THE COMMERCIAL DIVISION LAW REPORT

A report on leading decisions issued by the Justices of the Commercial Division of the Supreme Court of the State of New York

Hon. Jonathan Lippman
Chief Judge of the State of New York

Hon. Ann Pfau
Chief Administrative Judge of the State of New York

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Affirmative defenses; unregistered broker/dealer. Plaintiff and defendant entered into a contract whereby plaintiff agreed to seek "strategic relationships" for defendant in exchange for compensation. Plaintiff claimed that defendant had received over $2 million from a sale of securities facilitated by plaintiff. Plaintiff contended that although compensation for the facilitation of this financing was paid to an officer of plaintiff and to a third-party broker/dealer, the contractual "success fee" was never paid for plaintiff's role in securing the financing. Plaintiff then sued defendant, alleging conversion, unjust enrichment, and breach of contract. Defendant's answer raised fifteen affirmative defenses and asserted counterclaims for rescission and a declaratory judgment. Plaintiff moved to strike the affirmative defenses, dismiss the counterclaims, and for summary judgment on its breach of contract claims. The court granted plaintiff's motion to strike six of defendant's affirmative defenses. First, the court struck defendant's affirmative defense that the contract was void and should have been rescinded because plaintiff was allegedly acting as an unregistered broker/dealer, finding that the affirmative defense was time-barred pursuant to 15 USC § 78cc(b). The court acknowledged that the language suggested that the time limits should not apply to defenses, but concluded that it was constrained by the First Department's ruling in *Carter* "at least until the Appellate Division, Second Department, or the court of appeals rules otherwise on the matter." The court struck four affirmative defenses as barred by the doctrine of res judicata. Defendant waived its sixth affirmative defense, which asserted that plaintiff's injuries were not caused by defendant, and the court struck it without prejudice. The court declined to strike defendant's remaining nine affirmative defenses. The court dismissed as time-barred defendant's counterclaim seeking rescission of the agreement as an illegal contract on the ground that plaintiff allegedly failed to register properly as a broker/dealer. The court ruled that the counterclaim should have been raised within three years of the violation or one year of its discovery, pursuant to 15 USC § 78cc(b). The court then denied plaintiff's motion to dismiss with respect to the counterclaim seeking declaratory judgment, finding that the counterclaim was not time-barred, did not fail to state a claim, and was not disproved by documentary evidence. Finally, the court denied plaintiff's motion for summary judgment on the breach of contract claims on the ground that there were multiple material issues of fact which precluded the court from ruling on the merits at that time. Lawrence A.

Obstfeld v. Thermo Niton Analyzers LLC, Index No. 500152/2009, 7/25/11 (Demarest, J.).**

Bankruptcy; liquidation. Security interests; conflicting; priority; subordinate. UCC-1 financing statements; UCC-3 termination statements. Continuation of security interests after sale of collateral (UCC § 9-315). Successor liability. Alter ego liability. Factoring agreement. Res judicata. Plaintiff alleged that the owner of two Kosher dairies, defendants here, created corporate entities and instigated sham transfers of assets to escape the dairies' financial obligations. Plaintiff, liquidator for a factoring company that had entered into a factoring agreement with one dairy, sought $8,081,819 allegedly due under the agreement. The second dairy and the dairies' owner guaranteed the first dairy's obligations, and the factoring company was granted first priority security interests in all their respective assets. The factoring company perfected the security interests by filing UCC-1 financing statements, then went bankrupt and brought an adversary proceeding in SDNY Bankruptcy Court against the owner and three dairies–the original two and a third that allegedly had come to own the assets of the first and also was a defendant here. The proceeding was transferred to the US District Court for the Southern District of New York ("SDNY"). Before, during, and after the SDNY litigation, a tortuous sequence of events allegedly took place. Allegedly, while the first dairy grew indebted to the factoring company, the owner formed a new entity, also a defendant, with his brother, and then transferred all his shares to his brother. After that, the owner formed yet another new entity, also a defendant, and assets of the three SDNY dairy defendants were transferred to this entity; finally, the owner purported to transfer this entity's operations and those of the three SDNY dairies to his brother's entity. Also while the SDNY case was pending, UCC-3 termination statements purporting to terminate the factoring company's security interests were filed without its knowledge by the first dairy and the dairies' owner. Then, a non-party bank also became a creditor of the same SDNY defendants–the dairies and the owner--and related entities and filed UCC statements. Eventually the SDNY parties entered into a settlement agreement, and the court entered judgment against the defendants in various amounts, the largest being $3,500,000 against the original two dairies and the owner. The following day, in a separate action brought by the creditor bank, the NY Supreme Court entered judgment against two of the SDNY dairy defendants, two other defendants in this action, and the owner, for $9,338,103, and judgment against the owner's wife for over $1,781,621. The bank was granted relief from the automatic stay in bankruptcy by the Bankruptcy Court, to the limited extent that it was allowed to hold a sale of collateral of one specific debtor, one of the original two dairies, with all the bank's and factoring company's liens attaching to the proceeds. The bank purportedly sold the assets of various debtors to a bidder it owned. The assets were then sold again, under an "asset sale agreement," to one more entity, a defendant here, which entered into a "claims purchase agreement" with the factoring company to buy its claims and liens but then failed to make payments. Subsequently the bank bought the owner's stock in several defendant entities. When the SDNY Court found that the factoring company had not received payments as contemplated by the settlement agreement, it issued a final judgment for $3,500,000 against the dairy that allegedly had come to own the first dairy's assets. The liquidator then brought this action seeking to recover from all defendants, jointly and severally, obligations that included the $8,081,819 owed under the factoring agreement, the $3,500,000 judgment entered by the SDNY court, and the obligations under the claims purchase agreement. Defendants moved to dismiss the complaint. The liquidator based its claim for recovery on different theories of liability for different groups of defendants. Recovery against the original two dairies was based on their breach of the factoring agreement, and the liquidator sought a declaratory judgment that the factoring company maintained uninterrupted security interests in the two dairies' assets. Defendants argued that the interests were "eliminated" because the Bankruptcy Court order obtained by the bank said "all liens of [the bank and the factoring company] shall attach to the proceeds of the Sale," and this meant that the interests no longer attached to the underlying collateral sold. But the court explained that UCC § 9-315 provides that "a security interest continues in collateral notwithstanding sale...*and*...attaches to any identifiable proceeds of collateral." (Emphasis supplied.) The court further explained that, under the UCC, a subordinate security interest would have been discharged by the sale, but defendants failed to show that the factoring company's security interests were subordinate to the bank's. Further, according to the UCC, conflicting security interests rank according to time of filing or perfection, and the factoring company had filed UCC-1 statements before the bank. The termination statements did not change this because, for one, the secured party had not authorized the filing. Further, there remained an obligation secured by the collateral when the statements were filed, the $8,081,819 allegedly due under the factoring agreement. Hence the termination statements were ineffective under the UCC. Defendants next argued that by entering the SDNY settlement agreement the factoring company expressly waived its right to enforce its liens. But the claims released were "by and against the settling parties" and not interests in property; the release did not expressly address the latter, the court found. The court said that the scheme of the UCC, taken with the wording of the settlement agreement, showed the importance of explicitly addressing interests in property, and it analyzed defendants' contention in light of UCC § 9-601(e)(1) and (2). If the SDNY settlement agreement had eliminated the factoring company's security interests an execution lien would not relate back to the perfection of the interests, meaning the factoring company's execution liens would be subordinate to the bank's security interests, affecting its ability to enforce the SDNY judgment. However, the settlement agreement provided that nothing in it affected the company's ability to enforce a judgment. The court also made clear that according to defendants' interpretation, under the settlement agreement the factoring company gave up an $8,081,819 secured claim for an approximately $4,000,000 unsecured one. This interpretation undermined any business purpose the factoring company would have had in entering the agreement. The court therefore declined to dismiss the declaratory judgment claim. Finally, in regard to the claim, it joined the bank to the action because the claim depended in part on whether the factoring company's security interests were subordinate to

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the bank's. Next, the court considered a claim based on the theory of successor liability against the defendant that had bought the assets under the asset sale agreement, and which the liquidator argued was the successor of one or more of the SDNY dairies. The court noted that the asset sale agreement provided that the assets being sold were subject to all claims and liens of the factoring company and liquidator, and defendants had not shown that the factoring company's interests were subordinate to the bank's and thus discharged by the sale, and hence the claim survived. Claims of implied assumption of liability and de facto merger against the same defendant also survived because the liquidator alleged among other things that under the asset sale agreement the defendant had bought both all the personal property of and all the equity interests in the SDNY dairies, that the owner and his brother still controlled the entities, and that the defendant sold the dairies' same products under the same name to the same customers. In regard to claims of alter ego liability, the liquidator alleged that the ownership, officers, directors, and personnel of the owner's brother's entity and four other defendants overlapped with the three SDNY dairies, that they were completely dominated by one or both of the brothers and had been used to commit fraud against the factoring company by acting as vehicles for sham transfers. In regard to two other defendants, the liquidator alleged that they were alter egos of the defendant that had bought the assets under the asset sale agreement, with which they operated as a single business. Allegedly, too, the two defendants were dominated by individuals who refused to pay judgments owed to the factoring company and concealed assets by commingling them with their own. The alter ego claims all survived. Finally, the court turned to the branch of defendants' dismissal motion based on res judicata. It noted that the SDNY court had entered judgment predicated on the settlement agreement and dismissed all claims and counterclaims on the merits and with prejudice, and that subsequently the court issued a final judgment against one of the SDNY defendants for $3,500,000. Hence the liquidator's claim for $8,081,819 under the factoring agreement was barred by res judicata and was dismissed. The motion to dismiss was otherwise denied. The AEG Liquidation Trust v. Toobro NY LLC, Index No. 650680/2010, 6/24/11 (Kornreich, J.).

Blanket liens; nunc pro tunc amendment of liens. Respondent filed three notices of mechanic's liens with respect to work allegedly performed under three separate contracts with petitioner, a developer of a condominium property. In seeking to have the liens discharged and cancelled, petitioner alleged that the liens included thirty-six residential condominium units that it no longer owned and therefore were improper "blanket liens." The court noted that the First and Second Departments have consistently vacated "blanket liens," which either fail to separately identify the block and lot numbers of unsold condominium units retained by the owner or identify an entire condominium site by a superseded lot number without identifying individual condominium units. The court also noted that lienors are generally legally precluded from amending invalid "blanket liens." However, the court distinguished the facts of this case, as respondent's lien separately identified each unit by block and number, rather than solely listing the entire condominium property. The court noted that it is not fatal to include too much property in the lien description, as long as it includes and identifies all of the property upon which the lien could properly be claimed. Ultimately, the court decided that although respondent had filed liens against the entire superseded lot number, it also had identified the individual units in the liens, thus sufficiently identifying the property to satisfy the requirements of Lien Law § 9(7). The court further determined that the liens could be amended nunc pro tunc to eliminate the lots conveyed prior to the filing of the lien without prejudicing any existing lienor or purchaser. The court rejected respondent's argument that any amended liens should still include units purportedly transferred by the petitioner prior to the filing of the liens, but not recorded until after the filing of the liens. Citing Lien Law § 4(1) and Real Property Law §339-1 (2), the court concluded that the recording date was irrelevant because petitioner would not have been an "owner" of the units at the time the liens were filed, regardless of whether the transfers had been recorded. Furthermore, the court noted that the work completed by respondent was not for emergency repairs, and that there was no allegation that the new owners requested the work or consented to the liens. Thus, the court determined that the liens upon transferred units were invalid. Finally, the court denied petitioner's motion to discharge the liens for insufficient identification of the labor performed and materials furnished, as the liens clearly identified the work performed under each contract as required by law. Myrtle Owner, LLC v. Ro-Sal Plumbing and Heating Inc., Index No. 21200/2010, 7/22/11 (Demarest, J.).**

Compelled self-defamation; termination; employment contract. Plaintiff, a psychiatrist, asserted causes of action for breach of contract, defamation per se, and compelled self-defamation in connection with her termination by defendants, a hospital and a doctors services corporation, after a patient's death by suicide or drug overdose. Plaintiff also sought a judgment annulling defendants' decision to terminate her and directing a name clearing hearing. Plaintiff and defendants were parties to an employment agreement that allowed either party to terminate at any time without cause upon 60 days notice. Defendants filed a pre-answer motion to dismiss, which was denied at oral argument as to all causes of action except for the compelled self-defamation claim, on which the court reserved decision. As to this claim, defendants argued that New York did not recognize a cause of action for compelled self-defamation, or alternatively, that plaintiff failed to meet the heightened pleading burden of CPLR 3016 since her termination admittedly did not prevent her from renewing her medical license. Plaintiff's position was that she had been and would be required to explain the basis for her termination in connection with new employment applications and that, by doing so, she had been and would be forced to publish false and defamatory statements about her termination for cause. The court weighed the potential benefits of allowing such a cause of action in limited cases where the defendant knew or should have known that the plaintiff would be forced to repeat the defamatory statement. Despite noting the benefits, the court held that it was bound by precedent and was therefore compelled to dismiss the claim. The court also noted that the alleged compelled self-defamation consisted of two distinct claims: disclosure to future employers and disclosure to the New York State Board of Regents in the process of renewing plaintiff's medical license. As to the first claim, the court found that plaintiff failed to allege the elements with the particularity required by CPLR 3016 in that she failed to allege the identities of the potential employers to whom she was compelled to repeat the defamatory statements. In dicta, however, the court opined that plaintiff's allegations supporting her second claim were sufficiently specific under CPLR 3016 standards. Kiblitsky v. Lutheran Medical Center, Index No. 22397/10, 6/2/11 (Demarest, J.).**

Contract; breach; anticipatory breach and repudiation; duty of good faith and fair dealing; interpretation; parole evidence; exclusivity clause. Permanent injunction. Procedure; motion to dismiss; CPLR § 3211. Plaintiff and defendant entered into a contract in which defendant agreed to use plaintiff as the exclusive supplier of all milk and milk products that defendant sold as a dealer. Defendant subsequently notified plaintiff that it had entered into a contract with a major coffee company to deliver milk that the coffee company had purchased from a processor that was a competitor of plaintiff's. Plaintiff commenced the instant action against defendant, the coffee company, and the competitor processor. Plaintiff asserted causes of action against defendant for a permanent injunction, breach of contract, anticipatory breach and repudiation, and breach of the duty of good faith and fair dealing. Plaintiff additionally asserted a claim for tortious interference with contract against the coffee company and a claim for tortious interference with business relations against both the coffee company and the competitor milk processor. Defendant moved to dismiss the claims against it, and the court granted the motion. After finding that the contract between the parties was unambiguous and denying plaintiff's attempts to offer parole evidence, the court found that the contract did not prohibit defendant from delivering milk that the coffee company had purchased from another milk processor; the contract merely prohibited defendant from selling milk that defendant had purchased from another processor.
Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc., Index No. 12116/2011, 8/3/11 (Kitzes, J.).**

Contract; breach; non-compete agreements; liquidated damages; right to recover attorneys' fees. Tortious interference with contractual relations; special damages. Punitive damages. Plaintiff health insurance broker hired the individual defendant to assist in, among other things, working with plaintiff's largest customer, a company that provided insurance to entities in the automotive industry. After terminating the individual defendant for cause, plaintiff sued him, as well as two companies that he allegedly owned or controlled, for breaching two non-compete agreements and tortiously interfering with plaintiff's contractual relationship with its largest customer. Defendants moved to dismiss the complaint and also moved to strike plaintiff's claim for punitive damages. Defendants argued that plaintiff's breach of contract claim should be dismissed on the ground that the two non-compete agreements, which prohibited the individual defendant from soliciting plaintiff's customers, did not protect trade secrets or other confidential information and, therefore, were not enforceable. The court rejected this argument, finding that non-compete agreements may be enforceable as long as they are designed to protect a legitimate interest of the employer. Because plaintiff alleged a legitimate interest in protecting its customer relationships and goodwill, the court held that the non-compete agreements were not unenforceable as a matter of law. The court also rejected defendants' challenge to the liquidated damages provisions that were contained in the two non-compete agreements. The court noted that plaintiff's complaint merely sought damages "in an amount to be determined at trial," and held that these allegations were sufficient to survive a motion to dismiss. With respect to defendants' motion to dismiss plaintiff's claim for attorneys' fees, the court found that the two non-compete agreements explicitly provided for an award of attorneys' fees in the event of a breach. The court also rejected defendants' argument that plaintiff had not pleaded any specific acts that could support its tortious interference with contractual relations claim. The court found sufficient plaintiff's allegations that after being terminated from his employment with plaintiff, defendants had solicited, diverted, accepted and serviced clients of plaintiff's largest customer. Although defendants also argued that plaintiff had failed to plead special damages, the court held that special damages are not a necessary element of a claim for tortious interference with contractual relations. Finally, the court held that punitive damages are not available where, as in this case, they are sought as a remedy for a private wrong. Accordingly, the court denied the motion to dismiss but granted the motion to strike the claim for punitive damages. Group Health Solutions v. Smith, Index No. 650540/2010, 8/5/11 (Bransten, J.).

Contract; breach; notice of termination; holdover fees; interpretation of unambiguous contract. Plaintiff entered into a contract with defendants, a production company and its sponsor/guarantor, allowing the production company to use plaintiff's studio space to record the daytime television program "As the World Turns." The contract contained a clause stating that the agreement could be terminated in the event that "As The World Turns" was canceled, requiring the production company to give plaintiff "the greater of: (i) at least seven (7) weeks' written notice; and (ii) the notice [of cancellation] provided by the network to Televest[.]" Sometime later, the production company received word that "As the World Turns" was going to be canceled. That same day, it informed plaintiff that it would be exercising its option to terminate the contract and would be vacating the studio sometime the following year. Plaintiff took the position that termination of the agreement would become effective seven weeks after that notice was given, at which point the production company would be deemed a holdover tenant if it continued to occupy the premises. The production company continued to occupy the studio, and plaintiff sent weekly invoices reflecting the contractual penalty payment for holdover tenants, which the production company refused to pay. Subsequently, the production company gave plaintiff verbal notice that it would be vacating the studio space on a date certain, and that the termination of the agreement would be effective as of that date. The production company vacated on the date intended, and plaintiff sued the company and its sponsor/guarantor for breach of contract, account stated, and for quantum meruit, seeking to recover $3,176,017.20 in holdover penalties. Defendants moved to dismiss. The court dismissed the account stated claim as duplicative of the breach of contract cause of action. The court also dismissed the quantum meruit claim as precluded by the existence of an express contract. As to the breach of contract claim, the court held that the plain language of the agreement contained a minimum notice period and not, as plaintiff contended, a maximum notice period. Defendants were required only to provide plaintiff with *at least* seven weeks notice, which they did, and later gave verbal notice of the exact date they planned to vacate the premises. Therefore, the court ruled that that termination of the agreement was not effective until the vacate date and the production company could not be penalized as a holdover tenant for its occupancy prior to that date. The court also dismissed plaintiff's complaint against the sponsor/guarantor, on the grounds that a guarantor could not be liable when the obligor itself was not liable. Finally, the court found that plaintiff's conduct in bringing the action did not warrant sanctions, though plaintiff acknowledged that the second account stated cause of action was duplicative and the quantum meruit cause of action was precluded. J.C. Studios, LLC v. Telenext Media, Inc., Index No. 30606/2010, 7/6/11 (Demarest, J.).**

Contract; breach; patent license agreements; "patent exhaustion" doctrine; interpretation; affirmative defenses; equitable estoppel; waiver; failure to mitigate damages; unclean hands. Plaintiff and defendant entered into a patent license agreement permitting defendant to sell products, mostly DVD players, using patented technology in return for paying royalties to plaintiff. Plaintiff commenced this action for breach of contract, alleging that defendant failed to pay the required royalties. Plaintiff moved for summary judgment on its breach of contract claim. Defendant renewed a prior motion for summary judgment, arguing that the federal doctrine of "patent exhaustion" barred the instant action. The doctrine of "patent exhaustion" limits the patent holder's rights so that they do not survive the initial authorized sale of a patented product. The court found that plaintiff satisfied its *prima facie* burden to establish its entitlement to summary judgment on the breach of contract claim, but that defendant's affirmative defenses raised questions of material fact. Relying upon a number of recent decisions from the United States Supreme Court and the Federal Circuit, the court rejected defendant's argument that the patent exhaustion doctrine barred plaintiff's breach of contract claim as a matter of law. The court explained that in Quanta Computer Inc. v. LG Electronics, Inc., (533 US 617

[2008]), the United States Supreme Court applied the patent exhaustion doctrine and prohibited the assertion of patent rights to products sold in an authorized sale by the licensee. In a footnote, however, the Supreme Court noted that the complaint did not include a breach of contract claim, and expressed no opinion as to whether contract damages may be available even though the patent exhaustion doctrine eliminates patent damages. Similarly, in Tessera, Inc. v. International Trade Commission (646 F3d 1357 [Fed Cir 2011]), the Federal Circuit, in upholding the International Trade Commission's finding of patent exhaustion, found that the plaintiff still would be in a position to enforce the contractual rights that it had to receive royalty payments. Along similar lines, the Federal Circuit in ExcelStor Tech, Inc. v. Papst Licensing GMBH & Co KG (541 F3d 1373 [Fed Cir 2008]) stated that patent exhaustion prohibits patentees from enforcing patent rights in certain circumstances, but does not forbid multiple licenses or royalties. Based on these precedents, the court concluded that the patent exhaustion doctrine did not bar plaintiff's claim to recover royalties in connection with defendant's sale of patented products to end users. MPEG LA, LLC v. Audiovox Electronics Corporation, Index. No. 24678/2008, 7/27/11 (Pines, J.).**

Contract; breach; reinsurance agreements; interpretation; bad faith. Plaintiff made payments to its insured under an insurance policy and then filed a claim for reimbursement with defendant pursuant to the parties' reinsurance agreement. Defendant refused to reimburse plaintiff for the losses, claiming that the underlying insurance policy was excluded from coverage. Plaintiff sued defendant for breach of contract and for a judgment declaring defendant to be in bad faith. Plaintiff moved for summary judgment. The court granted plaintiff summary judgment on its breach of contract claims but after searching the record, granted defendant summary judgment dismissing plaintiff's bad faith claim. According to the parties' reinsurance agreement, defendant was permitted to exclude an insurance policy from coverage if the policy was "rated, as of the [effective date of the reinsurance agreement], below BBB- by S&P, Baa3 by Moody's . . . or below investment grade according to [plaintiff's] internal ratings scale." Defendant argued that this language permitted it to exclude from coverage any policy that fell below investment grade after the effective date of the reinsurance agreement. The court rejected this interpretation, finding that it was inconsistent with the plain language of the agreement. The court explained that nothing on the face of the parties' agreement required plaintiff to retrospectively analyze the accuracy of the ratings applied to particular policies. However, because the Appellate Division (MBIA Ins. Corp. v Merrill Lynch, 81 AD3d 419 [1st Dept. 2011]) had only recently issued a decision interpreting similar contractual language, the court held as a matter of law that defendant had not acted in bad faith in denying plaintiff's claims for reimbursement. CIFG Assurance North America, Inc. v. Assured Guaranty Corp., Index No. 651090/2010, 6/14/11 (Kapnick, J.).

Contract; breach; warranties; indemnification agreements; conditions precedent. Third-party plaintiff purchased residential mortgage loans from third-party defendant. After third-party plaintiff re-sold the loans, the loans were deposited into a trust, which, in turn, issued notes that were backed by the payments due on the mortgage loans. Plaintiff insured certain payments to be made to investors under the notes. After paying more than $93 million on claims to the insured noteholders, plaintiff sued third-party plaintiff claiming that it had breached various representations and warranties in connection with the re-sale of the loans. Third-party plaintiff impleaded the third-party defendant, asserting claims for indemnification and for breach of various representations and warranties made by third-party defendant in connection with the original sale of the loans. Third-party defendant moved to dismiss the third-party complaint, arguing that it had agreed to indemnify third-party plaintiff against claims based upon alleged breaches of its own representations and warranties. According to third-party defendant, plaintiff's claims against third-party plaintiff were based on breaches of third-party plaintiff's representations and warranties and, therefore, were not covered by the indemnification agreement. The court explained, however, that the indemnification claim could stand as long as the warranty that third-party plaintiff gave to plaintiff was co-extensive with the warranty that third-party defendant gave to third-party plaintiff. The court held that third-party defendant had failed to conclusively establish through documentary evidence that the warranties were not co-extensive. Third-party defendant also argued that the claims alleging breaches of representations and warranties should be dismissed on the ground that third-party plaintiff failed to give third-party defendant notice of the breaches and the opportunity to cure. The court found, however, that third-party defendant failed to establish that third-party plaintiff had not provided the requisite notice. Assured Guaranty Municipal Corp. v. DB Structured Products, Inc., Index No. 650705/2010, 7/25/11 (Kornreich, J.).

Contract; interpretation; Rule Against Perpetuities; EPTL §§ 9-1.1(b), 9-1.3. Preliminary injunction. Declaratory judgment. Plaintiff entered into a contract to purchase the site of a 20-story hotel project from defendant subject to two closing conditions both involving the resolution by defendant of pending litigation. The contract provided that if the defendant was unable to satisfy the closing conditions, then defendant could notify plaintiff, at which point plaintiff would have the right either to terminate the contract or waive the closing conditions. Defendant subsequently sent plaintiff two notices stating that it was unable to satisfy the closing conditions and that plaintiff had five days to elect between terminating the contract and waiving the closing conditions. Instead of making an election, plaintiff commenced the instant action for declaratory and injunctive relief and then moved for a preliminary injunction to enjoin defendant from requiring plaintiff to make any election. Defendant cross-moved to dismiss the complaint on the ground that the contract violated the Rule Against Perpetuities ("RAP") because it did not place a time limit or deadline on defendant's obligation to satisfy the closing conditions. The court first denied defendant's cross-motion to dismiss. Applying the rules of construction that are set forth in EPTL §§ 9-1.3(a) and (d), the court presumed that the parties intended for the closing conditions to be satisfied within 21 years of the contract's execution. Based on this presumption, the court found that the contract did not violate the RAP. The court turned to plaintiff's request for injunctive relief. Plaintiff claimed that it could not be forced to elect between terminating the contract and waiving the closing conditions given that the defendant still was technically "able" to satisfy the closing conditions. The court rejected this argument, finding no support in the contract for plaintiff's suggestion that defendant was required "to spend an unspecified amount of additional time, expense, and effort" trying to resolve pending litigations in order to satisfy the closing conditions. Accordingly, the court found that plaintiff had not established a likelihood of success on the merits, and it denied plaintiff's motion for preliminary injunction. Ludlow Street Holding, LLC v. SH Ludlow Street, LLC, Index No. 652134/2010, 9/7/11 (Kapnick, J.).

Contract; lease; early termination; demolition notice. Good faith intent to demolish. Irrevocable notice. Timing of landlord's demolition decision. Plaintiff sought a declaration invalidating a termination of lease notice. Defendant landlords purportedly intended to "substantially renovate" the building in accordance with a demolition clause that required plaintiff to vacate upon 12 months irrevocable written notice. Defendants and plaintiff cross-moved for summary judgment. After oral argument the court denied defendants' motion as premature and here addressed plaintiff's. Plaintiff argued that the notice was invalid because it did not satisfy the good faith requirement. The court acknowledged that the DOB rejected architectural renovation plans twice before defendants issued the termination notice. But, it said, notwithstanding a potential allegation by plaintiff that the applications were shams–potential because the plans had not been produced in discovery yet–defendants' objective steps of retaining architects and filing plans with the DOB could be seen as a meaningful progression toward renovation and some evidence of good faith. The relevant case law did not support plaintiff's argument that good faith required demolition to be imminent. The court distinguished a case where the court ruled that demolition plans tentative at time of notice did not satisfy the good faith requirement; there, no notice period was required and the court considered that it was unfair for the city to immediately terminate a lease where it was not ready to promptly demolish. Plaintiff argued that the requirement under the demolition clause of "irrevocable notice" was to ensure good faith intent in that the landlord had to have an unconditional right to renovate and know its plans were legal when it gave notice. The court, however, found a factual issue as to the parties' intent, which precluded summary judgment. Plaintiff argued, alternatively, that the termination notice was inconsistent with defendants' answer and therefore ambiguous. While agreeing that the word 'if' in "If defendant...seeks to invoke its rights" was some evidence of ambiguity, the court ultimately rejected the ambiguity argument because the lease set forth that the termination notice was irrevocable. Plaintiff's second line of argument was that defendants were not entitled to early termination under the demolition clause. The clause let the landlord terminate the lease early only if the landlord "shall at any time after the 10th anniversary of the commencement date of this lease decide to demolish or substantially renovate the building." Plaintiff contended that defendants failed to meet a condition precedent in that they substantially renovated the lobby during the first 10 years of the lease and that they did so in contravention of the demolition clause. The court said that a contractual provision allowing a party to terminate a lease early had to be strictly construed. It clarified that defendants were entitled to substantially renovate other areas of the building during the lease term and that if the lobby renovation had adversely affected plaintiff's use or access the appropriate finding might be that the lease was breached. The court agreed with plaintiff that defendants must not have decided to substantially renovate the building before the tenth anniversary prior to invoking the demolition clause but found there had not been adequate discovery to properly adjudicate this issue, either. Lasky Memorial Medical and Dental Center, LLC v. 63 West 38th, LLC, Index No. 603739/2008, 6/15/11 (Ramos, J.).

Contract; oral modification; past conduct; evidence; admissibility. Plaintiff, a producer and distributor of TV programming, and defendants, a partnership created to own and operate a Ukrainian TV network and its owners, entered into three licensing agreements allowing defendants to broadcast TV programming created by plaintiff. Defendants failed to make certain payments required by the licenses and a dispute arose over the amounts due. Plaintiff filed suit alleging breach of contract against the partnership defendant and tortious interference with contract against the owner defendants. Defendants' answer asserted multiple counterclaims. In separate motions consolidated for decision, the owner defendants moved for summary judgment dismissing the complaint on jurisdictional grounds and the tortious interference claim based on economic justification; plaintiff moved for summary judgment as to liability on its breach of contract and tortious interference claims and for damages against the partnership defendant. The court, noting that defendants raised the identical jurisdictional issues in a previous motion, ruled that its decision rejecting that jurisdiction challenge was the law of the case. However, the court summarily dismissed the tortious interference claim, referring to multiple instances in the record that substantiated the economic justification defense. In analyzing plaintiff's motion, the court first dealt with a choice of law issue since one of the agreements indicated that English law governed, while another required New York law. Given that the agreements were negotiated in New York, the court found that New York law governed. Substantively, defendants argued that they could not be liable for breach of contract because plaintiff orally extended the deadlines for payment. Applying New York law, the court noted that when an oral agreement to modify had been acted upon to completion, past oral exchanges or conduct could be fully relied upon as evidence, while in cases of only partial performance, past conduct was admissible only to the extent that it unequivocally related to the alleged oral modification. Furthermore, under the principles of equitable estoppel, a party to a written agreement who induced another's significant and substantial reliance on an oral modification would be estopped from invoking GOL §15-301 to bar proof of the alleged modification. Under this analysis, the court examined the evidence provided by the defendants, which took the form of testimony that the plaintiff's own agent directed which payments should be made and which sums should be withheld due to tax implications. Based on e-mails exchanged by the parties, the court concluded that a triable issue of fact existed as to whether plaintiff induced defendants' reliance on plaintiff's agent's instruction to defer payment and that the parties' collective conduct demonstrated a mutual departure from their written agreement regarding the payment deadlines. Finally, the court noted that plaintiff's allegation that the fact that some, but not all, of the agreements contained a no oral modification clause was not persuasive because such a clause could be waived. New Media Distribution Company Ltd. v. Iota Ventures LLP, Index No. 650754/2009 8/5/11 (Ramos, J.).

CPLR 3213; loan guaranty; contingent events; summary judgment in lieu of complaint. Plaintiffs, a group of banks, commenced an action against defendants, a residential and commercial real estate development company and its sole managing member. Plaintiffs held notes on loans taken and guaranteed by defendants in connection with an investment deal. The loan guarantees stated that the debt would become fully recourse to the borrower as well as immediately due and payable if the borrower filed a voluntary petition for bankruptcy. Defendants filed voluntary petitions for bankruptcy, and the plaintiffs notified defendants of their obligation to pay under the guarantees. The question presented before the court was whether a CPLR 3213 motion for summary judgment in lieu of a complaint applied to an obligation to pay out of a "bad boy" guaranty. Defendants contended that CPLR 3213 did not apply to the guaranty for the following reasons: (1) the guaranty was not an instrument for payment of money only since it contained obligations other than payment; (2) the guaranty depended on future events or external documents to trigger an obligation to pay; (3) the guaranty was not for a sum certain; (4) a latent ambiguity in the loan agreements needed to be resolved via discovery before liability could be determined; (5) the loan agreements contained other ambiguities precluding summary judgment; (6) the loan agreements were void as a matter of public policy; and (7) plaintiffs breached and/or frustrated defendants' performance. First, the court held that the guaranty was an instrument for payment of money only, since the other obligations in the guaranty merely described the conditions under which the borrower was liable for damages and did not require any additional performance as a condition precedent for payment. Second, the guaranty did not depend on any future event, external documents, or conditions precedent outside of the agreement. The alleged condition in this case was an obligation specifically contemplated within the actual debt instrument with no external contingency. Third, the court found that a guaranty could be the subject of a CPLR 3213 motion whether or not it recited a sum certain. In any event, a sum certain existed here because plaintiffs sought the full recourse of the maximum fixed amount allowed under the guaranty. Fourth, the court found that the language in the agreement regarding defendants' liability for damages for intentional physical waste and the consequences of a bankruptcy filing was not inconsistent or ambiguous. Fifth, the court rejected defendants' claim of additional ambiguities because defendants failed to identify any such ambiguities. Sixth, the court rejected the argument that the agreement was void as against public policy because defendants were sophisticated and waived their right to assert such a defense. Finally, the court found that there was no frustration or breach of the defendants' performance, as plaintiffs were under no obligation to accept tender of collateral or to exercise any particular remedy upon a default by borrowers. The court then held that the plaintiffs made a prima facie case for summary judgment and granted the motion. Bank of America, N.A. v. Lightstone Holding, LLC, Index No. 601853/2009, 7/14/11 (Schweitzer, M.).

Employment law; compensation; discretionary bonus; oral promise; Statute of Fraud. Reliance on oral modification; equitable estoppel. Wages. Plaintiff's employment with defendant bank began with an offer letter guaranteeing plaintiff a non-discretionary bonus of $1,300,000 for two consecutive years and also providing for a discretionary bonus. The offer letter included a non oral modification clause. Toward the end of the two years, plaintiff accepted an assignment to Hong Kong, and, having sought and received oral promises that he would be properly compensated, signed an assignment contract. The assignment contract provided for a two-year assignment and contained only a discretionary bonus provision. Toward the end of plaintiff's first year in Hong Kong, and two weeks before the bonus payout date, defendant terminated plaintiff due to the global credit crisis. Plaintiff received no bonus. Plaintiff sued for breach of contract, violation of New York Labor Law § 193, and other wrongs. Defendant moved to dismiss for failure to state a cause of action and because the alleged oral promises were unenforceable under the Statute of Frauds. Plaintiff argued that the Statute was inapplicable because under the offer letter his employment could have been terminated in less than a year; in effect, as the court clarified, plaintiff argued that the offer letter provided for at-will employment. Plaintiff further argued that because the assignment contract did not contain similar language, his employment in Hong Kong was not at-will, but for a two-year term. However, the assignment contract specifically bound plaintiff to the dismissal for cause provision of his original agreement, and the court found that plaintiff's employment on assignment continued to be at-will. Courts have consistently ruled that a bonus term payable after one year does not bring at-will employment within the Statute of Frauds, so plaintiff's claim that an oral contract existed was not barred. Defendant also argued that the no-oral-modification clause in the offer letter made the alleged oral promise unenforceable. However, no-oral-modification clauses may be waived either by completed or by partial performance, where partial performance is unequivocally referable to the oral modification. Equitable estoppel applies where one party induces another's reliance upon an oral modification and the actor's conduct is not otherwise referable to the written agreement. The court found that defendant's alleged promise of a bonus for plaintiff's first assignment year was intended to induce plaintiff to go to Hong Kong, and his move and employment there for a year was partial performance unequivocally referable to such an alleged oral promise. Therefore defendant was equitably estopped from relying on the no-oral-modification clause. Nevertheless, plaintiff's claim was defeated by the fact that plaintiff entered into the written assignment contract, which superseded the alleged oral promise. New York courts have held that subsequent written agreements subsume prior agreements even in the absence of an integration clause. Since both the assignment contract and defendant's international assignments policy, referred to in the contract, provided only for a discretionary bonus and according to the policy a change to the bonus terms had to be in writing, only a discretionary bonus was in play for plaintiff's Hong Kong year. In support of a claim for unpaid salary, plaintiff argued that the assignment contract provision requiring consultation with an employee before reassignment meant that the particular assignment could be terminated before two years, but not his employment with defendant. The court disagreed; plaintiff was an at will employee, and the assignment duration did not limit defendant's prerogative to end plaintiff's employment. Plaintiff alleged that defendant breached the implied covenant of good faith and fair dealing, that by terminating him only two weeks before the bonus pay out date defendant frustrated his expectations and the purpose of the contract even if complying with the terms. The court indicated, however, that it was not reasonable to expect that a discretionary bonus was guaranteed. Plaintiff made a final claim under New York Labor Law §193, which prohibits an employer from making deductions from an employee's wages. But the court ruled that because the offer letter stated that plaintiff's discretionary bonus depended in part on the firm's performance and was to be paid at defendant's sole discretion, it was not considered wages under the statute's definition. The complaint was dismissed for failure to state a cause of action. Barber v. Deutsche Bank Securities, Inc., Index No. 100653/2011, 7/14/11 (Schweitzer, J.).

Personal jurisdiction; general jurisdiction; CPLR § 301; specific jurisdiction; CPLR § 302(a)(3); alter-ego jurisdiction; CPLR Article 53. Plaintiff made loans of approximately $7 million to a non-party Russian company that was formed by defendant. When the borrower failed to repay the loans, plaintiff commenced an arbitration against the borrower in the London Court of International Arbitration. The arbitrators awarded plaintiff the full amount of principal owed under the loan agreements plus interest and costs. Plaintiff then obtained a judgment against the borrower from the Supreme Court of Arbitrazh of the Russian Federation. The borrower nonetheless failed to pay the judgment. As a result, plaintiff filed the instant litigation in New York against defendant, a Russian telecommunications company that allegedly was the alter ego of the borrower. Plaintiff alleged that defendant, as the majority stockholder of the borrower, improperly stripped the borrower of assets so that the borrower would be unable to repay the loans. Defendant moved to dismiss for lack of personal jurisdiction, among other grounds. First, the court explained that for general jurisdiction to exist under CPLR § 301, a foreign corporation must engage in a continuous and systematic course of doing business in the State of New York. Plaintiff argued that this standard was satisfied because: defendant maintained a “point of presence” in New York – that is, a physical location at which its telecommunications network connects to the networks of American telecommunications companies; defendant entered into “interconnect” contracts with other New York telecommunications companies; and defendant maintained a listing on the New York Stock Exchange and issued American Depositary Shares that were traded on the Exchange. The court found that none of these contacts justified a finding that defendant was doing business in New York so as to subject it to general jurisdiction. Second, the court held that plaintiff had not established that defendant was subject to specific jurisdiction under CPLR § 302(a)(3), which provides for jurisdiction when a tortious act is committed outside of New York and causes injury to a person or property in the state. Even though the plaintiff was a resident of New York and, therefore, arguably suffered financial damages there, the court explained that the situs of the injury for long-arm purposes is where the event giving rise to the injury occurred. In this case, the court ruled that all of the relevant events occurred in Russia, not in New York. Additionally, even assuming that the long-arm statute was satisfied, the court held that it would violate due process for the court to exercise personal jurisdiction over defendant because defendant lacked minimum contacts with New York. Third, the court rejected the argument that it should exercise jurisdiction pursuant to Article 53 of the CPLR, which provides for the enforcement of foreign money judgments in New York, because the Russian judgment that plaintiff sought to enforce was against the borrower, not the defendant. Although plaintiff argued that the court could enforce the judgment against defendant as the alter ego of the borrower, the court held that making a factual finding as to alter-ego liability went beyond the ministerial recognition of a foreign judgment that is contemplated under Article 53. Loral Space & Communications Holdings Corp. v. Open Joint Stock Company of Long Distance and International Telecommunications Rostelecom, Index No. 601009/2009, 6/3/11 (Kapnick, J.).

Prejudgment attachment; CPLR § 6201(3). Capacity to sue; foreign corporations; BCL § 1312. Plaintiff corporation moved for a prejudgment attachment, alleging that defendants intended to fraudulently remove assets so as to render a judgment unenforceable. The court denied the application. Although plaintiff alleged that defendants had diverted plaintiff’s accounts receivable and other monies, that they had refused plaintiff’s demands for an accounting and for return of the funds, and that they had indicated an intention to hold the funds as leverage, the court held that plaintiff failed to present evidentiary facts suggesting that defendants were fraudulently concealing assets. Defendants cross-moved to dismiss the complaint on the ground, among others, that plaintiff, a Hong Kong corporation, was allegedly doing business in New York without the required authorization and, therefore, lacked the capacity to sue under BCL § 1312(a). The court denied the motion to dismiss, finding that defendants had failed to show that plaintiff was doing business in New York. The court explained that a corporation is considered to be doing business in New York for the purposes of BCL § 1312(a) only if it is “engaged in a regular and continuous course of conduct in the state.” This standard cannot be met by evidence of “casual or occasional” business activities in the state. Rather, the plaintiff corporation’s activities have to be “so systematic and regular as to manifest continuity of activity in the jurisdiction.” The court found that plaintiff’s activities in the state did not meet that standard because they were limited to soliciting sales and delivering merchandise. In any event, the court noted that plaintiff’s failure to obtain a certificate of incorporation could be cured prior to the resolution of the case, and, thus, the absence of such a certificate was not a jurisdictional bar to maintaining the action. Top Apex Enterprises Ltd., Hong Kong. v. Cayton, Index No. 42013/2010, 6/28/11 (Emerson, J.).**

Preliminary injunction; likelihood of success on the merits; irreparable harm; liquidated damages; balancing of the equities; unclean hands; laches; necessity of hearing. Contracts; breach; restrictive covenants; physicians; enforceability. Plaintiff, a professional corporation of surgeons, sued defendants, both surgeons and former employees, for allegedly breaching their non-compete agreements. The non-compete agreements prohibited the defendants from practicing surgery within a 15-mile radius of plaintiff's offices for a period of three years following the termination of defendants' employment. After obtaining a temporary restraining order, plaintiff moved for a preliminary injunction, enjoining defendants from practicing surgery within the designated geographic area during the pendency of the litigation. The court found that plaintiff had established a likelihood of success on the merits because the restrictions contained in the non-compete agreements were reasonably limited in time, geographic area and scope, necessary to protect the plaintiff's interests, not harmful to the public, and not unduly burdensome. The court also found that plaintiff would be irreparably harmed because in the absence of an injunction, plaintiff would lose the investment that it made in defendants, a loss that is not readily compensated by money damages, as well as the goodwill associated with the practice. The court rejected defendants' argument that the existence of a liquidated damages provision in their non-compete agreements foreclosed the possibility of irreparable harm. With respect to whether the balance of the equities favored the granting of the injunction, defendants argued that the balance weighed in their favor because plaintiff had unclean hands. More specifically, defendants alleged that plaintiff's majority shareholder had breached his fiduciary duties to defendants by diverting funds from patients to himself and by using the corporation's funds to pay personal expenses. The court found that defendants' allegations of unclean hands raised a disputed issue of fact that had to be resolved in an evidentiary hearing. Accordingly, the court continued the temporary restraining order and scheduled a hearing to address the disputed issue. Peconic Surgical Group, P.C. v. Cervone, Index No. 7026/2011, 6/1/11 (Emerson, J.).**

Procedure; CPLR § 3213; summary judgment in lieu of complaint. Plaintiff and defendant started a law firm together. In order to help with the start-up, plaintiff loaned $135,000 to defendant. Defendant memorialized his obligation to repay the loan by providing plaintiff with a handwritten, signed note, stating "At the time the firm started and shortly thereafter you, between 2001 and 2002, advanced funds to me totaling $135,000 on a no interest basis. This letter will serve to confirm that I owe you the $135,000, without interest." Defendant failed to repay the loan, and plaintiff eventually sent defendant a letter demanding that defendant repay the full $135,000 by a date certain. When defendant still failed to repay the loan, plaintiff brought a motion pursuant to CPLR § 3213 for summary judgment in lieu of complaint. In opposition, defendant argued that the case was not appropriate for resolution under CPLR § 3213 because the note was not commercial paper or a negotiable instrument and did not contain an unconditional promise to pay a sum certain over a stated period of time. The court rejected these arguments, finding that the note qualified as "an instrument for the payment of money only" for the purposes of CPLR § 3213. Since plaintiff presented prima facie evidence of defendant's indebtedness and default, the court explained that defendant could avoid summary judgment only if he established the existence of a triable issue of fact. The court found that defendant failed to meet that burden. Although defendant argued that plaintiff had breached his fiduciary obligations by allegedly taking a number of actions that were not in the best interest of the parties' law firm, the court held that defendant's breach of fiduciary duty claim was extrinsic to the note and thus provided no defense to defendant's obligation to repay. Slade v. Newman, Index No. 650333/2011, 8/12/11 (Bransten, J.).

Summary judgment; CPLR § 3212; statement of material facts; Commercial Division Rule 19-a; unpled cause of action; contract; breach; account stated; lost profits; services performed. Plaintiff, a subcontractor, sued the general contractor, its principal, and an affiliate entity, in connection with defendants' failure to pay plaintiff for abatement services rendered on five separate construction projects. In addition, plaintiff alleged that the defendant-principal should be held personally liable on the contracts based upon the fact that general contractor was a dissolved corporation and that its principal was aware of this fact when he entered into the services agreements with plaintiff. Plaintiff's motion for summary judgment also sought dismissal of a counterclaim brought by the general contractor for lost profits based upon plaintiff's alleged breach in connection with services rendered at some of the construction projects. The defendant-principal and the affiliate entity also moved for summary judgment dismissing the complaint as to them. In opposition to plaintiff's summary judgment motion, the moving defendants argued that plaintiff failed to perform work on two of the projects, and that they lost a major client because of plaintiff's breaches, resulting in $2 million in lost profits. In support of its motion and in opposition to the defendants' application, plaintiff argued that it billed the general contractor for services rendered and the contractor did not object to the amounts owed. The court granted plaintiff summary judgment on the amounts owed on two of the construction projects. However, it denied the motion as to the other projects because defendants raised triable issues of fact regarding plaintiff's work at these other job sites. The court denied the moving defendants' motion for summary judgment because it found that plaintiff provided evidence creating a triable issue of fact on whether the defendant-principal should be held individually liable based on his knowledge of the general contractor's dissolution, given that he was president of the general contractor during the time of the agreements with plaintiff. Plaintiff also sought summary judgment based on an account stated, even though it was not pled in its verified complaint. The court found that it could grant summary judgment on an unpled cause of action where the proof supported such as cause, but found that plaintiff failed to meet its burden on that claim, since it could not show how the invoices for payment were sent to defendants. The court dismissed defendants' counterclaim for lost profits because they failed to show both that the loss of a specific client was a result of plaintiff's actions, and they provided no evidence as to their profits on prior business dealings with the lost client. Finally, the court noted that the moving defendants failed to file both a statement of material facts pursuant to Rule 19-a of the Commercial Division Rules in support of their motion for summary judgment, and counter-statement of facts responsive to plaintiff's motion. Although the court disregarded these omissions in light of the fact that the moving defendants provided affidavits laying out facts supportive of their motion, it strongly advised the parties to follow the Commercial Division Rules in all future submissions to the court. NSC Abatement Services, Inc. v. SNS Energy Distribution Corp., Index No. 005215/2010, 7/29/11 (Scheinkman, J.).**

The complete texts of decisions discussed in the *Law Report* are available by hyperlink on the website of the Commercial Division at www.nycourts.gov/comdiv (under the "Law Report" section), and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org (and following links). Members of the Commercial and Federal Litigation Section may sign up at the Section's home page to receive copies of the *Report* by e-mail automatically. The decisions as they appear on the home pages have not been edited and may differ from the final text published in the official reports by the State Reporter.

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