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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Constitutionality of amendment to hotel room occupancy tax; creation of new taxable entity, travel "remarketer"; obligation to collect hotel room occupancy tax; obligation to break down costs for consumer. Enabling legislation. Lack of consistency between sales and hotel room occupancy taxes. Various travel intermediaries ("remarketers") challenged the constitutionality of Local Law 43 of 2009 (LL43), which amended the Hotel Room Occupany Tax (HROT). Before LL43, consumers who booked hotel rooms through plaintiffs and similar remarketers were charged a single price that combined hotel room rent with the remarketer's service fee; the HROT, however, was based only on what the consumer paid for the hotel room, exclusive of the fee. LL43 made the remarketers taxable entities and imposed the HROT on their fees. The statute redefined "rent," introduced the terms "net rent" and "additional rent," required the remarketers to break down for the consumer the net and additional rent and the tax on each amount, and made the remarketer liable to collect the HROT on the net and additional rent "as trustee for and on account of the city." The City moved to dismiss the remarketers' cause of action for a declaratory judgment that LL43 was unconstitutional. The court explained that the State Legislature may delegate its power to tax to municipalities like the City, but that any tax a municipality imposes must be within the express limitations of enabling legislation. Defendants argued that the enabling legislation here unambiguously allowed the City to tax the entire amount a consumer paid for a hotel room, regardless of whether part of the amount went to a remarketer. The court found that the enabling legislation gave the City the power to impose a hotel occupancy tax and clearly provided that the tax be paid to the owner of the hotel room or to the person entitled to be paid for the room. The legislation did not distinguish between operators and remarketers, but focused on the amount paid by the consumer. The remarketers argued that State budget proposals showed that State action was required to expand the HROT base. They pointed to proposals to impose sales taxes and the HROT on remarketers, contending that the comments introducing the proposals and the simple fact that the State had considered the proposals proved that it alone had the power to enact LL43. The court said that there was no reason to infer from the State's having considered similar legislation that the City was unable to enact LL43. Similarly, it could not be inferred that the State's failure to enact LL43 had no bearing whatsoever on the City's ability to enact it. However, legislative inaction being inherently ambiguous, the court noted, it was not persuaded that

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the proposals showed any limitation in the City's power to enact the law. The remarketers also argued that LL43 exceeded the City's authority because it was inconsistent with the sales tax, that the two taxes together belonged to an overall legislative scheme, and that terms such as "rent" found in both the sales tax and HROT must be defined the same way because they had held similar definitions in the past. The court found no authority requiring the two statutes to be interpreted consistently; the enabling legislation clearly stated that the HROT was enacted "in addition to any tax authorized." The court noted that plaintiffs failed to cite any language in the enabling legislation to support their repeated contention that the HROT could not be imposed on remarketers' service fees. Department of Finance publications submitted by the remarketers to show LL43's purported unconstitutionality pre-dated LL43's enactment, were irrelevant, and, moreover, merely advisory and without authority to bind the court. The court granted defendants' motion to dismiss. Expedia, Inc v. City of New York Department of Finance, Index No. 650761/2009, 10/21/10 (Ramos, J.).

Contracts; breach; claim assignments; extrinsic evidence. Defendants and plaintiffs each moved for summary judgment on a breach of contract action arising from the sale and purchase of bankruptcy claims. Plaintiffs claimed that defendants, who sold the bankruptcy claims at issue, breached the terms of two separate claim assignment agreements. Specifically, plaintiffs purchased unsecured debts owed by the debtor to its landlords regarding certain non-residential real estate leases that the debtor had rejected or terminated in the bankruptcy case. The assignment contracts included multiple provisions to protect plaintiffs-purchasers, including (1) representations and warranties that the bankruptcy claims were valid and enforceable; (2) a formula by which defendants would repay plaintiffs for any claims that were offset, disallowed, subordinated, or otherwise impaired; (3) indemnification for all losses or damages resulting from defendants' breach of any representation or warranty, or impairment of the bankruptcy claims. Following the assignment, the debtor filed an objection to each of the bankruptcy claims, to which plaintiffs objected (through counsel hired by defendants). Although the debtor's proposed reorganization plan provided that creditors with general unsecured claims would receive certain distributions, only creditors with undisputed claims as of the plan confirmation date were eligible to receive those additional distributions. Accordingly, a prompt resolution of the debtor's objections was required if a creditor holding a disputed claim (such as plaintiffs) wished to receive those distributions. The Bankruptcy Court held a hearing on those objections, but adjourned that hearing to a date after the confirmation hearing for the debtor's Chapter 11 plan. As a result, the parties were faced with the choice of either attempting to negotiate a resolution to the debtor's objections prior to the confirmation date or forfeiting a significant part of the recoveries to which the bankruptcy claims were entitled. After defendants' attorneys recommended to plaintiffs that they settle the claims, plaintiffs authorized them to negotiate a settlement of the bankruptcy claims with the debtor. The two claims were settled for an amount that resulted in reductions of those claims by approximately $1.7 million. Plaintiffs claimed that the settlements

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amounted to an impairment of those claims and that they were entitled to be compensated pursuant to the assignment contracts, but defendants refused. In denying defendants' motion for summary judgment and granting plaintiffs summary judgment on the issue of liability, the court stressed that the contracts clearly stated that defendants would repay plaintiffs for the impaired amounts if the claims were disallowed or otherwise impaired "for whatever reason whatsoever." The court held that such language triggered repayment obligations under virtually any situation, including a reduction or disallowance of the claim amounts, in whole or in part, by settlement or otherwise. The court also rejected defendants' argument that plaintiffs could not unilaterally settle the claim objections without engaging in a bona-fide dispute with the debtor as to the validity of the bankruptcy claims because the contracts did not state that the settlements could only be entered when there was a bona-fide dispute of the claims. The court further held that defendants could not establish that the settlement was in bad faith since plaintiffs had to choose between settling the bankruptcy claims at reduced amounts or forfeiting the additional distributions. The court refused to consider certain extrinsic evidence submitted by defendants as evidence of the parties' intent in entering into the contract because the terms of the contract were unambiguous. Despite granting summary judgment to plaintiffs on the issue of liability, the court found that there were issues of fact regarding the amount of their damages. The court noted that the damages calculation advocated by plaintiffs failed to take into account the additional distributions they received under the debtor's plan, which plaintiffs obviously considered in deciding to settle the bankruptcy claims for reduced amounts. Deutsche Bank Securities Inc. v. Lexington Drake L.P., Index No. 603051-2008, 11/22/10 (Fried, J.).

Contracts; breach. CPLR § 203 (d). Metropolitan Transportation Authority; authority to make loans. Action arose from two agreements between plaintiff Nassau County (Long Island) and defendants the MTA, the LIRR, and the Metropolitan Suburban Bus Authority. Pursuant to the first agreement, made in 1996, the MTA would grant Nassau County up to $51,000,000 to offset up to $102,000,000 in "project contributions" that Nassau would pay to the MTA to cover capital costs of mass transportation projects. The agreement stated in part that the MTA's payments could help offset amounts due from the County under the LI Bus Lease... "or, in the sole discretion of the Authority [could also be paid]...for use by the County for any lawful County purpose..." A similar 1999 agreement provided that the MTA would grant the County up to $70,000,000 and get back in project contributions twice any amount it incurred for purchase of rolling stock, up to $140,000,000. In both agreements, the County agreed that each contribution to be paid by it would be twice the amount of each grant paid by the MTA. Both agreements were authorized by the Nassau County Legislature. There was no dispute that the MTA had spent nearly $95,000,000 on mass transit projects for the County's benefit pursuant to the first agreement, but, according to the MTA, the County had paid back only a little over $81,000,000, leaving requisitions totaling approximately $13,600,000. In 2001 the County sued, alleging that the MTA had misrepresented the nature of the funding to induce the County into the agreements and avoid limits on its authority to make loans for non-transportation purposes. The County sought a declaratory judgment setting the agreements aside as illegal and unenforceable, as well as costs and attorneys' fees. In 2008 defendants asserted counterclaims, including claims for breach of contract and conversion. In regard to the first agreement, the MTA sought damages, an accounting, prompt payment of outstanding requisitions, and a declaration that defendants were authorized pursuant to the first agreement to undertake additional mass transit projects and be paid for them by the County. Defendants moved to dismiss the County's complaint and for summary judgment on its counterclaims. The County did not substantively oppose the dismissal motion, but in opposition to summary judgment, argued that defendants had failed to show that the County had acquired a leasehold in the projects to which its contributions related, a condition precedent to payment under the first agreement. This argument was refuted by documentary evidence. The County next argued that the counterclaims were time-barred, if not in their entirety, at least to the extent they sought to recover for certain payments demanded in 2001. In support, the County contended that defendants' counterclaims did not arise from the same transactions as the County's claim for declaratory relief and thus the County could not benefit from CPLR § 203 (d), which says that if counterclaims arose from the same transactions on which claims depended, they were not barred even if barred at the time the claims in the complaint were interposed. The court found that it need not reach the issue of whether the counterclaims arose from the same transactions as the claims, as none of the counterclaims had been time-barred when the County commenced its action. The County's argument that the counterclaims were barred by the doctrine of laches did not persuade the court, either; defendants had not filed earlier because they had hoped to resolve the matter as part of a larger dispute, and the County had not shown any prejudice caused by the delay. Finally, the County argued that defendants had failed to comply with a Lease and Operating Agreement providing that disputes would be determined pursuant to CPLR § 3031, which sets forth a simplified procedure for commencing or continuing an action without pleadings. The court found that the County, by serving and filing a summons and not following the simplified procedure, had waived the benefit of the provision. Accordingly, the court granted the motion for summary judgment in its entirety, awarding judgment in favor of the MTA on all its counterclaims. County of Nassau v. Metropolitan Transportation Authority, Index No. 401279/2009, 12/22/10 (Kapnick, J.).

Contracts; construction; privity; third-party beneficiary. Negligence; negligent design; negligent construction; punitive damages. Procedure; leave to amend. After their condominium unit was damaged by water and mold, plaintiffs sued the condominium building's developer (along with affiliated entities and individuals), as well as the building's architects, general contractor, structural engineer, and mechanical engineer. Plaintiffs asserted that the water damage was caused by defendants' defective and negligent design, construction, engineering, and installation of the floor-to-ceiling window systems. Plaintiffs also claimed that they were entitled to punitive damages. All of the non-developer defendants moved to dismiss and/or for summary judgment, and plaintiffs cross-moved for leave to amend their complaint. The court dismissed plaintiffs' claims for punitive damages but otherwise denied defendants' motions. The court granted in part plaintiffs' motion for leave to amend. The mechanical engineer, structural engineer, architect, and general contractor all argued that they were not involved in the design or construction of the floor-to-ceiling window system. The court rejected this argument, finding that there were issues of fact regarding the scope of each defendant's work and whether that work was a contributing cause of the water damage to plaintiffs' condominium unit. The architect, general contractor, and structural engineer defendants each also argued for dismissal because of a lack of privity with plaintiffs. The court explained, however, that even in the absence of a contractual relationship, "recovery in negligence is available for non-economic losses resulting from allegations of dangerous conditions in the building due to alleged construction defects." Because plaintiffs alleged that defendants' negligence caused a hazardous mold condition, the court held that privity was unnecessary. Plaintiffs also sought leave to amend their complaint to add allegations that they were third-party beneficiaries of the relevant contracts. Holding that the language of the contracts controls whether a non-party is an intended beneficiary, the court held that discovery was needed to determine whether the architect and structural engineer defendants intended their contracts to benefit third parties. With respect to the general contractor, however, the court found that the relevant contract – which recited that it was not intended to confer any benefit or rights upon third parties – defeated plaintiffs' third-party beneficiary claim as a matter of law. As a result, the court granted leave to amend except with respect to the general contractor. Finally, the court dismissed all claims for punitive damages on the ground that plaintiffs' allegations did not show the degree of moral turpitude or malice required. Silverman v. Shaoul, Index No. 603231/2008, 10/20/10 (Bransten, J.).

Contracts; corporate operating agreement; interpretation. De facto merger. Statute of limitations; runs anew with renewal contract; tolling of. Plaintiff, a product development expert who specialized in toy figures and plush toys, was asked by the CEO and board chairman of defendant's predecessor to germinate ideas for a children's product line the company was creating that would teach reading. Plaintiff came up with a concept he called *Word World* and he and defendant's predecessor entered into a contract. Plaintiff assigned all intellectual property rights to the predecessor and worked to adapt *Word World* to the predecessor's concept. Plaintiff and the predecessor later entered into a renewal contract that, in addition to raising plaintiff's pay, acknowledged that plaintiff was owed over $50,000 and provided that failure to pay the debt by a certain date was a breach. The renewal contract stated that if the predecessor could not pay plaintiff in full during any pay period it would pay him not less than it paid any other key people and that the unpaid sums would accrue 8.5% interest per year. It also gave plaintiff 5% of the predecessor's common stock. The predecessor's product vision foundered, and the predecessor's CEO and plaintiff formed defendant company to develop plaintiff's *Word World* concept. The predecessor transferred to defendant its rights in *Word World* in return for membership units representing 70% of defendant's equity, and was dissolved. Defendant's operating agreement provided that defendant would have two initial managers, plaintiff and defendant's CEO, previously the predecessor's CEO. Their salaries would be $200,000 per year, but "shall be deferred...until the company has the ability to pay (as determined by the Managers)." The agreement stated that the number of managers could be changed at the sole discretion of the managers. It also stated that defendant could take actions without a meeting if evidenced by a written consent executed by at least 50% of the managers and 50% of the membership interests. An affirmative vote of members holding at least a majority of membership interests was required to approve any action, and defendant's CEO was empowered to vote his membership units and on behalf of the predecessor's investors. The operating agreement also provided that the members could vote in event of a deadlock between the managers "with respect to any action, at a meeting...or otherwise." After defendant's operating agreement was signed, defendant's location and contact information was the same as the predecessor's; personnel remained and operations continued without interruption. Plaintiff introduced defendant's CEO to FAO Schwarz, which launched *Word World*, and made other notable business connections. At a certain point the CEO asked plaintiff to resign as manager. Plaintiff refused. Defendant then purportedly approved two proposals on written consent, without a meeting. One proposal was to reduce the number of managers to one and make the CEO sole manager, the second was to amend the operating agreement to permit any manager to be removed by majority vote. The written consent stated that members had voted because the managers were deadlocked on both proposals. Plaintiff and defendant had subsequently signed a settlement agreement tolling the statute of limitations on their dispute; after terminating the agreement, plaintiff sued. First, the court declined to dismiss the first two claims for breach of contract on the grounds that defendant was not party to the first contract and renewal contract, finding sufficient showing of de facto merger. Defendant also failed to persuade the court that plaintiff's claims were time-barred. The court explained that the statute of limitations on the first contract had begun to run anew with the renewal contract because the renewal contract acknowledged the debt to plaintiff and promised to pay it. The renewal contract said that it would be breached if plaintiff were not paid by a certain date, and the settlement agreement– the court accepted as true that it tolled the statute– allegedly had been made less than six years after that date. Further, with respect to compensation under the operating agreement, defendant's statute of limitations argument rested on the theory that plaintiff had not proved defendant had ever had the means to pay him. If that were true, the court said, the statute never began to run, because the cause of action accrues at the time of a breach. The court found that plaintiff had stated claims that he was owed monies under both contracts and the operating agreement. Analyzing the renewal contract, the court made clear that the reference to "key employees" only required plaintiff to be paid no less than them during a pay period and that plaintiff was entitled to all unpaid sums owed with interest. The court found in addition that plaintiff had stated a claim that his removal as manager violated defendant's operating agreement. Plaintiff alleged that the former CEO had asked him to resign and he had refused. It was true that a vote by written consent of 50% of the managers and membership interests could resolve a deadlock between the two managers, but there was no proof that the managers had been deadlocked over what was in the consent. Plaintiff said that he was never asked to amend the operating agreement or given an opportunity to present his view on the proposals. The deadlock was over whether plaintiff should resign. The court found it significant the operating agreement said that the number of managers could be changed in the sole discretion of the "managers," plural. In addition, had a deadlock over plaintiff's resignation allowed a written consent to force his resignation, pursuant to the operating agreement the remaining manager would have had to appoint another manager because the agreement did not say that the remaining manager will be the sole manager. The motion to dismiss was denied. Schneider v. Word World LLC, Index No. 602855/2009, 12/17/10 (Kornreich, J.).

Contracts; limited partnership agreements; breach of contract. Breach of fiduciary duty; aiding and abetting liability. Procedure; CPLR 3211(a)(7). Plaintiff, the Comptroller of the State of New York, brought an action in his capacity as the sole trustee of the New York State Common Retirement Fund (the "Retirement Fund") against defendants, the general partner of a private equity fund, and an individual who had guaranteed certain payments owed by the private equity fund. The Retirement Fund had invested approximately $400 million in the private equity fund as its sole, unaffiliated limited partner. According to the limited partnership agreement, distributions from the fund's investments would be made according to a mathematical formula, first to the Retirement Fund and then to the general partner defendant, with any remainder to be split between the two in a prescribed ratio. In addition, the agreement entitled the Retirement Fund to receive "interim" and "final clawback" payments under certain conditions. These clawback provisions had been intended to allow the Retirement Fund to "recapture some or all" of the distributions made to the defendant general partner "if gains on investments realized early in the life" of the private equity fund "were later offset by realized or unrealized losses." The individual defendant had signed a guarantee making him personally liable for payment of the final clawback. In the complaint, plaintiff alleged that the general partner defendant was liable for breaching the interim and final clawback provisions and for a breach of fiduciary duty. With respect to the individual defendant, plaintiff alleged that he was liable for the final clawback payment based on his personal guarantee and that he had aided and abetted the general partner's breach of fiduciary duty. Defendants moved to dismiss. The court granted the motion in part. With respect to plaintiff's claims that the general partner defendant had breached the clawback provisions in the partnership agreement, the court found that the allegations in the complaint sufficed to state a cause of action. The court also sustained plaintiff's claim to recover on the personal guarantee by the individual defendant. With respect to plaintiff's claim for breach of fiduciary duty, the court held that plaintiff did not allege the breach of a duty independent of the partnership agreement. Rather than dismiss the cause of action, however, the court explained that a claim should be sustained as long as the alleged facts supported any viable cause of action under any legal theory. Because the facts alleged by plaintiff supported a separate cause of action for breach of the partnership agreement, the court declined to dismiss plaintiff's claim. Finally, because an aiding and abetting claim depends upon a viable breach of fiduciary duty claim, and the court had held that no such claim had been stated, the court dismissed plaintiff's aiding and abetting claim as against the individual defendant. DiNapoli v. Strategic Co-Investment Partners, GP, L.P., Index No. 2064/2010, 11/8/10 (Platkin, J.).**

Derivative action; venue; mismanagement of corporation; residence of director. Plaintiff, a resident of Kings County and vice-president of the corporation, brought a derivative action in Kings County as shareholder on behalf of the corporation against the corporation and the corporation's president. Plaintiff alleged breach of fiduciary duty and corporate waste on the ground that defendants excluded plaintiff from the management of the corporation. Defendants moved to change venue to Suffolk County on the basis that plaintiff brought the action as an officer of the corporation and the corporation's principal office and sole property was in Suffolk County. Defendants also contended that the judgment demanded would affect title to, possession, use, or enjoyment of the property. Plaintiff argued that as a Kings County resident he was entitled to pursue the action there since the relief requested involved only the mismanagement of the corporation and therefore did not affect title to, use, or enjoyment of the corporation's property. The court granted defendants' motion upon oral argument, but subsequently vacated that ruling and denied the motion in a written decision. The court reasoned that under CPLR § 503(a) the place of trial shall be in the county where one of the parties resided when the action was commenced. Since plaintiff resided in Kings County, and, under CPLR § 503(c), defendant corporation was a resident of Suffolk County, a venue conflict existed that permitted the court to make a discretionary determination. The court held that since the plaintiff brought the action derivatively as an officer of the corporation, it was the residence of the corporation's director, not the location of the corporation's office, that determined venue. It also found that the relief sought did not affect the Suffolk County property, thereby negating another basis for venue. In a derivative action the residence of the corporation's director is controlling for the purpose of determining venue. The action did not seek relief involving the property of the corporation, therefore venue based upon its location was improper. Since defendants did not show that Kings County would be inconvenient for any of the witnesses the motion was denied. Shami v. F.O.A.N, Inc., Index No. 13733/2010, 11/8/10 (Demarest, J.).**

Fraud; pleading with particularity; aiding and abetting; actual knowledge; substantial assistance; proximate cause; reasonably foreseeable injury. Choice of law; actual conflict; Pennsylvania law. Civil conspiracy; malice requirement; intent to injure. Long-arm jurisdiction; jurisdictional discovery; sufficient start. Plaintiffs, all of which had loaned money to a now bankrupt beverage manufacturer, bottler, and distributor (the "debtor") located in Pennsylvania, sued the bank that had arranged the syndicated loan, the debtor's auditor, and two executives of the debtor for fraud. In an amended complaint, plaintiffs added as defendants a German manufacturer of bottling systems, its U.S. subsidiary, and two of the German parent company's executives. Plaintiffs alleged that the newly added defendants aided and abetted the debtor's fraud and engaged in a conspiracy to defraud plaintiffs by paying illegal kickbacks to the debtor. These kickbacks allegedly enabled the debtor to show fictitious income on its balance sheet, which, in turn, induced plaintiffs to loan money to the debtor. The newly added defendants moved to dismiss the claims against them. The court granted the motion in part. It denied the new defendants' motion to dismiss plaintiffs' aiding and abetting claim. Defendants argued that Pennsylvania law should govern and that Pennsylvania law does not recognize a cause of action for aiding and abetting fraud. The court, however, found no conflict between the laws of Pennsylvania and New York regarding aiding and abetting liability and, therefore, applied New York law. Under New York law, the court explained, a claim for aiding and abetting fraud required plaintiffs to allege: (1) the existence of a fraud; (2) defendants' knowledge of the fraud; and (3) defendants' provision of substantial assistance to advance the fraud's commission. The court found that plaintiffs had pleaded each of these elements with the requisite particularity by alleging that defendants had played a central role in the debtor's fraud by knowingly paying kickbacks to the debtor and thereby enabling the debtor to misrepresent its financial worth. The court granted the newly added defendants' motion to dismiss plaintiffs' civil conspiracy claim. Because there was a conflict of law between the civil conspiracy laws of Pennsylvania and New York, the court performed a choice of law analysis. It concluded that Pennsylvania law should apply because the conspiracy allegedly transpired in Pennsylvania, therefore Pennsylvania had the greater interest in plaintiffs' civil conspiracy claims. Under Pennsylvania law, the court ruled that plaintiffs had to allege that the "sole purpose" of the conspiracy was to injure plaintiffs with malice. Because plaintiffs alleged that the newly added defendants' goal was to increase their own business, the court found that the malice requirement had not been satisfied and dismissed the conspiracy count. Finally, the court granted the motion made by the two executives of the German parent company defendant to dismiss for lack of personal jurisdiction. The court held that nothing in the amended complaint suggested that the two executives – one of whom lived in Germany and the other in Pennsylvania – were subject to personal jurisdiction, pursuant to either CPLR § 302(a)(1) or § 302(a)(3), based on the transaction of business in New York or the commission of a tort without the state causing injury to person or property within the state. The court explained that neither of the executives had ever lived, owned real estate, paid taxes, or voted in New York; neither had been to New York except for personal travel or occasional business unrelated to this litigation; neither regularly conducted business in New York or derived substantial revenue from goods used or consumed, or services rendered, in New York; and neither should have reasonably expected that any of his actions would have consequences in New York. The court also held that plaintiffs had failed to make a "sufficient start" to warrant jurisdictional discovery. Harbinger Capital Partners Master Fund I, Ltd., v. Wachovia Capital Markets, LLC, Index No. 602529/2008, 12/23/10 (Kapnick, J.).

GBL 349; statute of limitations. Accounting malpractice; statute of limitations; continuous representation exception. Fraud; damages; recovery of taxes paid; out-of-pocket rule. Unjust enrichment; fees payments as basis. Plaintiffs, with defendants' assistance, had established an employee death benefit plan funded by life insurance policies. After plaintiff had contributed over $2,000,000, it emerged that the plan did not satisfy IRS regulations. Defendant bank's vice-president advised plaintiff in writing to transfer the policies to a welfare benefit trust, predicting that the transfer should be non-taxable and plaintiff able to deduct premiums. Defendant accountant endorsed this solution, and plaintiff adopted it. About four years later, the IRS told plaintiff that its termination of the benefit plan had been a taxable event and that it owed the agency over $900,000. Plaintiff sued defendants seeking to recover as damages the additional taxes assessed by the IRS. Defendant accountant moved to dismiss various claims as time-barred and both defendants moved to dismiss the whole complaint on other grounds. The court found that a claim for violation of GBL 349, prohibiting deceptive business acts, was time-barred, since plaintiffs' injury had occurred at the time of termination and transfer, not when the IRS demanded payment years later. Despite arguments to the contrary, the court ruled that claims for accounting malpractice and professional negligence were similarly time-barred. As to the malpractice, plaintiffs argued that defendant accountant was equitably estopped from pleading a statute of limitations defense because the accountant had concealed its wrongdoing and misrepresented the transfer as non-taxable. The argument failed because the alleged concealment was the same conduct as the basis of the malpractice claim. Plaintiffs also argued that the statute of limitations should be tolled, because the accountant had provided continuous representation of them for a span of more than 10 years. To support this argument, plaintiffs provided bills from defendant accountant showing they had received services on the issue four years after they had received the accountant's advice. Nevertheless, the court found that plaintiffs' statements that the representation was continuous were conclusory absent evidence such as engagement letters establishing that the services had been contemplated by the parties; the services could have been a new representation. The professional negligence claim also was dismissed as untimely. Defendant bank argued that plaintiffs failed to state a claim for fraud because defendant's alleged misrepresentations were expressions of opinion, not statements of fact. The bank also argued that under the "out-of-pocket" rule plaintiffs had suffered no damages in consequence. The court agreed that bank and customer generally have an arm's length debtor-creditor relationship. Here, though, plaintiffs' allegations that defendant bank's vice president had acted as an advisor were sufficient to raise an issue as to a fiduciary relationship. But more was needed to set forth a claim for fraud, the court said, and the allegation that defendant bank knew or should have known that its statements were false when made was conclusory. The crucial point was whether the IRS deemed this transfer to be taxable at the time of the bank defendant's statements, yet plaintiffs made no allegation concerning this point, which would be on the public record. Without allegations as to the IRS position, plaintiffs failed to allege that the bank's representations were made knowingly. Further, the court explained, recovery of taxes is not allowed by the out-of-pocket rule, and recovery of consequential damages flowing from a fraud is limited to what will restore a party to its position before the fraud. The damages here flowed not from the misrepresentation, but from the funds' transfer. By making the transfer, however, plaintiffs gained full access to the policies and hence could take cash distributions without incurring taxes because they could validly claim the taxes had been paid. The fraud claim was thus dismissed. Claims of negligent misrepresentation and breach of fiduciary duty, also seeking recovery of taxes, were dismissed. Finally, an unjust enrichment claim was dismissed as against the bank because it had received no benefit from the policies' transfer. However, documents submitted on sur-reply indicated that plaintiffs had paid defendant accountant for its services, and these fees payments could form the basis of an unjust enrichment claim. The court granted plaintiff leave to replead this claim with greater specificity. Fownes Brothers & Co., Inc. v. JP Morgan Chase & Co., Index No. 603012/2009, 10/26/10 (Gammerman, J.).

Legal malpractice; patents; causation; statute of limitations; continuous representation doctrine. Plaintiffs sued two law firms ("law firm #1" and "law firm #2") and an individual attorney at each firm for legal malpractice relating to a patent. The patent had a natural expiration date of July 9, 2012, upon the proper filing of all maintenance fees with the Patent and Trademark Office ("PTO"). In 1999, the patent was licensed to Mystic Tan Inc. ("Mystic"). At some point, plaintiffs and law firm #1 decided that plaintiffs would stop paying the patent maintenance fees to reduce costs. The patent lapsed, and plaintiffs then realized that the lapsed patent was still licensed to Mystic. Although the PTO allows lapsed patents to be reinstated upon a petition showing either an unintentional delay in payment or an unavoidable delay, no petition seeking relief under either theory ever was made by defendants. In 2002, plaintiffs and law firm #1 discussed the cost of reviving the patent. At the time, a fee dispute arose between law firm #1 and plaintiffs, and plaintiffs transferred their intellectual property work from law firm #1 to law firm #2. Plaintiffs directed law firm #1 not to perform any further work without seeking prior approval. Law firm #1 submitted a quote to plaintiffs to handle the PTO proceeding in connection with the patent. Although plaintiffs instructed law firm #1 to file the petition, plaintiffs never paid the requisite advance, and the filing never occurred. Plaintiffs then directed law firm #1 to send all of the patent files to law firm #2, stating that law firm #1 would continue to represent plaintiffs on just six unrelated matters. Law firm #2 then sent plaintiffs a letter referencing the patent and the date of the next maintenance fee. Three years later (and two years after the statute of limitations to petition expired), plaintiffs filed a petition to reinstate the patent. The PTO denied the petition on the ground that plaintiffs failed to demonstrate that their conduct had met the applicable standard used by a prudent person in relation to their most important business. The PTO held that plaintiffs had an independent duty to investigate the patent and assure that the maintenance fee was paid and that counsel's failure to do so was not a sufficient excuse. In the malpractice action, plaintiffs alleged three causes of action against law firm #1: (1) failure to advise plaintiffs of the facts surrounding the payment of the maintenance fee and of the licensing agreement with Mystic; (2) failure to advise plaintiffs of the significance of the PTO regulations and the procedures available to plaintiffs; and (3) failure to advise plaintiffs of the PTO requirements and procedures after the patent lapsed. A cause of action against law firm #2 and its individual attorney was based on numerous actions or omissions and that, but for this negligence the PTO would have granted a petition based upon unintentional delay. Defendants moved to dismiss the action as untimely and for summary judgment and failure to state a cause of action on the grounds that plaintiffs could not prove they would have prevailed but for defendants' alleged negligence. The court granted the motions as to law firm #1 and denied the motion as to law firm #2 and attorney #2. In its decision, the court found that the two firms could not have ethically filed a petition to revive the patent on the ground of unintentional delay because the required accompanying statement that the "entire" delay was unintentional would not be true given the decision to not pay the maintenance fee. Revival could not be granted where a party intentionally delays seeking it. Even if a petition was filed, the PTO explicitly provides that a delay caused by a deliberately chosen course of action is not unintentional. Plaintiffs therefore could not show that the underlying PTO proceeding would have been different but for defendants' conduct. In connection with law firm #1's representation and its statute of limitations defense, the court held that plaintiffs failed to raise factual issues as to whether the continuous representation doctrine tolled the statute of limitations after the firm's services were terminated. The evidence demonstrated that plaintiffs fired law firm #1 over the bill dispute and, per plaintiffs' letter, it was clear that law firm #2 had succeeded law firm #1 in overseeing the patent three weeks beyond the applicable three year limitations period. Since it was not a situation where an attorney continued to represent a client with clear indicia of an ongoing, continuous, developing and dependant relationship to the same or related services, the doctrine did not apply. Finally, as against law firm #2, the court held that while the claims against the firm lacked merit in connection with the failure to file a petition with the PTO, it could not be said as a matter of law that the firm's failure to verify the status of the patents in the PTO records did not cause some damage to plaintiffs. If law firm #2 had verified the status of the patents, plaintiffs would have been alerted to the lapse more than two years earlier and could have potentially mitigated their damages. In sum, the court granted the motion of law firm #1 in its entirety and severed the action against law firm #2 and its individual attorney. Elizabeth Arden, Inc. v. Abelman, Franye & Schawb, Index No. 603778/2005, 10/22/10 (Fried, J.).

Mechanics lien; proper parties; statute of limitations; specificity. Owner Neptune Estates, LLC ("owner") entered into a construction contract with co-defendant Big Poll Construction, Inc. ("Big Poll"). Plaintiff IVM General Construction ("plaintiff") entered into two subcontractor agreements with Big Poll on the same project. Owner then removed Big Poll for cause and hired non-party contractor Future City ("Future"). Owner and Future then entered into a new contract and plaintiff entered into two subcontractor agreements with Future. Owner alleged that Future subsequently terminated the two subcontractor agreements. Nine months after termination plaintiff filed a mechanics lien identifying the persons with whom the contract was made as Big Poll and Future ("lien 1"). Owner successfully moved to discharge lien 1. Plaintiff filed a second mechanics lien identifying the persons with whom the contract was made as Big Poll and possibly Future, if Future agreed to assume the obligations of its predecessor ("lien 2"). Owner moved for summary judgment pursuant to CPLR § 3212(b) to dismiss the complaint, discharge the mechanic's lien, and cancel the notice of pendency. Owner argued that lien 2 should be discharged because: (1) it is invalid under Lien Law §4(1) because owner did not owe Big Poll any money when the lien was filed; (2) the contract between Big Poll and plaintiff precluded recovery against owner; (3) the lien was improperly filed more than eight months after the last furnishing or performance of work under Lien Law §10(1); (4) the lien failed to separately identify the amounts due under the subcontractor agreements between Big Poll and Future and was therefore invalid under Lien Law §9(4); and (5) plaintiff waived and released owner from all liens. The court denied owner's motion for the following reasons. First, the court found that an issue of fact existed as to whether owner owed funds to Big Poll when lien 2 was filed. Since Lien Law §§3 and 4(1) allow a subcontractor to file a mechanic's lien on improved property for a sum that is not greater than the sum earned and paid on the contract at the time of the filing of the notice of the lien and any sums subsequently earned, lien 2 could be valid if owner owed Big Poll at the time of the filing of the notice of lien. Even though Big Poll signed a final lien waiver in favor of owner, the waiver was undated and did not correspond to the purported contract between the parties. In addition, plaintiff provided an affidavit in a related matter signed by the president of Big Poll claiming Big Poll was not paid in full and was forced to sign the waiver for the project to continue and to receive partial payment. Second, the court denied the motion because issues of fact existed as to when plaintiff finished performing work which could make lien 2 timely. It was uncontested that plaintiff continued to work on the project after Future superseded Big Poll, and evidence submitted showed that Big Poll was still issuing payments to plaintiff during a time period that could potentially place the filing of lien 2 within the eight-month limitation period. Third, plaintiff's description in lien 2 that Future might be a person with whom plaintiff had a contract was not a fatal misdescription under Lien Law §9(3), since plaintiff substantially complied with the law by properly naming Big Poll as the actual party with which it had the contract. Fourth, since there were issues of fact on the completion date of the contracts between plaintiff and Big Poll, the court could not grant summary judgment for owner at this early stage of litigation. Fifth, the court held that since a lien is to be construed liberally and substantial compliance is sufficient, the lien substantially complied with Lien Law §9(4) and was therefore not facially invalid in setting forth "steel, masonry and concrete" and "$2,126,900.00" as the labor performed or materials furnished and the agreed price. The fact that lien 2 did not distinguish between the various subcontracts was not fatal. However, the court granted owner's request for an undertaking in light of the evidence that plaintiff executed a waiver and final release, thus directing plaintiff to post $1,000,000 as a condition of continuing lien 2. IVM General Construction v. Neptune Estates, LLC, Index No. 19311/2010, 12/16/10 (Demarest, J.).**

Preliminary injunction; limited liability companies. Plaintiff, a member of two LLCs that each owned certain real property, brought an action against the majority member of the two LLCs, alleging that defendants colluded to remove plaintiff from its management positions in those LLCs. Plaintiff moved for a preliminary injunction to prevent its removal as manager. The court stated that a party moving for a preliminary injunction must establish by clear and convincing evidence: (1) a likelihood of ultimate success on the merits; (2) irreparable injury if the provisional relief is withheld; and (3) the weight of the equities in its favor. With respect to the first factor, the court stated that the language of the operating agreements was too ambiguous to issue a preliminary injunction since it was not clear whether members or the manager had the right to remove an operating manager. The court also stated that plaintiff could not establish the second element of irreparable injury because economic loss does not constitute irreparable harm. The court further held that plaintiff did not establish by clear and convincing evidence that the purported irreparable harm was imminent (as opposed to remote or speculative). Rosenfeld v. Rothschild, Index No. 21263/2010, 10/05/10 (Grays, J.).**

Procedure; motion for reargument; CPLR 2221; time limit for moving for reargument; service of prior order by e-mail. Utilities; franchise law. The City of New York filed a declaratory judgment action against defendant telecommunications services provider, seeking a declaration that defendant was required to obtain a franchise in order to install its equipment throughout the City. In a prior ruling on defendant's motion for summary judgment, the court had held that no franchise was necessary for defendant to place its equipment in Manhattan, Brooklyn, and portions of the Bronx. After the submission of additional evidence, the court directed defendant to renew its motion for summary judgment with respect to those areas that had not been addressed in the court's prior ruling, *i.e.,* the boroughs of Queens and Staten Island and the remaining portion of the Bronx. Defendant renewed its motion, and the City cross-moved for reargument of the court's prior decision. Defendant asserted that the City's motion for reargument should be denied as untimely under CPLR 2221 because it was made more than 30 days after defendant had e-mailed the City a copy of the court's prior decision. The court rejected this procedural objection, finding that service by e-mail is a nullity and, therefore, that the 30-day deadline for the City to move to reargue had never started to run. Turning to the merits, the court denied the City's motion to reargue the court's prior determination that defendant had the authority to place telecommunications equipment underground in Brooklyn. With respect to the City's motion to reargue the court's prior determination regarding defendant's authority to place telephone poles above ground, the court granted the motion and clarified that defendant's authority to place aerial telephone lines was subject to the City's exercise of its police powers and to its right to mandate that lines be placed underground. Finally, the court granted defendant's renewed motion for summary judgment and held that defendant was entitled to an adverse declaration that it had the authority to install its equipment underground in the east Bronx, Queens, and Staten Island. City of New York v. Verizon New York, Inc., Index No. 402961/2003, 10/27/10 (Gammerman, J.H.O.).

Procedure; summary judgment. Contracts; breach; restrictive covenants; piercing the corporate veil; tort claims as duplicative of breach of contract claims. Unfair competition and tortious interference with prospective business or economic relations. Trade name and trade or service mark infringement. Unjust enrichment. Legal malpractice. Plaintiffs had purchased a flower shop from the defendant company. After the business failed, plaintiffs brought this action against the company, the company's owner and sole shareholder, and the lawyer who had represented plaintiffs in connection with the sale. Plaintiffs asserted causes of action against the defendant sellers for breach of contract, breach of the implied duty of good faith and fair dealing, unfair competition and tortious interference with prospective business or economic relations, trade name and trade or service mark infringement, and unjust enrichment. Plaintiffs sued their lawyer for legal malpractice. Defendants moved for summary judgment dismissing the complaint, and plaintiffs cross-moved for summary judgment. The court granted in part the motion of the defendant sellers, denied the motion of the defendant lawyer, and denied plaintiffs' cross-motion. With respect to the first cause of action for breach of contract, the court found that there were disputed issues of fact regarding the defendant company's alleged breach of a restrictive covenant included in the contract of sale. Although these factual disputes precluded the entry of judgment for either plaintiffs or the defendant company on the breach of contract claim, the court dismissed the cause of action as against the defendant company's owner and sole shareholder. The court held that the owner could not be held personally liable for any alleged breach of contract because she had signed the contract of sale in her corporate capacity. Further, the court refused to pierce the corporate veil, explaining that plaintiffs failed to show that the owner dominated the company with respect to the sale or that such domination was used to commit fraud or other wrongdoing. The court also dismissed plaintiffs' claim for breach of the implied duty of good faith and fair dealing as well as their claim for unjust enrichment on the ground that both claims were duplicative of plaintiffs' breach of contract claim. With respect to the plaintiffs' cause of action for unfair competition and tortious interference with prospective business or economic relations, the court held that this claim also was duplicative of plaintiffs' breach of contract claim because plaintiffs failed to allege the breach of a duty independent of the parties' contract. The court held that plaintiffs' unfair competition and tortious interference claim should be dismissed on the additional ground that plaintiffs did not contend that the defendant sellers misappropriated any trade secrets or proprietary information, nor did plaintiffs show that they would have entered into a business relationship but for the defendant sellers' wrongdoing. The court also dismissed plaintiffs' cause of action against the defendant sellers for trade name or service mark infringement on the ground that plaintiffs failed to show bad faith and actual confusion. J.E.K.A., Inc., v. Maggie & Faith Flowers, Inc., Index No. 32138/2007, 11/16/10 (Emerson, J.)**.

Procedure; summary judgment. Legal malpractice; proximate cause. Plaintiffs, a cooperative corporation and its shareholders, had orally agreed to sell their cooperative building to a non-party for $4.5 million. After reaching this agreement, plaintiffs had retained the defendant lawyers to "negotiate and consummate the sale of the . . . premises." Plaintiffs' retainer agreement with defendants had recited that defendants were "informed that the shareholders of the corporation have approved the sale and have agreed to terminate the cooperative regime." The agreement also had specified that defendants would "not render tax advice in this matter but will be available to discuss the transaction with [the co-op's] tax advisor/accountant." Shortly before the closing, plaintiffs' accountant had notified defendants that $1.8 million in corporate income taxes would be due upon the sale and that if the sale had been structured as a sale of shares, rather than a sale of the building, plaintiffs would have realized tax savings of approximately $1.3 million. Plaintiffs had tried to renegotiate the sale to avoid the increased tax liability, but the non-party buyer refused. Plaintiffs subsequently brought this action for legal malpractice. Defendants moved for summary judgment, and plaintiffs cross-moved for summary judgment and for the dismissal of defendants' counterclaims. The court granted defendants' motion for summary judgment, denied plaintiffs' cross-motion for summary judgment, and granted plaintiffs' motion to dismiss defendants' counterclaims. The court noted that although some courts in New York require a plaintiff in a legal malpractice action to show that the defendant's negligence was the "but for" cause of plaintiff's damages, other courts have applied the more relaxed standard that the defendant's negligence be "a" proximate cause. Federal courts applying New York law also have come to use the causation standards interchangeably. The court discussed a distinction applied by the California Court of Appeals, which has held that the "but for" causation standard should not apply to malpractice cases arising from transactions, because transactions involve many more variables than do litigation matters and therefore ordinary negligence standards and causation principles should suffice. The court suggested that New York's appellate courts might consider the California Court of Appeals view. In any event, even if these plaintiffs had established proximate cause under either standard, they could not establish defendants' liability. The court explained that where a written retainer agreement plainly indicates the specific purpose of the representation, an attorney will generally not be held liable in malpractice for failing to explore legal issues outside the scope of the agreement. Because this retainer agreement plainly stated that defendants would not provide any tax advice, the court held that plaintiffs' legal malpractice claim failed as a matter of law. The court, however, granted plaintiffs' motion to dismiss defendants' counterclaims for indemnification and contribution, explaining that in a legal malpractice action, an attorney may plead the culpable conduct of a client only as an affirmative defense, not in the form of a counterclaim. 180 E. 88th Street Apartment Corp. v. Law Office of Robert Jay Gumenick, P.C., Index No. 600039/2009, 12/21/10 (Gammerman, J.H.O.).

Sanctions; dismissal of complaint; costs and fees. Defendants moved to dismiss plaintiff's complaint, to strike plaintiff's reply to counterclaims, and for sanctions. The court granted the motion. The court explained that plaintiff failed to make available a person with settlement authority for more than three months after the court had ordered that the parties proceed with mediation, and failed to submit a confidential mediation statement as directed by the mediator. Additionally, plaintiff's counsel did not tell the mediator or defendants in advance that he would not be submitting a mediation statement. Rather, after the deadline for submitting the statement had passed and defendants already had incurred the costs of preparing and filing their own statement, plaintiff's counsel advised the mediator and defendants that he would not be submitting a mediation statement because he was on a family vacation. The court also noted that it had sanctioned plaintiff once already in the past based on plaintiff's disregard for court-imposed discovery deadlines and other misconduct. Based on plaintiff's "utter disregard for the court, the appointed mediator, and for opposing counsel," and a pattern of conduct that the court characterized as "wilful and contemptuous," the court dismissed the complaint with costs and disbursements to defendants, struck plaintiff's reply to the counterclaims, and directed plaintiff to pay for defendants' fees and costs incurred in connection with the aborted mediation process. Carnegie Associates Ltd. v. Miller, Index No. 600109/2008, 10/19/10 (Lowe, J.).

Summons with notice; jurisdictional defects; default judgment; out-of-state defendants. Plaintiff moved for default judgments pursuant to CPLR § 3215 against different defendants in twelve separate actions based on breaches of vehicle lease agreements. Plaintiff commenced each action by filing and serving a summons with notice on the twelve out-of-state defendants, requiring each defendant to appear by serving a notice of appearance on plaintiff at an address "set forth below." Each summons failed to contain the date of filing and all except one failed to list plaintiff's address. The court denied plaintiff's motions on a number of grounds. First, since venue was based solely on plaintiff's residence in New York, the omission on the summonses of plaintiff's address and filing date violated CPLR § 305(a). Second, since the defendants had no indication that the lease agreements had been assigned to plaintiff from the original lessors or of plaintiff's identity, the omission of plaintiff's address prejudiced the defendants by hindering their ability to respond and avoid default. The court noted that even if plaintiff were permitted to amend the summonses, defendants could move for dismissal under CPLR § 306-b since service of the proper summonses would occur more than 120 days after the original filing. For the one defendant of the twelve who learned of plaintiff's address (after service), the court held that since defendant (like all the defendants) was served out-of-state, plaintiff's failure to include the required certificate of conformity with the affidavit of service violated CPLR § 2309(c) and therefore mandated the denial of plaintiff's motion. Finally, the court noted that plaintiff's motion failed to include affidavits that the notice of default and summonses were sent to the defendants in envelopes bearing "personal and confidential," and therefore should also be denied for failure to comply with CPLR § 3215(g)(3)(i). In addition to denying all twelve applications for entry of default judgments, the court dismissed eleven of the actions (the sole exception being the one in which defendant learned of plaintiff's address) without prejudice *sua sponte* as jurisdictionally defective under CPLR § 305(a). Bloomingdale Road Judgment Recovery v. Wise, Index No. 31984/2009, 10/13/10 (Demarest, J.).**

Surety claims; defenses; fraudulent concealment; clear and convincing evidence. Procedure; confirmation of referee report. The obligee under several surety bonds filed a claim in a surety rehabilitation proceeding for payment from the surety after the principal defaulted. The surety argued that the obligee's alleged fraudulent concealment of material information concerning the principal's financial condition exonerated the surety from liability. Following a four-day evidentiary hearing, a referee recommended disallowance of the obligee's claim, finding that the evidence overwhelmingly demonstrated that the obligee knew of facts that materially increased the surety's risk and also knew that the surety would have been unwilling to assume that increased risk. The surety moved to confirm the referee's report, and the obligee opposed the application and requested entry of judgment in his favor. The court denied the surety's motion to confirm the referee's report and held that the obligee's claim should be deemed allowed. The court recognized that a fraudulent concealment defense is available to a surety under the following limited circumstances: (1) the obligee must know facts that materially increase the surety's risk and have reason to believe the surety would be unwilling to assume the higher risk; (2) the obligee must have reason to believe that such facts are unknown to the surety; (3) the obligee must have the opportunity to communicate the relevant information to the surety; and (4) the obligee must have the duty to disclose the information based upon its relationship to the surety, its responsibility for the surety's misimpression, or other circumstances. The court found that the surety had not met its burden of establishing the second and fourth prongs of this test by clear and convincing evidence. With respect to the second prong, the court noted that the relevant inquiry is not what the surety actually knew about the principal's financial condition but, rather, the obligee's reasonable perceptions about the surety's knowledge. The court found that the evidence presented to the referee here – which included the obligee's testimony that he had been told by both the principal's CFO and its corporate counsel that the principal had provided financial statements and other documents to the surety – established the obligee's reasonable belief that the surety accurately understood the principal's financial condition. The court further noted that it is customary for a compensated surety, like the surety here, to perform independent due diligence before agreeing to be held liable for the obligations of another, and that the information, which served as the basis for surety's concealment claim, would have been readily ascertainable through the exercise of ordinary diligence. The court, therefore, concluded that the referee's determination that the obligee knew material facts unknown to the surety lacked adequate support in the record. With respect to the fourth prong, the court rejected the referee's determination that the obligee was under a duty to disclose to the surety the information that he had about the principal's financial condition. Although the surety argued that a duty to disclose should be found because the obligee allegedly participated in the principal's decision not to provide the surety with "full-disclosure," the court concluded that there was no clear and convincing evidence of wrongdoing on the obligee's part. The court, therefore, held that the surety's defense of fraudulent concealment should have been rejected, denied the surety's motion to confirm the referee's report, and directed that the obligee's claim on the surety bonds should be deemed allowed. In the Matter of the Rehabilitation of Frontier Insurance Company, Index No. 084713/2006, 11/22/10 (Platkin, J).**

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