THE LAW REPORT

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

Hon. Judith S. Kaye

Chief Judge of the

State of New York

Hon. Jonathan Lippman

Chief administrative Judge

of the

State of New York

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Arbitration; attorney engagement letters; disclosure of consequences. Breach of contract and breach of fiduciary duty; relationship to legal malpractice. Damages; interest on back taxes. Discovery. Defendant law firms had supplied plaintiffs with written legal opinions on the tax consequences of certain partnership investments. Plaintiffs had invested in them, but the IRS had disallowed the tax benefits. Plaintiffs sued, arguing that an arbitration clause in engagement letters with the first firm could not be enforced because of the firm's failure to explain the consequences of the arbitration agreement, its superior knowledge, and plaintiffs' lack of informed consent. The court found that, although New York has yet to address disclosure in regard to arbitration agreements, the duty was applicable. Here, the duty to disclose was met by the engagement letters, which made clear the existence, scope, and implication of the clause, setting forth how the panel would be selected and other elements. Plaintiffs pointed to a NYCLA ethics opinion concerning arbitration clauses in retainer agreements between lawyers and clients. The court found the letters' provision consistent with the NYCLA opinion since the provision fully disclosed the facts; the provision was not unconscionable as no evidence existed of high-pressure tactics or deceptive language that would have shown that plaintiff had had no meaningful choice. The firm had not needed to explain the clause verbally because it was explained in writing. The court ordered the plaintiffs and the first firm to arbitration and stayed the action as to them. The court ruled that breach of contract and fiduciary duty claims against the second firm duplicated a malpractice claim. Plaintiffs did not allege an intentional tort apart from the malpractice; allegations that the firm had put its own interests before plaintiffs' arose from the malpractice claim. The breach of contract claim did not rest on the promise of any particular result, but merely alleged the firm's malpractice. The court stated that either claim could be restored based on discovery. The second firm argued that plaintiffs were not permitted to recover interest on the back taxes they had paid the IRS. The court agreed. It distinguished the case plaintiffs relied on. The plaintiffs there had had to pay interest to the IRS due to an agent's malfeasance. For them, recovery would not have constituted an "impermissible windfall." Here, plaintiffs had decided not to pay the taxes and had been able to use the money during the period without payment. Recovery would put them in a better position, as was the situation in the case that the law firm relied on. In that case a defrauded investor in a tax shelter could not recover since the interest was not damages the investor had suffered but payment to the IRS for use of money he was not entitled to. Plaintiffs were not entitled, based on the current claim, to punitive damages, either, as they did not allege that the firm's conduct sprang from "evil and reprehensible" motives. Plaintiffs argued, however, that discovery might show that the firm had profited by an undisclosed relationship with plaintiffs' accountant. Therefore, the court struck the claim without prejudice. The court dismissed for lack of standing two plaintiffs who had not entered into agreements with the second firm. The standing of another involved arguments based on a factual context better suited to a summary judgment motion than a motion to dismiss. The court denied the motion. The second firm moved for a stay pending the arbitration. The court had stayed the entire action while deciding the motion to compel arbitration, as above, and had said at oral argument that if it granted the motion it would continue the stay for a reasonable period. It now removed the stay as to the action involving the second firm to give plaintiffs fair opportunity to litigate. The second firm might move for summary judgment at the end of arbitration and if discovery did not proceed plaintiffs would have no discovery to support their position. The second firm argued that the arbitration and litigation involved the same issues, particularly as to proximate cause given plaintiffs' decision to settle with the IRS. But the court stated that the firm would likely litigate in this court - - argue collateral estoppel or defend the issue of proximate cause - - no matter how arbitration turned out and hence would not be prejudiced by discovery. Thies v. Bryan Cave LLP, Index No. 601036/2005, 3/14/06 (Ramos, J.).

Arbitration; commercial contract; expiration; presumption of arbitrability. Defendant moved pursuant to the FAA to stay this action and to compel arbitration. The parties had had a commercial contract. Plaintiff contended that it had expired at a certain point and that the arbitration cause thereof was enforceable only during that period, whereas defendant urged that because of plaintiff's continued performance after the purported expiration, the arbitration clause had remained in effect. The court discussed Nolde Bros. and Litton. It found that plaintiff was seeking to enforce duties arguably arising out of the relation governed by the contract and defendant was seeking to enforce provisions of the allegedly expired agreement by reference to normal principles of contract interpretation. Thus, the Nolde Bros. presumption of arbitrability applied. This was also the general NY approach. Stay granted. Rockwood Automatic Machine, Inc. v. Lear Corp., Index No. 11145/2005, 2/6/06 (Fisher, J.).**

BCL § 624; petition to inspect books and records. Petitioner brought this proceeding to inspect respondent's corporate books and records for several years. Petitioner, a shareholder in the corporation and former executive, alleged that after leaving the company, he had no longer received notices of annual meetings, balance sheets or profit and loss statements. The court determined that, pursuant to BCL § 624, petitioner's stated purpose for requesting the records -- to value his shares - - was legitimate, as was another purpose, protection of an investment. This was so although petitioner may have worked for a competitor of respondent for a time. The court noted that there is little New York authority on point with petitioner's situation as an "out" shareholder, but did cite a Third Circuit case, which had allowed the minority "out" shareholder an opportunity to inspect copies of the corporation's tax records. The statute should be liberally construed in favor of the shareholder. The burden is on the corporation to show improper purpose or bad faith, which respondent had failed to do. Petition granted; tax records to be produced after certain redactions were made and a confidentiality order was signed. In re Casacci Index No. 11708/2005, 3/23/06 (Fahey, J.).**

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Brokers; term of agreement; at-will arrangement; reasonable duration. Misrepresentation; intent to perform contract. Plaintiff broker sued claiming that defendants had improperly terminated it on a commercial listing. As the agreement did not have a definite term, it was presumed to be at will. The principal in such cases may terminate the broker's authority. Plaintiff did not show that defendants had terminated in bad faith to prevent plaintiff from fulfilling its undertaking. Plaintiff had not been engaged in negotiations to find buyers. Plaintiff argued that, absent a termination date, a reasonable duration should be implied; that since a coop offering plan had not been approved, plaintiff had not been able to offer the premises for sale; and that therefore it had not been given a reasonable time to sell, so that defendants had had no right to terminate its services. The court rejected this argument, noting that two years had passed between signing of the listing agreement and termination of plaintiff, which was a reasonable time. Defendants had had no duty to proceed with the conversion or retain plaintiff's services indefinitely. A fraud claim was rejected as merely asserting a misrepresented future intention. Case dismissed. Timeless Realty Corp. v. Connecticut Diversified Holdings LLC, Index No. 9667/2005, 3/28/06 (Demarest, J.).**

Class actions; deceptive trade practice (GBL 349 (a)); disclosure of surcharge; materiality. Unjust enrichment; existence of contract. Negligent misrepresentation; special relationship. Proposed class action claiming deceptive trade practices, unjust enrichment, and negligent misrepresentation. Plaintiff, a travel agency, alleged that each time it had used its ATM card in Brazil defendant US bank had imposed a hidden surcharge, 3.5% of the dollar amount corresponding to the currency withdrawn. Plaintiff alleged that the bank's "Fee Schedule" and website said that the ATM fee for foreign transactions was three dollars, but did not reveal the 3.5% surcharge. Plaintiff admitted that the surcharge was set forth on a deposit agreement. The bank moved to dismiss for failure to state a cause of action, pointing out that a deceptive act under GBL 349 (a) cannot be based on fully-disclosed facts. Plaintiff argued that most consumers would not read the 25-page agreement and its prolixity would keep them from realizing the surcharge was mentioned if they did. The court noted that a deceptive practice need not reach the level of common law fraud. The issue here was whether a reasonable consumer would be misled, whether the agreement as part of a set of practices - - not the agreement alone - - was deceptive. The court found that plaintiff adequately alleged that the agreement misled in a material way and that plaintiff had suffered actual injury, which did not require a showing of pecuniary harm. Here, the allegation of injury by being subject to an undisclosed surcharge was adequate. The court did not agree with the bank's argument that the allegations did not make out the bank's conduct to be materially misleading because the plaintiff did not say it would have moved to a different bank or found a cheaper source of currency and used it. Plaintiff did allege that the lack of complete disclosure raised costs to customers and kept them from making informed decisions and shopping for better terms. The deceptive trade practices claim survived. A claim of unjust enrichment was dismissed. The court noted that there can be no recovery under this theory when, as here, a valid contract governs the dispute. A claim of negligent misrepresentation failed because plaintiff showed, at most, an arm's-length business relationship with defendant, not the special relationship that would create a duty on the bank's part. Relativity Travel, Ltd v. JP Morgan Chase Bank, Index No. 601075/2005, 2/14/06 (Freedman, J.).

Contracts; asset purchase agreement; phantom stock agreement; share of owner-executive; release letter; misrepresentation; justifiable reliance. Defendants moved for summary judgment in a contract action. Plaintiff, former executive of a book publishing company, sued defendants claiming that he had not been paid his proper share of the proceeds after sale of the company to non-party Barnes & Noble. The parties had executed a "phantom stock agreement" in 1993 which provided in part that if all or substantially all of defendant's assets were sold, plaintiff would receive a pro rata share of the purchase price to be paid pari passu with the payments received by defendant or its owners. Plaintiff had offered in writing to acquire the business, but had been outbid by Barnes & Noble. Plaintiff and defendants had then executed a letter agreement which provided that Barnes & Noble would pay plaintiff his share of the purchase price at the closing based on the sale price of $115 million; plaintiff had acknowledged that 5% was the full amount to which he was entitled upon the sale. The agreement also released defendants from any claims which might arise out of any occurrences before the closing date. Plaintiff alleged here that defendants had fraudulently induced him to accept approximately $458,000 less than his proper share by misrepresentation of the consideration that Barnes & Noble paid (i.e., failing to disclose that Barnes & Noble would assume bank debt). As to whether the release letter had been procured by fraud, the court pointed out that, although plaintiff relied upon an oral statement that did not reveal the facts about the debt, the record showed that before the letter was signed, defendants had provided writings to plaintiff that showed that the buyer would assume liabilities. Plaintiff had seen the offering documents, which disclosed this, and the financials revealing the debt. Plaintiff also had seen the draft asset purchase documents, which revealed the facts. If the statement plaintiff cited had been unintentionally deceptive, plaintiff could not have justifiably relied upon it. Summary judgment to defendants. Nurnberg v. Hobo Corp., Index No. 602592/2003, 1/9/06 (Freedman, J.).

Contracts; breach of covenant of good faith and fair dealing; relationship to contract. Defamation; pleading elements; defamatory nature of words (regarding termination of employment). Procedure; asserting unpled theory in brief. Promissory estoppel; employment context. Corporations; liability of corporate parent. After internal investigation of potential improprieties in part of its business, defendant HBO had terminated plaintiff, a high corporate official, for gross misconduct. Plaintiff sued the corporation, various officials, and the corporate parent for breach of contract and other wrongs. Plaintiff alleged a breach of covenant of good faith and fair dealing because HBO had allegedly prevented him from performing his duties during a suspension and improperly terminated the employment agreement. The court ruled that this claim had to be dismissed because no such claim can exist where a contract claim is asserted. Here, all damages alleged flowed from the claimed breach of contract. Plaintiff asserted claims of defamation based on certain newspaper accounts. As to one, the court found that the statements had been attributed to unnamed sources, not to HBO. Another article repeated material from the first. A third item was of unknown origin and it was not known where or when it had been published or distributed. The complaint was deficient in that it failed to allege what statements each defendant is claimed to have made, the person to whom made, and the date, time and place thereof. The complaint sought to impose blanket liability on all defendants by setting forth possible ways in which they might have been connected with the articles. Further, defendants could not be responsible for statements attributable to a reporter that the defendants themselves did not write or publish. In any event, the statements were not defamatory; it is not defamatory to say, even incorrectly, that a person was discharged or terminated. Plaintiff improperly sought to recast this claim as one for injurious falsehood, but the complaint asserted no such cause of action and a plaintiff may not amend a complaint to assert a new theory by means of statements in a brief on a dispositive motion. Plaintiff asserted a promissory estoppel claim based upon an alleged promise that if the investigation did not turn up new adverse facts, HBO would honor the employment agreement regarding severance benefits. However, promissory estoppel is unavailable as a theory in the employment context and it is clear that the alleged promise was to have been performed by HBO. The corporate officer acting in that capacity would not be personally liable. The claim against the parent company had to be dismissed because it was not alleged to have done anything other than allowing HBO to investigate and harm plaintiff, but NY law does not permit parents to be held responsible for such a claim. Case dismissed except for breach of contract claim against HBO. Rosenberg v. Home Box Office, Index No. 601924/2005, 1/30/06 (Lowe, J.).

Contracts; commercial real estate transaction; notice of pendency; motion to vacate (CPLR 6501). Defendant moved to cancel a notice of pendency. The dispute arose out of a contract for the purchase and sale of a residential subdivision. At issue was whether plaintiff's claims affected real property (CPLR 6501). The court found that plaintiff alleged fraud only in regard to an oral contract to pay for pre-closing and alleged breach of an addendum regarding post-closing site work; a claim for fraud does not arise when the only fraud relates to a contract. Thus, though the claim of fraudulent inducement might support rescission of the sale, that claim was insufficient. In any event, specific restitution could not be awarded on rescission since years had passed and portions of the property had been developed and sold to third parties or were about to be and other portions were under development contract. The court discussed at length judicial discretion in such circumstances (citing Titterington), noting that most courts refused specific restitution because that would unduly interfere with the certainty of titles. Although, the court noted, under New York cases the rule that rescission is unavailable will not be strictly enforced where the party against whom rescission is sought is a wrongdoer exploiting its changes of position, here defendant alone had not created the changed circumstances. An adequate remedy at law was available. Motion to cancel granted. Henrietta Piping, Inc. v. Antetomaso & Micca Group, Index No. 12042/2005, 2/21/06 (Fisher, J.).**

Contracts; commercial real property; liquidated damages provision; penalty. Misrepresentation; intent to perform contract. Action alleging breach of a contract for the sale of commercial real property. A provision thereof set liquidated damages for a breach by defendant seller. Defendant had not closed, but had sent plaintiff the liquidated damages, which plaintiff had refused. Plaintiff sued seeking specific performance and asserting fraud. Plaintiff contended that the damages clause was an unenforceable penalty. Plaintiff claimed to have suffered adverse tax consequences from the failure to close. The burden here was on plaintiff, which it failed to meet. The contract did not address tax aspects of the deal. If plaintiff had been aware of the potential tax losses, it must have included them in the liquidated damages figure and could not have been defrauded. If plaintiff had not been aware, defendant could not have fraudulently induced plaintiff with the intention of depriving plaintiff of tax benefits. Here there had been an arms-length transaction between sophisticated and represented businessmen. Further, the court noted, liquidated damages have not been characterized as a penalty to the recipient. As to a fraud claim, general allegations, as here, that a defendant had entered into a contract without the intent to perform are insufficient. There were no allegations that a public right had been affected so that punitive damages were not available. Case dismissed in part. 195 Lombardy Street, LLC v. McCarthy, Index No. 16188/2005, 1/4/06 (Demarest, J.).**

Contracts; construction; interpretation; unit price contracts; extra work and change orders. Plaintiff commenced this action alleging breach of contract. Pursuant to the contract, plaintiff was to have performed repairs at SUNY Buffalo. Both parties moved for summary judgment. At issue was a dispute arising out of discrepancy in some of the drawings, which had resulted in plaintiff's having completed less work, in defendant's view, than had been contracted for, with defendant therefore asserting that a reduction in the contract price was due. Plaintiff argued that the contract was a lump sum contract rather than a unit price contract, binding the parties even if the nature of the work varied from an initial estimate, and that force credit change orders, which had been used by defendant, were not authorized by the contract. The court determined that plaintiff had met its burden entitling it to summary judgment. The court explained that the contract broke down the costs into specific descriptions of work to be paid for as a lump sum and did not factor any of the work on a unit price basis. The court further pointed out that although the contract did provide for additional payments for extra work or changes, it had not provided a scheme for reductions in payment for the described work. Defendant had failed to produce evidence raising an issue of fact. Plaintiff's motion for summary judgment granted; defendant's cross-motion for summary judgment denied. Allstate Development, Inc. v. Dormitory Authority, Index No. 10247/2002, 3/9/06 (Fahey, J.).**

Contracts; construction; reformation; waiver and release; alleged mistake. Parties had entered into a subcontract whereby plaintiff was to manufacture and install elevators for the Downtown Path Restoration Program. Plaintiff sued to recover monies for extra work it claimed to have performed under the subcontract. Defendants (GC) moved for summary judgment, arguing that plaintiff had submitted its claim for additional costs after the due date and that the owner, the Port Authority, had rejected the change order request on the ground that the work involved was not extra. Thereafter, a waiver and release was prepared by defendants and signed by an official of plaintiff. This document referred to 16 items as being covered thereby whereas, plaintiff contended, one change notice, regarding the work at issue here, had been taken off the table for resolution later. Plaintiff's execution of the document, it contended, had been in error. The court ruled, however, that the signer of a document is deemed to be conclusively bound by its terms absent fraud, duress or other wrongful act. Plaintiff was held to be bound by the waiver and release as written. Complaint dismissed. Schindler Elevator Corp. v. Yonkers Tully Pegno Cos., Index No. 9240/2004, 3/15/06 (Rudolph, J.).**

Contracts; discretionary compensation; oral agreement. Misrepresentation. Promissory estoppel. Unjust enrichment. Quantum meruit. Case arising from a dispute over entitlement to a bonus based on legal business generated by former associate at law firm. Defendant firm moved to dismiss for failure to state a cause of action, arguing that it could not be in breach of contract concerning a discretionary bonus policy and its oral statements did not matter because an employer can change its policy for an at-will employee, which plaintiff had been. The court agreed that an employee generally has no enforceable right to compensation under a discretionary compensation or bonus plan. New York, however, has a longstanding policy against forfeiture of earned wages, the court stated. Whether a bonus is an integral part of a compensation package is an issue of fact. The court found in plaintiff's allegations a sustainable claim of breach of oral contract. The bonus plan may have been discretionary both as to amount and entitlement, but plaintiff allegedly had repeatedly been reassured that such discretion had already been exercised in her favor. When she had inquired about a cap she was, it could be reasonably inferred, secure in her belief that she was going to get some bonus. Defendant had failed to refute her contentions that the firm's conduct over time had promised a bonus. Nor did the fact that the bonus amount on a given case could not be determined until the case settled bar recovery under an implied contract; whether there were guidelines sufficient for a court to calculate a bonus was a factual issue. The court also sustained a claim of fraudulent misrepresentation. There was a rational basis for inferring that the alleged misrepresentations had been knowingly made and it was too early to resolve the factual issues that would show whether plaintiff's reliance had been reasonable or not. Similarly, the court found that plaintiff had adequately alleged promissory estoppel based on her reliance on defendant's clear and unambiguous promise of a reward if she took certain steps that led to fees for the firm. An unjust enrichment claim survived, too, the allegations indicating that plaintiff had conferred a benefit on the defendant for which it had not adequately compensated her. A quantum meruit claim was sufficiently stated. The court noted that quantum meruit recovery rests on a narrow exception to the rule that a party may not expect to be compensated for a benefit conferred gratuitously. Plaintiff met the exception. Her uncontradicted affidavit, detailing four years of conduct by defendant that had persuaded her to expend energies for the defendant's sake in return for a bonus, made clear her reasonable expectation of compensation. Motion to dismiss denied. Guggenheimer v. Bernstein Litowitz Berger & Grossman LLP, Index No. 600816/2005, 2/24/06 (Fried, J.).

Contracts; interpretation; clear and unambiguous terms; provision re additional payment to lenders under certain circumstances. Action arising out of debt financing of the holder of a power generation company. Plaintiffs held tranche A debt and defendants held tranche B debt. The dispute concerned complex provisions of agreements, including one regarding a "make-whole amount" intended to compensate institutional lenders if the loan were repaid prior to maturity at a time when interest rates were low. If an event of default were to occur, the loan could be accelerated. In that event, the borrower would have to pay the tranche B lenders the make-whole amount except where the event was not solely or in material part attributable to the actions or omissions of an obligor. A default had occurred and the loan had been accelerated. The parties presented conflicting arguments as to whether the make-whole amount could be available. The court held that there were no limitations on the exception to the make-whole provision notwithstanding other provisions addressing defaults which could occur without wrongful conduct by the borrower. The court stated that if the borrower had made no effort to find a substitute buyer for the electricity when the counter-party had declared bankruptcy, then the default might have been the borrower's fault, in which case the make-whole provision would likely be applicable, but not if the borrower had tried but been unable to find a substitute buyer. As there was an issue of fact on the borrower's efforts to find a substitute, defendants' motion for summary judgment was denied. Trilogy Portfolio Co. v. Transamerica Occidental Life Ins. Co., Index No. 601380/2005, 1/20/06 (Fried, J.).

Contracts; interpretation; clear and unambiguous writings; parol evidence; reformation; mutual mistake; fraud; presumption in favor of written agreements. Dispute between two former business partners over distribution of proceeds from settlement of an unrelated lawsuit. The parties had been former equal co-shareholders of a corporation. Plaintiff had sold his interest to defendant through a letter agreement and a separate stock purchase agreement. At the time of the execution of those agreements, the corporation had been a party to a lawsuit. The letter agreement had provided that in the event proceeds from that lawsuit were paid to the corporation, the purchaser would pay 50% thereof to the seller. The lawsuit had settled and defendants had received proceeds and paid some, but less than half, to plaintiff. Plaintiff contended that he had been entitled to the full 50% pursuant to the letter agreement. The court found that plaintiff had made a prima facie showing of entitlement to judgment. Defendants contended that plaintiff was entitled to less than 50% in that he had not been damaged by the payor's conduct after he had sold his shares and a reduction therefor was required and that a further reduction was required because the shareholders agreement between the parties had awarded the defendant additional compensation that had to be taken into account in calculating proper distribution of the proceeds. The court explained that both the letter and stock purchase agreements were clear and unambiguous, that parol evidence was therefore inadmissible to create an ambiguity, and that the agreements had clearly divided the proceeds of the lawsuit in half without the adjustments defendants claimed. The court further stated that defendants' contention that the proceeds should have been paid proportionate to ownership was contradicted by the plain language of the two agreements. The court next dismissed defendants' first counterclaim for declaratory judgment finding that it had been based on the same arguments raised in opposition to plaintiff's motion. As to a counterclaim for reformation of the letter agreement, defendants contended that the parties' intent had been to distribute the proceeds of the lawsuit as if the funds had been received in the years for which the corporation had incurred the damages. The counterclaim further alleged that the two agreements had been silent as to the means and manner of the accounting for the proceeds. The court dismissed that counterclaim finding, first, that it had been the intent of the parties to divide the proceeds equally, and, second, that the parties had had the benefit of counsel dealing at arms length. Moreover, defendants had failed to raise triable issues as to whether the parties had intended to distribute the proceeds in some other manner resulting from a mutual mistake, or whether the agreement, as a result of fraud, had not expressed the true intentions of the parties. Judgment for plaintiff. Salerno v. Odoari, Index No. 8702/2005, 12/23/05 (Rudolph, J.).**

Contracts; interpretation; non-competition; banking solicitation of different types of investment. Procedure; injunctive relief; contempt as proper relief for disregard of court order. Plaintiff, a community bank, moved to enjoin two defendants from violating a settlement order that had modified and confirmed terms of a non-compete agreement that had paid defendants millions of dollars. The agreement and order prohibited the defendants from soliciting business from plaintiff's customers or communicating with prospective investors or industry analysts during a "black-out" period. Defendants were permitted to solicit founders, early investors who invested at least $1 million, at any time. The plaintiffs alleged that the defendants had solicited one of plaintiff's major customers to become a founder of the new local bank they were starting and that a banking consultant on defendants' behalf had solicited one of its major shareholders to invest in the new venture and that these acts violated the agreement and order. An application to hold the defendants in contempt would be the appropriate means to redress disregard of a court order, but contempt was not the relief plaintiffs sought. The court found that the only mention of contempt was in the plaintiff's memorandum of law and that to hold the defendants in contempt on such notice would be to deny their due process rights. The order to show cause and supporting papers did not contain the warning required by Judiciary Law § 756. Consequently, the court considered whether the defendants' conduct was a breach of the agreement or order so that the plaintiffs could obtain injunctive relief. Defendants conceded that one of them had met and talked with the plaintiff's major customer at a charity function and defendants had later made a presentation regarding being a founder to the customer. He would not commit until he had determined how it would affect his relationship with the plaintiff and soon afterwards had declined. The defendants denied that they had offered the customer a directorship and the plaintiff submitted no affidavit from him saying otherwise. The court found no violation of the agreement or order here. The customer had wanted the presentation and the agreement and order did not limit whom the defendants could solicit as founders. The defendants had not violated the provision of the order that prohibited them from soliciting the plaintiff's customers to become their own, either. The plaintiff might speculate that as a founder of the new bank the major customer would become a customer of the new bank. But, the court stated, its failure to account for such a development when it had allowed in the agreement, confirmed by the order, unfettered solicitation of founders could not now be the basis of a claim. As to the financial consultant, he had had a phone conversation with the plaintiff's major shareholder and in it mentioned the new bank venture. A plaintiff officer had stated in an affidavit that the shareholder had told him that the financial consultant was soliciting investments in the new bank. However, it was incumbent on the plaintiff to show that the type of investment solicited was other than the founding investment permitted. Further, the affidavit was hearsay. Nor had the plaintiff established that the shareholder was an industry analyst, with whom the defendants also were prohibited from communicating during the blackout period. The court found that the contact did not violate the order or agreement. The court denied the plaintiff's request for an evidentiary hearing. The plaintiff's motion was denied and pursuant to the settlement order the defendants were entitled to legal fees. The court sealed the record to avoid disclosing the name of the customer and shareholder. New York Community Bancorp, Inc. v. Puorro, Index No. 16231/2005, 3/22/06 (Austin, J.).**

Contracts; oral and written; meeting of the minds on material terms; rescission. A recording company and corporation promoting music concerts sued hip-hop star 50 Cent, his booking and management agencies, and officers of these for breach of written and oral contract. Plaintiffs had paid 50 Cent $40,000 to perform in Baltimore pursuant to a written agreement and he had done so. Plaintiffs alleged that originally there had been an oral agreement for the star to perform 10 days earlier for only $25,000. Plaintiffs claimed that defendants had subsequently agreed to 50 Cent's performing in three Northeast venues for $40,000 per show and defendants acknowledged discussion of this but denied agreement. Plaintiffs contended that they had sent the booking agency $50,000 toward payment but the record belied this. Plaintiffs had unsigned contracts for two of the Northeast performances. Subsequently, the parties had entered into a written agreement for 50 Cent to perform in Idaho on a date certain. Soon afterward, plaintiffs had contacted defendant booking agent to cancel the agreement. Defendant had promised to return the $50,000 deposit. Plaintiffs' attorney had faxed him a letter memorializing the oral cancellation agreement and asking for the deposit back "a.s.a.p." A few days later defendants had written to plaintiffs that they would return the $50,000 that day, but had not. The next day plaintiffs' attorney had written that because the deposit had not been refunded and plaintiffs had detrimentally relied on the contract to perform, the "offer" in the faxed cancellation letter was withdrawn. The refund was promptly wired. In the interval between the faxed cancellation letter and refund, an individual plaintiff had received a letter from William Morris saying that the agency was 50 Cent's exclusive agent, plaintiff had been "wrongfully promoting" the concert, 50 Cent had "never agreed to perform" at it, and William Morris's rights had been violated. Plaintiffs contended that this letter had contributed to the demise of the Idaho concert. The court noted that the letter had come after plaintiffs' attorney had set the cancellation down in his letter. There was no evidence that any defendant had procured the William Morris letter, and, further, plaintiffs had dealt with defendant booking agent to book the Baltimore concert. There also was no evidence that defendants had breached an oral agreement for 50 Cent to have performed in Baltimore some days before he did, the court found. The parties might have discussed the earlier date, but the written contract provided the later date. As to the three Northeast concerts, plaintiffs had only two unsigned contracts and no concrete evidence that anything more than discussions had occurred. In both instances, the subsequent written contracts had indicated that the parties intended to perform pursuant to written, not oral, contracts. Plaintiffs had not secured contracts with arenas in the Northeast cities, nor could they show they had made payments to any arenas. A venue presumably would not enter into a performance contract with promoters without having a written contract signed by artist or agent. Plaintiffs argued that they had a right to sue for breach of the written agreement for the Idaho concert on the theory that their attorney's letter rescinding the cancellation had voided the cancellation. They were wrong on both counts. To cancel a rescission a party must specifically reserve the right to do so, the court stated. Although the attorney had conditioned the rescission on the refund, the refund had been wired the next day and plaintiffs had not objected to getting it. Nor had they proceeded to fulfill their obligations under the contract. Complaint dismissed. Milan Music, Inc. v. Emmel Communications Bookings, Inc., Index No. 601306/2003, 2/20/06 (Freedman, J.).

Contracts; restrictive covenant; test of reasonableness; trade secrets. Two sophisticated programmers had left plaintiff to work for a similar business. Before arriving in the US, the programmers had signed "offer letters" from plaintiff providing that they would sign a standard employment agreement. The offer letter also stated some of the agreement's terms. The programmers had never signed the agreement. The plaintiff sued them and their new employer alleging breach of a restrictive covenant, unauthorized use of trade secrets and other wrongs. Defendants asserted that the (never signed) employment agreement was invalid and moved for summary judgment. The court, while noting that New York has long held that a contract may bind a party even if it did not sign it, decided that the defendants' demonstrated unwillingness to sign the agreement barred its enforcement. However, the signed offer letter did constitute a valid contract. Plaintiff alleged that defendants had breached its provision against working for any business within a 60-mile radius that supplied and serviced the same software plaintiff did. The court applied to the letter's terms the test of reasonableness established in BDO Seidman. The court considered the geographic scope of the restriction. Plaintiff failed to show that it was necessary to restrict the defendants, as the offer letter did, from working almost anywhere in the Northeast or in any other city where plaintiff had an office. Plaintiff also said that it possessed trade secrets, pointing to modifications it custom-made to Microsoft software that shaped it to different clients' needs. Defendants argued that the software code was proprietary to Microsoft, not plaintiff, but the court agreed that it was not the code but the customizations made to it that were in question, and found that the plaintiff's agreement governing its business with the software made clear that these customizations belonged to it. This did not mean that they were a secret, though. Plaintiff presented no evidence that the information involved was not generally known outside itself, that it guarded the information, or that the information met other measures of secrecy. Defendants argued that plaintiff did not even allege that trade secrets had been stolen. Further, plaintiff did not argue that the restrictions were necessary to prevent the defendants from disclosing confidential information. Plaintiff also had not shown that the restrictions were necessary to prevent the loss of unique or special employees. Plaintiff's president and former vice-president had said in deposition that defendants were neither. Plaintiff tried to work around this with a conjecture that, if there were no programmers immediately able to work with the software at the defendants' high level, defendants could be called unique. But plaintiff did not rebut defendants' own assertion that they were not unique. Plaintiff was right that protection from exploitation of clients' goodwill is a legitimate business interest, but failed to show how defendants threatened such exploitation. Finally, the restrictions were unreasonable because, defendants asserted, enforcement would stunt healthy competition. Plaintiff failed to address this or hardship to the employees. As plaintiff failed to demonstrate any issue of fact, the restrictions could not be enforced. Other claims based on an enforceable covenant failed. Summary judgment granted. Business Management Intl. v. Reynisson, Index No. 602538/2004, 1/27/06 (Ramos, J.).

Corporations; internal affairs; governing law; inspection of corporate records; fiduciary duty claims; derivative claims; limitation of director liability (Del. Corp. Law 102); pleading; business judgment rule; demand on board; futility. Procedure; statute of limitations. Petition arising out of alleged acts of wrongdoing with regard to a private Delaware corporation of which petitioners had been shareholders. Generally, the law of the state of incorporation applies. Issues related to the internal affairs of a corporation are decided under that law. A derivative claim under BCL 626, though allowed by BCL 1319 for jurisdictional purposes, must still be adjudicated by application of Delaware law. A claim for breach of fiduciary duty is governed by the law of the state of incorporation. Claims under BCL 624, 715 and 717 failed to state a claim. In any case, Delaware law required dismissal. The petition demanded inspection of corporate books and records, but failed to meet the requirements of Delaware law (Del. Corp. Law 220) and, further, surviving records had been made available to one petitioner some years before, after the corporation had ceased operations. The court held that claims for breach of fiduciary duty and an accounting should have been brought as derivative claims (Tooley). In addition, Delaware law permits the corporation to eliminate the personal liability of its directors for certain breaches of fiduciary duty (Corp. Law 102(b)(7)). The articles here contained such a provision so claims against respondents (other than two alleged to have engaged in misconduct) would have to be dismissed. As to the claims against the two, the court found them conclusory. Unrefuted independent audit reports supported respondents' contention that they had not improperly profited. The business judgment rule bolstered them and the petitioners had failed to rebut the presumption. A partially derivative claim under BCL 626 failed under Delaware law. The claim did not set forth a procedurally sufficient demand in that petitioners did not make specific assertions of wrongdoing on which the corporation could act. Petitioners merely asserted in essence that they wished to know why the company had gone out of business. There was also no proof that a demand would have been futile. Moreover, breach of fiduciary duty claims under Delaware law must be brought within three years and that law governed as the corporation was a non-resident (CPLR 202). The claims were untimely. A claim for appointment of a receiver was also untimely (BCL 1218), including under Delaware law (except that petitioners could apply to the Court of Chancery seeking an appointment upon showing good cause for the late application). Petition dismissed. Potter v. Arrington, Index No. 13028/2005, 2/6/06 (Fisher, J.).**

Corporations; Limited Liability Corporation Law 606, 702; withdrawal; absence of operating agreement. Petition seeking dissolution of LLC. The papers established discord among the three partners. Petitioner argued that when a member expresses a desire to sever a relationship with the LLC due to "untenable circumstances," LLCL 606(a) requires dissolution if there is, as here, no operating agreement. The court disagreed. Although Section 606(a) requires dissolution and winding up on withdrawal of a member, withdrawal is not available for the asking, especially absent an operating agreement. Rather, on withdrawal, the LLC is to continue absent a majority vote otherwise (not the case here) (Sec. 702 (b)); absent an operating agreement, dissolution can only be had when it is not "reasonably practicable" to continue. The LLC here was thriving. The court examined the legislative history, recognizing the dilemma faced by those such as petitioner. The court concluded that the legislative changes involved were not the result of oversight. Further, the remedy is discretionary. The absence of an exit mechanism bears on the appropriateness of dissolution, and the absence of an agreement here would leave the court no choice but to apply the strict Section 702 standard. Therefore, petitioner had failed to raise an issue warranting a trial (CPLR 400). Petition dismissed. In re Horning, Index No. 00477/2006, 3/21/06 (Fisher, J.).**

Corporations; Not-For-Profit Corporation Law § 511; sale of assets; reimbursement provision; validity; fiduciary duty of board. This matter arose out of efforts by the Manhattan Eye, Ear & Throat Hospital to sell its assets to Memorial Sloan Kettering Cancer Center and another purchaser. The court had denied a petition under N-PCL 511, finding that the terms were not fair and reasonable and that the purposes of the corporation or the interests of its members would not be advanced. Thereafter, Lenox Hill Hospital had agreed to take over the hospital. This case was commenced by the original putative purchaser asserting breach of contract and other wrongs. Plaintiff claimed that under a provision in the original agreement, the hospital was obligated to pay $1.6 million if the transaction were not to be approved. After a dismissal, the Court of Appeals had remanded the case, requiring the court to rule, under the Section 511(d) standard, as to whether the provision was fair and reasonable and in furtherance of the hospital's purpose. After extensive review of the facts, the court held that the provision was neither. The court found that there was nothing in the record to show that the board had been aware of or considered the provision. The provision would have had a significant adverse effect on the hospital's precarious finances, and since the transaction had been uncertain it should have been apparent that the provision might well have been activated. The provision was thus not fair or reasonable. Further, the provision was part of an agreement that contained a low price for the assets, for which there was not a good reason, nor was there a need to rush, the court found. In addition, the proposed sale would not have advanced the hospital's purposes; had the board not abdicated its fiduciary responsibility, the challenged provision would not have existed. The provision was not valid and the putative purchaser was not entitled to reimbursement. Case dismissed. 64th Associates, LLC v. Manhattan Eye, Ear & Throat Hospital, Index No. 600639/2001, 3/27/06 (Fried, J.).

Insurance; business interruption due to 9/11; partial suspension; damage to third-party property; rebuilding of WTC site; restriction of access; loss of attraction; plain or ambiguous language; dependent property provision. Insurance coverage dispute arising from the September 11 attacks on the World Trade Center (WTC). Insurers had already paid the owner of Brooks Brothers, a high-end clothing retailer, $3.5 million for physical damage and business interruption losses at its store at One Liberty Plaza. In this action declaratory relief was sought with respect to coverage provided the former owner of Brooks Brothers. The insurers sought a ruling that the retailer's coverage was limited to the money it had already received, covering losses sustained during the one year it had been closed after the attacks plus 30 days. The retailer contended that, under the policies at issue, it was entitled to coverage through 2009, the point at which the WTC was expected to be rebuilt. It argued that the policies' reference to necessary suspension of operations due to damage to nearby third-party property had to tie coverage to restoration of the WTC or else the policies would contain unnecessary language. The Court held that this interpretation was not the plain meaning of the language. The provisions covered the retailer for its own loss that resulted from an incident in the vicinity of its property, not for loss to a third party's property, the court said. Citing a Southern District case, the court stated that it would be unreasonable to think that the restoration period was tied to reconstruction of the WTC, over which neither party had any control. The court also found that the retailer tried improperly to read the policy's plain language defining a "necessary suspension" as "total cessation," as including a partial suspension or loss of customer attraction. Furthermore, the court ruled that the retailer was not entitled to 36 months of extended coverage as provided in the worldwide master policy. The extended coverage applied only to losses caused by an incident at the retailer's premises, not income losses due to damage to the WTC complex. A "dependent property" provision did not assist the retailer since WTC businesses had not supplied goods or services to Brooks; the fact that employees who worked in the WTC complex had purchased clothing there did not change the outcome. The retailer also failed to persuade the court that additional coverage was due under restriction of access and loss of attraction provisions. Pursuant to these the retailer was entitled to up to 12 months of additional coverage if damage to property in its vicinity decreased the number of customers attracted to its vicinity. The retailer argued that the area's loss of a transportation hub and added barriers hindered access. It asserted that the "incident" triggering coverage had taken place over the several months when lingering contaminants had filled the air. The court recognized that the retailer's revenues might have fallen, but found that conditions did not prevent customers from entering the store and that the master policy defined the incident as the day that the retailer's real property had been damaged. The court relied on other cases that interpreted similar provisions as not furnishing coverage that lasts until the WTC is rebuilt. It distinguished cases that the retailer cited, noting that they involved insureds dependent on their WTC location, such as one in the business of providing temporary office space in the towers. Here the policies related to the retailer's 235 worldwide locations, not specifically the WTC one. Despite diminished profits, the retailer continued to exist at the WTC. The court declined to consider extrinsic evidence since the language was unambiguous. Royal Indemnity Co. v. Retail Brand Alliance, Inc., Index No. 601164/2004, 2/23/06 (Freedman, J.).

Joint ventures; fiduciary duty; anti-assignment clause; assignment versus sub-license; preliminary injunction. Arbitration; exception for preliminary injunctions. Procedure; sealing. Action arising out of joint venture agreement between plaintiff and the main defendant to develop plaintiff's medical technology. The technology had been licensed to defendant, which was bound by confidentiality requirements. Defendant had entered into an agreement with the co-defendant whereby the latter would develop certain products. Plaintiff claimed that the co-defendant was a competitor and moved for a preliminary injunction. Plaintiff contended that the agreement was an assignment, which was barred absent plaintiff's consent. If the agreement was a sublicense, defendant could transfer confidential information to co-defendant. Since the agreements here involved the grant of rights to patents, the issue, the court stated, should be resolved by generally-accepted patent principles. The court found that defendant had intended to effect an assignment of substantially all its rights to the technology in question, which was exclusive to the co-defendant and covered the whole US. Under Waterman, the court stated, that would appear to be an assignment. Defendant had ceded control and development to the co-defendant. Defendant was prohibited from taking certain action without the co-defendant's approval and had granted to co-defendant the right to sue for infringement. The court rejected the argument that defendant's retention of discretion over the co-defendant's sublicensing precluded an assignment. A limited accounting provision likewise did not constitute a substantial proprietary right, nor did a reversionary interest. Since the co-defendant was required to indemnify defendant, defendant's possible liability to plaintiff would not affect the result. Thus, the court held that there was a likelihood that plaintiff would succeed on the argument that defendant had breached its fiduciary duty and the anti-assignment clause by assignment to co-defendant. The risk of irreparable harm was shown in that confidential information had been transferred. The balance of equities favored plaintiff. Injunction granted. Defendant cross-moved to compel arbitration. The court ruled that the agreement carved out of the ADR process claims for preliminary injunctions to protect the confidential information. Records unsealed in view of lack of any specific need for sealing that would overcome the general interest in open court records. Biosynexus, Inc. v. Glaxo Group Ltd., Index No. 604485/2005, 3/12/06 (Fried, J.).**

oint ventures; fiduciary duty; derivative claims. Misrepresentation; justifiable reliance; duty to inquire. Action arising out of joint venture. Plaintiffs alleged that defendants had had and adhered to an undisclosed policy regarding the use of music in compilations, which allegedly preferred defendants' interests over those of the venture. Defendants moved for summary judgment, asserting lack of justifiable reliance. In cases of sophisticated business entities, a plaintiff cannot claim justifiable reliance where plaintiff had access to critical information but failed to make use of it. But whether a duty to inquire is triggered is a fact-based question. The court held that the issue, under the circumstances, remained one for the trier of fact. Defendants also urged that various claims plaintiffs made were derivative and that they had been released by the Chapter 7 Trustee in the bankruptcy of the joint venture LLC, where plaintiffs had had an opportunity to object but had not done so. The court ruled that Delaware law on the question would apply to the LLC and that, under Tooley, plaintiffs' claims were derivative as plaintiffs' damages flowed from their interest in the LLC. The court held the same under NY and Delaware law as to plaintiffs' claim that a defendant had violated fiduciary duties as a joint venture partner, plaintiffs having failed to explain what the asserted independent duty of the partner was. Partial summary judgment granted. Finkelstein v. Warner Music Group, Index No. 604332/2002, 2/21/06 (Moskowitz, J.)

Judicial dissolution; laches; statute of limitations. Partnership law; extension; dissolution. Petitioners moved for judicial dissolution of a limited partnership. The partnership had been formed in 1972 for the purpose of buying property. The partnership's agreement had provided that it was to be dissolved upon the earlier of April 15, 1997 or the date on which the property was sold. The 1972 agreement had been amended three times. A 1989 amendment extended the duration of the partnership to the earlier of December 31, 2008 or the date the property was sold. Petitioner moved on the grounds that the partnership had been dissolved in accordance with the 1972 agreement on April 15, 1997. Respondents cross-moved to dismiss claiming that the 1989 agreement extended the partnership through December of 2008 and that petitioner's requested relief was barred by the statute of limitations and laches. The court first determined that since the partnership had been formed prior to July 1, 1991 and apparently had not adopted the Revised Limited Partnership Law as its governing stature, the action was governed by Article Eight of the Partnership Law. Petitioner limited partner had a right to bring this proceeding (Part. Law § 99 (1)). The court explained that under Part. Law § 45(2), when the partnership continued to do business after the original expiration date, it became a partnership-at-will and its partners became partners-at-will. The court then dismissed respondent's cross-motion to dismiss explaining that as a partnership-at-will, the partnership was dissolved when petitioner brought the instant proceeding so that the action would not be barred by the statute of limitations. The court found that the action was not barred by laches since none of the respondents had asserted any prejudice. Respondents argued that an agreement subsequent to the original had extended the partnership into the future. The subsequent amendment had not been signed by all limited partners (Part. Law §114(1)). A provision of the partnership agreement had required the limited partners to designate the managing general partners as attorneys-in-fact to execute amendments, but the latter had not signed on behalf of the former. Thus, the amendment had not been properly executed. Another provision would have allowed an amendment where the holders of a majority of the limited partnership capital signed, but respondents had not submitted proof to support this. If the partnership had been extended, petitioner could dissolve it by showing a reason (Part. Law § 63). No basis for dissolution had been shown. Discovery was ordered. In re Schlesinger, Index No. 16654/2005, 3/31/06 (Austin, J.).**

Judiciary Law 487; statute of limitations; CPLR 214(6); relation back (CPLR 203(f)); sufficiency of pleading; intent; misrepresentation. Procedure; motion for summary judgment; preliminary conference order deadline; untimeliness; issues of fact; piercing corporate veil. Former client from which law firm sought fees counterclaimed that attorneys had breached their duty to client by failing to disclose that the firm represented a non-party business that held a controlling interest in another company with which the client was in litigation in Federal court, represented by the firm. The client sought leave to amend to assert a claim under Judiciary Law 487 based upon certain deposition testimony. The client contended that a six-year statute of limitations applied. The client relied upon a First Department case, but the court agreed with the firm that a subsequent amendment to CPLR 214(6) regarding malpractice controlled. The court rejected as untenable the client's reliance upon a subsequent decision in the same litigation as had produced the pre-amendment ruling, finding that that was but a continuation of the same matter and the issue by then had been law of the case. The statute had been intended to give lawyers and others the same repose as doctors had then had. Technically, the amendment was stale. However, the court held further that the amendment related back and was timely (CPLR 203(f)). A 487 claim is basically equivalent to a fraud or fraudulent inducement claim. The court held that the pleading of the claim was legally insufficient. The client relied on deposition testimony that a lawyer could have seen conflict sheets, but that did not provide any indication that there had been any intent to deceive. At most, the client had a mere suspicion of fraud. Further, the fact that the firm may have followed its conflicts process improperly did not constitute an affirmative misrepresentation to the court. The claim was conclusory. Amendment denied. Defendants sought summary judgment on a piercing claim. Plaintiff responded that the motion had been made over three weeks past the court-ordered (PC order) deadline of 60 days from note of issue. The court agreed, citing Kihl, Miceli and Brill and pointing out the need for court orders to be taken seriously if the integrity of the judicial system is to be maintained. The fact that the motion was purportedly a cross-motion did not matter. In any event, the motion would have to be denied since evidence regarding possible domination by the individuals raised issues of fact. Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., Index No. 100630/2003, 3/21/06 (Lowe, J.).

Martin Act; "stock spinning" scheme; materiality; fraudulent conduct deceiving public; parens patriae; fiduciary duty; conflict between defendant and the corporation; self-dealing; duty to disclose IPO purchases; inducing or promoting purchase or sale; preemption. Unjust enrichment. Exec. Law 63(12); repeated fraudulent activity. Procedure; personal jurisdiction; stock accounts and trading therein in NY; CPLR 302 (a)(1); due process. Damages. Loss causation. Action by the Attorney General alleging that defendants (of whom one remained) had received illicit compensation for participating in a "stock spinning" scheme involving Jack Grubman of Salomon Smith Barney. In order to ensure that various telecom companies would retain SSB as an investment banker, Grubman allegedly would divert IPO shares to accounts of defendants, executives of the companies, maintained by SSB. Grubman and others would tout the IPO so as to drive up the price; defendants would sell the shares at inflated prices. In return for these personal benefits, defendants would cause their companies to retain SSB. Plaintiff asserted claims of fraudulent acts against defendant under the Martin Act and on other theories. Plaintiff argued that defendant was in an undisclosed (to the board or shareholders) conflict of interest that tended to deceive the public. Since defendant admitted having profited from "hot IPO's" and that he had made no disclosure thereof to his company's board or shareholders, a question of law was presented - - whether such conduct violates the Act. The court looked to Federal securities law for persuasive authority on this point. It found that non-disclosure of receipt of "hot IPO" stock was material within the Act and, further, that the non-disclosures were fraudulent since they tended to deceive the purchasing public. This was enough to prove the claims against defendant. In so concluding, the court rejected arguments by defendant. The court held that the fact that the corporation's shareholders might have discharged their claims against defendant as part of a bankruptcy reorganization would not preclude the State from proceeding under the Act. Defendant contended that plaintiff could not proceed under parens patriae to bring any claims on behalf of a corporation, but the court held that the Act and Exec. Law 63(12) afforded the State independent bases to proceed. The court rejected defendant's argument that the law did not allow the State to "bootstrap" claims for breach of fiduciary duty (belonging to the shareholders) into a securities fraud claim. Defendant relied on Federal law (e.g., Santa Fe), but the court disagreed with defendant's reading of the cases. Defendant next argued that the IPO purchases were immaterial because there was no conflict between defendant and the corporation. First, the court found persuasive Second Circuit authority that undisclosed conflicts would be material even absent a shareholder vote. Defendant argued that he had not usurped corporate opportunities, nor had there been any quid pro quo arrangements. But the court ruled that the Act does not require the State to prove self-dealing, and that defendant's points were irrelevant. Defendant next urged that he did not have a duty to disclose his IPO purchases, but the court held that he did because of his fiduciary obligations as controlling shareholder, board president and CEO. He may have breached his fiduciary duty, but the Act did not require the State to establish all the elements of such a claim. Further, defendant contended that the plaintiff had failed to prove that his purchases had "induced or promoted" the purchase or sale of the stock in violation of the Act. The court held, however, that his participation in the "stock spinning" scheme was sufficient to bring him within reach of the Act. This situation was analogous to cases of insider trading, which have been held to be covered by the Act. That the public did not engage in the purchase or sale of the stock did not assist defendant in view of the language of the Act (GBL 352-c(l)) and since there is no privity requirement. Defendant argued that Federal law preempted the Act. However, defendant failed to cite any Federal law or rule governing the duty to disclose to shareholders or board in his fiduciary capacity, and the court cited Santa Fe as leaving such matters to the states. The State was entitled to summary judgment on the Martin Act claims. On an unjust enrichment claim, the court ruled that the state was asserting the claim not on behalf of the corporation's shareholders, but the public. The court also rejected defendant's argument premised on the lack of direct dealing between the State and defendant since that is not a requirement. The court held, however, that the AG had failed to prove a necessary component of the claim in that the complaint referred to defendant's benefit as deriving from the investing public's loss of a fair marketplace, which the court found insufficient. The State also pressed an Exec. 63 (12) claim based on alleged repeated fraudulent activity. The court found that there had been repeated fraudulent acts in violation of the Law. Defendant sought summary judgment on several grounds. Defendant, a non-domiciliary, argued that there was no personal jurisdiction over him. As to transaction of business (CPLR 302 (a)(l)), the court cited the fact that defendant had maintained eight brokerage accounts with Salomon in New York through which he had traded millions of dollars of securities. The relevant agreements provided that New York law would control. The court further found that the claims here were substantially related to defendant's use of accounts in New York and obtaining margin loans secured by the hot stock. The statute was therefore satisfied. On the due process issue, the court found that a party that conducts the type and volume of purposeful business here that defendant did could reasonably expect to be haled into court here. Thus, there were sufficient minimum contacts. The court also held that requiring defendant to defend the case in New York would not offend traditional notions of fair play and substantial justice. The court rejected defendant's argument that no restitution could be ordered because of lack of proof of the amounts derived from the fraudulent activity and ordered a hearing. Defendant contended, further, that damages could not be obtained because they had not been pled, but the court ruled that no authority limited the State to whatever damages were specified in the original complaint in an Exec. Law 63 (12) claim. Defendant cited Federal and state authority in urging that the State had failed to establish loss causation, but the court distinguished the cases and stated that loss causation was not an element of an Exec. Law claim. Motions granted in part. State of New York v. McLeod, Index No. 403855/2002, 2/9/06 (Lowe, J.).

Misrepresentation; reliance. Contracts; breach; oral modification; conduct unequivocally referable; guaranty; interpretation; material breach. Trade secrets; misappropriation. Damages; lost profits; contemplation. Defendant Kinko's had, plaintiffs claimed, improperly terminated a "store in store" agreement without written notice. Pursuant to the agreement, one plaintiff would pay Kinko's rent and revenue share payments. Early on, Kinko's and plaintiff had discussed the possibility of Kinko's acquiring plaintiff, but that had not occurred. Dispute arose over timeliness of rent and revenue share payments and at a certain point Kinko's had unilaterally terminated the agreement. Plaintiffs had sued Kinko's, Kinko's parent, FedEx, and its CEO, who had won dismissal of several claims. Defendants now moved to dismiss the rest of the complaint, including fraud, breach of contract and misappropriation of trade secrets claims. To show defendants' intent to deceive, plaintiffs pointed to the discrepancy between a letter expressing concern over a potential acquisition by another company and an internal email in which Kinko's patted itself on the back for not investing further in plaintiff. But, the court noted, Kinko's had indisputably communicated to plaintiffs that it would not deepen its investment before plaintiffs had declined the other offer. Evidence showed that plaintiffs knew that nothing in the agreement or the parties' relationship precluded them from accepting the second company's offer. The fraud claim was dismissed for lack of reliance. On a breach of contract claim, defendants argued that they had terminated the agreement due to material breach. Plaintiffs asserted that the parties had orally added an invoicing requirement and that their late rental payments evinced a wait for proper invoices. The agreement had a provision barring oral modifications, but conduct unequivocally referable to an alleged oral modification may be the basis for a claim. Here, Kinko's had sent invoices for a period and stopped. Plaintiffs had continued to make payments without invoices, though. The court found that this conduct consistent with the written language, occurring subsequent to the alleged modification, defeated any contention of that modification and any argument that plaintiffs had detrimentally relied on it. However, Kinko's had failed to strictly impose the rent deadline. The court denied summary judgment on the breach of contract claim insofar as there was an issue of fact whether defendants had waived the right to impose the deadline. On a guaranty, plaintiffs argued that Kinko's had failed to fulfill the obligation it had to give written notice and an opportunity to cure. The guaranty provided that if one plaintiff defaulted the guarantor would provide full performance on its behalf, Kinko's written notice being the trigger. The court found that Kinko's could choose to "pull the trigger" but was not required to. By terminating, Kinko's had waived its right to pull the trigger. The court therefore was dealing with a circumstance in which the obligor plaintiff sought to invoke rights against the obligee, Kinko's, for not enforcing its rights against the guarantor. But a guaranty is a separate contract between guarantor and obligee, and the plaintiff had no implicit right to compel performance. The agreement itself did contain a written notice provision. In a previous decision the court had found that it would not be enforceable if there were a material breach. The issue was whether the plaintiff's rent delinquency and failure to pay a month was a material breach, substantially defeating the purpose of the agreement. The rent and revenue payments were certainly the primary consideration under the agreement, but Kinko's had repeatedly accepted late payments and had not shown how failure to timely receive the last missing month had substantially defeated the parties' aim in contracting. Also, an internal Kinko's email discussing the termination five days before its occurrence did not mention late payments among factors. Given the factual issue, the court denied summary judgment as to whether there had been a material breach allowing termination without notification. Regarding misappropriation of trade secrets, one plaintiff and Kinko's had executed a non-disclosure agreement and discovery had turned up that FedEx had acquired a document concerning the plaintiff's operations marked "proprietary" and "confidential" on its face. Since evidence tending to establish possession of confidential material raised a triable issue of fact regarding a misappropriation claim, and it would not be appropriate on a summary judgment motion to determine whether the document actually was a trade secret, summary judgment was denied as to this claim. Finally, the court considered whether plaintiffs could use their lost profit projections as a measure of damages. Damages for lost profits can be recovered in New York if the damages were caused by the breach, can be reliably measured, and were within the contemplation of the parties. Here, there was no doubt that plaintiffs had lost potential profits as a direct result of the end of the "store-in-store" endeavor. However, there was no evidence that the parties had contemplated such loss as a basis for damages or that Kinko's could be held liable therefor. Here, the agreement's only reference to future profits obligated one plaintiff to pay a certain share of revenue profits to Kinko's, and so, as far as it reflected the parties' contemplation of liability for future profits, limited recovery to Kinko's. Therefore, plaintiffs could not introduce lost profit projections as evidence of damages. Awards.com v. Kinko's, Inc., Index No. 603105/2003, 1/17/06 (Ramos, J.).

Preliminary injunctions; restrictive covenants; franchise agreement; covenants in documents for other businesses. Plaintiff, successor in interest to Sterling Optical Centers, moved for an order granting reconsideration of a prior order, and granting a preliminary injunction enjoining defendants from running a non-Sterling Optical store at the former site of a Sterling Optical store. Plaintiff had terminated the franchise agreement. Thereafter, defendants had continued to operate a store at the same location under the Sterling Optical name. Defendant subsequently went to court and secured an injunctive order. A restrictive covenant provided that defendants would not open such a store for a period of two years within a five-mile radius. Plaintiff further alleged that, since the prior order, defendants had opened or were about to open a non-Sterling Optical store in the same mall directly across from Sterling Optical's former location. Defendants argued that since the court's prior order had not explicitly enjoined them from opening a non-Sterling Optical store at another location in the mall, their actions were permissible. The court first denied plaintiff's motion to reargue since the court had not misapprehended the law or facts, and plaintiff's instant application was based on new facts, specifically that defendants had opened or were about to open the new store. The court then considered the motion as one for a preliminary injunction. The court found that the issuance of a preliminary injunction enjoining defendants from operating the non-Sterling store at a location directly across from the old store was appropriate as defendants' actions were violative of a restrictive covenant in two other leases they held. In any case, plaintiff would be entitled to relief since a franchiser has a right to protect its trade secrets against misuse in a non-franchise operation. A co-defendant, though having no interest in the other stores, could not be allowed to obtain Sterling information indirectly and benefit therefrom. Plaintiff had met its burden. Renewal was not proper since an applicant must show that the facts had been in existence, not the case here. Plaintiff had met its burden. Motion for a preliminary injunction granted; undertaking to be posted. Emerging Vision, Inc. v. Main Place Optical Inc., Index No. 16088/2005, 2/24/06 (Austin, J.).**

Procedure; order of attachment; motion to confirm; timeliness (CPLR 6211 (b)). Plaintiff alleged that defendant, a former employee, had embezzled and converted approximately $400,000 while in the company's employ. Plaintiff had obtained an ex parte of attachment. Plaintiff moved to confirm the order of attachment. Defendant cross-moved to vacate. At issue was whether the order to show cause to confirm had been timely made. Plaintiff was required to "move" within five days after levy (CPLR 6211(b)). Here, plaintiff had submitted an order to show cause on Friday and, on the following Monday, at the request of the court, had appeared and added to it a statement regarding absence of a prior application for the same or similar relief. The proposed order was marked as having been resubmitted that day. But it was not granted until two days later, more than five days after the levy. A motion is made when served, the court stated (CPLR 2211). Delivery to the courthouse for signature is not the equivalent and taking all possible steps to ensure filing does not suffice. Service establishes compliance with 6211(b) even if the order is later returned by the clerk for procedural defects. The court has no discretion to extend the five-day period. Motion denied; cross-motion granted. Voice Communications, Inc. v. Bello, Index No. 14813/2005, 3/24/06 (Austin, J.).**

Procedure; personal jurisdiction; contract to be performed out-of-state arranged through phone, fax and e-mail contacts; doing business (CPLR 301); transacting business (CPLR 302(a) (1)); forum non conveniens. Pleading; breach of contract; professional malpractice. Action by Kings County business against Delaware corporation headquartered in Illinois. Defendant was retained to conduct an animal welfare audit of the Ohio slaughterhouse facility of plaintiff's subsidiary. The court held that defendant's contacts with New York were not sufficiently systematic or continuous to support jurisdiction pursuant to CPLR 301. Defendant had no office or employees here and some audits conducted here did not establish the required continuity of presence. As to transacting business (CPLR 302(a)(1)), the mere interstate negotiation of a contract via phone, fax or e-mail, without more, is generally insufficient to confer jurisdiction. The court held that defendant had engaged in sufficient purposeful activity to support jurisdiction. The Ohio audit had been arranged solely through phone, fax and e-mail communications between plaintiff and defendant. Although the contract had not been negotiated or performed in New York, its connection to an ongoing business relationship between plaintiff and defendant (audits by defendant at plaintiff's Kings facility) sufficed, the court ruled, to warrant exercise of jurisdiction. The action arose out of losses suffered by plaintiff when it lost certification needed to supply product to a key purchaser due to defendant's alleged improper audit. With regard to forum non conveniens, New York was a suitable forum in view of the ongoing relationship of the parties whereby defendant did conduct some audits for plaintiff in Kings to assure plaintiff's retaining its certification. Since plaintiff allegedly suffered damages here due to defendant's work in Ohio, New York had an interest in adjudicating the disputes. New York law would apply under the grouping of contacts test. The court determined that plaintiff had adequately set forth claims for breach of contract and professional negligence. Motion to dismiss denied. Atlantic Veal & Lamb, Inc. v. Silliker, Inc., Index No. 22029/2005, 3/21/06 (Demarest, J.).**

Procedure; statute of limitations; equitable recoupment; CPLR 203(d). Plaintiff and defendant had entered into a contract whereby plaintiff was to provide consulting services to assist in distribution of movies. Defendant counterclaimed that plaintiff had failed to render services during the initial phase of their arrangement. Plaintiff responded that the counterclaims were time barred. Defendant relied upon CPLR 203(d). Here the claims of plaintiff and the counterclaims arose out of the same contract, but equitable recoupment is not available where the claims do not arise from the same transaction, the court stated. Reviewing the contract, the court concluded that the claims arose out of different transactions. Plaintiff relied upon certain paragraphs of the agreement covering one period and defendant relied on other provisions covering another period. The performances were to be compartmentalized. Summary judgment for plaintiff. Laloggia v. Document Security Systems, Inc., Index No. 08307/2005, 3/22/06 (Fisher, J.).**

Trade defamation; disparagement; truth; opinion; quality of goods and services; harm to plaintiff. Employment law; duty of loyalty; solicitation of employees; dishonest means; competition; conspiracy to harm. The country's largest bridal wear retailer and department store of which it was a division had proposed a partnership to a small manufacturer of expensive bridal wear, which had declined. Subsequently, the small manufacturer sued on claims of defamation, trade disparagement, and breach of the duty of loyalty by plaintiff's former marketing director, who had joined the big retailer. Before leaving plaintiff this defendant had allegedly solicited some of plaintiff's employees to move with him. Shortly after leaving, he had made comments to one of plaintiff's customers implying that plaintiff would not be able to service its customers adequately. Defendant moved to dismiss the claims. In trade defamation, the court said, the defamatory statement must play a material and substantial part in inducing others not to deal with plaintiff, which must demonstrate damages, except if the statements impugned its basic integrity or creditworthiness and were thus defamatory per se. In disparagement the statement must denigrate the quality of goods or services and plaintiff must show both malice and special damages. Defendant's statements did not amount to either trade defamation or disparagement. They were true to the extent that the big retailer had, in fact, doubled defendant's salary. The statements about the level of satisfaction of plaintiff's employees were only opinion, not bearing on plaintiff's goods or services. And plaintiff failed to allege that the statements had caused its business any damage. The breach claim failed also. Defendant's solicitation of plaintiff's at-will employees before he had left was not dishonest - - plaintiff did not allege that defendant had used plaintiff's time or resources or appropriated trade secrets in his solicitation - - and not part of a scheme solely to produce damage. Without allegations that the solicitation was in the nature of actual competition with plaintiff or conspiracy to harm it during the employment, there could be no breach of duty of loyalty. Case dismissed. Amsale Aberra, LLC v. David's Bridal, Inc., Index No. 103096/2005, 1/6/06 (Freedman, J.).

Trespass to chattels; invasion of computer network by former employee; restoration of deleted e-mails. Conversion. Penal Law 156.10 (computer trespass); implied civil action; accessory liability. Civil conspiracy. Damages; punitive damages. Action involving alleged misuse of trade secrets by former employees. The court considered a trespass to land claim against one defendant, finding it deficient for lack of an actual alleged entry onto plaintiff's land, but construed it as a claim for trespass to chattels, which theory has revived validity in the realm of cyberspace. The court held that plaintiff's charge that defendant had invaded its computer system failed since plaintiff failed to allege harm to the condition, quality or material value of the chattel or that plaintiff had been deprived of use of the chattel for a substantial time. Although e-mails had allegedly been deleted, plaintiff had restored them. A conversion claim failed since the alleged invasion of plaintiff's computer system had not prevented plaintiff from being able to use its information and, as noted, e-mails had been restored. Plaintiff asserted a purported claim under Penal Law 156.10 for computer trespass. The court considered whether a private right of action could be implied, but concluded that it could not because it would not be consistent with the legislative scheme. The court noted that when the legislature had considered the matter, many other states had already enacted only criminal statutes on the subject and others had introduced civil remedies as well, but the legislature chose the former approach. The plaintiff here would have remedies for the tort of misappropriation of trade secrets and a Federal civil remedy (18 U.S.C. § 1030 (g)). In any event, the claim would fail since plaintiff did not allege a misdeed after notice was given to defendant as required by the statute. Claims against a co-defendant for civil conspiracy failed, as did one premised on accessory liability under the criminal statute. A demand for punitive damages against this defendant was upheld. Rochester Linoleum & Carpet Center v. Springer, Index No. 11545/2005, 1/30/06 (Fisher, J.).

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