The ***Commercial Division***

of The State of New York

Law Report - January 1999

COMMERCIAL DIVISION

LAW REPORT

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

HON. STEPHEN G. CRANE
ADMINISTRATIVE JUDGE
SUPREME COURT, CIVIL
BRANCH, NEW YORK COUNTY

JUSTICES OF THE COMMERCIAL DIVISION:

JUSTICE HERMAN CAHN — JUSTICE BARRY A. COZIER

JUSTICE IRA GAMMERMAN — JUSTICE CHARLES E. RAMOS

JUSTICE BEATRICE SHAINSWIT — JUSTICE THOMAS A. STANDER

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The Report and the complete text of all decisions discussed in it are available on the Unified Court System's Internet home page at http://ucs.ljx.com and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org/sections/comfed. Members of the Commercial and Federal Litigation Section may sign up at the Section's home page to receive copies of the Report by e-mail automatically. The Commercial Division has issued a cumulative index for all cases cited in any issue of the Report, *which is available at the above addresses*.

Arbitration; Form U-4; employment agreement and note. CPLR 3213; note distinct from employment agreement. Defendant ended his employment with plaintiff and thereby became obliged to repay a loan, for which plaintiff sued. The court rejected defendant's contention that judgment should be delayed because plaintiff allegedly had breached his employment agreement by failing to pay certain sums since the note was a separate obligation and was for money only. An acceleration provision making termination an event of default did not disqualify the note. In any case, the court held, defendant's claim did not give rise to an issue of fact such as to defeat the 3213 motion. The court rejected the argument that arbitration was required under a Form U-4 because that form constituted an agreement with the securities exchange, not the employer. The employment agreement did not mandate

arbitration since that was required only of disputes arising under that agreement, not the separate note. Motion granted. Cantor Fitzgerald, LP v. Swain, Index No. 600699/98, 10/28/98 (Cozier, J.).

Attorney and client; disqualification. The court held that disqualification may be based on a showing of the appearance of impropriety evident from an of counsel relationship. Direct evidence of a breached confidential relationship not required. An attorney will be disqualified if he/she ought to be called as a witness or if the testimony will be adverse and prejudice the client's interest. DR 5-102. There were held to be issues of fact as to whether the two former partners in a plaintiff firm with whom the challenged attorney now practiced had been partners when that firm had been retained by the attorney's client or whether that earlier firm had been dissolved prior thereto. There was also an issue as to the attorney's role in earlier litigation and thus whether he would be a necessary witness in this case. Reference to Special Referee. Goddard, Ronan & Dineen v. Rigas, Index No. 600528/98, 11/16/98 (Cozier, J.).

Authority to sue (BCL 1312). Action by New Jersey corporation providing limousine services for breach of contract and other wrongs by professional singer. Motion to dismiss. Defendant submitted proof that plaintiff had never been licensed by the Taxi and Limousine Commission as required by law. Although the court has discretion to stay or dismiss an action under BCL 1312, the court held that dismissal was appropriate since plaintiff had made no efforts to obtain the required license. Case dismissed. Showcase Limousines, Inc. v. Carey, Index No. 601370/98, 11/2/98 (Ramos, J.).

Bills and notes; guaranty; defense of inability to speak English; statute of limitations; fraud. CPLR 3213 motionon notes and guaranty. The court rejected the guarantor's argument based upon lack of fluency in English because one who signs a contract not in his/her language must procure someone to translate it; failure to do so is gross negligence binding the signer unless the other party engaged in deception. The guarantor only claimed that a co-defendant had deceived him, not plaintiff. The statute of limitations did not bar recovery, the court held, since part payments were made and the claim did not accrue until the last of these. Last, defendant alleged fraud, but that was supposedly perpetrated by the co-defendant. Motion granted. Korea First Bank v. Arirang Boutique Trading Co., Index No. 603186/98, 11/23/98 (Shainswit, J.).

Bills and notes; sale of collateral on loan; commercial reasonableness as to delay; waiver of set-off. Procedure; argument raised in reply papers. CPLR 3213 motion. Mere presence of a security provision does not disqualify a note for 3213 treatment. The court found that plaintiff had failed to meet its burden in that it had not shown that a sale of collateral had been made in a commercially reasonable manner and whether plaintiff had complied with defendant’s instructions regarding the sale. Defendant claimed that plaintiff had negligently failed to sell shares on time, as a result of which the proceeds were reduced. Plaintiff disputed the facts as alleged by defendant, who it claimed sought to avoid and postpone the sale. The court held that issues of fact had been raised about disposition of the collateral which were not sham or frivolous. Though the bank had submitted an affidavit, it had not put in affidavits from those employees most involved in the communications at issue. Whether plaintiff had acted with commercial reasonableness was dependent in part on whether it had abided by defendant’s claimed instructions and whether it unreasonably delayed. Plaintiff asserted a waiver of any set-off or counterclaim, but the court held that this might be unenforceable if defendant prevailed in establishing negligence. Plaintiff was held to have raised improperly in reply papers an argument that it had not been obliged to sell the collateral in the absence of a written direction. Further, the court found that the writing was unclear as to whether it applied to a sale. Summary judgment denied. Coutts Bank v. Brand, Index No. 602288/98, 10/26/98 (Cahn, J.).

Class actions; approval of settlement. Tobacco litigation. Proposed settlement. The standard of review is whether a settlement is fair, reasonable, and adequate. Here, the court noted, there had been five months of arms-length bargaining. The court considered the risks of litigation or likelihood of success, the degree of support of the parties and counsel, and, in a case involving public issues, the impact on the public interest. The court noted that plaintiffs stood an excellent chance of having their claims

substantially dismissed at trial or appeal. The court compared the prayer for relief in the pleading with the terms of the settlement and found that the terms went well beyond what plaintiffs could have hoped for after a trial, exceeded those reached in another state, and accommodated the public interest. The court stated that it could not substitute its judgment for that of the parties, add provisions to the settlement, or condition its approval. Settlement approved. State v. Philip Morris, Index No. 400361/97, 12/23/98 (Crane, J.).

Class actions; certification. Standards for certification discussed. The court found sufficiently numerous a proposed class of 1100-1500 where defendant had admitted to having sent a cancellation letter to 1100 vendors, despite the fact that defendant claimed that most disputes had been resolved. The court held that the proposed class definition was unduly conclusory and, since the class would consist of persons who had had contracts that defendant breached, that the commonality requirement had not been met. The fact that a single notice had been sent would not resolve the key issue in each case -- whether or not a contract had existed and, if so, whether it had been breached. Many sections of the UCC might come into play in resolving these questions. The court held that the typicality requirement had likewise not been met and indeed that the claims of the representative plaintiffs were not even typical of each other. The adequacy requirement was thus not met. The court held that the amount of the possible claims and the lack of predominant common questions would make the class action device inferior to an ordinary action. Certification denied. Celebrity Int. Inc. v. F. W. Woolworth Co., Index No. 604241/97, 11/25/98 (Ramos, J.).

Class actions; GBL 342-b versus CPLR Art. 9. Tobacco antitrust litigation by Attorney General on behalf of the State and localities. The Court held that GBL 342-b, either as adopted or amended, does not supplant CPLR Art. 9. In this case the State is a member of the class, which makes Art. 9 and its safeguards appropriate. And there is a conflict of interest between the State and Westchester, perhaps rendering the AG an inadequate representative. Class certification had not occurred and the question of notice was not yet presented, though a letter from the AG was held insufficient notice. The rights of the Westchester County Attorney and whether there should be a subclass were found to be premature issues. The court held that even though no certification motion had been made, any settlement wouldrequire court approval and notice to the class. State v. Philip Morris, Index No. 400361/97, 11/12/98 (Crane, J.).

Class actions; voluntary discontinuance of class claims. Motion to voluntarily discontinue class action claims. Defendant consented. Plaintiff did not wish to continue as class representative and believed that there were no other persons having the same claim. Court approval is required for dismissal, discontinuance, or compromise of a class action. Notice is normally required to protect class members who might rely on the action and withhold commencement of their own suit. The court stated that it was not dispositive that the class action had not yet been certified. Here, the court noted, the individual claims were not being dismissed or discontinued. Nor was there a compromise involving an exchange between the parties. Plaintiff and defendant had submitted proof tending to show that there had been no publicity on the case and likely were no class members who might have relied. Thus, the court held, notice was not required. Daex Corporation v. IBM, Index No. 605326/97, 11/ 30/98 (Cahn, J.).

Contracts; **condition precedent; ambiguity; oral representations**. Plaintiff and defendant entered into a writing providing that the latter would assign a note and mortgage to plaintiff subject to the final approval of a committee. The committee declined to approve. That approval, the court held, was a condition precedent and the contract was not ambiguous. A claim of oral representations failed. Summary judgment for defendant. Flaum Management Co. v. Korea Exchange Bank, Index No. 4038/98, 10/14/98 (Stander, J.).

Contracts; former employee; trade secrets; preliminary injunction. Preliminary injunction sought against former employee. Standards discussed. Plaintiff alleged trade secrets consisting of manufacturing processes and technology. Plaintiff had the burden to show defendant was divulging

confidential information. Absent wrongdoing, the court stated, an employee may not be barred from using knowledge and talents in his area of expertise. Standard as to trade secret discussed. The court ruled that there was a sharp question of fact as to whether the processes and technology constituted a trade secret. The court held that a determination had to be made by hearing or otherwise (CPLR 6312 (c)). In regard to the latter, both sides made in camera submissions in view of the confidentiality of key material. The court held on all the papers that plaintiff had failed to meet its burden to establish a trade secret. It was conceded that reverse engineering was possible. Plaintiff also failed to show that defendant had disclosed any alleged secrets. Motion denied. Infrared Components Corp. v. Hyde, Index No. 11118/97, 10/16/98 (Stander, J.).

Contracts; interpretation; ambiguity; construction of related agreements. Tortious interference. Fraud; damages. Punitive damages. Dispute arising out of agreements to provide TV facilities and services. The court ruled that a claim regarding a right to match a bid was not supported by the proof relied on. As to a claim alleging the procuring of an artificially low bid, the court found that there existed a genuine issue of fact whether the bid had been bona fide and in good faith. The court held that the language of the matching rights agreement was ambiguous as to whether there were several rights or only one. Because the two agreements were between the same parties and concerned the same transaction, and one related and referred to the other in several respects, the court held that the two must be construed as unified. The termination of the second on a set date meant the first ended too. So regardless of how many rights plaintiffs might have had, there was no right to submit a matching bid at the time at issue (after termination). Further, the signatory had not provided the services at issue in the matching right; an affiliate had done so and as a non-signatory it could not claim rights under the agreement. The court found that there were issues of fact as to intent that precluded summary judgment dismissing a tortious interference claim, as well as punitive damages. The court ruled that plaintiffs could not recover items of lost profits on a fraud claim and in any event that claim arose out of the very facts that gave rise to a contract claim. Summary judgment granted in part. MTI/The Image Group v. Fox Studios East, Inc., Index No. 135489/94, 11/12/98 (Cozier, J.).

Contracts; interpretation; duty of good faith and fair dealing. Rescission. Suit arising out of $ 415 million investment in mortgage loans and real estate. Plaintiffs complained about the defendants' use of origination appraisals. The court found that use of appraisals did not breach warranties or affect the value of the assets since they were only an estimate of the price for which an asset might be sold (the price having been calculated using broker price opinions). The court found that the agreement did not require defendants actually to deliver the opinions. The court found that under the agreement the defendants' repurchase of remaining assets barred plaintiffs from raising claims regarding unapplied funds. The court held that claims of breach of a duty of good faith and fair dealing merely repeated breach of contract claims and could not stand for the reasons stated. Rescission requires that restoration of the status quo antebe possible, the court stated. Here 4000 assets had been involved. Defendants' 1996 repurchase of some assets amounted to rescission to the extent it was possible. Some other assets had been sold. And plaintiffs had an adequate remedy at law. Dismissal granted in part. Bristol Oaks, LP v. Citibank, Index No. 606635/97, 10/30/98 (Ramos, J.).

Contracts; interpretation. **Misrepresentation; lack of supporting detail. Impossibility of performance. Fiduciary duty; creation; breach; remedy. Constructive trust. Receivership. Declaratory judgment**. The court stated that if a contract's meaning is clear and plain, it is entitled to be enforced according to its terms and not subverted by straining to find an ambiguity or accepting a construction that would render a purposeful provision meaningless. Whether there is ambiguity can be learned by asking whether the agreement on its face is reasonably susceptible of more than one meaning. Memorandum of understanding was held clear. Defendants failed to submit evidence showing in any detail alleged fraudulent misrepresentations. As to impossibility, the court stated that it can be an excuse only if performance is rendered impossible by unforeseeable government acts. The court ruled that the acts here had been foreseeable. The court held that the Memorandum imposed fiduciary duties on two defendants and that they had breached these and ordered an accounting. A constructive trust was rejected because there had been no transfer of assets. A receivership was denied because of insufficient

showing of irreparable loss or harm and because the court lacked the power to transfer title of assets in another country to a receiver. The court gave a declaratory judgment regarding the ownership of shares. Alas Int. Ltd. v. Ramiz, Index No. 601817/97, 11/2/98 (Ramos, J.).

Contracts; investment banker's finders fee; ambiguity as to payment obligation. Plaintiff sought a fee under an agreement for producing a party for a possible transaction for defendant. The court stated that a finder need only introduce the parties and need not negotiate the transaction. The court held that there was an ambiguity in the agreement as to when the obligation to pay arose. Defendant argued that under the agreement it would become obligated only after the transaction had closed, which was after its relationship with plaintiff had by its terms ended. Plaintiff contended that the obligation to pay was complete and the only question was when the payment would have to be made. The court denied summary judgment and ordered an evidentiary hearing. Advisco Ltd. v. Hollywood Theatres, Inc., Index No. 105854/97, 10/16/98 (Cahn, J.).

Contractors; pay-when-paid provision; public works project. Procedure; affidavits considered to remedy defects in complaint. Suretyship; payment bond. Movants contended that a subcontractor was not yet contractually obligated to pay a subsubcontractor so the action was premature. The court held that a pay-when-paid provision did not bar the action since the agreement did not contain language indicating that payment by the GC was a condition precedent to payment by the sub. Further, a contrary rule would violate public policy as set forth in the Lien Law. The court rejected an argument that these principles did not apply because the project here was a public works project. This argument was improperly raised for the first time in reply. There was no condition precedent. And movants had failed to establish compliance with GML 106-b. The court looked to allegations in plaintiff's supporting affidavits for the limited purpose of remedying defects in the complaint. A claim against the surety was upheld since the relevant clause in the payment bond has been held enforceable despite a pay-when-paid provision and irrespective of actual payment by the owner. Plaintiff was held to be a proper claimant under the bond. United States Rebar v. J.C. Contracting Corp., Index No. 600397/98, 11/6/98 (Cahn, J.).

Contracts; privity; interpretation as to intent; third party beneficiary. Warranty and fraud; puffery; specificity. Unjust enrichment. Tortious interference. An alleged class of boxing viewers sought refund of ticket and pay-per-view prices for the Tyson-Holyfield fight. Contractual privity was lacking. The court found that there was no language in any contract giving plaintiffs or the class a right to enforce any obligation to present a certain kind of fight. The court pointed to language that negated any intent to benefit third parties. Nor was there language that imposed any duty to present a certain kind of fight. The court held that there was no third party beneficiary here. Further, the court held that warranty and fraud claims were premised on non-actionable puffery. The fraud claim lacked specificity (CPLR 3016(b)). As plaintiffs were only licensees who had only a right to see whatever happened even if it ended in disqualification, they had no unjust enrichment claim. Nor was there a basis for a tortious interference claim. Complaint dismissed. Castillo v. Tyson, Index No. 114044/97, 10/22/98 (Ramos, J.).

Contracts; waiver provisions. Procedure; declaratory judgment. Contract waiver provisions allegedly misused. The court stated that an exculpatory clause will be enforced only if the language is clear and unambiguous, the partiesacted on sufficient knowledge, and there has been no unfair dealing in the contract. The court held that there were material questions of fact as to whether the representations had been made before or after closing and whether they were covenants exempt from a waiver provision. The court sustained a declaratory judgment cause of action. Collins & Aikman Prods. Co. v. Sermatech Eng. Group, Index No. 606229/96, 10/22/98 (Cozier, J.).

Disclosure. Demand for tax returns. In an action seeking disability benefits, defendant insurer demanded production of plaintiff's tax returns. The court noted that tax returns are not discloseable absent a strong showing of need, but disclosure is allowed if the information sought is relevant to an issue in the case and cannot be obtained from other sources. Defendant stated that though there was no need to establish plaintiff's income since he claimed total disability, he admittedly had worked some

during the period. The court held that the tax information might be the only way to determine the nature and scope of services performed then. Motion to compel granted. Rosen v. Travelers Ins. Co., Index No. 605338/96, 10/27/98 (Cozier, J.).

Disclosure; deliberative process privilege; work product. EBTs of high-ranking government officials are allowed if the EBT is needed to obtain relevant information unavailable from another source and if it would not significantly interfere with official duties. If the decision-making process is itself the subject of litigation, the privilege cannot bar discovery of critical information. The court held that a former Attorney General and former Assistant Attorney General must answer questions about whether, when they were in office, they had knowledge of facts sufficient to pursue claims of fraud and conspiracy in tobacco litigation. The State had asserted in its pleading that it had lacked such knowledge until recently. The timeliness of fraud claims also justified a finding of waiver of the work product privilege. State v. Philip Morris, Index No. 400361/97, 11/13/98 (Crane, J.)

Fiduciary duty. Trade secrets. Alleged breach of fiduciary duty and theft of confidential information and trade secrets. Plaintiff, the court found, had failed to show how its customer lists had been compiled and thus that they constituted confidential information. Nor had it refuted defendants' claim to be using a different computer system and not using plaintiff's software. Plaintiff had shown, tho, that defendant had serviced a client of plaintiff for his own benefit while still in plaintiff's employ, thereby breaching a fiduciary duty. Plaintiff could be compensated by damages and defendant was no longer an employee. Thus, an injunction barring defendant from earning a living would have been too harsh and was denied. Theatrical Accounting Services, Inc. v. Castellana, Index No. 601854/98, 12/3/98 (Cahn, J.).

Implied warranty; economic loss; privity; Y2K problem. Magnuson-Moss claims; absence of economic damages; absence of notice. GBL 349; absence of injury; information and belief; class action. Breach of implied warranties; pleading. Plaintiffs in three class actions alleged wrongs arising out of purchase of software that will be affected by the Year 2000 computer problem. The court stated that absent privity, a purchaser cannot recover for economic loss against a manufacturer on a theory of breach of implied warranty. Two plaintiffs failed to allege privity with defendant so their complaints were dismissed. All Magnuson-Moss claims were dismissed because plaintiffs had not alleged that they had incurred any economic damages yet and the defect had not yet manifested itself and because they had not alleged that they had given defendant any notice of the defect or a chance to cure it. Claims under GBL 349 failed, the court held, for lack of injury, because the allegations were based on information and belief, and because damages under 349(h) may not be sought in a class action. As to breach of implied warranties, the court found that there were no allegations that the software is not reasonably fit, only that it will not be so in the year 2000. Defendant has committed to provide a free solution to the problem prior to then. Thus, the court held, no merchantability claim would lie. The court ruled that the plaintiffs had not alleged that plaintiffs had purchased the software for any particular other than the ordinary one or that defendant had known of any such purpose. Thus, the court held that there was no basis for a claim of breach of implied warranty of fitness for a particular purpose. Faegenburg v. Intuit Inc., Index No. 602587/98, 12/1/98 (Gammerman, J.).

Insurance; exclusions; standards. Insured-versus-insured exclusion. Plaintiff had purchased D&O coverage. At issue was whether coverage as to an action brought by a former director was barred by an "insured-versus-insured exclusion." Burden as to an exclusion discussed. The court held that the policy here applied to all persons who are or were directors or officers, regardless whether they are or were acting within the scope of official duties. Exclusion applied. Complaint dismissed. Franklin Holding Corp. v. National Union Fire Ins. Co., Index No. 605935/97, 11/6/98(Cozier, J.).

Insurance Law 3221. Procedure; CPLR 3212(f). GBL 349. Challenge to defendant's reimbursement practices in administering a group health plan. Plaintiffs claimed that defendant was required by statute (Ins. Law 3221) to cover, without co-pay or the like, office visits for preventive and primary care services. Based on the legislative history and the wording of the law, the court stated that mandating

free coverage for every office visit in which some history, exam or evaluation is performed would exceed the law's intended scope. Nor, the court found, had plaintiffs provided factual allegations or proof that any office visits where a co-pay or the like had been charged were preventive and primary care visits under the law. The court found unsupported plaintiffs' contention that the law requires free coverage for well-child care visits in both Participating Provider and Basic programs. Plaintiffs failed to make the required showing under CPLR 3212(f). A GBL 349 claim failed since the court found that the challenged practices had been fully disclosed. Summary judgment granted. Gocinski v. Metropolitan Life Ins. Co., Index No. 126777/95, 12/15/98 (Gammerman, J.).

Misrepresentation; reliance. Contracts; pleading breach; duty of good faith and fair dealing. Punitive damages. Claims for fraudulent inducement in the making of large investment in mortgage loans and real estate. Defendant sought dismissal of fraud claims because of a disclaimer as to value, marketability, and the like, thus barring reliance. The court held that there could have been no justifiable reliance in regard to certain appraisals but one claim was sustained in part. Plaintiff's sophistication would not bar a claim for fraud. The court held that there had been no breach of contract pleaded as to the appraisals. A claim for breach of implied obligations of good faith and fair dealing was dismissed as duplicative of the contract claim and as inadequately pled. Punitive damages claim was dismissed since the alleged fraud concerned a private transaction. Steinhardt Group, Inc. v. Citicorp, Index No. 606635/97, 10/30/98 (Ramos, J.).

Misrepresentation; share acquisition. Contracts; signature in representative capacity. Conversion; possession by an affiliated person. Corporations; authorization to sue. A fraud claim was dismissed because the defendants against whom it was alleged indisputably had made no misrepresentation at the time alleged and because plaintiffs failed to explain why they had been defrauded when they contracted to receive a set dollar amount of stock so that, if the price fell, they would receive an increase in the number of shares. Moving defendant was held not liable for breach of an agreement since he had signed only in a representative capacity. The court held that it was a question of fact that could not be disposed of on a motion to dismiss absent definitive documentary proof whether plaintiffs knew of and accepted the substitution of one company's stock for another. A conversion claim was dismissed since plaintiffs failed to refute documentary evidence and admission that a stock certificate was in the possession of a defendant affiliated with plaintiffs. The court held that even if an attempt had been made to use the certificate to support a loan, that did not amount to interference with the right to possession. The court declined to dismiss because the lawsuit had not been authorized by unanimous written consent of all shareholders since no corporate documents had been submitted to show that the requirement superseded the powers of the Board. American Cardiac Equipment v. Feng, Index No. 104207/98, 10/20/98 (Shainswit, J.).

Motor vehicle retail leasing. Conversion; identifiable fund. Unjust enrichment. Uncertified class action challenging imposition of late fees and penalties pursuant to a form auto leasing contract. The Motor Vehicle Retail Leasing Act was held inapplicable because of its effective date. The Motor Vehicle Retail Instalment Sales Act controlled, the court ruled, and undermined plaintiff's first two, common law causes of action. The act permits the lessor to collect a late penalty. A conversion cause of action was held invalid due to the lack of a specific, identifiable fund. An unjust enrichment claim was found to be dependent upon a statutory violation, nor was there any allegation or coercion or other act requiring exercise of equitable powers. Motion to dismiss granted. Pastreich v. General Motors Acceptance Corp., Index No. 600267/98, 12/23/98 (Ramos, J.).

Municipal liability. A developer had been involved in a five year process of review prior to approval of development plans. Approval was needed in order for plaintiff to have a portion dedicated to the town. Although the town responded with great specificity about defects in the plans, plaintiff had failed to show, the court held, that the town had assumed an affirmative duty to act on behalf of the developer. The town had no duty to approve the plans. If the developer wanted them approved, he would have had to comply with the town's requirements. Further, the court found noknowledge on the town's part that its

inaction could lead to harm or justifiable reliance. The town was just protecting its citizens. The court concluded that there was no special relationship sufficient to impose liability. Summary judgment for the town. Press v. Lozier, Inc., Index No. 5885/95, 10/26/98 (Stander, J.).

Partnership; limited partners. Infliction of emotional distress. Tortious interference. Dispute over termination of limited partnership interest due to plaintiff's alleged violation of a requirement not to interfere with the direction of the partnership by the issuance of unwarranted directions to employees and threats directed at management because of a failure to serve plaintiff's wife as she wanted. Plaintiff and third-party defendant sought summary judgment and contended that defendants' version of the threats and other interference was speculation. The court found that deposition testimony and affidavits of defendants, a detailed affidavit of a non-party witness allegedly involved in the incident, and a police report supported the defendants' position. The court denied the branch of the motion seeking dismissal of claims for intentional and negligent infliction of emotional distress and interference with business relations and contract. The court held that the alleged threat was extreme and outrageous conduct. That defendant had never undergone treatment was held not dispositive. Statements in a deposition and affidavit that defendant had feared for his life and hired a bodyguard sufficed. Intentional infliction did not require pleading of special damages. The court upheld the tortious interference claims, noting that wrongful conduct in the form of physical violence and resulting damage in the form of lost clientele had been alleged. St. John v. Lemon Limited Partnership, Index No. 602341/96, 10/14/98 (Crane, J.).

Preliminary injunction. Contracts; duress; ratification. Motion for preliminary injunction in dispute regarding promotion of boxing. Promotion agreement was governed by New York law, which provided that promoters must have a valid license and no promoter shall contract with an unlicensed person. Promoters violated these and like rules. Therefore, defendant promoter did not have a likelihood of success on the merits as to a certain agreement. A contract is voidable if one party is forced to agree by a wrongful threat precluding the exercise of free will, but the party must act promptly to challenge the alleged duress. The boxer here had performed under the contract for almost two years after the alleged duress and thus had ratified the agreement. Further, there was no continuing duress. Thus, the court held, defendant might succeed in defending the duress claim. But the court held that defendant's chance of success was diminished since it had not shown that arrangements of the boxer's consents to two bouts had been a breach of the agreement. The court also held that defendant had failed to establish irreparability of harm or the tipping of the balance of equities since damages would suffice and the equities favored the boxer. Motion denied. Quartey v. AB Stars Productions, SA, Index No. 600554/98, 11/4/98 (Ramos, J.).

Preliminary injunction. UCC 9-301-302. Motion for preliminary injunction arising out of asset sale. The court held that even if plaintiffs were correct that assignments for the benefit of creditors under Florida law were invalid because defendants had been contractually barred from making such transfers, the plaintiffs, the court held, could be compensated by damages. The court held that plaintiffs had not shown a likelihood of success on the merits since they had failed to file a financing statement to perfect security interests (UCC 9-302). The Florida defendant's rights as statutory lien creditor under Florida law were superior (UCC 9-301). The court also held that plaintiffs had failed to show that the balance of equities favored them. Kearny Publishing, Inc. v. Princeton Media Group, Index No. 605533/98, 12/1/98 (Cahn, J.).

Procedure; declaratory judgment; alternative remedies. Not-for-profit corporations; abolition of office while filled. Action for declaratory and injunctive relief involving dispute over governance of not-for-profit educational corporation. The court held that declaratory judgment is unnecessary and inappropriate where plaintiff has adequate, alternative remedy. The court also found that questions of fact about Board of Trustee actions precluded summary judgment. It is not the function of a court, it said, to make findings of fact on a summary judgment motion in order to declare the legal rights of parties. Defendants' cross-motion concerning the alleged absence of Board approval for this action was held not to be ripe since a Board may ratify actions taken. The sole issue to be decided was whether the Board could abolish the office of President. The court found that nothing in the by-laws might be read to

contemplate the abolition of the office of President while occupied. The by-laws did contemplate possible removal of an incumbent from that office. The court could not substitute its judgment for that of a duly constituted board as to whether to remove an incumbent or abolish an office. But, the court ruled, here the incumbent had a contract of employment establishing his tenure in accordance with then-prevailing by-laws. The by-laws could not be amendedto eliminate an office held by an incumbent under contract. Lycee Francais v. Somnolet, Index No. 600275/98,9/29/98(Shainswit, J.).

Procedure; forum non conveniens. Derivative action. The corporation in question is a British Virgin Islands corporation headquartered in Hong Kong. The challenged transaction had occurred in Barbados. Only one defendant resided in New York. That the company's shares were listed on the NYSE and an entity in the transaction was New York-based were held irrelevant to the question of the wrongdoing and did not support the contention that New York was the most convenient forum. The court ruled that the state of incorporation has the greatest interest in deciding issues concerning internal corporate affairs. That country's law applies. Dismissal granted conditioned on stipulation by all defendants (save two as to whom jurisdiction was lacking) to accept service and submit to jurisdiction of British Virgin Islands courts. In re Tommy Hilfiger Corp. Derivative Litigation, Index No. 600507/98, 12/7/98 (Ramos, J.).

Procedure; motion to dismiss; aiding and abetting breach of trust; partnership. On a motion to dismiss for failure to state a cause of action, the court must accept all of the facts alleged as true and give the plaintiff the benefit of every favorable inference; however, allegations consisting of bare legal conclusions, and factual claims either inherently incredible or contradicted by documentary evidence are not entitled to such consideration. As to a claim for aiding and abetting a breach of trust, the court said, plaintiff must allege facts sufficient to show that the defendant knowingly participated and provided substantial assistance to the breach and that plaintiff suffered damages thereby. The pleading must unambiguously allege that the defendant had actual, not merely constructive, knowledge of the breach of trust. The court held insufficient on this score the allegation that the institutional defendants had deposited a check given to them by the individual defendant and made payable to them; nor, the court ruled, could actual knowledge of the individual defendant's breach be reasonably inferred from such allegations. As to plaintiff's theory that the two moving defendants had been silent partners with the individual defendant, the pleading was insufficient basis for an inference of partnership insofar as it asserted that movants received money from him one year and paid money to him the next. Motion to dismiss granted. Stoller v. Mallory Factor, Index No. 604722/97, 10/2/98 (Gammerman, J.).

Procedure; pleading fraud and fiduciary duty. Claims arising out of defendants' marketing of managed futures limited partnership units. The court held that plaintiffs had failed to state a cause of action with specificity (CPLR 3211(a)(7), 3016(b)). The court found that the complaint failed to allege the specific circumstances surrounding the alleged fraudulent misrepresentations in the marketing and sale (which defendants performed which acts, when and where, the plaintiff aggrieved by any particular acts). The court pointed to language in the relevant prospectuses warning of the risks involved. Plaintiffs claimed that it had been defendants' practice to distribute prospectuses only after sales. But no plaintiff alleged that that had happened. Reference to an unsworn statement in defendants' brief failed to meet plaintiffs' burden of proof. There was also a lack of specificity regarding the circumstances that might have given rise to a fiduciary relationship. Complaint dismissed with leave to replead. In re Dean Witter Managed Futures Class Actions, Index No. 116698/96, 11/17/98 (Ramos, J.).

Procedure; pleading fraudulent inducement, conspiracy to defraud and piercing the veil. Alleged fraud and conspiracy to defraud in connection with agreement to provide telecommunications services. The court held that the complaint lacked allegations of fact from which a conclusion of misrepresentation as to future intentions could be drawn. Subsequent failure to keep the agreement was not sufficient. The only fraud charged related to a breach of contract. Further, the complaint sought damages equal to those sought for breach of contract plus punitive damages, but lacked allegations sufficient to plead elements necessary to recover such relief. The court held that the complaint failed adequately to plead a conspiracy since plaintiffs failed to set forth factual allegations to support a claim

that acts and representations as to a possible future IPO had been known to be false when made. Also reliance had not been justified since the future IPO was represented as contingent only and involved the future intentions of third party investment bankers. Further, plaintiffs failed to exercise ordinary care. There being no independent tort of civil conspiracy and no allegations of actionable fraud, this claim too had to be dismissed. The court rejected an effort to pierce the corporate veil as to three other claims since plaintiffs had not adequately alleged abuse of the corporate privilege. Conclusory alter ego allegations were not enough. Dismissal in part granted. Worldcom Inc. v. PrepayUSA Telecom. Corp., Index No. 603226/97, 10/10/98 (Cozier, J.).

Procedure; reargument; arguments in reply papers. Partnership Law 42-44; accounting. Reargument may begranted only on a showing that the court overlooked or misapprehended relevant facts or misapplied controlling principle of law. May not be used to revisit arguments previously rejected. A court may not rely on arguments raised initially in reply papers. The issue in question here, the court held, had been raised in opposition papers by defendants, who were not unfairly prejudiced by plaintiff's adoption of the point in reply. Further, defendants relied on points attacking not the decision sought to be reargued but a predecessor, no longer subject to reconsideration. Thus far reargument was denied. However, the court held that reargument was required as to the scope of an accounting ordered. Plaintiff relied on Partnership Law 42 in support of an argument that the accounting should cover all affairs. The court held that that section does not address the scope of a judicial accounting. The right to an accounting derived from Sections 43 and 44. The court held that a full accounting of all affairs was not required. Further, the court held that no accounting was required at this time because an issue of fact existed as to the right to collect management fees, the basis for the accounting sought. Reiter v. Kaywein Realty Co., Index No. 602311/97, 10/20/98 (Shainswit, J.).

Procedure; service; CPLR 311(b). Motion for court-directed (expedient) service on entities located in foreign countries (CPLR 311(b)). The court noted that recent amendment ostensibly permitted expedient service on a foreign corporation. The court held that the movant must show that service under prescribed methods is impracticable. The movant need not show due diligence or actual attempts under each and every method, but must make a showing as to the prior efforts actually made. Here, the court found, plaintiff had failed to provide any details about the prior steps it allegedly had taken to serve under treaties. That the entities might have received notice of the case from a local co-defendant did not alter this principle. Just because the entities were foreign corporations did not mean that plaintiff could dispense with the prescribed methods and serve by a means of its own choosing. Motion denied. West Mill Clothes, Inc. v. Kufner Textile Corp., Index No. 605505/97, 11/30/98 (Cahn, J.).

Procedure; severance. Defamation. Motion to sever the claims of individual plaintiffs from one another and to dismiss defamation claims. Burden lies with movant to show absence of common questions or unfair prejudice. The court held that claims based upon loss of employment had a common element -- that the terminations were allegedly due to a workforce reduction or attempted constructive discharge. Nor had defendants shown undue prejudice. Severance denied. The court held that alleged defamatory statements that one plaintiff had removed important documents and been immediately fired and that another had not stayed within budget were not statements of opinion. The court held that a statement that a company employee was stealing documents is actionable, but that a statement that another was not keeping within budget is not one that would cause apprehension about a person's ability to conduct business. Dismissal granted in part. Coyle v. Michael Stevens, Ltd., Index No. 606442/97, 12/3/98 (Shainswit, J.).

Procedure; standing; trusts. **Amendment; moving papers; addition of party**. Suit alleging fraud and other wrongs in connection with the sale of large insurance policies. Motion to dismiss. The stated policy owner was a non-party family trust. The court held that the individual plaintiffs lacked standing. The trustee was named as a party but as trustee for a different trust, not the one involved. Plaintiffs argued that the policies were null and void because that trust had not come into existence prior to the issuance of the policies or indeed at all. The court held that it would be contrary to public policy to

permit a party who misled another into believing that it was dealing with a trust to void the policy and recoup the premiums. The trustee had presented documents to this effect and the trust had paid the premiums. Further, a trust may emerge by implication, a writing not being required. Complaint dismissed. Leave to amend denied for failure to supply the proposed pleading. Also CPLR 3025(b) was not the proper device to add a party. Orentreich v. Prudential Ins. Co., Index No. 604936/97, 11/5/98 (Cozier, J.).

Procedure; summary judgment in lieu of complaint; availability. CPLR 3213 motion. An agreement to be the basis for a 3213 motion must set forth a sum certain. The amount may be contained in a separate writing if that is acknowledged by the debtor. One of the documents relied on here stated that the precise amount due was subject to reconciliation by the parties. A subsequent writing was not signed and did not indicate that it was the reconciliation to which the first referred. The court thus held 3213 unavailable. Motion denied. BankBoston Int. v. Barriero Laborda, Index No. 601967/98, 11/25/98 (Shainswit, J.).

Real property; repairs and improvements. Tenant was obliged to make repairs and improvements not to exceed a sum for any one such repair. Plaintiff tenant claimed that this meant that landlord was obliged to pay for all repairs and improvements over that sum. A landlord's obligation to make repairs must be expressly stated in the document. Thecourt thus rejected plaintiff's argument. The court found unavailing plaintiff''s attempt to rely upon the terms in another lease as evidence of the parties' intent. Summary judgment for defendant. Patrick Pontiac Nissan v. Jotric Land Development, Index No. 4815/98, 11/9/98 (Stander, J.).

Recusal. Trusts; authority of trustee; fiduciary duty. The decision on a recusal motion is discretionary. The movant must show that an actual ruling represents bias. That an attorney had managed a judge's election campaign does not mandate recusal. The court held that there was no proof of prejudice. Motion denied. Petitioner sought a determination that it had authority to settle a lawsuit it had brought. The trust agreement provided that the trustee would have no power to deal with any part of the trust or take any action under the agreement. The court held that the trustee was denied the power it sought. Certain movants sought to remove petitioner as trustee because the trustee in seeking to settle the case had endorsed legal arguments of the trust's litigation opponent in violation of its fiduciary duty. The court held that because some beneficiaries disagreed with the position of the trustee did not make that position wrongful or a violation of fiduciary duty. Nor did the absence of authority to consummate the settlement establish a breach of duty in bringing this proceeding. Motion to remove denied. In re IBJ Schroder Bank & Trust Co., Index No. 101530/98, 10/21/98 (Shainswit, J.).

Settlement. Misrepresentation. Prior action was settled and settlement documents were executed. Plaintiff in this case alleged that that settlement had been induced by fraudulent and negligent misrepresentations. Stipulations of settlement are favored and not lightly cast aside. Only under circumstances that would invalidate a contract, such as fraud, will a party be relieved from a stipulation. On this summary judgment motion, the court stated, plaintiff had the burden of showing facts sufficient to require a trial. The alleged misrepresentation concerned net profits for the 1997 fiscal year. The court found that plaintiff's own papers indicated that the profit had been only a projected figure. Because of plaintiff's connections to the corporation, he knew that the actual profit could not be calculated until year end. Plaintiff had been under no duress and could have proceeded with discovery in the earlier case. The court held that plaintiff had not met his burden. Summary judgment for defendants. Haas v. Schuler-Haas Elec. Corp., Index No. 5840/98, 11/4/98 (Stander, J.).

Statutory construction; adult entertainment nuisance. Movant sought to vacate a preliminary injunction and temporary closing order on the ground that it had abated a nuisance as an adult establishment under City zoning ordinance. The ordinance defined an adult establishment as a place not customarily open to the general public because it excludes minors by reason of age. The court stated that it could not disregard the plain words of a statute even in favor of what might be called an equitable

construction in order to extend the statute to some policy not included therein. Movant claimed that it had instituted a policy to admit minors. This was done after trial. Movant argued that the ordinance should be applied prospectively so as to entitle it to abate the nuisance. However, the court held that movant had not customarily (a word concerning the past) been open to the general public in the required sense. Thus, a prospective application was not possible. The court stated that movant had not raised the issue before or at trial and it was now too late. Motion denied. City of New York v. Dezer Properties, Inc., Index No. 403271/98, 11/19/98 (Crane, J.).

Statutory construction; anti-scalping law. Contracts; public policy. Private right of action. Scalping is in violation of public policy, the court stated, and contracts contradicting that policy will not be enforced. Defendants sold tickets without a license and charged prices above the maximum in violation of the law and the sale contract was void. The court rejected the argument that the parties should be left as they were found since the statute gave plaintiffs a private right of action. Reasonable attorney's fees awarded. The Diversified Group v. Sahn, Index No. 602829/98, 12/8/98 (Ramos, J.)

Suretyship; surety's duty to bond obligee. Plaintiff sued to recover under a performance bond issued by a surety. The City was the only obligee. Motion to dismiss by the surety. Third parties, the court said, have no right to recover under performance bonds for a contractor/principal's breach of performance owed the obligee. The dominant purpose of the bond was to protect the City here. GOL 7-301 limits the amount recoverable to that specified in the bond. The surety did not step into the shoes of the contractor but rather the owner. Anron Heating & Air Cond. Inc. v. City of New York, Index No. 605981/97, 11/4/98 (Cahn, J.).

Unfair competition; use of similar business name. Suit to enjoin use of a business name. GBL 133. The applicant filed a Certificate of Doing Business months after the alleged violator had. The names were not identical, one entity used a symbol as part of the name and the other did not, they did not sell the same brand names, and they were located over 3 miles apart. The applicant waited 18 months after the alleged wrongdoer commenced business before seeking relief. The applicant had not shown that its name had acquired a secondary meaning or that the wrongdoer had sought to deceive. Application denied. Irondequoit Garden Center v. Fox, Index No. 10324/98, 12/98 (Stander, J.)

UCC 8-319. Procedure; pleading transaction in shares. Quasi-contract. Plaintiff asserted causes of action arising out of an alleged oral commitment that he was to redesign a bar and was to become a 1/3 owner. The previous bar and the redesigned one both were owned by a corporate defendant. The court held that if the alleged agreement had been for the corporate defendant to give or sell 1/3 of its shares, such an oral agreement would have been unenforceable (UCC 8-319). If the mechanism was to be through a new corporation, plaintiff had failed to allege facts to indicate that the non-party co-owner of the old corporation would have agreed or that the Liquor Authority would have approved a license (not transferable by law). This doomed several causes of action. Quantum meruit and unjust enrichment claims, being quasi-contractual, would apply in the absence of an alleged agreement. Here there was an agreement to do work for a fee, with the share issue being in dispute. Therefore, the court held, these two claims duplicated the breach of contract claim. Complaint dismissed. Gavagan v. Bass, Index No. 602034/98, 11/6/98 (Ramos, J.).

Unjust enrichment. Attorney's fees. A party cannot seek damages on a quasi-contractual theory where the party has fully performed on a written agreement that was indisputably valid and existing. Here, the defendant had not yet answered and there was no basis to conclude that the existence and validity of an agreement were not disputed. Dismissal denied as premature. Absent a contract, attorney's fees are not recoverable unless the sole motivation for the acts at issue was disinterested malevolence. An alleged breach of fiduciary duty did not qualify. An employment agreement had a provision for indemnification that was to survive the agreement, but the parties entered into a termination agreement that did not refer to indemnification and it superseded the earlier agreement and terminated all obligations thereunder. Thus, the court held, the claim for fees was dismissed. Brennan v. EMI-Capitol Music Group, Index No.

602629/98, 12/8/98 (Ramos, J.).

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