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

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Arbitration; compelling; stay of action; non-competition provision; breach of contract; extension of time to respond to complaint. Plaintiff franchisor terminated five franchise agreements that contained arbitration clauses. Four of the agreements (the “New York franchise agreements”) excluded arbitration “for any claim brought by the company to enforce a non-competition agreement.” The fifth agreement (the “Delaware franchise agreement”) excluded arbitration only “for any action in any court of competent jurisdiction for injunctive relief.” Plaintiff then sued the franchisees for violating the non-competition provisions in the New York franchise agreements and moved for a preliminary injunction. After the court denied plaintiff’s motion, defendants moved to stay the action and compel arbitration. The court found that the arbitration clauses in the New York franchise agreements specifically excluded any claim to enforce a non-competition agreement. It rejected defendant’s contention that the exclusions applied only to actions seeking injunctive relief. Defendants also argued that the Delaware franchise agreement, which excluded from arbitration only those claims seeking injunctive relief, superseded the earlier New York franchise agreements. The court, noting that contracts are separate unless their history and subject matter show them to be unified, found that each agreement granted a separate franchise and that the Delaware agreement did not mention or modify the New York agreements. The court also refused to stay the action pending arbitration of the Delaware agreement, as such arbitration had yet to be commenced and any claims under that agreement had yet to be brought. In light of these rulings, the court granted defendants’ motion only to the extent of allowing additional time to answer the complaint and establishing a new discovery schedule. Golden Touch Transportation of NY, Inc. v. G.E.H.S. Transportation, Inc., Index No. 23990/2010 , 11/ 21/11 (Grays, J.).

Art law; authenticity; fraud; seller’s knowledge and intent. Action involving a painting sold at auction, for $242,000, as a Basquiat. Auction house defendant moved to dismiss claims for fraud and fraudulent inducement, the only two claims remaining. Plaintiff that bought the painting, a New York gallery, sold it to the second plaintiff, an individual, for $185,000. Some years later the individual applied to the Authentication Committee established by Basquiat's father for a certificate of authenticity and was rejected. It emerged that Basquiat's father and the director of a gallery representing the artist's estate had viewed the painting, purportedly at the auction house's request, before the auction and decided it was "not right." Opposing dismissal, individual plaintiff relied on testimony, particularly by Basquiat's father, that he returned to the auction house after the viewing and remarked to an employee there that the painting was "not right," to raise a triable issue as to the auction house's knowledge or recklessness. The auction house argued that the undisputed facts showed that it did not know the painting was inauthentic and that the record contained no evidence it doubted its authenticity, so there was no basis to find knowledge or intent to defraud. Former employees testified that the house's practice was to conduct exhaustive research including library research, review of catalogues raisonne, and consultation with outside authorities prior to a sale to verify information provided by an art work's consignor. The auction house also pointed to Basquiat's father's testimony that he spoke to only one unidentified person who was not among the employees with whom he had an established relationship, and did not tell him that the painting was a fake or should be removed from the auction, and to the fact that it was undisputed that the artist's father took no further action. The court noted that both Basquiat's father and the gallery director testified that they said nothing about the painting to an auction house employee who accompanied them on the viewing. The court found the father's testimony, which plaintiffs relied on, insufficient to raise a genuine issue as to the house's intent to defraud and its knowledge. Nor did the gallery director's testimony raise one; he did not testify that the auction house at any point told him of doubts concerning the painting's authenticity or provenance. The court said that under the proof presented, a trier of fact would have to assume that the unidentified person with whom the father spoke over 20 years ago worked for the auction house and had some authority and conveyed what he had been told to someone with authority to show that the auction house had knowledge and intent. The court rejected plaintiff's argument that because the auction house asked the father and gallery director to view the painting it should have followed up and contacted the father to ask if the painting was authentic. This might support a negligence claim but was inadequate for fraud. Defendant's motion for summary judgment was granted. Tony Shafrazi Gallery Inc. v. Christie's Inc., Index No. 112192/2007, 11/22/11 (Kornreich, J.).

Art law; ownership; oral agreement and modification; copyright; unpled claims and amendment. In a dispute arising from a written agreement for defendants to exhibit and sell plaintiff's paintings and an oral license for defendants to publish prints based on plaintiff's works, both sides moved for partial summary judgment. Plaintiff, taking the position that the oral license expired when the written agreement was terminated, sought an order that she: (1) was the owner of the unsold prints; (2) was entitled to the full price of prints sold after termination; (3) was entitled to a sworn and detailed accounting of all sales; and (4) could amend her complaint to seek a 50% commission on a specific painting defendants had sold at a price below the suggested retail. Defendants took the position that: (1) the oral license

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did not expire; (2) they owned the unsold prints or were entitled to 90% of their resale value; and (3) plaintiff's request to amend was untimely. The court, applying Arts and Cultural Affairs Law § 12.01, held that art given to a merchant for sale creates a consignment, with the merchant holding the art in trust and the artist entitled to possession after the parties terminate the relationship. The court rejected defendants' contention that the first sale doctrine of the U.S. Copyright Law allowed them to sell a copy of the work under their purported ownership of the original copy. It held that the first sale doctrine was inapplicable since defendants did not own the original copy. The court briefly noted that the derivative works provision of the Copyright Law could potentially allow defendants to continue to sell the prints as derivative works under its original authority. However, it decided that it could not determine whether these works were derivative based on the parties' summary judgment arguments and therefore needed to view the original works at trial. As to the accounting, the court again invoked Arts and Cultural Affairs Law § 12.01 and agreed that plaintiff was entitled to an accounting given that the previous accounting was unsworn and contained numerous mistakes. With respect to the commission on the specific painting, defendants claimed that they had an oral agreement with plaintiff to sell at the lesser price and that summary judgment may not be awarded on an unpleaded cause of action. The court pointed out that summary judgment may be awarded on an unpleaded cause of action if the undisputed proof supports the award and the opposing party has not been misled to its prejudice. Since plaintiff's complaint asserted a related breach of contract claim and the defendants would not be prejudiced, the court decided this point. It found that the parties' agreement stated a list of suggested retail prices to be approved by both parties prior to finalization of any sale, and that defendants were required to sell the works at the retail prices, subject to their ability to make discounts to customary trade purchasers. Any modification, however, needed to be in writing and signed by both parties. Given that none of these requirements were met prior to the sale, any oral modification was barred by the agreement's language and by GOL §15-301, which further required that a contract with a merger clause may only be changed by a written agreement signed by the party against whom enforcement of the change is sought. Plaintiff therefore established her entitlement to partial summary judgment on the claim for commission on the sale of the painting, but the court held that entry of judgment would be held in abeyance until the remaining claims were resolved. Scher v. Stendhal Gallery, Inc., Index No. 650698/2010, 9/15/11 (Schweitzer, J.).

Contract; breach; credit default swap; interpretation; third-party beneficiary. Fraud; negligent misrepresentation; breach of fiduciary duty. A non-party entered into a credit default swap, pursuant to a Master Agreement, to sell credit protection to one of the defendant financial institutions. In order to fund the payments to the credit protection buyer, the non-party issued notes that were purchased by plaintiffs pursuant to an Indenture Agreement. When the purchaser of the credit protection gave notification that the securities in its reference pool had defaulted, the non-party seller used plaintiffs' principal to pay the credit protection buyer and plaintiffs lost their investment. Plaintiffs brought suit against the credit protection purchaser and the trustee under the Indenture Agreement. Defendants moved to dismiss. The court granted the motion by the credit protection purchaser to dismiss plaintiffs' claims that it had breached the Master Agreement on the ground that plaintiffs were neither parties to nor third-party beneficiaries of the Master Agreement. The court also dismissed plaintiffs' fraud and negligent misrepresentation claims against the credit protection purchaser. The court held that plaintiffs could not show that they reasonably relied on the broker quotes received from the defendant regarding the value of the notes because plaintiffs had "the ability to gauge for themselves the changing value of the" notes based on market information that was publicly available. Turning to the trustee's motion to dismiss plaintiffs' breach of contract claim, the court held that plaintiffs were neither parties to nor third-party beneficiaries of the two agreements that they alleged the trustee had breached. Nor could plaintiffs show that the trustee owed any duty to plaintiffs under the Indenture Agreement to monitor the reference pool held by the credit protection buyer. <u>ASR Levensversekering NV v. Breithorn ABS Funding P.L.C.</u>, Index No. 650557/2009, 10/11/11 (Kapnick, J.).

C**ontract; breach; indemnification; attachment; preliminary injunction; motions to dismiss under CPLR 3211 and CPLR 3016(b).** Buyer, an out-of-home digital mobile television advertising network, and sellers, the holders of a majority of shares in Digital Media Group Company Limited ("DMG"), executed a letter of intent ("LOI") describing the terms and conditions for the buyer's acquisition of DMG. The LOI provided that buyer would pay $160 million to acquire DMG, subject to due diligence to be performed within 21 days. During the due diligence period, DMG representatives purportedly told buyer that DMG's current year revenue was higher than initially projected and forecast continued growth through the fourth quarter of that year. Relying on those representations, buyer entered into a merger agreement for the acquisition of DMG. The agreement contained a provision that required DMG to indemnify buyer for damages arising out of any breach of sellers' representations, subject to receipt of a claim notice within one year of the closing of the transaction. This procedure was buyer's "exclusive post-closing remedy." The agreement created an indemnification fund, into which buyer deposited $10 million of the purchase price, which was to be released on the first anniversary of the closing date, less amounts noticed for indemnification. Buyer delivered a claim notice within the one-year period, claiming that DMG had overstated revenue and receivables and therefore breached the agreement. Sellers objected to the notice. Buyer then filed an action asserting claims for breach of contract, unjust enrichment, fraud, and conspiracy to defraud, seeking restitution of $100,000,000 of the purchase price already paid and a declaration that it was not obligated to make any further payments. Sellers responded with their own action for breach of contract, anticipatory breach, and breach of the covenant of good faith and fair dealing. Buyer asserted counterclaims identical to the claims in their action. Each side moved to dismiss the other's action, while sellers also sought an attachment of buyer's assets under CPLR 6201(1) and a preliminary injunction preventing buyer from interfering with sellers' ability to trade their shares. The court held that the indemnification provision in the agreement provided the buyer's sole remedy, and therefore dismissed their fraud claim because buyer had failed to include fraud in their claim notice. The court also pointed out that, in any event, the fraud claim was not distinct from the breach of contract claim, and that buyer had failed to establish reasonable reliance on sellers' representations, noting that buyer was a sophisticated party that had the ability to perform reasonable due diligence that included updated financial information. The court granted sellers' order of attachment since: (1) buyer was not authorized to do business in New York; (2) the demand amount exceeded the amount sought in buyer's counterclaims; (3) sellers had demonstrated a likelihood of success; and (4) there was a risk of enforcement of a future judgment because buyer was domiciled in China, which does not have a treaty with the United States recognizing the reciprocal enforcement of judgments. The court denied sellers' motion for a preliminary injunction on the grounds that sellers had failed to demonstrate that monetary damages would not adequately compensate any losses incurred by buyer's actions, as any decrease in share value would be readily computable. However, the court granted dismissal of buyer's counterclaims, noting that the counterclaims were identical to the claims asserted in the action brought by buyer. <u>Visionchina Media Inc.et al v. Shareholder Representative Services, LLC</u>, Index No. 652390/2010 10/12/11 (Ramos, J.).

Contract; breach; interpretation; damages. Procedure; summary judgment. Defendant believed that the bank debt of an automotive parts supplier in bankruptcy was trading at overvalued price levels and that the market price would subsequently decline. Accordingly, defendant sought to purchase the bank debt for delivery to plaintiff at a depressed market price. Plaintiff and defendant entered into trade confirmations whereby defendant agreed to sell, and plaintiff agreed to buy, $140 million of the debt. Contrary to defendant's expectations, the market value of the bank debt soared. Defendant consequently made no attempt to acquire the bank debt and never settled the trades with plaintiff. Plaintiff, however, already had contracted to re-sell the debt to other purchasers. In order to meet those other obligations, plaintiff purchased the bank debt on the market at a price that was approximately 20 cents more per dollar than the price at which defendant had contracted to sell the debt to plaintiff. Plaintiff sued defendant to recover the difference between the price it had contracted to pay defendant and the market price of the debt. Defendant filed a counterclaim, claiming that plaintiff had also breached its contract with defendant. Both parties filed motions for summary judgment. The court granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment on its counterclaim. The court found that the trade confirmations into which plaintiff and defendant entered were contracts. Looking at the plain meaning of the trade confirmations, the court found that no triable issues of fact existed; defendant failed to settle the trades "as soon as practicable," as was required under the contracts, and nothing, except defendant's own inaction, prevented the trades from being settled. The court denied defendant's motion for summary judgment, holding that since defendant breached the contracts, plaintiff, the non-breaching party, was discharged from performing any future obligations under the contracts. Finally, the court granted plaintiff its requested damages, $25,225,000, with interest at the rate of nine percent. Goldman Sachs Lending Partners, LLC v. High River Limited Partnership, Index No. 603118/2009, 12/22/11 (Kapnick, J.).

Contract; breach; non-compete provision. Rights under contract extinguished by breach. Fraudulent inducement of contract. Tortious interference with business relations. Defendant was a former employee of plaintiff consulting firm. Plaintiff provided consultation services to a merchandising firm in which it later came to own significant equity. In the consulting agreement, plaintiff agreed that its principals, including defendant, would not engage in any business competing with the firm for three years. Later, a different firm retained plaintiff as a consultant, mainly through defendant's efforts. Defendant did not, however, obtain a signed agreement, and although plaintiff's cost-cutting measures saved the second firm millions of dollars, plaintiff had to sue for its fee. Upon defendant's resignation, plaintiff and defendant entered into a reorganization agreement under which defendant would get a share of monies that plaintiff got from the second firm and from a certain "Rawhide" transaction related to Enron. Defendant joined a company that was the largest equity owner of the second firm. At his new company defendant used a computer received from plaintiff to delete hundreds of his emails received at plaintiff and erased the computer's hard drive. Defendant allegedly, at the new company, became shareowner in a business purporting to be "behind 25% of the inventory that hits store warehouses," and which, plaintiff alleged, competed with the first merchandising firm. Plaintiff sued, bringing the claims here, including breach of the reorganization agreement and of the non-compete provision in its operating agreement; defendant asserted counterclaims including tortious interference with business relations, and among other things sought $28,000,000 in damages. Defendant also sought a declaration that the reorganization agreement entitled him to 23% of any amounts received in connection with the Rawhide transaction. He argued that the only condition of his right to recover was that he "make himself available to assist...from time to time...through the Rawhide Transaction's conclusion." The court noted that this provision did not exempt defendant from his obligations under the rest of the agreement, of which a material breach could extinguish his rights. There were factual issues as to whether defendant had performed his duties, including compliance with the non-compete provision, and the court denied summary judgment on that counterclaim. Defendant also unsuccessfully sought to dismiss plaintiff's claim for a declaration that it owed defendant no obligations under the reorganization agreement, the court finding that plaintiff's assertion that defendant deleted e-mails without permission adequately alleged breach. The court turned to defendant's cross-motion to dismiss the fraudulent inducement claim, which he argued was not adequately pled. Plaintiff alleged that after defendant stated that the second firm had signed an agreement defendant secretly destroyed documents that would have revealed his alleged deceit. Plaintiff further asserted that defendant, to perpetuate his lie, then made additional misrepresentations in the reorganization agreement, and that had plaintiff known the truth it would not have entered into the agreement. Plaintiff also alleged justifiable reliance and that it suffered millions of dollars of harm in consequence, in part because it had to sue the second firm for compensation. The court found these allegations sufficient for the claim to survive. Plaintiff also sought to dismiss defendant's counterclaim for tortious interference with business relations. Defendant asserted that plaintiff brought this lawsuit to chill his ability to invest in the merchandising firm his new employer acquired. Defendant said that plaintiff had written to defendant's lawyer accusing defendant, based on the acquisition, of violating the non-compete provision, and that as a result his new employer prohibited him from investing in the deal. The court found merit in plaintiff's argument that it had no contact either with defendant's employer or the merchandising firm. Defendant responded that the first merchandiser, formerly managed by plaintiff, copied defendant's new employer on letters to defendant. However, the court found this argument inconsistent with defendant's initial claim that he had been excluded from the transaction despite the first merchandising firm not being "concerned" whether the other merchandising firm was a direct competitor. The court explained that a court should not consider a new theory of recovery raised for the first time to oppose a motion for summary judgment. It also stated that failure by plaintiff to diligently ascertain whether the firms were competitors was not proof that plaintiff acted solely to harm its former employee or used improper means. Plaintiff won dismissal of the counterclaim for tortious interference. Defendant sought dismissal of declaratory judgment and breach claims based on the non-compete provision, but the court stated that whether the two merchandising firms competed was one of several issues of fact. Although defendant argued that the record established he had not been involved with the second merchandising firm, the court found that it showed that he wanted to be, and the timeline of events could permit an inference that he was. Plaintiff's claims based on the non-compete provision survived. <u>Impala Partners, LLC v. Borom</u>, Index No. 104091/2011, 11/14/11 (Sherwood, J.).

Contract; employment; breach; non-compete provision; commencement of one-year period. Legitimate interest of employer. Confidential information; pricing matrix. Metropolitan area as geographic scope. Irreparable injury; monetary compensation. Preliminary injunction. Plaintiff drug wholesaler alleged that, in violation of his employment agreement, defendant had taken a job with a competitor immediately after resigning from plaintiff and was soliciting plaintiff's customers and using plaintiff's purportedly confidential pricing matrix to undercut plaintiff. The matrix tied the volume of goods bought to price discount, and allegedly plaintiff's customers now leveraged information garnered from defendant to force plaintiff to drop its prices, becoming unprofitable with them just to stay in business. Plaintiff claimed losses directly attributable to defendant were $11,650 per month. The court had granted a TRO, later lifted at oral argument, and now considered plaintiff's motion for a preliminary injunction enjoining defendant from contacting plaintiff's customers and divulging confidential information. Defendant did not expressly deny that he had solicited business from companies that were plaintiff's customers while he worked there. The question was when the one-year non-compete period began, the court said. Defendant argued that after the three-year term of his employment agreement expired, plaintiff continued to employ him but did not extend their agreement, that under one of its provisions the agreement could not be extended orally, and that therefore the year non-compete period began on the agreement's three-year anniversary, the date he argued the agreement expired. By defendant's reasoning, the one-year non-compete period had expired by the time any solicitation of former clients occurred. Plaintiff, on the other hand, argued that the non-compete period did not begin until the final termination of defendant's employment, and plaintiff was right that under New York law employment continuing after an employment contract expires creates the presumption of a new contract with the same terms. However, the presumption may be rebutted, the court said. Here, defendant asserted that, although plaintiff disputed it, he was demoted after the agreement's three-year anniversary to a position with less territory. He also asserted that plaintiff rebuffed his pleas to extend the agreement, which contradicted a presumption that plaintiff intended to extend it. Although discovery might reveal that a new contract had, in fact, been formed on the same terms, the court could not determine based on undisputed facts whether it was. It turned to the question of whether the non-compete provision involved a reasonable restraint. New York law limits an employer's legitimate interests to protection against misappropriation of trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary. Such an employee usually works so closely with a client as to garner the client's primary loyalty, and barring the employee from soliciting former clients for a limited time allows the employer a legitimate chance to reestablish its client relationship using a new salesman. The court could not find that either of plaintiff's legitimate interests were in imminent danger. A company's prices, particularly for fungible goods, generally are not trade secrets, and it was doubtful that a fungible goods salesman like defendant would be central to customer transactions. Indeed, defendant's current employer confirmed that it only let defendant offer the prices in its own matrix, not negotiate sales. The court could not identify unique skills defendant possessed. Turning to the geographic scope of the non-compete provision, the court noted that at oral argument plaintiff's counsel limited the "extremely broad" scope, but also remarked that defendant's original territory of Manhattan and the Bronx were two of the nation's most commercially developed counties. Nevertheless plaintiff had not met its burden of showing that if its motion were denied it would suffer an injury monetary compensation could not repair; in fact, as the court pointed out, plaintiff actually calculated its purported monthly damages down to the penny. In considering the balance of equities, the court contrasted the current case to one where, if a former employee were not enjoined from disclosing a secret formula or manufacturing method crucial to a former employer's unique product, the employer might shun further investments, to the future detriment of consumers. That was not so here. The court found that granting the injunction to the extent plaintiff requested could significantly hamper defendant's ability to earn a living, while denial at most would force plaintiff to lower prices to a few customers. Plaintiff's motion was denied. H.D. Smith Wholesale Drug Co. v. Mittelmark, Index No. 650459/2011, 11/18/11 (Kornreich, J.).

Corporations; derivative actions; breach of fiduciary duty; breach of shareholders agreement; removal of director for cause; dissemination of confidential information; indemnification of directors and officers for legal fees; BCL §§ 722, 723. Procedure; injunctive relief; monetary damages. Plaintiff and the individual defendant were the sole officers, directors, and shareholders of a corporation (the "Corporation"). The individual defendant, without the knowledge or consent of plaintiff, began negotiations with a competitor company to sell defendant's ownership interest in the Corporation or all or substantially all of the Corporation's assets. In connection with these discussions, the individual defendant provided certain confidential information to the competitor. Thereafter, the individual defendant provided plaintiff with a notice of right of first refusal, which notified plaintiff that if he did not purchase defendant's shares, defendant would sell them to the competitor company. Plaintiff notified the individual defendant that the proposed sale violated the terms of the Corporation's shareholders agreement and that the disclosure of the confidential information to the competitor company was inappropriate. Plaintiff separately demanded that the competitor company return the confidential information that it had received. Plaintiff thereafter commenced suit, derivatively and in his individual capacity, against the individual defendant and the competitor company. Defendants moved to dismiss the case, and the individual defendant additionally sought an order directing the Corporation to reimburse him for attorneys' fees and expenses incurred in defending against the instant action. The court granted the motions in part. Accepting plaintiff's allegations as true, the court found that plaintiff had adequately pleaded that the individual defendant had breached his fiduciary duties and the Corporation's shareholders agreement by attempting to sell his interest in, or substantially all of the assets of, the Corporation, and by disclosing confidential information to the competitor company without plaintiff's knowledge or consent. The court also declined to dismiss plaintiff's claim for removal of the individual defendant as an officer and director of the Corporation for cause. The court, however, dismissed plaintiff's claims for an injunction, which would have enjoined the defendants from disseminating the Corporation's confidential information, on the grounds that the confidential information had been returned to the Corporation and plaintiff's injury was compensable by money damages. Finally, the Court held that the individual defendant was entitled to full indemnification for legal fees incurred in the defense of the instant action. Plaintiff argued that the individual defendant was not entitled to indemnification because the actions complained of were taken in defendant's personal capacity rather than in his capacity as an officer or director of the Corporation. The court disagreed, concluding that "[t]here is no question that the conduct of which [p]laintiff complains occurred in the context of [defendant's] position as an officer/director of [the Corporation]." Kliger v. Drucker, Index No. 3304/2011, 10/5/11 (Driscoll, J.).

Corporations; replacement of deceased directors; by-laws. Petitioners, shareholders of the respondent corporation, asked the court to vacate any actions taken by the board of directors following the death of one director. Petitioners argued that the board had improperly replaced the deceased director and that any actions taken by the board were, therefore, null and void. The court agreed and granted the application. The court rejected the corporation's claim that the replacement of the deceased director was permissible under the terms of a 2003 so-ordered stipulation. The court also rejected respondent's argument that "custom and usage" permitted the replacement of the deceased director. In the absence of any governing provision in the stipulation, the court held that the replacement of directors was governed by the corporation's by-laws. Because the replacement director had not been appointed in accordance with the by-laws, the court ruled that any actions taken by the board of directors were of no force and effect. Ziffer v. Tower Isles Frozen Foods, Ltd., Index No. 10846/2011, 7/30/11 (Driscoll, J.).

Deceptive business practices; Executive Law § 63(12); General Business Law § 349; jury demand. The Attorney General ("AG") brought an action against an entity providing real estate appraisal services to savings and loan institutions and its wholly-owned subsidiary, through which it provided those services. The AG alleged that the defendants had engaged in deceptive business practices in violation of Executive Law § 63(12) and GBL § 349 by permitting appraisers to inflate property appraisals in response to pressure from Washington Mutual, Inc., then the country's largest savings and loan institution. The action sought a permanent injunction, restitution of improperly earned appraisal fees, and disgorgement of unjustly earned profits. Executive Law § 63(12) empowers the AG to commence a special proceeding for restitution, damages, and injunctive relief against a business entity that engages in "repeated fraudulent acts" or "persistent fraud." GBL § 349 empowers the AG to pursue "those who commit deceptive acts or practices in the conduct of business." Upon the completion of discovery, the defendants served a demand for a jury trial. The AG moved to strike the jury demand because: (1) the claims upon which the action was based and the remedies sought were equitable in nature; and (2) the statutory claims asserted did not exist at common law. In opposition, defendants argued that the imposition of monetary penalties was not equitable in nature. The court agreed with the AG that the central consideration was "whether the main thrust of the action is for legal damages or for equitable relief." The court explained that statutorily created causes of action were "primarily equitable in nature" and that those causes of action used a broad definition of fraud that eliminated traditional elements and therefore did not exist at common law. The court also held that the remedies sought were equitable in nature. Although no First Department authority was directly on point, the court noted that most courts have concluded that there is no right to a jury trial in an action for civil penalties under state consumer protection statutes because, as in this case, they were proceedings unknown at common law. Finally, the court rejected defendants' attempt to draw support from federal jurisprudence, because "it is well-settled that the Seventh Amendment is not applicable to the states." <u>People of the State of New York v. First American Corp.</u>, Index No. 406796/2007, 11/18/11 (Ramos, J.).

Evidence; admissibility; motions in limine; preclusion; evidence of settlement negotiations; evidence of indemnification agreements; evidence of damages; evidence extrinsic to contract; evidence of litigation reserves. The court decided several in limine motions brought by both parties involved in a contract dispute. The court first addressed plaintiff's five in limine motions to preclude defendants from offering certain evidence at trial. It granted plaintiff's motion to preclude defendants from introducing documents of which defendants were unaware prior to discovery to the extent that defendants sought to demonstrate their reliance on such documents in support of an equitable estoppel defense. The court also granted plaintiff's second in limine motion to preclude defendants from introducing evidence regarding a 2009 licensing agreement, which altered the language in the 2003 agreement that was at issue in the instant litigation. The court explained that it already had ruled that the 2003 agreement was unambiguous, and, as a result, extrinsic evidence was inadmissible to vary the terms of the writing. With respect to plaintiff's third motion, the court precluded defendants from introducing evidence of settlement negotiations among the parties for the purpose of proving liability or the value of claims. It held, however, that defendants could introduce evidence of amounts actually paid to plaintiff in settlement to support a failure to mitigate defense. With respect to plaintiff's two remaining motions, the court precluded defendants from introducing evidence that had previously been requested by plaintiff but withheld by defendants during discovery. The court also ruled on six motions in limine brought by defendants to preclude plaintiff from offering certain evidence at trial. It precluded plaintiff from offering evidence that defendants had indemnification agreements with their suppliers to the extent plaintiff sought to introduce these agreements to establish defendants' liability. The court noted, however, that the indemnification agreements might be admissible if offered for other purposes. With respect to defendants' second motion in limine, the court precluded plaintiff from proffering evidence concerning the court's prior decision, rejecting defendants' patent exhaustion defense. In denying defendants' third in limine motion to preclude evidence relating to plaintiff's allegations that defendants colluded with their suppliers to underpay and under report royalties owed to plaintiff, the court explained that such evidence could be be used to challenge defendants' waiver and equitable estoppel defenses. The court also denied defendants' motion to preclude plaintiff from introducing evidence of damages in excess of $9,203,349 on the ground that defendants' motion related to the weight of the evidence, not its admissibility. With respect to defendants' fifth in limine motion, the court held that evidence of defendants' litigation reserves was inadmissible to the extent such material was prepared in anticipation of litigation. Finally, the court declined to preclude plaintiff from introducing documents that it initially refused to turn over in discovery but subsequently produced. <u>MPEG LA, LLC v. Audiovox Electronics Corp.</u>, Index No. 24678/2008, 11/23/11 (Pines, J.).

Exclusive distribution agreement; consequential damages; damages for lost profits; contract construction. In an action for breach of an exclusive distribution agreement for drug-eluting heart stents, defendants moved for summary judgment to dismiss all claims against them. Plaintiff, the distributor, alleged that defendants, the manufacturer and its affiliates, improperly stopped the sale of the product to bolster the sales of the affiliates' similar product in violation of a contract provision prohibiting unilateral termination. The agreement included a provision permitting unilateral termination, recall and cessation for safety reasons, and defendants relied on this provision as a defense. The court found that questions of fact as to the underlying reason for termination had to be determined before deciding which contract provision should be applied. The court did, however, dismiss plaintiff's damages claim for the profits it would have made if the agreement had not been terminated. Plaintiff argued that the purchase of products from the defendant manufacturer and resale to plaintiff's sub-distributors or end users constituted the essence of the distribution agreement and therefore made its lost profits general damages. The court relied on the agreement's specific exclusion of consequential damages, holding that, as a matter of New York law, lost profits are, invariably, consequential damages. Biotronik, A.G. v. Conor Medsystems Ireland, Ltd., Index No. 603751/2007, 10/19/11 (Fried, J.).

Finder's fee agreement; causation; proper counterparty. Plaintiff, an investment bank, claimed it was owed a finder's fee by defendant, a pharmaceutical company. Under the finder's fee agreement, plaintiff only earned a fee if defendant consummated a strategic transaction with a counterparty to develop and market rights to a drug for treating bladder cancer. At issue was whether plaintiff was entitled to a finder's fee because it had previous contacts with a company that later acquired another company that had developed a bladder cancer drug complementary to defendant's. Under the finder's fee agreement there were three ways in which a company could be added as a counterparty to be presented to defendant as a potential match: (1) the company approached plaintiff or defendant about the drug; (2) plaintiff proposed the company to the defendant; and (3) defendant requested plaintiff to approach the company. No matter which method was used, plaintiff needed defendant's approval before it could approach any company as a potential counterparty. In granting defendant's motion for summary judgment and dismissing the complaint, the court first noted that an unambiguous contract should be enforced on its terms and that clear language does not become ambiguous because parties assert differing interpretations. A finder's fee agreement required a causal connection between the introduction made between parties by a finder and the final transaction. In other words, there must be some continuing connection between the finder's initial efforts and the transaction, and the final transaction must have flowed directly from the introduction. A "but for" connection was not sufficient. The court rejected plaintiff's argument that the company approached plaintiff within the meaning of the agreement when it requested assistance regarding an opportunity regarding a drug related to urology and cancer. The finder's fee agreement required that the approach involving a strategic transaction directly related to defendant's drug, not simply any transaction in that area of medicine. Furthermore, defendant provided undisputed proof that plaintiff never made it aware of the company's interest, and plaintiff admitted that it did not inform defendant of its discussions with the company. Since plaintiff never informed defendant of the company as a potential counterparty, plaintiff indisputably did not obtain defendant's approval to add the company to the counterparty list contemplated by the agreement. Ferghana Partners Inc. v. Bioniche Life Sciences, Inc., Index No. 650747/2009, 10/5/11 (Schweitzer, J.).

Insurance; insured's duty to give notice; summary judgment; timeliness; Labor Law §§ 240, 241; homeowner's defenses. Homeowner, the defendant in a tort action arising from a construction accident that occurred during renovations on her home, brought a third-party action against her homeowner's insurance carrier and the contractor's insurance carrier for a judgment declaring the carriers' duty to defend and indemnify. The homeowner's insurer had disclaimed coverage on the ground that the homeowner had not provided timely notice of the accident. The contractor's insurer, whose policy named the homeowner as an additional insured, disclaimed coverage on the ground that its policy excluded damages arising from bodily injury sustained by an employee of any insured. In determining motions and cross-motions for summary judgment, the court upheld both disclaimers. The homeowner's policy required homeowner to provide notice of the occurrence as soon as practicable. Homeowner had provided notice only to the contractor's attorney, which was insufficient under the terms of the policy. The contractor's insurer established that the tort plaintiff was an employee of a corporate insured, which excluded coverage for his injury as to the homeowner as well. In addition, homeowner's notice to the contractor's attorney did not constitute notice to the contractor's insurer. In the main action, the court granted homeowner's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law fraud claims because the homeowner lacked actual or constructive knowledge of any allegedly defective condition and exercised no control or supervision over the work. The court also dismissed plaintiff's Labor Law §§ 240(1) and 241(6) claims because the homeowner's property fell within the exception for one and two-family homes. The court denied as untimely homeowner's motion for summary judgment on her indemnity claim against the contractor because it was not made within 120 days after filing of the note of issue and she neither obtained leave of court nor established a reasonable excuse for the delay. Finally, the court dismissed the homeowner's action against the contractor's insurance agent because insurance brokers owe no duty to an additional insured who is not their customer. Carpio-Sanchez v. Nakamura, Index No. 7901/2009, 11/4/11 (Grays, J.).

Negligence; fraudulent concealment; forgery of financial instruments; counterfeit; UCC 3-406; UCC 4-301; UCC4-302; duty to disclose. Plaintiff law firm sued defendants, two entities that were part of a global financial services firm, for negligence, negligent supervision, and fraudulent concealment in connection with defendants' dishonoring of a cashier's check issued by defendants. Defendants later dishonored and returned the check to plaintiff because they determined it was forged. The complaint alleged that defendants: (1) failed to implement effective mechanisms to monitor financial instruments and prevent forgery; (2) failed to implement effective mechanisms to monitor the criminal acts of employees; (3) failed to properly investigate the alleged counterfeiting and thereby assist plaintiff in mitigating damages and; (4) intentionally concealed similar instances of forged or counterfeit instruments. Plaintiff also alleged that it was a holder in due course of the cashier's check pursuant to UCC 3-406. Defendants moved to dismiss the complaint for failure to state a cause of action, arguing that: (1) defendants owed no duty to plaintiff, a non-customer third-party, and therefore plaintiff's claims for negligence and negligent supervision failed; (2) UCC 3-406 did not provide a basis for an affirmative claim, and plaintiff could not establish its status as a holder in due course; (3) plaintiff could not state a claim for fraudulent concealment because defendants did not have a fiduciary or contractual duty to plaintiff, nor a duty to warn the public; and (4) defendants were not liable for the criminal acts of third parties. The court granted defendants' motion in its entirety. It held that the duty of a payor bank to a non-customer depositor of a check derived solely from UCC 4-301 and UCC 4-302. UCC 4-301 authorizes a payor bank to revoke settlement and recover any payment if, before it has made final payment and before the prescribed deadline, it returns the item or sends written notice of dishonor or nonpayment. UCC 4-302 provides that a payor bank is liable for an item received by the payor bank if it does not pay or return the item or send notice of dishonor within the prescribed deadline. The court held that plaintiff failed to allege that defendants did not act to dishonor the cashier's check within the prescribed deadline. The court distinguished cases cited by plaintiff, which involved stolen and forged checks, because defendants submitted evidence sufficient to establish that the subject cashier's check was counterfeit, and plaintiff failed to present any evidence to the contrary. The court also held that plaintiff failed to state a cause of action for fraudulent concealment because it did not allege that defendants owed it a duty to disclose based on a contractual, confidential, or fiduciary relationship. Kevin Kerveng Tung, P.C. v. JP Morgan Chase & Co. et al., Index No. 11885/2011, 10/28/11 (Grays, J.).

Preliminary injunction; hearing; credibility of parties. Plaintiff was a member of the Russian Duma and co-plaintiff was one of the multinational corporations in which she had an interest. Defendants were plaintiff's daughter, a former employee of plaintiff's, a trust of which the daughter was both a beneficiary and trustee, and entities the daughter had set up. In this motion plaintiff sought a preliminary injunction to prevent her daughter from dissipating monies received from the sale of assets of one of the entities. Plaintiff contended that the assets were obtained with monies transferred from plaintiff's accounts without her consent, that the daughter's position as trustee allowed her to move the funds freely between accounts, and that plaintff had been defrauded into structuring the trust as she did by the daughter and former employee, who had mistranslated documents and conversations. To succeed on the merits, plaintiff had to offer convincing evidence that the daughter was not authorized to transfer funds from the corporate plaintiff or the mother's accounts to the trust, and, subsequently, to the daughter's entity. The court heard two days of testimony. The plaintiffs did not dispute that the daughter was an authorized signatory on the relevant accounts, but contended that, pursuant to an oral agreement, she was supposed to receive the plaintiff's permission before transferring funds. The daughter testified that she had gotten permission for each transfer: to wire funds from the plaintiff's Swiss account to the trust, to transfer $8,100,000 from the corporate co-plaintiff, to transfer $2,500,000 from an account the women jointly held, and to transfer $2,000,000 from the trust. The former employee testified that plaintiff intended to use the trust or the daughter's entity as the lending entity in a development project on Frederick Douglas Boulevard. The employee, the daughter, and the lawyer who advised the mother and daughter on the trust's creation each credibly rebutted plaintiff's assertions she had never meant the trust to benefit her daughter. The lawyer also rebutted plaintiff's contention that she never meant her daughter to control the trust's investments and testified that plaintiff had declined a copy of the trust agreement in Russian and did not request any translator other than her daughter. Although the two sides did offer some documentary evidence, the determination of this "she said/she said situation" turned on the credibility of the parties. The court found that the majority of the credible testimony given belied plaintiff's account and did not support the conclusion that the funds were transferred improperly. The court mentioned plaintiff's business acumen and extensive education, which made it hard to believe that she did not grasp the terms of the trust. Although plaintiff's failure to show likelihood of success on the merits meant the court did not need to consider the other bases for a preliminary injunction, it noted that the only basis asserted for irreparable harm was that the daughter might become insolvent and be unable to satisfy a judgment against her. Loss compensable by money damages does not give rise to the type of irreparable harm required for a preliminary injunction, the court said, and added that plaintiff presented no evidentiary support for her daughter's imminent financial insolvency. The request for a preliminary injunction was denied. <u>Ermakova v. Backman</u>, Index No. 651208/2011, 10/5/11 (Fried, J.).

Procedure; summary judgment; CPLR § 3212(a). Fraud; negligent misrepresentation; fraudulent inducement; justifiable reliance. Plaintiffs purchased a gas station business from the individual defendant and entered into a lease with the defendant owner of the real property on which the gas station was located. Prior to the closing on the purchase, the State announced plans to condemn part of the property in order to widen a road. The planned condemnation would prevent plaintiffs from continuing to operate the gas station. Plaintiffs brought an action against defendants for fraud, fraudulent inducement, and negligent misrepresentation alleging that defendants knew of the proposed condemnation prior to the closing but concealed it from plaintiffs. After the close of discovery, the owner of the real property moved for summary judgment. The court granted the motion. Explaining that to avoid summary judgment on all three fraud-based claims, plaintiffs needed to establish a triable issue regarding their justifiable reliance on the defendant's alleged failure to disclose the condemnation. The court found, however, that the pendency of the condemnation was a matter of widespread public notice well before plaintiffs closed on the transaction. Since plaintiffs reasonably could have discovered the State's condemnation plans prior to closing, the court rejected plaintiffs' claim of justifiable reliance as a matter of law. Though the individual defendant did not join in the motion, the court, exercising its authority under CPLR § 3212(a), searched the record and granted summary judgment to him as well. <u>Khindri v. Getty Petroleum Marketing, Inc.</u>, Index No. 39158/2008, 10/13/11 (Pines, J.).

Procedure; summary judgment; hearsay. Contracts; breach; restrictive covenants. Unfair competition; employee disloyalty. Plaintiffs, a specialty pharmacy and its owner, entered into a member agreement with the pharmacy's supervising pharmacist, giving the pharmacist a minority interest in the pharmacy. The member agreement contained restrictive covenants prohibiting the pharmacist from engaging in a competing business or soliciting the pharmacy's customers. The pharmacist subsequently sold his minority interest in the pharmacy to the pharmacy's owner pursuant to a stock sale agreement. As part of the stock sale, the pharmacy owner agreed to waive any claims relating to the member agreement, and the pharmacist agreed not to solicit then active customers of the pharmacy for a period of two years. The pharmacist began operating a new specialty pharmacy within weeks after the stock sale. Plaintiffs sued the pharmacist and his business partner for breach of contract, conversion, breach of fiduciary duty, and unfair competition. Defendants moved for summary judgment. The court dismissed plaintiffs' claims to the extent that they were based on any alleged breach of the restrictive covenants contained in the member agreement. It explained that plaintiffs had waived all claims under the member agreement, and the stock sale agreement specifically provided that the covenants contained therein superseded those in the member agreement. Although the pharmacist additionally argued that there was no evidence that he had breached the restrictive covenants contained in the stock sale agreement, the court denied this aspect of the motion on the ground that there was evidence in the record that the pharmacist had solicited at least one of the pharmacy's then active customers. Even though this evidence was hearsay, the court held that hearsay evidence can be considered in opposition to a motion for summary judgment and may be sufficient to defeat the motion. Finally, the court granted the motion of the co-defendant business partner for summary judgment on the ground that there was no evidence that he had solicited any of the plaintiffs' customers in violation of an employment and non-competition agreement. The court explained that the mere fact that the business partner defendant had formed a pharmacy while in plaintiffs' employ was not by itself sufficient to establish actionable employee disloyalty. Nor was there any evidence that the business partner defendant used plaintiffs' time, facilities, or secrets to build a competing business. Town Total Farmingdale LLC v. Dos Santos, Index No. 47337/2009, 11/17/11 (Emerson, J.).

Res judicata. Breach of fiduciary duty; tortious interference with current and prospective business relationships; misappropriation of trade secrets and confidential information; unfair competition. Plaintiff reinsurance brokerage firm sued a former employee who had resigned to work for defendant, a competitor reinsurance brokerage firm, in federal court in Kansas. Plaintiff alleged that the former employee, while still employed by plaintiff, had solicited one of plaintiff's clients to transfer its account to defendant and had shared trade secret and confidential information with defendant. Plaintiff subsequently filed the instant action against defendant for aiding and abetting a breach of fiduciary duty, tortious interference with current and prospective business relationships, misappropriation of trade secrets and confidential information, and unfair competition. Plaintiff alleged that defendant had induced the former employee to solicit plaintiff's client to move its account to defendant. Defendant moved for summary judgment based on res judicata and on the merits. The court granted the motion in part. First, defendant argued that because plaintiff had agreed to dismiss the Kansas litigation against the former employee with prejudice, the prior judgment should be given preclusive effect. The court held that res judicata precludes subsequent litigation if the earlier litigation was: (1) a final judgment on the merits (2) by a court of competent jurisdiction (3) in a case involving the same parties or their privies and (4) involving the same claims. Here, the court found that res judicata did not apply because the defendant was not a party to the Kansas action, nor was defendant in privity with the former employee since plaintiff had not sued defendant under a theory of respondent superior. The court also found that the case in Kansas and the instant litigation involved different causes of action. The court next denied defendant's summary judgment motion on the merits as to all claims except the misappropriation claim, which was dismissed. The court cited evidence that defendant conditioned its offer to employ plaintiff's former employee on his ability to secure the account of plaintiff's client. These facts, the court found, created an issue of material fact that precluded summary judgment on plaintiff's claims for aiding and abetting a breach of fiduciary duty, tortious interference, and unfair competition. However, the court also found that the information the former employee allegedly misappropriated was publicly available, not a trade secret, and that plaintiff took no steps to protect its purported secrecy. Therefore, the court granted defendant's motion for summary judgment on the misappropriation claim. Holborn Corporation v. Guy Carpenter & Company, LLC, Index No. 601831/2009, 10/19/11 (Kapnick, J.).

Successor liability. Procedure; CPLR § 602(a); consolidation; joint discovery; joint trial; CPLR § 603; severance. Stay of discovery. Defendant bank moved to sever plaintiff's successor liability claims against it, to stay related discovery, and to consolidate allegedly identical successor liability claims asserted against it by plaintiffs in three other actions. The plaintiffs in all four cases alleged that the defendant bank succeeded to the liabilities of the defendant mortgage lender as a result of a de facto merger. The court held that even though the plaintiffs' successor liability claims in all four cases rested upon the same facts and legal theories, under New York law, denial of consolidation is warranted when otherwise similar actions are at different procedural stages. Here, the court noted that the plaintiff in the instant action had nearly completed discovery, while the plaintiffs in the three other cases lagged behind. Because the plaintiff in the instant action would be prejudiced if it were required to halt discovery so that the other plaintiffs could catch up, the court declined to stay discovery regarding successor liability in the instant action or to consolidate the instant action with the three related cases for the purposes of discovery. The court further held that discovery regarding successor liability should move forward in the three related cases, although the court urged the plaintiffs to work together and avoid repeating prior discovery. Finally, the court held that it was premature to consolidate the successor liability claims for trial. Although the court explained that the allegations in all four cases seemed similar enough to warrant one trial, it held that facts might develop and the course of the cases might change as discovery proceeds. As such, the court held the issue of consolidation for trial purposes in abeyance. MBIA Insurance Corporation v. Countrywide Home Loans, Index No. 602825/2008, 10/31/11 (Bransten, J.).

Wire transfers; "discharge for value" rule; unjust enrichment; sufficient and timely notice. In this action for unjust enrichment, conversion, and a declaratory judgment, plaintiff sought to retrieve funds it had wire transferred to defendant, based on a claim that the funds had been sent in error. Non-party TIBC maintained accounts with both plaintiff and defendant and had debts to each. Plaintiff had given notice to TIBC that its debt was coming due, stating it would apply the funds in TIBC's account against its debt unless timely payment were made. When payment was not made, plaintiff liquidated funds from TIBC's account and transferred them to TIBC's account at defendant, as required by a prior standing order. Upon receipt, defendant applied a majority of the wired funds to the debt TIBC owed. Thereafter, plaintiff demanded that defendant return the full amount of the wire transfer, claiming the transfer had been made in error. Defendant claimed the "discharge for value" rule applicable to wire transfers protected it because it had already applied the funds received to offset a debt due from the putative owner of those funds. The court denied defendant's motion to dismiss, finding that the questions of fact as to whether defendant received sufficient and timely notice of the claimed error could negate the discharge for value rule and require return of the funds. The court also held that plaintiff sufficiently pled a possessory interest in the funds to deny defendant's motion to dismiss its conversion cause of action. In addition, the court declined to dismiss plaintiff's cause of action for declaratory judgment before discovery. Bayerische Hypo-Und Vereinsbank AG v.HSBC Bank USA, N.A., Index No. 602761/2009, 12/19/11 (Fried, J.).

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