SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 9, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, Román, JJ.

4058 Nancy Botwinik, etc., Index 6994/06
Plaintiff-Appellant,

-against-

Michael D. Moseson, M.D., et al.,
Defendants-Respondents.

_____

Victor M. Serby, Woodmere, for appellant.

Law Offices of Charles E. Kutner, LLP, New York (Charles E. Kutner of counsel), for respondents.

_____

Judgment, Supreme Court, Nassau County (F. Dana Winslow, J.), entered on or about September 28, 2009, in favor of defendants, dismissing the complaint, and bringing up for review an order, same court and Justice, entered on or about May 18, 2009, which granted defendants' oral motion in limine to preclude the testimony of plaintiff's expert and dismiss this medical malpractice action, unanimously reversed, on the law without costs, the motion denied, and the complaint reinstated.

In making their oral motion, after the jury was empaneled and before opening arguments, defendants argued that plaintiff's proposed expert, though a highly qualified registered nurse, lacked the necessary qualifications to give a medical opinion as to the requisite standard of informed consent (*see* CPLR 4401-a; *Orphan v Pilnik*, 15 NY3d 907 [2010]).

In opposition, plaintiff relied partially upon the deposition testimony of the defendant doctor which was not before the court, and the CPLR 3101(d) disclosure of the nurse's opinion. In addition, plaintiff orally cross-moved to substitute the testimony of a medical doctor for the testimony of the nurse, if the court ruled that plaintiff's offer was inadequate to establish the requisite prima facie claim. Apparently the court gave plaintiff's counsel a break to research the issue of the nurse's qualification to give an opinion under New York law, but did not read the deposition testimony. The court granted defendants' in limine motion and sub silentio denied plaintiff's.

CPLR 4401-a states that "[a] motion for judgment at the *end of the plaintiff's case* must be granted as to any cause of action for medical malpractice based solely on lack of informed consent

if the plaintiff has failed to adduce expert medical testimony in support of the alleged qualitative insufficiency of the consent" (emphasis added).

The grant of dismissal pursuant to CPLR 4401-a was an abuse of discretion, given that the timing of defendants' oral application was not at the end of plaintiff's case, the record on which the court ruled was sparse and the court failed to consider plaintiff's offer to substitute a medical doctor's opinion for the nurse's (*see Jean-Louis v City of New York*, 60 AD3d 737, 738 [2009] [court erred in dismissing the complaint before the plaintiff had completed her proof]; *Greenbaum v Hershman*, 31 AD3d 607 [2006] ["plaintiff should have been afforded the opportunity to conclude her case" and present expert medical testimony regarding the qualitative insufficiency of her consent]).

Because defendants chose to move orally as opposed to making a formal motion on notice, plaintiff had little opportunity to develop a full record and be heard. Moreover, courts favor disposition of cases on the merits rather than on oral application made after a jury is impaneled and waiting (*see*

Murray v Brookhaven Mem. Hosp. Med. Ctr, 73 AD3d 878, 879 [2010]; *Williams v Naylor*, 64 AD3d 588, 589 [2009]).

Accordingly, we reverse, deny defendants' motion and reinstate the complaint.

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

ENTERED: JUNE 9, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4916 Citibank, N.A., Index 651333/10
Plaintiff-Respondent,

-against-

Allen Silverman,
Defendant-Appellant.

_____

Brown & Whalen, P.C., New York (Rodney A. Brown of counsel), for appellant.

Hughes, Hubbard & Reed LLP, New York (Marc A. Weinstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 3, 2011, which granted plaintiff's motion for summary judgment in lieu of complaint and referred the issues of sanctions, interest, and attorneys' fees to a special referee, unanimously modified, on the law, to delete the issue of sanctions from the issues referred to the special referee, and otherwise affirmed, without costs.

Plaintiff made a prima facie case with respect to the letter of credit on which it seeks to recover by submitting the letter of credit and the forbearance agreement, in which defendant acknowledged his repayment obligations under the letter of credit and the amount thereof (*see Cantrade Privatbank AG. Zrich v Bangkok Bank Pub. Co.*, 256 AD2d 11, 12 [1998]).

Defendant failed to raise a triable issue of fact sufficient to defeat plaintiff's motion with respect to either the letter of credit or the note signed by him. Even if defendant were to prevail on his claims under the Bank Holding Company Act (BHCA) and the Equal Credit Opportunity Act (ECOA) (15 USC § 1691[a][1]), those claims would not prevent plaintiff from enforcing the note and letter of credit (*see Silverman v Eastrich Multiple Inv. Fund, L.P.*, 51 F3d 28, 33 [3d Cir 1995] [ECOA violation will not void underlying credit transaction]; 12 USC § 1975 [remedy for violation of BHCA is treble damages]; *see also Cohen v Natif*, 202 AD2d 332, 333 [1994], *lv dismissed in part, denied in part* 83 NY2d 996 [1994] [defendant's counterclaims alleging discrimination "are separable from the main cause of action and are not a bar to the entry of judgment in favor of plaintiff"] [citation omitted]).

Defendant does not contend that the note and letter of credit are void due to plaintiff's alleged negligent representation and breach of fiduciary duty. Rather, he contends that he would be entitled to a set-off on the amount due under those documents. Therefore, his negligent misrepresentation and fiduciary duty claims can be severed (*see Midtown Neon Sign Corp. v Miller*, 196 AD2d 458, 459 [1993]).

The only claims that would affect plaintiff's ability to bring an action on the note and letter of credit are defendant's arguments that plaintiff orally agreed to forbear after the written forbearance agreement expired and waived its rights under the note and letter of credit. However, the note, letter of credit and forbearance agreement all contain enforceable provisions to the effect that they cannot be changed orally (*see* General Obligations Law § 15-301[1]). While provisions such as these may be waived (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]), plaintiff repeatedly said that it was not giving up any of its rights, and we will not presume that it waived them (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]). In addition, while an oral agreement to modify a written contract will be effective if there has been partial performance thereof that is "unequivocally referable to the modification" (*Rose*, 42 NY2d at 341), defendant's payments in April and May 2010 were not unequivocally referable to the alleged oral agreement to forbear. Rather, they were referable to plaintiff's February 2010 proposal, defendant's February 2010 counterproposal and the May 2010 loan modification agreement, that was never signed.

Assuming, arguendo, that CPLR 3212(f) applies to an action commenced under CPLR 3213, defendant's affidavit failed to show

that "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212[f]; *see also Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [2006], *lv denied* 8 NY3d 804 [2007]).

The motion court properly dismissed defendant's counterclaim alleging a violation of the Bank Holding Company Act (BHCA), (12 USC § 1972[1][C]). When a bank engages in traditional banking practices, it cannot be liable under the BHCA (*see BC Recreational Indus. v First Natl. Bank of Boston*, 639 F2d 828 [1st Cir 1980]). "The anti-tying provisions [of the BHCA] were not intended to interfere with or impede appropriate traditional banking activities through which banks safeguard the value of their investment" (*In re Adelphia Communications Corp.*, 365 BR 24, 76 [SD NY 2007] *citing Nordic Bank PLC v Trend Group Ltd.*, 619 F Supp 542, 554 [SD NY 1985]).

To demand additional collateral from a debtor who is in default in exchange for extending that debtor's letter of credit is well within traditional banking practices. Indeed, it is commonplace (*see F.D.I.C. v Blankinship*, 986 F2d 1427 [10th Cir. 1992] ["As a condition to renegotiating debts, banks can properly require additional collateral and impose other terms designed to ensure payment"] [citations omitted]). That the demand for

additional collateral concerned the property of other family members does not take it out of the realm of traditional banking practices (*see Sanders v First Natl. Bank & Trust Co.*, 936 F2d 273, 278 [6th Cir. 1987]).

Defendant's counterclaim for breach of the implied covenant of good faith and fair dealing fails because, as we have found, there was no oral forbearance agreement (*see Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v Salomon Bros. Intl.*, 251 AD2d 137 [1998], *lv denied* 95 NY2d 762 [2000]). Even if, arguendo, plaintiff orally agreed to forbear while the parties negotiated, we would still reject defendant's claim of bad faith on the part of plaintiff (*see Massachusetts Mut. Life Ins. Co. v Gramercy Twins Assoc.*, 199 AD2d 214, 218 [1993]).

Defendant's counterclaims for negligent misrepresentation and breach of fiduciary duty also fail. His conclusory allegations that his relationship with plaintiff was more than that of lender and borrower and that he relied on plaintiff's advice are insufficient to raise the inference that this bank-borrower relationship was special (*see e.g. Korea First Bank of N.Y. v Noah Enters., Ltd.*, 12 AD3d 321, 323 [2004], *lv denied* 4 NY3d 710 [2005]). Even if, arguendo, there were a special relationship between the parties, defendant failed to raise the

inference that he reasonably relied on incorrect information imparted by plaintiff (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *Global Mins.*, 35 AD3d at 99; *P. Chimento Co. v Banco Popular de Puerto Rico*, 208 AD2d 385, 385 [1994]).

Defendant also fails to make a prima facie case of age discrimination under the ECOA. Even if plaintiff raised defendant's age as an issue during negotiations, it subsequently offered him a term sheet and a loan modification agreement. As for defendant's claim of discrimination on the basis of marital status, essentially based on 12 CFR 202.7(d)(5), his own affidavit and his lawyer's affidavit show that plaintiff did not require his wife to furnish collateral. Rather, plaintiff gave defendant various options, one of which was to give plaintiff a lien against his cooperative apartment, that he co-owned with his wife.

Because plaintiff did not seek sanctions, the motion court should not have referred that issue to the special referee.

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

ENTERED: JUNE 9, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5298 The People of the State of New York, Dkt. 45527C/04
Respondent,

-against-

Daniel Peart,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Kerry Elgarten of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Thomas Farber, J.), rendered January 17, 2007, convicting defendant, after a jury trial, of operating a motor vehicle while under the influence of alcohol (two counts) and criminal mischief in the fourth degree, and sentencing him to 3 years' probation and a $500 fine, unanimously affirmed.

Defendant did not preserve his challenge to the sufficiency of the evidence, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations.

This case turned on whether defendant was intoxicated at the

time he was driving, as opposed to becoming intoxicated after driving. The police did not observe defendant driving a car. Instead, they arrested defendant about 40 minutes after his car struck several parked cars. At trial, defendant claimed that during the time between the accident and his arrest he went home and drank a substantial amount of alcohol. According to defendant, his blood alcohol content of .199 thus reflected his condition at the time he gave a breath sample, but not at the time he was driving. However, a witness testified that defendant showed signs of intoxication immediately after the accident, and the arresting officers testified that defendant admitted he had been drinking before he drove home. Accordingly, the evidence supports the conclusion that defendant was intoxicated when he was driving.

Defendant did not preserve any of his arguments concerning the court's charge, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Nothing in the court's charge misled the jury or undermined defendant's theory of defense. The court properly charged as follows: "[E]vidence that the defendant operated a motor vehicle and that thereafter the defendant had .08 of one percent or more by weight of alcohol in his . . . blood permits, but does not require the inference that at the time of the operation of the motor vehicle the defendant had .08 percent or

more by weight of alcohol in his . . . blood." The court made it clear that this was only a permissible inference, and that the burden of proving defendant's guilt beyond a reasonable doubt remained with the People.

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

ENTERED: JUNE 9, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5299 GS Adjustment Company, Incorporated, Index 110971/07
Plaintiff-Respondent,

-against-

Roth & Roth, L.L.P., et al.,
Defendants-Appellants.

_____

David A. Roth, New York, for appellants.

Wilofsky, Friedman, Karel & Cummins, New York (David B. Karel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered April 12, 2010, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the breach of contract claim against defendant Roth & Roth, LLP, unanimously affirmed, without costs.

Defendant Roth & Roth retained plaintiff, a public adjuster, to "advise and assist in the preparation, presentation and adjustment of the claim" for business interruption losses following the September 11, 2001 attacks on the World Trade Center. In support of their motion for summary judgment, defendants argued that no fee was due under the contract because plaintiff breached the contract by failing to provide advice and assistance, or to adjust the claim. In light of the

discrepancies between the Roth affidavit and Schwartz's testimony, defendants failed to make an initial prima facie showing of entitlement to summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Issues of fact exist as to whether or not plaintiff provided valuable services in connection with the presentation and adjustment of Roth & Roth's claim against its insurance carrier sufficient to warrant recovery of a fee under the contract (*see* 11 NYCRR 25.10).

Defendants' contention that plaintiff's claim depends on an oral modification of the contract is without merit. Plaintiff's principal merely testified that defendant Roth told him at some point that no further assistance was needed from him.

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

ENTERED: JUNE 9, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5300 In re Anonymous, Index 103380/10
Petitioner-Appellant,

-against-

New York State Department
of Health, et al.,
Respondents-Respondents.

Cardillo Law, P.C., Brooklyn (Harry A. Cardillo of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered July 13, 2010, which denied the petition brought pursuant to CPLR article 78 for a permanent injunction prohibiting respondents from proceeding with an investigation into professional misconduct by petitioner, a physician, and declaring respondents' discovery procedures unlawful and unconstitutional, and granted respondents' motion to dismiss the petition, unanimously affirmed, without costs.

Petitioner contends that there was excessive delay in bringing charges against her after the determination was made that charges were warranted. Conclusory allegations that the passage of time has dulled witnesses' memories do not demonstrate

actual prejudice (*Matter of Cortlandt Nursing Home v Axelrod*, 66 NY2d 169, 181 [1985], *cert denied* 476 US 1115 [1986]). Moreover, more than half of this period was taken up with negotiations between the parties, which petitioner asked to be conducted before formal charges were issued against her. Thus, we find that petitioner failed to establish unreasonable delay pursuant to State Administrative Procedure Act § 301(1) ("all parties shall be afforded an opportunity for hearing within reasonable time"), assuming its applicability to the issues raised by petitioner.

Nor has petitioner established excessive delay pursuant to Public Health Law § 230(10)(a)(iv), which explicitly prescribes the time frame within which the director of the Office of Professional Medical Conduct (OPMC) must direct agency counsel to prepare charges. We reject petitioner's contention that this provision implies a time limit for the investigation of the charges, after which the investigation may be permanently enjoined. The delay in this case was reasonable under State Administration Procedure Act § 301 and there has been no prejudice to the licensee.

We also reject petitioner's contention that OPMC has a policy to withhold discovery until 10 days before a hearing and

that the policy is unwritten, unpromulgated, and unconstitutional. This contention is not only completely unsubstantiated but also irrelevant. Petitioner does not challenge the validity of 10 NYCRR 51.8, which governs disclosure in cases involving possible license revocation and provides for disclosure "[a]t least seven days prior to the first scheduled date of hearing."

As we have rejected petitioner's arguments on the merits, we need not reach the issues of failure to exhaust administrative remedies, the apparent lack of ripeness or the mootness of certain arguments.

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

ENTERED: JUNE 9, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5301 Shawn Torres, Index 107315/09
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

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

Silbowitz, Garafola, Silbowitz & Schatz, New York (Mitchell L. Perry of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered December 29, 2010, which, in an action for personal injuries allegedly sustained when plaintiff slipped on a substance as he descended a stairway in defendant's building and fell, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Defendant established its entitlement to judgment as a matter of law. Defendant demonstrated that it neither created nor had actual or constructive notice of the allegedly defective condition. The building's supervisor of caretakers stated that the janitorial schedule for the building included that the

subject stairs be cleaned in the hour before plaintiff fell (*see Love v New York City Hous. Auth.*, 82 AD3d 588 [2011]; *Raghu v New York City Hous. Auth.*, 72 AD3d 480, 482-483 [2010]).

Plaintiff's opposition failed to raise a triable issue of fact. Evidence of a general awareness of debris and spills in the stairway does not require a finding that defendant is deemed to have notice of the condition that caused plaintiff to fall (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *DeJesus v New York City Hous. Auth.*, 53 AD3d 410, 411 [2008]).

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

ENTERED: JUNE 9, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5303 & M-2009 In re Nicolae Calinescu, Petitioner-Appellant, Index 260131/10

-against-

State of New York - DHCR Office of Rent Administration, Respondent-Respondent.

_____

Nicolae Calinescu, appellant pro se.

Garry R. Connor, New York (Jack Kuttner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered July 30, 2010, which denied the petition seeking to annul a determination of respondent Division of Housing and Community Renewal (DHCR), dated January 15, 2010, denying petitioner tenant's petition for administrative review of the denial of his rent overcharge complaint on the basis that the owner of the building had failed to file a registration for the subject apartment, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR properly determined that petitioner's apartment was correctly registered, and thus, that there was no rent overcharge. This finding had a rational basis in the record and was not arbitrary and capricious or an abuse of discretion (*see*

CPLR 7803[3]; *Matter of Hicks v New York State Div. of Hous. & Community Renewal*, 75 AD3d 127 [2010]). The records of DHCR and the owner explained the minor discrepancy in the designation of petitioner's apartment.

DHCR was not required to provide the administrative "return" to petitioner (*White v Joy*, 95 AD2d 757 [1983]). In any event, the return was available for petitioner's inspection (*id.*).

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

M-2009 - *Calinescu v State of NY - DHCR*

Motion to strike brief denied.

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

ENTERED: JUNE 9, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5305-
5306 Index 601052/09

CRT Investments, Limited, et al.,
Plaintiffs-Appellants,

-against-

BDO Seidman, LLP, et al.,
Defendants-Respondents,

J. Ezra Merkin, et al.,
Defendants.

_____

Susman Godfrey LLP, New York (Suyash Agrawal of counsel), for appellants.

Edwards Angell Palmer & Dodge LLP, New York (Ira G. Greenberg of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Richard B. Lowe, III, J.), entered May 21, 2010, dismissing the complaint against defendants BDO Seidman, LLP and BDO Tortuga, and bringing up for review an order, same court and Justice, entered May 7, 2010, insofar as it granted said defendants' motions to dismiss the complaint, unanimously affirmed, with costs. Appeal from the order, entered May 7, 2010, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

This litigation arises out of plaintiffs' investment in the Ascot Fund, Limited, a Cayman Islands hedge fund audited by BDO Tortuga, which was a "feeder fund" for Ascot Partners, L.P., a

New York hedge fund audited by BDO Seidman. Plaintiffs asserted causes of action for fraud, aiding and abetting fraud, negligence, and gross negligence against these outside auditors for failing to disclose that the fund was ultimately managed by Bernard Madoff.

Plaintiffs failed to meet their burden of demonstrating the existence of personal jurisdiction over BDO Tortuga under New York's long arm statute (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 95 [2010]). Plaintiffs failed to rebut defendant's affidavit (*see Roldan v Dexter Folder Co.*, 178 AD2d 589, 590 [1991]), which established that BDO Tortuga has no presence in New York, that it performed the audit of the Ascot Fund in the Cayman Islands, pursuant to engagement letters executed in, and sent from, the Cayman Islands, and that there were only limited emails with anyone in New York "affiliated in any way with Ascot Fund." Although plaintiffs argue that BDO Tortuga relied upon the audit work that BDO Seidman had performed with respect to the existence and valuation of Ascot Partners and Ascot Fund's investments, there is no basis to conclude that BDO Tortuga should have reasonably expected to defend its actions in New York (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466 [1988]). All of the relevant parties to the cause of action (plaintiff,

defendant, and audit client), and all of the work that BDO Tortuga performed were in the Cayman Islands. Nor does sending a few emails and engagement letters into New York alter this result (*see Kimco Exch. Place Corp. v Thomas Benz, Inc.*, 34 AD3d 433, 434 [2006], *lv denied* 9 NY3d 803 [2007]).

Plaintiffs' alternative argument, that BDO Tortuga is subject to personal jurisdiction under CPLR 302(a)(3), is also unavailing. In the context of a commercial tort, where the damage is solely economic, the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred (*see O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 201-02 [2003]; *Mid-Atlantic Residential Invs. Ltd. Partnership v McGuire*, 166 AD2d 205, 206-07 [1990]). Plaintiff's claim that it was sold the investment in New York is irrelevant, because the injury did not arise out of its purchase of the investment here, but, rather, out of BDO Tortuga's alleged failure to appropriately perform its audit services. Defendants' affidavit also established that BDO Tortuga did not derive "substantial revenue" from interstate or international commerce (*see LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]).

Plaintiffs have failed to state a claim against BDO Seidman

for fraud, aiding and abetting fraud and negligent misrepresentation. Although an intent to commit fraud is divined from the surrounding circumstances, this does not mean "constructive knowledge, but actual knowledge of the fraud as discerned from the surrounding circumstances" (*Oster v Kirschner*, 77 AD3d 51, 56 [2010]). Plaintiffs' allegations of GAAS violations "without corresponding fraudulent intent" are insufficient to state a securities fraud claim against an independent accountant (*Rothman v Gregor*, 220 F3d 81, 98 [2d Cir 2000] [internal quotation marks and citation omitted]). "Substantial assistance," a necessary element of aiding and abetting fraud, means more than just performing routine business services for the alleged fraudster (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 11 [2008]). The complaint fails to plead a factual basis for inferring that BDO Seidman did anything more than perform the routine business of auditing. Where, as here, direct contact between the accountant and the plaintiff is minimal or nonexistent, the plaintiff cannot recover for the accountant's alleged negligence (*see e.g. Security Pac. Bus. Credit v Peat Marwick Main & Co.*, 79 NY2d 695, 706 (1992]. The fact that plaintiffs were entitled to and received a copy of the audited financial statements, or that BDO

Seidman knew that the investors would rely upon the information contained in the financial statements, does not establish the requisite linking conduct (*see Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 94-95 [2003]). BDO Seidman's work in the course of the audit was performed pursuant to professional standards applicable in the context of any audit, and was not undertaken pursuant to any specific duty owed to plaintiffs (*id.*). Therefore, plaintiffs cannot establish the direct nexus necessary to give them a claim against BDO Seidman for negligent misrepresentation.

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

ENTERED: JUNE 9, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5307-
5307A In re David Goliath G., Jr.
and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

David G.,
Respondent-Appellant,

McMahon Services for Children,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

Joseph T. Gatti, New York, for respondent.

Lawyers for Children, Inc., New York (Michael Moorman of counsel), attorney for the children.

_____

Orders, Family Court, Bronx County (Gloria Sosa-Lintner, J.), entered on or about November 25, 2009, which, to the extent appealed from as limited by the briefs, terminated respondent father's parental rights with respect to the subject children and transferred custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The court's determination that it would be in the children's best interests to be freed for adoption is supported by the

preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *see also Matter of Jayden C. [Michelle R.]*, 82 AD3d 674, 675 [2011]). The record shows that respondent is not able to financially or emotionally care for his children, and that the children have thrived in their foster home. Under the circumstances, a suspended judgment is not warranted (*Jayden*, 82 AD3d at 675).

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

ENTERED: JUNE 9, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5309-
5310 Index 108531/09

Lijo Panghat, M.D.,
Plaintiff-Appellant,

-against-

New York Downtown Hospital,
Defendant-Respondent.

_____

Lijo Panghat, appellant pro se.

Proskauer Rose LLP, New York (Anne C. Manolakas of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 18, 2010, which granted defendant's motion to dismiss the complaint for failure to state a cause of action, deemed to be an appeal from judgment, same court and Justice, entered June 29, 2010, dismissing the complaint, and as so considered, unanimously affirmed, without costs. Appeal from order, entered June 30, 2010, unanimously dismissed, without costs, as abandoned.

The motion court properly granted the motion to dismiss the complaint, which attempted to set forth a cause of action for defamation. To the extent plaintiff complains about statements made by his supervisors regarding his IM-ITE score, plaintiff does not contest that he received a very low score on that exam,

and thus the truth or substantial truth of the statements is a complete defense to the claim of defamation (*Fairley v Peekskill Star Corp.*, 83 AD2d 294, 297 [1981]; *see also American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 420-21 [1998]).

To the extent plaintiff attempts to plead a claim for "breach of confidentiality" for the failure to keep his IM-ITE score entirely confidential, he has not suggested any basis in common law or statute, or even by contract, which would prohibit his supervisors from discussing the score internally in connection with his employment review. Accordingly, that cause of action also fails.

Any other statements regarding plaintiff's poor performance made by his supervisors in the context of an internal employment review, were opinions and thus are not actionable (*see Ott v Automatic Connector*, 193 AD2d 657, 658 [1993]). In addition, those statements are protected by the common interest privilege (*see Dillon v City of New York*, 261 AD2d 34, 40 [1999]). Plaintiff merely asserted in conclusory fashion that the statements at issue were made with malice, which is insufficient to overcome the privilege (*see Hollander v Cayton*, 145 AD2d 605, 606 [1988]).

Defendant's statements to the New York State Division of

Human Rights in response to plaintiff's having filed a human rights complaint were also privileged pursuant to the judicial proceeding privilege and are not actionable (*see Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 920 [2010]; *see also Andrews v Hansford Mfg. Corp.*, 2002 WL 193139, at *3 [Sup Ct, Monroe County 2002]).

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

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

ENTERED: JUNE 9, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5311-
5312 Index 104767/09

Nina (Formerly Sebastiana)
Viola Montepagani,
Petitioner-Appellant,

-against-

The New York City Department
of Health, Division of Vital Records,
Respondent-Respondent.

_____

Lawrence B. Goldberg, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 7, 2011, which, upon granting petitioner's motion to renew, adhered to its prior order (same court and Justice), entered August 30, 2010, which denied the petition and dismissed the proceeding, unanimously affirmed, without costs.

We find that the IAS court property denied the petition both in its original order and upon renewal. As a preliminary matter, because petitioner's proofs failed to raise any issue of material fact, the proceeding was properly determined without a hearing *[see, Battaglia v. Schuler,* 60 AD2d 759]. There was no quasi judicial hearing before respondent agency. Thus, the IAS court was correct in refusing to refer the proceeding to this court

pursuant to CPLR 7804(g). Moreover, contrary to petitioner's assertion, the IAS court appropriately required that petitioner rebut the presumption of legitimacy by clear and convincing evidence in order to have her ostensible father's name removed from her birth certificate [*see Murtagh v. Murtagh*, 217 AD2d 538].

We have considered the remaining arguments and find them to be without merit.

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

ENTERED: JUNE 9, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5316N Robert Berk, Index 102767/10
Plaintiff-Respondent,

-against-

Paul J. Linnehan, et al.
Defendants-Appellants.

_____

Cascone & Kluepfel, LLP, Garden City (Kimberly von Arx of counsel), for appellants.

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered December 29, 2010, which, inter alia, in this action for personal injuries, denied defendants' motion to change venue from New York County to Suffolk County, unanimously affirmed, without costs.

The court properly denied defendants' motion for a change of venue to Suffolk County. Defendants failed to make the requisite showing that their allegedly inconvenienced non-party witnesses were actually contacted and were willing to testify (*see Gissen v Boy Scouts of Am.*, 26 AD3d 289 [2006]; *Gluck v Pond House Farm, Inc.*, 271 AD2d 334 [2000]; CPLR 510[3]). Defendants also failed

to set forth the substance and materiality of the testimony of at least two of the three witnesses.

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

ENTERED: JUNE 9, 2011

CLERK

Saxe, J.P., Friedman, Moskowitz, Abdus-Salaam, JJ.

2757 Josephine Penn, et al., Index 105637/07
Plaintiffs-Appellants,

-against-

Amchem Products, et al.,
Defendants,

Kerr Corporation,
Defendant-Respondent.

_____

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for appellants.

Marin Goodman LLP, New York (Diane H. Miller of counsel), and Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered June 1, 2009, which granted defendant-respondent Kerr Corporation's posttrial motion insofar as it sought to set aside the verdict and have judgment entered in its favor as a matter of law, and sub silentio denied the motion as academic, insofar as it alternatively sought a remittitur, unanimously reversed, on the law, without costs, the jury's verdict on liability reinstated as against Kerr, and the matter remanded for a new trial solely on the issue of damages for past and future pain and suffering and loss of consortium, unless plaintiffs, within 30 days of service of a copy of this order with notice of

entry, stipulate to reduce the award for past pain and suffering from $3,650,000 to $1,500,000, future pain and suffering from $10,900,000 to $2,000,000, and the award for loss of consortium from $1,670,000 to $260,000, and to entry of a judgment in accordance therewith.

Contrary to the trial court's finding, the evidence, viewed in the light most favorable to the prevailing plaintiffs (*see Matter of New York City Asbestos Litig.*, 256 AD2d 250, 250 [1998], *lv denied* 93 NY2d 818 [1999], *cert denied sub nom. Worthington Corp. v Ronsini*, 529 US 1019 [2000]), was sufficient to permit the jury to rationally conclude that the asbestos-containing dental liners to which the injured plaintiff (Penn) was exposed were distributed by Kerr. Such conclusion could be drawn from the evidence that Penn's dental technician school gave him boxes containing dental liners used to make prosthetic teeth that had Kerr's name on them; that Penn followed a chart specifically made for Kerr's casting ring product when given a box with Kerr's name on it; that Kerr supplied asbestos-containing dental liners to dental technician schools at the time Penn was a student; and that Kerr often packaged its casting ring product with its dental liners. That Penn's description of the dental liners he used differed from the descriptions given by

Kerr's representatives does not conclusively establish that Penn did not use Kerr's liners, and simply raised a credibility issue for the jury.

On the issue of causation, sufficient evidence was provided by Penn's testimony that visible dust emanated while working with the dental liners and by his expert's testimony that such dust must have contained enough asbestos to cause his mesothelioma (*see Matter of New York Asbestos Litig.*, 28 AD3d 255, 256 [2006]). On the issue of duty to warn, evidence that Kerr did not test or investigate the safety of its asbestos liners permitted the jury to conclude that Kerr failed to adequately warn Penn of a potential danger that it knew or should have known about (*see George v Celotex Corp.*, 914 F2d 26, 28 [1990]).

Kerr's argument that the verdict is inconsistent in holding it but not Celotex and Nicolet liable is unpreserved, since it was not raised until after the jury was discharged, and we decline to consider it (*see Barry v Manglass*, 55 NY2d 803, 806 [1981]; *Gavitt v Citnalta Constr. Corp.*, 33 AD3d 406, 407 [2006]). We do note, however, that the jury need not have credited Kerr's representative's testimony that Celotex and Nicolet supplied Kerr with prepackaged asbestos liners and rolls. Kerr's argument that plaintiffs' counsel's remarks on summation

were improper is also unpreserved, since Kerr failed to object during summation, ask for curative instructions, or seek a mistrial with regard to them, and we decline to consider it (*see Wilson v City of New York*, 65 AD3d 906, 908 [2009]). Were we to consider it, we would find that while some remarks were improper, they were not so egregious as to warrant a new trial (*id.* at 909).

The damage awards deviate from what would be reasonable compensation to the extent indicated (CPLR 5501[c]).

The Decision and Order of this Court entered herein on May 11, 2010 is hereby recalled and vacated (*see* M-830 decided simultaneously herewith).

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

ENTERED: JUNE 9, 2011

CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4853N Remco Maintenance, LLC, Index 603592/09
Petitioner-Appellant,

-against-

CC Management & Consulting, Inc., et al.,
Respondents-Respondents.

Katz & Rychik, P.C., New York (Abe M. Rychik of counsel), for appellant.

Goldberg Weprin Finkel Goldstein LLP, New York (Harvey L. Goldstein of counsel), for respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered on or about March 18, 2010, which denied petitioner's motion to stay arbitration, unanimously affirmed, without costs.

By a consulting agreement dated August 12, 2005, Remco Maintenance, LLC (Remco) retained CC Management & Consulting, Inc. (CC) as its consultant and principal sales representative. The term of the agreement was one year, automatically renewable for a further, one-year term "[u]nless either party gives to the other written notice of cancellation at least sixty (60) days prior to the end of the term." The agreement contained a broad arbitration clause providing that "[a]ny controversy or claim

arising out of this Agreement or any aspect of CC's relationship with [Remco] shall be adjudicated by arbitration" in accordance with the rules of the American Arbitration Association.

The agreement was extended, pursuant to its terms, for two more terms: September 1, 2006 through August 31, 2007 and September 1, 2007 through August 31, 2008. On November 7, 2007, Remco and CC entered into a Supplemental Letter Agreement modifying certain commission and draw terms, with the agreement otherwise remaining "in full force and effect."

By letter dated June 10, 2008, Remco advised CC that it was terminating the consulting agreement as of August 31, 2008 (its expiration date), but that its intention was to work toward a revision of the agreement. On August 11, 2008, a second supplemental letter agreement was entered into among Remco, CC and Building Services Corporation of America (BSCA), the transferee of CC. The second supplemental agreement provided that "[a]ll of the terms of the aforesaid [a]greements are in full force and effect" and modified the consulting agreement by: (1) recognizing that as of August 1, 2008, CC had "transferred" the previous two agreements to BSCA (Seymour Cohen was president of both CC and BSCA and signed on behalf of both entities), and that Remco had consented to the transfer; (2) extending the draw

provisions of the supplemental letter agreement from August 12, 2008 to December 31, 2008 and providing that they were equally applicable to BSCA; and (3) providing that "the terms of the aforesaid [a]greements as modified remain in full force and effect," binding CC and Remco for periods prior to August 1, 2008 and binding BSCA and Remco "from August 1, 2008 to December 31, 2008."

Although the second supplemental agreement provided that the relevant agreements had been "transferred" to BSCA, Remco apparently never did any business with nor made any payments to BSCA and continued to treat CC as the real party-in-interest under the consulting agreement.

On October 30, 2009, Remco served CC with the requisite 60-day notice of cancellation, thereby (according to CC), terminating the agreement as of December 31, 2009.

On November 18, 2009, CC filed a demand for arbitration seeking damages based on numerous alleged violations of the consulting agreement by Remco. CC alleged, inter alia, that Remco had given the "vast majority" of its construction industry leads to other salesmen, rather than to CC, its "principal sales representative"; that Remco had failed to provide complete, itemized and accurate information concerning various projects

procured by CC for which CC was owed commissions and a share of additional profits; and that Remco had "drastically" reduced CC's draw twice during 2009, and had refused to pay any draw since August 28, 2009.

Remco moved to stay arbitration on the grounds that (a) the parties' agreement had expired on December 31, 2008, and thus there was no valid agreement to arbitrate CC's claims, and (b) CC was not entitled to arbitrate because it had assigned the consulting agreement to BSCA. Remco argued that the agreement, as amended, had lapsed pursuant to its terms on December 31, 2008.[1] Remco thus took the position that the provisions of the second supplemental agreement had modified and supplanted Section 12 of the consulting agreement pertaining to its term and renewal in 12-month intervals. Remco argued that, in any event, even if the agreement remained in effect, it had been assigned from CC to BSCA as of July 31, 2008. Remco noted that CC was not claiming entitlement to any monies from 2008 or prior to 2008.

In opposition, CC maintained that the parties' contractual relationship continued into 2009 and had not been terminated by

[1]Remco also argued that extrinsic evidence demonstrated that the parties believed that the agreement would terminate as of December 31, 2008.

the second supplemental agreement. According to CC, although the second supplemental agreement created a new term ending December 31, 2008, that new term remained subject to the consulting agreement, including the automatic one-year renewal provision set forth in paragraph 12, by virtue of the savings provision in the second supplemental agreement that "the terms of the aforesaid [a]greements as modified remain in full force and effect. . ." Thus, CC argued, Remco was required to send a new notice of termination within 60 days of the end of the December 31, 2008 renewal term (prior to November 1, 2008), and, since it did not, the consulting agreement as modified continued into 2009; CC therefore retained the right to arbitrate, even if the disputes arose in 2009.

The court denied the stay and directed arbitration, finding that "the one-year agreement automatically extended for another one-year period." The court reasoned that, absent a clear manifestation of contrary intent, a broad arbitration clause survives and remains enforceable for the resolution of disputes arising out of that agreement subsequent to the termination thereof, regardless of the reason for expiration of the term of the agreement, citing *Matter of Primex Intl. Corp. v Wal-Mart Stores* (89 NY2d 594 [1997]).

The parties on the appeal dispute whether the second supplemental agreement incorporated all terms of the prior agreements, including the automatic renewal provision, or whether the second supplement agreement created a fixed termination date of December 31, 2008.

Remco maintains that this question is one of arbitrability and is therefore a threshold one for this Court. We disagree. Where parties have entered into an agreement containing a broad arbitration provision, "the question of whether the arbitration clause governs a particular aspect of the controversy, as well as the determination of the merits of the dispute, are matters within the exclusive province of the arbitrator" (*see De Shazo v Hirschler*, 282 AD2d 257, 258 [2001]).

In cases where the parties have adopted a broad arbitration clause, the Court of Appeals has made clear:

> "Once it appears that there is, or is not a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract, the court's inquiry is ended. Penetrating definitive analysis of the scope of the agreement must be left to the arbitrators whenever the parties have broadly agreed that any dispute involving the interpretation and meaning of the agreement should be submitted to arbitration."

(*Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*,

37 NY2d 91, 96 [1975] [citation omitted]).

It is thus for the arbitrator to determine the duration of the parties' agreement and whether CC's claims accrued during the relevant contract term (*see Matter of Bill of Fare [King]*, 191 AD2d 344 [1993] [broad arbitration clause encompassed claims not only for commissions earned prior to termination, but also commissions that would have been earned absent wrongful termination. The respondent's right to "prospective damages is a matter of contract interpretation to be left to the arbitrator under a broad arbitration clause"]; *National R.R. Passenger Corp. v Boston & Maine Corp.*, 850 F2d 756, 762 [DC Cir 1988] [clause providing that "(a)ny claim or controversy" between the parties concerning the "interpretation, application or implementation" of the agreement would be subject to arbitration encompassed claims concerning the duration of the contract; "(f)aced with a () broad() arbitration clause . . . (the court) will presume that disputes over the termination or expiration of the contract should be submitted to arbitration. Of course, this presumption also attaches where the arbitration clause is broader still, such as one requiring arbitration of any grievance affecting the mutual relations of the parties" [internal quotation marks and citation omitted]).

Remco also maintains that the clause is inapplicable because the dispute concerns commissions earned after the parties' agreement had been terminated. This argument must also be rejected. Even if the contract term expired – a point CC disputes – "[g]enerally, a broad arbitration clause in an agreement survives and remains enforceable for the resolution of disputes arising out of that agreement subsequent to the termination thereof and the discharge of obligations thereunder, irrespective of whether the termination and discharge resulted from the natural expiration of the term of the agreement, a unilateral termination under a notice of cancellation provision or the breach of the agreement by one of the parties" (*Matter of Primex Intl. Corp.*, 89 NY2d at 598-99 [citations omitted]; *see also H.M. Hamilton & Co. v American Home Assur. Co.*, 21 AD2d 500, 503, *affd* 15 NY2d 595 [1964] [termination of contract did not end right to arbitrate claims arising thereunder]).

Finally, we reject Remco's argument that CC has no standing to enforce the arbitration agreement. It appears that CC, not BSCA, was the real party in interest. To the extent necessary, BSCA can always be joined as a party to the arbitration. In any event, it is clear that Remco, the party resisting arbitration, agreed to submit claims to arbitration, regardless of whether it

is CC or BSCA that was initially named on the demand for arbitration.

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

ENTERED: JUNE 9, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4949 The People of the State of New York, Ind. 4236/08
Respondent,

-against-

David Scott,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Peter Theis of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Frank Glaser of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered March 6, 2009, convicting defendant, after a jury trial, of identity theft in the first degree and 10 counts of criminal possession of a forged instrument in the second degree, and sentencing him to concurrent terms of 2 to 4 years on each count, unanimously affirmed.

As defendant concedes, he did not preserve for appellate review his contention that the trial evidence was insufficient to establish that he assumed the identity of another and thereby committed or attempted to commit a D felony or higher level crime (Penal Law § 190.80[3]), and we decline to review it in the interest of justice.

The court properly exercised its discretion in admitting

evidence of uncharged crimes involving some of the same forged credit cards to establish that defendant possessed the cards with intent to defraud and to demonstrate the absence of mistaken or transitory possession. This evidence was very probative of material issues, and its probative value outweighed its potential for prejudice, which the court minimized by way of proper limiting instructions.

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

ENTERED: JUNE 9, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5018 In re R and S Circus Products Corp., Petitioner-Appellant, -against- The Business Integrity Commission of the City of New York, Respondent-Respondent. Index 113661/09

_____

Paul T. Gentile, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered April 22, 2010, denying the petition to annul respondent's determination, dated July 31, 2009, which denied petitioner's application to register as a wholesale business at the Hunt's Point Terminal Market, and to direct respondent to grant the application, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's finding that petitioner's principal, Silvestro LoVerde, associated with Frank Cali when he knew or should have known of Cali's criminal associations was rational, and was not arbitrary and capricious or an abuse of discretion (*see Concourse Rehabilitation & Nursing Ctr., Inc. v Novello*, 80 AD3d 507, 508

[2011]). LoVerde testified that, inter alia, he had been in business with Cali for five years before filing the application for registration, he had been on vacation with Cali (and others) on at least three separate occasions, he had attended Cali's wedding, and he and Cali met regularly for dinner or coffee. For the same reasons, it was not irrational or arbitrary and capricious for respondent to find that LoVerde provided false information in connection with the application when he asserted that he had no knowledge of Cali's organized crime activity. Each of these findings is sufficient reason to deny petitioner's application for registration (*see* Administrative Code of City of NY § 22-259[b]).

As the record establishes that respondent's determination was not arbitrary and capricious, no hearing was necessary (*Matter of Levine v New York State Liq. Auth.*, 23 NY2d 863 [1969]).

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

ENTERED: JUNE 9, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, Acosta, Abdus-Salaam, JJ.

5149 Brennan Beer Gorman/ Index 650383/08
Architects, LLP,
Plaintiff-Respondent-Appellant,

-against-

Cappelli Enterprises, Inc., et al.,
Defendants-Appellants-Respondents.

_____

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Robert Hermann of counsel), for appellants-respondents.

Sugarman Law Firm, LLP, Syracuse (Timothy J. Perry of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered August 18, 2010, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the first through sixth causes of action of the amended complaint and plaintiff's cross motion for summary judgment on its breach of contract causes of action, unanimously modified, on the law, to grant defendants' motion to the extent of dismissing the first through fifth causes of action of the amended complaint, and otherwise affirmed, without costs.

On May 19, 2008, plaintiff submitted a proposal for architectural and engineering services to defendants relating to a proposed casino resort project (the project). Four days later,

plaintiff informed defendants that it was still "working on a formal agreement," but nonetheless asked defendants to provide authorization to proceed. Defendants authorized plaintiff to start working, but expressly noted that plaintiff's "proposal and associated pricing" were "still under review and . . . subject to a formal agreement." Although plaintiff proceeded to work on the project, the parties continued to exchange contract drafts and comments for several months, never coming to an express agreement on price and other terms. It is thus evident on this record that the parties' minds never met on the material terms of their agreement, including price (*see Yenom Corp. v 155 Wooster St. Inc.*, 23 AD3d 259, 259-260 [2005], *lv denied* 6 NY3d 708 [2006]). Accordingly, defendants are entitled to summary judgment dismissing plaintiff's first and third causes of action for breach of an express contract.

Defendants are also entitled to summary judgment dismissing plaintiff's fourth cause of action for breach of an implied contract. As noted, the record establishes that the parties never reached an express agreement on the material term of price. Moreover, defendants' statement that they would be bound only by a formal agreement and their repeated rejection of plaintiff's proposal for lump-sum pricing overrides their act of paying

plaintiff's August 2008 invoice, which billed for work performed in June 2008 on a lump-sum basis (*see Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 179 [2007]).

Defendants' consistent objections to plaintiff's invoices requires dismissal of the fifth cause of action for an account stated (*cf. Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478-479 [2002]).

Because plaintiff's express and implied contract claims should be dismissed, plaintiff's second cause of action for attorneys' fees should also be dismissed, as that claim is premised exclusively on the attorneys' fees provision contained in plaintiff's May 2008 proposal.

Supreme Court properly declined to dismiss plaintiff's sixth cause of action for quantum meruit, since triable issues of fact exist as to whether plaintiff could have reasonably expected to be compensated for its services and the reasonable value of those services (*see generally Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 488-489 [2009]). Although the parties never reached an agreement on price, the record indicates that defendants acknowledged the need to pay plaintiff at least some amount for its services. Indeed, on July 3, 2008, defendants directed plaintiff to bill "for now on a [time and materials] basis until

we have reached conclusion on the contract," and, on August 18, 2008, defendants asked plaintiff to prepare a summary of spending and payment status, noting that they wanted "to make sure we are staying current."

We reject defendants' contention that plaintiff cannot establish that defendants benefitted from plaintiff's services. The plaintiff asserting a valid claim in quantum meruit "recovers the reasonable value of his performance whether or not the defendant in any economic sense benefitted from the performance" (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 484 [1991] [internal quotation marks and citation omitted]).

We also reject defendants' contention that plaintiff cannot establish the reasonable value of its services because it did not maintain itemized billing records detailing how it spent the asserted 5,800 man-hours of work. There are other means of establishing the reasonable value of services rendered, including the plaintiff's invoices and evidence of the number of hours of service rendered (*see Paul F. Vitale, Inc. v Parker's Grille, Inc.*, 23 AD3d 1147, 1147 [2005], *lv denied* 6 NY3d 707 [2006]; *Clark v Torian*, 214 AD2d 938, 938 [1995]), both of which are available in the record. Moreover, plaintiff has submitted the affidavit of a licensed architect who, based on his review of the

record, opined that plaintiff's schematic design work had a fair market value of at least $1.3 million.

We note that, on appeal, plaintiff does not seek summary judgment on its quantum meruit claim. In any event, we find that plaintiff is not entitled to such relief due to unresolved issues of material fact. We further note that defendant makes no argument with respect to plaintiff's seventh cause of action for a declaratory judgment.

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

ENTERED: JUNE 9, 2011

CLERK

Tom, J.P., Friedman, Catterson, Richter, JJ.

5308 The People of the State of New York, SCI 1251/09
Respondent,

-against-

Charles Ventura,
Defendant-Appellant.

_____

Steven A. Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Paynter, J.), rendered on or about May 19, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JUNE 9, 2011

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.