THE COMMERCIAL DIVISION LAW REPORT

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

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

Hon. Ann Pfau
Chief Administrative Judge of the State of New York

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Arbitration; non-signatory to agreement to arbitrate; imputation of intent. Non-signatory's direct benefit from agreement; indirect benefit. In a proceeding involving $1,300,000 in attorneys' fees, petitioner investment fund moved to stay, and respondent legal firm cross-moved to compel, arbitration. Petitioner was controlled by a non-party, a LLC with three non-party managing members. The New York-based managing member had a separate investment firm that faced a fraud investigation by the state attorney general (AG), and he retained respondent to represent the firm. The retainer agreement provided for disputes to be arbitrated. Subsequently, petitioner was itself contacted by the AG, and, respondent claimed, petitioner retained respondent and another law firm to represent it. The AG's investigation widened, and respondent drafted a second retainer agreement formalizing its representation of petitioner. The New York managing partner declined to sign on the grounds that the LLC's operating agreement required all three managing members to agree on company decisions. Respondent drafted another second retainer, which the first managing member signed, although the other two did not. Like the first retainer, the second provided that disputes would be arbitrated. The second retainer also recited specifically that it applied to respondent's representation of petitioner, and a letter accompanied it referring to respondent's representation of petitioner in the AG's investigation. Two months later all three managing members signed an interim agreement that stated that petitioner authorized respondent to continue to represent it in investigations by the AG. Petitioner had paid respondent over $975,000 in legal fees before the point respondent brought the arbitration action. Petitioner argued that no valid agreement existed to arbitrate between itself and respondent. The court noted that a non-signatory to an arbitration agreement cannot, generally, be compelled to arbitrate. The party seeking to compel arbitration must establish a basis from which an intent may be inferred. Intent may be imputed to a non-signatory in five ways: incorporation by reference; assumption; agency; veil-piercing/alter-ego; and estoppel. A non-signatory may be estopped from denying an obligation to arbitrate if it knowingly receives a direct benefit of an agreement containing an arbitration clause. Here, the court found, petitioner had willingly accepted respondent's legal services for more than two years, pursuant to the first retainer agreement with the New York managing member. Correspondence between the parties and petitioner's payments demonstrated that petitioner both had availed itself of respondent's representation and openly acknowledged doing so. Further, although this was not dispositive, New York regulations require an attorney to provide a client with a written letter of engagement; petitioner's argument that respondent, a large and experienced law firm, repre-

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sented it without governing written terms was unpersuasive, and the first retainer agreement had to be deemed the source of the terms. The court found that respondent's legal representation was a direct benefit to petitioner from the first retainer agreement, and so petitioner was estopped from avoiding arbitration under the agreement. It was not necessary to address respondent's arguments based on agency and contract ratification principles. The court granted the cross-motion to compel arbitration. Markstone Capital Partners, LP v. Gibson, Dunn & Crutcher, LLP, Index No. 101085/2010, 5/25/10 (Gammerman, JHO).

Contracts; ground leases; breach of contract; force majeure clauses. Pennsylvania law. Plaintiff and defendant had entered into a ground lease that required defendant to build and open a restaurant on commercial property owned by plaintiff and to pay plaintiff additional rent based on the gross sales of the restaurant. When defendant informed plaintiff that it had no present plans to open a restaurant, plaintiff sued for breach of contract. Plaintiff moved for partial summary judgment on the issue of defendant's liability. Defendant argued that its breach of the obligation to construct a restaurant was excused by the "force majeure" clause in the parties' contract. The "force majeure" defendant claimed was the "unprecedented worldwide economic meltdown." As an initial matter, the parties agreed that Pennsylvania law applied to their contract dispute (although the court noted that there appeared to be no conflict between Pennsylvania and New York law on the relevant issues). The court began its analysis with the plain language of the contract, which stated that non-performance under the lease would be excused when defendant was prevented from performing "by cause or causes beyond [its] control." Although the court stated that there could "be no doubt" that the "worldwide economic meltdown" was an event beyond defendant's control, it explained that the "critical inquiry" was whether defendant's failure to construct a restaurant on the leased property was due entirely to the global economic situation and not to any fault or negligence on its own part. The court held that, as a matter of law, defendant could not demonstrate that the global economic situation alone had prevented it from constructing a restaurant. Specifically, the court found that defendant had made various business decisions in response to the economic downturn and that one was to "apply its limited financial resources towards" obligations other than the construction of a restaurant. Finally, the court noted that there was no evidentiary showing that the severe economic downturn was not reasonably foreseeable. Indeed, the evidence showed that even in the absence of an economic downturn, entering into the lease was a "relatively risky deal" for defendant. Under these circumstances, the court explained that defendant could not "maintain its lease rights to the [property at issue] while depriving plaintiff of the full benefit of its bargain merely because [defendant's] expansion plans proved to be improvident." The court, therefore, granted partial summary judgment to the plaintiff on the issue of liability, and, according to the terms of the lease, held that plaintiff was entitled to costs and attorneys' fees as the prevailing party. Route 6 Outparcels, LLC v. Ruby Tuesday, Inc., Index No. 2413/2009, 5/12/10 (Platkin, J.). **

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Derivative suits; pre-suit demand; futility. Martin Act; preemption. Pleadings; duplicative claims; breach of contract; negligence. Auditor's liability; generally accepted accounting principles; due diligence. Corporate officers; business judgment rule; breach of fiduciary duties. Prior action pending; stay; first-in-time rule. Plaintiffs brought this derivative action against an investment company, the company's manager, the company's officers, the company's investment consultant, and the company's auditors, alleging that defendants' misconduct had led to the company's loss of approximately $75,000,000 in connection with investments that had been placed with Bernard Madoff. Defendants moved to dismiss or, in the alternative, to stay the proceeding pending resolution of a related action pending in the United States District Court for the Southern District of New York. The court denied defendants' motions to dismiss the complaint on the grounds, *inter alia*, that plaintiffs had failed to make a pre-suit demand, that the business judgment rule insulated their conduct, and that plaintiffs' claims were preempted by the Martin Act. The court did, however, find that plaintiffs' breach of contract claims against the investment consultant defendant were duplicative of their negligence claims and dismissed the breach claims accordingly. Finally, the court granted the defendants' motions to stay this action pending resolution of the related federal action, following the "first-in-time" rule, by which New York courts generally defer to the court in which a matter was first filed. Sacher v. Beacon Associates Management Corp., Index No. 005424/2009, 4/26/10 (Bucaria, J.). **

Discovery; non-party depositions; protective order; special circumstances; hardship. Plaintiff sued its landlord and the landlord's manager for breach of the parties' lease agreement. The individual defendant was deposed and the court found his answers to questions regarding the ownership and management of the corporate defendant "confusing and evasive." Plaintiff then sought the deposition of the individual defendant's non-party son, a resident of Iran, as he had been identified as the owner of the corporate defendant, the party who negotiated the lease agreement, and person responsible for management of the corporate defendant. Defendants moved for a protective order, claiming that the son of the individual defendant should not be required to appear for a deposition because of his status as a resident of Iran and based upon the "current political climate in Iran." The court denied the motion. The court held that the burden of establishing the right to any protection from the liberal discovery requirements established by the CPLR falls upon the party seeking the protection. While recognizing that a party seeking discovery from a non-party must establish "special circumstances," the court held that plaintiff had made that showing here because the information sought could not be obtained from another source. Moreover, the court held that no evidence of hardship had been provided, other than conclusory allegations about the "current political climate" in Iran. The court directed the non-party to appear and further ruled that it would entertain an application for dismissal of the action or sanctions against defendants if the non-party failed to appear for his deposition. Todd Rotwein, D.P.M., P.C. v. Nader Enterprises, LLC, Index No. 454/2008, 4/14/10 (Driscoll, J.).**

Employment discrimination; New York State Human Rights Law; discrimination based on disability; definition of "employee." Retaliation; Labor Law § 215; definition of "employee." Contracts; breach; Statute of Frauds. Shareholder oppression; Delaware law. Plaintiff, the former executive vice president and a shareholder of defendant corporation, sued the corporation and its president after she was terminated. Defendants moved to dismiss. The motion was granted in part. First, the court denied defendants' motion to dismiss plaintiff's claim that the defendants had violated the New York State Human Rights Law by failing to provide her with reasonable accommodations for her disability (cancer). Although defendants argued that plaintiff, a principal of the corporation, was not an "employee" entitled to protection under the Human Rights Law, the court held that whether plaintiff was an "employee" was a factual question that could not be resolved based solely on the allegations in the complaint. For similar reasons, the court also denied defendants' motion to dismiss plaintiff's claim that they had violated Labor Law § 215. In this cause of action, plaintiff alleged that she had been fired in retaliation for raising objections to defendants' noncompliance with wage-and-hour laws. Defendants argued that this claim should be dismissed because: (1) plaintiff was not an "employee" within the meaning of the Labor Law; and (2) complaints about wage-and-hour violations cannot form the basis for a retaliation claim because it was plaintiff's job to bring wage-and-hour violations to defendants' attention. The court rejected both arguments. The court again held that the question whether plaintiff was an "employee" was a factual question that could not be resolved at the motion to dismiss stage. Additionally, the court found that because plaintiff alleged that she had refused to implement the president's order to stop tracking the hours of certain non-exempt employees, those allegations – which suggested that she had performed more than a merely managerial function – supported a claim for retaliation. The court also refused to dismiss plaintiff's claim that defendants had breached an oral contract to employ plaintiff for as long as she held stock in the corporation. The court held that the contract did not fall within the statute of frauds because it was capable of performance within one year. Finally, the court dismissed plaintiff's claim of shareholder oppression because Delaware law, which the parties agreed governed plaintiff's claim, does not recognize a cause of action for shareholder oppression. Zutrau v. ICE Systems, Inc., Index No. 37576/2009, 5/13/10 (Emerson, J.).**

Federal preemption; New York State False Claims Act; Airline Deregulation Act; Federal Aviation Administration Authorization Act; proprietary State action. Procedure; motion to dismiss; failure to state a claim. Pleading; fraud; CPLR 3016(b). Statute of limitations; Interstate Commerce Act. Plaintiffs brought this qui tam action alleging that defendants, companies that provided package pick-up and delivery services to the State pursuant to contract, had violated the New York State False Claims Act (the "SFCA") by charging the State improper fuel surcharges for package delivery. Plaintiffs claimed that defendants had charged the State a fuel surcharge for travel by air even when packages were, in fact, delivered via ground transportation. The court denied defendants' motion to dismiss. Defendants, first, argued that plaintiffs' claims were preempted by the Airline Deregulation Act (ADA) and the Federal Aviation Administration Authorization Act (FAAAA). Although both the ADA and FAAAA expressly preempt any state law that is "related to" air carrier rates, the court held that this case was not preempted because "the SFCA constitutes a species of proprietary State action, traditionally an exception to federal preemption." Defendants also moved to dismiss for failure to state a claim. Specifically, defendants argued that there were no false claims submitted to the State because their contract with the State expressly permitted them to impose the fuel surcharges. The court rejected this argument, finding that defendants' reading of the contract, at least at this pre-discovery stage, could not be accepted because it would lead to the absurd result that the State would be bound to pay a higher jet fuel surcharge for packages traveling by ground transportation. Defendants next argued that plaintiffs had failed to plead fraud with the required specificity. The court found this contention without merit, stating that plaintiffs need not allege every particular package to which an allegedly improper fuel surcharge had been added. Finally, defendants moved to dismiss the complaint on statute of limitations grounds. Relying upon the statute of limitations found in the Interstate Commerce Act (ICA), defendants argued that the statute bars any claim arising more than 18 months prior to the filing of the complaint. The court held that the ICA did not apply to "claims of overcharging with respect to privately agreed upon terms," but, in any event, noted that plaintiffs were seeking recovery for false claims less than 18 months prior to service of the complaint. Therefore, plaintiffs' claims were timely even under the ICA. State of New York ex rel. Kevin Grupp v. DHL Express (USA), Inc., Index No. 4821/2008, 4/26/10 (Curran, J.).**

Insurance; re-insurance; follow the settlement doctrine. Reasonable investigation. Obligation to allocate. Punitive damages and pollution exclusions. Self-insured retentions. Inability to demonstrate loss within policy period. Plaintiff alleged breach of certificates of reinsurance; defendants, various reinsurers, argued that plaintiff's payments to a polluting chemical company were made outside the terms of the policies they reinsured. Defendants moved for summary judgment on some claims and some of their affirmative defenses. Plaintiff had provided liability coverage to a chemical company that manufactured products that included pollutant PCB. The chemical company had been sued by the EPA, state regulators, and third parties, then brought its own suit in a Delaware court for a declaration that plaintiff was obligated to pay under its liability policies. Plaintiff and chemical company engaged in serious settlement negotiations and agreed that plaintiff would pay $7,300,000 dollars in clean-up costs and 50% of third-party claims up to $150,000,000 per site after the chemical company satisfied an $80,000,000 per site deductible. Defendants, billed for clean -up costs, paid without objection. The first settlement agreement was amended twice. In the latter agreement, plaintiff agreed to pay approximately $140,000,000 of the $150,000,000 per site limit. Defendants refused to pay billings related to an Alabama site submitted under these agreements. Plaintiff argued here that defendants must reimburse it under the follow the settlements doctrine, by which a reinsurer will be bound by a settlement as long as it is reasonably, even if not technically, within the terms of the original policy, and as long as the ceding company entered into it in good faith after reasonable investigation. In opposition defendants submitted plaintiff's internal reports investigating the chemical company's reimbursement demand. One report forecast that the punitive damages award in one of the third party actions might reach $900,000,000, and a subsequent memo by plaintiff's counsel indicated that the company's settlement decision must have been affected by "fear" of such damages. The court noted that plaintiff's policies explicitly excluded both punitive damages and pollution, unless the contamination was sudden and accidental. Plaintiff's own report had said that the third party claims were the result of "traditional" environmental pollution, neither sudden nor accidental. The court also noted that by the time the chemical company had paid the third party claims, the Delaware court had determined that under the applicable Missouri law the pollution exclusions barred coverage for losses stemming from the company's repeated disposal of contaminants spanning decades. Although the Delaware court's determination had come shortly after the first settlement was entered into, plaintiff still had been required, when the third party claims were submitted, to conduct a reasonable investigation to determine if they were covered, and a reasonable investigation would include legal developments. The court noted that plaintiff's claims analyst had not even analyzed the pollution exclusions in the policies. It found that plaintiff had investigated the third party claims not in terms of whether the policies covered them but in reference to the indemnity provisions of the first settlement agreement. Defendants pointed to other ways that plaintiff had effectively provided for coverage exceeding the reinsured policies' limits. There was no dispute that the pollution had gone on continuously during the chemical plant's 50 years of operation. Plaintiff could not demonstrate that the chemical company had experienced a loss within the years of plaintiff's coverage. If, for example, the $550,000,000 the company had paid to settle the third party actions related to the Alabama site had been spread over 50 years, and self-insured retentions taken into account, the self-insured retention under the reinsurance certificates would likely not have been reached. In reimbursing the company plaintiff had assumed that the company had exhausted its self-insured retention and that its entire loss had occurred solely during plaintiff's coverage. This effected a change in coverage contravening express terms of the policies and eliminating their definition of "occurrence." Also, the first agreement contained a provision removing the obligation set forth in the policies to allocate to other insurers. But a reinsurer cannot be held accountable for any loss that the reinsurance policy did not cover. Plaintiff's main opposing argument was that defendants had paid their portion of the clean-up costs, which arose from the same pollution disposal. The court found, though, that plaintiff's clean-up payment had occurred under different terms from its settlement of the third-party claims. The court granted defendants' motions, finding that defendants had demonstrated that the third party payments for which they were billed were not made within the scope of the policies and that plaintiff had failed to reasonably investigate. American Home Assurance Co. v. American Re-Insurance Co., Index No. 602485/2006, 5/24/10 (Ramos, J.).**

Mortgages; mechanics' liens; Lien Law § 22; building loan contracts; priority among lienors; Section 13 of the Lien Law. Plaintiff commenced this foreclosure action after defendant borrowers defaulted under the terms of a loan agreement. Three defendant contractors moved for summary judgment on the priority of their mechanics' liens. The defendant contractors argued, first, that plaintiff's mortgage was subordinate to their mechanics' liens because the loan agreement had not been filed as required under Lien Law § 22. Under this statute, a "building loan contract either with or without the sale of land" must be filed in the county clerk's office, and if the loan contract is not properly filed, it "is subject to the lien and claim of a person who shall thereafter file a notice of lien." The court held that the plaintiff's mortgage constituted a "building loan contract" as defined by Lien Law § 2(13) because: (1) the loan agreement was between a lender and the owner of real property; (2) in the agreement, the owner made an express promise to make improvements on the property; (3) the lender was to be kept apprised of construction progress; and (4) the agreement itself contemplated that the $10,000,000 project loan would be secured by a mortgage on real property. Because the mortgage was an unrecorded building loan contract, the court held that it was subordinate to the defendants' mechanics' liens. The defendant contractors next disputed the priority of liens among themselves. The court found that the subcontractor's lien was superior to that of the general contractor defendant. And even though the remaining contractor claimed its lien should be superior to all others pursuant to Lien Law § 13 because it had performed labor, the court rejected this claim on the ground that there was no evidence that the lien was for daily or weekly wages of laborers. Altshuler Shaham Provident Funds, Ltd v. GLM Tower LLC, Index. No. 9348/2008, 5/17/10 (Karalunas, J.).**

Motion to dismiss; documentary evidence; failure to state a cause of action; exculpation clause. Breach of contract. Negligence; breach of fiduciary duty; breach of duty to disclose. Agency; apparent authority. Plaintiff's predecessor-in-interest entered into an escrow agreement with defendant in connection with the purchase of two parcels of property. In addition to being the escrow agent, defendant was also obligated to provide title insurance in accordance with the escrow agreement. Subsequently, defendant's former vice president began working for another title company that had shared a long-standing agency relationship with defendant with respect to escrow, title and closing matters. Defendant's former vice president, purportedly with defendant's knowledge and consent, requested that plaintiff's predecessor-in-interest agree to the appointment of the agent title company as successor escrow agent under the escrow agreement with defendant. Plaintiff's predecessor-in-interest consented to the appointment of the agent title company. However, pursuant to an amendment made to the underlying escrow agreement, defendant was to remain the issuer of title insurance at the closing of the property. The following year, defendant terminated its relationship with the agent title company after learning that the agent had been engaged in a fraudulent scheme to misappropriate various client escrow finds. Plaintiff had had no knowledge of either the alleged misappropriation or the subsequent termination. Within days of the termination, plaintiff's predecessor-in-interest had deposited monies with the agent to be held in escrow. Shortly thereafter, plaintiff's predecessor-in-interest had learned that the agent had absconded with the funds. Plaintiff demanded that defendant indemnify it for the loss of the escrow funds after it learned that defendant had commenced its own action against the agent based upon the alleged fraudulent scheme to misappropriate clients' escrow funds (the fraudulent scheme became the subject of a criminal prosecution). Defendant refused plaintiff's indemnity request, and plaintiff subsequently filed suit alleging: (1) breach of contract stemming from defendant's failure to ensure that the escrow funds were held in segregated accounts and failure to supervise its agent; (2) negligence predicated upon defendant's failure to properly monitor the agent; (3) breach of fiduciary duty based upon defendant's failure to disclose its suspicions concerning its agent and its termination of the agency relationship; and (4) breach of defendant's duty to disclose its suspicions. Defendant moved to dismiss the complaint based upon documentary evidence arising from an exculpation clause contained in the escrow agreement. The court held that although the exculpation clause immunized defendant from liability except for "willful misconduct or gross negligence," plaintiff sufficiently alleged in its complaint that defendant had acted with gross negligence when it failed to notify plaintiff that it had terminated its relationship with its agent due to the agent's criminal conduct, while it knew that plaintiff was relying upon this agency relationship. The court dismissed plaintiff's breach of contract cause of action since plaintiff failed to establish the existence of a specific contractual provision that required defendant to supervise its agent to insure that the escrow accounts were maintained in a certain manner. The court, however, denied defendant's motion to dismiss plaintiff's negligence cause of action. It found that plaintiff had sufficiently alleged that defendant owed it a duty of care since defendant had failed to take the necessary steps to notify plaintiff that it had terminated its relationship with its agent based upon its discovery of the agent's criminal conduct and since defendant was in the best position to prevent plaintiff's loss of the escrow funds it had transferred to defendant's long-standing agent. The court further held that the knowledge of the agent's criminal conduct was peculiarly within defendant's knowledge and that plaintiff was unable to learn of the agent's termination by due diligence since information about the termination was not publicly available at the time. Moreover, the court found that defendant also had failed to take steps to strip its agent of any lingering appearance of authority. Lastly, the court dismissed plaintiff's cause of action for breach of fiduciary duty since plaintiff failed to allege that it had placed the higher trust or confidence in defendant that would transform the relationship into a fiduciary one. Route 747 Investors I, LLC v. Commonwealth Land Title Insurance, Index No. 602352/2009, 4/19/10 (Ramos, J.).

Procedure; personal jurisdiction; CPLR 301; doing business; soliciting business; CPLR 302(a)(3); situs of injury; jurisdictional discovery. Forum non conveniens. Aiding and abetting breach of fiduciary duty; debtor/creditor relationship; arms-length transactions. Tortious interference with contract; breach of underlying contract required. Plaintiff, a French company, had invested $50,000,000 in two highly leveraged investment funds created by defendant banks, managed by defendant collateral managers, and rated by defendant ratings agency. The investment funds failed, and plaintiff sued, claiming that the collateral manager defendants had conspired with the bank defendants to transfer into the funds subprime mortgage securities that the bank knew had lost value in order to remove them from the bank's balance sheet. Plaintiff further alleged that the funds were able to finance the expansion of their investment portfolios because the ratings agency defendant falsely confirmed the funds' ratings. The complaint asserted claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and tortious interference. Defendants moved to dismiss on multiple grounds. The court dismissed the complaint in its entirety. First, the court dismissed the complaint as against the collateral manager defendants – one of which was based in London and the other in Jersey, an island in the English Channel – for lack of personal jurisdiction. The court held that the collateral managers' contacts with New York, which consisted of a handful of meetings in New York for the purpose of soliciting investors, were not sufficient to establish that the defendants were "doing business" in New York for the purposes of CPLR § 301. The court also rejected plaintiff's claim that because the funds maintained their investment portfolios in a bank in New York, plaintiff suffered an "injury" in New York for the purposes of CPLR 302 § (a)(3). The court explained that for the purposes of New York's long-arm statute, a nonphysical commercial injury is deemed to occur where the critical acts took place and/or where the plaintiff resided and suffered economic impact. In this case, the alleged misconduct occurred in England and Jersey, and plaintiff, a French company, sustained any injury in France. The court also denied plaintiff's request for an opportunity to conduct jurisdictional discovery, explaining that plaintiff had failed to make a "sufficient start" to establish that jurisdiction could exist. Although the court denied the defendant banks' motion to dismiss on forum non conveniens grounds, it granted their motion as well as the motion of the defendant ratings agency to dismiss for failure to state a claim. With respect to the issue of forum non conveniens, the court held that there was a substantial nexus between the case and New York because New York law would govern much of the litigation, defendant banks had offices in New York, and the funds' investment portfolio was held in New York. Turning to the merits of plaintiff's claims, the court, first, dismissed plaintiff's claim against both the bank defendants and the rating agency defendant for aiding and abetting the supposed breach of fiduciary duty by the collateral manager defendants. Applying New York law (which the court found was not in conflict with English law), the court held that the aiding and abetting claims failed because there was no underlying fiduciary duty owed by the collateral managers to plaintiff. The court explained that plaintiff was essentially a creditor of the funds and that the mere fact that a third party (i.e., the collateral managers) may have had a contractual relationship with the creditor's debtor did not give rise to a fiduciary relationship. The court also dismissed plaintiff's tortious interference with contract claims on the ground that plaintiff failed to allege any breach of the parties' contract. Oddo Asset Management v. Barclays Bank PLC, Index No. 109547/2008, 4/21/10 (Kapnick, J.).

Procedure; summary judgment. Debtor and Creditor Law §§ 276, 273 and 273-a; fraudulent conveyance. Conspiracy to defraud. Sanctions. Plaintiffs brought this action after one of the two individual defendants, who co-owned defendant limited liability company with the other individual defendant, defaulted on the terms of a stipulation of settlement that had been entered into in a prior lawsuit. Plaintiffs alleged that the defaulting defendant had tried to evade his debt obligation under the prior settlement by fraudulently transferring his interest in certain properties to his co-defendant without any consideration. Defendants moved for summary judgment and to impose sanctions on plaintiffs. The court granted defendants' motion for summary judgment but denied the motion for sanctions. First, the court granted summary judgment dismissing plaintiffs' claim that the defaulting defendant had violated Debtor and Creditor Law §§ 276, 273 and 273-a. The court noted that in order for a conveyance to violate these sections of the Debtor and Creditor Law, the debtor must have had an ownership interest in the asset that the creditor is alleging was fraudulently conveyed. In this case, however, the defaulting defendant did not hold legal title to the properties that were allegedly fraudulently conveyed. Accordingly, the court held that the defendant could not have conveyed those properties to evade his financial obligations to plaintiffs. Because plaintiffs had failed to present a triable issue that there had been any violation of the Debtor and Creditor Law, the court also dismissed plaintiffs' claim that there had been a conspiracy to defraud, explaining that there was no underlying tort that could support such a claim. Finally, the court found no basis for issuing sanctions. RDLF Financial Services, LLC v. Marc A. Bernstein, Index No. 101391/2009, 5/10/10 (Bransten, J.).

Right of first refusal; injunction; specific performance; declaratory relief. Plaintiff tenant commenced an action seeking, *inter alia*, a preliminary injunction to prevent defendant landlord from selling the commercial property in which plaintiff operated a store, in breach of tenant's properly and timely invoked right of first refusal to purchase the property "for the same price and upon the same terms." Tenant asserted that a provision contained in the third party contract of sale, which provided for the buyer to loan money to the seller, was an "unenforceable, arbitrary condition unrelated to the purchase of the subject premises." The court found that the loan was to assure availability of financing for a more expensive property the seller desired to purchase as a replacement property in order to take advantage of Internal Revenue Code §1031, which defers tax consequences on capital gains when the proceeds of a sale are invested in like property within six months. The court held the "provision to be entirely rational and to constitute an element of the consideration for the property" and there was "nothing about this clearly defined and detailed loan provision that suggests that it was intended to discourage plaintiff's exercise of its rights." The court granted the injunction and held that plaintiff was entitled to specific performance and directed plaintiff to enter into a contract of sale containing such "loan" provision, provide the required 10% down payment, and close within 40 days, as required by the third party contract of sale. Lesters Active, Inc. v. Combine Distributing Inc., Index No. 1350/2010, 4/5/10 (Demarest, J.).**

Securities; failure to state cause of action; common law fraud, aiding and abetting fraud, negligent misrepresentation; unjust enrichment. Plaintiffs brought this action against UBS AG (UBS), UBS Securities LLC (Securities) and UBS Financial Services Inc. (Financial) alleging common law fraud, aiding and abetting fraud, negligent misrepresentation and unjust enrichment in connection with a $50,000,000 investment in Medicor, a company formed to develop and market medical devices. Defendants moved to dismiss the complaint for failure to state a cause of action. Each of the defendants had assisted Medicor in marketing to plaintiffs senior secured convertible notes and warrants to purchase up to 3,125,000 shares of Medicor common stock. In connection with this marketing, plaintiffs alleged that Financial and Securities prepared and distributed on behalf of UBS a Company Overview and a Private Placement Memo with regard to Medicor's business, financial condition, etc. Each of these documents contained representations that Medicor had a strong management team and that its principal had invested a large amount of equity in Medicor and had provided additional capital to Medicor for operations and acquisition. Allegedly, further presentations illustrated that the principal had the resources to invest in Medicor based on his prior investments. Plaintiffs alleged that the representations regarding the principal's leadership and invested capital were false when made and that defendants either knew the representations to be false or were reckless in not knowing. Following plaintiffs' investment, the FBI uncovered a Ponzi scheme operated by the principal in connection with other tax advantaged investment vehicles (Exchange Entities), which were found to be connected to the investment capital in Medicor. Medicor and Financial were sued in a class action in Nevada by victims of the Ponzi scheme in March 2007. Plaintiffs were not parties to that action, and Financial settled all claims against it and all the other UBS parties. The Nevada court issued a Bar Order, which defendants asserted prevented plaintiffs from bringing the causes of action in this action. The court rejected this argument and held that the Bar Order did not prevent the assertion of plaintiffs' causes of action in this action because they did not specifically arise from the failure of the Exchange Entities. Plaintiffs neither were parties to the Nevada class action nor were they releasing parties under the settlement. In this case, plaintiffs asserted direct claims for damages against defendants arising solely from the circumstances of plaintiffs' $50,000,000 investment in Medicor, not damages arising from the failure of the Exchanged Entities. Defendants also argued that the fraud cause of action was not pleaded with specificity and failed to allege reliance, loss causation, or scienter. The court held that plaintiffs alleged with specificity that defendant Financial was involved in, or at least aware of, the Ponzi scheme and that it had prepared marketing documents and either distributed or caused them to be distributed to plaintiff. As such, plaintiffs adequately pleaded fraud against Financial. The court, however, declined to extend the same reasoning to Securities and UBS, and held that the complaint failed to allege with specificity that either of these two entities were aware of the Ponzi scheme or aware that the representations in the marketing material were false. The court found that the complaint clearly set forth the allegations necessary to state a cause of action for aiding and abetting fraudulent conduct against Financial, but not as against UBS or Securities. Lastly, defendants contended that plaintiffs' causes of action for negligent misrepresentation and unjust enrichment were barred by the Martin Act, General Business Law § 352 *et seq.* Relying on Jana Master Fund, Ltd. v. JPMorgan Chase & Co., 20008 WL 746540 (Sup Ct, NY County 2008), the court agreed with defendants and held that the Martin Act bars private claims for negligent misrepresentation since they are within the exclusive jurisdiction of the Attorney General. Similarly, plaintiffs' common law cause of action for unjust enrichment, which in this case was also based on alleged deceitful practices in connection with securities sales, was also dismissed, consistent with the holding in *Jana*. Silver Oak Capital L.L.C., v. UBS, A.G., Index No. 603750/08, 05/10/10 (Schweitzer, J.)

Summary judgment; breach of contract; waiver; tortious interference with contract. Plaintiff, which invested in and managed an investment banking boutique, sought recovery of its fees under an engagement agreement with defendant, which invested in and managed oil rigs and related equipment and facilities abroad. Plaintiff alleged that defendant had breached the agreement to pay plaintiff a fee for facilitating a "roll-up" transaction by which defendant would acquire oil rigs and other assets. Specifically, plaintiff claimed to have been "frozen out" of the negotiation and closing of a transaction that it had facilitated and for which it was owed a fee pursuant to the engagement agreement. Plaintiff sued for breach of contract, anticipatory breach, declaratory judgment on the contract, fraudulent inducement and punitive damages. Plaintiff also sued defendant's president and chairman for fraudulent inducement and tortious interference with contract. Plaintiff moved for summary judgment on its breach of contract claim. Defendants cross-moved for dismissal, arguing that the transaction described in the engagement agreement was never consummated, and correspondingly, that the transaction as to which plaintiff now sought fees was not contemplated by the engagement agreement. The court found that the terms of the engagement agreement were clear and unambiguous, and contemplated only a particular transaction that had not been consummated. Specifically, the court found that the engagement agreement identified particular parties to the contemplated transaction which, ultimately, did not participate in the "roll-up." Since the engagement agreement was clear and unambiguous, the court refused to give weight to extrinsic evidence showing that the engagement agreement was intended to cover transactions involving any other parties. Noting that the parties were sophisticated business entities, negotiating at arm's length, the court refused to entertain an alternative interpretation of the contract language. The court also rejected plaintiff's waiver argument, finding that statements in e-mails did not rise to the level of an unmistakably manifested waiver of a contract provision. Finally, the court dismissed the tortious interference cause of action, finding that breach of contract was an essential element of this cause of action. Since the court determined that the contract had not been breached, it dismissed that cause of action as well. Iconoclast Advisors LLC v. Petro-Suisse LTD,, Index No. 601048/2007, 5/14/10 (Fried, J.).

Summary judgment; leave to amend; hearsay evidence; pleading fraud with particularity; agency and apparent authority. Plaintiff purchased a note issued by defendant, a Bahamanian corporation, and, in return, loaned defendants $16,000,000 Defendants, including three guarantors of the corporate debt, subsequently defaulted on the note, and plaintiff sued to collect on the amount outstanding and moved for summary judgment. Defendants claimed that they did not owe any amount to plaintiffs because plaintiffs could not produce the physical note, which had been fully paid and destroyed on its maturity date. Defendants also moved for leave to amend their answer to consolidate the answers filed by all defendants and to add counterclaims for fraud, aiding and abetting fraud, and negligent misrepresentation. The court rejected defendants' contentions, noting first that in a separate litigation in Brazil, defendants acknowledged the existence of the note. Thus, the court held that plaintiff's inability to produce the original physical note was irrelevant. The court also held that some of defendants' evidence—a letter written by JPMorgan Chase purporting to show that the notes were paid for and destroyed upon maturity—were speculative hearsay and could not defeat summary judgment. The court noted that hearsay evidence may be used to oppose a summary judgment motion, but has very little value if offered as the only evidence in opposition to such a motion. The court also denied defendants' motions for leave to amend the answers, holding that while leave to amend pleadings should be freely given, it should be denied if the proposed claims lack merit. The court found that defendants failed to plead the elements of fraud with particularity in that they did not allege that plaintiff had made any misrepresentations to them directly; rather, defendants claimed that certain banks had made the misrepresentations. Defendants also admitted that they did not know and could not specifically allege the details of the alleged fraud with the requisite specificity. The court rejected defendants' argument that the banks were agents of the plaintiff. Apparent authority requires authorizing words or conduct by the principal, which defendants had not alleged. Finally, the court rejected defendants' negligent misrepresentation cause of action because it required a special or privity-like relationship imposing a duty on the defendant to impart correct information, and the parties here were engaged in an arm's length commercial transaction. IRB-Brasil Resseguros S.A. v. Portobello International Limited, Index No. 604449/2006, 5/27/10 (Fried, J.).

Ultra vires, Not-for-Profit Corp. Law § 203(a). Plaintiff had entered into a contract to purchase real property from defendant charitable organizations for $34,900,000. The Supreme Court authorized the sale. After plaintiff failed to make a required payment, defendants informed plaintiff by letter that they were terminating the sales agreement based on plaintiff's breach. Plaintiff brought suit, alleging four causes of action: (1) seeking declaratory judgment that the agreement was null and void ab initio because defendants lacked the requisite member approval pursuant to Not-for-Profit Corp. Law §§ 510-11; (2) for breach of contract and the making of materially false and/or fraudulent warranties or representations in the agreement; (3) for fraudulent inducement; (4) and for injunctive relief directing foreclosure and sale of the property to satisfy an alleged lien. Defendants moved to dismiss based on documentary evidence and for failure to state a claim. As an initial matter, the court ruled that the complaint was governed by the relevant ultra vires statute—Not-for-Profit Corp. Law § 203—which states that a court-approved corporate act may not be held invalid because the corporation lacked capacity or power for the act. The only three exceptions to this rule are when the lack of capacity or power is asserted: (1) by a shareholder of the corporation, (2) by the corporation itself, or (3) by the Attorney General. Because none of the exceptions existed, the court held that the agreement was not void as ultra vires, as it was duly authorized by the September 25, 2007 order. Furthermore, because this argument formed the legal basis for plaintiff's breach, fraud, and lien-based claims, the court dismissed the balance of the complaint. In a final note, the court admonished plaintiff's counsel for filing an affirmation in place of a memorandum of law in support of its position on the motion to dismiss. The court reminded the parties that an affirmation may be filed in place of an affidavit, but not in place of a brief pursuant to CPLR § 2106, stating that "[a]ffirmations, like affidavits, are reserved for a statement of the relevant facts; a statement of the relevant law and arguments belongs in a brief (i.e., a memorandum of law). 232 NYCRR § 202.8(c)." Empire 33rd LLC v. The Forward Association. Inc., Index No. 602074/2009, 4/1/10 (Fried, J.)

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

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