegations of

juror misconduct (*see generally People v Buford*, 69 NY2d 290, 298-99 [1987]), and it properly exercised its discretion in determining that no further inquiry was required (*see People v Rodriguez*, 71 NY2d 214 [1988]).

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

ENTERED: SEPTEMBER 25, 2012



CLERK

Sweeny, J.P., Catterson, Acosta, Freedman, Román, JJ.

7982

Index 601831/09

Holborn Corporation,
Plaintiff-Respondent,

-against-

Guy Carpenter & Company, LLC,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about October 20, 2011,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated July 20, 2012,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: SEPTEMBER 25, 2012


CLERK

Andrias, J.P., Sweeny, Moskowitz, Freedman, Richter, JJ.

8078 In re Joseph Z.,
 A Person Alleged to
 be a Juvenile Delinquent,
 Appellant.
 - - - - -
 Presentment Agency.

Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about January 19, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of 18 months, unananimously modified, on the law, to the extent of reducing the finding to attempted assault in the third degree, and otherwise affirmed, without costs.

Except as indicated, the court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its resolution of inconsistencies in

testimony.

The evidence supports the inference that appellant was one of two persons who took part in an attack on the victim, and that appellant intended to cause physical injury. However, the evidence does not establish that the victim sustained any impairment of his physical condition or substantial pain (see Penal Law § 10.00[9]; *People v Chiddick*, 8 NY3d 445, 447 [2007]). Thus, the evidence supports a finding of attempted, but not completed, third-degree assault.

To the extent appellant is arguing that the court's brief questioning of the victim deprived appellant of a fair fact-finding hearing, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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Defendant submitted deposition testimony and medical records establishing that he informed plaintiff of the risks associated with the procedures, and plaintiff signed written consent forms indicating her understanding of those risks (see Public Health Law § 2805-d[1]; *Lynn G. v Hugo*, 96 NY2d 306, 309 [2001]). In addition, defendant submitted an affirmed report from an expert who reviewed the medical records and deposition testimony and opined that defendant adequately informed plaintiff of all risks and alternatives (see *Orphan v Pilnik*, 15 NY3d 907 [2010]).

The IAS court properly concluded that plaintiff failed to rebut defendant's prima facie showing with medical evidence attesting that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Plaintiff also did not challenge defendant's expert's showing on the lack of informed consent claim.

On renewal, plaintiff failed to offer reasonable justification for the submission of his expert's new affidavit, which was apparently "responsive to the portion of the motion court's prior order stating that defendant's medical evidence was unrefuted" (see *Jones v 170 E. 92nd St. Owners Corp.*, 69 AD3d 483 [1st Dept 2010]). In any event, were we to accept plaintiff's new submission, we would find that that plaintiff's expert's

conclusions as to malpractice and lack of informed consent were not supported by record evidence (*see Orphan, supra*). In addition, plaintiff failed to tender expert testimony to prove the insufficiency of the information disclosed to the plaintiff (*see CPLR 4401-a; Orphan, 15 NY3d at 908-909*).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: SEPTEMBER 25, 2012


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finding of sexual misconduct, and to reinstate the penalty of termination, and otherwise affirmed, without costs.

Petitioner, a tenured high school teacher, became the subject of an investigation based upon an incident involving a telephone call to an 18-year-old female student's home. Following an investigation, four specifications were preferred against petitioner alleging, inter alia, that he engaged in sexual misconduct. At the disciplinary hearing, petitioner admitted that he called the student's home and identified himself by his first name to the woman who answered the telephone, in violation of school protocol. Petitioner then told the student that she had passed a recent examination, asked her if she was happy about the results, and asked her to go out with him. In response to this request, the student and her mother, who was also on the line, confronted petitioner, and he hung up. The student's mother added that petitioner told her daughter not to tell her mother that he was her teacher, which claim was consistent with the student's verbal and written reports. The arbitrator found petitioner guilty of sexual misconduct and terminated his employment.

Judicial review of this determination is limited to the grounds set forth in CPLR 7511 (see Education Law § 3020-a[5]), i.e., "misconduct, bias, excess of power or procedural defects"

(*Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008] [internal quotation marks and citation omitted]; see CPLR 7511[b][1]). Where, as here, the arbitration is compulsory, the excess of power standard under CPLR 7511(b) includes review of "whether the award is supported by evidence or other basis in reason, as may be appropriate, and appearing in the record" (*Mount St. Mary's Hosp. Of Niagara Falls v Catherwood* (26 NY2d 493, 508 [1970])). Thus, the "determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78" (*Lackow* at 567, citing *Motor Vehicle Mfrs. Ass'n v State*, 75 NY2d 175, 186 [1990])).

Here, as found by Supreme Court, petitioner's conduct served as a basis for sustaining Specification 1.1(e), which alleged that petitioner told the student not to tell her mother that he was her teacher, and Specification 3.2, which alleged that petitioner asked the student to go out with him. The record also supports sustaining Specification 1.2, which charged that petitioner hung up when confronted by the mother, which conduct constitutes a separate nonfrivolous element to the charge of sexual misconduct. Moreover, the record supports Specification 3.1, which charged that petitioner asked the student whether she was happy with the news that she had passed the exam. In the

context of the night-time phone call to a student, the question, asked by petitioner before his proposition of a date, suggests misconduct.

The court properly found that Specification 2.1, which charged that, the next day, petitioner told the student not to report the call, was supported by the record. The record also supports Specification 2.2, which further specified that petitioner warned the student not to tell the principal about the call, indicating an awareness of wrongdoing, and thus, the specification was not duplicative and should not have been dismissed by the court.

The sustained charges rationally support and provide adequate evidence for the arbitrator's conclusion that petitioner committed sexual misconduct by performing an "action that could reasonably be interpreted as soliciting a sexual relationship" as provided in article 21 § G[6] of the collective bargaining agreement. In finding to the contrary, Supreme Court impermissibly substituted its own judgment for that of the arbitrator, crediting petitioner's claim that he was joking when he asked the student to go out with him (*see Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]).

In light of the foregoing evidence, the penalty of

termination, notwithstanding petitioner's prior lack of disciplinary history, does not shock our sense of fairness. Petitioner's actions of calling a student at home, asking her if she was happy with the results of an examination, and then asking her out on a date, clearly constituted unacceptable behavior (see e.g. *Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856, 857 [1st Dept 2011]).

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

ENTERED: SEPTEMBER 25, 2012


CLERK

Andrias, J.P., Sweeny, Moskowitz, Freedman, Richter, JJ.

8081 Kamco Supply Corp., Ind. 603977/07
Plaintiff-Appellant,

-against-

JMT Brothers Realty, LLC,
Defendant-Respondent,

"John Doe One," et al.,
Defendants.

Eric Schneider, Kingston, for appellant.

Welby, Brady & Greenblatt, LLP, White Plains (Gregory J. Spaun of
counsel), for respondent.

Order, Supreme Court, New York County (Ira Gammerman,
J.H.O.), entered June 22, 2009, which, to the extent appealed
from, granted defendant owner's motion for summary judgment
dismissing plaintiff subcontractor's claim seeking foreclosure on
its mechanic's lien for materials furnished for a home
improvement project, unanimously affirmed, without costs.

Defendant owner had the initial burden on summary judgment
of establishing prima facie that at the time the lien was filed,
it owed no payment to the general contractor (*Penava Mech. Corp.
v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 495 [1st Dept 2010]). It
satisfied its burden by showing that by virtue of the general
contractor's unlicensed status, the home improvement contract
entered between the two was rendered unenforceable pursuant to

Administrative Code of City of NY §§ 20-386, 20-387 (see *B&F Bldg. Corp. v Liebig*, 76 NY2d 689, 692 [1990], citing *Mortise v 55 Liberty Owners Corp.*, 102 AD2d 719 [1st Dept 1984], *affd* 63 NY2d 743 [1984]). Where a home improvement contract has been rendered unenforceable, there can be no funds due and owing from the owner to the unlicensed general contractor to support a subcontractor's mechanic's lien claim (see e.g. Administrative Code § 20-387[a]; *Matros Automated Elec. Constr. Corp. v Libman*, 37 AD3d 313 [1st Dept 2007]; see also *Blake Elec. Contr. Co. v Paschall*, 222 AD2d 264, 267 [1st Dept 1995]). Defendant owner further showed that it had no direct contractual relationship with plaintiff subcontractor; absent such relationship, "the rights of a subcontractor [must be] derivative of the rights of the general contractor and a subcontractor's lien must be satisfied out of funds due and owing from the owner to the general contractor at the time the lien is filed" (*Penava*, 71

AD3d at 495 [internal quotation marks and citation omitted]).

The burden shifted to plaintiff, which failed to raise any triable issue of fact in opposition to defendant's motion.

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

ENTERED: SEPTEMBER 25, 2012


CLERK

Andrias, J.P., Sweeny, Moskowitz, Freedman, Richter, JJ.

8083 In re Matthew Ricardo M., etc.,
 A Child under Eighteen Years of
 Age, etc.,

Melissa M.,
 Respondent-Appellant.

Catholic Guardian Society and
Home Bureau, et al.,
 Petitioners-Respondents,

Andrew J. Baer, New York, for appellant.

Joseph T. Gatti, New York, for respondents.

Mayer Brown LLP, New York (Allison Levine Stillman of counsel),
attorney for the child.

Order, Family Court, New York County (Jody Adams, J.),
entered on or about April 11, 2011, which, upon a finding of
permanent neglect, terminated respondent mother's parental rights
to the subject child and committed custody and guardianship of
the child to petitioner agency and the Commissioner of the
Administration for Children's Services for the purpose of
adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and
convincing evidence (see Social Services Law § 384-b[7][a]). The
record shows that, despite the agency's diligent efforts, the
mother failed, during the statutorily relevant time period, to

comply with the agency's service plan. Indeed, the mother did not visit the child regularly between October 2009 and February 2010, failed to maintain sobriety or attend drug testing for several months, suspended mental health therapy, and failed to demonstrate a stable source of income (see *Matter of Angel P.*, 44 AD3d 448, 449 [1st Dept 2007]; *Matter of Carol Anne Marie L. [Melissa L.]*, 74 AD3d 643, 644 [1st Dept 2010]).

A preponderance of the evidence shows that it was in the child's best interests to terminate the mother's parental rights to free him for adoption by the foster parents, who have provided the special needs child with good care since shortly after birth (see *Matter of Paul Michael G.*, 36 AD3d 541, 542 [1st Dept 2007]). A suspended judgment was not warranted, especially where the mother had failed to comply with court orders prohibiting unsupervised visits with the child (*id.*).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: SEPTEMBER 25, 2012


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529 [1st Dept 2012]; *Cruz v Bronx Lebanon Hosp. Ctr.*, 73 AD3d 597, 598 [1st Dept 2010]). Here, the affidavit of merit submitted on renewal, together with counsel's affirmation explaining the delay in seeking a default, warrants a grant of renewal and denial of the motion to dismiss as to Christina (see *Smith v Arce*, 78 AD3d 612 [1st Dept 2010]; *LaValle v Astoria Constr. & Paving Corp.*, 266 AD2d 28 [1st Dept 1999]). The evidence that plaintiffs' attorney had continuing oral and written communications with defendant's insurer concerning this serious injury action, "while not the equivalent of ongoing negotiations, sufficiently indicates that plaintiffs did not intend to abandon the action," and provided a reasonable excuse under the circumstances (*Hinds v 2461 Realty Corp.*, 169 AD2d 629, 632 [1st Dept 1991]; see *Corbin v Wood Pro Installers*, 184 AD2d 234 [1st Dept 1992]). Moreover, there has been no showing of prejudice to defendant (see *LaValle*, 266 AD2d at 28).

However, plaintiffs did not provide an affidavit of merit or

other evidence sufficient to warrant reinstatement of plaintiff Margarita's serious injury claims (*see Utak v Commerce Bank Inc.*, 88 AD3d 522, 522-523 [1st Dept 2011]).

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

ENTERED: SEPTEMBER 25, 2012


CLERK

Andrias, J.P., Sweeny, Moskowitz, Freedman, Richter, JJ.

8085- 261 East 78th Realty Corp., Index 650107/11
8086 Plaintiff-Appellant,

-against-

William N. Bernstein,
Architects, PLLC, et al.,
Defendants-Respondents.

Georgoulis & Associates, PLLC, New York (Michael McDermott of counsel), for appellant.

Milber Makris Plousadis & Seiden, LLP, White Plains (Mark Seiden of counsel), for respondents.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 21, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint as against the individual defendant, William N. Bernstein, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 20, 2011, which, to the extent appealed from, upon reargument, adhered to the determination on the original motion, unanimously dismissed, without costs, as academic.

Although the individual defendant signed an agreement to provide architectural services on behalf of a nonexistent corporate entity and failed to disclose that the nonexistent entity was, in fact, a "trade name" for an otherwise undisclosed

principal, we note that defendant has willingly allowed its proper corporate name to be substituted. Furthermore, the complaint against the individual defendant was correctly dismissed since the parties' agreement expressly absolved the defendant of any personal liability in connection with architectural services performed under the agreement (see generally *Clinton Invs. Co., II v Watkins*, 146 AD2d 861, 862-863 [3d Dept 1989]; *Universal Indus. Corp. v Lindstrom*, 92 AD2d 150, 151 [4th Dept 1983]; cf. *Geron v Amritraj*, 82 AD3d 404, 405 [1st Dept 2011]). Parties to arm's-length transactions may agree to waive claims based on personal liability (see *Lawrence v Kennedy*, 95 AD3d 956, 959 [2d Dept 2012]). Moreover, contractual provisions that absolve a party of its own negligence are enforceable, absent evidence of gross negligence (see *Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823 [1993]). Here, the complaint alleges breach of contract and professional negligence, but not gross negligence.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: SEPTEMBER 25, 2012


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pay plaintiff 7% of the amount of loss "when adjusted or otherwise recovered." The claim was not adjusted; following extensive litigation, Seward Park settled with Greater New York.

We reject Seward Park's argument that plaintiff is not due any fee under the contract because it neither adjusted the claim nor provided "valuable services" that resulted in the adjustment of the claim (see 11 NYCRR 25.10). In light of the "otherwise recovered" language in the retainer agreement, we find that adjustment of the claim is not a condition precedent to plaintiff's recovery of a fee (see *GS Adj. Co., Inc. v Roth & Roth, L.L.P.*, 85 AD3d 467 [1st Dept 2011]; see also *Goldstein Affiliates v Affiliated FM Ins. Co.*, 178 AD2d 301 [1st Dept 1991]). However, the record presents an issue of fact whether plaintiff performed valuable services.

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

ENTERED: SEPTEMBER 25, 2012


CLERK

Andrias, J.P., Sweeny, Moskowitz, Freedman, Richter, JJ.

8091 In re Emmanuel J.,
 A Person Alleged to
 be a Juvenile Delinquent,
 Appellant.
 - - - - -
 Presentment Agency.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about January 4, 2012, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of petit larceny, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and placing him on probation rather than granting him an adjournment in contemplation of dismissal. Probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). A longer period of supervision than an ACD would have

provided was justified by appellant's chronic truancy and poor academic performance, which continued after he was placed in intensive case management, along with his unsatisfactory performance when offered an opportunity for adjustment of his case.

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

ENTERED: SEPTEMBER 25, 2012


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authority to revisit defendant's prison sentence on this appeal
(*see id.* at 635).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: SEPTEMBER 25, 2012


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improvements prior to his tenancy were supported by, among other things, plaintiff's affidavit and a contractor's estimate. At this stage of the proceeding, the court properly denied defendants' motion, affording plaintiff the opportunity to engage in discovery on the issue of the alleged fraudulent deregulation.

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

ENTERED: SEPTEMBER 25, 2012


CLERK

Andrias, J.P., Sweeny, Moskowitz, Freedman, Richter, JJ.

8094 Meusette Gonzalez, Index 114025/07
Plaintiff-Appellant,

-against-

DCFS Trust et al.,
Defendants,

Helen Tinelli, et al.,
Defendants-Respondents.

Dansker & Aspromonte Associates, New York (Dara L. Warren of
counsel), for appellant.

Law Offices of Curtis, Vasile P.C., Merrick (Michael J. Dorry of
counsel), for respondents.

Order, Supreme Court, New York County (Carol E. Huff, J.),
entered July 11, 2011, which, in an action to recover damages for
personal injuries sustained by plaintiff in a one-vehicle
accident, to the extent appealed from as limited by the briefs,
denied plaintiff passenger's posttrial motion to set aside the
jury verdict on the issue of proximate cause and direct a
judgment in her favor on the issue as against defendant driver
Espinal, or for a new trial on the issue of liability,
unanimously affirmed, without costs.

Given Espinal's testimony that she observed a problem with
the brakes a week before the accident while in the car with
defendant Vega, the car's owner, and her testimony describing how

the brakes performed and what she did with the brakes immediately before the accident, there was sufficient evidence to support the court's jury charge on the adequacy of the brakes. The jury's finding that Espinal was negligent, but that such negligence was not a substantial factor in causing plaintiff's injury, was supported by a fair interpretation of the evidence (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]; *Nicastro v Park*, 113 AD2d 129, 132-137 [2d Dept 1985]). While Espinal testified that she was driving at about 40 to 45 mph in a 30-mph zone up Broadway, she also testified that she had slowed down and was traveling at less than 10 mph when she hit the concrete median. She further testified that she steadily applied the brakes, but that the brakes became unresponsive and began "pumping," causing her to lose control. The jury could have reasonably concluded that although Espinal was negligently speeding up Broadway, it was the brake failure that proximately caused the injuries. The jury could have reasonably concluded that the pumping was a malfunctioning of the brake, especially given Espinal's testimony that she noticed a brake problem a week before the accident. In view of the court's instructions permitting the jury to draw the strongest inference that the opposing evidence permits against Vega, and Espinal's testimony that she had told Vega about the brake problem before the

accident, the jury could have reasonably concluded that Vega's failure to maintain the brakes was the sole proximate cause of plaintiff's injuries. Accordingly, we do not find the verdict to be irreconcilably inconsistent (see *Rubin v Pecoraro*, 141 AD2d 525 [2d Dept 1988]).

We have considered plaintiff's remaining contentions regarding proximate cause and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
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extreme brutality of the crime, which led to convictions of attempted murder in the second degree, sodomy in the first degree, and robbery in the first degree (see e.g. *People v Guasp*, 95 AD3d 608 [1st Dept 2012]). These aggravating factors outweighed the mitigating factors cited by defendant.

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

ENTERED: SEPTEMBER 25, 2012


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Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: SEPTEMBER 25, 2012


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pursuant to the agreement, to which he did not object (see *Bartning v Bartning*, 16 AD3d 249, 250 [1st Dept 2005]). In addition, the partial payment plaintiff made on the bills established an account stated, as "either retention of bills without objection or partial payment may give rise to an account stated" (*Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]). Under these circumstances, the court should not have referred the matter to a special referee to determine the reasonable value of the legal services rendered. Instead, it should have fixed a charging lien based upon the account stated (see *Tunick v Shaw*, 45 AD3d 145, 149 [1st Dept 2007]); *Bartning v Bartning*, 16 AD3d at 250).

The law firm was not entitled to entry of a money judgment. Although the amount of a charging lien may be determined and fixed before the outcome of the case, the charging lien does not provide for an immediately enforceable judgment against all assets of the former clients (*Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, 219 [1997]). Rather, the lien is security against a single asset of the client - a judgment or settlement reached in favor of the former client in the underlying matter (*id.*). Since the record here does not show that there has been a final judgment in this action, the law firm's request for a money

judgment was properly denied (*see Squitieri v Squitieri*, 77 AD3d 428, 428 [2010]). Should the law firm wish to obtain a judgment enforceable against plaintiff's other assets, it can bring a separate plenary action (*see Butler*, 235 AD2d at 218-219).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: SEPTEMBER 25, 2012


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The People do not dispute that defendant's Florida burglary conviction, which served as the predicate in this matter, cannot serve as the basis for **adjudicating defendant** a second felony offender (see *People v Fermin*, 231 AD2d 436, 436-437 [1st Dept 1996]). Because defendant's predicate sentence was based on a mistake of law, we exercise our interest of justice jurisdiction to the extent of remanding for resentencing (see *People v Marino*, 81 AD3d 426, 427 [1st Dept 2011], *lv denied* 16 NY3d 897 [2011]). On remand, the People may allege a different prior felony conviction, if there is one, as the basis for predicate felony adjudication (*id.*).

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

ENTERED: SEPTEMBER 25, 2012


CLERK

Mazzarelli, J.P., Andrias, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

6917- Mashreqbank PSC, 601650/09
6918 Plaintiff-Respondent, 590643/09

-against-

Ahmed Hamad Al Gosaibi & Brothers Company,
Defendant- Appellant,

- - - - -

Ahmed Hamad Al Gosaibi & Brothers Company,
Third-Party-Plaintiff-Appellant,

Maan Abdul Waheed Al Sanea,
Third-Party-Defendant-Respondent,

Awal Bank BSC,
Third-Party-Defendant.

Lewis Baach PLLC, New York (Bruce R. Grace of counsel), for
appellant.

Cleary Gottlieb Steen & Hamilton LLP, New York (Carmin D.
Boccuzzi of counsel), for Mashreqbank PSC, respondent.

Gibson, Dunn & Crutcher LLP, New York (Robert F. Serio of
counsel), for Maan Abdul Waheed Al Sanea, respondent.

Judgment, Supreme Court, New York County (Richard B. Lowe,
III, J.), entered August 11, 2010, reversed, on the law, with
costs, the judgment vacated and the complaints reinstated.
Appeal from the order, same court and Justice, entered July 29,
2010, dismissed, without costs, as subsumed in the appeal from
the judgment.

Opinion by Catterson, J. All concur except Mazzarelli,
J.P., and Andrias, J., who dissent in an Opinion by
Andrias, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
James M. Catterson
Shelia Abdus-Salaam
Sallie Manzanet-Daniels, JJ.

6917-
6918
Index 601650/09
590643/09

Mashreqbank PSC,
Plaintiff-Respondent,

-against-

Ahmed Hamad Al Gosaibi & Brothers Company,
Defendant-Appellant.

- - - - -

Ahmed Hamad Al Gosaibi & Brothers Company,
Third Party Plaintiff-Appellant,

-against-

Maan Abdul Waheed Al Sanea,
Third Party Defendant-Respondent,

Awal Bank BSC,
Third Party Defendant.

Defendant/third party plaintiff appeals from the judgment of the
Supreme Court, New York County (Richard B.
Lowe, III, J.), entered August 11, 2010,
dismissing the action and the third-party

action and from the order of the same court and Justice, entered July 29, 2010, which granted third-party defendant Maan Abdul Waheed Al Sanea's motion to dismiss.

Lewis Baach PLLC, New York (Bruce R. Grace and Eric L. Lewis of counsel), for appellant.

Cleary Gottlieb Steen & Hamilton LLP, New York (Carmine D. Boccuzzi, David E. Brodsky, Lisa M. Gouldy and Liana Roza Vitale of counsel), for Mashreqbank PSC, respondent.

Gibson, Dunn & Crutcher LLP, New York (Robert F. Serio and Gabriel Herrmann of counsel), for Maan Abdul Waheed Al Sanea, respondent.

CATTERSON, J.

In these dual actions arising from an alleged Ponzi scheme of global proportions, precedent mandates reversal of the motion court's sua sponte dismissal of the main action on a forum non conveniens ground. Moreover, we find that dismissal of the related third-party action, on notice of motion, on a forum non conveniens ground, was an improvident exercise of the court's discretion. New York has a compelling interest in adjudicating controversies that implicate its preeminent position in the international banking system, and in any event, the third-party defendant failed to demonstrate that New York is an inconvenient forum.

Plaintiff Mashreqbank PSC (hereinafter referred to as "Mashreqbank") is a United Arab Emirates (hereinafter referred to as "UAE") bank with its principal place of business located in New York. Mashreqbank filed the instant action against defendant Ahmad Hamad Al Gosaibi & Brothers Company (hereinafter referred to as "AHAB") seeking to recover \$150 million in connection with a series of financial transactions executed in New York. AHAB is a Saudi Arabian general partnership with a principal place of business in Saudi Arabia.

Mashreqbank alleges that it wired the \$150 million to an account at the Bank of America in New York as part of a currency

exchange transaction with AHAB. Mashreqbank further alleges that AHAB failed to transfer the Saudi riyals contemplated by the currency exchange. Instead, the funds in the Bank of America account were transferred to an HSBC account located in New York and controlled by third-party defendant Maan Abdul Waheed Al Sanea (hereinafter referred to as "Al Sanea"). The HSBC account was in the name of Awal Bank BSC (hereinafter referred to as "Awal"). Awal is a bank established by Al Sanea in Bahrain.

Mashreqbank filed the instant action seeking damages for breach of contract for the currency exchanges that took place in New York through Mashreqbank's bank in New York to AHAB's bank in New York. Additionally, Mashreqbank filed an order of attachment against AHAB's property in New York including the funds contained in the Al Sanea Bank of America account. At the time of the attachment, Al Sanea had already transferred all of the money in question through the HSBC account in New York to institutions outside of the United States.

AHAB filed its answer and a third-party action against Al Sanea and Awal alleging that both third-party defendants engaged in an international Ponzi scheme using AHAB's accounts without AHAB's knowledge and/or consent. Thus, AHAB claimed that any liability that AHAB might have to Mashreqbank was solely due to Al Sanea's theft of the money through the currency exchange

transactions that took place in New York. AHAB later counterclaimed against Mashreqbank asserting that Mashreqbank aided and abetted Al Sanea in the perpetration of Al Sanea's Ponzi scheme.

Al Sanea moved to dismiss the third-party complaint on the ground of forum non conveniens and lack of personal jurisdiction.¹ In support of his motion, insofar as relevant, Al Sanea averred as follows: that he is a Saudi citizen and resident; that he holds a 47% interest in defendant Awal Bank, which he also controls; that AHAB is a Saudi partnership; and that the transaction would be governed by Saudi law. He further averred that at least one of the underlying transactional documents selected a UAE forum; that all of AHAB's witnesses,

¹The portion of the order denying Al Sanea's motion to dismiss for lack of personal jurisdiction is not on appeal. However, were we to consider the issue, we would agree with the motion court that there is personal jurisdiction based on Al Sanea's transaction of business in New York (see e.g. Deutsche Bank Sec., Inc. v. Montana Bd. of Invs., 7 N.Y.3d 65, 71, 818 N.Y.S.2d 164, 167, 850 N.E.2d 1140, 1143 (2006), cert. denied 549 U.S. 1095, 127 S.Ct. 832, 166 L.Ed.2d 665 (2006) (the court may exercise long-arm jurisdiction over persons who, from out of state, use electronic and telephonic means to project themselves into New York to conduct business transactions), and/or his commission of a tort in New York (see e.g. Banco Nacional Ultramarino v. Chan, 169 Misc.2d 182, 188, 641 N.Y.S.2d 1006, 1009 (Sup. Ct., N.Y. County 1996), aff'd 240 A.D.2d 253, 659 N.Y.S.2d 734 (1st Dept. 1997)) (where jurisdiction is based on committing a tort in New York, under CPLR 302(a)(2), the defendant need not be physically present in order to be subject to personal jurisdiction)).

except its professional advisers, and all its documents are in Saudi Arabia; and that both translation and travel would be expensive because many, if not all, of the witnesses speak Arabic as a first language and many of the documents are in Arabic. Al Sanea also maintained that legal restrictions would prevent most of the witnesses from traveling to New York.

Al Sanea further stated that AHAB made a fraud claim to Saudi authorities and that there are pending criminal and civil proceedings in Bahrain, the UAE, the Cayman Islands, and the United Kingdom. Al Sanea also submitted the affidavit of an expert on Saudi law who opined that Saudi Arabia is capable of adjudicating this type of commercial dispute and could hear the matter through its Board of Grievances. The expert further opined that the ad hoc committee that was formed can investigate and resolve the dispute.

In opposition, Mashreqbank submitted a list indicating that most of the relevant documents are in English. The former general manager of the Money Exchange, the entity involved in the subject transaction, averred that the employees with knowledge of the transaction speak English fluently, and reside in England, Bahrain, Saudi Arabia, India, Jordan and Canada. He further stated that the documents located in Saudi Arabia are available electronically.

Mashreqbank also submitted the affidavit of the Saudi lawyer who had represented Mashreqbank before the Saudi special committee. He disagreed with Al Sanea's expert about the ad hoc committee's role, averring that it lacks the power to adjudicate the dispute between the parties. Mashreqbank's expert in Saudi law opined that differences between New York and Saudi law would limit access to documents and testimony. He further testified that, although the Saudi Board of Grievances can adjudicate this dispute, there could be long delays and uncertainty over whether the Board would exercise jurisdiction.

In reply, Al Sanea identified witnesses who do not reside in New York. He noted that none of the witnesses identified in Mashreqbank's and AHAB's discovery responses reside in New York, and only three reside in countries subject to the Hague Convention rules on taking evidence abroad in commercial matters. He further noted that the amount Mashreqbank seeks from AHAB in this action is encompassed in Mashreqbank's action against AHAB in the UAE.

The motion court dismissed the third-party action, finding that the factors in Islamic Republic of Iran v. Pahlavi (62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), cert. denied 469 U.S. 1108, 105 S.Ct. 783, 83 L.Ed.2d 778 (1985)) weighed in favor of dismissal on the ground of forum non conveniens. Having

found that the relevant factors warrant dismissal of the third-party action, the court sua sponte dismissed the main action. For the reasons set forth below, this was error.

In VSL Corp. v. Dunes Hotels & Casinos, (70 N.Y.2d 948, 524 N.Y.S.2d 671, 519 N.E.2d 617 (1988)), the Court of Appeals reversed this Court's sua sponte dismissal of an action concerning construction in Las Vegas. The dispute was between California and Nevada corporations. A New York corporation provided a financial guarantee, and resolution of the dispute required an interpretation of Nevada law. The Court stated that: "Under CPLR 327(a) a court may stay or dismiss an action in whole or in part on forum non conveniens grounds only upon the motion of a party; a court does not have the authority to invoke the doctrine on its own motion." 70 N.Y.2d at 949, 524 N.Y.S.2d at 671.

We have consistently adhered to the Court of Appeals admonition after VSL Corp. In Todtman, Young, Tunick, Nachamie, Hendler, Spizz & Drogin v. Richardson, 231 A.D.2d 1, 660 N.Y.S.2d 410 (1st Dept 1997), we reversed Supreme Court's sua sponte forum non conveniens dismissal: "A court does not have the power to invoke the doctrine of forum non conveniens on its own." 231 A.D.2d at 5, 660 N.Y.S.2d at 411, citing VSL Corp.; see Matter of Bernz (Widschi), 139 A.D.2d 444, 527 N.Y.S.2d 221 (1st Dept

1988).

Al Sanea's reliance on Imperial Imports Co. v. Hugo Neu & Sons, 161 A.D.2d 411, 555 N.Y.S.2d 323 (1st Dept. 1990), to controvert the plain holdings of VSL Corp., Todtman, Young, and Bernz, is misplaced. In Imperial Imports, third-party defendant Hanover Warehouses, a New Jersey corporation, moved to dismiss the entire New York action. This Court, relying specifically on the Court of Appeals holding in VSL Corp., again ruled that "[p]ursuant to CPLR 327(a), a court may stay or dismiss an action in whole or in part on forum non conveniens grounds upon the motion of a party." 161 A.D.2d at 412, 555 N.Y.S.2d at 324. We then granted the motion of the third-party defendant in part by severing the third-party action. Of course, in the instant case, it is uncontroverted that Al Sanea made no such motion to dismiss the entire case. Al Sanea also relies on Shiboleth v. Yerushalmi, 268 A.D.2d 300, 702 N.Y.S.2d 32 (1st Dept. 2000), but once again, the case supports AHAB's position. In Shiboleth, one of the two third-party defendants moved to dismiss the entire third-party complaint. This Court affirmed Supreme Court's dismissal of just the third-party action under CPLR 327(a). Unlike the instant case, the dismissal was not sua sponte.

The dissent's rationale is based upon the incorrect basic premise that dismissal of the main action on a forum non

conveniens ground was proper because "the third-party defendant moved to dismiss the third-party complaint on forum non conveniens grounds" and the "third-party complaint, counterclaims and defense to the complaint are admittedly intertwined" with the main action. However, no authority is cited for that proposition and, as discussed above, it runs counter to the precedent of this Department and the Court of Appeals.

Furthermore, Al Sanea distorts the record of the proceeding below. Al Sanea asserts, and the dissent accepts the assertion, that the motion court invited submissions for dismissal of the entire case. This is simply not true. While the motion court expressed reservations concerning whether the entire case "belong[ed] here," the court only scheduled briefing for Al Sanea's motion to dismiss the third-party action. Mashreqbank did not participate in that initial briefing on Al Sanea's motion because, as Mashreqbank's counsel stated, "[N]o one ha[d] made a forum non [conveniens] motion against my client Mashreqbank." Despite what Mashreqbank may have ultimately stated to the motion court at oral argument, when Mashreqbank finally briefed the forum non conveniens question with regard to Al Sanea's motion, Mashreqbank argued against dismissal of the main action. The dissent's view, that because Mashreqbank conceded that the UAE "would be an adequate forum" Mashreqbank necessarily advocated

for a forum non conveniens dismissal of its own case, is similarly without support in the record. Of course, Mashreqbank, as plaintiff in the main action, could have moved the court to withdraw the action in its entirety. Mashreqbank, however, continued to argue that New York was the appropriate forum.

The dissent's reliance on our decision Banco do Estado de Sao Paulo v. Mendes Jr. Intl., 249 A.D.2d 137, 139, 672 N.Y.S.2d 28, 29 (1st Dept. 1998), is also misplaced. In Banco do Estado do Sao Paulo, we acknowledged that the motion was technically denominated as one for summary judgment. However, both plaintiff and defendants in that motion fully briefed the forum non conveniens issue as a "clearly articulated motif" of the motion. There simply is no indication that we raised the question sua sponte. Indeed, we explicitly recognized in Banco do Estado do Sao Paulo that our holding in Todtman, Young would have precluded such sua sponte application of forum non conveniens.

Moreover, it is clear that the motion court improvidently exercised its discretion in dismissing the third-party action on forum non conveniens grounds. In Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), supra, the Court of Appeals set out the factors to be considered in a forum non conveniens dismissal. These factors, discussed in seriatum below, support reinstatement of the complaints.

The Pahlavi Court began with the premise that, "[t]he burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation." 62 N.Y.2d at 479, 478 N.Y.S.2d at 599-600, citing, inter alia, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). Al Sanea argues, inter alia, that all of the transactions at issue occurred outside of New York. Thus, argues Al Sanea, there is no real nexus to the New York banking system, factor militating in favor of dismissal.

This argument fails for two basic reasons. First, it is beyond cavil that New York has a compelling interest in the protection of the native banking system from misfeasance or malfeasance. The Court of Appeals holding in J. Zeevi & Sons v. Grindlays Bank (Uganda), 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168 (1975), cert. denied 423 U.S. 866, 96 S.Ct. 126, 46 L.Ed.2d 95 (1975), could not be clearer in this regard. In Zeevi, the Court was faced with a dispute over a letter of credit repudiated at Citibank in New York. The plaintiff, an Israeli company, deposited funds with the defendant Ugandan bank which issued the letter of credit. At the direction of the Ugandan government and pursuant to Ugandan law, the defendant refused to honor the letter of credit and communicated that repudiation to

Citibank in New York.

The Court of Appeals held that, inter alia:
"New York has an overriding and paramount interest in the outcome of this litigation. It is a financial capital of the world, serving as an international clearinghouse and market place for a plethora of international transactions, such as to be so recognized by our decisional law (Intercontinental Planning v. Daystrom, Inc., 24 N.Y.2d 372, 383-384, 300 N.Y.S.2d 817, 826-827, 248 N.E.2d 576, 582-583 (1969)). A vast amount of international letter of credit business is customarily handled by certain New York banks whose facilities and foreign connections are particularly adaptable to this field of operation (34 N.Y.Jur., Letters of Credit, s 10, p. 427). The parties, by listing United States dollars as the form of payment, impliedly accepted these facts and set up procedures to implement their trust in our policies. In order to maintain its preeminent financial position, it is important that the justified expectations of the parties to the contract be protected (cf. Kossick v. United Fruit Co., 365 U.S. 731, 741, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961)). Since New York has the greatest interest and is most intimately concerned with the outcome of this litigation, its laws should be accorded paramount control over the legal issues presented (cf. Auten v. Auten, 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954))." 37 N.Y.2d at 227, 371 N.Y.S.2d at 898-899.

The parallels to the instant dispute are striking. In Zeevi, both parties were foreign nationals, with one being a foreign chartered bank. The letter of credit transaction in Zeevi was one of a vast amount of letter of credit transactions in New York banks that happen every day. The foreign exchange laws of Uganda were central to the dispute.

In the instant case, the parties to the main action and third-party action are foreign nationals or a foreign chartered financial institution. The currency swaps utilizing the federal

reserve bank in New York and various New York corresponding banks are little different from the letter of credit transactions in Zeevi. That there was a currency swap versus the negotiation of a letter of credit drawn against funds in a foreign bank is a distinction immaterial to the Zeevi Court's holding.

The second reason that Al Sanea's argument on nexus to New York fails is that Al Sanea consistently recasts the allegations in both the main complaint and the third-party complaint to suit this forum non conveniens argument. The dissent appears to suffer from the same error. AHAB framed the allegations in the third-party complaint as a scheme whereby Al Sanea committed fraud, forgery and improper use of AHAB's credit to borrow money solely for Al Sanea's benefit. AHAB also alleges that Al Sanea used AHAB's New York bank accounts to further this scheme and then stole the money from these New York accounts.

In his motion to dismiss that third-party complaint, Al Sanea consistently characterizes the dispute as one over Al Sanea's authority to act on behalf of AHAB; a dispute that Al Sanea contends is governed by Saudi law. Indeed, the motion court appears to have accepted Al Sanea's premise in ruling on the motion to dismiss. The motion court specifically pondered "whether or not Mr. Al Sanea was authorized to do what he did."

This constituted fundamental error by the motion court. In

Ehrlich-Bober & Co. v. University of Houston, 49 N.Y.2d 574, 427 N.Y.S.2d 604, 404 N.E.2d 726 (1980), the Court of Appeals reversed this Court's dismissal on forum non conveniens grounds of an action between a New York securities dealer and an agency of the State of Texas. The ruling in Ehrlich-Bober is instructive in several aspects. Most importantly, the Court was unequivocal in its view that the allegations in the complaint *must be accepted as true*:

"Preliminary to our consideration of the comity issue, we note our agreement with the conclusions reached by the Appellate Division that there was a proper basis for the exercise of long-arm jurisdiction and that the doctrine of forum non conveniens is inapplicable here. Although "standing by itself, a correspondent bank relationship, without any other indicia or evidence to explain its essence, may not form the basis for long-arm jurisdiction under CPLR 302 (subd. (a), par 1)" (Amigo Foods Corp. v. Marine Midland Bank-New York, 39 N.Y.2d 391, 396, 384 N.Y.S.2d 124, 127, 348 N.E.2d 581, 584 (1976)), the facts alleged here, which we accept as true for this purpose, show substantially more (compare Longines-Wittnauer Co. v. Barnes & Reinecke, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965))." 49 N.Y.2d at 579, 427 N.Y.S.2d at 607.

Thus, the motion court plainly erred in not accepting as true AHAB's allegations that Al Sanea used for its own purposes, and then looted, AHAB's New York bank accounts. Ehrlich-Bober is also instructive for its recitation of the principle enunciated above that New York has a paramount interest in protecting its own financial institutions. The Texas statute at issue provided that the defendant, as an agency of that State, enjoyed immunity

from suit. The Court of Appeals was faced with both forum non conveniens and the question of whether the doctrine of comity precluded the action in New York.

The Ehrlich-Bober Court held that:

"Arrayed against that policy which essentially serves administrative convenience, is New York's recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world (International Planning v. Daystrom, Inc., 24 N.Y.2d 372, 300 N.Y.S.2d 817, 248 N.E.2d 576 (1969); see also, Bache & Co. v. International Controls Corp., 339 F.Supp. 341 (1972)). That interest naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here. Indeed, access to a convenient forum which dispassionately administers a known, stable, and commercially sophisticated body of law may be considered as much an attraction to conducting business in New York as its unique financial and communications resources.

"New York's interest in providing a convenient forum is least subject to challenge when a transaction is centered here (see Rubin v. Irving Trust Co., 305 N.Y. 288, 305, 113 N.E.2d 424 (1953); and Auten v. Auten, 308 N.Y. 155, 160, 124 N.E.2d 99 (1954)), and particularly when it is wholly commercial in character (see Et Ve Balik Kurumu v. B. N. S. Int. Sales Corp., 25 Misc.2d 299, 204 N.Y.S.2d 971 (1960), affd. 17 A.D.2d 927, 233 N.Y.S.2d 1013 (1962); Tiernan v. Missouri New World's Fair Comm., 48 Misc.2d 376, 264 N.Y.S.2d 834 (1965); cf. Dunhill of London v. Cuba, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976)).

* * *

"In the instant case the transactions in question, judged by any indicator, must be considered to have been centered here. They were initiated by an employee of the defendant university in a phone call to the plaintiff's New York offices. They were accepted in New York by the plaintiff. The money was paid in New York. The securities were delivered in New York. And finally, the repurchases were to have been accomplished in New York. It must also be concluded that these were ordinary commercial transactions

having no more than an indirect relation to the fulfillment of the defendant university's governmental responsibilities." 49 N.Y.2d at 581-582, 427 N.Y.S.2d at 608-609.

When we analyze the facts in this case as framed by AHAB's third-party complaint, the scenario is analytically indistinguishable from that described in Ehrlich-Bober.

The motion court erred in its analysis in other areas as well. The question of an alternative forum, one of the Pahlavi factors, was given short shrift by the motion court and is given even shorter treatment by the dissent. The court failed to identify an alternative forum that would have jurisdiction over the dispute as framed by the complaints, let alone whether the dispute would be "better adjudicated" in the alternative forum.

The motion court held only that AHAB had "several alternative locations ... to resolve the disputes." Furthermore, AHAB could "decide whether it prefers to bring its third-party action in the UAE as well, or to seek redress in Saudi Arabia." The facts of record simply do not support the motion court's musing. Mashreqbank asserted that it was not subject to jurisdiction in Saudi Arabia. Al Sanea maintained that he was only subject to jurisdiction in Saudi Arabia. There are no facts of record to support any alternative forum, let alone Saudi Arabia, Bahrain, or the UAE. More importantly, though, Pahlavi

does not suggest that merely because a party may be subject to suit in a country establishes that it would be an alternative forum.

The Pahlavi analysis is far more nuanced. Pahlavi cited with approval the factors set forth in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 843 (1947), which were reaffirmed in Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n. 6, 102 S.Ct. 252, 258 (1981). These factors include: "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses." The motion court simply made no factual findings whatsoever on any of these factors.

There is no finding that witnesses subject to a travel bar in Saudi Arabia would be precluded from testifying via some alternate means. Similarly, and perhaps more importantly, there is no finding that the witnesses could even testify in Saudi Arabia, Bahrain or the UAE. AHAB proffered that two of the witnesses with the most knowledge of the Al Sanea scheme reside in England and Los Angeles. Al Sanea identified no witnesses in his moving brief. It was only in reply that he listed a series of witnesses but failed to link their proposed testimony to the allegations of the third-party complaint.

The record is similarly inadequate on the issues of access to documents. Only AHAB specified which documents were necessary and none support dismissal on forum non conveniens grounds.

Finally, crediting the allegations in the third-party complaint as true, as we must, it is patent that New York law will apply. The law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating conduct within its borders. Banco Nacional Ultramarino v. Chan, 169 Misc.2d 182 (Sup. Ct., N.Y. County 1996), aff'd 240 A.D.2d 253, 659 N.Y.S.2d 734 (1st Dept. 1997).

In light of our reinstatement of the complaints, we need not address the issue of whether further forum discovery should have been permitted.

Accordingly, the judgment of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered August 11, 2010, dismissing the action and the third-party action, should be reversed, on the law, with costs, the judgment vacated and the complaints reinstated. The appeal from the order of the same court and Justice, entered July 29, 2010, which granted third-party defendant's motion to dismiss, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Mazzairelli, J.P. and Andrias, J. who dissent in an Opinion by Andrias, J.

Andrias, J. (dissenting)

Under the particular circumstances before us, Supreme Court did not exceed its authority and providently exercised its discretion when it dismissed both the action and third-party action on forum non conveniens grounds. Accordingly, I respectfully dissent.

Plaintiff, a United Arab Emirates (UAE) bank, is headquartered in Dubai and has a branch in New York. In 2009, it brought this action against defendant Ahmed Hamad Al Gosaibi & Brothers Company (AHAB), a Saudi Arabian general partnership, seeking to recover, under the theories of breach of contract, unjust enrichment and breach of implied duty of good faith and fair dealing, damages for AHAB's default on a US dollars for Saudi Arabian riyals currency swap. Plaintiff alleges that it wired \$150 million to AHAB's account at the Bank of America in New York, but AHAB failed to wire the riyals to plaintiff. The funds in the Bank of America account were then transferred to an HSBC account in New York controlled by third-party defendant Maan Abdul Waheed Al Sanea (Al Sanea), a Saudi national and the head of operations of AHAB's Money Exchange. Plaintiff filed an order of attachment against AHAB's property in New York, but by that time Al Sanea had already transferred the funds to institutions outside New York.

AHAB answered and filed a third-party complaint against Al Sanea and Awal Bank, a Bahrain bank that Al Sanea owned and controlled. AHAB alleged that the subject foreign exchange transaction was part of a massive fraudulent scheme perpetrated by Al Sanea through which he caused unauthorized borrowing of more than \$10 billion in the name of AHAB and then siphoned the bulk of those funds into his own accounts or those of his companies, including Awal. Al Sanea allegedly used the fraudulent foreign exchange deals to hide disguised short term loans he obtained to keep his scheme going. AHAB also asserted counterclaims alleging that plaintiff aided and abetted Al Sanea in his fraudulent scheme and, as an affirmative defense, alleged that "[v]enue in this Court is improper."

Al Sanea moved to dismiss the third-party complaint against himself and Awal pursuant to CPLR 327(a) on forum non conveniens grounds. Plaintiff moved to dismiss the counterclaims on other grounds. After twice hearing oral argument, the court dismissed the complaint, counterclaims and third-party complaint on forum non conveniens grounds.

The majority believes that the motion court lacked the authority to dismiss the main action because no party formally moved to dismiss it on forum non conveniens grounds, and a court does not have authority to invoke the doctrine sua sponte (see

VSL Corp. v Dunes Hotels & Casinos, 70 NY2d 948 [1988]; *Todtman, Young, Tunick, Nachamie, Hendler, Spizz & Drogin v Richardson*, 231 AD2d 1 [1997]). However, CPLR 327(a) provides:

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, *on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just.* The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action (emphasis added).

Here, unlike *VSL Corp.*, where the Appellate Division dismissed the complaint sua sponte on forum non conveniens grounds, and *Todtman, Young*, where the defendants sought only to dismiss the complaint for lack of subject matter jurisdiction, the third-party defendant moved to dismiss the third-party action based on the doctrine. Further, "although no formal motion was made to dismiss the [main action] on the ground of forum non conveniens, the doctrine was raised before the court, and the parties contested the matter" (*Matter of Smith v Miller*, 237 AD2d 294, 295 [1997]).

When the court heard argument on January 5, 2010, it immediately expressed its view that "if the motion to dismiss for forum non conveniens has ... legs, it affects everything else" and stated that it wanted the issue fully briefed. While the majority contends that we are distorting the record of the

proceeding below and that the court only scheduled briefing for Al Sanea's motion to dismiss the third-party complaint, the majority is wrong. True, after the court first stated that it would have the forum non conveniens issue fully briefed, Al Sanea's counsel stated, "It's against AHAB," and the court responded, "Right." However, the court immediately clarified that "I want you to respond to a forum non conveniens argument because I am very, very concerned, if you will, that *these cases do not belong here*" (emphasis added). The court also made clear that even though no one had made a formal forum non conveniens motion against plaintiff, it wanted to hear from plaintiff on the issue and granted plaintiff's request that it first see the third-party defendants' reply before it submitted its papers.

At oral argument on March 25, 2010, third-party defendants, by counsel, reiterated their position that the court "would be well grounded in its discretion to dismiss the entire action." Counsel noted that plaintiff had submitted supplemental papers stating:

"[plaintiff] does not dispute that the UAE ... would be an adequate forum for litigating its first-party case against Ahab. Indeed, as explained in its prior brief, [plaintiff] has already commenced a breach of contract case in the UAE against Ahab and its partners, that encompasses a claim based on the foreign-exchange transaction at issue here."

. . .

"Notably, neither Ahab nor its partners have contested the jurisdiction of the UAE courts as they have in this court in New York. *For those reasons, and because it has been unable to locate any assets of Ahab or its partners in New York, [plaintiff] would not object to litigating its breach of contract claims against Ahab and the Ahab partners in the UAE in the event that this Court were to dismiss Ahab's third party complaint...*" (emphasis added).

Plaintiff's counsel confirmed that this was in fact plaintiff's position and the court reiterated its view that there were two parts to the application, one for the third-party defendants to be "cut out," and the other "to consider forum non conveniens as to everybody." While counsel for the third-party plaintiff AHAB stated that he opposed both parts, he acknowledged that "our case against Al Sanea, is completely intertwined with our defense to the contract case that [plaintiff] has brought and also with our counterclaim." Counsel did not argue that the court lacked the authority to dismiss the main action because no party had filed a formal motion seeking that relief.

Under these circumstances, where the third-party defendant moved to dismiss the third-party complaint on forum non conveniens grounds, placing the doctrine before the court, and the dismissal of the main action on that ground was addressed by the parties at oral argument, the court had discretion to dismiss the entire action in whole or in part, especially where AHAB's third-party complaint, counterclaims and defense to the complaint

are admittedly intertwined and plaintiff stated its position that if the third-party complaint was dismissed, the complaint should be dismissed as well (see *Banco do Estado de Sao Paulo S.A. v Mendes Jr. Int'l Co.*, 249 AD2d 137, 139 [1998] ["Although plaintiff did not move for summary judgment on forum non conveniens grounds, and the court may not sua sponte invoke this basis for dismissal, forum non conveniens had been raised by plaintiff as an affirmative defense to the counterclaims and was a clearly articulated motif of plaintiff's arguments in the motion proceedings"] [internal citations omitted]; see *Smith v Miller*, 237 AD2d at 295).

The majority makes no attempt to distinguish *Smith v Miller*, and states that *Banco do Estado* is inapposite because there the issue of forum non conveniens was fully briefed. However, irrespective of the scope of the briefs submitted to the motion court, the salient point is that in both cases, although no formal motion was made, the doctrine of forum non conveniens was squarely before the court and the parties had a full and fair opportunity to litigate the issue.

As set forth above, the record in this case clearly shows that all parties were made fully aware that the court was considering whether the main action should also be dismissed on forum non conveniens grounds and were given the opportunity to

brief the issue, which they addressed at the second oral argument. While the majority emphasizes that plaintiff submitted papers opposing the motion to dismiss, it ignores the concessions plaintiff's counsel later made at the March 25, 2010 oral argument, and the fact that plaintiff has submitted a brief in support of the dismissal of the entire action on this appeal (see *Ridge Meadows Homeowners' Assn v Tara Dev. Co.*, 242 AD2d 947 [1997]).

The majority also states that our view that "because [plaintiff] conceded that the UAE 'would be an adequate forum' [plaintiff] necessarily advocated for a forum non conveniens dismissal of its own case, is similarly without support in the record." However, the record establishes that after the third-party defendants moved to dismiss the third-party complaint, and the court indicated its view that the entire case should be dismissed on that ground, plaintiff confirmed that it would not object to litigating its claims against defendant in the UAE in the event that the court dismissed the third-party complaint.

As to the merits, the common-law doctrine of forum non conveniens, codified in CPLR 327, permits a court to dismiss an action, when it finds that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327 [a]). A motion to dismiss on the ground of forum non conveniens

is subject to the discretion of the trial court, and "should turn on considerations of justice, fairness and convenience" (*Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 [1972]). A court's determination generally will not be disturbed on appeal unless the court has failed to properly consider and balance all of the relevant factors, which include the existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; the potential hardship to the defendant; location of documents; the location of a majority of the witnesses; and the burden on New York courts (see *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], cert denied, 469 US 1108 [1985]). "No one factor is controlling," and the "great advantage" of the doctrine is "its flexibility based upon the facts and circumstances of each case" (*id.*). If the balance of conveniences indicates that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper (*id.*; see also *Matter of New York City Asbestos Litig.*, 239 AD2d 303 [1997]).

Applying these principles, the motion court correctly considered and balanced the appropriate factors in finding that New York is an inconvenient forum for this dispute because it is between a foreign bank and foreign businesses, the alleged wrongdoing took place in foreign countries even though New York

banks were its instrumentalities, documentary evidence and witnesses are located outside of New York, and the resolution likely requires the application of foreign law (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d at 480; *Kuwaiti Eng'g Group v Consortium of Intl. Consultants, LLC*, 50 AD3d 599 [2008]; *Garmendia v O'Neill*, 46 AD3d 361, 362 [2007])). In reaching its conclusion that Supreme Court improvidently exercised its discretion in balancing the *Pahlavi* factors, the majority again gives short shrift to the facts that (1) the third-party defendant moved to dismiss the third-party complaint, which was based on Al Sanea's alleged Ponzi scheme which originated in the Middle East, (2) the third-party plaintiff conceded at oral argument that "our case against Al Sanea, is completely intertwined with our defense to the contract case that [plaintiff] has brought and also with our counterclaim," and (3) plaintiff, who now advocates for the dismissal of the entire action, represented to the motion court that it agreed that if the third-party complaint was dismissed on *forum non conveniens* grounds, the complaint should be dismissed on that ground as well.

Citing *J. Zeevi & Sons, Ltd. v Grindlays Bank (Uganda) Ltd.* (37 NY2d 220 [1975], *cert denied* 423 US 866 [1975]), the majority also states that Supreme Court erred because "New York has a

compelling interest in the protection of the native banking system from misfeasance or malfeasance." However, the language which the dissent quotes from *Zeevi* in support of its position addressed choice-of-law issues, not forum non conveniens.

Further, while "[t]he doctrine [of forum non conveniens] rests, in large part, on considerations of public policy ... our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York" (*Silver v Great Am. Ins. Co.*, 29 NY2d at 361 [internal quotation marks omitted]). Thus, insofar as *Zeevi* stands for the premise that New York is a "financial capital of the world" (37 NY2d at 227), and that the passage of global capital through New York requires that its courts be open to the settling of commercial disputes that are transacted here, "this principle is not without its limitations, and commercial disputes that are more fundamentally connected to other venues are more appropriately settled there" (*Wilson v ImageSat Intl. N.V.*, 2008 WL 2851511, *7, n13, 2008 US Dist LEXIS 57897, *25-26, n13 [SD NY 2008]; see also *Martin v Mieth*, 35 NY2d 414, 418 [1974] [it is well settled that, New York courts "need not entertain causes of action lacking a substantial nexus with New York"]; *P.T. Delami Garment Indus. v Cassa di Risparmio di Torino*, 164 Misc 2d 38 [Sup Ct, NY County 1994] [suit predicated

on New York situs of issuer's correspondent bank dismissed], *affd World Point Trading PTE v Credito Italiano*, 225 AD2d 153 [1996]).

Furthermore, in *Zeevi*, where Grindlays had anticipatorily breached its obligations under a letter of credit, there was a closer nexus to New York in that "New York was the locus of repudiation" of the instrument because the "defendant's order countermanding payment by cable and letter took effect upon receipt by Citibank in New York and then gave rise to a cause of action here" (*Zeevi*, 37 NY2d at 226). Here, Al Sanea's alleged Ponzi Scheme, perpetrated in the Middle East, is the dominant feature of AHAB's defense to the complaint, counterclaim, and third-party complaint.

The majority also contends that the motion court erred "in not accepting as true AHAB's allegations that Al Sanea used for its own purposes, and then looted, AHAB's New York bank accounts." However, the fact that the proceeds of Al Sanea's fraudulent scheme passed through the New York banking system is a peripheral and transitory contact, which, without more, does not give New York an interest in transactions that otherwise are foreign (*see Calgarth Invs., Ltd. v Bank Saderat Iran*, 1996 WL 204470, *6, 1996 US Dist LEXIS 5562, *20 [SD NY 1996] ["[D]ebits and credits at New York bank accounts, without more, do not give New York or the United States an interest in transactions that

otherwise are entirely foreign"], *affd* 108 F3d 329 [2d Cir 1997]); *Sussman v Bank of Israel*, 801 F Supp 1068, 1074 [1992] [bank's "use of its New York branch ... to route the loan proceeds ... cannot be regarded, in the overall scheme of things, as other than peripheral"], *affd* 990 F2d 71 [2d Cir 1993]; *Lan Assoc. XVIII, L.P. v Bank of Nova Scotia*, 1997 WL 458753, *6, 1997 US Dist LEXIS 11931, *16 [SD NY 1997] ["Were such a minimal contact with New York to be deemed significant, this Court, located in one of the world's largest and busiest financial centers, would be burdened with countless international financial disputes having no real, substantive link to New York"]; *see also Finance & Trading Ltd. v Rhodia S.A.*, 28 AD3d 346 [2006], *lv denied* 7 NY3d 706 [2006] [purported meetings in New York City between the defendants and the plaintiff's principal did not

suffice to create substantial nexus with New York in that underlying transaction occurred primarily in foreign jurisdiction]). Accordingly, the judgment should be affirmed.

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

ENTERED: SEPTEMBER 25, 2012


CLERK