
The *Commercial Division*

of The State of New York



Law Report - March 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 JUSTICES OF THE COMMERCIAL DIVISION:
ADMINISTRATIVE JUDGE

SUPREME COURT, CIVIL BRANCH, NEW YORK COUNTY JUSTICE LEONARD AUSTIN (Nass.) JUSTICE HERMAN CAHN (N.Y.)

JUSTICE HELEN E. FREEDMAN(N.Y.) JUSTICE IRA GAMMERMAN (N.Y.)

JUSTICE CHARLES E. RAMOS(N.Y.) JUSTICE THOMAS A. STANDER (Mon.)

VOL. IV, NO. 1 **March 2001 (COVERING DECISIONS ISSUED JANUARY-FEBRUARY 2001)**

The Report and the complete text of all decisions discussed in it are available on the Unified Court System's Internet home page 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.

At the end of March 2001, the Administrative Judge of New York County, Hon. Stephen G. Crane, and New York County Commercial Division Justice Barry A. Cozier were appointed to the Appellate Division, Second Department. Though their names no longer are listed on the masthead, decisions from them may appear in the Report through the next issue. The Commercial Division congratulates them and wishes them well in their important new assignments.

Arbitration; waiver by participation in litigation; late discovery of arbitration agreement. Procedure; pleading misrepresentation with particularity. Action alleging that plaintiff was fraudulently induced into purchasing stock. The court held that defendant brokers had waived their right to compel arbitration where they had filed a motion to dismiss, participated in several conferences and served and responded to discovery demands. Failure to discover the arbitration agreement until after

the motion was made was no excuse. The court held that the allegation that a defendant had lied about a specific corporate transaction to induce plaintiff to invest in the corporation so that the corporation would be able to repay a loan made by the broker was sufficiently particularized. The allegations concerning the broker's work for the brokerage firm supported a claim premised on respondeat superior. Motions to compel arbitration and dismiss denied. [Kraus v. Semper Resources Corp., Index No. 600448/1999, 1/8/01 \(Cahn, J.\)](#).

Brokers; real estate; implied in fact agreement; ready, willing and able buyer. Action by brokers to recover

commission allegedly due in connection with the sale of a block front in Manhattan. Plaintiff claimed that it had had an exclusive agreement with defendant estate and had produced a buyer ready, willing and able to buy. The estate had entered into an exclusive written agreement with another entity prior to the date of the alleged retention of plaintiff. Plaintiff relied upon an alleged implied-in-fact brokerage agreement, but the court held that the parties had not discussed the terms of an agreement, including the fee. Plaintiff had been a volunteer at most. Further, the court found that plaintiff had not earned the claimed commission since the buyer produced had not been ready, willing and able to buy on the estate's terms, which included a no contingencies clause, whereas the partner of the purchaser had intended there to be conditions to the sale. The person produced had not had the money and so was not financially able to purchase. Plaintiff had failed to submit concrete proof of the partner's finances so as to show that it had been financially able. Also, the court found that the parties had not agreed on all relevant terms and disagreed about the no contingencies clause. Summary judgment for defendant. [Strougo v. Estate of Diamond, Index No. 602946/1997, 2/15/01 \(Ramos, J.\)](#).

Contracts; anticipatory repudiation; pre-contract request for proposal and oral representations; merger clause; parol evidence on intent. Procedure; pleading repudiation; summary judgment on unpled defense. Statute of limitations; relation back; CPLR 205(a). Action by software provider for breach of contract. Under the agreement between plaintiff and defendant, plaintiff was to provide defendant with software at prices agreed upon. Plaintiff later entered into an agreement that granted another entity the exclusive right to sell the software outside plaintiff's home territory at prices in the discretion of the entity. This caused plaintiff to lose control over pricing outside its home territory and, the court held, constituted an anticipatory repudiation of the agreement with defendant. This action discharged defendant's duties under the agreement. If defendant breached, it could only have done so before plaintiff entered into the other agreement. The court found that defendant had adequately pled repudiation as an affirmative defense by including in a defense the allegation that defendant's obligations had been discharged by plaintiff's material breach. Further, summary judgment could be granted to defendant even on a ground not pleaded as a defense absent surprise or prejudice, not present here. The statute of limitations, the court held, barred plaintiff's claim for the period prior to entry into the other agreement. The court rejected an argument that this case related back to the date of commencement of a Federal action (CPLR 205(a)) where that case had ended by a stipulation of dismissal which did not expressly state that the dismissal was involuntary or that plaintiff intended to commence a subsequent action. Plaintiff also had failed to show that the commencement of the Federal case against defendant's parent served to toll the limitations period against defendant. The mere existence of a parent-subsidary relationship would not suffice. The court also determined that certain claims for alleged breaches were deficient because they were based upon a Request for Proposal which contained a disclaimer that its terms did not constitute a contract and upon oral representations when the contract contained a merger clause. Plaintiff argued that parol evidence would be admissible to clarify that defendant's obligation to "endorse" the software would include an obligation to undertake certain actions. The court ruled, however, that the writing was unambiguous and the rule bars evidence of conflicting intent. Summary judgment for defendant. [Computer Possibilities Unlimited v. Mobil Oil Corp., Index No. 606360/1997, 1/10/01 \(Cahn, J.\)](#).

Contracts; construction law; delay damages; liquidating agreement. Action arising out of restoration of Grand Central Station by main contractor. Plaintiff claimed that the defendant project developer, and through it defendant MTA, had breached a covenant to cooperate with plaintiff, thereby increasing costs. Plaintiff's contracts with subcontractors provided that it would not be liable for any added costs caused by delays occasioned by the developer. Without the developer's consent, plaintiff entered into a liquidation agreement with the subs agreeing to be liable for delay costs in the amount recovered in this case, with the subs assigning rights to plaintiff. Liquidation agreements are enforced if the contractor's assumption of liability is set forth in a signed writing. This might provide privity, the court stated, but it does not vary the terms of the contracts. Such an agreement cannot exist where the prime contractor is not liable for the subcontractor's claims. Here defendants had not

consented to the agreement. Thus, the court ruled, the claim was deficient and should be dismissed. [Bovis Lend Lease LMB Inc. v. GCT Venture, Inc., Index No. 105398/2000, 1/4/01 \(Ramos, J.\)](#).

Contracts; construction law; interpretation; completion deadline; "no damages for delay" clause. Collateral estoppel. Action by contractor for damages for performance delays allegedly caused by the City. The City argued that the work was to have been done in two 180-day phases, that there was to be a pause between the phases and that the entire project did not have to be completed within 360 days. The court agreed. The court rejected plaintiff's argument for a 360 consecutive-day deadline premised on the resident engineer's work schedule. Further, there was a "no-damages-for-delay" clause here and the court found that plaintiff had failed to produce proof establishing that the delays had not been contemplated. The court rejected plaintiff's contention that the City was estopped from asserting that a job action had been a cause of delay. Federal court rulings had not held that the job action had played no role. Even if the City had revised its testing procedures, which had delayed some of the work, the delay would not be compensable in view of the no-damages-for-delay clause, the contract provisions providing for two phases and delays caused by other contractors, including the job action. Delays due to alleged defective plans were not unanticipated or a result of bad faith. Summary judgment for the City. [TJD Construction Co. v. City of New York, Index No. 411358/1995, 2/28/01 \(Ramos, J.\)](#).

Contracts; interpretation; incorporation of related agreement; law firm context. Action by retired partner of law firm, now being wound up, to recover retirement benefits. Defendant argued that it was entitled not to pay benefits under a provision of the partnership agreement which permitted deferral as necessary to avoid exceeding a defined percentage of the expected profit. The court rejected the argument that because a letter agreement between plaintiff and the firm provided that it was being made "pursuant to" the partnership agreement, the latter was incorporated into the former. The sophisticated parties had not expressly incorporated the agreement in the letter agreement nor explicitly conditioned the pension payments on profits. Summary judgment for plaintiff. [Osmond v. Donovan Leisure Newton & Irvine, Index No. 602200/1999, 1/4/01 \(Ramos, J.\)](#).

Contracts; interpretation; interdependence of multiple documents. Action arising out of Brady Bond transactions. Plaintiffs sought partial summary judgment for \$21 million in reliance damages from an allegedly wrongful liquidation of plaintiffs' Brady Bond repo portfolio and on defendant parent's guaranties of the other defendant's obligations and performance. The only issue presented was whether defendant's actions in terminating the repo agreements and selling the bonds without complying with provisions in the master agreement concerning contents, submission and timing of written notices of demand, non-compliance and default constituted repudiatory breaches of the master agreement. Plaintiff relied on the master agreement. However, the court found, account - opening documents and trade confirms contained contradictory language that authorized defendant to liquidate and sell securities without notice. New York law applied to these documents and that law provides that agreements executed at the same time should be interpreted as one contract. That rule applies even though one contract does not refer in terms to the other. The court also found that the master agreement provided that it controlled unless otherwise agreed in writing. The court thus held that defendants had raised questions of fact as to whether the parties intended only the master agreement, or all of them, to govern their dealings. Further, the court concluded, it was impossible, on papers alone, to reconcile the agreements, thus meaning they were ambiguous, requiring action by the trier of fact. Defendants were also found to have raised issues of fact as to waiver and affirmation premised on plaintiffs' failure, during a series of meetings, to have ended the relationship and pursued remedies. The court ruled that the defendant parent had executed absolute, unconditional guaranties and would be liable for any damages due from the defendant. Partial summary judgment granted in part. [Genira Trade & Finance Inc. v. Refco Capital Markets Ltd., Index No. 603233/1998, 1/2/01 \(Freedman, J.\)](#).

Contracts; interpretation; interdependence of multiple documents; third-party beneficiaries. Indemnity; common law. Restitution. Procedure; statute of limitations; recovery of clean-up costs; discovery; equitable estoppel. Action seeking reimbursement of costs caused by oil contamination at terminals at JFK Airport. Defendant, which had contracted with plaintiff to provide fuel services, moved to dismiss on the ground that an agreement had limited its liability to the insurance proceeds actually collected from its insurers. Though not a party to the agreement, defendant argued that it was interdependent with other agreements. The court found no language connecting the agreements. The evidence showed that documents had been executed a month apart, by different parties, for different purposes. GOL 15-301(1) was held inapplicable because different parties were

involved. Further, the court held that defendant was not a third-party beneficiary even though an agreement required plaintiff to enter into a contract with defendant in the form attached to the agreement. The court declined to dismiss a common-law indemnification claim on the theory that plaintiff had caused some of the contamination. The court held that plaintiff had sufficiently alleged that it had not been at fault to survive a 3211(a) (7) motion. The court rejected an argument that plaintiff's duty under a consent order to clean up the site barred it from seeking restitution. A statutory claim to recover cleanup costs, as well as a restitution claim, was held to be subject to a six-year statute of limitations as relief in the nature of indemnification and thus timely. Statutory and negligence claims seeking damages were held to be subject to CPLR 214-c (2). The court found that plaintiff was, or reasonably should have been, aware of the contamination from 1994 on as a consent order had been entered that year. The court held inadequate plaintiff's arguments that defendant should be equitably estopped; these claims were time-barred. Motion to dismiss granted in part. [American Airlines v. United Air Lines, Index No. 600283/2000, 1/10/01 \(Cozier, J.\)](#).

Contracts; standing; piercing corporate veil. Accounting. Action alleging breach of a record distribution contract and subsequent modification. The court held that one plaintiff was not allowed to recover on the contract where he had negotiated it on behalf of his corporation and agreement contained nothing to indicate he was to be a third-party beneficiary. Proof had been presented that raised a question whether the individual defendants had diverted monies to themselves for purposes of piercing the corporate veil. The court held plaintiff could proceed with its claim for breach of contract and an accounting where defendants had failed to show that statements provided the plaintiff had contained the contractually-required information. As plaintiff had failed to show that the parties had ever entered into the modification, claims based thereon failed. Defendant's motions for summary judgment granted in part. [Arpee Music, Inc. v. Hush Entertainment, Inc. Index No. 600717/1998, 1/22/01 \(Ramos, J.\)](#).

Contracts; third-party beneficiary status. Procedure; summary judgment; binding effect at trial. Decision after trial regarding plaintiff's rights as third-party beneficiary under a 1917 agreement covering title to real property in Manhattan. A decision on a summary judgment motion did not bind the court at trial since it was limited to the proof before the court at that time. The court held that plaintiff had failed to prove it had a legally cognizable interest or to establish third-party beneficiary status. The court found that the agreement intended to preserve the property as a house of worship, not to benefit plaintiff directly. The agreement referred to plaintiff as a tenant at will and did not extend plaintiff any rights in the property. Extrinsic historical records could not create a right where none existed. Particular provisions relied on by plaintiff did not support its argument. Plaintiff relied upon use of certain items referred to in the agreement. But, the court noted, ownership of these had been transferred to defendants along with the property. Had they truly belonged to plaintiff, they would have been transferred to it. Plaintiff was merely an incidental beneficiary. Extrinsic evidence in the form of practical construction cannot serve to contradict an agreement or insert a provision for which there is no basis. Judgment for defendants. [Bethany Memorial Reformed Church v. Minister, Elders and Deacons, Index No. 601389/1996, 2/8/01 \(Ramos, J.\)](#).

Discovery; failure of aggrieved party to act promptly. Plaintiff had sought discovery in this action seeking compensation under licensing agreement. Defendant had failed to supply all information sought. Plaintiff had waited eight months to file a motion seeking conditional preclusion. The court ordered defendant to produce information within nine days, which defendant did. Two months later, plaintiff's representatives met with defendant's for an inspection of records. Plaintiff found the production deficient as records encompassed within the court's order. Plaintiff moved to strike the answer. The court denied the motion noting that plaintiff had waited eight months before moving originally, waited two months to conduct the inspection and waited seven months to bring on the present motion, without objecting to the production or trying to resolve the dispute. [Video Sports Productions v. V.I.E.W. Inc., Index No. 604612/1998, 1/16/01 \(Ramos, J.\)](#).

Financial consultant; best efforts. Covenant of good faith and fair dealing. Misrepresentation; fraud versus contract. Fraudulent inducement. Action for breach of contract by company engaged to act as financial adviser, consultant and placement agent in connection with defendant's efforts to obtain bridge financing. Motion to dismiss counterclaims. The court found that there were factual disputes as to whether defendant had failed to provide necessary financial information and whether deadlines were goals or firm deadlines. The court ruled that the counterclaim adequately stated that plaintiff had failed

to use its best efforts, as required, and to conduct a private placement by set dates. A counterclaim asserting a cause of action for breach of the covenant of good faith and fair dealing failed because it was duplicative of the first counterclaim. The court ruled that the third counterclaim failed since it alleged that plaintiff had misrepresented that it had the business expertise and financing capabilities to fulfill the agreement, which was insufficient to state fraud separate from the breach of contract claim. The allegation that plaintiff had entered into the agreement without the intention of performing it was similarly insufficient. Statements of alleged fraudulent inducement failed in view of the absence of alleged facts to show that the statements were false when made. Counterclaim dismissed with leave to replead. [Viscount Securities v. Cyberaction, Inc., Index No. 601711/2000, 1/11/01 \(Cahn, J.\)](#).

Full faith and credit; class actions. Action alleging breach of a Purchase Contract Agreement, pursuant to which plaintiffs held more than 2.1 million Threshold Appreciation Purchase Securities ("TAPS") issued by defendant. Plaintiffs alleged that a Termination Event had occurred, which required that escrowed funds be returned to holders of the TAPS. Court noted that in [Matter of Colt Indus. Shareholder Litig. v Colt Indus. Inc., 77 NY2d 185 \(1991\)](#), New York Court of Appeals held that it is improper for a New York court to bind an absent class member with no ties to New York to a settlement which would extinguish rights to bring a damage action in another jurisdiction. Nonetheless, defendant's motion to dismiss granted, on the basis that full faith and credit must be given to a Final Approval Order and Judgment issued by an Alabama court settling the nationwide class action. The settlement provided specific recovery for class members, in exchange for which the class members agreed that they would receive no further recovery based on, or related to, any claim relating to the TAPS issued. The dismissal was without prejudice to plaintiffs' right to recommence the action if the Alabama decision is reversed on appeal. [Aragon Investments, Ltd. v Caremark, RX, Inc., Index No. 601559/00, 1/18/01 \(Gammerman, J.\)](#).

Insurance; status of wife as of date of occurrence; insurable interest; duty to save and preserve property; misrepresentations. Action on insurance policy. Defendant insurer had declined to pay because the loss had allegedly been the result of an act of an insured, plaintiff's wife, from whom plaintiff had not been divorced as of the date of the occurrence, the wife had had an insurable interest, misrepresentations had been made regarding the identity of the vandal, and plaintiff had failed to press criminal charges or use reasonable means to retrieve the property. The court found that a stipulation of divorce had been put on the record and so ordered at a hearing prior to the occurrence. The divorce had been granted as of that date; the signing of the judgment was a ministerial act. The parties were thus divorced as of the occurrence, the ex-wife was no longer an insured and any action by her to cause the loss would not adversely affect plaintiff's coverage. Further, plaintiff had had an insurable interest. Whether the ex-wife had a valid interest and whether she removed property were issues related to the amount of damages. The policy required plaintiff to use reasonable means to "save and preserve property." The court declined to read into this provision an obligation, not otherwise present, to criminally prosecute a suspect or actively pursue retrieval. The court held that plaintiff had not made any misrepresentations about the identity of the suspected vandal. The court further found that the issues in the matrimonial case about plaintiff's property at the time of the loss provided a good-faith basis for the proof of loss submitted, defeating any presumption of fraud. The court ruled that there was no basis to deny coverage because of concealment or fraud. Summary judgment for plaintiff on liability. The court rejected defenses that the ex-wife was an unnamed necessary party. Plaintiff's claims for attorneys' fees and expenses were dismissed, as was a claim for breach of a duty of good faith and fair dealing, which duplicated a contract claim. [Fazio v. Travelers Property Casualty Co., Index No. 09386/1999, 1/11/01 \(Stander, J.\)](#).

Interference with contract and with business relations; trade secrets; unfair competition; aiding and abetting; declaratory and injunctive relief; disqualification of counsel; service of process; BCL § 1312(a) - foreign corporation capacity to sue. Plaintiff alleged that defendants stole plaintiff's key employee in order to compete unfairly with plaintiff in the inter-dealer brokerage business. Defendants' motion to dismiss for lack of proper service of process denied as premature, because time to serve had not run. Motion to dismiss under BCL § 1312(a) also denied. Plaintiff was foreign corporation not authorized to do business in New York, but its activities in New York were not sufficient to constitute "doing business" and it could maintain an action in New York courts. Motion to dismiss tortious interference with contract claim denied. Plaintiff adequately alleged that defendants' job offer to plaintiff's former employee was the efficient cause of his breach of contract with plaintiff. Claim for tortious interference with business relations dismissed because of lack of allegation that defendants acted maliciously or used wrongful means. Causes of action for misappropriation of trade secrets and unfair competition based upon defendants' alleged use of trade secret dismissed because information concerning customer lists, allegedly taken by

former employee, was known to all brokers, and business information, to which former employee had been privy, was not kept secret by plaintiff. Therefore, the information was not entitled to trade secret protection. Cause of action alleging defendants aided and abetted former employee in violating fiduciary duty to plaintiff dismissed. Failure to allege facts inferring that defendants had knowledge of the terms of former employee's employment contract other than provision barring him from working for a competitor within particular geographical area. Court rejected claim for declaratory relief based upon defendant's alleged violation of former employee's employment contract, since defendant not a party to that contract. Claim for permanent injunction barring former employee from working for a competitor of plaintiff for certain time also rejected because former employee not a party to action. Plaintiff moved to disqualify defendants' attorney based upon his employment, from 1994-1995, by law firms which represented enterprises related to plaintiff to assist them in formulating employment policies and in drafting form employment contracts. Motion to disqualify denied. Neither the terms of the former employee's employment contract, nor the general employment policies of plaintiff were at issue, and evidence submitted that plaintiff's employment contracts with which counsel was familiar had been completely revised. Summary judgment dismissing co-defendant GFI Group, Inc. granted on the basis of prima facie showing that it was not the employer of the employee in question. [Prebon Financial Products, Inc. v GFI Holdings Ltd., Index No. 603085/00, 1/10/01 \(Ramos, J.\)](#)

Labor Law §220; prevailing wages; aliens. Class action by workers on a construction project asserting that they did not receive prevailing wages for work performed as required by Labor Law §220. The class was previously certified and the case was ripe for settlement, but for one issue: The court rejected defendants' argument that undocumented aliens should not be allowed to recover. The court held that reliance on [Sure-Tan v. NLRB](#), 467 U.S. 882, was misplaced. This case involved wages for work actually performed, not, as there, back pay for a constructive discharge. Defendants' interpretation would conflict with Congress's intent. [Andrzejewski v. Interphase Co., Index No. 131657/1994, 1/3/01 \(Ramos, J.\)](#)

Misappropriation of intellectual property; breach of contract; different standards. Plaintiff alleged misappropriation of intellectual property, breach of contract and quasi contract, and unjust enrichment in connection with an idea for a TV program "Where Do They All Come From, Guns In The Black Community," which he sent to Oprah Winfrey. To prevail on a claim for misappropriation of property, the idea must be novel and original and must have been used by the defendant. For a contract based claim, plaintiff need only show the idea is of value to the buyer and that the idea was used, which must also be shown for quasi contract and unjust enrichment claims. Plaintiff failed to show that his idea was novel, that it was the same as the idea used by Winfrey in her show "Children and Guns," or that there was an express contract between the parties. Motion for summary judgment dismissing the complaint granted. [Talley v Winfrey, Index No. 604367/1999, 1/5/01 \(Ramos, J.\)](#)

Misrepresentation; reliance; adequacy of pleading. Procedure; cross-claim converted to third-party claim; venue.

Action alleging misrepresentations as to the status of a purported conversion of condominium units to a Home Owners Association and incomplete and inadequate construction. Motion to dismiss by defendant attorneys. The court dismissed certain plaintiffs' claims for lack of an allegation of reliance on the attorneys' work. Other plaintiffs asserted reliance on a letter by one attorney, which the court found contained statements that could give the impression the offering plan had been delivered to the Attorney General when it had not. However, the court concluded that allegations of justifiable reliance were lacking in that plaintiffs claimed to have relied on their own attorney's advice that they could proceed. A cross-claim failed insofar as premised on plaintiffs' fraud allegations, but the court permitted it to be treated as a third-party claim founded on the attorney's failure to file documents and resultant harm to cross-claimants. Motion to dismiss by certain defendants granted. Motion to change venue denied for failure to show that venue was erroneous and failure to make the detailed showing necessary for a change for the convenience of witnesses. [Honor v. Northfield Savings Bank, Index No. 600457/2000, 1/4/01 \(Cozier, J.\)](#)

Preemption; copyright law; common law claims regarding photographs. Business disparagement . Fiduciary duty.

Action by a photographer alleging that defendant distributed plaintiff's photos of Grand Central Station without plaintiff's knowledge or consent, advised the recipients that they could reproduce the photos without limitation or compensation to plaintiff and then sent a follow-up letter falsely stating that the images were not available for licensing or use and suggesting that images of the Station could be obtained from his competitors. Various causes of action were set forth on a number of theories. The court held that the complaint had to be dismissed. Claims for negligent and intentional interference with

contractual relations and misrepresentation were held to be essentially claims to enforce Federal copyright laws, which preempt state statute and common law. Even the misrepresentation claims were preempted since they were based on misstatements about reproduction rights. The court rejected plaintiff's argument that this case was distinguishable because the rights infringed on were delineated in plaintiff's contracts with an architectural firm and Metro-North since plaintiff had made no claims for breach of those agreements and these entities were not parties. The court held that statements in the letter were insufficient to constitute business disparagement, especially since plaintiff had demanded that the images not be released. Also, special damages had not been pleaded or established. A claim for breach of fiduciary duty was dismissed since plaintiff had no such relationship with defendant. [Rudnick v. Kreisberg Group, Index No. 117706/1999, 2/9/01 \(Cahn, J.\)](#).

Procedure; forum selection clause. Motion to dismiss based on forum selection clause. The parties had signed an agreement whereby plaintiff was to serve as defendant's investment relations counselor. Plaintiff sued for unpaid compensation. Defendant contended that this court lacked jurisdiction because of a clause providing that the contract "shall be governed by and subject to the jurisdiction of and law of Broward County, Florida". The court found that the clause was clear and that only Florida courts would have jurisdiction. To construe the language otherwise, the court held, would read the clause out of the agreement. The agreement here had been drafted by plaintiff and thus should be construed against plaintiff. No basis had been shown to overcome the clause. Case dismissed. [Strategic Growth Intl., Inc. v Finantra Capital, Inc., Index No. 11074/2000, 1/31/01 \(Austin, J.\)](#).

Procedure; leave to amend; late application. Motion for leave to amend complaint. Although leave is to be freely given, judicial discretion should be exercised cautiously when the amendment is sought to be made late in the case. Here, the motion was made after all discovery had been completed and the note of issue filed. Entirely new factual allegations were proposed in the new pleading, although the circumstances had been known to plaintiff when the action was commenced. Further discovery would be necessary and prejudice and delay would be caused were the amendment allowed. Plaintiff argued that a Justice previously assigned had granted leave, but there had been no conference order or other order nor any direction on the record. Had leave been granted, plaintiff should have acted but did not. Motion denied. [GCS Computers, Inc. v. Greenhouse, Index No. 7859/1999, 2/26/01 \(Austin, J.\)](#).

Procedure; motion to reargue/renew; reasonable justification. Delay damages. Motion for clarification or modification, and for leave to file amended complaint. Court had previously dismissed plaintiff's causes of action for breach of contract and delay damages except portion of first cause of action for unpaid labor and materials arising out of changes and/or extra work. Prior motion based upon documentary evidence relating to the contract, instructions to bidders. Plaintiff sought to submit "new evidence" regarding "Suspension of Work" provisions of the instructions to bidders to recast failed delay damage claims as claims for unreasonable suspensions. Lack of attorney's due diligence did not constitute reasonable justification for failure to provide the evidence on prior motion, therefore motion to renew denied. Reargument denied because case on which plaintiff now sought to rely was decided before prior motions were submitted, but was not argued by plaintiff and was factually distinguishable. Reargument not an opportunity to advance different or new arguments from those previously advanced. No basis for clarification or modification of previous decision. On previous request to replead claims for delay damages, plaintiff failed to provide affidavits or proposed amended pleading containing facts supporting request. Leave to file amended complaint was therefore denied. [Abax Inc. v New York City Housing Authority, Index No. 604023/2000, 1/4/01 \(Gammerman, J.\)](#)

Procedure; personal jurisdiction; counsel taking a part in transactions centered in NY. Action involving limited partnership and rights to a movie. Motion by defendant attorney to dismiss for lack of personal jurisdiction on the ground that he is a resident of France and the complaint failed to allege contacts by him with New York. The defendant, though licensed to practice law in New York, claimed not to have done so for 30 years and that visits here were for family purposes. The court held that even if it accepted defendant's assertions that he was never in New York in regard to the transactions at issue, he had engaged in purposeful activity here, including having a role in commercial transactions about the movie that were centered in New York. The claims alleged arose out of the transaction of business in New York. Motion to dismiss denied. Action consolidated. [Briarpatch Limited, L.P. v. Stage Fright LLC, Index No. 603820/1999, 1/3/01 \(Cozier, J.\)](#)

Public Authorities Law §1744(2); notice of claim. Statute of limitations; fiduciary duty and contract. Statute of frauds. Tort versus contract. Quantum meruit. Accounting. Action alleging breach of contract and other wrongs due to defendant's failure to provide risk management and insurance brokerage services in connection with "wrap up" construction insurance. The court rejected plaintiff's argument that counterclaims should be dismissed because of non-compliance with the notice-of-claim requirement of Pub. Auth. Law §1744 (2) since a claim for brokerage commissions is not a construction claim. As to the complaint, the court held that a six-year statute of limitations applied. This applied also to a breach of fiduciary duty claim because the same facts were involved in that claim and the contract claim, the rights and obligations of the parties were defined by the agreement, and that agreement allegedly provided that defendant could be held liable for breach of fiduciary duty. Negligence and negligent misrepresentation claims would be limited by the three-year statute. As to the oral portion of the contract, the statute of frauds would not bar that part of the case since the agreement could be terminated within one year and part performance had been referable to the agreement. The court held that plaintiff's claims basically sought enforcement of the contract; there was no independent duty of reasonable care. Hence, the tort claims failed. A quantum meruit claim failed since there was a valid, enforceable contract in place. An accounting claim failed since no special circumstances justifying equitable relief had been pleaded. Finally, defendant had a contractual duty to secure appropriate coverage and the best available premium. [New York City School Construction Authority v. Marsh & McLennan, Index No. 404842/1997, 2/20/01 \(Ramos, J.\)](#).

Purchase agreement; put option. Release. Plaintiff claimed that defendant had failed to comply with a purchase agreement on plaintiff's decision to exercise a put option. The court agreed that defendant had offered no proof to undermine this claim. The fact that plaintiff's final exercise of the put did not comply with a 30-day provision in the agreement did not prevent plaintiff from being entitled to judgment in its favor. On a counterclaim on a loan to a partnership, the court found that defendant had raised questions of fact to preclude summary judgment for plaintiff. Plaintiff had not shown that the loan had been discharged. Plaintiff relied on a release, but loans were made subsequent to the date of the release and there was a question as to whether the release was intended to apply to subsequent loans. Summary judgment granted to plaintiff in part. [Encare, Inc. v. Vehicare Joint Ventures, Index No. 07979/1997, 1/4/01 \(Stander, J.\)](#).

Quantum meruit; contract claim barred by statute of frauds. Motion for summary judgment dismissing quantum meruit cause of action on statute of frauds grounds. Action to recover fees for consulting services in connection with proposed corporate acquisition. The court had previously held that there had never been a meeting of the minds so a contract claim failed, but that a quantum meruit cause of action had been adequately pled. The court held that a contract to provide consulting and analytical services in regard to a proposed real estate acquisition falls within the statute of frauds. Such services were involved here. Because the alleged agreement would be barred by the statute, plaintiff could not proceed on a quantum meruit theory based on the same promise. Motion granted. [BDO Seidman, LLP v. Frydman & Co., Index No. 603077/1998, 2/6/01 \(Cahn, J.\)](#).

Release; general; allegations of breach of fiduciary duty. Action by former shareholder against a shareholder for breach of fiduciary duty. The corporation had been dissolved pursuant to a termination agreement. The defendant had been permitted to retain the right to use the corporate name. The business had been sold to another entity and became very successful. Plaintiff alleged that defendant had misled him into believing that the corporation was without prospects and had to be terminated and concealed the fact that the other entity was interested in the company. Defendant moved to dismiss, relying on a release signed as part of the termination. The court held that the claims were not barred since a general release will not bar allegations of breach of fiduciary duty where defendant did not fully disclose alleged wrongdoing or a conflict of interest. The court rejected defendant's assertion that the release here was a narrow, targeted one. [Workman v. Golden, Index No. 602437/2000, 1/5/01 \(Freedman, J.\)](#).

Res judicata; previous Article 78 proceeding; contract claim. Motion to dismiss and for sanctions. The court rejected defendant's argument that the action was barred by res judicata. The action sought recovery of sums due for work performed on a construction contract. Defendant had withheld payments during an inquiry into wage rates paid by plaintiff. In an Article 78 proceeding, the Appellate Division had found that defendant had not been arbitrary or capricious in withholding payments during the investigation. However, that decision was not the final step in the process. Defendant could issue a final order but was required first to hold a hearing, which it never did. Thus, the breach of contract claim here was not resolved by res judicata.

Motion denied. [A & A Associates v. New York City Housing Authority, Index No. 600919/2000, 1/18/01 \(Ramos, J.\)](#).

Restrictive covenants; preliminary injunction; proof required; territorial restriction; post-employment compensation.

Motion for preliminary injunction against former employee of modeling agency who had resigned to work for a competitor. The court found that plaintiff's proof that the defendant had lured employees and models away from plaintiff and stolen confidential information was conclusory and generalized. Defendant had submitted a highly detailed refutation of the plaintiff's assertions, to which plaintiff's only response was that defendant should not object to an injunction if he was not doing what he was accused of. Plaintiff failed to offer proof, as opposed to conclusory allegations, that defendant had misappropriated trade secrets or a confidential customer list. Also, defendant had raised questions as to whether the territorial constraint was applicable to where he worked and whether plaintiff was paying him the proper severance as required by the employment agreement. There was no showing that defendant was a unique employee, or that he had taken property, trade secrets or confidential information. Motion denied. [Next Management Co. v Lata, Index No. 603436/2000, 1/16/01 \(Ramos, J.\)](#).

Restrictive covenants; restriction on clients' hiring of employees. Contracts; interpretation. Plaintiff had agreements with its clients that they would not employ its staff and restrictive covenants with staff. Defendant former client argued that it had hired the co-defendant, former employee of plaintiff, after it had ceased to be a client of plaintiff. The court ruled that the agreement here was clear and that "customer" could not reasonably be construed to mean "former customer". The plaintiff should have included "former customer" in the agreement if it had wished to reach them. Had the former client hired the employee while still a client of plaintiff, plaintiff could sue. A claim for breach of the duty of good faith and fair dealing failed. Case dismissed. [Bond Technologies v. Komita, Index No. 603176/2000, 2/28/01 \(Ramos, J.\)](#).

Summary judgment; identity of contracting party. Dispute arising out of ad display on a Times Square building. Plaintiff sued for compensation. Motion by plaintiff for summary judgment on liability; cross-motion by defendant. Defendant contended that plaintiff had sued the wrong party. The court held that issues of fact existed as to which entity was liable. A letter from plaintiff indicated that it had been looking to a non-party as responsible under the agreement. The claim that the defendant and the non-party were the same had not been established. On the cross-motion, it was disputed whether the non-party had acted as an agent for defendant or another entity. Motions denied. [Spectacolor Communications v. Saatchi & Saatchi Advertising, Index No. 113845, 1/10/01 \(Ramos, J.\)](#).

UCC 4-406; timely notice of forged instrument; failure to exercise ordinary care; definition of "send". Defendant's motion for partial summary judgment granted. Plaintiffs' sought damages from bank for cashing business checks which were forged by plaintiffs' bookkeeper. Bank sent statements and canceled checks to company. Bank initially strictly liable for honoring a forged instrument, but liability shifts partly back to depositor if bank demonstrates that the depositor was negligent or failed properly to examine the bank statements. Bank is exonerated from liability when it delivers bank statement accompanied by canceled check and depositor fails properly to check the document and notify bank within reasonable period not exceeding 14 days. Bank mailed statement and initial forged check and company president reviewed same, but failed to give timely notice of forgery to the bank. Diversion of other bank statements and checks by bookkeeper was not a defense to company's failure to notify bank because under UCC 4- 406[1], the duty to inspect statement and timely notify bank is triggered when bank sends the statement to the customer. Under UCC 1-201, "send" means "deposit in the mail." Plaintiffs submitted no evidence by person with personal knowledge that bank failed to exercise ordinary care in cashing the checks, or that bank was negligent in mailing bank statements to plaintiffs' office. [Su-Su NY, Inc. v Citibank, N.A., Index No. 104195/1998, 1/24/01 \(Ramos, J.\)](#)

© 2001

THE NEXT ISSUE WILL BE POSTED ON THE HOME PAGES OF THE COMMERCIAL DIVISION AND THE COMMERCIAL AND FEDERAL LITIGATION SECTION ON MAY 24, 2001, COVERING DECISIONS ISSUED MARCH AND APRIL 2001.

Please forward any comments on this website to the Webmaster at rboucher@courts.state.ny.us

[[Home](#)] [[Inaugural Issue March 1998](#)] [[Law Report - May 1998](#)] [[Law Report - July 1998](#)]
[[Law Report - October 1998](#)] [[Law Report - January 1999](#)] [[Law Report - March 1999](#)]
[[Law Report - May 1999](#)] [[Law Report - July 1999](#)] [[Law Report - October 1999](#)]
[[Law Report - January 2000](#)] [[Law Report - March 2000](#)] [[Law Report - May 2000](#)]
[[Law Report - July 2000](#)] [[Law Report - October 2000](#)] [[Law Report - January 2001](#)]
[[Law Report - March 2001](#)] [[Law Report - May 2001](#)] [[Law Report - October 2001](#)]
[[Law Report - January 2002](#)] [[Law Report - March 2002](#)]