The Commercial Division

of The State of New York

Law Report - JANUARY 2005

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

Accountants; hedge fund; GAAS; GAAP. Liquidation; successor liquidating trustee. Derivative and direct claims. Principal and agent; *in pari delicto* (Wagoner rule); adverse interest; sole actor; innocent insider. Fraud; scienter. Malpractice; privity. In actions arising from a hedge fund's demise, plaintiffs asserted claims against the fund's auditor, a big five firm, for excessive incentive and management fees received by fund officers. The court stayed the claims, which it found derivative in nature, pending determination of the liquidating trustee's legal standing to pursue his own claim on the partnership's behalf. Plaintiffs in one case were limited partners in the fund, in the second investors purporting to represent a class, who also sued certain fund officers. Plaintiffs opposed the stay and tried to characterize their attempt to recover the fees as a direct claim. They cited a case that held that a liquidator had no standing where limited partners were the ultimate injured party, but the claim there involved an initial partnership investment and hence was direct. The court also distinguished a case involving medical malpractice and fraud. Plaintiffs pointed out that the excessive fees were charged *pro rata* to the individual partners' capital accounts. The injury nevertheless accrued to the partnership, the court stated. The management fees were for managing, the incentive fees were to influence the managers' performance on the fund's behalf, and the way the fees were paid merely conformed to hedge fund accounting requirements. Plaintiffs argued that while the liquidator had a claim for restitution against the general partners for the fees' excess, their own claim sought compensatory damages from the auditor, and was direct. The court found the distinction meaningless; the claim belonged to the injured party, the partnership. The plaintiffs argued that the "*in pari delicto"* rule prevented the liquidator from suing the auditor. According to the rule, a manager's misconduct would be imputed to the corporation and bar the trustee standing in for the corporation from suing a third party over a wrong that he essentially took part in. It was undisputed that at least one fund manager here had committed undetected frauds. But whether his misconduct could be imputed to the partnership was not clear from the record so far, the court found. It could not be imputed if the "adverse interest" exception to the *"in pari delicto"* rule applied–if the manager's course had entirely abandoned the partnership's interests and pursued solely his own interests or another's. Here, it appeared likely that the manager had overstated the funds' holdings so that he and others could receive inflated fees, to the partnership's detriment. If so, the liquidator would have standing to pursue his own fees claim. The plaintiffs argued that the "adverse interest" exception was precluded here by the "sole actor" rule, which applies when a principal and agent are the same, so that misconduct must reasonably be imputed. The court drew from a Federal decision to clarify that the "sole actor" rule would require that there had been no "innocent insiders" at the fund with authority to halt the fraud had they known of it. Indications–according to a report by a law firm–were that the fund's president, among possible others, was a relevant "innocent insider," empowered to stop the fraud but unaware of it. That aside, some courts do not even recognize the rule, implicitly requiring management to choose its agents carefully and keep close tabs on them. Until the court could determine whether *in pari delicto* prevented

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the liquidator from suing, or its exception "adverse interest" gave him standing, it stayed rather than dismissed the derivative claims. But it also noted that the liquidator was in the best position to sue, able to assert claims that would benefit all partners, not just plaintiffs. Further, with several competing suits in process, it was preferable to adjudicate centrally at least the claims that the liquidator could bring. In regard to direct claims in the limited partners' suit, they were different from the liquidator's claims, and the court declined to stay them, as the liquidator sought, or dismiss them, as the auditor sought. That the liquidator might recover beyond what the plaintiffs would recover–and whatever the former recovered would be on behalf of the limited partners– was not a reason to dismiss or stay. The court also disagreed with the auditor's argument that the fraud claim and certain others were duplicative of one for accounting malpractice. Plaintiffs alleged purposeful activity on the auditor's part that established the scienter necessary for fraud. The claim was not weakened because plaintiffs alleged some of the same acts in their other claims. Moreover, plaintiffs could not pursue the return of their initial investment through a malpractice claim as there had been no privity at the outset. Finally, the auditor was wrong that the case was premature, the court found. Although it was not yet knowable whether the plaintiffs had been injured by sustaining actual losses–if their withdrawals plus liquidating distributions from the partnership would prove less than the amount they had invested–the question was an issue of fact, not a reason to dismiss. Jones v. Price WaterhouseCoopers LLP, Index No. 602962/2003, 11/5/04; Morgado Family Partners, LP v. Lipper, Index No. 604396/2002,11/5/04 (Moskowitz, J.).

Accountants; indemnification of client; contract implied in law; professional malpractice; counsel fees. Action by purchaser of corporation against sellers of corporate shares. Third-party action by defendants against an accounting firm. Defendants alleged that the firm had served as their accountants during the sale transaction, had been responsible for ensuring that representations and warranties were accurate, and would be obliged to indemnify defendants if it were found that defendants are liable to plaintiff. The court ruled that defendants might have a professional malpractice claim, but not an indemnification action based upon a contract implied in law. The firm had owed no duty to plaintiff. Nor did the firm owe the defendants a special duty, independent of the accountant/client relationship, to hold defendants harmless from liability to plaintiff. The indemnification claim failed and a malpractice claim was time-barred. The court also held that, since defendants had no tort claim against the firm, their claim for counsel fees failed. WSNCHS East, Inc. v. Pike, Index No. 10489/2002, 11/3/04 (Emerson, J.).**

Article 78; motion to dismiss; Labor Law § 220-b; Lien Law 3-a. Petitioner, construction contractor for the Town of Southampton Animal Shelter, sought an order compelling respondent, Town of Southampton, to release monies held in trust pursuant to Labor Law 220-b, and a declaration that the Town's refusal to release said monies violated Article 8 of the Labor Law and Article 3-a of the Lien Law. Petitioner alleged that pursuant to a final release issued by the Department of Labor, respondent was to have released $149,541.97 to the petitioner and $18,846.23 to the Commissioner of Labor. Petitioner claimed that respondent had refused to release the funds as stated in the Department of Labor's notice, and that the money was already the subject of a contract dispute between the parties. Respondent asserted that pursuant to a previous stipulation of settlement and a subsequent letter from the Attorney General, the sum of $8,464.89, which was to be used to compensate underpaid workers who ultimately could not be timely located, was to remain withheld and released in accordance with directions from the New York State Department of Labor. Respondent further claimed that because petitioner's claim sounded in breach of contract, an Article 78 proceeding was inappropriate. The court granted the portion of respondent's motion which sought to have $8,464.89 paid to the petitioner and concurred with respondent that the money was to compensate underpaid workers so that petitioner had no claim to those funds. The court next found that petitioner had not brought the Article 78 proceeding in error, and pointed out that issues raised by the withholding of sums of money pursuant to Labor Law § 220-b are properly reviewable in an Article 78 proceeding. The court determined that petitioner's notice of claim had been timely made. The court explained that since the amount of monies to be released could not have been ascertained until the notice of release, any claim to amounts unlawfully retained by respondents could not have been made until respondents refused to release them. The court dismissed the portion of petitioner's claim that sought the payment of $18,846.23 to petitioner or the Commissioner of Labor as neither had any claim to those monies. Finally, the court dismissed the petition as to respondent, State of New York Department of Labor, finding that it did not have, nor had it ever had, control of the monies it had directed respondent Town to hold in trust pending resolution of the Labor Law 220-b action. ADC Contracting v. Town of Southampton, Index No. 16316/2004, 12/7/04 (Emerson, J.).**

Attorney-client privilege; protective order; inadvertent disclosure of e-mail in motion papers; effort to recall. Defendant moved for a protective order blocking the use of certain documents it claimed had been inadvertently attached to the exhibit section of its motion to dismiss. Of particular concern to defendant was a two page email which defendant claimed was protected by the attorney-client privilege. Defendant asserted that plaintiffs had been in possession of the email from September 15 until October 7, at which time defendant had discovered the unintended disclosure when plaintiffs referenced it in their memorandum of law in opposition. Defendant asserted that it had never intended to waive attorney-client privilege with respect to the email, nor did it have the client's authorization to do so. Defendant further claimed that when it discovered that the email had been inadvertently turned over to plaintiffs, it immediately wrote to plaintiffs and all other parties who had appeared in the action noting the unintended disclosure of the email and explaining that it had been a privileged communication between attorney and client. Defendant demanded its return and requested that all portions of plaintiffs' memorandum of law which referred to the email be withdrawn. Plaintiffs responded that since the documents had been attached to defendant's affirmation in support, it was unclear that their production had been inadvertent. Moreover, the email bolstered plaintiffs' position in the underlying action, that defendants had intentionally and maliciously precluded them from marketing the recording "Got You On My Mind," and that the exclusion of all of the inadvertently disclosed documents would prejudice their client. The court determined that the email was protected by the attorney-client privilege and that defendant's disclosure had been inadvertent and unintentional. Further, defendant's immediate attempts to recall the e-mail negated a claim of intentional waiver. The court relied upon recent opinions from ethics committees of the Association of the Bar of the City of New York and the New York County Lawyers' Association, which both support notification as to and return of privileged communications. The court directed that all copies of the email in plaintiffs' possession be returned to defendant and that plaintiffs' counsel contact any parties to whom the email had been disseminated and transmit a letter demanding return of the email to defendant. The court denied the branch of defendant's motion seeking sanctions and disqualification of plaintiffs' counsel. Galison v. Greenberg, Index No. 602478/2004, 11/8/04 (Cahn, J.).

BCL § 627; motion to reargue or renew; shareholder derivative action. Plaintiffs, shareholders of defendant country club, brought the underlying action which alleged, *inter alia,* a shareholder derivative claim which sought to recover damages from defendants for breach of fiduciary duty and waste of corporate assets, common law dissolution of defendant country club, and a claim seeking an injunction enjoining defendants from violating the New York State Security Takeover Disclosure Act (BCL Article 16). Summary judgment had previously been granted to defendants. Plaintiffs sought leave to reargue the court's subsequent order which had granted defendants' motion to renew and also directed plaintiffs to post a bond for reasonable expenses pending the perfection of plaintiffs' appeal. Plaintiffs argued that reargument should be granted because, pursuant to BCL § 627, the court could have directed the posting of security at any time up to the filing of a final judgment, yet in the instant case, judgment had been entered before the court granted the motion for security for costs so that the court lacked jurisdiction to hear the motion. Plaintiffs further contended that defendants' motion was not one to renew since motions to renew must be based on new or additional facts which had not been known to the party at the time the motion was made. Finally, plaintiffs argued that the court's decision on the prior summary judgment motion was immaterial to the fair value of plaintiffs' shares in defendant country club. The court found that plaintiffs' argument that the court lacked jurisdiction to entertain defendants' earlier motion to renew was without merit. The court stated that having granted defendants' summary judgment motion, the court was deprived of jurisdiction except for a motion to renew. The court stated further that the issue was whether defendants' motion to renew had been properly designated as such. The court explained that since defendants' motion had asked the court to reconsider its prior order regarding the necessity of plaintiffs posting security for costs, it was a proper motion to renew. The court next ruled that orders entered on motions brought pursuant to BCL § 627 are subject to renewal if there are changes in the relevant facts, and that in the instant case the relevant facts which related to the value of plaintiffs' beneficial interest in defendant country club had changed. Further, the court had dismissed plaintiffs' action for a common law dissolution of defendant country club. The court pointed out that BCL § 627 was a recodification of General Corporation Law § 61-b; therefore, the court's requirement that plaintiffs in the instant action post security for costs was consistent with the legislative intent of the statute to frustrate strike suits. Shapiro v. Rockville Country Club, Inc., Index No. 15308/2002, 10/22/2004 (Austin, J.).**

Comity; Brazilian concordata and declaratory actions. Jurisdiction; submission by assumption of selection clauses. Plaintiff, a Dutch Antilles corporation with its principal place of business in Rotterdam, sued defendant, a Brazilian corporation, for some $4 million claimed due on certain contractual obligations that plaintiff had guaranteed. Plaintiff contended that, pursuant to agreements between plaintiff and defendant, defendant had assumed certain 1997 agreements and was thus bound by selection clauses contained therein. Defendant argued that the complaint should be dismissed because comity should be extended to the Brazilian courts in regard to a concordata action or a declaratory action. Defendant contended that the concordata action is the equivalent of a Chapter 11 proceeding. The court found that, unlike a Chapter 11 proceeding, a concordata action binds only general unsecured creditors and a secured creditor, such as plaintiff, is not subject to an automatic stay. Thus, plaintiff here could pursue its rights elsewhere. Nor, the court found, had plaintiff subjected itself to the jurisdiction of the concordata court when it submitted a restructuring agreement for approval. Comity therefore would not be extended to the concordata action.

Further, the only basis for jurisdiction of defendant was its claimed submission to New York jurisdiction by assumption of selection clauses. Although defendant had assumed bank debt, it denied accepting assignment of obligations, including the selection clauses. The court concluded that plaintiff had failed to prove that defendant had assumed the clauses. Defendant was not a party to the 1997 agreements and subsequent documents, relied on by plaintiff, did not refer to them. Certain possibly relevant documents had not been presented to the court, nor had plaintiff requested discovery. Plaintiff, the court ruled, had failed to meet its burden to establish jurisdiction and had failed to show that comity should not be extended to the declaratory action. Case dismissed. Hunter Douglas N.V. v. Wotan Maquinas Ltda., Index No. 603668/2003, 10/7/04 (Fried, J.).

Commercial real property; tax escalation clause; clarity of clause; disproportional nature of obligation; due diligence; unconscionability. Plaintiff, a commercial tenant in defendant's building, commenced the instant action for breach of contract, fraud and unjust enrichment. Plaintiff claimed that the modified tax escalation clause it had signed in 2001 when it agreed to lease additional space from defendant did not accurately reflect the proportionate share of space leased and was excessive in light of an 18.5% real property tax increase imposed by New York City in 2003. The court granted defendant's motion for summary judgment and found, first, that the escalation clause set forth a simple and unambiguous formula for calculating tax increases to which plaintiff had agreed. The court found that the modified clause was not unconscionable for stating a percentage that was greater than the actual proportionate share of the building's total area and pointed out that paragraph 41 of the lease deemed the tenant's share to be 6% and specifically disclaimed that that percentage bore any relationship to the "precise" amount of space leased and the total amount of space in the building. The court further stated that plaintiff could not complain about its ignorance as to the total size of the building since that information could have been easily ascertained through inquiry and due diligence. The court next found that plaintiff's representative had not been misled by the landlord's managing agent about the minimal impact of the escalation clause since the impact of any future tax increases could have been easily calculated by multiplication of a hypothetical increase times 6%. Finally, the court found that plaintiff could not sustain a challenge based on a claim of unequal bargaining power of the parties and determined that the lease had been negotiated by experienced parties on both sides. 609 Corporation v. Park Towers South Co. LLC., Index No. 121510/2003, 12/1/2004 (Cahn, J.).

Contracts; arbitration clause; composition of arbitration panel; corporate personality; party as adjudicator; relationship between corporate disputant partners and arbitration panel. The plaintiff, a national accounting firm, sued to collect on a promissory note and the defendant asserted counterclaims of wrongful termination and for monies owed under a partnership agreement. The plaintiff moved, pursuant to the agreement's arbitration clause, to compel the counterclaims' arbitration. The defendant argued that the clause no longer applied to him: the agreement defined "partner" as "all those persons to whom units have been allocated," which he contended excluded former partners, like himself, who have no units. However, the court found that the past-tense construction clearly included current and former partners both and that certain sections of the agreement referring to "former" partners did not mean that only those sections applied to them. For example, one section set forth against a "partner" prohibitions that applied "at, before, or within two years after termination from the partnership" and provided that the term "partner" included "former" partner. Further, the agreement directed that any controversy be resolved according to the section that defined "partner" as having been allocated units. And, a supplemental agreement, which governed in case of inconsistency, contained the arbitration clause and did not include "former" partner at all. The defendant argued that disputes that involved board actions, such as his termination, were not subject to arbitration. The agreement said that the panel's members would be mutually agreed to by the board and the parties to the dispute, language, he argued, that distinguished the board from the parties. The intent, however, the court found, was to give the board a say in composing the panel even when it was *not* involved in the dispute. Otherwise the drafters would have included specifics limits, as they had when excluding accountings from the arbitration clause. The defendant argued that his termination could not be arbitrated because the provision required that the panel include, as well as five partners who had not been involved in the dispute, two board members who had not. The requirement could be met, though; the board's composition had changed since the defendant's termination and the plaintiff had agreed to waive the requirement if it were not possible to supply two eligible members. Moreover, the party to the dispute was the plaintiff, a business entity, not the individual partners arbitrating. The distinction was clear in that the partnership could not act without at least seven board members, and neither the two board members nor the five partners on the panel could individually or together have terminated the defendant. The panel's relationship to the plaintiff did not invalidate the clause, either. Regarding this, the defendant argued that the panel members had a financial interest in siding against him–the money he sought could potentially cost each partner about $10,000–and that the panel was so identified with the plaintiff that it was illusory and unconscionable. But the court noted that the parties' freedom to name the arbitrator is basic to arbitration, and cited Westinghouse Elec. Corp., 82 NY2d 47, which, with its progeny, upheld contractual ADR provisions that authorized a disputant's employees to make binding decisions. In Westinghouse, the employee had even been personally involved in the events creating the dispute. This case was not distinguishable even though the partnership agreement here provided that the panel's determination was binding; the plaintiff moved to compel arbitration pursuant to CPLR 75, which provides for judicial review. The court cited an appellate decision which upheld an ADR clause that put resolution entirely in the hands of a single employee of one of the disputants without providing any standard at all for judicial review; the court had found sufficient merely that there was "some form." Here, the court noted, the provision safeguarded the arbitration by specifying that mostly partners, not board members, compose the panel, and with other requirements. The defendant urged as precedent a 1957 case in which the court had declined to enforce a clause allowing a disputant's board to arbitrate. However, an entire board has complete control of a corporation. Nor did the partiality for the plaintiff that the defendant asserted would rule the panel in this case invalidate the clause since the defendant had known the conditions when entering the agreement. Other partners, too, were subject to the clause, indicating a reasonable expectation of fairness. Finally, the court disagreed that the underlying action and counterclaims should be resolved in the same forum to conserve judicial resources. The counterclaims required consideration of the partnership agreement and were separate and distinct. The parties were ordered to arbitrate the counterclaims. BDO Seidman, LLP v. Bloom, Index No. 600404/2004, 10/6/04 (Fried, J.).

Contracts; incomplete transaction; notes versus down payments; unconditional nature of notes and guarantees; meeting of the minds; statute of frauds; consideration. Procedure; change of venue; showing. The instant dispute arose out of unpaid promissory notes. At the time the notes had been executed, the parties had been trying to negotiate a sale and lease-back agreement which would have had the effect of assisting defendant in the refinancing of its debt. Those negotiations, however, stalled and the sale and lease-back transaction were never completed. Plaintiffs moved for summary judgment in lieu of complaint. Defendants cross-moved to dismiss or have the action converted to a plenary action, or, in the alternative, for an order transferring venue from Nassau to New York County. Plaintiffs had cross-moved to dismiss defendant's counterclaims. The court found that plaintiffs had shown their entitlement to summary judgment in lieu of complaint and that defendants had defaulted in making payments on the notes. The court was unconvinced by defendants' argument that the notes were in fact not notes, but down payments inextricably intertwined with the failed lease-back transaction. The court determined that although the lease-back transaction was in the process of being negotiated at the same time the notes had been executed, the record did not support defendants' contention that the amounts due had actually been escrow funds or down payments. Moreover, the parties' understanding had not demonstrated that the unambiguous terms of the notes had been conditional on, or had altered, defendants' repayment obligation. The court further disagreed with defendants' assertions that the personal guarantees on the notes were not really guarantees, but personal assurances that defendants would complete the lease-back transaction, and noted that the guarantees were unequivocal and made no reference to the lease-back agreement. The court found unpersuasive defendants' arguments that no one would loan funds to a financially troubled institution, as well as their claim that the parties had executed complete and unequivocal instruments on three separate occasions allegedly with the unstated intent that none of the documents actually carried the meaning dictated by their express terms. The court next granted plaintiffs' cross-motion to dismiss and determined that defendants had not established viable defenses or issues of fact. Despite extensive negotiations and preparation of draft agreements, no meeting of the minds had been reached. The statute of frauds would bar enforcement of the purported agreement (GOL-5-703(2)). Consideration supporting the principal contract would support the guarantees. Finally, the court found that defendants had failed to make an appropriate showing that they were entitled to a change of venue and plaintiffs' designation of Nassau County was proper. Lepore v Novex Systems International, Index No. 3976/2004, 10/15/04 (Austin, J.).**

Contracts; individual liability for breach; covenant of good faith and fair dealing. Misrepresentation; pleading with specificity. Fiduciary duty. Corporations; piercing corporate veil. Motions to dismiss and change venue in an action which arose out an alleged breach of agreement by defendant, insurance brokerage firm, from which plaintiffs had purchased approximately 1200 insurance policies. Plaintiffs intended that most of the balance of the purchase price would come from commissions earned on insurance policy renewals after closing. In the instant action, plaintiffs alleged collusion between defendants to siphon off money so that plaintiffs ultimately would not have sufficient funds to make the payments due on a promissory note. One individual defendant moved to dismiss the action and to change venue to Nassau County. Defendant claimed he had not been a party to the allegedly breached contract, owed no fiduciary duty to plaintiffs, and had made no fraudulent representations to plaintiffs with respect to their purchase. He further stated that he had no relationship to defendant brokerage firm sufficient to justify piercing the corporate veil to hold him personally liable to plaintiffs. The court found that venue could properly be changed to Nassau County as plaintiffs had failed to raise any objection to the proposed change. The court granted defendant's motion to dismiss. The court found that with respect to the movant, no facts had been alleged in the complaint that would support a breach of contract claim. The court found no breach of a covenant of good faith and fair dealing since no contract existed between plaintiffs and movant. As to the fraud claim, the court stated that plaintiffs had not given specifics as to any direct fraudulent conduct or particular representations made by the movant. The court held that the plaintiffs' claim for breach of fiduciary duty had not been pled with specificity, and that in the absence of a contractual relationship there could be no fiduciary duty owed by the movant to plaintiffs. Finally, the court found no basis to pierce the corporate veil and impose personal liability on the movant. The court explained that plaintiffs' allegation that defendant corporation was an empty shell with no assets was insufficient to support their claim against movant, who was neither an owner of the corporation nor a party to plaintiffs' contract with it. Black Car and Livery Insurance Inc. v.H & W Brokerage, Inc., Index No. 8615/2004, 11/9/04 (Austin, J.).**

Contracts; interpretation; prior conduct; extrinsic proof; sub-chapter "S" corporation; distribution. Procedure; motion to reargue. Petitioner, a shareholder and former employee of respondent, sub-chapter "S" corporation, moved to reargue an order which had construed the shareholders agreement as not requiring the corporation to make a distribution of new income. Plaintiff asserted that the court had misconstrued the law and the facts in its previous interpretation of the agreement by not having referenced the parties' prior conduct. Petitioner elaborated that respondent had always made a distribution to the shareholders sufficient to cover the income tax liability incurred because of the corporation's sub-chapter "S" status. However, petitioner was discharged, the corporation had failed to make such a distribution, as a result of which the shareholders had incurred a substantial tax liability without having received payment of net income. The court denied petitioner's motion. The court explained that the language of the shareholder agreement was clear and unambiguous in its provisions of procedures for the allocation of distribution of net income. The intent of the parties should therefore be determined from the agreement, not from outside sources. The court found that the agreement did not require an annual distribution of net income. The practice of the parties in prior years constituted extrinsic evidence that could not be considered by the court in its interpretation of the agreement. The court stated further that if the parties had wanted to require an annual distribution of the net income, the agreement could and should have required that. Motion to reargue denied. Matz v. Matco-Norca, Inc., Index No. 3133/2002, 11/15/04 (Austin, J.).**

Corporations; Not-for-Profit Corporation Law §§ 601, 706; conflicting boards; specific performance. Plaintiff, which had entered into a contract to purchase real property from defendants, sued for, inter alia, specific performance and to enjoin the sale of the subject premises to any other entity. Motions had been filed by both sides. Plaintiff complained of defendants' failure or unwillingness to provide audited financial statements that were necessary in order for plaintiff to gain HUD approval of its purchase of the premises. A critical issue was an internal conflict involving the construction of N-PCL **§** 706 and the issue of which of the defendant corporations' Boards of Directors had the authority to deal with plaintiff to effect the sale. Defendants claimed that the Union Baptist Church's control had stifled the newly appointed directors of Park Lake and thus prevented them from acting in the best interests of the corporation vis-a-vis the sale of the subject premises. The court first noted that under N-PCL **§** 601, the certificate and the by-laws, there was no reason not to recognize the ultimate control held by the Church over the composition of the Board of Directors of Park Lake. The court thus found that the Board appointed by the Board of Trustees of the Church was the valid Board having full authority to act on behalf of Park Lake. The court denied plaintiff's request for a preliminary injunction in light of the fact that since Park Lake was a not-for-profit corporation subject to oversight and regulation by multiple state and federal agencies, there could be no sale of the subject premises absent approval of the court. Silver Street Development Corp. II v. Park Lake Housing Development Fund Corp., Index No. 010415/2004, 12/6/04 (Warshawsky, J.).**

Corporations; shareholders agreement; ouster of shareholder. Post-trial decision in action by one shareholder against her two co-shareholders. The court found that all major corporate decisions had to be unanimous under the clear terms of the shareholders agreement. Thus, though defendants had been frustrated by difficulties caused by plaintiff, they had to act jointly with her on all key corporate decisions during the life of the corporation, absent a subsequent shareholders agreement. Defendants had improperly demoted plaintiff from her job and then suspended her from all employment. The court directed that plaintiff would be reinstated, with back pay. The court further found that a loan structured as a personal loan was actually for corporate purposes; that a defendant's withdrawal of part of the proceeds was improper because done without plaintiff's knowledge or consent; and that the withdrawal should be reversed. Sullivan v. Johns, Index No. 600343/1999, 11/2/04 (Cahn, J.).**

Discovery; material posted on private website; trade libel. Defendants had contracted to provide plaintiff with new computer hardware and software programs. When the new computer system failed to function as promised, plaintiff brought the instant litigation for breach of contract and fraud. Defendants counterclaimed for trade libel, tortious interference with contract and fraud. In particular, defendants claimed that plaintiff had posted allegedly defamatory material on the website of a private group of business executives to which plaintiff's CEO belonged. Defendants demanded copies of the text of the material, as well as the names of the members of the group to which plaintiff belonged. Plaintiff refused to produce the requested information, maintaining that any information posted on the website was confidential. The court granted defendants' motion and determined that defendants had demonstrated that the information they demanded from plaintiff was material and necessary to establishing the elements of their counterclaim for trade libel. The court further found that plaintiff had failed to establish that any damage would or might result from the disclosure of the requested information. United States Luggage v. Vormittag Associates, Index No. 7167/2003, 11/19/04 (Austin, J.).**

Donnelly Act; Insurance Law 2123(b); motion to dismiss. Plaintiff, an insurance salesperson, brought suit against multiple defendants when defendant hospital decided to limit the number of investment providers for its employee IRC § 403 (b) retirement plan and excluded plaintiff, who had long been one of its retirement plan investment providers. Plaintiff alleged that hospital had conspired with the other investment provider defendants and used wrongful means to eliminate it as an annuity provider. Plaintiff alleged, *inter alia,* violations of the Donnelly Act and Insurance Law 2123 (b), as well as tortious interference with contract, tortious interference with prospective contractual relations, and unfair competition and misappropriation, and sought a permanent injunction and compensatory, treble and punitive damages. All defendants moved to dismiss. The court dismissed the Donnelly Act claim, finding, first, that plaintiff had failed to set forth a conspiracy or reciprocal relationship necessary to allege violation of the Act. The court pointed out that the facts failed to suggest anything more than a unilateral decision by hospital to limit the number of providers available to its employees. The court further found that plaintiff's naming of hospital without including all relevant geographic areas in the alleged market was insufficient, nor could the annuity product sold by plaintiff to hospital's employees be characterized as a product market in and of itself. The court next held that plaintiff had failed to allege sufficiently how the economic impact of the alleged conspiracy could restrain trade in the market at issue. The court pointed out that the cognizable injury under the Act must be to competition in the market, not merely a loss of commissions by a single competitor. The court next dismissed plaintiff's claim alleging violations of Insurance Law 2123(b). The court found that plaintiff had failed to allege that the provider defendants had acted as agents or encouraged any individual to replace one policy with another, or made misleading statements, incomplete comparisons or misrepresentations. The court dismissed plaintiff's claim for tortious interference with contract, finding that plaintiff had not alleged the existence of any contract between it and hospital; rather, the claim had been based on employees' voluntary salary reduction agreements between each of them and hospital. Further, plaintiff had failed to show that it was a third-party beneficiary of those voluntary salary reduction agreements. The court further ruled that plaintiff had failed to allege any improper interference with a contract by defendants. The court dismissed plaintiff's claim for tortious interference with prospective contractual relations and/or economic advantage because plaintiff had failed to allege specifically any malice or conduct by defendants which could be characterized as having been intended for the sole purpose of harming it. Finally, the court also dismissed plaintiff's claim for unfair competition and misappropriation of business as plaintiff had not shown any misappropriation for commercial advantage of a benefit or property right belonging to another. Lopresti v. Massachusetts Mutual Life Ins. Co., Index No.12719/2004, 10/9/04 (Demarest, J.).**

Fiduciary duty; duty of corporate officers/directors to creditors. A defendant moved for summary judgment and plaintiff cross-moved for summary judgment in an action which arose when the defendant owner and sole shareholder of a commercial plywood business in financial difficulty wrote seven checks to plaintiff which were dishonored for insufficient funds. Plaintiff contended that defendant, as the business owner, should be held personally liable for the dishonored checks because he owed a fiduciary duty to plaintiff and/or had committed actionable fraud by issuing checks with either actual or constructive knowledge that there were insufficient funds in defendant company's account to cover them. Defendants' bookkeeper testified at deposition that it was office policy not to issue checks if there were insufficient funds to cover them and that at the time the checks had been sent to plaintiff the bookkeeper believed that there were sufficient funds in the company's checking account to cover them. The court found plaintiff's argument that defendants breached a fiduciary duty to plaintiff to be without merit. Plaintiff's reliance on Delaware law was incorrect. In New York, the fiduciary duty of corporate officers and directors runs to the corporation and its shareholders and New York courts have not extended the fiduciary duty of a director or officer to creditors. Further, the court stated, it is the legislature's place to expand the fiduciary duties of corporate officers or directors, not the court's. The checks in question had been prepared in the defendant company's customary fashion and were considered issued when they were actually delivered to plaintiff, not when they were signed by defendant. Moreover, there was no evidence that defendant owner had had any knowledge of the fact that there were insufficient funds in the account to cover the checks when they were issued. The court thus found that defendants had made a prima facie showing of entitlement to judgment as a matter of law, and that plaintiff had failed to come forward with evidence to raise triable issues of fact. Nor had plaintiff established defendants' fraudulent intent in order to sustain a claim for fraud. Columbia Forest Products v. Firestone Plywood Corp., Index No. 4545/2002, 11/23/04 (Austin, J.).**

Good will; express transfer; implied covenant; customer solicitation. Solicitation versus competition. Employee restrictive covenants; reasonableness; tortious interference; breach; requirement to show

services were unique or extraordinary. Confidential and proprietary information; misappropriation. Preliminary injunction; irreparable injury; balance of equities. Software development; obsolescence. The plaintiff sought a preliminary injunction against the "seller" defendants, who had helped create banking software, OPICS, used by banks on four continents, and been stockholders in the software creator. The plaintiff, successor to an entity that had purchased the creator, serviced OPICS for clients. The plaintiff alleged that the seller defendants were soliciting its customers with whom they had done business while in the plaintiff's employ. The plaintiff alleged that this violated implied covenants against customer solicitation stemming from the purchase of the creator entity; the purchase agreement had specifically transferred "good will" and attached a list of the creator's ten biggest clients. The seller defendants after resigning from the plaintiff had become part-owners of a financial software developer and its financial consulting affiliate, which, among other things, serviced OPICS. The developer and financial consulting entities, and four individuals who had resigned from the plaintiff to join one or the other, were also defendants, against whom plaintiff sought additional injunctive relief. In testimony one employee defendant who had joined the financial consulting defendant acknowledged that she had promptly contacted 20 of her former clients who used OPICS, including one on the ten-biggest list, in the expectation, the court found, of selling them OPICS services. The defendants argued that although the plaintiff's purchase agreement had specifically included "good will," two-year non-competition and non-solicitation covenants in the seller-defendants' employment agreements with the plaintiff, trumped the common law obligation as regarded them. Both sides cited a decision that held that the implied covenant applied unless the parties had specifically negotiated a lesser restriction. The plaintiff argued that the showing had not been made because the seller defendants had not known of the implied covenant when they had signed their agreements. The court agreed. It further noted that in the case cited and others upholding specifically negotiated lesser restrictions no explicit transfer of good will had taken place, as here. The court distinguished customer solicitation from competition; the common law obligation prohibits solicitation but not competition, which is the risk assumed when one buys an established business. It noted that here, however, competition came circumstantially into play in the solicitation process: the seller defendants' use of their financial consulting entity to feed plaintiff's clients news of their software producer's emerging product, essentially competitive with OPICS, was direct solicitation of those clients. In determining that the software was "essentially competitive" the court considered the defendants' testimony that their product would replace "obsolete" OPICS, and was a "Ferrari" to OPICS's "Pinto." Despite some functional differences the softwares shared the same financial applications, the court found. It granted injunctions against the seller defendants and the defendant entities. The four employee defendants had executed 18-month confidentiality and restrictive covenants with the plaintiff. The defendant at the consulting entity had not only contacted her former OPICS clients, but also prepared a list of certain of plaintiff's current employees and subsequently phoned one to recruit him. The remaining employee defendants were technical employees and had been hired by the software developer defendant because their knowledge of OPICS would help design that entity's software system. One "tech" person had been discovered, after departing the plaintiff, to have brought home a document that could serve as a design template to a competitor, and other confidential material. The court concluded that all the employee defendants had possessed trade secrets or confidential information of plaintiff's. Absence of proof that they had exposed the secrets was not sufficient to deny injunctive relief. Even if the consulting affiliate defendant, when contacting her former clients, the plaintiff's customers, had intended only to let them know where she had gone because the alternative would have been "rude," in her term, she could not pluck the secrets out of her mind. Whatever her "good intentions," she would inevitably use the secrets in her duty to solicit OPICS business. Similarly, with the technical employees, the work they were doing was close enough to the work that they had done for the plaintiff that the risk of disclosure was likely. The defendants argued that the employee defendants' restrictive covenants were unenforceable, unreasonable in their 18-month time-frame and worldwide scope. The court, however, granted injunctions against all the employee defendants. But, although 18 months is not an unreasonable time frame as a matter of law, and although the evidence contradicted defendants' argument that OPICS was obsolete, the court reduced 18 months down to 12 based on the plaintiff's CEO's covenant and reduced the scope down to the US, South America, England and Israel. Nonetheless, further discovery and trial might show a global prohibition to be proper, it stated. The court found overwhelming evidence, finally, that both defendant entities had tortiously interfered with the plaintiff's contracts with the employee defendants. The owners had hired the employee defendants in full knowledge of their restrictive covenants and they were designing an OPICS-competitive product and using, or were destined to use inadvertently, plaintiff's confidential information, and the consulting entity employee was soliciting plaintiff's clients, at the least, in breach of her agreement. The court granted the injunction against the defendant entities. In finding that the equities weighed in the plaintiff's favor the court noted that a part-owner had promised the employee-defendants that he would pay their legal fees and ensure they suffered no loss. Further, the injunctions would not put the defendant entities out of business; for one thing, the software entity could continue to develop and market its product, just not to the plaintiff's customers, and with the 12-month prohibition on the employee defendants' participation. Misys International Banking Systems, Inc. v. TwoFour Systems, LLC, Index No. 650101/2004, 11/23/04 (Fried, J.).

Joint venture; sharing of losses; implied versus express agreement to share; tort and other liability.

Publishing; royalty agreement. The plaintiff was legal executor of an eminent figure in the interior design industry who for years had published its premiere magazine. In retirement the individual had conceived an idea for a book about corporate interiors to be financed by design firms and industry advertisements. The plaintiff alleged that the decedent had proposed the book to the individual defendants and the three had agreed to create it as a joint venture. The plaintiff alleged that they had arranged that the decedent would handle the creative side and the two other individuals and either or both of their corporations, collectively the defendants, would handle production, distribution, and accounting. Neither the decedent nor the individual or corporate defendants would receive salaries, but they would split net profits, if any, half to the former and half to a corporate defendant the individual defendants owned. If there were no net profits, but revenues allowed, the parties to the agreement would be reimbursed costs. Regarding losses, the parties had accepted the risk that if ample revenues did not materialize they would receive nothing for either work or expenses. However, the book created earned significant profits and the decedent and defendants had brought out four more editions under the same terms. The decedent had died while assembling a sixth edition. The defendants' press release mourned him as the books' "driving force" and named a release date for the sixth edition; thereafter the defendants had assumed the stance that the deceased had had no continuing interest in the new edition or in the books' title. Plaintiff brought this suit and the defendants moved to dismiss it for failure to state a cause of action. They argued that the complaint failed to allege one of the necessary indicators of a joint venture, a provision for sharing profits and losses, in that it did not allege an express agreement that the eminent publisher would be personally liable for the venture's debts and liabilities. However, the plaintiff alleged that the parties had contemplated mutual losses if the work did not sell. The court noted that a joint venture may exist where there is no explicit agreement to share losses if there was no reasonable expectation of them; here, that the parties did not contemplate tort or other liabilities was not fatal to the claim if they had had no reasonable expectation that the venture would open them to such. Further, the other elements of joint venture were present–intent, mutual contribution, and a measure of joint proprietorship. Hence, even if the plaintiff had failed to allege any explicit agreement as to the sharing of liabilities other than production costs, no such allegations were needed at the pleading stage, because New York courts infer an agreement to share losses. The court distinguished various cases on which the defendants relied. In one, the Court of Appeals had simply recognized the obvious: an author's royalty agreement with a publisher was not a joint venture because there was no loss sharing. In another, the plaintiff had said outright at deposition that he had had no responsibility to share in losses from an endeavor involving laser light shows. The court declined to dismiss the complaint, either as against all the defendants or as against only the individuals. The complaint alleged that the agreement had been with the individuals, and that the three individual parties had agreed to consult on anything substantial related to the venture. Dundes v. Fuersich, Index No. 602314/2004, 12/22/04 (Fried, J.).

License agreements; preliminary injunction; television broadcast rights. Plaintiff, the current holder of exclusive rights to televise regular season Mets games on pay television, brought this lawsuit and moved for a preliminary injunction when defendant sought to negotiate plans to launch a regional sports network with Time Warner Cable and Comcast Corporation, after having exercised its buyout option under the buyout provision of the agreement. The buyout option shortened plaintiff's license term to the end of the 2005 baseball season; defendant paid plaintiff more than $54 million to exercise the option. Plaintiff claimed that the license agreement required defendant to wait until November 1, 2005, when the contract and license agreements were scheduled to terminate, before negotiating a new television rights deal with any third party. Plaintiff further claimed that defendant had violated the first negotiation/first refusal provisions in the license agreement, which, under certain circumstances, would require defendant to negotiate exclusively with plaintiff for a license extension past the contract termination date, to make thereafter an offer to plaintiff, and, if plaintiff rejected defendant's terms, to afford plaintiff the opportunity to match later offers by third parties. That option was to end when the contract was terminated. Plaintiff also asserted breach of a contractual representation that it had not granted any pay television rights for Mets games other than its license. Defendant contended that the contract permitted post-option negotiations and that plaintiff misread it. Defendant further claimed that plaintiff's rights under the first negotiation/first refusal option ceased when defendant exercised the buyout option in May 2004. Defendant argued that it had complied with the covenant because it had not entered into any license agreement for the post-2005 broadcasts but only agreed in principle to license those rights under contracts that it explained would not be executed until after the contract terminated, and, further, that the representation plaintiff alleged had been breached only pertained to the day that defendant had made it, upon the execution of the contract. Further, defendant contended, in the event of a conflict, the buyout provision was controlling. Plaintiff sought an order permanently enjoining defendant from negotiating with third parties; rescinding any agreements with them and voiding and permanently enjoining defendant's exercise of the option or a declaration that the license agreement would not terminate until seventeen months after judgment in the instant lawsuit or in the alternative, money damages. The court concluded that plaintiff had not sustained its burden for a preliminary injunction. The court stated that the buyout provision had been intended to afford the parties early termination of the license agreement and thus end their contractual relationship. The court found unpersuasive plaintiff's argument that defendant had breached the covenant merely by negotiating future deals and concurred with defendant that the representation only applied to the date on which it had been made. The court next determined that the threatened harm that plaintiff complained of was too speculative to support preliminary injunctive relief and that should plaintiff prevail on the merits, any lost opportunities could be redressed by the enjoining of further negotiations with third parties and the rescinding of existing agreements and by affording plaintiff exclusive negotiation and first refusal rights for an appropriate period. The court pointed out that a preliminary injunction would not be helpful to plaintiff's bargaining position with advertisers and sponsors given that plaintiff had issued a press release that defendant had paid it $54 million to terminate the license agreement early, and that plaintiff's claim that marketplace disruption and confusion would ensue if the Mets' licensee for the 2006 season were to do business with advertisers and distributors while plaintiff did business in connection with the 2005 season was mere speculation. Finally, the court found that the equities did not favor the granting of a preliminary injunction since that relief would prevent defendant from making alternative broadcasting arrangements and bar it from exercising its termination rights under the buyout provision. Sportschannel Associates v. Sterling Mets, L.P., Index No. 603548/2004, 12/16/2004 (Freedman, J.).**

Negligent misrepresentation; attorney to non-client; special relationship; reasonable reliance. Fiduciary duty. Intentional misrepresentation; specificity. Damages; missed opportunities; punitive damages. Plaintiff, a securities brokerage firm, asserted a claim for negligent misrepresentation against defendants. Plaintiff claimed that it had been contacted by one Pachtinger, who had expressed an intention to acquire plaintiff's firm. Pachtinger had then introduced plaintiff to his attorneys, the moving defendants, who allegedly had made various representations about their financial expertise in mergers and acquisitions in order to gain plaintiff's confidence. Defendants had made repeated representations to plaintiff that their client could fund the transaction, and also had sent an e-mail to plaintiff which made additional representations as to defendants' financial holdings. Plaintiff alleged that, in reliance on those statements, after having spent more than $50,000 in negotiating the contract sale/purchase agreement, it had entered into an agreement with the client in March 2001 to proceed with the transaction. Plaintiff claimed further that it had extended credit to the client to open a trading account at plaintiff's firm, which lost over $80,000, for which plaintiff had not been reimbursed. In 2002, defendants had advised plaintiff that their client could not come up with the funds to complete the transaction. Plaintiff claimed that it had later discovered that defendants had been aware that their client's assets were composed almost entirely of worthless East German instruments, that criminal charges were pending against him in England for having written a $10 million bad check, and that his home in Israel was being foreclosed on. Plaintiff asserted that the proposed transaction was actually a scheme to con acquisition targets into signing sales/purchase agreements with Pachtinger so that he could use those agreements and his valueless securities to deceive lenders into lending him $30 million, and then leave the targets with the obligation to repay the loan. Plaintiff claimed that defendant attorneys had been willful or negligent participants in their client's scheme. Plaintiff alleged that defendants had not used reasonable care in advising it about the value of their client's assets and that the information provided to plaintiff by defendants was false information that plaintiff had reasonably relied upon. Defendant attorneys moved to dismiss the complaint for failure to state a cause of action and failure to plead with particularity. Defendants argued, first, that plaintiff could not recover on a theory of negligent misrepresentation because they had had no attorney-client relationship with plaintiff and that there had been no special relationship of trust or confidence between them and plaintiff. The court rejected defendants' arguments, finding that defendants had known the identity of plaintiff and had had direct oral and written contact with plaintiff's president when they had made specific representations as to their client's financial viability in the attempt to induce plaintiff to agree to the merger. The court further found that the e-mail qualified as an opinion letter intended to be used by plaintiff for a particular purpose. Defendants next argued that plaintiff had failed to allege facts suggesting that it had reasonably relied upon any representations by them and that plaintiff was a sophisticated business entity represented by its own counsel. The court rejected that argument and found that whether plaintiff should have independently ascertained that defendants' alleged misrepresentations were false and whether its subsequent reliance on them was reasonable presented triable issues of fact. The court pointed out that as attorneys, defendants had been obligated not to misrepresent their client's assets or their own role in the management of a trust. Finally, defendants argued that their only aim had been to represent their client, not to induce plaintiff to enter into the transaction at issue. The court rejected this argument as well, finding that defendants' purpose in the meetings and the e-mail had been to provide plaintiff with the financial information it required to enter into the proposed merger. The court concluded that the alleged communications between defendants and plaintiff, as well as the contents of the e-mail, adequately supported a finding of a special relationship between them approaching privity, so that defendants had owed a duty to plaintiff, which, when breached, gave rise to a cause of action for negligent misrepresentation. The court dismissed plaintiff's claim for breach of fiduciary duty because defendants, as attorneys for the party on the other side of the transaction, had not owed a separate fiduciary duty both to plaintiff and to their own client. The court rejected defendants' argument that plaintiff had not pled its cause of action for intentional misrepresentation with specificity, finding that plaintiff had set forth the facts in sufficient detail at the pleading stage of the action. Defendants argued that the value of alternative transactions plaintiff claimed it could have pursued was too speculative to support an award of damages, and such damages are not recoverable on a fraud claim. The court ruled, however, that plaintiff had alleged specific pecuniary or out-of-pocket losses sustained as a result of defendants' misrepresentations sufficient to support its claim. Finally, the court dismissed plaintiff's cause of action for such damages because there is no separate cause of action for such damages. Kensington Capital Corp. v. Gibson, Dunn & Crutcher LLP., Index No. 2910/2004, 12/22/2004 (Demarest, J.).**

Procedure; BCL 1312. Misrepresentation; specificity of pleading; relationship to contract claim. Piercing the corporate veil; alter ego liability. Plaintiff provided financing to defendants for the purchase and shipment of frozen meat products for resale in Eastern Europe. Plaintiff alleged that defendants had acted in concert to defraud it in the amount of $18 million. Several defendants moved to dismiss as against them, arguing that plaintiff lacked standing under BCL §1312, which prohibits a foreign corporation doing business in New York from maintaining any action or special proceeding here unless it has been authorized to do business and paid associated state taxes and fees; defendants argued that the complaint had not alleged that plaintiff, an Irish corporation, or its representative, located in New Jersey, was authorized to do business in New York. Defendants also argued that the claims against them were not validly stated; that plaintiff's first two causes of action were not based upon a legally recognized claim; and that the fourth cause of action failed to support a fraud claim either directly or based upon alter ego liability theory. The court held that defendants had not met their burden of establishing that plaintiff had been transacting business in New York for the purposes of BCL § 1312 (a). The court stated that although plaintiff had transferred funds into New York for the purposes of the transactions in the instant case, the record did not indicate that it had conducted continuous activities essential to its business purpose. Further, the purpose of BCL §1312 is only to regulate foreign corporations doing business within the state, not to enable avoidance of contractual obligations. The court ruled that plaintiff's claim for fraud had been pled with sufficient particularity. The court noted that the complaint set forth the entities that had made the representations, when they had been made and their content, and described the alleged interlocking relationships of the defendants and adequately alleged movants' participation. The court ruled that the fraud claim had not merely restated the breach of contract claim as plaintiff alleged that defendants had made misrepresentations of present facts that were collateral to, but an inducement for, the contract. The court stated that plaintiff had alleged reliance, and it was not required at the pleading stage to state with particularity the specific matters upon which it had relied. The court next found that plaintiff had adequately alleged breach of contract by another defendant. As to plaintiff's cause of action that movants, through a shell company, did not adhere to corporate formalities and improperly exercised control over the other defendant's daily operations, the court pointed out that the claim, taken in isolation, had not been validly stated. However, in construing the complaint as a whole, the court found that the purpose of those allegations was to hold movants liable under a piercing the corporate veil doctrine or alter ego theory for the fraud and breach of contract claims and that these were validly stated. Finally, the court determined that to the extent the complaint sought to hold movants liable for the alleged wrongdoing of other co-defendants under the piercing the corporate veil doctrine, that claim alleged only a legal conclusion with no factual allegations supporting it as to those entities. Bowman Import/Export Ltd. v. Trans Commodities Inc., Index No. 603755/2003, 12/2/04 (Freedman, J.).

Procedure; personal jurisdiction. In a breach of contract action, defendants moved to dismiss for lack of personal jurisdiction. One defendant was the parent of several subsidiaries through which it produced and distributed products for use in foods and beverages. Defendant was an Australian proprietary company whose office is located in South Australia. A related defendant was also not a New York domiciliary. In 1998, defendant had contracted for a three-year term to retain the services of plaintiff as its consultant for the promotion of its products in specified countries. Plaintiff's president listed the corporation's address and place of business as one in Manhattan. Later, payment for plaintiff's services was to be made to a bank account in Manhattan. Plaintiff's president notified defendant by fax that he had moved to Los Angeles, California and also set up a home office there for plaintiff corporation. He further stated in the fax that an office for plaintiff corporation was also maintained in Manhattan. When the initial agreement ended, the parties renewed their agreement for another three-year term. A dispute arose between the parties and plaintiff filed the instant action for breach of contract and unjust enrichment. At the time of filing, plaintiff's complaint listed a Brooklyn address as the location of its corporate offices. Defendants moved to dismiss based on lack of personal jurisdiction over them. Plaintiff argued that the court should exercise long-arm jurisdiction over defendant based on documentation it had supplied to the Australian government which gave plaintiff's New York address as that of defendants' representatives abroad. The court found plaintiff's argument meritless and granted defendants' motion to dismiss. The court determined, first, that plaintiff had approached defendants in Australia and that no one from defendant Tarac International had ever visited New York in connection with the negotiation, execution or performance of either the 1998 or the 2001 agreements. The court stated that no sales were made to any customers in New York while the agreements had been in effect and that the sales to customers in Mexico, South Africa and Japan had been negotiated and executed in Australia. The court pointed out that during the relevant time period, plaintiff had apparently been conducting business from Los Angeles, California, which was the address listed on the renewed August 2001 agreement. Further, the fact that defendants had taken advantage of plaintiff's status as a New York corporation in order to obtain rebates from the Australian government did not create a sufficient connection or nexus to New York to establish long-arm jurisdiction. The court next rejected plaintiff''s argument that long-arm jurisdiction could be established because the 1998 agreement had been executed by its president in New York. The court pointed out that defendants had signed the contract outside of New York, which was insufficient to establish long-arm jurisdiction. The court rejected plaintiff's argument that sufficient nexus to New York had been established because defendants had wired payments to plaintiff's New York bank account. The passive accommodation of wiring money to the New York account was not enough to satisfy the requisite purposeful activity to confer jurisdiction in New York. Finally, the court rejected plaintiff's argument that long-arm jurisdiction could be established because defendants had committed a tortious act without the state which had resulted in injury within the state. The court found that plaintiff had failed to allege the key element of injury in New York. Moreover, at the time of the alleged injury plaintiff had been conducting the business at issue from the Los Angeles office. Case dismissed. Pluteus International Proprietary, Ltd. v. Tarac International Pty. Ltd., Index No. 15037/2004, 11/22/04 (Demarest, J.).**

Procedure; personal jurisdiction; alter ego; BCL 307. Misrepresentation; reliance. Conspiracy to commit fraud. Unjust enrichment; benefit; duty to discover wrongdoing of others. Interference with contract and prospective business relations. In an action between shipping financiers, plaintiff sought to recover monies that it had paid on the grounds that defendants had conspired with two non-parties to deceive plaintiff into advancing funds to a non-party in regard to cargo that the other non-party had already sold to defendants. Defendants moved to dismiss, asserting lack of personal jurisdiction over defendant, Elsner Vienna, and failure to state a cause of action over either defendant. Plaintiff alleged that Elsner N.A. was the alter ego of Elsner Vienna and that service of process on Elsner N.A. was sufficient to obtain jurisdiction over both entities. The court first dismissed plaintiff's alter ego claim, finding that plaintiff had not alleged that Elsner N.A. had engaged in improper corporate procedures, was inadequately capitalized, or had diverted funds to, or shared offices with, Elsner Vienna. Further, the court stated that Elsner N.A. had demonstrated that it did not have any directors in common with Elsner Vienna. The court next dismissed the claim against both defendants for lack of personal jurisdiction, finding, *inter alia,* that BCL 307 does not apply to entities over which the court lacks long-arm jurisdiction and that here plaintiff had failed to establish the requisite elements that either defendant had engaged in a continuous and systematic course of doing business in New York to sustain a finding of "presence" in this jurisdiction. The court dismissed plaintiff's claims for misrepresentation and fraudulent concealment, finding, first, that plaintiff's acknowledgment that it had had no business dealings with the defendants precluded its having relied on any of their representations. The court then found that there had been no concealment, as defendants had had no obligation to discern the identity of the third-party payor of a non-party's debt so long as the payment was for value. The court dismissed a claim for conspiracy to commit fraud on the ground that plaintiff, which had never dealt with defendants, could not have detrimentally relied on any of their misrepresentations. Further, a showing that the two non-parties had engaged in fraud did not suffice to sustain a cause of action against defendants. The court dismissed claims for restitution and unjust enrichment because defendants had not received any benefit to which they were not entitled under one of the contracts and, further, they had had no obligation to discover the potential wrongdoing of the two non-parties. The court dismissed claims for intentional interference with contractual relationships, holding that defendants could not have interfered with contracts that did not yet exist, and, further, that defendants' act of purchasing a cargo that plaintiff wanted did not satisfy the elements of interference with prospective business advantage since purchasing something that someone else wants is not a tort. Finally, plaintiff's demand for declaratory judgment that defendants return the third-party payment because they knew or should have known that the monies came from plaintiff failed since defendants had had no obligation to determine how the non-party had arranged to make payment to defendants. Bowman Import/ Export Ltd. v. F.J. Elsner North America Ltd., Index No. 603756/2003, 10/13/04 (Freedman, J.).

Procedure; sealing; confidentiality stipulation and protective order issued in another state; documents confidential thereunder. Defendant moved pursuant to Part 216 of the Uniform Rules for an order sealing part of the record in a consumer fraud action. Plaintiff alleged that defendant's DVD players were incompatible with the DVD-Video standard and therefore could not play all DVD Video discs in an acceptable fashion. There was a related case in California in which the same parties had agreed to produce like discovery, and where a stipulation of confidentiality and a protective order with regard to certain documents had been entered. Defendant's motion here sought to seal the same records that had been marked as confidential in the California proceeding on the grounds that the records showed, *inter alia*, information about the design and testing of its DVD players and details of internal investigations, which, defendant maintained, it treated as trade secrets. Plaintiff argued that New York does not recognize confidential documents as protectable trade secrets. The court granted defendant's motion for a sealing order and explained, first, that under Crain, 135 AD2d 351, confidential trade information can be protected in New York. The court further pointed out that since plaintiff had already agreed to a confidentiality designation and protective order in California and had received the documents in question under that order, it could not now reverse its earlier promise and expose the documents to full public review. Eusini v. Pioneer Electronics (USA) Inc., Index No. 4526/2004, 11/17/04 (Warshawsky, J.).**

UCC 2-602, 2-606, 2-607, 2-708; summary judgment. Action arose out of a transaction between the parties for the sale and delivery of goods. Defendant had placed several orders with plaintiff for women's polyester suits. The first order had apparently been delayed because of a dock strike and plaintiff had agreed to accept a discount for the late goods. Defendant then returned part of a second shipment of women's suits claiming that they had arrived wrinkled. Plaintiff re-ironed the suits, but defendant refused to accept the re-ironed goods because plaintiff requested payment for them, as well as the already-accepted goods. Plaintiff wrote to defendant requesting return of all goods not paid for, but defendant retained and re-sold the goods instead. Plaintiff claimed that the cost of re-ironing the rejected suits was $4,465 and the lost profits on the refused and returned goods was $25,641.82. Although plaintiff filled additional orders, defendant did not accept them. Plaintiff sued for $374,493.90. Defendant counterclaimed for $2,000,000.00 and asserted that the goods delivered had been damaged and non-conforming and that it was not obligated to accept goods that were delivered late. Defendant further contended that its acceptance of non-conforming goods would not preclude other remedies under the UCC. In granting summary judgment to plaintiff, the court pointed out that other than the lateness and wrinkled condition of some of the suits, defendant had failed to indicate any non-conformity, nor had it given any reason for its failure to return or timely reject the goods delivered. The court further found that defendant's acceptance, use and non-return of goods, even if non-conforming, constituted acceptance and that mere complaint about the goods did not constitute a rejection. The court found defendant liable for the agreed-upon contract price for all goods delivered and accepted and held that the actual amount due plaintiff would be resolved at trial. The court dismissed defendant's counterclaim. Top Five Textiles, Inc. v. Katherine Bishop II, LTD., Index No. 600086/2003, 10/22/2004 (Freedman, J.).

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