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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Arbitration; Federal Arbitration Act; subpoena power; non-party disclosure. Petitioners had hired the respondent law firm to represent them in a Massachusetts litigation against Facebook, Inc. and its founders. Pursuant to the terms of the engagement letter, respondent had agreed to represent petitioners in exchange for 20 percent of the value of any settlement or judgment in the action. Petitioners and Facebook eventually reached a settlement in the Massachusetts litigation that had provided, *inter alia*, that petitioners would receive a certain number of shares of Facebook common stock valued at $35.90 per share. During the finalization of the settlement, however, petitioners learned that shares of Facebook common stock allegedly had a much lower value. Petitioners had asked respondent to challenge the settlement in light of the new information and respondent refused. After respondent's representation of petitioners was terminated, respondent initiated arbitration proceedings against petitioners to recover unpaid legal fees. Petitioners asserted malpractice counterclaims. Petitioners had alleged that the true value of Facebook stock was a critical issue in the arbitration both with respect to respondent's claim for attorneys' fees and with respect to petitioners' counterclaim for malpractice. Accordingly, the arbitration panel had issued several subpoenas to non-parties seeking information regarding the valuation of Facebook stock and Facebook's business plans. Petitioners moved under the Federal Arbitration Act ("FAA") to compel compliance with the subpoenas. The court denied the motion. In order to determine whether to enforce the subpoenas duces tecum that had been issued by the arbitration panel, the court compared the standards applied by the First Department and the Second Circuit. Although the First Department had held that an arbitration panel may issue non-party document subpoenas upon a showing of "special need or hardship," the Second Circuit subsequently reached a contrary result, finding that the FAA did not authorize pre-hearing discovery of non-parties. The court held that it need not resolve the inconsistency because even under the First Department's more liberal standard, petitioners had not established a special need or hardship that would justify granting the motion to compel. The court found that the non-parties had shown that the information sought by the subpoenas was sensitive, trade secret information and that the non-parties had a legitimate interest in protecting the confidentiality of that information. Given this showing, the court explained that petitioners bore the burden of establishing that the information sought was "indispensable" to the arbitration. The court held that petitioners failed to satisfy this burden because the information was not necessary to the arbitration and could be obtained by alternative means. The

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court also refused to enforce a subpoena commanding Facebook to appear and provide testimony. Because any Facebook witness would be located in California, the court held that it lacked jurisdiction to enforce the subpoenas, explaining that the court's ability to compel a witness to testify was limited to witnesses located in New York State. ConnectU, Inc. v. Quinn Emanuel Urquhart Oliver & Hedges, Index No. 602082/2008, 01/06/10 (Lowe, J.).**

Arbitration; motion to compel arbitration; scope of arbitration agreement; doctrine of "expressio unius est exclusio alterus." Plaintiff tenant commenced this action to resolve various disputes that had arisen during an arbitration with defendant landlord regarding the terms of a renewal lease. Defendant moved for an order staying the litigation and compelling the parties to proceed to arbitration. The court granted the motion. Addressing the first dispute that had arisen during the arbitration – the size of the parcel of the land that was the subject of the renewal lease – the court found that the dispute fell within the scope of the parties' arbitration agreement. The court explained that "[o]nce a reasonable relation[ship] between the subject matter of the dispute and the general subject matter of the underlying agreement has been found, any analysis of the scope of the substantive provisions of the parties' agreement is left to the arbitrator." The court found the requisite reasonable relationship here. The parties had specifically agreed that disputes regarding the fixed annual rent under the renewal lease would be submitted to arbitration, and the court held there was a reasonable relationship between the size of the land and its fair market rental value. Turning to the second dispute that had arisen during the arbitration – whether the third arbitrator on the arbitration panel was required to be a duly qualified Member of the Appraisal Institute ("MAI") – the court applied the doctrine of "expressio unius est exclusio alterus" to determine the intent of the parties. As the court explained, "when a law or contract expressly describes a particular act, thing, or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded." In this case, the parties' arbitration agreement explicitly stated that each party-appointed arbitrator must be a qualified MAI appraiser, but the agreement was silent with respect to the qualifications of the third arbitrator. The court found that by omitting the words "qualified MAI appraiser" from their description of the third arbitrator, the parties did not intend that the third arbitrator be a qualified MAI appraiser. Astoria Federal Savings and Loan Association v. Medford Equities, Index No. 44512/2009, 3/1/10 (Emerson, J.).**

Art. Preliminary injunction. Consignment agreement; agreement altered after signing. Artworks transported from US. Quality of artworks. Attachment as remedy. In a suit alleging the conversion of art works, plaintiff sought an injunction for the return of 108 works, including Malevich drawings valued at $750,000, or to enjoin defendants from selling or transferring the art. Alternatively, plaintiff asked for attachment of an apartment and artworks belonging to first defendant, a Russian citizen with legal residency here, and his gallery, also a defendant. Defendant countersued for breach of contract. Plaintiff and first defendant had entered into consign-

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ment agreements for the Malevichs. They had subsequently entered into a sales agreement worth $2,600,000 for another 97 artworks. The agreements covering the Malevichs had expired and plaintiff had demanded the drawings back but they had not been returned nor paid for. After plaintiff had signed the second sales agreement defendant changed it to a consignment agreement and altered the payment terms. Plaintiff averred that second individual defendant had, by email, objected to the quality of the works covered by this agreement, demanded additional works, and told plaintiff that the works, which he had not authorized removed from New York, were in Switzerland. Plaintiff argued that this agreement was void because it had been coerced, the sales price being much below market value, and defendant had altered it and sent letters rejecting the art. For his part, defendant claimed that he had overpaid by nearly $100,000 for the Malevichs, that the Malevichs were part of, not in addition to, the second group of works, that a significant number of those works were not of acceptable quality. Defendant claimed that plaintiff had agreed to deliver additional art works as well as previously promised works. Some had never been delivered, defendant alleged, and he had changed the agreement as a result and plaintiff himself had agreed to the change. Defendant averred that those works he had received were forwarded to a customer who wanted a reduced price due to the o.es still missing, circumstances that allegedly gave rise to defendant's counterclaim. Finally, defendant averred that defendants could not return the art works because they were all with a customer in Russia. The court found that plaintiff had demonstrated likelihood of success on his conversion claim and granted an injunction directing the art works to be returned to New York and not sold or transferred until the suit was resolved. It was clear that the Malevich drawings were subject to consignment contracts and defendants contended that the other transaction was a consignment contract, thus the parties agreed that the works had never passed to defendants, yet defendants admittedly had neither returned nor paid for the works, despite plaintiff's demands. The art was irreplaceable and had been transported to Russia where first defendant also owned a gallery and did business. The court found the possibility of irreparable injury without an injunction. It found, however, that the CPLR did not sanction attachment in this case. Attachment is a statutory remedy, strictly construed; defendant gallery was not a foreign corporation not authorized to do business here and the individual, though a nondomiciliary, lived within the state. Nussberg v. Tatintsian, Index No. 650741/2009 (105792/2007), 3/12/10 (Kornreich, J.).

Contracts; breach; breach of warranty; strict compliance; Statute of Frauds; waiver; estoppel; part performance; oral modification. Negligence; duty. Plaintiff's twenty-year ground sublease with defendant landlord required defendant to make certain improvements to the property at its sole cost and expense. One of these improvements included the requirement that any fill used in grading consist of suitable materials for the plaintiff's intended use of the area. The parties also subsequently entered into a series of amendments to the lease, one incorporating a document captioned "Construction Specifications" that provided additional requirements relating to the on-site processed fill materials. The defendant hired two contractors to make these im-

provements. Although the plaintiff retained a firm of geotechnical engineers to test the demolition materials on the site, the parties offered differing accounts of whether the plaintiff informed the defendant that the tested materials were non-compliant with the project specifications. Specifically, while the plaintiff claimed that it informed the defendant that the sample contained too much organic material, the defendant insisted that the plaintiff had confirmed in writing that the sample had been approved. The plaintiff eventually began excavations at the site, but discovered that the soil was unsatisfactory. The plaintiff claimed that it incurred over $3,000,000 in expenses in bringing the project site into compliance with contract specifications and that it also experienced a three-month delay. The plaintiff then brought this action for breach of the sublease, negligence and breach of warranty. Defendant moved for summary judgment dismissing the complaint. In determining the motion, the court found that the defendant established its prima facie entitlement to summary judgment on the breach of the sublease cause of action by providing evidence that it relied in good faith on the plaintiff's engineers' inspection and approval of the crushed materials, and that the plaintiff waived its objections or was otherwise estopped from demanding strict compliance by having its engineers repeatedly test samples without making complaints. As such, the burden shifted to the plaintiff to produce evidence showing the existence of a genuine issue of fact. The court found that the plaintiff met this burden by providing evidence that it had not waived strict compliance with the terms of the contract, such as by showing that its engineers were not responsible for monitoring the defendant's work throughout the course of construction, and that the engineers were not on site frequently enough to observe most of the demolition and construction. Thus, the court held that there were issues of fact as to whether the plaintiff waived strict compliance with contract specifications or became subject to an estoppel in regard to the specifications, and as to whether the parties orally had modified the terms of the agreement. Although the court acknowledged that the contract at issue contained a clause precluding oral modification, it recognized that "an oral modification will be enforced if there is part performance that is unequivocally referable to the modification, and a showing of equitable estoppel." The court also recognized that while the lease may have been subject to the Statute of Frauds because of its term, the plaintiff could be estopped from denying the effectiveness of an oral modification by virtue of its conduct. Accordingly, the court denied the defendant's summary judgment motion with respect to the causes of action for breach of sublease and breach of warranty. The court dismissed the negligence cause of action, however, because the plaintiff failed to establish that the defendant owed it a legal duty independent of a contractual duty. Home Depot U.S.A., Inc. v. 168th Street Jamaica LLC, Index No. 29966/2007, 2/22/10 (Grays, J.).**

Contracts; employment contracts; restrictive covenants; enforceability. Injunctive relief; preliminary injunctions; likelihood of success on the merits; irreparable harm; balancing of the equities. After obtaining a TRO, plaintiff, an insurance brokerage company, moved for an order preliminarily enjoining defendants, two former employees, from allegedly soliciting plaintiff's customers in breach of a restrictive covenant contained in the defendants' employment agreements with plaintiff. The court vacated the TRO and denied the application for a preliminary injunction. The court found that plaintiff had failed to demonstrate a likelihood of success on the merits because the evidence suggested that defendants had not improperly solicited plaintiff's customers and that information concerning plaintiff's customers was available from public sources and, therefore, was not a trade secret or confidential. The court also found that plaintiff had not demonstrated that it would suffer irreparable harm in the absence of an injunction. Because the employment agreement at issue permitted plaintiff to be compensated for any clients that were obtained by defendants as a result of plaintiff's leads, the court held that plaintiff could be fully compensated by money damages. Finally, the court held that a balancing of the equities did not favor plaintiff given that the record strongly suggested that the clients who switched to defendants did so of their own accord. S & M Klein Company, Inc. v. Glass, Index No. 000296/2010, 2/5/10 (Driscoll, J.).**

Contracts; insurance; builder's risk policies; policy void ab initio based on material misrepresentation by insured. Procedure; summary judgment. Plaintiff, the owner of a five-story masonry building, sued, among others, the insurance company that had issued a builder's risk insurance policy allegedly covering plaintiff's renovations to the building. After the building collapsed, the defendant insurance company disclaimed coverage, and plaintiff sued for breach of the insurance contract. Defendant moved for summary judgment dismissing the claim against it, and plaintiff cross-moved for summary judgment. The court granted the defendant's motion. Defendant argued that the insurance policy it had issued was void ab initio because plaintiff had made a material misrepresentation on the application, namely, that it did not contemplate making

structural alterations to the building as part of the renovation. In support, defendant cited the deposition testimony of plaintiff's president, in which he admitted that the statement on the insurance application regarding contemplated structural alterations was inaccurate. Defendant also relied on its underwriting guidelines and the deposition testimony of its underwriter, both of which suggested that no insurance policy would have been issued had defendant known plaintiff contemplated making structural alterations. Based on this evidence, the court found that defendant had made a prima facie showing of its entitlement to summary judgment. In an effort to establish a triable issue of fact, plaintiff argued that defendant was on notice that it intended to make structural alterations because plaintiff had indicated to defendant's brokers that the renovation "was going to be a complete gut, with the exception of exterior walls," and because plaintiff had provided defendant with a cost breakdown sheet, which listed and allocated significant amounts of money to renovation tasks such as "demolition & removal," "new flooring systems," and "masonry work," all of which necessarily require structural work. The court found that this evidence did not create a material issue of fact for trial, and it granted defendant's motion for summary judgment. East 115th Street Realty Corp. v. Focus & Struga Building Developers LLC, Index No. 604164/2007, 3/9/10 (Bransten, J.).

Contracts; interpretation. This action arose from plaintiff's subcontract with defendant builder to furnish and install plumbing and fixtures as part of the construction of a new store defendant had contracted with project owner to build. Although the subcontract contained a base price for plaintiff's work, defendant directed plaintiff to perform work outside the scope of the original subcontract. On some of these occasions a Contract Change Directive ("CCD") was issued identifying the change but on other occasions a CCD was not issued. Plaintiff alleged that it was not paid in full for the CCD work nor for the additional work defendant directed it to perform without a CCD. It was alleged that CCDs were not always issued because they often involved repairs required when other subcontractors and defendants' employees damaged pipes on the work site. Since defendant could not pass these costs along to the project owner it could not reduce them to CCDs. Defendants moved for an order granting partial summary judgment contending that plaintiff's claims on four change orders were contractually limited to the amount of each change order approved by the project owner. The court's analysis of the relevant contract documents revealed that the Project Manual/Specifications, incorporated by reference into the Subcontract, contained a provision that modified the standard change order provisions. The court held that this provision, contrary to defendants' contentions, did not limit recovery on change orders, but rather required defendant to include a provision in subcontracts requiring subcontractors to submit written change orders. Additionally, none of the contracts before the court or the provisions cited by defendants limited recovery on change orders to whatever amount the general contractor was able to recover from the owner. Further, the court found that the Notice of Intent language on the change orders themselves did not lend itself to unambiguous interpretation. Although defendant contended that the language limited plaintiff to recovery of amounts ultimately recovered from the owner, the court disagreed and held that this one-sided interpretation easily could have been reduced to clear and unmistakable language had the parties intended plaintiff's rights to be limited to whatever amount the project owner chose to pay. Defendants, therefore, failed to satisfy their initial burden of showing that their interpretation of the contract documents was the only fair construction of the contracts. Plaintiff's proffered interpretation was also a plausible interpretation. CNP Mechanical, Inc., v. Allied Builders, Inc., et. al., Index No. 08310/2007, 1/2010 (Fisher, J.).**

Contracts; interpretation; CPLR § 3211(a)(1) and (a)(7); prevention doctrine. The individual defendant, an executive with defendant record company, entered into negotiations with plaintiff in contemplation of employment upon the expiration of his existing contract. The parties then entered into a letter agreement (the "Letter Agreement") in which defendant agreed to join plaintiff at the expiration of his existing contract provided he was not subject to any other agreement that would restrict his ability to work for plaintiff. Prior to the expiration of his contract, however, he agreed to a contract extension with defendant company. He informed plaintiff of this extension, and plaintiff filed suit against him for breach of contract, fraud, and breach of the duty of good faith and fair dealing, and against defendant record company for tortious interference with contract. Defendants moved to dismiss the case, arguing that the Letter Agreement was not a binding contract, as the condition precedent—that defendant not be restricted from working for plaintiff as of April 1, 2010—was never met. Defendant record company also added that it could not have tortiously interfered with a non-binding contract, and noted that under the terms of his original contract with it, defendant was specifically prohibited from entering into a binding employment contract with plaintiff while still employed by defendant company.Plaintiff responded that the Letter Agreement was a binding contract for future performance and that the

prevention doctrine prohibited defendant record company and defendant from undermining a condition precedent within the contract. Plaintiff further argued that defendant had committed fraud because he represented to plaintiff that he did not have any restrictive covenants in his employment contract with defendant record company when, in fact, he never intended to work for plaintiff and was merely using the Letter Agreement as leverage in contract negotiations with defendant record company.The court held that the Letter Agreement was not an enforceable contract because the condition precedent had not occurred. It noted that the prevention doctrine protects only the undermining of a condition precedent in a binding contract and that the Letter Agreement, by its own terms, was not binding on the parties until after the occurrence of the condition precedent. The court also dismissed plaintiff's fraud claim, holding: (1) that where a such a claim merely restates a claim for breach of contract, it must fail as a matter of law; and (2) that allegations that a party entered into a contract without intending to perform could not form a basis for a fraud claim. The court similarly dismissed plaintiff's claim for breach of the covenant of good faith and fair dealing as duplicative of the breach of contract claim and dismissed the tortious interference claim against defendant record company because there was no enforceable contract with which the company could have tortiously interfered. Sony Music Entertainment, Inc. v.Werre, Index No. 601441/2009, 3/17/10 (Fried, J.).

Contracts; interpretation; parole evidence rule; merger clause. Procedure; motion to reargue. Waiver. Plaintiff provided video, audio, and data services to the public using programming it licensed from defendants. Plaintiff alleged that defendants breached their license agreement by failing to provide the same high definition feeds of defendants' programming that they provided to other distributors. Plaintiff's claims were based upon language in the agreement entitling it to receive "all feeds" of the "Networks," a defined term. The court found that under the plain language of the contract, the programming plaintiff sought was that of a network not included within the defined term "Network," but was rather an additional feed of the Network. The court held that extrinsic evidence was not admissible to vary the plain meaning of the contract, and that use of prior drafts was barred by the merger clause. Defendants asserted a counterclaim for interest on late payments made by plaintiff, as to which the court previously had granted summary judgment on liability. The court rejected plaintiff's attempt to reargue because it made the same arguments and relied on the same evidence it had previously proffered. The court reiterated that acceptance of late payments was not a waiver of the contractual right to seek interest on the late payments, absent evidence of an intentional relinquishment of a known right or evidence of additional consideration paid for the alleged modification of a contract term. With respect to interest, the contract unambiguously provided that payment was due after 30 days but that interest would not be charged if payment was made within 45 days. Thus, the court found, interest accrued after 30 days, not 45 days. To construe the contract otherwise, the court held, would render meaningless the provision making the payment due in 30 days, violating the well-settled rule that a contract should not be interpreted to render a provision meaningless. Accordingly, the court granted summary judgment for defendants on plaintiff's claims and on defendants' counterclaims. Echostar Satellite, LLC v ESPN, Inc., Index No. 600282/08, 3/15/2010 (Gammerman, J.).

Contracts; investment management agreements; breach of contract; specific vs. general contractual provisions; failure to comply with investment objective; Chapter 13 of the Delaware Insurance Code. Breach of fiduciary duty; gross negligence; Martin Act; preemption. Plaintiff sued defendant investment manager for breach of contract, breach of fiduciary duty, and gross negligence. Plaintiff alleged that instead of managing its $1.65 billion portfolio in a conservative and prudent manner pursuant to the parties' investment management agreement and defendant's fiduciary duties as an investment advisor, defendant invested heavily in risky subprime and mortgage-backed securities. The court granted defendant's motion to dismiss. With respect to plaintiff's breach of contract claim, the court found that plaintiff failed to allege any breach of the parties' investment management agreement. While asserting that defendant had failed to pursue plaintiff's stated investment objective to obtain "reasonable income" while maintaining "a high level of safety of capital," plaintiff, at the same time, conceded that the investment agreement between the parties expressly allowed the defendant to invest a certain percentage of plaintiff's portfolio in mortgage-backed securities and that defendant had not exceeded those percentage limitations. Under these circumstances, where the defendant followed the specific diversification requirements set forth in the parties' investment management agreement, the court held that plaintiff's allegation that defendant had failed to pursue its general investment objective did not set forth a claim for breach of contract. The court also rejected plaintiff's claim that defendant had breached the parties' investment management agreement by supposedly managing plaintiff's portfolio in a

grossly negligent manner. Although plaintiff asserted that defendant knew investments in subprime and mortgage-backed securities were too risky and that it nonetheless failed to warn plaintiff, the court found that plaintiff had failed to allege facts that supported this allegation. Nor could plaintiff's breach of contract claim survive based on plaintiff's allegation that defendant had failed to comply with Chapter 13 of the Delaware Insurance Code, which prescribes the types of securities that are eligible investments for insurers because, according to the court, the investments made by defendant complied with the specific provision applicable to the securities at issue. With respect to plaintiff's breach of fiduciary duty and gross negligence claims, the court found that those claims were preempted by the Martin Act. Although tort claims will not be preempted by the Martin Act if they are not predicated upon allegations of fraud or deceptive conduct, in this case, plaintiff alleged that defendant knew of and failed to disclose to plaintiff the riskiness of subprime and mortgage-backed securities. The court found that these kinds of claims were more akin to fraud than mere mismanagement and fell within the purview of the Martin Act. Ambac Assurance UK Limited v. J.P. Morgan Investment Management, Inc., Index No. 650259/2009, 3/24/10 (Kapnick, J.).

Contracts; sale of real property; breach of contract; anticipatory repudiation; right to demand reasonable assurance of future performance; liquidated damages; fraud as claim independent from breach of contract claim. Plaintiffs sued, and defendant counterclaimed, for breach of a contract regarding the sale of commercial property. Plaintiffs alleged that defendant had breached the contract by failing to remediate an allegedly hazardous environmental condition on the property. Defendant alleged that plaintiffs had breached the contract because after indicating that they might have difficulty obtaining necessary financing, plaintiffs failed to provide defendant with reassurance that they were ready and financially able to close. The parties each sought summary judgment. The court denied both motions. The court found that issues of fact prevented a finding that the doctrine of anticipatory breach entitled defendant to claim a total breach of the contract. The court explained that in order to establish anticipatory breach, defendant had to prove that the repudiating party had made an unqualified and clear refusal to perform the entire contract. The refusal could take the form of an unequivocal statement or act, but anticipatory breach could also be found if a repudiating party tried to avoid its obligations by advancing an untenable interpretation of the contract, or communicated its intent to perform only upon the satisfaction of extracontractual conditions. In this case, although there was evidence in the record that plaintiffs had told defendant they were having difficulty obtaining financing, the court held that there were disputed issues of fact regarding plaintiffs' unequivocal refusal to perform the contract on that basis. The court also found disputed issues of fact regarding whether plaintiffs had repudiated the contract by insisting that defendant remediate an allegedly hazardous environmental condition on the property. With respect to defendant's claim that plaintiffs had repudiated the contract by refusing to provide assurances that they were financially able to perform, the court again found issues of fact precluding summary judgment. The court explained that in circumstances where an obligor indicates that performance is not likely, the obligee is entitled to seek reasonable assurances from the obligor that he or she will perform when the time for performance arrives. "If the demand is proper and reasonable assurance is not forthcoming, the obligee may treat the failure as a repudiation." The court held that this rule applied to the parties' contract for the sale of real property but that issues of fact existed regarding whether defendant had made a reasonable demand for adequate assurances of performance. Plaintiffs additionally moved for summary judgment with respect to defendant's counterclaim for $2,000,000 in "economic loss" damages as well as its counterclaim for fraud. The court granted summary judgment dismissing both counterclaims. With respect to defendant's claim for "economic loss" damages, the court held that the contract contained a liquidated damages clause that limited defendant's recovery to the amount of plaintiffs' down payment. With respect to defendant's counterclaim for fraud, the court granted plaintiffs' motion because defendant had not asserted a breach of duty independent of the contract itself. Peng v. Willets Point Asphalt Corp., Index No. 11972/2007, 3/23/10 (Kitzes, J.).**

Defamation; defamation per se; special damages*; respondeat superior.* Defendant moved pursuant to CPLR 3211 to dismiss plaintiff's First Amended Complaint's sole cause of action for commercial defamation. The action involved a dispute between two competitors, each selling space in coupon booklets inserted into Sunday newspapers used by consumers nationally. At some point, defendant stopped distributing its coupon booklets in newspapers and instead sent the booklets to consumers through direct or "junk" mail. Defendant's decision led to the creation of a consumer advocacy website on which consumers allegedly threatened to stop using defendant's coupons if they were sent by junk mail and to stop purchasing from manufacturers who advertised through defendant. Plaintiff alleged that in response, defendant tried to redirect consumer

anger away from defendant and toward plaintiff by publishing false statements on the consumer website about plaintiff. These took the form of posts by defendant's employees using aliases and alleging that plaintiff deceptively created the website to cause a consumer uprising against defendants. Plaintiff contended that these statements were defamatory and, because they impugned its business integrity, constituted defamation per se. Under New York law, a cause of action for defamation requires: (1) a false statement, (2) published without privilege or authorization of a third party, (3) constituting fault as judged by, at a minimum, a negligence standard, and (4) causes special harm or constitutes defamation per se. In rejecting defendants' argument that the postings could not be defamatory as a matter of law because they were opinions which are absolutely protected under New York law, the court found that several of the statements made by the aliases constituted actionable fact or at the very least "mixed opinion" which is actionable if the writer implies that the "opinion" is based on undisclosed facts which are defamatory. Since plaintiff's allegations must be taken as true for the purposes of a motion to dismiss, the court held they were sufficient to sustain plaintiff's cause of action for defamation. The court also rejected defendants' argument that the complaint should be dismissed because the plaintiff failed to plead special damages, which plaintiff argued was unnecessary because the alleged defamation was defamation per se. The court held that under New York law, proof of special damages is not required where the alleged defamatory statements impute dishonest or unethical business practices or that the plaintiff was engaged in deception. Since plaintiff alleged that the defendant published statements that attributed dishonest business practices to plaintiff and they impugned the integrity of plaintiff, they fell directly into the category of defamation per se, and the court therefore held that the plaintiff was not required to plead special damages. Lastly, the court held that plaintiff sufficiently alleged defendants' liability under a theory of respondeat superior. News America Marketing FSI L.L.C v. Valassis Communications, Inc., Index No. 601044/2009, 2/01/10 (Schweitzer, J.).

Discovery; motion for a protective order; relevance of demands; breadth of demands. Discovery; cost of producing electronically stored materials. Plaintiff, an insurer of financial guarantees, provided guarantees and insurance for the repayment of 17 of the defendant-mortgage lenders' loans. In an action that concerned 15 of the 17 loans, plaintiff issued document demands and brought a motion to compel responses to those demands. Defendants brought a motion for a protective order seeking to shift the cost of responding to discovery onto plaintiff. In deciding the motion to compel, the court weighed plaintiff's need for discovery against the burden borne by defendants in producing the documents. For each category of documents requested, the court examined the relevance the documents had to the underlying facts of the case and whether plaintiff based its various requests on facts or suspicions. The court stated that in a case of this magnitude, discovery is expected to be burdensome and expensive. Accordingly, it directed defendants to respond unless the burden became inordinate. Even so, because many of plaintiff's demands were irrelevant to the underlying transactions, the court denied much of plaintiff's motion to compel. In some instances, however, the court gave plaintiff instructions on how to refashion its demands to include only those documents relevant to the case as opposed to the overbroad demands plaintiff originally served. Defendants sought a protective order due to the excessive cost of producing the electronically-stored information sought by plaintiff. Defendants relied on cases standing for the proposition that the party seeking discovery should bear the cost incurred in the production of the material. The court disagreed, noting that the cost of examining responsive documents for privileged materials is borne by the producing party and that the general rule of law states that each party should bear the expenses it incurs when responding to discovery demands. The court distinguished the cases relied on by defendants because the electronically stored information in those cases was not readily available. MBIA Insurance Corp. v. Countrywide Home Loans, Inc., et al, Index No. 602825/2008, 1/14/2010 (Bransten, J.).

Legal malpractice; "but for" causation; speculative damages. Evidence; enforceability of stipulation limiting presentation of evidence. Arbitration; collateral estoppel. Plaintiff obtained advice from defendant on structure and legality of Russian investment. Plaintiff claimed defendant failed to warn that investment possibly violated Russian criminal laws and alleged that, had it been warned, it would not have made the investment. The court rejected this argument because in a prior arbitration involving plaintiff, the arbitrator had found that the investment did not violate Russian criminal law. The court also rejected, for lack of evidence, plaintiff's alternative causation argument that the structure for the investment recommended by defendant prompted the Russian Tax Police investigation that caused the demise of plaintiff's business in Russia. The only evidence submitted by plaintiff was the declaration of a Russian government official who had not

been deposed, and the parties had previously stipulated that they would not offer the testimony of any Russian government witness unless, prior to the close of fact discovery, the witness had given testimony. Discovery had closed without the official being deposed. Accordingly, plaintiff's claimed damages were speculative, and the court granted summary judgment for defendant. Gus Consulting GmbH v. Chadbourne & Parke, LLP, Index No. 106539/2010, 1/14/10 (Kapnick, J.).

Martin Act; Executive Law § 63(12); "bespeaks caution" doctrine; the Not-for-Profit Corporation Law; breach of fiduciary duty; parens patriae standing. The New York Attorney General (the "NYAG") brought an action against the manager of several hedge funds and his investment management company, alleging violations of the Martin Act, Executive Law § 63(12), and the Not-for-Profit Corporation Law, as well as common law claims. In essence, the NYAG alleged that defendants made various material misrepresentations and omissions to their investors, which included many charities, with respect to significant investments made with Bernard Madoff. The court denied defendants' motion to dismiss. With respect to the Martin Act claim and the Executive Law claim, the court held that the NYAG adequately pled: (1) that defendants had misrepresented that they were actively managing their investors' money when, in fact, they were funneling substantial funds to Madoff; and (2) that these misrepresentations and omissions were material, *i.e.*, a substantial likelihood existed that disclosure of the omitted facts would have been viewed by a reasonable investor as having significantly altered the mix of information available. Defendants tried to invoke the "bespeaks caution" doctrine, claiming that any alleged misrepresentations or omissions were not material because the hedge funds' offering memoranda warned investors that management duties might be delegated to independent money managers, but the court rejected this argument. The court explained that the "bespeaks caution" doctrine "is limited to forward-looking statements, and not applied to misrepresentations of present or historical facts which cannot be cured by cautionary language." Because defendants already had ceded substantial discretion and control to Madoff by the time of the offering memoranda, the court held that the misrepresentation of Madoff's role was the misrepresentation of a historical fact that could not be cured by the language in the memoranda. The court also rejected defendants' reliance on e-mails from approximately 10 investors indicating that they knew monies were invested with Madoff. The court explained that the "complaint details claims that hundreds of investors were not so aware and therefore the e-mails do not provide a basis for dismissal as a matter of law." With respect to the Not-for-Profit Corporation Law claim, the court held that the NYAG adequately pled that the defendant hedge fund manager was a trustee and/or investment advisor for several not-for-profit corporations and that he breached his fiduciary duties to those not-for-profits by, among other things, failing to make diligent inquiries into the risks of investing with Madoff, ignoring numerous indications that Madoff was engaged in fraud, and failing to disclose his conflicts of interest. Although defendant presented documentary evidence that suggested he had disclosed certain conflicts to one not-for-profit corporation, the court held that this evidence did not "clearly refute all of the assertions regarding [defendant's] failures." The court also held that the NYAG sufficiently alleged that defendants had breached their fiduciary duties to investors by failing to conduct adequate due diligence with respect to investments made with Madoff and by closing their eyes to evidence of potential fraud by Madoff. Defendants argued that the NYAG lacked parens patriae standing to bring such a claim because the NYAG was seeking to recover on behalf of an identifiable group of private investors. The court rejected this, explaining that the NYAG was seeking relief in order to "vindicate the State's quasi sovereign interest in securing an honest marketplace for all consumers." The court also rejected the defendants' suggestion that the Martin Act claim preempted the NYAG's breach of fiduciary duty claim. It noted that the purpose of the Martin Act "preemption doctrine is to preserve the AG's exclusive jurisdiction to enforce the statute." Because allowing the NYAG to proceed with the breach of fiduciary duty claim did "not undermine that exclusive enforcement jurisdiction," the court held that there was no preemption. The court also distinguished *People v. Grasso*, a case that held the NYAG had exceeded his authority by asserting both common law and statutory claims under the Not-for-Profit Corporation Law. Unlike in *Grasso*, the court explained that in this case, there was no inconsistency between the NYAG's Martin Act claim and its breach of fiduciary duty claim and, thus, no risk that the NYAG was trying to exceed his statutory authority. Finally, the court denied as premature defendants' application to strike the NYAG's request for injunctive relief. People v. Merkin, Index No. 450879/2009, 02/08/10 (Lowe, J.).

Procedure; choice of law. Limited liability companies; operating agreements; waiver of fiduciary duties; misappropriation of corporate opportunities; tortious interference with prospective business opportunities. Contracts; covenant of good faith and fair dealing. Conversion. Unjust enrichment.

Fraud; "special facts" doctrine; duty to disclose; inadequacy of pleading information and belief. Derivative action; standing. Plaintiffs and defendant had formed a Delaware limited liability company. Approximately one year later, plaintiffs had sold their interests in the LLC to defendant, earning an approximately 2,000% profit on their initial investment. When defendant subsequently sold a lease that had been owned by the LLC for a substantial profit, plaintiffs sued, claiming that defendant had been negotiating the transfer of the lease at the time that he had purchased plaintiffs' interests in the LLC and that he had wrongfully failed to disclose the sale opportunity to plaintiffs. Defendant moved to dismiss the complaint, and the court granted the motion. It held that it need not resolve whether the action would be governed by New York law (designated as the governing law in the operating agreement for the LLC) or Delaware law (under which the LLC had been formed) because the result would be the same under the law of either state. Next, relying upon the operating agreement for the LLC, the court granted defendant's motion to dismiss plaintiffs' breach of fiduciary duty claim, plaintiffs' claim that defendant's sale of the lease constituted the misappropriation of a business interest of the LLC, and plaintiffs' claim for tortious interference with a prospective business opportunity. With respect to the breach of fiduciary duty claim, the court held that the operating agreement for the LLC, which stated that the parties were entitled to compete with each other and with the LLC on "business ventures and investments of any nature whatsoever," eliminated the fiduciary duties that otherwise would have been owed by the parties to one another. The court observed that neither Delaware law nor New York law prohibited the parties from disclaiming the existence of a fiduciary relationship by contract. In fact, the Delaware Limited Liability Company Act explicitly permits the members of an LLC to agree to restrict or eliminate any fiduciary duties owed to the LLC or to another member of the LLC. The court dismissed plaintiffs' claim that defendant had misappropriated a business interest of the LLC on similar grounds. Specifically, because the operating agreement for the LLC explicitly gave the parties the right to pursue business opportunities in competition with the LLC, the court held that plaintiffs' claim that defendant had misappropriated a business interest of the LLC was "not viable." Finding that it was duplicative of plaintiffs' breach of fiduciary duty claim, the court likewise dismissed plaintiffs' claim that defendant had tortiously interfered with their prospective business opportunities. The court dismissed all of plaintiffs' remaining causes of action. With respect to plaintiffs' claim that defendant had breached the implied covenant of good faith and fair dealing by not disclosing his negotiations regarding the sale of the lease, the court held that the implied covenant did not "create a special relationship between the parties to a contract, such as would give rise to a duty to disclose material information." The court also dismissed plaintiffs' claim that defendant's purchase of plaintiffs' interests in the LLC constituted a conversion, explaining that it is "axiomatic that property that a party has willingly sold cannot form the basis of a claim for conversion." With respect to plaintiffs' claim for unjust enrichment, the court held the cause of action was not viable because plaintiffs willingly had sold their investment in an arms' length transaction and were free to assess for themselves the value of the interests sold. The court noted that this claim was "no more than a lament that plaintiffs failed to get a better price for the interests that they sold." Because the court had dismissed the underlying causes of action, the court also dismissed plaintiffs' parallel claims for equitable relief. With respect to plaintiffs' claim for fraud and misrepresentation, the court stated that in the absence of a fiduciary relationship, defendant could be held liable for a failure to inform the plaintiffs only under the "special facts" doctrine. "That doctrine holds that where one party to a transaction has such a superior knowledge of the relevant facts that a failure to disclose them would render the transaction unfair, that party has a duty to disclose those facts." The court held that the "special facts" doctrine was inapplicable because: (1) the high price that defendant paid plaintiffs for their interests in the LLC put plaintiffs on notice of facts that should have caused them to inquire into the basis for defendant's offer; and (2) plaintiffs' allegation that defendant knew he was likely to sell the lease for a substantial profit was made solely on information and belief and, thus, could not support a claim for fraud. Finally, the court rejected plaintiffs' attempt to assert a derivative cause of action on behalf of the LLC. Because plaintiffs had sold their interests in the LLC to defendant, the court held that they lacked standing to assert a derivative claim on behalf of the entity. Pappas v. Tzolis, Index No. 601115/2009, 3/3/10 (Gammerman, JHO).

Procedure; forum selection clauses; employment agreements. Plaintiffs sued their former employers claiming that the defendants had retaliated against them because they had complained about alleged violations of the Labor Law. One of the defendants moved to dismiss the claims against it on the ground that the plaintiffs' employment agreements contained a forum selection clause requiring that all actions be brought in Texas. The court granted the motion in part. It held that the defendant had failed to establish as a matter of law that certain of the plaintiffs had executed the employment agreements containing the forum selection

clause. The court denied the motion with respect to those plaintiffs. With respect to the remaining plaintiffs, who had indisputably signed, the court granted the motion. The court explained that contractual forum selection clauses are "prima facie valid and enforceable unless shown to be unreasonable." "To set aside a forum-selection clause, the challenging party is required to show that enforcement would be unreasonable and unjust, that it would contravene public policy, or that it is invalid because of fraud or overreaching such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court." Applying this standard, the court held, first, that enforcing the forum selection clause would not be unreasonable or unjust. Although the plaintiffs may have been in a weaker bargaining position than defendant when they executed the employment agreements, they were not pressured into agreeing to the forum selection clause, nor was the forum selection clause "hidden or tucked away within a complex document of inordinate length." The court next concluded that the forum selection clause was not against public policy. Although the plaintiffs asserted that the cost of litigating their claims in Texas would be prohibitive, the court found that they had provided no evidence regarding the economic burden of litigating in Texas and noted that, in any event, plaintiffs would be able to recover their attorneys' fees if they ultimately prevailed. Adler v. 20/20 Companies, Index No. 4884/2009, 1/5/10 (Emerson, J.).**

Procedure; statute of limitations; CPLR 213(7); breach of fiduciary duty; discovery rule. Corporate dissolution. Petitioner commenced this action for judicial dissolution of a corporation in which he and respondent each held a 50 percent interest. Petitioner alleged, among other things, that respondent breached his fiduciary duties by converting and/or diverting corporation assets and negligently managing the company. Respondent moved for partial summary judgment dismissing all allegations that related to events occurring more than six years prior to the commencement of the lawsuit. The court granted the motion. The court held that petitioner's breach of fiduciary duty allegations fell squarely within CPLR 213(7), which prescribes a six-year statute of limitations for "an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith." The only question remaining, therefore, was when petitioner's breach of fiduciary duty claims accrued. The court rejected petitioner's claim that the statute of limitations did not begin to run until after the dissolution of the corporation. Because his claims against respondent arose out of a fiduciary relationship, petitioner alternatively argued that the statute of limitations should not begin to run until respondent openly repudiated his obligation or the fiduciary relationship otherwise was terminated. The court rejected this argument as well, finding that petitioner's claims accrued when the corporation sustained injury as a result of respondent's alleged breaches of fiduciary duty. Finally, petitioner argued that he should get the benefit of the two-year discovery rule that applies to fraud claims. The court held, however, that the discovery rule applies to breach of fiduciary duty claims only where the allegations of fraud are "essential" to such claims. In this case, where petitioner's breach of fiduciary duty claims were based upon his allegations that respondent converted and/or diverted corporate assets and negligently managed the company, the court held that "allegations of fraud cannot be considered essential." DiStefano v. DiStefano, Index No. 5091/2008, 3/26/10 (Platkin, J.).**

Summary judgment; CPLR 3212. Declaratory judgment. Breach of contract. Breach of fiduciary duty. Promissory and equitable estoppel. Negligent misrepresentation. Attorneys' and experts' fees. This litigation arose from a failed joint venture to develop a destination resort in the Bahamas. The parties had signed a letter of intent to form a joint venture to develop the resort. Subsequently, a subscription agreement and a joint venture agreement were executed. The subscription agreement provided for the parties to make substantial capital contributions, subject to the occurrence of certain conditions precedent. The agreements, however, also provided that either party could terminate them and abandon the project at any time prior to closing. The closing did not occur on the date originally scheduled or on an extended date agreed to through amendments to the agreements, but the parties continued to work to satisfy the conditions to closing. One party requested that the other sign an agreement further extending the closing date, but the latter declined and thereafter terminated the project. Plaintiff filed suit for a declaratory judgment that it had validly terminated the agreements; defendant counterclaimed for breach of contract and asserted a third-party complaint for an investor's breach of the investment agreement. Both sides moved for summary judgment. The court held that the termination provision of the agreement had a plain meaning and had to be enforced according to

its terms. Under this provision, either party had an unconditional right to terminate at any time before closing. It was undisputed that no closing had occurred and the execution of certain collateral agreements did not create a duty to proceed with the project or waive any rights under the original agreements. Additionally, the subscription agreement reflected the parties' intent to create express conditions precedent to the duty of either party to close. Indeed, the documents contained at least 19 express conditions precedent and there was no contention that all of these conditions were satisfied. Defendant's attempt to characterize some of the unfulfilled conditions as "minor closing items" was unavailing as conditions precedent, unless excused by waiver, forfeiture, or modification, must be literally performed. The agreements contained non-waiver clauses and there was no manifestation of a clear intent to waive the contractual right of termination or any of the conditions precedent to closing. To the contrary, the record demonstrated a continuous effort to insist on fulfillment of the conditions to closing. Defendant's third-party claim based upon a guarantee was dismissed because the guarantee only became effective at closing and, as the court had already determined, the underlying agreements were validly terminated and no closing ever occurred. Defendant's tort counterclaims also were dismissed. The claims alleged that plaintiff misrepresented its intent to proceed to closing. Although a false statement of a party's intention may be sufficient to support an action for fraud even where the statement relates to an agreement between the parties, the alleged fraud must be independent of the parties' contractual obligations and based on an additional representation, omission, or conduct other than the agreement itself. The absence of any intent to deceive and of the element of reasonable reliance defeated the fraud counterclaim. A counterclaim for breach of fiduciary duty failed because the parties had an arms-length contractual relationship, not a fiduciary one, and a counterclaim for promissory and equitable estoppel failed because there was no clear, unambiguous, specific promise upon which defendant relied. Finally, the plaintiff was entitled to recover its reasonable attorneys' fees incurred in the litigation based upon a prevailing-party clause in the subscription agreement, with the amount of such fees to be determined by a Special Referee. Caesars Bahamas Investment Corp. v. Baha Mar Joint Venture Holdings Ltd., Index No. 600740/2008, 1/22/10 (Ramos, J.).**

Summary Judgment; CPLR 3212. Lien Law. Piercing corporate veil as to a Limited Liability Company. The parties entered into a construction contract whereby plaintiff served as a general contractor and the defendant LLC, owned by the individual defendants, served as the building developer. Plaintiff moved for partial summary judgment on its first cause of action against the LLC for breach of contract, which included a claim for lost profits, dismissal of the LLC's counterclaim for breach of contract, and for an award of attorneys' fees and costs. All defendants moved for partial summary judgment dismissing another cause of action under Article 3-A of the Lien Law for trust fund diversion and causes of action seeking to pierce the corporate veil to reach the individual defendants who were members of the LLC. Plaintiff alleged that the LLC had breached the contract because it had failed to fulfill a condition precedent requiring it to obtain certification from an architect that sufficient cause existed to justify its termination. Plaintiff further alleged that it was entitled to lost profits because of its wrongful termination. Lastly, plaintiff alleged that defendants' own breach of the contract warranted dismissal of the counterclaim against it. The court found that plaintiff made a prima facie showing that the LLC failed to terminate the contract in compliance with the contractual termination provisions and that the LLC failed to provide the required certificate from the architect. However, the court found that plaintiff was not entitled to lost profits since the claim was based on work done on properties that were not subject to the instant action. The court dismissed the defendants' counterclaim since it found that the defendants had failed to give plaintiff an opportunity to cure its allegedly defective or nonconforming work, and failed to provide a subsequent written notice as required by the contract. With regard to defendants' motion for partial summary judgment, the court found that plaintiff failed to establish the elements necessary to pierce the veil of defendant LLC and hold the individual defendants personally liable for damages caused by the LLC's breach of the contract. Observing that corporate formalities are much more flexible when applied to a limited liability company, the court found that the actions of a member of the LLC were authorized by an operating agreement, and that decisions regarding the management of the LLC were made jointly, and that no single person dominated the LLC or was its alter ego. The court also found it irrelevant that the LLC was managed from an office used by a member for his own separate business. The court, however, denied defendants' motion for partial summary judgment dismissing plaintiff's cause of action for trust fund diversion under Lien Law Article 3-A, finding that, although evidence of diversion was incomplete, certain withheld loan proceeds qualified as trust assets. In light of this denial, the court also denied partial summary judgment dis-

missing the piercing of the corporate veil claims as they related to the Lien Law cause of action. Mike Building and Contracting, Inc. v. Just Homes, LLC, Index No. 31035/2007, 2/2/10 (Demarest, J.).**

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