SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 3, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Freedman, Abdus-Salaam, JJ.

1758 Roni LLC, et al., Index 601224/07
Plaintiffs-Respondents,

-against-

Rachel L. Arfa, et al.,
Defendants-Appellants,

Lawrence A. Mandelker, etc., et al.,
Defendants,

Edward Lukashok,
Defendant-Respondent.

Schlam Stone & Dolan LLP, New York (David J. Katz of counsel), for appellants.

Balber Pickard Maldonado & Van Der Tuin, P.C., New York (John T. Van Der Tuin of counsel), for plaintiffs-respondents.

Bellin & Associates LLC, White Plains (Aytan Y. Bellin of counsel), for Edward Lukashok, respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 17, 2009, which, insofar as appealed from as limited by the briefs, denied the motion of defendants Rachel L. Arfa, Alexander Shpigel and American Elite Properties, Inc. (the promoter defendants) to dismiss plaintiffs' accounting, breach of fiduciary duty, and constructive fraud causes of action, unanimously affirmed, with costs.

This action arises from a series of business transactions in which investors acquired membership interests in limited liability companies (LLCs) that purchased and managed multi-family residential buildings in Harlem and the Bronx. The promoter defendants, directly or through their wholly owned companies, located the properties, arranged financing, organized the LLCs, solicited the investors, and managed the properties. Plaintiffs comprise the substantial majority of the investors or the assignees of their claims.

Plaintiffs' central allegation in the amended complaint and in the affidavits and documents submitted in opposition to the motion to dismiss is that the promoter defendants made secret profits at the expense of plaintiffs and the LLCs. Plaintiffs allege that the promoter defendants disclosed some of the profits they would make from the business venture but deliberately concealed that property sellers and mortgage brokers directly or indirectly paid them commissions of up to 15% of the purchase prices of the properties. These undisclosed commissions, plaintiffs allege, inflated the prices that the LLCs paid for the properties by millions of dollars.

In the amended complaint, plaintiffs asserted claims for an accounting, waste, breach of fiduciary duty, actual fraud, and constructive fraud. The promoter defendants moved to dismiss the complaint as against them for, among other things, failure to state a cause of action (CPLR 3211[a][7]) and failure to plead actual fraud and breach of fiduciary duty with specificity (CPLR 3016[b]). The motion court granted the motion only to the extent of dismissing the cause of action for waste and granting plaintiff leave to re-plead the cause of action for actual fraud.[1]

As a threshold matter, and contrary to the promoter defendants' assertion, the anti-fraud provisions of the Martin Act (General Business Law art 23-A), which regulates the sale of publicly offered securities, do not preempt plaintiffs' claims for an accounting, breach of fiduciary duty, and constructive fraud, because given the relatively small number of investors and the absence of advertising, other than written promotional materials distributed to some of them, the offering was not "public" within the meaning of the Act (*see* General Business Law § 352-e[1][a]; *People v Glenn Realty Corp.*, 106 Misc 2d 46, 48 [1980]). In view of the foregoing, we need not address the promoter defendants' other arguments with respect to the Act.

The promoter defendants also contend that the causes of action for breach of fiduciary duty, constructive fraud and an accounting should have been dismissed because plaintiffs failed to allege facts establishing that the promoter defendants were

[1]The record indicates that plaintiffs re-pleaded the fraud cause of action by serving and filing a second amended complaint, which is not a subject of this appeal.

their fiduciaries (*see Vitale v Steinberg*, 307 AD2d 107, 110 [2003]). The motion court found that a fiduciary duty had been sufficiently alleged based both on the parties' relationship and on the promoter defendants' status as the organizers of the business venture.

The parties' business or personal relationship is not sufficient to establish a fiduciary relationship. A conventional business relationship between parties dealing at arm's length does not give rise to fiduciary duties (*see Schonfeld v Thompson*, 243 AD2d 343, 343 [1997]) unless the plaintiff shows that the defendant "had superior expertise or knowledge about some subject *and misled [the] plaintiff by false representations concerning that subject*" (*Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 99 [1997] [emphasis supplied]; *see also EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19-20 [2005]). Although plaintiffs allege that the investors, who were Israelis, "had little or limited knowledge of New York real estate or United States laws, customs or business practices with respect to real estate or investments" and that the promoter defendants held themselves out as experienced experts in these areas, plaintiffs do not claim that the promoter defendants misled them about how particular real estate and investing practices in New York and the United States would affect the transactions in question.

Plaintiffs also allege that the promoter defendants "play[ed] upon the cultural identities and friendship" of the Israeli investors, but personal connections of that sort alone between parties to business transactions do not establish a fiduciary relationship (*see Johnston v DeHaan*, 37 AD2d 1028, 1029 [1971]).

However, plaintiffs' allegations that the promoter defendants planned the business venture, organized the LLCs, and solicited plaintiffs to invest in them are sufficient to establish a fiduciary relationship (*see Dickerman v Northern Trust Co.*, 176 US 181, 203-204 [1900]). It is well settled that both before and after a corporation comes into existence, its promoter acts as the fiduciary of that corporation and its present and anticipated shareholders (*see Brewster v Hatch*, 122 NY 349, 358 [1890]; *Gates v Megargel*, 266 F 811, 816-817 [2d Cir 1920], *cert denied* 254 US 639 [1920]; *see also* 1A Fletcher, Cyclopedia of Corporations § 192.10, at 340-350 [Perm ed]). By extension, the organizer of a limited liability company is a fiduciary of the investors it solicits to become members (*see generally* Limited Liability Company Law § 203[a][iii]). The fiduciary duty includes the obligation to disclose fully any interests of the promoter that might affect the company and its members, including profits that the promoter makes from organizing the company (*see Brewster*, 122 NY at 358; *see also* 1A Fletcher, Cyclopedia of Corporations § 193.10, at 353-357 [Perm ed]). Accordingly, plaintiffs stated a cause of action for breach of fiduciary duty by alleging that the promoter defendants failed to reveal that they would receive commissions from sellers and mortgage brokers in addition to their other, disclosed, profit from the venture.

The promoter defendants' argument that the constructive fraud cause of action should have been dismissed for failure to plead the materiality, justifiable reliance, and damages elements of the claim (*see Del Vecchio v Nassau County*, 118 AD2d 615, 617-618 [1986]) is without merit.[2] As for materiality, plaintiffs allege that they never would have invested in the LLCs had they known about the undisclosed commissions, and it cannot be said as a matter of law that knowledge of these commissions would not have influenced their decision (*see Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1996]).

As for justifiable reliance, the promoter defendants claim that plaintiffs received constructive notice of brokerage commissions, and point to a provision in some of the LLCs' operating agreements that permits the promoter defendants to provide services to the real estate properties' sellers, and to

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[2]In their brief, the promoter defendants also contend that the actual fraud claim should be dismissed for failure to allege materiality, justifiable reliance, and damages, but the issue whether the fraud claim was adequately pleaded is not properly before this Court, since the motion court granted the promoter defendants' motion to dismiss the claim with leave to re-plead, and that ruling has not been appealed.

drafts of letter agreements that some plaintiffs allegedly received and that purportedly refer to the commissions. The import of these documents and the question whether they put plaintiffs on constructive notice cannot be resolved on a pre-answer motion to dismiss (*see Braddock v Braddock*, 60 AD3d 84, 88 [2009]).

Finally, plaintiffs sufficiently alleged damages by asserting that they suffered actual pecuniary loss in the amount of the secret commissions that inflated the purchase prices of the properties that the LLCs acquired (*see Kuo Feng Corp. v Ma*, 248 AD2d 168, 169 [1998], *appeal dismissed* 92 NY2d 845 [1998], *lv denied* 92 NY2d 809 [1998]).

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

ENTERED: JUNE 3, 2010

David Apolony
CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

1133 GATX Flightlease Aircraft Company Limited, Plaintiff-Respondent, Index 650194/05

Flightlease Holdings (Guernsey) Limited, etc.,
Plaintiff-Intervenor-Respondent,

-against-

Airbus S.A.S., etc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a order of the Supreme Court, New York County (Eileen Bransten, J.), entered on or about February 11, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 21, 2010,

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1793 Janet Mercado-Arif, Index 16475/06
Plaintiff-Respondent,

-against-

Jose Daniel Garcia, et al.,
Defendants-Appellants,

Sandra Y. Santiago,
Defendant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Steven N. Feinman of counsel), for appellants.

DeAngelis & Hafiz, Mount Vernon (Talay Hafiz of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered February 3, 2009, which denied defendants' motion and cross motion for summary judgment dismissing the complaint, modified, on the law, to grant the motion and cross motion as to plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

Defendants-appellants (hereinafter defendants) made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). While one of their experts, Dr. Schwartz, found limitations in plaintiff's ranges of motion, he did not causally relate these limitations to the accident (*cf. Glynn v Hopkins*, 55 AD3d 498 [2008]); on the contrary, he found that plaintiff was deliberately restricting her movements (*see Santos v Taveras*, 55 AD3d 405 [2008]).

Moreover, another of defendants' experts, Dr. Tantleff, found degenerative changes in plaintiff's spine. In any event, to warrant a finding of serious injury, a limitation must be "consequential" or "significant" (*see* Insurance Law § 5102[d]; *Licari v Elliott*, 57 NY2d 230, 236 [1982]).

Contrary to plaintiff's contention, defendants addressed her MRIs, via Dr. Tantleff. Defendants raised the 90/180-day issue by pointing to plaintiff's deposition testimony that she was only confined to her home for one week after the accident (*see e.g. Cruz v Aponte*, 60 AD3d 431, 432 [2009]).

In opposition, plaintiff's chiropractor's affidavit was sufficient to raise a triable issue of fact, and plaintiff's limitations cannot be deemed minor as a matter of law (*see e.g. Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352-353 [2002]; *Hernandez v Rodriguez*, 63 AD3d 520, 520-521 [2009]).

Plaintiff's chiropractor relied, inter alia, on range of motion tests, the MRIs, the nerve conduction studies, and observation of spasm, and not solely on plaintiff's subjective complaints of pain (*see e.g. Cruz v Castanos*, 10 AD3d 277, 279 [2004]; *Brown v Achy*, 9 AD3d 30, 31, 33 [2004]; *Arjona v Calcano*, 7 AD3d 279 [2004]; *Adetunji v U-Haul Co. of Wis.*, 250 AD2d 483 [1998]). Contrary to defendants' contention, the nerve conduction studies were affirmed. Although the MRIs were unsworn, plaintiff's chiropractor's opinion relying on them was "sworn and thus competent evidence" (*Pommells*, 4 NY3d at 577 n 5).

The conflicting opinions of defendants' expert, Dr. Tantleff, and plaintiff's chiropractor as to whether the MRIs show degenerative changes present issues of fact and credibility for a jury to resolve.

Plaintiff adequately explained the gap in her treatment between January 25, 2006 and July 29, 2008 by submitting her own affidavit, saying that no-fault had stopped her benefits (*see Wadford v Gruz*, 35 AD3d 258, 259 [2006]), and her chiropractor's affidavit, stating that plaintiff had reached maximum medical improvement and that any further treatment would be palliative (*see e.g. Pommells v Perez*, 4 NY3d 566, 577 [2005]).

As to her 90/180-day claim, however, plaintiff failed to raise an issue of fact. Her chiropractor's statement that plaintiff was told to limit her physical activities for approximately four months was too general to constitute the requisite competent medical proof to substantiate the claim (*see Cruz*, 60 AD3d at 432; *Gorden v Tibulcio*, 50 AD3d 460, 463 [2008]). Although defendant Santiago has not appealed, the 90/180-day claim should be dismissed as against her, too (*see e.g. Brewster v FTM Servo, Corp.*, 44 AD3d 351, 353 [2007]).

All concur except Andrias and McGuire, JJ. who concur in a separate memorandum by McGuire, J. as follows:

McGUIRE, J. (concurring)

The majority states that "[a]lthough the MRIs were unsworn, plaintiff's chiropractor's opinion relying on them was 'sworn and thus competent evidence.'" While it is true that the chiropractor's opinion was sworn, neither it nor the reports on which it relies offer any evidence that the herniations suffered by plaintiff did not result from degenerative changes. Rather, the MRI reports are silent as to the cause of the herniations. The chiropractor makes great hay of that silence, for he asserts that because no degenerative changes were noted on the MRIs (and because plaintiff was asymptomatic prior to the automobile accident), plaintiff's injury was caused by the motor vehicle accident. The chiropractor, however, provides no factual support for the implicit assertion that the radiologist would have noted degenerative changes had any been revealed. I do not understand how the very silence of the radiologist can be used to remedy the failure to provide an affidavit from the radiologist. Nonetheless, because defendants did not argue that the chiropractor's affidavit was insufficient for this reason, I agree with the majority that we should affirm the denial of that portion of defendants' motions seeking summary judgment on the issue of whether plaintiff suffered a personal injury that resulted in "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" within the meaning of Insurance Law § 5102(d).

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2216 Vivian Kleinerman, et al., Index 604135/07
Plaintiffs-Respondents,

-against-

245 East 87 Tenants Corp., et al.,
Defendants-Appellants.

Braverman & Associates, P.C., New York (Scott S. Greenspan of counsel), for appellants.

Vivian Kleinerman, respondent pro se.

Gerald Kleinerman, respondent pro se.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 23, 2008, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the third and eight causes of action as against the Tenants Corp. (the co-op) and the entire the complaint as against all other defendants, unanimously modified, on the law, the motion granted to the extent of dismissing the second, third, and fourth causes of action as against the co-op and its seven board members, the seventh cause of action against defendants Orsid, Ginsberg and McKenzie, and the eighth cause of action as against all defendants, and otherwise affirmed, without costs.

The instant action by owners of shares in a cooperative apartment alleged, inter alia, breach of fiduciary duty, breach of the covenant of quiet enjoyment, breach of contract and fraud against the co-op, its Assistant Secretary (Ginsberg), and seven individual members of the board. Other causes of action were alleged against the co-op's superintendent (McKenzie), the co-op's managing agent (Orsid), and Ginsberg in his capacity as an employee of that agent. The complaint alleged that plaintiffs were directed to stop work on renovations to their apartment that were already approved by the co-op board and the New York City Buildings Department. Plaintiffs alleged the board's stop-work order, predicated supposedly on undertaking unapproved alterations, constituted retaliation for plaintiffs' unwillingness to acquiesce to the superintendent's extortionate demands.

Plaintiffs sufficiently alleged a cause of action for breach of fiduciary duty against the co-op, board, its officer and individual board members, with assertions that indicated actual knowledge of their superintendent's purported extortionate demands from plaintiffs, and substantially assisting those demands by issuing the stop-work order once plaintiffs discontinued payments to the superintendent. Such claim sufficiently alleges the requisite independent tortious conduct on the part of the co-op, its officers and individual board members to preclude dismissal of the breach of fiduciary duty claim against them (*Ackerman v 305 40^th Owners Corp.*, 189 AD2d 667 [1993]).

Dismissal of the claims in the second (breach of covenant of quiet enjoyment) and fourth (breach of contract) causes of action as against the co-op's officer and seven board members is warranted because plaintiffs offer no opposition, and because these defendants were not parties to the proprietary lease in question. That being the case, Supreme Court should also have dismissed the fraud claim (third cause of action) because it arises out of the facts and circumstances identical to the action for breach of contract (*Spellman v Columbia Manicure Mfg. Co.*, 111 AD2d 320, 322-324 [1985]). And since we are dismissing the fraud claim, the seventh cause of action for aiding and abetting a fraud, against defendants Orsid, Ginsberg and McKenzie, should also be dismissed.

Dismissal of the eighth cause of action (prima facie tort) as against all defendants is warranted because the allegations do not establish that defendants' purportedly tortious conduct was motivated by an otherwise lawful act performed with the intent to injure or with a "disinterested malevolence" (*see Curiano v Suozzi*, 63 NY2d 113, 117 [1984]). Plaintiffs themselves maintained that defendants' superintendent had engaged in tortious conduct to extort money from them for purposes of financial gain.

The argument for dismissal of the sixth cause of action (aiding and abetting a breach of fiduciary duty) is unavailing as the allegations against the management defendants adequately assert actual knowledge that they were substantially assisting the primary wrongdoer's misconduct (i.e., including the superintendent's alleged extortion of money from plaintiffs) (*see generally Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461,463-464 [2007]).

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: JUNE 3, 2010

David Apolony

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2666 Louise Digiulio, etc., Index 105441/06
Plaintiff-Appellant, 590415/09

-against-

Gran, Inc., doing business as
New York Health & Racquet Club, et al.,
Defendants-Respondents.

[And a Third-Party Action]

Decolator, Cohen & DiPrisco, LLP, Garden City (David Stanton Gould of counsel), for appellant.

Morgan Melhuish Abrutyn, New York (Douglas S. Langholz of counsel), for respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered October 19, 2009, which denied plaintiff's motion for partial summary judgment on the issue of liability and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

This appeal concerns the duty of a health club when faced with a stricken patron. The relevant facts in this personal injury action are largely undisputed. At about 6:22 a.m. on the morning of February 21, 2006, plaintiff's decedent, Albert Digiulio, suffered a heart attack while running on a treadmill at a health club that defendants owned and operated. Digiulio, age 52, was a longtime club member who frequently exercised on its treadmills. After Digiulio fell off the treadmill and collapsed on the floor, another patron ran down a flight of stairs to the lobby and alerted the club's assistant manager, Terrance James, who immediately called 911 and ran upstairs. Another club employee, Bernard Ang, came to Digiulio's aid at the same time and immediately began performing cardiopulmonary resuscitation on him.

While Ang was performing CPR, James, who was trained to operate automated external defibrillators (AEDs),[1] went to an AED stored in a glass cabinet hung on a nearby wall. The cabinet had a visible key lock mechanism, but was unlocked. Instead of trying to open the cabinet, James, who admittedly was panicked, assumed it was locked and, not knowing where the key was, ran back downstairs to the club offices and searched for it in various places. He abandoned his search when emergency medical services personnel arrived at the scene.

A EMS Pre-Hospital Care Report of the incident stated that EMS personnel arrived at 6:29 a.m. and found Digiulio "in full cardiac arrest." While EMS personnel were administering CPR, more personnel arrived, placed Digiulio on a monitor, and delivered shocks with their own AED starting at 6:31 a.m. Digiulio's heartbeat was restored and he was taken to a hospital. Digiulio, who had suffered anoxic brain damage while stricken,

[1]An AED delivers a shock to the heart of a cardiac arrest victim that can eliminate an abnormal "ventricular fibrillation" rhythm, which often causes arrest, and allow a normal heart rhythm to resume.

remained hospitalized from February 21 until his death on June 14, 2006.

In April 2006, Digiulio and his wife commenced this action alleging claims for negligence and loss of consortium. Following discovery, she moved for partial summary judgment on the issue of defendants' liability under theories of common-law negligence and negligence per se for violation of General Business Law § 627-a, which required the club to keep an AED on premises along with a person trained to use it. Plaintiff claimed that the decedent should have been treated with the club's AED in the minutes before the EMS personnel arrived, and if James had used the AED when he first intended, her husband "almost certainly" would have survived his heart attack and "most likely" would have suffered no more than minor brain damage.

With respect to negligence, plaintiff claimed that since the club had an AED on the premises, it was "unreasonable" not to use it on the decedent. Plaintiff further claimed that the club was grossly negligent in failing to inform its employees that the wall cabinet was unlocked, and it was negligent for the club's employees to treat the stricken client with CPR instead of the AED. Plaintiff further contended that James was negligent in not trying to open the unlocked case before searching for a key, and the club was liable for its employee's negligence under a theory of respondeat superior.

Plaintiff also claimed that defendants violated General Business Law § 627-a, which in relevant part provides that every health club with 500 or more members (as is the case here)

> shall have on the premises at least one [AED] and shall have in attendance, at all times during business hours, at least one individual performing employment or individual acting as an authorized volunteer who holds a valid certification of completion of a course in the study of the operation of AEDs and a valid certification of the completion of a course in the training of [CPR] provided by a nationally recognized organization or association (§ 627-a[1]).

Plaintiff acknowledged that the club "literally" complied with the statute by having the AED and a certified employee on premises, but argued that the statute imposed a duty to make the AED available and to use it when necessary.

Defendants, in opposition, argued that the decedent had voluntarily assumed the inherent medical risks of intense exercise, including the risk of cardiac failure. Defendants further contended that their employees had acted reasonably under the circumstances by calling 911 and administering CPR, and that they had no common-law duty to use an AED on the decedent. Finally, defendants argued that they had fully complied with § 627-a and that the statute does not impose a duty on health club employees to use AEDs at any particular time.

In denying the motion and granting the cross motion, the court found that no common-law duty to the decedent had been breached, and that the club had complied with § 627-a by storing the AED in an unlocked case in an accessible location on the premises.

We agree with the motion court that plaintiff has not established a common-law negligence claim. The decedent, in regularly using the club's treadmills, assumed the inherent risk of a heart attack that attends intense exercise (*see Rutnik v Colonie Ctr. Ct. Club*, 249 AD2d 873, 875 [1998], *lv denied* 92 NY2d 808 [1998]; *see also Morgan v State of New York*, 90 NY2d 471 [1997]). After the heart attack, the club's employees more than fulfilled their duty of care by immediately calling 911 and performing CPR, had no common-law duty to use the AED, and could not be held liable for not using it.

Nor was the club vicariously liable for breaching a common-law duty of care that the employees had assumed by coming to Digiulio's aid as "Good Samaritans." Since the employees were providing emergency medical treatment to Digiulio, they could only have been liable for gross negligence (*see* Public Health Law § 3000-a[1]), which is "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]). The complained-of conduct - namely, James's failure during an ongoing crisis to check whether the cabinet door was locked before searching for the key, and the treatment of Digiulio with CPR instead of the AED - does not constitute gross negligence.

Turning to the statutory claim, we reject plaintiff's argument that General Business Law § 627-a implicitly obligated the club to use its AED to treat Digiulio. While the statute explicitly requires health clubs to have AEDs and people trained to operate them on their premises, it is silent as to the clubs' duty, if any, to use the devices. As discussed, the common law does not recognize that duty, and to interpret § 627-a as implicitly creating a new duty would conflict with the rule that legislative enactments in derogation of common law, and especially those creating liability where none previously existed, must be strictly construed (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008].

The statute's limitation of the liability of health clubs and their agents when "voluntarily" using AEDs to aid stricken persons (*see* § 627-a[3]) indicates that its use is not obligatory. While the Legislature meant to require health clubs to make AEDs available and encourage their use in medical emergencies, it did not intend to impose liability on clubs for usage failures.

Finally, we agree with the motion court that the club complied with the statutory requirement to have an AED "on the premises" by storing it in an unlocked cabinet on the wall of an exercise room. Plaintiff argues that the statute implicitly requires health clubs to make their AEDs accessible for use, and that under the circumstances the AED in defendants' club was inaccessible because it was in a cabinet that James mistakenly believed was locked. This argument is unavailing. The club's AED was not inaccessible and was unavailable only because James in his agitated state did not think of trying to open the cabinet. As the motion court pointed out, § 627-a cannot be construed as imposing liability on a health club where only its employee's mistake prevented him or her from gaining access to the AED.

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

ENTERED: JUNE 3, 2010

David Spolzino

CLERK

Saxe, J.P., Friedman, Nardelli, Freedman, Abdus-Salaam, JJ.

2764 Bibi Mohammed, et al., Plaintiffs-Respondents, Index 23260/06

-against-

Silverstein Properties, Inc., Defendant-Appellant,

Otis Elevator Company, Defendant-Respondent.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Susan M. Jaffe of counsel), for Mohammed respondents.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Otis Elevator Company, respondent.

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered November 27, 2009, which denied defendant Silverstein Properties, Inc.'s motion for summary judgment dismissing the complaint as against it or, in the alternative, for summary judgment on its cross claim for contractual indemnification against defendant Otis Elevator Company, unanimously affirmed, without costs.

The motion court correctly denied Silverstein's motion for summary judgment on the claims against it, since the conflict between the injured plaintiff's former co-worker's testimony, that she witnessed plaintiff's fall from the elevator and that she had previously notified Silverstein of a defect in that elevator car, and Silverstein's building manager's testimony, that he did not recall receiving complaints, raises an issue of fact whether Silverstein had notice of the alleged defective condition and failed to notify Otis (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 562 [1973]).

The court also correctly denied Silverstein summary judgment on its contractual indemnification claim, since the contract between Silverstein and Otis provides that Otis will indemnify Silverstein against certain liability to the extent that liability arises out of Otis's negligence in its performance of the contract, and there has been no finding that Otis was negligent (*see e.g. Zeigler-Bonds v Structure Tone*, 245 AD2d 80 [1997]; *Malecki v Wal-Mart Stores*, 222 AD2d 1010, 1011 [1995]).

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

Saxe, J.P., Friedman, Nardelli, Freedman, Abdus-Salaam, JJ.

2765N Robert Sulecki, Plaintiff-Respondent, Index 101205/06

-against-

The City of New York, et al., Defendants-Appellants,

M.A. Angeliades, Inc., et al., Defendants.

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

Eric H. Green, New York (Marc D. Citrin of counsel), for respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered February 2, 2009, which denied the municipal defendants' motion to amend their answer to assert the defenses of workers' compensation and collateral estoppel, unanimously reversed, on the law, without costs, leave to amend granted and the complaint dismissed as against the City of New York and the New York City Fire Department.

Plaintiff, an engineer employed by the New York City Department of Design and Construction, was injured after tripping on a sidewalk adjoining a City-owned building while on his way to a work-related meeting. The Workers' Compensation Law provides the exclusive remedy where, as here, the employer and the landowner are essentially the same party and the plaintiff is injured while performing his job (*see Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 158-159 [1980]; *Murray v City of New York,* 43 NY2d 400 [1977]; *Paulino v Lifecare Transp.*, 57 AD3d 319 [2008]. No exception should be made simply because plaintiff's injury did not occur at the location of the work-related meeting. Accordingly, the motion for leave to amend the answer should have been granted and the complaint dismissed as against the municipal defendants.

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2816 Belinda Wise Montalvo, etc., Plaintiff-Appellant, Index 302602/08

-against-

Dante M. Chiaramonte, et al., Defendants-Respondents.

Edward A. Mermelstein & Associates, P.C., New York (John C. Naccarato of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Kathleen E. Fioretti of counsel), for Dante M. Chiaramonte, respondent.

Burke, Lipton & Gordon, White Plains (Ashley E. Sproat of counsel), for Tart respondents.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered April 24, 2009, which granted defendant Chiaramonte's motion to dismiss the complaint as against him and the Tart defendants' motion for summary judgment dismissing the complaint as against them, unanimously modified, on the law, Chiaramonte's motion denied with respect to the first cause of action, the complaint as so pared reinstated, and otherwise affirmed, without costs.

The first cause of action seeks to recover damages for the personal injuries sustained by the decedent, i.e., for his conscious pain and suffering (*see Ratka v St. Francis Hosp.*, 44 NY2d 604, 609 [1978]; *Lancaster v 46 NYL Partners*, 228 AD2d 133, 138 [1996]; *Matter of Ruiz v New York City Health & Hosps. Corp.*, 165 AD2d 75, 80 [1991]), and thus was timely commenced (CPLR

214[5]). However, inasmuch as decedent lived barely more than two hours after the accident, from 4:45 until 6:58 A.M., plaintiff's derivative cause of action for loss of services fails.

The second cause of action, alleging pecuniary injury to the decedent's distributees, sounds in wrongful death (*see Ratka*, 44 NY2d at 609; *Lancaster*, 228 AD2d at 138; *Ruiz*, 165 AD2d at 80), and is thus time-barred (EPTL 5-4.1[1]). However, even though the second cause of action states that funeral expenses were paid by plaintiff in her individual capacity, if she demonstrates that she paid them as administrator of decedent's estate, they may be recoverable in connection with the cause of action for personal injuries (EPTL 11-3.3[a]; *see Erbstein v Savasatit*, 274 AD2d 445, 446 [2000]).

Neither plaintiffs nor Chiaramonte submitted any affidavits or evidence to show that "facts essential to justify opposition [to the Tarts' motion] may exist but cannot then be stated" (CPLR 3212[f]). Nor did they ever challenge the motion court's finding that the "Tart vehicle never came into contact with the decedent."

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

ENTERED: JUNE 3, 2010

David Spokony

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2829 Mary Wallace, etc., et al., Index 115189/07
Plaintiffs-Respondents,

-against-

Bell & Gossett Company, et al.,
Defendants,

York International Corporation,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Joan A. Madden, J.), entered on or about August 31, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 24, 2010,

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

ENTERED:

David Apolony

CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2952 The People of the State of New York, Ind. 1087/07
Respondent,

-against-

Delone Stallings, etc.,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), entered December 5, 2008, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The victim's identification was supported by credible testimony that defendant boasted about the crime to the codefendant's mother.

The court properly denied defendant's motion to suppress identification testimony. The record, including the lineup photograph, supports the court's finding that the lineup was not unduly suggestive. The lineup participants were sufficiently similar, and none of the differences between defendant and the others, when viewed in light of the description given by the victim, created a substantial likelihood that defendant would be singled out for identification (*see People v Jackson*, 98 NY2d 555, 558-559 [2002]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2954 In re Iris R.,
Petitioner-Respondent,

-against-

Jose R.,
Respondent,

Lisa R.,
Respondent-Appellant.

Lisa H. Blitman, New York, for appellant.

Randall S. Carmel, Syosset, for Iris R., respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Heather L. Kalachman of counsel), Law Guardian.

Order, Family Court, New York County (Sarah P. Cooper, Referee), entered on or about November 8, 2007, which, after a hearing and to the extent appealed from, granted the paternal grandmother's petition for modification of a 2005 order that had given her physical custody of the child in a joint custody arrangement with respondent parents, and denied respondent mother's cross petition for sole custody, awarding sole custody to petitioner with permission to relocate with the child to Florida, unanimously affirmed, without costs.

The 2005 custody arrangement was granted on consent, and respondent mother failed to demonstrate a sufficient change in circumstances since the time of that stipulation to support her latest cross petition (*see Sergei P. v Sofia M.*, 44 AD3d 490 [2007]). Additionally, extraordinary circumstances triggered this latest inquiry as to the best interests of the child with regard to changing petitioner's physical custody to sole custody (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]). The evidence established persistent neglect by both parents, and revealed a prolonged separation between them and the child, who has been residing with petitioner for over three years (Domestic Relations Law § 72[2][b]; *see Matter of Carton v Grimm*, 51 AD3d 1111, 1112 n [2008], *lv denied* 10 NY3d 716 [2008]).

Based upon the totality of the circumstances, including evidence relating to the parents' past performance and the need to maintain stability for this young child (now nine years old), we find no basis for disturbing the court's best-interests award of sole custody to petitioner, with permission for the child to remain with her in Florida (*see Matter of Elizabeth A.*, 13 AD3d 615 [2004]).

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

Nardelli, J.P., Moskowitz, Freedman, Manzanet-Daniels, JJ.

2956 In re Rachel Cohn, Index 108965/08
Petitioner-Respondent,

-against-

Board of Education of the
City School District of the
City of New York, et al.,
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for appellants.

Office of James R. Sandner, New York (Ariana A. Gambella of counsel), for respondent.

Order, Supreme Court, New York County (Carol Edmead, J.), entered February 2, 2009, which directed expungement of a disciplinary letter from petitioner's personnel file, unanimously reversed, on the law, without costs, the petition denied, and this proceeding commenced under CPLR Article 78 dismissed.

As is clear in the contract language and explanatory record documentation, the current collective bargaining agreement negotiated by petitioner's union, the United Federation of Teachers, amended the prior version of Article Twenty-One pertaining to matter placed in a teacher's permanent personnel file. Under the current contract, letters placed in a teacher's personnel file that do not result in administrative charges or other actual disciplinary sanctions are no longer subject to the previously available grievance procedures, with narrow exceptions not applicable herein. Characterizing a letter as a reprimand, in contrast to a counseling memo, as defined therein, does not change that contractual result (*see Holt v Board of Educ. of Webutuck Cent. School Dist.*, 52 NY2d 625, 631-632 [1981]).

Among the benefits conferred by the new provisions, teachers can respond to any disparaging information contained in those letters by appending a written response, which remains in the file with the letter, and such letters are automatically removed from the file three years after the incident giving rise to any such letter, unless administrative charges ensue. In the latter event, the teacher can challenge the letter and its contents as part of the administrative review proceeding. Additionally, these procedural protections were extended to nontenured personnel. School administrators, meanwhile, are relieved of the burden of engaging in grievance procedures, including hearings, as to letters that do not result in disciplinary charges.

The record does not disclose that petitioner was subjected to disciplinary charges, and aside from mischaracterizing a critical letter as itself constituting a disciplinary charge, petitioner does not allege that her employment status has been adversely affected as a consequence of the letter, which, by operation of new Article Twenty-One(A)(5), will be automatically removed from her file toward the end of this year. As such, petitioner cannot avail herself of the hearing procedures set forth in Education Law § 3020-a.

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

Nardelli, J.P., Moskowitz, Freedman, Manzanet-Daniels, JJ.

2957 In re Helen Hickey, Index 112353/08
Petitioner-Respondent,

-against-

New York City Department of Education,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for appellant.

Richard Krinsky, Brooklyn, for respondent.

Judgment, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered February 13, 2009, directing expungement of a letter dated June 3, 2008 from petitioner's personnel file, unanimously reversed, on the law, without costs, the petition denied, and this proceeding, commenced under CPLR Article 78, dismissed.

As is clear in the contract language and explanatory record documentation, the current collective bargaining agreement negotiated by petitioner's union, the United Federation of Teachers, amended the prior provisions of Article Twenty-One pertaining to materials placed in a teacher's permanent personnel file. Under the current contract, letters placed in a teacher's personnel file that do not result in administrative charges are no longer subject to the previously available grievance procedures, with narrow exceptions not applicable herein. Characterizing a letter as a reprimand, in contrast to a counseling memo, as defined therein, does not change that contractual result (*see Holt v Board of Educ. of Webutuck Cent. School Dist.*, 52 NY2d 625, 631-632 [1981]).

Among the benefits conferred by the new provisions, teachers can respond to any disparaging information contained in those letters by appending a written response, which remains in the file with the letter, and such letters are automatically removed from the file three years after the incident giving rise to any such letter, unless administrative charges ensued. In the latter event, the teacher can challenge the letter and its contents as part of the administrative review proceeding. Additionally, these procedural protections were extended to nontenured personnel. School administrators, meanwhile, are relieved of the burden of engaging in grievance procedures, including hearings, as to letters that do not result in disciplinary charges.

Although respondent's own record fails to provide any information purporting to justify the harshness of the principal's letter or her conclusion in this case, and we do not endorse the unjustified action taken by her, the record also does not disclose that any charges were filed against petitioner as a direct consequence of the subject letter. As such, petitioner cannot avail herself of the hearing procedures set forth in Education Law § 3020-a.

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2959 & M-2120 The People of the State of New York, Respondent, Ind. 886/02

-against-

Kevin Smiley,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Appeal from judgment of resentence, Supreme Court, New York County (Gregory Carro, J.), rendered October 27, 2008, as amended November 19, 2008, resentencing defendant to a term of 7 years, with 5 years' post-release supervision, unanimously dismissed as moot, in that Supreme Court has granted defendant's motion to set aside the resentence.

M-2120 - Motion to dismiss appeal as moot granted.

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2962-
2962A In re John Jay College of Criminal Justice of the City University of New York — Index 102934/01

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River Center LLC, et al.,
Claimants-Appellants-Respondents,

-against-

The Dormitory Authority of the State of New York,
Condemnor-Respondent-Appellant.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), for River Center LLC, appellant-respondent.

Kramer Levin Naftalis & Frankel, LLP, New York (James G. Greilsheimer of counsel), for Blackacre Bridge Capital, L.L.C. and SWH Funding Corp., appellants-respondents.

Berger & Webb, LLP, New York (Charles S. Webb III of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered June 5, 2008, awarding claimant River Center LLC the principal sum of $15,065,000, based on a decision, same court (Leland G. DeGrasse, J.), dated April 16, 2008, which, after a nonjury trial, valued River Center's property at $97,250,000 and deducted the condemnor's advance payments of $82,185,000, unanimously modified, on the law and the facts, to vacate that portion of the award which is for $14,800,000 in enhanced value for the zoning change and permits obtained by River Center, the matter remanded for recalculation of the interest, and otherwise affirmed, without costs. Order, same court (Jane S. Solomon, J.), entered May 29, 2008, which denied River Center's motion to reopen the trial for submission of additional evidence or for a new trial, unanimously affirmed, without costs.

The trial court's findings in this condemnation valuation case are based on a fair interpretation of the evidence and we discern no basis to disturb those findings (*see W. T. Grant Co. v Srogi*, 52 NY2d 496, 510 [1981]). While fair market value should be based on the highest and best use of the property even though the owner may not have been utilizing it to its fullest potential at the time of the taking (*see Matter of Town of Islip [Mascioli]*, 49 NY2d 354, 360 [1980]), a use must be established as reasonably probable and not a "speculative or hypothetical arrangement in the mind of the claimant" (*see Matter of City of New York [Rudnick]*, 25 NY2d 146, 149 [1969], *remittitur amended* 26 NY2d 748 [1970]). The speculative nature of the proposed development was shown here by, among other things, the testimony of River Center's principal admitting that at the time of the taking he had yet to obtain any financing commitment or any signed leases for the proposed development or, in fact, any of the requirements that would bring the project to fruition in the near future. To the extent that the appraisal rejected by the court was based on capitalization of income, it too was speculative (*see Matter of City of New York [Atl. Improvement Corp.]*, 28 NY2d 465, 470 [1971]; *Arlen of Nanuet v State of New York*, 26 NY2d 346, 354-355 [1970]).

Although the trial court cited the rule that "the purchase price set in the course of an arm's length transaction of recent vintage, if not explained away as abnormal in any fashion, is evidence of the 'highest rank' to determine the true value of the property at that time" (*Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d 273, 277 [1975]), and thus considered the price set forth in the 1998 purchase agreement for the property, the court properly recognized that such evidence is not determinative and took into account other factors (*see Matter of Kings Mayflower v Finance Admin'r of City of New York*, 63 AD2d 970 [1978]). Such qualified reliance on the 1998 purchase agreement was shown by the trial court's statements that such evidence was recent enough "to warrant consideration" and that it was the "starting point" of any determination of value. In view of such limited use of the recent sale, any exclusion of the evidence proffered by River Center to show that the sale was not at arm's length would have had a minimal effect on the outcome.

The amount of the mortgage loan, with interest at 18½%, did not necessarily reflect the value of the property (*see Farash v Smith*, 59 NY2d 952, 955 [1983]; *see also Matter of City of New York [Esam Holding Corp.]*, 222 App Div 554, 559 [1928], *affd* 250

NY 588 [1929]). Evidence of offers for the property was properly excluded because, among other reasons, offers of such nature are inadmissible on the issue of value (*see Brummer v State of New York*, 25 AD2d 245, 248-249 [1966]). Contrary to River Center's contention, the trial court did not misapply the rule in *Frye v United States* (293 Fed 1013 [1923]) to the two-grid analysis of its appraiser; the court did not exclude this evidence, and merely drew an apt analogy to the rule in finding that the appraiser's analysis was unreliable because it was not based on a generally accepted methodology. The trial court properly rejected River Center's appraiser's addition of $37.8 million in value for entrepreneurial profit, since any claimed developer enhancements were only at the preliminary stage and there was testimony, found to be credible, that the plans were not compliant with the zoning or the special permits for the property. Thus, while the plans might have been useful as a marketing tool, the court reasonably found that no purchaser would have paid for them as an added element of the purchase price for the property. The claim for delay damages as a result of the State's alleged interference in River Center's eventually successful efforts to obtain rezoning was properly dismissed as not an appropriate element in valuation, properly subject to the jurisdiction of the Court of Claims, and duplicative of a claim already before that court.

The motion court properly exercised its discretion (CPLR 4404[b]) in denying River Center's motion to reopen the record or for a new trial. There was insufficient explanation for the failure to present at trial the testimony of a union official knowledgeable about River Center's predecessor's 1992 option and the 1998 purchase of the property (*see Fischer v RWSP Realty, LLC*, 63 AD3d 878 [2009]). Moreover, given that the trial court's discretion to reopen a case after a party has rested should be sparingly exercised (*see Lindenman v Kreitzer*, 7 AD3d 30, 33 [2004]), such discretion should be exercised even more sparingly where, as here, the motion is made after a decision has been rendered. Finally, as noted, it was unlikely that the evidence would have made any difference.

We modify the judgment solely on the ground, based on our review of the record, that the amount awarded for enhanced value for obtaining rezoning and special permits was duplicative, since it was already factored into the condemnor's appraisal that was accepted by the court; in addition, the costs were not documented.

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

ENTERED: JUNE 3, 2010

CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2963 The People of the State of New York, Ind. 4040/07
Respondent,

-against-

Luis Vasquez,
Defendant-Appellant.

Franzblau Dratch, P.C., New York (Stephen N. Dratch of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County (Renee A. White, J.), rendered on or about May 12, 2009, revoking a prior sentence of probation and resentencing defendant to a term of 4 to 12 years, unanimously affirmed.

After denying defendant's CPL 420.10(5) application for resentencing, made on the ground of inability to pay restitution, the court properly revoked defendant's probation and imposed a prison sentence based on his undisputed failure to comply with the restitution condition of his probation. Initially, we note that a denial of a CPL 420.10(5) resentencing application is not appealable (*People v Frederick*, 123 AD2d 468 [1986]). In any event, regardless of whether the present appeal from the resentence brings up for review the denial of the application, we conclude that, based on the history of the case and all the information before it at resentencing, the court properly rejected defendant's excuses for nonpayment of restitution and resentenced him to prison.

Defendant's claim that he was unconstitutionally imprisoned for inability to pay (*see Bearden v Georgia*, 461 US 660 [1983]) is unpreserved because he failed to articulate a constitutional claim (*see e.g. People v Kello*, 96 NY2d 740, 743 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court did not revoke defendant's probation "simply because, through no fault of his own," he could not comply with the restitution order that he signed as part of the plea bargain. The record establishes that defendant's nonpayment was wilful in that he failed to make good faith efforts to pay, and was also wilful in that "in the first instance, the defendant agreed to pay the restitution in order to obtain the benefits of a favorable plea, but knew at the time that he . . . would very likely be unable to satisfy the obligation" (*People v Hassman*, 70 AD3d 716, 718 [2010]).

Furthermore, regardless of whether defendant's nonpayment was wilful, a prison sentence was constitutionally permissible and a proper exercise of discretion, since there was no adequate alternative to prison (*see Bearden*, 461 US at 672-73). "[A] paramount condition of defendant's probation was that he make restitution; his failure to abide by this condition does not render [the] revocation unconstitutional" (*People v Martinich*, 258 AD2d 742, 743 [1999], *lv denied* 93 NY2d 927 [1999]). Defendant was a bookkeeper who stole approximately $590,000, amounting to nearly all the assets of his employer, and his promise to make restitution was the only reason the court initially sentenced him to probation.

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2966 The People of the State of New York, Ind. 3816/01
Respondent,

-against-

Jerome Birth,
Defendant-Appellant.

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

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered February 25, 2009, resentencing defendant to a term of 5 years, with 5 years' postrelease supervision, unanimously reversed, on the law, the resentence vacated and the original sentence without postrelease supervision reinstated.

Defendant is entitled to relief under *People v Williams* (14 NY3d 198 [2010]), which invalidates the imposition of postrelease supervision upon resentencing of defendants who have been released after completing their terms of imprisonment.

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

ENTERED: JUNE 3, 2010

David Spokony

CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2967-
2967A-
2987B In re Norma B.,
Petitioner,

-against-

Sven H.,
Respondent.
\- - - - -
Simon B.,
Appellant.

Dewey & LeBoeuf LLP, New York (Ryan D. Fahey of counsel), for appellant.

Orders, Family Court, New York County (Tandra L. Dawson, J.), entered on or about March 31, 2008 and on or about September 8, 2008, which, insofar as appealed from, determined after fact-finding and dispositional hearings that the evidence was insufficient to sustain a finding of aggravating circumstances under Family Court Act § 827(a)(vii), and order, same court and Judge, entered on or about October 16, 2007, which denied petitioner's motion to permit a certified social worker to testify at the fact-finding hearing to out-of-court statements made by the parties' child, or alternatively to permit the child to testify in camera at the fact-finding or dispositional hearing, unanimously affirmed, without costs.

No basis exists to disturb Family Court's findings of credibility (*see Yoba v Yoba*, 183 AD2d 418 [1992]). To the extent respondent's acts exposed family members to physical injury, Family Court properly found that the acts were not sufficiently contemporaneous with the dispositional hearing to support the requisite statutory element of "immediate and ongoing danger" (*see id.*; *Matter of Ann P v Nicholas C.P.*, 44 AD3d 776, 777 [2007]). While Family Court erred in refusing to permit the child to testify in camera at the dispositional hearing, a remand to permit the child to testify in camera would not be warranted since the child's testimony, even if credited, would have involved events not sufficiently contemporaneous to support a finding of aggravating circumstances. We have considered appellant's other arguments and find them unavailing.

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2968 In re James Thomas, Index 101223/09
Petitioner-Appellant,

-against

MasterCard Advisors, LLC, et al.,
Respondents-Respondents.

Higgins & Trippett LLP, New York (Lewis P. Trippett of counsel), for appellant.

McElroy, Deutsch, Mullvaney & Carpenter, LLP, New York (J. Michael Riordan of counsel), for respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered March 20, 2009, which, inter alia, denied petitioner's application pursuant to CPLR 3102(c) for the pre-action production of records and documents relating to his former employment so as to enable him to frame claims for wrongful termination of employment, unanimously affirmed, without costs.

Pre-action disclosure is available only upon a showing that the petitioner has a meritorious cause of action and that the information sought is material and necessary to an actionable wrong (*see Holzman v Manhattan & Bronx Surface Tr. Operating Auth.*, 271 AD2d 346, 347 [2000]). It may not be used for the purpose of exploring the possibility of alternative theories of liability or whether the prospective plaintiff has a cause of action worth pursuing (*see id.; Matter of Uddin v New York City Tr. Auth.*, 27 AD3d 265 [2006]).

Here, the court exercised its discretion in a provident manner in denying the application since it is clear that petitioner does not have a viable claim against respondents for wrongful termination in violation of its standards contained in the employee handbook. Petitioner, who acknowledged in his employment application that "I understand that my employment may be terminated with or without cause and with or without notice, at any time, at the option of either MasterCard or myself," may not ignore the disclaimer in the code of conduct that the "the Code of Conduct, Employee Handbook . . . are not contracts of employment and are not intended to create any implied promises or guarantees of fixed terms of employment" by endeavoring to create a contractual obligation upon his employer not to exercise its otherwise unfettered right to terminate, at any time, an at-will employee with or without cause (*see Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312 [2001]; *compare Weiner v McGraw-Hill, Inc.*, 57 NY2d 458 [1982]).

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

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK

JUN 3 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick
Helen E. Freedman, JJ.

370
Index 650164/08

____x

Centro Empresarial Cempresa S.A., et al.,
Plaintiffs-Respondents,

-against-

América Móvil, S.A.B. de C.V., et al.,
Defendants-Appellants.
____x

Defendants appeal from an order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered December 10, 2008, which denied their motion to dismiss the complaint.

Mayer Brown LLP, New York (Philip Allen Lacovara and Scott A. Chesin of counsel), for appellants.

Fox Horan & Camerini LLP, New York (Kathleen M. Kundar and Eric Lindquist of counsel), for respondents.

FRIEDMAN, J.P.

Plaintiffs allege that they were induced to sell out their indirect minority interest in an Ecuadorian mobile telephone company by misrepresentations made to them by defendants (the owner of the majority interest and its affiliates) concerning the value of the underlying enterprise. We hold that plaintiffs' various causes of action for fraud and breach of contract are barred by the general release they granted defendants in connection with the sale of their interest, which release covered any and all claims, "whether past, present or future, actual or contingent," arising from the parties' association as co-investors in this enterprise.

Plaintiffs Centro Empresarial Cempresa S.A. and Conecel Holding Limited are British Virgin Islands entities that, as of 1999, held a combined majority interest in defendant Consorcio Ecuatoriano de Telecommunicaciones S.A. Conecel (Conecel), the Ecuadorian mobile telephone company. As alleged in the complaint, in 1999, plaintiffs were seeking an outside investor to infuse additional capital into Conecel. To that end, they approached defendant Carlos Slim Helú (Slim), the chairman of defendant Teléfonos de México, S.A. de C.V. (Telmex), a Mexican telecommunications company with operations (through subsidiaries) throughout Latin America. Slim expressed interest in acquiring

100% of Conecel, but plaintiffs insisted on retaining a minority interest in the company and on participating in any "upside" that might result from a future public offering of its shares.

After several months of negotiation, the parties entered into a number of related agreements, dated as of March 8, 2000, under which Telmex invested $185 million in Conecel and acquired a 60% indirect interest in the company, with plaintiffs (together with a third investor not participating in this lawsuit) retaining a combined 40% indirect interest. As a result of the transaction, the parties held their interests in Conecel through defendant Telmex Wireless Ecuador LLC (TWE), a newly formed Delaware limited liability company.[1] Telmex held its interest in TWE through a subsidiary, defendant Telmex Wireless LLC (Telmex LLC), which, under the TWE limited liability company agreement, was given the responsibility to "oversee [TWE's] accounting, tax and recordkeeping matters."[2]

One of the contracts made in connection with Telmex's investment in Conecel was the Agreement Among Members, dated March 8, 2000. Section 3.09 of the Agreement Among Members provided that, in the event Telmex sought to consolidate its

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[1]TWE is now known as Wireless Ecuador LLC.

[2]Telmex LLC is now known as AMX Ecuador LLC.

Latin American telecommunications interests into one entity "for purposes of selling the equity securities of such entity in international capital markets" (a transaction the complaint refers to as a "roll-up"), plaintiffs would have the right to "negotiate in good faith (for a period not to exceed 20 days)" to exchange their units in TWE for equity shares of the new entity "at a mutually satisfactory rate of exchange."[3]

Another contract made in connection with the transaction was the Put Agreement, dated March 8, 2000, which granted plaintiffs the right to require Telmex LLC to purchase, at a pre-set price, up to 95% of plaintiffs' TWE units in increments during three six-month windows of time over a period of 6½ years. The price set by the Put Agreement (referred to in the complaint as the

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[3]In pertinent part, section 3.09 of the Agreement Among Members provides:

> "SECTION 3.09. <u>Exchange of Units in Event of Consolidation of Telmex Business</u>. For so long as the Adjusted Ownership Percentage of [plaintiffs] is (in the aggregate) equal to or greater than 5%, in the event that Telmex LLC or its Affiliates seeks to engage in a transaction to consolidate the investments of [Telmex] in the telecommunications industry in Central and South America, including [TWE] or Conecel, into a single entity for purposes of selling the equity securities of such entity in international capital markets, Telmex LLC and [plaintiff] shall negotiate in good faith (for a period not to exceed 20 days) to exchange Units for the equity securities of such entity at a mutually satisfactory rate of exchange."

"Floor Price") was based on Conecel's value at the end of 1999, at which time (plaintiffs allege) Ecaudor's economy was in crisis and, as a result, Conecel's value was depressed. The Put Agreement entitled plaintiffs to "put" up to 50% of their TWE units to Telmex LLC during the 180 days following March 8, 2002; up to 75% of their units during the 180 days following March 8, 2004; and up to 95% of their units during the 180 days following March 8, 2006.

In September 2000, Telmex formed defendant América Móvil, S.A.B. de C.V. (América Móvil), a spin-off company which became the holding company for a number of Telmex's telecommunications interests, including TWE (and thus Conecel). The complaint alleges that plaintiffs did not learn of the formation of América Móvil until December 2000, when the latter filed a registration statement with the United States Securities and Exchange Commission setting forth the trading markets on which its shares were listed, including the New York Stock Exchange and Nasdaq. The complaint further alleges that "[t]he América Móvil spin-off constituted a roll-up as covered by Section 3.09 of the Agreement Among Members," triggering plaintiffs' right to a 20-day negotiation for an exchange, "at a mutually satisfactory rate," of their TWE units for América Móvil shares.

The complaint alleges that, beginning in March 2001, plaintiffs sought to enter into negotiations with defendants concerning an exchange of their TWE units for América Móvil shares and, to that end, requested that defendants provide them with Conecel's and TWE's internal "financial information" and business plans. The complaint further alleges that defendants failed to provide plaintiff with the requested information, in violation of various contractual obligations to do so, and instead consistently brushed off plaintiffs' requests for information, failing to return phone calls and directing plaintiffs from one executive to another. Plaintiffs also allege that, to the extent defendants provided them with any information about the value of Conecel and TWE, such information, whether conveyed orally or in written documents (such as balance sheets), was to the effect that Conecel was "financially distressed with uncertain prospects," consistent with the company's public filings. Plaintiffs allege that the bleak picture of Conecel's financial condition thus portrayed to them (and to investors generally through public filings) was materially false and misleading. In fact, plaintiffs allege, Conecel was performing much better than reflected in defendants' oral and written representations and public filings.

It is further alleged that plaintiffs, having been led by defendants to believe that Conecel was in financial difficulty, disposed of their interest in Conecel in two stages. First, in March 2002, plaintiffs exercised their right under the Put Agreement to sell 50% of their TWE units to Telmex LLC at the pre-set "Floor Price," which amounted to $64 million. In this regard, plaintiffs allege:

> "Deprived by [d]efendants of complete and accurate financial information regarding Conecel in public filings [*sic*], [plaintiffs] were deprived of having an informed negotiation for the exchange [pursuant to section 3.09 of the Agreement Among Members] and were wary of the threat that [d]efendants would never negotiate in good faith and would never distribute the Conecel profits through TWE LLC as agreed by them. Consequently, [plaintiffs] were left with no practical alternative but to dispose of the portion of their interest in . . . TWE LLC that could be sold through the exercise of the First Put [under the Put Agreement]."

The complaint alleges that defendants' obfuscation and misrepresentation of Conecel's true financial condition continued for more than a year after plaintiffs' exercise of their first option under the Put Agreement. Ultimately, in 2003, Telmex LLC offered to purchase all of plaintiffs' TWE units at the "Floor Price" set by the Put Agreement, but in advance of the schedule set by that agreement. Plaintiffs accepted the offer, allegedly "in reliance on [defendants'] misrepresentations," and the parties entered into a Purchase Agreement, dated July 29, 2003, pursuant to which plaintiffs sold their remaining TWE units to Telmex LLC at the "Floor Price," which amounted to another $64 million. It is undisputed that the Purchase Agreement was the product of rigorous, arm's length negotiations between sophisticated parties, all of whom were advised by their own expert legal counsel.

Pursuant to the Purchase Agreement, the parties executed and exchanged a broadly drafted mutual release (the 2003 release), under which, in pertinent part, plaintiffs

> "fully release[d] [defendants] of and from all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands, liability [*sic*], whatsoever, in law or equity, whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of, based upon, attributable to or resulting from the ownership of membership interests in [TWE] or having taken or failed to take any action in any capacity on behalf of [TWE] or in connection with the business of [TWE]."

The complaint further alleges that, years after the buy-out of plaintiffs' interest, defendants' alleged dishonesty was exposed as a result of an audit of Conecel conducted by the Ecuadorian tax authority. The findings of the tax audit allegedly revealed that "the true financial results of Conecel in 2001-2003 were considerably better than represented by [d]efendants to [p]laintiffs when [d]efendants offered to purchase [p]laintiffs' Units [in TWE]." As a result, plaintiffs commenced this action for fraud and breach of contract in 2008. Plaintiffs allege that, had defendants honored their right to negotiate an exchange of their TWE units for América Móvil shares, plaintiffs would have owned América Móvil shares worth more than $1 billion as of May 30, 2008 (the date of the complaint). By contrast, plaintiffs complain, defendants induced them to sell their TWE units in the 2002 and 2003 transactions for aggregate consideration of less than $130 million.

Based on the allegations of the complaint itself, this action is barred in its entirety, as a matter of law, by the 2003 release that plaintiffs granted defendants in connection with the sale of all of their remaining interest in TWE to Telmex LLC for $64 million, years in advance of their right to require Telmex LLC to purchase nearly all of that interest under the Put Agreement. Indeed, plaintiffs do not deny that their claims fall squarely within the scope of the plain terms of the 2003 release which, to reiterate, extinguishes defendants' liability in

> "all manner of actions . . . whatsoever, in law or equity, whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members [of TWE] and/or arising out of, based upon, attributable to or resulting from the ownership of membership interests in [TWE] or having taken or failed to take any action in any capacity on behalf of [TWE] or in connection with the business of [TWE]."

Notwithstanding that the 2003 release, by its terms, encompasses any kind of claim arising from the parties' holding of interests in TWE, plaintiffs argue that the allegations of the complaint, if true, make out a case for voiding the 2003 release on the ground of fraudulent inducement. In this regard, plaintiffs point to their allegations that, during the period from 2001 through the buy-out of their interest in TWE in 2003, defendants were (as plaintiffs claim) misrepresenting to them that Conecel (which was owned by TWE) was "financially distressed with uncertain prospects," consistent with the company's public filings. According to the complaint, defendants never corrected these alleged misrepresentations at any time before the execution of the 2003 release. As a result, plaintiffs allege, they were induced to sell their interest in TWE to defendants in July 2003 (foregoing the negotiated exchange to which they were entitled) and, as part of that transaction, to grant defendants the 2003 release. It is plaintiffs' contention that these allegations, if proven at trial, would establish that the 2003 release was the product of fraudulent inducement and, as such, voidable.

In our view, plaintiffs have not alleged any basis for voiding the release they granted to defendants. As the Court of Appeals has explained:

> "[A] release may [not] be treated lightly. It is a jural act of high significance without which the settlement of disputes would be rendered all but

> impossible. It should never be converted into a starting point for renewed litigation except under circumstances and under rules which would render any other result a grave injustice" (*Mangini v McClurg*, 24 NY2d 556, 563 [1969]).[4]

In this case, plaintiffs seek to convert the 2003 release into a starting point for new (rather than renewed) litigation, essentially asking to be relieved of the release on the ground that they did not realize the true value of the claims they were giving up, namely, their claims for the value of their interests in TWE. In other words, as defendants point out, plaintiffs are

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[4]The dissent seizes on the statement in *Mangini* (which involved a personal injury claim on behalf of a minor) that there are cases in which it is appropriate to allow a party to "avoid[] [a release] with respect to uncontemplated transactions despite the generality of the language in the release" (24 NY2d at 562). This observation in no way supports the dissent's position here, since plaintiffs' present claims do not arise from any transaction that was "uncontemplated" by the parties when the 2003 release was granted. To reiterate, that release extinguished all claims arising from defendants' conduct in connection with "the Agreement Among Members [of TWE] and/or . . . the ownership of membership interests in [TWE] or . . . having taken or failed to take any action in any capacity on behalf of [TWE] or in connection with the business of [TWE]" -- precisely the matters placed at issue by plaintiffs' complaint. Moreover, nothing in *Mangini* supports the dissent's apparent view that, in a commercial context, a party should not be held to a release if the claims it released later turn out to have been worth significantly more than it contemplated when the release was granted. While there are undoubtedly cases in which giving effect to a release would result in such "grave injustice" (*id.* at 563) that it should not be enforced, this case -- in which the releasors were highly sophisticated and well-counseled business organizations that granted the release as part of a deal in which they were paid $64 million and made a handsome profit -- does not fall in that category, as discussed below.

arguing that a release may be invalidated by its own effectiveness. We find this contention to be self-refuting.

It is clear from the allegations of the complaint that the issue in contention between the parties when they negotiated the July 2003 sale of plaintiffs' interests in TWE to defendants was the value of Conecel, TWE's sole asset. The parties agreed on a purchase price of $64 million, which plaintiffs received immediately, thereby avoiding waiting years for the exercise dates of their second and third options under the Put Agreement (2004 and 2006, respectively). The parties further agreed that plaintiffs would grant defendants a broad release of any and all claims, "whether past, present or future, actual or contingent," arising from "the ownership of membership interests in [TWE] or having taken or failed to take any action in any capacity on behalf of [TWE] or in connection with the business of [TWE]." On its face, this language clearly includes any claim possibly to be discovered in the future that defendants had misrepresented the value of Conecel (and, thus, of TWE), the issue at the heart of the entire deal.

Whether or not plaintiffs had reason to suspect that defendants were misrepresenting the value of Conecel in the negotiation of the 2003 transaction, they cannot reasonably contend that they did not intend to release possible fraud claims as to that matter of which they were unaware. Whatever subjective intent they may have harbored, the objective meaning of the release they signed was that any such fraud claims they might subsequently discover were being extinguished. A party cannot overturn the settlement of a dispute as to a particular matter (here, the value of Conecel) on the ground that "it reasonably relied on a representation by [its adversary], in . . . [the] settlement negotiations, as to that exact point" (*Eastbrook Caribe, A.V.V. v Fresh Del Monte Produce, Inc.*, 11 AD3d 296, 297 [2004], *lv denied in part, dismissed in part* 4 NY3d 844 [2005]).[5] In other words, "[w]hen a party releases a claim for fraud, it can later challenge that release for fraudulent inducement only by identifying a separate and distinct fraud from that contemplated by the agreement" (*DIRECTV Group, Inc. v Darlene Invs., LLC*, 2006 WL 2773024, *4, 2006 US Dist LEXIS 69129, *11 [SD NY 2006]). In this case, plaintiffs have not alleged that the 2003 release granted in connection with the buy-

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[5]The dissent seeks to distinguish *Eastbrook* on the ground that the settlement at issue therein resolved a prior lawsuit in which fraud was alleged. Nothing in the decision, however, indicates that it was the pendency of fraud claims in the prior litigation that mandated the rejection of the plaintiff's attempt to invalidate the settlement on grounds of fraudulent inducement. Rather, it was the subject matter of the settled dispute that negated the plaintiff's claim that the settlement had been fraudulently induced by a misrepresentation as to that very matter.

out transaction was induced by a fraud as to any matter "separate and distinct" from the issue settled by that very transaction, namely, the value of Conecel.[6]

Contrary to plaintiffs' contentions, a claim for fraud within the scope of a release can be released even if it is unknown to the releasor, and notwithstanding that the releasee did not make full disclosure of its wrongdoing before the release was granted (*see Bellefonte Re Ins. Co. v Argonaut Ins. Co.*, 757 F2d 523, 527-528 [2d Cir 1985]; *Alleghany Corp. v Kirby*, 333 F2d 327, 333 [2d Cir 1964], *adhered to on reh* 340 F2d 311 [1965] [en banc], *cert dismissed* 384 US 28 [1966]; *Consorcio Prodipe, S.A. de C.V. v Vinci, S.A.*, 544 F Supp 2d 178, 190-192 [SD NY 2008]). As stated in the last cited case, "[a] 'general release executed even without knowledge of a specific fraud effectively bars a claim or defense based on that fraud'" (*id.* at 191, quoting *Sotheby's, Inc. v Dumba*, 1992 WL 27043, *7, 1992 US Dist LEXIS

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[6]Plaintiffs attempt to distinguish between defendants' alleged fraud through 2002 (when plaintiffs were prevented from exchanging their TWE units for América Móvil shares) and the alleged fraudulent inducement of the 2003 buy-out transaction (when plaintiffs were induced to dispose of their interest altogether) based on the change in defendants' objective. This argument is unavailing; in both cases, precisely the same factual matter (the true value of Conecel) was being misrepresented.

965, *21 [SD NY 1992]).[7] Further, a release that, by its terms, extinguishes liability on any and all claims arising in connection with specified matters is deemed to encompass claims of fraud relating to those matters, even if the release does not specifically refer to fraud and was not granted in settlement of an actually asserted fraud claim (*see Consorcio*, 544 Supp 2d at 192 [where "language of remarkable breadth makes clear the parties' intent to release all claims, including those of fraudulent inducement," court held that "(e)ven if no semblance of fraud had come to light before the releases were executed, it is clear that the parties intended to settle fraud claims"] [citations, internal quotation marks, ellipses and brackets omitted]).[8]

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[7]We reject plaintiffs' argument that a release, no matter how broad, does not encompass unknown claims unless it specifically recites that it covers claims "known and unknown." As a federal appellate court has stated: "When a release provides that 'any and all claims,' 'past, present, or future' are to be extinguished, a court is required to enforce its provisions both as to known and unknown claims" (*Ingram Corp. v J. Ray McDermott & Co, Inc.*, 698 F2d 1295, 1312 [5th Cir 1983]).

[8]Contrary to the dissent's implication, the court in *Consorcio* expressly *rejected* the argument that the fraud claims in that case were not barred by the plaintiffs' release of the defendants because "no release at issue here was born from the settlement of a fraud claim" (*id.* at 191). Notwithstanding that the release at issue had not been granted in settlement of a previously asserted fraud claim and did not even expressly refer to fraud, the court held that "[t]he broad releasing language encompasses a fraudulent inducement claim because the claim

While Telmex LLC, as the holder of the majority interest in TWE (and, through TWE, Conecel) owed plaintiffs certain fiduciary duties, the foregoing principles apply (at least among sophisticated parties advised by counsel) even where the releasee is a fiduciary (*see Alleghany Corp.*, 333 F2d at 328 [enforcing release granted to defendant Kirby by corporation of which he had been an "officer() and director()"]; *Consorcio*, 544 F Supp 2d at 191 ["'the policy underlying *Alleghany* and *Bellefonte* applies with equal force to fiduciaries'"] [brackets omitted], quoting *Tyson v Cayton*, 784 F Supp 69, 75 [SD NY 1992] [enforcing boxer's release of his former manager]; *Gaetjens v Gaetjens, Berger & Wirth*, 151 F Supp 701, 704 [SD NY 1957] [counterclaim against former corporate officer for conversion of corporate funds was barred by release, notwithstanding that corporation did not know of the conversion when release was signed]). If Telmex LLC's fiduciary status alone sufficed to prevent it from obtaining the dismissal of this action based on the 2003 release, the implication would be that a fiduciary can never obtain a valid release without first making a full confession of its sins to the releasor, regardless of the releasor's sophistication and the arm's length nature of the negotiations from which the release

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relates to the Project" referenced by the release (*id.* at 192).

emerged. This is not the law (*see Alleghany Corp.*, 333 F2d at 333 [it was "no prerequisite" to the effectiveness of a release of a fiduciary defendant that he "come forward and confess to all his wrongful acts" before the granting of the release]). Such a rule would render useless and meaningless any release of a party that owed the releasor a fiduciary duty, thereby unjustifiably impinging on the freedom of commercial actors to order their own affairs by contract and, moreover, contravening the public policy favoring the settlement of business disputes. We are not aware of any precedent compelling us to accept such an absurd result.

Further, the allegations of the complaint make clear that plaintiffs entered into the 2003 transaction well aware that defendants had not given them access to the internal financial records of Conecel. If plaintiffs did not intend to release claims of fraud concerning the value of Conecel that they might discover in the future, they should have insisted on access to Conecel's internal books and records (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 60 AD3d 421, 424 [2009], *lv granted* 13 NY3d 710 [2009]), instead of relying on public filings and the limited documentation and oral representations defendants provided. If defendants would not provide access to the internal books and records voluntarily, plaintiffs could have sued for such access under the terms of their existing agreements with defendants.

More fundamentally, if plaintiffs did not wish to forego suing on a fraud claim they might discover in the future, these sophisticated and well-counseled entities should have insisted that the release be conditioned on the truth of the financial information provided by defendants (whether directly or through public filings) on which plaintiffs were relying (*see Graham Packaging Co., L.P. v Owens-Illinois, Inc.*, 67 AD3d 465 [2009]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100-101 [2006], *lv denied* 8 NY3d 804 [2007]; *Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc.*, 16 AD3d 352 [2005]; *Rodas v Manitaras*, 159 AD2d 341, 343 [1990]). In essence, by entering into the 2003 sale of their interests in reliance on defendants' unverified representations concerning Conecel's financial condition, without inserting into the agreement "a prophylactic provision . . . to ensure against the possibility of misrepresentation" (*Permasteelisa*, 16 AD3d at 352), plaintiffs "may be truly said to have willingly assumed the business risk that the facts may not be as represented" (*Rodas*, 159 AD2d at 343). In this regard, we note that it is also clear from the complaint that, throughout the period in question (2001-2003), relations between the parties were adversarial, if not outright hostile, thereby negating as a matter of law any inference that business entities as sophisticated as plaintiffs were relying on defendants for an objective assessment of the value of their investment (*see Shea v Hambros PLC*, 244 AD2d 39, 47 [1998]).

As previously stated, while it is true that defendants were fiduciaries insofar as they managed and held the majority interest in TWE, that does not permit plaintiffs to avoid the effect of the release they signed under the circumstances alleged in the complaint. This Court's decision in *Blue Chip Emerald v Allied Partners* (299 AD2d 278 [2002]) is not to the contrary. In *Blue Chip*, the plaintiff was permitted to sue its former fiduciary in a joint venture for the ownership of a building, notwithstanding certain representations and disclaimers in the agreement for the fiduciary's buy-out of the plaintiff's interest, for the alleged concealment from the plaintiff, at the time it sold its interest, of the fiduciary's oral agreement with a third party for the sale of the building, which transaction was consummated two weeks after the fiduciary bought out the plaintiff. It was critical to the result in *Blue Chip* that the plaintiff in that case did not have "at its disposal ready and efficient means" for ascertaining whether such an oral agreement (or an offer in the relevant price range) even existed (299 AD2d at 280). Here, by contrast, plaintiffs were well aware that Conecel did have a value, and nonetheless chose to cash out their interests without either insisting on verifying defendants' representations as to that value or, on the other hand, conditioning the deal on the accuracy of the information they did receive. Indeed, as previously discussed, plaintiffs here were well aware that they were not in possession of all the information they believed they were entitled to when they sold their interests. *Blue Chip* is further distinguishable on the ground that it did not involve a formal general release but only contractual disclaimers of reliance.[9]

For the foregoing reasons, this action is barred in its entirety by the 2003 release. Since we reach this conclusion based on the allegations of the complaint itself and on the unambiguous language of the 2003 release, there is no need to

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[9]Also distinguishable from the instant case is this Court's decision in *Littman v Magee* (54 AD3d 14 [2008]), in which a general release in the agreement for the sale of the plaintiff's interest in a closely-held business was held not to bar a fraud action against a former fiduciary at the pleading stage because the complaint was deemed to allege that the defendant fiduciary had told the plaintiff that no further documentation bearing on the valuation of the enterprise existed, thereby exonerating the plaintiff from the need to investigate further (54 AD3d at 19). Here, plaintiffs do not allege that defendants told them that no information about Conecel's financial condition beyond the minimal amount that had been shared with plaintiffs was in existence. In addition, the *Littman* plaintiff alleged that he was induced to sell out in part by a "threat[] that if [he] did not agree to the proposed sale, approximately $1 million in income would be allocated to him for the year 2004, while no distribution would be made to him to cover the taxes resulting from that allocation" (*id.* at 16). No such threat or duress is alleged here.

give plaintiffs "their day in court," as the dissent suggests we should. Assuming the truth of plaintiffs' own allegations, they could not prevail at trial, as a matter of law. Given our conclusion that the 2003 release dictates the outcome of this appeal, we need not address defendants' remaining arguments in favor of reversal. Although certain of the defendants have argued that they are not subject to personal jurisdiction in the New York courts, we are not asked to rule on the jurisdictional issue in the event we accept defendants' primary argument that the complaint must be dismissed as against all of them based on the 2003 release.

Accordingly, the order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered December 10, 2008, which denied defendants' motion to dismiss the complaint, should be reversed, on the law, and the motion granted, with costs. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

All concur except Sweeny and Catterson, JJ.
who dissent in an Opinion by Catterson, J.

CATTERSON, J. (dissenting)

I must respectfully dissent. The majority relies on the seminal case of Mangini v. McClurg (24 N.Y.2d 556, 301 N.Y.S.2d 508, 249 N.E.2d 386 (1969)), but appears to miss the proposition for which it stands. In that case, the Court of Appeals held that while a release may not be treated lightly, "the cases are many in which the release has been avoided with respect to uncontemplated transactions despite the generality of the language in the release." 24 N.Y.2d at 562, 301 N.Y.S.2d at 513. It may be safely assumed that the plaintiffs were not contemplating the possibility of being defrauded out of hundreds of millions of dollars by signing the release. Further, the Court was clear that a release may be avoided "under circumstances and under rules which would render any other result a grave injustice." 24 N.Y.2d at 563, 301 N.Y.S.2d at 513. In my opinion, allowing the defendants to invoke a release that was signed in consideration for a deal that rewarded only the defendants is the very essence of a grave injustice. More egregiously, it allows the defendants to flaunt their alleged contractual violations by arguing that any failure to negotiate in good faith or to provide key financial documents should have been recognized by the plaintiffs as an indication of fraud. Incomprehensibly, the majority also adopts the defendants' disingenuous argument that this Court would be invalidating a release because of "its own effectiveness" if it invalidated the release on the basis that the plaintiffs did not realize the true value of the claims they were giving up. It appears the majority has overlooked the well-established precept that releases "'must be *knowingly* and voluntarily entered into'" (Consorcio Prodipe S.A. de C.V. v. Vinci, S.A., 544 F.Supp.2d 178, 189, (S.D.N.Y. 2008) quoting Skluth v. United Merchants & Mfrs., 163 A.D.2d 104, 106, 559 N.Y.S.2d 280, 282 (1st Dept. 1990), and propounds, instead, the view that an effective release is one in which the releasor is hoodwinked by the releasee.

In any event, the majority's holding that the plaintiffs could have insisted on, or independently verified, defendants' representations as to the value of the subject company ignores the fact that this is a motion to dismiss pursuant to CPLR 3211. This means that, at this stage of the pleadings: (1) all facts pleaded by the plaintiffs must be assumed to be true and the plaintiffs must be given the benefit of every reasonable inference, and (2) what the plaintiffs knew or should have known or should have investigated is an element of fraudulent inducement that cannot be determined on a motion to dismiss, but is subject to proof offered at trial. Ultimately, I disagree with the majority in its attempt to resolve the issue on its merits without giving the plaintiffs their day in court.

In this action for, inter alia, breach of contract and fraud, the defendants appeal the denial of their motion to dismiss primarily on the grounds that all of the plaintiffs' causes of action are covered by a 2003 release, and all are time-barred by the applicable statutes of limitations. The plaintiffs, former owners of an Ecuadorian cell phone company, allege that they rejected Mexican billionaire Carlos Slim Helu's (hereinafter referred to as "Slim") initial offer to buy out their interest in the company, but that, nevertheless, within three years América Móvil, a holding company of which Slim is chairman emeritus of the board, owned 100% of their interest. Why and how the plaintiffs came to divest themselves of their ownership interest lies at the crux of this action. The plaintiffs allege they were fraudulently induced to sell their ownership interest and to sign a release in favor of the defendants. Moreover, the plaintiffs claim that they did not discover the fraud until 2008 when a multi-year tax audit of the company by the Ecuadorian government revealed that publicly filed financial statements were false.

The key issue on appeal is whether on the pleadings, the plaintiffs allege sufficient facts to controvert the release on the grounds of fraudulent inducement. Since on a motion pursuant to CPLR 3211, the court must accept as true the allegations of the complaint, and give the plaintiffs the benefit of any reasonable inference to be drawn from them (Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 428, 754 N.E.2d 184, 187 (2001); see also Littman v. Magee, 54 A.D.3d 14, 860 N.Y.S.2d 24 (1st Dept. 2008)), and since the defendants owed the plaintiffs a fiduciary duty (54 A.D.3d at 15; 860 N.Y.S.2d at 25), I believe the motion court correctly found that the plaintiffs' claims were not barred, as a matter of law, at this stage of the pleadings by the release they signed.

The plaintiffs are two Mexican companies, Centro Empresarial Cempresa S.A. and Conecel Holding Limited, which, before March 2000, jointly owned a controlling interest in Consorcio Ecuatoriano de Telecommunicaciones S.A. Conecel (hereinafter referred to as "Conecel"), an Ecuadorian cell phone company. The defendants are Conecel, América Móvil S.A.B. de C.V. (hereinafter referred to as "América Móvil") and Teléfonos de Mexico, S.A. de C.V. (hereinafter referred to as "Telmex"), which are Mexican companies; Wireless Ecuador LLC, f/k/a Telmex Wireless Ecuador LLC (hereinafter referred to as "TWE LLC") and AMX Ecuador, LLC, f/k/a Telmex Wireless LLC (hereinafter referred to as "Telmex LLC"), which are Delaware LLCs; and two individual defendants, Slim, chairman emeritus of the boards of both Telmex and América

Móvil and Daniel Hajj Aboumrad (hereinafter referred to as "Hajj"), Slim's son-in-law and the CEO of América Móvil.

The plaintiffs allege that in March 2000, they executed a series of agreements with Mexico's leading telecommunications company Telmex and its wholly owned subsidiary, Telmex LLC. The agreements were executed in New York following discussions commenced in 1999 by Simon Parra, the plaintiffs' representative and Slim, owner and chairman of the board of Telmex.

At that time, the plaintiffs were seeking outside investors for the Ecuadorian wireless company in which they held a controlling interest. Slim stated that he was interested in buying 100% of Conecel, but Parra emphasized that the plaintiffs did not want to sell off the entire company. Slim then stated that he would invest in Conecel only if Telmex could hold a majority interest in the company. Slim told the plaintiffs that if Telmex or any of its affiliates acquired a majority interest in Conecel, there would be protections for the minority interest and a potential upside in value for the minority such as through a stock exchange listing.

In January 2000, the parties signed a letter of intent, which provided that if there were a roll-up transaction - that is, if Telmex decided to consolidate its investments in various Latin American telecommunications companies so that those investments could be placed into the international markets - then the plaintiffs would have the right to exchange their shares in Conecel for shares of the new holding company.

In March 2000, the parties negotiated several agreements, which were all executed on March 8, 2000. The agreements were an Agreement Among Members, a Put Agreement, an LLC Agreement, a Purchase Agreement, and a Master Agreement. Pursuant to the latter, the plaintiffs contributed their Conecel capital stock to TWE LLC, a newly-formed Delaware limited liability company, in return for approximately 37% of the interest in TWE. Telmex contributed $150 million and paid $35 million to retire Conecel Holding Limited's debt. In return, Telmex LLC received 60% of the interest in TWE.[1] Thus, pursuant to the Master Agreement, TWE became the sole shareholder of Conecel. Each party held its interest in TWE as a member of the company holding "Units."

The LLC agreement provided pursuant to section 7.4 that:

> "Telmex LLC shall oversee the accounting, tax and record keeping matters of [TWE LLC]; provided that the Members shall be entitled to review any tax statements of [TWE LLC] prior to its filing. [TWE LLC] shall provide quarterly financial statements to all Members."

Under the separate Put Agreement, the plaintiffs received

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[1] A third company, MasTec Ecuador, which is not a party to this action, held approximately three percent of the interest in TWE.

the option to require Telmex LLC to purchase the following Units of TWE within any three 180-day periods: up to 50% of their Units during a 180-day period in 2002 (the "first put right"); an aggregate of 75% of their remaining Units during a six-month period in 2004 (the "second put right"); and buy up to an aggregate of 95% of their remaining Units during a six-month period in 2006 (the "third put right"). Further, the consideration to be paid - that is, the "floor price" - was fixed based on a value of Conecel at the end of 1999.

Entirely separate from the Put Agreement, the Agreement Among Members included two provisions regarding the potential roll-up transaction. First, section 3.06 provided:

> "Information. Prior to the occurrence of either an initial public offering of Conecel or the transaction described in Section 3.09 hereof, each of Telmex LLC, [TWE], and the Cempresa Parties will take all Necessary Action to provide the Cempresa Representative . . . with such financial, accounting and legal information with respect to Conecel and [TWE] as may reasonably be requested by the Cempresa Representative."

Section 3.09 then provided, in pertinent part:

> "Exchange of Units in Event of Consolidation of Telmex Business . . . [I]n the event that Telmex LLC or its Affiliates seeks to engage in a transaction to consolidate the investment of [Telmex Mexico] in the telecommunications industry in Central and South America, including [TWE] or Conecel, into a single entity for purposes of selling the equity securities of such entity in international capital markets, Telmex LLC and the Cempresa Parties shall negotiate

> in good faith (for a period not to exceed 20 days) to exchange Units for the equity securities of such entity at a mutually satisfactory rate of exchange."

In September 2000, Telmex spun off América Móvil, a holding company for Telmex's wireless business and for several indirectly owned international wireless businesses, including its partial ownership in TWE. The plaintiffs took the position that the formation of América Móvil constituted a transaction under section 3.09 of the Agreement Among Members, and therefore triggered their right to negotiate the exchange of their TWE Units for equity securities.

In March 2001, the plaintiffs' representative met with defendant Hajj. According to the complaint, at that meeting, the plaintiffs' representative told Hajj that the plaintiffs needed financial information about Conecel and its owner, TWE, in order to be able to negotiate a rate for the exchange. Despite the defendants' contractual obligations, they refused to provide that information or to engage in good-faith negotiations. When the plaintiffs tried to move negotiations forward by contacting various América Móvil personnel, such as the general counsel, those personnel failed to return their phone calls. Hence, the plaintiffs assert, they became "wary of the threat that [d]efendants would never negotiate in good faith."

The plaintiffs allege that the defendants caused Conecel to file false and misleading public financial information so as to make it appear that an exchange under section 3.09 of the Agreement Among Members would yield fewer América Móvil shares than was actually the case. Thus, in any informed and good-faith negotiation as to an exchange of Units under section 3.09, the plaintiffs would have had a strong negotiating position because América Móvil's securities had a depressed value on the stock exchanges, while the true value of Conecel would have increased the value of their TWE Units. Indeed, the plaintiffs allege that from the very beginning of the parties' involvement, the defendants had had no intention of fulfilling the promises they had made to plaintiffs.

In 2002, the plaintiffs further allege that, as minority shareholders of a closed corporation, they realized they had "no practical alternative" but to dispose of the portion of the interest in TWE that could be sold through the exercise of the first put. Hence, the plaintiffs sold 50% of their Units in TWE, for the floor price to Telmex LLC, receiving approximately $64 million.

From 2002 to 2003, after they exercised the first put, the plaintiffs continued to press the defendants [through Hajj] to negotiate as to the exchange of their remaining Units under section 3.09. According to the complaint, Hajj informed the plaintiffs that Conecel's poor financial condition did not allow distribution of profits; they were supplied false information purporting to support the fact of Conecel's financial troubles; and moreover neither Hajj nor anyone else acting for any defendant, including Telmex LLC, would discuss a range of prices for any exchange of Units.

In 2003, Telmex LLC offered to buy the plaintiffs' remaining units at the floor price. Because the offer was made outside of the remaining put periods, it was contingent on the plaintiffs' signing a release of claims against the defendants. The release purported to release the defendants from "all manner of actions . . . whatsoever, in law or equity, whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of, based upon, attributable to or resulting from" the ownership of TWE shares. In July 2003, the plaintiffs accepted the defendants' offer and sold all their remaining TWE shares to Telmex LLC for another $64 million.

Subsequently, the Ecuadorian equivalent of the United States Internal Revenue Service audited Conecel for the tax years 2000 through 2006. The plaintiffs allege that when the results of the audits were released, they realized that they had been defrauded because the defendants had concealed Conecel's true financial condition. The plaintiffs allege the true value of Conecel would have provided them with at least 7,000,000 American Depository Shares of América Móvil in a section 3.09 exchange of Unit. The plaintiffs calculate that, as of the time the complaint was filed, the ADSs would have had a market value of $1 billion.

By complaint dated May 30, 2008, the plaintiffs commenced this action. In the complaint, the plaintiffs asserted 12 causes of action, for breach of contract,[2] breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, promissory fraud, fraud, conspiracy to defraud, fraudulent inducement, unjust enrichment, equitable estoppel, and for an accounting and declaratory judgment. The plaintiffs asserted jurisdiction pursuant to CPLR 302, the "transacting business" prong of New York's long-arm statute.

By notice dated September 12, 2008, the defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(5), (a)(7), and (a)(8) on the grounds of documentary evidence, release, failure to state a cause of action, and failure to assert cognizable damages. After oral argument, the court denied

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[2] The complaint contains two causes of action for breach of contract. The first is against Telmex LLC and TWE for breach of the LLC Agreement. Specifically for breach of the previously mentioned section 7.4; the second is against Telmex LLC for breach of section 3.09 of the Agreement Among Members.

the motion. Ruling from the bench, the court noted, "the causes of action that are contained in the complaint are clear causes of action recognized in the State of New York, and they are not inartfully pled, they are pled rather straightforwardly." The court also noted its disagreement with the defendants' implied statement that "the releases, in effect, trump any fraudulent actions on our part."

After hearing brief oral argument on the issue of jurisdiction, the court stated that it would allow discovery to proceed. For the reasons set forth below, I would modify the motion court's ruling to the extent of dismissing the cause of action for unjust enrichment as against Telmex LLC, and by making the denial of so much of the motion as seeks to dismiss as against the individual defendants without prejudice, and otherwise affirm.

It is well established 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 A.D.3d 93, 98, 824 N.Y.S.2d 210, 214 (1st Dept. 2006), lv. denied, 8 N.Y.3d 804, 831 N.Y.S.2d 106, 863 N.E.2d 111 (2007). Nevertheless, it is equally well established that a release may be set aside on the grounds of fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake or duress. Littman, 54 A.D.3d at 17, 860 N.Y.S.2d at 26-27; Global Mins., 35 A.D.3d at 98, 824 N.Y.S.2d at 214; see also Lobel v. Maimonides Med. Ctr., 39 A.D.3d 275, 276, 835 N.Y.S.2d 28, 29 (1st Dept. 2007).

Further, a general release will not insulate a tortfeasor from allegations of breach of fiduciary duty, where it has not fully disclosed alleged wrongdoing. Littman, 54 A.D.3d at 17, 860 N.Y.S.2d at 26; H.W. Collections v. Kolber, 256 A.D.2d 240, 241, 682 N.Y.S.2d 189, 190 (1st Dept. 1998).

A plaintiff with a fraudulent inducement claim, however, must establish justifiable reliance on the misrepresentations or omissions at issue. See Global Mins., 35 A.D.3d at 98, 824 N.Y.S.2d at 214. Hence, if the plaintiff was aware of information that rendered his or her reliance unreasonable, or if he or she had enough information to create a duty to investigate further, the requisite reliance cannot be established. Id., at 98-101; see also Permasteelisa, S.p.A. v. Lincolnshire Mgt. Inc., 16 A.D.3d 352, 352, 739 N.Y.S.2d 16, 17 (1st Dept. 2005) ("plaintiff neglected to seek examination of the books and records of the company it was acquiring, relying on an unaudited financial statement that allegedly proved inaccurate").

In this case, the defendants argue that the plaintiffs' own allegations demonstrate that the plaintiffs strongly suspected fraud as early as 2001 and "knew everything they needed to know" to file a lawsuit yet chose not to inquire further, and also chose to sign the release in return for valuable consideration. Specifically, the defendants argue that the right of plaintiffs pursuant to the Agreement Among Members was the *right to negotiate in good faith,* and that the plaintiffs knew that no such good-faith negotiation had taken place as soon as América Móvil was spun off. The defendants point to the plaintiffs' language that they were "wary of the threat that no good faith" negotiations would take place. Thus, the defendants argue that the plaintiffs had a duty to inquire further which they did not, or even to initiate a lawsuit based on the failure of the defendants to provide information as contractually required. The defendants further argue that the plaintiffs are similarly situated to the plaintiff in <u>Global Mins.</u> and must have known about the possibility of fraud as they demanded certain information but never received it.

In my opinion, the defendants' argument is disingenuous, and, insufficient to warrant imputing unjustifiable reliance, as a matter of law, to the plaintiffs. Although the plaintiffs allege that the defendants' representatives failed to return their phone calls and stalled negotiations by not turning over certain financial information, these allegations are not tantamount to admissions of knowledge of fraud. The plaintiffs clearly allege that some information was turned over at various times and it supported Hajj's misrepresentations about Conecel, but the plaintiffs did not realize this information was false until after the government tax audit of the company. The defendants' argument that the plaintiffs had ample means to investigate, and had a contractual right to information for which they could have sued is meaningless. As the plaintiffs point out, no lawsuit or further inquiry could have produced accurate information for the plaintiffs. The alleged statements by Hajj that Conecel shares were worthless and that Conecel could make no distributions because it made no profits were supported by tax statements filed by Conecel that were also allegedly fraudulent and designed to gloss over the true worth of Conecel. The plaintiffs allege the same holds true for other financial statements that were turned over to the plaintiffs.

More significantly, the defendants owed a fiduciary duty to the plaintiffs who were minority shareholders in a limited liability corporation that defendants managed and in which they held a majority interest. See e.g., Madison Hudson Assoc. LLC v. Neumann, 44 A.D.3d 473, 484, 843 N.Y.S.2d 589, 598 (1st Dept. 2007); see also Metro Communication Corp. BVI v. Advanced MobileComm Tech., 854 A.2d 121, 152-153 (Del. Ch. 2004). As a result, the plaintiffs were reasonably justified in their expectations that the defendants would disclose any information in their possession that might affect plaintiffs' decision on their best course of action especially as to signing the release that the defendants now argue bars this action. See Blue Chip Emerald v. Allied Partners, 299 A.D.2d 278, 279-280, 750 N.Y.S.2d 291, 294-295 (1st Dept. 2002).

In my opinion, the defendants' reliance on Global Mins. is misplaced. That case is distinguishable in two important respects from this case: first, it was decided after discovery and a motion for summary judgment; and second, the Global Mins. plaintiff was provided with information strongly suggesting malfeasance by the defendants and was on notice of many of the acts alleged in the complaints when it issued its general release. Global Mins., 35 A.D.3d at 97, 824 N.Y.S.2d at 214.

Giving the plaintiffs "'the benefit of every possible favorable inference'" (see Littman, 54 A.D.3d at 18, 860 N.Y.S.2d at 27, quoting AG Capital Funding Partners, LP v. State St. Bank & Trust Co., 5 N.Y.3d 582, 591, 808 N.Y.S.2d 573, 842 N.E.2d 471 (2005), quoting Leon v. Martinez, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 974, 638 N.E.2d 511, 513 (1994)) their assertions are sufficient to support the claim that the release should be set aside on the ground of fraudulent inducement. I reject the majority's attempt to distinguish Littman from the instant case.

The majority does so on the basis that the plaintiff in Littman was told that no further documentation bearing on the valuation of the enterprise existed, thus exonerating him from the need to investigate further whereas here the plaintiffs were not so told. I fail to see how being told that no documentation exists provides a better basis for exoneration than receipt of publicly filed documents. In the instant case, whatever message was being conveyed by the defendants' stonewalling, it was not incumbent on the plaintiffs to suspect that the defendants were defrauding a governmental agency by publicly filing false information.

I further reject the defendants' argument that the plaintiffs' challenge of the release for fraudulent inducement cannot stand because it does not identify a separate and distinct fraud from that contemplated by the agreement. The defendants rely on Alleghany Corp. v. Kirby (333 F.2d 327 (2d Cir. 1964), adhered to on reh 340 F.2d 311 (1965, en banc), cert. dismissed 384 U.S. 28 (1966)) and Eastbrook Caribe, A.V.V. v. Fresh Del Monte Produce, Inc. (11 A.D.3d 296, 783 N.Y.S.2d 533 (1st Dept. 2004), lv. denied in part and dismissed in part, 4 N.Y.3d 844, 797 N.Y.S.2d 414, 830 N.E.2d 313 (2005)) on this issue but that reliance is misplaced. In both cases, allegations of fraud had been made in prior lawsuits. Here, the signing of the releases was not preceded by the plaintiffs' claims of fraud or any claims whatsoever, nor in response to any lawsuits. The defendants demanded the release in consideration for their spontaneous offer to accelerate the buy out of the balance of the plaintiffs' interest in Conecel. Based on the plaintiffs' allegations, at that time they had as little idea of the fraud being perpetrated as they did of the value of their Conecel holding. In any event, one of the cases that the majority relies on (Consorcio Prodipe, S.A. de C.V. v. Vinci, S.A., 544 F.Supp.2d 178 (S.D.N.Y. 2008), supra) specifically explains that a party challenging a release for fraudulent inducement must point to a separate and distinct fraud only where a party has granted a release *for fraud*. In the instant case, the release refers to general claims; fraud is not mentioned or contemplated in the release, and thus it is not necessary to point to a separate or distinct fraud.

I would also find that the plaintiffs' claims of fraud, conspiracy to defraud, fraudulent inducement are properly pleaded and are not duplicative of the breach of contract action. First, the breach of contract action is asserted only against Telmex LLC and TWE LLC in the first cause of action, and solely against Telmex LLC in the second cause of action. The fraud claims are asserted against all the defendants, not just the parties to the agreements at issue. Second, the defendants err in arguing that the plaintiffs have but a single cause of action which is their claim of an alleged violation of section 3:09 of the Agreement Among Members, the failure of the defendants to negotiate an exchange of units.

It is well settled that "a fraud-based cause of action may lie . . . where the plaintiff pleads a breach of a duty separate from a breach of the contract." Mañas v. VMS Assoc., LLC, 53 A.D.3d 451, 453, 863 N.Y.S.2d 4, 7 (1st Dept. 2008); First Bank of Ams. v. Motor Car Funding, 257 A.D.2d 287, 291, 690 N.Y.S.2d 17, 21 (1st Dept. 1999). The distinguishing test for determining whether a claim is actionable as a breach of contract only or also as a tort was set down long ago. See Rich v. New York Cent. and Hudson Riv. R.R. Co., 87 N.Y. 382, 390-391 (1882). The Rich Court found that, if there is a relationship between the parties giving rise to a distinct legal duty outside of the contract that is breached, neglect of that duty may constitute a tort. Id. "'Where the defendant has done something more than remain inactive and is to be charged with a 'misfeasance', the possibility of recovery in tort is considerably increased.'" Albemarle Theatre v. Bayberry Realty Corp., 27 A.D.2d 172, 175, 277 N.Y.S.2d 505, 509 (1st Dept. 1967) quoting Prosser on Torts at 637-638 (3rd Ed.). In the latter case, the Court found both breach of contract and fraud determining that the defendants "not only failed to operate . . . responsibly pursuant to the contract, but affirmatively, intentionally and wilfully set out . . . to destroy the value and utility of [the subject facility]" (Albemarle Theatre, 27 A.D.2d at 174, 277 N.Y.S.2d at 508).

It could be said that, likewise in this case, based on the plaintiffs' allegations, the defendants not only failed to engage in good-faith negotiations pursuant to their contractual obligation, but generated false fraudulent financial statements, and that such misfeasance was designed to lead plaintiffs to forego their right to negotiate for any exchange of shares. Assuming the truth of the plaintiffs' allegations that as a result of the fraudulent statements they chose to forego their right to negotiate an exchange pursuant to section 3.09 of the Agreement Among Members, the defendants' actions would be entirely collateral to their failure to perform under the agreement.

Indeed, based on the allegations of the plaintiffs, the observation of the Rich Court in that case, could be aptly duplicated verbatim as follows:

> "[A] breach of contract may be so intended and planned; so purposely fitted to time, and circumstances and conditions; so inwoven into a scheme of oppression and fraud . . . as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission." Rich, 87 N.Y. at 398.

Similarly, it is my view that, at this stage of the litigation, the fifth cause of action for promissory fraud is also adequately pleaded. The plaintiffs allege specifically what they must to adequately differentiate this claim from the one for breach of contract: that they were induced to enter into an agreement based on the defendants' promises regarding potential benefits to the minority stockholders. Indeed, the plaintiffs allege that when Parra approached Slim and Telmex for a potential investment in Conecel, Parra rejected Slim's proposal wherein Telmex would own 100% of Conecel, stating that plaintiffs did not, in fact, want to sell off 100% of Conecel. Therefore, according to a fair reading of the complaint, the plaintiffs entered into negotiations with the defendants only after Slim told the plaintiffs that he would settle for becoming a majority shareholder and that there would be protections for the minority interest and "potential upside" for the minority, such as a stock exchange listing. Giving the plaintiffs the benefit of any reasonable inference to be drawn from the allegations in the complaint, in my opinion they have adequately pleaded the fifth cause of action.

I further believe that the motion court properly denied dismissal of the cause of action for breach of fiduciary duty alleged against Telmex LLC. Generally, a cause of action for breach of fiduciary duty that is merely duplicative of a breach of contract claim cannot stand. Granirer v. Bakery, Inc., 54 A.D.3d 269, 272, 863 N.Y.S.2d 396, 399 (1st Dept. 2008); William Kaufman Org. v. Graham & James, 269 A.D.2d 171, 173, 703 N.Y.S.2d 439, 442 (1st Dept. 2000). But "the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself." Mandelblatt v. Devon Stores, 132 A.D.2d 162, 167-168, 521 N.Y.S.2d 672, 676 (1st Dept. 1987). In this case, the relationship between the parties was not established solely by the Agreement Among Members or the LLC Agreement of which sections 3.06, 3.09 and 7.4 respectively were allegedly breached. The fiduciary relationship between Telmex and Cempresa was established by the Master Agreement pursuant to which TWE LLC became the sole shareholder of Conecel shares and by which Telemex LLC held a 60% majority interest while the plaintiffs became minority shareholders. Thus the defendants not only had a contractual obligation to provide information that was reasonably requested, but specifically had an obligation imposed by the fiduciary relationship to share *any* and *all* financial information that would impact the plaintiffs' decision making in any negotiations for the exchange of shares.

I also find that the plaintiffs' cause of action seeking recovery against defendants for their breach of the implied covenant of good faith and fair dealing is equally well pleaded. Since the breach of contract claims are pleaded only against Telmex LLC and TWE, this claim cannot be said to be "duplicative" as against the other defendants. What is more, at this stage of the litigation, the plaintiffs are permitted to plead in the alternative. CPLR 3014; see Citi Mgt. Group, Ltd. v. Highbridge House Ogden, LLC, 45 A.D.3d 487, 847 N.Y.S.2d 33 (1st Dept. 2007). What plaintiffs essentially argue here, even aside from the breach of contract itself, is that the defendants acted in a manner that, although not expressly forbidden by any contractual provision, deprived the plaintiffs of the right to receive the benefits under the various agreements. Jaffe v. Paramount Communications, 222 A.D.2d 17, 22-23, 644 N.Y.S.2d 43, 47 (1st Dept. 1996); cf. Pier 59 Studios L.P. v. Chelsea Piers L.P., 27 A.D.3d 217, 811 N.Y.S.2d 24 (1st Dept. 2006) (implied covenant claim dismissed after discovery and summary judgment motion).

Finally, on the plaintiffs' unjust enrichment cause of action, again I note that the claims for breach of contract are pleaded only against Telmex LLC and TWE, and thus, the claim of unjust enrichment cannot be said to be "duplicative" as against the other defendants named in the ninth cause of action - namely, América Móvil, Telmex Mexico, Slim, and Hajj. However, with respect to Telmex LLC, the plaintiffs plead no facts in their unjust enrichment claim separate from the general breach of contract claim. This is not a case where, for example, a plaintiff may be permitted to plead in the alternative because there is a bona fide disagreement as to whether a contract actually existed. See e.g., Foster v. Kovner, 44 A.D.3d 23, 29, 840 N.Y.S.2d 328, 333 (1st Dept. 2007), citing Zuccarini v. Ziff-Davis Media, 306 A.D.2d 404, 762 N.Y.S.2d 621 (1st Dept. 2003). Thus, in my opinion, the unjust enrichment claim should have been dismissed as against Telmex LLC, as it is duplicative of the breach of contract claim against that defendant.

I am not persuaded by the defendants' argument that the fraud claims are not viable because the plaintiffs do not seek damages that would not be recoverable under a contract measure of damages. In addition to compensatory damages, in the fraud causes of action the plaintiffs ask for punitive damages, which should be considered in this case. Punitive damages may be recovered where the defendant has committed a gross, wanton, or willful fraud or other morally culpable conduct in a sufficiently high degree. See Giblin v. Murphy, 73 N.Y.2d 769, 772, 536 N.Y.S.2d 54, 56, 532 N.E.2d 1282, 1284 (1988). Thus, the claim for punitive damages may well be viable. See Lawlor v. Engley, 166 A.D.2d 799, 563 N.Y.S.2d 160 (3d Dept. 1990) (demand for punitives properly asserted without allegation that fraud aimed at public generally). However, discovery would be necessary to make that determination.

I also reject the defendants' claims that plaintiffs' breach of contract claims, including the claim for breach of the implied covenant of good faith and fair dealing, are time-barred because the six-year statute of limitations has passed. First, equitable estoppel will preclude a defendant from using the statute of limitations as a defense where a plaintiff is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant. Zumpano v. Quinn, 6 N.Y.3d 666, 673, 816 N.Y.S.2d 703, 849 N.E.2d 926, 928-929 (2006); General Stencils v. Chiappa, 18 N.Y.2d 125, 128, 272 N.Y.S.2d 337, 339, 219 N.E.2d 169, 171 (1966). Although the plaintiffs have not established, on this record, their entitlement to equitable estoppel, I find that they have demonstrated a reasonable basis to believe that with additional discovery they may be able to develop facts sufficient to sustain their claim.

See Century Fed. Sav. & Loan Assn. of Long Is. v. Net Realty Holding Trust, 87 A.D.2d 858, 858, 449 N.Y.S.2d 293, 294 (2d Dept. 1982) ("the issue of whether [a] defendant should be equitably estopped from asserting the Statute of Limitations as an affirmative defense to [a] plaintiffs complaint is not a question of law, but rather a question of fact").

In any event, in my view the statute of limitations does not necessarily act to bar the plaintiffs' action. The claim of breach of contract as to the 3.09 provision of the Agreement Among Members did not accrue until all possibility of negotiation for the exchange of shares was foreclosed permanently by the sale of the remaining shares in 2003.[3] Until that point in 2003, the parties could have conducted good-faith negotiations as to the shares remaining in the plaintiffs' possession.

As to the provision of section 7.4 of the LLC Agreement that pertains to the provision of quarterly tax statements, the statute of limitations started running the first quarter in which the plaintiffs were entitled to tax statements, that is, upon the execution of the agreements in 2000. The failure to provide tax

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[3]The defendants' argument that the claim accrued within 20 days of the América Móvil spin off is not persuasive. The plain meaning of the provision indicates instead that any negotiations should be completed within 20 days. Here, negotiations had not commenced.

statements in the latter years up until the sale of all remaining units would not be time-barred, however. It is impossible to ascertain on the basis of the record, however, whether the plaintiffs' cause of action is based on the defendants' refusal to provide quarterly tax returns or whether it is based on the allegation that the financial statements provided were simply false. Hence, in my view, discovery would be required to determine whether that cause of action is time-barred and/or as of which year it is time-barred.

The statute of limitations for fraud claims is six years from the time of the fraud itself, or within two years of discovery of the fraud, or within two years of the time that a reasonable person should have discovered the fraud. CPLR 213(8). The defendants make the same arguments here as they did for dismissal of the fraudulent inducement claim. In other words, that the plaintiffs were on notice of the possibility of fraud virtually from the beginning of the association when the defendants repeatedly refused to provide the critical financial data plaintiffs knew they possessed. As I have already observed, based on the plaintiffs' allegations, they were not on notice of any fraud until the Ecuadorian government concluded its investigation and found that Conecel had filed false tax statements. Hence, I would find the plaintiffs' fraud claims are timely, in particular because they could not have had the facts with which to allege fraud with the requisite particularity before the Ecuadorian investigation was completed.

Finally, as the defendants acknowledge, Wireless Ecuador LLC, f/k/a Telmex Wireless Ecuador LLC, and Telmex LLC, consented to the New York courts' exercise of personal jurisdiction of them by signing the parties' Agreement Among Members or LLC Agreement, which contain New York forum selection clauses. I find that Telefonos de Mexico, S.A. de C.V. and Consorcio Ecuatoriano de Telecommunicaciones S.A. Conecel also consented, by signing the Master Agreement which conditioned their obligations upon their execution and delivery of the Agreement Among Members. América Móvil S.A.B. de C.V. is subject to the courts' long-arm jurisdiction based on the listing and sale of its securities on the New York Stock Exchange (CPLR 302[a][1]; see e.g. Schottenstein v. Schottenstein, 2004 WL 2534155, *9, 2004 US Dist LEXIS 22648, *46 (SD NY 2004)).

As to the individual defendants, Slim and Hajj, allegations through affidavits that they conducted numerous telephone conversations with representatives of the corporate defendants in New York, and directed the negotiations of the agreements, in my opinion, constitute a "sufficient start" to warrant further discovery as to whether the individual defendants inserted themselves in a meaningful way into business transactions in New York, thereby submitting to the New York courts' jurisdiction. See *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 467, 354 N.Y.S.2d 905, 908, 310 N.E.2d 513, 515 (1974); Deutsche Bank Sec. Inc. v. Montana Bd. Of Invs., 21 A.D.3d 90, 93-94, 797 N.Y.S.2d 439, 442 (1st Dept. 2005), aff'd, 7 N.Y.3d 65, 818 N.Y.S.2d 164, 850 N.E.2d 1140 (2006), cert. denied, 549 US 1095 (2006)).

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

ENTERED: JUNE 3, 2010

David Apolony

CLERK