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THE LAW REPORT

A report on leading decisions issued by the Justices of the Commercial Division of the Supreme Court of the State of New York

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Decisions discussed were issued
July - September 2004

Arbitration award; arbitrator misconduct as grounds for vacatur; refusal to allow rebuttal witness; damages measurement period. Oral agreement; breach of contract. Procedure; rebuttal testimony. Motion and cross motion to vacate and confirm an NASD arbitral award. In the proceeding, the two petitioners had sought $22 million each in damages, alleging that a binding oral agreement had existed allowing them to buy part of the respondent's interest in a technology entity that was planning an IPO. Shortly before the IPO the respondent had told them that there was no contract, which the petitioners treated as a breach. The stock's value at that time had been estimated at $10-12 per share; on the first day of trading it had opened at $59. The Panel had found the respondent liable and awarded each petitioner $344,000. Testimony and evidence suggested that the sum represented the date-of-breach calculation for which the respondent had argued, rather than being based on a date after the IPO, for which the petitioners had argued. The petitioners asserted that by denying their request to call a rebuttal witness the Panel had excluded pertinent and material evidence, an act of misconduct, one of few grounds for vacatur of an arbitral award. The petitioners had sought the particular rebuttal witness after the respondent's expert had testified about the stock's value prior to and after the IPO. The court found that the subjects of valuation and of the petitioners' ability to monetize their interest after the IPO using hedging techniques–techniques that the petitioners' expert had testified were not available to them–had already been raised during the petitioners' case-in-chief. The petitioners' opportunity to prepare a direct case and present it during the arbitration's 24 hearing dates had been full and fair, and included cross-examination. The petitioners should not have been surprised, as they alleged, that the respondent's expert had pressed the respondent's position on calculating recovery. Rather, the court found, the petitioners had chosen not even to contemplate a date-of-breach valuation in their direct case, gambling instead that the Panel would adopt their post-breach damage analysis. Nor had they shown that the rebuttal witness would have addressed issues newly raised during the respondent's case, and rebuttal testimony offered solely to raise doubt about another witness's credibility is considered merely collateral. Although they were disappointed with the damages awarded them, the petitioners had not shown that the arbitrators had engaged in misconduct. The motion to vacate was denied. Kaminsky v. Segura, Index No. 119675/2003, 7/6/04 (Cahn, J.).

Commercial leases; tax escalation clause; property valuation; summary judgment; tax certiorari proceedings. Both sides sought summary judgment in a dispute over interpretation of a tax escalation clause contained in a commercial lease. The former leaseholder and its former successor in interest had both successfully pursued tax certiorari proceedings contesting the assessed value of the property for certain tax years, which had resulted in a reduced valuation of the property and a tax refund for the landlord. The parties disputed the effect that the proceeding for the base tax year for the rental period had on the calculation of the tax due date escalation clause. Plaintiff, the current successor in interest, asserted that pursuant to the tax escalation clause in the lease, the base real estate tax should be calculated using the assessed value of the property as determined by the prior tax certiorari proceedings. Defendant argued that the language of the lease required the base real successor in interest, asserted that pursuant to the tax escalation clause in the lease, the base real estate tax should be calculated using the assessed value of the property as determined by the prior tax certiorari proceedings. Defendant argued that the language of the lease required the base real estate tax to be calculated as of the base tax year by the Nassau County Assessor as a fixed amount not to be reduced by the prior tax certiorari proceedings. Defendant further argued that plaintiff would receive a windfall if it were allowed to recalculate the tax escalation to reduce the base assessed valuation to the amount stated in the tax certiorari judgment since plaintiff had received a tax refund from Nassau County and increased tax escalation payments from defendant. The court concurred with defendant's interpretation of the tax escalation clause as both reflective of the parties' intent and in accord with the language of the lease. The court further found the term "base assessed valuation" to mean the assessed valuation of the property without the reduction obtained as a result of the tax certiorari proceeding and that the lease fixed the base tax rate for the purpose of calculating tax escalations, as of the base tax year. Summary judgment for defendant. Fair Oak, L.L.C. v. Greenpoint Financial Corp., Index No. 187/2003, 9/16/04 (Austin, J.).**

Construction Law; class action; Labor Law § 220-g; New York State Finance Law § 137; partial summary judgment. In a class action, window installers sued for unpaid wages and benefits earned on public works projects. Plaintiffs claimed that they had not been paid prevailing wages in violation of Art I, Section 17 of the New York State Constitution. Defendant surety company moved for partial summary judgment, arguing that plaintiffs had failed to comply with statutory notice requirements: specifically, that class members who worked on the project more than 120 days prior to the filing of the lawsuit while employed by a subcontractor should be barred from asserting non-payment and underpayment claims. Defendant further contended that the 120-day notice was necessary as the plaintiffs who had been hired by a subcontractor lacked privity with the principal contractor. The court denied defendant's motion and concurred with plaintiffs that § 220-g of the Labor Law permits indirect employees to sue the principal contractor for their underpaid wages without prior notice. The court cited to the holding in *Bravo* as persuasive. The court found meritless defendant's argument that upholding § 220-g's no-notice requirement would violate the statutory construction of New York State Finance Law § 137. Mercado v. Excel Group, Inc., Index No. 601812/2002, 7/23/04 (Freedman, J.).

Contracts; breach; comity; forum non-conveniens; promissory notes; summary judgment; choice of law provision; venue jurisdiction clause. Litigation arose after defendant, an Argentine entity, had defaulted on repayment of a promissory note. Payments on the note were initially to be made to a bank in Germany. After defendant defaulted, the German bank had assigned the note to plaintiff. The note contained a clause whereby the borrower agreed to submit to the jurisdiction of either the New York courts and/or the Ordinary Courts in Commercial Matters of the Federal Capital of the Argentine Republic. Defendant had signed a receipt for a written default notice and the lender had notified defendant in a writing of the assignment of the note to plaintiff. The defendant had initiated judicial proceedings regarding the note before the National Commercial Court in Buenos Aires. That forum had ordered pesification of the debt, a measure which reduced the debt by 53%. Neither the lender, nor plaintiff had been given any prior notice of the Argentine proceeding. Plaintiff asserted causes of action for, inter alia, breach of contract-default on the note. Defendant asserted affirmative defenses of lack of personal jurisdiction, failure to state a cause of action and forum non-conveniens. Defendant further claimed that Argentinian law should be applied to the dispute and that the Argentine proceeding had resolved all issues concerning the note. The court determined first that plaintiff had rights as the current holder of the note and granted summary judgment on its claim for breach of contract-default on the note. The court next addressed defendant's claim of forum non-conveniens and determined that New York was a convenient forum. The court pointed to the note's choice of New York law clause, that the borrower had submitted to the jurisdiction of the New York courts, and that the obligation at issue was over a million dollars. The court addressed defendant's request that the Argentine pesification order be honored by the New York court. The court found that the order did not merit recognition as a matter of comity since plaintiff had not been given notice of that proceeding nor opportunity to contest defendant's application for pesification. Moreover, since the venue of the action and the choice of controlling law were set out in the note as New York or Argentina at the option of the holder, and plaintiff as holder had chosen New York, the Argentine decree was of no relevance. The court found that defendant's lack of personal jurisdiction defense lacked merit as defendant had agreed to submit to the jurisdiction of the New York courts in the promissory note itself. Finally, the court found that defendant's claim that Argentine law should apply ignored the plain language of the choice of law clause in the note. Fleet National Bank, N.A. v. Liag Argentina, S.A., Index No. 603428/2003, 9/21/04 (Cahn, J.).

Contracts; breach; declaratory and injunctive relief; indemnification provisions. Fraud; negligent misrepresentation; requisite specificity of claims for; reasonable reliance. The plaintiffs, an award-winning creator of filmic creature-figures and the production company he owned, sought over $25 million in damages based on allegations that the defendants had fraudulently induced them to enter into a licensing agreement. The defendants were a leading toy retailer and some of its executives. According to the plaintiffs, licensing negotiations had begun after monster figures that they had created for a TV-movie series whipped up interest at a toy industry fair. Among the plaintiffs' allegations were that the defendants had brought a model of their new Times Square store to an early meeting and used it to embellish a promise that a "store within a store" dedicated to the plaintiffs' creations would be in place for the big new location's opening ceremony and grow as the location did. They had said that the retailer was going to evolve from a toy supermarket into a tony operation with exclusive products, that it had stores in 26 other countries, that hundreds of thousands of collectors came to it to buy toys like the plaintiff's creations, and had allegedly made many other false representations. The court found that recognizing any pre-contractual representations would add impermissibly to the parties' written agreement, which was permeated with details of the parties' working relationship set out in unambiguous provisions. A "Promotions" provision, for example, obligated the retailer only to display the plaintiffs' figures on fixtures in the Times Square store after it opened, not at the opening ceremony, and did not mention a "store within a store." Further, merger and no-oral-modification clauses barred the plaintiffs from reasonable reliance, and, additionally, some allegations failed to provide the essential elements of fraud with requisite particularity. Allegations that the defendants, having stated that their leverage with manufacturers would enable the most profitable toy production, had subsequently "resorted" to the manufacturer that the plaintiffs had already found, did not plead in requisite detail how the alleged statements about leverage had been false. Most important, the agreement's "Sourcing" provision, which, among other things, gave the plaintiffs final approval rights over factories, contradicted the allegations. The court dismissed the causes of action for fraud, and dismissed a claim for negligent misrepresentation, because it was not based on a duty independent of the contract. The plaintiffs argued that the defendants' superior knowledge, their statements having been made face-to-face, and their intent to change the plaintiffs' position in reliance on the statements, had brought about the special relationship that obligated the defendants to provide accurate information. In support, the plaintiffs pointed to an action involving a lease dispute in which the court had found a special relationship, but the context was different; the statements there had been made not about the lease, but during settlement negotiations. Finally, the court said again, it would have been unreasonable for the plaintiffs to have relied on representations inconsistent with the written agreement. The court severed the individual defendants from the action because the dismissed fraud and negligent misrepresentation claims were the only claims asserted against them. It dismissed a breach of contract claim to the extent that it was brought by the individual plaintiff, not a party to the contract. However, the court found that the corporate plaintiff could sue for damages sustained by the defendant's own actions; the agreement's "Indemnification" provision did not apply to the breach claim as there was no duty to a third person at issue. The court also disagreed with the defendants that the agreement contradicted some of the allegations supporting the claim. Consistent with the agreement defining its territory as "worldwide," for example, the plaintiffs alleged that the defendants had failed to sell the "creatures" throughout the world, and had failed to manufacture new series of creatures as obligated by the agreement's "Series" provision. Stan Winston Creatures, Inc. v. Toys "R" Us, Inc., Index No. 604183/2002, 9/1/04 (Cahn, J.).

Contracts; breach; defamation/slander per se; leave to amend; partial summary judgment; piercing the corporate veil; lack of public license. Plaintiffs brought litigation to recover damages stemming from defendants' incomplete renovation and reconstruction of their home. Plaintiffs' complaint alleged breach of contract, defamation, libel and fraudulent transfer. In the instant motion, plaintiffs further alleged that since they had filed their complaint, they had discovered that they could not obtain a certificate of occupancy from the Town of Southampton as the work performed by defendant was found not to be in accordance with the plans filed with the Building Department. Plaintiffs further moved to amend their complaint to add claims of piercing the corporate veil, fraud, defamation/slander per se and constructive trust. Specifically, plaintiffs alleged that defendants had made statements to subcontractors that plaintiffs were not paying and were behind in their payments. Plaintiffs further alleged that defendants had intentionally underbid the job, were undercapitalized, failed to segregate plaintiffs' payments and had failed to make timely payments to subcontractors. The court denied plaintiffs leave to amend for defamation/slander per se finding that the alleged statements to unpaid subcontractors did not rise to the level of actionable defamation. The court did, however, allow plaintiffs to amend their claim to include piercing the corporate veil and constructive trust. The court next denied summary judgment to defendants on plaintiffs' claim of fraudulent transfer, finding that defendants had not met their initial burden as a matter of law. Finally, the court denied the portion of plaintiffs' motion which sought to dismiss defendants' counterclaim for the claimed balance due on the contract. Plaintiffs argued that unlicensed contractors were not entitled to collect on contracts. The court pointed out, however, that recovery could not be had by contractors who were unlicensed at the time they performed the work, but that it was undisputed that defendants had had a license when the contract was entered into through the date that the work had been terminated. Kelley v. Vikse, Index No. 2307/2004, 7/28/04 (Emerson, J.).**

Contracts; breach. Misrepresentation; fraudulent inducement; contract remedy; punitive damages. Five defendants moved for summary judgment in an action for breach of contract and fraud which arose after a concert scheduled to be performed by hip hop artist Curtis Jackson (Fifty Cent) was canceled. Plaintiffs alleged that defendants had held themselves out to the public and the music industry as Jackson's exclusive managers, but that after the contract for a set concert date had been executed and delivered and plaintiffs had taken steps to organize and promote the concert, defendants had canceled the contract. Plaintiffs alleged that defendants had fraudulently induced them to enter into the contract and spend money to promote the concert with the knowledge that they did not in fact have the authority to represent defendant Jackson or enter into entertainment contracts on his behalf. Defendants contended that one defendant had always been Jackson's manager, that the contract had actually been between Jackson and plaintiffs, and that defendants could not be held liable for breach. Defendants further contended that the contract had been mutually rescinded by the parties and plaintiffs' deposit had been returned. The court dismissed the breach of contract claim ruling that since defendants had not been parties to the contract, they could not be held liable for breach. The court next dismissed plaintiffs' claim of fraudulent inducement on the ground that plaintiffs had failed to offer any probative evidence which would have raised an issue of fact and further dismissed the fraud claim as duplicative of the claims for breach of contract. The court denied plaintiffs' request for punitive damages since the alleged conduct did not qualify as sufficiently egregious to warrant such damages. The court granted plaintiffs' cross-motion in part, allowing leave to add a claim for breach of contract on an earlier obligation for Jackson to perform. Milan Music, Inc. v. Emmel Communications Booking Inc., Index No. 601306/2003, 9/14/04 (Freedman, J).

Contracts; breach; UCC 2-606; oral modification; part performance; economic duress; promissory estoppel. Plaintiff, an international commodity trading company, sued and sought compensatory damages for breach of contract, economic duress and promissory estoppel. Plaintiff alleged that defendant had failed to produce merchantable fuel oil in accordance with the parties' agreement. Defendant moved to dismiss the breach of contract action arguing that plaintiff's claim was inconsistent with the terms of the parties' Finished Product Agreement, that plaintiff had failed to follow the contractual procedures for dealing with questions of late delivery, and that plaintiff's claim was barred under UCC 2-606 as plaintiff had failed to reject the alleged non-conforming goods. The court found first that the Finished Product Agreement section of the contract offered no mechanism providing for damages for late deliveries. The court ruled that UCC 2-606 was not a bar as that section was inapplicable to plaintiff's claims of non-conforming tender due to alleged delivery delays. Under New York law, a buyer of a commodity that accepts late delivery does not lose the right of action for damages caused by delay. The court denied defendant's motion to dismiss the second cause for breach of an alleged oral modification to the contract, finding that notwithstanding the contract's "no oral modification" clause, plaintiff's partial performance was unequivocally referable to the terms of the modification and that the modification was neither indefinite nor too vague to be enforced by the court. In response to defendant's arguments that plaintiff had contractual remedies available in the event of default, the court reiterated that none of the parties' agreements provided remedies for plaintiff caused by late deliveries by defendant. The court dismissed plaintiff's claim for economic duress because plaintiff had an adequate remedy in the breach of contract claim. The court also dismissed plaintiff's claim for promissory estoppel as the claim was duplicative of plaintiff's cause of action for breach of the modified contract. Trafigura Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd., Index No. 602890/2003, 8/23/04 (Freedman, J.).

Contracts; construction; fraud and contract remedies; independent wrong; "No damages for delay;" change orders; defendant's contribution to delay. Action which arose out of a contract by which plaintiff performed general construction for the Town of Southampton. Plaintiff claimed that defendant had breached the contract, asserting claims for change orders, delay expenses, fraud, fraudulent inducement to contract and tortious violation of Article 3-a of the Lien Law. Defendants argued that plaintiff had failed to comply with the notice and documentation requirements regarding change orders, and further contended that plaintiff's notice of claim was deficient as it only included the breach of contract claims. The court dismissed plaintiff's claims for fraud, fraudulent inducement to contract, unjust enrichment and tortious violation of the Lien Law on the ground that they stemmed from the breach of contract claim and plaintiff had failed to establish the requisite standard that any wrong independent of the contract had occurred. The court dismissed plaintiff's claim for breach of contract/delay damages because the claim fell within the scope of the contract's exculpatory, "no damages for delay" clause. As to the issue of the change orders, the court found that the contract did not explicitly require strict compliance with the terms regarding notice and documentation. The court explained further that if defendant had contributed to the construction delays, it could not insist on enforcement of that particular condition precedent. The court thus determined that questions of fact existed as to whether defendant Town had had actual knowledge of plaintiff's additional work claims and denied defendant's motion for summary judgment as to that issue. ADC Contracting & Construction, Inc. v. Town of Southampton, Index No. 31308/2002, 7/28/04 (Emerson, J.).**

Contracts; interpretation; termination of distributorship. Fiduciary duty; provision of confidential information. Action arising out of distribution agreements. Plaintiff distributor claimed that agreements were automatically renewed at the end of additional two-year periods where neither party took action to terminate them. The court ruled that this interpretation would be contrary to a key provision, which was clear and unambiguous, and which created a month-to-month arrangement terminable on 30 days notice in the event the two-year term concluded without a renewal agreement having been reached. Cases cited by plaintiff were distinguished because they contained no indication as to what would occur if neither party took action to renew or terminate. Thus, termination was proper. Plaintiff contended that its relationship with defendant had been a fiduciary one. Domination by the manufacturer and other factors, the court stated, influenced whether such a relationship existed. The arrangement here had lasted for 37 years. Plaintiff argued that it had been required to furnish defendant with confidential marketing information and that defendant had breached its fiduciary duty by providing its successor with plaintiff's information. Ordinarily, the trade secret status of a customer list is determined by whether or not the information is readily ascertainable and the efforts made to keep it confidential. There is an exception to this rule where a distributor is required by a distributorship agreement to provide the manufacturer with customer information; a breach of fiduciary duty may be found. The court held that issues of fact regarding these questions barred summary judgment. Summary judgment to defendant granted in part. Pond Technical Sales, Inc. v. Pall Corp., Index No. 4607/2001, 9/2/04 (Austin, J.).**

Contracts; non-exclusive; reservation of rights. Fraud. Prima facie tort and injurious falsehood; essential elements. Misappropriation. Unfair competition. The plaintiff alleged that before entering into an asset purchase agreement with a non-party corporation it had received certain reassurances from the defendant. These were that the defendant would continue to use the plaintiff as a distributor in the same capacity in which it had used the non-party corporation, with which it had a distribution agreement. The plaintiff had entered into the asset purchase agreement and paid the defendant $200,000 in outstanding receivables. Soon afterward, allegedly, the defendant had canceled the plaintiff's rights as distributor of certain products. The plaintiff brought this action. The plaintiff failed to establish a cause of action for fraud because it failed to allege a misrepresentation or material omission of fact. According to the plaintiff itself, the defendant had merely assured the plaintiff that it would continue to use it in the same capacity as the first corporation. After the purchase, plaintiff did continue as a distributor with the same rights as the other entity. The distribution agreement had expressly allowed the defendant to change or drop products, and to market products directly or through other channels. Further, the agreement stated that it could not be changed except in a writing signed by both parties. The plaintiff failed to establish causes of action for prima facie tort and injurious falsehood. Although it alleged that the defendant's statements had been made maliciously, recklessly, or with an intent to harm, it did not allege that their sole motivation was disinterested malevolence, without which there could be no recovery. Special damages, specifically identified, are also an essential element of prima facie tort and injurious falsehood, and here the plaintiff sought damages for the entire amount of the asset-purchase agreement. The plaintiff also alleged misappropriation and unfair competition based on assertions that it had prepared reports identifying customers of defendant's products, and recording sales and prices. But under the distribution agreement such information constituted defendant's trade secret. Moreover, customer lists are generally not considered confidential information, and the plaintiff failed to allege how the identity of customers of the defendant's products was its own trade secret in this case. The case was dismissed. Jaco Electronics, Inc. v. M-Systems, Inc., Index No. 25982/2003, 8/18/04 (Emerson, J.).**

Contracts; separation agreement; breach; fraudulent inducement; duplication of contract claim; release; fraud. Tortious interference; causation; malice; speculation. Plaintiffs sought rescission of a separation agreement pursuant to which they had paid a former employee, an individual defendant, $2.2 million, on the provision that he would not disparage plaintiffs, and not, for specified times, participate with competing businesses, interfere with plaintiffs' employees or solicit plaintiffs' clients. Plaintiffs alleged that the defendant had violated these obligations. The defendant moved to dismiss all claims as against him. The court found that a fraudulent inducement claim against him failed to plead a breach of duty separate from or extraneous to that pled in the breach of contract claim: the fraud alleged was that the defendant had not intended to perform the contract he had entered into. That claim was dismissed as duplicative. Claims that the defendant had breached his fiduciary duties to plaintiff companies, that sought to impose a constructive trust against defendant and his new venture, and that sought a declaratory judgment that plaintiff companies had terminated him for cause, also failed. Even if the allegations against the former employee were true, they fell within the scope of a release that plaintiffs had executed with him of any and all claims that they had had against him. Plaintiffs' defense that they had been fraudulently induced to sign the separation agreement, which provided for the release, was of no use as that claim had been dismissed. Other defendants, corporate and individual, moved to dismiss particular claims against them for failure to state a cause of action. A claim against one corporate defendant for tortious interference with contract, the separation agreement, was dismissed. The former employee's leading role in the complained-of conduct was repeatedly alleged in the complaint, implying his predisposition to breach and so preventing a viable assertion of the "but for" causation against the corporate defendant that New York law requires. The claim that various defendants had misappropriated proprietary and confidential information and used it to interfere with plaintiffs' prospective relationships with three California pension funds failed to allege the necessary element of malice, rather than self-interest, as motivation, and to say what information was allegedly misappropriated and how it was used to solicit the funds' business. In regard to one corporate defendant, the only allegation was that it had used the information to solicit the funds, which was not wrongful conduct. That claim was dismissed, too, as was a claim that various defendants had intentionally interfered with plaintiffs' prospective employment of a non-party, which was purely speculative. The court denied as futile plaintiffs' cross-motion for leave to re-plead. Claims against certain defendants for breach of fiduciary duty, for aiding and abetting the individual defendant's breach of fiduciary duty, and for a constructive trust were not subjects of motions to dismiss. Ledy v. Wilson, Index No. 603305/2003, 7/26/04 (Freedman, J.).

Contracts; severance agreement; indemnification and option provisions; notice of board meeting. Plaintiff, former COO, sued his former employer claiming that it had breached portions of his severance agreement dealing with indemnification of costs accrued in his defense of an SEC action, as well as vested options. Defendant moved to dismiss based on documentary evidence. Defendant contended that the severance agreement contained an express waiver of his right to pursue the indemnification claim. The court dismissed the breach of contract claim on the ground that plaintiff had agreed to freeze his stock options pending determination by defendant's board that plaintiff had acted in the best interests of the corporation. The court further found that when the board was unable to reach such a determination, plaintiff's stock options had been irrevocably cancelled pursuant to the severance agreement. The court next determined that in a consent decree plaintiff had expressly waived any indemnification claims against the SEC or the United States Government for defending against the SEC action. However, the court held that under the severance agreement, notwithstanding the consent decree, defendant did have an obligation to indemnify plaintiff subject to its corporate by-laws, certificate of incorporation and Delaware General Corporation Law. Finally, the court denied as meritless plaintiff's request for leave to amend the complaint based on his contention that he had not received notice of the board meeting. The court pointed out that the severance agreement did not contain an express requirement for the board to notify plaintiff of its pending deliberations. O'Shaughnessy v. Candie's Inc., Index No. 120687/2003, 9/29/04 (Freedman, J.).

Corporations; corporate veil; alter ego; fraud or wrongdoing. Breach of contract; implied covenant of good faith. Liability of directors. Not-for-Profit Corporation Law §720-a. A homeowners association, to which 370 homeowners in a Long Island development were required to belong, had allegedly agreed to invoice its members for charges for purchases from the plaintiff's restaurant, which was situated in the development, and to "promptly remit" the monies to the plaintiff. Plaintiff claimed that the defendants, the homeowners association and individuals on its board, had collected $559,000, including mandatory minimums that all homeowners paid each month that were supposed to be credited toward purchases from the restaurant, but had not given the plaintiff the money. The court granted the defendants' motion to dismiss, as against the individual defendants, causes of action for unjust enrichment and breach of contract. Pursuant to Not-For-Profit Corporation Law § 720-a, as uncompensated directors of an association the individuals were immune from liability absent allegations of gross negligence or intention to cause harm. They were not parties to the plaintiff's contract with the homeowners association, and could be held personally liable for contractual breach only if they had so dominated the homeowners association that it had been their "alter ego"–a vehicle for personal, and not corporate, ends–and, they had wielded their control over the association to commit fraud or wrong against the plaintiff. The complaint lacked factual allegations to support this. A claim against the individuals of "bad faith" duplicated the breach of contract claim. The implied covenant of good faith does not create new contractual rights, and here, the court found, did not provide a basis for recovery either against the individuals personally or as directors of the association. The court further noted that a director is not personally liable just because his or her decisions lead to a corporation's promise being broken. A conversion claim against all the defendants was dismissed because it was predicated solely on the alleged breach of contract and did not result in a wrong distinct from contractual breach, such as tortious conduct. The court dismissed claims for a declaration that the plaintiff was entitled to receive the $559,000, and for injunctive relief. The plaintiff's damages were precisely calculable, and the plaintiff had an adequate remedy at law in its claims against the homeowners association. Hamlet on Olde Oyster Bay Food and Beverage Corp. v. The Hamlet on Olde Oyster Bay Home Owners Association, Inc., Index No. 5562/2004, 9/20/04 (Austin, J.).**

Corporations; corporate veil; individual and corporate alter egos. Partnership; fiduciary duty. Unjust enrichment. Quasi-contract. Two corporations that owned radio networks had formed a general partnership based on an agreement that, among other things, prohibited them from competing with the partnership. The partnership and one of the partners and its corporate parent claimed that the partnership's co-chairman had acquired the second partner's parent, sold a minority interest in it, and used the proceeds to buy a company that competed with the partnership. The defendants–the co-chairman, a corporation that he had formed, allegedly, to acquire covertly the second partner's parent, the parent, the competitor, and the second partner–moved to dismiss five causes of action that were at least partly staked on claims that the individual and corporate defendants were alter egos. The court granted the motion to dismiss. Regarding a claim that the second partner had breached its fiduciary duty to the partnership, the court found that the second partner and the competitor were sister corporations. Parent, subsidiary, and sister corporations are treated as separate and independent legal entities unless one completely dominates and controls the other. True, the co-chairman of the partnership was chairman of the second partner and had allegedly acquired 100% of the partner's parent's stock before the partner's parent had acquired the competitor. But the complaint lacked factual allegations that the second partner had dominated or controlled the competitor or any of the other corporate defendants. Even if the second partner and competitor had identical controlling shareholders, officers and directors, that would not of itself warrant disregarding the separate corporate entities, the court noted. A claim seeking to pierce the corporate veil must not only establish domination, but that it was used to commit a fraud or wrong against the plaintiff. Here, the competitor was not under contractual prohibition to compete, as the second partner was, so its competition was not fraud or corporate wrongdoing. The plaintiffs argued that for the sake of equity, "Partner" in the agreement should be taken to mean all of the corporate defendants and the individual defendant. But under Pennsylvania law, which governed the contract, the court preliminarily determines whether a contract's language is ambiguous, and it was not. An unjust enrichment claim against all defendants failed because the plaintiffs failed to allege that they had conferred any benefit on the defendants. And because the partnership agreement governed the subject matter of the dispute, a claim sounding in quasi-contract was precluded. An application for an injunction, improperly styled as a separate cause of action, was dismissed, although plaintiffs sought injunctive relief elsewhere in the complaint and were not precluded from its remedy if they prevailed. The court dismissed an "alter ego" claim because the plaintiffs had failed to state grounds for piercing the corporate veil and also because an attempt to do so is not properly a cause of action independent of that against the corporation. Regarding the co-chairman's disposal of minority shares in the second partner, the court dismissed plaintiffs' claim that the defendants had breached an agreement between the partners' corporate parents to give each other first refusal before disposing of any shares in the partners. The claim was untimely under Pennsylvania's four-year statute of limitations and would have been untimely even under New York's six-year statute. In any case, the court pointed out, it did not provide grounds for piercing the corporate veil, as it sounded in breach of contract, not fraud. The defendants did not dispute the viability of the remaining claim, that the co-chairman had breached his fiduciary duty to the partnership. Sheridan Broadcasting Corporation v. Small, Index No. 603681/2003, 7/30/04 (Freedman, J.).

Discovery; attendance at deposition; misdemeanor charge; CPLR 3126. Defendants moved under CPLR 3126 to dismiss plaintiff's complaint or, in the alternative, to bar plaintiff from offering any of his sworn testimony in opposition to defendants' evidence, claiming that plaintiff had failed to testify at a scheduled deposition. Plaintiff contended that he had arrived for the deposition and defendants' counsel had informed him that he would be facing a misdemeanor charge of commercial bribery. Plaintiff, upon seeking immediate counsel from his criminal defense attorney, did not testify at the deposition since he had not yet seen the criminal charges or the statements allegedly implicating him in a kickback scheme. The court found that under such exigent circumstances plaintiff's failure to testify did not warrant the sanction of dismissal of his complaint. The court did, however, grant defendants' alternative relief prohibiting plaintiff from offering any sworn testimony in opposition, but only in the event that plaintiff failed to make himself available for deposition within thirty days of the instant order. The court further directed plaintiff to pay reasonable attorney's fees to defendant's counsel for the failed deposition. Clementi v. Home Town Funding Inc., Index No. 14675/2002, 8/04 (Stander, J.).**

Fiduciary duty; breach; discovery; motion to dismiss; preliminary injunction; summary judgment; tortious interference; unfair competition. Plaintiff operates websites that solicit visitors to fill out auto loan applications, and then refer the applications to auto dealerships for a fee. Plaintiff alleged that several former employees had breached their fiduciary duty to plaintiff when they had set up a competing business while still in plaintiff's employ. Plaintiff claimed that defendants had converted its confidential customer lists, interfered with existing and prospective contracts and copied or appropriated its pricing scheme and unique business strategies for obtaining customers. In their motion for summary judgment, defendants maintained that plaintiff's business model was not special, and that defendants had merely contacted automobile dealerships that had been listed in the yellow pages. Further, they stated, the "zip code" method used by plaintiff was one commonly used for Internet auto loan companies and could be found in a book available at any Staples store. Defendants also claimed that their pricing scheme differed from plaintiff's. Defendants contended further that plaintiff's allegation that defendants had purloined customer lists was baseless as defendants had developed their customer base from lists provided by the National Automobile Dealers Association. The court denied defendants' motion finding that although defendants had made a strong showing, plaintiff had set forth sufficient facts to defeat it. The court cautioned the plaintiff, however, that it must show that defendants had deliberately interfered with some existing contract, which was thereby breached, and must also meet the criteria for its claims of unfair competition, and conversion of trade secrets and customer lists. The court denied plaintiff's request for a preliminary injunction finding that the standards had not been met. 1-800 Communications, Inc. v. Levy, Index No. 113723/2003, 8/11/04 (Freedman, J.)

Mechanic's lien; expenditure in excess of contract amount; summary judgment. Construction of a parking garage resulted in the instant litigation. Plaintiff alleged in its complaint that it had contracts with two defendants whereby plaintiff would supply all labor and materials involved with various aspects of the construction project. Plaintiff further alleged that although partial payment was made to it by defendants, monies were owing on both contracts. Defendants moved to dismiss as to all except the two. Plaintiff moved for summary judgment in its favor against various defendants and to foreclose on the mechanic's lien it had filed. Defendants argued that plaintiff's mechanic's lien must be discharged as their expenditures, made to correct defective work performed on the project by one of the two, had exceeded the amount of the original contract, and thus left no lien fund to which plaintiff's lien could have attached. In its opposition, plaintiff questioned whether the payments made had actually been made to correct the work. The court found that defendants had met their burden for summary judgment by proving that no funds were owed to one of the two at the time of the termination of the contract with it, and that defendants had expended more than the original contract in order to correct that defendant's work. The court explained that plaintiff had not submitted documentation of its alleged contract with the two defendants. The court further found that plaintiff's allegation regarding whether or not lien funds existed was insufficient to support its motion for summary judgment and did not raise any triable questions of fact in opposition to defendants' motion. Defendants' motion for summary judgment was granted and the mechanic's lien vacated and discharged. Plaintiff's motion seeking severance as to the two defendants was granted, but the portion of plaintiff's motion seeking an inquest as to their liability was denied as premature. Rodbusters, Inc. v. Peregrine Management Corp., Index No. 17025/2003, 8/8/04 (Demarest, J.).**

Misappropriation of confidential information and design. Patents; jurisdiction; confidentiality. Preliminary injunction; likelihood of success; disputes; irreparable harm; presumption; loss of market leadership. Attachment. Motion for preliminary injunction in action arising out of alleged misappropriation of confidential information and design for silicone gloves. Defendants had agreed to manufacture molds for plaintiffs' gloves. The parties had agreed that information furnished to defendants was confidential and defendants had undertaken not to disclose that information and agreed that the molds would be used only for the purposes of the agreement. Plaintiffs claimed that defendants had made "knock-off" versions of its own gloves. The court rejected defendants' argument that the fact that plaintiffs had patented a design for gloves means that the Federal court had exclusive jurisdiction. This was not a patent infringement action, but one for breach of contract and misappropriation. The court found that plaintiffs had shown a likelihood of success on the breach and misappropriation claims. The court determined that there was substantial evidence of breach by defendants of their objections under the agreements. Defendants' gloves were strikingly similar to plaintiffs' and were being marketed on defendants' website. Plaintiffs presented proof that defendants had had no knowledge of a design such as plaintiffs' prior to the agreements. Defendants' bare assertions that the gloves were different was insufficient. In any event, even where there is a factual dispute, a plaintiff may still demonstrate likelihood of success. Defendants had failed to return the molds, despite an order to do so by a Hong Kong court. As to a misappropriation claim, defendants had acknowledged in the agreements that they were receiving secret materials and information from plaintiffs. Plaintiffs produced proof that they had striven to maintain the confidentiality of the information. Although plaintiffs had a patent, it contained only a few line drawings, not all of the information made available to defendants. The court stated that irreparable harm was presumed where trade secrets are misappropriated. The loss of a market suffered by an industry leader and the loss of the advantage of being a pioneer and market leader may constitute irreparable harm. Further, plaintiffs showed that they had been suffering a loss of goodwill, sales and market share daily. The damage was impossible to quantify in dollars. Therefore, an injunction was proper. The court found that the balance of equities favored plaintiffs. The court denied plaintiffs' request for an order of attachment as plaintiffs based it on conclusory assertions without evidentiary facts indicating a fraudulent concealment of assets. Motion granted. Sylmark Holdings Ltd. v. Silicone Zone Intl. Ltd., Index No. 601058/2004, 8/9/04 (Cahn, J.).

Partnership; former partners in medical practice; former patients–contacting same; contacting new patients; fiduciary duty; breach of contract; conversion; unjust enrichment; misrepresentation. Action arose after defendants, two doctors, left plaintiffs' medical care partnership and opened their own practice. Plaintiffs sought injunctive relief and damages for fraud, unfair competition and breach of the defendants' obligations under the partnership agreement. Plaintiffs alleged that the defendants had taken medical files and proprietary information when they left the partnership and had subsequently used that information to solicit plaintiffs' patients. The court denied plaintiffs' request for an injunction with regard to defendants' soliciting the patients they had treated while working for plaintiffs. The court explained that those patients were defendants' patients and defendants could not be enjoined from notifying them that they were leaving the practice or from providing them with their new business address. The court did, however, enjoin defendants from obtaining the names or records of patients they had not treated while working for plaintiffs and from notifying same of their new address, as such patient lists are confidential. The court further found that although defendants had not converted records of patients they had treated while working for plaintiffs, issues remained as to whether defendants had solicited patients other than their own from plaintiffs' practice. The court next addressed plaintiffs' allegation of breach of fiduciary duty and dismissed it in part, finding that defendants had not set up a competing business in violation of the partnership agreement's restrictive covenant. However, the court found that issues remained as to whether defendants had billed through their New York office for medical services rendered to their patients while still at plaintiffs' practice, whether defendants had induced plaintiffs to enter into a long term lease, whether defendants had taken and solicited business from plaintiffs' patient lists and whether defendants had overdrawn their earned compensations. The court found that plaintiffs had pled sufficient facts to establish their breach of contract claim and denied defendants' motion to dismiss. The court dismissed plaintiffs' allegation of conversion, however, finding, first, that the claim that defendants had overdrawn their compensation was insufficient. The court further found that plaintiffs lacked standing to bring the claim because medical records of patients not treated by defendants did not belong to plaintiffs, but rather to the doctors in the practice who had treated those patients. The court next examined plaintiffs' claim for unjust enrichment and found that the claim actually sounded in breach of contract; thus, the cause of action was more appropriately one for restitution. The court stated further that plaintiffs had pled sufficient facts to support their claim that defendants had received money from plaintiffs to which they were not entitled. The court next determined that the issues surrounding allegations that defendants took and used plaintiffs' patient lists could not be resolved on the pleadings. The court also found that plaintiffs had pled sufficient facts to sustain their claim for fraud with regard to their reliance on representations made by defendants which caused them to enter into a long term lease. Finally, the court allowed plaintiffs' request for punitive damages to stand. Prohealth Care Associates, LLP v. April, Index No. 15830/2003, 8/18/04 (Austin, J.).**

Preliminary injunction. Doctrine of ripeness. Uniform Land Use Review Procedure (ULURP); State Environmental Quality Review Act (SEQRA); City Environmental Quality Review (CEQR) requirements; Environmental Conservation Law; environmental impact statement; scoping. Construction; Hudson Yards. In Article 78 proceeding petitioners moved for a preliminary injunction to prevent respondents from holding public hearings on the construction project titled "No. 7 Subway Extension - Hudson Yards Rezoning and Development Program." The project would, among other things, erect a sports stadium on Manhattan's far west side, extend the No.7 subway line, expand the Jacob K. Javits Convention Center, develop commercial space and residential units, and open public spaces with views of the Hudson River. Petitioners claimed that the draft Environmental Impact Statement (EIS) two of respondents had issued, as required by State and City environmental quality review laws, had, after a determination of the project's potential for significant adverse environmental impact, postponed disclosure of critical analyses and mitigation measures. They claimed that the draft EIS provided the only official basis for public comment and that to hold public hearings based on a flawed draft would deprive them of a meaningful and informed review process. Respondents contended, among other things, that the review process had to be completed by a certain imminent date or the project would not be completed on time. Petitioners asserted that their action was only about the government's obligation to comply with the law. In ruling on the motion, the court found that consideration of the matter was barred by the doctrine of ripeness and distinguished the two cases petitioners relied on to support their assertion that the matter was justiciable. Each of the two cases involved a final administrative action, that if implemented, would have caused actual injury to petitioners. Here the respondents had not issued final approval for construction to proceed. The scheduled hearings were not an injury, nor the last step of a process that would with finality impose an obligation or deny a right. Nor had petitioners exhausted all administrative review procedures, as they could lodge their objections to the draft EIS at the public hearings. Responses to all substantive comments made there would be required as part of the final EIS mandated by City and State laws. If petitioners did not find the responses adequate, at that point they could seek relief from the court. Ultimately, however, how to deal with the problems inevitably accompanying so large a project was a decision for the Executive and Legislative branches, the court noted. Its function is to assure compliance with applicable statutes and regulations. The motion for a preliminary injunction was denied; due to the exigent circumstances, various cross-motions to be determined in a subsequent decision. Hell's Kitchen Neighborhood Association v. New York City Department of City Planning, Index No. 112368/2004, 9/21/04 (Cahn, J.).

Preliminary injunction; representation that corporation was for sale; fiduciary duty. Arbitration; corporations; shareholders agreement; fiduciary duty; BCL § 717. The court granted a preliminary injunction enjoining the defendant from representing that the petitioner corporation was for sale and soliciting bids for it. The individual plaintiffs and the defendant were the corporation's directors and shareholders. The defendant, contending that she was an oppressed minority shareholder, had begun an arbitration to dissolve the corporation. It was undisputed that she had solicited a third-party bid to buy the corporation; plaintiffs alleged that she had neither been authorized to solicit the bid nor advised them of her intent and that her conduct had breached her fiduciary duty to the corporation. The court agreed that it could be inferred that the defendant had solicited the bid to bolster her case before the arbitrator that her shares' fair value exceeded that ascribed them by the shareholders agreement's valuation method. Granting the injunction, the court found that the plaintiffs had met the requirements to prevail on the motion, including demonstrating irreparable injury, such was the potential damage to a business's reputation by disclosure of a possible sale. In a separate decision of the same date the court denied the defendant's motion to compel arbitration of the claim that alleged her fiduciary breach. The shareholders agreement provided for arbitration of disputes, but the breach alleged concerned the defendant's duty as a corporate director, not shareholder, and was not reasonably related to the shareholders agreement. The court noted that in a previous decision it had, conversely, declined to stay arbitration of the defendant's claim of fiduciary breach against plaintiffs. That claim had concerned the plaintiffs' duty as controlling shareholders and it was, in fact, reasonably related to the shareholders agreement. Hallock v. Richey, Index No. 9533/2004, 7/29/04 [Order for preliminary injunction]** [Order denying defendant's motion]** (Emerson, J.).

Procedure; forum non conveniens; forum selection; mortgage; execution versus notarization and recording; equal and ratable liens; security interest. A threshold issue here was when a mortgage that had been executed on a certain date, but notarized some months after it, would have come into effect under Mexican law and created a lien on defendant's property. Defendant and plaintiffs produced Mexico's former attorney general and the dean of Mexico's leading law school to aver, on the one hand, that the mortgage had come to "exist" on the earlier, and, on the other hand, the later date. Defendant, the mortgagor, a Mexican cell phone company, had issued $150 million of notes pursuant to an indenture agreement that had provided that note holders were entitled to equal and ratable liens with any liens granted in their assets after a certain date, which was also the date borne by the mortgage. Defendants had defaulted on the notes, and plaintiffs brought this action for breach of contract and specific performance and other causes. The indenture agreement had provided that parties consented to New York jurisdiction, waived any forum non conveniens objections, and selected New York law to govern the agreement. The mortgage, though, was written in Spanish and provided that it be construed under Mexican law. Defendants moved to dismiss plaintiffs' first cause of action for equal and ratable liens, which turned on the date of the mortgage, contending that the issue should be decided by a Mexican court. The court found that the present action concerned the indenture agreement and that its selection of a New York venue controlled. New York courts are competent to interpret Mexican law and determine the date at which the mortgage had first "existed." Defendants argued that a subsequent Mexican action might be necessary even if the plaintiffs were successful in the cause of action in New York, but, the court noted, conversely if a Mexican court found that the mortgage had "existed" on the earlier date, the parties' rights would need to be determined under New York law. There would be minimal hardship to the parties in bringing witnesses and documents related to the issue, the court found. It distinguished a case in which the First Department had held that a forum non conveniens dismissal should have been granted where neither party resided in New York and the law of India would determine the meaning of certain terms in a document. There, there had been neither choice of a New York forum nor express waiver of the right to claim forum non conveniens. Plaintiffs also contended that the first cause of action should be dismissed because it sought specific performance when there was an adequate remedy at law. However, plaintiffs alleged breaches of the indenture agreement that they claimed denied them security interests, for which there is no adequate remedy at law. The court ruled that plaintiffs could seek specific performance, and denied defendant's motion to dismiss the first cause of action. TCW Gem V Limited v. Grupo Iusacell Celular, Index No. 600091/2004, 7/16/04 (Fried, J.).

Procedure; forum non conveniens. German accounting technique, "cash pooling." Consortium agreement. German non-recognition of RICO, punitive damages. Amenability to jurisdiction. Plaintiff alleged that corporate and individual defendants had conspired to "dump" unprofitable subsidiaries belonging to one defendant on another, a German corporation, rendering plaintiff's $20 million investment in the defendant nearly worthless. Plaintiff alleged that a majority interest in a profitable subsidiary had simultaneously been sold to the defendant and that cash flow from the subsidiary, one of Europe's premier submarine makers, had covered the other subsidiaries' shortfalls through a German accounting technique known as "cash pooling." An individual defendant had been a director of both the defendant in which plaintiff had invested and a second corporate defendant. Allegedly, the two defendants had formed a secret consortium agreement that allowed the second to reclaim control of the submarine maker. It had. The ailing finances of the defendant in which the plaintiff's investment lay had been exposed and its CEO, also an individual defendant, had departed to head the submarine maker. The plaintiff had won an injunction in a German court prohibiting the corporation from selling its holdings in the submarine maker. The defendant had sold them and in its response to the court there had furnished the details of the consortium agreement. In its suit here the plaintiff asserted claims for fraud, negligent misrepresentation, and RICO violations. Defendants moved to dismiss on forum non conveniens and other grounds. The court found that although the ailing defendant's value had been touted to the plaintiff at a meeting in New York, it was undisputed that at that point the plaintiff already had owned the bulk of its stock. The court cited a case in which the single act in an alleged global "smear campaign" that had taken place in

New York had not warranted keeping the case here despite the nexus that, allegedly, the defendant's deed had deliberately created; the key events had occurred in the Philippines. Here, the defendant in which plaintiff had invested was traded solely on German stock exchanges, the issuing of annual reports avowing the company's health and other misrepresentations of which plaintiff complained had taken place in Germany, and the "cash pooling" had mostly occurred there. The fact that German law did not recognize RICO or punitive damages claims, or operated under different procedures from New York's, did not make Germany an inadequate forum, the court stated. The fraud claims could be pursued there, and the plaintiff's having brought an action there based on at least some of the events in this one showed that it considered Germany an adequate forum. The court was capable of applying German law and accounting rules, but less efficiently than a German court, and Germany has routinely been deemed an adequate forum by New York courts. Further, the court noted, even availability of an adequate alternative forum–generally, one where the defendant is amenable to process in its jurisdiction–was not a precondition to dismissal on forum non conveniens grounds. Placement of undue burdens on New York's courts had to be seriously weighed. Finally, costs to plaintiff in having to litigate abroad had to be measured against the greater costs to its opponents if they had to conduct their defense in New York. Germany was the proper forum for this action, the court found, and granted the motion to dismiss. Plaintiff was, however, permitted to renew the action with respect to any defendant that was not amenable to German jurisdiction. Wyser-Pratte Management Co., Inc. v. Babcock Borsig AG, Index No. 603364/2002, 7/8/04 (Ramos, J.).

Real property; commercial lease; termination; notice of default/cure; interpretation; exclusivity of notice method; improper notice; waiver. Action arising out of commercial lease. Notice of default/cure and notice of termination were sent to plaintiffs. Plaintiffs claimed that the notices were not sent in compliance with the lease. The court rejected plaintiffs' assertion that service had to be made in person at, or by mail to, the demised promises. The relevant clause stated that notice would be "deemed" to have been given if made by these means. The language was not mandatory and so was susceptible of a construction that it had been intended to protect the landlord by ensuring sufficiency of notice even if the tenant did not receive actual notice. As the language was not exclusive, the court held, its interpretation would not be made solely by the court. In any event, plaintiffs had failed to raise the defense in the District Court, where two now-removed and consolidated actions had begun. Plaintiffs had also failed to raise the issue on a prior motion for summary judgment and had generally delayed in asserting it. The court held that the defense had been waived. Plaintiffs' motion for summary judgment denied. Ply-Gem Industries, Inc. v. Inip Co., Index No. 14520/2001, 9/27/04 (Austin, J.).**

Restrictive covenants; incident to the sale of a business; reasonableness; recapture of good will; likelihood of success on the merits; irreparable harm; balance of equities. The court granted a preliminary injunction enjoining the defendants from engaging in alleged wrongful competition in the New York City real estate market. The defendants, individuals and businesses, had specialized in purchasing New York apartments to re-sell to Israeli investors. A defendant business and a second business had founded the plaintiff to engage in similar dealings. Disputes ensued between the founders and the non-party had bought out the defendant's interest for $2.7 million. Pursuant to their agreement the defendant businesses–the bought-out founder and various affiliates–would not sell NYC apartments to Israelis for four years, and for three years would not solicit the plaintiff's employees or hire any who had worked for the plaintiff in the previous 12 months unless they had been fired. The plaintiff adduced contracts in which one business defendant had agreed to sell NYC apartments to Israeli investors during the four-year period of restriction. It also offered copies of that defendant's web pages aimed at Hebrew and other foreign language-speaking investors, and a statement from the defendant, made in an appellate brief in a separate action, that it was in the business of selling New York City apartments to Israeli investors. Regarding employees, the plaintiff adduced a purported lease that an individual defendant, while in plaintiff's employ, had signed as agent of another defendant which had subsequently hired the individual less than 12 months after he resigned from plaintiff. The plaintiff also claimed that the defendant had gotten a second employee of plaintiff's to be insubordinate to bring about her own termination, so that she could immediately go to work for the defendant; plaintiff pointed to her admission in her affidavit that a position had awaited her. The court found the non-competition provisions enforceable, reasonable in their three and four-year time frames and New York City scope to protect the plaintiff's ownership rights, for which it had paid a good deal. Further, the plaintiff demonstrated the other requisites for an injunction. There were indications that the defendants had breached the provisions, so the plaintiff showed a likelihood of success on the merits. The court stated that loss of business good will, a prospect threatening the plaintiff as a consequence of the defendants' competition, can constitute irreparable injury even when monetary damages are sought. Finally, the equities balanced in the plaintiff's favor: the restrictions left the defendants free enough to practice their trade that they were not deprived of livelihood. Manhattan Real Estate Equities Group LLC, v. Pine Equity NY, Inc., Index No. 603259/2003, 8/3/04 (Cahn, J.).

Shareholders' derivative action; Delaware law; direct harm; particularized facts; business judgment rule;

pleading of lack of disinterestedness; failure to disclose; pleading misleading effect. Plaintiff, an aggrieved stockholder, sued for breach of fiduciary duty, breach of the duty of loyalty, and a failure of the Board of Directors to disclose material information in a proxy statement. Plaintiff alleged that defendants had engaged in self-dealing and control of the Board by structuring a merger so as to maximize their own return on preferred shares while at the same time decreasing the return for plaintiff and other holders of the company's common stock. In their motion to dismiss, defendants argued that plaintiff asserted derivative claims that had been extinguished at the time the merger became effective and that his shares had been cancelled by its terms. Moreover, defendants contended that plaintiff's derivative claims had been discontinued with prejudice in prior actions. Defendants also pointed out that the proxy statement had alerted shareholders that under Delaware law they could have chosen to opt out of the merger's payment scheme and petition the Delaware Court of Chancery for an appraisal of the fair value of their shares. The court held that Delaware law applied to the facts and that plaintiff's post-merger claims would survive only if they were direct and not derivative. The court dismissed claims because they alleged harm to the corporation rather than individual harm (e.g., the transaction affected the corporation's finances) and had been previously discontinued with prejudice. The court ruled that even if plaintiff's claims had been direct, they would have been dismissed as plaintiff had failed to allege particularized facts. Further, the court found that plaintiff had failed to rebut the presumption under the business judgment rule that the Board had acted in the best interests of the company. The court explained that plaintiff had failed to plead with particularity that certain members of the Board were not disinterested when they voted to approve the merger. Finally, the court dismissed plaintiff's claim alleging defendants' failure to disclose material information in the proxy statement, since plaintiff did not allege that he had actually been misled and his allegation that the statement had misled others was inadequate to state a claim. Nemazee v. Premier Purchasing Partners L.P., Index No. 602178/2003, 8/24/04 (Freedman, J.).

Shareholders' derivative action(s); acquisition of controlling interest in American stock exchange; standing; Not-for-Profit Corp. Law § 623(a); demand on the board; futility; interested directors; failure of directors to inform themselves; business judgment. Individual claim by shareholders; harm independent from that suffered by the corporation; fiduciary duty; special injury. Arbitration. Plaintiffs sued to prevent the Amex Membership Corp. (AMC) from acquiring the interest of the National Association of Securities Dealers, LLC in the American Stock Exchange, LLC (Amex) on various individual and derivative theories. Various motions to dismiss and for other relief were made. Plaintiffs were AMC members and some directors. Pursuant to a 1998 agreement, NASD held a controlling interest in Amex and Amex and Nasdaq became sister companies under NASD. The 2004 transaction at issue in this case would have unwound the 1998 merger and returned Amex to AMC's exclusive ownership. Plaintiffs claimed that NASD had failed to fulfill obligations under the agreement. The court held that defendants' motions to dismiss for failure to satisfy Not-for-Profit Corporation Law (NPC Law) § 623(a) (an action can be brought by 5% or more of any class of members) had to be granted. Plaintiffs named 30 plaintiffs and asserted that these were more than 5% of the AMC members. Defendants challenged this, but AMC failed to offer proof though that proof would be in its possession. The only authority cited was distinguishable. Plaintiffs had not made a demand on the board, but claimed to have met the futility requirements. The court found that one AMC director had been interested in the 2004 transaction, but failed to show that any others were. The court found that even if two directors had been appointed hold-over directors by the interested director, the plaintiffs had failed to show that these two were beholden to NASD or controlled by the interested director. The court also ruled that allegations of futility due to the AMC directors having already approved of the transaction were conclusory and insufficient. Allegations regarding economic benefits to the directors were insufficient since directors' fees do not establish self-interest and plaintiffs failed to allege that the fees were abnormally high. The court stated that personal relationships were insufficient. Thus, only one of the four directors was alleged to be interested or to have lost independence. Plaintiffs also argued that the directors had failed to inform themselves fully about the transaction. Plaintiffs cited various alleged acts of improper conduct. However, the court held that the complaint failed to allege with particularity that the directors had not been fully informed about conduct leading up to the 2004 transaction. Information about a key loan had been disclosed publicly years before, the directors had intensively negotiated a memo of understanding and they had retained advisors to assist in negotiating and drafting the 2004 agreement. There had been many conversations and meetings as well. That the directors had been fully informed and actively involved was clear from changes to the loan structure that were favorable to AMC as a result of the negotiations. Plaintiffs claimed that defendants had used the loan as leverage to coerce a favorable vote. However, the court ruled, NASD had been under no obligation to forgive any part of the loan, which could not have been used to coerce a vote in favor. Plaintiffs further urged that approval of the transaction could not have been the product of sound business judgment because it would release NASD from obligations due Amex. The court held that plaintiffs improperly assumed the egregiousness of the approval without explaining with particularity why approval could not have been the product of sound business judgment. The court pointed to several business rationales that demonstrated that approval was not so egregious that it could not have been the product of sound business judgment. The loan had been needed, had been negotiated by counsel and business representatives at arm's length, etc. Questions of expediency and adequacy of consideration are left to the directors. In any case, ample business justifications existed. The transaction had been intensely negotiated and studied, including by 80% of the AMC members, who had approved it. Plaintiffs cited no legal authority to support their position. As to plaintiffs' individual claims, defendants moved to dismiss various such claims. Under NY and Delaware law, these claims must allege harm independent from the alleged injury suffered by the corporation. Plaintiffs argued that the transaction would have absolved the defendants of liability while returning a burdened Amex to its members. The court held, however, that any injury sustained by plaintiffs would have been suffered by Amex as a whole. Therefore, there was no harm independent of the wrong to Amex or AMC. Plaintiffs asserted that the NASD defendants, as Amex's controlling shareholders, owed a fiduciary duty to plaintiffs. The court stated that NASD owed the Amex minority shareholders such a duty by virtue of its majority ownership and control over Amex. However, the court ruled, a claim for breach thereof would be a derivative claim, not an individual one. The court noted that Delaware law rejected the concept of "special injury." In any case, the complaint failed to allege that plaintiffs had suffered injury not suffered by the other class of shares, AMC or Amex. The various individual claims would be dismissed. Injunctive relief was denied since no basis remained for awarding any. Further, the court ruled that various claims arose out of the 1998 merger agreement, which contained an arbitration clause. Although the claims were dismissed, they would have to have been arbitrated. Plaintiffs sought to compel AMC to initiate arbitration. The court held that the complaint failed to allege that plaintiffs had made a demand, nor had they satisfied the demand futility requirements. Plaintiffs were not signatories to the 1998 agreement, which denied rights or remedies to non-parties. Thus, plaintiffs could not claim third-party beneficiary status. Complaint dismissed. Plaintiffs' motion for an injunction denied. Alpert v. National Association of Securities Dealers, LLC, Index No. 600657/2004, 7/28/04 (Lowe, J.).

UCC; secured creditor remedies; inventory finance agreements; guarantor liability. Manufacturer's repurchase agreements. UCC § 9-627 (b); commercially reasonable disposition of repossessed collateral; proceeds and procedures tests. The plaintiff, which provided inventory financing to mobile home dealers, moved for summary judgment as to the defendant's liability for a $220,000 deficiency due on the sale of collateral seized from two dealerships. The defendant admitted that he had signed guarantees of the dealerships' debts under their inventory financing agreements, but contended that the plaintiffs had not sold the collateral in a commercially reasonable manner. The court found that according to industry custom and practice, when a mobile home dealer defaulted, the first step was to identify, among the mobile homes subject to the financing agreement's security provisions, the homes subject to a manufacturer repurchase obligation. The manufacturer would repurchase those homes according to an agreed pricing formula based upon factors such as the age of the unit. Homes "out of repurchase," with expired repurchase agreements, would be sold to bidders through private sale. In the case of the first dealership, of 75 mobile homes the plaintiff had repossessed, 40 had been sold with no deficiency. Thirty had been repurchased under repurchase agreements at the formula-designated price, and five with expired repurchase agreements had been sold for over 74% of their original invoice price– 60-70% of the invoice price is the level of recovery usually sought in the industry, according to an affidavit submitted by the plaintiff's recovery director. In New York, to be commercially reasonable, sale of collateral by a secured party must meet both proceeds and procedures tests: it must have been conducted so as to fetch the highest price, and conducted by appropriate methods. The court found that the plaintiff showed prima facie that it had met the tests. The defendant merely made a conclusory statement of his contrary opinion, without presenting facts suggesting that the plaintiff could have gotten more money by different methods, or even establishing that he knew what the customary and reasonable industry practices were. The defendant contended that as guarantor he should have consented to the plaintiff's repossession of the collateral, but the plaintiff, as a secured party, had had no obligation to notify him that it was taking possession. Nor had it had any obligation to negotiate a settlement with the defendant, and defendant's insistent point that the plaintiff had refused to negotiate did not rise to the level of a contested material fact that would defeat summary judgment. Of collateral seized from the second dealership, seven units sold through private sale all garnered 60-70% of their invoice price, and the defendant again gave no basis for concluding that the disposition was not commercially reasonable. The court granted summary judgment to the plaintiff, and ordered hearings to determine various interest and finance charges claimed by the plaintiff, its financing agreements with the dealerships not indicating how these should be calculated. Bombardier Capital Inc. v. Kontogiannis, Index No. 8308/2003, 9/15/04 (Austin, J.).**

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**The PDF copy of the decision posted on the Division's website is not an exact image of the original, signed decision filed with the County Clerk.

THE NEXT ISSUE WILL BE POSTED ON THE HOME PAGES OF THE COMMERCIAL DIVISION AND THE COMMERCIAL AND FEDERAL LITIGATION SECTION ON FEBRUARY 28, 2005 COVERING DECISIONS ISSUED OCTOBER-DECEMBER 2004.

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