SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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SEAN CLIFFORD and LESLIE CLIFFORD,

Plaintiffs,

- v -

WILLIAM A. WEINER, M.D., NEXRAY MEDICAL IMAGING, P.C., PRENUVO OF CALIFORNIA, P.C., PRENUVO CLINIC CA1, LLC, PRENUVO, INC., PRENUVO OF GOLDEN STATE, P.C., PRENUVO, INC., doing business as PRENUVO NEW YORK CITY CANCER & DISEASE SCREENING (312 West 34th Street, New York, New York 10001), and SOLLIS HEALTH LA, P.C., A MEDICAL CORPORATION,

Defendants.

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INDEX NO. 805267/2024

MOTION DATE 10/06/2025
10/27/2025

MOTION SEQ. NO. 003, 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 124, 125

were read on this motion to/for ENFORCEMENT OF CHOICE OF LAW PROVISION IN PATIENT CONTRACT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 117, 118, 119, 120, 121, 122, 123, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146

were read on this motion to/for ENFORCEMENT OF CHOICE OF LAW PROVISION IN PATIENT CONTRACT.

This is an action to recover damages for medical malpractice based on alleged departures from good and accepted practice under both New York and California law, lack of informed consent, common-law negligence, gross negligence, negligent hiring and retention of healthcare personnel, strict products liability, breach of contract, and loss of spousal consortium. Under Motion Sequence 003, the defendants Prenuvo of California, P.C., Prenuvo Clinic CA1, LLC, and Prenuvo, Inc., doing business as Prenuvo New York City Cancer & Screening (312

West 34th Street, New York, New York 10001) (collectively the Prenuvo defendants),[1] move to enforce the choice-of-law clause set forth in Section 15 of the Patient Agreement and Consent entered into between the plaintiff Sean Clifford (the patient) and the defendant Prenuvo of California, P.C., that Clifford had signed on July 14, 2023 (the agreement). That clause provided, in relevant part, that "[t]he validity, interpretation, construction and performance of this Agreement will be governed by the laws of the State of California, without regard to any conflicts of law provisions. All parts of this Agreement apply to the maximum extent permitted by law." The plaintiff opposes that motion. Under Motion Sequence 004, the defendant radiologist William A. Weiner, M.D., who apparently is a doctor of osteopathy, moves to have the court deem him a "participant" in the agreement, and thereupon to enforce the choice-of-law clause. The plaintiff opposes that motion as well. Prenuvo's motion is granted only to the extent that the California choice-of-law provision in the agreement shall apply to the plaintiffs' breach of contract cause of action, which was asserted only against Prenuvo of California, P.C., and that motion is otherwise denied. Weiner's motion is granted only to the extent that he is deemed to be a third-party beneficiary of the agreement, and his motion is otherwise denied.

The crux of the plaintiff's claims against the defendants is that, on July 19, 2023, Weiner, while working for the Prenuvo defendants, misinterpreted a full-body magnetic resonance imaging (MRI) scan taken of the patient at a New York Prenuvo location on July 15, 2023. Specifically, the plaintiffs asserted that Weiner's interpretation was incorrect and incomplete, since Weiner failed to recognize and acknowledge the presence of stenosis, irregular narrowing, and a partial occlusion in the patient's proximal right middle cerebral artery, and that the patient consequently suffered a stroke on March 7, 2024 that would have been avoided by a proper interpretation of the MRI scan.

[1] Although the defendant Prenuvo of Golden State, P.C., was served with a copy of the summons and complaint, it neither answered nor moved with respect to the complaint. Hence, that entity is not included as one of the Prenuvo defendants.

Generally, a choice-of-law clause in a contract is valid and enforceable, as long as the law of the state that is agreed upon bears a reasonable relationship to the parties or the transaction (*see Edwards v Erie Coach Lines Co*., 17 NY3d 306, 318-319 [2011]; *Boss v American Express Fin. Advisors, Inc*., 15 AD3d 306, 307-308 [1st Dept 2005]). As the Prenuvo defendants correctly pointed out, to invalidate a choice-of-law clause, the opponent must show that its enforcement would be unreasonable or unjust, would contravene public policy, or is invalid because of fraud or overreaching (*see Boss v American Express Fin. Advisors, Inc*., 15 AD3d at 307-308; *see also Brown & Brown, Inc. v Johnson*, 25 NY3d 364, 368-369 [2015] [courts will not enforce agreements where the chosen law violates some fundamental principle of justice or some prevalent conception of good morals]; *Marsh USA, Inc. v Doerfler*, 46 Misc 3d 1208[A]; 2015 NY Slip Op 50020[U], *3, 4, 2015 NY Misc LEXIS 22, *10 [Sup Ct, N.Y. County, Jan. 9, 2015] [mere difference between a legal rule in the foreign state and the New York rule does not warrant a refusal to apply the foreign law]).

Neither party has cited, and research has revealed, no authority addressing the issue of whether a choice-of-law provision in a written contract between a patient and a medical provider is enforceable and, thus, supersedes New York's common-law choice-of-law jurisprudence with respect to causes of action sounding in medical malpractice, common-law negligence unrelated to medical malpractice, gross negligence, negligent hiring and retention of healthcare personnel, and strict products liability. The defendants rely only on authority applicable to commercial and employment disputes. The plaintiffs rely upon the decision of the Appellate Division, First Department, in *Fonda v Wapner* (103 AD3d 510, 510-511 [1st Dept 2013]), a medical malpractice action in which the Court affirmed an order denying that branch of the defendant's motion which was to dismiss the complaint on the ground that New York was an inconvenient forum, but had nonetheless granted that branch of the motion which sought to apply Colorado law to the claims at trial. That Court explained that the Supreme Court had

> "correctly applied an interest analysis to the choice-of-law issue, correctly determined that the conflicting wrongful birth laws at issue are loss-allocating rules, and correctly concluded that Colorado law applies (*see Cooney v Osgood Mach*., 81 NY2d 66, 72 [1993]). Indeed, under the second rule set forth in *Neumeier v Kuehner* (31 NY2d 121, 128 [1972]), which applies in this case, the 'place of injury' governs and is understood to be where the injury, or the last event necessary to make the defendant liable, occurred, even if the defendant did not actually engage in any actual tortious conduct in that location (*see Glunt v ABC Paving Co.,* 247 AD2d 871, 871 [4th Dept 1998]; *see also Schultz v Boy Scouts of Am*., 65 NY2d 189, 195 [1985]). Here, the last events necessary to make defendants liable, namely the birth and treatment of the subject child, occurred in Colorado"

(*Fonda v Wapner*, 103 AD3d at 510-511). The *Fonda* case, however, did not involve the enforcement a choice-of-law clause in a written contract. Rather, it only involved whether a New York court was required to apply Colorado law under the circumstances presented there, which necessitated the application of a "place of injury" rule to the choice-of-law question. The plaintiffs themselves essentially conceded that, all things being equal, the situs of the tortious conduct constitutes a "tiebreaker" factor (*see Cooney v Osgood Mach., Inc*., 81 NY2d 66, 77 [1993] [after analyzing choice-of-law rules based on the interests of the competing states in the dispute, loss-distribution factors, and conduct-regulating aspects, the Court concluded that the reason "locus tips the balance, of course, is that ordinarily it is the place with which both parties have voluntarily associated themselves"]).

Moreover, although the Prenuvo defendants correctly conceded that tort claims are typically outside the scope of contractual choice-of-law provisions, unless the express language of the provision is sufficiently broad to encompass the entire relationship between the contracting parties (*see Newage Garden Grove, LLC v Wells Fargo Bank, N.A*., 2023 NY Slip Op 32447[U], *7, 2023 NY Misc LEXIS 3644, *14-15 [Sup Ct, N.Y. County, Jul. 14, 2023] [Chan, J.]), the cases to which they cited, however, involved choice-of-forum and/or jurisdiction clauses (*see Korea Inv. & Sec. Co., Ltd. v Seabury Capital Group, LLC,* 86 Misc 3d 1234[A], 2025 NY Slip Op 51098[U], 2025 NY Misc LEXIS 6088 [Sup Ct, N.Y. County, Jul. 14, 2025] [Chan, J.] [forum clause that designated California as the exclusive venue and jurisdiction of any suit

arising under agreement was broad, and thus encompassed tort claims in the context of the parties' contract]; *Glencore, Ltd. v Kamca Trading SA*, 2025 NY Slip Op 31324[U], 2025 NY Misc LEXIS 2443 [Sup Ct, N.Y. County, Apr. 15, 2025] [forum selection clause applied to fraud claims since those claims arose out of an in connection with the parties' agreement]). None of the cases that the Prenuvo defendants cited involved medical malpractice claims where a patient had signed an agreement containing such a clause.

The court concludes that the choice-of-law provision in the agreement that is the subject of this action was not sufficiently broad to encompass the entire relationship between the contracting parties. Rather, it was limited to "the validity, interpretation, construction and performance of th[e] Agreement." Crucially, both New York and California jurisprudence limits the extent to which a breach of contract cause of action may be asserted in connection with a claim that primarily involves a medical provider's departure from applicable standards of care. In New York, to establish a cause of action alleging breach of contract, a plaintiff ultimately must demonstrate the "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009]; *see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009]). A breach of contract claim in relation to the rendition of medical services will withstand a test of legal sufficiency where a medical defendant "expressed a specific promise to accomplish some definite result" (*B.F. v Reproductive Medicine Assoc. of N.Y., LLP*, 136 AD3d 73, 81 [1st Dept 2015]; *see Leighton v Lowenberg*, 103 AD3d 530, 531 [1st Dept 2013]; *Scalisi v New York Univ. Med. Ctr.*, 24 AD3d 145, 147 [1st Dept 2005]; *Chaff v Parkway Hosp.*, 205 AD2d 571, 613 [2d Dept 1994]; *Nicoleau v Brookhaven Mem. Hosp.*, 201 AD2d 544, 545 [2d Dept 1994]; *Dodes v North Shore Univ. Hosp.*, 149 AD2d 455, 456 [2d Dept 1989]; *Monroe v Long Is. Coll. Hosp.*, 84 AD2d 576, 576-577 [2d Dept 1981]; *see also Robins v Finestone*, 308 NY 543, 546 [1955]; *Catapano v Winthrop Univ. Hosp.*, 19 AD3d 355, 355-356 [2d Dept 2005]). Moreover, a breach of contract cause of action may also be stated where a patient enters into an agreement with a

physician, pursuant to which the patient agrees to retain the physician's services in exchange for a specific promise that the physician would provide the patient with certain medical services in a particularized fashion, and the physician does not provide the services that were agreed to, or provide them in the manner agreed to (*see Duquette v Oliva*, 75 AD3d 727, 728 [3d Dept 2010]; *Nicoleau v Brookhaven Mem. Hosp.*, 201 AD2d at 545). Under California law, "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff" (*Oasis West Realty, LLC v Goldman*, 51 Cal4th 811, 821 [2011]). In California,

> "if a plaintiff can prove to a properly instructed jury that a surgeon has clearly promised a particular result (as distinguished from a mere generalized statement that the result will be good), and that the patient consented to an operation or other procedure in reliance on that promise, there can be recovery on the theory of warranty (or, to give the theory its more accurate name, breach of contract)"

(*Depenbrok v Kaiser Found. Health Plan, Inc.*, 79 Cal App 3d 167, 171 [2d Dist, 4th Div 1978]; *see Brown v Bleiberg*, 32 Cal3d 426, 431 n 1 [1982] [plaintiff's breach of warranty cause of action was premised upon defendants' obtaining plaintiff's consent to undergo operation by representing that the contemplated surgery was a "simple and uncomplicated removal of calluses" while intending to, and actually performing, "major foot surgery"]; *Herrera v Superior Ct.*, 158 Cal App 3d 255, 261 [2d Dist, 4th Div 1984]; *McKinney v Nash*, 120 Cal App 3d 428, 442 [3d Dist 1981] ["To recover for breach of warranty or contract in a medical malpractice case, there must be proof of an express contract by which the physician clearly promises a particular result and the patient consents to treatment in reliance on that promise. . . . The promise of a particular result is to be distinguished from the mere generalized statement that the result of treatment will be good"]; *Jamison v Lindsay,* 108 Cal App 3d 223, 234 [1st Dist, 4th Div 1980] ["The theory of express warranty is applicable to a medical personal injury case only when the physician promises that a certain result will follow from a procedure or treatment, and the patient consents to treatment in reliance on that promise"]).

In the instant action, the plaintiffs' breach of contract cause of action was asserted solely against Prenuvo of California, P.C., and was premised upon allegations that this defendant had included the following representation in the agreement:

> "radiology is built on 'pattern recognition'. Prenuvo can perform such highly accurate radiology readings because it has almost 10 years of experience doing so. The Reading you will receive benefits from all the readings that come before it in that it creates a body of knowledge and catalog of conditions that that be referred to in informing a diagnosis or potential differential diagnoses,"

and the following representations on its website:

> "every Prenuvo report is carefully interpreted and reported by a radiologist. They'll also provide helpful context in the report for you and your doctor.
>
> "our radiologists are specialized in whole body screening, rather than simply focusing on individual organs. This means you get holistic insights that keep your entire health in mind.
>
> "We continually develop our radiology tools specifically for radiologists, making it easier for them to conduct screenings and assess your risks accurately.
>
> "when your results are ready, you'll get a comprehensive report in the Prenuvo app. A Prenuvo nurse practitioner will walk you through your results, and call out the things that you may want to bring up with your doctor.
>
> "Our radiologists have assessed every condition's risk and contextualized it for you, from minor/benign observations to more critical insights — complete with annotated key images."

The plaintiffs alleged that this defendant breached the agreement and the promises made on its website solely because they informed the patient that the results of his scan were "normal," when, in fact, they were not.

Although the court does not have before it a motion seeking summary judgment dismissing the breach of contract cause of action, it concludes that the allegations set forth in the breach of contract cause of action did not identify a specific promise by Prenuvo of California, P.C., to accomplish some definite result, and did not articulate a specific promise that Prenuvo of California, P.C., would provide the patient with certain medical services in a particularized fashion but failed to provide them. Rather, it alleged a simple failure to diagnose the patient's true condition, thus causing injury, which is a species of a claim sounding in

medical malpractice (*see Perez v Fitzgerald,* 115 AD3d 177, 178 [1st Dept 2014]; *Perlin v King*, 36 AD3d 495, 495 [1st Dept 2007]; *see generally Zabary v North Shore Hosp. in Plainview,* 190 AD3d 790, 795 [2d Dept 2021]; *Lewis v Rutkovsky*, 153 AD3d 450, 451 [1st Dept 2017]; *Monzon v Chiaramonte*, 140 AD3d 1126, 1128 [2d Dept 2016] ["(c)ases . . . which allege medical malpractice for failure to diagnose a condition . . . pertain to the level or standard of care expected of a physician in the community"]; *O'Sullivan v Presbyterian Hosp. at Columbia Presbyterian Med. Ctr.*, 217 AD2d 98, 101 [1st Dept 1995]). The court expresses no opinion as to the continuing validity of the breach of contact cause of action, but, in light of the foregoing, it nonetheless concludes that the choice-of-law provision in the subject agreement cannot be distended to cover non-contractual causes of action such as medical malpractice, lack of informed consent, common-law negligence, gross negligence, negligent hiring and retention of healthcare personnel, and strict products liability. Rather, to the extent that the breach of contract cause of action remains viable, the provision only applies to that cause of action itself.

The court further concludes that Weiner is covered by the agreement, even though he is not specifically named therein. In this respect, the agreement expressly provided that

> "[t]his Patient Agreement and Consent reviews the benefits, risks and limitations of undergoing a screening test through Prenuvo, Inc. *and its affiliates and contractors* ('Prenuvo') to screen you for certain types of medical conditions, as indicated on the Prenuvo website for your test ('Test').

(emphasis added). Since the court has concluded that California law is applicable to the breach of contract cause of action, it notes that, under California law,

> "[a] third party beneficiary is someone who may enforce a contract because the contract is made expressly for his [or her] benefit. A third party beneficiary is someone who may enforce a contract because the contract is made expressly for his benefit. The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [W]here . . . the issue [of whether a third party is an intended beneficiary] can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, the issue becomes one of law that we resolve independently"

(*Jensen v U-Haul Co. of California,* 18 Cal. App. 5th 295, 301 [4th Dist, 2d Div 2017]). The court concludes that the agreement was expressly made not only for the benefit of Prenuvo of California, P.C., but its employees as well. Nonetheless, even though Weiner is covered by the agreement, the choice-of-law provision does not apply to him, since the breach of contract claim was not asserted against him, and all of the causes of action that were asserted against him were non-contractual causes of action, to which the choice-of-law provision is inapplicable.

The remaining contentions of the Prenuvo defendants and Weiner are without merit.

Accordingly, it is,

ORDERED that the motion of the defendants Prenuvo of California, P.C., Prenuvo Clinic CA1, LLC, and Prenuvo, Inc., doing business as Prenuvo New York City Cancer & Screening (312 West 34th Street, New York, New York 10001) (MOT SEQ 003), is granted only to the extent that it is declared that the California choice-of-law provision set forth at section 15 of the July 14, 2023 agreement between Prenuvo of California, P.C., and the plaintiff Sean Clifford is applicable only to the breach of contract cause of action that the plaintiffs asserted against Prenuvo of California, P.C., and that motion is otherwise denied; and it is further,

ORDERED that the motion of the defendant William A. Weiner, M.D. (MOT SEQ 004), is granted only to the extent that it is declared that he is covered by, and a third-party beneficiary of, the July 14, 2023 agreement between Prenuvo of California, P.C., and the plaintiff Sean Clifford, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

12/18/2025
DATE

JOHN J. KELLEY, J.S.C.

MOTION 003:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	**X**	**GRANTED IN PART**	**OTHER**
MOTION 004:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	**X**	**GRANTED IN PART**	**OTHER**