THE COMMERCIAL DIVISION LAW REPORT

A report on leading decisions issued by the Justices of the Commercial Division of the Supreme Court of the State of New York

Hon. Jonathan Lippman
Chief Judge of the State of New York

Hon. A. Gail Prudenti
Chief Administrative Judge of the State of New York

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Arbitration. Mechanic's lien; lien exaggeration. Breach of contract. Vacate. General contractor D.C.M. of New York, LLC ("DCM") moved to vacate an arbitration award rendered in favor of Vintage Flooring and Tile Inc. ("Vintage"). Under a separate index number, Vintage moved to confirm the arbitration award. The dispute stemmed from a construction project for which DCM entered into agreements with various subcontractors, including Vintage, for labor and materials. The agreement between DCM and Vintage contained a mandatory arbitration clause. After controversies arose between the parties, DCM initiated arbitration. Several hearings were conducted and the arbitrator rendered a decision awarding Vintage $76,539.13. The award indicated that it included all claims of Vintage and directed Vintage to, upon receipt of payment, provide DCM with a satisfaction of mechanic's lien. Another subcontractor on the project, 5 Brothers, Inc. ("5 Brothers"), initiated an action against DCM and named additional parties, including Vintage. DCM filed an answer and counterclaim, and Vintage filed cross-claims against DCM for breach of contract, quantum meruit, foreclosure of its mechanic's lien, account stated, and unjust enrichment. In response, DCM answered and counterclaimed for willful exaggeration of its mechanic's lien. DCM then moved to vacate the arbitration award, for summary judgment dismissing Vintage's lien claim, and for summary judgment on its lien exaggeration claim. Not having received payment of the award, Vintage moved to confirm the award in a separate action. DCM opposed Vintage's motion, citing the pending 5 Brothers action and adopting all the arguments set forth in its motion to vacate filed in that action. DCM moved to vacate and set aside the award on the grounds that it was irrational because items were awarded to Vintage without proof or justification and because it was based on a willfully exaggerated mechanic's lien. DCM also asserted that the arbitrator exceeded his powers and that the award was indefinite. The court stated that arbitrators are not bound by the principles of substantive law or the traditional rules of procedure governing litigation and that an arbitrator is not required to justify his award. The court held that the arbitrator, who relied on voluminous exhibits, several witnesses, and multiple briefs, found that DCM was liable for extra work performed by Vintage that was not covered in the original contract. The court rejected DCM's claim that the award was irrational because it was based on an exaggerated mechanic's lien. As to DCM's argument that the award was indefinite and contrary to public policy, the court held that to be final and definite an award must resolve the dispute in a manner that does not remit the parties to a new controversy or future litigation, and that unequivocally indicates their respective rights and obligations and what each must do. The court found no evidence suggesting that the arbitrator failed to dispose of the controversy submitted. DCM argued that because the arbitrator did not expressly address, and was without authority to rule on, the exaggeration claim, no decision on the issue was made, and the award incompletely resolved the issues before the court. The court found, however, that the exaggeration issue was subsumed within the agreement to arbitrate and that, since no penalties were warranted, the award properly disposed of the issue and was within the arbitrator's authority to do so. The arbitrator found Vintage's claim meritorious, and therefore implicitly rejected the exaggeration claim. Accordingly, the court denied DCM's motion to vacate the award and confirmed the award. The award instructed Vintage, upon receipt of payment, to provide DCM with satisfaction of its mechanic's lien. Upon such satisfaction, Vintage's cross-claim for foreclosure of its lien became moot. If DCM failed to make payment in accordance with the decision, Vintage could proceed to foreclose upon its lien. Accordingly, DCM's motion to dismiss the cross-claim was denied, pending payment of the award. DCM's motion to vacate the arbitration award was denied, and the award was confirmed. DCM's motion for summary judgment dismissing Vintage's cross-claim to foreclose on its mechanic's lien was denied, subject to DCM's payment of the award. DCM's motion for summary judgment on its willfully exaggerated lien claim was denied. 5 Brothers, Inc. v. D.C.M. of New York, LLC, Index No. 500824/2011, 4/2/13 (Demarest, J.).**

Construction contract; breach. Municipal Home Rule. Fraudulent inducement. Plaintiff contracted to perform landscaping and construction services on defendants' property. When defendants failed to pay, plaintiff filed a notice of mechanic's lien. Plaintiff sued to foreclose the mechanic's lien and asserted claims for breach of contract and fraudulent inducement. Defendants, arguing that plaintiff was barred from maintaining the action because it did not have a valid home improvement license when the work was performed, moved to dismiss. The court denied the motion and rejected defendants' contention the action was barred. Plaintiff then moved for partial summary judgment for the amount owed for the landscaping services only. Defendants opposed the motion on the grounds that the Suffolk County Code required all home improvement contractors to be licensed and that, under the code, home improvement included work on driveways and landscaping. Defendants also cross-moved for summary judgment and dismissal of plaintiff's complaint based on these same grounds. A contractor that performs home improvement work without a license is barred from maintaining an action where the license is mandated. However, the court needed to determine the interaction between the county code and the Town of Shelter Island Code, which specifically excluded landscaping from the definition of home improvement. The court determined defendants were entitled to summary judgment with respect to the driveway work because it fell within the definition of home improvement work under both the county and town codes. With respect to landscaping services, however, the court found plaintiff was entitled to summary judgment on the breach of contract claim. Applying Municipal Home Rule § 10, the

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court held that the town code's exclusion of landscaping from the definition of home improvement relieved plaintiff from the licensing requirement. Plaintiff had a right to foreclose on the mechanic's lien, but the amount representing the landscaping work needed to be determined at trial. The court granted summary judgment to defendants on the fraud claim because the complaint merely asserted a general allegation that defendants entered the contract without any intent to perform. MGD Horticultural Services, Inc. v. Hahn, Index No. 8315/2011, 3/19/13 (Pines, J.).**

Contract; breach; failure to state a claim. Procedure; motion to dismiss. Plaintiff, a licensed New York City taxi driver, leased a taxicab and a medallion from defendant. The rules of the New York City Taxi and Limousine Commission (TLC) imposed a cap on the amount a taxi medallion owner can charge a driver for the lease of a taxi medallion on a daily and weekly basis. Defendant raised the rates for plaintiff to lease the taxi and medallion, and plaintiff responded that the increased amount was more than defendant was allowed to charge under TLC rules. Defendant replied that he would nevertheless charge the increased rates, as well as charge plaintiff the maximum rate on passenger credit card transactions rather than deduct only actual expenses to process the transactions. Plaintiff filed a complaint with the TLC, and when plaintiff refused a demand by defendant to withdraw it, his relationship with the company ended. Plaintiff then filed this action and asserted four causes of action: (1) breach of contract by charging an excessive weekly rate; (2) breach of contract by charging an excessive rate on credit card transactions; (3) unjust enrichment; and (4) violation of TLC Rules 58-21(c)(4) and 58-21(f)(3). Defendant moved to dismiss the complaint for failure to state a cause of action. As to the first cause of action, plaintiff claimed defendant charged an excessive weekly rate. The court found documentary evidence submitted by plaintiff contradicted his own allegations, which are generally entitled to a presumption of truth on a motion to dismiss, and showed plaintiff had instead been charged the maximum daily rates. The court further reasoned, even assuming that the parties entered into weekly leases, the lease cap amount is found in the TLC's rules, not in the parties' contract pursuant to which the defendant demanded – and plaintiff accepted – a higher rate. Lastly, the court determined defendant was free to charge for sequential daily leases even if that charge exceeded the weekly lease cap. For the second cause of action, plaintiff argued that the TLC rule requiring charges on credit card transactions not to exceed 5% limited such charges to "actual expenses." Disagreeing with plaintiff, the court held that the rule did not contain such a limitation. The court dismissed the unjust enrichment claim as duplicative of the breach of contract claim. For the same reasons it dismissed the first and second causes of action, the court dismissed the fourth cause of action alleging violations of TLC Rule 58-21(c)(4) by charging an excessive weekly rate for leasing a taxi and medallion and TLC Rule 58-21(f)(3) by charging more than its actual costs to process credit card fares. Accordingly, the court granted defendant's motion in its entirety and dismissed the complaint. El-Nathal v FA Management, Inc., Index No. 701569/2012, 3/11/13 (Kitzes, J.).**

Contract; breach; good faith and fair dealing; asset valuation. Plaintiff entered into an agreement with defendant to purchase four properties, including the former "Waterside" power plant. As part of the contract, defendant agreed to make "all necessary filings to protest or reduce Real Property Taxes." The parties had agreed that plaintiff would pay all post-closing real property taxes. The dispute centered on the 2005/2006 tax year filing for the Waterside property. Defendant received approval from the New York State Public Service Commission to sell the property on the condition that it remained operational until its replacement, a power plant on 14th Street, was fully functional. Defendant would then pay for the complete demolition of the Waterside plant and the parties would close on the property. After the Department of Finance announced its 2005/2006 assessment for Waterside, defendant initiated a protest and sought a multi-million dollar reduction. In its protest, however, defendant did not include the fact that Waterside was to be shut down and destroyed in the next six months. The protest was rejected, resulting in real property taxes owed by plaintiff at the original assessed amount. In its complaint, plaintiff alleged that defendant had: (1) breached the agreement by failing to make the necessary filings to protest or reduce real property taxes assessed for the 2005/2006 tax year; (2) breached the covenant of good faith and fair dealing with respect to its obligations under the contract; (3) frustrated the purpose of the agreement by failing to make the necessary tax filings to protest the real property taxes; and (4) terminated the tax proceeding without plaintiff's consent. After filing a counterclaim for attorney's fees and costs, defendant moved for summary judgment dismissing the complaint. It argued that it had made all the Department of Finance filings required by the agreement, that the claim for breach of the implied covenant of good faith was duplicative of the claims for breach of contract, that there was no evidence it had acted in bad faith, and that plaintiff's damages were speculative. In opposition, plaintiff argued that defendant had used the wrong valuation method and had failed to include the fact that the Waterside plant was to be shut down and demolished imminently. Citing to authority that "there is no fixed method for determining . . . [assessed] value," the court held that there was no evidence that defendant had not used the method preferred by plaintiff — or that they had not used the correct method. Instead, the court reasoned, plaintiff was merely complaining that the imminent closing of the power plant had not been included, which, based on a number of reported decisions, was appropriate. The court pointed out that under New York law, the value of a property must be assessed on the "taxable status date," which in New York City is January 5th. On that date, Waterside was fully operational. The court found that there was no evidence that Waterside, or any part of it, had been demolished on that date. Thus, it was not irrational or arbitrary to exclude this fact from the protest, and plaintiff's claim for breach of contract must fail. Plaintiff's causes of action alleging a breach of the covenant of good faith and fair dealing was also dismissed as duplicative of its breach of contract claim. Finally, plaintiff's claim based on defendant's failure to seek plaintiff's consent to the tax filings was dismissed, as "the unambiguous language of the contract" gave defendant the sole discretion to settle or compromise any real tax property protest. <u>East River Realty Co., LLC v. Consolidated Edison Co. of New York, Inc.</u>, Index No. 110981/2009, 3/13/13 (Schweitzer, J.).

Contract; breach. Trusts; breach. Fiduciary duty; breach. Plaintiff was a not-for-profit corporation organized for the purposes of competing in competitive sailing events. Defendant was the trustee of the America's Cup. Defendant, upon receiving the Cup, agreed to hold the Cup in trust in accordance with the deed of gift. Under the deed, any entity may submit an application to represent the home country in defending the Cup in the next race. Plaintiff submitted an application, which defendant rejected because it was not satisfied that plaintiff had the necessary resources and experience to defend. Plaintiff filed suit, claiming defendant had no basis for denying the application. Plaintiff's breach of contract claim alleged the application and the accompanying required fee constituted a binding contract defendant breached by failing to act in good faith when it rejected the application without a reasonable basis. The court dismissed this claim, noting the submission of the application did not create a binding contract and the deed protocol directed defendants to evaluate individuals under a subjective standard that did not require a reasonable basis for rejection. The court found no support for plaintiff's contention that defendant acted in bad faith. Plaintiff's breach of trust claim alleged defendant breached its fiduciary duty as trustee to the Cup. Defendant argued plaintiff did not have standing to sue because it was a mere beneficiary of the charitable trust. The court agreed, holding that, as an applicant, plaintiff had no standing and that the special interest exception did not apply because plaintiff was not a beneficiary of the trust. Plaintiff's breach of fiduciary duty claim alleged defendant negotiated terms directly beneficial to it in violation of the deed. The court dismissed this claim for the same reasons on which it found plaintiff lacked standing. <u>African Diaspora Maritime v. Golden Gate Yacht Club,</u> Index No. 653419/2011, 1/18/13 (Kapnick J.).

Contract; frivolous litigation. Plaintiff-tenant sued to recover 12 years of its share of real estate taxes paid to defendant-landlord. It claimed that a lease provision requiring it to pay taxes levied against its own trade signs excused it from paying its proportionate share of real estate taxes for the building. Defendant-landlord moved to dismiss. The lease contained a standard real estate tax escalation clause requiring plaintiff to pay a proportionate share of any increase in real estate taxes imposed on the building. A separate signage tax clause required plaintiff to pay any taxes assessed against plaintiff's own signage on the building, but not taxes assessed against any other signs on the building. Based on those clauses, the plaintiff paid its real estate tax escalation obligation each year for 12 years without objection, and did not pay any signage taxes other than those assessed on its own signs. However, plaintiff now argued that because income derived from all signs is used to determine building taxes, it was implicitly and wrongfully charged for taxes assessed against other tenants' signs. The court rejected this argument. It found that "plaintiff is conflating income derived from signs with taxes charged by the City" and that "plaintiff cannot credibly argue that it is being required to pay 'taxes levied with respect to any other signs on the building.'" Warning that the complaint approached "frivolity," the court dismissed the complaint with prejudice. Toys "R" Us-Delaware, Inc. v. 44-45 Broadway Realty Co., LLC, Index No. 651403/2012, 1/2/13 (Ramos, J.).

Damages; consequential vs. general; taxes as damages. Continuous representation doctrine. Negligence; professional malpractice. Breach of fiduciary duty. Defendant accounting firm moved to dismiss plaintiff's complaint, which asserted causes of action for negligence, professional malpractice, and breach of fiduciary duty, and sought punitive damages. Plaintiff alleged that it and its parent corporation retained defendant to advise them of the tax consequences that would result from the parent's corporate reorganization. Pursuant to that reorganization, plaintiff transferred a number of its foreign subsidiaries to a U.S. holding company, then to a Dutch holding company, and then to a subsidiary of the Dutch holding company. The transactions were intended to fall within a non-recognition provision of Internal Revenue Code § 367. Plaintiff alleged in its complaint that it sought to accomplish these transfers only if they were eligible for tax-free treatment. Defendant allegedly failed to inform plaintiff that transfers of the interests of some subsidiaries were not eligible for tax-free treatment. Further, plaintiff alleged that defendant failed to file the required certifications for certain of the transfers and then, due to prior omissions, failed to obtain reasonable cause relief from the IRS for these failures. Ultimately, the reorganization resulted in a tax liability of $30.2 million plus interest. Plaintiff claimed that if shares in the subsidies had not been transferred, it would have avoided a liability of at least $6.9 million, which it claimed was caused by defendant's actions. Plaintiff also claimed that defendant's failures—to exercise due professional care in rendering tax advice and to seek a determination from the IRS that the failure to file certain documentation was for reasonable cause—constituted negligence and professional malpractice. In its second cause of action, plaintiff claimed that these same acts constituted a breach of fiduciary duty when defendant protected its own interests rather than securing plaintiff's position before the IRS. The complaint sought damages of over $35 million and punitive damages, costs and disbursements, including attorneys' and experts' fees, and interest. The court first reasoned that plaintiff was seeking consequential, and not general damages. The opinion explained that general damages refer to damages based upon the value of performance, i.e., what plaintiff paid defendant for its tax advice. Consequential damages, however, are based upon the "value of some consequence that performance may produce." Since plaintiff sought to recover the damages that resulted from the allegedly negligent services it paid for, it was seeking consequential damages. Plaintiff, however, failed to adequately plead a basis to recover consequential damages. The court next held that plaintiff could not recover the taxes paid because, under New York law, taxes are not recoverable in a tort lawsuit because "the taxes did not result from the alleged misrepresentation or actions of the defendant, but from the taxable events in which the taxpayer engaged." Further, recovery of taxes is not permitted where the recovery would result in a windfall to the plaintiff, i.e., an asset would receive a stepped-up basis that would reduce the tax liability on later distributions. Since, in this case, a windfall would result to plaintiff if it received the value of the taxes from defendant, recovery of the taxes paid was not permitted. The court also dismissed plaintiff's claim for breach of fiduciary duty, finding that it was duplicative of its claim for negligence and professional malpractice because it was based on the identical set of alleged wrongs by defendant. The court noted that plaintiff was required to—but did not—show that but for defendant's acts, the IRS would not have imposed the taxes levied upon plaintiff. Finally, the court noted that an ordinary accountant/client relationship is not a fiduciary relationship. The expertise of a tax advisor is not the same thing as the expertise of an investment advisor, and plaintiff pleaded no facts to establish a fiduciary relationship between the two entities. The court also dismissed claims relating to a particular subsidiary of plaintiff as those transactions occurred beyond the relevant statute of limitations. The court refused to apply the "continuous representation" doctrine to those claims, noting that the doctrine requires that the services defendant provided "would have to be with respect to the particular problem giving rise to the claims, not merely a continuing professional relationship." Since the services were not addressed to those particular transaction, but were rather a continuing relationship, the continuous representation doctrine could not be invoked to preserve those claims beyond the statute of limitations. Finally, the court held that plaintiff had not established that defendant's conduct was deliberate and intentional, or malicious, or actuated by reprehensible or evil motives, and that therefore, punitive damages were inappropriate. MMS USA Holdings, Inc. v. Pricewaterhousecoopers LLP, No. 650382/2012, 3/19/13 (Sherwood, J.).

Employment law; improper termination. US Constitution; Establishment and Free Exercise clauses; ministerial exception; mixed secular and clerical job duties. Plaintiff alleged that he was improperly terminated from his position as associate general secretary in an agency of the Methodist Church. Plaintiff had been hired for this position and, pursuant to the church's Book of Discipline, elected to it as well. He was subsequently re-elected numerous times. Plaintiff later applied to be general secretary, but the position went to the individual defendant ("the general secretary"). Plaintiff then wrote an email to a church bishop expressing discontent with the appointment. The church bishop forwarded the email to the general secretary. After putting a written warning in plaintiff's personnel file, the general secretary recommended plaintiff for re-election, and plaintiff again was re-elected. Eventually, however, plaintiff was terminated for "insubordination, untrustworthiness, undermining the ministry of the agency," and other causes. Here defendants, the church agency and general secretary, moved for summary judgment, arguing that adjudication would violate the Establishment and Free Exercise clauses of the Constitution, which federal courts have long interpreted as barring government interference with a religious group's decision to fire one of its ministers. Defendants pointed to Hosanna-Tabor Evangelical Lutheran Church & Sch. v EEOC (___US___, 132 S.Ct. 694 [2012]), in which the US Supreme Court recently confirmed the ministerial exception. Plaintiff argued that Hosanna-Tabor was an employment discrimination case inapplicable to contract claims and that he was employed by the agency in a wholly secular, not ministerial, capacity. The court clarified that Hosanna-Tabor specifically expressed "no view on whether the exception bars other types of suits, including... breach of contract..." It also explained that in Hosanna-Tabor, the Supreme Court had stated that the ministerial exception was not limited to the head of a religious congregation and confirmed that the exception could apply to an individual performing mixed secular and ministerial duties even if the employee's ministerial duties occupied only 45 minutes of the day. The court here examined the nature of plaintiff's employment, which the US Supreme Court had noted to be relevant when significant religious training and a recognized religious mission underlay the employee's job description. The court here noted the religious mission in defendant agency's purpose of working toward "a full reception of the gift of Christian unity." It found that the Book of Discipline required candidates for plaintiff's position to "model themselves after the servanthood of Jesus Christ" and that plaintiff as an ordained minister had been designated by the church agency as a clergy employee and clergyperson assigned to an "extension ministry." Plaintiff wore ministerial attire for business travel and claimed the same ministerial housing tax exemption the Hosannah-Tabor plaintiff had claimed. Further, plaintiff's job served the church's mission; he published ecumenical writings and at least once preached. Moreover, adjudicating plaintiff's claims would necessitate the court determining whether plaintiff's termination was justified under the Book of Discipline, a constitutionally questionable undertaking. The relevant paragraph used terms such as "immoral conduct" or "breach of trust," which lack legal standards under New York law. Even if the court were constitutionally permitted to adjudicate, it said, there was no evidence of an employment contract, and only a fixed term of employment could preclude the employment at will rule to which New York courts adhere. Plaintiff argued that there was an implied four-year agreement because the Book of Discipline called for four-year elections to his position, but the court found that the Book conflicted itself, and in any case the personnel manual contained a clear and unambiguous "at will" provision. Finally, if plaintiff's employment were not at will, his termination would be subject to the Book of Discipline. The complaint was dismissed. Mills v Standing General Commission on Christian Unity, Index No. 601640/2009, 1/29/13 (Ramos, J.).

Fiduciary duty; breach. Duty of good faith and loyalty; breach. Fraudulent inducement. Release. Plaintiffs owned interests in hotels that defendants decided to sell. Based on defendants' representation that one of the hotels was valued at approximately $125,000,000, plaintiffs agreed to accept $5,200,000 in exchange for their interest in that hotel. Five months after plaintiffs redeemed their interest, the hotel was sold for

$2,100,000 million. Plaintiffs brought an action for breach of fiduciary duty, breach of duty of good faith and loyalty, fraudulent inducement, intentional misrepresentation, and unjust enrichment, alleging defendants knew and failed to disclose the true value of the hotel. Defendants moved for summary judgment on the ground plaintiffs released all claims against defendants in the agreement. Defendants argued the language of the release applied to "any and all rights, claims . . . whatsoever, whether in law or in equity, whether known or unknown." Plaintiffs argued their unknown fraud claims were not covered by the release because they were unaware of any fraud claims when they signed the agreement and because the relationship with defendants was one of trust, which remained fully intact during the contract negotiations. The court determined the fraud described in the complaint fell within the scope of the release and plaintiffs did not allege a separate fraud to induce them into signing the release. The fiduciary relationship did not change the interpretation of the release; plaintiffs were sophisticated and made no effort to verify the approximation. The court granted defendants' summary judgment motion and dismissed the complaint with prejudice. Kafa Investments LLC v. 2170-2178 Broadway LLC, Index No. 650349/2008, 1/23/13 (Kapnick, J.).

Fraud; breach; contract. Note of issue deadline. Failure to prosecute. Plaintiff brought claims for fraud and breach of contract against defendants, alleging payment made for work that never was completed. A preliminary conference resulted in an order that included a date for filing the note of issue with a warning that failure to comply could result in dismissal of the action. After a number of appearances and adjournments, the note of issue filing deadline was extended. Defendants' attorney thereafter moved to be relieved. The motion was granted and the case was stayed to allow defendants time to retain another attorney. At the next appearance, the parties were told to sort out various document demands. At the subsequent appearance, three months later, it was noted that nothing had been done with regard to discovery, plaintiff had not submitted any default motions, nor had plaintiff communicated with defendants regarding discovery. The court warned plaintiff's counsel that failure to prosecute the case could result in dismissal. Plaintiff's counsel did not attempt to resolve discovery issues, but instead, on the next scheduled conference date, filed a motion to compel the production of documents by defendants, or to strike defendants' answer and counterclaim, and for leave to reargue the motion to relieve defendant's counsel. The conference was adjourned to the motion's return date, when the court issued an order denying plaintiff's motion as meritless. The order also stated that plaintiff failed to file a note of issue, directed plaintiff to file a motion returnable on a specific date, and stated that, absent such a motion, the case would be deemed abandoned and dismissed without prejudice. On that date, the court noted that nothing had been done since the prior appearance and that no motion had been filed in compliance with the prior order. Plaintiff's counsel represented that an attempt to file a motion had been made the previous afternoon; however, even if true, the motion could not have been returnable the following day as the court had directed. The court, therefore, held that plaintiff failed to comply with the prior order. It stated that it is well established in the Second Department that a compliance conference order containing a note of issue deadline and a warning that failure to file by the deadline may result in dismissal satisfies the 90-day notice requirement for dismissal pursuant to CPLR § 3216. The preliminary conference order directed that the note of issue be filed by a specific date and that failure to do so risked dismissal. The deadline was extended and then the stay intervened. Plaintiff argued that the stay prevented compliance with the direction to file the note of issue. However, after the stay expired, plaintiff made no attempt to obtain a further extension. The court also held that plaintiff's counsel had repeatedly shown disrespect for opposing counsel and the court by failing to appear or by appearing hours after the court's call time. Plaintiff's lack of diligence and failure to adhere to court rules justified sanctions. The court dismissed the action without prejudice pursuant to CPLR § 3216 for failure to prosecute due to plaintiff's repeated failure to comply with court orders. Robert Stanley, LLC, v. Orange General Contracting, Inc., Index No. 9404/2010, 2/13/13 (Demarest, J.).**

Fraud; fraudulent concealment; negligent misrepresentation; CPLR 3211(a)(7). Plaintiff, an investment vehicle for a Cayman Islands based mutual fund, brought claims for fraud, fraudulent concealment, and negligent misrepresentation in connection with the purchase of $17 million in notes sold by defendants. The notes were part of the most junior tranche of a collateralized debt obligation called STACK 2006-1 ("STACK"), which was collateralized by asset-backed securities, including residential mortgaged-backed securities, selected by defendants. The securities also were originally underwritten or securitized by defendant Morgan Stanley or its co-defendant affiliates. The tranche from which plaintiff purchased notes contained unrated securities. In connection with the purchase, plaintiff executed a Master Purchase Letter in which it disclaimed any investment reliance on defendant Morgan Stanley and represented that it had access to all the information it needed. Additionally, plaintiff represented that it had consulted with its own advisors and that Morgan Stanley was not acting as "its fiduciary or financial or investment advisor." The complaint included three allegations in support of its claims: (1) that Morgan Stanley had placed a billion dollar bet against the collateral assets of STACK; (2) that Morgan Stanley knew that STACK included "toxic" securities; and (3) that Morgan Stanley paid the rating agencies excessive fees in return for inflated ratings. Defendants moved to dismiss the complaint for failure to state a cause of action. The court noted that in order to state a claim for fraud, a plaintiff must allege "a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." The court also noted that, generally, reliance is to be determined by the trier of fact, not as a matter of law upon a motion to dismiss. Nonetheless, because of the extensive disclaimers of reliance contained in the Master Purchase Letter, the court undertook to determine if those disclaimers barred plaintiff's fraud claims, or if they could be overcome by "specific allegations regarding facts known to the defendant and which could not have been discovered by the plaintiff in the course of due diligence." The court addressed each of plaintiff's allegations. First, it explained that Morgan Stanley's bet against the underlying securities could not support a fraud claim since defendants had disclosed their position in the STACK offering documents. Thus, plaintiff could not escape their disclaimer since the facts were not within the "peculiar knowledge" of defendants. Second, the allegation that Morgan Stanley knew of "toxic" securities included in STACK was pled with "a core of highly specific allegations with identified sources." The complaint's factual allegations that Morgan Stanley was aware of underwriting failures for these securities allowed the court to find that Morgan Stanley's internal procedures were peculiarly within its own knowledge. Thus, as a matter of law, plaintiff could plead justifiable reliance on defendant's alleged misrepresentations with respect to the subordinated notes. Plaintiff's third allegation, that Morgan Stanley influenced ratings agencies into using an older, less accurate model that inflated the ratings, allowed plaintiff to avoid the disclaimers in the master purchase agreement and therefore, as a matter of law, plaintiff could plead justifiable reliance. Specifically, plaintiff had alleged particular information regarding Morgan Stanley's relationship with its rating agencies that was peculiarly within its knowledge, while noting that similar allegations had recently been upheld by the First Department to overcome similar disclaimers and state a claim for fraud. The court also reasoned that although plaintiff had purchased unrated securities, it nonetheless could plead reliance on misrepresentations as to rated securities that were contained in other STACK tranches. The court agreed with plaintiff that because STACK was made up of a single pool of assets, the allegedly fraudulent ratings of the senior levels were relevant to its purchase of notes from unrated tranches. The court also rejected defendants' argument that plaintiff had failed to allege scienter. The decision noted that plaintiff had alleged motives "beyond mere greed," including defendants' need to protect its CDO business and its influence over the rating agencies. Lastly, the court dismissed plaintiff's claim of negligent misrepresentation for failure to allege a "special relationship" required to sustain a claim. The court further held that even if such a relationship did exist, the disclaimers relieved Morgan Stanley of any duty to provide investment advice about STACK, thus dooming such a claim. Thus, the court granted defendants' motion to dismiss in part. Basis Yield Alpha Fund Master v. Morgan Stanley, Index No. 652129/2012, 2/28/13 (Schweitzer, J.).

Fraud; representations of future conduct; expression of opinion as basis for claim; business valuation. Duplication of breach of contract claims. Plaintiff's predecessor and two of the corporate defendants entered into an asset purchase agreement under which the first defendant would run plaintiff's business and have the option to buy it at a price determined by the agreement's "Valuation Matrix." The parties executed a subsequent agreement that established an advisory board to oversee the business's transition and ensure transparency of its valuation; the board would include officers of plaintiff's predecessor and the second corporate defendant, which was managing the first, and would receive the business's financial information from the first corporate defendant. Eventually, the corporate defendants notified plaintiff that the first defendant was exercising its option to buy the business. Plaintiff sued for breach of contract and indemnification against the corporate defendants, alleging they had taken actions devaluing the business to lower its purchase price, and sued the CEO of the second corporate defendant for fraud. The fraud claim was based on two sets of representations the CEO had made in relation to the asset purchase agreement. One set stated that the business would perform "virtual factoring" whereby some amounts due under its receivables would be credited to revenue for purposes of calculating the purchase price. The other set represented that there was no uncollectible debt when there was in fact over $28,400 in uncollectible debt. The CEO moved to dismiss the claim. Pointedly, the court noted that one may assert a claim for fraud based on a representation of future conduct and that financial projections of a company's future performance alleged to be false and not based on a company's actual financial condition can be the basis of a fraud claim. This rule permits a fraud claim to be based on a defendant's expression of opinion regarding a corporate financial projection, the court said, as long as the opinion is irreconcilable with some objective fact. The question on a motion to dismiss is whether plaintiff identifies an incompatible fact known to defendant when defendant made the allegedly fraudulent representations. The court found that plaintiff failed to allege any fact incompatible with the CEO's promises related to virtual factoring. By contrast, plaintiff's allegations that the CEO knew facts incompatible with his representations concerning the business's debt and whether it was collectible might in some circumstances support a fraud claim. However, all his representations were made within the scope of his employment by the corporate defendant and were duplicative of plaintiff's breach of contract claims. The CEO's promises concerning virtual factoring, as alleged by plaintiff, described a way corporate defendants would increase the business's value. The failure to use virtual factoring, among other actions and omissions plaintiff alleged, furnished the precise grounds for plaintiff's breach of contract claims. The CEO's representations regarding the business's debt were made pursuant to the second corporate defendant's financial disclosure obligations under the agreements. The court remarked that if the CEO's representations were grounds for a fraud claim, any employee who ever made a statement about a company's performance under a contract might be held personally liable for the company's breach of contract. Plaintiff had not alleged a single representation unrelated to the corporate defendants' contractual obligations, or beyond the scope of the CEO defendant's employment authority. The court then summarized the explanation of the Appellate Division, First Department, that the rule prohibiting fraud claims that duplicate breach of contract claims maintains the distinction between different species of damages. In this suit, plaintiff essentially claimed that the amount paid for its business was less than what it was entitled to because defendants' wrongful actions had lowered the purchase price. The damages due were breach of contract damages, to place plaintiff in the same position as if the contract had been performed; such damages were the difference between the sum plaintiff should rightfully have received minus the amount actually received. Damages for fraud are intended to indemnify for loss suffered through the inducement – are damages for foregone opportunities. Since the CEO's actions may have helped lower the business purchase price but did not cause damages independent of the contract damages, the fraud claims against him were dismissed. DSM2X, Inc. v. GFK Custom Research, LLC, Index No. 650008/2012, 2/22/13 (Kornreich, J.).

Human Rights Law. Labor Law § 215. Discrimination; disability; retaliatory discharge; breach of fiduciary duty. Defendant corporation and defendant's president, the majority shareholder, fired plaintiff, a minority shareholder, about 2 ½ years after plaintiff was diagnosed with breast cancer. While with the company, plaintiff installed timekeeping software that would ensure proper payment of overtime. Shortly before being fired, plaintiff and defendant disagreed as to whether the sales manager was exempt from having to clock in and out. A non-jury trial was held. First, the court found that plaintiff failed to establish by a fair preponderance of the credible evidence her claims under the New York State Human Rights Law. Defendants did not refuse to accommodate her disability because they granted all of plaintiff's requests to take time off for treatment and switched from an insurance plan that did not cover plaintiff's cancer medication to one that did. Further, although no Second Department authority imposes liability for an employer's failure to try to work with the disabled employee to reach an accommodation, plaintiff failed to show that defendants refused to do so. Plaintiff also failed to show that her termination was in retaliation for requesting an accommodation. Second, plaintiff's retaliatory discharge claim under Labor Law § 215 failed to show by a preponderance of credible evidence that plaintiff was fired in retaliation for disagreeing with defendant about the exempt status of the sales manager. Plaintiff never believed there was a Labor Law violation because plaintiff never reported overtime for the manager, took steps to pay overtime, or told the manager he was entitled to overtime. Further, plaintiff fired an employee without honoring defendant's request for a meeting to discuss the employee's performance, at which point defendant fired plaintiff. Third, defendant, as majority shareholder, did not breach a fiduciary duty by excluding plaintiff from management of the corporation because no specific authorization in law or in the company's certificate of incorporation entitled plaintiff to such participation. Also, plaintiff failed to show by a preponderance of evidence that defendants breached a fiduciary duty by paying bonuses that were actually shareholder distributions. The bonuses were paid through payroll and reported to the IRS as compensation. To the extent bonuses diverted corporate assets, such bonuses should be addressed as part of an already existing Delaware derivative action because they alleged harm to the corporation. Finally, the court awarded plaintiff $60,307, the amount of plaintiff's accumulated capital account with the defendant corporation. Zutrau v. ICE Sys., Inc., Index No. 37576/2009, 03/20/13 (Emerson, J.).**

Insurance Law; CPLR Article 78; error of law; arbitrary and capricious; abuse of discretion. Petitioners, a bank and a banking corporation, challenged the approval by respondent New York State Insurance Department of the restructuring of respondent insurance companies. Those companies insured repayment of petitioners' structured-finance products. The restructuring effectively divided one insurance company into two: one new company focusing on the structured finance market and another focusing on public finance, like municipal bonds. The restructuring included a dividend payment, a reinsurance transaction, and a stock redemption. First, the court held respondent's approval was not affected by an error of law. The payment of dividends out of earned surplus created by simultaneous transactions was not barred by New York Insurance Law ("NYIL") §§ 4105, 1308, or 1505. Respondent's approval of the reinsurance transaction as fair and equitable because the interests of policyholders would not be adversely affected was not an irrational or unreasonable interpretation of NYIL § 1505. Nor did respondent err in approving the stock redemption under NYIL § 1411 by failing to treat the redemption as a proposed dividend or by determining that the redemption was reasonable and equitable as long as the insurer could pay claims as they came due. Second, the court held respondent's approval was not arbitrary and capricious or an abuse of discretion. Despite some errors in the restructuring application, petitioners failed to show the errors would have affected the approval decision. Further, the arbitrary and capricious test is not satisfied by respondent's failing to take a course of action petitioners insist would have been more prudent. Although alleging that information was concealed from the application, petitioners cited no authority allowing the court to annul the approval decision based on such concealment. Last, because there was no finding of insolvency, NYIL § 1309 was not implicated. The court denied the petition, except for declaring respondent's approval did not extinguish petitioners' causes of action against the respondent insurance companies in a separate proceeding. <u>ABN Amro Bank N.V. v. Dinallo</u>, Index No. 601846/2009, 3/04/13 (Kapnick, J.).

Mechanic's lien. Breach; contract; negligence; restitution; indemnification; conversion; unjust enrichment; willful exaggeration; injury to property; slander of title. This action involved a dispute between plaintiff-owner and a general contractor, a subcontractor, and their respective principals. After the general contractor entered into two agreements with the subcontractor, plaintiff-owner removed the general contractor for cause and hired non-party Future City to act as the new general contractor on the project. The subcontractor then entered into two agreements with Future City. Plaintiff-owner alleged that Future City subsequently terminated these subcontracts for cause, and the subcontractor filed a mechanic's lien against the property but improperly identified the person with whom the contract was made. This lien was vacated in a consent order that indicated a new mechanic's lien could be filed in a timely manner. Three months later, the subcontractor filed a second mechanic's lien identifying the original general contractor as the contracting party. Plaintiff-owner sought damages under alternative theories of breach of contract, negligence, indemnification, restitution, and a wrongfully filed mechanic's lien, while the contractor/principal defendants asserted counterclaims of breach of contract, conversion, and unjust enrichment, This action was joined for a bench trial with a related action brought by the subcontractor against the owner to foreclose the second mechanic's lien. At the conclusion of the joint trial, the court ruled that the lien was void as it was filed untimely. As a result, plaintiff-owner's counterclaim in the subcontractor's action for willful exaggeration was dismissed. In the action brought by plaintiff-owner, the causes of action for breach of contract and negligence were withdrawn, while the causes of action for indemnification and restitution were dismissed on the ground that plaintiff-owner was not a beneficiary under the Lien Law and no proof of any actual diversion of assets by the original general contractor, the subcontractor, or its principal was presented. The cause of action for a wrongfully filed mechanic's lien was dismissed as to the general contractor's principal only after it was established that the subcontractor's principal had filed the lien. The conversion counterclaim asserted by the general contractor and its principal was dismissed on the ground that any recovery by the general contractor could be based only upon breach of contract. Plaintiff-owner argued that the general contractor's counterclaims for breach of contract and unjust enrichment must be dismissed based on payment. The court found that the general contractor failed to prove any damages for breach of contract and unjust enrichment since a final release was signed by its principal and stated a balance due of $0. Plaintiff-owner contended that its causes of action seeking damages for a wrongfully filed mechanic's liens were based upon the common law tort cause of action for injury to property. The subcontractor argued that the counterclaims were actually for slander to title and that plaintiff-owner failed to allege the requisite malice and special damages in its pleadings. The court found this argument unavailing since plaintiff-owner never sought to recover based upon slander of title and a mechanic's lien does not cast doubt on the validity of title. The court also held that plaintiff-owner had properly alleged an injury to property cause of action. The court found that recovery for damages resulting from the willful exaggeration of a lien is available through various common law claims, including injury to property. The court further found that the general contractor was not running the project, but that the subcontractor and its principal, who had brought the general contractor onto the job, were actually managing it and acting as the general contractor. Accordingly, the court found that the subcontractor wrongfully, unlawfully, and knowingly filed the mechanic's lien against the property based upon a fictitious claim. The evidence demonstrated that the subcontractor made false representations that the lien was for work completed solely under its contract with the general contractor and filed fictitious liens against the property by intentionally incorporating inflated claims and false work completion dates. Plaintiff-owner was awarded judgment against the subcontractor for $150,036.41, representing the cost of flood insurance and mortgage interest incurred during the period defendants' fraudulent lien delayed construction. Plaintiff was also entitled to recover against the subcontractor's principal in his individual capacity for the wrongfully filed mechanic's lien. Neptune Estate, LLC v. Big Poll & Son Construction, LLC, Index No. 16458/2010, 3/14/13 (Demarest, J). **

Mortgage-backed securitizations. Sealing order. Plaintiff insured 15 residential mortgage-backed securitizations. Plaintiff sued defendant financial institutions that originated or purchased the mortgages and alleged successor and vicarious liability against defendant bank. Defendant bank moved to seal in whole or part eleven categories of previously-designated confidential documents included as exhibits to summary judgment motions. Records may be sealed for "good cause" under § 216.1(a) of the Uniform Rules for Trial Courts. Good cause requires that public access to a document will likely result in harm to a compelling interest of the movant, and has been found where sealing protects trade secrets or a business's competitive advantage. Where sealing is authorized, redaction is an option. As to defendant's financial account numbers, home addresses of witnesses, and identifying information of non-party borrowers of the securitized loans, the court held good cause existed based on the protection of privacy interests and a lack of compelling interest in disclosure. Next, the court agreed with defendant's argument that amounts paid by defendants to vendors should be sealed because disclosure could harm defendant's procurement-related dealings. The court also held good cause existed to redact information concerning defendant's subsidiaries not involved in the litigation. As to the amount of repurchase reserves, the formula for calculating reserves, and other information about setting reserves, the court granted defendant's request to redact such information because disclosure could reveal defendant's ability to resolve claims. The court agreed to redact figures, but not headings and other contextual information, from documents disclosing defendant's minimum capital ratios, litigation reserves, and expenses incurred due to legal fees and settlements, as well as from documents disclosing non-public information of the defendant financial institutions, such as current profitability, aggregate litigation amounts, legal fees, and reserves. Defendant also sought to redact information concerning its capital contributions to the defendant financial institutions. Plaintiff argued that the aggregate amount of contributions was revealed in a separate litigation. But the amount in that litigation differed from the figures in the documents at issue. Moreover, plaintiff failed to show how disclosure of a certain subject matter outside of the litigation operated as a subject matter waiver in the litigation prohibiting a showing of good cause for information pertaining to the same subject matter. Thus the court held there was good cause to redact the capital contributions. As to the sealing of a settlement agreement, the court held there was good cause to seal only the confidential portions of the agreement that had not been previously disclosed in a press release. Last, the court determined that defendant's internal documents describing allocation of settlement payments should be redacted to hide specific dollar amounts, but not sealed in their entirety. MBIA Ins. Corp. v. Countrywide Home Loans, Inc., Index No. 602825/2008, 1/4/13 (Bransten, J.).

Securities fraud. Common law fraud. Statute of limitations. Plaintiffs purchased residential mortgage-backed securities from defendants over a period of one year. Four years after the last purchase, plaintiffs filed a complaint asserting claims based on fraud, fraudulent inducement, aiding and abetting fraud, negligent misrepresentation, and violations of the 1933 Securities Act. Plaintiffs alleged defendants falsely represented in offering materials that the loans were originated in accord with sound underwriting guidelines, misrepresented due diligence, and misrepresented the quality of the loans. Defendants moved to dismiss the claims as time-barred under both Illinois and federal law and for failure to state a claim. The court determined the claims were timely under Illinois law because the tolling provision of Illinois Securities Act applied to the statutory claims and the common law claims and plaintiffs were not required to plead that the limitations period was tolled. The court credited plaintiffs' allegation that information giving rise to a duty to inquire only became known one year after the last purchase. However, the court dismissed the federal claims as untimely because plaintiffs must affirmatively allege tolling under the Securities Act and the claims were barred by the three-year statute of repose regardless. The court denied the motion to dismiss the fraud and fraudulent inducement claims. The court determined plaintiffs adequately pled reliance on offering materials before the purchases; boilerplate disclaimers in the materials did not disclose the risk of systemic disregard for underwriting standards, as defendants alleged; and defendants had peculiar knowledge because plaintiffs lacked access to underlying loan files. The court also determined that plaintiffs adequately pled misrepresentation because defendants' cure provision and disclaimers in the materials were inapplicable where plaintiffs alleged a systemic abandonment of standards and defendants' appraisals were akin to facts, not opinions. The court determined that plaintiffs adequately pled scienter because the inference of scienter could be drawn from pervasive misconduct and plaintiffs need not identify particular individuals involved. The court therefor denied the motion to dismiss the aiding and abetting fraud claim, but dismissed the negligent misrepresentation claim because defendants' mere possession of loan files did not constitute the specialized knowledge that can create a duty. Allstate Insurance Co. v. Merrill Lynch, Index No. 650559/2011, 3/14/13 (Bransten, J.).

Settlement; enforcement of agreement in principle; CPLR 2104; stipulation of settlement. Plaintiff corporation filed suit alleging a pattern of misconduct and breaches of fiduciary duty by defendants, former and current directors, officers and employees of plaintiff. Defendants counterclaimed and filed a third-party complaint against an entity related to plaintiff, alleging breach of contract, breach of fiduciary duties and fraud, among other claims. The principals of plaintiff/third-party defendants and defendants/third-party plaintiffs, who had been former classmates, longtime friends, and business partners, met in person for 14 hours to negotiate a settlement. No attorneys were present at this meeting. Defendants claimed that a global settlement was reached and that a written agreement in principle was prepared and signed at the meeting. This agreement stated its purpose was "to negotiate all of the substantive terms of a settlement and leave it to our respective lawyers to 'draft a formal agreement.'" The agreement stated that each side no longer would pursue any other past claims and all legal proceedings would be cancelled, plaintiff would make a lump sum payment to defendants, tax issues would be split 50/50, and plaintiff would acquire all shares from defendants. Thereafter the parties were unable to agree to a more formal settlement agreement. Plaintiff/third-party defendants moved for an order dismissing certain claims asserted in defendants' counterclaim and third-party complaint. Defendants cross-moved to enforce the purported settlement agreement. Plaintiff opposed the cross-motion, arguing that its principal did not have authority to bind all parties and that the written agreement did not contain all material terms needed to resolve all issues, including the failure to include a non-competition provision. The court reasoned that all requirements of CPLR 2104 governing stipulations must be analyzed pursuant to principles of contract law. It noted that this written settlement agreement had been signed by the principals, who would not have met for fourteen hours if they did not have authority to bind their respective parties. It found that the agreement addressed all relevant terms, including the buyout price, payment terms, redemption of shares, a covenant as to naming rights, and a release of all claims. On these facts, and coupled with New York's public policy favoring the enforcement of settlement agreements, the court granted defendants' cross-motion to enforce and denied plaintiff's motion to dismiss as moot. De Well Container Shipping Corp. v. Guo, Index No. 12955/2011, 3/3/13 (Driscoll, J.). **

Shareholder derivative suit; demand futility. Delaware Chancery Court Rule 23.1. Plaintiffs commenced a shareholders' derivative action arising from the company's admissions in a deferred prosecution agreement and an SEC consent judgment to bribing a customer to purchase more than $12,000,000 worth of the company's products. Plaintiffs alleged the company made materially misleading statements about the true nature of its business relationships, failed to maintain accurate records of expenses associated with the bribes, and failed to implement adequate oversight to prevent the misconduct. Further, plaintiffs alleged that three of the six members of the board of directors served on the company's compensation committee responsible for the award of stock options and restricted stock as part of the bribes, a violation of the company's shareholder plan. Relying on Delaware Chancery Court Rule 23.1, defendants moved to dismiss because plaintiffs did not first demand that the board of directors bring a lawsuit. Under Delaware law, demand is excused if the derivative complaint pleads particularized facts creating a reasonable doubt that the directors are disinterested and independent or that the challenged transaction resulted from the valid exercise of business judgment. The court found the complaint lacked the particularized facts required by either part of the test. The complaint failed to explain the board's involvement in or knowledge of the bribery scheme or with statements connected to the scheme. No current board member was implicated in the criminal or SEC action. No facts showed that the board members on the compensation committee knew or should have known that they were violating the shareholder plan. In the absence of such particularized facts, the court held that plaintiffs failed to show that a demand upon the board of directors was futile and dismissed the complaint. In re Falconstor Software, Inc. Derivative Litig., Index No. 2555/2011, 3/05/13 (Pines, J.).**

Single motion rule. Pleading with particularity; fraud; implied contract. Nonparty subpoena; apex deposition rule. Plaintiffs discussed a proposed website idea with defendants, after which defendants allegedly circumvented plaintiffs and created the website as if it had been their own idea. Defendants moved to dismiss plaintiffs' amended complaint, which repleaded plaintiffs' causes of action after their original complaint was dismissed without prejudice due to deficiencies. Plaintiffs alleged that there was an implied contract between the parties, that defendants fraudulently induced plaintiffs to reveal their plans about the website, and that defendants unjustly enriched themselves by using plaintiffs' idea without providing compensation. The first issue decided by the court was whether the single motion rule foreclosed defendants' right to seek dismissal of the cause of action alleging idea misappropriation in the amended complaint. The single motion rule prohibits a party from filing a second motion to dismiss an amended complaint if the same motion was essentially brought against the first complaint. Since plaintiffs' amended complaint asserted almost the identical idea misappropriation claim as the original complaint, the court ruled that defendants' second motion was barred by the rule. The court then analyzed whether the previously dismissed fraud claim was now pled with sufficient particularity to survive this motion. Analyzing defendants' challenge on the pleadings, the court noted that the particularity requirement is not meant to prevent a valid claim merely because the facts needed for particularity are not available at the time of pleading. Since the pleadings showed the general elements for fraud, plaintiffs' fraud claim could survive. Additionally, the court rejected defendants' contention that plaintiffs insufficiently pled silence in the absence of a fiduciary relationship in connection with the fraud. Defendants' actions were more than just mere silence since they actively listened to plaintiffs' idea and then allegedly induced plaintiffs to believe that they agreed with it. Turning to the element of reliance, the court held that although the exact role of the parties in the potential deal was not clear, there was enough of an agreement to work together to create justifiable reliance between the parties. The court then considered the repleaded cause of action for breach of implied contract. The court found that plaintiffs had not pled the required elements since an implied contract must be pled with the same elements as an express contract. Although the amended complaint contained facts to support some form of agreement, the amended complaint still failed to adequately set forth the terms of that agreement and therefore that action must be dismissed. As to the action for unjust enrichment, the court found that it would be unfair at the pleading stage to preclude plaintiffs from arguing that defendants somehow benefitted from their actions because there was a sufficient relationship between the parties. Finally, the court analyzed an ancillary issue regarding a nonparty subpoena. Plaintiffs served a subpoena on the nonparty CEO of a company that purchased the disputed website from defendants. The subpoena was served on the CEO personally, not on the company, and sought information from a valuation report produced by the company in deciding whether to purchase the website. The witness argued that he was subject to the apex deposition rule and therefore was protected from deposition. He also argued that the information sought could be provided by anyone at the company. The court granted the motion to quash the subpoena since plaintiffs had not shown that the information could not be obtained from interrogatories or that this witness had special knowledge that made his individual deposition necessary. Daou v. Huffington, Index No. 651997/10, 2/13/13 (Ramos, J.).

Third-party indemnification. Breach of contract. Gross negligence/recklessness. Breach of the implied duty of good faith and fair dealing. Contract formation. Plaintiffs comprise two groups ("Cointer" and "COPASA") that participated in bidding on three road projects being auctioned by the Government of Chile. Defendants collectively acted as plaintiffs' financial advisor under the terms of an engagement letter. The project required plaintiffs to submit a bid and a $10 million "bid bond," which would be forfeited in the event that plaintiffs withdrew from the project. The engagement letter expressly limited plaintiffs' recovery to 50% of the amount of the success fee (which was payable to the winning bidder upon closing for the project; this event never occurred). Plaintiffs alleged that defendants violated the terms of the engagement letter when senior members of the team were replaced by junior and unsupervised personnel. The bid ultimately was submitted with serious errors and miscalculations, resulting in the submission of a bid undervalued by $82 million. Absent the miscalculations, plaintiffs bid would still have been the lowest (and would have been awarded the contract), but at a price $82 million higher. In subsequent meetings between the parties, plaintiffs requested that defendants take a 49% interest in the project. When defendants refused, plaintiff COPASA terminated its participation in the project. Ultimately, defendants agreed to provide financing in exchange for a 33.3% interest in a corporation set up to manage the project (once it had completed diligence on a third-party company selected to replace COPASA) ("the March agreement"). In reliance on that offer, plaintiff Cointer assured Chile in meetings attended by defendants that it remained committed to the project. As alleged in the complaints, defendants did not provide or procure financing and instead requested additional concessions, including a $10 million structuring fee. Plaintiff Cointer and defendants continued negotiations, resulting in another agreement ("the October agreement") pursuant to which defendants were to provide financing in exchange for 505 shares of common equity, half of which was to be syndicated to a third-party Canadian engineering and construction firm selected to replace plaintiff COPASA. Plaintiffs alleged that defendants retreated from their obligations under the October agreement and demanded additional equity financing without any required reciprocal contributions before withdrawing from the project. Plaintiff COPASA asserted a single cause of action for breach of contract; plaintiff Cointer, in a separate but related action, brought eight claims: breaches of contract and breaches of the implied duty of good faith and fair dealing on each of the engagement letters, the March agreement, the October agreement, as well as claims for gross negligence/recklessness and promissory estoppel. Defendants argued that the engagement letter limited any recovery to 50% of the success fee received by any party. The court noted that although parties are free to enter into contracts that "absolve a party from its own negligence . . . or that limit liability to a nominal sum," New York public policy prohibits insulation from grossly negligent conduct, which "must smack of intentional wrongdoing." Defendants argued that the limitation applied only in the event that a success fee was received. The court disagreed with this interpretation, finding that the provision applied to the entirety of the engagement letter, at whatever point in time the alleged loss or damage occurred. However, the court held that the language did not "unequivocally reflect" the intent to indemnify claims "between the contracting parties rather than third-party claims" and therefore would not be applied to the instant claims, those between the parties to the contract. Plaintiffs argued that they had adequately alleged more than the mere "typo" described by defendants, and that, in any event, the issue of gross negligence could not be determined as a matter of law. The court held that, in fact, "courts routinely dismiss gross negligence claims on motions to dismiss where the allegations do not 'smack of intentional wrongdoing.'" The court dismissed the gross negligence claims, holding that plaintiffs' allegations—that the bid model: (1) was designed defectively; (2) failed to incorporate information set forth in tender documents; (3) failed to incorporate the correct completion date; (4) failed to run checks on the bid model to confirm calculations; and (5) did not replace one member of the team who left defendant prior to submission of the bid—established only an allegation that defendants were careless, and did not amount to conduct that "smacks of intentional wrongdoing." The court dismissed plaintiff Cointer's three claims for breach of the duty of good faith and fair dealing and its promissory estoppel claim because they were not pleaded in the alternative. The opinion noted that even if they had been pleaded properly, they would not survive the deficiencies identified in the court's analysis regarding the claims for gross negligence/recklessness. The court next dismissed claims arising out of the March agreement, which it noted was marked "For Discussion Purposes Only," had no designated space for affixing authorized signatures, and could not constitute a binding contract. The court also noted that "it is not clear" that the October Agreement reflected a meeting of the mind since it contained many conditions which had to be satisfied before the parties could proceed." Nonetheless, because it was possible that the October agreement contained a binding commitment for defendants to provide an equity stake in the project, the court held that whether defendants acted in good faith under that agreement required denial of the motion to dismiss that cause of action. S.A. De Obras Y Servicios, COPASA v. The Bank of Nova Scotia, No. 651231/2012 (Sherwood, J.) and Cointer Chile, S.A. v. The Bank of Nova Scotia , No. 651555/2012, 3/22/13 (Sherwood, J.).

Unjust enrichment. Conversion. Default rate of interest. Options to extend. Fraud with particularity. Statute of limitations. Plaintiff borrowed $1,600,000 from defendant mortgagee. The mortgage agreement provided four options to extend the maturity date and set forth the terms under which the options could be exercised. Approximately one week before the maturity date, plaintiff faxed a letter requesting a pay-off figure and a two-month extension of the loan at the same rate of interest. These terms differed from the option terms set forth in the mortgage. Defendant mortgagee immediately faxed a letter informing plaintiff that the mortgage would mature on the specified date and, if not paid in full, it would assess the maximum amount of interest permitted by law (24%), as agreed to in the mortgage. The mortgage matured without full payment, and over the next three months defendant sent three letters advising of the default and the 24% default rate on the unpaid principal balance. Plaintiff then paid off the loan, which included $135,397.81 in interest at the default rate. In exchange for waiving an $110,000 assignment of mortgage fee, the plaintiff executed and delivered a general release to the mortgagee "under protest." More than three years after the payment, plaintiff commenced an action against defendant for: (1) unjust enrichment; (2) conversion; (3) fraud; and (4) fraudulent inducement with respect to the default interest rate. A fifth cause of action sought punitive damages. Defendant moved to dismiss the complaint based upon documentary evidence, statute of frauds, statute of limitations and failure to state a cause of action. The court dismissed the unjust enrichment, conversion, and punitive damages claims. With respect to causes of action for fraud and fraudulent misrepresentation, the court found that when the purported justifiable reliance is based on an alleged oral modification of the note and mortgage, such reliance is barred by the Statute of Frauds (G.O.L. §§5-701, 5-703 and 15-301). The court also found that the release signed by the plaintiffs barred all claims set forth in the complaint and that signing the release "under protest" at most made the release voidable. It also noted that the complaint neither alleged that the release was procured by fraud not sought to set it aside. A&A World Realty Inc. v. Emigrant Funding Corporation, Index No. 15095/2012, 3/7/13 (Kitzes, J.).**

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