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# The *Commercial Division*

of The State of New York

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Law Report - January 2002

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## COMMERCIAL DIVISION LAW REPORT

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

HON. JACQUELINE W. SILBERMANN  
ADMINISTRATIVE JUDGE  
SUPREME COURT, CIVIL BRANCH,  
NEW YORK COUNTY

### JUSTICES OF THE COMMERCIAL DIVISION

JUSTICE LEONARD AUSTIN (Nass.)	JUSTICE HERMAN CAHN (N.Y.)
JUSTICE HELEN E. FREEDMAN(N.Y.)	JUSTICE IRA GAMMERMAN (N.Y.)
JUSTICE RICHARD B. LOWE III (N.Y.)	JUSTICE KARLA MOSKOWITZ (N.Y.)
JUSTICE CHARLES E. RAMOS (N.Y.)	JUSTICE KENNETH W. RUDOLPH (WEST.)
JUSTICE THOMAS A. STANDER (Mon)	

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JANUARY 2002 (COVERING DECISIONS ISSUED OCTOBER-DECEMBER 2001)

**The Report and the complete text of all decisions discussed in it are available on the website of the Commercial Division (recently revised) at <http://www.courts.state.ny.us/comdiv>, and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at [www.nysba.org/sections/comfed](http://www.nysba.org/sections/comfed). 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 Report is issued by the Commercial Division, not the State Reporter. 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.**

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**Account stated. Goods sold and delivered (CPLR 3016(f)). Attorney's fee; liquidated damages; reasonable value. Guaranties.** Action arising out of consignment of diamonds. Plaintiff asserted a claim for an account stated. Defendants contended that the corporate defendant had never agreed to the prices set forth in memoranda and invoices. The court ruled that defendants' allegations were insufficient to defeat summary judgment. The court found the allegations self-serving, conclusory and unsubstantiated. Defendants asserted that there had been a practice whereby value would be agreed upon after delivery, but the court found that they had offered no proof of this. Further, they failed to explain why the corporate defendant had tendered checks in the full amount billed. The court held that plaintiff had satisfactorily pled a claim for goods sold and delivered (CPLR 3016 (f)). The court ruled that defendants' contentions here were likewise insufficient. As to a claim for liquidated damages for attorney's fees, the court held that a notice on the front of each memorandum called attention to terms on the back and bound the corporate defendant thereto. The assertion of a disparity in bargaining power was unsubstantiated. The court declined to enter a judgment in the amount of 25% in liquidated damages, as specified, absent proof of reasonable value. This issue was referred to a referee. As to liability on guaranties, an issue of fact had been presented as to whether defendants had been under duress. [Milistar N.Y. Inc. v. J. Shree Corp.](#), Index No. 111507/2000, 12/24/01 (Cahn, J.).

**Arbitration; interpretation of scope of arbitration clause.** Motion by insurer to compel arbitration against all but four reinsurers, where reinsurers sought declaration that they were not obliged to reimburse the liability insurer under four reinsurance certificates. Applying the four-step inquiry under [McDonnell Douglas Finance Corp. v Pennsylvania Power &](#)

**Light Co.**, 858 F.2d 825 (2<sup>nd</sup> Cir 1988), the court found that the insurer identified no dispute between the parties within the scope of the arbitration clauses of the reinsurance certificates. The arbitration clauses limited arbitration to "irreconcilable differences of opinion ... as to the interpretation" of the contract. Following Associated Indem. Corp. v Home Ins. Co., 19 F3d 1432 (6<sup>th</sup> Cir 1994), the court found that the parties did not dispute interpretation, which involves "the sense and meaning," but rather the "legal affects and consequences" of the texts of the reinsurance certificates. Motion denied in its entirety. Argonaut Ins. Co. v Traveler's Ins. Co., Index No. 124063/2000, 11/2/01 (Freedman, J.).

**Arbitration; non-signatory; alter ego.** Pursuant to agreement, petitioner obtained licensees for defendants' designs and trademarks for home furnishing products. Under the agreement, petitioner was to receive a percentage of the royalties. The agreement contained an arbitration provision. Respondents sold the designs, trademarks and license agreements to another entity and terminated the agreement with petitioner. Petitioner demanded arbitration and commenced a proceeding to compel. The court ruled that the corporate respondent had to arbitrate, rejecting the contention that the application should be denied because the corporate respondent was willing to pay royalties. The individual respondent was a non-signatory to the agreement. A non-signatory can be compelled to arbitrate if the alter ego of the corporate signatory. The court ruled that petitioner had sufficiently alleged alter ego status in that the individual respondent had caused the corporation to sell all its assets, leaving it without assets to fulfill its obligation to petitioner, while all the proceeds were directed to the individual personally. Petition granted. Weil v. Abboud, Index No. 102678/2001, 11/5/01 (Cahn, J.)

**Arbitration; service of summons.** Action for tortious interference with employment contract. Employee left plaintiff to work for defendant. The court denied defendant's motion to stay plaintiff's arbitration with its former employee. This action did not meet any of the conditions necessary to stay an arbitration. Defendant was not a party in the arbitration, and the employee was not a party in this action. Plaintiff's claims against the employee could not be raised in this action, and its claims against defendant could not be raised in arbitration. The damages sought in the action were separately recoverable from the damages that plaintiff could recover in the arbitration. Even though the arbitration would decide two issues in this action, the arbitrator's decision would have no preclusive effect upon the defendant, even if the employee succeeded in the arbitration. The court noted that the arbitration was not much farther along than the action. The court granted plaintiff's motion to extend the time to serve the amended complaint and summons. The plaintiff needed additional time after its failed attempt to effect personal service on the defendant's director. The plaintiff's initiation of service pursuant to the Hague Convention, 14 days after filing of the amended complaint, and the attempt to serve defendant personally, constituted "more than reasonable diligence." No affidavit of merit was needed as the remaining cause of action withstood a prior motion to dismiss. Prebon Financial Products, Inc. v GFI Holdings Ltd., Index No. 603085/00, 10/9/2001 (Ramos, J.).

**Arbitration; threshold issues; arbitrability; non-signatories.** Action by former employee. Defendant moved to compel arbitration. Plaintiff contended that defendant had improperly confiscated shares because under the agreement plaintiff would forfeit the shares only if he quit or was terminated for cause. Defendant asserted that it had terminated plaintiff for poor performance. The parties disputed whether plaintiff's performance had been poor and whether that had been the reason for the termination. The dispute could only be resolved by determining what plaintiff did and what defendant's motive had been. These issues related to the parties' "employment relationship" and thus fell within the reach of an arbitration clause, as would plaintiff's claims themselves. The employment agreement would not apply to a co-plaintiff entity as a non-party and its claim against defendant would not have to be arbitrated under a clause in consulting agreements because defendant was not a party to those. A tortious interference claim thus survived, the court held. Arbitration ordered in part. Palowitch v. Cap Gemini Ernst & Young, Index No. 114312/2001, 11/9/02 (Freedman, J.).

**Breach of contract; tortious interference; summary judgment.** Action for breach of contract and tortious interference. Pursuant to CPLR 3212, defendant moved to dismiss the complaint. Corporation hired defendant to perform audit work and prepare tax returns. Defendant hired plaintiff in 1992, pursuant to a letter agreement, to prepare the corporation's 1991 tax returns. The relationship continued until 1999, when the corporation told the plaintiff that the defendant would assume the responsibility of preparing the corporation's tax returns. According to plaintiff, defendant agreed to let him serve as tax preparer so long as the corporation hired defendant. Although the agreement provided that defendant would not endeavor to displace plaintiff, the agreement unambiguously stated that plaintiff was engaged to prepare 1991 tax returns and did not create an ongoing contractual obligation. Subsequent correspondence renewed the engagement yearly. The defendant did not guarantee the plaintiff would serve as tax preparer for the duration of defendant's relationship with the corporation, especially where the corporation was not a party to the agreement engaging plaintiff and could override defendant's selection of a tax

preparer. The agreement did not contain an express integration clause. Relying on affidavits, exhibits, and the facts before the court, the court held that there was no expectation of a perennial agreement. Accordingly, the court dismissed the two causes of action alleging breach of contract. With respect to the remaining causes of action for breach of covenant and tortious interference, the court noted that the plaintiff only offered conjecture and defendant had attempted to influence the corporation's decision or somehow interfered with plaintiff's purported contract for continued employment. [Thurm v Deloitte & Touche](#), Index No. 118732/00, 10/10/01 (Ramos, J.).

**Breach of fiduciary duty; pleading with particularity. Conversion. Unjust Enrichment.** Action by owners and renters of units of a luxury resort against the developer, its managing agent, the officers of the managing agent, and members of a "Management Committee" handling the affairs of the resort. Plaintiffs alleged that a member of the Management Committee, who was voted out for cause, refused to step down, and that defendants constructed new villas on the resort's common areas. Funds from a "Rental Pool" used to pay resort expenses were allegedly diverted for improvement of the common areas and construction of a rival resort. Defendants also allegedly mishandled insurance claims and proceeds from losses due to hurricanes. Complaint alleged causes of action sounding in breach of fiduciary duty, conversion, unjust enrichment, fraud, constructive trust, and negligence, and sought an accounting, declaratory and injunctive relief. The court denied defendants' motion to dismiss, *inter alia*, the breach of fiduciary duty claims. The court found that the complaint alleged sufficient facts for a jury to find a relationship of confidence and trust with defendants, so as to give rise to fiduciary duties. The managing agent allegedly had complete control over the Rental Pool, determined rent and maintenance costs, and controlled plaintiffs' right to rent out their vacation homes. The court also held that, until plaintiffs had obtained an accounting, their inability to detail their damages was not an impediment to their claims. The court held that the business judgment rule did not bar plaintiffs' claims regarding mishandling of the insurance claims and proceeds, as plaintiffs alleged self-dealing and lack of good faith by defendants. Finally, the court held that a fiduciary relationship with defendants would not preclude plaintiffs from also asserting breach of contract claims as to certain resort leases. However, the court dismissed plaintiffs' claims for misuse of common areas, as the resort's offering plan clearly gave plaintiffs no expectation that the size of the common areas would remain as originally depicted. Plaintiffs also could not recover against the builder of rival resort for the profits he derived from that resort, as they established no fiduciary duty with the builder in this regard. Finally, the court dismissed plaintiffs' claims of conversion and unjust enrichment regarding misappropriation of the Rental Pool monies, as plaintiffs had no possessory right to the funds. As to plaintiffs' cross-motion, the court found that the part of the motion seeking summary judgment was premature, and no irreparable harm was demonstrated to warrant injunctive relief. Defendants' motion to dismiss partially granted; plaintiffs' cross-motion denied. [Howard v Cove Castles Dev. Corp.](#), Index No. 601414/2000, 11/14/01 (Cahn, J.).

**Class actions; antitrust; treble damages.** Antitrust class action against the five largest cigarette companies. Pursuant to General Business Law § 340(6) (the Donnelly Act), plaintiffs sued on behalf of persons who purchased cigarettes in New York indirectly from defendants from November 1993 until the present. Plaintiffs claimed that the defendants had engaged in lock-step pricing practices, citing examples from 1997 through 2000, and maintained a database to monitor cigarette prices. Plaintiffs sought treble damages under the Donnelly Act for defendants' maintenance of cigarette prices at artificially high levels. Upon the defendants' CPLR 3211 motion, the court dismissed the class action because CPLR 901(b) does not allow class actions to seek punitive damages. The court held that under New York law, treble damages are punitive, in contrast to the view of treble damages awarded under federal antitrust law. The Donnelly Act did not expressly authorize class actions by indirect purchasers. The court also held that GBL § 340(6) is not remedial in effect and, thus, the statute of limitation could not be retroactively applied. Plaintiffs' allegations pre-dated the effective date of the section. The court dismissed plaintiffs' claim pursuant to GBL § 349 because they did not oppose defendants' motion with respect to that claim. [Lennon v Phil Morris Companies, Inc.](#), Index No. 102396/2000, 10/9/2001 (Ramos, J.).

**Class actions; certification of reverse limited fund class; justiciability; class action elements.** Hospital sought to discontinue operations. It brought an action seeking certification of a mandatory class of unsecured creditors. Plaintiff sought a declaration of the rights of the parties. The court determined that plaintiff had not alleged a justiciable controversy. Plaintiff owed money to defendants and a putative class of unsecured creditors. It was defendants who had definite and concrete claims against plaintiff. Further, the court could not create a mandatory class to force defendants to settle with plaintiff. Plaintiff argued that justiciability existed because this was a limited fund class action. The court noted that New York cases have largely found limited fund class actions when plaintiffs sought to establish a class against a defendant having limited funds to pay plaintiffs. Plaintiff relied upon only one reverse limited fund class action, but there the parties had not challenged use of the class action device. If the court were able to proceed, it would have to conclude that individual questions affecting creditors would predominate over common questions, that the claims of the named defendants were not typical of the class,

that several sub-classes would be necessary, and that the action would not be superior. Plaintiff could settle with individual creditors, file for bankruptcy, or pursue a general assignment for the benefit of creditors. Motion denied. [Genesee Hospital v. Allied Office Products](#), Index No. 12761/2001, 12/21/01 (Stander, J.).

**Conflicts of law; foreign limited partnership. Contracts; interpretation; specific versus general provisions; Delaware Revised Uniform Limited Partnership Act. Accountings; other claims. Partnerships; general partner; mismanagement; derivative claim. Procedure; necessary parties.** Action arising out of dissolution of partnership. Plaintiffs claimed certain intellectual property. The court held that Delaware law applied since the agreement contained a provision designating New York law, including as to conflicts of law, as controlling. Under New York law, the law of the jurisdiction where a foreign limited partnership was organized governs its organization and internal affairs and the liability of its limited partners. Plaintiff pointed to language in the agreement providing for a return of intellectual property to plaintiff. However, that provision was one of several numbered paragraphs and the numbering would be rendered meaningless were the court to accept plaintiff's argument that the paragraph on intellectual property should be read as a specific provision taking precedence over the general priority of distribution. Plaintiff argued that the property could be conveyed only to him since the paragraph did not name anyone else. However, under the Delaware Revised Uniform Limited Partnership Act, priority is given to creditors. Distribution to creditors could be made even though they were not named. Claims for breach of contract and the covenant of good faith were dismissed as premature since there had not yet been an accounting. A breach of fiduciary duty claim was dismissed for this reason and also because a claim for mismanagement by a general partner should be asserted as a derivative claim. The court held that plaintiffs were entitled to an accounting though the agreement was silent on that. The court rejected an argument that unnamed signatories and limited partners had to be joined as necessary parties. As shareholders in a related entity, the signatories would be entitled to a payment from plaintiffs if the intellectual property were obtained, and they were subject to no liability here. As to the limited partners, they were necessary parties but, as they were subject to jurisdiction, they should be added instead of a dismissal of the case. [Mizrabi v. Chanel, Inc.](#), Index No. 601103/2001, 12/17/01 (Lowe, J.).

**Contracts; employment; oral modification; partial performance; estoppel; fraud and contract; fiduciary duty.** Plaintiff alleged an oral modification of a written contract that prohibited oral amendments. Plaintiff argued that the modification here was enforceable because of partial performance. The court ruled that conduct plaintiff referred to - - inaction - - could constitute partial performance only if the oral modification called for it, which plaintiff had not pled. Taking on additional duties would merely have been doing what the original contract required. Also, only the actions of the party insisting on the oral contract would be relevant. These considerations also doomed an estoppel argument. A fraud in the inducement claim merely duplicated the contract claim. The court held further that defendant owed no duty to plaintiff at-will employee. Complaint dismissed. [Murakami v. Napoli, Kaiser & Bern, LLP](#), Index No. 601345/2001, 10/29/01 (Freedman, J.).

**Contracts; interpretation; ambiguity.** Action arising out of complex transaction involving time-share investments. Plaintiff claimed that defendant had changed methods of allocation of common costs and expenses and retained \$4.2 million in breach of relevant trust transaction agreements. The parties agreed that plaintiff was obligated to reimburse defendant from funds held in a letter of credit account for certain costs and expenses, but disagreed as to which costs and expenses were reimbursable. The court ruled that the language of the relevant agreement was clear and unequivocal, demonstrating that the parties had intended that only costs and expenses incurred in connection with a 1989 trust transaction would be reimbursable. The court noted that some costs and expenses were common ones. The court found that the agreements were silent about this and that silence could not be interpreted as permitting allocation of all or most such costs to one account. Partial summary judgment for plaintiff. [Yasuda Trust and Banking Co. v. Financial Security Assurance, Inc.](#), Index No. 600594/2001, 11/20/2001 (Lowe, J.).

**Contracts; interpretation; breach of contract; premature claim; anticipatory breach; commercially reasonable efforts. Quantum meruit. Unjust enrichment.** Action arising out of contract regarding promotion of internet service venture developed by defendant. Under the contract, defendant was obligated to refund a portion of sums paid by plaintiff if defendant failed to procure one million users by a set date. Before that date arrived, the internet service provider retained by defendant ceased to provide the service and a replacement could not be found. Defendant refused to return any of the money received from plaintiff. As to a claim of breach of contract, defendant contended that it was premature since the date by which defendant was to refund a portion of the monies if one million users were not registered had not yet arrived. Plaintiff argued that the contract had not contemplated that the service would cease to operate and that defendant should have refunded a ratable portion of the monies within a reasonable time after the service had ceased. The court ruled, however, that the claim was premature and dismissed it without prejudice. As to a claim of anticipatory breach, the court concluded that the pleading did not set forth a viable claim of this type since it did not allege that defendant had expressed a clear and unequivocal intent to

repudiate its obligations. The court sustained a claim that defendant had breached the contract by retaining a nonrefundable payment of \$ 3.2 million even though it had failed to use commercially reasonable efforts to distribute five million CD's advertising the service; the payment would be nonrefundable only if the requisite efforts had been made. The court dismissed as duplicative of the other claims a claim that defendant had breached the contract by failing to determine with plaintiff the best course to follow in response to the cessation of business by the service provider. The court upheld claims for quantum meruit and unjust enrichment based upon plaintiff's having distributed e-mails promoting defendant in response to defendant's representation that it would execute a service termination agreement, which it failed to sign. [iWon, Inc. v. Ourhouse, Inc.](#), Index No. 9164/2001, 10/18/01 (Rudolph, J.).

**Contracts; interpretation; custom and usage of the industry.** In an action arising out of a contract to sell assets of a law practice, the parties disagreed as to the meaning of "disbursements" in a clause of the agreement. Defendants argued for a broad reading of the term. The court ruled that the contract was not ambiguous. The agreement had to do with the sale of a law practice and in the law "disbursement" has a narrow meaning; the custom and usage of a term were known to the parties and were deemed part of the contract. The clause in question could only have meaning if read in this way. Defendants' motion for summary judgment denied. [Lysaght v. Trager, Cronin, Byczek, LLP](#), Index No. 2118/2000, 11/19/01 (Austin, J.).

**Contracts; interpretation; investment consulting agreement; deadline; ambiguity; waiver. Procedure; pleading; alter ego.** Action arising out of investment consulting agreement. Plaintiffs claimed that defendants had breached the agreement by depriving plaintiffs of a right of first refusal on certain investments. The parties disagreed as to the meaning of contractual language containing a deadline, with each side arguing that the language was unambiguous. The court ruled that the language was ambiguous as to the precise event that would require a notice of the right of first refusal. The court noted that neither side had offered a completely reasonable or consistent analysis of the language and pointed out weaknesses in each side's interpretation. There were therefore issues of fact present. The court also ruled that there were issues of fact as to plaintiffs' waiver of its right. The court dismissed the case as to two defendants since they had not been parties to any contract and it was not alleged that they had engaged in any specific tortious conduct; alter ego allegations were merely conclusory. [Imprimis Investors LLC v. Insight Venture Management](#), Index No. 604431/2000, 12/12/01 (Cahn, J.).

**Contracts; interpretation; investment partnership; obligation to read agreements; specific performance.** Action by investor against investment limited partnership. Plaintiff had requested a liquidation of his interest. The defendants had refused at the time. When, months later, plaintiff was paid 90% of his interest, he had sustained a large loss. Plaintiff claimed that defendants had breached a contract with him. The court ruled that defendants had followed their obligations pursuant to a subscription agreement and other documents plaintiff had executed. The terms thereof were not ambiguous. The fact that plaintiff did not read the documents would not undo plaintiff's obligation absent a valid excuse for not reading the documents, which was not offered. The court rejected plaintiff's argument that defendants had breached a contract by issuing a check to him rather than to an entity as directed by him. Plaintiff had failed to show an injury since he could have deposited the check as he wished. Specific performance as to the balance of plaintiff's funds was unavailable since defendants were not yet obligated to deliver the balance under the agreements. Case dismissed. [Hirschfeld v. Neptune Partners, L.P.](#), Index No. 601184/2001, 11/30/01 (Cahn, J.).

**Contracts; limitation on agency services; termination; implied covenant of good faith; specific performance.** Action arising out of agreements designating plaintiff licensing agent for defendants' trademarks, etc. Plaintiff challenged defendants' prohibition on making deals for certain "excluded products" and later its taking all deals "in house". The court found that the agreements permitted these actions. It ruled that defendants' dispensing with plaintiff's services had not been a termination of the agreements since defendants still had ongoing obligations (e.g., not to retain another entity as third party representative). Since the contracts permitted the actions taken, defendants could not have breached implied covenant of good faith. The court refused specific performance since the agreements were for personal services. The court sustained some claims regarding certain failures by defendants insofar as they concerned plaintiff prior to cessation of use of plaintiff's services as it would not then have been futile for defendants to fulfill the contracts. Case dismissed in part. [Peisinger Creative Branding Systems v. CBS Cable Networks](#), Index No. 602600/01, 10/25/02 (Freedman, J.).

**Contracts; not-for-profit corporations; breach of contract; sale of assets; quantum meruit. Misrepresentation; reliance. Tortious interference.** Unsuccessful purchaser of real estate from hospital claimed that defendant had breached the agreement

by failing to use best efforts to obtain judicial approval and in other ways. Defendant argued that a court decision had disapproved the sale of the defendant's real property and that this had rendered the whole agreement void ab initio and inoperative. The court ruled that even though the parties had undertaken substantial steps toward the transaction, the prior court decision had rendered the agreement void. Plaintiff argued that since it had expended sums for development and other services, it could recover in quantum meruit. The court held that plaintiff had acted to advance its own interests and had been aware of the risk of judicial disapproval, barring quantum meruit. Plaintiff asserted a negligent misrepresentation claim against defendant and its directors with regard to their statements that they had taken all actions required to authorize the sale, that the sale would not violate corporate rules or law, that defendant had the power and authority to execute the sale, and that the agreement would be valid. The court held that plaintiff was a sophisticated entity and could easily have determined whether the representations were true. Further, it was aware of the risk of judicial disapproval. Thus, even if there had been a misrepresentation of material facts and a special relationship that might have made actionable a misrepresentation about an opinion on a matter of law, the claim failed for lack of justifiable reliance. A claim for tortious interference by another hospital failed because plaintiff had failed to show intentional inducement since it had been defendant that had sought offers from others in response to court action requiring it. Motion to dismiss granted. [64<sup>th</sup> Associates v. Manhattan Eye, Ear & Throat Hospital](#), Index No. 600639/2001, 11/20/01 (Gammerman, J.).

**Contracts; restrictive covenants; custom lists; irreparable harm.** Application for preliminary injunction enjoining former employee from contacting customers of plaintiff which defendant had serviced during employ with plaintiff as Director of Latin American sales. The court found that plaintiff had failed to offer sufficient proof to show that its customer base was not readily discoverable. Defendant responded with proof showing that many of plaintiff's customers advertized on the web and thus could be located using a search engine. Nor were defendant's services shown to be unique or extraordinary. Assertions of irreparable harm were conclusory. Motion denied. [Atlantis Worldwide, Ltd. v. Benitez](#), Index No. 603838/2001, 10/10/01 (Lowe, J.).

**Cooperatives; discriminatory refusal to approve sale of shares; standing; punitive damages; discrimination claim (Exec. Law 296); plaintiff as non-member of protected class.** Plaintiff alleged that members of cooperative board had improperly refused to approve several proposed sales of cooperative shares because of discriminatory motive to prevent sales to young couples likely to have children. The court held that plaintiff's claims were actionable. The court ruled that plaintiff could not recover claimed lost profits because plaintiff did not allege that the board had rejected a sale in the amount asserted; rather, the board did approve a sale in the amount of a rejected sale and in excess of another. The court rejected defendants' argument that plaintiff had sustained no damages by reason of the claimed wrongdoing. Plaintiff did have to pay maintenance for a longer time than was allegedly necessary and lost interest on the proceeds. Further, punitive damages might be recoverable if the alleged breach of fiduciary duty were found to be egregious. The court held further that defendants' conduct, if proven, would constitute a violation of Exec. Law 296 (5) prohibiting age discrimination (but not discrimination based on familial status). Also, N.Y.C. Admin. Code 8-107(5) would apply. Thus, plaintiff had stated a discrimination claim, even though she was not a member of the protected class and only indirectly affected. Motion to dismiss granted only in part. [Axelrod v. 400 Owners Corp.](#), Index No. 112146/2000, 10/30/01 (Cahn, J.).

**Corporations; derivative action; demand on board.** Action by shareholder in corporate defendant arising out of merger of that defendant with Global Crossing. Defendants moved to dismiss. The court ruled that plaintiff's claim was derivative in nature. Plaintiff alleged that the defendant former directors of the corporate defendant breached fiduciary duty by failing to obtain best value for the corporation. A claim is derivative where it affects all shareholders equally through the corporation, e. g., cases of alleged mismanagement by directors. A claim that the value of all stock holdings has been damaged is derivative and belongs to the corporation. Claims on behalf of the corporation against the directors for breach of fiduciary duty, though labeled individual or class claims, are derivative. Though plaintiff's counsel argued that a separate duty had been breached, no such duty was set forth in the complaint or affidavits. Plaintiff failed to allege a pre-suit demand on the board (BCL 626) or that such a demand would be futile. Counsel argued that the directors had acquiesced, but that is insufficient. Case dismissed. [Stepak v. Frontier Corp.](#), Index No. 12157/1999, 10/18/01 (Stander, J.).

**Corporations; derivative action; indemnification; necessity of fees.** Defendant sought indemnification (BCL 724) for attorneys' fees incurred in defense of a shareholder derivative action. The defendant had been successful in that defense. The question was whether the fees had been necessarily incurred. The court rejected the company's argument that the movant's failure to pursue a statute of limitations argument made the fees unnecessary. The defendant had raised the issue in its answer but not pursued it. The court found that, at the least, the defense would have been complicated and non-dispositive, and would

not have avoided litigation expense. A hearing was ordered as to the amount of fees due, which would include fees incurred in pursuing indemnification. [Sayour v. Sayour, Index No. 7269/1991](#), 10/4/01 (Cahn, J.)

**Declaratory judgment; reinsurance; summary judgment.** Action for a declaratory judgment under two facultative reinsurance certificates. In an underlying case, plaintiff entered into a settlement agreement which called for future payments to the insured from an escrow account. Plaintiff then made claims for immediate payments from its reinsurers. Defendant refused. The payment clauses of the certificates provided that defendant would remit payment "of loss and expense paid by plaintiff," which clearly and unequivocally confined the obligation of the defendant to indemnify for payments already made by plaintiff. The defendant had no obligation to make an immediate payment under the settlement agreement because defendant was not a party to the settlement and plaintiff had not remitted payment to the insured. Accordingly, the court dismissed plaintiff's causes of action for breach of certificate and declaratory judgment. The court dismissed the cause of action for unjust enrichment because the parties had an express written contract which controlled recovery for settlement amounts. Because defendant had no current obligation to reimburse plaintiff, the court also dismissed the causes of action for specific performance and estoppel. [Atlanta International Ins. Co. v CGU Ins.](#), Index No. 605236/99, 10/2001 (Cahn, J.).

**Forum non-conveniens.** Law firm brought action against clients for recovery of legal fees, where clients had already commenced a malpractice action against law firm in another state court. Clients moved to dismiss on grounds of forum non conveniens. The court found that clients failed to establish New York as an inconvenient forum to warrant dismissal. The court rejected as irrelevant the likelihood that law firm's claim for legal fees would be asserted as a compulsory counterclaim in the malpractice action, and the priority in filing of the two actions. However, the court stayed the New York action pending determination of the out-of-state malpractice action, citing convenience of the parties and preservation of judicial resources. The stay order was conditioned on clients serving and filing a waiver of any objections they might have to law firm's assertion of counterclaim(s) for legal fees in malpractice action. Motion granted to the extent of staying the action. [Stroock & Stroock & Lavan, LLP v KSW, Inc.](#), Index No. 110886/2000, 10/24/01 (Cahn, J.).

**Forum non conveniens.** In an action for breach of contract, the defendant moved to dismiss on forum non conveniens grounds. Defendant was an Indiana corporation with corporate headquarters in Westchester County. The transaction at issue had occurred in Indiana; the relevant employees worked in Indiana; and the subject matter of the transaction, computer chips, was located in California. Plaintiff was a Delaware corporation with a Florida headquarters. Plaintiff conducted no business in New York. Although there had been some phone calls to New York and payment therefrom, the court concluded that the case lacked a substantial nexus to New York and granted the motion on conditions. [Advanced Aviation Technologies, Inc. v. ITT Industries, Inc.](#), Index No. 8053/2001, 10/15/01 (Rudolph, J.).

**Misrepresentation; merger clause; elements; due diligence; reliance; statements of future intent; proof; failure to raise fraud defense in timely manner. Summary judgment; need for discovery; mere hope. Evidence; tape recording; settlement discussion; admissions.** Action arising out of asset purchase and consulting agreements. Plaintiff moved for summary judgment on breach of contract and unjust enrichment claims. The parties agreed that the asset purchase agreement was unambiguous. Defendant asserted an affirmative defense and counterclaim for fraud in the inducement. The court rejected plaintiff's reliance on a merger clause and ruled that defendant could maintain a defense and claim for fraud despite the merger clause. The court held that defendant's allegations that plaintiff had misrepresented that there would be a continuing flow of revenue, including from a particular contract and a particular placement, would not sustain a claim of fraud. Defendant had conducted due diligence and had an opportunity to review financial statements and contracts, and thus could not have relied on plaintiff's statements. Statements that plaintiff would perform introductions and obtain preferred supplier status and new accounts were statements of future intent and not actionable. Defendant claimed that plaintiff had never intended to perform. Defendant merely relied upon an inference from non-performance. Defendant asserted a need to take depositions, but a mere hope of finding proof is not sufficient to deny summary judgment. Plaintiff relied upon admissions by representatives of defendant. The court stated a tape recording of a phone conversation recorded by a participant without the knowledge and consent of the others is admissible. Although evidence of statements made during settlement discussions is generally inadmissible, an admission of liability is admissible. Further, defendant failed to explain why it had operated the business for two and one-half years and paid on the consulting agreement before raising a fraud claim. Summary judgment for plaintiff. [Carrazza v. Thinkpath. Com.](#), Index No. 600553/2001, 12/18/01 (Lowe, J.).

**Misrepresentation; pleading participation by or actual knowledge of defendants; pleading specificity (CPLR 3016 (b)); reliance; duty to investigate; expressions of hope; merger clause; express warranty.** Action by investors in internet advertizing business alleging fraud and breach of contract. Plaintiffs asserted that defendants had supplied false sales contract status reports. As to three defendants, the court found that the complaint simply included them in general allegations against all defendants or posited that they must have known of false representations made by main defendants. As there were no allegations of personal participation by these defendants or actual knowledge, the fraud claims had to be dismissed. As to the main defendants, the court held that CPLR 3016(b) had been satisfied. However, most of the deficiencies alleged could have been discovered by plaintiffs by routine investigation. Thus, plaintiffs could not prove justifiable reliance. Further, allegations based on expressions of hope of profitability for the future would not be actionable, especially as plaintiffs were sophisticated entities. Plaintiffs could not rely on preclosing written or oral representations in view of a merger clause in the purchase agreement. As to an express warranty claim, the court held that such a claim could be actionable only as to a specific existing fact, not a promise of future performance. The court ruled that plaintiffs mostly sought to enforce promises or projections of future profitability that were not mentioned in the express warranties. Complaint dismissed. [Valassis Communications v. Weimer](#), Index No. 605222/2000, 12/21/01 (Gammerman, J.).

**Procedure; pleading; misrepresentation; CPLR 3016(b); knowledge of falsity; disclaimer; fiduciary duty; fiduciary relationship; constructive trust; conversion.** Action alleging that plaintiff was caused to invest in a private placement for an internet start-up company as a result of fraud, breach of fiduciary duty, etc. Motion by defendant, former attorney for the corporate defendant, to dismiss. The court held that the complaint failed to set forth specific facts as to when and how defendant had learned that the offering plan contained misleading information. The court also found deficient the assertion that defendant had conspired to commit fraud since the complaint lacked allegations of fact from which the court could infer that defendant had had an agreement or understanding with the other defendants to cooperate in a fraudulent scheme. The complaint contained only the barest allegation that defendant had had knowledge that the information in the private placement materials was false. Even if defendant had had knowledge, his silence or inaction would not be actionable absent a fiduciary relationship. Further, the private placement memorandum contained disclaimer language. Plaintiff argued that defendant had breached a fiduciary duty because plaintiff had delivered funds to him based on his implied promise to hold them in trust until the corporation satisfied conditions precedent to the closing but that defendant had forwarded the funds to the corporation. The defendant was not plaintiff's attorney or escrow agent. The alleged implied promise was insufficient to create a fiduciary relationship. Plaintiff, a sophisticated investor, had never spoken to defendant. The stock purchase agreement required plaintiff to send his check to the corporate checking account prior to closing. No document required defendant to hold the check pending satisfaction of conditions precedent. A constructive trust claim failed due to the lack of fiduciary relationship. A conversion claim failed since the complaint did not allege that defendant had exercised dominion and control over the funds; plaintiff made the check out to the corporate defendant, signed the stock purchase agreement and received the shares bargained for. Motion granted. [Laikin v. Vaid](#), Index No. 604996/2000, 10/10/01 (Moskowitz, J.)

**Representation agreements; penalty clause.** Action seeking recovery of unpaid commissions, spill payments, and liquidated damages for termination of a representation agreement. In connection with its purchase of two radio stations, defendant assumed the obligations of representation agreements between plaintiff and each station. When defendant terminated one of the agreements, plaintiff demanded payment of termination obligations, spill payments and commissions. Defendant failed to make payments, alleging that plaintiff switched the agreement that it had assumed with a bogus agreement that provided for bigger commissions. Defendant also argued that the termination provision was an unenforceable penalty clause. The court found triable issues of fact as to whether the agreement at issue reflected the true terms of the agreement between plaintiff and the radio station. Turning to the termination provision, the court found issues of fact as to whether the method for termination payments was based on accepted industry standards. Motion for summary judgment denied. [Katz Communications, Inc. v Emmis Broadcasting Corps. of Phoenix](#), Index No. 600173/2001, 10/16/01 (Ramos, J.).

**Stock purchase agreement; misrepresentation; fraud; breach of contract.** Plaintiff purchased all the outstanding shares of defendants' company and offered employment and consulting agreements to defendants. After closing, plaintiff hired an accounting firm to determine net worth for post-closing price adjustments, and it allegedly discovered irregularities. Plaintiff requested a reduction of the purchase price, pursuant to an amendment to the stock purchase agreement. Plaintiff alleged breach of the amendment and the stock purchase agreement, based on the individual defendants' failure: 1) to provide a statement of the company's net worth at closing; 2) to reduce the purchase price; and 3) to contribute to the cost of accounting firm's audit. Plaintiff also alleged fraudulent inducement by defendants' misrepresentations, and breach of guaranties made by the individual defendants in connection with certain accounts receivables. The court held that the misrepresentations, which otherwise constituted breach of specific warranties in the stock purchase agreement, did not render plaintiff's fraud claims

duplicative of plaintiff's breach of contract claims. The court reasoned that the misrepresentations could not be characterized as "merely insincere promises of future performance." The court rejected application of a one-year limitations period in the stock purchase agreement to the misrepresentation claims. However, rescission was unavailable because plaintiff had sold the business to a third party and the company was in bankruptcy. Court also found that defendants were not obligated to share costs of the accounting firm with plaintiff as plaintiff had hired the accounting firm without defendants' input, contrary to their agreements. Finally, court held that plaintiff could not use defendants' statements regarding reduction of company's purchase price, as these were made in the course of settlement. Defendants' motion for summary judgment granted only so as to dismiss claims for breach of contract for failure to pay accountants' fees, and rescission; plaintiff's cross-motion for summary judgment granted dismissing defendants' second counterclaim, as decided earlier upon the record. [J.A.O. Acquisition Corp. v Stavitsky](#), Index No. 604798/1999, 11/14/01 (Moskowitz, J.).

**Summary judgment; guarantee; motion to transfer to Surrogate's Court.** In an action to enforce guarantees on a loan, plaintiff moved for summary judgment. Defendants guaranteed the payment of outstanding interest on a loan, but not the principal, if the non-party borrower defaulted. The variable rate ranged from 12% to 14.5% per year. If a default was not cured within a certain period, the interest on the unpaid principal balance of the loan would accrue at 24% per year. If the guarantors missed a payment, they also had to pay interest on the amount they owed at a rate of 24% per year. The guarantors could prepay the entire amount of interest that was due through the maturity date of the note in a lump sum at the interest rate existing on the date of the default. The plaintiff notified the borrower of its default. The plaintiff then notified the guarantors of the amount of interest they owed under the agreement, but they did not pay. The guarantors alleged that the effective compound rate was usurious, exceeding 25% per year. The court held that the guarantors' interest obligation did not violate the criminal usury statute because it applied only if the guarantors failed to make payments of interest after the borrower defaulted. The obligations were related, but not identical. The court rejected the guarantors' claim that the plaintiff was attempting to collect unearned interest, because none of the documents indicated that the plaintiff was asking for interest in advance. The court found issues of fact concerning the amounts owed, because the amounts claimed by the plaintiff in various papers were inconsistent, and other documents indicated that defendants may have made some payments. An issue of fact existed concerning the plaintiff's sale of an interest in the loans, which could terminate the guarantors' obligations if a security interest was given to anyone else except an affiliate of the corporate plaintiff. Accordingly, the court denied summary judgment. The court denied the cross motion of the estate of the decedent guarantor to transfer the action to Surrogate's Court, because the executor's case was identical to the other guarantor's, who could not have his case heard in Surrogate's Court. [Jericho State Capital Corp. v Luciani](#), Index No. 602854/00, 10/2/01 (Ramos, J.).

**Summary judgment; promissory note; guaranty; fraud.** Plaintiff moved for summary judgment, pursuant to CPLR 3213, to recover money owed from a guaranty of a promissory note. The CEO of a company guaranteed the company's promissory note, which was used to pay half the cost of a series of buildings in upstate New York. Plaintiff presented a prima facie case that neither the company nor the guarantor paid the amount due. The court held that the guarantor had no defense because the company purchased the property "as is" and the agreement of sale contained a merger clause. The court rejected the guarantor's defense on the ground of fraud. The seller, through its employee, represented that the plant was in excellent, good, and solid condition. The guarantor's allegations that the seller actively concealed defects concerning a drain pipe were unsupported. Only the purchaser could raise the issue of fraud. The alleged representations were expressions of opinion and were not specifically related to the drainage system. The court awarded plaintiff the full amount of the note plus interest. [Philips Electronics North America Corp. v Bronfman](#), Index No. 600678/01, 10/15/01 (Ramos, J.).

**UCC; offer and acceptance; reasonable time to inspect; revocation of acceptance. Contribution; economic loss. Accord and satisfaction.** Plaintiff invited bids seeking to purchase in accord with its specifications. Defendant responded by offering to supply at a set price, but submitted a different specification drawing. The court held that this was an offer to plaintiff, which it had accepted. The goods delivered, being in accordance with the drawing, were not non-confirming. Further, plaintiff accepted the goods. UCC 2-606(1). The court held that plaintiff had had a reasonable time to inspect for conformity. The drawing put plaintiff, a sophisticated party, on notice, or should have. Plaintiff had accepted five lots over a year without complaint. There was an acceptance. The court held that plaintiff could not have revoked acceptance (UCC 2-608) since there had been no non-conformity to the drawing and plaintiff had no excuse for failing to act within a reasonable time. There was no proof of false assurances. Plaintiff's breach of express warranty claim failed (UCC 2-313) since the contract was based on defendant's drawing, not plaintiff's or plaintiff's and defendant's. An implied warranty claim (UCC 2-314) similarly failed. A contribution cross-claim failed since it related only to economic loss from breach of contract. Another cross-claim failed because there had been an accord and satisfaction between defendants; a check was cashed without reservation and there had not been a conditioning of the settlement upon the reaching of an agreement with plaintiff. [Rockburl Industries v. Industrial](#)

[Bearing Corp.](#), Index No. 05333/2000, 12/01 (Stander, J.).

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