SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 4, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12400-
12401-
12401A

Index 14093/05

Tony Mafes,
Plaintiff-Respondent,

-against-

City of New York, et al.,
Defendants,

Lincoln Tugwell,
Defendant-Appellant.

_____

Rothstein Law PLLC, New York (Eric E. Rothstein of counsel), for appellant.

Miranda Sambursky Slone Sklarin Verveniotis, LLP, Elmsford (Robert D. Wilkins of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 26, 2013, to the extent appealed from, awarding plaintiff damages as against defendant Lincoln Tugwell, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 26, 2013, after an inquest, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court (Barry Salman, J.), entered

October 24, 2013, which denied defendant's motion for reargument and sanctions against plaintiff's counsel, or, in the alternative, an extension of time to demonstrate a meritorious defense to the action, unanimously affirmed, insofar as it denied sanctions or an extension of time, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable paper.

Defendant requests that we exercise our "interest of justice power to correct a fundamental error" that his counsel failed to raise at the inquest, i.e., that damages have been awarded against him for conduct not attributed to him in the complaint (citing *Peguero v 601 Realty Corp.*, 58 AD3d 556, 563 [1st Dept 2009] [an error "so fundamental as to preclude consideration of the central issue upon which the claim of liability is founded" may be reviewed in the interests of justice, even absent objection]). However, since the inquest was held upon his default, defendant's liability was not at issue therein; he is deemed to have admitted it (*see Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827, 830 [2008]). In the circumstances, our going outside applicable law to entertain arguments not preserved for appeal would not further the objective of "ensur[ing] that plaintiffs do not secure money judgments based on fraudulent claims" (*id.*).

No appeal lies from the denial of a motion for leave to reargue (*Belok v New York City Dept. of Hous. Preserv. & Dev.*, 89 AD3d 579 [1st Dept 2011]).

We have considered defendant's remaining contentions and find them without merit.

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

ENTERED: SEPTEMBER 4, 2014

CLERK

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

8341N In re Nancy Moynihan, Index 108757/10
Petitioner-Respondent,

-against-

New York City Health and
Hospitals Corporation,
Respondent-Appellant,

The City of New York,
Respondent.

_____

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for appellant.

Beldock Levine & Hoffman LLP, New York (Cynthia Rollings of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 5, 2010, which granted a petition for leave to file a late notice of claim against respondent-appellant New York City Health and Hospitals Corporation (HHC) pursuant to General Municipal Law (GML) § 50-e, reversed, on the law, without costs, the petition denied, the proceeding brought pursuant to CPLR article 4 dismissed, and the proposed complaint dismissed, with prejudice. The Clerk is directed to enter judgment accordingly.

The crux of petitioner's claim against her former employer, respondent HHC, is that, on April 6, 2009, HHC fired her from her position with HHC's Office of Clinical and Health Services

Research (OCHSR), not because of budget constraints (as petitioner was told), but in retaliation for her objection to the failure of the documentation of many human-subject research programs submitted to her office (which it was her job to review) to comply with applicable regulatory requirements. The verified complaint for petitioner's proposed action against HHC summarizes the conduct for which HHC allegedly retaliated against petitioner as follows:

> "24. From the beginning of her employment by HHC, [petitioner] had reason to believe that a number of HHC hospitals . . . were out of compliance with HHC operating procedures, for reasons including but not limited to: (1) failure to comply with HIPPA, IRB and protocol requirements; (2) failure to provide informed consents in compliance with regulatory requirements; and (3) failure to submit information relating to adverse events occurring in the course of human subject research.
>
> "25. [Petitioner] brought such noncompliance to the attention of affiliates, officials at HHC hospitals and HHC administration, and attempted to enforce applicable federal, state and city laws and regulations."

Based on her own allegations in the proposed verified complaint and other sworn statements submitted with her application for leave to file a late notice of claim, petitioner reviewed the documentation of human-subject research projects conducted at HHC facilities for regulatory compliance. She

neither provided treatment nor care to patients, nor did she supervise or direct those who did; nor did she have responsibility for the provision of resources needed for treatment or care. She does not allege that she had interaction with patients or any decision-making authority concerning the care administered to any particular patient.

Petitioner seeks to assert causes of action against HHC for retaliatory termination based on Labor Law § 740, which applies to all employees of health care organizations, and Labor Law § 741, which applies more narrowly to employees of health care organizations who actually "perform[] health care services" (§ 741[1][a]), as well as a few other claims to be discussed later. She failed to serve a notice of claim on HHC within 90 days of her termination on April 6, 2009, as required by General Municipal Law § 50-e and the New York City Health and Hospitals Corporation Act (HHC Act) § 20(2) (McKinney's Uncons Laws of NY § 7401[2]), although she did serve a notice of claim within the 90-day period upon the Office of the Comptroller of New York City, which does not have the authority to receive notices of claim on behalf of HHC. On July 2, 2010, petitioner made the instant application for leave to serve a late notice of claim and file the annexed verified complaint. Supreme Court granted the

application.

Upon HHC's appeal, we reverse the granting of the motion for leave to file a late notice of claim against HHC, and accordingly dismiss the proposed complaint, on the ground that, as a matter of law, petitioner cannot prevail on any of the claims that she seeks to assert. Because petitioner does not assert any legally viable causes of action, we need not consider whether Supreme Court's granting of leave to file a late notice of claim would otherwise have been a proper exercise of discretion.

We turn first to the claim under Labor Law § 740. That cause of action is time-barred under the terms of the statute itself because, as previously stated, HHC terminated petitioner's employment on April 6, 2009, and petitioner filed her petition for leave to file a late notice of claim on July 2, 2010, after the expiration of the one-year statute of limitations incorporated into the statute (*see* Labor Law § 740[4][a]). General Municipal Law § 50-e(5), made applicable to HHC by HHC Act § 20(2), permits a court to entertain a motion for leave to serve a late notice of claim only within the applicable limitations period, not, as here, after the limitations period has expired. Contrary to Supreme Court's view, the one-year statute of limitations that is part of section 740 takes

precedence over the one-year and 90-day limitations period set forth in the HHC Act (*see Romano v Romano*, 19 NY2d 444, 447 [1967]).

Although not time-barred, the claim under Labor Law § 741 is also without merit as a matter of law. Section 741 affords to a health care "employee," as defined in the statute, a cause of action against the employer for "retaliatory action" (§ 741[2]) taken

> "because the employee does any of the following:
>
> > "(a) discloses or threatens to disclose to a supervisor, or to a public body an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care; or
> >
> > "(b) objects to, or refuses to participate in any activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care."

Section 741 defines the term "employee," as used in that statute, as "any person *who performs health care services* for and under the control and direction of any public or private employer which provides health care services for wages or other remuneration" (§ 741[1][a] [emphasis added]). The Court of Appeals, describing this definition as "exactingly specific" (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 90 [2008]), has

held that "the 'natural signification' of section 741(1)(a) is quite definite: to be subject to the special protections of section 741, an employee of a health care provider must 'perform[] health care services,' which means to actually supply health care services, not merely to coordinate with those who do" (*id.* at 91). Section 741, the Court of Appeals concluded, "is meant to safeguard only those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, *and whose jobs require them to make these judgments*" (*id.* at 93 [emphasis added]). Accordingly, the *Reddington* Court held that section 741 does not apply to "an individual who does not render medical treatment" (*id.* at 87 [internal quotation marks omitted] [answering the second certified question in the negative]).

Based on the Court of Appeals' holding in *Reddington*, the Second Circuit (which had certified the question to the Court of Appeals in that case) affirmed the dismissal of a claim under § 741 asserted by a hospital employee who "allege[d] that she coordinated and developed certain services for the Hospital's patients, took charge of patient satisfaction questionnaires, and managed and trained personnel who provided translation assistance, but . . . [did] not allege that she supplied any

treatment" (*Reddington v Staten Is. Univ. Hosp.*, 543 F3d 91, 93 [2d Cir 2008]). Similarly, this Court dismissed a claim under § 741 asserted by

> "a licensed clinical social worker . . . [who] alleges that she 'secure[d] prescribed medications,' 'evaluate[d] the need for and arrange[d] for individual patients' appropriate staffing and treatment,' and was 'personally involved in ensuring that patients received protective and healthful grooming and other health-related treatment.' These allegations establish that plaintiff 'merely . . . coordinate[d] with those who [performed health care services]'" (*Webb-Weber v Community Action for Human Servs., Inc.*, 98 AD3d 923, 924 [1st Dept 2012], *revd on other grounds* __ NY3d __, 2014 NY Slip Op 03428 [2014], quoting *Reddington*, 11 NY3d at 91).[1]

In this case, petitioner, by her own account, reviewed the supporting paperwork for research projects involving human subjects for compliance with applicable regulatory requirements. She had no responsibility, direct or indirect, for providing

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[1]In its *Webb-Weber* decision, which reinstated a claim under Labor Law § 740, the Court of Appeals did not address the issue of whether the plaintiff was an "employee" within the scope of Labor Law § 741 because, as stated in Judge Pigott's opinion, the plaintiff "ha[d] abandoned th[e] claim [under section 741] on this appeal and ask[ed] for reinstatement of only the section 740 claim" (__ NY3d __, __ 2014 NY Slip Op 03428, *3 n 2). Unlike section 741, section 740 does not restrict its coverage to employees who perform health care services (*see* Labor Law § 740[1][a] [defining the term "employee" as used in section 740 to mean "an individual who performs services for and under the control and direction of an employer for wages or other remuneration"]).

treatment or care to any patient, for any patient outcome, or even for facilitating the provision of care or treatment to patients through the allocation of HHC resources. She was charged simply with making sure that HHC did not run afoul of applicable legal requirements in the documentation of human-subject research projects conducted at its hospitals. She was even further removed from the actual provision of care or treatment to patients than were the plaintiffs in *Reddington* and *Webb-Weber*. As HHC aptly points out in its reply brief, petitioner "did not see, treat or otherwise interact with patients, nor did she have any decision making authority regarding direct patient health care."

The dissent stresses petitioner's "experience" as a registered nurse licensed to practice in New York — which, while undisputed, is irrelevant to her standing under section 741, given the absence of any basis in the record for the dissent's characterization of petitioner's position as one that actually required her "to make . . . judgments [concerning] the quality of patient care" (*Reddington*, 11 NY3d at 93). Again, in her job at OCHSR, petitioner participated in the process of approving research projects at inception, and in monitoring ongoing projects, based on whether the researchers had complied with

applicable legal requirements and HHC procedures. Nowhere does petitioner allege that she rendered any independent "judgment" about the quality of any patient's health care. While we appreciate the importance to the integrity of the scientific enterprise of the work petitioner did at OCHSR, we do not believe that she was "perform[ing] health care services" (§ 741[1][a]) in this position.

The dissent attempts to distinguish *Reddington* and *Webb-Weber* on the ground that the plaintiffs in those cases (a coordinator of volunteer services and translator in *Reddington*, a clinical social worker in *Webb-Weber*), unlike petitioner herein, were not trained medical professionals. We disagree. Although petitioner was a licensed registered nurse qualified to "perform[] health care services" (§ 741[1][a]), during her employment at OCHSR, she neither performed health care services nor was she required to make "judgments as to the quality of patient care" (*Reddington*, 11 NY3d at 93) based on her training and experience as a nurse. Indeed, the plaintiffs in *Reddington* and *Webb-Weber*, notwithstanding their lack of health care credentials, performed tasks closer to providing health care services than petitioner did at OCHSR, since they actively coordinated with providers of health care services and, in one

case, even secured prescribed medications. Petitioner, by contrast, merely reviewed the documentation generated by medical researchers for compliance with regulatory requirements. If the tasks performed by the *Reddington* and *Webb-Weber* plaintiffs did not give them standing under section 741, still less should petitioner's review functions qualify her for such standing.

The dissent also stresses petitioner's allegation that the actions she took that allegedly led to her termination were motivated by her concern for the quality of the care that the subjects of the research programs she monitored would ultimately receive. This motivation, laudable though it was, does not confer standing on petitioner to sue under section 741. The statute provides that it covers only persons who actually "perform[] health care services" (§ 741[1][a]). Health care institutions employ many people who do not perform health care services. While such an employee might, out of concern for patients, disclose perceived improprieties in the quality of patient care, that motivation, however commendable, would not bring within the purview of the statute an accountant, a social worker, or, as here, a person who reviews research documentation for compliance with legal requirements.

Notwithstanding that, as a registered nurse, petitioner was

qualified to provide health care services, HHC plainly did not employ her to do so. To reiterate, she did not provide care; she did not supervise those who provided care; and she did not facilitate the provision of care through resource allocation. She reviewed paperwork for compliance with legal requirements, which, under *Reddington*, does not qualify petitioner as a member of the class of those "who perform[] health care services" (§ 741[1][a]), for whose sole benefit the statute was enacted. Accordingly, *Reddington* mandates dismissal of petitioner's claim under section 741.

Petitioner's remaining claims against HHC are also without merit as a matter of law. The claims for violation of Administrative Code of the City of New York § 12-113 and for violation of her constitutional right of free speech are barred because her assertion of claims under Labor Law §§ 740 and 741 waived her right to assert whistleblower claims under other provisions of law (*see Reddington*, 11 NY3d at 87, 89). Finally, petitioner's cause of action for tortious interference with prospective business relations fails as a matter of law because

she does not identify any third party with whom she lost the prospect of doing business as a result of HHC's actions (*see Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 [2004]).

All concur except Moskowitz, J. who dissents in part in a memorandum as follows:

MOSKOWITZ, J. (dissenting in part)

For the reasons that the majority states, I agree that we should dismiss petitioner's Labor Law § 740 claim on the basis that it is time-barred. I also agree that we should dismiss petitioner's claims for tortious interference with prospective business relations, violation of Administrative Code of the City of New York § 12-113 and violation of the constitutional right of free speech. However, in my view, the motion court properly granted petitioner's motion for leave to file a late notice of claim. Similarly, I believe that at this stage of the litigation, petitioner has adequately pleaded a cause of action for violation of Labor Law § 741. Therefore, I respectfully dissent.

Petitioner is a former employee of HHC in its Office of Clinical and Health Services Research (OCHSR). In this action, she sues for retaliatory termination, alleging that OCHSR fired her after she reported HHC's noncompliance with regulations designed to protect human subjects in research studies. Likewise, petitioner alleges that OCHSR fired her for trying to remedy HHC's noncompliance.

In January 2008, HHC hired petitioner, a licensed registered nurse with over 20 years of experience in the clinical research

field, as a director of OCHSR, with the title of Human Research Protection Program QC/QA/QI Regulatory Specialist. Petitioner reported to Nonie Pegoraro, Senior Director, who herself reported to HHC officials.

According to federal regulations, researchers at HHC facilities had to obtain approval from OCHSR before beginning research studies involving human subjects. In September 2008, petitioner assumed the responsibility of reviewing research proposals to ensure that HHC's affiliated hospitals had complied with these regulations. In the course of her review, petitioner identified a number of HHC hospitals, including Bellevue and Harlem Hospitals, that were missing necessary documents, including informed consent forms and Institutional Review Board (IRB) approvals.

Petitioner reported to Pegoraro her concerns about the missing documents. In addition, she tried to remedy the alleged noncompliance by sending out notices to the hospitals involved. For example, in late 2008, petitioner contacted Ernest Marrero, research chair of Bellevue, to inform him of his facility's noncompliance and to explain the reason OCHSR had not approved the facility's research proposals. From late 2008 to early March 2009, petitioner alleges, Marrero objected to her questioning of

Bellevue protocols and resisted her efforts to effect compliance. During this time, petitioner repeatedly discussed her concerns with Pegoraro, who in turn discussed petitioner's concerns with her superiors, HHC officials.

Eventually, OCHSR determined that Harlem Hospital's noncompliance warranted suspension. In early February 2009, at petitioner's recommendation, OCHSR notified Harlem Hospital of OCHSR's intent to audit a number of studies. Petitioner alleged that HHC officials objected to the proposed suspension and took actions to resist it.

In March 2009, with the goal of overcoming HHC's resistance to the proposed suspension, petitioner and Pegoraro prepared audits documenting outstanding issues in five Harlem Hospital research proposals. According to petitioner, HHC's special counsel confirmed the audits' findings. On March 24, 2009, petitioner and Pegoraro attended a meeting at Harlem Hospital to address the facility's noncompliance. Petitioner believed the purpose of the meeting was to move toward resolution of the noncompliance issues. Instead, meeting attendees discounted petitioner's concerns, characterizing them as "irritating."

After the meeting, petitioner and Pegoraro continued to urge that HHC comply with regulations. For example, OCHSR requested

that Harlem Hospital forward documentation relating to informed consent and IRB approvals. In addition, Pegoraro unsuccessfully sought approval from HHC officials to schedule follow-up meetings so that she and petitioner could review the records of outstanding research proposals, including the medical records of research participants.

Petitioner alleges that on April 6, 2009, without any previous warning or notice, HHC's security chief appeared at her desk and escorted her out of the building to HHC's Human Resources office. There, she received a letter stating that HHC was terminating her, effective immediately, because of budgetary constraints. Petitioner knew that layoffs were due to occur by June 30, 2009 but asserts that fiscal problems were merely a pretext for her termination. HHC later named Marrero as Corporate Compliance Officer, with supervisory authority over Pegoraro and OCHSR. In May 2009, HHC terminated Pegoraro summarily and without warning.

On June 29, 2009, within 90 days of her termination, petitioner served a notice of claim on the New York City Comptroller rather than directly on HHC. In the notice, petitioner identified HHC as the "city agency involved" and provided the factual basis for her claim. Specifically,

petitioner recounted the events surrounding her termination and asserted that HHC had wrongfully retaliated against her for her reports of regulatory noncompliance at HHC affiliates. The Comptroller's office accepted petitioner's notice of claim, acknowledged receipt of the claim in writing, and assigned petitioner a claim number.

Meanwhile, on June 5, 2009, also within 90 days of petitioner's termination, Pegoraro served her own notice of claim on HHC, specifying her claim of retaliatory termination. On January 5, 2010, she commenced a federal court action for retaliatory termination, alleging that her termination violated New York and federal law. In the course of investigating Pegoraro's claims, HHC's Inspector General met twice with Pegoraro and, in March 2010, once with petitioner.

On July 2, 2010, petitioner filed the summons and verified complaint in this action. She asserted five causes of action: (1) retaliatory termination in violation of Labor Law § 740; (2) retaliatory termination in violation of Labor Law § 741; (3) violation of petitioner's free speech rights under the New York Constitution, article I, § 8; (4) violation of Administrative Code § 12-113 by terminating petitioner for making a report of information she believed to present a risk of harm to the health

and safety of a child; and (5) common-law tortious interference with prospective business relations for allegedly interfering with petitioner's later efforts to obtain employment.

On the same day, petitioner filed a verified petition and moved by order to show cause for an order deeming her notice of claim timely served on HHC, nunc pro tunc. In the alternative, she sought leave to file a late notice of claim.

The motion court granted petitioner leave to serve a late notice of claim. Noting that HHC was a City-affiliated organization, the court found that petitioner had shown a reasonable excuse for erroneously filing her notice of claim with the City Comptroller. The court also found that "HHC officials were well aware of" petitioner's noncompliance concerns and her termination, thereby acquiring actual knowledge of the essential facts underlying petitioner's claim. Further, the court held, the lateness of petitioner's claim would not prejudice HHC because, among other things, HHC had timely notice of Pegoraro's claim, which was based in part on the same underlying events as petitioner's claim. Therefore, the court concluded, HHC had presumably taken steps to preserve evidence relating to those claims.

Finally, the court rejected HHC's argument that Labor Law

§ 740 barred petitioner's claims as untimely. Rather, the court held, the one-year and 90-day limitations period set forth in the New York City Health and Hospitals Corporation Act (the HHC Act) (McKinney's Uncons Laws of NY §§ 7381-7406) took precedence over other limitations periods, including the one-year limitations period in Labor Law § 740.

General Municipal Law (GML) § 50-e(1) requires that a petitioner in a tort action against a public corporation serve a notice of claim on that entity within 90 days after the claim arises. The statute's intent "is to protect the municipality from unfounded claims" and to ensure that it has an adequate opportunity to explore the claim's merits while information is still readily available (*Matter of Porcaro v City of New York*, 20 AD3d 357, 357 [1st Dept 2005]). However, courts should liberally construe the statute because it is remedial in nature (*Camacho v City of New York*, 187 AD2d 262, 263 [1st Dept 1992]) and should not operate to frustrate the rights of those with legitimate claims (*see Porcaro*, 20 AD3d at 358).

Under GML § 50-e(5), a court has discretion to grant leave to serve a late notice of claim after considering, "in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential

facts constituting the claim within [90 days of the claim's accrual] or within a reasonable time thereafter." The court must also consider all other relevant factors, including whether "the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted . . . and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits" (GML § 50-e[5]; *see also Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]; *Ifejika-Obukwelu v New York City Dept of Educ.*, 47 AD3d 447, 447 [1st Dept 2008]). The party seeking leave to serve a late notice of claim bears the burden of establishing these criteria (*see Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 826 [1st Dept 2010]; *Matter of Lauray v City of New York*, 62 AD3d 467 [1st Dept 2009]).

Here, HHC had timely notice of the essential facts underlying petitioner's claim. The record demonstrates that HHC officials were actively involved in petitioner's termination and were well aware of her concerns about HHC's alleged regulatory noncompliance. Indeed, petitioner alleges that before her termination, HHC's special counsel confirmed the findings in petitioner and Pegoraro's audits, which addressed that very

noncompliance.

Further, as noted above, Pegoraro timely commenced a separate action for retaliatory termination, and HHC's Inspector General investigated that action. Because the facts of Pegoraro's action paralleled those in petitioner's action – to be sure, Pegoraro's action was based on the same events – HHC was on notice within the statutory time frame of the facts underlying petitioner's action.

That petitioner served the notice of claim on the City Comptroller, rather than on HHC, constituted a reasonable and excusable error (*see Harris v City of New York*, 297 AD2d 473, 474-475 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002] [distinguishing the case then at bar from a situation in which the claimant's error "rested on an excusable confusion as to the proper governmental entity to be served with the notice of claim"]). Petitioner served her notice of claim within 90 days of her termination and identified HHC as the agency involved. The Comptroller, in fact, actively endorsed her error by formally acknowledging her claim and assigning her a claim number. This kind of error warrants late filing relief (*see Matter of Gherardi v City of New York*, 294 AD2d 101 [1st Dept 2002]; *Tadros v New York City Health & Hosps. Corp.*, 112 AD2d 85, 86 [1st Dept 1985]

["[M]istaken belief that HHC was a city agency [is] a sufficient excuse warranting late filing relief"]).

One point does run in HHC's favor: generally, a petitioner seeking late filing relief must also set forth some "excuse for [a] lengthy delay in seeking leave to serve a late notice of claim" (*Matter of Reed v County of Westchester*, 222 AD2d 679 [2d Dept 1995]; *see Matter of Nairne v New York City Health & Hosps. Corp.*, 303 AD2d 409, 410 [2d Dept 2003]). Here, although petitioner has sufficiently explained her initial mistaken filing, she has failed to offer any explanation for the subsequent long delay in seeking late filing relief (*Matter of Matarrese v New York City Health & Hosps. Corp.*, 215 AD2d 7, 9 [2d Dept 1995], *lv denied* 87 NY2d 810 [1996]). This fact does militate against her argument that the motion court properly permitted her late filing.

On balance, however, petitioner's delay is excusable. In cases where courts have found inexcusable delay in seeking late filing relief, the petitions suffered from two deficiencies: first, they failed to set forth any excuse for the delay; and second, they failed to demonstrate a lack of prejudice to the opposing party arising from the delay (*see Matter of Reed*, 222 AD2d at 679; *Matter of Nairne*, 303 AD2d at 410; *Matter of*

Matarrese, 215 AD2d at 9-11). By contrast, as noted above, petitioner has shown that any delay did not prejudice HHC, because that entity was timely aware of the facts surrounding petitioner's claim and, in fact, one of the defendants in the underlying action gave a deposition in August 2010. Likewise, as also noted above, petitioner has shown a reasonable excuse for her delay – namely, that she served the City Comptroller rather than HHC.

In addition, *Reed*, *Nairne* and *Matarrese* present markedly different factual situations from the one presented here. In *Reed*, the court found the papers supporting the proceeding to be "patently insufficient," as they failed to allege the manner in which the respondents were negligent or committed malpractice (*Reed*, 222 AD2d at 679). In this case, on the other hand, there is no allegation that the papers do not adequately set forth petitioner's causes of action. And in *Nairne* and *Matarrese*, there were seven-year and eight-year delays, respectively, in making the applications (*Matter of Nairne*, 303 AD2d at 409-410; *Matter of Matarrese*, 215 AD2d at 9). In this case, the delay was around 15 months.

Thus, considering all the relevant factors, I believe that the motion court correctly granted petitioner's motion for leave

to serve a late notice of claim.

With regard to Labor Law § 741, HHC argues, and the majority agrees, that petitioner's proposed cause of action is patently meritless because she is not an "employee" for purposes of that statute. Labor Law § 741 prohibits a health-care employer from taking any retaliatory action against an employee who "discloses or threatens to disclose to a supervisor, or to a public body an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care" (Labor Law § 741[2][a]).

Unlike Labor Law § 740, which broadly defines an "employee" to include any individual who "performs services" for any employer, § 741 defines an "employee" much more restrictively, as "any person who performs health care services for and under the control and direction of any public or private employer which provides health care services for wages or other remuneration" (Labor Law § 741[1][a]). Thus, to determine whether petitioner falls under the aegis of Labor Law § 741, we must decide whether she "performs health care services."

The Court of Appeals has addressed this issue, holding that, while not necessarily excluding persons other than doctors and nurses, § 741's "specialized protections . . . were meant to

protect professional judgments regarding the quality of patient care" (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 92 [2008]). Hence, the Court held, "an employee of a health care provider must 'perform[] health care services,'" meaning that the employee must "actually supply health care services, [and] not merely . . . coordinate with those who do" to receive "the special protections of section 741" (*id.* at 91, quoting Labor Law § 741[1][a]). The Court further stated that § 741 "safeguard[s] only those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, and whose jobs require them to make these judgments" (*id.* at 93).

On that basis, the *Reddington* Court held that Labor Law § 741's definition of "employee" did not encompass the plaintiff because she did not care for patients, nor did she have any responsibility for ensuring proper patient care (*id.* at 83-84 [describing the plaintiff's duties as involving, among other things, coordinating patient travel and providing patients with translation services]). Further, the Court held, § 741 contemplates a "registered professional nurse" "speaking out about [her] perception of inadequate staffing levels," in violation of Department of Health regulations governing nurse

staffing (*id.* at 92).

Here, I believe that for pleading purposes, petitioner falls within the definition of an employee under Labor Law § 741 because she has, in fact, alleged that she is a "licensed registered nurse" responsible for "ensur[ing] that all human subject research regulatory requirements were met for new and continuing research conducted at HHC hospitals." Under the standards of the *Reddington* Court, this allegation is more than sufficient to sustain petitioner's claim on a motion to dismiss (*see also Webb-Weber v Community Action for Human Servs. Inc.*, __ NY3d __, __ 2014 NY Slip Op 03428, *6 [2014], *revg on other grounds* 98 AD3d 923 [1st Dept 2012]).

In arguing that petitioner is not an "employee" within the meaning of § 741, the majority refers to our decision in *Webb-Weber* (98 AD3d 923). As the majority notes, the Court of Appeals in *Webb-Weber* recently reversed this decision insofar as we dismissed the claim under § 740; however, the Court did not address the viability of the § 741 claim because the plaintiff abandoned that claim on her appeal to the Court of Appeals and asked only for reinstatement of the Labor Law § 740 claim (2014 NY Slip Op 03428, *3 n 2).

Nonetheless, *Webb-Weber* still does not foreclose

petitioner's action in this case. The *Webb-Weber* plaintiff, who was the chief operating officer of the defendant health care provider, did not allege that she used her training to provide mental health services or other services that might qualify as health care (98 AD3d at 924). Indeed, reference to the complaint in *Webb-Weber* reveals that there was no connection between the plaintiff's professional training and the allegedly harmful conditions that she complained about.[1] Instead, the plaintiff, who was trained as a clinical social worker, complained about matters including lack of podiatric care for patients, lack of safe egress from facility premises, improperly working doors that caused injury to a patient, faulty plumbing, nonworking fire alarms, financial improprieties and sloppy construction work. Her complaints about these matters, the plaintiff alleged, resulted in her unlawful dismissal. But none of these various complaints required any application, even tangentially, of the plaintiff's health care training; her experience in health care was entirely unrelated to the allegations of her complaint. The

[1] This Court may take judicial notice of undisputed court records and files (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 102 [1st Dept 2010]; *Matter of Khatibi v Weill*, 8 AD3d 485, 485 [2d Dept 2004]).

Webb-Weber plaintiff, therefore, fell outside the "specialized protections of Labor Law § 741 [, which] were meant to protect professional judgments regarding the quality of patient care" (*Reddington*, 11 NY3d at 92).

Similarly, *Reddington*, upon which the majority also places much reliance, does not serve to foreclose petitioner's action. In *Reddington*, the plaintiff had begun her tenure at the defendant hospital by working in volunteer services (*id.* at 82). She later began working as a translator for a group of Italian patients and their families, eventually attaining the title of "Director – International Patient Program" (*id.* at 83).

However, nothing in the *Reddington* decision suggests that the plaintiff was a medical professional, or that she used any medical or paraprofessional training to perform the tasks within her job description. The job description itself, which is set forth in *Reddington*, listed no duties requiring medical training. Instead, the description made clear that at most, one of the plaintiff's duties involved interaction with medical personnel to determine what services the defendant hospital would provide to international patients (*id.* at 83-84). The rest of the plaintiff's listed duties comprised tasks such as coordinating transportation, developing a calendar of activities for

international patients, and coordinating marketing efforts for the international patients' program (*id.*). In light of the facts set forth in *Reddington*, it is difficult to discern how the majority can fairly characterize the *Reddington* plaintiff's tasks as "closer to providing health care services" than the ones petitioner undertook at OCHSR.

In this case, petitioner pleaded that she was a licensed and registered nurse with over 20 years of experience in clinical research. What is more, her allegations of wrongdoing related directly to her health care and research experience. Indeed, petitioner alleged that she was ultimately impelled to act because of the potential harm that might be inflicted on patients as a direct result of HHC's regulatory noncompliance. Further, petitioner alleged, she had grown concerned with the possibility that "patients enrolled in ongoing studies would be deprived of the opportunity to continue treatment if the studies lacked the requisite approvals."

These allegations encompass precisely the type of "professional judgment[] regarding the quality of patient care" that the Court of Appeals contemplated in *Reddington* (*see id.* at 92). That the patient care in this case depended on compliance with research protocols rather than on implementing specific

medical procedures does not serve to render petitioner's claim patently meritless at this stage of the litigation. This conclusion holds especially true in light of the fact that petitioner's professional experience was not only in nursing, but in clinical research.

The majority, in further support of its argument that petitioner was not an "employee" within the meaning of § 741, adopts HHC's position that petitioner "did not see, treat or otherwise interact with patients, nor did she have any decision making authority regarding direct patient health care." This assertion misses the point. Neither § 741 nor the Court of Appeals mandates that an "employee" must directly treat or interact with patients to receive § 741 protection. Rather, as the *Reddington* Court stated, § 741 safeguards "those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, and whose jobs require them to make these judgments" (*id.* at 92-93). The complaint adequately pleads that petitioner fell under this rubric during her employment with OCHSR.

As a result, affording the complaint a liberal construction and giving petitioner the benefit of every possible favorable inference, as we must at this stage of the litigation,

petitioner's proposed claim under § 741 is not so "patently meritless" as to warrant denial of her application for late filing relief. This was the very standard that the Court of Appeals advanced in reversing our decision with respect to § 740 in *Webb-Weber* (*Webb-Weber*, 2014 NY Slip Op 03428, *6).

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

ENTERED: SEPTEMBER 4, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11697 Johnson Devadas, et al., Index 107637/07
Plaintiffs-Respondents,

-against-

Kevin Niksarli, M.D., et al.,
Defendants-Appellants.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Edward J. Guardaro, Jr. of counsel), for appellants.

Law Office of Todd J. Krouner, Chappaqua (Todd J. Krouner of counsel), for respondents.

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Judgment, Supreme Court, New York County (Doris Ling-Cohan, J.), entered August 12, 2011, upon a jury verdict in favor of plaintiffs, modified, on the law, to the extent of dismissing the derivative claim of plaintiff Saramma Devadas, and otherwise affirmed, without costs.

In March 2004, plaintiff Johnson Devadas (plaintiff), a 25-year-old pharmacist, accompanied his wife when she went to consult defendant Kevin Niksarli (defendant), an ophthalmologist specializing in Lasik surgery.[1] A Lasik surgeon attempts to improve vision by cutting a flap in the eye with a laser and

[1] Newsight Laser Center, PLLC, the entity that owns the center where Niksarli operates, is also a defendant, and the term defendant herein, although primarily referring to Niksarli, encompasses the entity as well.

reshaping the cornea to allow light to fall on the retina, instead of in front of or behind it. Plaintiff had not himself been considering Lasik, but he was nearsighted and found that wearing glasses and having to focus on a computer screen at his pharmacy gave him headaches. He decided to be evaluated by defendant that day, too. Defendant told plaintiff he was a suitable candidate for the procedure, after plaintiff was put through various tests. These included a topography, which plotted the shape of his cornea, and a pachymetry exam, which measured the thickness of his cornea. Defendant also performed an autorefraction and a slit lamp test.

Plaintiff decided to go through with the procedure and scheduled it for April 6, 2004. That day, he was given a Valium tablet because he was nervous, and was then given a written consent form, which he signed. The form listed a variety of possible complications, including evening glare, less-than-corrected 20/20 vision, haloed vision, double vision, progressive corneal thinning (also known as ectasia), and complications that might require further procedures, including a corneal transplant.

Plaintiff returned to defendant's office the day after the procedure, as instructed. He told defendant that his left eye was blurry and tearing, and that he felt like he had grains of

sand inside his eye. The doctor told him that this was a normal and temporary condition which would subside. At his next follow-up visit on April 19, 2004, plaintiff again complained of the blurry vision in his left eye, and told defendant that, while the tearing had stopped, he was now experiencing dryness in that eye. According to plaintiff, defendant was dismissive, and recommended rewetting drops. At his six-week postoperative appointment, on May 19, 2004, plaintiff made the same complaints but recalled that defendant was again dismissive, telling plaintiff that he was expecting too much so soon after the surgery, and that he needed to give his eyes time to heal. Defendant told plaintiff to follow up "as needed," and that he could come back any time. According to plaintiff, although "[t]here was no definite time [he] had to come back to him," he considered Dr. Niksarli his "ophthalmologist for life." This was based on plaintiff's recollection that defendant had assured him that the procedure came with a lifetime guarantee.

Plaintiff had no further contact with defendant until February 21, 2007. Although the postsurgical blurriness had never really gone away, plaintiff stated that he learned to adapt to it. By early 2007, however, the blurriness had gotten worse, and plaintiff began experiencing visual distortions and double

vision. At the February appointment, defendant performed tests similar to those he had performed preoperatively, and diagnosed plaintiff with a condition called forme fruste keratoconus (FFK). Keratoconus is a bilateral bulging of the cornea and the forme fruste type is an early presentation of the condition. Defendant told plaintiff that it was a genetic condition where the collagen inside the cornea progressively weakens, with no known cure except an experimental procedure being performed by a doctor in California. Defendant told plaintiff that the Lasik surgery had nothing to do with the onset of plaintiff's condition.

Plaintiff commenced this action on May 31, 2007, alleging that defendant committed medical malpractice. His wife interposed a derivative claim. Defendant moved for summary judgment, arguing that plaintiff filed his summons after the expiration of the 2-1/2 year statute of limitations for medical malpractice actions (CPLR 214-a). He argued that the cause of action accrued on April 6, 2004, when he performed the Lasik procedure. Plaintiff, in opposing the motion, invoked the continuous treatment doctrine, contending that defendant had continued treating him for a blurry vision condition, with no interruption, after the surgery was performed, and up to and including his last visit to defendant on February 21, 2007.

Plaintiff's expert opined that the blurry vision for which plaintiff visited defendant in February 2007 was related to the Lasik surgery, because the Lasik caused the dormant condition of FFK to manifest into a more active keratoconus, which severely affected plaintiff's vision. Defendant countered by asserting that the last possible date he could be considered to have treated plaintiff was May 19, 2004, at the six-week postoperative checkup, which would render the action time-barred. He argued that plaintiff made no complaints at the time, and had corrected vision of 20/20. He further stated that, although instructed to schedule a routine ophthalmology exam with defendant, three to six months in the future, plaintiff never did so. Finally, defendant argued that the blurriness which prompted plaintiff to visit him in February 2007 was unrelated to the blurriness the Lasik surgery was designed to address.

The court denied the summary judgment motion, finding that issues of fact precluded it from determining the continuous treatment question. The case proceeded to trial. Dr. Paul B. Donzis, plaintiff's expert ophthalmologist, reiterated his opinion, laid out in opposition to the summary judgment motion, that plaintiff had mild dormant FFK before surgery, and that the Lasik surgery weakened plaintiff's cornea such that it triggered

the dormant FFK to become active. Thus, he stated, while the surgery was technically performed well, it should have never been performed in the first place. Dr. Donzis testified that dormant FFK can become triggered anywhere from a month or two to five years after Lasik surgery. He further testified that plaintiff's blurry vision immediately after the surgery could not have been from FFK; rather, it was normal temporary Lasik postsurgical blurriness. He stated that plaintiff did not begin experiencing FFK-related blurriness until a few months before the February 2007 visit with defendant.

Defendant's main expert, an ophthalmologist named Dr. Peter Hersh, opined that, upon reviewing the 2004 data, the topography of plaintiff's eyes did not indicate that he had FFK prior to the Lasik procedure. Therefore, he stated, defendant's assessment of plaintiff's condition was appropriate, and Lasik surgery was not contraindicated. Dr. Hersh further testified that a patient can develop FFK absent a Lasik procedure, and there was no causal connection between plaintiff's Lasik surgery and his subsequent development of FFK.

The jury returned a verdict for plaintiff, specifically finding that the last date of continuous treatment was February 21, 2007. It awarded plaintiff $100,000 for past pain and

suffering, $3,000,000 for future pain and suffering over 45 years, $60,000 in lost earnings, and $740,000 for future lost earnings for a period of 37 years ($20,000 per year). The jury awarded plaintiff's wife $20,000 for past loss of services and $100,000 for future loss of services. Defendant moved for, among other things, judgment notwithstanding the verdict, or, in the alternative, for an order setting aside the verdict and directing a new trial on the grounds that the verdict was against the weight of the evidence and that the court had committed prejudicial errors, or, in the alternative, for an order reducing the damages. The court denied defendant's motion. Regarding defendant's argument that the claim was barred by the statute of limitations, the court stated that the "issue of whether [plaintiff's] February 21, 2007 visit to [defendant] constituted continuous treatment was determined to be a question for the jury, in defendants' previous summary judgment motion."

As a preliminary matter, we note that defendant's statute of limitations defense must be analyzed in light of the fact that the question of the applicability of the continuous treatment doctrine was put before, and decided by, a jury. Accordingly, the jury's verdict on that issue should only be set aside as not supported by sufficient evidence if "there is simply no valid

line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]). Accordingly, we review the issue with great deference to the jury.

The continuous treatment doctrine is codified at CPLR 214-a, which provides, in pertinent part, that "[a]n action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." One of the purposes of the doctrine is to permit a doctor to address a possible act of malpractice without the distraction of a lawsuit commenced by the very person he or she is trying to treat (*Nykorchuck v Henriques*, 78 NY2d 255, 258 [1991]).

Defendant claims that the continuous treatment doctrine did not toll the statute of limitations because plaintiff's treatment with defendant concerning the Lasik surgery came to an end, at the latest, on May 19, 2004, and plaintiff's next visit, nearly three years later, was for an unrelated condition. Specifically, he argues that the reason for the surgery was garden-variety

myopia, and the visits after the surgery, up to and including the May 2004 visit, were for routine follow-up exams that every Lasik patient has. Further, defendant asserts that the February 2007 visit arose not out of the myopia condition, but rather out of the keratoconus that plaintiff alleges was brought on by the surgery. Thus, he contends that the conditions were not the "same" for purposes of CPLR 214-a. Defendant further notes that, after the May 2004 visit, plaintiff never scheduled another follow-up appointment and never even communicated with defendant, until he reappeared in 2007. Thus, he concludes, the original treatment had come to an end.

Plaintiff, on the other hand, asserts that the 2007 visit satisfied CPLR 214-a, because it was for the "same" condition as the 2004 visits, which was blurry vision in his left eye. He further argues that whether he and defendant agreed that he would seek further treatment after the May 2004 visit is irrelevant, because defendant "guaranteed" that the Lasik procedure would correct the blurry condition, and stated that he was plaintiff's "doctor for life" for that purpose.

Although the CPLR defines "continuous" treatment as treatment "*for* the *same* illness, injury or condition" out of which the malpractice arose (CPLR 214-a [emphasis added]), the

controlling case law holds only that the subsequent medical visits must "relate" to the original condition (*Richardson v Orentreich*, 64 NY2d 896, 899 [1985]; *Chestnut v Bobb-McKoy*, 94 AD3d 659, 660 [1st Dept 2012]). Here, plaintiff initially engaged defendant to correct his blurry vision, and the 2007 visit was motivated by continued blurriness in plaintiff's eye, thus making the two visits "related" (*id.*).

Indeed, this view of the evidence has support in the case law. For example, in *Branigan v DeBrovner* (197 AD2d 270 [1st Dept 1994]), the defendant gynecologist failed to diagnose rubella in the plaintiff, his pregnant patient. He argued that the plaintiff's cause of action for malpractice accrued, at the latest, when he read the results of a rubella test that he had ordered and declared her to not have contracted the disease, a date which predated the commencement of the action by more than 2-1/2 years (*id.* at 271-272). This Court disagreed, and held that the continuous treatment doctrine tolled the start of the limitations period until the plaintiff's final prenatal visit, stating as follows:

> "Here, it is undisputed that Dr. DeBrovner was plaintiff's gynecologist and had been providing her with prenatal care during her early pregnancy. While Dr. DeBrovner would limit the condition being treated to rubella

> and the course of treatment to his May 15, 1989 negative diagnosis, it is clear that plaintiff was under his care for all her early pregnancy prenatal medical needs, and not for a series of unrelated and discrete tests and procedures, each giving rise to a separate and unrelated course of treatment. Plaintiff engaged Dr. DeBrovner's services for her pregnancy and not her complaint of rubella. As her gynecologist/obstetrician, he was required to treat the complications of her pregnancy or, if the complication was beyond his area of specialty, to refer her to another competent medical care provider. Continuous treatment for prenatal care should extend to the time of birth and encompass the myriad, diverse procedures and tests appropriate to carrying a child to term and the delivery" (*id*. at 274).

In so holding, we cited favorably to a Third Department decision, *Miller v Rivard* (180 AD2d 331 [3d Dept 1992]). That case involved a woman's "wrongful conception" claim arising out of an unsuccessful vasectomy performed on her husband (*id.* at 333-334*)*. The defendant doctor moved for summary judgment based on the statute of limitations (*id*. at 334). Although it was dicta because the court deemed the defendant to have conceded the point, the court stated the following:

> "[T]he course of related, continuous treatment in the case of a vasectomy performed for the purpose of birth control does not end until completion of the postoperative procedures of fertility testing and notification to the patient that the test results show that the vasectomy was a

success" (*id.* at 338).

Here, plaintiff testified, and the jury was entitled to believe, that, prior to the Lasik surgery, defendant guaranteed him a good result, meaning that the procedure would fix plaintiff's nearsightedness. Under these circumstances, we find that, like the plaintiff in *Branigan*, who was considered to be under the continuous care of her doctor until she carried her baby to term, and the plaintiff in *Miller*, whose husband was considered to be under the continuous care of his doctor until it was determined that he was sterile, plaintiff was under the continuous care of defendant for statute of limitations purposes until defendant rectified plaintiff's vision problems, or, as turned out to be the case, determined that any further efforts by him to do so would be futile.

We must also address defendant's argument that because plaintiff pursued no treatment for over 30 months after May 2004, he is not entitled to a tolling based on his single visit in February 2007. This, again, ignores plaintiff's belief that he was under the active treatment of defendant at all times, so long as the Lasik surgery did not result in an appreciable improvement in his vision. In determining whether continuous treatment exists, the focus is on whether the patient believed that further

treatment was necessary, and whether he sought such treatment (*see Rizk v Cohen*, 73 NY2d 98, 104 [1989]). Further, this Court has suggested that a key to a finding of continuous treatment is whether there is "an ongoing relationship of trust and confidence between" the patient and physician (*Ramirez v Friedman*, 287 AD2d 376, 377 [1st Dept 2001]). Plaintiff's testimony that he considered defendant to be his "[doctor] for life," and that the efficacy of the Lasik was guaranteed, was a sufficient basis for the jury to conclude that such a relationship existed.

Edmonds v Getchonis (150 AD2d 879 [3d Dept 1989]), a dental malpractice case, illustrates this point. There, the defendant inserted an implant in the plaintiff's mouth in November 1977 to correct a "denture problem" (*id.* at 879-880). After the removable implant was determined to be ineffective, the defendant inserted a fixed one in August 1978 (*id.* at 880). He then told the plaintiff that he no longer needed to see her, unless she had any problems (*id.*). In fact, the plaintiff wrote a letter to the defendant in September 1978 thanking the defendant for his efforts and noting "we have finally come to a parting of our ways" (*id.*). In December 1980, 27 months later, the plaintiff went to see the defendant, complaining of "continued denture-related problems," and continued under his care through August

1982 (*id.*). The defendant moved for summary judgment dismissing part of the action, which was commenced in September 1983, arguing that any claim for malpractice that took place more than three years prior (the statute of limitations was three years at the time) was time-barred (*id.*). The plaintiff contended that her visit in December 1980 related back to the insertion of the original implant, and the court found that there was at least an issue of fact, stating as follows:

> "Assessed from plaintiff's point of view, the temporal gap between visits was not excessive. In her opposing affidavit, plaintiff averred that she continued to place her trust and confidence in [the defendant's] care, that she did not consult any other dentist, that her September 10, 1978 letter was not intended to terminate her relationship with [the defendant] and that she finally returned for treatment when 'the problem with my implant get [sic] progressively worse.' Given the history of dental treatment in this case, we find, at the very least, that a question of fact exists as to whether plaintiff's December 1980 return was 'timely' for purposes of establishing the required continuity" (*id.* at 881).

Plaintiff's vision problems here are analogous to the plaintiff's "denture problems" in *Edmonds*, and the jury did not act irrationally in finding that plaintiff continued to place trust and confidence in defendant's ability to correct his blurry

vision. Further, even if we were to accept the proposition advanced by defendant, that the keratoconus was unrelated to the Lasik surgery, plaintiff had no reason to believe that to be the case when he returned to defendant in February 2007. Thus, in reasonably believing that his continued, and worsening, blurry vision was attributable to the Lasik surgery that defendant had guaranteed, plaintiff was genuinely "confronted with the dilemma that led to the judicial adoption of the continuous treatment doctrine" (*Rizk v Cohen*, 73 NY2d at 104).

Cases such as *Clayton v Memorial Hosp. for Cancer and Allied Diseases* (58 AD3d 548 [1st Dept 2009]) are inapplicable here, to the extent they reiterate that "continuous treatment exists 'when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past'" (58 AD3d at 549, quoting *Richardson v Orentreich*, 64 NY2d at 898-899). In *Clayton*, the plaintiff asserted that a visit to the defendant in January 2001 was in continuance of treatment last rendered in November 1999 (58 AD3d at 549). This Court found that the continuous treatment doctrine did not apply, because the

plaintiff testified that she did not believe anything further could be done to treat her condition after the November 1999 visit, and there was no evidence that plaintiff viewed the two visits as related (*id.*).

Here, of course, plaintiff went back to defendant in February 2007 precisely because he wanted defendant to fulfill his guarantee that the Lasik surgery would work. This was consistent with the notion that "[i]ncluded within the scope of 'continuous treatment' is a timely return visit *instigated by the patient* to complain about and seek treatment for a matter related to the initial treatment" (*McDermott v Torre*, 56 NY2d 399, 406 [1982] [emphasis added]). Indeed, "as a practical matter, it is not always possible to know at the conclusion of one visit with a physician whether a further visit with the physician may become indicated for the same condition within a reasonable time thereafter" (*Gomez v Katz*, 61 AD3d 108, 114 [2d Dept 2009]). We further note that defendant prescribed Timoptoc to plaintiff at the February 21, 2007 appointment, to alleviate the effects of keratoconus. The term "course of treatment" includes the prescription of medications (*see id.* at 112).

It bears emphasizing that the question of the applicability of the continuous treatment doctrine was specifically put before

the jury. Our view of the trial record is that sufficient evidence was put before the jury to justify its determination that plaintiff's visit to defendant in February 2007 tolled the statute of limitations. Accordingly, we defer to the jury and uphold that portion of its verdict.

Notwithstanding that determination, the derivative claim of Saramma Devadas must nevertheless be dismissed. "[T]olling of the statute of limitations pursuant to the continuous treatment doctrine is personal to the recipient of such treatment and does not extend to a derivative claim for loss of services" (*Wojnarowski v Cherry*, 184 AD2d 353, 354-355 [1st Dept 1992]). Accordingly, plaintiff Saramma Devadas's claim is time-barred.

As for the jury's substantive determination that defendant committed malpractice, we cannot say that "no valid line of reasoning and permissible inferences . . . could possibly lead rational [people] to th[at] conclusion . . . on the basis of the evidence presented at trial" (*Cohen*, 45 NY2d at 499). Quite simply, plaintiffs expert ophthalmologist, Dr. Donzis, testified that it was his opinion, within a reasonable degree of medical certainty, that plaintiff had a mild dormant form of FFK contraindicating Lasik surgery, and that defendant should have diagnosed this condition. Further, he testified that the Lasik

surgery caused plaintiff's dormant FFK to become active, resulting in his vision problems. While defendant's experts may have disagreed, that is not a reason to set aside the verdict (*see Brotman v Biegeleisen*, 192 AD2d 410, 410 [1st Dept 1993] *lv denied*, 82 NY2d 654 [1993]).

Defendant mischaracterizes Dr. Donzis's testimony in an effort to discredit it. For example, he points to passages which suggest that even Dr. Donzis conceded that FFK could not be diagnosed in 2004, when defendant performed the Lasik surgery. However, while the experts agreed that plaintiff's dormant FFK could not be diagnosed clinically using a slit lamp, they agreed that dormant FFK could be diagnosed via topographic map. Thus, if the jury believed that plaintiff had dormant FFK in 2004, it had a basis for finding that defendant could and should have diagnosed it. Defendant also points to the fact that Dr. Donzis agreed that plaintiff's age and cornea thickness were within normal limits, and that the Humphrey-Pathfinder analysis stated that plaintiff's eye topography was normal. However, Dr. Donzis also testified that defendant should not have relied solely upon the Humphrey-Pathfinder analysis, given that plaintiff's corneal thickness and topography were borderline normal, and plaintiff was young, an additional risk factor. According to Dr. Donzis,

defendant should have performed an independent analysis of plaintiff's I-S value[1], which would have indicated that plaintiff's I-S was 3.08, a level at which Lasik was contraindicated. Further, defendant's protestations regarding Dr. Donzis's use of the 2006 version of Pathfinder is a red herring. Dr. Donzis testified that the 2006 version presented the topography of plaintiff's eye in a different manner than the 2004 version of the software. Critically, however, he added the caveat that the "absolute numbers" used to determine whether there is an abnormality are the same, regardless of the software used. Thus, the jury had reason to disregard the fact that Dr. Donzis used a version of the software that was unavailable to defendant during his initial examination of plaintiff.

Defendant also mischaracterizes the record by arguing that Dr. Donzis "manipulat[ed] numerical descriptions" in determining that plaintiff's I-S was 3.08. Defendant's expert, Dr. Hersh, testified that Dr. Donzis's numbers were incorrect, not because he "manipulated" data, but because he incorrectly used all corneal measurements within a 3 mm radius of the eye's center.

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[1] I-S value is short for Inferior-Superior value, a measurement that represents a comparison between the shape of the top half of the cornea and the lower half. A higher number indicates a more irregularly shaped eye.

By doing so, Dr. Hersh opined, Dr. Donzis relied on data that was inaccurate due to interference caused by plaintiff's long lashes. Instead, according to Dr. Hersh, the I-S should be calculated by using only the data within a 2 mm radius, or 4 mm zone. On cross-examination, however, plaintiff's counsel read Dr. Hersh's testimony from a prior trial of an unrelated case, in which he stated that it was really the data from the central 6 mm of the cornea that should be used. This contradicted his direct testimony. Dr. Hersh could not explain the discrepancy between his testimony in this trial and the other, nor could he point to any support for his use of a 4 mm methodology at the trial of this matter. Under such circumstances, it would have been reasonable for the jury to discredit Dr. Hersh, and believe Dr. Donzis.

Defendant also points to the testimony of Dr. Chu, who conducted a medical examination for him in which he found plaintiff's vision to be 20/30 uncorrected, and 20/20 when corrected. However, Dr. Chu admitted that he did not conduct any qualitative testing to address plaintiff's claims of cometing, haloing, and other adverse effects of the Lasik surgery. Further, while Dr. Chu explained that plaintiff's near 20/20 vision belied any such claims, making further objective

testing unnecessary, the jury was not obliged to believe this explanation.

We reject defendant's argument that the jury's verdict was tainted by the introduction of a topography of plaintiff's eye created with software not available until two years after the surgery in question. Again, the critical aspect of Dr. Donzis's testimony was that plaintiff's I-S was 3.08, and this was obtained without use of the 2006 topography. Nor was defendant prejudiced by plaintiff's failure to produce the topography during discovery. Plaintiff's expert disclosure provided that his expert would testify as to all records, including "post-operative topographies." Since defendant had the 2006 Pathfinder software, and the 2004 data, he could have easily created the topography himself.

We further find that the jury award did not deviate materially from what would be reasonable compensation (CPLR 5501[c]). Plaintiff sustained serious and permanent damage to his vision, testifying that he continues to suffer from double vision, starbursts, and halos. His eyes are constantly dry, and even though he has an unrestricted drivers license, he testified that he can only wear corrective lenses for about six hours a day. Even surveillance tape shown at trial by defendant

establishes that plaintiff must depend on his wife and father for rides to work and other places. Case law supports significant awards for blindness in one eye (*see e.g. Sanchez v Project Adventure, Inc.*, 12 AD3d 208 [1st Dept 2004]; *Crawford v Williams*, 198 AD2d 48 [1st Dept 1993], *lv denied* 83 NY2d 751 [1994]), and because plaintiff's condition affects both eyes, the jury had sufficient basis to award plaintiff the amount it did.

Finally, the judgment complies with CPLR 5031.

All concur except Friedman, J. who dissents in part in a memorandum as follows:

FRIEDMAN, J. (dissenting in part)

The majority affirms the judgment for plaintiff Johnson Devadas in this medical malpractice action based on its holding that a factual question was presented at trial as to whether the "continuous treatment" doctrine tolled the running of the statute of limitations from May 19, 2004, the date of plaintiff's last immediate postoperative consultation with defendant Kevin Niksarli, M.D., until February 21, 2007, the date of plaintiff's last consultation with defendant before he commenced this action.[1] The majority reaches this result even though it is undisputed that, following defendant's performance of the allegedly contraindicated LASIK eye surgery in April 2004, there was no contact of any kind between plaintiff and defendant during the 33 months that passed between the May 2004 visit and the February 2007 visit — an interval three months longer than the 30-month limitation period (CPLR 214-a). The majority's sustaining of a finding that a course of "continuous treatment" persisted over a period longer than the limitation period, in

[1]I concur with the majority's dismissal of the derivative claim of plaintiff Saramma Devadas. In the remainder of this writing, the term "plaintiff" refers to plaintiff Johnson Devadas. References to "defendant" include Dr. Niksarli's professional limited liability company, which is also named as a defendant in this action.

which no physician-patient contact whatsoever occurred, appears to be without precedent in this state (*see* Edward J. Guardaro, Jr. & Norman Bard, New York Medical Malpractice § 9:100 [2014]).

The majority purports to justify its apparently unprecedented holding by pointing to the "guarantee" that plaintiff claims to have received from defendant. According to plaintiff's own testimony, however, this alleged "guarantee" was nothing more than a promise that plaintiff would not be charged for additional treatment or follow-up procedures relating to the LASIK surgery.[2] By plaintiff's own account, although he believed that he could see defendant "at any time" for issues relating to the surgery, on an "as-needed basis," he had no specific intention of returning to consult with defendant at any "definite time," or within any particular time frame, after the May 2004 office visit. Notwithstanding the blurred vision that persisted after the operation, plaintiff testified that he did not return to defendant's office for nearly three years after the May 2004 appointment because he "had adapted to [the] blurry vision" and had found defendant to be "dismissive" of his complaints at his

[2]According to defendant, he had told plaintiff that he could receive any follow-up treatment free of charge for the first year after the surgery and, thereafter, he would be billed for further treatment relating to LASIK surgery at a reduced rate.

postoperative visits in 2004. It was only when the blurred vision "got[] worse" in early 2007 that plaintiff returned to see defendant.

Even assuming in plaintiff's favor that his May 2004 and February 2007 consultations with defendant were "for the same illness, injury or condition" (CPLR 214-a), I cannot see how plaintiff's knowledge of the alleged "guarantee," by itself, can be deemed to support a finding that "continuous treatment" persisted over a 33-month period in which there was neither any actual physician-patient contact nor any definite plans or expectation for such contact to resume. That plaintiff believed he could return to defendant's office at any point in the future to seek treatment relating to his LASIK surgery, on an "as-needed basis," does not distinguish this case from any situation in which a course of treatment concludes without either a definite breach in the physician-patient relationship or the patient's switching to a different doctor. Plaintiff's belief that defendant would not charge him for any future LASIK-related treatment is irrelevant to the question of whether a course of treatment continued over nearly three years during which the parties had no actual contact, whether in person or otherwise. Thus, plaintiff's own testimony establishes, as a matter of law,

that defendant's continuous treatment of plaintiff relating to the allegedly negligent April 2004 LASIK surgery came to an end in May 2004. Plaintiff's brief resumption of treatment with defendant in February 2007 (for only one visit), while perhaps for the same condition, was not part of the earlier course of treatment that had ended in May 2004 and could not revive claims arising from that course of treatment, for which the statute of limitations had expired in November 2006. A renewal or resumption of treatment after a lengthy break is not continuous with an earlier course of treatment that had reached its end (*see Rizk v Cohen*, 73 NY2d 98, 105 [1989] [the continuous treatment doctrine did not apply where the later contact between the parties "was a renewal, rather than a continuation, of the physician-patient relationship"]; *Aulita v Chang*, 44 AD3d 1206, 1210 [3d Dept 2007] [the patient's "later treatment . . . could only be considered a resumption of treatment as opposed to a continuation of his prior care"] [internal quotation marks omitted]; *Van Inwegen v Lucia*, 222 AD2d 576, 577 [2d Dept 1995] ["the plaintiff's return to Dr. Lucia in August of 1982 for treatment of two teeth which he had not worked on since 1977 was a resumption of treatment rather than continuous treatment"]).

The purpose of the continuous treatment toll, now codified

by CPLR 214-a, is "to enforce the view that a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuing trust in the physician-patient relationship in order to ensure the timeliness of a medical malpractice action" (*Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]). Here, during the 33-month interval between plaintiff's May 2004 and February 2007 consultations with defendant, plaintiff was not undergoing any treatment of any kind by defendant; hence, commencing an action within that period would not have interrupted any ongoing treatment. While it is possible for a course of continuous treatment to be extended beyond the patient's last visit with the physician "when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future" (*Richardson v Orentreich*, 64 NY2d 896, 898-899 [1985] [continuous treatment ended on the date of the patient's last scheduled appointment, for which she failed to appear]), in this case — by plaintiff's own admission — the parties did not "explicitly anticipate[]" further treatment at any particular time or within any defined time frame. As plaintiff testified at trial: "There was no definite time I had to come back to him. It was an as-needed

basis. He was my ophthalmologist for life. According to his guarantee I could come back any time." Again, apart from plaintiff's alleged understanding that any future LASIK-related treatment would be free of charge, this is no different from the conclusion of any course of treatment in which neither the physician nor the patient affirmatively breaks off the relationship. Moreover, plaintiff admits that, in the time between his May 2004 and February 2007 consultations with defendant, he was not aware of any need for further treatment. "Given plaintiff's lack of awareness of a condition warranting further treatment, the purpose of the continuous treatment doctrine would not be served by its application here" (*Young*, 91 NY2d at 297; *see also id.* at 296 ["a patient who is not aware of the need for further treatment of a condition is not faced with the dilemma that the doctrine is designed to prevent"]; *Rizk v Cohen*, 73 NY2d at 104 [there was "no sound basis for applying the continuous treatment doctrine" where the plaintiff was "unaware of the need for further treatment"]).

Further, by extending the course of treatment in which the alleged malpractice occurred from May 2004, when the last regular postoperative examination occurred, to a single visit in February 2007, covering a period of 33 months in which the parties had no

contact at all, the majority in effect applies an accrual-upon-discovery rule to a malpractice claim that is not based on the presence of a foreign object in the patient's body.[3] In so doing, the majority contravenes both the Legislature's determination to limit the discovery rule to foreign-object claims (*see* CPLR 214-a) and the Court of Appeals' admonition against judicial extension of the discovery rule beyond the scope the Legislature prescribed for it in the statute (*see Rizk v Cohen*, 73 NY2d at 104 n 3).

The Court of Appeals' statement, quoted by the majority, that a course of continuous treatment includes "a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment" (*McDermott v Torre*, 56 NY2d 399, 406 [1982]), does not support the majority's result. As the Court of Appeals noted in *Curcio v Ippolito* (63 NY2d 967 [1984]), a unanimous decision rendered only two years later, the key word in the quoted passage from *McDermott* is "timely." In *Curcio*, the Court of Appeals affirmed

[3]In the February 2007 examination, defendant diagnosed plaintiff as having a congenital eye condition that, had it been diagnosed in 2004, would have contraindicated LASIK surgery. The majority's ruling effectively tolls the running of the statute of limitations on plaintiff's claim until his discovery, in 2007, of defendant's failure to diagnose the condition in 2004.

summary judgment dismissing as time-barred a malpractice claim against a surgeon who had operated on the plaintiff's nose. The *Curcio* plaintiff, who had been discharged from the defendant surgeon's care in January 1976, went back to see the defendant on February 24, 1979, presenting with complaints about her breathing and nasal indentation, "without having seen defendant or any other physician in the meantime with respect to her nose" (*id.* at 968). In affirming the dismissal of the claim, Court of Appeals explained:

> "[I]t is enough to bar plaintiff's claim that no contact between plaintiff and defendant after her discharge and before the February 24, 1979 visit has been shown. Under such circumstances the required continuity has not been established through 'a *timely* return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment' (*McDermott v Torre*, 56 NY2d 399, 406 [emphasis supplied]), or otherwise" (63 NY2d at 969).

Since, by the majority's reckoning, a return visit may serve to extend the toll of the statute of limitations even where further treatment is not specifically contemplated, a return visit occurring any length of time after the initial course of treatment — perhaps for the rest of the patient's life or for the rest of the physician's career — could be deemed "timely" under the majority's holding. I do not believe that this approach is consistent with the continuous treatment doctrine as formulated

by the Court of Appeals and enacted by the Legislature.

The instant plaintiff, like the plaintiff in *Curcio*, had no contact with the defendant physician after the alleged malpractice for a period of time longer than the limitation period applicable to his claim. During that hiatus, moreover, neither party anticipated that contact would be resumed within any particular time frame. Accordingly, the claim here, like the claim in *Curcio*, should be dismissed as time-barred (*see also Spear v Rish*, 161 AD2d 197, 198 [1st Dept 1990] [the plaintiff, who completed the course of allegedly negligent treatment in 1967 and did not see the defendant physician again until 1975, failed to establish "a 'timely' return visit so as to be able to invoke the continuous treatment doctrine," where, "(d)uring the long periods between treatments, (she) was not under any form of medical care, nor was there any existing ongoing physician-patient relationship"]).

I note that the result reached by the majority is anomalous and will create perverse incentives for physicians. Had plaintiff instituted this suit in February 2007, without visiting defendant's office again for the first time in nearly three years, the action plainly would have been dismissed pursuant to the statute of limitations upon defendant's motion. By deeming

plaintiff's one-time office visit in February 2007 to extend a course of treatment that otherwise plainly ended in May 2004, the majority sends physicians the unfortunate message that they should think twice before seeing patients with whom they have not had contact for longer than 2½ years — especially in the cases of patients with whom the physicians have had difficulties. Under the majority's holding, by seeing such a patient, the physician may be reviving an otherwise time-barred claim. Thus, as applied by the majority, a doctrine that was instituted for the purpose of avoiding the "interrupt[ion] [of] corrective medical treatment" (*Young*, 91 NY2d at 296) could have the effect of deterring physicians from resuming treatment of former patients.

For the reasons discussed above, I believe that the record does not support the jury's finding that February 21, 2007 was the last date of a "continuous course of treatment" that included defendant's alleged malpractice in April 2004, and that defendant's posttrial motion for judgment notwithstanding the verdict should have been granted and the complaint dismissed. I

therefore respectfully dissent to the extent the majority's affirms the judgment for plaintiff. Given my view that the statute of limitations issue is dispositive of this appeal, I need not reach the remaining issues defendant raises.

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

ENTERED: SEPTEMBER 4, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12385N Tanner Ross Bhonlay, etc., et al., Index 158150/12
Plaintiffs-Appellants,

-against-

Raquette Lake Camps, Inc., et al.,
Defendants-Respondents.

_____

Weisfuse & Weisfuse, LLP, New York (Martin H. Weisfuse of counsel), for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Glen S. Feinberg of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 16, 2013, which granted defendants' motion to change the venue of this action from New York County to Hamilton County, and denied plaintiffs' cross motion to retain venue in New York County, unanimously affirmed, without costs.

We are constrained by this Court's holdings in *Medina v Gold Crest Care Ctr., Inc.* (117 AD3d 633 [1st Dept 2014]) and *Hendrickson v Birchwood Nursing Home Partnership* (26 AD3d 187 [1st Dept 2006]). In any event, whether the motion to change venue was analyzed as one based on "improper" venue or not, the agreement would control. In other words, even if we deemed a demand necessary, we would still exercise our discretion to enforce the agreement (*see Pittman v Maher*, 202 AD2d 172, 175

[1st Dept 1994] [existence of venue agreement is one of the "limited situations" in which the court may disregard strict compliance with the statute]; *Callanan Indus. v Sovereign Constr. Co.*, 44 AD2d 292, 294-295 [3d Dept 1974]).

There is no basis for disregarding the venue agreement. Plaintiff has not demonstrated that enforcement of the venue clause would be unjust or would contravene public policy, or that the clause was rendered invalid by fraud or overreaching (*see Molino v Sagamore*, 105 AD3d 922 [2d Dept 2013] [enforcing against Queens resident venue clause in rental agreement requiring litigation of disputes in Warren County]). This case has been transferred to Fulton County, because there are no Supreme Court sessions held in the parties' selected venue of Hamilton County. While there is evidence that it would be inconvenient for plaintiff and his witnesses to travel to Fulton County for trial, it cannot be said that "the selected forum would be so gravely difficult that [plaintiff] would, for all practical purposes, be

deprived of [his] day in court" (*LSPA Enter., Inc. v Jani-King of N.Y., Inc.* (31 AD3d 394, 395 [2d Dept 2006]; *see also Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836 [2d Dept 2009], *lv denied* 13 NY3d 706 [2009]).

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

ENTERED: SEPTEMBER 4, 2014

CLERK

Tom, J.P., Acosta, Andrias, DeGrasse, Richter, JJ.

12411 Linda Dauria, et al., Index 302708/11
Plaintiffs-Appellants,

-against-

Castlepoint Insurance Company, et al.,
Defendants,

Frank Campo,
Defendant-Respondent.

_____

Aboulafia Law Firm, LLC, New York (Jack Glanzberg of counsel), for appellants.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Sara M. Ziolkowski of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 8, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to renew defendant Frank Campo's motion to dismiss the complaint, affirmed, without costs.

In 2008, defendant Castlepoint Insurance Company issued a homeowner's policy to plaintiffs Linda Dauria and Thomas Dauria based on an application prepared and submitted on their behalf by defendant broker Frank Campo. After a fire in 2010, Castlepoint rescinded the policy based on its determination that the premises contained a basement apartment, which rendered it a "three

family" dwelling as opposed to the "two family" designation listed on the insurance application.

In 2011, plaintiffs commenced this action against Castlepoint for breach of contract, and against Campo for his alleged negligence and breach of contract in failing to procure the proper insurance policy and to properly process plaintiffs' application for insurance. Campo moved to dismiss for failure to state a cause of action and based on documentary evidence, claiming that he was never advised or had reason to believe that the premises was a three-family dwelling. In opposition, Mr. Dauria stated that in a conversation with Campo after the fire, Campo admitted that he had "messed up," and that in 2002 an investigator for Allstate, the prior insurer of the premises, had advised Campo that the house was a three-family home. Plaintiffs also cross-moved for summary judgment against Castlepoint and Castlepoint cross-moved for summary judgment against plaintiffs dismissing the complaint.

The motion court granted Campo's and plaintiffs' motions for summary judgment, and denied Castlepoint's motion on the ground that Campo fulfilled his duties to plaintiffs, and Castlepoint failed to meet its prima facie burden of showing its entitlement to rescission as a matter of law. In so ruling, the court found

that Castlepoint did not establish that plaintiffs had made a material misrepresentation in the insurance application because three-family dwellings were not listed as an "unacceptable exposure" in Castlepoint's underwriting guidelines, and the policy did not exclude three-family dwellings from coverage.

Castlepoint appealed. This Court reversed and granted Castlepoint summary judgment (104 AD3d 406 [1st Dept 2013]), holding that the motion court erred in finding that Castlepoint failed to establish the materiality of the misrepresentation that the premises was a two-family dwelling, as opposed to a three family dwelling that did not fit within the policy definition of a "residence premises."

Plaintiffs did not appeal from the grant of summary judgment as to Campo. However, after our decision in the Castlepoint appeal was issued, plaintiffs moved below to renew Campo's motion to dismiss. Finding that plaintiffs' failed to present any new and additional facts not available at time of Campo's original motion to dismiss the complaint, the motion court deemed the motion to be an untimely motion to reargue based on our decision in the Castlepoint appeal, which did not address the unappealed dismissal of the complaint against Campo. The court further stated that even assuming arguendo that it could consider the

motion, plaintiffs' arguments were without merit.

Although the grant of a dismissal to a codefendant at the appellate level may form the basis of a renewal motion (in the court below) by a nonappealing defendant on the ground of "law of the case" (*Spierer v Bloomingdale's,* 59 AD23d 267 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009]; *Koscinski v St. Joseph's Med. Ctr.*, 47 AD3d 685 [2d Dept 2008]), this is not a case where two codefendants are so similarly situated that this Court's order with respect to one defendant directly impacts the other defendant. The issue of Campo's liability is not identical to the issue of Castlepoint's liability, and plaintiffs have not shown that the factual or legal basis for the order dismissing the claims against Campo has been overturned (*compare Ramos v City of New York*, 61 AD3d 51 [1st Dept 2009]).

An insurance broker can be held liable in negligence if he or she does not exercise due care in an insurance brokerage transaction (*see Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865 [1st Dept 2009]). In the order dismissing the claims against Campo, the motion court found that Campo had shown that "no significant dispute exists regarding his lack of duty to [p]laintiffs under the circumstances of this matter" (internal quotation marks omitted). The court reasoned that

Campo procured the requested insurance for plaintiffs, within a reasonable time, and had no continuing duty to advise plaintiffs to procure additional insurance once this was achieved. Although the dissent states that "the entire premise of [the motion court's] dismissal of the complaint against Campo was that Campo obtained the requested coverage and thus fulfilled his duty," in denying renewal the motion court stated that "the issue of the materiality of the misrepresentations regarding the number of families the home was designed to accommodate, was not discussed with reference to Campo, and was immaterial to the decision to dismiss the complaint as against [him]."

Significantly, in our decision in the Castlepoint appeal this Court did not find that Campo was in fact responsible for a material misrepresentation in the insurance policy application, and plaintiffs have not shown that the motion court's exoneration of Campo was based on its now-overturned holding that there was no misrepresentation (*see e.g. Estate of Brown v Pullman Group*, 60 AD3d 481, 482 [1st Dept 2009], *lv dismissed in part, denied in part* 13 NY3d 789 [2009]). If, as the dissent finds, material issues of fact exist as to whether Campo failed to fulfill his duty to obtain the requested coverage and whether he made a material misrepresentation in the application, under the

circumstances of this case plaintiffs' remedy was to appeal from the original order granting Campo summary judgment.

We have considered plaintiffs' other contentions and find them unavailing.

All concur except Acosta and Richter, JJ. who dissent in a memorandum by Richter, J. as follows:

RICHTER, J. (dissenting)

Plaintiffs Linda Dauria and Thomas Dauria are the owners of a house in the Bronx where they live with their in-laws. In 2002, defendant Frank Campo, an insurance broker, procured a homeowners insurance policy for the premises from Allstate. The Allstate policy listed the house as a two-family residence. In 2008, Allstate did not renew the policy, and Campo obtained a policy from defendant CastlePoint Insurance Company. The application for that policy also identified the premises as a two-family residence. In November 2010, the premises was damaged by fire resulting in an alleged loss of $330,000. CastlePoint disclaimed coverage based on a material misrepresentation in the policy application. According to CastlePoint, its investigation showed that the premises was a three-family dwelling, and not a two-family dwelling as listed on the application.

In March 2011, plaintiffs commenced this action against CastlePoint and Campo alleging, inter alia, that CastlePoint breached the insurance contract by denying coverage, and that Campo was negligent and breached his contract with plaintiffs by failing to obtain the requested coverage. Campo moved to dismiss the complaint, and both CastlePoint and plaintiffs moved for summary judgment. In opposing Campo's motion, plaintiff Thomas

Dauria submitted an affidavit stating that in a conversation after the fire, Campo admitted that he "messed up," and that in 2002 an Allstate investigator had sent Campo a letter stating that the house was a three-family home. Dauria further alleged that he had neither seen nor signed the CastlePoint application, and that Campo had submitted it unbeknownst to him.

By decision and order entered February 7, 2012, the motion court granted plaintiffs' motion for summary judgment against CastlePoint, finding that CastlePoint was required to indemnify plaintiffs under the policy. In light of this conclusion, the court dismissed the complaint against Campo, finding that he fulfilled his duty to plaintiffs by obtaining the requested insurance coverage within a reasonable time. CastlePoint appealed, and on March 5, 2013, this Court reversed and dismissed the complaint against CastlePoint, finding that plaintiffs' designation of the premises as a two-family residence was a material misrepresentation (104 AD3d 406 [1st Dept 2013]). In light of this Court's decision, which resulted in the loss of insurance coverage, on June 7, 2013, plaintiffs promptly moved to renew Campo's motion to dismiss the complaint. The motion court denied the motion and this appeal ensued.

A motion for leave to renew a prior motion "shall be based

upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2],[3]; *Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. (USA) LLC*, 114 AD3d 432 [1st Dept 2014]). Unlike a motion for reargument, "a motion for leave to renew is not subject to any particular time constraints" (*Ramos v City of New York*, 61 AD3d 51, 54 [1st Dept 2009]; *see* CPLR 2221[e]).

Applying these principles, the motion court should have granted plaintiffs' motion to renew. The motion court's initial decision found that CastlePoint was required to cover the loss. The entire premise of its dismissal of the complaint against Campo was that Campo obtained the requested coverage and thus fulfilled his duty. In light of this Court's decision that there was no insurance coverage, however, the original factual premise of the motion court's decision was no longer true. Thus, there was a sufficient basis to grant renewal, deny Campo's motion to dismiss, and allow plaintiffs to litigate the issue of his liability (*see Ramos*, 61 AD3d at 51 [subsequent reversal of the plaintiff's criminal conviction constituted a new fact warranting

renewal of the motion court's earlier decision dismissing the plaintiff's complaint alleging false arrest and malicious prosecution]).

It is well settled that insurance brokers have a common-law duty to obtain insurance coverage requested by their clients within a reasonable time after the request is made or to inform the client of an inability to do so (*see Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 157 [2006]; *Murphy v Kuhn*, 90 NY2d 266, 270 [1997]; *Cosmos, Queens Ltd. v Matthias Saechang Im Agency*, 74 AD3d 682 [1st Dept 2010]). Thus, a client who has engaged a broker to procure adequate insurance can "recover damages from the broker if the policy obtained does not cover a loss for which the broker contracted to provide insurance, and the insurance company refuses to cover the loss" (*Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 866 [1st Dept 2009] [internal quotation marks omitted]).

Triable issues of fact exist as to whether Campo failed to fulfill his duty to obtain the requested coverage and whether Campo made a material misrepresentation in the application. Plaintiffs allege that although Campo had previously been informed by an insurance investigator that the home was a three-family residence, he nevertheless submitted the application to

CastlePoint describing it as a two-family residence. Plaintiffs further allege that Campo submitted the application without plaintiffs' knowledge and without giving them the opportunity to review it. Campo does not dispute that he submitted the application which identified the premises as a two-family residence. In light of these allegations, dismissal of the complaint against Campo at this stage is unwarranted.

There is no merit to Campo's contention that plaintiffs are precluded from seeking renewal because they did not appeal from the motion court's dismissal of the complaint against him. In *Koscinski v St. Joseph's Med. Ctr.* (47 AD3d 685 [2d Dept 2008]), the Second Department rejected a similar argument. In that case, the lower court denied the motions of two defendants to dismiss the complaint. Only one of the defendants appealed, and on appeal, the Second Department reversed and dismissed the complaint against that defendant. Based on that appellate decision, the nonappealing defendant moved in the lower court for leave to renew its motion to dismiss. The motion court granted the motion to renew, and upon renewal, dismissed the complaint against the nonappealing defendant. The Second Department affirmed, concluding that "the [nonappealing defendant] was not precluded from seeking renewal of its . . . motion to dismiss the

complaint insofar as asserted against it because it did not appeal from the prior order which denied that . . . motion" (47 AD3d at 685-686). A similar result is warranted here (*see also Irizarry v New York City Health & Hosps. Corp.*, 268 AD2d 321, 322 [1st Dept 2000] [where the basis of a prior order has subsequently been overturned, reargument based on a change in the law is proper even if the period within which to appeal the prior order has expired]).

The majority misapprehends the motion court's reasons for initially dismissing the complaint against Campo. The motion court stated: "CAMPO fulfilled his duty to Plaintiffs; CASTLEPOINT is not entitled to rescind the insurance policy" and "CAMPO procured insurance for the Plaintiffs, within a reasonable time." The only logical inference from these statements is that Campo was dismissed from the action because he obtained the requested coverage. In light of this Court's dismissing the action against CastlePoint, however, the motion court's factual conclusion was incorrect and renewal was appropriate. The majority, and the motion court, fail to explain how Campo could have fulfilled his duty as a matter of law if, in fact, he did not obtain the requested coverage.

The majority virtually ignores this Court's decision in

Ramos. In attempting to distinguish *Koscinski*, the majority asserts that this Court's order with respect to CastlePoint did not "directly impact[]" Campo. That is simply not true. The issue of Campo's liability is dependent upon whether or not plaintiffs are covered by the CastlePoint policy and whether Campo, as the broker, obtained coverage for them. If the CastlePoint policy covered the loss, then Campo unquestionably fulfilled his duty. If, on the other hand, as is the case here, the loss is not covered, issues of fact exist as to Campo's negligence. Thus, this Court's finding of no coverage and its dismissal against CastlePoint "directly impact[ed]" the case against Campo.

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

ENTERED: SEPTEMBER 4, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12567 Beta Holdings, Inc., et al., Index 652401/12
Plaintiffs-Appellants,

-against-

Robert J. Goldsmith, et al.,
Defendants-Respondents.

- - - - -

Corinthian-Beta Investments, LLC, et al.,
Proposed Additional Counterclaim
Defendants-Appellants.

_____

Lowenstein Sandler LLP, New York (Donald A. Corbett of counsel), for appellants.

Boyar Miller, Houston, TX (Christopher P. Hanslik of the bar of the State of Texas, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 21, 2013, which, insofar as appealed from, denied plaintiffs-counterclaim defendants and proposed additional counterclaim defendants' (collectively counterclaim defendants) cross motion to dismiss the fraud counterclaims asserted against them pursuant to CPLR 3211(a)(7), unanimously reversed on the law, with costs, and the cross motion granted.

The fraud counterclaims, insofar as based on the alleged misrepresentations by counterclaim defendants that they would honor the terms of the promissory notes, are duplicative of the

breach of contract counterclaims; the allegations are essentially that they did not intend to honor the terms of the notes at the time they executed them (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]; *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118-119 [1st Dept 1998]). The allegations are insufficient to satisfactorily plead that counterclaim defendants, at the time the agreement was entered into, never intended to carry out the terms of the agreement (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]). Neither do they allege a duty separate from the terms of the agreement that was breached by counterclaim defendants so as to support a claim of fraud (*see First Bank of Ams. v Motor Car Funding,* 257 AD2d 287 [1st Dept 1999]), or that the damages sought to be recovered are based on lost opportunities arising from counterclaim plaintiffs having been induced to sell their company (*see Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008]). Here, plaintiffs claim that counterclaim defendants orally promised to "grow the company" using methods such as geographic expansion, acquisition opportunities and better marketing, and that these promises are specific and not subject to the agreement's merger provision.

However, this overlooks the September 8, 2008 letter of intent, which includes a promise that the buyers "want to continue to grow the Company," and briefly summaries how this would be done. The terms of the letter of intent are subject to the merger provision. In any event, the alleged promises are of a general nature and insufficiently specific to establish fraudulent inducement, even were they not barred by the agreement's merger provision.

The pleadings of the counterclaims also fail to show that the individual counterclaim defendants, officers of the counterclaim defendant companies, allegedly acted outside of their corporate capacities or for personal gain. There is no showing of a duty separate from counterclaim defendants' alleged failure to abide by the terms of the agreement (*see Allerand, LLC v 233 E. 18th St. Co., L.L.C.*, 19 AD3d 275, 277-278 [1st Dept 2005]).

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

ENTERED: SEPTEMBER 4, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12654 Rosemond Barney-Yeboah, Index 103354/10
Plaintiff-Appellant,

-against-

Metro-North Commuter Railroad, etc.,
Defendant-Respondent.

_____

Buttafuoco & Associates, PLLC, Woodbury (Jason Murphy of counsel), for appellant.

Krez & Flores, LLP, New York (Edwin Knauer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 10, 2013, which denied plaintiff's motion for partial summary judgment on the issue of liability, reversed, on the law and the facts, without costs, and the motion granted.

Plaintiff, a passenger on defendant's train, was allegedly injured when a ceiling panel in the train car swung open and struck her in the head. Plaintiff testified that she was seated on the train when she heard a loud sound, and the next thing she knew, she was on her knees with people around her yelling. After the commotion, she looked up and saw a hanging panel — a cabinet utility door that had hit her in the head.

The motion court improperly denied plaintiff's motion on the issue of liability based on the doctrine of res ipsa loquitur.

While summary judgment is rarely granted in res ipsa loquitur cases, it is appropriate in "exceptional case[s]," such as this one, where "the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209-212 [2006]).

To demonstrate a claim under the doctrine, a plaintiff must establish three elements: (1) the accident is of a kind that ordinarily does not occur in the absence of defendant's negligence; (2) the instrumentality causing the accident was within defendant's exclusive control; and (3) the accident was not due to any voluntary action or contribution by plaintiff (*see Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]).

Plaintiff met all three elements with her submission of witness testimony and the testimony of defendant's foreman. The foreman testified that the train's HVAC and ventilation system was accessible through the ceiling panel that hit plaintiff. He also testified that to his knowledge, no one but defendant's personnel accessed the ceiling panels and that he had no explanation for how the accident occurred. The foreman described the panel as being fastened to the ceiling with four screws outside and two safety latches and a safety chain inside.

Defendant concedes the first and third elements but argues that it did not have exclusive control over the ceiling panels. However, defendant offers no evidence to support its argument. Rather, defendant simply offers its attorney's affirmation, in which counsel opines that "the only logical conclusion," considering the foreman's testimony, was that the accident occurred because of tampering by unauthorized individuals. This statement, which amounts to no more than counsel's speculation about what might have happened, is insufficient to defeat plaintiff's motion (*see Dillenberger v 74 Fifth Ave. Owners Corp.*, 155 AD2d 327 [1st Dept 1989]). This conclusion holds especially true here, where defendant's own foreman testified that to his knowledge, no one but defendant's personnel accessed the ceiling panels. Indeed, that the panel somehow became dislodged after Metro-North employees worked on the HVAC or ventilation system is a far more "logical conclusion" than the one counsel offers – namely, that "someone other than a Metro-North employee" must have tampered with the ceiling panel while on the train.

Pavon v Rudin (254 AD2d 143 [1st Dept 1998]) and *Nesbit v New York City Transit Authority* (170 AD2d 92 [1st Dept 1991]) are both directly on point. In *Nesbit*, the plaintiff's decedent was

walking on the sidewalk when he was struck on the head by a bar and safety chain that fell from the defendant's elevated subway train (*Nesbit*, 170 AD2d at 94). The safety chain and bar had been attached to the train between two of its cars (*id.*). The trial court submitted the case to the jury on a res ipsa theory.

We held that the court erroneously set aside the plaintiff's jury verdict and directed judgment for the defendant. In so doing, we noted that "no evidence of tampering or tools were found between the cars with the missing chains, and no witnesses ever testified to seeing some unidentified vandal tampering with the chain" between the cars (*id.* at 98). Under these circumstances, we found, "Certainly, one can infer it was 'probably' defendant's negligence which caused the occurrence, and the evidence shows it was *not* 'equally probable' that the negligence was that of another without any requirement that other possibilities be excluded altogether" (*id.* at 99). Thus, we found that the jury had clearly considered but rejected the defendant's "theory of the 'phantom vandal'" where there was no evidence that an unknown passenger or vandal had tampered with the train's safety chain (*id.* at 96, 98).

Defendant's opposition to the motion for summary judgment here suffers from precisely the same deficiency. Indeed, as in

Nesbit, the utility door in this case had multiple safety mechanisms — screws, safety latches, and a safety chain — all of which apparently failed. Neither defendant nor the dissent offers any reason to accept the unlikely hypothesis that a train passenger "had the tools or inclination to stand . . . in view of other passengers" and tamper with the utility door (*see Nesbit*, 170 AD2d at 99).

In *Pavon*, the plaintiff, while working at the defendants' premises, was injured when she was allegedly struck on the head by a heavy seven-foot-high door that had apparently dislodged from its top pivot hinge (*Pavon*, 254 AD2d at 143). We reversed the motion court's grant of summary judgment to defendants, finding that the plaintiff had established a triable issue based on a res ipsa theory. In so doing, we noted that the motion court, in determining the issue of defendants' exclusive control, improperly focused on the door that fell on the plaintiff, rather than the more appropriate inquiry of whether the door's hinge itself "was generally handled by the public" (*id.* at 146). Similarly, here, defendant offered no evidence suggesting that Metro-North passengers generally handled the overhead panel.

On the issue of exclusive control, the dissent relies on *Dermatossian v New York City Transit Authority* (67 NY2d 219

[1986]), for the proposition that where there is "extensive public contact with an instrumentality," we must not assume a defendant's exclusive control. In *Dermatossian*, the plaintiff was injured when he struck his head on a defective grab handle as he stood to leave a city bus (*id.* at 221). However, unlike *Dermatossian*, where the grab handle was "continuously available for use by defendant's passengers," here, the panel that allegedly struck plaintiff was fixed to the ceiling of the train car. Indeed, defendant's train passenger's were not similarly "invited to use" the ceiling panel as they were the grab handle in the city bus and there is nothing more than defense counsel's speculation to suggest that someone other than defendant's employees touched or accessed the panel.

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

DeGRASSE, J. (dissenting)

Contrary to what the majority has determined, the motion court properly denied plaintiff's motion for summary judgment on the issue of liability. Plaintiff, a passenger on a crowded commuter train, was injured when a ceiling panel swung open and struck her head. Plaintiff invoked the doctrine of res ipsa loquitur as the only ground for summary judgment. Res ipsa loquitur is an evidentiary doctrine that permits an inference of negligence "solely from the happening of the accident upon the theory that 'certain occurrences contain within themselves a sufficient basis for an inference of negligence'" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986][citation omitted]). The majority correctly recites the three elements that must be established to warrant the submission of a case to a jury on the theory of res ipsa loquitur (*see id.*). I dissent because there is a triable issue of fact as to whether, under the second element, the accident was caused "by an agency or instrumentality within the exclusive control of the defendant" (*id.* [citation omitted]).

As noted above, this case involves an event that occurred within a commuter train car. It cannot be assumed that a common carrier, such as defendant, has exclusive control over its

facilities that are accessible to the riding public. *Dermatossian* is on point. The plaintiff in *Dermatossian* was struck in the head by a defective grab handle on a city bus. The case against the Transit Authority was submitted to the jury under the theory of res ipsa loquitur. In reversing the judgment entered on the plaintiff's verdict and ordering the dismissal of the complaint, the Court found that "[t]he proof did not adequately exclude the *chance* that the handle had been damaged by one or more of defendant's passengers who were invited to use it" (*Dermatossian*, 67 NY2d at 228 [emphasis added]). Where there is extensive public contact with an instrumentality, the standard articulated by *Dermatossian* is one of "sufficient exclusivity to fairly rule out the *chance* that [a defect] was caused by some agency other than defendant's negligence' (*id.*[emphasis added]; *see also Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]).

A foreman, who was deposed on behalf of defendant, testified that the ceiling panel could have been loosened by use of a standard flathead screwdriver. Given the exposure of the panel to daily public contact, the majority misplaces its reliance on the foreman's testimony that "to his knowledge," no one other than defendant's employees accessed the ceiling panels. Contrary

to the majority's view, this testimony is insufficient to establish defendant's exclusive control of the publicly accessible ceiling panel as a matter of law. Like the proof considered by the Court in *Dermatossian*, the foreman's testimony does not adequately exclude the chance that the panel had been loosened by one or more of defendant's passengers (*Dermatossian*, 67 NY2d at 228; *see also Bazne v Port Auth. of N.Y. and N.J.*, 61 AD3d 583 [1st Dept 2009]). By application of *Dermatossian*, it was plaintiff's burden to establish the absence of a triable issue of fact as to whether there was any chance that the panel had been loosened by another passenger. This is because plaintiff made the underlying motion for summary judgment. This distinction seems to have eluded the majority as evidenced by its belief that *Pavon v Rudin* (254 AD2d 143 [1st Dept 1998] is "directly on point."[1] In *Pavon*, we reversed an order that granted the defendants' motion for summary judgment, finding the record sufficient to warrant submission of the case to a jury on the theory of res ipsa loquitur. In so doing, we noted that in

[1]*Nesbit v New York City Tr. Auth.* (170 AD2d 92 [1st Dept 1991]), another case the majority relies upon, is even more distinguishable because it involves a post-trial motion to set aside a jury's verdict, implicating standards that have no application to a motion for summary judgment.

order to raise an issue of fact under the doctrine it was "not necessary for plaintiff to rule out all other possible causes [other than a defendants' negligence], only to show that they are less likely" (*id.* at 145 [citation omitted]). Here, by contrast, the majority's grant of summary judgment in favor of plaintiff amounts to a finding that defendant's negligence is the only possible cause of the accident. In my view, such a finding is not supported by the record. In addition, the instant motion for summary judgment does not call for a determination of which party has proffered the more "logical conclusion," as the majority seems to suggest. The question is whether there exists a triable issue of fact.

Moreover, given the fact that the ceiling panel was within the reach of any passenger on the commuter train, the majority misplaces its reliance on the absence of evidence that passengers "generally handled the overhead panel." *Bazne*, for example, involved a bus terminal escalator that shook suddenly and stopped, causing the plaintiff to fall (61 AD3d at 583). In affirming an order granting the defendant's motion for summary judgment, we found res ipsa loquitur inapplicable in light of the extensive daily public contact with the escalator (*id.* at 583-584). The result reached in this case cannot be reconciled with

our decision in *Bazne* in which there is no indication that the component parts of the malfunctioning escalator were handled by members of the public (*see also Parris v Port of N.Y. Auth.*, 47 AD3d 460 [1st Dept 2008]). Accordingly, this case should not have given us occasion to depart from the general rule that "only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict" (*Morejon v Rais Constr. Co.* 7 NY3d 203, 209 [2006]).

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

ENTERED: SEPTEMBER 4, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12751 The People of the State of New York, Ind. 6530/10
Respondent,

-against-

Augustine Verges,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Kirkland & Ellis LLP, New York (Leopoldo Yanez of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered July 13, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of two to four years, unanimously affirmed.

The court properly denied defendant's motion to suppress a knife and statements he made to the police. Police officers patrolling a New York City Housing Authority building saw defendant try to enter the building as the man in front of him, whom he did not appear to know, opened the door after being buzzed into the building. Defendant did not have a key out, and he was not seen using the buzzer system himself. Although

defendant suggests that the officers approached him as he merely stood behind the other man, they actually observed him attempting to enter, in a manner inconsistent with that of a resident or invitee, and apparently without authorization.

Defendant's inability to provide the name or apartment number of the person he was purportedly visiting, or any other innocent explanation, provided probable cause to arrest him for attempted criminal trespass (*see e.g. People v Wighfall*, 55 AD3d 347 [1st Dept 2008], *lv denied* 11 NY3d 931 [2009]; *People v Hendricks*, 43 AD3d 361, 363-364 [1st Dept 2007]). Thus, the search of defendant's pocket was permitted as a search incident to a lawful arrest. The fact that the search occurred first is of no moment (*see People v Evans*, 43 NY2d 160, 166 [1977] ["It may be said that the search and arrest must constitute a single res gestae. The fact that the search precedes the formal arrest is irrelevant as long as the search and arrest are nearly simultaneous so as to constitute one event"]).

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

ENTERED: SEPTEMBER 4, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12377 Mill Financial, LLC, et al., Index 652055/10
Plaintiffs-Respondents,

-against-

George N. Gillett, Jr., et al,
Defendants,

The Royal Bank of Scotland PLC,
Defendant-Appellant.

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Freshfields Bruckhaus Deringer US LLP, New York (Marshall H. Fishman of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Paul M. O'Connor, III of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 4, 2013, modified, on the law, to dismiss plaintiffs' cause of action for breach of the covenant of good faith and fair dealing, and otherwise affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Dianne T. Renwick
Paul G. Feinman
Judith J. Gische
Barbara R. Kapnick, JJ.

12377
Index 652055/10

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Mill Financial, LLC, et al.,
Plaintiffs-Respondents,

-against-

George N. Gillett, Jr., et al.,
Defendants,

The Royal Bank of Scotland PLC,
Defendant-Appellant.

_____x

Defendant The Royal Bank of Scotland PLC appeals from the order of the Supreme Court, New York County (Eileen Bransten, J.), entered October 4, 2013, which denied its motion to dismiss the second amended complaint as against it.

Freshfields Bruckhaus Deringer US LLP, New York (Marshall H. Fishman, Dana L. Post and Patrick D. Oh of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Paul M. O'Connor, III, Marc E. Kasowitz, Seth A. Moskowitz and Henry B. Brownstein of counsel), for respondents.

RENWICK, J.

Plaintiffs Mill Financial, LLC and Mill Football Holdings, PLC (collectively Mill Financial) bring this breach of contract action against the former owners, and one creditor, of the Liverpool Football Club of the English Premier League (the Club). The complaint asserts claims against multiple entities related to George N. Gillett, Jr., but the instant appeal solely relates to claims against The Royal Bank of Scotland, PLC (RBS). Mill Financial asserts that RBS breached a triparty intercreditor agreement (the Tri-Party Agreement) between Mill Financial, RBS and Wells Fargo Bank, N.A. Specifically, Mill Financial alleges that RBS enforced its interest under the terms of applicable loan documents without first providing written notice to Mill Financial. Mill Financial also brings a claim against RBS for breach of the implied covenant of good faith and fair dealing inherent in the Tri-Party Agreement.

As expected, the Tri-Party Agreement was preceded by several loans used to finance the purchase of the Club. First, on January 25, 2008, RBS and Wells Fargo extended approximately £235 million in credit(the RBS Credit Agreement) to Kop Football Holdings Limited (KFHL), certain of its subsidiaries, George Gillett and Tom Hicks (the owners). The Club was a wholly owned subsidiary of Kop Football Limited (Kop Football), and Kop

Football was a wholly owned subsidiary of KFHL. Second, under a related Term Loan Agreement, Mill Financial loaned $70 million to Gillett Football, LLC (borrower), secured by its 50% ownership interest in the Club.

Also, on January 25, 2008, RBS, Wells Fargo and Mill Financial entered into the Tri-Party Agreement. The Tri-Party Agreement memorialized and protected their rights as creditors holding security interests in the Club. Pursuant to Section 7 of the Tri-Party Agreement, RBS, Mill Financial and Wells Fargo (collectively, the Gillett creditors) agreed to mutually notice certain events. Each Gillett creditor agreed to provide to all other Gillett creditors copies of any notice sent or received by each Gillett creditor relating to the Tri-Party Agreement, the Intercreditor Agreement, or any individual loan agreements. Further, Section 7.7 required that the Gillett creditors provide each other with notice about any demands or enforcement actions that a Gillett creditor was planning to take under their respective loan documents.

By April 2010, after RBS had agreed to extend the repayment date of the Club's loans eight previous times, the Club again defaulted on the RBS Loan. On April 16 and April 30, 2010, RBS sent three letters to the Club (the side letters) that delineated the terms by which RBS would grant the Club its ninth, and

allegedly final, extension. As per RBS's requested terms, KFHL, a parent company of the Club, and KFHL's subsidiaries agreed to appoint a new non-executive chairman to KFHL's board of directors. Under the terms of the side letters, RBS had the right to "approve" whomever was selected as chairman. In addition, the newly appointed Chairman of KFHL controlled not only the composition of the KFHL's board, but also the boards of its subsidiaries. The side letters further required that by April 16, 2010, the owners and KFHL were to announce an intention to sell 100% of the shares in Kop Football or the Club, with the Chairman leading the process. On April 30, 2010, after the terms of the side letters were met, RBS amended the RBS Credit Agreement for the ninth time.

By August 13, 2010, Gillett Football defaulted on the Mill Loan Agreement. In August 2010, Mill Financial approached RBS about Mill Financial repaying the Club's and Kop Football's debt to RBS. A managing director of RBS, Richard Holliday, allegedly informed Mill Financial that: (1) RBS would not sell the loans to Mill Financial because RBS wanted to remain a creditor; and (2) the Club's board of directors would not approve the debt repayment if current ownership would remain. Mill Financial alleges that it made substantial efforts to purchase the Club. The second amended complaint alleges that Holliday verbally

outlined an offer to Mill Financial, with the specific terms that would be acceptable to RBS. As per this alleged interaction, in September 2010, Mill Financial submitted a written proposal to buy the Club. Mill Financial offered to pay £100 million of the debt owed to RBS and to assume the remaining amounts of the RBS debt. RBS allegedly represented to Mill Financial that it would waive the £20 million "ticking fees" that, pursuant to the side letters, would accrue on certain specified dates until the loan facilities under the RBS Loan were repaid in full. Despite Mill Financial's efforts, it was unsuccessful in buying the Club. Mill Financial alleges that both RBS representatives and the Club's RBS approved Chairman, Broughton, met with New England Sports Ventures in early September 2010. New England Sports Ventures purchased the Club just a month later, in October 2010. The complaint alleges that New England Sports Ventures paid a price that was significantly lower than Mill Financial's bid.

Initially, in November 2010, Mill Financial commenced this action solely against its guarantors, namely Gillett and its companies. A year later, in September 2011, Mill Financial added RBS as a defendant, alleging that (i) RBS breached the Tri-Party Agreement by taking control of the Club's board of directors via the side letters, without first providing written notice to Mill Financial; and (ii) RBS breached the implied covenant of good

faith and fair dealing inherent in the Tri-Party Agreement by taking control of the Club's board and selling the Club to New England Sports Ventures for a low price that covered only RBS's debt.

Defendant RBS moved to dismiss the claims asserted against it pursuant to CPLR 3211(a)(1) and (7), on the grounds that Mill Financial failed to state a cause of action and that the terms of the Tri-Party Agreement foreclosed Mill Financial's claims. At some point in the motion process, Mill Financial wrote to inform the court that it had uncovered documents in its possession that showed that it had received copies of the proposed side letter terms, and the eighth and ninth forbearance agreements and side letters in April 2010. According to Mill Financial, Gillett provided these documents to it, not defendant RBS. Plaintiffs received the term sheet just after it was signed, and received the draft of the eighth forbearance agreement and side letter on April 29, 2010, the day before they were signed. The motion court denied RBS's motion in its entirety. This appeal ensued.

On a motion to dismiss pursuant to CPLR 3211(a)(7), a court is obliged "to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*Weil, Gotshal &*

Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 270-271 [1st Dept 2004] [internal quotation marks omitted]). Moreover, dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see also Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]), and "conclusively establishes a defense to the asserted claims as a matter of law" (*Weil, Gotshal & Manges, LLP*, 10 AD3d at 271, [internal quotation marks omitted]). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*see McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660, 661 [1st Dept 2005]).

Initially, we find that Mill Financial has stated a cause of action for breach of contract. The motion court correctly concluded that the plain language of the Tri-Party Agreement required defendant RBS to give notice to Mill Financial of its demand that Mill Financial's collateral be sold, in exchange for forbearance from immediate default under the RBS Credit Agreement (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). RBS, a sophisticated party making a loan of approximately a half

billion dollars, failed to limit the notice language to only "formal" enforcement actions (*id.; see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1 [1st Dept 2012]).

We further concur with the motion court that the Tri-Party Agreement's preclusion of consequential damages does not constitute an irrefutable defense to Mill Financial's breach of contract claim. Contrary to RBS's allegations, Mill Financial alleges damages directly attributable to acts taken by RBS in an attempt to enforce its rights in contravention of the Tri-Party Agreement. As indicated, pursuant to Section 7.7, the performance promised by RBS was to notify in writing to its fellow creditors of any action taken to enforce its debt instruments. As RBS concedes, the purpose of Section 7.7 was to allow all creditors to contemporaneously enforce their rights in an orderly manner. Obviously, the value of the notice was Mill Financial's ability to protect its security interest. Yet, Mill Financial alleges that RBS's failure to provide written notice of its actions was part and parcel of RBS's strategy to wipe out Mill Financial's security interest in the Club, which was accomplished by taking control of the Club's board and forcing its sale below market value. Under the circumstances, this Court cannot say, as a matter of law, that Mill Financial's damages were an indirect loss that did not flow naturally from RBS's

actions in contravention of the Tri-Party Agreement.

Likewise, we concur with the motion court's finding that Mill Financial did not waive any claims by virtue of the fact that it was in receipt of letters sent from RBS to the Club, which detail the terms under which RBS granted the Club repayment extensions and appointed a new non-executive chairman (the side letters). We agree that these letters do not negate any allegation that lack of formal notice caused Mill Financial any injury (*cf. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]). On this record, we find that Mill Financial's allegation that its ability to protect its security interest was impaired by RBS's failure to formally notify Mill Financial of its action taken pursuant to Section 7.7 of the Tri-Party Agreement was not conclusively controverted.

We do agree, however, with RBS that the claim for breach of the covenant of good faith and fair dealing must be dismissed since it is duplicative of the breach of contract claim. Where a good faith claim arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed *(Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]). Mill Financial argues that the failure to give notice was the breach of contract, and the taking control and sale of the Club

is the conduct giving rise to the good faith claim. However, as noted, the only damages flowing from the alleged failure to give notice are from the sale of the Club. The whole theory of the breach of contract action was that Mill Financial was prevented from taking steps to protect its collateral, i.e., stopping the sale of the Club. The conduct alleged in the two causes of action need not be identical in every respect. It is enough that they arise from the same operative facts (*see Cerberus Intl., Ltd. v BancTec, Inc.*, 16 AD3d 126 [1st Dept 2005]).

Accordingly, the order of the Supreme Court, New York County (Eileen Bransten, J.), entered October 4, 2013, which denied defendant The Royal Bank of Scotland PLC's motion to dismiss the second amended complaint as against it, should be modified, on the law, to dismiss plaintiffs' cause of action for breach of the covenant of good faith and fair dealing, and otherwise affirmed, without costs.

All concur.

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

ENTERED: SEPTEMBER 4, 2014

CLERK