The Commercial Division

of The State of New York

Law Report - October 2001

COMMERCIAL DIVISION
LAW REPORT

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

HON. JACQUELINE W. SILBERMANN
ADMINISTRATIVE JUDGE
SUPREME COURT, CIVIL BRANCH,
NEW YORK COUNTY

JUSTICES OF THE COMMERCIAL DIVISION

JUSTICE LEONARD AUSTIN (Nass.) — JUSTICE HERMAN CAHN (N.Y)
JUSTICE HELEN E. FREEDMAN(N.Y) — JUSTICE IRA GAMMERMAN (N.Y.)
JUSTICE RICHARD B. LOWE III (N.Y.) — JUSTICE KARLA MOSKOWITZ (N.Y.)
JUSTICE CHARLES E. RAMOS (N.Y.) — JUSTICE KENNETH W. RUDOLPH (WEST.)
JUSTICE THOMAS A. STANDER (Mon)

VOL. IV, NO. 4

OCTOBER 2001 (COVERING DECISIONS ISSUED JULY-SEPTEMBER 2001)

The Report and the complete text of all decisions discussed in it are available on the Commercial Division home page on the Unified Court System's Internet website at http://www.courts.state.ny.us and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org/sections/comfed. 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 Report is issued by the Commercial Division, not the State Reporter. 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.

Arbitration, reinsurance; party's dual status; collateral estoppel; waiver. Proceeding to compel arbitration of dispute regarding reinsurance pool. The court ruled that as interstate commerce was involved, the Federal arbitration act applied, even though the agreement provided that the panel should "consider" Illinois law. The parties had agreed to arbitrate any dispute under the retro program at issue, including any claims brought by petitioner as retrocessionaire. The issue presented was whether any claim by a party, either as retrocessionaire or retrocedent (petitioner was both), could be raised in a single, consolidated arbitration. Petitioner argued that respondents were collaterally estopped by a Federal Appeals Court decision from arguing that petitioner could not bring all its claims in a consolidated proceeding. On this point, the court looked to New York law. The court noted that, though the Federal courts had been aware of petitioner's dual status and there had been extensive debate about the issue, the courts had not ordered petitioner, as a condition to consolidation, to choose a side. The court ruled that the conditions for collateral estoppel had been met. The court rejected an argument that petitioner had waived its right to seek judicial resolution of the question of whether it could bring retrocession claims in the arbitration by presenting the argument to the panel since respondents had raised that question, not petitioner, and petitioner had strongly argued that the claims should be presented. The petition was granted. General & Cologne Life Re v. Connecticut General Life Ins. Co., Index No. 600278/2001, 7/17/01 (Ramos, J.).

Brokerage commission. General release; fraud; reliance. Action to recover broker's commission. Defendant had conveyed title to third-party defendant and delivered a general release. Defendant argued that it had had no dealings with plaintiff and

had relied on third-party defendant's representation in the contract that no broker had brought about the transaction. The court ruled that defendant had made an insufficient showing of fraud on third-party defendant's part to vitiate the release. The court found speculative defendant's assertion that any connection to plaintiff had to have been on third-party defendant's part and concluded that reliance had not been shown in view of defendant's delivery of the general release at the closing. Cassetta & Associates v. MZ Briarcliff Limited Partnership, Index No. 6223/2000, 7/31/01 (Rudolph, J.).

Class actions; certification. Motion to certify class in action alleging misrepresentations in sale of water filtration system. The numerosity and superiority tests were met as there were millions of potential claimants with similar claims and small potential recovery by each claimant. The court found that the claims of the plaintiffs were typical of those of the class. The fact that plaintiffs were all from New York whereas the proposed class was nationwide would not matter, the court found. Two plaintiffs were related to plaintiffs' counsel, but not, the court decided, so closely as to render them inadequate representatives. One plaintiff, an attorney, shared office space with plaintiffs' counsel. The court ruled that problems of this sort should be addressed on a case-by-case basis and that withdrawal of this plaintiff or plaintiffs' counsel was not required, as there was no proof of collusion apart from the office-sharing arrangement and in light of the close oversight courts give in class actions. Defendants argued that the fact that several product models and a variety of product instructions were involved meant that individual claims predominated over common ones. The court ruled that the models and sets of instructions were not so numerous and dissimilar as to require individual inquiries. In contrast with other cases, the instructions likely would have motivated consumers' changes of water filters. If the class were nationwide, differences in relevant substantive law would produce too many individual questions. The court ruled that the class would be limited to purchasers in New York. This was also appropriate since plaintiffs' GBL 349 and 350 claims would be limited to New York transactions. Under New York law, reliance should be presumed. The court rejected defendants' contentions that the class action would be unmanageable and the case was a sham, but indicated that the issues could be revisited. Hazelhurst v. Brita Products Co., Index No. 603367/1998, 7/12/01 (Cahn, J.).

Collateral estoppel. Procedure; summary judgment. Unjust enrichment; contract. Action by corporation asserting that defendant, a shareholder, had caused himself to be paid sums in excess of his share of net operating profits. Defendant argued that the plaintiff's claims arose out of the shareholder's agreement and that agreement had been terminated by a redemption agreement. Defendant relied on a judgment in a special proceeding permanently staying arbitration on the ground that the agreement containing an arbitration provision had been terminated by the redemption agreement. The court ruled that the judgment was limited to the arbitration issue; defendant's obligations that had been carved out of the termination/waiver provisions and excepted from a release survived. The court found that plaintiff, though having access to relevant records, had failed to controvert defendant's assertion that payments made for certain years had been consulting fees and salary advances, not profit distributions. A claim for over-payment could survive for only one year. The court dismissed an unjust enrichment claim in view of the existence of a written contract. Lackmann Management of Floridia, Inc. v. Burrows, Index No. 6465/2001, 9/28/01 (Austin, J.).

Collateral estoppel; stock exchange agreement. Action arising out of agreement to exchange stock. Plaintiff was to receive shares along with others and one party was to transfer a technology license to defendant. Defendant claimed that the party never transferred the license. In an action in Maryland, it was determined that the party had breached the agreement and committed fraud and that defendant did not have to transfer shares to him. Defendant argued for collateral estoppel here. The court ruled, however, that the plaintiff here had not been a party to the Maryland case and that defendant had not shown that plaintiff and the party had been in privity or that all share ownership issues had been resolved there. Defendant failed to established entitlement to summary judgment as a matter of law. Davidson v. American Bio Medica Corp., Index No. 8025/1999, 7/17/01 (Rudolph, J.).

Commercial lease; obligation to renovate; penalty clause. Action arising out of commercial lease. The defendant landlord was obliged to make substantial renovations. Plaintiff relied upon a rent abatement clause covering defendant's failure to complete all required work on time. The clause was either a liquidated damages clause or an unenforceable penalty, a question of law for the court. The court held that the clause was a penalty because its purpose was to compel landlord's performance and there was no attempt to apportion the damages to the probable loss. The landlord's liability would be the same regardless of how many items went uncompleted. However, plaintiff might be entitled to actual damages. Bates Advertising USA v. 498 Seventh, LLC, Index No. 605632/1999, 7/16/01 (Cahn, J.).

Commercial lease; termination; duty to give notice of restoration; interpretation. Action for a declaration that plaintiff had properly terminated a commercial lease. Plaintiff moved for summary judgment. The court found that defendant was obliged within one year to restore the premises after damage was caused by the collapse of a wall in a neighboring building.

Defendant failed to offer any meaningful evidence to show that the restoration took place. Further, defendant failed to give plaintiff timely written notice that the restoration had been done as required by the lease. Mere restoration without notice would not suffice, the court ruled. The obligation to restore within one year had to be read in conjunction with the obligation set forth in another clause to give notice of such restoration; otherwise, a landlord could defeat termination indefinitely simply by failing to give notice. Also, the court stated, this interpretation was reasonable since a tenant out of possession would not be likely to become aware of restoration without notice. Finally, the court rejected defendant's technical complaints about plaintiff's notice to restore since defendant had received the notice without objecting to its form. Motion granted. Vermont Teddy Bear Co. v. 538 Madison Realty Co., Index No. 602568/1999, 7/25/01 (Cahn, J.).

Computers; domain name; nature of rights. Contracts. GBL 347, 350; disclosure; deception. Unjust enrichment; contract. Action arising out of registry of a domain name. The court ruled that a registered domain name is the product of a contract for services and that plaintiff had a contract right, not a property right, in the name. Plaintiff's service agreement with defendant governed his rights to use of the name. Initially, the court found, plaintiff had stated a cause of action for breach of an implied covenant of good faith and fair dealing since the complaint alleged that plaintiff had been deprived of the benefits of the service contract because defendant had interfered with his bargained-for right to exclusive control of the domain name. However, the court held, the claim failed since the contract provided that defendant would "register" the name, which it did, not that plaintiff would have the right to control the name. A claim under GBL 349, 350 failed since there was full disclosure of the alleged deceptive practices. Defendant disclosed on its website its practice of displaying a "Coming Soon Page". Further, this page was not materially deceptive as it did not interfere with plaintiff's use of the domain name. Also, plaintiff had the ability to delete the "Coming Soon Page". As a valid and enforceable contract existed, an unjust enrichment claim was defective. Complaint dismissed. Zurakov v. Register.com, Index No. 600703/2001, 7/25/01 (Moskowitz, J.).

Contracts; breach of duty of loyalty; duplication. Conversion; UCC 3-419. Procedure; pleading; tortious interference; unjust enrichment; defamation; punitive damages. Action arising out of alleged disloyalty by attorneys at law firm. The court dismissed a claim for breach of duty of loyalty because it duplicated a contract claim. A motion to dismiss a conversion claim involving checks failed since UCC 3-419 does not preclude claims for common-law conversion by individuals and plaintiff alleged damages caused during the period prior to defendants' return of the checks. A tortious interference claim failed because it duplicated a breach of contract claim, did not adequately allege malice and failed to identify third parties involved. An unjust enrichment claim failed to identify diverted clients. A defamation claim failed for lack of specificity as to the words complained of, the person to whom they were directed, and other aspects. A demand for punitive damages was deficient. Costigan & Co., P.C. v. Costigan, Index No. 116489/2000, 7/23/01 (Freedman, J.).

Contracts; buy-out of joint venture interest; fraud; breach of fiduciary duty; reliance; disclaimer provisions. Attorney malpractice. Action by former holders of interest in joint venture alleging that defendants had improperly induced them to sell to defendants. Plaintiffs alleged that defendants had committed fraud and breach of fiduciary duty by purchasing plaintiffs' interest knowing that another entity was willing to purchase the building owned by the venture at a price far in excess of its purchase price. However, the court ruled that plaintiffs could not assert misrepresentations by defendants when the buy-out agreement disclaimed reliance by plaintiffs. Further, in the agreement plaintiffs acknowledged having had a full opportunity to conduct due diligence into discussions concerning a sale being conducted with a named entity, which defeated plaintiffs' assertion that defendants had rushed them into signing without adequate opportunity to conduct due diligence. Plaintiffs claimed that defendants had breached their fiduciary duty prior to the time of the buy-out agreement by inducing an uninformed negotiation of a buy-out. But, the court held, the only harm plaintiffs could point to was that plaintiffs had been induced to enter into the buy-out agreement, yet in that agreement they disclaimed reliance on representations not set forth; plaintiffs could not circumvent these provisions by citing alleged false statements by defendant. A legal malpractice claim against the venture's attorneys failed since plaintiffs had known the attorneys were not representing them; indeed, plaintiffs had had their own counsel in connection with the buy-out. Blue Chip Emerald LLC v. Allied Partners Inc., Index No. 601415/2001, 9/26/01 (Cahn, J.).

Contracts; commission on sales; interpretation; oral agreement. Defamation; injurious falsehood; qualified privilege. Plaintiff referred business opportunities to defendants. Agreement provided that plaintiff was to be paid a commission on sales. Defendants terminated the arrangement after some time. Plaintiff was an independent contractor. The court held that termination would not discharge defendants' obligation to continue to pay commissions on sales. The court read the agreements as maintaining defendants' obligation to plaintiff as long as the third-party businesses continued to do business with defendants. The court found that the agreement provided for compensation on a finder's fee basis; plaintiff was not required to do anything further. The court found that service provisions, compliance with which defendants claimed to be a condition to payment, were ambiguous, thus disfavoring a condition precedent. Plaintiff also relied upon an alleged oral agreement as to a particular third party. The court found that the agreement, being for an indefinite period, was unenforceable.

A memo cited by plaintiff lacked necessary elements and was thus insufficient. On defamation and injurious falsehood claims, defendants argued that their communications with customers about plaintiff's termination were qualifiedly privileged and the court agreed. Clifford Associates v. First Quality International, Inc., Index No. 603331/1998, 9/24/01 (Ramos, J.).

Contracts; governing law; tort counterclaim. Procedure; stay. Rescission; election of remedies. Action arising out of merger transaction involving Internet services companies. Plaintiff asserted that defendant had breached the merger agreement by failing to pay plaintiff pursuant to a put option. Defendant counterclaimed that plaintiff had committed fraud in violation of California securities law. Plaintiff argued that the counterclaim should be dismissed because the merger agreement provided that it was governed by Delaware law. The court ruled that the agreement did not expressly provide that it encompassed the entire relationship between the parties and thus would not apply to tort claims. Plaintiff also moved to stay counterclaims by which defendant sought damages and indemnification under the agreement on the ground that the claims might be resolved by a related arbitration, CPLR 2201. Defendant opposed such a stay but cross-moved to stay the entire action. The court refused to stay the case because of a lack of identity between the case and the arbitration. The latter related only to shares escrowed pursuant to an escrow agreement, not to any extrinsic representations, and the arbitration decision would not determine all issues. Plaintiff moved for summary judgment that defendant had breached the agreement by failing to pay pursuant to the put option. Defendant offered proof that plaintiff had misrepresented material facts regarding the merged company's customer base. Defendant's claim, the court found, went to the heart of the put option and defendant had raised triable issues. Plaintiff moved to strike defendant's fraud defense to the extent it sought rescission on the theory that as the entire merger would have to be undone in rescission, the defendant's only remedy would be damages. The court stated that a variety of equitable remedies were available short of rescission, and, if justified, a finding that the put option was void or voidable. Further, there was no basis at an early stage in the case to force defendant to elect remedies. Defendant's punitive damages claim was stricken as lacking basis under Delaware law. Couch v. Applied Theory Corp., Index No. 605424/2000, 7/2/01 (Freedman, J.).

Contracts; lease of space for equipment; proof of existence of lease; incorporation. **Procedure; summary judgment; contradictory testimony. Defamation; truth.** Action arising out of dispute regarding leasing of space for telecommunications equipment. Certain document signed, but there was disagreement whether a lease had been signed. Plaintiff argued that the parties had signed the lease. But, the court found, the persons who executed the document testified that it was not part of any other document, that they had not made oral reference to a lease and the document did not make express reference to a lease. In order for incorporation by reference to be found, it must be shown that the parties had knowledge of and assented to the incorporated terms. Plaintiff had submitted the affidavit of a witness, who asserted that the lease had been signed in front of him. But the court ruled that no issue of fact had been created as the witness had contradicted this assertion at a prior EBT. Further, the purported lease did not actually give plaintiff right to exclusive possession of defined space. The court found that plaintiff had submitted only a conclusory and self-serving affidavit in an attempt to defeat defendants' summary judgment motion on a cause of action for tortious interference with prospective contractual relations where defendants had offered testimony to the effect that the failure to contract had not been due to defendants. A defamation claim failed since the statements regarding the absence of a lease were true. Subcarrier Communications, Inc. v. Verdi, Index No. 473/1998, 9/26/01 (Stander, J.).

Contracts; stock purchase agreement; post-closing adjustment; exchange of information. Arbitration; condition precedent; frustration. Action arising out of stock purchase agreement. The agreement provided for a post-closing adjustment in the purchase price based on actual working capital. Plaintiff delivered a statement setting forth a claimed adjustment, to which defendant objected. Plaintiff moved for summary judgment, which the court denied. The court noted that plaintiff had not argued that defendant had submitted no timely written response to plaintiff's statement, as required by the agreement, only that the response lacked reasonable detail. The adequacy of the objection is generally a question of fact. Here, the court ruled, the response sufficed since defendant lacked information to provide further detail, had sought information from plaintiff, but had not received it, even though the agreement required plaintiff to cooperate in inventorying assets and liabilities. Second, plaintiff's statement failed to comply with GAAP, as required. Cross-motion to compel arbitration granted despite plaintiff's assertion that arbitration would be premature absent information exchange since plaintiff had precluded the completion of a condition precedent to arbitration. Caribbean Fertilizer Group v. Protein Genetics, Inc., Index No. 604490/2000, 7/9/01 (Freedman, J.).

Contracts; stock valuation; ambiguity; extrinsic proof. In settlement of disputes, defendants agreed to pay plaintiff and payment was made in stock. Plaintiff claimed that defendants incorrectly valued the stock. The court ruled that the agreement was clear and the intent was that the price was to be the average price within five days of the valuation date rather than five business days since the agreement did not say "business days" although elsewhere such qualifications were used. Partial summary judgment for plaintiff. Extrinsic proof could not be considered. The court declined to stay execution since defendant had not made counterclaims or articulated why prejudice would result. Edvica Investment Co. v. Ha-Lo Industries, Inc., Index

No. 602467/2001, 9/27/01 (Lowe, J.).

Corporations; piercing corporate veil. Action seeking to pierce the corporate veil of one defendant and hold the other defendants liable for the commercial lease obligation of the former. The court found that plaintiff's predecessor in interest knew, or should have known, when the original lease was signed that the tenant had been formed only to hold the lease, not to engage in any business, and would have no substantial assets other than the lease, that the premises were due to be occupied by another entity, and that the tenant would be the only party liable on the lease. Defendants offered proof to this effect. The court found the terms of the lease consistent with this analysis. The knowledge of the predecessor would bind its successor. Plaintiff countered only with affidavits from an attorney and a leasing agent, neither of whom had any first-hand knowledge of the facts; such proof was not probative. Thus, it would be unjust to pierce the veil. Case dismissed as against additional defendants. Issues of fact found as to amount due plaintiff from main defendant. Timur on 5th Ave., Inc. v. Jim, Jack & Joe Realty Corp., Index No. 603233/2000, 9/5/01 (Cahn, J.)

Corporations; shareholders' meeting; restrictions in shareholders' agreement. Action regarding special meeting of corporation. Plaintiff sought to enjoin a shareholders' vote on proposed amendments to the certificate of incorporation because no board approval had been obtained (BCL 803(a)). However, a board meeting was scheduled in conjunction with the shareholders' meeting and a vote on the amendments by the board was to be held. A shareholders' agreement set the number of directors at six. That agreement by its terms was binding on the heirs and assigns. Thus, the proposal to increase the board to seven could not be voted on. A preliminary injunction to this effect was proper. The shareholders' agreement named six persons as directors and officers but all were now deceased. The agreement was silent as to filling of vacancies. Thus, this part of the agreement was unenforceable. Claire v. O'Driscoll, Index No. 603747/2001, 8/28/01 (Cahn, J.).

Debtor & Creditor Law 273. Res judicata; settlement. Contracts; third-party beneficiary. Action arising out of construction project. A subcontractor had obtained a judgment against the GC. In this action, the subcontractor alleged that the GC had fraudulently transferred assets to another company. The transferee alleged that plaintiff was barred by res judicata but the court rejected that argument since it was founded on a settlement, not a final determination on the merits. The court ruled that plaintiff had stated a cause of action under Debtor and Creditor Law 273. The court held that a settlement with plaintiff's insurer, which had been executed by the insurer as such and which provided that defendant's claims against plaintiff and/or the insurer were resolved but was silent as to plaintiff's right to assert further claims against defendant, did not bar this action. Plaintiff cross-moved to amend asserting third-party beneficiary status. Such status is generally denied in the case of an ordinary construction contract. The court held that the contract did not indicate intent to benefit plaintiff so that plaintiff was only an incidental beneficiary. Palermo Mason Construction, Inc. v. AARK Holding Corp., Index No. 13492/1999, 7/24/01 (Rudolph, J.).

Discovery; attorney work product; dual status of witness. An individual had served as project manager for the corporate project manager on a municipal construction project. After legal issues arose, the City of Rochester asked the individual to serve as a consultant to it with regard to those issues. As a fact witness in a lawsuit, the project manager was an appropriate person to be deposed. At his deposition, an attorney for the City directed the witness not to answer questions about a recent meeting between the consultant and the City on the grounds of work product and materials prepared in anticipation of litigation. The court noted that the witness, as a consultant, would normally not be required to disclose materials prepared in anticipation of litigation. However, the court stated, the hiring of a fact witness as a consultant could not restrict the testimony of that witness. This was especially true, the court observed, since the City was aware at the time of the retention of the individual that he and his fellow employees would be fact witnesses. The court ruled that the witness had to answer all questions related to the individual's role as project manager and all questions that simultaneously concerned both his roles. Further, the witness had to answer questions about any documents the witness had reviewed prior to the deposition. The court ruled that the witness would not have to answer questions that would disclose mental impressions, opinions or legal theories of the attorneys or consultants. Any objections would have to be made by the witness or his counsel, not the attorney for the City. City of Rochester v. E & L Piping, Inc., Index No. 12094/1999, 8/29/01 (Stander, J.).

Discovery; refusal to schedule EBTs. Attorneys; appearances by attorney with knowledge of case. The court sanctioned counsel for defendant for failure to schedule depositions for over a year. The court rejected as frivolous defendant's refusal to proceed with depositions absent a court order. A preliminary conference can facilitate discovery, the court said, but the CPLR must still be complied with. Counsel was also ordered to send an attorney familiar with the case and all future appearances; that had not been done, despite Commercial Division Rule 1. CIS Air Corp. v. Express One Int., Inc., Index No. 114347/1997, 9/7/01 (Ramos, J.).

Fraud. Conversion. Money had and received. Unjust enrichment. Breach of fiduciary duty. Plaintiff invested money in a

program at defendants' urging. Defendants moved to dismiss a fraud claim alleging a misrepresentation as to anticipated profits. Such statements are generally not actionable, being predictions, but defendants only sought dismissal beyond a certain sum. There were issues of fact as to the sum due. A conversion claim was ruled defective since defendants had invested sums plaintiff delivered for that purpose. For the same reason, claims for money had and received and unjust enrichment failed. Generally, there is no fiduciary relationship between accountant and client. But here, the court ruled, due to defendants' superior knowledge about the program, the fact that the investment had been made through defendants and the fact that they had assured plaintiff that the principal would not be put at risk, plaintiff had stated a valid claim for breach of fiduciary duty or professional malpractice. L.H.P. Realty Co. v. Rich, Index No. 601537/2000, 7/28/01 (Cahn, J.).

Insurance; liability of broker; untimely notice of claim. Negligent misrepresentation; reliance. An action by a prospective purchaser of a baseball franchise against plaintiffs was settled and plaintiffs' insurers refused to pay for the settlement. The insurers prevailed in a declaratory judgment action on grounds of lack of timely notice of the claim. Plaintiffs sued defendant broker on the theory that the fault for the late notice was defendant's. Plaintiffs claim to have relied on defendant's statements that there was no coverage under the policies and thus did not give timely notice. The court found that, at a hearing, plaintiffs had failed to submit proof to rebut defendant's testimony that it could find no companies willing to cover the risk involved. The court also found that on the proof presented, defendant's conduct has not the proximate cause of plaintiffs' problem. The court rejected plaintiffs' claim that defendant had negligently advised plaintiffs. Plaintiffs, sophisticated parties, were presumed to have read the policies and could not have relied on defendant's statements about coverage. Summary judgment for defendant. Baseball Office of the Commissioner v. Marsh & McLennan, Inc., Index No. 112619/1995, 7/20/01 (Ramos, J.).

Preliminary injunction; stock purchase; "reset" provision; irreparable harm. Procedure; personal jurisdiction. Related action pending. Action arising out of stock purchase agreement. The agreement included a "reset" provision whereby defendant had to transfer additional shares to plaintiff if the stock price declined. The court rejected a personal jurisdiction argument since the agreement contained a forum selection clause and defendant failed to show that there was any fraud or overreaching with regard to that clause or that enforcement was unreasonable or unjust. A federal action elsewhere was not for the same relief so that dismissal because of another pending action was denied. The court issued a preliminary injunction against defendant's transfer of the number of shares needed to satisfy plaintiff's rights under the reset clause. Although defendant was legally authorized to issue shares in sufficient number, its financial condition was unclear so that plaintiff could suffer irreparable harm. Harvest Court LLC v. Nanopierce Technologies, Inc., Index No. 602281/2001, 8/1/01 (Cahn, J.).

Procedure; CPLR 3213; proof outside instrument; prior action pending. In connection with negotiations for a consolidation between plaintiff and defendant corporations, defendant executed a promissory note to repay a loan from plaintiff, and a guaranty by co-defendant. The merger did not occur and plaintiff demanded repayment of the loan. On a CPLR 3213 motion, defendant argued that the note was a conditional instrument, to be repaid only if there was no merger, so that it was a proper instrument for a 3213 motion. The court ruled that the note was clear that repayment would be required if there was no merger and the failure to merge was undisputed; as no proof outside the note was required, the motion was proper. The court rejected defendant's cross-motion to dismiss because a prior pending action relied on by defendant involved different claims. The court declined to stay enforcement of the judgment because defendant's counterclaims had been made in the other lawsuit. Motion granted. Aluminum.com, Inc. v. Commodities Management Exchange, Inc., Index No. 602970/2001, 9/27/01 (Lowe, J.).

Procedure; forum non conveniens; pleading; breach of contract; indefiniteness; damages. Action alleging breach of contract for failing properly to market a musical. Defendant moved to dismiss on forum non conveniens ground as defendant was a California corporation and the musical was to be presented there. The court denied the motion as defendant's presentation was conclusory, with no identification of California witnesses who would be affected, and plaintiff was a New York partnership. Defendant argued that the parties had never actually arrived at a contract since some material terms were left open, such as how ticket sales would be generated. The court held that the complaint adequately stated a cause of action for breach of contract. It set forth dates, times and venue allegedly agreed upon, plaintiff's royalty, a payment schedule, an anticipated gross, and defendant's responsibility for local expenses, including for advertizing and promotion. Both parties signed under the heading "Accepted and Agreed". Plaintiff received the first payment due under the agreement. Though some details were lacking, the court said, the agreement sufficiently supported plaintiff's assertion that a contract was reached for purposes of a pleading motion. Defendant also argued that plaintiff's claim for lost profits, etc. was speculative and that plaintiff should be limited to a maximum possible recovery. The court rejected suggested limit and stated that the pleading was adequate, although some damage aspects might prove speculative. Selena Forever L.P. v. House of Blues Concerts, Inc., Index No. 602140/2000, 7/24/01 (Cahn, J.).

Procedure; multiple summary judgment motions. Contracts; termination; ambiguity; parol evidence; general and specific provisions. Misrepresentation; merger clause; reliance. Statute of limitations. Best efforts clause. Plaintiff sued for breach of contract due to an allegedly improper termination under the contract's terms. The court had ruled that issues of fact precluded summary judgment for plaintiff on liability. Plaintiff moved again for summary judgment. Though multiple such motions are discouraged absent new evidence or other sufficient cause, the court addressed the motion on the merits where there was no new evidence but where defendants did not object, the complaint had been amended after the initial ruling and the ends of justice and judicial economy would be served. Plaintiff argued that the termination had violated the contract in that defendant had not forecast within 10% of actual volume of mail, as required. Defendant conceded that its forecasting had fallen short, but argued that it was required to forecast on an annual, not monthly, basis. The court ruled that the unambiguous language of the contract obligated defendant to provide a forecast on a monthly basis when two paragraphs were read in conjunction. The court held that it could not consider parol evidence of what was widely understood or what plaintiff's president had known given the lack of ambiguity. Thus, defendant had failed to meet a condition precedent to termination under one paragraph and had failed to furnish required notice under another. Plaintiff was entitled to summary judgment on liability on one cause of action. On another claim, the court found that the contract unambiguously provided that defendant had to pay plaintiff for any shortfalls on minimum volumes and parol evidence could not be considered. Defendant's citation of a limitation-of-liability clause did not assist it since a specific provision, on which plaintiff relied, took precedence over the general one cited by defendant. Plaintiff moved to dismiss a fraud counterclaim. The court ruled that the merger clause in the contract was a general one that did not bar parol evidence. Plaintiff's statute of limitations argument failed since defendant had established that it had only discovered the falsity of the representations during the case and had asserted the counterclaim within two years of discovery. The court held, though, that defendant could not have justifiably relied on the misrepresentations since it had been put on notice of undocumented facts but had proceeded with the transaction without obtaining documentation or inserting appropriate protective language in the contract. The court determined that a "best efforts" clause lacked any objective criteria and was unenforceable and a counterclaim based thereon had to be dismissed. Northeast Sort & Fulfillment Corp. v. Reader's Digest Assn., Index No. 13834/1996, 8/30/01 (Rudolph, J.).

Procedure; personal jurisdiction. Defendant was a Maryland corporation with its principal place of business there and no employees, property or offices in New York. It had entered into an agreement with plaintiff whereby the latter would provide financing for vehicles purchased from defendant. The court concluded that defendant had purposefully availed itself of the benefits of the New York forum. Defendant had used plaintiff to provide financing for more than 1,000 installment contracts worth over 17 million dollars. The court also found that the causes of action at issue arose from the business relationship created by the agreement between the parties. The court held that there was personal jurisdiction over defendant. Summary judgment was denied to plaintiff as questions of fact existed. Charter One Auto Finance Corp. v. King Hagerstown Motors LLC, Index No. 10806/2000, 8/01 (Stander, J.).

Procedure; pleading; breach of contract; fraud; negligence; tortious interference; GBL 349; punitive damages. Exculpatory provision. In this action to recover for corporate services rendered, the court upheld defendant's counterclaim for breach of contract since the claim set forth specific instances of failure by plaintiff to pay defendant's payroll on time and in the correct amounts, with damages in overtime and the like. Plaintiff relied upon exculpatory language in the contract, but the court found that the placement of the language in an indemnification clause demonstrated the parties' intent to limit damages defendant could pass on to plaintiff in the event of claims by third parties. A negligence counterclaim was dismissed since the only duties at issue arose out of contract. Fraud claims were dismissed as the only fraud alleged related to contract. Further, the court ruled that defendants had failed to allege any specific misrepresentation of facts by plaintiff. A GBL 349 claim was dismissed since the misconduct alleged concerned defendant only; allegations by an attorney as to commercials by plaintiff did not suffice. A tortious interference claim failed since defendant alleged negligence rather than an intentional, malicious act. A demand for punitive damages had to be stricken as the necessary elements were lacking. Affirmative defenses also stricken. Epix V, Inc. v. Dale Security Corp., Index No. 103232/2001, 8/20/01 (Lowe, J.).

Procedure; stay (CPLR 3212(e)(2)). The court granted partial summary judgment against a defendant on a promissory note and entry of judgment was stayed (CPLR 3212(e)(2)). Defendants had commenced an action against plaintiff, which was consolidated with this one. On a motion to reargue or renew, the court stated that it was appropriate to issue the stay in light of defendants' claims in the consolidated action and their financial circumstances. Courts have wide discretion to condition the granting of partial summary judgment. The fact that the note contained a provision waiving the right to assert offsets did not preclude a discretionary stay. Fishman v. Grand Imports, Ltd., Index No. 13346/2000, 9/28/01 (Austin, J.).

Real estate; broker's commission; tortious interference; economic justification. In action by real estate broker to recover a

commission, defendant landlord moved to dismiss a claim against it wherein plaintiff alleged that defendant had tortiously induced tenant to assume sole responsibility for the commission through a sublease in violation of a clause in the brokerage agreement requiring the broker to look to the landlord for payment. The court ruled that defendant's motivation was economic, to avoid paying the commission itself. It was under no obligation to assume that burden merely because the broker and the tenant had agreed between them that the landlord should pay. The use of financial pressure directed to the tenant would be merely hard bargaining; thus, plaintiff's call for discovery was unavailing. Insignia/ESG, Inc. v. Digital: Convergence, Inc., Index No. 605528/2000, 7/6/01 (Freedman, J.).

Secured creditors; commercial reasonableness; waiver by conduct. Defendant argued that plaintiff had not acted with commercial reasonableness in the sale of collateral (UCC § 9-502(2)). Plaintiff contended that defendant had waived its right to raise this objection. The court noted that other decisions had held that the debtor could waive its right to complain about the method of sale, but in those cases the consent had been in writing. In this case, plaintiff based its argument as to waiver on defendant's having participated in the disposition of the assets. The court held that knowledge of the process and the lack of an overt objection to it did not establish consent. The evidence did not show that defendant had participated to such a degree that consent could be inferred. The court found that defendant had presented proof that raised a question as to whether plaintiff's procedures were commercially reasonable in light of the state of the market at the time. A trial would be required. HSBC Bank USA v. Economy Steel, Inc., Index No. 6147/2001, 9/01 (Stander, J.).

Tortious interference. Procedure; pleading; defamation; slander per se. Action by publishing representative alleging tortious interference by successor company. The defendants argued that the contract with plaintiff was terminable at will. The court stated that negotiations between the defendant successor and the publishing company whereby defendant could succeed plaintiff after plaintiff's termination would involve advancement of a competing business interest. The court ruled that plaintiff had adequately alleged that defendant had employed wrongful means in so acting in that defendant was alleged to have misrepresented itself as the exclusive agency prior to plaintiff's termination. The court pointed to correspondence as supporting plaintiff's assertion that, but for defendants, contracts would have been placed through plaintiff, thereby constituting damage. On a defamation claim, the court held that the complaint adequately set out the defamatory words even though quotation marks were not used and that the date and time of the defamation were adequately set forth in the assertion that the utterances had been made at a sales show in Las Vegas, the date being readily determinable. But the court ruled that plaintiff had not alleged a causal connection between the loss of business and the remarks. The court also held that the statement at issue (that plaintiff was on medication for personality disorders and depression) was unrelated to plaintiff's status as a businessman and thus not defamation per se. Cybertech Communications Corp. v. Quad International, Inc., Index No. 602513/1998, 9/7/01 (Ramos, J.).

Usury; guarantee of promissory note. Action on personal guarantee on a corporate promissory note pursuant to CPLR 3213. Defendant did not oppose the motion. The court found that the stated rate of interest of 20% per annum did not violate GOL 5-521 or Penal Law 190.40 regarding criminal usury. However, interest was to be compounded daily, resulting in an effective annual interest of 34%, which would violate the statutes. Even though an individual can be charged at a rate higher than 16% set out in Banking Law 14-a on a personal guarantee of a corporate obligation, the interest charged to the corporation cannot be usurious. The note and guaranty were therefore declared void. Sandcastle Foundry Inc. v. Burns, Index No. 10403/2001, 9/28/01 (Austin, J.).

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