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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Chief Administrative Judge of the State of New York

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Accounting Firm and non client; fraud, aiding and abetting fraud, negligent misrepresentation. Plaintiff loaned money to a holding company that owned two professional sports teams and was controlled by a private equity investor. The sports teams began to struggle financially, and consequently, the holding company secured capital by entering into a series of credit agreements. Defendant accounting firm undertook an audit of the holding company's 2007 financial statements, which it completed one year and three months after execution of the last credit agreement, but did not include a "going concern" reference. The equity investor subsequently infused cash into the holding company, but the holding company eventually suffered further losses and could not make the required interest payment to plaintiff. Although plaintiff made loans to the holding company prior to defendant's audit, plaintiff claimed that a properly conducted audit would have allowed plaintiff to declare the company to be in default earlier and mitigate its damages. As a result, plaintiff brought suit alleging fraud, negligent misrepresentation, aiding and abetting fraud, and civil conspiracy. Defendant moved to dismiss the complaint. The court determined that there was a question of fact as to whether defendant's failure to include a qualified opinion as to a going concern certification in its report constituted fraud. The court dismissed the negligent misrepresentation claim because plaintiff failed to show that it was a known party to the defendant in connection with the audit. The court declined to dismiss the aiding and abetting fraud claim because plaintiff sufficiently pled it. Lastly, the court noted that New York does not recognize civil conspiracy as an independent tort, but allowed plaintiff to plead that the fraud and aiding and abetting fraud claims were part of a common scheme. GSP Finance LLC v. KPMG LLP, Index No. 650841/2011, 9/6/12 (Kapnick, J).

Contract; breach. Agency; liability of principal. Procedure; renew; reargue; vacate default; summary judgment; statute of limitations. Plaintiff, a certified public accountant, sued defendant law firm to recover fees for accounting services rendered in connection with defendant's representation of its client, the third-party defendants. Defendant had billed the third-party defendants for plaintiff's services, and defendant paid plaintiff when it received payment from its client. Defendant previously moved for summary judgment, which the court granted on default. On this motion, plaintiff moved for leave to renew and reargue defendant's motion. Reasoning that plaintiff's remedy was limited to vacatur of his default, the court deemed his motion as

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one to vacate the default and for leave to submit opposition to defendant's summary judgment motion. The court granted the motion to vacate and denied summary judgment, finding that plaintiff had demonstrated both a reasonable excuse for the default and a meritorious opposition to defendant's motion. Moreover, the court found that plaintiff had demonstrated the existence of an issue of fact sufficient to defeat defendant's motion. The court then summarized general agency principles with respect to disclosed versus undisclosed principals and determined that defendant's client was a disclosed principal. The court went on to discuss a 1990 First Department decision that had departed from general agency principles in the case of court reporting services. Specifically, in the First Department, an attorney is personally liable for court reporting expenses "unless the attorney expressly disclaims responsibility therefore." The court, however, then explained that in the Second Department "an attorney who represents a client and who incurs expenses with third parties, other than court reporters, as an agent for a disclosed principal is not personally liable for contracts made on behalf of the client unless the attorney assumes responsibility therefor." The court found that, in this case, defendant had assumed responsibility to pay plaintiff for his services. It explained that defendant commenced the third-party action when its client stopped making payments for plaintiff's services, at which time plaintiff agreed to wait for payment until the third-party defendants paid defendant. The court concluded that plaintiff had demonstrated the existence of an issue of fact because it was unable to determine from the existing record whether defendant had recovered in its third-party action or whether the third-party defendant had paid defendant any sums to which plaintiff was entitled. Finally, the court found that, contrary to defendant's contentions, plaintiff's action was not untimely because he had commenced it against defendant within the six-year period of limitations for actions sounding in breach of contract. <u>Hackeling v. Pryor Cashman Sherman & Flynn LLP</u>, Index No. 25284/2007, 7/25/12 (Emerson, J.).**

Contract; breach; bankruptcy; calculation of damages; mitigation. The parties, two investment companies, entered into a contract of sale for unsecured bankruptcy claims for a shipping company. The contract was subject to "negotiation, execution and delivery" of "[a] reasonably acceptable assignment agreement containing customary provisions." The defendant buyer insisted on receiving unqualified representations in the assignment of claim, which the plaintiff seller refused. After a year of negotiations, the buyer announced that it was canceling the transaction, breaching the contract, and the seller commenced this action for damages. The seller ultimately sold the claims to a third party. Plaintiff obtained summary judgment on the issue of breach of contract. On this subsequent motion, with plaintiff seeking approximately $4.5 million dollars in damages, the parties disputed the measure of damages to be employed. Plaintiff/seller argued that the court should calculate damages as the contract price (plus pre-judgment statutory interest), less the amount for which plaintiff ultimately sold its claims to a third party. Defendant/buyer argued for application of the general rule in New York, that damages are to be measured as the difference between the contract price and the fair market value of the asset at the time of the breach.

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The court ruled that the measure of damages was a question of law, appropriate for summary judgment, and applied the general measure used in New York, as urged by defendant. The court held that this method of calculation applied even when it was difficult to determine the fair market value at the time of the breach, since expert testimony may be used at trial. The court offered the exception that, where there is no market for an asset, a court may instead calculate the contract price less the resale price at which seller ultimately sold the asset. Generally, a jury must determine whether there was a market for the asset before a court will consider using this alternate damages calculation. A jury may also determine whether UCC 2-709 is applicable as a measure of damages where a buyer failed to pay and a seller was unable with reasonable efforts to resell an asset. In this case, because the record was limited and often contradictory, the court left the final determination on the issue of fair market value for trial. The record was also unclear on the issue of mitigation. Generally, a party who suffers damages for a breach of contract has a duty to mitigate. In denying summary judgment, the court held that whether plaintiff acted reasonably was a question of fact to be determined by a jury. It set a trial for factual determination of the appropriate damages and on the issue of mitigation. Deephaven Distressed Opportunities Trading, Ltd. v. 3V Capital Master Fund Ltd. v. Imperial Capital LLC., Index No. 600610/2008, 6/26/12 (Schweitzer, J.).

Contract; breach; burden of proof; waiver; parol evidence. In this action for, *inter alia*, breach of contract associated with a leveraged buyout plan, defendant attorney and defendant investment banker devised a plan to acquire a publicly held company in the nursing home business. The plaintiffs were investors in real estate, and the remaining defendants were entities associated with the operating company managing the nursing homes. After plaintiffs' summary judgment motion was granted in part, a limited non-jury trial was held regarding the interpretation of purchase option agreements that were part of the transaction. In the transaction, the attorney and banker approached their mutual client of many years, a sophisticated real estate investor, ("the individual plaintff") to serve as the principal source of financial resources for the deal. Defendants developed a "PropCo/OpCo" structure, whereby the plaintiff entities associated with the individual defendant would acquire and mortgage the real estate and lease it to an operating company, which was affiliated with the defendants and had experience operating nursing homes. The resulting rents from the various properties would supply revenue to pay the mortgages. Under the option agreements, plaintiff CamEquity Holdings, LLC ("CamEquity") was granted the right to purchase up to 99.999% of all membership units of defendants Canyon Sudar Partners, LLC ("Canyon") and SVCARE Holdings, LLC ("SVCARE") (a holding company formed in connection with the transaction that owned approximately 170 nursing home operating entities). Canyon was jointly owned by the attorney and the banker and was the owner of SVCARE. The plaintiffs alleged that SVCARE and Canyon breached the option agreements by failing to honor CamEquity's notice to exercise its purchase option. The defendants alleged that the option was unenforceable because it was conditioned upon CamEquity or its affiliates (including one known as"CAM III") funding a $100,000,000 loan it had entered with SVCARE, which the defendants claim did not occur at the closing as agreed. After plaintiffs won partial summary judgment, a trial was held on the issue of what portion, if any, of the $100 million purchase price could be defrayed by assumption/ release of SVCARE's indebtedness to CamEquity. The court held that CamEquity was entitled to immediately acquire the 99.999% of the outstanding shares of SVCARE by forgiving $100 million in debt, and that the parties were to proceed to closing on this transfer without delay. In reaching its decision, the court found that the parties entered into a later loan that reaffirmed the loan at issue and waived their legal remedies under that loan. It found that the evidence regarding the parties' conduct at the closing was at odds with the "post hoc accounting arguments" offered at trial and held that the later loan and its note were dispositive of the dispute. It found that the individual plaintiff and his entities provided all of the financing for the transaction, in exchange for which he received various forms of consideration, including the real estate and the $100 million promissory note payable by SVCARE to CAM III. The attorney and the banker testified that prior to the closing the individual plaintiff stated that he was not going to fund the loan at the closing. They testified that, despite full knowledge of the individual plaintiff's intention, the parties proceeded to closing without amending the loan documents to reflect that purported fact. If true, the court held, they would be guilty of perpetuating a fraud. The court found that their testimony was not credible, based on conflicting evidence, and because no sophisticated businessmen in their position would reaffirm the loan and waive their legal remedies if the $100 million had not been funded after two years. Generally, the court held, even a single document that acknowledges a loan suffices to rebut self-serving testimony. Here, in addition to the reaffirmance in the later loan, the individual plaintiff refinanced loans related to the transaction and at that time restated the earlier loan agreement and promissory note. The banker signed, on behalf of defendants SVCARE and Canyon Sudar, many documents confirming SVCARE's $100 million debt and its promise to "pay" the "oustanding" indebtedness "together with unpaid and accrued interest." It also confirmed the terms in the original note that CAM III's books and records would be conclusive of the outstanding indebtedness, absent "manifest error." The court noted that both sides' accounting experts offered interpretations of the contracts signed by the parties to the transaction, which were not within their area of expertise, but more within a legal expert's field. Still, the court stated that their accounting testimony facilitated the court's findings with regard to the allocation of funds. The court held that the loan agreement and amended note, together with proof in CAM III's and other entities' financial records, established that no payment of either principal or interest had been paid on the $100 million loan (nor on an additional $20 million subsequently loaned), so that SVCARE's outstanding indebtedness to CAM III was far in excess of the purchase option price of $100 million. Thus, the outstanding debts were sufficient to pay the entire purchase price under the terms of the option by assumption or release of the debt evidenced by the later note. The court held that the loan agreements and promissory notes were properly signed and delivered, were explicit in their terms and included proper integration clauses, thus barring modification by parol evidence. Therefore, the burden shifted to the defendants as borrowers to prove that the loan was not funded. The court held that the defendants failed to meet their burden, and that they did not establish that there was "manifest error" as required in both notes. Additionally, the court held that waiver clauses in the later loan agreements properly waived any defenses, set-offs, or counterclaims relating to the earlier loan agreements, and that the funding of the original note was irrelevant, since the debts acknowledged in the later agreements were controlling. In rejecting the defendants' "hyper-technical" arguments as to compliance with certain sections of both agreements, the court held that parties may not avoid their obligations under an unambiguous promissory note by pleading technical defects in loan-related documentation, particularly where the party arguing that there is a deficiency drafted the contract. Schron v. Grunstein, Index No. 650702/2010, New York County, 9/6/12 (Sherwood, J.).

Contract; breach; damages; statute of limitations. Defendant, his LLC, and another individual purchased an option to buy land. Defendants then enlisted plaintiff to find a buyer for the property. According to plaintiff, defendants agreed to pay a $1 million brokerage commission; defendant contended that he offered plaintiff $100,000 as a gift for introducing him to potential buyers. A meeting with a potential buyer followed, and the LLC sold its portion of the option to a joint venture in which the potential buyer had an ownership interest. The purchase and sale agreement expressly stated that plaintiff was the only broker the parties dealt with and that defendant agreed to pay all brokerage commissions to plaintiff. Plaintiff alleged that he sent invoices and commission agreements to defendant over the next six years in an attempt to collect payment. Plaintiff then commenced this action against defendants for breach of contract, and both sides moved for summary judgment. Defendants argued that plaintiff did not procure a sale, but was just a finder, and that the statute of limitations barred the claim because plaintiff did not commence this action within six years of the purchase and sale agreement's execution. Plaintiff argued that defendants' emails to him constituted knowledge of the debt, which took the action out of the statute of limitations. The court, while acknowledging that the purchase and sales agreement clearly identified plaintiff as the broker, found that the emails were conditional promises to pay and, consequently, determined that defendants raised a triable issue of fact as to whether the parties performed the conditions. Plaintiff also argued that defendants should be stopped from asserting the statute of limitations because defendants' affirmative wrongdoing produced a long delay between the accrual of the action and commencement. The court found further issues of fact as to whether defendants' promises to pay were calculated to mislead or induce plaintiff to delay bringing this action. Finally, plaintiff sought summary judgment on the cause of action for an account stated. Plaintiff relied on invoices that he allegedly sent to defendant. Defendant denied receiving the invoices and alleged that they were not produced until after the close of discovery. The court denied both motions and ordered the parties to proceed to trial. George Tunis Real Estate, Inc. v. Benedict, Index No. 23524/2010, 7/6/12 (Emerson, J.).**

Contract; breach; duty; negligence; Martin Act; professional malpractice; fraud; negligent misrepresentation; GBL §349. Certain condominium buildings were renovated, constructed, and converted into a commercial condominium, pursuant to a project by one defendant (the "sponsor defendant"). The condominium's commercial units were offered for sale pursuant to a condominium offering plan. Each purchaser executed a form purchase agreement with the sponsor, as seller, which incorporated the offering plan and all amendments made thereto. The certification by the sponsor defendant and individual defendant (collectively the "sponsor defendants") was part of the offering plan. Architect defendants were retained by the sponsor in connection with the design of the condominium buildings and preparation of the offering plan. The architect defendants issued an architect's report regarding the then-current conditions of the existing structures as well as the planned modifications. In order to file the offering plan, the sponsor was required to include an architect's certification. The architect's principal, as required by statute, executed the Certification. A certificate of occupancy was issued by the New York City Department of Buildings. The offering plan was amended eight times over the years. Plaintiffs, the condominium board, and a group of individual unit owners who purchased condominium units, commenced an action against the sponsor defendants, the architect defendants, and the four sponsor-appointed members of the board. Plaintiffs alleged that the design and construction of the condominium were grossly deficient, with numerous problems and deviations from what was promised to unit owners. Plaintiffs asserted that defects in the design and construction of the condominium were identified in a limited inspection conducted by the sponsor's engineering consultant and a report prepared by an architect retained by plaintiffs. Plaintiffs' amended complaint set forth 12 causes of action, including: (1) breach of contract against the sponsor defendants; (2) breach of duty to build in a skillful and workmanlike manner against the sponsor defendants and others; (3) breach of contract against the architect defendants, the sponsor defendants; (4) negligence against the sponsor defendants, the architect defendants; (5) negligent supervision of construction against the sponsor defendants; (6) professional malpractice against the architect defendants; (7) fraud and/or negligent misrepresentation as against the sponsor defendants and others; (8) fraud and/or negligent misrepresentation against the architect defendants; (9) violation of GBL §349(a) against the sponsor defendants; (10) violation of 15 USC §1703(a)(2) against the sponsor defendants and others; (11) conversion against individual sponsor; and (12) breach of fiduciary duty against the individual sponsor. The architect defendants' moved for an order pursuant to CPLR §§ 3211(a)(1), (5), and (7), dismissing plaintiffs' verified complaint as directed against them and all cross claims as against them. The sponsor defendants moved for an order pursuant to CPLR §§ 3211(a)(1), (2) and (7) and 3016 (b) dismissing plaintiffs' amended complaint as directed against them in its entirety. The architect defendants argued that plaintiffs' amended complaint was preempted by the Martin Act. The Martin Act is a disclosure statute designed to protect the public from fraud in the sale of real estate and other securities, and the Attorney General is charged with enforcing it. A private litigant may not pursue a common law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute. Thus, there is no private right of action where the fraud and misrepresentation claim or other common law claims alleged by the plaintiffs rely entirely upon alleged omissions in filings required by the Martin Act. The court held that the fraud claims against the architect defendants were preempted by the Martin Act because plaintiffs' attempted to premise these claims upon omissions in the amendments to the offering plan. Plaintiffs' claim against the architect defendants for breach of contract was also dismissed because a plaintiff who purchases a condominium unit is merely an incidental third-party beneficiary to the contracts between the sponsor and contractors who participated in the development of the condominium and has no standing to bring a breach of contract claim against such contractors. The court also dismissed plaintiffs' cause of action against the Architect defendants for professional malpractice as there was no privity or a relationship approaching privity between them. The claim was also barred by the three-year statute of limitations. Plaintiffs' cause of action for negligence was also dismissed on the basis that it was merely duplicative of plaintiffs' breach of contract claim. The court denied the sponsor defendants' motion insofar as it sought to dismiss plaintiffs' breach of contract claim. The court held that the purchase agreements between the sponsor and the purchasers established a contract and that the "as is" provision in the purchase agreements was subject to all terms in the offering plan. Further, the court held that the purchase agreement also asserted that nothing excused the sponsor from its obligations to correct defects in the construction in accordance with the conditions set forth. The court also held that there were sufficient allegations to justify piercing the sponsor's limited liability company veil as to the principal, who controlled and dominated the sponsor as a personal enterprise and therefore could not be permitted to use the limited liability form and ownership structure to perpetrate the alleged wrongs. The court dismissed plaintiffs' second cause of action for breach of duty to build in a skillful and workmanlike manner as it was largely duplicative of the breach of contract claim. The court dismissed plaintiffs' third cause of action for breach of contract as asserted against the sponsor defendants as plaintiffs were merely incidental third-party beneficiaries. The court also dismissed plaintiffs' fourth and fifth causes of action for negligence and negligent supervision of construction as against the sponsor defendants as duplicative of the breach of contract claim. The court held that plaintiffs' seventh cause of action for fraud was not preempted by the Martin Act because it was based upon alleged affirmative misrepresentations. It also was not duplicative of the breach of contract claim in that it set out misrepresentations collateral to the contract. The court dismissed plaintiff's ninth cause of action against the sponsor defendants for violation of GBL §349 since it stemmed from a private contractual dispute between parties without ramification for the public at large. The court also held that the court had proper jurisdiction over plaintiffs' tenth cause of action against the Sponsor defendants for violation of 15 USC § 1703 (a)(2). The court dismissed plaintiff's eleventh cause of action for conversion because plaintiffs did not allege a specific identifiable thing that was entrusted to sponsor's principal but rather alleged wrongful use of funds to pay for items and services that should have been paid for by the sponsor. Finally, the court preserved plaintiffs' twelfth cause of action for breach of fiduciary duty since it plead fraud claims and the sponsor defendants did not show that there was no basis for a breach of fiduciary claim against the principal. <u>The Board of Managers of the 231 Norman Avenue Condominium v. 231 Norman Avenue Property Development LLC</u>, Index No. 4197/2011, 7/20/12 (Demarest, J).**

Contract; breach; fraud; unjust enrichment; piercing the corporate veil; corporations. Plaintiffs had purchased luxury motor vehicles from the corporate defendant for resale and export to Europe. Defendants allegedly demanded and received full pre-payment of the aggregate purchase price, which exceeded $500,000, but neither delivered the vehicles nor refunded the purchase price when plaintiffs demanded. Plaintiff's amended complaint alleged that the corporate defendant breached the contract of sale and that the three individual defendants, acting as owners of or fiduciaries to the corporate defendant, defrauded plaintiffs by converting the purchase price to their personal use. In addition to breach of contract and fraud, plaintiffs also alleged a claim for unjust enrichment. The corporate defendant and two of the individual defendants asserted cross-claims against the third individual defendant. Before the start of the trial, plaintiffs and the remaining defendants withdrew all claims against the last defendant. At the conclusion of plaintiffs' case, the corporate and two individual defendants moved to dismiss the complaint and plaintiffs moved to conform the pleadings to the proof, specifically seeking recovery of damages against the individual defendants personally under a theory of piercing the corporate veil. The court dismissed plaintiffs' causes of action for fraud as plaintiffs had not demonstrated prima facie evidence of a fraud independent of their breach of contract claim. The court also dismissed one plaintiff's claims based on its failure to prove payment. The court granted plaintiffs' motion to conform the pleadings to the proof and denied the individual defendants' motion to dismiss. At conclusion of the trial, the court awarded judgments for breach of contract against the corporate defendant and reserved decision on whether either of the individual defendants could be held personally liable under a theory of piercing the corporate veil. The court thereafter held that piercing the corporate veil and holding one defendant personally liable was an appropriate equitable remedy since substantial evidence demonstrated that this defendant did not treat the corporation as a separate entity. The court found that defendant ignored corporate formalities by using his personal address on corporate bank statements, failing to create loan documents with respect to the money he deposited into the corporate account, and treating those accounts as his personal funds. Further, upon learning that the corporation would be a named defendant in a number of lawsuits, this defendant transferred most of the corporation's remaining funds to his personal account, leaving the corporation undercapitalized and virtually judgment proof. However, the court found that there was insufficient evidence to pierce the corporate veil as to the other individual defendant, who owned a mere 5% of the corporation and neither commingled corporate assets with his own nor diverted corporate assets for his personal use. AZTE Inc. v. The Auto Collection, Inc., Index No. 19999/2008, 9/6/12 (Demarest, J).

Contract; breach; representations and warranties. Trusts; CPLR Article 77. Proposed settlement. Procedure; leave to intervene; CPLR 1013. Petitioner, trustee of certain trusts, commenced this CPLR Article 77 special proceeding to settle potential claims against respondents, who sold loans to the trusts. Respondents removed the proceeding to the Southern District of New York, and the Delaware Department of Justice and the New York Attorney General (collectively, "the AGs") moved to intervene in order to protect the interests of absent investors. The District Court granted the AGs' motion on the basis of parens patriae standing and denied the petitioner's motion to remand the matter back to New York Supreme Court. On appeal, the Second Circuit instructed the District Court to vacate its decision denying remand, but did not specifically address the order granting the motion to intervene. The District Court remanded the action, and the AGs moved to intervene in this proceeding. In opposition, petitioner contended that the AGs lacked parens patriae standing, that seeking pecuniary relief on behalf of private investors did not invoke quasi-sovereign interests, and that allowing intervention would greatly expand the AGs' power to intervene in private litigation. Petitioner also argued that the AGs could not seek any injunctive relief that would address quasi-sovereign interests in an Article 77 proceeding and that the District Court's decision to grant the motion to intervene was null and void as a result of the Second Circuit's directive. Here, the court granted the AGs' motion to intervene, finding that the Second Circuit did not specifically vacate the District Court's order granting intervention, that the AGs had standing to intervene pursuant to parens patriae authority because they sufficiently articulated legitimate quasi-sovereign interests in protecting the integrity of the marketplace, and that there was no indication that intervention would be a source of undue delay or burden. Matter of Bank of New York Mellon, Index No. 651786/2011, 6/6/12 (Kapnick, J.).

Contract, breach; Statute of Frauds. Plaintiff, his LLC, and corporate defendant, which individual defendants managed, entered into an agreement that detailed their mutual understanding with respect to their rights and obligations as the property's owners and tenants in common. After the parties amended the agreement twice, plaintiff and the LLC executed a promissory note in favor of corporate defendant. Plaintiff and the LLC defaulted on the promissory note, and corporate defendant moved for summary judgment in lieu of complaint. The court granted the motion on default, entered a default judgment, and denied plaintiff and LLC's subsequent motion to vacate. Plaintiff then commenced this action against defendants asserting claims sounding in breach of contract and unjust enrichment to recover damages for services purportedly rendered for the property pursuant to an oral agreement. Defendants moved to dismiss the complaint, or alternatively, to consolidate this action with the prior action for summary judgment in lieu of complaint. The court disagreed with the defendants' contention that plaintiff's claims applied to either the agreement or the promissory note because plaintiff was not a party to either but rather signed them in his representative capacity as the LLC's managing member. Defendants also contended that the statute of frauds barred this matter because the alleged oral agreement could not be performed within one year from its making since it neither contained a duration term nor allowed the parties to discontinue their obligations as a matter of right within one year. The court held that the oral agreement was thus void and dismissed the breach of contract claim. Additionally, the court dismissed the unjust enrichment claim because plaintiff could not escape the statute of frauds by attaching an unjust enrichment label to an underlying contract claim. Wagner v. 135 Main Street, LLC, Index No. 34326/2011, 9/24/12 (Emerson, J.).**

Copyright Infringement; pre-1972 recordings. Unfair competition. Federal Copyright Laws; common law copyright; statutory copyright. Digital Millennium Copyright Act; safe harbor. Communications Decency Act. Plaintiff owned the rights to certain sound recordings created prior to February 15, 1972, and commenced this lawsuit against defendant for common law copyright infringement and unfair competition. Defendant asserted affirmative defenses contending that the "safe harbor" provision in Section 512 of the Digital Millennium Copyright Act (DMCA) barred this action and that Section 230 of the Communications Decency Act (CDA) preempted it. Plaintiff moved to dismiss the safe harbor defense, arguing that the defense was unavailable because "copyright", as used in the DMCA, refers exclusively to copyrights created pursuant to and protected by the Copyright Act, and the copyrighted material at issue was created under New York state common law. Moreover, Section 301 of the Copyright Act only protects copyrights of pre-1972 recordings. The court held that DMCA's safe harbor provision applied to pre-1972 recordings, finding that there was no textual basis in the statute to indicate that Congress intended to limit its applicability to post-1972 recordings. Plaintiff argued that defendant's preemption defense had to be dismissed because the CDA did not bar claims that pertained to intellectual property. The court granted this branch of plaintiff's motion, finding that the CDA's language was broad in scope and could include the claims asserted in this matter. Plaintiff also moved to dismiss counterclaims that alleged violations of the General Business Law, and for tortuous interference with contract and prospective economic advantage. With respect to the statutory violation, defendant alleged that plaintiff owned and controlled the largest catalogue of recorded music in the world, thereby affording it substantial leverage and power in dissemination of recorded music. As to the second and third counterclaims, defendant alleged that plaintiff coerced two entities to breach their contracts and terminate their relationships with defendant and that plaintiff interfered with the defendant's relationship with these entities. The court granted plaintiff's motion to dismiss the first counterclaim because defendant did no more than allege an injury to itself rather than an adverse effect on competition in the relevant market. Conversely, the court denied the motion to dismiss the second and third counterclaims because it is unclear whether the plaintiff acted to protect its interest in the other entities or, as the counterclaim alleged, used its relationship to coerce them to breach their contracts with defendant merely to damage defendant's business. UMG Recordings, Inc v. Escape Media Group, Index No. 100152/2012, 7/10/12 (Kapnick, J.).

CPLR 3126; strike affirmative defenses and counterclaims; sanctions; noncompliance with discovery demands. Plaintiff, a lender, moved for summary judgment in lieu of a complaint to enforce a promissory note against the defendant borrower. Plaintiff claimed that the note was consideration for transferring his 26.37 % equity interest in a coal company to defendant. Defendant claimed that he mistakenly signed his name under the term "borrower" on the note, when he thought he was signing as a witness, because he was intoxicated. In his first affirmative defense and counterclaim, defendant requested that the court reform the note to reflect that he was the witness and that the amount in question was $270 million. In his ninth affirmative defense, defendant asserted that the note was void for lack of consideration. Defendant alleged that, instead, plaintiff owed him $270 million for a loan made between 1996 and 1998 by a company controlled and funded by defendant ("Nash/Vitapoint"), to two entities in which plaintiff had an interest. The court denied plaintiff's motion for summary judgment and discovery ensued. Plaintiff then moved to strike defendant's affirmative defenses and counterclaims by defendant in light of his failure to cooperate during discovery and his violation of the court's prior orders to turn over certain categories of documents. In its decision, the court referenced its July 2011 decision stating that defendant had resisted discovery into accounts that would have conclusively proved whether or not the Nash/Vitapoint loan was repaid. Plaintiff continually demanded production of these documents, and several months later, the court granted plaintiff's motion to compel and ordered that the documents be produced within thirty days, or the court would entertain a motion to strike the first affirmative defense and counterclaim. With respect to the issue of whether there was consideration for the promissory note, the court ordered defendant to turn over documents reflecting his interest in the coal company, or it would entertain a motion to preclude him from arguing the consideration issue. Instead of producing the documents, defendant submitted an affidavit stating that he had produced all Nash and coal company documents within his possession, custody, or control. He stated in the affidavit, "I have never claimed that I personally owned shares in [the coal company] at any time . . . Accordingly, I cannot produce the requested documents simply because they do not exist." The instant motion to strike and for sanctions was based on defendant's failure to produce the documents as ordered. Defendant argued that, under the court's order, he was entitled to submit an affidavit swearing that he did not have possession or control of the subject documents. The parties raised the issue of whether defendant had violated the court's order to compel, but the court held that in order to strike pleadings or award sanctions under CPLR 3126 it was not necessary to establish that defendant violated the court's previous order. Rather, the remedy could be based on his original noncompliance with the discovery demands. The court then decided that defendant willfully failed to disclose information which the court found ought to have been disclosed, under CPLR 3126. In deciding this issue, the court examined defendant's allegations over the course of the litigation in various motion submissions and other pleadings, noting that he first claimed that none of the $270 million had been repaid to Nash/Vitapoint, but when plaintiff produced evidence that the loan had been repaid, he abruptly changed his position, stating that only $78.25 million was outstanding. Thus, the Nash documents were important to resolving the issue of fact. The court also decided that defendant's assertion that he was unable to produce Nash/Viatpoint records was not credible. Among other things, the court noted his past conflicting statements, in the same submission to the court, that he controlled and personally funded Nash, and that to the contrary, he "has never owned Nash directly, has never been a director and has never held a power of attorney for the company." Additionally, Nash had produced certain Nash documents related to a different issue. Thus, the court found that defendant's excuses lacked credibility and concluded that his failure to produce the documents repeatedly demanded and ordered over three years was willful. As such, it struck his first affirmative defense and counterclaim seeking reformation of the loan. With respect to documents relating to the issue of defendant's interest in the coal company, the court held that striking the ninth affirmative defense was too drastic a remedy at this point. The court cited defendant's argument that he interpreted the demands and the order to compel to only require documents showing his personal ownership, which he disputed, as opposed to his investment in the company. The court declared this interpretation incorrect, but rather than striking the ninth affirmative defense, it ordered defendant to appear for a deposition to answer questions regarding the location of any documents related to the coal company and why they are not within his possession or control. Subsequently, the court would review the transcript and determine whether it would be appropriate to strike the ninth affirmative defense. Gliklad v. Cherney, Index No. 602335/09, New York County, 7/19/2012 (Schweitzer, J.).

Duty to conduct inquiry; depository accounts; negligence; breach of fiduciary duty; Bank Secrecy Act; Patriot Act; aiding and abetting a breach of fiduciary duty. Plaintiff, which obtained a judgment exceeding $44,000,000 against the judgment debtor based upon his breach of fiduciary duty and diversion of certain funds, brought an action against defendants, which maintained accounts in which the judgment debtor had deposited the funds. Plaintiff alleged that defendants negligently failed to perform an appropriate inquiry into the judgment debtor and the accounts that he had opened so as to prevent the diversion of funds from those accounts in violation of plaintiff's rights. Defendants moved, and plaintiff cross-moved, for summary judgment. The court stated as an initial matter that it is well-settled under New York law that generally neither banks nor brokerages owe a duty to third parties with respect to any fraud or wrongdoing that may have been perpetrated by a client of the bank or the brokerage. The court held that the mere fact that defendants were made aware of plaintiff's allegations of wrongdoing against the judgment debtor did not establish the validity of plaintiff's claims, and, as such, did not create any duty running from defendants to plaintiff to act on its behalf. Since an element of a negligence cause of action is a duty owed by the defendant to the plaintiff, the absence of any such duty warranted the dismissal of plaintiff's negligence causes of action. Similarly, the court dismissed plaintiff's breach of fiduciary duty causes of action on the ground that defendants owed no fiduciary duty to plaintiffs. Although the court acknowledged that the judgment debtor owed a fiduciary duty to plaintiff, and that the recipient of fraudulently conveyed property may be deemed to be a constructive trustee of such property for the benefit of the defrauded party, it stressed that the funds at issue were not transferred to defendants. Rather, defendants were merely the custodians of the funds, which remained the property of the judgment debtor and his various businesses. The court emphasized that since these accounts were all depository, not trust accounts, defendants were not chargeable with any extraordinary duty to plaintiff. The court also held that neither the Bank Secrecy Act nor the Patriot Act created a private right of action for the failure to investigate allegedly "suspicious" activity in a client's account. Finally, with respect to plaintiff's causes of action for aiding and abetting a breach of fiduciary duty, the court indicated that the elements of such a cause of action are (1) a breach by a fiduciary of obligations to another; (2) knowing participation by defendant in the breach; and (3) damages to plaintiff. The court stated that although plaintiff argued that defendants had constructive knowledge of the judgment debtor's breach, actual knowledge is required for an aiding and abetting cause of action. The court further held that plaintiff did not establish that defendants actively and knowingly participated in the judgment debtor's fraud, thereby failing to satisfy the second element of an aiding and abetting cause of action (i.e., substantial assistance). The court noted that providing routine financial services to a client does not constitute substantial assistance to the client's breach of fiduciary duty to another, nor can the collection of fees for services rendered create a reasonable inference of fraudulent intent. Defendants' summary judgment motion was granted in its entirety and plaintiff's cross-motion was denied in its entirety. Parklex Associates v. Royal Capital Markets Corp., Index No. 25705/09, 7/30/12 (Demarest, J.).**

Electronically stored information; e-discovery; document production; key word search; protective order; CPLR 3103; motion to compel; CPLR 3124. Plaintiff claims that defendants interfered with the possession, operation, and use of a computer application and related software programs. Plaintiff further claims that defendants failed to obtain licenses for software provided to plaintiff. Defendants denied the allegations and asserted counterclaims. The parties served written discovery requests on each other, including document requests. Plaintiff objected to every interrogatory and failed to provide responses. Defendants failed to respond to any discovery requests. Plaintiff and defendants each filed a motion to compel pursuant to CPLR 3124. In addition, plaintiff filed a motion for a protective order pursuant to CPLR 3103 relating to defendants' document requests. Plaintiff argued that defendants' document requests would force plaintiff to review approximately 36 gigabytes of uncompressed electronically stored information, including approximately 280,000 e-mails. Plaintiff contended that the review would take approximately 2,800 hours and would cost about $500,000. Plaintiff's motion sought an order permitting a keyword search of electronically stored information in plaintiff's database to cull out non-responsive documents. Defendants objected to the key word search, arguing that many documents would be excluded. The court granted each party's motion to compel and issued conditional thirty-day orders of preclusion for failure to comply. The court granted plaintiff's motion for a protective order and permitted plaintiff to review electronically stored information via key word search. The court reasoned that defendants' document requests would be abusive and unduly burdensome if plaintiff was forced to search and review its electronically stored information without culling documents via key word search. Lechase Construction Services, LLC v. Info. Advantage, Inc., Index No. 7765/2011, 10/4/12 (Rosenbaum, J.).**

Fraud; breach of fiduciary duty; agency; unjust enrichment; punitive damages; pre-answer motion to dismiss; CPLR 3211(a)(7). Plaintiff, a ninety-three year old incapacitated woman, brought an action alleging that defendants induced her son to sell on plaintiff's behalf certain works of art for below-market value, with defendants retaining a 50% commission for the sale. Defendants filed a pre-answer motion to dismiss several causes of action for failure to state a valid cause of action. The court rejected defendants' argument that the fraud cause of action should be dismissed because it arose from a breach of contract. The court stressed that the fraud cause of action was premised not upon the contractual arrangement between the parties, but rather upon allegations that defendants induced plaintiff's son to agree to a below-market sale based upon misrepresentations concerning the present value of the artwork intended to justify a below-market sales price. The court rejected defendants' argument that the element of reasonable reliance was lacking, finding that a sophisticated plaintiff's reliance on a defendant's misrepresentations was not unreasonable as a matter of law where the facts allegedly misrepresented were within the exclusive knowledge of the defendant, or where one party's superior knowledge of essential facts rendered the transaction inherently unfair. The court further noted that the question of what constitutes reasonable reliance is fact-intensive and contextual. The court also refused to dismiss plaintiff's breach of fiduciary duty cause of action, holding that defendants, as agents acting on behalf of their consignor, had a fiduciary duty to act in the utmost good faith and in the interest of plaintiff, their principal. The court found that the complaint's allegation that defendants invited a prospective purchaser to make a "cruel and offensive offer" in order to take advantage of plaintiff and her son described conduct that could constitute a breach of fiduciary duty. The court also declined to dismiss the unjust enrichment cause of action. Although the court recognized that the existence of a valid and enforceable contract governing a matter precludes recovery for unjust enrichment, it found a bona fide dispute as to the existence of an enforceable contract. In addition, the court held that allegations regarding defendants' commission through dishonest brokerage of the art, standing alone, sufficiently stated a cause of action for unjust enrichment. Finally, the court refused to dismiss the demand for punitive damages, holding that the complaint adequately pleaded recklessness and conscious disregard of rights in a private transaction. Cowles v. Gagosian, Index No. 650152/12, 8/22/12 (Ramos, J.).

Fraud; misrepresentation of present intent. Fraudulent misrepresentations by global business aimed at New York plaintiffs. Forum non conveniens. Stock market; short selling. Plaintiffs, global hedge funds, sued car-maker Porsche for fraud and other wrongs, alleging that in a scheme to take over Volkswagen (VW) Porsche fraudulently induced plaintiffs to take short-selling positions that caused them to lose over a billion dollars. Purportedly, Porsche needed plaintiffs to short-sell VW shares to increase their supply in the market. Plaintiffs' principal place of business was New York, Porsche's was Stuttgart, and VW's was Lower Saxony. In 1960, to shield VW from a hostile takeover, the German government enacted the VW Act, under which an acquirer had to own 80% of VW's stock, not the 75% German law typically required, to effect a takeover. In 2004 the European Commission determined that the Act hindered the free movement of capital and violated European Union law. By 2005, Porsche had secretly acquired over 10% interest in VW, and by late 2008 had built its position to over 42%. Throughout most of 2008, Porsche issued press releases indicating that it sought only a simple majority in VW, not a controlling stake. In one public statement, Porsche noted that Lower Saxony's 20% ownership of VW made it very unlikely that Porsche could ever accumulate enough VW shares to dominate. Plaintiffs, purportedly relying on these representations and believing that VW's share price would fall, decided to short sell VW stock. VW's share price rose. Each plaintiff separately phoned Porsche's head of investor relations, and, in more than an alleged half-dozen phone calls, the head reaffirmed Porsche's public stance. Porsche continued public statements denying it sought a 75% stake in VW until, in late 2008, it issued a press release announcing that it had accumulated 74.1% of VW's shares. The press release, mailed to plaintiffs, stated that Porsche's acquisitions were to pave the way to a domination agreement. VW shares shot so high that VW briefly became the world's most valuable company by stock price. Plaintiffs lost over a billion dollars covering their short positions, while Porsche reaped spectacular profits. Here, Porsche moved to dismiss based on forum non conveniens and failure to state a claim. The court summarized the suit's procedural history, noting that 35 global hedge funds including plaintiffs had sued Porsche in the Southern District. That court had dismissed the case on the basis that the securities-based swap agreements involved were a foreign securities exchange not within the purview of the Securities and Exchange Act. Plaintiffs were appealing. In Germany, authorities were investigating Porsche's conduct and private investors had commenced actions. The court then considered Porsche's forum non conveniens argument. At issue were numerous purported misrepresentations made directly to plaintiffs' analysts in New York, the court found. It noted that plaintiffs' analysts had identified themselves to Porsche's head of investor relations as "hedge funds based in New York," plaintiffs allegedly evaluated Porsche's public statements and oral communications, sent directly to New York, in New York, and plaintiffs conducted due diligence and made their investment decisions in New York. Plaintiffs' documents and witnesses were in New York, and Porsche regularly transacted business here and employed over 200 people in the US. Although Porsche's witnesses were in Germany, it could afford to bring them, and documents, to New York. New York County's Commercial Division was able to apply German law. Last, the court disagreed with Porsche that the issues here were manipulation of the German stock market and trade of German securities. The issue was whether New York courts could hold responsible a foreign entity conducting global business for fraudulent misrepresentations purportedly aimed at New York plaintiffs. For these reasons, the court found that Porsche failed its heavy burden of demonstrating forum non conveniens. It turned to the fraud claim. Plaintiffs alleged, among other things, that Porsche's misrepresentations affected the price at which they took short positions, and that Porsche led them to believe that natural market forces were lifting VW's share price when in fact Porsche's fraud was skewing the market. Porsche argued the claim should be dismissed because it was based on statements that were not predictive. The court noted that Porsche came to control 74.1% of the carmaker's shares at the same time that it publically stated it wanted only a simple majority. Since a statement of one's present intention is a statement of a material existing fact sufficient to support a fraud claim, the court found that plaintiffs adequately alleged that Porsche knowingly made false statements of its present intent. The court next weighed whether plaintiffs' reliance on Porsche's statements was unreasonable. Plaintiffs alleged that no public or other information available to them existed to allow them to establish the truth. Porsche's public statements and representations made directly to plaintiffs indicated that Porsche did not seek to raise its stake to 75%, and Porsche concealed that it controlled much more than a simple majority of shares. Asked if it intended to obtain a controlling stake, Porsche publically and repeatedly dismissed "speculation." Plaintiffs also alleged that they performed extensive due diligence and submitted the affidavit of a due diligence expert stating that a reasonable sophisticated investor would infer from Porsche's public and private statements that it sought only a slight, simple majority of shares. The court particularly noted plaintiffs' attempts to verify Porsche's public statement via direct inquiries to Porsche. Finally, plaintiffs sufficiently alleged that Porsche's misrepresentations were material to their decision to invest. Whether plaintiffs had a right to rely on Porsche's public and private statements was ultimately an issue of fact to be explored in discovery, but at the pleading stage the element of reasonable reliance had to survive, the court decided. In regard to an unjust enrichment claim, the court disagreed with Porsche that the alleged connection between its enrichment and plaintiff's loss was too attenuated for the claim to survive, so it did. It also declined to stay the action on other grounds, finding that the claims and judgments sought in the federal action pending appeal to the Second Circuit and the current action were distinct. Viking Global Equities, LP v. Porsche Automobil Holding SE, Index No.

650435/2011, 8/6/12 (Ramos, J.).

Insurance indemnification; punitive damages; New York law and public policy; award rendered in foreign state; declaratory judgment while appeal pending in foreign state. Plaintiff insurers sought a declaration that a Florida jury award and judgment of $55,000,000 in punitive damages against defendant accounting firm was not covered by their policies. Defendant argued that there was an issue of fact whether the determination in the underlying action conformed with Florida law and that until its appeal pending in Florida was resolved, the court could not rule on plaintiff's summary judgment motion. The court began by noting that New York public policy precludes insurance indemnification for punitive damages on the basis that indemnification would defeat such damages' aim, which is solely to punish the offender and to deter similar conduct by others. The court also noted that the New York Court of Appeals said, in *Home Insurance Co*., that New York's public policy should not be applied differently simply because a punitive damages award was rendered in another state. The Court of Appeals formulated a two-part test to decide whether an out-of-state punitive damages judgment is indemnifiable in New York: (1) a court must weigh the degree of wrongfulness for which damages were awarded to determine whether the award is punitive; (2) and it must examine the foreign state's law and policy relating to the damages to ascertain whether reimbursement would offend New York's policy. The court explained that in *Home Insurance Co*., in the underlying action over claims that a drug had harmed a child, the plaintiff won punitive damages of $13,000,000 that were affirmed by an Illinois intermediate appellate court, and that defendant's insurer sought a declaratory judgment in New York that it was not required to indemnify. On appeal from a federal court decision that New York law was not applicable, the Second Circuit Court of Appeals certified the question to the New York Court of Appeals: Would New York require the insurer to reimburse the insured for punitive damages on the out-of-state judgment in this case? The Court of Appeals held that New York and Illinois law both prohibited indemnification of punitive damages and that no barrier existed to applying New York law. Next, the court turned its attention to *Zurich Insurance Co.*, where the Court of Appeals considered the application of New York's public policy prohibition to two separate punitive damage awards, one made in Georgia, one in Texas. Georgia state law permitted punitive damages for both punitive and compensatory purposes, and, because the Georgia judge had so instructed the jury, New York public policy did not preclude the insurer covering the Georgia judgment. By contrast, in the Texas action, although state law authorizing punitive damages let a jury consider both exemplary and compensatory damages, the court had instructed the jury to consider only exemplary damages. Hence New York's public policy did preclude insurance coverage on the Texas judgment, the Court of Appeals found. It specifically stated that the standard for corporate liability under Texas law was satisfied, and under *Home Insurance Co.* New York will not undertake collateral review of a sister State's application of its own law. Applying these principles to the current action, the court found that it must assume that the verdict in the underlying action conformed with prevailing Florida law. The court found Florida's statutory and decisional law to be consistent with New York's; the purpose of punitive damages in both states was to punish conduct of high moral culpability and to warn others in the future. The Florida trial judge's instructions to the jury had tracked the state's statutory language, and, the court here noted, the instructions included statutory definitions of intentional misconduct and gross negligence. Defendant, pointing to the appeal pending before the Florida state court, cited an unpublished opinion of the Superior Court of Delaware in which the court cited *Home Insurance Co.* for the proposition that it should assume that the judgments in the underlying actions conformed with the law of their respective states, but where, nevertheless, the court declined to grant the insurers summary judgment because appeals were pending in both actions. The court here took a different view, pointing out that in *Home Insurance Co.* the court specifically noted that it rendered its decision while an appeal of an intermediate appellate court's affirmation of the award was before the Illinois Supreme Court, the latter court, moreover, recently having emphasized that the law does not favor punitive damages. Based on the foregoing, the court found that plaintiffs were not obligated to provide coverage for the punitive damages, and it granted plaintiffs' motion. Certain Underwriters at Lloyd's v. BDO Seidman, LLP, Index No. 651032/2011, 7/27/12 (Sherwood, J.).

Martin Act; private actions under common law. Contract; third party beneficiaries. Breach of fiduciary duty; aiding and abetting; statutes of limitation. Fraud in the inducement; aiding and abetting; intent not to perform. General Business Law § 349. Plaintiff brought causes of action against a cooperative sponsor, its management company, engineers hired by the sponsor, members of the cooperative's original board of directors, and the entity that sold the property to the sponsor, asserting claims for breach of contract, breach of fiduciary duty and fraud. Plaintiff alleged that the sponsor, with the help of culpable professionals and a "puppet" board of directors and property manager, hid a termite and carpenter ant infestation. Various defendants sought to dismiss the common law claims related to the sale of cooperative apartment interests on the ground that the Martin Act (General Business Law Article 25-A) provided the sole basis for relief. The court disagreed, holding that plaintiff could raise common law claims in connection with the sale of securities so long as the claims were not predicated solely on omissions from documents filed pursuant to the Martin Act. Because plaintiff raised fact issues regarding defendant's alleged misrepresentations and omissions regarding the condition and adequacy of the premises and operating budget, the court ruled that plaintiff was entitled to a trial on its common law claims. With respect to the third party beneficiary claims, the court found that a purchaser of a cooperative unit is a third party beneficiary of contracts between the sponsor and professionals when the selling documentation and offering plan manifest the sponsor's intent to make unit owners the intended beneficiaries of such contracts. However, unit owners were not intended beneficiaries of the contract by which the sponsor acquired the premises when the seller sold the property "as is." Thus, the court granted summary judgment to the seller of the premises on the breach of contract claim. With respect to breach of fiduciary duty and aiding and abetting breach of fiduciary duty, the court found that evidence regarding failure to hold board meetings, failure to provide a sufficient cooperative budget, and alleged false statements in the offering plan and subscription agreement were sufficient to require the sponsor, the members of the initial board of directors, the property manager and its designees to proceed to trial on those claims. The court also allowed the aiding and abetting breach of fiduciary duty claim against the premises seller to proceed because it was alleged to be the alter ego of the sponsor, made payments to one of the engineer defendants, and signed amendments to the offering plan containing misrepresentations. The court observed that the statute of limitations for breach of fiduciary duty and aiding and abetting breach of fiduciary duty turned on whether the relief sought was equitable (six-year statute) or legal (three-year statute unless fraud statute applies) and on whether any fraud alleged is central or incidental to the claim. Because of the numerous fraud allegations, the court applied the six year statute of limitations. The court also observed that complaints raising both fraud and breach of contract claims were subject to additional scrutiny because unfulfilled promises were not fraud unless they were misstatements of material fact or promises made with a present but undisclosed intention not to perform. In this case, the combination of the false statements in the offering plan and subscription agreements combined with allegations that the purchasers were rushed into closings raised a sufficient issue of fact as to defendants' intent to deceive plaintiff and its assignees. The court rejected the plaintiff's claim for violation of GBL § 349 because the acts alleged constituted a private dispute without ramifications to the public at large. Finally, the court ruled that the phrase "unsold shares" in the offering plan and other documents did not apply to shares sold to an affiliate of the sponsor and thus granted summary judgment to plaintiff on its claim that the sponsor's affiliate was not entitled to designate a member of plaintiff's board. <u>Sherbrooke Smithtown Owners Corp. v. Merson</u>, Index No. 34476/2008, 09/24/12 (Pines, J.).**

Preliminary injunctions; irreparable harm; purely economic loss; restraining orders; CPLR 6301; General Business Law § 342. Plaintiff moved for a preliminary injunction and temporary restraining order pursuant to CPLR 6301, et seq., and General Business Law § 342, ordering defendants to cease and desist from refusing to sell certain products to plaintiff on the same terms and conditions on which their products were sold to other authorized dealers. One defendant had entered into an agreement that permitted plaintiff to sell and service defendant's business equipment. Defendant ultimately terminated that agreement based upon plaintiff's refusal to fire an individual who had previously defrauded defendant, as well as plaintiff's opening of a new dealership without defendant's knowledge or approval. Plaintiff brought this application for an injunction and a temporary restraining order to restore its rights under the sales and service agreement. The court stated that in order to obtain a preliminary injunction, plaintiff must establish, by clear and convincing evidence (1) a likelihood of success on the merits; (2) irreparable injury absent a preliminary injunction; and (3) a balancing of the equities in its favor. The court further observed that the decision to grant or deny the drastic remedy of a preliminary injunction lay within the sound discretion of the court. Applying this standard, the court found that plaintiff did not satisfy its burden of proving a clear right to preliminary injunctive relief since it only made conclusory, speculative, and factually unsupported allegations regarding harm in the absence of a preliminary injunction. Although plaintiff argued that its business would perish in the absence of an injunction, the court stressed that a retail dealer's loss of affiliation with one brand of equipment did not necessarily mean the end of the business. For example, the court suggested that plaintiff could stay in business by switching to one of defendant's competing brands. The court further held that defendant had a legitimate interest in enforcing the business agreement, tipping the balance of the equities in favor of defendants. The court noted that even if plaintiff were to go out of business in the absence of a preliminary injunction, such harm would be compensable by monetary damages, and economic loss that is compensable by monetary damages does not constitute irreparable harm. New York Office Systems, Inc. v. Canon USA, Inc., Index No. 10659/2012, 8/6/12 (Grays, J.).**

Racketeer Influenced and Corrupt Organizations Act; legislative intent. Breach of contract. Breach of fiduciary duty. Faithless Servant Doctrine. Diversion of corporate opportunity. Tortious interference. Misappropriation of trade secrets. Commercial defamation. Unjust enrichment. Conversion. Fraud. Prima facie tort. Defendants moved to dismiss claims asserted under the Racketeer Influenced and Corrupt Organizations Act (RICO) and plaintiffs' common law causes of action sounding in breach of contract, breach of fiduciary duty, the faithless servant doctrine, diversion of corporate opportunity, misappropriation of trade secrets, commercial defamation, unjust enrichment, conversion, fraud, prima facie tort, and tortious interference with current and prospective business relations. Plaintiffs alleged that the defendants engaged in a pattern of criminal activity by misappropriating plaintiffs' business and customers in violation of RICO. Defendants moved to dismiss the complaint, arguing that plaintiffs' RICO claims were not pled with adequate specificity. Upon review of legislative intent, the court concluded that the RICO claims were deficient. The court's analysis distinguished between RICO's "closed-ended" and "open-ended" pattern requirement. The court explained that a "closed-ended" pattern "consist[s] of a series of related predicate acts extending over a substantial period" while an "open-ended" pattern pertains to "activity that poses a threat of continuing criminal conduct beyond the period during which the predicate acts were performed." The allegations set forth in the complaint failed to satisfy RICO's continuity requirement both under the "closed-ended" and "open-ended" concepts. The complaint alleged small-scale criminal activities performed by a few participants, affecting only one victim, and spanning less than two years. The court further noted that mere allegations of lost sales and lost profits cannot demonstrate that defendants' alleged criminal activities were the proximate cause of plaintiffs' reduced pecuniary gains since lost sales could have resulted from a multitude of factors unrelated to defendants' actions. With respect to plaintiffs' common law claims, the court held that plaintiffs adequately pled causes of action for breach of contract based on allegations that some defendants breached provisions set forth in employee manuals and non-compete agreements. The court dismissed plaintiffs' causes of actions based on breach of fiduciary duty, the faithless servant doctrine, and diversion of corporate opportunity, deeming them duplicative of the breach of contract claims. The court found that the complaint set forth facts supporting a cause of action for tortious interference with existing and future business relations. The court also found that a misappropriation of trade secrets claim was sufficiently pled based on allegations that some defendants stole confidential marketing strategies in order to compete with plaintiffs' business. The court dismissed the commercial defamation claim as defective and duplicative of the claim for tortious interference with existing and future business relations, but rejected defendants' argument that the cause of action for unjust enrichment was duplicative of the breach of contract claims. It found plaintiffs' conversion action to be sufficiently pled, but dismissed the fraud and prima facie tort causes of action due to factual deficiencies in the complaint. Worldcare International Inc. v. Kay, Index No. 17452/2011, 6/27/12 (Pines, E.).**

Real estate development; notice of claim; statutes of limitations; promissory estoppel; unlawful taking; substantive due process; procedural due process; municipality; wetlands; environmental protection. Plaintiff developer bought two parcels of land within the defendant Town of Amherst containing some percentage of protected wetlands for use as an office park. Based on a federal grant funding a town sewer project in 1983, the wetlands were subject to a fifty-year moratorium on development, including sewer hook-ups. The moratorium was not recorded and the developer had no notice of it until years after the purchase. The developer received a permit from the Army Corps of Engineers to fill in a portion of the wetlands. After much negotiation and litigation, the town approved the developer's site plan, rezoned the area for office businesses, and issued a waiver for the developer to tap into the sewer system. However, a newly elected town supervisor then drafted a withdrawal resolution and the town board rescinded its tap-in waiver and terminated the development without the authority to do so. The developer sued for unlawful taking of property without just compensation, breach of special duty, breach of duty, promissory estoppel, prima facie tort, § 1983 violation of procedural due process, § 1983 violation of substantive due process, equal protection violations, and a violation of Real Property Law ("RPL") 290-291 by failing to record the moratorium. In a multifaceted decision, the court held that ongoing litigation and written correspondence was sufficient to give the town notice of plaintiff's tort claims but the court dismissed causes of action for breach of special duty, breach of duty and prima facie tort that accrued after the correspondence. Generally, no notice of claim is necessary against town officers in their individual capacities where the town is not required to indemnify the officers. The court tolled the statute of limitations for all causes of action that would have been timely as of the filing of a prior federal suit relating to the same transaction or occurrence, even as against individual defendants who were not party to that suit. However, the court dismissed all named individual defendants who did not hold office at the time of termination of the development. The court also dismissed plaintiff's causes of action for promissory estoppel and a violation of RPL 290-291. The court reasoned that promissory estoppel is generally unavailable against municipalities. Additionally, the developer admitted that it had notice of the moratorium after the purchase, so its cause of action based on a violation of RPL 290-291 was time-barred. The court denied summary judgment on plaintiff's cause of action for unlawful taking. Since the taking by regulation did not deprive the developer of 100% of the economically beneficial use of the property, plaintiff would have to prove the amount of damages recoverable using the balancing test in Penn Central Transportation v. City of New York (438 US 104 [1978]). The court also denied summary judgment on plaintiff's claim of violation of substantive due process rights. Under a two-part test, the court was required to determine whether the town deprived a landowner of a vested property interest and whether the challenged governmental action was wholly without legal justification. To prove that the landowner's property interest had vested before the taking, evidence of a substantial change to the property or outlay of expense must be shown. Plaintiff argued that ground had not been broken in the years following the original grant of the tap-in waiver because plaintiff was in the process of applying for additional permits. The court held that there were issues of fact as to whether plaintiff was barred from making any substantial changes to its property, prohibiting summary judgment. The court also denied summary judgment for plaintiff's claim of a violation of procedural due process. Examining the factors of: (1) the private interest affected, (2) the risk of erroneous deprivation through the procedures used and the probable value of other procedural safeguards, and (3) the governmental interest, the court found the record lacking. As to the cause of action for violation of equal protection, there was evidence that other community stakeholders had been granted tap-in waivers to the same federally-funded sewer that plaintiff developer was barred from accessing. The record was insufficient, however, for a ruling upon summary judgment. The individual defendants claimed qualified immunity for alleged § 1983 violations. Qualified immunity generally shields governmental officials from liability for their official actions. The court instructed that defendants must prove this affirmative defense at trial, but dismissed the affirmative defense as to the town supervisor and town engineer because they admittedly prepared the resolution and withdrew the tap-in waiver without reviewing documentary evidence. With respect to these individuals, the court held it was not objectively reasonable to assume that no constitutional rights of plaintiff would be violated by their actions. Thus, the motion for summary judgment was granted in part. Acquest Wehrle, LLC v. Town of Amherst, Index No. 10455/2009, 9/6/12 (Michalek, J.).**

Securityholder agreement; contract construction; election of independent board. Preliminary injunction. The plaintiffs, minority shareholders of defendant ImageSat, moved for a preliminary injunction seeking to enjoin the defendants from electing two members to ImageSat's board of directors on the basis that the two candidates did not fulfill the requirements in their securityholders agreement necessary to perform the role of independent directors. ImageSat was a joint venture between defendant Israel Aerospace Industries Ltd. ("IAI"), Israel's largest defense contractor, and plaintiff Core Software Technology ("CST"). The securityholders agreement (the "agreement") among ImageSat's principal shareholders and investors treated corporate governance and control of ImageSat, including terms relating to the structure and composition of its Board of Directors (the "board"), and the related selection process. The plaintiffs asserted that the search process conducted by ImageSat to identify candidates was dominated by IAI, and therefore did not result in independent candidates. Plaintiffs submitted the names of ten candidates identified through the National Association to Corporate Directors ("NACD"), a not-for-profit association. IAI identified six candidates from a variety of sources, including the Israel Chamber of Commerce, a database search of directors of publicly traded companies in Israel, and a review of Israeli and European candidates know to IAI personnel. A three-person nominating committee was appointed to review these potential nominees and reduce the number of candidates. Plaintiffs asserted that this committee was improper because it was appointed by IAI. It selected five candidates, two from the NACD list submitted by plaintiffs and three from IAI's list. Plaintiffs assert that one IAI candidate was not independent because he had served on the board of directors of the Israel Export &

International Cooperation Institute ("IEICI") together with ImageSat's Chairman. He also was CEO of a gas company that was supplier to IAI. Plaintiffs argued that a second IAI candidate was not independent because he and his former firm were one of multiple investment banks that IAI contacted regarding an assignment related to a potential sale of ImageSat. Defendants argued that these relationships were too attenuated to undermine each candidate's independence. In denying plaintiff's motion for a preliminary injunction, the court held that the agreement provided that the directors were to be selected by the board and approved by the shareholders, without mandating any other procedural requirements. The court stated that it would not "draft" those terms when the parties saw no need for them initially. It also noted that it was virtually universal practice for an incumbent board to determine whether new directors qualify as independent, citing the New York Stock Exchange and NASDAQ corporate governance standards as examples. The court reasoned that there was no indication in the agreement that the parties intended to depart from this practice. The court also rejected the plaintiff's assertion that in order for the directors to be independent, the selection process must be independent, rather than controlled by a majority shareholder. The court reasoned that IAI's participation in the selection process was contemplated at the time of the agreement, and New York and Delaware law both held that involvement of an allegedly interested party in the selection of a director does not negate that director's independence. As a practical matter, it noted, board candidates are often identified through business and personal contacts with officers or directors of a company. Again applying New York and Delaware law, the court held that the test for independence of a director was the "denomination and control" test utilized in the context of demand-excused cases pertaining to shareholder derivative suits. The plaintiff bore this burden of proof. Here, the candidates had no meaningful economic or family ties to ImageSat or its securityholders, and therefore, their casual contacts with IAI were insufficient to imply partiality. The court rejected the plaintiff's argument that the demand-excused test was improper and the appropriate test was the one employed by Delaware courts in the context of special litigation committees, which examined whether a director was incapable of making a decision with only the best interest of the corporation in mind. That test also placed the burden on the corporation to prove the independence of the director. Finally, the court rejected the plaintiff's assertion that the IAI-controlled selection process placed ImageSat within the purview of the Israeli Government Companies Law. The plaintiff offered no expert opinion as to this assertion, and therefore the court adopted the view of IAI's expert that the law did not apply. It held that IAI's veto rights over independent directors pursuant to the agreement was not tantamount to the power to appoint under Israeli law and therefore the agreement did not implicate Israeli law. Core Software Tech., Inc. v. ImageSat Int'l. N.V., Index No. 650062/10, New York County, 7/19/2012 (Schweitzer, J.).

Shareholder derivative actions; futility of demand; business judgment rule; choice of law; CPLR 3211(a)(7); pleadings. The court granted defendants' pre-answer motion to dismiss plaintiffs' shareholder derivative action on the ground that plaintiffs failed to allege facts showing that they either made a demand on the corporation's board of directors to address a wrong or that such demand would have been futile. Plaintiffs alleged that the corporation, which sold footwear and fashion accessories on a global basis, improperly amended the employment contract for its creative design chief so as to increase his compensation. The court initially observed that Delaware law applied since the company was incorporated in Delaware. Under Delaware law, a shareholder must demand that the board of directors address a wrong before the shareholder can commence a derivative action on behalf of the company, unless the shareholder can establish that such a demand would be futile. A demand was considered to be futile if (1) under the particularized facts alleged, a reasonable doubt existed as to whether the directors were disinterested and independent (i.e., incapable of objectively evaluating a demand due to personal interest or domination and control); and (2) the pleading raised a reasonable doubt that the challenged transaction was otherwise the product of a valid exercise of business judgment. The court found that plaintiffs were unable to satisfy the test. As to the first prong, the court held that since the board of directors consisted of an even number of members, plaintiffs needed to show that at least half of them were not independent. Plaintiffs, however, only alleged that one of the six board members, brother of the creative design chief, lacked independence. The court stressed that it did not suffice to allege that a demand was necessarily futile because the directors could be held personally liable for authorizing the questioned transaction; rather, there must be a substantial likelihood of the existence of personal liability. As to the second prong, the court held that plaintiffs' allegations put the transaction at issue squarely within the realm of reasonable business judgment since there was no allegation that the directors personally profited from enhancing the compensation package, and the company, which had flourished, was heavily reliant on the creative design chief's creative talents. Ioffe v. Madden, Index Nos. 700188/2012 and 700189/2012, 9/13/12 (Grays, J.).**