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

VOLUME 13, NUMBER 3 NOVEMBER 2010

Arbitration; confirmation of arbitration award; scope of judicial review; manifest disregard of the law; CPLR § 7510; arbitrators' equity powers. Breach of fiduciary duty; Martin Act; preemption. New Jersey Securities Act. Procedure; sealing. Petitioner, a New Jersey resident, had invested approximately $1.5 million in a Delaware private investment fund, which, according to the fund's offering documents, was managed by the individual respondent. Unbeknownst to petitioner, the private investment fund had invested substantially all of its assets with Bernard L. Madoff and thus was being managed by Madoff. Following the discovery of Madoff's Ponzi scheme, petitioner initiated arbitration proceedings against the individual respondent and his investment management firm, asserting claims for breach of fiduciary duty, violations of federal securities laws and of the New Jersey Securities Act (the "NJSA"), negligence, gross negligence, common law fraud, and negligent misrepresentation. A three-member arbitration panel from the American Arbitration Association denied all of petitioner's claims against the investment management firm respondent, found the individual respondent liable for breach of fiduciary duty and for violating the NJSA, and denied all of petitioner's remaining claims against the individual respondent. Petitioner filed the instant petition to confirm the arbitration award to the extent the award granted petitioner's claims. Petitioner also moved to unseal the arbitration record. Respondents filed a cross-petition to confirm the award to the extent it denied petitioner's claims and to vacate the remainder of the award. Respondents also asserted a counterclaim for indemnification. After explaining the extremely limited scope of judicial review of arbitration awards, the court granted the petition to confirm the award. As an initial matter, the court observed that many of the panel's rulings reflected the arbitrators' attempt to reach an equitable result and noted that even respondents did not attack the right of the arbitrators to rely upon principles of equity. Turning to respondents' specific challenges to the award, the court, first, rejected respondents' claim that the arbitration panel acted irrationally and in manifest disregard of the law when it refused to bar petitioner's claims based on his misrepresentation of his financial qualifications. In order to qualify for investment in respondents' private investment fund, individual investors had to own at least $5 million in qualified investments. Petitioner testified at the arbitration hearing that he mistakenly believed that his home and other assets could be considered as qualified investments. The court stated that in refusing to bar petitioner's claims on this basis, the arbitration panel properly sought to reach an equitable result. Given respondents' failure to explain the significance of the qualified investment requirement and their failure to perform due diligence or otherwise ensure compliance, the arbitration panel found it would be inequitable to bar petitioner's claims based on his misrepresentation of his financial qualifications. The court held that this exercise of equity power by the arbitrators was not totally irrational. Second, respondents argued that the arbitrators ignored controlling law when they refused to find that the Martin Act preempted petitioner's claim for breach of fiduciary duty. The court noted that there is a split of authority among the various Appellate Divisions regarding whether the Martin Act preempts common-law claims brought by private parties, and the Court of Appeals has not yet addressed the issue. Given the conflicting case law, and the fact that the arbitration panel analyzed the law on both sides, the court held that the arbitrators' ruling regarding Martin Act preemption did not reflect a manifest disregard of the law. Third, respondents argued that the arbitration panel acted totally irrationally in finding a violation of the NJSA because: (1) the evidence showed that petitioner had not been deceived regarding Madoff's role in managing the private investment fund; (2) the NJSA did not apply because the limited partnership agreement for the investment fund provides that it will be governed by Delaware law and much of respondents' misconduct took place in New York; and (3) the statute's scienter requirement was not satisfied. The court rejected all of these arguments. With respect to whether petitioner was on notice of Madoff's involvement in managing the private investment fund, the court held that respondents had provided no authority that suggested notice from a third party defeated a claim under the NJSA. Although there was conflicting evidence regarding whether and to what extent the individual respondent had disclosed Madoff's role directly, the court held that it lacked the power to second-guess the factual findings of the arbitrators on this issue. With respect to respondents' claim that New Jersey law did not apply to petitioner's claims, the court held there was a "colorable justification" for the arbitrators' decision given that petitioner was a New Jersey resident and the fact that the NJSA is applied liberally to protect its residents. With respect to respondents' claim that the individual respondent did not possess the requisite scienter under the NJSA, the court held that the arbitrators analyzed the evidence and determined factual and credibility issues that went directly to the question of intent. Because there was a "colorable justification" for the arbitrators' determination that the scienter requirement was satisfied, the court refused to set that finding aside. Turning to respondents' counterclaim for indemnification, the court held that respondents' indemnification claims as to damages and arbitration costs had been raised and decided during the arbitration proceedings. Finally, in recognition that "confidentiality is a paradigmatic aspect of arbitration," the court denied petitioner's motion to unseal the arbitration record. Wiederhorn v. Merkin, 601265/2010, 8/6/10 (Lowe, J.).

Arbitration; CPLR § 7503(b); petition to stay arbitration. Petitioner, a pharmaceutical corporation, and respondent had entered into a licensing agreement, giving petitioner the exclusive license to develop pharmaceutical products containing Acadesine, a proprie-

THE LAW REPORT
is published
four times per year by
the Commercial Division of the
Supreme Court of the
State of New York

LAW REPORT Editors:
Kevin Egan, Esq.
Loren Schwartz

The Commercial Division
acknowledges with gratitude
the assistance provided by the
Commercial and Federal
Litigation Section of the
New York State Bar
Association
in the publication of
The Law Report

Section Chair:
Jonathan D. Lupkin, Esq.

Co-Editors for the Section:
Megan Davis, Esq.
Scott E. Kossove, Esq.

The following members of the Section contributed to the preparation of summaries contained in this issue:
Yael Barbibay, Mark Berman, Linda Clemente, Elyssa Cohen, Deborah Deitsch-Perez, Stephanie Gase, Lindsay Katz, Claire Lee, Sammi Malek, Matthew Maron, Paul Marquez, Dan Maunz, Ira Matetsky, Adam Oppenheim, Joan Rosenstock, Emily K. Stitelman, Colleen Tarpey, Esqs.

tary compound for which respondent possessed the intellectual property. The parties' agreement had included an arbitration clause requiring that, "[i]f the Parties are unable to resolve a given dispute, the Parties shall have the given dispute settled by binding arbitration." The arbitration agreement had excluded only those disputes relating to patents and the use of confidential information. After a dispute arose between the parties, respondent had filed a demand for arbitration. Petitioner subsequently filed a petition, pursuant to CPLR 7503(b), seeking to stay the arbitration. The court denied the petition. The court explained that the parties' agreement contained a broad arbitration clause pursuant to which the parties had agreed to settle all unresolved disputes – with certain narrow exceptions not at issue in this case – by binding arbitration. Petitioner argued that the parties' agreement gave petitioner "sole and final responsibility and discretion for all decisions relating to" the development of licensed products and that this provision gave petitioner sole discretion with respect to the matters at issue in the arbitration. The court rejected this argument as a basis for staying the arbitration. Although noting that this provision might ultimately result in a finding that respondent had no valid claims against petitioner, the court held that the CPLR precluded it from passing on the merits of the parties' dispute. Schering Corporation v. Pericor Therapeutics, Inc., Index No. 601210/2010, 8/5/10 (Gammerman, J.H.O.).

Attorney-client relationship; confidentiality; disqualification of law firm; irrebuttable presumption of disqualification. Rules of Professional Conduct. Lawyer for corporation represents corporation, not employees. Petitioner sought to disqualify two lawyers and their current firm from representing respondents in an arbitration involving a shareholders agreement. Respondents, here and in arbitration, were one of several inter-related aviation companies and individuals. Petitioner had been employed as a lawyer by the companies, one of which, soon after the invasion of Iraq, had been in competition for a prime government contract there. That aviation company was held by another, and petitioner and all respondents were parties to the holding company's shareholder agreement. While the Iraq contract was in the offing, petitioner had contacted the two lawyers he now wanted disqualified, seeking, he claimed, confidential advice and an opinion on various issues raised by the shareholders agreement. Petitioner claimed that he had believed the two lawyers were acting as his attorneys and that he had faxed them documents and otherwise provided confidential information pursuant to the express understanding that the disclosures would be protected by client-lawyer relationship. Petitioner said that the lawyers had not gone forward with representing him only because they decided that their fee would exceed what he could pay. Subsequently, petitioner had commenced arbitration against respondents, claiming that they had denied him monies he was entitled to under the holding company shareholders agreement. In arbitration, respondents asserted that petitioner, while purporting to represent the aviation companies, among other things had wrongly advised them that US government contracting law required them to restructure the holding company as a majority-owned US enterprise and proposed that he, as a US citizen, should receive 30% of the company's shares. Respondents sought a declaration from the arbitrator that their tender of $25,000 to petitioner was a valid exercise of their option to repurchase his shares, and asserted other defenses and counterclaims. Here, petitioner contended that the arbitration involved information, issues, and documents identical to those he previously had disclosed to the two lawyers in confidence and that they should be disqualified from representing respondents. The court stated that to disqualify attorneys on the ground of prior representation a party had to establish the existence of a prior attorney-client relationship and show that the former and current representations were both adverse and substantially related. The court found the record to support that petitioner had spoken with the two lawyers, whom he knew to be aviation company's outside counsel, not on his own behalf but as attorney for the company. Further, the two lawyers always had represented the inter-related companies as outside counsel, so there was no question that the law firm had changed sides. The court also noted that unless parties have expressly agreed otherwise, a lawyer for a corporation represents the corporation, not its employees, and that the two lawyers' explaining the company agreements to petitioner was consistent with their role as outside counsel. Petitioner's claims that the lawyers had assumed a duty to represent him personally were merely conclusory, and, as petitioner had not proved prior representation, an irrebuttable presumption of disqualification did not arise. Moreover, petitioner did not identify confidential material he had disclosed, and having known the lawyers were the companies' counsel, could not have had a reasonable expectation of confidentiality. Motion denied. <u>Gordon v. Skylink Aviation, Inc</u>., Index No. 111401/2009, 9/7/2010 (Kapnick, J.).

Contract; breach; "hell or high water clause;" unconscionability; unconditional guaranty agreements. In an action involving a breach of commercial aifrcraft lease agreements, the court granted partial summary judgment to plaintiff-lessor against defendant-lessee and defendant-guarantor. Plaintiff-lessor and defendant-lessee entered into four identical commercial aircraft lease agreements, pursuant to which plaintiff-lessor was to deliver four aircraft (respectively "aircraft 1, 2, 3, and 4") to defendant-lessee at scheduled intervals. Defendant-guarantor executed an unconditional guaranty of defendant-lessee's obligations under each of the lease agreements. In addition to the terms and conditions regarding the tender of each aircraft, the lease agreements contained a clause commonly referred to as a "hell or high water clause," requiring defendant-lessee to unconditionally carry out its obligations notwithstanding any defense, set-off, counterclaim or other right it may have against plaintiff-lessor. Plaintiff-lessor prepped and delivered aircraft 1, which defendant-lessee accepted by signing an acceptance certificate in accordance with the terms of the lease agreements. The acceptance certificate explicitly stated that the aircraft was delivered, inspected, and conformed fully. Thereafter, plaintiff-lessor tendered aircraft 2 and sent a notice regarding the future tender of aircraft 3. After payment of two months' rent, defendant-lessee ceased rent payments on aircraft 1 and failed to take delivery of aircrafts 2 and 3. Defendant-lessee then failed to pay any rent on aircrafts 2 and 3. Thereafter, plaintiff-lessor sent a notice of default to defendant-lessee with respect to the breaches on aircrafts 1, 2, and 3 and invoked the guaranty agreement against defendant-guarantor. Plaintiff-lessor also sent a notice of default to defendant-lessee with respect to the yet to be tendered aircraft 4 under the cross-default provision of the lease agreements. Plaintiff-lessor commenced its action against both defendant-lessee and defendant-guarantor. Defendant-lessee opposed the pre-discovery motion for summary judgment on the grounds that its contractual obligations never materialized since they were contingent on plaintiff-lessor securing an export certificate of airworthiness, which defendant-lessee argues plaintiff-lessor never provided. Plaintiff-lessor argued that defendant-lessee accepted at least aircraft 1, as shown by its execution of the acceptance certificate, and that this defense was meritless. The court held that plaintiff-lessor had shown a prima facie basis for summary judgment. The court agreed that defendant-lessee was in material breach with respect to aircraft 1, 2, and 3, and defendant-lessee's defense of lack of performance by plaintiff-lessor with regards to the purported certificate of airworthiness was foreclosed by the lease agreements' "hell or high water clause." The court noted that commercial agreements between corporations dealing at arms' length are to be enforced in accordance with their written terms and "hell or high water clauses" are commonplace in equipment lease agreements. The court also rejected defendant-lessee's argument that it was not in breach regarding aircraft 4 stating that defendant-lessee was in automatic default of the fourth lease agreement pursuant to the cross-default provisions therein. Additionally, the court rejected defendant-lessee's defense based upon the doctrine of unconscionability, as the doctrine is presumed legally inapplicable in a commercial transaction among sophisticated business entities. The court then examined the facts and declined to apply the doctrine, finding that the lease agreements were not one-sided or grossly. Finally, the court granted plaintiff-lessor summary judgment as to liability under the guaranty against defendant-guarantor, holding that plaintiff-lessor had met its burden to enforce the written guaranty by showing an absolute and unconditional guaranty; existence of an underlying debt; and the guarantor's failure to perform under the guaranty. With respect to damages, the court referred the case to a special referee for a report and recommendation. Jet Acceptance Corp. v. Quest Mexicana, S.A. de C.V., Index No. 602789/2008, 6/23/10 (Fried, J.).

Contract; breach; partnership agreements; conditions precedent; interpretation; ambiguities; extrinsic evidence; damages. Fraud; negligent misrepresentation; breach of fiduciary duty; unjust enrichment; dismissal of claims that are duplicative of breach of contract claims. Procedure; summary judgment, CPLR § 3212. Plaintiff, a Delaware limited liability company owned by a private investor who once owned TWA, and defendants, a limited liability company and the guarantor of some of its payment obligations, had entered into a partnership agreement for the purpose of competing for the purchase of a real estate investment trust. The agreement had provided that upon its breach, the non-breaching party would be entitled to collect $60 million. Plaintiff sued for breach of contract, fraud, unjust enrichment, negligent misrepresentation, and breach of fiduciary duty, claiming that defendants had breached their obligation under the agreement to make a $600 million initial capital contribution to the partnership. Defendants moved for summary judgment dismissing the claims. The court denied the motion with respect to the breach of contract claim, but dismissed all other causes of action. Defendants argued that they had not breached the agreement by failing to make the $600 million initial capital contribution because their funding obligations were subject to two conditions precedent that had never materialized. Defendants also claimed that the $60 million in damages sought by plaintiff for defendants' alleged breach constituted an unenforceable penalty under either New York or Delaware law. The court ruled that the language of the agreement was ambiguous as to whether defendants' funding obligation was conditional and that the extrinsic evidence submitted by the parties did not clarify the agreement's meaning. The court also rejected defendants' claim that the $60 million in damages sought by plaintiff constituted an unenforceable penalty, explaining that the $60 million amount had been negotiated by sophisticated business people. For these reasons, the court held that it could not grant summary judgment dismissing plaintiff's breach of contract claims as a matter of law. However, the court found plaintiff's claims for fraud, unjust enrichment, negligent misrepresentation, and breach of fiduciary duty to be duplicative of the breach of contract claims. The court reasoned that these claims were based on the conclusory allegation that defendants had misrepresented their intention to perform under the agreement and that there was no allegation that defendants had breached a duty independent of the agreement. Meadow Star LLC v. Macklowe, Index No. 603165/2008, 9/27/10 (Kapnick, J.).

Contract; home improvement contract; breach; quantum meruit; conversion; account stated; unjust enrichment; fraud in the inducement; tortious interference with contract; right to sue for work performed without a license; fraud claim as duplicative of breach of contract claim. Plaintiff sued to recover payment for home improvement work that it performed on an apartment. Plaintiff asserted claims for breach of contract, conversion, account stated, and unjust enrichment against the owner of the apartment. Plaintiff also asserted causes of action for fraud in the inducement and tortious interference with contract against a second defendant, who allegedly solicited plaintiff to perform the home improvement work and promised that plaintiff would be paid. Defendants moved to dismiss the complaint, and the court granted the motion. Defendants argued that plaintiff's claims should be dismissed because it was not a licensed home improvement contractor when it performed the home renovation work. The court agreed. The court explained that under the Administrative Code of the City of New York, anyone performing home improvement work must have a home improvement contracting license. Because plaintiff indisputably was an unlicensed contractor, the court held that plaintiff could not enforce a home improvement contract nor seek recovery in quantum meruit. Finding that plaintiff's causes of action for account stated, unjust enrichment, conversion, and tortious interference with contract likewise depended upon the existence of an enforceable home improvement contract, the court dismissed these causes of action as well. Finally, the court dismissed plaintiff's cause of action for fraud in the inducement, finding it duplicative of plaintiff's breach of contract claim. Orchid Construction Corp. v. Gottbetter, Index No. 3320/2010 (Kitzes, J.).**

Derivative action; breach of fiduciary duty; business judgment rule; duty of loyalty; duty of care; duty of disclosure; liability of controlling shareholders; piercing the corporate veil; aiding and abetting the breach of fiduciary duty. Shareholders of a Delaware corporation brought this derivative action challenging the defendant corporation's decision to merge with a Delaware private equity firm. The complaint alleged that the corporation's directors and controlling shareholders breached their fiduciary duties by, among other things, failing to engage in an honest and fair sale process. Plaintiffs also alleged that the private equity firm aided and abetted this breach of fiduciary duties. Defendants moved to dismiss the complaint. First, the court denied the motion to dismiss by the director defendants. In doing so, it rejected the director defendants' claim that plaintiffs had failed to overcome the presumption that the director defendants' actions were protected by the business judgment rule. The court explained that in order to rebut the presumption that the business judgment rule applies, plaintiffs had to plead facts sufficient to create a reasonable inference that the corporation's board was either dominated or controlled by a materially interested director or that at least half of the members of the board were not independent. The court found that plaintiffs satisfied this burden here. Plaintiffs alleged that one of the corporation's directors received an $11.8 million phantom stock award as part of the merger and that this personal financial benefit created a disabling conflict of interest; that two other directors, who were members of the Special Committee charged with evaluating and negotiating the merger, were passive in performing their functions and deferred entirely to the recommendations of a non-independent director; and that two additional directors were interested because they had been appointed to the board by a group of shareholders that allegedly benefited disproportionately from the merger. Although the court noted that "each of the plaintiffs' claims of influence standing alone may not be sufficient to support a conclusion that the [d]irector [d]efendants were interested, the totality of the circumstances and overlapping issues create a reasonable inference sufficient to survive a motion to dismiss." The court also rejected the claim of the director defendants that the certificate of incorporation absolved them from liability arising from breaches of the duty of care. Although the court noted that Delaware law permits corporations to limit or eliminate the personal liability of a director for breaches of the duty of care, the director defendants failed to provide a copy of the Certificate of Incorporation to the court and, therefore, failed to establish this defense as a matter of law. Finally, the court rejected the director defendants' motion to dismiss plaintiffs' claim that they had breached their duty to disclose all material information relating to the merger. Although the director defendants argued that there was no longer any remedy for the alleged disclosure violations since the shareholders already had voted to approve the merger, the court declined to dismiss plaintiffs' claim given the allegations that the directors who had authorized the disclosures had breached their duty of loyalty. Next, the court granted in part the motion to dismiss by the controlling shareholder defendants – a limited liability company that owned 27.5 % of the outstanding shares in the corporation and its sole owner. The court explained that a shareholder owes fiduciary duties to the corporation if it is a "controlling shareholder," i.e., a shareholder that exercises control over the corporation's conduct. The court held that plaintiffs had alleged facts sufficient to create a reasonable inference that the limited liability company was a controlling shareholder and denied that defendant's motion to dismiss. With respect to the sole owner of the limited liability company, however, the court explained that he was not a shareholder and, thus, could be held liable as a "controlling shareholder" only by piercing the corporate veil. Because plaintiffs failed to allege any fraudulent conduct, which is required in order to pierce the corporate veil under Delaware law, the court granted the sole owner's motion to dismiss. Finally, the court granted the private equity firm's motion to dismiss plaintiffs' aiding and abetting claims. In order to state a claim for aiding and abetting the breach of a fiduciary duty, plaintiffs had to plead facts that created a reasonable inference that the private equity firm acted with knowledge that its conduct advocated or assisted the breach of fiduciary duty by the director defendants. The court found that plaintiffs' conclusory allegations were insufficient to survive a motion to dismiss. <u>In Re Allion Healthcare, Inc. Shareholders Litigation</u>, Index No. 41990/2009, 8/13/10 (Emerson, J.).**

Enforcement of judgments; turnover proceeding. Fraudulent conveyance; certificated securities; UCC Article 8. After a limited partnership sold an office building for a substantial sum, the general partner directed that a portion of the sale proceeds be transferred to an entity that he owned. The limited partners sued the general partner derivatively for fraud and sought an accounting. Thereafter, the general partner transferred sums into his entity's bank accounts at certain financial institutions. The limited partners served subpoenas duces tecum on the financial institutions, contending that the documents sought were necessary to investigate an allegation that the general partner tried to secret the money from the sale of partnership assets. Several months afterwards, one of the financial institutions made a line of credit available to the general partner's entity, secured by a Pledge and Security Agreement creating a first-priority security interest in favor of the lender. The original action between the general partner and limited partners was settled, but the general partner defaulted under the settlement agreement, and judgment was entered against him pursuant to a confession of judgment. The representative of the derivative plaintiff then served restraining notices on all accounts in which the judgment debtor had an interest and the accounts were frozen. Plaintiff then sought an order compelling the account balances be turned over to the partnership. Plaintiff alleged that the initial transfers of partnership funds were fraudulent. The financial institutions asserted that they had a superior right to the account assets pursuant to the security interest created in the Pledge and Security Agreement and based upon UCC Article 8. The court concluded that the outcome of this issue depended on whether the financial institution was on notice of an adverse claim to the accounts at the time it made its loan. It added that, under UCC 8-105(a)(2), "willful blindness" toward an adverse claim, meaning that "the person is aware of facts sufficient to indicate that there is a significant possibility that an adverse claim exists" but "deliberately avoids information that would establish the existence of the adverse claim," is treated as the equivalent of knowledge. The court observed that the financial institution's wholly owned subsidiary was aware, before the loan was made, that funds had been transferred from the partnership around the time of a court order restraining any such transfers and that litigation regarding such transfers was pending. Furthermore, the court held that the available information placed the institution on notice that it should investigate further, particularly in light of various federal anti-money-laundering regulations listing red flags that should be sufficient to trigger an investigation. The failure to conduct a reasonable investigation when it should have done so results in the institution being charged with knowledge that a reasonable inquiry would have provided. Such knowledge would have included the fact that no consideration was provided for the transfers and that the moneys were fraudulently transferred out of the partnership. The parent of the financial institution appeared likely to have been similarly on notice of circumstances sufficient to trigger an investigation. Although for this purpose one individual's knowledge within an organization generally may not be imputed to others, this does not mean that an organization may act to prevent the relevant individual from obtaining knowledge. Here, the facts were sufficient to require investigation and the failure to investigate could be attributed only to willful blindness. Accordingly, the motion to dismiss the turnover petition was denied. The plaintiff's motion for partial summary judgment was also denied, but the court directed an immediate trial pursuant to CPLR 3212(c) on the issue of the parties' adverse claims. <u>Scher Law Firm v. DB Partners I LLC</u>, No. 24633/2009, 6/3/10 (Demarest, J.).**

Insurance; occurrence; fortuity; expected injuries or events; risk; known-loss doctrine. Exclusions for prior and pending litigation. Asbestos. Plaintiff, which mined and milled asbestos at a California location for over 20 years, brought a declaratory judgment action to determine defendant insurers' obligations to provide coverage for claims of bodily injury allegedly resulting from asbestos exposure. Defendants denied coverage on the ground that the occurrences were not fortuitous. Plaintiff moved for partial summary judgment striking that defense, and defendants moved for summary judgment. Defendants' policies insured plaintiff for "all sums" arising from personal injury claims and for loss due to an "occurrence," defined as "an accident or event or continuous or repeated exposure to conditions which unexpectedly results in personal injury." Because there was no question that the occurrences would be covered if fortuitous, defendants bore the burden of proving plaintiff's positive intention or that an exclusion for lack of fortuity applied. The court explained that fortuitous loss was a necessary element of insurance policies based on accident or occurrence, a natural extension of the centuries' old New York public policy, the known-loss doctrine, by which an insured is not covered for a loss known before a policy takes effect. The known-loss defense requires consideration of whether the loss, and not the mere risk of loss, was known when the insured bought the policy. This limitation recognizes that risk is the very reason for buying insurance. Defendants argued that a disclaimer based on "expected or intended" injury required an inquiry that generally asked merely whether the injury was accidental. The court agreed that plaintiff might have known that people had begun to make claims and might have projected the extent of possible future claims. However, it was perfectly acceptable for plaintiff to replace the uncertainty of exposure with the precision of premiums; to exclude any loss an insured might in some way have expected could stretch the field of exclusions until it was impossible to recover at all. Insurers, the court pointed out, are free to ask about lawsuits before issuing coverage. The court found that the cases defendants relied on were factually distinguishable. There was no indication that plaintiff had acted in bad faith, and, in fact, the record showed that plaintiff constantly had informed customers and clients about asbestos risks. It was hard to conceive that defendants had been wholly unaware of the risks when they insured plaintiff. The court also found that defendants pled no exclusion for prior and pending litigation, although such exclusions are common. Absence of that exclusion, given the presence of other tailored exclusions, for example for injuries arising from nuclear energy use, implied that there should be coverage. Defendants argued that plaintiff was collaterally estopped from arguing that it did not expect or intend asbestos bodily injuries and claims because a California court, in an unreported decision, awarded punitive damages against plaintiff for injuries arising from asbestos exposoure. But defendants failed to establish that the issue raised in the California case was the same issue raised here, and the jury instructions, stated in the disjunctive, did not tie the award to any specific factor. This lack of specificity defeated any claim of collateral estoppel. Plaintiff's motion to strike defendants' affirmative defense was granted, defendant's motion denied. Union Carbide Corp. v. Affiliated FM Insurance Co., Index No. 600804/2004, 9/9/2010 (Ramos, J.).

Joint venture; oral agreement; statute of frauds. After a non-jury trial for breach of contract of an alleged oral joint venture agreement relating to the constitution of a design center, fraud, and imposition of a constructive trust, the court found that no binding oral contract had been formed to create a joint venture because there had never been a meeting of the minds. The evidence demonstrated that the negotiations were merely investigatory, and that plaintiff did not change her position in reliance upon the alleged agreement. The court noted that the statute of frauds was not applicable to a joint venture, but if it did apply, it could void the agreement because the purported joint venture might be viewed as having a definite term of more than one year since the "object" was to open a design center that would take at least two years to complete. The court further noted, however, that if the term of the agreement was indefinite (and thus not subject to the statute of frauds) because the "continued operation" of the design center was "contemplated," then defendants terminated it as of right, "without liability for breach of contract." Mendelowitz v. Cohen, Index No. 17390/2005, 8/5/10 (Demarest, J).**

Landlord-tenant; constructive eviction; covenant of quiet enjoyment; wrongful eviction; fraudulent misrepresentation. Procedure; motion to amend complaint. Plaintiff tenant sued defendant, a commercial landlord, alleging that it had rented property from defendant for the purpose of using the premises as a recording studio, that plaintiff later discovered that this use violated local zoning ordinances, and that defendant was aware of how plaintiff intended to use the property and also knew that this intended use was not permitted by local law. Plaintiff asserted causes of action for constructive eviction, breach of the covenant of quiet enjoyment, and wrongful eviction. Defendant moved for summary judgment dismissing all of plaintiff's claims and granting judgment on defendant's counterclaims. Plaintiff cross-moved to amend the complaint to add a cause of action for fraudulent misrepresentation. The court denied defendant's motion for summary judgment in part and granted plaintiff's motion to amend the complaint. With respect to plaintiff's claim for constructive eviction, defendant moved for summary judgment on the grounds that the purported inability of plaintiff to bring its use of the premises into compliance with local zoning laws was plaintiff's responsibility under the clear language of the lease, and that plaintiff's inordinate delay in vacating the premises barred any claim for constructive eviction as a matter of law. The court rejected both arguments. First, the court held that there was an issue of fact regarding whether the lease between the parties imposed upon plaintiff the burden to ensure that its intended use for the property complied with local zoning ordinances. Although the lease stated that plaintiff was "solely responsible for obtaining plans and permits" for the premises, agreed to accept the premises subject to any code violations, and agreed to hold the landlord harmless for any claim or penalty arising from a code violation, the court held that plaintiff's allegation that defendant explicitly represented that the proposed recording studio was legal and that a rider to the lease specifically stated that plaintiff intended to use the property as a recording studio created a triable issue of fact. Additionally, while the court acknowledged that abandonment of the leased premises is a prerequisite to bringing a constructive eviction claim, it held that the question of whether plaintiff abandoned the property in a timely manner presented an issue of fact. Because plaintiff's constructive eviction claim survived defendant's motion, the court also declined to dismiss plaintiff's claim for breach of the covenant of quiet enjoyment since the latter claim derived from the former. With respect to plaintiff's claim for wrongful eviction, the court granted defendant's motion for summary judgment on the ground that the evidence showed plaintiff had abandoned the property and was not evicted. The court, however, denied defendant's motion for summary judgment on its counterclaim for unpaid rent, explaining that if plaintiff were to prevail on its constructive eviction claim and/or its breach of the covenant of quiet enjoyment claim at trial, the amount of rent owed to defendant might be abated. Finally, the court granted plaintiff leave to amend its complaint to add a claim for fraudulent misrepresentation. The court found that there was no prejudice to defendant in adding the claim since it was based on statements made in the original complaint and that the amendment was not futile since plaintiff had alleged facts which, if proved, supported a claim for misrepresentation. 3 MB Recording Studios, LLC v. 737 Smithtown Bypass Corp., Index No. 42036/2008, 8/2/10 (Pines, J.).**

Personal jurisdiction; burden on party opposing a motion to dismiss; CPLR § 301; general jurisdic-

tion; CPLR § 302(a)(1); transaction of business in New York; solicitation of business in New York; CPLR § 302(a)(2); commission of a tortious act while in the state. Plaintiff, a limited partnership with offices in New York, sued defendant, a resident of Italy and the former CEO of a Delaware corporation headquartered in Georgia, after plaintiff purchased stock in defendant's company and the stock price plummeted. Plaintiff alleged that defendant had persuaded it to buy the stock based on various allegedly false representations. Defendant moved to dismiss for lack of personal jurisdiction and failure to state a claim. The court found that plaintiff had failed to satisfy its minimal burden to show that jurisdictional facts may exist so as to entitle it to jurisdictional discovery and, accordingly, granted defendant's motion to dismiss for lack of personal jurisdiction. First, the court found that defendant was not subject to general jurisdiction under CPLR § 301 because plaintiff failed to allege that defendant had a continuous and systematic presence in New York during the relevant time period. Although plaintiff alleged that defendant paid taxes to New York as a non-resident, that he had purchased real property in New York, that he received consulting fees from a New York-based corporation, that he managed a New York-based corporation, that he met with plaintiff once in New York regarding the stock purchase and thereafter e-mailed and called plaintiff about the stock, that he visited New York two to three weeks every year to visit family, and that his wife maintained an apartment in New York, the court held that many of these contacts with New York were irrelevant to the question of personal jurisdiction because they occurred before the instant action was commenced. Even if the one instance when defendant visited New York for a meeting with plaintiff rose to the level of "doing business" in New York, the court explained that defendant still would not be subject to jurisdiction as an individual under CPLR § 301 because defendant was conducting business as a corporate agent, not in his individual capacity. Second, the court held that plaintiff failed to allege personal jurisdiction under CPLR § 302(a)(1), which allows the court to exercise personal jurisdiction over any non-resident who transacts business in New York. While defendant had met with plaintiff in New York on one occasion to encourage plaintiff to invest in defendant's company, the court found that this meeting constituted mere solicitation, not the transaction of business. Finally, the court held that defendant was not subject to personal jurisdiction under CPLR §302 (a)(2) because plaintiff failed to allege that defendant committed a tortious act while in the state. Plaintiff had asserted that during the meeting with defendant in New York defendant falsely represented that Goldman Sachs had expressed an interest in purchasing shares of the company's stock, but the court held that this allegation was insufficient to state a claim for fraud. The court explained that defendant's prediction regarding future actions by Goldman Sachs could not provide a basis for a fraud cause of action in the absence of some showing that defendant knew his statements were false. Because plaintiff failed to make such a showing, the court held that it could not exercise jurisdiction over defendant based on his alleged commission of fraud within the state. For all of these reasons, the court granted defendant's motion to dismiss the complaint in its entirety. <u>Argos Capital Appreciation Master Fund, L.P. v. Gilo</u>, Index No. 650441/2008, 9/24/10 (Bransten, J.).

Res judicata. Compulsory counterclaims. Federal Rules of Bankruptcy Procedure; adversarial proceedings; contested proceedings. Sameness of operative facts in objections in fee application proceedings and in malpractice claims. Several businesses sued their former bankruptcy counsel for alleged breaches related to that representation, including for malpractice. The law firm had applied to the bankruptcy court for legal fees and plaintiffs had objected based on the firm's status as a pre-petition creditor and its consequent alleged lack of disinterestedness. Plaintiffs also had objected to the firm's alleged failure to disclose that plaintiffs had promised to pay its fees when the proceedings concluded, and to the law firm's sudden withdrawal after receiving partial payment. The bankruptcy court had found that the firm was not "disinterested" and denied it fees and ordered it to disgorge $50,000, but allowed it to request expenses. Defendant moved to dismiss the present suit based on res judicata. In opposition, plaintiffs contended that because the bankruptcy proceeding had been merely a contested matter, not a full-out adversarial proceeding, their claims were not compulsory counterclaims barred by res judicata. Plaintiffs pointed to the Federal Rules of Bankruptcy Procedure, where fee applications are not listed among "adversary proceedings" and have been described as "contested matters." The court explained that application of res judicata turns on whether the prior decision was a final judgment on the merits, the parties were identical, the court had jurisdiction, and the causes of action were the same. Even after those criteria have been met, a malpractice claim could still be viable, unless – a key element – it could and should have been asserted in the former proceeding. The court distinguished a case in which counsel had represented a plaintiff throughout bankruptcy proceedings and given that plaintiff no reason, during these proceedings, to doubt their performance and interpose malpractice claims; there, an independent malpractice claim had been allowed. Here, the bankruptcy court had

had competent jurisdiction over the fee dispute. Although plaintiff claimed that the bankruptcy proceeding was not a full-blown adversarial proceeding, plaintiff had reserved the right in its written objections to raise at the hearing any and all substantive arguments with regard to the firm's fee application regardless of whether or not those arguments were contained in its writte n objections. The court said that although New York State does not have a compulsory counterclaims rule, it was not permissible for plaintiff to stand silent regarding its malpractice claims during the bankruptcy proceedings, then bring a new action under a new legal theory seeking relief inconsistent with the bankruptcy court's judgment. The court found that a common nucleus of operative facts formed the factual basis for the fee dispute and the present claims and that plaintiffs were aware of the claims raised here when they objected to the firm's fee application–their objections then were substantially identical to their present causes of action. An order on a fee application that completely resolved the issues, including relief, was a final order, the court said, and it cited precedent that such orders are sufficiently final to be appealable where the bankruptcy court disallowed fees but allowed certain expenses, as here. Finally, the court found that the parties in both actions were identical. It granted defendant's motion to dismiss. Source Enterprises, Inc. v. Windels Marx Lane & Mittendorf, LLP, Index No. 110684/2009, 7/8/10 (Gammerman, J.).

Retroactivity analysis; threshold requirement; new legal principle. Court of Appeals; statutory interpretation; legislative intent. Not new legal principle if decision foreshadowed. Rent Stabilization Law §§ 26-504.1 and 26-504.2 (a); Rent Regulation Reform Act; luxury decontrol. Administrative agency; rules rejected by court. Plaintiffs in this purported class action were seeking $215,000,000 in damages for alleged rent overcharges and a declaration that their apartments would remain stabilized as long as defendants received City tax benefits known as J-51 benefits. The court considered whether a Court of Appeals decision (the Decision) handed down in the case would properly be applied retroactively. The court of Appeals had ruled that defendants could not deregulate plaintiffs' apartments while receiving J-51benefits. Certain defendants argued that the Decision should not be applied retroactively and moved to dismiss. Plaintiffs argued that the Decision did not constitute a new legal principle, hence the threshold requirement of a retroactivity analysis was not satisfied. The defendants relied heavily on Gurnee v. Aetna Life and Cas. Co., (55 NY2d 184 [1982]), where the Court of Appeals had explained that retroactivity analysis is traditionally used where there has been an abrupt shift in controlling decisional law, not in instances where the court has taken its first opportunity to construe the language of a statute. Here, the Decision had construed provisions of the Rent Stabilization Law (RSL), calling the question one of "pure statutory reading and analysis depending on an understanding of legislative intent." The court found that statements by the Rent Regulation Reform Act's (RRRA's) sponsor made plain that luxury decontrol was not intended to apply to buildings that got J-51 tax benefits, and further, that the relevant RSL provisions said that luxury decontrol did not apply to units that "became" or "become" regulated by virtue of receiving J-51 benefits. Defendants' contention had been that they had not become regulated solely by applying for and receiving J-51 benefits because they had initially been subject to rent stabilization since 1974. However, the Court of Appeals had explained that "become" can refer to "achieving, for a second time, a status already attained." The court here said that even under what Gurnee called a traditional retroactivity analysis, the Decision should be accorded full retroactive effect. Under Gurnee, a change in decisional law usually would be applied retrospectively except where the decision established a new principle of law, either by overruling clear past precedent, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Defendants argued that the Decision was not foreshadowed, that the Department of Housing and Community Renewal (DHCR) had uniformly held that defendants' buildings could use luxury decontrol. But in Gurnee, the Court of Appeals had rejected a similar argument in regard to regulations promulgated by the Insurance Superintendent. Defendants argued that not only DCHR's regulation but its adjudications and orders had established the meaning of the RSL. However, the sole post-Gurnee case cited did not involve judicial interpretation of a statute, but an administrative agency's decision concerning its own policy. The court here was not persuaded, either, by defendants' argument that the Decision was not clearly foreshadowed. There was the Court of Appeals' reliance on the RRRA sponsor's express statements at the inception of the statute, which more than foreshadowed, indeed clearly acknowledged, the Decision. Further, while defendants pointed to "DHCR's first interpretation of luxury decontrol" over 13 years before the Decision, the DHCR previously had issued a bulletin saying that luxury decontrol would not apply to housing receiving tax benefits until the benefit period expired. This too foreshadowed the decision. Nor did the court agree that Housing Preservation and Development had never objected to DHCR's position; HPD had written to the latter asking it to reconsider its amendment to the rent stabilization code that "appeared to permit deregulation of units not intended to be deregulated." Further, the New York State Register showed that the amendment was raised as a major issue during public commentary. The court found that defendants had failed to show that the Decision was a new rule of law or that it was unforeseen. The motions to dismiss were denied. Roberts v. Tishman Speyer Properties, LP, Index No. 100956/2007, 7/30/10 (Lowe, J.).

Sanctions; CPLR § 3126; willful and contumacious failure to comply with court orders; striking of pleading as an appropriate sanction. Plaintiff moved for an order, among other things, striking defendants' answer on the ground that defendants had willfully and contumaciously failed to comply with various court orders. The court granted the motion. The court explained that although it is generally preferable to resolve cases on the merits, striking a pleading may be an appropriate sanction where the offending party willfully and contumaciously fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR. The court found that defendants' conduct in this case – which included their failure to comply with a court order requiring them to share the cost of a court-appointed forensic accountant, their failure to comply with numerous court orders requiring the production of documents, and their failure to comply with a court order requiring them to submit an affidavit regarding the existence or non-existence of the materials being sought through discovery – warranted the imposition of sanctions. The court described defendants' violations of court orders as "striking in their depth and breadth" and held that they "readily demonstrate willfulness and contumaciousness." Indeed, the court said that it would be "hard to conceive of a pattern of willful violations of court orders that is more complete than the [d]efendants' conduct here." The court, accordingly, held that it was an appropriate exercise of discretion to strike defendants' answer, along with all affirmative defenses and counterclaims, and to grant judgment for plaintiff as to liability. The court referred the issue of damages to a special referee to be determined at an inquest. Lipp v. Zigman, Index No. 011435/2005, 6/8/10 (Driscoll, J.).**

Summary judgment; "associated persons"; employment; implied contracts; insurance contracts; ambiguities. Insurers brought declaratory judgment action and moved for summary judgment seeking declaration that defendant's loss was not covered under plaintiffs' policies. The court denied plaintiffs' motion, and upon a search of the record, granted summary judgment to defendant. Defendant, a financial institution, owned an insurance policy and excess financial institution bonds issued by plaintiffs. One of defendant's traders traded commodities futures on the overnight electronic exchange, in excess of his margin, resulting in a prospective loss to defendant in excess of $141 million. Defendant filed a claim under its primary insurance policy and its excess financial institution bonds. Plaintiffs took the position that defendant's loss was not a covered loss as defined under the policy, alleging that: (1) the trader was not an employee of the defendant; (2) the trader did not commit a fraudulent or wrongful act as defined in the policy; and (3) defendant did not suffer a direct loss. Because there was no dispute that there was coverage during the period in question, plaintiffs needed to prove that the alleged exceptions or exclusions applied. The court found that the plaintiffs failed to meet their burden. First, the court found that the trader was an "associated person" of the defendant (a status sufficient to subject one to mandatory employee arbitration) and therefore, as a matter of law, was a person with an implied contract with defendant. Since the policy defined an employee as someone under an implied contract of employment or service, the trader was an employee under the policy. Second, the court found that the trader had committed a wrongful act in that his trades were unauthorized and done for financial gain. Finally, the court rejected plaintiffs' argument that the defendant's loss was not direct. It found that the loss was direct to the defendant and not the trader based on evidence that the Chicago Mercantile Exchange demanded its intraday settlement on the unusually large shortfall from the transaction directly from the defendant without regard to or knowledge of the individual trader's identity. Since the debt accrued before knowledge of the trader's identity, the court found that the debt could not be the trader's direct debt or loss and that the debt or loss was therefore directly suffered by the defendant under the terms of the policy. New Hampshire Insurance Company v. MF Global, Inc., Index No. 601621/2010, 9/28/10 (Fried, J.).

Summary judgment; construction contract; surety; reclassification of termination provisions. Plaintiff and defendant contractor entered into a contract requiring defendant contractor to complete excavation and underpinning work. After significant delays and damage to the adjoining properties, plaintiff terminated the contract for convenience, reserving its right to change the termination to one for cause upon further investigation. Less than a month later, plaintiff changed the termination to one for cause. Plaintiff then sued defendant contractor for breach of contract and defendant surety to recover under a performance bond. Defendant surety moved for summary judgment, claiming that plaintiff's original termination for convenience could not be converted to a termination for cause. The court rejected that argument, holding that, absent the contractor's or surety's reliance on the termination for convenience, plaintiff was not bound by its initial designation of the termination. The court found no reliance was possible because the surety was not given notice of the termination for convenience and, when plaintiff notified the contractor, plaintiff reserved its right to change the type of termination. Nevertheless, the court granted defendant surety's motion for summary judgment, finding that plaintiff did not sustain any compensable damages recoverable from defendant surety. Under the terms of the performance bond, defendant surety was only responsible for the balance of the contract price. Plaintiff, however, procured a contract to complete the remaining work for a lower total sum than the original contract, thereby obtaining a "completion contract at a lesser cost than the contract balance." Finally, the court found that plaintiff could recover damages based on costs associated with third party property damages under a commercial general liability policy, but not from defendant surety. 400 15th Street, LLC v. Promo-Pro, Ltd., Index No. 20651/2006, 9/10/10 (Demarest, J.).**

Summary judgment; motion to dismiss; res judicata; collateral estoppel; Rule against Perpetuities; promissory estoppel. Plaintiff, operator of a not-for-profit club that provided facilities and overnight accommodations to military personnel and retirees, entered into a series of transactions with two developers whereby the developers purchased property adjacent to the club's property, and entered into an initial 50-year lease, with two 25-year renewal options. Plaintiff leased its clubhouse to the developers, which in turn subleased the clubhouse back to plaintiff rent-free for 25 years, with one 15-year renewal. Both of these transactions required court approval. Plaintiff and developers also entered into an option agreement that granted plaintiff the option to sell the club to the developers for a set amount at any time before the termination of the sublease. The developers subsequently built two residential towers on neighboring properties using the air rights that were acquired in the lease, and both buildings were subsequently converted to cooperative ownership. As part of the conversion, the developers assigned their rights in the lease, sublease and option agreement to the cooperative apartment corporation, which is the defendant in this action. Plaintiff sought summary judgment to invalidate the lease and option agreement pursuant to New York's Rule against Perpetuities (EPTL § 9-1.1). Defendant subsequently commenced a third-party action against the alleged heirs of the developers, who in turn commenced a fourth-party action against a title company and related principals. The court initially found that the developers heirs' could not raise claims of res judicata and collateral estoppel since the issue of perpetuities was never raised or addressed in the prior proceeding approving the transactions between plaintiff and the developers. As for the arguments concerning alleged violations of the Rule, the court found that the lease required the two 25-year renewal terms to be exercised during the lease term and applied consecutively and without interruption. As such, the lease established unambiguously that plaintiff's renewal options were for two consecutive terms. Because of this language, the court found that the absence of an express right under the renewal terms of the lease constrained the Rule from being applied, and that the renewal option originated in one of the lease provisions so that it was incapable of separation from the lease. Therefore, the court denied plaintiff's motion for summary judgment on this issue and dismissed this cause of action. The court additionally held that the lease provision that required plaintiff to perform maintenance and repairs on the club throughout the term of the lease did not constitute an unreasonable restraint on alienation, thus making the Rule inapplicable. Moreover, the court held that since the option agreement created an option to sell property held by the owner of that property, it was also not subject to the Rule. This holding provided a basis for dismissing the heirs' counterclaim, which sought a declaration that plaintiff's right to sell the club under the option agreement would not be exercised. The title company cross-moved to dismiss the second cause of action in the fourth-party complaint, seeking a declaratory judgment on whether the title company was required to indemnify the heirs of the developers under a title policy that the title company assumed by succession. The court granted the title company's motion to dismiss this cause of action based upon the fact that title coverage ceased upon the developers' transfer of their rights in the lease, sublease, and option agreement to the cooperative apartment corporation because the instrument was devoid of any covenant or warranty of title that would have continued coverage. Defendant also moved to dismiss a number of counterclaims asserted by the developers' heirs. The court dismissed the unjust enrichment counterclaim because even though defendant may have received an incidental benefit, the rent payments were made at the behest of plaintiff. The motion to dismiss the heirs' counterclaim for promissory estoppel, however, was denied in part because the court found that the defendant clearly and unambiguously promised not to interfere with the heirs' rights in connection with the property, and that the heirs suffered an injury as a result of their reliance on this promise regarding the assignment. However, the court dismissed the claim as to the lease and sublease because the heirs were not parties to these agreements. The court also dismissed the heirs' claim against defendant for breach of the covenant of good faith and fair dealing, finding that the allegation was conclusory. The court sustained the heirs' counterclaim for a temporary and permanent injunction against defendant from taking any action that created, extended or otherwise conferred rights in and to a certain air rights parcel, or to diminish the remainder interest in the club in any way. The court concluded that further discovery was necessary to ascertain the extent to which the heirs relied on the various agreements noted in their promissory estoppel cause of action. Lastly, the court dismissed the fourth-party complaint against two of the individual defendants based upon the absence of any duty owed to the heirs. Soldiers', Sailors', Marines' and Airmen's Club, Inc. v. The Carlton Regency Corporation, Index No. 600813/2007, 6/22/10 (Ramos, J.).

Summary judgment in lieu of complaint; CPLR § 3213; sum certain; unconditional guaranty. Plaintiff and one defendant entered into a credit agreement backed by guaranty agreements between plaintiff and the other defendants. Plaintiff brought a motion for summary judgment in lieu of a complaint as to defendants' liability. The borrowing defendant's default under the terms of the credit agreement, the unconditional promises to pay in the event of such default, and the timely notice of default were undisputed. Plaintiff argued that the credit agreement, along with the guarantees and the affidavit setting forth the guarantor defendants' nonpayment, were sufficient proof of plaintiff's entitlement to summary judgment under CPLR § 3213. Defendants opposed the motion on several grounds, but principally argued that summary disposition was improper because plaintiff's entitlement to a sum certain could not be ascertained without reference to documents outside of the instruments. The court rejected defendants' argument and held that an unconditional guaranty, even one that does not set forth a sum certain, qualifies under CPLR § 3213 as an instrument for the payment of money only. The court found that defendants' argument of a triable issue of fact as to the exact amount due and owing under the guarantees was insufficient to defeat summary judgment. Furthermore, the fact that the amount to be paid could fluctuate depending on the amount of the revolving credit outstanding at a given time did not take the guarantees outside of CPLR § 3213. Since there was no dispute as to the default, nor as to the unconditional nature of the guarantees and lack of payment, the court granted plaintiff's motion as to liability and referred the case to a special referee for determination of damages. Webster Business Credit Corporation v. Durham, Index No. 650091/2010, 9/15/10 (Fried, J.).

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

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