SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 29, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Sweeny, Renwick, Moskowitz, Kahn, JJ.

3852-
3853

Index 653488/15

Perella Weinberg Partners LLC,
et al.,
Plaintiffs-Respondents,

-against-

Michael A. Kramer, et al.,
Defendants-Appellants,

Ducera Partners LLC,
Defendant.

- - - - -

Michael A. Kramer, et al.,
Counterclaim Plaintiffs-Appellants,

-against-

Perella Weinberg Partners LLC, et al.,
Counterclaim Defendants-Respondents.

- - - - -

Michael A. Kramer, et al.,
Cross Claim Plaintiffs-Appellants,

-against-

Joseph R. Perella, et al.,
Third-Party Cross Claim
Defendants-Respondents.

- - - - -

Perella Weinberg Partners LLC,
et al.,
Plaintiffs,

Perella Weinberg Group LP,
Plaintiff-Respondent,

-against-

Michael A. Kramer, et al.,
Defendants-Appellants,

Joshua S. Scherer, et al.,
Defendants.
- - - - -
Michael A. Kramer, et al.,
Counterclaim Plaintiffs-Appellants,

Joshua S. Scherer, et al.,
Counterclaim Plaintiffs,

-against-

Perella Weinberg Partners LLC, et al.,
Counterclaim Defendants,

Perella Weinberg Partners Group,
Counterclaim Defendant-Respondent.
- - - - -
Michael A. Kramer, et al.,
Cross Claim Plaintiffs-Appellants,

Joshua S. Scherer, et al.,
Cross Claim Plaintiffs,

-against-

Joseph R. Perella, et al.,
Third-Party Cross Claim
Defendants-Respondents.

_____

Arkin Solbakken LLP, New York (Lisa C. Solbakken of counsel), for appellants.

Boies Schiller Flexner LLP, NY (Jonathan D. Schiller of counsel), and Weil, Gotshal & Manges LLP, New York (Jeffrey S. Klein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley W. Kornreich, J.), entered July 19, 2016, which, insofar as appealed from as limited by the briefs, denied defendants Michael A. Kramer and

Derron S. Slonecker's motion for summary judgment on the issue of plaintiff Perella Weinberg Partners Group LP's liability for unpaid deferred compensation, and granted plaintiffs' and third-party cross claim defendants' motion to dismiss defendants Kramer, Slonecker, Joshua S. Scherer and Adam W. Verost's counterclaims and cross claims for fraudulent inducement, Labor Law, and breach of fiduciary duty, unanimously modified, on the law, to deny plaintiffs' and third-party cross claim defendants' motions as to the claim for breach of fiduciary duty asserted by Kramer against Joseph R. Perella, Peter A. Weinberg, and Perella Weinberg Partners LLC, and otherwise affirmed, without costs.

We find that, for the reasons that follow, defendants Kramer and Slonecker have failed to establish that the Deferred Compensation Amount Election Forms dated May 31, 2011 (Election Forms) unambiguously modified the terms of the Deferred Compensation Agreements dated May 30, 2007 (DCAs) to require payment of the deferred compensation accounts upon any separation from service, thereby entitling them to immediate payment of their deferred compensation accounts.

The separate DCAs executed by Kramer and Slonecker were virtually identical, detailed, four-page documents, except with respect to the amount of their respective compensation allocations. Each DCA entitled defendants to annual interest

payments, and in paragraph 4 defined the "payment date" for the deferred compensation as follows:

> "4. Payment Date. The Compensation, plus any accrued but unpaid interest thereon . . . shall be payable by the Company to the Partner in lump sum on the earlier to occur of (a) the fifth anniversary of the Effective Date [June 1, 2007], or (b) the date 15 business days following the Partner's separation from service with the Company without Cause or by reason of death or Disability . . . . The Compensation shall be forfeited in full upon a termination by the Company for Cause."

Each DCA further defined termination for "cause" to include "violation . . . of any non-solicitation, non-competition or similar restrictive covenant." Additionally, in paragraph 5(b), each DCA included a merger clause that contained the following language:

> "Entire Agreement/Amendments. This Agreement contains the entire understanding of the parties with respect to the Compensation . . . . This Agreement may not be altered, modified, or amended except by written instrument signed by the parties hereto. . . ."

Each subsequently executed Election Form was a single page document, printed with the employee's name, a space for signature and date, and a direction to "Please fill-in," and providing the employee with a choice to continue the Payment Date as set forth in the DCA, or alternatively, to defer receipt of payment, and the taxable consequences of it, until a later date, by checking the appropriate box. The substantive provisions of the Election Forms read, in their entirety, as follows:

> "I elect to defer payment of _____% of my Deferred Compensation Amount of $ _____currently payable on June 1, 2012 (the "Payment Date"), in accordance with the terms of the Deferred Compensation Agreement, as amended, dated May 30, 2007, until the earlier to occur of my separation form service or the fifth anniversary of the Payment Date.
>
> "Please pay me the Deferred Compensation Amount on the Payment Date."

The form directed the employee to submit the form "to Human Resources" after electing its chosen option.

Here, the issue of defendants' alleged misconduct by violating the non-solicitation and noncompete provisions of the DCA and breaching their duty of loyalty as alleged in the complaint, which, if proven, would unquestionably constitute a termination for cause under the DCA, remains an issues of fact to be determined by the jury at trial. Kramer and Slonecker contend that the omission in the Election Form of the clause providing for forfeiture of any payment of deferred compensation upon the employee's termination for cause renders that provision of the DCA superseded, and they seek summary judgment granting them payment of those amounts based upon their separation from service, without regard to the ultimate finding on the issue of whether they were terminated for cause.

On a summary judgment motion in a case involving interpretation of the terms of a contract, the Court of Appeals has instructed:

> "The objective in any question of the interpretation of a written contract, of course, is to determine what is the intention of the parties as derived from the language employed. At the same time the test on a motion for summary judgment is whether there are issues of fact properly to be resolved by a jury. In general the courts have declared on countless occasions that it is the responsibility of the court to interpret written instruments. This is obviously so where there is no ambiguity.
>
> "If there is ambiguity in the terminology used, however, and determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, then such determination is to be made by the jury. On the other hand, if the equivocality must be resolved wholly without reference to extrinsic evidence the issue is to be determined as a question of law for the court"

(*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 171-172 [1973] [citations and internal quotation marks omitted]).

To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation (*Ellington v EMI Music Inc.*, 24 NY3d 239, 244 [2014]). The existence of ambiguity must be determined by examining the "entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed," with the wording to be considered "in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66-67 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Further, in deciding the motion, "[t]he evidence will be construed in the light most

favorable to the one moved against" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]), citing, inter alia, *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]).

In this case, the Election Forms, by their express language, provide that any deferral of payment of deferred compensation is to be made "in accordance with the terms of the Deferred Compensation Agreement . . . ." The DCAs, as noted, clearly provide in paragraph 4 that deferred compensation is forfeited if the employee is terminated for cause, including violation of non-solicitation or noncompetition covenants. There is no mention in the Election Forms of any intent to override this provision.

Additionally, paragraph 5 of the DCAs specifically provides that their terms "may not be altered, modified, or amended except by written instrument signed by the parties hereto." At a minimum, it is commercially reasonable to view the Election Forms, on their face, to be informal human resources administrative forms. In any case, they are not "written instrument[s] signed by the parties [to the DCAs]," as they lack any signature of plaintiffs, as required by paragraph 5 in order to amend the DCAs. In light of that omission, it is certainly reasonable, given the informality of the form, and its direction to the employee to make an election and then return the form to

the human resources department, to conclude that the form was meant solely to provide the employee with the option of amending the DCA to defer the payment date from 2012 to 2017, and not for amending the DCA in any other regard.

The terms of the Election Form support this construction. It enabled the employee to retain the option of choosing 2012 as the payment date, or alternatively, to choose to defer payment, as well as to defer its ensuing income tax obligations, for another five years, in essence, by postponing the date on which the wages were earned. By its express terms, it did not change any other provisions of the DCA.

Even if we were to examine the circumstances surrounding the making of the Election Form agreements, the result would be the same. According to the affidavit of plaintiffs' chief financial officer, Aaron Hood, the sole purpose of the Election Form was to enable the employee to choose or reject, one year prior to the payment date, the option to extend the term of the DCA and its maturity date for payment of the employee's provision of tax deferred income for another five years. He averred that none of the other provisions of the DCA were changed, including continued accrual and payment of interest. Hood maintained that he presented these terms to the management committee, with defendant Kramer present, prior to the distribution of the Election Forms

to the employees. Indeed, it is uncontroverted that defendants, after making the election to defer their payment dates until 2017, continued to receive and accept the interest payments provided by their DCAs for the years 2012 and 2013, notwithstanding the absence of any mention of continuing interest payments in the Election Forms.

Defendants counter that the Election Form was an agreement by which Perella Weinberg Partners Group LP (PWP) was to be given more time to make the DCA payments, and that the consideration for doing so was the implicit elimination of any restriction on the employees' entitlement to such payments.

It is certainly reasonable to conclude that if PWP intended to relieve the employee of the termination for cause limitation on payment, it would have so provided in the subsequent document, in accordance both with paragraph 5 of the DCA and the import of such a change to the parties' agreement under the DCA. Indeed, there is nothing in the Election Form which would suggest that employees who elected to retain the original 2012 payment date would avoid the operation of the termination for cause condition, nor why the differing options would carry such differing terms. It does not appear that the employees electing a further deferment of payment received no consideration for their deferral, such that relief from the discharge for cause

limitation should be implied, as they would obtain five additional years of income tax deferral on the compensation, while continuing to receive interest payments. Any questions in this regard are not susceptible of resolution on a motion for summary judgment, however.

At the very least, the parties' differing positions as to the circumstances surrounding the execution of the Election Forms give rise to conflicting, reasonable commercial interpretations to be given to the Election Forms on this prediscovery motion, requiring denial of defendants' motion for summary judgment. Resort to extrinsic sources will be necessary for determination of the issue by the jury. And, as noted, the issue of whether defendants were terminated for cause remains a question for resolution at trial.

Similarly, even were we to find the election form to be ambiguous, defendants' reliance on the doctrine of contra proferentem, allowing ambiguities in a contractual instrument to be resolved against the drafter, is misplaced. That doctrine may only be applied as a last resort, if the extrinsic evidence is inconclusive (*Albany Sav. Bank, FSB v Halpin*, 117 F3d 669, 674 [2d Cir 1997]; *see Kenavan v Empire Blue Cross & Blue Shield*, 248 AD2d 42, 47 [1st Dept 1998]). Here, it cannot be assumed that all relevant extrinsic evidence has been presented at this stage

of the proceedings.

Defendants seek as an alternative remedy rescission of the Election Forms on the ground that plaintiffs fraudulently induced them to sign them by misrepresenting that their compensation would not be subject to forfeiture.

A viable claim for fraudulent inducement requires the allegation of a "misrepresentation of a material fact, which was known by [the adversary] to be false and intended to be relied on when made, and that there was justifiable reliance and resulting injury" (*Braddock v Braddock*, 60 AD3d 84, 86 [1st Dept 2009]). The parties dispute whether defendants have alleged an actionable misrepresentation or justifiable reliance on same.

To fulfill the element of misrepresentation of material fact, the party advancing the claim must allege a misrepresentation of present fact rather than of future intent (*see Deerfield Communications Corp v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]). General allegations of lack of intent to perform are insufficient; rather, facts must be alleged establishing that the adverse party, at the time of making the promissory representation, never intended to honor the promise (*Laura Corio, M.D., PLLC v R. Lewin Interior Design, Inc.*, 49 AD3d 411, 412 [1st Dept 2008]).

Here, the facts alleged are insufficient to raise an

inference of a present intent to deceive at the time the alleged misrepresentations were made in 2011. None of the misconduct alleged occurred until at least three years later.

With respect to justifiable reliance, the issue is one of fact, which, as noted, cannot properly be resolved at this prediscovery motion stage of the proceedings (*Braddock v Braddock,* 60 AD3d at 88; *Global Icons, LLC v Sillerman*, 45 AD3d 457 [1st Dept 2007]).

Defendants Kramer, Slonecker, Scherer and Verost's Labor Law claims were correctly dismissed because a wholesale withholding of payment is not a "deduction" within the meaning of Labor Law § 193 (*see Miles A. Kletter, D.M.D. & Andrew S. Levine, D.D.S., P.C. v Fleming*, 32 AD3d 566, 567 [3d Dept 2006]; *Sheehan v Square Mile Capital Partners*, 2013 WL 649418, *4 [Sup Ct, NY County Feb. 19, 2013]; *Wachter v Kim*, 2013 WL 144760 [Sup Ct, NY County Jan. 11, 2013], *Goldberg v Jacquet*, 667 Fed Appx 313, 314 [2d Cir 2016]; *O'Grady v BlueCrest Capital Mgt. LLP*, 111 F Supp 3d 494, 506 [SD NY 2015], *affd* 646 Fed Appx 2 [2d Cir 2016]; *Gold v American Med. Alert Corp.*, 2015 WL 4887525, *5, 2015 US Dist LEXIS 108122, *11-12 [SD NY Aug. 17, 2015]; *Monagle v Scholastic, Inc.*, 2007 WL 766282, *2, 2007 US Dist LEXIS 19788, *5 [SD NY Mar. 9, 2007]; *see also Cuervo v Opera Solutions LLC*, 87 AD3d 426, 428 [1st Dept 2011] [Moskowitz, J., concurring in

part]). This issue was not addressed by the Court of Appeals in *Ryan v Kellogg Partners Inst. Servs.* (19 NY3d 1, 16 [2012]) or by this Court in *Wachter v Kim* (82 AD3d 658, 663 [1st Dept 2011]).

The breach of fiduciary duty claim may proceed, but only as asserted by Kramer, because he was the only one harmed by the alleged pre-termination misconduct, and only as against Perella Weinberg Partners LLC – the general partner of PWP MC LP, the entity of which Kramer was a limited partner – and Perella and Weinberg, its control persons (*see Matter of Boston Celtics Ltd. Partnership Shareholders Litig.*, 1999 WL 641902, *4, 1999 Del Ch LEXIS 166, *10 [Del Ch Aug. 6, 1999]). The parties agree that Delaware law governs this claim because the alleged duties stem from partnerships organized under Delaware law.

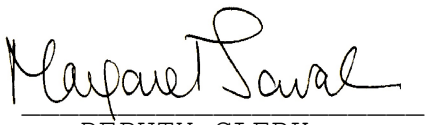
The breach of fiduciary duty claim is not duplicative of the breach of contract claims. The misconduct alleged in connection with the former is distinct from the misconduct alleged in connection with the latter (*see PT China LLC v PT Korea LLC*, 2010 WL 761145, *7, 2010 Del Ch LEXIS 38, *26 [Del Ch Feb. 26, 2010]). In the breach of contract claims, defendants allege that plaintiffs breached their obligation to pay deferred compensation and their implicit obligation not to terminate the former employees for cause when in fact no such cause existed. By contrast, in the breach of fiduciary duty claim, defendants

allege that, long before the subject terminations, plaintiffs and their representatives wrongfully sought to undermine Kramer's position at the firm in an effort to make him leave. In addition, the remedies sought are different (*see Stewart v BF Bolthouse Holdco, LLC*, 2013 WL 5210220, *15, 2013 Del Ch LEXIS 215, *50-51 [Del Ch Aug. 30, 2013]; *Grunstein v Silva*, 2009 WL 4698541, *7, 2009 Del Ch LEXIS 206, *22 [Del Ch Dec. 8, 2009]). On the breach of contract claims, defendants seek to recover the deferred compensation allegedly owed and other damages stemming from the wrongful terminations. By contrast, on the breach of fiduciary duty claim, defendants seek to recover damages relating to the alleged pre-termination misconduct of plaintiffs and third-party cross claim defendants.

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: AUGUST 29, 2017



DEPUTY CLERK

Tom, J.P., Moskowitz, Gische, Kapnick, JJ.

3569-
3570 Michelle Lewis,
Plaintiff-Respondent,

-against-

Frederick D. Rutkovsky, M.D., et al.,
Defendants-Appellants.

Index 102947/10

_____

Gordon & Silber, P.C., New York (Eldar Mayouhas of counsel), for Frederick D. Rutkovsky, M.D., appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (David A. Beatty of counsel), for LHHN Medical, P.C. and Lenox Hill Community Medical Group, P.C., appellants.

Law Offices of Annette Hasapidis, White Plains (Annette G. Hasapidis of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about April 21, 2015, which denied defendants' motions for summary judgment as untimely, affirmed, without costs. Appeals from order, same court and Justice, entered April 18, 2016, which, upon effectively granting defendants' motions for reargument, adhered to the prior order, dismissed, without costs, as academic.

In this medical malpractice action, plaintiff claimed to have suffered injuries as a result of negligent care she received from defendant Frederick D. Rutkovsky, M.D., plaintiff's primary care physician, and, vicariously, from defendant LHHN Medical

P.C.[1] Specifically, plaintiff alleged that Dr. Rutkovsky failed to detect, diagnose, and treat a meningioma (that is, a benign brain tumor) from on or about April 3, 1998 until September 5, 2007. In support of her allegations, plaintiff asserted that Dr. Rutkovsky "ignored" her repeated complaints of migraine headaches, blurred vision, and other related symptoms. Plaintiff ultimately underwent a left frontal parasagittal craniotomy and suffered a loss of vision rendering her legally blind. By complaint dated March 5, 2010, plaintiff commenced this action against LHHN Medical, P.C., and Lenox Hill Community Medical Group, P.C. (together LHHN) and Dr. Rutkovsky, alleging medical malpractice and lack of informed consent.

By order to show cause filed with the County Clerk's office on January 23, 2015 and dated January 28, 2015, LHHN moved for summary judgment. On the motion, LHHN asserted that plaintiff's malpractice claims were time-barred, as she had commenced the action on March 5, 2010, more than two and one-half years after her last appointment with Dr. Rutkovsky at LHHN on September 5, 2007. LHHN further contended, preemptively, that plaintiff's care did not fall within the continuous treatment exception to

[1] LHHN Medical P.C., doing business as Manhattan's Physician Group and formerly known as Lenox Hill Community Medical Group, is sued in this action as Lenox Hill Community Medical Group, P.C.

the statute of limitations because she was not involved in a continuous course of treatment related to her headaches. Dr. Rutkovsky moved separately for summary judgment, filing his order to show cause on January 26, 2015. Like LHHN, Dr. Rutkovsky asserted that plaintiff's claims for treatment before September 5, 2007 were time-barred. Dr. Rutkovsky also asserted that plaintiff's informed consent claim should be dismissed, since plaintiff's allegations did not involve an invasive diagnostic procedure.

In opposition, plaintiff asserted that defendants' motions could not be entertained because they were untimely. Plaintiff noted that the court's part rules, as set forth in the Preliminary Conference Order, stated that "[m]otions for Summary Judgment and/or other dispositive motions shall be made no later than 60 (sixty) days from the filing of the Note of Issue, unless the Court directs otherwise."[2] Therefore, plaintiff concluded, because the note of issue was filed on November 25, 2014, all dispositive motions were to be made no later than January 26, 2015.

[2] The phrase "by order to show cause" was inserted by hand in the PC order, so that the paragraph read, "Motions for Summary Judgment and/or other dispositive motions shall be made *by order to show cause* no later than 60 (sixty) days from the filing of the Note of Issue, unless the Court directs otherwise" (emphasis added).

Plaintiff also opposed defendants' motions on the merits, opining by way of expert affidavits that defendants' actions had constituted deviations from the applicable standard of care. With respect to the statute of limitations, plaintiff argued that her visits from March 1999, when she first complained of headaches to Dr. Rutkovsky, to February 5, 2007, fell under the "continuous treatment" doctrine, and thus, that the doctrine should apply to toll the statute of limitations.

Dr. Rutkovsky and LHHN argued that their motions were timely because, among other things, on the day they filed their OSCs, court closed early because of Winter Storm Juno, a major storm, and was also closed the following day. The court closings, they argued, led to the delay in obtaining the court's signature on the orders. Nonetheless, defendants argued that they timely filed their OSCs with the court in good faith and within the 60-day time limit, and that the inclement weather contributed to the delay in obtaining the court's signature on the order.

Basing its decision on its part rules requiring that post note of issue dispositive motions must be made no later than 60 days after the filing of the note of issue, the court found defendants' motions for summary judgment to be untimely. The court rejected defendants' argument that the court's setting of a service and return date constituted approval of the late motion.

Rather, the court found the motions to be untimely, as neither party made its motion for summary judgment by January 26, 2015, and, according to the court, neither movant addressed the issue of good cause, which the court could not consider sua sponte. The court accordingly denied defendants' motions without addressing the merits.

To begin, as a procedural matter, we may properly consider defendants' appeal from the order denying their motion to reargue. In general, an order denying a motion for reargument is not appealable (*see e.g. Kitchen v Crotona Park W. Hous. Dev. Fund Corp.*, 145 AD3d 521 [1st Dept 2016]). Here, however, although the motion court purported to deny the motion to reargue, it nonetheless considered the merits of defendants' argument that the inclement weather on the motion's due date provided good cause for the delay. As a result, the court, in effect, granted reargument, then adhered to the original decision (*see Matter of 1234 Broadway, LLC v New York State Div. of Hous. & Community Renewal*, 102 AD3d 628, 629 [1st Dept 2013]). The April 18, 2016 order is therefore appealable (*id.*).

Turning now to the merits of this appeal, we find that the motion court improvidently exercised its discretion in finding that the motions were untimely and declining to consider them on that basis. Under CPLR 3212(a), a motion for summary judgment

must be made within 120 days of the filing of the note of issue. So long as it is within that time period, the court may set forth its own deadline, in which case the court's directive controls (*see McFadden v 530 Fifth Ave. RPS III Assoc., LP* , 28 AD3d 202, 202-203 [1st Dept 2006]). Accordingly, when a motion for summary judgment is untimely, the movant must show good cause for the delay; otherwise the late motion will not be addressed (*see Andron v City of New York*, 117 AD3d 526 [1st Dept 2014]). Further, a court has broad discretion in determining whether the moving party has established good cause for the delay, and its determination will not be overturned unless it is improvident (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]).

Dr. Rutkovsky filed his OSC with the clerk's office on January 26, 2015; the court signed it on January 29, 2015 and Dr. Rutkovsky served it on January 30, 2015. Likewise, LHHN filed its OSC on January 23, 2015; the court signed it on January 28, 2015 and LHHN served it on February 2, 2015. No party disputes that, on the day the orders would usually have been processed and timely signed, inclement weather from Winter Storm Juno created a "state of emergency" and caused the early closure of the courts; indeed, because of the storm, the Governor signed an executive order suspending legal deadlines.

Indeed, even if we were to find that the orders were

untimely, the weather conditions and resulting court closing provides "good cause" for the de minimis delay. Under these circumstances, the motion court should have considered defendants' motions for summary judgment on the merits (*see e.g. Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338, 339-340 [1st Dept 2007]; *see also Pippo v City of New York*, 43 AD3d 303 [1st Dept 2007]).

Turning to the merits of defendants' motions, the record presents issues of fact as to continuous treatment. As is well established, "the continuous treatment doctrine tolls the Statute of Limitations for a medical malpractice action when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (*Cox v Kingsboro Med. Group*, 88 NY2d 904, 906 [1996] [internal quotation marks omitted]). In addition, "[w]here the malpractice claim is based on an alleged failure to properly diagnose a condition, the continuous treatment doctrine may apply as long as the symptoms being treated indicate the presence of that condition" (*Wilson v Southhampton Urgent Med. Care, P.C.*, 112 AD3d 499, 500 [1st Dept 2013][internal quotation marks omitted]).

Here, read in the light most favorable to plaintiff, the record contains issues of fact as to whether from March 1999

until at least September 5, 2007 there was continuity of treatment for symptoms – namely, recurring and sometimes severe headaches – that were traceable to plaintiff's meningioma (*see id.* at 500-501). If so, the course of treatment would render plaintiff's action timely, as the statute of limitations would be tolled between March 1999 and September 2007.

Our decision in *Wilson* is instructive. In *Wilson*, the decedent received treatment at a walk-in clinic on 11 occasions between September 1, 2003 and July 21, 2005. At those visits, the decedent complained of headaches; she was eventually diagnosed with metastasized lung cancer. During his deposition, one of the defendants conceded that a brain tumor from metastasized lung cancer would, in fact, cause headaches, and he testified that on that basis, he had recommended an MRI and neurological consult (*id.* at 500). Under those circumstances, we affirmed the denial of the defendants' motion for summary judgment, finding that there existed a triable question of fact as to whether the decedent's visits to the defendants for the applicable period were part of continuous treatments for headaches that were traceable to the lung cancer that killed her.

The same reasoning applies here. Given the fact that plaintiff complained of headaches or vision difficulties, or both, on at least six occasions between March 1999 and September

2007, the record presents an issue of fact as to whether, before September 5, 2007, defendants were consistently monitoring plaintiff for specific symptoms related to the meningioma. In fact, if anything, the symptoms in *Wilson* were more attenuated from the ultimate diagnosis than the symptoms in this case.

Our dissenting colleague insists that the continuous treatment doctrine cannot apply, asserting that there was no evidence of regular appointments or ongoing treatment for plaintiff's headache-related complaints. Putting aside the fact that the assertion mischaracterizes the record – in fact, plaintiff testified that once per month from January 2007 until June 2007 she complained of "extreme" headaches that were not helped by over-the-counter medication – it is a red herring, as it has no bearing on whether the record contains evidence that the continuous treatment doctrine may apply. On the contrary, the case law contains no requirement that a plaintiff have attended "regular" appointments in the sense that the appointments were scheduled for the sole purpose of treating the allegedly misdiagnosed condition. Rather, the inquiry centers on whether the treated symptoms indicated the presence of the condition that was not properly diagnosed – here, a meningioma that gave rise to plaintiff's severe headaches and partial loss of vision, both of which Dr. Rutkovsky undertook to treat by,

among other things, prescribing reading glasses (see *Wilson*, 112 AD3d at 500; *see also Devadas v Niksarli*, 120 AD3d 1000, 1006 [1st Dept 2014]["in determining whether continuous treatment exists, the focus is on whether the patient believed that further treatment was necessary, and whether he sought such treatment"], citing *Rizk v Cohen*, 73 NY2d 98, 104 [1989]; *Simons v Bassett Health Care*, 73 AD3d 1252, 1254 [3d Dept 2010]).

The dissent attempts to dismiss the record testimony of once-monthly visits over a six-month period by asserting that plaintiff gave "self-serving" deposition testimony about those visits. There is nothing "self-serving," in a legal sense, about deposition testimony that favors the party giving it. Rather, testimony is said to be self-serving when it contradicts prior testimony – a situation that does not exist here (*see e.g. Capuano v Tishman Const. Corp.*, 98 AD3d 848, 851 [1st Dept 2012] [an affidavit that does not contradict one's prior deposition testimony and "provides additional details illuminating" the prior testimony is not considered self-serving]). Whether the testimony is "self-serving" in the sense that it is incredible on its face, and therefore creates no material issue of fact, is an issue for the factfinder to resolve.

Likewise, contrary to the dissent's characterization, plaintiff's deposition testimony does not amount to mere

"[c]onclusory allegations" in any sense that that phrase is used to defeat a motion for summary judgment. Plaintiff's deposition testimony was factual, simply reflecting her recollections of how often she visited Dr. Rutkovsky during a certain time period and what she recalled telling him at those times. Applying the word "conclusory" to such testimony is not meaningful in this context; plaintiff was not making a legal conclusion about continuing treatment, but merely testifying to her recollection of events (*cf. McGahee v Kennedy*, 48 NY2d 832, 834 [1979] [summary judgment not defeated by the defendant's conclusory statements that he was coerced to sign amendment to separation agreement]). Whether this testimony is credible is a matter to be evaluated by the factfinder, not by the court on summary disposition.

In a similar vein, the dissent insists that "plaintiff does not connect these purported visits between January and June 2007 to her documented visit in September 2007, or otherwise raise an issue regarding a continuing course of treatment for headaches." We disagree with this statement because, as noted above, plaintiff did, in fact, testify that she told Dr. Rutkovsky about her headaches during these once-monthly visits. Specifically, she testified that she was "at his office [once a month] telling him about [] headaches [that] were getting more and more extreme" such that she could not get out of bed, and were not alleviated

by Ibuprofen. This testimony, read in the light most favorable to plaintiff, is quite sufficient to raise an issue of fact, which is all that the law requires at this stage (*see e.g. Chestnut v Bobb-McKoy*, 94 AD3d 659, 662 [1st Dept 2012]).

We note that plaintiff does not address defendants' arguments regarding the cause of action for informed consent, and specifically notes in her papers that she does not intend to pursue that claim. At any rate, the informed consent claim lacks merit. As we have held, "[a] failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that 'involve[s] invasion or disruption of the integrity of the body'" (*Janeczko v Russell*, 46 AD3d 324, 325 [1st Dept 2007], quoting Public Health Law § 2805-d[2][b]).

Finally, we specifically decline to reach the issue of whether a departure from the applicable standard of care was a cause of plaintiff's brain surgery or vision loss, because the trial court never considered that issue. Thus, we need not address the dissent's discussion of causation. We find only that the record presents issues of fact about the continuous treatment doctrine for the trial judge to evaluate.

In light of our decision, we need not consider the parties' remaining arguments.

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

TOM, J.P. (dissenting)

While I agree with the majority that defendants showed good cause for the de minimis delay in the filing of their summary judgment motions, and that Supreme Court should have considered the motions on the merits, I would grant defendants' motions for summary judgment as plaintiff failed to raise triable issues of fact as to the continuous treatment doctrine or that defendants committed medical malpractice. Accordingly, I respectfully dissent.

On March 5, 2010, plaintiff commenced this action against defendant Frederick D. Rutkovsky, M.D., her primary care physician, and, defendants LHHN Medical P.C. and Lenox Hill Community Medical Group, P.C. (together LHHN), seeking damages for injuries - including a frontal craniotomy and loss of vision - related to a meningioma, i.e. a benign brain tumor. Plaintiff alleged that Dr. Rutkovsky failed to detect, diagnose, and treat the meningioma from on or about April 3, 1998 to September 5, 2007. Specifically, she asserted that Dr. Rutkovsky "ignored" her primary complaints of headache, including occasional complaints of blurred vision, and other related symptoms.

In their motions for summary judgment, defendants contended that plaintiff's malpractice claims were time-barred, as she commenced the action on March 5, 2010, more than two and a half

years after her last appointment with Dr. Rutkovsky at LHHN on September 5, 2007. They maintained that plaintiff's care did not fall within the continuous treatment exception to the statute of limitations because she was not involved in a continuous course of treatment concerning her headaches and/or vision issues. Defendants also maintained that the medical services provided to plaintiff were within good and accepted medical practice.

"The continuous treatment doctrine tolls the Statute of Limitations for a medical malpractice action when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (*Cox v Kingsboro Med. Group*, 88 NY2d 904, 906 [1996] [internal quotation marks omitted]). "Where the malpractice claim is based on an alleged failure to properly diagnose a condition, the continuous treatment doctrine may apply as long as the symptoms being treated indicated the presence of that condition" (*Wilson v Southhampton Urgent Med Care, P.C.*, 112 AD3d 499, 500 [1st Dept 2013][internal quotation marks omitted]).

Plaintiff's medical records reveal that she first sought treatment from Dr. Rutkovsky on April 3, 1998, complaining of allergies and congestion. Thereafter, of the approximately 30 visits to Dr. Rutkovsky between 1998 and 2007 documented by her medical records, plaintiff sporadically complained of headaches

and/or vision issues on only five occasions: March 1, 1999; July 14, 1999; July 23, 2004; November 8, 2006; September 5, 2007.

Notably, plaintiff visited Dr. Rutkovsky through these years for routine annual checkups and for other concerns, and there are gaps of years between the 1999 and 2004 visits, and the 2004 and 2006 visits during which there is no evidence of explicit anticipation "by both physician and patient" of further treatment "as manifested in the form of a regularly scheduled appointment for the near future" relating to the same original condition or complaint concerning her headaches (*Cox*, 88 NY2d at 906 [internal quotation marks omitted]). Rather, it appears plaintiff's complaints of headaches were isolated and not part of a continuous course of treatment. Indeed, Dr. Rutkovsky noted that plaintiff never complained of headaches at any two contiguous visits and that five years elapsed between the second complaint of headaches in 1999 and her third complaint in 2004. Then there was a gap of two more years before she complained of headaches in 2006. In sum, plaintiff complained of headaches and/or vision problems on five separate occasions with long gaps in between during approximately 30 visits to Dr. Rutkovsky and over a period of close to a decade. Clearly, this set of circumstances cannot support a continuous course of treatment for plaintiff's sporadic complaints of headache.

In opposition to defendants' prima facie showing that so much of the complaint as alleged medical malpractice committed before September 5, 2007 was barred by the governing statute of limitations, contrary to the majority's contention, plaintiff failed to raise a triable issue of fact. The majority, relying solely on plaintiff's self-serving deposition testimony, claims that I mischaracterized the record in asserting that there was no evidence of regular appointments or ongoing treatment for plaintiff's headache-related complaints. However, the medical records in evidence do not show that there were any visits by the plaintiff to Dr. Rutkovsky between January and June 2007 at which she complained of headaches or received treatment for that ailment. Instead, the medical records show that plaintiff presented during those months with only back pain and gynecological concerns. Moreover, plaintiff's testimony was unsure. In response to questions about how often she saw Dr. Rutkovsky in that time period, she could only state "I think it was once a month," and no medical records corroborate her claim that she complained of headaches during those visits in any event. Conclusory allegations, without more, are insufficient to defeat summary judgment (*see McGahee v Kennedy*, 48 NY2d 832, 834 [1979]). Further, plaintiff's equivocal testimony did not create a genuine issue as it was contradicted by the documentary

evidence, and thus failed to raise a triable issue of fact (*see Bank of N.Y. v 125-127 Allen St. Assoc.*, 59 AD3d 220 [1st Dept 2009]; *see also Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). Here, plaintiff's bare, equivocal statements of the times she saw Dr. Rutkovsky during this time period concerning complaints of headache, contradicted by the medical records, is insufficient to raise a factual issue concerning continuous treatment. Moreover, plaintiff does not connect these purported visits between January and June 2007 to her documented visit in September 2007, or otherwise raise an issue regarding a continuing course of treatment for headaches.

As noted, plaintiff's medical records demonstrate only sporadic complaints of headache and/or vision issues over the course of almost a decade, and there is no evidence to show that both Dr. Rutkovsky and plaintiff "explicitly anticipated" that Dr. Rutkovsky would treat plaintiff for a specific condition. In fact, there was no evidence of regular appointments or ongoing treatment for plaintiff's sporadic headache-related complaints. Accordingly, these circumstances fail to rise to the level of "continuous treatment" articulated by the controlling case law (*Cox*, 88 NY2d at 906). The majority's bare allegation that issues of fact are raised as to continuous treatment is unsupported and belied by the record of this case.

Contrary to the majority's reading of the relevant case law, while the "determination as to whether continuous treatment exists [] must focus on the patient" (*Rizk v Cohen*, 73 NY2d 98, 104 [1989]), the patient is required to make timely return visits related to the same original condition or complaint (*see McDermott v Torre*, 56 NY2d 399, 405-406 [1982]; *see also Cox*, 88 NY2d at 906, citing *Borgia v City of New York*, 12 NY2d 151, 155 [1962]). Thus, while we must look at "whether the patient believed that further treatment was necessary, and whether [s]he sought such treatment" (*Devadas v Niksarli*, 120 AD3d 1000, 1006 [1st Dept 2014]), here, the medical records reflect plaintiff did not consistently seek treatment for headaches. Nor does the record evidence support the claim that Dr. Rutkovsky was "consistently treating and/or monitoring [plaintiff] for specific symptoms related" to meningioma (*Chestnut v Bobb-McKoy*, 94 AD3d 659, 661 [1st Dept 2012]).

This case is akin to *O'Donnell v Siegel (*49 AD3d 415, 417 [1st Dept 2008]) where, over a nine-year period, the defendant physician on five separate occasions treated the plaintiff "as he appeared," and there was no discussion of a "course of treatment" or evidence that further treatment was explicitly anticipated by doctor and patient. Further, as is also the case here, in *O'Donnell* there was a gap of five years during which no treatment

was rendered relating to the original condition, and the return five years later was fairly characterized as a "renewal" rather than a continuation of the relationship. We held that in such circumstances the motion court should have dismissed the plaintiff's claims as time-barred and that the continuous treatment doctrine could not be invoked by the plaintiff (49 AD3d at 417).

The majority's reliance on *Wilson v Southhampton Urgent Med Care, P.C.* (112 AD3d 499, 500 [1st Dept 2013], supra) is misplaced. First, all of the plaintiff's 11 visits to the physician in *Wilson* took place over a period less than two years. Further, at each of those visits the plaintiff apparently complained of headaches. Moreover, in *Wilson*, this Court found that the plaintiff raised a triable issue of fact regarding whether he was receiving continuous treatment for symptoms related to lung cancer where the treating physician admitted that a brain tumor from metastasized lung cancer would cause headaches; the physician considered the possibility of a brain tumor in his differential diagnosis; and the physician recommended a MRI and neurological consult. Here, by contrast, the evidence shows that there was no continuous course of treatment for her periodic complaints of headache and/or vision issues over a period of almost a decade long.

In addition, while the majority posits that the symptoms in *Wilson* were more attenuated from the ultimate diagnosis than the symptoms in this case, this argument misses the mark. Rather, the holding in *Wilson* was supported by a substantial number of visits in a short time period all of which dealt with the same complaint of headaches. Such circumstances clearly do not exist in this case.

Notably, in *Simons v Bassett Health Care* (73 AD3d 1252 [3d Dept 2010]), relied on by the majority, the patient's entire course of treatment took place over less than three years and included numerous visits for "complaints or ongoing treatment of migraines, headaches, dizziness, pain on the right side of her face and blurred vision" which were suggestive of or consistent with meningioma (id. at 1255). Thus, *Simons* turned on the frequency of visits over a shorter time span during which the patient sought treatment for complaints related to her meningioma. Again, such circumstances do no exist here (*see also Chestnut*, 94 AD3d at 662 [finding triable issue of fact as to whether continuous treatment existed where patient made "frequen[t]" visits for, inter alia, bilateral knee pain, leg swelling and high levels of alkaline phosphates in the blood (symptoms associated with lung cancer) over "relatively short period of 13 months" and where doctor engaged in "intens[e]"

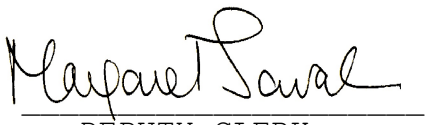
course of treatment of the plaintiff's knee condition]). Once again, plaintiff's occasional complaints of headaches during visits to Dr. Rutkovsky span over a period of close to a decade.

With respect to plaintiff's remaining timely allegation that defendants committed medical malpractice on her last visit on September 5, 2007, plaintiff again failed to raise a triable issue of fact in opposition to defendants' prima facie showing. Based on the record, defendants established that Dr. Rutkovsky did not deviate from the accepted standard of care when plaintiff presented at his office on her last visit complaining of headache and vision disturbances by advising her to return for a neurology referral if her symptoms did not subside in one week. It is undisputed that plaintiff did not seek further neurological treatment or medical attention from Dr. Rutkovsky. She was subsequently diagnosed with a meningioma in November 2007, when she was admitted to the emergency room with vision complaints. Plaintiff's expert affirmations submitted in opposition were conclusory and speculative, and, thus, insufficient to raise a question of fact as to defendants' liability (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

Accordingly, I would reverse the order on appeal and grant defendants' summary judgment motions to dismiss the action.

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

ENTERED: AUGUST 29, 2017



DEPUTY CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Webber, JJ.

4048 In re New York City Asbestos Litigation — Index 190029/15

- - - - -

Anne M. South, etc.,
Plaintiff-Respondent,

-against-

Chevron Corporation, etc.,
Defendant-Appellant,

John Crane Inc.,
Defendant.

_____

Jones Day, New York (Meir Feder of counsel), for appellant.

Motley Rice LLC, Washington, D.C. (Louis M. Bograd of the bar of the State of Kentucky and the District of Columbia, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Peter H. Moulton, J.), entered on or about January 5, 2016, which, to the extent appealed from, denied defendant Chevron Corporation's alleged predecessor in interest's (Texaco) motion for summary judgment dismissing the complaint as against it, affirmed.

Plaintiff's decedent, Mason South, and plaintiff, South's wife, commenced this action alleging that South's mesothelioma resulted from his exposure to asbestos during his 37-year career in the Merchant Marine. They claimed that defendant Texaco manufactured, produced, sold, supplied, merchandised and/or distributed asbestos-containing products that were located on the

ships South worked on. The claims were brought under the Jones Act (46 USC § 30104 *et seq*.). South's wife asserted derivative claims and was substituted as plaintiff after South died of mesothelioma.

Texaco moved for summary judgment dismissing the complaint as against it. The basis for the motion was a release that South had given to it in connection with an earlier lawsuit, also in connection with his exposure to asbestos on merchant ships. In that Jones Act action, filed in 1997 in the United States District Court for the Northern District of Ohio, South alleged that

> "[a]s a direct and proximate result of said exposure to asbestos aboard the said vessels as well as secondary or passive smoke that hung still in the atmosphere free from dissipation for lack of adequate ventilation, Plaintiff suffers cancerphobia, traumatic stressful fear of affliction and worsening of pneumoconiosis as well as exacerbation of existing diseases; and suffers anatomical disorder, structural changes, pulmonary diseases inclusive of asbestosis/mesothelioma/lung cancer/pneumoconiosis/chronic obstructive pulmonary disease/colon cancer/stomach cancer/rectal cancer/kidney cancer/pancreas cancer/pharynx cancer/brain cancer/other anatomical cancer, et cetera, either singularly or in combination thereof; and, moreover, Plaintiff suffers harm in the form of necessity to be monitored for other asbestotic diseases including lung cancer."

The release that South executed in connection with the settlement of the 1997 action stated that South, "for himself, his heirs, administrators, beneficiaries, executors and assigns," released Texaco "forever" from any and all "actions, suits, [and] claims"

which he "has now, has ever had, or which may accrue in the future." The release included any "bodily and/or personal injuries, sickness or death" which allegedly occurred as a result of South's asbestos exposure. The release acknowledged that the "long term effects of exposure" to asbestos might result in "obtaining a new and different diagnosis from the diagnosis as of the date of this Release." South stated in the release that despite this, he knew that he would be giving up the right to bring an action in the future for "any new or different diagnosis that may be made" as a result of his exposure to any asbestos or other product. This provision also pertained to South's executors, administrators, and heirs. South acknowledged that he had read the full release, discussed it with his attorney, and was signing it with full knowledge of its contents, and that he would be legally bound by it. In return for furnishing the release, South was paid $1,750.

In opposition to the motion, plaintiffs argued that the release did not preclude the claim for mesothelioma, based on section 5 of the Federal Employers' Liability Act (FELA) (45 USC § 55), which requires strict scrutiny of releases and prohibits agreements that exempt common carriers from liability. Under that standard, plaintiffs asserted that at the time South signed the release, he did not have mesothelioma and was not aware of

the risk of mesothelioma as a potential injury from his asbestos exposure.

The court denied Texaco's motion. It focused its analysis on two federal cases, one from the Sixth Circuit adopting a bright-line test voiding releases that attempt to bar claims for injuries that have not been explicitly forsaken, and one from the Third Circuit enforcing such releases, provided that the plaintiff understood the actual specific risks being released. The motion court held that, under either circuit's standard, Texaco failed to establish that South understood he was releasing a future claim for mesothelioma. Under the more lenient Third Circuit test, the 1997 release was inadequate because although it referred to future claims arising out of asbestos exposure and contemplated a second injury, it did not mention cancer or mesothelioma explicitly. Moreover, the court characterized the settlement payment South received as consideration for the 1997 release as, "[b]ased on this court's experience . . . extremely low, given . . . South's alleged extensive asbestos exposure." The court alternatively described the amount as "meager."

Texaco argues on appeal that the release should be enforced because it represents a compromise of a known claim, not an exemption from liability for a future unknown claim. It contends that because the release resolved an action arising out of

South's exposure to asbestos, it applies to additional injuries that might later manifest themselves as a result of the same exposure. Texaco notes that the 1997 complaint asserted a claim for possible diseases stemming from his exposure, and mentioned mesothelioma as one of those diseases. Thus, Texaco reasons, the release necessarily embraced mesothelioma as a condition South was aware of as a risk of asbestos exposure but was willing to compromise as a claim in exchange for monetary consideration. Texaco stresses the language in the release by which South acknowledged that his exposure to asbestos could cause new diseases that were not yet apparent on the date he executed the release, and his statement in the release that he had read it carefully and had had the assistance of counsel.

The Jones Act provides merchant mariners, such as South, with a right of action for injuries and death arising out of the performance of their duties. The statute incorporates FELA by reference (*American Dredging Co. v Miller*, 510 US 443, 456 [1994] ["the Jones Act adopts the entire judicially developed doctrine of liability under the Federal Employers' Liability Act"] [internal quotations omitted]). While section 5 of FELA voids any contract, such as a release, "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter" (45 USC § 55), the United

States Supreme Court has differentiated between an agreement conferring a broad immunity from liability and one, such as a release, that compromises an actual claimed liability (*see Callen v Pennsylvania R. Co.*, 332 US 625, 631 [1948]).

Nevertheless, not all releases can pass muster under section 5. As noted by the motion court, there is a split in the federal circuits as to the standard under which a release should be analyzed for FELA purposes, although both cases discussed by the court resulted in the release at issue being declared unenforceable. In *Babbitt v Norfolk & Western Ry. Co.* (104 F3d 89, 93 [6th Cir 1997]), the Sixth Circuit concluded that for a FELA release to be valid, it "must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him." The Third Circuit, in contrast, focused, in *Wicker v Consolidated Rail Corp.* (142 F3d 690, 701 [3rd Cir 1998], *cert denied* 525 US 1012 [1998]), on the broader question of whether, as opposed to an actual injury, the plaintiff who signed the release was aware of "known risks even if there is no present manifestation of injury." The *Wicker* court cautioned, however, that a release should be carefully construed to ensure that the plaintiff was specifically aware of the known risks, and that the

inclusion of boilerplate in the release would militate against such a conclusion. Thus, the Third Circuit declined to dismiss the complaint in *Wicker*, finding that the five releases at issue there either were pro forma and did not reflect any actual negotiation of the claims being waived or were blunderbuss efforts to preclude any and all possible claims. Texaco contends that neither case applies here. It points out that *Babbitt* did not deal with a release in connection with the settlement of a lawsuit, but rather in the context of the plaintiff's separation from the defendant as part of an early retirement program. With respect to *Wicker*, Texaco contrasts the releases in those cases, which it characterizes as going "well beyond the specific controversies that had been settled," with the release here.

We start with the observation that, since this is an admiralty case, Texaco bears the burden of establishing that the release is enforceable (*see Garrett v Moore-McCormack Co.*, 317 US 239, 248 [1942]). That burden includes demonstrating that South fully understood his rights and received adequate consideration (*id.*). Turning to the two federal cases discussed by the parties, there is no question that *Babbitt*, assuming it applied to the release in this case, would bar the release's application. That is because the release does not explicitly mention that South was forbearing any claim against Texaco specifically for

mesothelioma. Whether *Wicker* also bars the release necessitates, according to the Third Circuit, a "fact-intensive" examination to ascertain the parties' intent at the time the release was executed (142 F3d at 701), for which the *Wicker* court offered some guidelines. For example, "the validity of the release [should not] turn on the writing alone because of the ease in writing detailed boiler plate agreements" (*id.*). Further, written releases spelling out "the scope and duration of known risks" would be "strong, but not conclusive, evidence of the parties' intent" (*id.*).

Here, subjecting it to the high level of scrutiny required by *Wicker*, we find that the release does not pass muster. To tease out the true intent South had when he signed the release, it is necessary to consider the context in which he did so. The 1997 complaint, while making generalized allegations that South had been exposed to asbestos, is exceedingly vague as to whether he had actually contracted an asbestos-related disease. To be sure, it mentions a "devastating pulmonary disease Plaintiff now suffers" and an exhaustive grab-bag of asbestos-related diseases, from asbestosis to mesothelioma to brain cancer. However, it is impossible to conclude from the complaint that South had actually received a diagnosis. Indeed, the "meager" consideration he received for resolving the claim suggests that he had not been

diagnosed with an asbestos-related disease, much less one even approaching the severity of the mesothelioma that the complaint specifically alleges he had. The complaint leaves open that possibility, to the extent it seeks relief for fear of an asbestos-related disease and not for the disease itself. Accordingly, the risk of contracting an actual asbestos-related disease remained hypothetical to South, and we decline to read the release as if South understood the implications of such a disease but chose nonetheless to release Texaco from claims arising from it.

Further, if South had not received a definitive diagnosis at the time the 1997 complaint was filed, then the release, to the extent it warns him of the possibility of "a new and different diagnosis from the diagnosis as of the date of this Release," does not reflect the actual circumstances known to him, since the words "new" and "different" suggest that South had already been diagnosed with a disease when he executed the release. Rather, the lack of an actual diagnosis reveals the language in the release as mere boilerplate, and not the result of an agreement the parameters of which had been specifically negotiated and understood by South. Under even the stricter standard of *Wicker*, "the release do[es] not demonstrate [South] knew of the actual risks to which [he was] exposed and from which [Texaco] was being

released" (142 F3d at 701).

The dissent acknowledges that *Wicker* cautions that a court, in interpreting a release such as the one at issue here, must probe beyond the release's words. However, it then disregards that requirement, stating that "the language of the release is clear and comprehensive" and that "the release's language establishes that the decedent understood that his exposure to asbestos could result in future injuries and diagnoses." Even when purporting to consider the context in which the release was executed, the dissent focuses only on the fact that the complaint mentions mesothelioma, concluding from that fact that South definitively intended to release a claim for it. Thus, the dissent directly contradicts *Wicker*'s determination that "the written release should not be conclusive" (142 F3d at 701).

Furthermore, the dissent points to no evidence that South appreciated the consequence of waiving a claim for mesothelioma. It cites *Oliverio v Consolidated Rail Corp.* (14 Misc 3d 219 [Sup Ct, Erie County 2006]) favorably; however, in that case, it appears that the plaintiff already had received a diagnosis of lung cancer when he signed the release. Accordingly, the court held, it could not be said that he should not reasonably have anticipated contracting a different sort of cancer at a later date, such as his bladder cancer, as a result of his initial

exposure to asbestos. The court's concern in *Oliverio* was that "[i]f a new claim were permitted for each and every new manifestation of the asbestos exposure, regardless of the extent of the parties' awareness of such risks, there would be no incentive on the part of the . . . defendant to ever compromise such claims" (14 Misc 3d at 222). Here, again, there is no evidence that South had *any* manifestation of his asbestos exposure at the time he executed the release. Under those circumstances, it cannot be said that Texaco carried its burden of proving that the release is enforceable.

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

TOM, J.P. (dissenting)

In this matter, the parties executed a release that should be enforced and that constitutes a complete bar to this action (see *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006], 8 NY3d 804 [2007]). The release was properly limited to those risks known to the parties at the time of its execution (*see Wicker v Consolidated Rail Corp.*, 142 F3d 690, 701 [3d Cir 1998], *cert denied* 525 US 1012 [1998]), including the known risk that the decedent could contract mesothelioma in the future. Accordingly, because I find the release enforceable, I would reverse the order and dismiss the complaint. Therefore, I respectfully dissent.

Plaintiff's decedent, Mason South, served as a merchant mariner for over 35 years, during which time, he alleged, he was constantly exposed to asbestos friable fibers, causing him to inhale carcinogenic dust.

In 1997, the decedent (and a group of similarly situated plaintiffs) filed a Jones Act (46 USC § 30104 *et seq.*) claim in the United States District Court for the Northern District of Ohio against defendant Texaco and 115 other named defendants, alleging that he had suffered injury during his career as a merchant mariner. He alleged, inter alia, that,

"[a]s a direct and proximate result of said exposure to

> asbestos aboard the said vessels as well as secondary or passive smoke that hung still in the atmosphere free from dissipation for lack of adequate ventilation, Plaintiff suffers cancerphobia, traumatic stressful fear of affliction and worsening of pneumoconiosis as well as exacerbation of existing diseases; and suffers anatomical disorder, structural changes, pulmonary diseases inclusive of asbestosis/mesothelioma/lung cancer/pneumoconiosis/chronic obstructive pulmonary disease/colon cancer/stomach cancer/rectal cancer/kidney cancer/pancreas cancer/pharynx cancer/brain cancer/other anatomical cancer, et cetera, either singularly or in combination thereof; and, moreover, Plaintiff suffers harm in the form of necessity to be monitored for other asbestotic diseases including lung cancer."

The decedent settled his claims against Texaco, executing a comprehensive release of all claims against the company. At the time of the release the decedent did not suffer from mesothelioma. The release stated that the decedent, for "himself, his heirs, administrators, beneficiaries, executors and assigns," released Texaco "forever" from any and all "actions, suits, [and] claims" which he "has now, has ever had, or which may accrue in the future." The release included any "bodily and/or personal injuries, sickness or death" allegedly caused as a result of the decedent's asbestos exposure.

The decedent also stated in the release that he understood that the "long term effects of exposure" to asbestos might result in "obtaining a new and different diagnosis" from the diagnosis at the time of the release. He stated that despite this, he knew that he would be giving up the right to bring an action against

Texaco in the future for "any new or different diagnosis that may be made" as a result of his exposure to any asbestos or other product. This provision also pertained to the decedent's executors, administrators, and heirs. The decedent acknowledged that he had read the full release, discussed it with his attorney, and was signing it freely and with full knowledge of its contents, and that he would be legally bound by it.

Unfortunately, 17 years later, in 2014, when the decedent had reached the age of 86, he was diagnosed with malignant mesothelioma. In 2015, he and his wife commenced this action asserting claims sounding in negligence and under the Jones Act against five defendants, including Chevron Corporation, the alleged successor in interest, by merger, to Texaco. He alleged, as he had similarly alleged in the 1997 Jones Act claim, that he had suffered exposure to asbestos friable fibers throughout his Merchant Marine career, resulting in his contracting mesothelioma. His wife asserted derivative claims. The decedent died during the pendency of this action as a result of the mesothelioma. His wife, as executor of his estate, was substituted as plaintiff.

Defendant Texaco moved for summary judgment dismissing the complaint as against it, arguing that the 1997 release barred any and all future claims against it arising from the decedent's

exposure to friable asbestos fibers. Texaco further argued that the unambiguous language of the release demonstrated that thoughtful negotiation was had in arriving at its terms and that the decedent clearly gave up his right to sue Texaco for any future diagnosis arising from alleged asbestos exposure.

Plaintiffs opposed, arguing that the Federal Employers' Liability Act (FELA)(45 USC § 51 *et seq.*), which requires strict scrutiny of releases, applies to Jones Act claims. Plaintiffs contended that under that standard, because at the time the decedent signed the release he did not have mesothelioma, and was not aware of the risk of mesothelioma as a potential injury from his asbestos exposure, his current claim was not barred.

Texaco replied that FELA applies only to railroad workers, not mariners, and in any event, the release bars the current claims even under the heightened FELA standard.

Supreme Court denied defendant's motion. As a threshold matter, the court held that federal law governed this Jones Act/maritime law action and that the Jones Act "incorporates not only the FELA statutes but also its [sic] entirely judicially developed doctrine of liability" (internal quotation marks omitted). Accordingly, the court concluded that the 1997 release was to be strictly examined, and would only be enforced to the extent "it reflect[ed] a bargained-for settlement of a known

claim for a specific, known injury suffered."

Noting that there is a split in the federal circuits as to whether FELA permits a release of future claims for known risks, the motion court found that under either the Sixth Circuit's bright-line test voiding releases attempting to bar future claims for known or unknown risks or the Third Circuit's more lenient test enforcing such releases provided that the plaintiff understood the actual, specific risks being released, Texaco had failed to meet its burden to show that the decedent understood he was releasing it from a future claim for mesothelioma.

On appeal, Texaco asserts that the 1997 release should be enforced because it constitutes a settlement of a known claim. In that regard, Texaco notes that the release resolved the decedent's action arising out of his exposure to asbestos and that the parties contemplated all injuries that might later arise due to that exposure. Texaco points out that the 1997 complaint specifically mentioned mesothelioma as one of the known diseases, and argues that thus the release clearly intended to resolve any future claim of mesothelioma. And Texaco highlights the expansive language of the release, including the decedent's recognition that his exposure to asbestos might result in "obtaining a new and different diagnosis" from the diagnosis at the time of the release but that he would be giving up the right

to bring an action against Texaco in the future for "any new or different diagnosis that may be made" as a result of his exposure to asbestos.

It should be noted that "[s]tipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]) and that "[s]trong policy considerations favor the enforcement of settlement agreements" (*Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993]). As the Court of Appeals has explained, this is because

> "[a] negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources; courts could not function if every dispute devolved into a lawsuit. Moreover, there is a societal benefit in recognizing the autonomy of parties to shape their own solution to a controversy rather than * having one judicially imposed. Additionally, a settlement produces finality and repose upon which people can order their affairs" (82 NY2d at 383).

Similarly, this Court has recognized that "a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006], *supra*). Therefore, "[i]f the language of a release is clear and unambiguous, the signing of a release is a jural act binding on the parties" (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks omitted]).

Because the subject release is governed by the law applicable to Jones Act claims and general maritime law, the responsibility is Texaco's to establish the enforceability of the release, rather than plaintiff's to overcome it (*see Garrett v Moore-McCormack Co.*, 317 US 239 [1942]). The Jones Act incorporates FELA (*see Rabenstein v Sealift, Inc.*, 18 F Supp 3d 343, 351 n 6 [ED NY 2014]), which, in turn, prohibits releases that seek to exempt a defendant entirely from any liability under FELA (*see Callen v Pennsylvania R. Co.*, 332 US 625, 630-631 [1948]). However, the United States Supreme Court has determined that FELA does allow parties to compromise an actual, claimed liability via a release (*id.* at 631).

Due to the aforementioned split in the federal circuits, and since "neither the United States Court of Appeals for the Second Circuit, the New York Court of Appeals, nor any of the Appellate Divisions have addressed the issue of the proper standard to be applied in judging whether a particular release may be enforced against a claim under the FELA" (*Oliverio v Consolidated Rail Corp.*, 14 Misc 3d 219, 221 [Sup Ct, Erie County 2006]), the issue as to the standard by which the language of the release should be judged needs to be decided.

In *Babbitt v Norfolk & Western Ry. Co.* (104 F3d 89, 93 [6th Cir 1997]), the Sixth Circuit concluded that for a FELA release

to be valid, it "must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him." In contrast, the Third Circuit, in *Wicker v Consolidated Rail Corp.* (142 F3d 690 [3d Cir 1998], *cert denied* 525 US 1012 [1998]), recognized the beneficial predictability of the Sixth Circuit's bright-line rule, but ultimately decided to take a different approach, reasoning that

> "it is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement. The employer may desire to quantify and limit its future liabilities and the employee may desire an immediate settlement rather than waiting to see if injuries develop in the future. To put it another way, the parties may want to settle controversies about potential liability and damages related to known risks even if there is no present manifestation of injury" (*id.* at 700-701).

The Third Circuit therefore determined that a release does not violate FELA if "the scope of the release is limited to those risks which are known to the parties at the time the release is signed" (*Wicker*, 142 F3d at 701). At the same time, the *Wicker* Court cautioned that "the validity of the release [should not] turn on the writing alone because of the ease in writing detailed boiler plate agreements," and that there should be a "fact-intensive" examination to ascertain the parties' intent at the

time the release was executed (*id.*). Thus, written releases spelling out "the scope and duration of known risks" would be "strong, but not conclusive, evidence of the parties' intent" (*id.*).

The *Wicker* approach takes a more "[]realistic view on how parties compromise claims" and reasonably permits parties to compromise over specific risks that are contemplated by them (*Oliverio*, 14 Misc 3d at 221-222). This approach is the better and more workable one for cases predicated on exposure to asbestos. As the court noted in *Oliverio*:

> "This is particularly true with respect to claims based upon exposure to asbestos, where effects of the exposure may be latent for a considerable period of time. If a new claim were permitted for each and every new manifestation of the asbestos exposure, regardless of the extent of the parties' awareness of such risks, there would be no incentive on the part of the railroad defendant to ever compromise such claims. This result would not further the public policy of encouraging settlement of claims" (14 Misc 3d at 222).

Moreover, this approach

> "permits the enforcement of the release for not only the specific injuries already manifested at the time of its execution, but also any risks of future injury which the parties specifically contemplated in its execution, so long as those risks are properly within the ambit of the claim compromised. This approach provides a realistic view of compromises and releases, while staying true to the prohibition on blanket relinquishments of rights under FELA" (*id.*).

Turning to the release in this case, I find that Texaco met its burden to show that the release was valid and bars this

action, as it released Texaco from all claims and actions arising from the decendant's exposure to asbestos. As *Wicker* instructs, the language of the release constitutes strong evidence of the parties' intent. Notably, the language of the release is clear and comprehensive and releases Texaco for any injury that would occur as a result of exposure to asbestos. Further, the release's language establishes that the decedent understood that his exposure to asbestos could result in future injuries and diagnoses, including at some point many years into the future, but that despite those risks he agreed to give up his right to bring any actions against Texaco for "any new or different diagnosis" as a result of his exposure to asbestos.

The majority's assertion that my writing "points to no evidence that South appreciated the consequence of waiving a claim for mesothelioma" is belied by the record. In the context of the decedent's execution of the release, it is apparent that although he was not suffering from mesothelioma at the time he executed the release, he sought recovery for, and specifically listed, that disease in his settled 1997 complaint as one of the illnesses he could contract from his exposure to asbestos. Thus, the complaint demonstrates that the decedent was aware of the specific risk of contracting mesothelioma at the time of the release, and freely chose to waive his right to sue for that

potential injury. It is of no moment that he may not have received any particular diagnosis at the time of the release. The very point of the compromise contained in the release is that the decedent was waiving any future rights to sue Texaco even though he was acknowledging that he could in the future contract an asbestos-related disease, including the various diseases listed in his 1997 complaint, which include mesothelioma.

The majority misapprehends the *Wicker* standard in focusing on whether there was evidence that the decedent was diagnosed with an asbestos-related disease at the time of the release. As set forth above, *Wicker* permits releases that which cover "risks which are known to the parties at the time the release is signed" (142 F3d at 701) and recognizes that parties can fully comprehend future risks and potential liabilities. In other words, under *Wicker*, as long as the risks are known, parties can waive future risks even if they do not have a current claim for such risks when they sign a release. Here, the decedent may not have had any manifestations of his exposure to asbestos, but he was fully able to comprehend the future risk of certain known illnesses that he could contract from exposure to asbestos, as reflected in detail in his 1997 complaint. Thus, at the time of the release, he knowingly released Texaco from liability in the event that he was diagnosed in the future with an asbestos-related disease,

including mesothelioma, a risk of which he was aware. Therefore, contrary to the majority's contention, Texaco met its burden under *Wicker* to show that the release is enforceable.

Further, the release is a product of a compromise between the parties, each of which was represented by counsel, to settle the decedent's claims for exposure to asbestos. Accordingly, the decedent's interests were protected by his counsel, and there is no evidence or even allegation of fraud, duress, collusion or mistake that would invalidate the agreement (*see Hallock*, 64 NY2d at 230).

While the amount of consideration received by decedent for the release is contained neither in the language of the release nor elsewhere in the appellate record, the motion court characterized the amount as low and "meager." However, even accepting the amount paid was small, the decedent decided to accept it even while he knew he risked contracting asbestos-related diseases and could not bring any future claims against Texaco. It should be noted that the decedent did not suffer from mesothelioma at the time of the release but was diagnosed with the disease 17 years later. The decedent could have received a low settlement because he did not suffer from an asbestos-related disease at the time of the release.

Moreover, Texaco had a reasonable expectation of finality

with respect to the specific claim of asbestos exposure, and the settlement paid was likely to have been based upon that expectation. Policy considerations favor permitting parties such as these to craft their only solutions to disputes, and enforcement of these agreements promotes both finality and judicial economy. Thus, it is appropriate to enforce the release in this action "where the claim arises out of precisely the same asbestos exposure that was compromised in the earlier settlement and release" (*Oliverio*, 14 Misc 3d at 223).

In addition, in contrast with the releases invalidated in *Wicker*, the release here did not seek to insulate Texaco from liability beyond the specific controversies that were settled. Indeed, unlike the instant release, the releases in *Wicker* "recite[d] a series of generic hazards to which [plaintiffs] might have been exposed, rather than specific risks the employees faced during the course of their employment" (142 F3d at 701). Accordingly, based on those circumstances, the Third Circuit found that "the releases do not demonstrate the employees knew of the actual risks to which they were exposed and from which the employer was being released" (*id.* at 701). Here, however, the release focused on the specific exposure to asbestos that the decedent knew he had faced during the course of his employment and acknowledged the risks of future diseases related to asbestos

exposure as reflected in the decedent's 1997 claim, and thus demonstrated that the decedent knew the actual risks to which he was exposed and from which Texaco was being released.

Accordingly, I would reverse the order on appeal, and grant Texaco's motion for summary judgment dismissing the complaint as against it.

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

ENTERED: AUGUST 29, 2017

Margaret Sawal
DEPUTY CLERK

Tom, J.P., Moskowitz, Gische, Kapnick, JJ.

3579- Index 652890/14
3580-
3580A Universal Investment Advisory SA, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Bakrie Telecom PTE, Ltd., et al.,
Defendants-Respondents-Appellants,

PT Bakrie & Brothers TBK, et al.,
Defendants-Respondents.

_____

Greenberg Traurig, LLP, New York (James W. Perkins and Anne C. Reddy of counsel), for appellants-respondents.

Schnader Harrison Segal & Lewis LLP, New York (Theodore L. Hecht of counsel), for respondents-appellants and respondents.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 29, 2016, reversed, on the law, without costs, the motion to dismiss as to said defendants denied without prejudice, and the court is directed to permit the parties to conduct jurisdictional discovery. Orders, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 22, 2016, modified, on the law and the facts, to grant defendants' motion to dismiss the fourth cause of action (fraud) as duplicative of the first cause of action (breach of contract), and to deny the motion to dismiss the eighth cause of action (breach of contract), insofar as it asserts a breach of section 6.07 of the indenture, and otherwise affirmed, without costs.

Opinion by Kapnick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.,
Karla Moskowitz
Judith J. Gische
Barbara R. Kapnick, JJ.

3579-3580-3580A
Index 652890/14

_____x

Universal Investment Advisory SA, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Bakrie Telecom PTE, Ltd., et al.,
Defendants-Respondents-Appellants,

PT Bakrie & Brothers TBK, et al.,
Defendants-Respondents.

_____x

Plaintiffs appeal from the judgment of the Supreme Court, New York County (Saliann Scarpulla, J.), entered September 29, 2016, dismissing the complaint (third, fifth and seventh causes of action) as against the individual defendants and defendant PT Bakrie & Brothers TBK for lack of personal jurisdiction. Cross appeals from the orders of the Supreme Court, New York County (Saliann Scarpulla, J.), entered April 22, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiffs' cross motion to convert defendants' motion to dismiss the first cause of action (breach of contract) into a motion for summary judgment, and granted plaintiffs' partial summary judgment on that cause of action, denied defendants' motion to dismiss the claims asserted by plaintiffs Universal Investment

Advisory SA and Vaquero Master EM Credit Fund Ltd. for lack of standing, and to dismiss the second and fourth causes of action (fraud), purportedly denied defendants' motion to dismiss the cause of action for a declaratory judgment, and granted defendants' motion to dismiss the eighth cause of action (breach of contract).

Greenberg Traurig, LLP, New York (James W. Perkins and Anne C. Reddy of counsel), and Hal Hirsch, New York, for appellants-respondents.

Schnader Harrison Segal & Lewis LLP, New York (Theodore L. Hecht, Kenneth R. Puhala and Jessica M. Lau of counsel), for respondents-appellants and respondents.

KAPNICK, J.

This case arises out of an issuer's and guarantors' default in the payment of notes that were publicly offered in the international financial markets. Defendant PT Bakrie Telecom Tbk (BTEL) is a telecommunications company organized under the laws of Indonesia and is the parent of defendant Bakrie Telecom Pte. Ltd (issuer). Defendants PT Bakrie Network (PT Network) and PT Bakrie Connectivity (PT Connectivity) are Indonesian subsidiaries of BTEL (BTEL, issuer, PT Network and PT Connectivity, collectively, the manager defendants). Defendant PT Bakrie & Brothers (B&B) is the Indonesian parent company of BTEL and the other Bakrie defendants, has effective control over the management of BTEL, and is the controlling shareholder of BTEL, owning 39.6% of BTEL stock at the time of the offering. The individually named defendants are/were directors or commissioners of BTEL either at the time of the offering or thereafter (individual defendants).

Under an indenture dated May 7, 2010, as supplemented by a supplemental indenture dated January 27, 2011, the issuer, on behalf of BTEL, issued $380 million of guaranteed senior notes, due on May 7, 2015 (notes). Plaintiffs are holders of more than 25% of the notes. By way of an intercompany loan from the issuer, BTEL received the $380 million proceeds of the offering,

and issued an unconditional parent guarantee of the issuer's payment obligations under the notes. BTEL's subsidiaries, PT Network and PT Connectivity, executed subsidiary guarantees of the issuer's payment obligations under the notes. Neither B&B nor the individual defendants, in their individual capacities, executed the indenture or the subsequent supplemental indenture or provided any guarantee of the issuer's payment obligations under the notes.

Under the terms of the notes and the indenture, the issuer was obligated to make semi-annual interest payments of approximately $21.8 million by funding a New York interest reserve account maintained by the indenture trustee, BNY Mellon. Sections 12.07(a) - (b) of the indenture contain a New York choice of law and forum selection clause. Section 6.07 of the indenture, referred to by the parties as the "no impairment" clause, provides as follows:

> *Rights of the holders to Receive Payment*. Notwithstanding anything to the contrary, the right of any holder of a Note to receive payment of the principal of, premium, if any, or interest on, such Note, or to bring suit for the enforcement of any such payment, on or after the due date expressed in the Notes of such series, which right shall not be impaired or affected without the consent of the holder.

Defendants distributed an offering memorandum for the notes, dated April 30, 2010, which incorporated BTEL's 2009 audited financial statements. Defendants distributed a supplemental

offering memorandum, dated January 24, 2011. Plaintiffs allege that the offering memoranda falsely portrayed BTEL as a successful wireless provider that continued to experience growth and remained competitive in an ever expanding and developing industry, when in actuality, at the time the offering memoranda were distributed, BTEL was insolvent, its technology was outdated, and the offering memoranda had inflated the value of its assets. Plaintiffs further allege that B&B and BTEL's directors and commissioners at the time of the offering (offering defendants), by virtue of their positions of decision-making control and management responsibility, were aware that BTEL was incapable of meeting its obligations, or refinancing the $380 million intercompany loan, when the notes matured.

Specifically, plaintiffs allege that BTEL's capital expenditures from 2004 to 2011 were more than 100% of its operating cash flow, such that BTEL had to obtain high interest loans in order to build and maintain the telephone network that is the core of its business; that BTEL's returns continually declined between 2006 and 2013, causing it to lose its competitive market position; and that BTEL improperly depreciated its telephone network assets, claiming a longer useful life than they actually had. Plaintiffs further allege that BTEL's working capital substantially declined since 2008, because its current

debt payments were increasing at a greater rate than the cash it generated from operations and financing.

Under the indenture and supplemental indenture, interest on the notes was payable on May 7 and November 7 of each year. In November 2012, BTEL missed its biannual interest payment. Plaintiffs allege that BTEL's directors at the time caused BTEL to issue false assurances to plaintiffs that BTEL had plans to improve its cash flow, which would allow it to pay off the November 2012 interest payment and the upcoming May 2013 interest payment. Plaintiffs contend that the plan to improve cash flow consisted of a short-term infusion from the Bakrie family to make the payments, which further deceived plaintiffs as to BTEL's financial health and status.

In November 2013, and then again in May 2014, BTEL defaulted on its interest payments on the notes. On the eve of the May 2014 payment date, BTEL issued a notice to bondholders that the company was engaged in negotiations concerning its operations and potential restructuring of the notes, and that pending these negotiations, BTEL would not be making any further interest payments on the notes. Plaintiffs were not part of these negotiations.

In response to this notice, plaintiffs and other noteholders, holding an aggregate of $106 million of the notes,

formed an Ad Hoc Committee in order to engage in discussions with BTEL about its financial and operational plans, including its plans to restructure the notes. The Ad Hoc Committee entered into a memorandum of understanding (MOU) with BTEL that they would "enter into a process to reach a resolution to the default," and that for a two-week period, the Ad Hoc Committee would not accelerate or enforce the debt. BTEL allegedly refused to grant the Ad Hoc Committee access to technical, financial and economic data that it required to assess BTEL's restructuring plan. In early August 2014, when the two-week MOU period expired, the MOU was not extended by the parties.

In light of BTEL's failure to make interest payments in November 2013, May 2014 and November 2014, plaintiffs, as holders of at least 25% of the outstanding notes, accelerated the principal and interest due under the notes, by notice of acceleration dated September 29, 2014. On November 9, 2014, BNY Mellon, as Indenture Trustee, issued a separate notice of acceleration. Plaintiffs commenced this action on or about September 22, 2014.

In addition to the allegations already noted, plaintiffs further allege that, in contravention of section 6.07 of the indenture and New York law, defendants attempted to undermine this litigation by "artificially stag[ing]" a restructuring

proceeding in Indonesia (referred to in the complaint as the PKPU), which involved the restructuring of BTEL's obligations under the notes. Specifically, one of BTEL's creditors, allegedly acting in concert with BTEL, commenced the PKPU against BTEL. While the PKPU was purportedly a contested proceeding, BTEL consented to it. On November 10, 2014, the Commercial Court of Central Jakarta appointed a supervisory judge and administrators who announced a process of less than 30 days for the filing and validation of claims, and for voting on a restructuring plan to be submitted by BTEL.

BTEL submitted a restructuring plan in the PKPU proceeding. The plan did not provide for revisions or the submission of a counterplan. Under the terms of the restructuring plan, the noteholders would lose all past due interest under the notes, would have 70% of the principal converted to BTEL stock with a 10-year holding period after approval of the plan, and would not receive interest going forward. The plan further proposed treating the noteholders as unsecured creditors. BTEL later submitted a new plan but refused to provide its creditors with a copy of it. On December 5, 2014, the administrators in the PKPU proceeding determined which claims would be accepted – and, thus, entitled to vote on the plan – or disallowed. On December 8, 2014, the accepted creditors voted on the plan; plaintiffs were

unable to vote, as their claims had been disallowed.

In their second amended verified complaint[1], plaintiffs asserted nine causes of action for: (1) breach of the notes, indenture and guarantees based on non-payment (asserted against BTEL, the issuer and the guarantors); (2) fraud against BTEL and the issuer for misrepresentations made during the offering; (3) aiding and abetting fraud against the offering defendants and B&B, based on misrepresentations made during the offering; (4) fraud against BTEL for misrepresentations made post-offering; (5) aiding and abetting fraud against the interim defendants (directors and commissioners joining BTEL after the offering), and B&B for misrepresentations made post-offering; (6) breach of fiduciary duty against all defendants[2]; (7) aiding and abetting breach of fiduciary duty against the individual defendants and B&B; (8) breach of contract against BTEL based on breach of sections 6.07 and 12.07 of the indenture; and (9) a declaratory

---

[1] The fraud-based claims initially were asserted in a separate action (*Universal Inv. Advisory SA v PT Bakrie Telecom TBK*, Index No. 653745/2014 [Sup Ct, NY Co][Scarpulla, J.], and were later consolidated with the remaining claims in the second amended complaint in this action.

[2] The motion court dismissed plaintiff's sixth cause of action for breach of fiduciary duty, finding the claim insufficient as a matter of law. As neither party is appealing this portion of the decision, it will not be addressed by this Court.

judgment that the PKPU proceeding and plan have no effect on plaintiffs' rights, or on the obligations of BTEL, the issuer or the guarantors under the notes and indenture, and that defendants are liable for plaintiffs' damages incurred in connection with the PKPU proceeding.

The manager defendants moved to dismiss the first cause of action insofar as asserted by plaintiffs Universal Investment Advisory SA (Universal Investment) and Vaquero Master EM Credit Fund Ltd. (Vaquero), and the second through ninth causes of action pursuant to CPLR 3211(a)(1), (3) and (7) and CPLR 3016(b). B&B and the individual defendants separately moved pursuant to CPLR 3211(a)(1), (3), (7) and (8) to dismiss the complaint. Plaintiffs cross-moved pursuant to CPLR 3211(c) to convert the manager defendants' motion to dismiss the first cause of action into a motion for summary judgment, and for summary judgment as to liability on that cause of action.

The motion court granted that portion of the motion by the individual defendants and B&B to dismiss the third, fifth and seventh causes of action on the ground of lack of personal jurisdiction, and thereby dismissed the complaint in its entirety as asserted against them. The court denied the motion as to the second and fourth causes of action for fraud during the pre and post-offering periods, and denied the motion of the manager

defendants to dismiss the first cause of action for breach of contract asserted by plaintiffs Universal Investment and Vaquero, finding that those plaintiffs had standing to bring that claim.

The court also granted plaintiffs' cross motion for summary judgment on liability under the notes, indentures and guarantees, and directed that the issue of damages be resolved at trial or upon other resolution of the rest of the action. The court, however, dismissed the eighth cause of action for additional breaches of contract as duplicative and unnecessary.

As relevant here, the motion court properly determined that it had jurisdiction over the manager defendants, given that they are all signatories to the indenture, which contains the New York forum selection clause. However, the court found that personal jurisdiction as to B&B and the individual defendants was lacking because they were not signatories to the indenture.[3] Moreover, the court found that under the closely related theory, plaintiffs had failed to allege the extensive involvement of any of those defendants with the indenture transaction, which would evidence a

[3] The motion court did not discuss the merits of the aiding and abetting claims (third, fifth and seventh causes of action) or the sufficiency of plaintiffs' allegations, since it dismissed those claims based on lack of personal jurisdiction. Because we are solely determining that jurisdictional discovery should have been permitted and are thus denying the motion to dismiss these three causes of action without prejudice, we will not consider the substantive allegations of these claims.

close enough relationship between the signatories and nonsignatories of the indenture as well as involvement in the subject transaction, such that it would be foreseeable that the nonsignatories would be subject to the forum selection clause.

We now reverse as to B&B and the individual defendants and find that the motion to dismiss the third, fifth and seventh causes of action should have been denied without prejudice and the parties permitted to conduct jurisdictional discovery because plaintiffs "have demonstrated that facts 'may exist' in opposition to the motion to dismiss and are therefore entitled to the disclosure expressly sanctioned by CPLR 3211" (*Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]). "Under New York law, a signatory to a contract may invoke a forum selection clause against a non-signatory if the non-signatory is 'closely related' to one of the signatories such that 'enforcement of the forum selection clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound'" (*Metro-Goldwyn-Mayer Studios Inc. v Canal+ Distributions S.A.S*, 2010 WL 537583, *5, 2010 US Dist LEXIS 12765, *15 [SD NY Feb. 9, 2010], quoting *Direct Mail Prod. Servs. Ltd. v MBNA Corp.*, 2000 WL 1277597, *3, 2000 US Dist LEXIS 12945, *8 [SD NY 2000]; *see also Tate & Lyle Ingredients Ams., Inc. v Whitefox Tech. USA, Inc.*, 98 AD3d 401 [1st Dept 2012]). If the nonsignatory party has an

ownership interest or a direct or indirect controlling interest in the signing party (*Metro-Goldwyn-Mayer Studios Inc.*, 2010 WL 537583, *5, 2010 US Dist LEXIS 12765, *15), or, the entities or individuals consulted with each other regarding decisions and were intimately involved in the decision-making process (*Tate & Lyle Ingredients Ams. Inc.*, 98 AD3d at 402), then, a finding of personal jurisdiction based on a forum selection clause may be proper, as it achieves the "rationale behind binding closely related entities to the forum selection clause [which] is to 'promote stable and dependable trade relations.'" (*id.*, quoting *Weygandt v Weco, LLC*, 2009 WL 1351808, *5, 2009 Del Ch LEXIS 87, *19 [Del Ch 2009]).

Here, plaintiffs allege that the individual defendants, by virtue of their senior management positions, power and decision-making authority, and B&B, as the parent company of BTEL and as a principal shareholder of 39.6% of BTEL's stock, had actual knowledge at the time of the offering that BTEL was insolvent and would be incapable of meeting its obligations under the notes; that they authorized, participated in, and promoted the offering; and that they caused the offering memoranda to be distributed into the marketplace.[4] This is enough, at this stage, to permit

[4] Plaintiffs further point out that the individual defendants did not refute in their affidavits submitted in support of the

jurisdictional discovery as to the nature of B&B's and the individual defendants' actual knowledge and role in the offering of the notes, and their responsibilities connected thereto, because this information, which may result in a determination that the nonsignatories are indeed "closely related" to the signing parties, is a fact that cannot be presently known to plaintiffs, but rather, is within the exclusive control of defendants (*see Peterson*, 33 NY2d at 466).

Although the motion court did not explicitly address defendants' champerty argument, it implicitly rejected it when it properly denied the manager defendants' motion to dismiss, on standing grounds, the breach of contract claim asserted by plaintiffs Universal Investment and Vaquero.

"Judiciary Law § 489 is New York's champerty statute. Section 489(1) restricts individuals and companies from purchasing or taking an assignment of notes or other securities 'with the intent and for the purpose of bringing an action or proceeding thereon'" (*Justinian Capital SPC v WestLB AG, N.Y. Branch*, 28 NY3d 160, 166 [2016]). Indeed, "[t]o constitute the offense [of champerty] the *primary purpose* of the purchase must be to enable [one] to bring a suit, and the intent to bring a

---

motion to dismiss that they had knowledge of, or directed, the offering.

suit must not be merely incidental and contingent" (*id.*, quoting *Moses v McDivitt*, 88 NY 62, 65 [1882]). Under the primary purpose analysis, there is a distinction "between acquiring a thing in action in order to obtain costs and acquiring it in order to protect an independent right of the assignee" (*id.* at 167, quoting *Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v Love Funding Corp.*, 13 NY3d 190, 198-199 [2009]), with only the former being champertous. However, and as set out in *Trust for Certificate Holders of Merrill Lynch Mtge. Invs.*, (13 NY3d at 195), the offense of champerty does not arise if a corporation or association takes an assignment for the purpose of collecting damages, by means of a lawsuit, "for losses on a debt instrument in which it holds a preexisting proprietary interest." This is because there is a difference "between one who acquires a right in order to make money from litigating it and one who acquires a right in order to enforce it" (*id.* at 200).

Here, the assignments to Universal Investment and Vaquero were not champertous. Universal Investment and Vaquero each held a "preexisting proprietary interest" in the notes (*see Trust for Certificate Holders of Merrill Lynch Mtge. Invs.*, 13 NY3d at 195). Pursuant to a written assignment dated September 2014, assignor/nonparty Tembo Sondirya Padone transferred to plaintiff

Universal Investment (the chairman of the Ad Hoc Committee and holder of about $4 million of its own notes, through an affiliate) his legal title only to approximately $87 million of notes. Padone retained full beneficial title to the proceeds of his notes. Pursuant to a written assignment dated September 2014, assignor/nonparty James Bonfils transferred to plaintiff Vaquero (who holds about $9.25 million of his own notes) legal title only to approximately $100,000 of his notes. Bonfils also retained full beneficial title to the proceeds of his notes. Pursuant to both assignments, Universal Investment and Vaquero are entitled to seek reimbursement of fees and expenses incurred in enforcing the assigned notes. Moreover, there are no allegations or evidence that Universal Investment or Vaquero ever paid a purchase price in exchange for the assignments of legal title. Indeed, all that they are entitled to seek is reimbursement for the assignors' pro rata share of costs and fees associated with bringing this lawsuit; neither plaintiff is entitled to retain the assignors' pro rata share of damages, should plaintiffs prevail.

As to plaintiffs' allegations of fraudulent conduct both pre-offering and post-offering, the motion court denied defendants' motion to dismiss, finding that plaintiffs' second and fourth causes of action were not duplicative of the breach of

contract claim and that plaintiffs had sufficiently pleaded definite, measureable and out-of-pocket damages in the form of the loss of the value of the notes and the interest due thereunder. The second cause of action was properly sustained. However, the fourth cause of action, which alleges fraud based on defendants' false post-offering assurances that they would make interest payments under the notes, is duplicative of the first cause of action, which alleges breach of contract in connection with nonpayment under the Notes (*Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008]), and thus, should have been dismissed.

As to plaintiffs' eighth cause of action for breach of contract based on the "no impairment" clause and forum selection clause of the indenture, the court granted defendants' motion to dismiss, finding that the claim was duplicative of the first cause of action for breach of contract for failure to make payment under the notes, indenture and guarantees. However, plaintiffs' claim for breach of the "no impairment" clause is not based on defendants' failure to make payment under the notes. Rather, the allegations that BTEL improperly staged the Indonesian restructuring proceeding to interfere with and undermine plaintiffs' rights under the indenture state a cause of action for breach of the "no impairment" clause (§ 6.07) of the indenture. Indeed, the type of damages available in connection

with an alleged breach of the "no impairment" clause may include the costs and fees and other expenses incurred in connection with the PKPU proceeding.

Defendants argue in their brief that plaintiffs' ninth cause of action for a declaratory judgment was properly dismissed. In fact, the motion court did not dismiss that cause of action, but rather "decline[d] to issue a declaratory judgment at [that] time," and did so without prejudice, finding that it could not, at that juncture and based on the allegations contained in the complaint, "determine whether there [was] a justiciable controversy for which declaratory relief would be available." Although plaintiffs argue the merits of this claim on appeal, the motion court did not dismiss this cause of action, and plaintiffs did not affirmatively seek declaratory relief in Supreme Court. Therefore, there is no appealable determination for us to consider.

Lastly, the motion court properly granted plaintiffs' cross motion for summary judgment as to liability on their first cause of action for breach of contract based on defendants' default under the notes, indenture and guarantees. Plaintiffs provided documentation of the unpaid notes, as well as the notice of acceleration provided to defendants, dated September 29, 2014, informing them that they were in default and demanding the

principal, premium if any, and interest due. Since we have rejected defendants' arguments as to champerty, and since defendants did not dispute the allegations of non-payment, they fail to raise an issue of fact in this regard.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

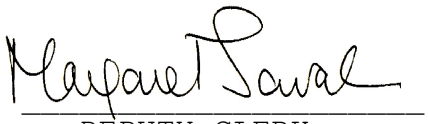
Accordingly, judgment of the Supreme Court, New York County (Saliann Scarpulla, J.), entered September 29, 2016, dismissing the complaint (third, fifth and seventh causes of action) as against the individual defendants and defendant PT Bakrie & Brothers TBK for lack of personal jurisdiction, should be reversed, on the law, without costs, the motion to dismiss as to said defendants denied without prejudice, and the court directed to permit the parties to conduct jurisdictional discovery. The orders of the Supreme Court, New York County (Saliann Scarpulla, J.), entered April 22, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiffs' cross motion to convert defendants' motion to dismiss the first cause of action (breach of contract) into a motion for summary judgment and granted plaintiffs' partial summary judgment on that cause of action, denied defendants' motion to dismiss the claims asserted by plaintiffs Universal Investment Advisory SA and Vaquero Master EM Credit Fund Ltd. for lack of standing, and to dismiss the

second and fourth causes of action (fraud), purportedly denied defendants' motion to dismiss the cause of action for a declaratory judgment, and granted defendants' motion to dismiss the eighth cause of action (breach of contract), should be modified, on the law and the facts, to grant defendants' motion to dismiss the fourth cause of action (fraud) as duplicative of the first cause of action (breach of contract), and to deny the motion to dismiss the eighth cause of action (breach of contract), insofar as it asserts a breach of section 6.07 of the indenture, and otherwise affirmed, without costs.

All concur.

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

ENTERED: AUGUST 29, 2017



DEPUTY CLERK