The ***Commercial Division***

of The State of New York

THE LAW REPORT

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Arbitration; application of provision; unconscionability; designation of arbitration organizations; mutuality of remedy. GBL 349. Purported class action alleging unjust enrichment and violation of GBL 349 arising out of defendants' "pay by phone" credit card service. Defendants moved to stay the action and compel arbitration. The court rejected plaintiff's argument that the arbitration provision did not apply since plaintiff had been advised that use of the card or a feature of the account constituted consent to the terms of the agreement. The court rejected plaintiff's argument that the arbitration provision was substantively or procedurally unconscionable since the cardholders had agreed to the provision; they had an alternative in that they could have returned the cards if the terms had been unacceptable; and the agreement did not preclude class-wide litigation of claims not subject to the arbitration provision. The court rejected the argument that the arbitration provision frustrated the purpose of GBL 349. The court did not find fault with the agreement's designation of three arbitration organizations and upheld the designated appeal process on the ground that mutuality of remedy is not required in arbitration agreements. Action stayed. Whalen v. American Express Co., Index No. 602754/2001, 7/8/02 (Ramos, J.).

Attorney disqualification. In case of alleged corporate mismanagement, plaintiff asserted that attorney and his firm should be disqualified from representing defendants because the attorney and the firm had been the sole general counsel to the corporation at the time of the alleged wrongdoing by defendants.

The court found the former and current representations by the attorney and the law firm to be adverse in that the allegations against the defendants were that they had intentionally harmed the corporation and its shareholders, by wrongfully taking monies from the corporation in order to support other, unrelated companies. Thus, taking the allegations as true, the interests of the defendants diverged from those of the corporation and its other shareholders. The court also found the law firm's former representation of the corporation and current representation of the two defendants to be "substantially related" in that the causes of action were based on allegedly wrongful actions by the defendants directed against the corporation at a time when the law firm was the corporation's counsel. Baron v. Diabla, Inc., Index No. 602720/2201, 8/28/02 (Lowe, J.).

Brokers; real estate; commissions; procuring cause. Plaintiff real estate broker sought a commission based on an alleged oral agreement to be paid its standard rate upon producing a tenant ready, willing, and able to enter into a lease for commercial premises. Alternatively, plaintiff sought recovery based upon quantum meruit. In a trial decision, the court held that plaintiff was not entitled to a commission because it had not been the procuring cause of the transaction that eventually transpired. Plaintiff had failed to bring the parties together concerning the material terms. Although plaintiff may have played a role in introducing the parties to one another, merely calling the premises to the buyer's attention was insufficient to entitle it to a commission. Plaintiff did not establish a continuing connection between its initial efforts and the transaction that was eventually consummated, which was very different from the one that the parties had originally contemplated. Plaintiff's quantum meruit claim was also denied. Plaintiff could not have had a reasonable expectation of compensation, because the proposed commission agreement was never executed and plaintiff did not contribute to the transaction that actually closed. Garrick-Aug Assoc. Store Leasing v. Hirschfeld Realty Club Corp., 601276/1999, 7/11/02 (Cahn, J.).

Business Corporation Law § 619; bearer share certificates. Article 78 proceeding by wholly-owned second and third-tier subsidiaries, and the sole shareholder of the parent company, a Netherlands Antilles company, to confirm the removal of respondent Contogouris as the sole director and officer of the subsidiaries and to affirm the appointment of a new director. Contogouris had been removed by resolution of the sole shareholder, the first-tier subsidiary. He argued that his removal was not valid because the sole shareholder of the parent company failed to produce a record of transfer to establish ownership. Petitioners submitted copies of two bearer share certificates, which had been delivered to be held in trust for petitioner Stavrau and his sister, who affirmed that she later transferred all of her ownership rights in the company to Stavrau. The court ruled that those bearer share certificates were sufficient to establish ownership. Certificated securities in bearer form may be transferred by mere manual delivery without entering a record of transfer. Stavrou v. Contogouris, Index No. 108965/02, 9/9/02 (Lowe, J.).

Construction contracts; delays; filing late notice of claim; "no damages for delay" clause. Pursuant to Education Law § 3813 (2-a), a GC sought leave to file a late notice of claim against a school district for damages resulting from delays in a construction project involving additions, renovations and sitework at an elementary school. The court ruled that the GC had failed to make the necessary showing that the school district had knowledge of its claim. The construction manager for the school district confirmed that the GC had never submitted any written application for a time extension, any written notice of claim, or any five-day notification of delay, as required by contract. The court rejected arguments that the school district had waived these contractual notice provisions when it issued drafts of change orders, which provided for a 196-day extension. Because the change orders were not executed by the school district, its architect, or its construction manager, no extension was ever granted. The court also held that the general contractor's claim was barred by a "no damages for delay" clause in the contract. Finally, the court recognized that the school district would be prejudiced by the late notice of claim because it had neither budgeted nor allocated any additional funds for the project and because granting leave would delay the opening of one of the school district's kindergarten projects. Moreover, key personnel from the school district and the construction manager were no longer available to investigate, thus depriving the school district of the ability to timely investigate the claim. Petition for leave to file a late notice of claim denied. Matter of Fratello Construction Corp. v. Garden City Union Free School District, Index No. 03402/2002, 9/6/02 (Austin, J.).

Construction contracts; "no damages for delay" clause; exclusion for additional payment. Action by completion contractor against surety for additional work and delay damages based on alleged misrepresentations. Plaintiff relied in part on the doctrine that a "no-damages for delay" clause can be overridden where a contractor's actions are grossly negligent or willful. The court held that plaintiff could not prove either exception. The delays had been caused by the owner, not the surety, and it would be speculative to assume that the surety had deliberately misled plaintiff when negotiating the completion contract. The "no damages for delay" clause was binding. The court also found that plaintiff had participated in the drafting of the contract, had not had the materials lists included and had inspected the worksite before signing the contract. The contract specifically excluded additional payment for materials or anticipated work. The court found an issue of fact as to claims for additional work for which no change orders existed, but which were the

result of requests by the contractor. Partial summary judgment for defendant. Gemma Development Co. v. Fidelity & Deposit Co, Index No. 112147/2000, 9/11/02 (Freedman, J.).

Construction law; release; waiver of defense; procedure; assertion nunc pro tunc. Lien Law § 34. Action by subcontractor against GC and sureties for $4.1 million for additional work regarding a stadium at USTA National Tennis Center. The court found that plaintiff had executed releases in exchange for payments by the GC. The court ruled that the releases were unambiguous and should be given effect, especially since the subcontractor had ratified the releases by accepting payment. The court rejected plaintiff's argument that defendant had waived the defense by failing to raise it in the answer or a prior 3211 motion. The defense is not jurisdictional and a court may, absent prejudice, deem it asserted in the answer nunc pro tunc in connection with a motion for summary judgment. The defense of waiver had been pleaded and plaintiff had been on notice from having signed the releases. Plaintiff could not rely on an alleged course of conduct to vary the terms of the releases. The argument that the releases violated public policy (Lien Law § 34) was meritless since the statute authorizes use of a release where payment has been made. Navillus Tile, Inc. v. Turner Construction Co., Index No. 402728/2000, 7/8/02 (Freedman, J.).

Contracts; computer software; breach; warranty disclaimer. Misrepresentation. Negligent misrepresentation; special relationship. In action by computer software developer against commodity trading company alleging breach of a consulting agreement, plaintiff moved to dismiss defendant's counterclaims. Plaintiff had agreed to license commodity trading software to defendant and, pursuant to the consulting agreement, to develop interfaces between the software and a separate accounting software, which defendant licensed from another company. The court dismissed defendant's counterclaim for breach of the license agreement premised upon certain alleged deficiencies in the commodity trading software because that agreement called for the licensed software to be delivered "as is" and without any warranty, except for certain specifically enumerated warranties which were not implicated. However, the court declined to dismiss counterclaims for breach of the consulting agreement, fraud, negligent misrepresentation and rescission. The court found that the "as is" and warranty disclaimer provisions contained in the consulting agreement did not preclude defendant's counterclaim for breach of that agreement because the claim was predicated upon plaintiff's failure to deliver the interfaces. The court also held that the counterclaims for fraud and negligent misrepresentation were not barred by the warranty and liability disclaimers contained in the license and consulting agreements, and rejected plaintiff's contention that those counterclaims were duplicative of defendant's counterclaims for breach of contract, finding that plaintiff's statement that it had already successfully developed an interface between the commodity trading and accounting software systems in the past, for another client, was a representation collateral to the contracts between the parties. The court ruled, further, that plaintiff had failed to establish that the negligent misrepresentation claim was barred by the absence of a special relationship between the parties, noting that plaintiff arguably held special expertise, vis-à-vis defendant, with respect to plaintiff's ability to develop, and its past experience in developing, interfaces of the sort which were the subject of the consulting agreement. Triple Point Technology, Inc. v. Transammonia, Inc., Index No. 603950/2001, 7/1/02 (Cahn, J.).

Contracts; credit agreement; general release; fraudulent inducement; economic duress. Two actions arising from insurer's default under a credit agreement with a consortium of banks. After the insurer defaulted, the parties had executed a forbearance agreement whereby the banks had agreed to delay the exercise of certain rights under the credit agreement in exchange for a general release of any past or current claims under the credit agreement. After the insurer had failed to remedy the default, the banks had commenced an action and moved for summary judgment in lieu of complaint, which was denied. In the meantime, the insurer had commenced this action, alleging, among other things, that the banks had breached the credit agreement and fraudulently induced the insurer to execute the forbearance agreement. The court granted the banks' motion to dismiss the insurer's complaint. First, the court found that the insurer's claims in connection with the credit agreement were barred by the release contained in the forbearance agreement. The court also found that the insurer had failed to state any facts to support its claims that it had been fraudulently induced to execute the forbearance agreement or that it had done so as the result of economic duress. As a result, the court also dismissed the insurer's claims for recission or reformation of the forbearance agreement, which were based on allegations that the insurer had executed that agreement as the result of fraud or duress. Motion to dismiss complaint granted. Frontier Insurance Group, Inc., v. Deutsche Bank, Index No. 600294/2002, 8/28/02 (Cahn, J.).

Contracts; interpretation; agreement missing terms; repudiation by conduct. The court dismissed plaintiff's complaint, which alleged that defendant had breached their employment agreement and sought injunctive relief. Plaintiff, a younger doctor, had entered into a five-year employment agreement to work for defendant's long-established medical practice. The parties also agreed to form a new professional corporation when the contract ended. The terms and conditions were attached to the five-year employment contract in a Shareholders' Agreement. Approximately three years after the agreement was executed, defendant informed plaintiff that he could not form a new professional corporation. Both parties expressed concerns about the terms of the Shareholders' Agreement and began discussing alterations to

that agreement. Plaintiff did not demand that defendant sign the Shareholders' Agreement prior to the expiration of his employment, nor did plaintiff sign the agreement. Several months after the expiration of the employment agreement, plaintiff terminated his relationship with defendant. The court held that the Shareholders' Agreement was missing significant material terms, and thus, could not be enforced. The parties' actions, including negotiations over changes, indicated that they mutually repudiated the proposed Shareholders' Agreement. Plaintiff formally demanded that defendant sign the Shareholders' Agreement more than four months after the expiration of the employment agreement. The court also concluded that the development of managed care undermined the parties' expectation that they would ever generate the same level of revenue, even though both performed the same number of procedures. Bercow v. Damus, Index No. 968/1999, 9/3/02 (Austin, J.).

Contracts; interpretation; employment agreement; giving effect to all terms. The court found that the parties had agreed that the employer would hire the employee for three years with a right to terminate for specified reasons and that thereafter, either party could terminate for any reason, on notice. The court rejected an argument that the employer could terminate at any time for any reason as long as stated payments were made; this argument would render meaningless the “for cause” provisions and the 30-days notice provision and did not harmonize with the three-year term. Summary judgment for employee. Sozio v. Exhibitgroup/Giltspur, Index No. 13864/2001, 8/23/02 (Stander, J.).

Contracts; interpretation; exclusive sales representation agreement; tortious interference with contract; measure of damages. Action by representative of television stations and broadcasters for breach of exclusive sales representation agreement whereby plaintiff was to represent defendant owners of cable television channel in the sale of national television spot advertising time during Philadelphia Flyers and Philadelphia 76ers games. Plaintiff also sued defendants’ new sales representative for tortious interference with the exclusive sales agreement. Plaintiff claimed that defendants, in contravention of industry custom, had cancelled the agreement without offering plaintiff a “buyout,” using the alleged standard industry formula. The court found that the agreement’s unambiguous limitation of liability provision, wherein each side agreed that neither would be liable for “any indirect, punitive or consequential damages or loss of revenue or profits, arising in connection with this Agreement,” served as a complete bar to the action for breach of contract. Parties to such contracts accept the risk of non-performance, and parole evidence will not be considered to alter the agreement’s terms. Plaintiff was permitted to proceed against new representative for intentionally acting to induce the termination of the exclusive sales representative agreement because the limitation of liability provision between the contracting parties did not negate the fact that actual damages may have been incurred. However, the amount of damages to which plaintiff might be entitled on its claim for tortious interference with contract might not accord with the “customary” industry formula for determining the amount of a buyout. That determination would be up to the jury. Petry Television v. Comcast Spectator, Index No. 600851/2002, 7/29/02

Contracts; novation. Corporations; alter-ego; piercing the corporate veil. Action by advertising agency to recover unpaid advertising and ad agency fees from a venture development strategy firm and a start-up company. The venture firm had had a consulting agreement with the start-up, to assist it in developing a business model and acquiring financing. The venture firm introduced the start-up to the agency as a potential ad agency and marketing partner. The advertising agency received a memo on the venture firm’s letterhead defining the scope of work and business requirements of the start-up. The agency then replied with a letter agreement, which the start-up signed. Pursuant to this letter agreement, the agency rendered certain services, which were not paid for. The start-up ultimately notified the agency that it was not going to pursue all the activities forecast in the letter agreement, allegedly due to adverse market conditions and lack of funding. However, the agency received a settlement proposal consisting of cash and stock of the start-up as full satisfaction of all of the start-up’s debt owed to the agency. The agency never signed the settlement proposal. The agency’s lawyers later wrote that their client agreed to the cash payment and shares, but defendants had not completed the necessary paperwork. The court found that defendants raised issues of fact as to whether a novation had been created. The court rejected plaintiff’s argument that defendants had waived the defense for failure to plead it in the answer. Nor did plaintiff show that it was either surprised or prejudiced. The court also ruled that plaintiff had failed to show that the venture firm was an alter ego of the start-up, even though the two companies had the same address, telephone number, and corporate officers, among other things. The venture firm submitted proof of separate bank accounts and that the start-up paid for its own advertising. Plaintiff failed to allege that the venture firm had engaged in anything fraudulent or illegal so as to justify piercing the corporate veil. Plaintiff argued that depositions of defendants would demonstrate that there had never been an agreement or consent to discharge the original letter agreement. However, the court found that plaintiff had waived the right to conduct further depositions by filing a note of issue. Defendants’ motion for summary judgment granted in part; plaintiff’s cross-motion to compel depositions denied. DCA Advertising, Inc. v. The Fox Group, Inc., Index No. 601080/2001, 7/15/02 (Ramos, J.).

Contracts; statute of frauds; part performance. Action by former consultant for unpaid compensation. The court ruled that the doctrine of part performance took the case out of the statute of frauds. The court found that plaintiff had been paid at the rate referable to the consulting agreement, not other arrangements; plaintiff had received a 1099 with no tax

withholding; defendant's assistant general manager had testified at deposition that plaintiff had been a consultant. Summary judgment for plaintiff. Chiarella v. Midtown Rochester, LLC, Index No. 1662/1999, 9/19/02 (Stander, J.)

Corporations; business judgment rule; interest of directors; ratification. Action arising out of reverse stock split. Plaintiff shareholder challenged the board's action in approving the split. The court found that the board had had an independent third party value the shares and had not influenced its work. The court upheld the decision to retain the entity under the business judgment rule. The court found, however, that questions of fact existed as to whether the defendant directors had acted properly in setting a fair market value for purposes of an equity incentive plan and had had an interest in the actions taken. The independent valuation did not extend to these shares. The court ruled that it was not self-interest per se for the directors to approve a reverse stock split as the purpose was to limit the number of shareholders. Further, the shareholders had ratified the action. The business judgment rule insulated the transaction. BCL 713(a). Summary judgment for defendants. Anderson v. Blabey, Index No. 165/2001, 9/02 (Stander, J.).

Guaranties. Procedure; CPLR 3212(f). Action for breach of security agreement. A guarantor contended that he had warned plaintiff of irregularities engaged in by his partner in the business. The court ruled that this would not avoid defendant's liability as guarantor. Plaintiff had moved promptly after the notice to it. Defendant had not taken action to cut off dealings with the partner or the corporation, nor sought legal relief. As to CPLR 3212(f), defendant had not shown what relevant proof plaintiff possessed that would warrant postponing summary judgment, nor had defendant sought discovery in the several months between commencement of the case and the motion. Summary judgment for plaintiff. Banc of America Specialty Finance, Inc. v. Freedom Marine Corp., Index No. 10282/2001, 8/16/02 (Austin, J.).

HMOs; alleged wrongful termination of a doctor. Public Health Law; private rights of action; good-faith reporting. Action by a physician against an HMO, which had terminated the physician from its provider network. The HMO claimed that the physician had unnecessarily prescribed endoscopies even though the physician's patients consisted mainly of patients of an ethnic group who had a higher incidence of gastroenterological disease. The HMO had requested reimbursement of the earlier payments to the physician and subsequently withheld payments for the physician's later services. The physician had appealed to the State Insurance Department. However, because the HMO had misinformed the Department that the matter was in litigation, the Department had declined jurisdiction to investigate. The HMO later terminated the physician, claiming that the physician posed a threat of imminent harm to the HMO's members. The HMO also notified the Office of Professional Medical Conduct (OPMC) of its decision. Following an investigation, the OPMC closed the file without taking any action against the physician. The physician alleged breach of contract, breach of the duty of good faith and fair dealing, violations of Public Health Law, and breach of fiduciary duty. The court rejected the HMO's argument that the physician did not have a private right of action under Public Health Law § 4406-d, which provides for due process protections for health care providers participating in the network of an HMO or insurer. The court found that recognizing a private right of action would promote the legislative purpose of the statute, and that it would be consistent with the statute's legislative scheme. The court stated that, in deciding not to follow the steps delineated in the statute and in preventing the physician from seeking administrative relief, the HMO " had opened the door for the courts to enter." The court also held that the physician had a private right of action for "bad faith reporting" under Public Health Law § 230 (11) (b), which grants civil immunity to any organization which reports or provides information to the State Licensing Board in good faith. The court dismissed the physician's claim for breach of fiduciary duty because the physician failed to demonstrate a special relationship, other than a contractual one, between the parties. The court found issues of fact as to all the remaining causes of action and ruled that more discovery was needed. Defendants' motion for summary judgment granted in part. Foong v. Empire Blue Cross and Blue Shield, Index No. 602836/2001, 9/25/02 (Ramos, J.).

Insurance; change of beneficiary without complete signatures; standing of contingent beneficiary. Action for breach of contract against insurer. Husband was a beneficiary under a structured settlement agreement, as was wife; plaintiff children were contingent beneficiaries. As part of a divorce proceeding, wife undertook to remove herself as primary contingent beneficiary but never signed the documents. Husband signed a change of beneficiary form. Husband later died. It was argued that plaintiff children lacked standing because not third-party beneficiaries and their interest had not vested, former wife not having died. The court ruled that wife's rights had been breached by the change of beneficiary, for which wife was required by settlement agreement to sign. The purported change was void. The prior beneficiary, wife, would be entitled to the proceeds except that she had waived her rights in the divorce. Plaintiffs thus had standing. Defendant insurer breached the settlement agreement by signing a form to change the beneficiary without wife's signature. This deprived husband of an opportunity to obtain wife's signature. Summary judgment for plaintiff on breach of contract. Kamens v. Utica Mutual Insurance Co., Index No. 688/2001, 8/27/02 (Stander, J.).

Insurance; duty to defend; emotional injury as bodily injury; accident; malicious prosecution; exclusion for termination of employment; employment-related practices exclusion. Disclaimer; Ins. Law § 3420(d). Action

seeking declaratory judgment as to coverage in a Federal case. Plaintiffs sought coverage under provisions for bodily injury or personal and advertising liability. The court found that the complaint in the Federal case alleged emotional injury, which would constitute bodily injury, and that that was allegedly the result of an accident since it was alleged that plaintiffs had negligently accused the plaintiff there of misdeeds, which would have been unforseen and unexpected to that plaintiff. Also, the complaint alleged malicious prosecution, which was included in the second coverage provision. Thus, defendant had a duty to defend plaintiffs. Defendant argued that an exclusion for termination of employment applied since the plaintiff had been fired for disclosing confidential business information, which had led plaintiffs to report the Federal plaintiff for theft in retaliation for her failure to sign a release after termination, which had led to the malicious prosecution claim. The court held that defendant had not established the applicability of the exclusion as a matter of law. Although the underlying complaint suggested that the police report had been made in retaliation for the plaintiff's failure to sign a release after termination, the proof had not established that as fact. An employment-related practices exclusion did not apply, the court ruled, since the activity of theft could not be related to employment. Thus, defendant had a duty to defend. Further, the court ruled that an accident had occurred for purposes of Insurance Law § 3420(d). The court found that the defendant had, within a few weeks, denied coverage, quoting the entire employment-related practices exclusion, which was proper and timely disclaimer. Burns Glass Services Ltd. v. Travelers Indemnity Co., Index No. 3433/2001, 7/02 (Stander, J.).

Insurance; E&O policy; disclaimer; notice; equitable estoppel; damages; claims. With regard to E&O policy, insurer disclaimed on grounds that plaintiff had allegedly failed to provide sufficient notice until after last policy had expired. The court ruled that notice complied with NY amendatory endorsement on these claims-made policies in that plaintiff had provided particulars sufficient to identify the insured. The court found that the insurer had received substantial information about PERB proceedings. Further, the court held that the proof showed that the insurer would be equitably estopped based on information provided through the attorney hired by the insurer to defend the underlying suit. The court found that plaintiff, by the insurer's actions, had been led to believe that the insurer was on notice. The court ruled, however, that plaintiff was not entitled to extra-contractual damages as bad faith had not been shown. As to a second insurer, the court held that it provided plaintiff no coverage since the second lawsuit involved claims that were connected to those in the first suit, which had preceded the effective date of the second insurer's policy. Summary judgment accordingly. Greenburgh Eleven Union Free School District v. National Union Fire Insurance Co, Index No. 605208/1999, 8/19/02 (Freedman, J.).

Misrepresentation; breach of contract. Procedure; personal jurisdiction; undertaking. Constructive trust. Fiduciary duty. Unjust enrichment. Plaintiff commenced an action against four limited liability companies and four individual defendants after one of the companies, the Polimeni Organization, had notified plaintiff that it was terminating his consulting agreement, pursuant to which plaintiff had earned an interest in Polimeni International. Plaintiff's share in the company was dependent upon his level of participation in developing various commercial properties in Poland. The court dismissed the complaint as against the individual defendants and one of the limited liability companies, because, as members of Polimeni International, they were not liable for any debts or obligations of the Polimeni Organization. The complaint as against a company based in Poland was dismissed for lack of jurisdiction because plaintiff's allegations did not specify the nature of the company's alleged contacts and activities in New York. The documentary evidence was also insufficient to establish jurisdiction. The court granted the branch of defendants' motion for an undertaking in the amount of $50,000.00, which it had previously declined to do when it enjoined and restrained defendants from admitting new members to Polimeni International or transferring any interest in that company without court approval. The court granted plaintiff's cross-motion for the return of his personal items and business-related documents where defendants did not dispute plaintiff's superior right to possession of those belongings. The court denied the branch of the motion to dismiss three causes of action related to plaintiff's interest in Polimeni International even though they might be duplicative on the ground that such duplication was harmless. The court granted the motion to dismiss the cause of action for a constructive trust because plaintiff had failed to establish the four essential elements of that cause of action. The court dismissed plaintiff's cause of action for fraud, because the complaint did not allege misrepresentation of any material fact extraneous to the actual agreement. The court dismissed the cause of action for breach of fiduciary duty against three of the individual defendants because plaintiff's allegations were unsubstantiated and conclusory. The court also held that the Polimeni International's lawyer did not have an attorney-client relationship with plaintiff due to lack of proof of retainer or representation with respect to the subject agreement. The court dismissed the cause of action for unjust enrichment, because the existence of an express written contract precluded recovery based on quasi-contract. The court also held that defendants' alleged wrongdoing did not warrant the imposition of punitive damages. Krasinski v. Polimeni Organization LLC, Index No. 5563/2002, 8/20/02 (Austin, J.).

Preliminary injunction; adequacy of money damages; impact of termination on business reputation. Motion for preliminary injunction. Defendant issued a series of notes totaling approximately $674 million the proceeds of which were used to purchase a portfolio of securities and other assets. Plaintiff was engaged, pursuant to a Management Agreement, to act as investment manager for the portfolio. Defendant terminated plaintiff for allegedly failing to manage the portfolio pursuant to the terms of the Agreement. In an action for breach of contract and tortious interference with

contract, plaintiff moved for a preliminary injunction to restrain defendant from terminating the Agreement on the grounds that such termination would put plaintiff out of business, since defendant was its only client, and that plaintiff's reputation would be harmed by such termination. The court denied the motion, finding that plaintiff could be compensated by money damages. The court noted that the Agreement provided a formula for calculating plaintiff's compensation, which could be utilized in the event that plaintiff succeeded in the underlying action. Moreover, plaintiff had reserved its rights in the Agreement to seek and engage in other business, although it had chosen not to do so. Finally, the court found that plaintiff had not set forth any facts to support its allegation that its reputation would be damaged. Motion denied. Triumph CBO Advisors, LLC v. Triumph Capital CBO I Ltd., 605194/2001, 7/8/02 (Cahn, J.).

Procedure; another action pending (CPLR 3211 (a)(4)). Defendants' insurers commenced an action against them. Defendant/insureds moved to dismiss on the basis that defendants had previously commenced an action in Minnesota against the same plaintiffs concerning the same issues. CPLR 3211 (a) (4). Within a month of defendants' commencing the Minnesota action, plaintiffs had commenced their separate New York actions. Both jurisdictions had ties to the litigation. As part of pre-litigation negotiations, defendants had written to one plaintiff stating that adversarial procedures would be delayed pending plaintiff's receipt of certain information. Although the letter did not indicate a permanent agreement to defer litigation, it was misleading for defendants to commence the Minnesota action without giving notice to plaintiff. This behavior by defendants trumped the first-in-time rule. Moreover, defendants could easily obtain information from witnesses in Minnesota, as those were their own employees. The court denied the motion to dismiss and granted plaintiffs' cross motion to consolidate the New York actions. Executive Risk Indemnity v. American Express Co., Index No. 604842/01; Certain Underwriters at Lloyd's, London v American Express Co., Index No. 605739/01, 7/9/02 (Ramos, J.).

Procedure; application to quash subpoena; standing; authority to issue. Proceeding to quash non-judicial subpoena (CPLR 2304) issued by Town to government employee for testimony before Town Board. The court ruled that one petitioner did not have standing. It was not the person on whom the subpoena had been served. Petitioner argued that its trade secrets would be revealed, but the court noted that reports prepared by the witness had already been turned over to the Town as part of its proceedings. The court ruled that petitioner had not shown that its property rights or privileges would be violated. With regard to the other petitioner's challenge, the court stated that the subpoena had been issued during the Board's proceedings. However, the court ruled that the Town did not have authority to commence an administrative proceeding after a franchise agreement had been entered into, although it had power to conduct public hearings before that. Contractually-required meetings were not equivalent of an administrative proceeding. The Town lacked statutory authority to compel witnesses to appear in the context at issue; the matters at issue were within the purview of the PSC. There was not compliance with 2302 and the Town appeared to be seeking improper discovery in connection with a related Article 78 proceeding. New York State Department of Public Service v. Town of Beekmantown, Index No. 3914/2002, 8/18/02 (Benza, J.).

Procedure; personal jurisdiction; CPLR 302 (a); out-of-state note. Motion for summary judgment in lieu of complaint and attachment. All four parties resided in Peru. Notes had been issued in a transaction by a foreign corporation to a bank, which had sold them to plaintiffs. As to long-arm jurisdiction (CPLR 302 (a)), an out-of-state note made payable in NY does not confer jurisdiction over a non-domiciliary absent numerous phone or other communications to NY regarding the transaction. Defendant, an individual, had never come to NY; had negotiated the deal in Peru with plaintiffs and bank employees in Peru; defendant's personal account in NY was not involved in the deal. The transmittal of one fax as to each note to the bank in NY was insufficient. Defendant's property in NY was unrelated to the transaction and could not provide quasi-in-rem jurisdiction. Plaintiffs' assertion that discovery might uncover some evidence to provide jurisdiction was found to be unsupported conjecture. Case dismissed. Lemor de Gabel v. Franco, Index No. 101259/2002, 7/25/02 (Freedman, J.).

Procedure; personal jurisdiction; service on former employee at previous place of business. Misrepresentation; promissory statements about future action. Action arising out of contract for services in regard to defendant's business of connecting internet auction sites. A co-defendant argued that personal jurisdiction was lacking since he had been served by delivery to a receptionist at defendant company but had left the company two months before. The court rejected this contention because a Department of State search showed that the defendant had held out the address as his actual place of business. CPLR 308(b). With regard to plaintiff's fraudulent inducement claim, the court ruled that the misrepresentation alleged (that defendants had represented that they would open to plaintiff a virtually captive tech market) concerned promissory statements about actions in the future. Claim dismissed. Global Integration Technology, Inc. v. Waybid Technologies, Inc., Index No. 604244/2001, 8/8/02 (Ramos, J.).

Procedure; summary judgment in lieu of complaint. The court held that summary judgment in lieu of complaint was inappropriate, even on a continuing unconditional guaranty, where additional proof outside the instrument would be

necessary, or where an instrument sued upon is subject to terms and conditions in a separate document, or where the factual assertions made by the parties are complex. Defenses raised by the defendant guarantor were sufficient to raise issues of fact as to defenses to the instrument, including waiver and whether the guarantor's obligations under the later guaranty were extinguished by payments made to plaintiff, whether an integration clause in the later guaranty covered loans which were the subject of the earlier guaranty, and the effects of a bridge loan. Perry H. Koplik & Sons, Inc. v. Gabayzadeh, Index No. 600153/2002, 7/31/02 (Cahn, J.).

Procedure; waiver of right to move for *forum non conveniens* dismissal based on lapse of time and participation in discovery; Friendship Treaty with Denmark; adequacy of Sri Lankan forum. Action by plaintiff subcontractors, incorporated in Gibraltar and Denmark, with offices in England, for payment of arrears allegedly due from defendant general contractors, which were incorporated in Delaware, Texas and Hong Kong, with offices in New York County. Plaintiffs contracted to install the HVAC systems in a 39-floor twin-tower office complex in Colombo, Sri Lanka and now alleged that defendants had caused excessive delays in the project's completion. Citing the Federal Arbitration Act, defendants initially had had the case transferred to the Southern District, which found no agreement to arbitrate. The Second Circuit affirmed and the matter was remanded to this court, where defendants promptly moved for *forum non conveniens* dismissal. The court ruled that, while defendants could have asserted the *forum non conveniens* defense in the Southern District, given their prompt assertion of the defense upon remand, there was no waiver. Defendants' participation in discovery concerning threshold matters did not constitute consent to jurisdiction or a waiver of the *forum non conveniens* defense. The court found that New York had no interest in the outcome of the parties' dispute, which arose out of events and transactions that had occurred in Sri Lanka and whose sole connection to New York was defendants' Manhattan offices. Both the private and the public interest factors militated against New York's assertion of jurisdiction, so even a finding that plaintiffs were Danish citizens entitled to treatment as Americans pursuant to the Friendship Treaty executed by the United States and Denmark would not compel New York's assertion of jurisdiction. Defendants were amenable to process in Sri Lanka, which was a suitable forum with an independent judiciary and a complete body of statutory law based on English common law. The court rejected plaintiffs' complaints about the Sri Lankan judiciary and about social and political unrest, as the unrest obtained before, during, and after the execution of the disputed contract, and plaintiffs had maintained a fully staffed office in the country and had prosecuted other suits there. Intertec Contr. A/S v. Turner Steiner Intl., S.A., Index No. 605915/1998, 7/29/02 (Lowe, J.).

Real property; merger of contract in deed. Misrepresentation; reliance; due diligence. Action arising out of sale of building. Plaintiff asserted that defendants had misrepresented the rent roll and engaged in other wrongdoing. Generally, provisions of a contract for the sale of real property are merged in the deed and extinguished on closing unless there is a clear intent that a provision will survive delivery of the deed or there is a collateral undertaking, or where there is fraud. The court held that plaintiff here, by the exercise of due diligence, could have discovered the true state of the facts so that reliance was not reasonable. The court found no indication that the parties had intended survival of certain provisions. RIGS Management Co. v. Hussain, Index No. 5722/2001, 7/1/02 (Austin, J.).

Res judicata; arbitration determination. Plaintiff sued defendant for breach of contract. Defendant moved to dismiss on res judicata grounds premised on an arbitration reached in a federal case. In that case plaintiff's assignor had sought payment under a material and labor payment bond. The arbitration had determined that a letter agreement between plaintiff's assignor and defendant had adversely affected the surety's rights without its consent, thereby releasing it. The court held that this ruling was not res judicata as to the issue of whether defendant was liable on its subcontract with the assignor. Motion denied. Johansen v. City of Rochester, Index No. 545/2002, 7/12/02 (Stander, J.)

Res judicata; collateral estoppel; forum selection clause, forum non conveniens. Action by a subsidiary of a large Korean exporter of goods for unpaid invoices. Under a "Four Party Agreement," defendant's parent corporation, which manufactures shipping containers, would export its containers, through plaintiff's parent corporation and plaintiff, and ultimately to defendant. The Four Party Agreement also contained a forum selection clause allegedly designating the Seoul District Court as having exclusive jurisdiction over disputes relating to the Four Party Agreement. While this action was pending, defendant's parent corporation entered into bankruptcy reorganization proceedings in Korea. The Korean court issued a reorganization plan that included a 90% debt-equity swap of the money that defendant owed to plaintiff and a deferred payment schedule on the remaining 10%. Defendant argued that the action should be dismissed either under principles of res judicata and collateral estoppel, or pursuant to the forum selection clause. Defendant also contended that Korea was a more appropriate forum. The court found that defendant had not met its burden, reasoning that the crux of the dispute was whether the deliveries had been governed by the Four Party Agreement, which plaintiff disputed. Defendant had failed to demonstrate that the action was definitively governed by the Four Party Agreement, and that the forum selection clause was exclusive or mandatory, as plaintiff offered a different translation of the forum selection clause. Motion to dismiss denied. Daewoo International (AM.) Corp. v. Jindo AM, Inc., Index No. 605683/1999, 9/26/02 (Ramos, J.).

Shareholders Agreement; Stock Valuation Formula; Mandatory Repurchase-Upon-Termination Clause. Defendant sought summary judgment. Plaintiff, a former long-term employee of defendant and the holder of shares of defendant's Class "C" stock, sought summary judgment on the amended complaint with respect to the issue of liability and damages. The court rejected plaintiff's contention that under the parties' Shareholder Agreement, defendant was required to determine the "Computed Value" of the shares on the basis of audited financials, and that defendant had breached the Agreement by deter-mining the value of plaintiff's shares on the basis of unconfirmed information provided by "controlling insiders." The court held that pursuant to the plain language of the Agreement, upon defendant's termination of plaintiff's employment, defendant was required to purchase, and plaintiff was required to sell, his Class "C" stock based upon a formula set forth in various provisions of the Agreement, a formula that included "Computed Value" of the stock and a "Valuation Date." Defendant had provided documentary evidence demonstrating that the accounting firm retained by it to perform stock valuation services consistently utilized the same formula and valuation methodology to repurchase the stock of every other employee who departed during plaintiff's 26-year tenure with the corporation, and that the firm's computations were based on all information reasonably available at the time. Defendant further demonstrated that there was no evidence that the firm had intentionally undervalued plaintiff's stock, or that plaintiff had been treated differently from other shareholders whose stock was repurchased in 1989, the year of plaintiff's resignation. Plaintiff admitted to the receipt of yearly statements with regard to the valuation of his stock, and that subsequent to his resignation, defendant began paying him for the stated value of his stock pursuant to a 6-year payout schedule, a method of payment authorized under the Agreement. The court further held that under the terms of the Agreement, the stock values fixed by defendant's accountant firm were conclusive, final and binding upon defendant and all stockholders, including plaintiff, unless disapproved by defendant's Board of Directors, or duly appointed committee, within thirty days after submission, and that, since this provision under the Agreement was silent as to what information or grounds were necessary to initiate Board disapproval of any particular stock value submission, the issue of whether plaintiff had had sufficient or insufficient information to initiate such a process during his time with defendant was inconsequential. In addition, the court held that the evidence submitted by plaintiff regarding defendant's alleged undervaluation of his Stock and with respect to defendant's alleged failure to properly appraise certain real property owned by it, as well as other evidence obtained by plaintiff many years subsequent to his resignation, was insufficient to overcome this well-settled rule of law. Plaintiff's fraud claim was dismissed as a matter of law. The court held that defendant's alleged failure to perform under the parties' Voting Trust Agreement was merely a claim alleging breach of contract, and that due to plaintiff's failure to provide evidence that a legal duty independent of the contract itself had been violated, the claim could not be maintained. Plaintiff's claim alleging breach of fiduciary duty was also dismissed as a matter of law. The court held that no fiduciary duty could be created by the parties' Shareholders Agreement in that it contained a mandatory repurchase-upon-termination clause. Yatter v. William Morris Agency, Index No. 111543/1995, 8/6/02 (Ramos, J.).

State Insurance Fund; Workers' Compensation insurance premiums; State Finance Law § 18(5) (recovery of legal fees as costs of debt collection); State Finance Law § 18(10) (determination whether immediate collection of entire debt poses public hardship). Action by the State Insurance Fund (SIF) to recover unpaid workers' compensation insurance premiums. The court granted SIF partial summary judgment to recover premiums determined based upon an audit of the defendant insured's books and records and rejected several challenges by the insured to SIF's audit and calculation of the amount of premiums due. The court ruled that the insured could not assert, as a defense to the action, that SIF had improperly classified its employees for the purpose of calculating the premiums. Instead, the insured had to challenge the classification administratively before the New York Compensation Insurance Rating Board (NYCIRB), the body which established the classification system used by SIF, within twelve months after the expiration of the applicable policy term. In this case, the insured had not produced the records required for the audit until after a second court order and thus was primarily responsible for SIF's delay in completing its audit until after the expiration of the time period for an administrative challenge before NYCIRB. The court ruled that SIF was not entitled to recover the legal fees paid to its attorneys as a cost of debt collection under State Fin. Law § 18(5), as the insurance premiums, which were finally fixed and determined to be due as a result of this litigation, did not constitute a debt, defined as a "liquidated sum due and owing" (State Fin. Law § 18[1][b]). The court denied the insured's motion to dismiss the complaint, rejecting the contention that State Fin. Law § 18(10) requires SIF, as a condition precedent to bringing an action to collect unpaid insurance premiums, to make a determination whether the immediate collection of the entire amount of the debt owed "would jeopardize the debtor's fiscal viability and thereby pose a hardship to the public" and, thus, whether it must offer the insured the option to pay on an installment or deferred basis. In this instance, where the amount of the debt to be collected must be determined in litigation, the court noted that it was more appropriate for SIF to make the determination required by State Fin. Law § 18(10) after judgment was entered, when all of the relevant information, including the debtor's financial condition and the amount of the debt, would be known. State Insurance Fund v. Carlton Concrete Corp., Index No. 402036/2000, 9/3/02 (Ramos, J.).

Statute of frauds; GOL § 5-701; literary agency agreement; unsuccessful broker. Plaintiff, a literary agency, sought payment for services in allegedly representing Eve Ensler with respect to her work "The Vagina Monologues." Ms. Ensler moved to dismiss on the ground that the statute of frauds barred both the breach of contract and quantum meruit

claims, because she had never signed any agency agreement with plaintiff. She also sought dismissal of the quantum meruit and unjust enrichment claim on the ground that plaintiff was an unsuccessful broker. Plaintiff submitted several documents in an attempt to satisfy the statute of frauds. The court held that the purported literary agency agreement fell within GOL § 5-701(a)(10), as an agreement to pay compensation for services rendered in negotiating a business opportunity, which provision applied to both contracts implied in fact or in law. It found that there was no writing signed by Ms. Ensler and that the letters between counsel failed to provide the material terms, including the agreed-upon compensation. The court also held that this was not an agreement that could be performed within one year and that there is no part performance exception to GOL § 5-701. Finally, the court dismissed the quantum meruit and unjust enrichment claims on the ground that no benefit had been conferred upon Ms. Ensler since the publishing agreement that plaintiff had allegedly brokered had been cancelled by the publisher for its own reasons, and "The Vagina Monologues" was instead published by a different publishing house. Complaint dismissed. Stephen Pevner, Inc., v. Ensler, Index No. 102149/2001, 7/1/02 (Cahn, J.).

UCC; impairment of collateral; commercial unreasonableness. Guaranties; duty to advise guarantor about financial condition of corporation. Partnership; liability of non-working partner. Action for breach of inventory security agreement. A defendant guarantor argued that plaintiff had been negligent in administering the financing; that defendant's partner had mismanaged operations; and that defendant had not discovered this until a later time, whereas plaintiff should have known. However, the court noted that the guaranty absolved plaintiff of any duty to advise guarantor of information about the financial condition of the corporation. The court ruled that plaintiff's actions in determining the position of the financing arrangement did not rise to the level of a failure to proceed against the collateral so as to warrant a finding of impairment. UCC 3-606. The defendant's argument that he had not been a working partner could not insulate him from wrongdoing by a partner. The court ruled further that defendant had failed to offer proof that collateral that had been part of the inventory had not been treated with commercial reasonableness. Summary judgment for plaintiff. Transamerica Commercial Finance Corp. v. Freedom Marine Corp. Index No. 11649/2001, 8/21/02 (Austin, J.).

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