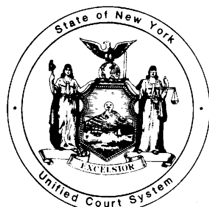
The Commercial Division

of The State of New York

Law Report - MARCH 2004



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

VOL.7, NO.1
MARCH 2004

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Decisions discussed were issued **January-February 2004**
An asterix marks discussions of decisions posted in PDF; all other decisions are in HTML.

Agency agreements; contract indemnification; breach of contract; negligence. Plaintiff, a title insurance company, moved for summary judgment on its complaint for contract indemnification for losses that ensued from an allegedly incomplete title search by defendant. Defendant cross-moved for summary judgment. The court denied defendant's motion and stated that defendant had failed to establish any question of fact that it had complied with provisions of the agency agreement, specifically that defendant's request for title notes from third party defendant was not the legal equivalent of an abstract of title and thus did not satisfy provisions calling for "complete investigation of the record status of title by an abstract or search of the public record." The court granted plaintiff's motion for summary judgment and concluded that plaintiff had established its entitlement to indemnification under the agreement. Next, addressing the third party complaint, the court denied summary judgment to the third party defendant on the issues of breach of contract and negligence. The court stated first that case law in New York has established that a cause of action for negligence may lie in an action arising from a contract to search titles, and further, that the third party plaintiff had raised issues as to whether a contract existed between the parties. First American Title Insurance Co. v. Capri Title Services, Ltd., Index No. 03628/2003, 2/04 (Stander, J.).

Banking; unauthorized disbursements; Banking Law 237; UCC 4-406. Plaintiff moved for summary judgment in a case which alleged unauthorized disbursements from an Estate's account. Plaintiff argued that Banking Law 237 mandated that defendant bank should have required the executor to provide proof of appointment prior to opening a fiduciary account, and that defendant had failed to demonstrate that it had obtained such proof. Defendant cross-moved for summary judgment and argued that it did not have a duty to monitor the Estate's account, that plaintiff had provided no evidence that letters testamentary were used to open the account, and that the action was untimely brought under UCC 4-406. The court noted first that there was no indication the Legislature intended Banking Law 237 to provide for private damages for monies misappropriated by fiduciaries acting outside the scope of their powers, although liability might be imposed if the bank had actual knowledge or notice that funds were being diverted. Moreover, in the instant case, there had been no allegations that defendant was on notice that the executor either intended to or did use Estate funds for improper purposes. The court concurred with defendant's argument that the complaint was untimely under the limitations period of UCC 4-406 and granted defendant's cross-motion for summary judgment. The court pointed out that defendant had written the last check on the account in January of 1998 yet plaintiff had not commenced the instant suit until June 2002. Dorsman v. Fleet Bank, Index No. 4515/2002, 1/14/04 (Benza, J.).

Breach of contract; financial advisory services; summary judgment. In an action alleging breach of a financial advisor contract, plaintiff moved for summary judgment. Defendant counterclaimed, also alleging breach of contract. Defendant, a holding company

whose subsidiaries, among other things, underwrite malpractice insurance for physicians, retained the financial advisory services of the plaintiff to accomplish either a merger or a sale in order to dispose of assets and maximize shareholder value. The dispute arose over the issue of whether plaintiff was entitled to its final advisory fee. Defendant maintained that since plaintiff had failed to accomplish either a merger or purchase of the company, defendant was forced to explore other options to protect the assets and the stockholders' interests. Plaintiff argued that defendant satisfied the intent of the parties' letter agreement that a material interest be transferred when it created two new companies which subsequently purchased the entirety of defendant's business; thus plaintiff was entitled to the final advisory fee. Defendant maintained that the newly created companies did not gain control of all the defendants' assets. The court concurred with defendant that there remained a question of fact as to whether the amounts paid to defendant by the new companies constituted a material interest as defined in the parties' agreement, and denied plaintiff's motion. The court then granted plaintiff's motion to dismiss defendant's counterclaim for breach of contract and concluded that defendant's contention that plaintiff was not entitled to its final advisory fee was merely a defense to the breach of contract claim and not an independent ground for relief. Fox-Pitt v. The Miix Group, Inc., Index No. 600462/2003, 1/14/04 (Ramos, J.).

Breach of contract; promissory estoppel; **breach of fiduciary duty; anticipatory breach**. Action arising out of an agreement whereby defendants, CBS and its successor Viacom, were to invest in, and provide advertising for, plaintiff's Internet start–up company, which had created an online shopping mall and directory for consumers but had subsequently ended up in bankruptcy. Plaintiff alleged that defendants had breached the parties' advertising agreement, had overcharged for advertising, and had terminated the agreement without proper justification. The court denied with leave to renew plaintiff's motion for summary judgment, finding it was unable to determine the precise relief being sought as it was not clear which causes of action were the subject of the motion. The court granted defendants' motion for summary judgment dismissing plaintiff's allegations of breach of contract, finding that defendant had made efforts to sell advertising within the meaning of the parties' agreement. The court then addressed plaintiff's argument that it had been overcharged by defendants for unused advertising credits and was thus entitled to the "market value" for those credits. The court found that since neither the advertising agreement nor the parties' rights thereunder were assignable, the proper measure of damages was actually lost sales or profits from the alleged lost use of the credits. The court stated further that the plaintiff had not shown that it had failed to receive the "benefit of the bargain" of any monetary amount; thus the extent of damages sustained by plaintiff was too speculative and unascertainable. The court granted defendants' motion dismissing plaintiff's promissory estoppel claim, finding that regardless of whether defendants' alleged promise to fill 50 seats at plaintiff's sales seminars was an oral modification or a new agreement, it was unenforceable as the essential terms of the alleged promise were unclear. Finally, the court addressed defendants' motion to dismiss plaintiff's allegation of breach of fiduciary duty by stating, first, that it would treat the allegation as one of anticipatory breach since neither party had shown any evidence of breach of fiduciary duty. The court then granted defendants' motion, holding that even after the alleged termination of the advertising agreement, plaintiff had remained concerned with its disposition. Further, plaintiff's continued access to defendants' sales force and trademarks showed that it treated defendants' provision of advertising credits as a valuable continuing obligation. Storerunner Network, Inc. v. CBS Corp., Index No. 604022/2001, 1/21/04 (Ramos, J.).

Commissions; defamation; prima facie tort; retaliatory lawsuits. Plaintiffs Fresh Del Monte Produce N.V., a Netherlands Antilles corporation and holding company for several subsidiaries, and its affiliate, I.A.T. Group, a Cayman Island holding company, were engaged in the production, transportation and marketing of produce worldwide. Defendant Eastbrook Caribe A.V.V. had a prior interest in Fresh Del Monte N.V. Styling their claim as one for prima facie tort, plaintiffs alleged that defendants had conspired with non-parties to injure plaintiffs by filing baseless lawsuits in violation of various indemnification agreements signed by the parties, created inflammatory press campaigns which challenged the validity of the 1996 acquisition of Fresh Del Monte N.V. by I.A.T., and provided misleading information to stock analysts and journalists. Defendants moved for summary judgment, claiming that plaintiffs had brought the instant action in retaliation for defendant's commencement of a prior New York action and, further, that their claims for prima facie tort must fail. The court found that plaintiffs had not acted in retaliation against defendants but that they nonetheless had failed to state a cause of action for prima facie tort as their complaint had acknowledged an economic incentive for defendants' alleged wrongful actions. The court further found that plaintiff's allegations that defendants had instituted inflammatory campaigns in the press and provided misleading information to journalists and stock analysts were insufficient to state a cause of action for defamation since plaintiffs failed to set forth the particular words complained of. Finally, the court granted plaintiff's request for an order directing commissions to be issued to take the videotaped oral testimony of certain out of state, non-party witnesses, finding

that the line of inquiry might be relevant to the breach of release and settlement causes of action. Fresh Del Monte Produce N.V. v. Eastbrook Caribe A.V.V., Index No. 600860/2003, 1/13/2004 (Ramos, J.).

Condominium by-laws; interpretation; Article 78; motion to dismiss; RPL art 9-B. Petitioner sought an order annulling the election for her Condominium's Board of Managers and directing a new election at the 2002 annual meeting. Petitioner further sought an order directing respondent to furnish her with the names and addresses of the other unit owners. Respondents cross-moved to dismiss for failure to state a claim. At issue was an interpretation of a Condominium by-law as it pertained to plurality voting for the nine member Board of Managers. Petitioner argued that the by-law clause, "not more than three members of the Condominium Board shall serve by reason of the votes cast by Sponsor," permitted the Condominium's Sponsor to designate two board members and to vote for only one additional member. Respondents argued that the same clause restricted the Sponsor's ability to cast the winning vote for "not more than three candidates." The court granted respondent's motion. In the instant case petitioner's construction of the clause was incorrect as it would dilute the Sponsor's right to vote its shares and severely restrict its participation in the election. The court also found that petitioner's contention that she was allegedly denied a list of names and addresses of other Condominium owners had no merit and thus concluded that there was no basis for annulling the election. The court explained that there is no provision in RPL Art. 9-B requiring access to a list of unit owners. Moreover, such information would have been readily available by a search of public deed filings. Finally, the court dismissed petitioner's allegation that one unit owner was wrongfully prevented from running for the board because of delinquency in paying common charges and concurred with respondent's argument that the ballot contained seven blank nominee spaces and thus would not have precluded other unit owners from voting for him by writing his name in on the ballot. Mishkin v. The 155 Condominium, Index No. 106770/2003, 2/19/04 (Cahn, J.).

Consulting agreements; attorneys' fees; confidential documents; Uniform Rule 216.1. In a case which alleged wrongful termination and breach of a consulting agreement, defendant moved for summary judgment, attorneys' fees, return of allegedly confidential documents held by plaintiffs, and a waiver by the court of filing certain papers which underlay the instant motion or in the alternative that such papers remain under seal. Defendant argued that the consulting agreement lacked definiteness and was thus unenforceable as a matter of law. Defendant further argued that plaintiffs had acted illegally when they shared third party confidential information with defendant. The court denied defendant's motion on the issue of definiteness and determined that the consulting agreement did not lack objective criteria which would have rendered it indefinite or unenforceable. Moreover, the agreement had been entered into by sophisticated parties; thus, defendant could not avoid the promises it contracted for in the agreement. The court, however, granted defendant's motion on the issue of plaintiffs' disclosure of confidential information and participation in illegal acts, and stated that plaintiffs had failed to raise any questions of fact as to whether confidential information was disclosed. The court also granted defendant's request for the return of confidential documents held by the plaintiffs. The court denied defendant's request that the court waive the filing of confidential documents, as they had relevance to the instant motion. But it granted in the alternative defendant's request that the records be sealed pursuant to Uniform Rule 216.1, noting that the documents had come into defendant's possession as a result of plaintiffs' wrongful disclosure. The court denied defendant's requested relief for attorneys' fees, finding that it was a contingency not covered by the parties' agreement. The court further stated that it would not address in a civil summary judgment motion the defendant's allegations that plaintiffs had violated various provisions of the Penal Law. Turner v. Isoflux, Inc., Index No. 4315/2002, 2/02/04 (Stander, J.).

Contracts; business advisory services; non-circumvention agreement; procuring cause. Tortious interference. Action arising out of agreement whereby plaintiff, a business consulting and advisory firm, was retained to assist defendant to secure financing for the purchase of a portfolio of commercial real properties. Plaintiff had allegedly introduced certain entities to defendant and sought a fee based on this. Plaintiff asserted claims against these entities for breach of contract (confidentiality and non-circumvent agreements) and tortious interference with plaintiff's agreement with defendant. On plaintiff's motion for summary judgment, plaintiff relied upon a provision of its agreement with the entities whereby an entity agreed not to contact defendant with regard to the portfolio without plaintiff's prior approval. The entity argued that it had had a prior relationship with defendant of which plaintiff had been aware, which rendered the agreement's provision ambiguous. Plaintiff had not introduced the entity to defendant. The entity was the leasing agent for several buildings that defendant managed. Further, the entity argued that although plaintiff had purported to register the entities as equity investors, plaintiff had not been the procuring cause of the transaction. The entity also asserted that it, not plaintiff, had done the work needed to secure funding from a non-party and close the transaction. The court ruled that the entity had raised issues of fact as to whether it had agreed not to contact defendant without plaintiff's prior approval. With regard to alleged tortious interference and the entity's having breached its agreement by consummating the transaction without having assured that plaintiff would be paid by defendant, the court had previously ruled that there were issues of fact as to whether plaintiff had performed its part of the agreement with defendant and the entity could only be liable if plaintiff had earned a fee by

work for defendant. The same outcome obtained as to plaintiff's motion against the other entity. The court also found that plaintiff had failed credibly to plead that the entities had intentionally induced the breach with defendant since plaintiff's own allegations indicated that the entities had provided defendant with the means to fulfill its obligations to plaintiff. Thus, summary judgment could not be granted to plaintiff on the interference claim. American Property Consultants, Ltd. v. Max Capital Management Corp., Index No. 603604/2002, 2/20/04 (Ramos, J.).

Contracts; employment agreements; interpretation of tax equalization plans; Labor Law 198. Plaintiff moved for a declaratory judgment in a case that involved wages withheld under the parties' employment agreement. Plaintiff asserted a violation of Labor Law 198, damages for breach of agreement, conversion, and fraud, and also sought a declaration holding defendant responsible for the payment of back wages and tax preparation costs. Under the agreement's tax equalization plan, defendant had withheld a percentage, agreed to by the parties, from plaintiff's wages for the purpose of offsetting a potentially large tax debt incurred during plaintiff's overseas assignments. When plaintiff's employment with defendant had terminated, plaintiff demanded the return of unused tax holdings, as well as tax preparation costs plaintiff claimed were due under the agreement. The court ruled that there was no basis for declaratory relief because plaintiff had an adequate alternative remedy, a breach of contract claim. The court examined defendant's obligations to plaintiff during two distinct periods of employment. During plaintiff's assignment to Japan, plaintiff had been covered by the employment agreement so that defendant was obligated to pay the taxes on plaintiff's salary during that period. Further, the employment agreement made no provision for refunds of such hypothetical tax deductions over and above the actual amount of taxes due, as such would undermine the purpose of tax equalization plans. If the parties had intended that to be the case, they could have negotiated for such a provision. The court also noted that plaintiff was not an unsophisticated party. The court next determined that plaintiff's later employment in Europe had been employment at will. Thus, only the moving expenses provision of the employment agreement survived. Further, plaintiff remained responsible for a 25% hypothetical tax deduction and defendant remained responsible for payment of taxes due on plaintiff's salary during that period. The court granted the motion as it related to defendant's liability for paying taxes due on plaintiff's salary during his term of employment, and referred the issue of damages to a Special Referee to hear and report. The court dismissed plaintiff's claims for tax preparation costs from a personal tax preparer as unrecoverable under the agreement. The court further dismissed plaintiff's claim under Labor Law 198 as the statute, *inter alia,* does not apply to executives earning more than $600 a week. Finally, the court dismissed plaintiff's claims for conversion and fraud as restatements of the breach of contract claim. Both v. Lowe & Partners, Inc., Index No. 119862/2002, 1/30/04 (Cahn, J.).

Contracts; fraud; negligent misrepresentation; deceptive practices; unjust enrichment; proper parties; class certification; GBL 349; CPLR 3016 (b). Defendant, AOL Time Warner, moved to dismiss in an action alleging that it had intended to defraud its customers, cable subscribers, into paying for unnecessary equipment. Plaintiffs claimed specifically that defendant had failed to notify subscribers that converter cable box equipment was not necessary in order to access cable programming. Plaintiffs alleged breach of contract, fraud and negligent misrepresentation, and deceptive practices under GBL 349. The court dismissed with prejudice the claim for breach of contract, and stated that plaintiffs' contention of failure of consideration was insufficient to support that claim. The court also dismissed with prejudice plaintiffs' claim that defendant had failed to fully and adequately disclose that cable-ready TVs and VCRs may not require cable converter boxes as the claim did not rise to the level of fraud or misrepresentation under CPLR 3016 (b). It further held that no claim existed for negligent misrepresentation as such a claim generally requires a relationship beyond that of vendor and customer. The court, however, dismissed without prejudice plaintiffs' claim of deceptive business practices under GBL 349, and stated that a question of fact might exist as to whether defendant's notice that cable-ready TVs and VCRs can receive basic service by a direct hook-up was less than adequate. However, the court noted that any recovery pursuant to GBL 349 claims would be limited to New York State residents. The court dismissed plaintiffs' claim for unjust enrichment since plaintiffs based their case on the contract between the parties. The court ruled that plaintiffs were not proper parties, explaining that the type of cable service to which they had subscribed was only accessible via a cable converter box. Thus, plaintiffs had not suffered any damages. The court further determined that plaintiffs had sued defendant in error when in fact the plaintiffs should have sued a subsidiary. Plaintiff failed to show that the subsidiary acted as defendant's agent as there was no direct operator control necessary to hold a parent company liable. Finally, the court found plaintiffs' remaining claims for class certification, imposition of a constructive trust and an accounting, premature. Saunders v. AOL Time Warner, Index No. 601544/2003, 2/09/04 (Freedman, J.).

Contracts; interpretation; "affiliate." Motion to dismiss (CPLR 3211(a) (1), (3) and (7). Defendant moved to dismiss the complaint for breach of contract and alleged that it was plaintiff, an aircraft maintenance company, that had committed a breach of the agreement's assignment clause when it had transferred its interest and formed a joint venture with another company without defendant's consent. The court denied defendant's motion and determined that the defendant's evidence did not conclusively resolve issues of fact as to the assignment clause's definition regarding

what entity would be considered an affiliate company of the joint venture. Specifically, the court stated that the term "affiliate" was ambiguous and open to interpretation. This disposed of the motion under CPLR 3211(a) (1) and (3). The court further denied defendant's motion in the alternative for failure to state a cause of action, finding that plaintiff had stated the elements for a breach of contract claim. Aviation Services Intl., LLC, v. Southeast Airlines, Inc., Index No. 601371/2003, 1/16/04 (Ramos, J.).

Contracts; interpretation; breach. Procedure; CPLR 2221 (d), (e); CPLR 2214 (c); Rules of the Justices of the Commercial Division, Rule 19-1 (a). Sanctions. Plaintiffs allege breach of fiduciary duty and other causes of action and assert a right to a share of certain stock paid to an individual defendant. Plaintiffs had brought defendants, two individuals and a corporation, into a business transaction. Pursuant to a signed memorandum of agreement, parties would help three affiliated businesses to raise money, and the affiliates would pay parties with stock in a public shell into which they proposed putting various "properties." Two of the businesses had closed on an agreement with a corporation, a public shell, that had subsequently issued 125,000 shares of stock to one defendant. Later, that defendant had allegedly claimed to have made a million dollars on the shares, and thereafter plaintiffs had brought this action. The court found no evidence that the shares included any that should have been given to plaintiffs, and granted defendants' cross-motion for summary judgment to dismiss. In its decision the court disposed of several motions. In a motion to reargue, renew, and amend the complaint, plaintiffs did not identify any matter of law or fact that the court had allegedly overlooked, or any new fact–the court had previously considered plaintiffs' allegation that parties had had an agreement to share fees. Nor did plaintiffs explain how a complex transaction they described, involving defendant and another, non-party corporation, created a new cause of action. Although plaintiffs held that the agreement stemming from the transaction was intended to preclude their collecting a fee, that agreement had not expressly superceded the memorandum of agreement. The motion for leave to reargue was denied, and could not be a basis for plaintiffs' motion to vacate the note of issue, and plaintiffs were too vague regarding a pending motion related to discovery for the court to determine whether it gave grounds to vacate. Plaintiffs' motion to dismiss the cross-motion for summary judgment on procedural grounds also failed; defendants' missing statement of material facts had not raised an objection in plaintiffs' opposition papers. However, the court suppressed the statement. Plaintiffs accused defendants of submitting false and misleading statements on whether parties had had a fee-sharing arrangement. But read in context, free of plaintiffs' misleading, selective quoting, the statements were not clearly contradictory. In their cross-motion for summary judgment defendants contended that the agreement provided that the shell corporation would pay the parties, not that the parties would share what they received. They also held that the admissible evidence showed that the 125,000 shares paid to the defendant were not compensation for any of the transactions the complaint described. Plaintiff pointed to an email from the CEO of two of the affiliates that indicated that the shares were payment under the memorandum. However, assuming the email was admissible, at best it demonstrated that defendant had gotten paid, not that it had kept plaintiffs' compensation. In regard to plaintiffs' contention that the corporation had issued the shares so that defendants would work on financing, even though they had found none, the court stated that there was no evidence that defendants had to share any benefits from all business relationships that might have been initiated by plaintiffs. If the stock payment had been a retainer fee that the agreement promised parties, and if the CEO had not delivered to plaintiffs shares that he was required to deliver, they should sue him. The court addressed several procedural matters. It had not considered any of numerous letters the parties had improperly submitted after oral argument, or a motion, not properly filed or served, to allow plaintiffs to file a certain additional affirmation. It reminded the parties that if they filed any more motions they should carefully research statutory and case law for submission requirements or risk denial on procedural grounds. The court also denied each side's move for sanctions against the other. Plaintiffs had failed to show that the cross motion was frivolous, and, despite defendants' offense at having to defend themselves in the action, they had not established that plaintiffs had asserted baseless claims. Robert Green Consulting, Inc. v. Thacher Vendig & Co., Index No. 603273/2001, 2/20/04 (Ramos, J.).

Contracts; publishing; good faith and fair dealing; editorial control; early termination as remedy for breach. Damages. Defamation; business disparagement; basic integrity; credit worthiness; special damages. Attorneys' fees. Rights of a secured party. Plaintiff, a publishing company, and defendants, television celebrity Rosie O'Donnell and her entertainment company, had entered into a joint venture ("JVA") and other agreements to publish a magazine. In this action both sides alleged breach of contract and sought damages. Pursuant to the JVA, defendant O'Donnell had held the position of editorial director and exercised control over the magazine's editorial staff and process. The JVA also contained provisions for early termination of the agreement. In spring of 2002, newsstand sales had dropped and the parties hired a new editor-in-chief. O'Donnell had not learned until after the employment agreement had been executed that the new editor's letter of employment specified that she would report to plaintiff's CEO, not her. Additionally, a new organizational chart had been issued at the editor's advent that omitted O'Donnell's name and placed the editor at the top. A spate of incidents reflecting conflict between her and O'Donnell had quickly occurred. The editor had sent O'Donnell only one proposed cover, instead of the two or more usually

provided for her selection, for an upcoming issue; O'Donnell had, according to plaintiff, gone "ballistic" on the phone with the editor. The CEO, in apparent response to O'Donnell's telephone outburst, had issued a memo stating his non-tolerance "of verbal or emotional abuse of...employees" and indicating that the caliber of editor the magazine required needed "autonomy and latitude." Without notifying O'Donnell and in contrast to a former absence of day-to-day involvement, the CEO had then held meetings with senior editorial staff and directed them to deal with the new editor rather than with O'Donnell. A creative director with whom O'Donnell had closely affiliated was fired. For O'Donnell's part, according to plaintiff, she had on two further occasions yelled at the editor and the CEO, in the latter case using speech laced with profanity, and in conversations and emails had repeatedly said that she would not work with the editor. Following approximately a week of conflict, in July, O'Donnell had told the CEO over the phone that she "wanted out," but according to plaintiff later in the day had denied that she had quit. Pursuant to the JVA early termination was available to either party upon written notice of material breach if the breach was not cured within 30 days. O'Donnell had subsequently notified the CEO that plaintiff had breached the JVA by assuming editorial control. She had then installed a family member as "editor-at-large," sowing further discord. In the fall of 2002, she had publicly announced the termination of the joint venture. Plaintiff contended that defendant had breached the JVA by stating that she was quitting, by her formal termination, and by her disruptive actions, and sought monetary damages of $27 million. Defendants' counterclaim alleged contractual breach for violation of O'Donnell's editorial control and other breaches, and in addition to damages sought attorneys' fees pursuant to an Equity Pledge Agreement. The court agreed that O'Donnell had breached the JVA with disruptive actions that had violated her duty of good faith and fair dealing. The court also found that plaintiff had breached the contract by violating O'Donnell's editorial control. Plaintiff, to rebut that claim as bogus, had pointed out that the JVA gave the CEO editorial veto power and required defendant to relinquish control during the last week before an issued closed, but the latter provision, the court said, simply indicated that the defendant was intended to have meaningful editorial control. Although firing the creative director had not been a breach by plaintiff, hiring a new one over O'Donnell's objections had been; an LLC agreement allowed the CEO the former step. Plaintiff had also breached the non-disparagement agreement of the JVA, defendants had demonstrated, but they had not established defamation. They would have had to show special damages in order to recover. Nor were defendants entitled to attorneys' fees, the Equity Pledge Agreement notwithstanding. The Pledge limited the remedies to rights of a secured party under the UCC, such as taking possession of the collateral; had the JVA, which allowed damages for breach of contract, had a similar attorneys' fees provision, defendant would have been able to recover the fees. Defendants' claim of breach of fiduciary duty, based on the allegation that plaintiff had manipulated the magazine's financial performance to prevent her exercising the right to terminate if net loss for a given period exceeded a threshold, failed. The court declined to award damages to either side. Damages based on lost profits, especially with a new business, can only be awarded where they can be demonstrated with reasonable certainty. Here the evidence had failed to establish that the magazine would ever have been profitable - - more likely, it would not (it had lost $18 million in 19 months of operation). Nor could damages be based upon the value of each side's investment. The various authorities and propositions of law relied on by plaintiffs to argue to the contrary all, the court found, assumed that the venture would have at least covered the initial outlay, which evidence had not established. Judgment in favor of each side, and a nominal award of $1 to each, would be meaningless; complaint and counterclaims were dismissed. Gruner+Jahr Printing and Publishing Co. v. O'Donnell, Index No. 603581/2002, 2/19/04 (Gammerman, J.).*

Contracts; settlement; release; fraudulent inducement. Plaintiff alleged that in 1996 it had been fraudulently induced to enter into a settlement agreement, under which it had been paid $14.1 million, that had resolved litigation over the sale of a company in which it had indirectly owned stock. It sought damages and equitable relief, claiming that a bribe had passed between two of defendant buyers that had allowed the company to sell at a below market price. Defendants moved to dismiss the complaint, arguing that the claims were barred by the agreement and release. The court agreed. The current complaint was identical to plaintiff's allegations in its 1996 suit, except that it was couched in different legal theories and the newly alleged bribe was cited as a motive for the company's supposedly inferior sale price. Plaintiff's only basis for alleging the bribe was that it alleged that a certain payment had been made in 1997 that it said showed a payoff had been arranged the previous year. On a motion to dismiss, a complaint's allegations must be assumed true, but the assumption fails where conclusory allegations are devoid of other evidentiary matter. Plaintiff's bare conclusory assertions of fraudulent inducement were insufficient to overcome a release in clear and unambiguous language. The court noted that public policy favors enforcement of settlements, which, without releases, would be all but impossible. Complaint dismissed. Eastbrook Caribe, A.V.V. v. Fresh Del Monte Produce, Inc., Index No. 124404/2002, 1/13/04 (Ramos, J.).

Declaratory judgment; motion to dismiss. Defendant insurance companies moved to dismiss complaint in a declaratory judgment action arising from a dispute over whether plaintiffs were entitled to insurance coverage for defense costs and amounts they had paid to settle claims in an underlying action arising out of large losses due to unauthorized copper trading and derivative transactions. Relying on the First Department's decision in Reliance, 188

AD2d 47, holding that a person may not insure against the risk of being ordered to return money or property that has been wrongfully acquired, as well as this court's previous decision in Vigilant, defendants' chief argument was that the settlement agreement in the underlying action represented a disgorgement by plaintiffs of profits that they had wrongfully acquired and such disgorgement would therefore bar plaintiffs from any recovery from insurance coverage. The court distinguished both cases and pointed out that in Vigilant the order specifically stated that the payment represented a disgorgement of monies improperly obtained whereas in the instant case a party had settled an action without admitting liability and there had been a settlement agreement, not a court order. The court further determined that there were questions of fact on plaintiffs' claims for indemnification and thus denied defendants' motions to dismiss. J.P. Morgan Chase & Co. v. National Union, Index No. 600261/2003, 2/9/04 (Moskowitz, J.).

Declaratory judgment; summary judgment; breach of contract. Plaintiff, receiver for a closed hospital, moved for summary judgment in a declaratory judgment action and sought to determine that deferred compensation funds constituted the sole property of the receiver free and clear of liens, claims or interests from individually named defendants, doctors formerly employed at the hospital. The complaint further directed that all of the deferred compensation funds be delivered to the receiver for distribution to creditors of the hospital. The complaint also alleged a breach of contract claim against one of the defendant doctors and one of the corporate defendants over an alleged unauthorized distribution of deferred compensation funds. Defendant doctors moved for partial summary judgment and claimed that they were entitled to return of their contributions to deferred compensation accounts. Corporate defendants, insurance and annuity companies, moved respectively for orders permitting them to deposit into court the amount of deferred compensation funds identified to individual defendant doctors and discharging them from any liability to the named individual defendants. The court denied plaintiff's summary judgment motion on the declaratory judgment issue and held that the deferred compensation funds, which consisted of salary deductions from monies earned by the defendant doctors, constituted laborers' wages that became due at the time the doctors' employment at the hospital was terminated. The court cited **§** 1210 of the Not-For-Profit-Corporation Law and held that such wages were preferred claims that were entitled to payment before other creditors. Thus, the funds could not be held by the receiver free and clear of claims or liens by individual defendants. The court also directed that the commissions and expenses of the receiver were chargeable against all monies received and disbursed by the receiver on behalf of the hospital, including the deferred compensation funds at issue. Moreover, the receiver's expenses, commissions and administrative expenses would receive priority over any other claims against the assets of the hospital. On the breach of contract claim, plaintiff's motion for summary judgment was denied as there were questions of fact raised by individual defendant doctor as to her last day of employment, as well as to what employer's name was listed on her deferred compensation agreement. Gates v. Arreaza, Index No.11363/2002, 1/01/04 (Stander, J.).

Employees; breach of fiduciary duty; conduct involving establishment of competing business; tortious interference; accounting; constructive trust; summary judgment. In a case alleging, inter alia, breach of fiduciary duty and tortious interference, defendants moved to dismiss allegations that while they had been employed by plaintiff's talent agency, they had made plans to exit and start their own competitor company, had solicited plaintiff's clients, taken client lists and other confidential documents, and had arranged for riders to be added onto the contracts of several of plaintiff's clients that allowed the clients to terminate their contracts with plaintiff in the event that particular defendants discontinued their employment with plaintiff's agency. The court found the allegation that defendants had solicited plaintiff's clients was conclusory, stating that the allegedly purloined clients had originally patronized plaintiff's firm solely because of the former employee defendants. Thus, it would not have been unusual for those clients to continue a working relationship with defendants after they left plaintiff's agency. Moreover, that type of solicitation was not a clear breach of fiduciary duty. The court next determined that the riders attached to the contracts of plaintiff's clients allowing for early termination had been added by the clients' own judgment or that of their attorneys and had not been caused to be added by defendants. The court, however, did find that a question of fact existed as to whether confidential information, including client lists from plaintiff's agency, had been improperly removed or used by defendants, or if such information was in the public domain, and denied defendants summary judgment on that issue. The court granted defendants' motion on the issue of tortious interference, pointing out that in the instant case the pending issue of breach of fiduciary duty by removal of documents was not relevant to the issue of contract termination. Further, the court dismissed plaintiff's cause of action for tortious inducement, holding that it was duplicative of the tortious interference claim. The court dismissed plaintiff's claim for an accounting, pointing out that an equitable remedy cannot be dependent on the main legal issues of the complaint. The court denied as premature the parties' claims for summary judgment on the issue of aiding and abetting a breach of fiduciary duty pending the outcome of plaintiff's initial claim on the same issue. Don Buchwald & Assoc. Inc. v. Marber-Rich, Index No. 600878/2000, 2/19/04 (Ramos, J.).

Insurance; reinsurance treaty; capacity of pool members; parent corporation; action in collection on claims. Action seeking declaration that plaintiff was not liable to the main defendant insurer under a reinsurance treaty. The

defendant sought $39 million from plaintiff with respect to a settlement agreement. Members of a reinsurance pool asserted cross-claims. The defendant asserted that the members lacked the capacity to assert claims and that it should be required to deal with the pool and its administration only. The court found that the defendant had entered into a treaty with a pool to which insurers had subscribed in their individual capacities and in which they had assumed individual shares of the risk. The agreement with regard to management of the pool had had no effect on the individual assumptions of liability under the treaty. Another insurer sought to dismiss all claims on the ground that its only connection to the case was as the parent of the main defendant and a pool member. The court ruled that plaintiffs' allegation that this insurer had been active in trying to collect on the claims of the main defendant was insufficient basis for ignoring the corporate form. The corporate veil can be pierced only to prevent fraud or achieve equity. The court held, though, that this insurer should remain in the case as its rights might be adversely affected by a declaration of the court. Motions denied. American Guaranty Co. v. United States Fidelity & Guaranty Co., Index No. 604517/2002, 1/8/04 (Lowe, J.).

Levy and seizure; poundage; liability for fee. Default judgment; vacatur. Stipulation of settlement. CPLR 8012 [b] [1] and [2]. A City Marshal had seized property that included diamonds worth $1 million, pursuant to executions issued to him by plaintiff upon a default judgment. As the Marshal had prepared to hold public auction, defendants had moved by order to show cause to vacate the judgment. The court had granted the motion upon certain conditions that defendants had ultimately not met, the parties meanwhile entering into a so-ordered stipulation of settlement for $631,221. A third party had made the first payment but defendants had not timely made the remaining payments. The default judgment had been vacated, a new judgment entered, and a second stipulation entered into. The Marshal made the instant motion for an order awarding him a poundage fee, setting its amount, and determining which party or parties were liable for it. The court noted that the Marshal did not need to commence a plenary action to pursue his claim. He was entitled to a fee and the statutory provision on poundage in relation to settlement, not vacatur, governed. When a settlement is reached after a levy and seizure, the proper fee is 5% of the levied property up to the settlement amount: the Marshal was due $31,561. A defendant debtor is generally held liable for such fee, but here the parties were jointly and severally liable. Plaintiff had taken payment directly from defendants, pursuant to the first stipulation, interfering with collection by the Marshal, who had acted at its behest. Further, if defendants lacked assets sufficient to pay the poundage, as had been claimed, holding them solely liable would free plaintiff from the statutory obligation calling for the fee's payment. Plaintiff pointed to the stipulations the parties had entered into that provided that defendants would pay any poundage fee relating to the default judgment. The provisions bound the parties, but not the Marshal, the court stated, and did not impair his right to collect poundage, but plaintiff could use the provisions to place ultimate liability for the fee upon defendants. B.V. Jewels (USA) Inc. v. Cosmopolitan Gem Corp., Index No. 602274/2001, 1/28/04 (Ramos, J.).

Motion to dismiss; subject matter jurisdiction; personal jurisdiction; forum non conveniens. In an action which arose out of a construction project in Brazil, defendant, a bonding company, moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, or, in the alternative, on grounds of forum non conveniens. Plaintiff, an oil services company, cross-moved for an order granting leave to amend its complaint. The court granted defendant's motion to dismiss on the grounds of forum non conveniens, stating that none of the parties, witnesses or supporting documentation was accessible in New York. Further, Brazil was a viable alternative forum for the instant action. The court further concluded that the bond agreement's forum selection clause, which specified the forum as the Southern District of New York, was not in compliance with GOL 5-1402 (1). The court denied plaintiff's cross-motion to amend, defendant's motion for a protective order and plaintiff's cross-motion to compel as moot. Braspetro Oil Services Co. v. U.K. Guaranty & Bonding Corp., Index No. 604502/2002, 1/14/04 (Ramos, J.).

Motion to stay; preliminary injunction. Partnerships. Litigation arose out of a partnership formed by the parties. Plaintiff and defendant Hambrecht co-founded a hedge fund and an additional corporation, EBCA, to serve as the fund's general partner, of which they were the sole shareholders. The parties had crafted an agreement which provided, inter alia, that if either of them stopped working for EBCA, that individual would no longer be entitled to receive any net income from the hedge fund. In 2001, Hambrecht designated defendant Barlow Company as general partner of the fund, liquidated the general partner capital account of EBCA, and distributed to plaintiff and defendant their respective shares. Plaintiff was subsequently informed by defendant that since he was no longer working for EBCA, he was not entitled to any further compensation under the parties' agreements. Plaintiff then commenced the instant action and alleged, inter alia, breach of fiduciary duty, breach of contract, conversion and unjust enrichment. Defendants counterclaimed for tortious interference and breach of contract. Defendant began a dissolution proceeding of EBCA, and moved to stay the instant action pending its resolution. Plaintiff cross-moved for a preliminary injunction contending that the dissolution action would interfere with the court's ability to decide the issues presented and that it would delay the instant action. Plaintiff argued that defendants' motion to stay should be denied because there was no identity of parties, causes of action or judgments sought. The court denied defendants' motion,

finding that the dissolution proceeding failed to satisfy the prerequisites necessary for the court to grant a stay. The court further denied plaintiff's cross-motion, pointing to its prior decision enjoining defendant from taking any action to liquidate the fund without due authorization in writing from EBCA and approval of such limited partners of the fund as required by the limited partnership agreement. Ehrlich v. Hambrecht, Index No.600708/2003, 1/12/04 (Ramos, J.).

Procedure; long arm jurisdiction; motion to dismiss; motion to vacate; extension of time to serve (CPLR 306-b); defective service; motion for leave to renew or reargue. In a case involving an alleged refusal to transfer shares of stock, a defendant, a California company, moved to dismiss under CPLR 320 (b) and 3211 (a) (8) for lack of personal jurisdiction and on the grounds that it was not subject to personal jurisdiction under either CPLR 301 or 302. Defendant further alleged defective service and moved to renew or reargue and vacate the court's prior order which had extended plaintiff's time to serve the summons and complaint. The court denied the motion to vacate, citing CPLR 306-b, which provides for an extension of the time to serve "in the interest of justice." The court further stated that defendant had not alleged any prejudice in the delay. Moreover, if the motion had been granted, there would have been no benefit other than to require plaintiff to pay additional court fees to start a new action. The court also found that service of process was adequate as plaintiff had properly served upon the name and address designated by defendant's counsel, which thus properly constituted a waiver of the alleged defect that the agent for service was no longer the registered agent of defendant. The court further stated that in its motion to reargue, defendant failed to demonstrate that the court had misapplied the law or overlooked any relevant facts. Next, the court denied defendant's motion to dismiss for lack of personal jurisdiction. The court held that plaintiff had failed to prove jurisdiction under CPLR 301 as the evidence showed neither that defendant's subsidiaries engaged in purposeful activities in New York nor that defendant exercised any control over the subsidiaries. However, the court held that plaintiff had established long arm jurisdiction under CPLR 302 (a) and determined that the legend on the stock certificate indicating that same was transferable in New York City provided an express promise by defendant to effect such transfer within New York and thus submitted defendant to the jurisdiction of the New York courts. The court further held that when defendant had failed to transfer the shares containing the promise that they were transferable in New York, it arguably committed tortious conversion of plaintiff's property both within and without the state. It determined that jurisdiction over defendant was actually a hybrid of CPLR 302 (a) 1, 2, and 3. Smouha v. MTA, Index No. 7544/01, 2/27/04 (Demarest, J.).

Shareholders' derivative actions; appointment of receiver; preliminary injunction. Discovery. In a shareholders' derivative action plaintiffs sought appointment of a receiver to manage the business, a preliminary injunction to enjoin defendants from transferring the corporation's assets, appointment of an independent counsel to represent the corporation's interests, production of certain documents, and a modification of the court's previous order which had prohibited individual defendants from transferring corporate assets to themselves or any entity owned by them. The court found plaintiffs had not established by clear and convincing evidence that defendants had engaged in corporate waste and denied plaintiffs' request for the appointment of a temporary receiver. The court, however, granted plaintiffs' request for a preliminary injunction which enjoined defendants from compensating themselves through payments to their other companies, and directed that any payments from the corporation to defendants' other companies must be for actual services rendered by those companies to the corporation. Further, the individual defendants were enjoined from paying their legal expenses from the corporation's assets. The court determined that an inherent conflict existed between the corporation's interests and those of individual defendants and granted plaintiffs' motion for the appointment of independent counsel. In addressing defendants' objections to plaintiffs' motions to compel discovery, the court first clarified that CPLR 3120 (b) as amended in 2002 dispensed with motions for non-party discovery. The court then granted plaintiffs' requests for discovery in part, i.e., the production of documents, financial statements and tax returns related specifically to transactions between defendants' other companies and the corporation, as well as to the corporation's 2002 tax returns and any supporting documents. The court denied as moot plaintiffs' motion for modification of a prior order in light of its now granting the preliminary injunction. Finally, the court granted with limitations plaintiffs' request for an order directing defendants to produce daily printouts of the corporations' revenue and expenses and directed the parties to find a reasonable procedure for the provision of that information. Basile v. Polakoff, Index No. 601204/2001, 1/05/04 (Ramos, J.).

Shareholders' derivative action; demand on board of directors. Contracts; breach; consideration. Breach of fiduciary duty; statute of limitations. Constructive trust. Two banks and an investment company formed to develop a provincial economy under the laws of the People's Republic of China brought this shareholders' derivative action. Defendants, including a corporation with New York offices and three individuals who managed its assets, moved to dismiss the complaint. The court granted the motion in part. Plaintiffs alleged, among other things, that the three individuals had borrowed $10 million in the corporation's name and loaned it to a Manhattan building owner, who when he defaulted sold the building to another defendant, an entity controlled by one of the individuals. The individuals had told plaintiffs that the corporation owned a 50% interest in the building, but the interest had not been

recorded, nor had repayment of the loan ever been confirmed to the corporation. The individuals had also allegedly caused the corporation to buy uncollectible loans from a bank they controlled, the final defendant, and had made numerous other investments in loans and real estate to benefit themselves, friends, and family. At a 1996 board meeting the parties had entered into an agreement in which the individuals promised to undertake various reparative obligations regarding these transactions. These had been memorialized in the meeting minutes, but plaintiffs had been unable to obtain any information about their performance since 1997. The court declined to dismiss the complaint for failure to make a demand on the board of directors. Taking the allegations as true, plaintiffs had demonstrated the futility of a demand, the court found, and, distinguishing Marx, which involved executive compensation, it said that defendants were not required to allege that the board had failed to deliberate or exercise proper business judgment. Defendants argued that one of the plaintiffs did not have "legal capacity to sue" as it was being liquidated in China. The complaint alleged that a Liquidation Committee had assumed that plaintiff's rights, and plaintiffs had not submitted an affidavit of someone who knew the facts regarding its capacity to sue. The court dismissed it as a party. However, in a shareholders' derivative action, the other shareholders are not always necessary parties, and defendants had failed to demonstrate that the Liquidation Committee had to be joined as a plaintiff. Accordingly, the court denied the branch of the cross-motion that sought dismissal pursuant to CPLR 1003. Defendants argued that plaintiffs' claim of breach of contract failed due to lack of consideration. The individuals were already obliged to fulfill the obligations recorded in the 1996 board meeting minutes, and plaintiffs' not taking legal action could not act as consideration because it was not mentioned in the minutes. The court disagreed. At most, defendants had only identified the issue of consideration as an issue of fact. The brothers argued that the alleged contract could not be enforced against them because they had not signed it individually; it had been signed by an eponymous "Enterprise." But they did not indicate whether that entity would protect them against personal liability; that also was an issue of fact. The individuals argued that plaintiffs could not state a breach of contract claim against them based on actions taken by the corporation. However, the claim was not based on the corporation's acts, but on the individuals' failure to fulfill their promises. Defendants argued that the six-year statue of limitations barred the claim for breach of fiduciary duty. Plaintiff cast the breaches as breaches of the 1996 agreement, in which case, the court noted, they would duplicate the breach of contract claim. But if the agreement should turn out not to be enforceable, the individuals' various representations at the 1996 board meeting created an issue of fact about whether the doctrine of equitable estoppel would toll the statute of limitations. The court upheld the breach claim against the individuals, but dismissed claims for inducement of breach against the two defendants the individuals controlled, in regard to which equitable estoppel did not apply. Defendants argued that New York law does not recognize a cause of action for a constructive trust, which plaintiffs sought to impose on defendants' improperly obtained assets. Defendants argued that constructive trust is a remedy for breach of fiduciary duty, but did not cite any case where a court dismissed a request merely because the complaint pleaded it as a cause of action. The court found that the complaint's allegations were sufficient to impose a constructive trust with respect to the individual defendants. China Construction Bank-Guangdong Branch v. New York Guangdong Finance, Inc., Index No. 602811/2002, 1/27/04 (Ramos, J.).

Sovereign immunity; direct effect of commercial activity. Forum non conveniens; alternative forum; court backlogs. Action arising out of alleged failure of defendant bank to honor letters of credit issued for the benefit of plaintiff, a Japanese corporation. Defendant asserted that it is an arm of the government of India and immune under the Foreign Sovereign Immunities Act, 28 USC §1602. An exception thereto involves a foreign act in connection with commercial activity of the state elsewhere that causes a "direct effect" in the United States. Plaintiff cited numerous subsidiaries in the US, but failed, the court ruled, to explain how any of these had been directly affected by defendant's failure to honor the letters of credit, save for a conclusory claim that any money lost by plaintiff directly affected plaintiff's U.S. business. No part of the payment here was to be made in the U.S. Further, the case would have to be dismissed on forum non conveniens grounds. Here the transaction was entirely foreign, with no link to the U.S. Defendant had a branch here, but that was not connected to the transaction. Plaintiff asserted that it had no alternative forum because of severe backlogs in the Indian courts. The court found more persuasive proof as to the ability of a particular court, the one likely to have jurisdiction, to handle the matter. The court also noted that the Appellate Division had recently held that Indian courts were capable of handling complex litigation. Further, the court pointed out that plaintiff had failed to address why Japan was not a proper forum. Case dismissed. Shin-Etsu Chemical Co. v. State Branch of India, Index No. 600148/2003, 2/10/04 (Lowe, J.).

Summary judgment; contracts; gross negligence. Defendants, professional engineers, moved for summary judgment in a contract action. Plaintiffs alleged that defendants had failed to properly perform a prepurchase inspection of a home. At issue was whether a clause in the contract limiting liability to cost of the service was enforceable. Plaintiffs argued that the terms of the agreement had not been explained to them and that they had not read the agreement prior to signing it. The court granted defendants' motion and limited defendants' liability, if any, to the cost of the inspection service. A party who signs a document without any valid excuse for having failed to read it

is bound by its terms. The court determined that the signed single page agreement bearing the liability limitation clearly printed in bold rendered plaintiffs' allegations insufficient to raise any issue of fact. The court further held that defendants' alleged failure to properly conduct the inspection of the house did not rise to the level of gross negligence. E-Venture Capital Management, Inc. v. Tauscher Cronacher Professional Engineers, P.C., Index No. 11251/2002, 1/29/04 (Emerson, J.).

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