The Commercial Division

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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).

Attorneys; pro hac vice admission; circumvention of New York licensing requirements. Application for pro hac vice admission. An order had granted such admission. The admission was terminated and this motion required when it became apparent that counsel's license in the other state had been suspended for failure to pay fees and that he was a New York resident. Decisions refer to admission of out-of-state attorneys who practice elsewhere; such admission cannot be used by New York residents to avoid admission requirements for New York Bar. The court found that the license had been suspended for a time, that he was not an out-of-state attorney but a New York resident with no office in the other state. The attorney had not complied with New York CLE rules. Motion denied. George C. Miller Brick Co. v. Stark Ceramics, Inc., Index No. 01001/1995, 1/6/03 (Stander, J.).

Class actions; approval of proposed settlement. Proposed settlement of consumer fraud class actions arising out of plans for wireless telephone service. The court found that the class action elements of CPLR 901 had been met; that individual mailing and publication notice was the best notice practicable under the circumstances; that the class would receive $40 million in benefits; that plaintiffs' likelihood of success was low due to hurdles, including defendant's defenses; that only a small number of opt-outs and objections had occurred; that there was good faith bargaining over the terms with the help of a mediator. That some class members might not use extra calling minutes or phone cards was not a reason to reject the settlement. Objections were raised to additional benefits to be given to the named plaintiffs only, but the court noted that these would come out of attorney's fees. The court ruled that New Jersey and Connecticut residents were appropriate class members although the gravamen of the complaint arose under GBL 349 and 350. The court found that a 12% attorney's fee, to be paid by defendants over and above the $40 million in benefits, which fee had been suggested by the mediator, was reasonable. Settlement approved. Naevus Intl., Inc. v. AT & T Corp., Index No. 602191/1999, 1/8/03 (Moskowitz, J.).

Commercial real property; lease; preliminary injunction. Plaintiffs leased commercial premises. The lease provided for unlimited onsite parking on a first-come, first-serve basis. Defendant decided that plaintiffs' business had grown and that they were using a disproportionate amount of space. A restricted parking system was introduced. The court found that the relevant lease clause did not authorize the landlord to impose unilaterally a system of assigned or reserved parking. The clause contained a caveat "except where restricted." As originally implemented, the parking system did not involve reserved spaces or other restrictions. The court read this provision as referring to mandatorily reserved areas, such as handicapped and fire zone spaces. If there were any ambiguities, they would have to be construed against defendant as drafter of the lease. The lease gave the landlord the right to enact reasonable rules, but if these were to conflict with a lease provision, the latter would control. The court concluded that plaintiffs had established a likelihood of success and that the imminent termination of plaintiffs' rights constituted irreparable injury. The balance of the equities favored plaintiffs. Preliminary injunction granted. Orthopaedic Associates v. Michael Parisi & Son Construction Co., Index No. 13309/2002, 1/24/03 (Austin, J.).

Commercial real property; option to purchase; conditions. Lease of restaurant premises. Five-year term commenced, court held, when a certificate of occupancy was obtained. Temporary certificate of occupancy caused the period to begin. An option to purchase was held to begin when the lease term began with the certificate of occupancy, not from the date the lease was signed. The term "month of lease" would be so interpreted. The court found that the defendant gave notice of intent to purchase with the first year at that year's price. The first notice, the court ruled, having been sent to the wrong (though related) addressee without a copy to the second required recipient, was ineffective. The second notice, however, was sent to the correct addressees, actual notice was received, and the notice was valid. Plaintiff argued that the option was contingent upon there being no tenant defaults and that defendant failed to pay initial rent on time. The court held that the rent had not been due for some weeks after the date claimed by plaintiff and there was no default. The court ruled that plaintiff had sent no notice of default for lack of proof of insurance coverage and maintenance problem, as required, so that arguments based thereon failed. Summary judgment of specific performance to defendant. AJSH72, LLC v. Hwang, Index No. 07561/2002, 1/03 (Stander, J.).

Contracts; motion to dismiss; unauthorized changes to required letter. Good faith and fair dealing. Contract and

unjust enrichment. Contract and misrepresentation. Fiduciary duty; joint venture. Action for lost profits, breakup fee, etc. arising out of aborted investment transaction. Motion to dismiss. The court found that the proposal on which plaintiff sued required it to provide a commitment letter for agreed-upon financing of $8 million. The commitment letter that was sent contained unauthorized, unilateral changes as to the amount of the financing and the breakup fee. This non-performance excused defendants from making the payments plaintiff sought. A claim for breach of covenant of good faith and fair dealing will not lie if it merely duplicates a claim for breach of contract. An unjust enrichment claim was held barred because a valid and enforceable contract governed the subject matter of the dispute. A fraud claim was held to be merely a restatement of the alleged breach. As to fiduciary duty, the court ruled that the proposal was for a joint venture in which plaintiff did not participate; thus, all the elements of a joint venture were not present and no fiduciary duty existed. Case dismissed. Golub Associates, Inc. v. Lincolnshire Management, Inc., Index No. 602897/2002, 2/26/03 (Ramos, J.)

Contracts; multiple agreements as one; breach and covenant of good faith. Procedure; CPLR 3211(a)(1); questions in dispute. Damages; duty to mitigate. Action for declaratory judgment regarding plaintiff's obligations under a guarantee of agreements. Defendant, broker of U.S. Government securities, agreed to distribute its market pricing data through an entity later acquired by plaintiff in return for payments by the entity which plaintiff guaranteed allegedly amounting to some $250 million. Eventually, the entity attempted, but failed, to reorganize in bankruptcy and ceased operations. Plaintiff contended that the cessation ended plaintiff's obligations under the guarantee under the terms of the agreements. At issue was whether two agreements were intended to be one. Generally, the court stated, as to whether writings should be construed as mutually dependent or not, absent some clear contrary intention, contracts manifesting separate assents to be bound are presumed to be separable. The court found that plaintiff had pointed to facts sufficient to raise questions as to the applicability of the rule. The documentary evidence (CPLR 3211(a)(1)), did not conclusively permit a resolution of the issue. The court declined to treat defendants' dismissal motions as ones for summary judgment since there were material factual issues in dispute. The court rejected defendants' argument that plaintiff could not assert a duty on defendants' part to mitigate. Generally, there is such a duty, the court stated. Although one defendant was not a party to one of the agreements, it was assignee of half of the payments and either a party to the agreement if the two were considered one or a third-party beneficiary. A claim for breach of the covenant of good faith and fair dealing was found duplicative of a cause of action for breach of contract and was dismissed. Dow Jones & Co. v. Market Data Corp., Index No. 121155/2001, 1/6/03 (Moskowitz, J.).

Contracts; subordinated debentures; dismissal (CPLR 3211). Action by investment fund which purchased subordinated convertible debentures subject to plaintiff's option to put them to defendant at certain times. Defendant owed money to a bank. Plaintiff, defendant and the bank entered into a subordination agreement that barred plaintiff from seeking to enforce the debentures until the bank was paid. The action was based on plaintiff's exercise of the put option, defendant's failure to pay off the bank, and its subsequent failure to pay plaintiff. The court ruled on a motion to dismiss that plaintiff had agreed not to commence any proceeding so long as any of the bank debt remained. The court also ruled that defendant had no obligation to pay the bank. The court found plaintiff's reading of the agreements untenable as a matter of law. Case dismissed. Montrose Investments Ltd. v. Tidel Technologies, Inc., Index No. 602947/2002, 2/3/03 (Ramos, J.).

Contracts; termination; law of other state; GOL 5-901; unconscionability. Action arising out of master lease for computer equipment. Termination issue. The lease was so framed as to make it almost impossible for the lessee to terminate it. Foreign state law applied by the lease terms. Choice of law provisions will be enforced, the court stated, if the law in question has a reasonable relationship to the agreement and the law does not violate New York public policy. The plaintiff was a New York-based corporation and the lease covered equipment to be used here. The equipment was not delivered from the foreign state and lease payments were made to another state. GOL-5-901 serves a public policy purpose and was therefor held applicable. Even under foreign law, the lease might be unconscionable. Motion to dismiss denied. Andin Intl., Inc. v. Matrix Funding Corp., Index No. 600918/2002, 2/10/03 (Cahn, J.).

Corporations; dissolution; fair value; BCL 1118. In dissolution proceeding, respondents filed election to purchase shares of petitioner for fair value (BCL 1118)**.** The court determined that it must find net asset value and then consider a

discount for lack of marketability of shares in a close corporation. Potential future capital gains tax liability was rejected as an independent adjustment. The award would then have to be reduced by the value of petitioner's loan accounts and/or intra-family receivables. Interest would be awarded from date of commencement of proceeding until payment at statutory rate. The court found a 25% rate of discount for lack of marketability to be appropriate. Value was determined accordingly. In re La Sala, Index No. 7063/2001, 1/16/03 (Rudolph, J.)

Corporations; purchase of stock; oral agreement; estoppel. Promissory notes; oral modification; estoppel. Issue on motions for summary judgment was defendants' status as stockholders. Defendants claimed that there was a binding oral agreement for the purchase of stock. The court held that, as notes had never been signed, there was no enforceable agreement. UCC 8-319. Defendants argued that plaintiffs were estopped because they had held defendants out to public as shareholders. The court held that the circumstances were not so exceptional as to set aside strong policy considerations (BCL 504). Defendants did not cite proof to support the assertion nor offered an excuse for failing to do so. In another set of notes, provision was made against set-off or counterclaims. Defendants argued that because of reliance on the oral agreement regarding the second block of shares (which included a rollover of the first notes) they were not in default on the first notes. But pledge agreements provided that any change in the agreements had to be in writing. GBL 15-30l (1). Defendants' estoppel argument was held to be short of the standard for invocation of an exception to this rule. Josephthal Holdings Inc. v. Weisman, Index No. 603429/1999, 1/29/03 (Ramos, J.).

Corporations; shareholders derivative action; demand; futility. After a hearing, the court held that there was at least a reasonable doubt regarding the ability of one director to pass upon a demand by shareholders in a disinterested and impartial manner. The court found that the director was beholden to the prime defendant, who had assisted him in the past in achieving business success. A reasonable doubt existed also as to the director's ability to assess independently possible legal action against entities with which he had a past and continuing relationship. A demand would have been futile. Dismissal denied. Venturetek, L.P. v. Rand Publishing Co., Index No. 605046/1998, 1/7/03 (Cahn. J.).

Employment agreements; preliminary injunction. Defendant signed contract containing a non-compete clause. The clause barred defendant from accepting business from any client of plaintiff of which the defendant had had knowledge or with which he had had contact while at plaintiff. Defendant offered as an explanation for the plaintiff's loss of clients after defendant went into competition that these were clients with which defendant had had long relationships and that it would be natural for them to want to continue to work with defendant. The court ruled that plaintiff had shown a likelihood of success, irreparable harm and tipping of the balance of equities. Preliminary injunction granted. Milbrandt & Co., v. Griffin, Index No. 21719/2002, 1/23/03 (Rudolph, J.).

Employment agreements; restrictive covenant; reasonableness of restraint. Defendant entered into an employment agreement with plaintiff which contained a restrictive covenant barring defendant from practicing veterinary medicine on the South Fork of Long Island for three years. The court found that defendant was free to work anywhere on Long Island other than the South Fork and that defendant had failed to demonstrate that the restriction was unreasonable or unduly burdensome. Preliminary injunction granted. Davis v. Browning, Index No. 1611/2003, 2/27/03 (Emerson, J.).

Employment contracts; restrictive covenants; advertising as solicitation. A restrictive covenant barred defendant from practicing medicine within a 10-mile radius and from soliciting any of plaintiff's patients. Plaintiff argued that defendant's announcement in a local paper of the relocation of his office constituted solicitation in violation of the agreement. The court held that such an ad does not constitute solicitation. There was no evidence that defendant had solicited any particular patients. Plaintiff also failed to show that services to school districts provided by defendant violated the agreement. Plaintiff had failed to show a likelihood of success. Preliminary injunction denied. Great South Bay Family Medical Practice, LLP v. Anthony Donatelli, Jr., M.D., P.C., Index No. 26875/2002, 1/7/03 (Emerson, J.).

Employment contracts; restrictive covenants; geographic scope; solicitation of customers. Restrictive covenant prohibited former employees from competing anywhere plaintiff did business. The court held that this restriction was unreasonably broad. Plaintiff argued that it did not seek to prevent defendants from working, but only from contacting its customers. A court may partially enforce a restrictive covenant. However, on summary judgment, defendants submitted affidavits that they had not solicited any of plaintiff's customers. The plaintiff failed to identify a single customer solicited, merely alleging solicitation in conclusory fashion. LAN Solutions, Inc. v. Island Logic, Index No. 24641/2002, 1/23/03 (Emerson, J.).

Fiduciary duty; attorney to debtor; asset sale; duty to creditors. Legal malpractice. Debtor & Creditor Law 273-a, 274; claims against debtor's attorney. Conversion. Waste and misappropriation. Procedure; CPLR 3211(d). Alleged breach of fiduciary duty by certain defendants for having failed to disclose asset sale. These defendants were outsider counsel to LLC and plaintiffs had lent money to it. The court rejected plaintiffs' argument that these defendants owed a fiduciary duty to plaintiffs, as would a corporation. Plaintiffs complained that defendants had denied them necessary discovery, but the court found that none of their arguments or allegations suggested that discovery would assist. CPLR 3211(d). A negligence theory also failed, though plaintiffs alleged that one defendant had been told of the entity's debts. Defendants had a duty to follow the client's instructions. A claim for legal malpractice by one plaintiff, a shareholder of the corporations, failed for insufficient allegation of causation. Claims against a debtor's attorney could not lie under Debtor & Creditor Law 273-a or 274 based on a representation alone; facts would be required showing the attorney counseled the client to engage in fraud. Claims here were deemed insufficient for lack of such facts. A conversion claim failed since movants were not alleged to have possessed any monies owed to plaintiffs, nor did plaintiffs sufficiently allege a superior right to any monies. Claims for waste and misappropriation also failed. Motion granted. Falcigno v. Tesei, Index No. 105039/2002, 1/7/03 (Cahn. J.).

GOL 5-701, 5-703; past performance. Misrepresentation; relation to contract. Motion to reargue based on claimed misapprehension of law regarding application of part performance to a contract governed by GOL 5-701. Court discussed at length Court of Appeals and Appellate Division authority on point, noting conflicting views. Motion granted. The underlying motion to dismiss concerned an alleged oral agreement to sell a business as to which there was claimed to have been part performance. The court noted that GOL 5-703 contains an exception for contracts involving real estate and that part performance is an equitable doctrine applicable to unique real property. In the case at hand, the plaintiffs sought money damages, not specific performance. As a court at law, the court declined to apply the equitable doctrine and dismissed a cause of action. The court declined to dismiss a claim to recover for value of acts performed in reliance on statements of the other party. A fraud claim was dismissed as it related to the breach of an oral agreement (barred by the statute of frauds) to sign an agreement. Bisig v. Hebert, Index No. 966/2002, 2/03 (Stander, J.).

Insurance; breach of contract; ambiguity. Unjust enrichment; relation to contract. GBL 349; full disclosure. Plaintiffs claimed that defendant offered two payment options on life insurance policies, one of which provided that the insured paid the first premium in full when the policy was delivered but effectively received coverage for less than a full year. In this putative class action, the court held that the breach of contract claim was defective since the policy was unambiguous. The word "annual" referred to the period between premium payments. An unjust enrichment claim failed because the rights and liabilities were controlled by contract. A GBL 349 claim failed because there was no deception since the payment option challenged had been fully disclosed. Case dismissed. Franco v. Guardian Life Ins. Co., Index No. 604302/2001, 1/23/03 (Cahn, J.).

Insurance; demutualization; review of Superintendent's actions; breach of contract; violation of statute; private right of action; collateral attack on Superintendent's actions; "method four"; common-law and statutory fiduciary duty claims; derivative actions; alleged director misconduct; business judgment rule; standing; misrepresentation; reliance. Actions arising out of conversion of Met Life from a mutual life insurance company to a domestic stock life insurance company. Action brought against Superintendent. The court held that review of his actions

in approving the Plan must be sought by Article 78 proceeding. A breach of contact claim failed since plaintiffs failed to allege what policyholder rights had been violated by the Plan, which expressly preserved rights. Plaintiffs challenged defendants' alleged non-compliance with the Conversion Law, the unfairness, etc. This was, the court found, a collateral attack on the Superintendent. The court determined that the Insurance Law allows for an action by a policyholder allegedly damaged by lack of notice or to enforce certain share restrictions (§ 7312(s)&(v)), but that plaintiffs had not shown any basis for a private right of action against Met Life regarding the issues that fall within the Superintendent's authority. The issues could be asserted in the Article 78. Allowing such an action would violate the legislative scheme. Further, the court ruled that the fact that trust provisions and those for funding the closed block might have varied from those set forth in the statute did not amount to a violation for a method four demutualization since the legislature had intended there to be flexibility. Also, the statute, the court held, did not require that policyholders be advised in advance of the specific value of the consideration. Plaintiffs asserted claims for breach of common-law and statutory fiduciary duty claims by the Met Life directors primarily in regard to the consideration to policyholders. But that issue had been determined by the Superintendent. These claims were another collateral attack. Further, the relationship is generally one of contract, not a fiduciary one. Policyholders of a mutual insurer are not authorized to bring a derivative action to challenge director misconduct. Beyond this, plaintiffs failed to allege facts indicating bad faith by the directors, thereby taking the case out of the business judgment rule. Plaintiffs alleged that the predominant motive for the demutualization was the directors' desire to increase executive compensation. However, the court determined, the allegations were conclusory. The Superintendent reviewed this and found no unfairness. Further, plaintiffs did not allege standing, in that they did not allege that they had taken cash rather than shares, which increased in value, or sold before a repurchase was announced. A misrepresentation claim based on alleged statements in press interviews by the Met Life defendants that they believed that policyholders would receive book value plus a premium failed since plaintiffs failed to allege reliance and could not do so as the statements were not ones of fact and were superseded by the later written Plan. Nor did plaintiffs allege damage. Request for bond denied. Private defendants' motion to dismiss granted. Shah v. Metropolitan Life Ins. Co., Index No. 108887/2000; Fiala v. Metropolitan Life Ins. Co., Index No. 601181/2000, 2/21/03 (Cahn, J.).

Insurance; misrepresentations; materiality. Plaintiff misstated value of property and date of purchase in application. The court found these to be material misrepresentations. Underwriting guidelines prohibited defendant from issuing insurance where a property had been uninsured for a time by the owner. Thus, misrepresentations were material as a matter of law. Summary judgment for defendant. Zazzara v. Prudential Property & Casualty Ins. Co., Index No. 510/2001, 1/31/03 (Stander, J.).

Misrepresentation; reliance; due diligence. Alleged misrepresentation that induced plaintiffs to purchase a business. The court found that plaintiffs could not have reasonably relied on statements in a cryptic newspaper ad by defendant to the effect that the business was a "gold mine". The individual plaintiff was a businessman experienced in this field who would not have been justified in relying prior to any due diligence. The cited comment had also not been made by the seller. That these defendants allegedly knew that the seller was not current in rental payments prior to the sale was not proof of fraud by them. Defendants had made no representation as to this. Plaintiffs had made no inquiry into the matter. Further, reliance would have been foreclosed by a specific merger disclaimer clause. As to the selling defendants, there was, the court found, no proof of representations as to future profits. Plaintiffs had had an opportunity to and did review relevant records. Complaint dismissed. Summary judgment on counterclaims for overdue payments. Q.A.R. Bagel & Deli, Inc. v. Farmdale Farms, Inc., Index No. 10370/2001, 1/7/03 (Austin, J.).

Misrepresentation; specific disclaimer clause; facts peculiarly within the knowledge of the representing party. Corporations; liability of officer. On motion to reargue, defendants relied on a specific disclaimer clause, but the court ruled that such a clause would not bar plaintiff from claiming reliance on misrepresentations of facts peculiarly within the seller's knowledge. The court found that plaintiff's allegations - - that certain defects were latent, were known to defendants since performed by them, and were improperly certified by them as legal - - fell within this rule. The court ruled that the individual defendants, corporate officers, could be personally liable for fraudulent conduct of their own or in which they participated despite acting in the course of corporate duties. Reargument granted; motion to dismiss denied. B & J Building Corp. v. M-Bro Realty, Index No. 5619/1999, 1/13/03 (Austin, J.).

Misrepresentation. Tortious interference. Unjust enrichment. Physician payment under health plan. Counterclaims of defendants based on practice of plaintiff physician, a non-participating doctor of the Empire Plan, of accepting as payment that part of his fee that is reimbursed by defendants, 80% of the allowed fee. On a fraud claim, the court found that plaintiff had made false statements about the fee in a statement submitted to defendant that the fee was 20% more than the fee to be accepted. Plaintiff intended defendant to rely. Defendants were damaged by overpaying by 20%. The court ruled further that tortious interference would be present as plaintiff's conduct induced the enrollees to breach their agreement with the insurer. Plaintiff had acted without justification. The elements of unjust enrichment were found to exist since defendants overpaid plaintiff by 20%. An issue remained as to plaintiff's intent to defraud. Summary judgment for defendants on two of the three claims. Long Island Pulmonary Associates, P.C. v. Metropolitan Life Ins. Co., Index No. 023531/1999, 1/14/03 (Warshawsky, J.).

Preliminary injunction; information on collateral under loan agreement. Motion for preliminary injunction. An event of default and a termination event occurred under loan agreements with plaintiff's predecessor in interest. Plaintiff commenced action seeking to foreclose on security interests in collateral. The court ruled that plaintiff had shown a likelihood of success since it was absolutely entitled to repossession of the collateral on an event of termination, despite defendants' complaints about a possible breach of a provision whereby plaintiff would be able to appoint a back-up manager for the assets. Any cause of action by defendants concerning this would not impede plaintiff's clear right to foreclose. Plaintiff sought disclosure of information regarding the assets at issue. The court found that plaintiff would be irreparably harmed without the information since it had no way of verifying the status of property it was empowered to repossess. The injunction would also need to protect against dissipation or transfer of assets. The equities favored plaintiff. Defendants would not be prejudiced. The application was granted except that the court declined to order a turnover of the assets as the ultimate relief sought. Prudential Securities Credit Corp. v. Teevee Toons, Inc., Index No. 603112/2002, 2/7/03 (Cahn, J.).

Procedure; choice of law. GOL 5-901. GBL 349. Quasi-contract; relation to contract. Action arising out of lease of telephone switching agreement. The lease provided that foreign state law would control. The court ruled that that choice of law bore a rational relationship to the agreement and that law would not give rise to a violation of a fundamental policy of New York. Plaintiff challenged an automatic renewal provision in the lease, but the law of the other state did not require advance notice. Even if New York law applied, the court stated, plaintiff had no claim under GOL 5-901 since plaintiff had paid for and received benefits after the lease term. Plaintiff could not void the lease retroactively. Further, the lease was terminated by a bargained-for agreement. GBL 349, the court held, is inapplicable to commercial leases, whereas plaintiff's conduct and dealings were not consumer-related. A quasi contract remedy was unavailable since a written agreement controlled. Case dismissed. Ludl Electronic Products Ltd. v. Wells Fargo Financial Leasing, Inc., Index No. 4654/2002, 1/14/03 (Rudolph, J.).

Procedure; CPLR 3211(a)(4); prior motion to amend; statute of limitations; breach of fiduciary duty. In 1999, the court refused a late amendment seeking to add a claim on the ground that granting that motion would have prejudicially added new facts that could have been interposed earlier. The plaintiff later commenced this action. This case repeated the basic claims of wrongdoing by the defendants. The court ruled that there was a substantial identity of parties and claims, that this would negate the court's prior order, and that dismissal was proper under CPLR 3211(a)(4). The action was also time-barred since a three-year statute applies to breach of fiduciary duty claims seeking only money damages and the conduct alleged occurred before that. GCS Computers Inc. v. Sara Computers, Index No. 3243/2002, 2/6/03 (Austin, J.).

Procedure; forum non conveniens. Motion to dismiss or stay on the basis of forum non conveniens in favor of action in English court. Plaintiff was a Netherlands bank with principal place of business there. Defendant was a Canadian bank with principal place of business there. Action arose out of complex swap transaction. Plaintiff alleged that defendant had engaged in fraudulent inducement and other wrongs connected with the Enron debacle. Defendant commenced the English action to enforce the transactions. Plaintiff asserted counterclaims there substantially similar to those raised in the complaint here. The court denied the motion. The court noted New York's role as a financial capital and the need to

provide access and a forum, to redress grievances in cases where parties use New York financial resources to further their actions, such as use of New York banks to facilitate money transfers pursuant to agreement. Further, the court alluded to the need for a United States court to provide a forum for a party seeking redress related to a part of the fraudulent Enron scheme. Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A. v. Royal Bank of Canada, Index No. 602303/2002, 1/31/03 (Ramos, J.).

Procedure; forum non conveniens. On a motion per CPLR 327, the court noted that the plaintiff was a New York resident, the corporate defendant is a New York entity, and the stockholders agreement involved contained a New York choice of law provision. Defendant argued for Illinois, but the corporation had no links to that state other than defendant's residence. Some witnesses were in Illinois, but some were in other states not under Illinois jurisdiction. The defendant was subject to the power of New York courts. A bank account at the center of the case was located in Illinois, but Illinois would enforce a New York judgment; this case was unlike Iran v. Pahlavi. Defendant failed to meet his heavy burden, the court concluded. Motion denied. Richards v. Mark, Index No. 601336/2000, 1/6/03 (Ramos, J.)

Procedure; forum selection clause; disparity and hardship in enforcement; forum non conveniens. Motion to dismiss based on forum selection clause. Action alleged breach of contract by defendant bank in dispersing funds from defendant's account at branch near Zurich to an allegedly unauthorized person. The agreement with defendant contained a clause providing that any action would be brought by defendant in the location of the branch. Forum selection clauses are generally enforceable and presumed to be valid unless unreasonable or unjust. The clause also provided that defendant could sue the client anywhere. Plaintiff contended that this disparity rendered the clause unconscionable. The court rejected this argument. Plaintiff argued that the clause could not be enforced since he was unable to obtain a visa for Switzerland. The court noted a lack of documentation and vagueness in plaintiff's presentation on this point and found it insufficient to raise a question of fact. The court also found significant plaintiff's willingness to have the action dismissed on forum non conveniens grounds if defendant waived the statute of limitations since this showed that he could pursue litigation in Switzerland. Apart from the forum selection clause, the complaint would have to be dismissed. The court found that plaintiff's New York residence was in doubt and that New York had no connection to the dispute, which had to do with a Swiss bank account opened by an Iraqi national with Swiss law governing. Case dismissed. Hayder v. Union Bank of Switzerland, Index No. 113689/2002, 2/7/03 (Ramos, J.).

Procedure; jury demand; waiver. Action to recover premiums. Defendant moved to strike jury demand. Plaintiffs sought money damages on various claims. At issue were claims to pierce the corporate veil and on an alter ego theory. The court ruled that the claims were equitable in nature, rejecting plaintiff's argument from Federal case law that the sole determinant is the relief sought. Motion granted. Serio v. Flatow & Co., Index No. 30543/1999, 2/6/03 (Austin, J).

Procedure; personal jurisdiction; communications into New York; meetings. Action arising out of redemption agreement regarding a New York LLC. All individual parties were members, with one domiciled in New York. At issue was the parties' rights in a New York res. There were long-distance communications into New York and face-to-face meetings here. The final agreements were sent here for signing. The individual defendants participated in the dealings. The court held that there was personal jurisdiction under CPLR 302(a)(1). Entertainment Media Partners, LLC v. BCI Eclipse, LLC, Index No. 604059/2002, 2/13/03 (Cahn, J.).

Procedure; preliminary injunction; elements. Motion for preliminary injunction. Plaintiffs claimed that defendants had failed to assign an office lease to plaintiffs as agreed in a sale of dental practices. Defendants argued that plaintiffs were responsible for preparing an assignment and that plaintiffs no longer wanted the office. The court found that issues of fact clouded a determination on likelihood of success (CPLR 6312(c)), but that the record favored a conclusion that plaintiffs had not met their burden. The court found that plaintiffs had failed to explain why money would not be an adequate remedy for the failure to assign the lease. The court also concluded, as to patient fees and tangible property allegedly due plaintiffs, that a monetary award would suffice. The court found that the balance of equities favored defendants,

whose current practices would be interrupted and whose patients would be adversely affected. Motion denied. DDS Partners, LLC v. Celenza, Index No. 604086/2002, 2/27/03 (Ramos, J.).

Procedure; stay; leave to amend; punitive damages. Discovery; attorney-client privilege; waiver. Two actions in which plaintiffs allege that defendant law firm breached fiduciary duty and contract in connection with defendant's representations of plaintiffs in both actions in regard to adverse drug patent applications. Defendant moved for a stay based on the pendency of an infringement action. The court found the parties, claims, and issues to be different. The clients' interests would have been adverse, the court ruled, whether the patents were found valid or not. The complexity of privilege issues in these cases was not, the court stated, a reason for issuing a stay. Also, the issues cited by defendant were not determinative. The court found that little time would be saved by a stay and that a stay would be too drastic a remedy. Plaintiff moved to amend to add a demand for punitive damages. The court held that the conduct alleged did not rise to the level necessary to satisfy the standard for such damages. Motion granted except as to punitive damages. Defendant sought certain documents from a law firm representing a plaintiff in the infringement action. The court held that the documents were material and necessary. As to privilege, the court held that some documents were privileged, but that there had been a waiver as to any documents to which defendant had been exposed and an at-issue waiver as to documents concerning roles of counsel. Deposition of attorney allowed as relevant to defendant's defense. GD Searle & Co. v. Pennie & Edmonds LLP, Index No. 602374/2000; University of Rochester v. Pennie & Edmonds, LLP, Index No. 406372/2001, 1/27/03 (Ramos, J.).

Tortious interference with contract; collateral estoppel; arbitration. Tortious interference with prospective economic advantage; evidence of resulting harm. On summary judgment, court held that plaintiffs could not prove tortious interference because collaterally estopped from offering evidence of breach by an arbitration award. The court found that in awarding defendant a sum after a minimal set off, the arbitration had necessarily determined that defendant had not breached the agreement. The award of the set off was not necessarily a determination that there had been a breach. The award contained no findings of fact; thus, it would be impossible to arrive at any factual determinations beyond the fact of the award to defendant. The award also signified that plaintiffs had recovered the damages they were entitled to. Further, the court found pertinent the fact that plaintiff's agency had been non-exclusive. As to interference with prospective economic advantage, the court found that the record was devoid of admissible evidence that solicitations had caused any company or individual to cancel orders with plaintiff or to fail to place orders they would otherwise have placed. Case dismissed. Cybertech Communications Corp. v. Quad International, Inc., Index No. 602513/1998, 1/7/03 (Ramos, J.).

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