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

Arbitration; waiver. Plaintiff and the individual defendant entered into two separate agreements: a shareholders agreement, which established each party's shareholder interest in defendant corporation, and a compensation agreement. The first agreement provided that any disputes concerning the agreement or the corporation's operations must be resolved through arbitration. Subsequently, plaintiff filed for arbitration on the grounds that the individual defendant froze him out of the corporation and wrongfully misappropriated and diverted corporate assets. Plaintiff further alleged the defendant failed to pay him under the terms of the compensation agreement. The defendant counterclaimed that the plaintiff was disabled under the terms of the shareholder agreement, automatically triggering a buy-out of the plaintiff's interests. Two weeks later, plaintiff moved by order to show cause for an order enjoining defendant from using corporate funds to pay for his legal fees and requiring defendant to disgorge any corporate funds he already had used. Plaintiff later withdrew the order to show cause and informed both the arbitrator and the defendants that he intended to recommence arbitrating the disgorgement issue. Defendants moved to stay arbitration on the ground that plaintiff had waived his right to arbitrate. The court determined the disgorgement issue was indisputably subject to arbitration. However, it also determined that plaintiff demonstrated his intent to resolve the disgorgement issue through litigation, as opposed to arbitration, when he sought a mandatory injunction that would have disturbed the status quo and awarded some of the relief he requested. Because plaintiff's intent to pursue the issue in court was inconsistent with his later claim that the parties were obligated to arbitrate, he waived his right to arbitration. Since a party cannot waive and then revive the right to arbitrate, the court granted defendants' motion to stay arbitration. <u>Contugno v. Bartkowski</u>, Index No. 12064/2011, 10/5/12 (Emerson, J.).**

Arbitration; confirmation of award; vacatur or modification of award; contracts; liquidated damages; penalties; attorneys' fees; prevailing party status. The parties entered into an agreement to combine their proprietary information and data to create a new financial product. The agreement limited petitioner's distribution and use of respondent's data, provided that petitioner would pay respondent $500 per day for each of respondent's brokers who received the data in violation of the agreement, and specified that such payments did not constitute liquidated damages. The agreement also contained an arbitration clause and provided that the prevailing party in an arbitration would be entitled to recover attorneys' fees and costs. Respondent filed a demand for arbitration alleging that petitioner's brokers received and used proprietary data in violation of the agreement. Petitioner conceded before the arbitrator that it had distributed the data to unauthorized brokers, but argued that the $500 payment provision was an unenforceable penalty and that respondent was entitled to actual compensatory damages only. After a hearing, the arbitrator determined that the payment provision did not constitute liquidated damages because the agreement so stated and did not represent compensatory damages because the $500 per day figure was arbitrary. The only remaining conclusion was that the payment constituted a penalty unenforceable under New York law. Accordingly, respondent could recover only actual damages, plus interest. Because respondent's recovery was so limited, the arbitrator deemed that it was not the prevailing party and was not entitled to attorneys' fees. Petitioner moved in court to confirm the arbitrator's award, and respondent cross-moved to vacate it. The court confirmed the award. An arbitration award may be vacated only where it violates a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's power. An award may not be vacated if a plausible basis existed for it, and the party seeking to upset an award bears a heavy burden. Here, the arbitrator's award on the penalty issue was legally correct, and, in any event, an arbitration award will not be set aside even where the arbitrator erred in judgment on the facts or the law. The arbitrator's determination regarding attorneys' fees was within his discretion, and there was no evidence that the arbitrator had manifestly disregarded the law in making his award. Tullet Prebon Financial Services v. BGC Financial L.P., Index No. 652157/2010, (11/8/12) (Sherwood, J.).**

Art law; art authentication; class actions. Insurance agreements; exclusions; "professional services" definition. Settlement as full adjudication. Lanham Act; false advertising. Plaintiffs were two not-for-profits that, respectively, authenticated artworks by Pop artist Andy Warhol and made arts grants. After the first plaintiff determined that an artwork was not a Warhol, the work's owner brought a class action alleging fraud, conspiracy, and violations of the Lanham Act on behalf of all persons who submitted Warhol artwork for authentication. A second action based on identical factual and legal allegations followed. Plaintiff notified defendant insurer of both actions. Defendant eventually agreed to cover $225,000 of plaintiffs' defense costs under one of two professional liability policies, each worth $2,000,000, but refused to cover any costs under two directors and officers ["D&O"] policies worth $10,000,000 each. Eventually plaintiffs and defendant executed a "standstill agreement" under which defendant paid plaintiffs the remaining $1,775,000 of the professional liability policy, and plaintiffs agreed not to pursue coverage under either D&O policy until the class actions had been "completely adjudicated" and good faith efforts made to obtain reimbursement from the individuals who had brought them. Subsequently the individuals agreed to dismiss their claims with prejudice for no consideration, and plaintiffs agreed to settle the class action suits for $0. Defendant refused to cover the remaining $4,600,000 of plaintiffs' defense costs from the D&O policies. Plaintiffs sued, and defendant moved for summary

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judgment. The court first considered defendant's argument that the D&O policies excluded coverage for "professional services." The court noted that the Second Department recently concluded that policy exclusions needed to be set out in clear and unmistakable language and that the insurer bore the burden of establishing that the exclusions applied. The court found that the one D&O policy defined "professional services" as, among other things, services "such as provided by an architect, engineer, accountant ... veterinarian." The court also noted that defendant contended plaintiff listed itself as a "social services organization" in the Yellow Pages, and that the policy excluded professional services rendered in the insured's capacity as "social service organization," such as "furnishing counseling" or "medication." The court found that none of the examples of "professional services" related to art authentication, nor did the policies state the exclusion in "clear and unmistakable language." Thus the exclusionary language had to be construed in favor of plaintiffs. Defendant also argued that plaintiffs failed to comply with the standstill agreement since the class actions never were completely adjudicated. However, the court explained that a settlement is as much a complete adjudication as a judgment entered after a trial. Nor did the court agree that plaintiffs failed to make good faith efforts to obtain reimbursement from the individuals, since plaintiffs hired a researcher who concluded the individuals lacked assets. Defendant had one last alternative argument for partial summary judgment based on the Lanham Act claims in the first class action. There, the individual alleged that plaintiff publicized that his art work "was not an authentic Warhol despite knowing that such publication was false." Based on this allegation, defendant argued that the Lanham Act claims were not covered because one of the D&O policies excluded "oral or written publication or material done by... the 'Insured' with knowledge of its falsity." The court disagreed, finding that, to be actionable under the Lanham Act, an advertisement needed to be literally false or, though literally true, likely to mislead or confuse. Consequently, the class could have recovered without proving that plaintiffs knew of its falsity. Because the class enjoyed a reasonable possibility of recovery under the policy, defendant had a duty to defend. The Andy Warhol Foundation for the Visual Arts, Inc. v. Philadelphia Indemnity Insurance Co., Index No. 650917/2011, 12/6/12 (Sherwood, J.).

Commercial paper; holder in due course; UCC 3-302. Plaintiff, a check-cashing business, sued its customer, the corporate defendant, and a bank to recover money paid to the customer on checks fraudulently drawn against the bank. The bank moved for summary judgment dismissing the complaint, and plaintiff cross-moved for summary judgment on the basis that it was a holder in due course of the checks. The bank argued that plaintiff was not a holder in due course, principally because: (1) it had cashed the checks with notice of the fraud; and (2) it did not act in good faith. Relying on the UCC, the court rejected both of these arguments and granted plaintiff's motion for summary judgment. The customer presented five fraudulently obtained checks to plaintiff and was successful in cashing three of them for a total of $83,000. New York State Banking Law and the federal Bank Secrecy Act require that transactions of more than $10,000 be reported to the Internal Revenue Service by the filing of a Currency Transaction Report ("CTR"). Although the checks were made out to the corporate defendant, the CTRs reflected that the transactions were conducted on behalf of a different entity. However, according to a deposition of plaintiff's employee, the customer had done business with plaintiff for several years and had frequently presented checks from both the corporate defendant and the other entity. UCC 3-302 defines a holder in due course as one who takes an instrument: (1) in good faith; (2) for value; and (3) without knowledge of any defense or claim against it. The bank argued that plaintiff had knowledge of the fraud and did not act in good faith when cashing the checks. The court explained that in New York, constructive knowledge is insufficient; actual knowledge is required to show bad faith. The court held that the fact that the customer had frequently presented valid checks in the same manner was compelling evidence of plaintiff's good faith. The opinion stated this "long experience of plaintiff ... does not suggest bad faith in cashing the checks at issue or permit an inference of knowledge of defenses that were not otherwise perceptible." Since the bank raised no other triable issue of fact regarding plaintiff's knowledge of the underlying fraud, the court granted plaintiff's motion for summary judgment. Reliable Check Cashing Corp. v. Banco Popular, Index No. 11726/2009, 11/27/12 (Demarest, J.).**

Contract; anticipatory breach and repudiation; UCC 2-609(4). Arbitration. Procedure; CPLR § 7502(c); order of attachment; CPLR § 6201; renew; intervene. Respondent, a wind turbine manufacturing and servicing company, entered into agreements to supply turbines to petitioner, a wind energy company, in return for almost $60 million in advance payments. Pursuant to the agreements, petitioner was to place firm orders for turbines on a fixed schedule or forfeit the advance payments. Prior to placing any orders, petitioner learned that respondent was experiencing financial difficulties and demanded adequate assurance of respondent's performance, pursuant to UCC 2-609(4), which defines repudiation of a contract as failure to provide assurance of performance within 30 days of receiving a justified demand. After respondent failed to assure performance, petitioner commenced an arbitration to recover the advance payments, asserting breach of contract, breach of duty of good faith and fair dealing, and unjust enrichment, based on respondent's anticipatory breach. Petitioner then commenced this special proceeding, pursuant to CPLR § 7502(c), for an order of attachment in aid of arbitration, based on respondent's alleged poor financial health and its failure to provide adequate assurances of performance. Respondent disputed petitioner's position and stated that while it had ceased manufacturing due to lack of orders, it was ready willing and able to resume manufacturing when it received orders. The court denied the petition, finding that petitioner had failed to meet its burden of showing irreparable harm, and ordered respondent to provide its financial statement to petitioner. Petitioner then moved to renew the petition on the grounds that respondent's financial statement demonstrated that it was insolvent. Another party, similarly situated to petitioner, moved to intervene and also sought an order of attachment against respondent. The court again denied the petition and dismissed the proceeding, finding that petitioner had not met its heavy burden of demonstrating it was entitled to the "harsh" and "extraordinary" relief of attachment. The court explained that it had limited power to issue an order of attachment in connection with an arbitration and could do so only on the ground that an award may be rendered ineffectual without such provisional relief. The court further explained that a party seeking an attachment also must demonstrate the traditional elements of a preliminary injunction (i.e., irreparable harm, likelihood of success on the merits, and a balance of the equities). Here, the court found that petitioner had failed to demonstrate its likelihood of prevailing on its contract claim. The court reasoned that, while respondent was experiencing financial difficulties, it had stated that it was ready willing and able to manufacture turbines if petitioner placed a firm order. The court further found that the equities did not tip in petitioner's favor, since the attachment would likely put respondent into involuntary bankruptcy, and petitioner's speculative belief in respondent's financial failure was insufficient to warrant the drastic relief sought. First Wind Energy, LLC v. Clipper Windpower, LLC, Index No. 653088/2012, 10/2/12 (Sherwood, J.).

Contract; breach; conversion; exculpation clause; summary judgment. In this dispute among creditors, plaintiffs alleged that defendants wrongfully deprived them of security interests they held in two ethanol production plants as collateral for a loan. The borrowers filed for bankruptcy protection, and the plants were auctioned off to the borrowers' lenders in an acquisition approved by the Bankruptcy Court. The operating agreement then drafted by the administrative and collateral agent sought to create a management and ownership structure that rewarded certain "exit" lenders through "participation enhancements" over plaintiffs, lenders who had refused to commit to certain "exit" funding. The plants were ultimately sold to a third party, and plaintiffs were granted a preliminary injunction enjoining defendants from distributing any liquidation preference derived from such sale. Plaintiffs asserted causes of action for breach of contract and conversion, alleging that the agent for the lenders abused its position to derive a benefit for itself and the other defendants to the detriment of plaintiffs and improperly sought to dilute plaintiffs' interests in breach of the credit agreement. The agent did not deny that the operating agreement would significantly reduce the amount plaintiffs would receive from distribution of the proceeds of the sale, while "exit" lenders would receive significantly more. However, the agent argued that "but for" the "participation enhancements" that enticed lenders to fund the "exit" facility, the plants would have sold for much less and all lenders ultimately would have received a lesser return on their pre-petition investment. The court granted plaintiffs partial summary judgment on their breach of contract and conversion causes of action, noting that the language in the operative documents mandated a pro rata distribution of ownership of the plants and payments received from their sale and there was no language that granted the agent authority to reduce a lender's interest or permit a differential treatment of lenders without their consent. As such, the court held that there was no justification for the agent's contention that the "exit" lenders deserved more than the other lenders from the proceeds of the sale of the plants. The court further held that the exculpation clause in the operative agreement, which provided that the agent is not liable for actions taken with the prior consent, or at the request of certain lenders, or in the absence of agent's own gross negligence or willful misconduct, presented a triable issue of fact as to whether the agent was not entitled to exculpation. Prudential Ins. Co. of America, v. WestLB AG, Index No. 650371/2009, (10/12/12) (Ramos, J.).

Contract; breach. Implied covenant of good faith and fair dealing; breach. Fiduciary duty; breach. Fraudulent concealment. Fraud. Negligent misrepresentation. Plaintiff opened numerous accounts with defendant and entered several agreements allowing plaintiff and its agent to engage in foreign-exchange and equities trading. After several years, defendant, claiming that plaintiff owed it several hundred million dollars, seized and liquidated plaintiff's accounts and brought suit in London for the amount owed. Meanwhile, plaintiff filed suit in New York. The court granted defendant's pre-answer dismissal motion as to the breach of fiduciary duty, fraudulent concealment, fraud, and negligent misrepresentation causes of action. The Appellate Division, First Department, affirmed. Defendant then answered, plaintiff served an amended complaint, and defendant moved to dismiss twelve of the fourteen causes of action. Defendant argued these causes of action previously had survived dismissal because plaintiff initially claimed they were governed by an agreement that lacked a forum selection clause while the previously dismissed causes of action were governed by agreements that included forum selection clauses. Defendant argued the causes of action at issue in the amended complaint relied on the agreements with forum selection clauses and that plaintiff was estopped from adopting a contrary position with respect to the clauses. The court, however, determined estoppel was irrelevant because defendant sought to dismiss causes of action in the amended complaint, not renew the previous motion to dismiss. The court then turned to the specific causes of action. Two breach of contract causes of action alleged that defendant breached an agreement with a forum selection clause and an agreement without one. The court refused to dismiss either cause of action because plaintiff alleged a breach of both agreements and the applicability of these agreements was a question of fact. The court dismissed the negligence cause of action on the ground that it restated the breach of contract claim and alleged no duty independent of the obligations under the agreements. Plaintiff alleged causes of action for conversion, money had and received, and unjust enrichment. Defendant argued that conversion could not be predicated on breach of contract and that the other two claims duplicated plaintiff's breach of contract claims. Although the court previously upheld these causes of action, it found that the amended complaint alleged new breach of contract claims that revealed defendants were circumscribed by the scope of the agreements. Therefore, the court dismissed these causes of action as duplicative. Two causes of action alleged breach of an authority letter, which the court found imposed no obligations on defendant and therefore provided a complete defense. The court also dismissed a cause of action for breach of the implied covenant of good faith and fair dealing as duplicative of the breach of contract claims because plaintiff alleged no duty other than in the agreements. Two other causes of action alleged defendant breached agreements when it failed to comply with plaintiff's instructions. The court refused to dismiss these causes of action because plaintiff's affidavit and amended complaint sufficiently alleged the instructions. Defendant also argued that the consequential damages sought by plaintiff were both speculative and outside the contemplation of the parties. The court, however, determined that plaintiff adequately alleged that the profits it lost as a result of defendant's alleged wrongs were both reasonable and foreseeable at the time the parties entered into the agreements. Finally, the court dismissed plaintiff's punitive damages claim because it was based on the conversion cause of action the court already dismissed. Sebastian Holdings, Inc. v. Deutsche Bank, AG, Index No. 603431/2008, 11/8/12 (Kapnick, J.).

Contract; breach. Implied covenant of good faith and fair dealing; breach. Rule against perpetuities. Plaintiffs contracted to purchase defendant's unused air rights in order to complete a development project in compliance with zoning regulations. The contract required defendant to use its best efforts to obtain a waiver from the mortgagor on defendant's property within thirty days of the execution of the contract. If defendant was unsuccessful, the contract further provided that plaintiffs could seek the waiver themselves and extend the contingency period as needed to obtain the waiver. Defendant failed to procure a waiver and sent plaintiffs a termination letter. Plaintiffs extended the contingency period. Defendant then notified the mortgagor of the termination of the contract and informed the mortgagor it was no longer obligated to continue speaking with plaintiffs. Plaintiffs brought an action for breach of contract, breach of implied covenant of good faith and fair dealing, declaratory judgment, a preliminary injunction, and a permanent injunction. They also sought specific performance on the contract and compensatory damages. Defendant moved to dismiss plaintiffs' breach of contract claim on the grounds that: (1) the contract was void because there was no criteria for best efforts; (2) the contract was invalid under EPTL § 9-1.1(b), the "rule against perpetuities;" and (3) plaintiffs failed to plead that they had performed on the contract. The court denied defendant's motion to dismiss on the grounds that: (1) the contract was not void because it was for the court to interpret a best efforts clause and to ascertain the parties' intentions from the plain meaning or extrinsic evidence; (2) the contract was not invalid under EPTL § 9-1.3(d) because the court presumed the parties intended the contingency to occur within 21 years and applied the "savings clause" to avoid invalidating the contract; and (3) plaintiffs claimed that they performed all their obligations under the contract. Defendant further moved to dismiss plaintiffs' breach of implied covenant of good faith and fair dealing claim because this claim was identical to plaintiffs' breach of contract claim. The court granted defendant's motion because the facts underlying plaintiffs' cause of action for breach of implied covenant of good faith and fair dealing were identical to the facts that gave rise to plaintiffs' cause of action for breach of contract. Defendant also moved to dismiss plaintiffs' claim for declaratory judgment because plaintiffs had an alternative remedy at law and the cause of action had been pleaded in a conclusory manner. The court held plaintiffs properly moved for declaratory judgment to enforce the contractual rights of the parties in order to prevent defendant from selling or encumbering defendant's unused air rights. The court granted defendant's motion to dismiss plaintiffs' cause of action for specific performance because specific performance is a form of relief rather than an independent claim. The court determined plaintiffs successfully showed a probability of success on the merits and irreparable harm in the absence of an injunction and granted plaintiffs' motion for preliminary injunction, but ordered plaintiffs to post an undertaking of $230,000. However, the court denied plaintiffs' motion for a permanent injunction because it was too early in the litigation and denied plaintiffs' motion for mandatory injunction because the temporary injunction sufficiently protected any rights plaintiffs had in the air rights. Lastly, the court denied as premature plaintiffs' motion for expedited discovery. Maestro West Chelsea SPE LLC v. Pradera Realty Inc., Index No. 652142/2012, 10/9/12 (Bransten, J.)

Contract; breach; non-waiver provision; implied covenant of good faith and fair dealing; torts; tortious interference with contract; conversion; breach of fiduciary duty; unjust enrichment; constructive trust; accounting. The parties entered into two agreements to fund and establish a financial management venture. Plaintiff was to make a substantial contribution to the venture once total assets under management, as verified by a statement from an independent auditor, reached a specified milestone. If plaintiff defaulted in making the contribution within 30 days, its ownership in the venture would be reduced and it would forfeit the right to designate directors. Defendants sent plaintiff a letter asserting that the milestone had been achieved and that plaintiff's contribution was due, but supported this assertion with a spreadsheet prepared by a bank rather than by an independent auditor. Defendants alleged that the parties acknowledged that the contribution was due 30 days later and that plaintiff wired a portion of the contribution, but that plaintiff never funded the balance. After 30 days had elapsed, defendants declared plaintiff in default, attaching to the notice of default a letter from the independent auditor confirming that the milestone had been achieved. The next day, plaintiff wired the balance due on its contribution, but defendants rejected it and returned the money. Plaintiff claimed that its payment was timely because it occurred within one day after receiving the auditor's statement. The court held that these allegations stated a legally sufficient cause of action for breach of contract. Defendants' argument that the initial failure to supply an auditor's statement was a trivial requirement, subsequently satisfied, was not dispositive at the motion to dismiss stage, especially given the non-waiver provision in the agreements. However, plaintiff's remaining causes of action for breach of the covenant of good faith and fair dealing, intentional or tortious interference, conversion, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, constructive trust, and an accounting were all dismissed as duplicative of the breach of contract cause of action. Fund.com Inc. v. AdvisorShares Investments, LLC, Index No. 650321/2012, (11/27/12) (Schweitzer, J.).

Contract; breach. Personal jurisdiction. Forum non conveniens. Plaintiffs, an import/export company incorporated in Japan and a subsidiary incorporated and headquartered in New York, filed a breach of contract claim alleging that defendants, a steel manufacturing company and its purchasing agent incorporated in Argentina, refused to accept a coal shipment. The New York plaintiff had initiated discussions with defendants concerning the sale of coal. Defendants continued to negotiate with both plaintiffs and exchanged offers. Pursuant to plaintiffs' instruction, defendants sent an email to the New York plaintiff regarding the contract details. The parties exchanged draft contracts, specifying arbitration of disputes in New York and providing that New York law governed. Defendants later requested the New York plaintiff investigate future sale options. After further exchanges, the parties had a "deal," but defendants refused delivery. The parties mediated without agreement in Argentina, and then plaintiffs brought this action. Defendants, asserting that their only contact with New York was a single email initiated by plaintiff, moved to dismiss for lack of personal jurisdiction and forum non conveniens. They argued the email exchange stating the proposed terms of an alleged transaction did not constitute transacting business in New York, and therefore, the long arm statute of CPLR § 302 did not apply. Defendants also argued that they did not project themselves into New York because plaintiffs chose to involve New York in negotiating the contract. The court held personal jurisdiction had been established because defendants' contacts with New York were more than just a single email; defendants engaged in several email exchanges negotiating the terms of the contract even before they were instructed to email the New York plaintiff. The court held these email exchanges showed defendants purposely availed themselves of the privilege of conducting activities in New York and could have reasonably foreseen defending a suit there. The court also denied the motion to dismiss for forum non conveniens because there was a substantial nexus between the case and New York. The court found defendants negotiated extensively with the New York plaintiff, and all plaintiffs' records and some witnesses were located in New York. The court also determined litigating the commercial dispute in New York would not place an undue burden on defendant or the court. Itochu Corp. v. Siderar, S.A.I.C., Index No. 650097/2010, 11/13/12 (Kapnick, J.).

Contracts; sufficiency of consideration; fraudulent conveyances; Debtor and Creditor Law § 274; law of the case doctrine. Defendant, pretending to be an attorney, fraudulently induced the plaintiff to lend him money. In anticipation of the fraud, defendant had transferred a property interest to his ex-wife and mother-in-law, also both defendants, to protect it against any future judgments. This transfer was effectuated by a deed that transferred the property interest "in consideration of ten dollars." The plaintiff sued to set aside the transfer as a fraudulent conveyance under Debtor and Creditor Law § 274. The defendants moved for summary judgment, arguing that the transfer was not fraudulent because it had been made in satisfaction of an antecedent debt, which included past rent owed to the mother-in-law. The court denied the defendants' motion, ruling that there remained triable issues of fact regarding the sufficiency of the consideration for the transfer. Plaintiff subsequently moved for summary judgment. The defendants argued that because the court had previously ruled that triable issues of fact existed regarding the consideration for the transfer, the law of the case doctrine prohibited the plaintiff from relitigating the same issue in his motion for summary judgment. The court agreed, explaining that because the plaintiff advanced no new legal theories and presented no new evidence in his motion for summary judgment, the law of the case doctrine barred the relief he sought. The court noted that the plaintiff could have sought leave to reargue the summary judgment motion pursuant to CPLR 2221 (d), but could not be afforded the relief sought on a de novo summary judgment motion. The court did comment, in dicta, that the forgiveness of any unpaid rent would undermine the sufficiency of the consideration for the transfer of the property interest, given that the dollar amount of unpaid rent would be but a fraction of the property's value. Akodes v. Pyatetsky, Index No. 29672/2008, 10/3/12 (Demarest, J.).**

Forum non conveniens; personal jurisdiction; CPLR § 302; closely-held corporation. Defendant, a closely-held corporation, was originally incorporated in New York with a principal place of business in Nassau County. The shareholders were plaintiff son, defendant father (now deceased), and two defendant sons.

Shortly after incorporation, the parties entered into a buy-sell agreement that restricted the shareholders' ability to sell or otherwise dispose of their shares. At the same time, the corporation moved its principal place of business to Suffolk County. Several years later, the corporation moved its headquarters and factory to Florida and operated as a New York corporation authorized to conduct business in Florida. Several years after that, the corporation became a Florida corporation and then dissolved as a New York corporation. During this lengthy period, all shareholders except plaintiff relocated to Florida. After defendant father died, plaintiff filed suit in New York alleging various breaches of the buy-sell agreement. Defendants moved to dismiss the complaint for lack of personal jurisdiction pursuant to CPLR § 302 and based on forum non conveniens. Plaintiff countered that the corporation maintained an office in New York and continued to service approximately 70 customers in New York. The court held that personal jurisdiction existed because the buy-sell agreement was a business transaction in New York, but dismissed the case on the doctrine of forum non conveniens, finding substantial justice compelled the action to be litigated in Florida. The court reasoned that the corporation was now incorporated in Florida and that Florida, therefore, had a paramount interest in adjudicating a claim involving a domestic corporation. The court further reasoned that the majority of the corporation's shareholders, officers, directors, books and records were located in Florida, the stockholder and director meetings were held in Florida, the corporation was not engaged in any other litigation in New York, and the corporation was not publically traded on the New York Stock Exchange. The court found that, on balance, there was a lack of substantial nexus with New York, and the ends of justice and convenience of the parties compelled the action to proceed in Florida. Rensing v. Renco Electronics, Inc., Index No. 8342/2012, 12/5/12 (Emerson, J.).**

Joinder; CPLR § 1002(b); adjudication of interrelated issues under the Business Corporation Law; amendment of pleadings; CPLR 3025(b). The petitioner moved by order to show cause to amend a petition seeking corporate dissolution to include claims arising from a purportedly fraudulent sale of a building in Brooklyn (the corporation's sole asset) and to join two parties as proposed respondents for enabling the fraudulent sale. The corporation's shares were divided between the petitioner (75%) and his ex-wife (25%) following their separation. In their divorce, the ex-wife had been subject to a temporary restraining order that barred her from dissipating, transferring, or encumbering any corporate assets. Despite the restraining order, the ex-wife had sold the building to one of the proposed respondents for $1.6 million. The petitioner initiated this special proceeding to wind up the affairs and sell the assets of the corporation and to examine the books and records to determine the extent of any dissipation. The purchaser claimed that there was no notice of pendency filed against the property, and that therefore he was unaware of the court's order. The petitioner's attempts to obtain discovery from the proposed respondents (including the title company and the purchaser) were unsuccessful, as all parties asserted a privilege over closing documents associated with the sale of the building. The petitioner sought to amend his dissolution petition to add a variety of claims against the proposed respondents for negligence, rescission of the sale based upon fraud, and breach of fiduciary duty in enabling and effectuating the improper sale. Citing the permissive language regarding the amendment of pleadings in CPLR 3025(b), the court held that petitioner's proposed claims arose from "the same series of transactions with, and shared a common nucleus of operative fact with, the instant proceeding." The proposed respondents had not demonstrated how they would be prejudiced by the amendment. The court also held that it was appropriate to add parties in a dissolution proceeding brought under the Business Corporation Law because the court has discretion to adjudicate "interrelated" issues to expedite just results, including the right to decide competing claims to property transferred in violation of an order. The petitioner's claims were not "devoid of merit" since petitioner's ex-wife, as a 25% shareholder, lacked plenary or apparent authority to sell the assets. Thus, the petitioner was permitted to add a claim for rescission. However, because the title company petitioner sought to add as respondent was not in privity with either the petitioner or the corporation, the court denied joinder for the purpose of asserting a claim for negligence. The court granted leave to include the petitioner's other claims, and in one instance, granted leave to add additional claims suggested by the opinion. Finally, the court granted the petitioner's request for discovery, noting that petitioner sought material clearly necessary to his claims, despite such discovery being generally inconsistent with the summary nature of a special proceeding. In Re: Lowbet Realty Corp., Index No. 22533/2011, 11/2/12 (Demarest, J.).**

Martin Act; required disclosures; inaccuracies in offering plan; when private actions foreclosed. Contract; failure to perform promises in offering plan. Common law fraud; affirmative misrepresentations in offering plan; collateral misrepresentations. Breach of fiduciary duty; independent tortious conduct. Plaintiff homeowners association brought fraud, breach of contract, and breach of fiduciary duty claims against the sponsor and individual members of initial homeowners association's board of directors. After trial, the court found that causes of action relating to the alleged inaccuracy of the projected budgets in the offering plan were predicated solely on budget accuracy requirements set forth in the Martin Act and its regulations. Because no private right of action for such claims existed under the Act, the court ruled in favor of defendants on these claims. Plaintiff's breach of contract cause of action alleged that defendants failed to construct the roads and parking areas in accordance with the offering plan and local law. The court held that plaintiff stated a claim because the alleged breach concerned a duty independent of those created solely by the Martin Act. However, it found, as a matter of fact, that plaintiff failed to prove the roads and parking lots were inadequately constructed. Similarly, the court found that the fraud cause of action was not barred because it was not based solely on the alleged omission of a Martin Act requirement, but concerned affirmative misrepresentations about the quality of the roads and parking lots. However, the court found that the alleged fraud concerned the same factual allegations as the breach of contract claim. Since a fraud cause of action cannot be maintained when the only fraud alleged relates to a breach of contract, and there was no material misrepresentation concerning an obligation to perform a duty collateral to the contract, the court ruled for the defendants on the fraud claim. Finally, the court also ruled for defendants on the breach of fiduciary duty cause of action because there was no evidence in the record of any independently tortious conduct by the individual defendants or any breach of duty other than that contractually imposed on the board. Defendants, therefore, prevailed on all causes of action. <u>The Hamlet At Willow Creek Golf & Country Club Home Owners Association, Inc. v. The Hamlet at Willow Creek, LLC,</u>, Index No. 16877/2007, 11/16/12 (Emerson, J.)**

Shareholder derivative action. Standing. Judicial estoppel. Defendants brought three motions to dismiss plaintiff's claims on the ground plaintiff did not have standing to bring his shareholder derivative suit. Defendants argued plaintiff was not a shareholder and was judicially estopped because he had submitted sworn statements in a prior, unrelated lawsuit that he had transferred all his shares. In support of their motions, the defendants provided the court with a purchase and sale agreement stating that plaintiff sold his rights, title, and interest in the corporation to his father for $188,509.97, and plaintiff acknowledged receiving that amount because his father had previously deposited $188,509.97 in plaintiff's bank account. The agreement also stated, upon its execution, that plaintiff would transfer to his father all of plaintiff's stock certificates in the corporation. Plaintiff submitted an affidavit in response, claiming he had considered the transfer to raise funds during the prior action, but he never transferred the stock certificates. Plaintiff also argued that previously filed corporate tax returns indicated he was a shareholder. In response, the defendants attached the complaint in the prior action and plaintiff's verified answer, which stated that he had transferred his 25% shareholder interest in the corporation to his father for $188,509.97. Here the court determined the settlement was subject to judicial estoppel because the settlement was approved by a judge on the record, the parties swore before the judge that the transfer occurred, and the sworn pleadings and plaintiff's deposition testimony were part of the record before that court. The court noted that there was no rational basis on which the settlement could have taken place if plaintiff still had been a shareholder in the corporation. Judicial estoppel prevented plaintiff from asserting that he was a shareholder, and, as a result, plaintiff lacked standing to bring any cause of action alleged in his complaint because all were brought on behalf of the corporation. The court dismissed plaintiff's complaint, denied plaintiff's request for preliminary injunction, and granted one defendant's motion to prohibit plaintiff from using corporate funds to pay for attorney's fees. The court also denied applications by both plaintiff and the defendants for sanctions. <u>Rubio v. Rubio</u>, Index No. 24515/2012, 11/26/12 (Pines, 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 "Publications" 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.

**** The decisions discussed have been posted in PDF format, but the reader should be aware that these PDF copies may not be exact images of the original signed text as filed in the County Clerk's Office.**