

THE COMMERCIAL DIVISION LAW REPORT

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

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



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

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Art buyer and seller: art auction house and art consignor; art dealer; fiduciary duty, arm's length business transaction. Plaintiff had paid defendants \$118,000 for a painting by John Wesley. Individual defendant had sold the Wesley to a third party and offered plaintiff, instead of money back, a \$200,000 credit toward a Julian Schnabel painting. Defendant had allegedly represented the Schnabel as worth \$500,000 but promised to sell it to plaintiff for a total of \$380,000. After advancing \$90,000 toward the Schnabel plaintiff had discovered that its market value was at best \$110,000. Plaintiff sued for a return of her money based on fraud and related causes of action. Defendant moved to dismiss the complaint. In opposing the motion and to support her fraud claim, plaintiff alleged that defendant had misrepresented the Schnabel as worth \$500,000 when she knew it was worth much less. Plaintiff submitted defendant's e-mail messages that stated, among other things, that plaintiff was "getting beyond a good deal," and that defendant had talked to Schnabel to "get the lowest price possible." Plaintiff also submitted defendant's invoice for the Schnabel listing a \$500,000 price minus discount. Plaintiff relied on Cristallina S.A. v Christie, Manson & Woods, (117 AD2d 284, 294 [1st Dept. 1986]) in which the Appellate Division said that an agent at an auction house "merely expressing an opinion" still had an obligation to render the opinion truthfully. However, that obligation flowed in part from the fiduciary relationship between art auction consignors and consignees, not present in this case, the court said. Plaintiff did not allege that she had tried to ascertain the Schnabel's value before agreeing to buy it and the court found that her blind reliance on defendant's alleged statements in the context of an arm's length transaction was not reasonable as a matter of law. The fraud claim was dismissed. Plaintiff pointed to cases from other jurisdictions for authority that art dealers could be liable for negligent misrepresentation. But the court explained that New York courts have ruled, for example, that Sotheby's could not be liable for negligence unless plaintiff had hired or paid it for an appraisal, and have distinguished auctioneers and art appraisers from lawyers and engineers, who might have special relationships of trust with their clients by virtue of their special expertise. Here, the court found, plaintiff alleged nothing more than a relationship of art buyer to art seller, which did not rise to the level of a special relationship. The claim was dismissed, as was one for promissory estoppel. To the extent that any alleged promises were not fulfilled, the court found, again, that plaintiff could not reasonably have relied on statements regarding the Schnabel's value when she had made no effort to independently appraise it. Plaintiff's unjust enrichment claim, the court said, could have

Procedure; personal jurisdiction; equitable estoppel; forum non conveniens; pre-judgment attachment. In these two consolidated actions, plaintiff, a citizen of the United Kingdom residing in the United Arab Emirates, sued defendants, two hedge funds and their administrator, for breach of contract, fraud, unjust enrichment, and negligent supervision arising out of the defendants' failure to redeem plaintiff's investments. Defendants moved to dismiss for lack of personal jurisdiction and on the ground of forum non conveniens. Plaintiff cross-moved for partial summary judgment and for a pre-judgment order of attachment. The court denied the defendants' motion to dismiss and granted in part the plaintiff's cross-motion. The defendant administrator, which was incorporated in the Commonwealth of the Bahamas and had its principal place of business in Dubai, and the defendant hedge funds, both formed in the Commonwealth of Dominica, argued that they did not do business in New York and that the court, therefore, lacked personal jurisdiction. The court rejected this argument, finding that the defendants were equitably estopped by their own misconduct from contesting personal jurisdiction. In particular, the court explained that the defendants had represented on both their website and in their prospectuses that they maintained a New York office, and the defendants' office manager and attorneys had directed the plaintiff to send correspondence, including his redemption request, to New York. The court held that the defendants could not take "advantage of the prestige and trust that a New York office" conferred upon them and then, at the same time, seek "to avoid any state or judicial recourse." The court also rejected the forum non conveniens argument. It explained that the party seeking a change of forum "must clearly establish that another jurisdiction was a more appropriate forum." In this case, the defendants failed to establish that another jurisdiction is a more appropriate forum and, at oral argument, refused to agree to jurisdiction in Dubai. The court granted the plaintiff partial summary judgment with respect to the first breach of contract cause of action, but denied it with respect to the second. With respect to the first breach of contract cause of action, the court held that the record established that plaintiff had an investment in one of the defendant hedge funds worth approximately \$600,000, that he had made a demand for the redemption of his shares, and that, under the terms of the relevant prospectus, plaintiff's investment should have been redeemed within 14 days. Based on this evidence, the court held as a matter of law that the defendants were liable for the amount of plaintiff's investment plus interest. With respect to plaintiff's second breach of contract cause of action, the court found that the record did not establish the amount of plaintiff's investment and that defendants had raised an issue of fact regarding whether they should be held liable for the fraudulent conduct of their employee. The court also denied the plaintiff's motion for a pre-judgment order of attachment on the ground that the plaintiff had not demonstrated that the defendants would be unable to satisfy any eventual judgment. Peers v. Montague Morgan Slade Ltd., Index Nos. 602010/2008, 650496/2008, 12/9/09 (Lowe, J.).

Procedure; preliminary injunction; irreparable harm; balance of the equities. Corporations; stock redemption agreements; life insurance policies purchased by the corporation; judgment creditors; breach of fiduciary duty; fraud. Plaintiff, the executrix of the estate of a stockholder in the defendant corporation, moved for, among other things, a preliminary injunction enjoining the defendant escrow agent from distributing life insurance proceeds that had been paid to the defendant corporation upon the decedent's death. The court denied plaintiff's motion. Plaintiff argued that under the terms of a Stock Redemption Agreement, the defendant corporation was required to use the insurance proceeds to purchase the shares of stock that the decedent had held in the corporation at the time of his death. Intervenor-defendant, a judgment creditor of the defendant corporation, argued, by contrast, that the insurance proceeds should be used to pay his judgment. The court held that plaintiff had failed to establish irreparable harm because its claim "which is monetary, can be satisfied through an action for damages." The court also found that a balance of the equities did not weigh in plaintiff's favor given that the intervenor-defendant had been attempting to collect on his judgment for more than eight years, and the decedent allegedly had played a role in preventing that money from being paid. McCallen v. MRW Group, Index No. 24000/2009, 11/4/09 (Pines, J.).**

Procedure; statute of limitations; UCC § 2-725(1); tolling based on misrepresentations. Art law; breach of contract; fraudulent or negligent appraisals; unjust enrichment; fraudulent concealment; negligent misrepresentation. Attorneys' fee awards. Plaintiffs art dealer and sole shareholder sued to recover \$11 million paid to defendant for ancient Chinese art. Plaintiffs alleged that the art was not authentic, and that defendants furnished appraisals they knew to be false. Defendants moved for summary judgment. The court granted the motion with respect to plaintiffs' claim for attorneys' fees, given that there was no agreement between the parties authorizing the recovery of attorneys' fees, nor any specific statutory

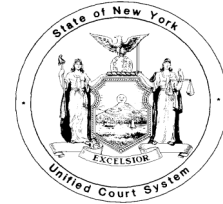
authorization. The other claims remained. As to plaintiffs' breach of contract claims, defendants argued that those claims were time-barred to the extent they related to any art purchases and appraisals more than four years prior to the commencement of the action. The court acknowledged that the UCC's four-year statute of limitations applied but found that the limitations period was tolled based upon defendants' misrepresentations. In particular, the court said there was evidence that defendants had discouraged plaintiffs from obtaining third-party appraisals in order to conceal their misconduct. With respect to plaintiffs' unjust enrichment claim, while recognizing that this claim generally lies only in the absence of an express agreement, the court declined to dismiss the claim here on the grounds that (1) plaintiffs were seeking rescission of any agreement with defendants; and (2) defendants denied that they provided appraisals to plaintiffs for compensation. The court also denied defendants' motion with respect to plaintiffs' remaining claims for negligent appraisal, fraudulent appraisal, fraudulent concealment, and negligent misrepresentation. To the extent that these claims required plaintiffs to establish the existence of a fiduciary relationship, the court found that the evidence that plaintiffs and defendants had a social relationship, along with the evidence of defendants' expertise, was sufficient to create an issue of fact for trial. Concorde Arts Associates, LLC v. Weisbrod Chinese Art, Ltd., Index No. 014427/2004, 11/3/09 (Driscoll, J.).**

Property; negative easements; public and private nuisance. Injunctive relief. Plaintiff, a cooperative that owned a 20-story residential building, had an easement for unrestricted light, air, and view above an adjacent commercial building, which was owned by one of the defendants. The easement specified the exact location and volume of any air conditioning tower that could be installed on the roof of the commercial building. Plaintiff sued the owner of the commercial building, as well as a company that operated a grocery store in the building, claiming that the defendants had installed a new air conditioning tower that violated the terms of the easement and created a nuisance. Plaintiff sought a permanent injunction, enjoining defendant from operating the air conditioning tower and compelling them to remove it on the grounds that the tower allegedly violated the terms of the easement and/or the noise limits of the New York City Administrative Code, and/or that the tower constituted a public or private nuisance. The court granted plaintiff's motion for summary judgment. Through expert evidence, plaintiff established that the air conditioning tower violated both the terms of the easement and the New York City Administrative Code. The court also found that the size, location, and noise level of the air conditioning tower adversely impacted the residents' quality of life, thus constituting a private nuisance. However, the court held that the air conditioning tower did not constitute a public nuisance because it did not cause damage to the public. Finally, although defendants argued that plaintiff had not established irreparable harm, the court disagreed, explaining that in the absence of an injunction, plaintiff could lose its rights under the easement by virtue of defendants' adverse possession of a portion of the roof of the commercial building. Based on all of the above, the court granted plaintiff a permanent injunction, directing defendants to remove, replace or modify the air conditioning tower to bring it into compliance with the terms of the easement. First Avenue Owners, Inc. v. Valentina Enterprises, LLC, Index No. 115812/2005, 10/14/09 (Bransten, J).

Surety agreements; novation; Insurance Law § 7434; priority of creditors' claims. A coal company in Kentucky had executed a bond in favor of claimants, a Kentucky agency and a Kentucky not-for-profit legal entity, both of which were established to ensure that the injured employees of self-insured coal employers receive workers' compensation payments. After the coal company filed for bankruptcy, the surety on the bond entered into a series of agreements with the claimants, under which the surety agreed to assume the coal company's liability for workers' compensation claims rather than making immediate payment under the bond. Thereafter, the surety had made payments to claimants totaling more than \$8 million. The surety subsequently argued that its agreements with the claimants constituted a novation of the bond, and that its payment obligations under those agreements were fully satisfied. Claimants had argued that the surety still was obligated to complete payment on the bond. The parties submitted the dispute to a referee, who agreed with the surety. Claimants moved for an order rejecting the referee's report, and the surety moved for an order confirming it. Applying Kentucky law, the court rejected the referee's finding that the parties' agreements established a novation that extinguished all obligations under the original bond. While acknowledging that the parties had recited that the agreements were intended to provide "substitute security," the court found that other language in the parties' agreements expressed their intention that the bond would survive. In particular, the court pointed to language in the agreements that provided that the surety was excused from making further payment on the bond "so long as" it complied with its obligations under the

agreements. The parties' agreements also recited that the parties' rights and responsibilities under the bond "shall not be altered or impaired." Reading the agreements as a whole, the court concluded that they did not manifest an intention to extinguish the bond until the full amount of the bond had been paid. The court, however, confirmed the referee's finding that claimants were not entitled to collect interest. Given that the surety had been adjudicated an insolvent insurer, the court held that under the Insurance Law, a creditor may not recover post-insolvency interest. Finally, the court rejected the surety's argument that claimants' claim against the bond was entitled to no greater priority than any other unsecured general creditor. In the Matter of the Rehabilitation of Frontier Insurance Company, Index No. 97/2006, 11/16/09 (Platkin, J.).**

**SUPREME COURT, CIVIL BRANCH
NEW YORK COUNTY
ELECTRONIC FILING OFFICE**



**IMPORTANT NOTICE TO
COMMERCIAL PRACTITIONERS:
MANDATORY ELECTRONIC FILING**

Pursuant to Chapter 416 of the Laws of 2009, **mandatory electronic filing will be instituted in this Court soon in certain commercial cases (“mandatory commercial cases”). The target date for commencement of this program is May 24, 2010.** A Uniform Rule is being drafted that will set forth the procedures for mandatory e-filing. Although that Rule will, of course, control, the following are the key aspects of mandatory e-filing that the Court at present expects to implement. If upon issuance of the Rule any changes in procedures are required, the Court will provide notice thereof as expeditiously as possible.

Any mandatory commercial case commenced on or after May 24 and any previously-commenced such case in which a Request for Judicial Intervention (“RJI”) is filed on or after that date must be electronically filed through the New York State Courts Electronic Filing System (“NYSCEF”), as must subsequent filings therein. Mandatory e-filing also applies to Commercial Division cases commenced since June 15, 2008 in which no party has declined to consent to e-filing. Mandatory commercial cases consist of commercial matters of the types set forth in Uniform Rule 202.70 (b) (excluding those listed in 202.70 (c)), irrespective of whether the cases have been or will be designated as Commercial Division actions, provided that the amount in controversy is over \$ 100,000 (exclusive of interest, costs, disbursements, counsel fees, and punitive damages). However, in two categories of mandatory commercial cases there is no monetary threshold: corporate and other business dissolution proceedings and commercial arbitration matters (see Uniform Rule 202.70 (b) (11) and (12)).

Except to the extent that the Uniform Rule may provide otherwise, on and after May 24, the County Clerk and court clerks will not accept documents filed in mandatory commercial cases in hard copy form. Working copies of motion papers and other documents intended to be reviewed by a Justice must be delivered to the court unless the Justice indicates otherwise. Final procedures regarding submission of working copies will be promulgated soon by amendment to the Protocol on Electronic Filing now posted on the “E-Filing” page of this Court’s website at www.nycourts.gov/suptcmanh. Attorneys should familiarize themselves with the current version of the Protocol and any revisions that may be posted in the next few weeks. To facilitate identification of mandatory commercial cases, the County Clerk may require the filing of a special cover sheet upon the commencement of new actions and a supplement to the RJI may be required as well.

The NYSCEF system offers many benefits to attorneys and their clients. There is no charge to use the system (usual court fees apply) - - that is, there is no charge to file a document, serve a document (which NYSCEF does automatically), consult the NYSCEF case file, or print documents from the system. The NYSCEF system resembles the Federal ECF system. Thus, those familiar with the latter will be able to use the former with no formal training. Because the system is simple and easy to learn, many will find sufficient a brief review of the *User’s Manual* and *FAQ’s* that are available on the NYSCEF site (www.nycourts.gov/efile), or some practice using the NYSCEF “Practice System.” Training, however, is available: those interested are urged to contact the NYSCEF Resource Center at efile@courts.state.ny.us or 646-386-3033. A two-credit CLE course is offered at no charge at the New York County Courthouse every week. The staff of the Resource Center can answer any other questions attorneys may have and are eager to be of assistance.

Please follow our website for additional information on this important new initiative. Thank you.

Dated: March 24, 2010

HON. SHERRY KLEIN HEITLER
Administrative Judge

JEFFREY CARUCCI
Statewide Coordinator for Electronic Filing
Unified Court System

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

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