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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Ancillary enforcement jurisdiction; forum selection clause; dismissal based on documentary evidence; CPLR 3211(a)(1). Plaintiff sued to enforce consent judgment that was issued by the United States District Court for the Southern District of New York ("SDNY"). Defendants moved to dismiss pursuant to CPLR 3211(a)(1) on the ground that the consent judgment, and the settlement agreements that were incorporated therein, included a forum selection clause designating the SDNY as the judicial forum for the resolution of disputes relating to the consent judgment and the settlement agreements. The consent judgment stated that the SDNY "retains exclusive jurisdiction" to enforce the terms of the judgment and of the settlement agreements. One of the settlement agreements also provided that any action relating to the subject matter of the settlement agreement "shall" be brought in the SDNY. The court granted the defendants' motion to dismiss. Plaintiff argued that the settlement agreements and consent judgment at issue permitted federal court jurisdiction but did not require that disputes be resolved in federal court. The court rejected this argument, finding that the forum selection clause was "mandatory and not permissive." The court also rejected the plaintiff's claim that the federal court lacked subject matter jurisdiction over the dispute between the parties, explaining that the source of jurisdiction was the fact that the federal district court had retained "continuing jurisdiction" over the consent judgment. Spirits of St. Louis Basketball Club, L.P. v. Denver Nuggets, Inc., Index No. 600096/2009, 10/15/09 (Kapnick, J.).

Arbitration; waiver of right to arbitrate: Procedure; CPLR 7503(c); motion to stay arbitration; choice of law. Petitioners, the managing partner of an investment fund and the fund's management company, filed a petition, pursuant to CPLR 7503(c), to stay arbitration proceedings that had been commenced by respondent, an investor and limited partner in the fund, after it learned that the fund had invested substantially all of its assets with Bernard Madoff. Although the limited partnership agreement for the fund provided that all disputes would be submitted to arbitration, petitioners argued that respondent had waived its right to arbitrate by initially filing an application for injunctive relief in federal court. The court rejected this argument and denied the petition. Before turning to petitioners' waiver argument, the court addressed the question of which state's law should govern the petition. The court held that federal law did not apply because under the Federal Arbitra-

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tion Act, state law governs the resolution of common law defenses, such as the waiver defense that had been raised by petitioners. Although petitioners argued that New York law should apply and respondent urged the court to apply the law of Delaware, the court ultimately held that it did not have to resolve the choice of law question because there was no genuine conflict between the laws of those two states. Under both states' laws, the court found that respondent had not waived its right to arbitrate. While recognizing that before commencing arbitration proceedings the respondent had filed an application for injunctive relief in federal court, the court explained that this did not suffice to constitute a waiver of the right to arbitrate. Rather, as the court noted, respondent had sought injunctive relief merely in order to maintain the status quo, and respondent never exhibited an intention to litigate the merits of the dispute in federal court. J. Ezra Merkin v. The Calibre Fund, LLC, Index No. 600617/2009, 9/18/09 (Lowe, J.).

Attorney-client; disqualification; conflicts of interest; prior representation; attorney as witness. Contracts; breach of contract. Procedure; standing to sue; RPL § 442-d. Plaintiff company and defendant company entered into a contract whereby defendant agreed to compensate plaintiff for services relating to finding suitable locations in Nassau and Suffolk Counties for restaurant franchises. After defendant terminated the contract for cause, plaintiff commenced this lawsuit, alleging a claim for breach of contract. Plaintiff moved to disqualify defendant's legal counsel, and defendant moved to dismiss the complaint. The court denied both motions. First, with respect to the motion to disqualify, plaintiff argued that defendant's counsel had a conflict of interest because defendant's counsel and the owner of the plaintiff company had been partners and managing members in an unrelated limited liability company, and because defendant's counsel had introduced the owner of the plaintiff company to defendant and had represented both plaintiff and defendant with respect to the contract at issue. Plaintiff also asserted that defendant's counsel would be a necessary witness in this litigation with respect to the meaning of terms in the contract and the facts relating to defendant's termination of the contract. The Court rejected both arguments. With respect to counsel's alleged conflict of interest, the court held that counsel's personal business dealings with the owner of the plaintiff company in connection with an unrelated entity had no bearing on the issues in this matter and did not establish a conflict of interest. The court likewise held that the fact that defendant's counsel represented both plaintiff and defendant companies in negotiating the contract at issue did not create a conflict of interest because there was no claim that counsel had divulged confidential information to defendant. The court also rejected plaintiff's claim that counsel would be a necessary witness in the action. The court explained that counsel's testimony was not necessary to interpret the parties' agreement since the contract would be enforced according to its clear terms, and that other witnesses, besides defendant's attorney, would be available to testify regarding the events leading to the termination of the parties' contract. With respect to defendant's motion to dismiss, the court held that plaintiff had sufficiently alleged a claim for breach of contract. Rejecting defendant's claim that, as a matter of law, plaintiff (who is not a licensed real estate broker) lacked standing to sue under the RPL, the court held that at this early stage in the litigation, it could not determine whether plaintiff's

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performance under the agreement was such that a brokers' license was required. MWH Group, LLC v. Spartan Restaurant Holdings Corp., Index No. 18629/2008, 7/1/09 (Driscoll, J.).**

Attorney-client; disqualification; Rules of Professional Conduct, Rules 1.9, 3.7; advocate-witness rule; duties to former clients. Procedure; service of process; extension of time to effectuate service. Amendment of pleadings. Plaintiff commenced this action arising out of the cooperative conversion of an apartment complex. Plaintiff alleged that defendants breached the offering plan and subscription agreement and committed fraud and misrepresentation regarding the condition of the premises. Defendants moved to disqualify plaintiff's law firm on two grounds. First, defendants argued that the law firm should be disqualified under Rule 3.7 of the Rules of Professional Conduct, known as the advocate witness rule, because a former associate of the firm and another member of the firm were likely to become witnesses in the instant action. The former associate of the firm had been an elected member of the coop board, the law firm had acted as counsel for the board, and the law firm had allegedly taken various wrongful actions, including holding private, unauthorized board meetings. Second, defendants argued that the law firm should be disqualified under Rule 1.9 of the Rules of Professional Conduct. Because the law firm had acted as counsel to the coop board at a time when one of the individual defendants was also a board member, defendants argued that the law firm could not now represent the plaintiff in a lawsuit against that same individual defendant. The court disqualified plaintiff's counsel on both grounds. Next, one of the individual defendants moved to dismiss the complaint for lack of service. Although the affidavit of service alleged that service had been effectuated at her home in New York, the individual defendant asserted that she was, in fact, a resident of Florida at the time. Given that the statute of limitations had not expired, and since discovery had not yet commenced, the court held that any defect could be cured without prejudice to the individual defendant. Accordingly, the court granted plaintiff an extension of time to effectuate service. Finally, the court granted the plaintiff's motion to amend the complaint to add additional facts and to assert a cause of action against additional defendants. Sherbrooke Smithtown Owners Corp. v. Johanna Merson, Index No. 34476/2008, 8/30/09 (Pines, J.).**

Attorney-client; DR 5-102; disqualification; lawyer as witness; necessary testimony. Petitioner bank sought to enforce judgment by obtaining judgment-debtor's shares of stock in the respondent corporations. Respondents moved to disqualify petitioner's counsel under the former Code of Professional Responsibility, DR 5-102, on the ground that he was allegedly a material witness. The court denied the motion. It explained that an attorney will be disqualified only if his or her testimony is necessary to the proceeding, and the burden of demonstrating necessity is on the moving party. In this case, the court held that respondents failed to satisfy that burden. The only issue in this enforcement proceeding was what ownership interest the judgment-debtor had in the respondent corporations. Even if petitioner's counsel may have had some personal knowledge on this subject since he had interviewed the accountant for the respondent corporations, the court concluded that that did not make counsel's testimony necessary. First,

the court noted that the authenticity of tax filings already had been established through deposition testimony, and, therefore, counsel's testimony was not necessary on this issue. Nor was counsel's testimony necessary with respect to issues of "corporate capitalization, tax return accuracy, and the protocol of respondents' tax return preparation." Even if petitioner's counsel may have had some personal knowledge of these matters, the court found that "such knowledge is not unique to him, and respondents do not show that his testimony would not simply be cumulative" of other testimony in the case. Moreover, other witnesses, including the accountant himself, could testify to these same matters. Marine Midland Bank, N.A. v. Richard F. Koch, Index No. 100613/2009, 8/28/09 (Bransten, J.).

Capacity to sue; foreign corporations; BCL 1312. Defendant corporation moved to dismiss on the ground that the plaintiff, a Canadian corporation, was allegedly doing business in New York without the required authorization and, therefore, lacked the capacity to sue under BCL 1312(a). The court denied the motion to dismiss. While recognizing that under BCL 1312(a) an action cannot be maintained by a foreign corporation found to be doing business in New York without the required authorization, the court explained that the defendant had failed to satisfy its burden to show that plaintiff was doing business in New York. A corporation is doing business in New York for the purposes of the BCL only if it is "engaged in a regular and continuous course of conduct in the state." This standard cannot be met by evidence of "casual or occasional" business activities in the state. Rather, the corporation's in-state activities must be "so systematic and regular as to manifest continuity of activity in the jurisdiction." The court held that the plaintiff's activities failed to meet that standard. At the time the parties entered into the contract being sued upon, the court explained, plaintiff's connection to and its business activities in New York were limited to taking orders from and delivering goods to buyers. Where, as here, a corporation's in-state activities consisted of the "mere solicitation of sales in New York and the placement of orders," those activities did not constitute doing business in the state within the meaning of the BCL. In any event, the court noted that the failure of the plaintiff to obtain a certificate of incorporation could be cured prior to the resolution of the action, and, thus, the absence of such a certificate was not a jurisdictional bar to maintaining the action. Rather, plaintiff's failure to obtain a certificate of incorporation warranted only a stay of the action until authorization to do business is obtained. 1198934 Ontario Inc. v. Calcedo Construction Corp., Index No. 30543/2007, 7/30/09 (Emerson, J.).**

Civil contempt; Judiciary Law 750, 753, 773; enforcement of consent judgment. State sued to enforce a consent judgment that prohibited the defendant cigarette company from using cartoon advertising. Defendant moved to dismiss, claiming that under the parties' settlement agreement, the State was required to provide 30 days' written notice before bringing suit. The court denied the motion to dismiss, finding that the suit had been brought under the consent judgment, not the settlement agreement, and that the consent judgment did not contain any notice requirement. Defendant alternatively moved to limit the State's potential recovery. Although the State had requested that defendant be ordered to pay $100 per violation, the court explained that civil contempt fines "must be remedial in nature and effect" and that they "should be formulated not to punish an offender, but solely to compensate or indemnify private complainants." In this case, since the State conceded it had no evidence of specific compensable harm, the court held that the requested fine of $100 per violation bore no rational relationship to any actual loss or injury and was, therefore, improper. Accordingly, the court found that the only damages that could be recovered by the State were its attorneys' fees and costs. State of New York v. Phillip Morris Incorporated, Index No. 400361/1997, 10/13/09 (Kapnick, J.).

Contracts; breach. Contract; e-mail correspondence; statute of frauds. Evidence; affidavit and testimony in connection with settlement contradicted defendant's answer. Fiduciary duty; genesis in friendship, prior business dealings, superior knowledge. Greenhouse Gas Market; Kyoto Protocol; CERs. Plaintiffs alleged that defendants breached a written agreement to be plaintiffs' broker in an investment opportunity arising in China involving certified emissions reduction credits, or CERs, which are generated by projects authorized by the Kyoto Protocol of the UN Framework Convention on Climate Change. Plaintiff managed two hedge funds, also plaintiffs here, and the three had put away $10,000,000 to purchase the CERs in question. Plaintiff's non-party principal had become friends with individual defendants while they were all partners at one defendant company. When the principal left and formed plaintiff fund manager, defendant company acted as his broker in environmental commodities transactions and delivered investment opportunities. One of the principal's former partners, a particular friend of his, sued with other of defendant's principals here, had been the principal's main contact in dealing with defendant on the China CERs. Accord-

ing to both principal and friend, the friend agreed that defendant would use its knowledge of the Chinese market to broker an investment opportunity for the principal in the CERs and agreed on defendant's fee. According to both, defendant had, around that time, changed its primary business model from brokerage services into investment management and other activities that competed with plaintiff. Both principal and friend also maintained that plaintiff had placed full trust and confidence in the friend and that plaintiff had backed defendant financially. According to plaintiffs, defendants had not honestly reported their negotiations and had pursued the CERs for themselves and their managed fund clients. It was undisputed that neither plaintiff nor defendants had participated in the final CER deal. Defendants moved to dismiss the complaint, which, in addition to breach of contract, claimed breach of fiduciary duty. They argued that the friend's affidavit and deposition testimony should not be considered because they contradicted his answer and the answer was binding. The court found, however, that the friend's answer bound the friend, not plaintiffs, who could use admissions made in connection with his settlement to defeat summary judgment. Defendants contended that, contrary to plaintiffs' assertion, e-mail correspondence between the principal and friend did not create a written memorandum of agreement satisfying the statute of frauds. Among other things the e-mails contained back-and-forth on changing terms and at one point, the principal's reference to defendant as 'Ratsource.' Defendants argued that the e-mails did not specify the volume of CERs to be acquired, the conditions of defendant's compensation or the entities to be parties to the agreement. The court determined that the e-mails showed that defendant was to obtain some CERs for plaintiffs and that defendant would get a fee of 3% of the CERs and expenses. The court found that CER quantity may not have been an essential term since descriptions of CER negotiations indicated that ordinarily the volume and allocation of CERs were not known until a deal closed. The parties in privity were not identified but there was evidence that both e-mailers had the authority to bind their entities, and although the former friend had refused to say he was the broker, the nature of a deal is governed by the parties' relationship and not their nomenclature, the court said. In one e-mail the friend had written of a "standard brokerage agreement," and defendants argued that the e-mails showed the parties did not intend to be bound by less than a formal written agreement. However, the friend also had told the principal in an e-mail that they always had done business "on a handshake," thus creating an issue of fact on whether they had intended to be bound only by a formal agreement. The breach claim survived, the court decided, but any lost profits were speculative, so plaintiffs would at most be entitled to nominal damages. Defendants argued that a breach of fiduciary duty claim was duplicative; further, it must fail because the parties had had only an arms-length business relationship. The court explained that a fiduciary relationship could arise between contracting commercial parties when one's access to confidential information so surpassed the other's that the other had virtually no choice but to repose trust and confidence in the first. Here plaintiffs relied on defendants for all information on the potential transaction and there was evidence of defendants' superior knowledge. Further, the court said, fiduciary relationships could arise from close friendships or prior business dealings and there was evidence here of longstanding friendship and trust, although there was also some evidence of the principal's mistrust. Whether the fiduciary claim here alleged breach of a duty apart from a duty under a putative contract presented questions of fact; the claim survived. So did an aiding and abetting claim against individual defendants, the court finding evidence in e-mails and testimony that they were at various stages in charge of negotiating for plaintiffs but had changed course and deliberately pursued the CER deal for themselves and their managed fund investors to the exclusion of plaintiff. This might be a basis for both nominal and punitive damages, the court said, even though defendants had not profited by the putative breach because they had failed to get the deal. But as with the contract claim, establishing lost profits would require showing that the CER seller would have sold to plaintiffs, which was speculative. A negligent misrepresentation claim for which plaintiffs sought damages because they had allegedly bypassed deals to reserve money for the China CERs had to be dismissed because damages for that claim are limited to provable out-of-pocket losses. RNK Capital LLC v. Natsource LLC, Index No. 603483/2006, 7/10/09 (Kornreich, J.).

Contracts; breach; letter of credit. Pre-judgment order of attachment (CPLR 6201); quasi in rem jurisdiction; minimum contacts; foreign corporation; correspondent bank accounts. Comity; non-final *ex parte* orders. In a breach of contract action, plaintiff foreign bank brought action against defendant foreign bank seeking a prejudgment order of attachment pursuant to CPLR 6201 to establish quasi in rem jurisdiction over defendant and secure judgment against bank for bank's alleged failure to honor its written obligation to reimburse plaintiff on a letter of credit. By terms of the letter of credit, defendant issued confirmation to a letter of credit and contracted to reimburse plaintiff upon its receipt from plaintiff of confirmation that documents

had been presented in conformity with the letter of credit terms and had been forwarded to the issuing bank. Defendant bank received a fee for adding this confirmation, which defendant directed to be paid into a correspondent New York bank account. Plaintiff complied with the terms of the letter of credit and demanded reimbursement from defendant. Rather than reimburse plaintiff, defendant went to a foreign court and obtained an *ex parte* order injunction against its paying plaintiff on the confirmation based on conclusory allegations that the issuing bank's agents had been engaged in fraud. Defendant argued to this court that plaintiff's refusal to show defendant copies of the "credit complying" documentation it had negotiated and sent directly to the issuing bank created concerns about the possible fraudulent nature of the transaction. The court disagreed and found that no reports or specific allegations were presented to the court regarding fraud in the letter of credit transaction, nor were any specific allegations of fact made that plaintiff engaged in any fraud. The court accepted plaintiff's argument that at the pre-discovery phase of litigation, when the issue is whether an attachment should be granted to establish in rem jurisdiction, plaintiff has no obligation to honor defendant's request to provide them with the documents without there being any evidence of fraud in the transaction. Defendant's additional argument that the foreign court's issuance of the *ex parte* order excuses its payments to plaintiff also failed. The court determined that the decision to extend comity is a matter of discretion and it is normally not extended by New York courts to non-final, non-merit orders such as the one issued by the foreign court in this case. Additionally, the court rejected defendant's argument that quasi in rem jurisdiction could not be exercised because defendant did not maintain sufficient minimum contacts with the State of New York and the property plaintiff sought to attach (defendant's bank accounts maintained at its correspondent banks in New York). Relying on the Court of Appeals case Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust, 62 N.Y.2d 65 (1984) as precedent, the court rejected defendant's claims that it was not authorized to do business in New York and determined that simply maintaining a correspondent bank account in New York was insufficient to establish personal jurisdiction. Defendant's contacts included three correspondent New York bank accounts, one of which received the fee for the transaction at issue, and defendant's own demand to paid on this letter of credit from a bank in New York to one of defendant's accounts in New York. Therefore, the court held that there was a sufficient relationship between defendant's correspondent bank accounts in New York and its reimbursement obligation to plaintiff to grant plaintiff's application for an order of attachment for purposes of quasi in rem jurisdiction. Fortis Bank (Nederland) N.V. v. Abu Dhabi Islamic Bank, Index No. 601948/09, 09/25/09 (Schweitzer, J.).

Contracts; breach; specific performance; time is of the essence provisions. Plaintiff and defendant had entered into a purchase and sale agreement in which plaintiff had agreed to sell to defendant its membership interest in a limited liability company, which had been formed to manage and redevelop a nine-acre site along First Avenue in Manhattan. The parties then negotiated amendments to the purchase and sale agreement and postponed the closing date for the deal three times. When the parties' efforts to negotiate a fourth amendment to the purchase and sale agreement failed, and the deal did not close on the date previously agreed to by the parties, plaintiff brought the instant action for breach of contract and specific performance. Plaintiff moved for summary judgment, claiming that the court should find, as a matter of law, that defendant breached the purchase and sale agreement by refusing to close on the date previously agreed to and unilaterally adjourning the closing date by 90 days. Although the purchase and sale agreement did not state that time was of the essence, plaintiff argued that a presumption that time is of the essence applies to personal property transactions where the parties agree on a closing date. The court denied plaintiff's motion. In deciding whether or not the time for performance set forth in the purchase and sale agreement was of the essence, the court held that it, first, had to determine whether this case was an action at law or equity. As the court explained, in equity actions, time is generally *not* of the essence unless the parties affirmatively indicate otherwise. By contrast, in actions at law, time generally *is* of the essence unless the contract or the parties' conduct evidences the contrary. The court held that the instant litigation was an action at equity because plaintiff was seeking specific performance of what was, in essence, a contract for the sale of real property. As a result, the equitable rule that time was not of the essence applied, and defendant was entitled to adjourn the closing for a reasonable period of time. Whether or not defendant's adjournment of the closing date for 90 days was reasonable was a question of fact that could not be resolved on summary judgment. Alternatively, the court held that even assuming that this case should be treated as an action at law, plaintiff's motion for summary judgment still should be denied because defendant had raised issues of fact with respect to whether plaintiff had waived its right to strictly enforce the original closing date. Fisher East River Associates, LLC. v. Solow East River Development Company, LLC, Index No. 600110/2009, 7/14/09 (Lowe, J.).

Contracts; commercial lease; construction; merger clause; parol evidence rule; procedure; declaratory judgment; motion to dismiss; summary judgment; judicial estoppel. Plaintiff hospital entered into a lease with defendant, the owner of the property on which one of plaintiff's facilities was located, which provided for parking spaces in a parking area across the street. When other tenants of defendant began using the parking area, plaintiff filed an action for a declaratory judgment and other relief asking the court to determine that plaintiff had an exclusive right to use the parking area. Defendant made a motion to dismiss, which the court treated as a summary judgment motion on the ground that dismissal was not an appropriate remedy against a party seeking a declaratory judgment. The court held that the lease entitled plaintiff to the use of the parking spaces in the area across the street, but only on a nonexclusive basis. Since the court concluded the lease was unambiguous, it rejected plaintiff's contention that the parties agreed, either prior to the signing of the lease or afterward, that plaintiff would have exclusive use of the parking area. The lease had a merger clause, and such clauses are strictly enforced in New York to prevent the introduction of extrinsic evidence to vary the terms of a lease by applying the parol evidence rule. The court, however, searched the record and granted summary judgment to plaintiff, the nonmoving party, holding that defendant was judicially estopped from claiming that plaintiff did not have the exclusive right to use the parking area. Judicial estoppel has two elements: the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding, and the prior inconsistent position must have been adopted by the tribunal. Defendant's conduct satisfied both of these elements: defendant, through its attorney, had argued before the zoning board in support of plaintiff's application for a variance that the parking area in question was for plaintiff's exclusive use, and the Board had granted the variance on the express condition that plaintiff would have exclusive use of the parking area. Defendant could not avoid the consequence of that position simply because it now wanted to provide parking to tenants other than plaintiff. Montefiore Medical Center v. Crest Plaza LLC, Index No. 05535/2008, 6/09 (Scheinkman, J.).**

Contracts; employment; restrictive covenant; three-pronged reasonableness test. Legitimate interests of employer. Reimbursement clause. Partial enforcement of restrictive covenants. Plaintiff sued his former employer, claiming it owed him $75,000 in fees and seeking to set aside restrictive covenants in the agreement he had executed as a condition of employment. Defendant counter-claimed that plaintiff had breached the restrictive covenants in soliciting and serving defendant's clients and maintained that plaintiff had been rightfully terminated and was not owed fees. A reimbursement clause required plaintiff to compensate defendant $2,000 for each of defendant's clients, as defined by the agreement, to whom plaintiff had provided tax services or financial planning within a mile of defendant's Manhattan office for two years after termination. Plaintiff admittedly had prepared taxes for 249 clients. The court cited BDO Seidman v Hirshberg (93 NY2d 382 [1999]), stating that to be enforceable a non-compete clause must meet a three-pronged reasonableness test: be no greater than needed to protect an employer's legitimate interests; not cause an employee undue hardship; not be injurious to the public. Defendant conceded that the restrictive covenants were overly broad in seeking to prevent plaintiff from providing financial planning to defendant's clients, since defendant itself was not licensed to provide financial planning. The court emphasized this point. The restrictive covenants' definition of defendant's clients also was overly broad, since it included current clients not served by plaintiff while at defendant, and prospective clients who had never had their taxes done by defendant but merely phoned or dropped in to ask about its services. The court explained that legitimate interests of the employer are typically limited to circumstances where an employee's services are unique or extraordinary, trade secrets, or protection of client relationships developed by the employee at the employer's expense. It was not demonstrated here that plaintiff had provided unique or extraordinary services. Defendant contended that plaintiff had wrongfully solicited its clients by sending Christmas cards and other mailings and giving his own business card to defendant's clients. But defendant submitted no sworn statements and did not allege that any of the alleged clients actually had gone on to form a relationship with plaintiff. Defendant contended that of the 249 clients plaintiff admitted serving, the "overwhelming majority" were its own prior clients. Plaintiff's previous employer, who also had worked for defendant, submitted an affidavit stating that plaintiff had had no more than a handful of his own clients while working for him and that all the clients they had served were defendant's clients. However, examining defendant's client lists, the court found that a number of the clients had had a pre-existing relationship with plaintiff stemming from his work for the previous employer and that it was unclear whether plaintiff had solicited these clients while at defendant. Thus, the court was unable to conclude that plaintiff had engaged in unfair competition or obtained a competitive advantage over defendant at

its expense. Additionally, enforcing the reimbursement clause would mean plaintiff had to pay defendant more than $500,000, far more than the $105,000 in fees plaintiff had collected and plainly and grossly disproportionate. The court determined that the restrictive covenants were unenforceable and partial enforcement, urged by defendant, was not appropriate because it could not be said that the unreasonable and overboard restraints were not essential parts of the agreement. Further, plaintiff had signed the restrictive covenants as condition of initial employment, not in return for a promotion or another added benefit, hence the restraints did not appear a product of an agreed exchange but rather of defendant's superior bargaining power. Finally, the court noted, defendant had continued to require plaintiff and presumably other tax preparers to execute the agreement with the restrictive covenants even after the Court of Appeals had ruled in BDO Seidman. The totality pointed to anti-competitive conduct, the court said, and granted plaintiff's summary judgment motion as far as setting aside the restrictive covenants. Plaintiff's claim that defendant owed him fees involved credibility determinations and factual disputes not resolvable on a motion for summary judgment. Plaintiff's application for sanctions and attorney's fees was also denied. Fullman v. R&G Brenner Income Tax Consultants, Index No. 106634/2007, 6/23/09 (Ramos, J.).

Contracts; interpretation; ambiguity; limited liability company; manager/member rights. Defendant moved for summary judgment with respect to affirmative defense that a non-party had been rightfully appointed as and was currently a manager of a limited liability company. Plaintiff moved for summary judgment on his cause of action for declaratory judgment that same non-party was not a properly designated manager and to dismiss defendant's affirmative defense, set off, and counterclaim. The limited liability company's Operating Agreement contained specific terms that governed the resignation of existing managers who were also members, and the designation of successor managers by resigning managers. When a founding member/manager sold his interest to an existing member/manager, he also executed a power of attorney giving a third party rights to act on his behalf on the rationale that he was moving out of the country and wanted protection should issues arise with the transfer of interest. The power of attorney did not contain any terms regarding the right to designate anyone as manager. Two of the remaining members of the limited liability company decided thereafter to remove another remaining member from his manager position. The holder of the power of attorney intervened and claimed that he had designated his wife as a manager to replace the manager who had sold his interest. The wife produced a notice of designation from the prior manager appointing her as a manager, which was signed by the third party for the prior manager via the power of attorney. The applicable Operating Agreement stated in part that the resignation of a manager who is also a member shall not affect the manager's rights as a member and shall not constitute a withdrawal of a member. It further stated that in the event a manager shall resign he shall have the exclusive right to designate a successor manager and the members hereto agreed to vote their membership interest in support of the successor. The court held that, while not conclusive, it was at least reasonable that the power conferred on an outgoing manager to name a successor applied only if the manager retained his membership interest upon resignation. The court set forth that the agreement must be read as a whole to determine its purpose and intent. In determining whether the agreement was ambiguous, the inquiry was whether the agreement on its face was reasonably susceptible to more than one interpretation. Both plaintiff and defendant failed to meet the burden that their construction was the only reasonable one that could be fairly placed on the Operating Agreement. Summary judgment was therefore inappropriate since the agreement was reasonably susceptible to more than one interpretation. The court noted that an agreement should not be interpreted to produce a result that is absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties. It did not appear commercially reasonable to believe that the parties to the Operating Agreement would intend to allow a disgruntled manager selling all of his membership interest and resigning as a manager to directly chose or indirectly chose via a power of attorney a manager of the company to bind the company in the future after that manager no longer had an economic interest. Muffed Siad v. Sandeep Tuli, Index No. 4970/2009, 9/23/09 (Grays, J.).**

Contracts; interpretation of lease provisions; express terms; equitable estoppel; breach of the implied contractual duty of good faith and fair dealing; specific performance; unjust enrichment. Plaintiff/landlord sought a declaratory judgment that its untimely demand for reappraisal was effective; and asserted causes of action for equitable estoppel, breach of the implied contractual covenant of good faith and fair dealing, specific performance, and unjust enrichment. Plaintiff and defendant/tenant had entered into a 75-year lease whereby the defendant was to pay a fixed annual rental for the first 15 years. Each party also had iden-

tical reappraisal rights exercisable successively at the end of each tenth year of the remaining term of the lease to request an adjustment of the rental amount based on said re-appraisal. The lease had an express notice provision requiring that either party could give written notice to the other within a specified time period to demand a reappraisal of the value of the land and a readjustment of the rental amount in conformance with the reappraisal. Plaintiff made an untimely demand for reappraisal, and defendant invoked the provision that required the rent to remain unchanged until the next right of reappraisal. In the first instance, the court found that the parties' agreement regarding reappraisals and rent adjustments was in clear and unambiguous terms. The court distinguished a New York Court of Appeals case relied on by plaintiff for the proposition that the court could exercise its equity jurisdiction to approve the entity's late request for reappraisal. Unlike in *J.N.A. Realty Corp. v. Cross Bay Chelsea,* 42 N.Y.2d 392, 396 (1977), where the failure to exercise the option would result in the tenant suffering forfeiture, equity would not intervene in this case where plaintiff's failure to obtain an increase in the amount of its rent did not constitute the forfeiture of a vested right because the lease explicitly contemplated what would happen if neither party made a timely request for reappraisal. Additionally, the court rejected plaintiff's argument that the reappraisal provision was not a "time of the essence" provision. In doing so, the court held that the deadline for exercising the reappraisal option did not have to be expressly labeled "time of the essence" for it to be strictly enforced because it is a well settled New York rule that no provision making time of the essence is required in an option contract since an option contract by its express terms must be exercised within a specified time and in accordance with specified terms. In rejecting equitable estoppel as a basis for relief, the court noted that it is a settled principle that a single instance of conduct between parties does not establish a "course of conduct." As such, plaintiff's waiver of the notice provision in 1997 cannot impute a waiver by the defendant in 2007. Further, because the court found that plaintiff failed to timely exercise its option of reappraisal, plaintiff's claim for specific performance was also unavailable since the option was not exercised according to its terms. The court additionally found that plaintiff's claim for breach of the implied covenant of good faith and fair dealing failed because the implied covenant could not modify the express terms of the contract. Finally, the court determined that plaintiff's claim for unjust enrichment was likewise barred by the existence of the valid written contract governing the dispute between the parties. Provident Loan Society of New York v. 190 East 72nd Corp., Index No. 114195/2008, 06/02/09 (Schweitzer, J.).

Contracts; letter of intent; constructive trust; breach of fiduciary duty; conversion; promissory estoppel; unjust enrichment. Plaintiff, the owner of a mortgage company, and defendants, another mortgage company and its majority owner, signed a letter of intent, in which the parties agreed that plaintiff would transfer the assets of her mortgage company to defendants in return for being hired as defendants' chief operating officer and receiving an equity ownership interest in defendants' company. Plaintiff began working for defendants, but she eventually left the company and was hired by a mortgage lender. Plaintiff then sued, alleging claims for a constructive trust, breach of fiduciary duty, conversion, promissory estoppel and unjust enrichment, and claims for non-payment of her 2006 bonus and unpaid distributions of profits for 2005 and 2006. Defendants asserted counterclaims for breach of fiduciary duty, breach of contract, and a declaratory judgment. The parties moved for summary judgment on their various claims and counterclaims. With respect to plaintiff's first cause of action for a constructive trust, the court held as a matter of law that plaintiff was not entitled to the imposition of a constructive trust over 20 percent of the shares in defendants' mortgage company because plaintiff failed to allege that there had been any transfer in reliance upon a promise by defendants to give her an equity share in their company. The court also granted defendants' motion for summary judgment with respect to plaintiff's claims for breach of fiduciary duty, conversion, promissory estoppel, and unjust enrichment. The court found triable issues of fact with respect to the question whether the letter of intent executed by the parties entitled plaintiff to recover payment of a bonus for 2006 and a 20 percent share in defendants' profits for 2005 and 2006. While defendants argued that the provisions in the letter of intent that related to plaintiff's 2006 bonus and plaintiff's right to share in 2005 and 2006 profits were not binding because the parties had explicitly agreed to enter a further formal agreement, the court held that there was a triable question of fact regarding whether defendants had waived the requirement of a further formal agreement. Finally, defendants argued, in the alternative, that to the extent the court found plaintiff was entitled to a 20 percent equity interest in their company, she breached a two-year restrictive covenant associated with that equity interest. The court found no evidence to suggest that plaintiff ever agreed to a two-year restrictive covenant and dismissed defendants' counterclaim accordingly. Kaufman v. Burr Enterprises, Ltd., Index No. 005064/2007, 6/2/09 (Driscoll, J.).**

Contracts; real estate; general release; instances in which general releases are voidable. Fraud; reasonable reliance; sophisticated parties; due diligence requirements. Breach of fiduciary duty; limited liability companies; duty of loyalty to members. As a result of several loans provided by plaintiff to defendants, plaintiff acquired part ownership interests in several large real estate development projects owned and managed by defendants. After the relationship between the principals soured, defendants bought out plaintiff's interests, and the parties exchanged general releases as part of the buy-out agreement. Plaintiff sued after learning that defendants had sold the development projects to an outside investor for a profit. The court bifurcated the trial and proceeded with a bench trial solely on the issue of liability. As an initial matter, both parties recognized that plaintiff could prevail on its claims only if it established that the general release it had provided as part of the buy-out agreement was void or voidable based on fraud in the inducement and/or a breach of defendants' fiduciary duties. First, the court rejected plaintiff's claim that the general release was procured by fraud. Even though plaintiff alleged that defendants had fraudulently concealed the existence of the outside investor, the court held that plaintiff failed to establish that it reasonably relied on defendants' silence. The court explained that sophisticated parties, like the plaintiff here, are expected to conduct due diligence and perform an independent appraisal of the risks they are assuming before they can claim to have reasonably relied on a defendant's statements as a basis for a fraud claim. In this case, plaintiff's principal admitted that he never made any inquiry into how defendants had obtained the money to buy out plaintiff's interests in the real estate development projects, nor did he take any steps to ensure that plaintiff would be able to share in any future profits earned by defendants. Under these circumstances, the court held that plaintiff could not establish by clear and convincing evidence that it justifiably relied on any statement or omission by defendants. Second, the court held that by failing to disclose their deal with the outside investor, defendants breached their fiduciary duties to plaintiff. The court explained that defendants owed fiduciary duties to plaintiff by virtue of defendants' and plaintiff's membership in the LLCs that had been formed for the purposes of the real estate development projects. Defendants' fiduciary duties to plaintiff did not terminate until the closing date of the buy-out agreement. In order to recover on its breach of fiduciary duty claim, however, the court held that plaintiff had to establish by clear and convincing evidence that it had suffered damages that were proximately caused by defendants' misconduct. Therefore, the court directed the parties to proceed to the second damages phase of trial. McGuire Children, LLC v. Huntress, Index No. 1999/2004, 6/17/09 (Curran, J.).**

Contracts; real property; statute of frauds; corporate dissolution; valuation and appraisal; Business Corporation Law § 1104-a; Business Corporation Law § 1118. An action and a special proceeding between the same parties were joined for a non-jury trial. The first involved a dispute arising from the settlement of protracted prior litigation involving a third party. Plaintiff, a board member and 20% shareholder of the corporation, contended that in consideration for her payment of legal fees relating to the prior litigation, it had been agreed that she would become the owner of an apartment belonging to the corporation. The court found that while the parties had discussed plaintiff's acquiring the apartment, no contract was ever entered into and no transfer of title had ever taken place. Rather, the transfer was to be predicated upon payment of consideration by the plaintiff, which never occurred, and the statute of frauds barred any finding that a transfer had been agreed to in the absence of a writing. Moreover, plaintiff already had been reimbursed for a portion of the legal fees she had advanced. The court, however, directed reimbursement for the remainder of the legal fees because plaintiff was entitled to indemnification and there was no showing of breach of fiduciary duty or bad faith on her part. In the special proceeding, petitioner sued for dissolution under BCL § 1104-a, and the corporation elected to buy out petitioner's interest under BLC § 1118. The remaining issue was the valuation of that interest. The objective in calculating "fair value" in an appraisal proceeding is to determine what a willing purchaser in an arms-length transaction would offer for the subject interest in the company as an operating business, thereby allowing payment of a cash sum to substitute for dissolution of the corporation. Here, the interest being valued was shares of a cooperative housing corporation accompanied by a proprietary lease relating to a particular apartment. Thus, appraisal methods useful in valuing for-profit businesses could not be used, and the value of petitioner's interest was her pro rata share of a valuation of the property as a whole, less any adjustments for debt or similar matters. In reaching a valuation, the court must take into account encumbrances on the property; for example, it could not accept a valuation predicated on turning the property into a single-family home where there were several long-term proprietary leases making it impossible to do so. The court therefore turned to a review of sale prices for comparable apartments in the area, includ-

ing some in that very building. The court determined a fair valuation for petitioner's interest and declined to apply either a surcharge for alleged corporate waste, as sought by petitioner, or a discount for the pending litigation, as sought by respondent. The court exercised its discretion to decline to award interest on the appraised sum, based on factors including petitioner's having failed to make maintenance payments on her apartment and her having filed a baseless UCC-1 statement that impeded the cooperative's obtaining needed financing. McDaniel v. 162 Columbia Heights Housing Corp., Index Nos. 27566/05 and 18894/07, 9/29/09 (Demarest, J.).**

In Personam Jurisdiction; Forum Non Conveniens. The court denied defendants' motion to dismiss for lack of *in personam* jurisdiction and on the ground of *forum non conveniens*. The complaint alleged that defendants, through an agent in Maryland, reached out to plaintiff, a New York LLC located in New York City, to gain assistance in obtaining financing for a real estate development project in Baltimore known as "Silo Point." Plaintiff's suit sought damages for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment arising from defendants' failure to reimburse plaintiff for money and effort expended in attempts to obtain financing. Defendants first argued that the court lacked *i*n personam jurisdiction because no defendant had ever resided in, owned property in, or traveled to New York for negotiation of the contract at issue. The court, however, held that defendants' communications with plaintiff—both directly, and indirectly through their Maryland-based agent—constituted sufficient "quality of contacts" to subject them to New York jurisdiction under New York's long-arm statute (CPLR § 302(a)). Those contacts included "prolonged communications" with plaintiff through defendants' agent, over which defendants had control, as evidenced by documents and correspondence, and defendants' direct solicitation of plaintiff's assistance to secure New York financing. Second, defendants argued that the action should be dismissed under the doctrine of forum non conveniens because the transaction took place, and the real estate project was located, in Maryland, and because some non-party witnesses resided in Maryland. The court rejected this argument, noting that the relevant transaction was not the underlying real estate project, but instead was defendants' efforts to obtain financing in New York; plaintiff's alleged damages arose from efforts undertaken pursuant to the financing agreement—not the real estate project. The court also noted that New York courts—the Commercial Division in particular—"have procedures in place, which are used everyday, to deal with out-of-state non-party witnesses" and that there were out-of-state witnesses in New York who would need to travel to Maryland should the dispute be heard in that jurisdiction. Finally, the court stated that there was no unique burden on the New York courts in accepting "a straightforward breach of contract claim that does not appear to involve any novel or complicated issues of law." The court also noted that defendants' argument—that the case would unnecessarily burden the New York court system—was unhelpful in that it would always weigh in the balance of dismissal, thus running afoul of New York's long-standing policy that a plaintiff's choice of forum should rarely be disturbed. JPS Capital Partners, LLC v. Silo Point Holding, LLC, Index No. 603721/2008, 7/30/09 (Fried, J.).

Insurance; late notice of claim; timeliness of disclaimer of coverage; waiver of late notice defense. Plaintiff insurance company sought a declaration that it was not liable to provide coverage for the cost of investigating and remediating pollution at seven former manufactured gas plants ("MGP") that had been owned by defendants. Using the MGP site located in Nyack as a test case, plaintiff moved for partial summary judgment on its claim that it was not obligated to provide coverage on the ground that defendants allegedly provided late notice. The defendants cross-moved for partial summary judgment on their claim that plaintiff waived its right to assert a late-notice defense with respect to the Nyack MGP. The court granted the defendants' motion and denied the plaintiff's cross-motion. Plaintiff argued that defendants knew about their potential liability as early as 1981 but that they did not provide notice until 14 years later when the State Department of Environment Conservation indicated that it wanted defendants to investigate and, if necessary, remediate. The court explained that an insured's obligation to provide notice to its insurer is triggered only upon "some realistic and certain action from a regulatory agency or third party showing some reasonable possibility of liability." In this case, the court found that defendants provided timely notice to plaintiff once it had "concrete knowledge" that the Nyack MGP site was contaminated at a level necessitating regulatory action. The court also found that plaintiff had waived any right to assert a late notice defense by failing to deny coverage for more than seven years after receipt of defendants' notice. The "repeated transmission of boilerplate reservation of rights letters" by plaintiff, the court held, "without even a cursory investigation," did not satisfy

plaintiff's obligations as a matter of law. Travelers Indemnity Co. v. Orange & Rockland Utilities, Inc.., Index No. 603601/2002, 8/19/09 (Bransten, J.).

Misrepresentation; negligent; fraudulent; reasonable reliance. Nature of alleged misrepresentations; present facts. Contract; warranties. Damages. Dispute arose from the alleged failure of components containing laser diodes in a submarine telecommunications cable system active in East Asia. The diodes, which amplify light signals to preserve data in transit, came from two different makers. After finding problems with the first diode type, plaintiff owner and defendant contractor held new negotiations concerning defendant's warranties and executed an amendment to their original contract, a "contract variation." Components with the first diode make subsequently failed, before and right after the 2006 Taiwan earthquake, and continued to fail while the other diodes did not. Plaintiff alleged that defendant had not done timely maintenance or repairs. It sued, and defendant moved to dismiss all claims not based on breach of warranties. The court dismissed a claim of gross negligence as being no more than one for breach of contract. Plaintiff also claimed negligent and fraudulent misrepresentation. It alleged that during negotiations for the contract variation, defendant's president had represented that the components in question posed no threat to the system's performance and that their failure rate would decline. Plaintiff contended that, but for reliance on these alleged misrepresentations, plaintiff would have executed a different variation. The court found that plaintiff did not show the special relationship of trust and confidence necessary for negligent misrepresentation. It did not allege that defendant's expertise was unique or specialized, but instead admitted that both parties were sophisticated and the contract negotiated extensively. Nor did the system's public nature create a special relationship; no allegations were made of public harm and plaintiff had used other cables to service customers when the diodes failed. Further, to be actionable as negligent or fraudulent misrepresentation, statements must be false when made and concern present facts; the statements here all concerned future reliability. The president's statements were vague and plaintiff did not allege that he had misrepresented or withheld data. Finally, the court found, the variation's preamble specifically said that plaintiff did not accept defendant's predictions on performance. Normally the question of reasonable reliance is one of fact, but here documentary evidence flatly contradicting plaintiff's claim made summary dismissal appropriate. Moreover, plaintiff had access to test results, and a sophisticated plaintiff cannot establish justifiable reliance if it failed to use means of verification available to it. Defendant further argued that claims had to be dismissed based on an Article in the contract stating that defendant made "no claims of merchantability or fitness for a particular purpose." Plaintiff responded that in quoting only part of the Article and omitting that it dealt exclusively with "Intellectual Property" defendant offered a totally implausible argument. The Article was captioned "Intellectual Property" but the court found that the contract provided that Article captions had no effect on interpretation and that the disjunctive language, "any information or intellectual property" included information on key system components. The court noted that the Article precluded a negligent misrepresentation claim but not a fraud claim if plaintiff had shown intentional conduct. It had not. The tort claims were dismissed, disposing of plaintiff's right to punitive damages. Defendant argued that plaintiff's prayer for relief should be stricken because it sought damages explicitly foregone in the contract and the variation. The court explained, though, that certain "sole and exclusive remedy" language only limited contractual warranties in the event of component problems involving the diodes. Pursuant to the contract, plaintiff was entitled to seek direct compensatory damages for defendant's breach of warranties to repair and replace parts and for failure to fulfill other obligations and to take appropriate measures to meet the contract's performance requirements. The court noted that defendant's liability for contract damages was limited to 100% of the contract price. On the other hand, plaintiff expressly had waived the right to consequential damages it sought, for example, for the need to interconnect to different cable systems and to deploy guard boats. Plaintiff did not allege that defendant's conduct evinced reckless disregard or smacked of intentional wrongdoing, so there was no basis not to enforce these liability limitations. A claim for attorneys fees was stricken. Pacnet Network Ltd. V. KDDI Corp., Index No. 602182/2008, 9/16/09 (Fried, J.).

Motion to dismiss; pleading standard; fraudulent inducement; negligent misrepresentation; breach of fiduciary duty; breach of contract; breach of implied covenant of good faith and fair dealing; usury. Plaintiffs sued defendants for failing to honor a conversion notice on a series of notes issued pursuant to a securities purchase agreement, which allowed plaintiffs to convert the note from a debt instrument into common stock. Defendants asserted a series of counterclaims, several of which the court dismissed. Defen-

dants' allegations that plaintiffs had misrepresented that they would act in good faith and that they were "long-term investors," were too generalized and insufficient to support the counterclaim for fraudulent inducement, especially where plaintiffs' conduct was consistent with the requirements of the agreement. Moreover, the allegation that a party entered into a contract without intending to perform it, without more, does not state a cause of action for fraud. Defendants' counterclaim for negligent misrepresentation failed to plead sufficient facts showing a special or fiduciary relationship with plaintiffs. The securities purchase agreement established a contractual arm's-length debtor-creditor relationship, not a fiduciary one. The counterclaim for breach of fiduciary duty also failed because the securities purchase agreement specified that the parties acted at arm's length under the agreement and not as fiduciaries. The counterclaim for breach of contract was dismissed because the complaint did not sufficiently allege that a breach had occurred. The contract limited plaintiffs' ownership interest in the corporation to 4.99%, and defendants did not allege that plaintiffs owned more than 4.99% of the company at any one time. Counterclaims for breach of the implied covenant of good faith and fair dealing and for conversion were dismissed as duplicative of the dismissed breach of contract cause of action. Finally, a counterclaim for a declaratory judgment that the transaction violated the criminal usury statute was dismissed because the securities purchase agreement involved a loan in excess of $2.5 million, which was exempt from the usury provisions of General Obligations Law § 5-501. AJW Partners, LLC v. Itronics, Inc., Index No. 602987/08, 7/16/09 (Ramos, J.).

Pleadings; failure to join necessary party; N-PCL 511(a); failure to state a cause of action; failure to verify pleading; CPLR 3022. Not-for-profit law; immunity from suit; uncompensated not-for-profit corporate officers and directors; N-PCL 720-a. Notice of pendency; vacatur. Plaintiff, a development company, sued defendants, a not-for-profit religious corporation and its chairman, for breach of a contract between the parties for the sale of land and a building. The contract required plaintiff to obtain certain necessary approvals from the local municipality for its intended use and development of the property, and required the not-for-profit to cooperate as necessary with plaintiff to assist plaintiff in obtaining the approvals. The contract also required the not-for-profit to apply, pursuant to N-PCL §§ 510 and 511, for court approval of the sale, and to provide notice, as required by statute, to the New York State Attorney General. After the not-for-profit cancelled the contract, plaintiff sued for breach of contract and filed a notice of pendency. Plaintiff asserted that the not-for-profit breached the contract by, *inter alia*, interfering with plaintiff's ability to obtain the necessary approvals and refusing to convey marketable title to the premises. In addition, plaintiff asserted a cause of action against the not-for-profit's chairman, alleging that he: (1) induced the not-for-profit's breach of contract because of a competing offer that was more personally lucrative; (2) made false representations to the Attorney General's Office in order to influence its decision regarding approval of the sale; and (3) executed a listing agreement with a real estate broker to market the premises despite the contract with plaintiff. Defendants moved to dismiss the complaint and to vacate the Notice of Pendency. The court granted the motion to dismiss the plaintiff's claim against the individual defendant but otherwise denied the motion. First, the court declined to dismiss the complaint for lack of verification. Because defendants failed to provide notice, as required by CPLR 3022, that they intended to treat the unverified complaint as a nullity, the court held that defendants had waived their right to do so. The court also rejected defendants' claim that the complaint should be dismissed for failure to join the Attorney General as a party. Although the applicable statutes required the Attorney General to be given notice of the real property sale at issue in the litigation, the court held that those statutes did not require the Attorney General to be named as a party in any action concerning the sale. Additionally, the court held that plaintiff stated a cause of action for breach of contract against defendants, and it denied defendants' motion to dismiss those claims. The court granted defendants' motion to dismiss the cause of action asserted against the not-for-profit's chairman. In doing so, the court explained that under N-PCL § 720-a, an uncompensated director or officer of a not-for-profit corporation enjoys immunity from suit unless the director or officer acted with "gross negligence" or "intended to cause the resulting harm to the person asserting such liability." Given the plaintiff's failure to plead facts sufficient to give rise to an allegation of gross negligence or intent to harm, the court dismissed the claim against the individual defendant. Finally, given that several of plaintiff's causes of action against defendants withstood dismissal, the court declined to cancel or vacate the Notice of Pendency. Good Deeds Development, LLC v. Israel Community Center of Levittown, Index No. 17906/2008, 7/1/09 (Driscoll, J.).**

Preliminary injunction; employment agreements; restrictive covenants. Plaintiff corporation and defendant entered into an employment agreement that contained a restrictive covenant. After plaintiff terminated

defendant's employment, plaintiff sued defendant, claiming that he was diverting customers and business away from plaintiff. Plaintiff moved for a preliminary injunction enjoining defendant from contacting or soliciting plaintiff's customers, enjoining defendant from initiating any communications with plaintiff's customers and suppliers, and directing defendant to return all customer lists, supplier lists, and any other business information not available to the general public and obtained by the defendant during his employment. The court denied the motion. First, the court held that plaintiff failed to demonstrate the likelihood of success on the merits. Because restrictive covenants that prevent an employee from pursuing a similar vocation are disfavored by law, they are enforced only "to the extent necessary to prevent the disclosure or use of trade secrets or confidential information or when the employee's services are unique or extraordinary." In this case, plaintiff failed to establish that its customer and supplier lists were trade secrets or that defendant's services were unique or extraordinary. Accordingly, the court found that plaintiff failed to demonstrate a likelihood of success with respect to the enforceability of the restrictive covenant. Second, the court also found that plaintiff failed to demonstrate that it would be irreparably harmed in the absence of an injunction. Although plaintiff alleged a loss of business and customer goodwill, it also set forth a claim for money damages. As a result, the court held that it was "unpersuaded that the plaintiff's losses are not compensable by money damages." Finally, the court found that if the injunction were granted, the injury to the defendant would substantially outweigh the benefit to the plaintiff. Broadway Neon Sign Corp. v. Thomas T. Swift, Index No. 20336/2009, 7/30/09 (Emerson, J.).**

Procedure; Rule 24 of the Commercial Division Rules; discovery motions. Measure of damages; unjust enrichment; quantum meruit. Defendants moved for a protective order with respect to certain of plaintiff's discovery demands, and plaintiff cross-moved to compel. As an initial matter, the court rejected the plaintiff's claim that defendants' motion to compel was procedurally improper under Rule 24 of the Commercial Division Rules because defendants allegedly did not provide advance notice of their motion. The court noted that Rule 24 "clearly exempts 'disclosure disputes' from its ambit" and that, in any event, "the court did conference the issues raised by defendants' application with counsel prior to considering the parties' written submissions." Having dispensed with this procedural issue, the court then turned to the merits of the discovery dispute. Since the only cause of action alleged in the case was an equitable claim for unjust enrichment, the court held that plaintiff could not obtain discovery related to breach of contract damages. The measure of recovery for a claim of unjust enrichment is "generally limited to the reasonable value of the services rendered," the court explained, not the profits that the defendants may have yielded from those services. Accordingly, the court tailored the plaintiff's discovery demands to relate only to those items that could reasonably be recovered in the action, including, for example, the difference in rent actually paid by defendants to plaintiff versus the fair market value of the premises; any utility bills paid by plaintiff on defendants' behalf; and the fair and reasonable value of all labor, materials and services provided by plaintiff to the defendants during the relevant time period. Lawrence A. Davis v. Cornerstone Telephone Company, Index No. 6913/2007, 9/18/09, (Platkin, J.)**

Trade secret; publicly available information; unique combination. Databases; software; development process; clean room environment. Expert testimony. Demonstrative evidence. Plaintiff alleged defendants had misappropriated plaintiff's trade secret in developing a system of two investment management databases. According to plaintiff, defendant investment bank had lured away its employees including a former IT head and senior applications developer, also defendants here. The defendants then allegedly used their knowledge of plaintiff's "Q-tech" system, containing modules called *Alpha Source* and others, to develop *Alpha Workbench* and *Portfolio Workbench* for the corporate defendant. Defendants also had retained two consultants whom plaintiff had retained previously, who had allegedly devoted two solid years' consulting time to developing "Q-tech". Plaintiff moved by order to show cause for a preliminary injunction. There were five days of hearings. Defendants contended that neither plaintiff's software nor database structure were confidential and unique. Plaintiff conceded that some software in its system was publicly available but claimed that the overall whole was unique. The court noted that a unique way of compiling information that adds value to the information may qualify as a trade secret, even if all the information is publicly available. It explained that among factors to be considered in deciding a trade secret claim are the alleged secret's value to the business, the extent to which it was known in and outside the business, and the effort or money invested to develop it. Plaintiff testified that it always had taken steps to

keep its information secret and that presentations using "Q-tech" contained no technical specifications and were equipped with clear confidentiality designations. Testimony was given concerning development of defendants' system. Defendant IT head acknowledged in an affidavit that when he first joined defendant bank he drafted a document called "Quick Qtech Overview." Later, in preparation for a discussion on technology development he referred by email to the overview as a document that would be helpful "to get the ball rolling." The overview was not a technical spec, "but whenever you are ready to really go down into the guts...I can help." (The court supplied emphases.) The same defendant had prepared a document summarizing a certain "Investment Decision Center" (IDC) describing investment decisions, a "Decision Quality Screen," and other things. Plaintiff contended that the investment process described by the IDC and software needed to support it were substantially identical to plaintiff's investment process and the modules embedded in "Q-tech". Defendant's expert undermined his credibility in the court's eyes; on cross-examination he acknowledged deeming it relevant that defendant applications developer had looked to the IDC when he began work for defendant bank, however the expert had never mentioned the IDC in his affidavit in opposition to the current motion. This same expert also acknowledged reviewing a document prepared by defendant application developer, which stated that various modules had to be "recreated" because the "Bank has no equivalent." The expert denied the relevance of a later draft being changed to say that the modules had to be "created from the ground up." Plaintiff's first expert noted that defendants' *Alpha Workbench* had been developed in nine months while plaintiff's *Alpha Source* had taken several years. Plaintiff's second expert testified to a lack of development artifacts and "appropriate design documents" on defendants' part. Defendant applications developer testified to " white boarding sessions" and "thousands of e-mails documenting the back and forth" but admitted that certain diagrams he described had not been made until after the underlying suit was brought. This defendant said that a certain widely used "normalization process" determined the relationship between data tables and that the "normalized" structure was dictated by data and was essentially generic. However, in a comparison of plaintiff's *Alpha Sources* and defendant's *Alpha Workbench,* plaintiff's first expert found 27 matched and four partially matched tables. Plaintiff's expert concluded that the two databases were substantially similar, complex and not generic, and in support pointed to numbers of links and steps a user had to take between tables to relate a piece of information across the database. On cross examination he conceded that the systems used different database management systems and that there was no claim that source code had been copied but on re-direct pointed to six comparison tables that he said illustrated similarity too complex to be coincidental. Plaintiff's second expert agreed. Plaintiff's experts also compared other modules contained in the parties' systems, plaintiff's *portfolio implementation tool* and defendants' *portfolio workbench.* The second expert conceded that certain tables reflected merely a logical relationship, such as in currency blocks to countries, but said that parallels between other tables found in both systems reflected defendants' choices. Defendants' expert said that plaintiff's database and software's functions could be carried out by an integration of products "purchased off the shelf." He testified that defendants' system lacked functions, involved in implementing investment decisions, found in plaintiff's system. On rebuttal plaintiff's second expert said in regard to database development that the relationship among tables represents information common to the industry but "how you tie it together is unique to the development team." The court granted the preliminary injunction, finding plaintiff likely to succeed on the merits and noting the extensive testimony and demonstrative evidence involved in the hearing. Invesco Institutional (N.A.), Inc. v. Deutsche Investment Mgt. Americas, Inc., Index No. 650154/2007, 9/29/09 (Kapnick, J.).

Valuation and appraisal; Business Corporation Law § 623; attorneys' fees and costs; interest. Respondent shareholders objected to a merger agreement and exercised their appraisal rights under BCL § 623. Petitioners retained an expert to advise as to a range of good-faith offers for respondents' stock as of "the day after the merger." The expert valued the company utilizing the guideline company method together with a capitalization of dividend paying capacity. The expert confirmed its valuation findings by applying a reasonableness test based upon an asset approach utilizing the company's adjusted book value. Respondents rejected the company's offer, contending that it did not fairly represent the value of the dissenters' shares immediately prior to the merger. The court agreed with respondents that the company's offer was inadequate, because it represented the value of respondents' shares in the post-merger rather than pre-merger entities, while BCL § 623 requires that the appraisal be based on valuation of the dissenters' shares in the preexisting entities. In finding the company's offer inade-

quate, the court also weighed competing evidence concerning minority discounts, tax implications, discounts for lack of marketability, and capitalization rates. The court then addressed whether the dissenting shareholders should receive an award of attorneys' fees and costs under BCL § 623(h)(7). While the company's offer was made in good faith, given that the court's value determination materially exceeded the offer and that the ongoing changing fact value calculations by petitioners were vexatious to respondents, the court directed the company to pay 50% of the dissenting shareholders' attorneys' fees and costs. With respect to interest, the court awarded respondents 6.5% interest per annum on the amount owed from the valuation date to the date of the decision, statutory interest of 9% per annum for the period from the date of decision to entry of judgment, and post-judgment interest from the entry of judgment to the date of payment of the total amount due. The court declined to grant interest on the partial award of attorneys' fees and costs. Matter of Jamaica Acquisition, Inc. v. Shea, Index No. 009278/2007, 9/29/09 (Warshawsky, J.).**

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**** 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.**

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