The ***Commercial Division***

of The State of New York

THE 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

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NOTICE TO THE BAR: The Commercial Division of the Supreme Court of the State of New York, Nassau County recently launched an Alternative Dispute Resolution Program. In doing so, Nassau County joined the Commercial Divisions of New York, Erie and Westchester Counties in supplementing its innovative efforts to streamline the resolution of complex commercial disputes by providing a formal ADR Program. With the approval of Administrative Judge Edward McCabe, Justices Leonard Austin and Ira Warshawsky, who preside over the Nassau County Commercial Division, have promulgated rules which govern the ADR program.

The Program is applicable to cases referred by Justices of the Commercial Division, the Administrative Judge of the Supreme Court, Nassau County, and the other Justices of the Supreme Court, Nassau County upon authorization of the Administrative Judge, as well as commercial cases referred on consent of the parties.

The Court has established a roster of Neutrals, all of whom have successfully completed twenty four hours of mediation training in a training program sponsored by the Office of Court Administration. With the assistance of OCA's Office of ADR Programs, the Court sponsored two three-day training programs on the fundamentals of mediation theory and practice. A total of 42 mediators now serve on the Court's roster.

Mediators must handle two matters each year on a pro bono basis. Mediators who have satisfied their pro-bono service requirement for a given year may require the parties to pay reasonable compensation.

The Roster and program rules are available through the ADR Coordinator, located in Nassau County Supreme Court. The Rules have also been posted on the Commercial Division website (at www.courts.state.ny.us/comdiv).

Alternative dispute resolution; agreement defining procedures. Parties had agreed to submit any disputes to an examiner, who was empowered to determine them. Certain categories of determination by the examiner would be final and subject to review only under CPLR Art. 75. Respondents argued that the examiner had failed to follow the procedural requirements of Art. 75. However, the court found that the agreement was unambiguous and that it did not provide that Art. 75 would govern procedures before the examiner, only that Art. 75 would provide a standard for review. Application to vacate determination denied. Rochester Endodontic Assocs. P.C. v. Quevado, Index No. 2294/2002, 11/25/02 (Stander, J.).

Arbitration; interpretation of agreement; arbitrability. Parties agreed that rules of a named entity in their "current version" would govern. The court ruled that this meant rules in effect at the time the agreement was reached, not when the arbitration was commenced. The court noted that draft contract had referred to rules of another entity "then in effect." In any case, under whichever rules of the outside entity applied, the arbitrator had the power to determine arbitrability. Had the parties intended to reserve that issue to the court, they should have so provided. Arbitration compelled. Hawkeye Funding v. Duke/Fluor, Index No. 603531/2002, 11/22/02 (Cahn, J.).

Attorney and client; attorney's fees; class action; court authority to approve per CPLR Art. 9 fees determined in arbitration pursuant to settlement. Settlement of tobacco class action. The court sua sponte raised the issue of whether attorney's fees of $625 million awarded in arbitration conducted pursuant to the settlement but not approved by any court were excessive and unethical. The court had previously approved the settlement, but not the fee award. Justice Crane had ruled that the case was a class action and should be settled in accordance with CPLR Art. 9. Judge Crane had approved New York's agreement to settle the case pursuant to a Master Settlement Agreement. This ruling was sustained on appeal. The MSA provided that plaintiff's counsel would receive reasonable attorney's fees paid by defendants subject to the ABA Code of Professional Responsibility, with the issue to be decided by arbitration absent agreement. The State's obligation was released. When agreement was not reached on fees, the matter was arbitrated between defendants and counsel. The panel voted 2-1 to award counsel $625 million. The award was not confirmed by any court, not objected to by defendants and never filed. The court held that Judge Crane's approval of the MSA (with its arbitration process) did not end the court's responsibility under Art. 9. The court cannot shift its responsibility for supervising class action legal fees to an arbitrator. Although Judge Crane had ruled that only one cause of action on behalf of municipalities was a class action, he applied Art. 9 to the entire MSA. The court held that it would fix a proper fee pursuant to CPLR 909 based upon the class action status of the case. Counsel sought to minimize the class cause of action, but the court noted in response that almost 50% of the recovery went to the municipalities, who were parties only on that cause of action. Courts have inherent power to supervise attorney's fees and can act sua sponte. Courts also have a duty, the court stated, to preserve the integrity of the judicial system. Neither Judge Crane nor the Appellate Division had to or did address reviewability of the award since the CPLR provides for review in Art. 75. The settlement agreement provided that the Panel's decision would be final, binding and non-appealable. This would not bind the court where an award is on its face violative of public policy. The court had not usurped the Attorney General's function since he was not a party to the agreement and had been released from any fee obligation. The court has continuing jurisdiction over compliance. The court's obligation under Art. 9 to fix a reasonable fee must trump an award otherwise unassailable, if that were the case, under Art. 75. Payment of legal fees stayed. State of New York v. Phillip Morris Inc., Index No. 400361/1997, 10/22/02 (Ramos, J.).

Attorney and client; class actions; attorney's fees. Application to approve amended class action settlement agreement. Action arising out of tender offer challenging adequacy of offer price. A settlement was negotiated for a higher price. However, a major shareholder objected. Having acquired a blocking position, this shareholder negotiated directly with defendants and achieved an even higher price. Plaintiffs sought court approval of the "settlement" and approval of plaintiffs' counsel fees. The shareholder opposed the application, contending that no compensation was warranted since only minimal discovery had been conducted and it had achieved the settlement price, not plaintiffs' counsel. The court found that the attorneys for plaintiffs had resisted court directives to provide information about efforts expended and time spent and resisted the shareholder's efforts to review their files although the shareholder was the largest member of the class to whom counsel owed a fiduciary duty. After discussions, an amendment to the proposed settlement was arrived at whereby counsel would forego the fees requested and the monies that defendants had agreed to pay for that purpose would be paid to shareholders less administrative expenses and a payment to defray part of the objectant's attorney's fees. The court found the settlement reasonable since the shareholders received the benefit and noted that as no one other than the objectant had objected to the original proposal, there was no basis for anyone to object now. The court noted that class counsel represents individual class members and that, within reason, class members are entitled to review counsel's files and have discovery about counsel's actions. Crandon Capital Partners v. Fukutake, Index No. 600007/2001, 1120/02 (Cahn, J.).

Attorney and client; duty of care; representation; duty to inform. Guaranty; reaffirmation; payment history;

issues of fact. Action arising out of loan by plaintiff to an entity and a guaranty by defendant. Various complex transactions later took place. Plaintiff creditor claimed that liability on the original transaction remained and that, as to a defendant law firm, he had had an effective attorney-client relationship, which had resulted in a conflict of interest and improper payment by the firm of certain tax refund proceeds from an escrow account to another entity instead of the plaintiff. The court ruled that the firm had not represented plaintiff in 1997 when an agreement had been reached although it had represented him on prior, unrelated matters. Thus, it had not owed him a duty of care in 1977, nor did it owe him a fiduciary duty to protect his rights above and beyond adherence to the terms of an agreement he had signed. The court rejected the assertion that the firm had assumed a duty or had a continuing duty to apprise non-client plaintiff or his lawyer of subsequent relevant developments, plaintiff having been represented by competent counsel. Further, since the other entity had paid the real estate taxes, it was entitled to the refund in any event under the Real Property Tax Law. Thus, the firm was entitled to summary judgment. As to the individual defendant's argument that the statute of limitations had expired on his guarantee, this court found issues of fact as to whether defendant had reaffirmed his obligation in writing and by making payments through various entities even after the corporate debtor had filed for bankruptcy. Also, the 1997 agreement had referred to him as the borrower and he had therein acknowledged an obligation to pay the debt. Even though the payments were not made by him personally or on his behalf, the payment history gave rise to issues of fact. The silence of the note as to post-maturity interest did not alter this result since the general rule is that the legal rate is applicable. The papers were also unclear as to the amount allegedly due. Summary judgment denied. Malkin v. Melius, Index No. 11246/2000, 12/23/02 (Austin, J.).

Collateral estoppel. Sovereign immunity; management agreement; gaming and licensing; Indian tribe. Action arising out of alleged breach of management agreement between plaintiff and defendant Indian tribe. Defendant argued that a Federal decision held that the Indian Gaming Regulatory Act does not require a tribe's gaming and licensing authority to be exercised in good faith and that plaintiff would be barred from relitigating the issue here. The court found, though, that the decision had concluded that Federal jurisdiction was lacking and the good faith issue had not been material. The court ruled that the first cause of action stated a claim for breach of contract and that the reference to the Act did not destroy its facial validity. The court further found that the agreement did not include an open-ended waiver of sovereign immunity by defendant, but only a waiver to the extent needed to allow plaintiff to sue to enforce or interpret the terms of the agreement. Conversion and unjust enrichment claims were barred. The court found that, since plaintiff alleged firing under pretext of a cause, a "termination for cause" section limiting damages did not apply and plaintiff could seek loss of management fees. The court rejected defendant's argument that a promissory note was void because it had not been approved by government agencies and because the tribe had not waived sovereign immunity in regard to it. The court held that the complaint, as supplemented by an affidavit and other submissions, adequately alleged that the note was a collateral agreement to the management agreement and had been approved as required. The court also held that the tribal council had approved the note. President R.C.-St. Regis Mgt. Co. v. the Saint Regis Mohawk Tribe, Index No. 011959/2002, 12/2/03 (Warshawsky, J.).

Contracts; binding effect of oral "agreements" and written confirmations absent formal agreements. Commodity Exchange Act; illegal off-exchange futures contracts. Guaranty. Action alleging breach of contracts for purchase and sale of petroleum products. The contracts were alleged to have been entered into on the telephone. These conversations were followed by written sale confirmations, which set forth the details but also stated that defendant would transit a formal sales agreement in the near term. Defendant did send multi-page agreements, but they were not signed. After futures price fluctuations, plaintiff demanded millions of dollars under "blow-out" provisions of the alleged agreements. The court ruled that issues of fact existed as to whether defendant had intended to be and was bound by the oral agreements and subsequent confirmations in the absence of a signed contract. The court could not find plaintiff's intention as a matter of law and the customs and practices of the trade might be relevant. The court rejected defendants' argument that the contracts were illegal off-exchange futures contracts under the Commodity Exchange Act. In 2000, Congress passed the Commodity Futures Modernization Act pursuant to a provision of which failure to comply with the CEA would not render a contract between private parties void or unenforceable. The parties disagreed as to whether the provision could be applied retroactively. The court ruled that 7 U.S.C. § 25(d) meant that Section 25(a)(4) could be applied retroactively, that this was Congress's clear intent, and that doing so would not impose new burdens on any party. The court disagreed with a Federal decision on point. Further, the court held that the claims against a defendant on a guaranty should be dismissed since the guaranty had expired before the alleged obligations here arose. Louis Dreyfus Energy Corp. v. MG Refining and Marketing, Inc., Index No. 600053/1995, 10/23/02 (Cahn, J.).

Contracts; construction development; reliance on assurances; seller's obligations under "as is" sale; modification by letter. Agency; apparent authority. Trial decision in action alleging breach of contract for development of housing. Plaintiff alleged that various difficulties had raised the cost of development and that it had received assurances from defendants. The court held that it was not reasonable for plaintiff to have relied on alleged

assurances about a right of way. Further, when those problems had led to the denial of the original subdivision plan, plaintiff had had the right to withdraw but failed to do so. Plaintiff's claims based on assurances failed. However, the court rejected defendants' argument that obligations were limited to conveyance of the property. The implied covenant of good faith would encompass promises a reasonable party would understand to be included. Although there was an "as is" clause, the seller also was obliged to demolish property and remove structures, which it had delayed doing and in part failed to do. Plaintiff was entitled to resulting damages. Letters by defendant were found to constitute a modification and plaintiff was entitled to damages for breach thereof. Defendants' architect, the court held, had had apparent authority to authorize changes. Judgment for plaintiff in part. Metro Group Construction Corp. v. Town of Hempstead, Index No. 15799/1998, 12/19/2002 (Austin, J.).

Contracts; equipment lease; unconditional liability; letter as reflecting condition to duty to pay rent. Action arising out of lease of high-grade printing equipment to defendant producer of visual effects. Plaintiff was assignee of lease. Lease made defendant's liability absolute and unconditional ("hell or high water provisions"). Defendants argued that the lessor had breached the agreement by failing to provide financing, thereby relieving defendants of their obligation under the lease and guaranty. The court ruled that a question of fact was presented by a letter as to whether defendants and the lessor had intended that the lessor's provision of financing would trigger defendants' duty to pay rent under the lease. Although plaintiff cited the parol evidence rule, the letter was dated just before the lease and formed part of the same transaction. The court also ruled that questions of fact existed as to whether plaintiff knew that the lessor was in breach of the lease at the time of the assignment and that it was using the assignment to shield itself from liability. Summary judgment denied. Wells Fargo Minnesota National Assn. v. Stargate Films, Index No. 600978/2002, 12/4/02 (Moskowitz, J.).

Contracts; interpretation; lease/buyback as sale; ambiguity; intent of parties; notice of termination. Action arising out of lease/buyback agreement between a plaintiff and defendant's predecessor in interest in connection with financing for a broadband communications network. Defendant moved for summary judgment. Defendant argued, relying upon a clause concerning termination, that plaintiff was obliged to give defendant three months notice prior to exercising option to purchase the equipment involved. The court rejected this interpretation, finding that a clause governing the purchase option, which provided no three-month notice, controlled. The court also rejected defendant's argument that plaintiff's failure to pay the purchase price for a period caused the rent to continue to accrue, with the option price remaining fixed and not amortizing. The court found that the clause cited was ambiguous and that it could therefore look to the purpose to be accomplished and the substantial intent of the parties. The court found that defendant's interpretation would render a clause meaningless. Even if the contract was not ambiguous, the court could interpret it to reflect the parties' intent if liberal interpretation would not reflect that intent, as the court found to be the case. The court noted that, though labeled a lease, the contract had all the elements of a sale contract. Plaintiff did fail to pay for the equipment at the end of certain schedules, but defendant's interpretation would produce a windfall, the court found, causing plaintiff to pay far in excess of the value of the equipment. Summary judgment denied to defendant, granted to plaintiff, but plaintiff would have to pay fair rent for the period from end of its payments till tendering of the purchase price. Winstar Wireless, Inc. v. BW Financial Corp., Index No. 600345/2001, 10/29/02 (Ramos, J.).

Contracts; interpretation; termination provision. At issue was interpretation of a termination provision. Plaintiff had the right to terminate employment voluntarily, and defendant was obliged to make certain payments, if the company wished to sell all or substantially all its assets or dissolve and liquidate its assets. The court ruled that the agreement was not ambiguous and thus extrinsic evidence could not be considered. The court found that the intent was that the company could not retain any assets of value. It would be rewriting the agreement to limit this to "operating assets." Since the company retained considerable assets, plaintiff was not entitled to the payments. Partial summary judgment to defendant. Lippman v. Despatch Indistries, Inc., Index No. 11429/2000, 10/18/02 (Stander, J.).

Contracts; option; notice of exercise of option. Fiduciary duty; relationship; dominance and reliance. Action alleging breach of contract and breach of fiduciary duty for failure to complete the purchase of a corporate plaintiff, an internet-related business, as provided for in an option agreement. The court held that defendants had not given notice of exercise of the option as provided in the agreement and that an e-mail message specifying a date of closing was not sufficient to constitute an election. The court held that the allegations of the complaint that there was a fiduciary relationship based upon defendants' alleged control over plaintiff under an operating agreement and plaintiff's resulting inability to seek out alternate financing were not adequately detailed. Plaintiffs did not allege a high degree of dominance and reliance existing prior to the transaction, nor that defendants had blocked actual efforts to obtain other financing. Case dismissed. Brainstorms Internet Marketing, Inc.v. USA Networks, Inc., Index No. 604052/2001, 10/17/02 (Ramos, J.).

Contracts; third-party beneficiary status; agreement with municipality. Purported class action challenging late payment fees. Plaintiffs alleged that under a franchise agreement with New York City, defendant had agreed not to impose late fees on subscription payments less than 60 days past due. Plaintiffs claimed to be third-party beneficiaries. However, the agreement with the City provided that the agreement did not create rights or benefits for any non-party. Such a provision is decisive. Case dismissed. Elges v. Time Warner Entertainment Co., Index No. 119962/2000, 10/13/02 (Ramos, J.).

Corporations; signature by officer; capacity; ambiguity; parol evidence. Liability of corporation; transfer. In a contract action, the court held that there was a claim stated against the individual defendant corporate officer, who had signed the contract on behalf of an entity and signed a second time below. The court found that the second signature created an ambiguity, which allowed the court to consider parol evidence. The corporate defendant had agreed to assume the liability of the entity to plaintiff, but argued that it had returned that liability to the entity. The court ruled, though, that the letter did not return the liability; at best, defendant would have a possible claim for indemnification, which did not have to be adjudicated in this case. Dismissal denied. Loyal Mgmt, Inc. v. IP Logic, LLC, Index No. 3811/2002, 11/6/02 (Benza, J.).

Debtor & Creditor Law; assistance in transfer. Fiduciary duty; factor-client relationship; special trust and confidence. Contracts; factor's duty to collect. Counterclaim dismissed. Creditor had no cause of action under Debtor & Creditor Law against party who merely assisted a debtor in transferring assets. Breach of fiduciary duty counterclaim dismissed since relationship between factor and its client is a debtor-creditor relationship and not a fiduciary one. Nor does such a relationship arise in a guarantor-lender relationship. An informal relationship may arise when one party places trust and confidence in another and becomes dependent on the latter. The court declined to find such a relationship, noting that creditors offer to work with, but not manage or control, a debtor in financial distress. To impose a duty here, the court said, would be to impose a duty on creditors generally. The court dismissed a counterclaim based on the factor's alleged lack of effort to collect from account debtors in view of inconsistent language in guaranties. CIT Group/Commercial Services Inc. v. Weiner, Index No. 603480/2001, 10/9/02 (Ramos, J.).

Evidence; admissibility of expert report; Daubert. Motion to exclude expert report and related testimony in action against former employees for breach of restrictive covenants. The challenge was based in part on Daubert. The court ruled that the report was admissible under Daubert and Frye. Defendants were basically attacking the expert's conclusions when the attack would have to be upon the methodology used under Daubert. The disagreement of experts, the court stated, went to the weight and reliability of competing reports, not admissibility. Motion denied. Stanley Tulchin Assoc., Inc. v. Grossman, Index No. 1236/1999, 10/10/02 (Austin, J.).

Evidence; attorney-client privilege; waiver; ownership of relationship after business transfer. Evidentiary issue regarding use of certain letters at trial. The court stated that proof that may be barred by the rules of evidence at trial may be considered in opposition to a motion for summary judgment to determine whether an issue of fact exists. The fact that the Appellate Division had referred to a letter in finding an issue of fact and remanding for trial did not mean that the letter was admissible at trial. Plaintiff's argument that he controlled the attorney-client privilege of an alleged partnership because he had been a partner failed in light of a settlement agreement which did not transfer the attorney-client relationship. None of the parties, the court ruled, could assert the privilege. The court ruled that the non-party owner had not waived the privilege. This was so even though plaintiffs, in an unknown fashion, had obtained copies. The fact that the owner may have been required by a certain agreement to turn over the letters to plaintiffs might be a basis for a claim against the owner, but would not give rise to a waiver as an actual turn-over had not occurred. The agreement did not expressly waive the privilege. Plaintiffs' motion denied.
R.G. Egan Equipment, Inc. v. Polymag Tek, Inc., Index No. 3599/1996, 12/12/02 (Stander, J.).

Insurance; demutualization; annuity beneficiary's right to stock. Fiduciary duty; relationship. Unjust enrichment. Action on behalf of class to recover a stock distribution allegedly due in connection with conversion of defendant insurer from a mutual insurance company to a stock company. Plaintiff was beneficiary of an annuity contract pursuant to a structured settlement. The court found that MetRe, defendant's subsidiary, was the owner of the contract at issue, not plaintiff, and the settlement agreement provided that plaintiff would have no interest in the contract. Under the demutualization Plan and statutory law, a "policyholder" is the owner or holder of a policy or annuity contract, which plaintiff was not. Plaintiff had no rights in the assets used to purchase the contract. A fiduciary duty claim failed for lack of a fiduciary relationship. MetRe's obligation to pay plaintiff was contractual. As a settlement agreement controlled plaintiff's rights, an unjust enrichment claim failed. Case dismissed. Gonzalez v. Metropolitan Life Ins. Co., Index No. 605243/2000, 10/25/02 (Cahn, J.).

Insurance; disability policy; total disability; proof needed to raise issue of fact; bad faith denial of coverage. GBL 349. Surgeon gave up his medical practice due to cardiac problems. Defendant insurer declined to provide total disability benefits because there allegedly was insufficient medical substantiation for plaintiff's limitations. It is generally a jury question as to whether a policyholder is totally disabled, but if the party opposing such a motion fails to produce admissible evidentiary proof to raise issues of fact, a summary judgment motion for the insured can be granted. The court found that plaintiff had presented a prima facie case of total disability since cardiac episodes had required plaintiff to be under a doctor's care, his primary care physician and cardiologist had concurred that he must retire, and a Social Security Administration ruling had found total disability. Records cited by defendant showed that plaintiff could perform the duties of regular life, but failed to take account of the fact that plaintiff's angina had occurred as a result of the stress of performing surgery. Defendant's expert, the court found, had conducted a superficial analysis, which did not include examination of plaintiff, contact with his physicians, or a review of plaintiff's full medical file, so that the expert had been unaware that plaintiff's second cardiac episode had occurred while plaintiff was performing surgery. The court ruled that defendant had failed to present proof to raise an issue of fact as to total disability. As an insurer's bad faith denial of coverage is not recognized as an independent cause of action, that claim had to be dismissed. The court allowed plaintiff to assert a GBL 349 claim premised on allegations that defendant's policy had been sold to many consumers and that defendant's representations and omissions had been misleading. Monga v. Security Mutual Life Ins. Co., Index No. 5164/2000, 10/02 (Stander, J.)

Insurance; motion picture financing. Procedure; personal jurisdiction; pleading fraud (CPLR 3016(b)); choice of English law and jurisdiction. Contracts; disclaimers regarding revenue analysis. Misrepresentation; reliance; sales estimates as projections; production data; mistatement of fact; materiality; relationship approaching privity. Negligence. Action arising out of movie financing arrangements. Defendant brought third-party action against various entities. The court held that third-party plaintiff had failed to allege a sufficient basis for CPLR 301 jurisdiction over certain third-party defendants based on the office and activities of the parent since plaintiff had not alleged sufficient control. However, there was jurisdiction under CPLR 302(a)(1) because the third-party defendant had regularly corresponded and was in phone touch with plaintiff regarding an insurance policy it brokered. The policy was to be delivered and performed in New York and contained a New York forum designation. The court held that these third-party defendants could rely on disclaimers in the revenue analysis clause of the policy. Third-party plaintiff had failed to conduct a thorough investigation into the financial viability of plaintiff's movie production loan, precluding its claim of detrimental reliance on third-party defendant's alleged inadequate investigation or fraudulent representations. Third-party defendant sales agents had been hired by the producers, but third-party plaintiff, in a negligent misrepresentation claim, had allegedly relied upon specifications in contracts that a bank and the insurer on the bank's loan would be receiving sales estimates from the agents and alleged that it had in fact so relied. At first blush, this seemed to the court to raise an issue of fact. The court noted that the revenue analysis clause, by reciting that the third-party plaintiff had made an independent investigation and decision in assessing the risks, conflicted with an earlier statement that the third-party plaintiff was relying on the sales agreement and seemed to create an ambiguity. However, the court concluded, specific disclaimers in the policy precluded third-party plaintiff from relying on the sales estimates, which were only speculations or projections of unknown future events. The president of the sales agent could not be held liable for the negligent misrepresentation of the corporation merely because of this official relationship. The pleading was deficient as it lacked any allegation of malice, abuse of corporate power or intentional wrongdoing. On a fraudulent inducement claim against the producers, the court found that the third-party defendants had sufficiently alleged a representation to third-party plaintiff about the production budget in that the producers knew or expected that production data would be taken into account by the insurer in deciding whether to insure plaintiff's loan to the producers. Unlike the sales estimates, the statements as to budget data allegedly misstated a fact - - how much money the producers had allotted to the production. The court found the statement material since the production budget bore on the prospects that able people could be recruited to work on the film. The court found that fraud was pled with sufficient particularity. The court found that the producers had a special relationship with the insurer approaching privity as they knew that the production data would be passed on to it and should have known that it would rely on that data. A negligence claim failed since the acts alleged concerned the producers' obligations to plaintiff bank under contracts so that these parties owed no independent, common-law duty. Under a risk management agreement, English law and English courts were specified, the movie's risk managers being British. The court declined to ignore these clear provisions in favor of a discretionary one (action "may be brought in New York") in the policy. Third-party plaintiff had not alleged that the risk management agreement was a product of overreaching or was unreasonable, or that its enforcement would be unjust. Personal jurisdiction was thus lacking.
Chase Manhattan Bank v. New Hampshire Ins. Co., Index No. 600996/2000, 10/11/02 (Ramos, J.).

Insurance; receipt of policy and declarations; liability of agent for failure to procure coverage. Liability coverage was obtained, but not coverage for property damage. Plaintiffs sued for breach of contract, fraud and

breach of a contract to procure insurance (against defendant agent). As to the insurer, the court held that summary judgment should be granted in its favor since plaintiffs had received the policy and declarations pages. The court further stated that agents have a common-law duty to obtain requested coverage within a reasonable time, but no continuing duty to advise, guide or direct a client to obtain additional coverage. The court found that the defendant agent had obtained the coverage requested, plaintiffs never having specifically requested property damage coverage. Summary judgment for defendants. Madelena v. Markel Ins. Co., Index No. 08935/1999, 10/4/02 (Stander, J.).

Misrepresentation; collateral representation; constructive fraud; special relationship; superior knowledge of industry. Conversion. Breach of contract; representative capacity. Action arising out of investment in aborted project. Plaintiff sued for fraud, conversion and breach of contract. An individual defendant, who had signed a term sheet with plaintiff as managing member of a corporate defendant, moved to dismiss. The court upheld a fraud claim since defendant had allegedly misrepresented, outside the agreement, that millions in financing had been secured, upon which plaintiff had allegedly relied. The court ruled that plaintiff had not adequately alleged a fiduciary relationship in the form of a special relationship antedating the transaction; defendant's superior knowledge about the industry involved was not enough. A constructive fraud claim was dismissed, as was one for conversion since conversion damages cannot be predicated on a breach of contract. As the defendant had signed in a representative capacity, a breach of contract claim failed. Cohen v. Glazier, Index No. 9688/2002, 11/21/02

Negligent infliction of emotional distress. Intentional infliction; privilege; claims of entities and employees. Libel; special damages; compulsory publication. In a research project, university professor sent letters to restaurants claiming that he had suffered food poisoning at each recipient's facility. Restaurants sued. The court found a claim of negligent infliction of emotional distress defective for lack of allegations regarding physical safety or exceptions to that doctrine. As to intentional infliction, the court ruled that the letters were not covered by a privilege and declined to hold that, as a matter of law, the letters were not sufficiently outrageous as to provide the basis for a claim. The court stated that the impact of the actions of defendant's "campaign" may have been harassment of the owners. The court held, though that the restaurants as entities had no claims and that claims of employees were too attenuated to be upheld. Claims of owners were upheld. As to libel, the court ruled that the complaint did not allege with specificity special damages arising from publication to employees so that the case was not an appropriate one in which to extend the doctrine of compulsory publication. The case was also not appropriate for such extension as to libel per se. Dismissal granted in part. Chez Josephine v. Columbia University, Index No. 101362/2002, 11/26/02 (Gammerman, J.).

Partnership; breach of fiduciary duty; accounting; statute of limitations; derivative claims; necessary parties. In action by two partners against a third for breach of fiduciary duty, an accounting and a declaration, the court upheld the claims as pled. As to the statute of limitations, the court ruled that allegations of a continuing breach of fiduciary duty, such as continuing failure to account for and turn over profits and income, meant that a new claim would accrue upon each failure to account. A derivative claim was not required because plaintiffs' personal interests were involved. All partnerships need not have been joined. Lieberman v. Wachsman, Index No. 5879/2002, 11/6/02 (Austin, J.).

Poundage; City Marshal; execution on judgment; settlement. Motion by City Marshal for poundage fees for execution of a judgment in an action (CPLR 8021(b)). A judgment had been obtained and the Marshal had executed on certain monies. A settlement agreement was thereafter entered into and the Marshal was advised to cease levying on the payments. The Marshal requested disclosure of the settlement amount in order to calculate his fees, but the confidentiality provision of the agreement was invoked. The Marshal may collect poundage on the value of property levied on where a settlement is made after a levy by execution. The parties argued that the settlement here was not a settlement of the judgment, but an assignment of the judgment interest. The court held that the judgment had been assigned for value to a related party and had the effect of a settlement. It appeared that the assignment had been made with the intent of defeating the execution by the Marshal in order to benefit the judgment debtor. The Marshal was entitled to recover poundage. Of the $12 million involved, $6 million related to the settlement of other cases, and $6 million to the judgment at issue. Poundage, the court ruled, should be calculated on $6 million. Amount fixed at $300,000. Loral Aerospace Holdings, Inc. v. Continental Satellite Corp., Index No. 122929/98, 12/5/02 (Gammerman, J.).

Preliminary injunction; loss of new market as irreparable damages. Contracts; duty to deliver copy of fully signed agreement; intent to be bound. Licensing arrangement. Motion for preliminary injunction in action regarding licensing and use of trade name. The court found a strong probability of success on the merits, rejecting defendant's argument that there was no binding contract because defendant never received an executed copy. Plaintiff had sent an agreement, which defendant had signed and returned. Defendant did not alter it and it contained no language obligating plaintiff to deliver a copy to defendant. Further, plaintiff placed orders and obtained a line of

credit as required, ultimately purchasing $600,000 of inventory. These facts showed acceptance by plaintiff and intent of both sides to be bound in the absence of a requirement that defendant receive a copy of the contract in order to be bound. If defendant were to distribute to others, plaintiff would lose a new market it had created and there would be confusion in the marketplace. This established irreparable injury. The equities tipped in plaintiff's favor given the inadequacy of damages as relief, the fact that defendant supported its assertion that the product line was the sole source of defendant's business only with an affidavit from a former employee, and the fact that defendant did not claim that it could not sell the product outside the western hemisphere, as permitted by the agreement. Motion granted. J&D Walter Distributors, Inc. v. Premiere Development, LLC, Index No. 4157/2002, 12/3/02 (Benza, J.).

Procedure; application for pre-action discovery; fraud; breach of fiduciary duty. Application for pre-action discovery to obtain information regarding contributions to and disbursements from charitable entity. Petitioners sought appointment of a referee or Judicial Hearing Office to supervise document discovery and an accounting. Fund in question had been set up to aid families of police officers killed on Sept. 11, 2001. Some funds had been disbursed to families, but petitioners alleged that the PBA had stated at a public meeting that some of the monies collected would not go to the families. As the Attorney General, who had submitted papers, had been given broad supervisory responsibility over charities by the legislature, he would be allowed to intervene. The court pointed out that the fund had a separate corporate existence as a not-for-profit, but had not been served, nor had it been the focus of the application. Beyond that, the court stated, petitioners had not presented proof that they had a cause of action for breach for fiduciary duty or fraud; pre-action discovery is not available to determine whether a claim exists. The Attorney General had already looked into the fund and the documents petitioners sought and had determined that the fund had been properly administered. Petition dismissed. In re McDonell, Index No. 602561/2002, 12/10/02 (Gammerman, J.).

Procedure; CPLR 3211(a)(1); absence of documentary evidence. Quantum meruit; existence of contract. On motion to dismiss founded on documentary evidence, defendants relied upon plaintiff's by-laws and the absence of a subscription agreement between plaintiff and defendants. But, the court found, the by-laws did not definitively dispose of the claims and there was no contract. Sufficient evidence was contained only in defendants' affidavits, which were not documentary evidence. The court declined to dismiss a quantum meruit claim on the ground that the existence of a contract precluded it since at the early stage of the case it had not been determined whether a sufficient contract relationship existed. That and the degree of benefit furnished would be addressed on summary judgment. Motion denied. Rochester McDonalds Operators Assn. v. Freiman, Index No. 7352/2002, 12/20/02 (Stander, J.).

Procedure; motion to amend; trial; diligence of party; surprise. Procedure; summary judgment; prima facie showing. Corporations; piercing; domination; status of defendant as stockholder. Misrepresentation; prediction. Action arising out of contract by which corporate defendant was to purchase goods from plaintiff which were delivered to defendant but not fully paid for. A motion to amend was made near to trial, but plaintiff had moved with reasonable diligence after learning in discovery the information on which the claims were premised. Also, plaintiff had pursued a piercing theory from the outset so the application would not surprise defendants. The court further found that the proposed amendments were not devoid of merit. Motion granted. The court held that plaintiff's summary judgment motion had to be denied for lack of a prima facie showing that eliminated all material issues of fact. Plaintiff presented cryptic excerpts from defendants' depositions that did not sufficiently clarify the transaction. Plaintiff's papers did not include an affidavit from a person with knowledge nor foundational documents. On defendant's motion for summary judgment to dismiss claims based on a piercing theory, the court stated that that theory is fact-laden and not well suited for summary judgment resolution. The court found issues of fact as to domination. The court rejected the argument that the doctrine was inapplicable to an individual defendant as a matter of law because he was not a stockholder. The court held, though, that a fraud claim was defective because the alleged misrepresentation as to the corporation's ability to pay its debts vaguely set forth a prediction only. The papers seeking dismissal of an unjust enrichment claim were not sufficiently particularized in their factual and legal analysis. Motion granted in part. Venator Group Retail, Inc. v. S.K.I. Inc., Index No. 19412/2000, 12/3/02 (Austin, J.).

Procedure; personal jurisdiction; website ad; CPLR 302(a)(1). A breach of contract action arising out of employment of lawyer by foreign country. With regard to personal jurisdiction, the court found that a passive ad posted on an employment website could not serve as a basis for personal jurisdiction. Although plaintiff had signed the contract in New York, defendant had not. Storage of plaintiff's goods in New York and a drug test here had no connection to the cause of action. E-mails and phone conversations between plaintiff in New York and defendant were not enough to provide jurisdiction**.** Absent jurisdiction (CPLR 302(a)(1)), case dismissed. Betz v. Commonwealth of Northern Mariana Islands, Index No. 104484/2002, 10/7/02 (Ramos, J.).

Procedure; personal jurisdiction over foreign corporate guarantor of note. Plaintiff moved for an order of

attachment and summary judgment. A promissory note and guarantee were unpaid by defendants. One defendant was a New Jersey corporation. The other, its parent, was a Mexican corporation. The latter argued that the court lacked jurisdiction over it. However, the court found that its wholly-owned subsidiary was a New York resident, for which entity the benefit of the guarantee was made. The note was made payable to defendants' New York bank. The court also noted that defendant had made the identical argument, unsuccessfully, in a case brought by another bank on an identical note. Jurisdiction existed over this defendant. Standard Bank London v. Asarco Inc., Index No. 602148/02, 10/10/02 (Ramos, J.).

Settlement; enforceability; illegal scheme. Parties had executed settlement agreement. Plaintiffs had challenged the agreement as unenforceable, relying on extrinsic evidence of an illegal scheme by defendants in executing it. The court stated that the agreement was not ambiguous and that extrinsic proof was inadmissible. Further, the court found that the terms agreed to did not contravene public policy. The court found a non-disparagement clause to be a common provision not reflective of an illegal scheme. Provisions permitting parties to respond to subpoenas and discuss documents and the like indicated absence of illegality. Plaintiffs' motion for summary judgment denied. Quevedo v. Fine, Index No. 11606/2001, 10/2/02 (Standard, J.).

Shareholders derivative action; demand; rejection; business judgment rule. Stockholders derivative action alleging that Amazon had paid an excessive brokerage fee in a sale of debt securities in violation of GOL 5-531. The board had rejected a demand to sue. Amazon had moved to dismiss based on the rejection of the demand by a disinterested board. Under Delaware law, which governed the demand issue, the board is competent to exercise its business judgment as to the impact of suing investment banker and the board is not obligated to provide a detailed rebuttal of plaintiff's claims. Before making a business decision, the directors have a duty to inform themselves about all material information reasonably available and must then act with requisite care in discharge of their duties. A refusal letter's failure to respond to all allegations in the demand letter does not mean that the board did not consider the demand before refusing it. The court found that the essence of the amended complaint was that the board was required to conduct a factual investigation. However, the court stated, the facts were not in dispute. Thus, this was a facially meritless case in which directors' actions are particularly entitled to the protections of the business judgment rule. Motion to dismiss granted. Leen v. Credit Suisse First Boston Corp., Index No. 601271/2002, 10/17/02 (Ramos, J.).

Special proceeding to inspect corporate records; specification of need; breadth of request. Article 78 proceeding seeking order directing inspection and copying of corporate books and records. The court found that petitioner had not specified why the requested records were needed to value his shares in the corporation and why access previously provided to corporate books had not sufficed. Nor were mere suspicions of corporate scheming sufficient to constitute an adequate claim of corporate mismanagement that would require granting of the application. The request was also overly broad. Petition dismissed. Dyer v. Indium Corp., Index No. 5217/2002, 10/25/02 (Benza, J.).

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