The Commercial Division

of The State of New York

Law Report - January 2001

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

VOL. III, NO. 5

JANUARY 2001 (COVERING DECISIONS ISSUED OCTOBER-DECEMBER 2000)

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://www.courts.state.ny.us 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* Report *is issued by the Commercial Division, not the State Reporter. The decisions as they appear on the home pages have not been edited and may differ from the final text published in the official reports.

Attorney and client; charging lien. Suretyship. Motion for a charging lien. Dispute over priority. The court rejected an argument that the movant should be divested of priority due to alleged misconduct in a Federal case since a charging lien is a vested property right, not a priority of payment. The court held that even if the movant had engaged in misconduct, which had not been established, the opposition had failed to demonstrate standing as a judgment creditor on an unrelated debt. The opposition had failed to dislodge the priority of a surety on the theory that it had paid as a volunteer or in bad faith since a surety's rights are prior to others with respect to the proceeds of the contract to which the bond attaches. Further, the "volunteer doctrine" does not apply where there is an express indemnity agreement and a settlement clause. Payments made by sureties under indemnification agreements are scrutinized only for good faith and reasonableness as to amounts paid. The attorney was entitled to first priority and the surety the second. Herbert Construction Co. v. J.P. Maguire Co., Index No. 601364/97, 10/10/00 (Cozier, J.).

Attorney and client; disqualification; prior representation; attorney-witness. Motion to disqualify plaintiff's counsel. The attorney and an officer of plaintiff had both been partners at a law firm. The officer had represented defendants on various corporate matters and the attorney had represented defendants on small collection matters. The defendant signed a waiver of a conflict of interest. There was proof that the officer had represented plaintiff and defendants in regard to the agreements at issue in this case. The court found that this letter did not satisfy DR 22NYCRR 1200.27 because full disclosure had not occurred. The interests of the parties here were adverse. Disqualification was thus required, though it was denied on an attorney-witness basis. The court found that disqualification was not avoided because the officer was a third-party defendant here. First Austin Funding Corp. v. Midwest Financial Acceptance Corp., Index No. 3280/2000, 10/3/00 (Stander, J.).

Champerty. Sanctions (Rule 130.1). Two previous decisions had held that an assignment of claims had been champertous but allowed plaintiffs to replead claims that had been asserted in a first pre-assignment complaint. Plaintiffs pled over but asserted numerous new causes of action containing allegations the court had found champertous. In view of plaintiffs' bad faith non-compliance, the court dismissed all but the original claims. Plaintiffs were directed to state why Rule 130.1 sanctions should not be imposed. Richbell Information Services, Inc. v. Jupiter Partners L.P., Index No. 605979/97, 10/20/00 (Cozier, J.).

Commercial lease; restrictive covenant; competing business. Commercial lease with restrictive covenant. The court held that the landlord had complied with its obligation to offer first refusal on space to plaintiff and that plaintiff had declined to exercise the option. The court further ruled that the covenant did not bar the lease to another entity. Standards reviewed. The court found that, although there might be some overlap in the products offered by the new lessee and plaintiff, plaintiff and the lessee were not in the same business. Plaintiff's application for a preliminary injunction was therefore denied. Craftmasters Construction Corp. v. RML Realty, Index No. 15884/2000, 11/14/00 (Austin, J.).

Conspiracy to defraud. Contracts; specific performance. Declaratory judgment. Constructive trust. Accounting; fiduciary relationship. Unjust enrichment; contract claim. Action asserting that plaintiff still owned shares he purportedly had surrendered. The court granted plaintiff leave to amend to assert a cause of action against one defendant for conspiracy to defraud. Although there is no separate tort of conspiracy, allegations thereof are permitted to connect the actions of separate defendants with an otherwise actionable tort; here fraud by the main defendant. However, the court concluded that there was a lack of proof of a common scheme or plan and that defendant was entitled to summary judgment. Plaintiff sought specific performance on an alleged agreement that plaintiff would own 50% of the company, but such relief could not be granted since the defendants had sold all their shares to another entity. A declaratory judgment claim regarding right to proceeds of the sale failed since plaintiff had an available, adequate remedy on another claim (constructive trust). Defendant argued that the trust claim must fail since he took the shares as a bona fide purchaser. The court ruled that the bona fide purchaser defense does not apply to an over- issue of stock, which at least in part had occurred here, and that there were questions of fact as to whether the defendant had paid fair consideration for his shares in view of testimony in conflict. An accounting claim was dismissed for lack of a fiduciary relationship. An unjust enrichment claim failed since plaintiff had received compensation for the collateral provided to the corporate defendant; the existence of a valid contract precludes recovery in quasi-contract. Yoo v. Lee, Index No. 600404/1995, 12/12/00 (Cozier, J.).

Contracts; duress. Tortious interference; breach; damage. In a contract for monies due on a film project, defendants asserted that they had signed an agreement to pay plaintiffs monies to resolve a dispute over plaintiffs' work on the project under duress caused by plaintiffs' threats to disparage the final film to defendants' bonding company. The court found that the alleged threat was sufficient to raise a triable issue of fact as to defendants' lack of an alternative and that the threat could have been one to perform an illegal act. Summary judgment was denied to plaintiffs. The court refused to allow an amendment of the answer to assert a tortious interference counter-claim as the bonding company had never breached its agreement and defendants had not been damaged. Kramer v Universal Pictures, Inc., Index No. 604917/99, 11/15/00 (Ramos, J.).

Contracts; joint venture; duty of loyalty. Defamation; opinion; epithets. The opportunity to purchase a mortgage belonged to a joint venture. Defendants abandoned the bid and moved to acquire an option to purchase to gain control. A co-venturer owed plaintiff the duty of first loyalty. Plaintiff should have been included in the restructured transaction. The parties' intent in the joint venture had included "acquiring" the property and, the court found, the trier of fact could conclude that acquiring included coming into possession or control of by unspecified means. The complaint, the court ruled, stated a claim for breach of contract. The court found that statements that defendant was dishonorable, a "crook" and not someone with whom to do business were opinions uttered in the heat of the moment, non-actionable vigorous epithets. Motion to dismiss denied. Counterclaims dismissed. Hakim v. Kaufman, Index No. 28186/1997, 11/21/00 (Austin, J.).

Contracts; statute of frauds; finder's fee; part performance. Quantum meruit. Restitution. Unjust enrichment. Promissory estoppel. Misrepresentation. Tortious interference. Plaintiff served as financial advisor on a "going private" transaction pursuant to a written agreement. Plaintiff claimed that the agreement had been orally extended. The court found that the agreement called for finder's services, was not divisible since totally focused on the sale of stock, and fell within the statute of frauds (GOL 5-701(a)(10)). The agreement did not "waive" the statute of frauds because it was silent as to the means for expressing mutual consent to an extension. The court found that a contract claim could not be dismissed because plaintiff's allegations could bring the claim within the doctrine of part performance. A question as to whether plaintiff had been acting as advisor or in a different role at a certain point could not be resolved on a pleading motion. The court dismissed quantum meruit, restitution and unjust enrichment claims since there had been no writing for the period at issue and such claims cannot be used to evade the statute of frauds. The court held that plaintiff could not recover a finder's fee on a promissory estoppel theory, but could recoup out-of- pocket expenses. A fraud claim failed since the fraud concerned a breach of contract and since plaintiff's principal was a sophisticated attorney who could not have reasonably relied on an assurance that a writing was not necessary. If the agreement were a valid one, plaintiff could recover on a contract theory and a tortious interference theory would be unnecessary, and if the agreement was not valid, the interference claim would fail. Dismissal granted in part. Lincolnshire Management, Inc. v. Les Gantiers Holdings, B.V., Index No. 604633/99, 12/15/00 (Cahn, J.).

Contracts; statute of frauds; memorandum of agreement. Signatures; Electronic Signature and Records Act. Alleged two-year employment agreement. Plaintiff claimed that the signed writing here, a restrictive covenant, did not establish the existence of a contractual relationship. The writing did not contain the terms of the contract. There was no parol or other proof of defendant's assent; rather, the proof showed controversy and the lack of a meeting of the minds. Plaintiff's demand at the time that when issues were resolved they be reduced to a signed writing precluded the reading together of signed and unsigned documents. The court rejected the contention that a subsequent e-mail by defendant's representative constituted a signing in satisfaction of the statute of frauds. The court held that a mere typed name at the end of the e-mail was not a secured electronic signature, a digital signature, or an e-commerce type electronic signature. Under the Electronic Signature and Records Act, the name on the e-mail would not suffice since plaintiff had not shown that the representative intended his name to be a signature; rather, the e-mail showed a willingness to reach a signed writing in the future, not a present intent to "sign". Absent a written agreement, the court ruled, plaintiff had been properly terminated. Case dismissed. D'Elia v. Horizon Real-Time Systems, Index No. 123637/99, 10/10/00 (Cahn, J.).

Contracts; statute of frauds; writings as to essential terms. Action for specific performance of agreement to sell a cooperative apartment. Defendant argued that writings failed to satisfy the statute of frauds. The terms and conditions of a mortgage subject to which title is to be taken are essential terms of the agreement. Here, the court found, none of the writings indicated whether the obligation to buy would be contingent on financing. The court concluded that plaintiff had intended such a contingency. Since defendant had not agreed, the writings did not satisfy the statute. The court also found that defendant had revoked the offer. Case dismissed. Fidlow v. Estate of Metzger, Index No. 110937/00, 10/30/00 (Freedman, J.).

Contracts; substantial performance; interpretation. Action arising out of agreement to transfer claims later rendered worthless by failure to file before a bankruptcy court deadline. The parties disputed which was at fault. The court found that plaintiff as seller was obliged to hold any notices on behalf of and in trust for defendant buyer and to deliver them forthwith to buyer. Plaintiff had failed to forward a notice regarding the deadline. This was a significant contractual obligation, which barred plaintiff from asserting that there had been substantial performance. The court also ruled that plaintiff was barred from

recovery here because of a clause that allocated liability to plaintiff if claims were disallowed. The court found that plaintiff could have filed a proof of claim on defendant's behalf. Even if defendant had been negligent, that would not be a defense to a breach of contract action and an indemnification provision favoring defendant would be enforceable. The court rejected plaintiff's argument that knowledge of the co- defendant, should be imputed to the defendant since the agreement required plaintiff to forward notices to defendant. The court declined to split the loss since legal principle required otherwise. Judgment for defendant after trial. Star Diamond Group v. Comac International, Index No. 600334/98, 11/3/00 (Cahn, J.).

Corporations; liability of officer. Alter ego liability. Tortious interference. Contracts; disclaimer. Misrepresentation; pleading. Mutual mistake. Claims arising out of transaction involving equipment lease. As to claims against a corporate official, the court declined to grant summary judgment since the record contained evidence raising triable issues as to whether the defendant used corporations as alter egos and intermingled their assets with his own. The defendant had executed a bill of sale for the lease personally and deposited certain checks into his own account. As to an interference claim, there was no dispute that defendants had known of the transfer of the lease to a plaintiff, but the court found triable issues of fact as to whether the defendants were alter egos and whether the individual defendant was an agent of the corporate defendants. The court found issues of fact as to how many items on the equipment lease had been disposed of prior to the closing and whether plaintiffs had known about them. The court rejected an argument premised on disclaimer provisions, noting that the purpose of the provisions was to provide protection with regard to the condition and value of the equipment, not to shield the seller from a claim of fraudulently misrepresenting the equipment's existence. The court found that plaintiffs had pled a fraud claim with adequate specificity since plaintiffs asserted that defendants had intentionally misrepresented the number of items subject to the lease. The court dismissed a mutual mistake claim since the allegations plaintiffs relied on appeared in motion papers, not the pleading. Lana & Samer, Inc. v. Goldfine, Index No. 600894/1999, 12/21/00 (Cahn, J.).

Corporations; shareholder derivative action; adequate representative; contemporaneous ownership rule; continuing wrong; double derivative claim; demand of subsidiary's board; standing; collateral estoppel; demand; interestedness; action on informed basis. Shareholder derivative action alleging overcompensation of co- CEOs and breach of fiduciary duty in connection with share repurchases engaged in when the corporation was in dire financial condition. The court held that plaintiff had failed to establish, as required, that it would be an adequate representative. The fact that plaintiff had demanded individual damages and alleged that incorrect actions had been taken by defendants to aid common shareholders, as well as a prior action by plaintiff against the corporation, indicated that plaintiff would not be an adequate representative. Plaintiff had failed to show any shareholder support for this action and lacked familiarity with the action. The court held that the contemporaneous ownership rule applied and that there was no exception based on a continuing wrong here since plaintiff had had notice that the buyback program was in effect when purchasing shares. The court held that plaintiff could not bring a "double derivative" claim based on actions by a subsidiary. Plaintiff had failed to show that the corporation exercised dominion and control over the subsidiary nor were there allegations to that effect. Further, plaintiff had never made a demand on the subsidiary's board, as required, nor had it shown that that would have been futile. The court ruled that plaintiff lacked standing to challenge payments to the co-CEO defendants by another corporation. Plaintiff argued that a bankruptcy court's allowance of these payments was not collateral estoppel because that court had not addressed the directors' fiduciary duty to the shareholders. The court ruled that the payments would have been made either to the CEOs or to creditors, but that the corporation had had no interest in them so that the board would have had no fiduciary duty to challenge them. The court held that, under Delaware law, plaintiff had to prove that a pre-suit demand upon both the old and the new board would have been futile. The court found that plaintiff had failed to raise any doubt about whether the old board had been disinterested and not beholden to the co-CEOs. These directors had not been financially interested in challenged transactions, nor did plaintiff allege that the old board had been threatened or promised rewards. The court found that the old board had acted on an informed, good faith basis (outside consultants had been involved, etc.). The court ruled that plaintiff's assertion that compensation decisions of the old board had been waste was conclusory and without basis in fact. As to the new board, the court noted that directors are not to be considered interested solely because of a personal connection to the beneficiary of a challenged transaction. Plaintiff had not alleged that any new board members had received or would receive financial benefits from support of the co-CEOs. However, the court found, plaintiff had alleged with particularity that the new board had relied solely on the co-CEOs when making compensation decisions and defendants had not responded. Although questions were thus raised, plaintiff was not, the court found, the correct party to pursue the claims. Summary judgment for defendants; case dismissed. Anvil Investment Partners, L.P. v. Butler, Index No. 602773/1998, 11/17/00 (Ramos, J.).

Corporations; shareholder derivative action; direct claims. Promissory estoppel; unconscionability. Arbitration; arbitrable and non-arbitrable claims. Alleged breach of fiduciary duty. The court ruled that several claims had been improperly brought as direct claims when they were derivative claims. Plaintiffs had not alleged that a demand had been made or would have been futile. The court rejected an argument that defendants had promised to provide sufficient funding for the company, giving rise to promissory estoppel. The court held that facts had not been alleged that would have made it unconscionable to deny an oral promise. The court found that a claim by one plaintiff was arbitrable but that it was not intertwined with other claims. No other plaintiff was involved in the contractual dispute at issue on that claim. Application to stay the case pending arbitration denied. Salvin v. IQ Financial Systems, Inc., Index No. 601285/2000, 12/27/00 (Cozier, J.).

Corporations; shareholders derivative action; pre-suit demand; futility. Derivative action challenging corporate repurchase of common shares and aircraft purchase. No pre-suit demand had been made because it allegedly would have been futile. The court ruled that plaintiff had failed to meet pleading requirements. It found that the assertion of control by two directors who owned 40% of the stock was conclusory. Nor was it enough that plaintiff had asserted that the other directors had supported past initiatives of the two and valued their positions as directors. The court rejected the argument that, under Delaware law, the defendants had the burden of proving the entire fairness of the transaction. The court held that a repurchase at a premium over market from a dissident shareholder is entitled to the protection of the business judgment rule and that the alleged repurchase was well within the directors' business judgment. The complaint was deficient for failing to allege that sums paid out for aircraft were in excess of market prices. A demand was not excused; case dismissed. Pallot v. Peltz, Index No. 604257/99, 10/31/00 (Freedman, J.).

GBL 349, 350; ads for DSL service; disclaimers and merger clause; out-of state plaintiffs. Procedure; amendment; fraudulent inducement; supporting affidavit. Purported class action by DSL subscribers asserting false or misleading representations in advertising by defendants, suppliers of service, about the speed and reliability of the service. Defendants sought dismissal of GBL 349 and 350 claims, asserting that terms and conditions for installation had noted the lack of a warranty that the service would be error-free. The court held that claims were adequately stated since defendants raised issues about reasonable expectations appropriate for summary judgment perhaps but not dismissal. The court rejected the contention for dismissal purposes that ad materials were superceded by the Terms and Conditions, which contained disclaimers and a merger clause. The court also refused to dismiss the claims as to out-of-state plaintiffs since defendants' principal place of business is New York and the alleged acts affected all named plaintiffs. The court granted a motion to amend to add a fraudulent inducement claim. As to the argument that no supporting factual affidavit had been submitted, the court ruled that this was only a formal defect and that no material allegations were to add to those in the prior pleading. Scott v. Bell Atlantic Corp., Index No. 600591/2000, 10/12/00 (Cahn, J.)

Implied warranties; privity; agency relationship. Express warranty; specificity of representations. Negligent misrepresentation. GBL 349, 350. Action for breach of implied warranties arising out of lease of a document imaging system. Plaintiff lacked privity with the defendant manufacturer and the agreement between it and the defendant dealer expressly disclaimed an agency relationship. The court thus held that the complaint failed against the manufacturer. On a cross-motion to amend, the court upheld an express warranty claim since it identified the specific representations made. A negligent misrepresentation claim was also found viable in view of the defendant's written materials. GBL 349 and 350 claims were sustained even though plaintiff was a business consumer. Michael G. Kessler & Associates v. Bitwise Designs, Inc., Index No. 604846/1999, 12/7/00 (Cozier, J.).

Insurance; accidental death policy; exceptions; standard of proof for summary judgment. Action on accidental death policies. Defendants sought summary judgment because the death was officially due to suicide, an exception. The court found that the death certificate only reflected the opinion of the medical examiner and was not conclusive as to the manner of death; no information was contained in the autopsy report to support a conclusion of suicide. Witness statements created an issue of fact on this. The policies did not define intoxication, another exception. Although the autopsy showed a presence of alcohol well in excess of the V & T Law limit, a question of fact was presented given the lack of a definition. The insurers also argued

that the policyholder has the burden of showing that the death was totally accidental under the terms of the policies. The court stated that it should look at whether the insured would have regarded the casualty as unforseen. By this standard, the defendants had not established enough to prevail on summary judgment. Motion denied. Brust v. Mutual of Omaha, Index No. 12000/1998, 11/14/00 (Stander, J.).

Insurance; temporary binder; Ins. Law 3426(b). Action for breach of an insurance contract and for negligence and malpractice. The court granted summary judgment for plaintiffs on liability. The defendant insurance agent had accepted plaintiffs' application and a premium deposit and sent plaintiffs a binder. The court ruled that the binder had provided temporary coverage and that the insurer should have given notice of termination had it wished to refuse coverage (Ins. Law §3426 (b)). A letter from the underwriter to the agent did not suffice. Thus, the policy had not been canceled as of the date of the loss. Summary judgment for the agent on a cross-claim against the insurer. Gatti v. Alliance Group, Index No. 11805/1998, 11/3/00 (Stander, J.).

Joint venture; pleading. Constructive trust. Alleged joint venture in connection with construction project. Plaintiff claimed to have hired an engineering firm and to have shared costs of certain engineering work. Plaintiff sought a constructive trust and damages. The court found the complaint defective for failure to plead essential terms of a joint venture. Plaintiff failed to allege sharing of profits and losses. An unsigned settlement agreement was insufficient, as was a letter and a check, which had been rejected and returned. The court also held that plaintiff had failed to show a confidential relationship, a disparity of bargaining power or a reasonable basis for a close association between the parties, thereby barring a constructive trust. Summary judgment for defendants. Brookside Greens, Inc. v. Rosewood Sewer Corp., Index No. 605085/99, 11/1/00 (Cozier, J.).

Legal subrogation; payment of debt services under threat of litigation. Contracts. Reformation. Plaintiff, a debt servicer, made partial payment to satisfy a note and mortgage. Plaintiff sued the mortgagor and maker of the note even though the mortgage and note had been discharged and refinanced. The problem arose when plaintiff miscalculated the amount of prepayment penalties that would be due if the note and mortgage were paid off. The court held that plaintiff's breach of contract claim failed since plaintiff lacked standing as a debt servicer and could not rely on an assignment from a bank since its note had already been satisfied and assigned to another lender when the bank purported to assign its rights. A reformation claim failed since plaintiff sought to reform a prepayment worksheet, not an agreement, and plaintiff had not alleged mutual mistake nor fraud. However, the court ruled that a claim for legal subrogation would lie. The plaintiff had not paid as a volunteer, but to avoid litigation, and had paid off defendant's obligation. Motion to dismiss granted in part. Criimi Mae Services, LP v. Nassau Bay Associates, Index No. 600249/00, 10/25/00 (Freedman, J.).

Letters of credit; revolving; extent of liability. Action involving revolving letter of credit agreement. Plaintiff contended that at stated intervals, the full amount of the letter ($11.5 million) became reinstated. Defendant argued that plaintiff could withdraw $11.5 million only after defendant had been reimbursed for earlier drawings. The court ruled that the letter was clear and unambiguous: the letter provided that plaintiff was entitled to draw up to $11.5 million each quarter, but did not limit the number of times a withdrawal could be made or the maximum aggregate amount. The only limit was that payments owed plaintiff by a third party not have been repaid. An unsubstantiated assertion of collusion by defendant was deemed insufficient to defeat summary judgment. The court ruled that not only had defendant breached its obligation for a past period but it had anticipatorily repudiated the entire obligation by virtue of various letters denying that obligation and its pleadings in the case. Nissho Iwai Europe PLC v. Korea First Bank, Index No. 600891/2000, 10/27/00 (Cozier, J.).

Letters of credit; right of issuer to claim excess proceeds paid. Plaintiff sued to recover a portion of payment made to a defendant pursuant to a letter of credit. A tenant of the defendant had obtained the letter of credit from plaintiff payable to the defendant as security for performance of commercial lease obligations. Upon breach, defendant had presented a sight draft and plaintiff had paid. Defendant had deducted arrears but retained the balance. The court ruled that plaintiff lacked standing even

though the beneficiary had applied only a portion of the proceeds to the holder's obligations. The issuer must honor a draft irrespective of whether the underlying contract has been properly performed. The court rejected plaintiff's argument that the lease incorporated the terms of the letter so as to grant plaintiff a claim on monies the defendant had obtained through the letter. Plaintiff could not enforce the tenant's rights. No fraud was alleged. Case dismissed. European American Bank v. Three Park Avenue Building Co., Index No. 104250/99, 10/5/00 (Cahn, J.).

Partnership; death of a partner; winding up. Guaranty; limit of liability. Procedure; CPLR 3213; joint trial. The death of one of the partners of plaintiff partnership did not bar this action since the winding up of affairs included resolution of this dispute. Defendants' guaranty was not limited to an amount set forth in the guaranty since that applied only to a letter of credit, the posting of which would have relieved defendants of liability on the guaranty. The court held that plaintiff could not use CPLR 3213 since the amount of the debt could not be established without resort to proof outside the guaranty as to set-offs possibly due defendants. The court rejected defendants' cross-motion pursuant to CPLR 3213 as unauthorized by that statute. In view of common questions between this case and one in another county concerning the amount of set-offs, a joint trial should be held, the court ruled, in that county since it was the locus of the events and the action there was commenced first. HHM Associates v. Zwerin, Index No. 14303/2000, 12/14/00 (Austin, J.).

Pleading; alter ego liability. Contracts. Misappropriation of assets. Action arising out of investment banking partnership. One defendant, an NASD broker-dealer, moved to dismiss since it was not in privity with plaintiffs. Plaintiffs contended that the defendant was the alter ego of the other defendants. The court found, however, that the complaint was deficient for failing to allege any facts tending to support the alter ego conclusion. Motion granted with leave to replead alter ego or quantum meruit. A similar result was reached as to another defendant. Further, the court rejected an argument that a plaintiff could not recover since he had not signed the contract because plaintiff alleged an oral contract, not barred by statute of frauds, and also could seek quantum meruit. The court also rejected an argument that a misappropriation claim failed because, absent fraud or the like, an employee or shareholder cannot sue an officer of a corporation for misappropriation of corporate assets absent breach of an independent duty. But this case involved a general partnership, as to which the doctrine should not apply. Also, the claim here was for breach of contract. Klepetko v. Potter, Index No. 600240/00, 10/17/00 (Ramos, J.).

Preliminary injunction; adequacy of damages. Contracts; oral extension of agreement. Action alleging that plaintiff had been cut out of his commission on the sale of one 24 original copies of the Declaration of Independence. Plaintiff sought a preliminary injunction on the ground that the corporate defendant was about to dissolve, which would frustrate plaintiff's ability to collect damages. The court found that plaintiff had failed to show that recovery would be absolutely precluded under those circumstances. The court found that there had been no written agreement with plaintiff in effect when the sale occurred. Plaintiff argued that a written agreement had been extended. Although oral directions to perform extra work can modify or eliminate contract provisions requiring written authorization, the court ruled that documents relied upon as proof of an oral extension failed to support the argument. Movant's cross-motion to dismiss granted. Scheer v. Visual Equities, Inc., Index No. 603220/2000, 12/27/00 (Cozier, J.)

Procedure; adjournment of time to answer; motion for a default judgment. Action to recover fees. The parties negotiated and plaintiff extended the time to answer. At a certain point, plaintiff insisted on an answer being served. Defendants stated that the parties had then agreed to extend the time sine die. The court found that the alleged extension was not enforceable because not in writing or on the record (CPLR 2104). The alleged oral extension occurred 15 months after service and the motion for a default was not made for another five months during which no negotiations occurred. The court held that defendants were in default. The court also found that defendants had failed to make a factual showing of merit to their defense. Motion granted as to liability. Pomerantz v. Henderson, Index No. 19946/1998, 11/22/00 (Austin, J.).

Procedure; change of venue; contractual venue clause; convenience of witnesses; fair trial; scandalous matter; sealing.

Defendants moved to change venue to Nassau County. The court found that venue was proper in N.Y. County and rejected defendants' argument in favor of a change based on a contractual provision, which the court found to be a consent-to-jurisdiction clause. The court rejected defendants' argument for a change based on convenience of witnesses because the assertion of inconvenience was unsupported and had to do with only a brief commute to N.Y. County. The fact that defendants subsequently filed a declaratory judgment action in Nassau did not support a change. The court stated that the assertion by both sides that it would not be possible for them to receive a fair trial in one county or the other was baseless and insufficient. The court criticized the parties for arguing that judges in either county would be biased because a judicial colleague might be called as a witness. The court rejected a motion to strike alleged scandalous matter because the court found that an allegation that the uncovering of defendants' misconduct had motivated the alleged defamatory statements was not completely irrelevant to the defamation claim and was relevant to punitive damages. Certain allegations regarding the judiciary were irrelevant. The court denied defendants' request to seal the file or remove previously-filed documents because defendants had failed to show that their interests outweighed the general public interest in open files. Liapakis v. Sullivan, Index No. 603307/99, 10/4/00 (Ramos, J.).

Procedure; failure to prosecute; CPLR 3404, 3216. Attorney and client; disqualification; effect of settlement in other case. Plaintiff's lawsuit was delayed some years before an RJI was filed. The court held that since the case had never been on a calendar during the delay, it could not be dismissed pursuant to CPLR 3404. Since defendants had failed to serve a 90-day notice, dismissal could not be based on CPLR 3216. As to a motion by defendants to disqualify the attorney for plaintiff, a former partner of defendant firm, the attorney had represented another partner in a separate, similar action against the firm. In an agreement settling that case, confidentiality provisions had been included, defendants contended, to prevent plaintiff's attorney from using information acquired during settlement to benefit plaintiff. The court ruled, however, that defendants had not shown that the settlement terms could only be complied with by disqualifying counsel. These terms were found to be less sweeping than those in Feldman v. Minars. Motion denied. Weithorn v. Baer Marks & Upham, Index No. 600470/2000, 11/17/00 (Cozier, J.).

Procedure; motion to vacate default. Arbitration; waiver. A summons and complaint were served on defendant's general manager. Defendant failed to answer or move. Some six weeks later plaintiffs moved for a default judgment. The court found no reasonable excuse for the failure to answer. No proof was presented that the manager had been out of town after service was made. The court declined to extend CPLR 2005 to include defendant's inaction. Defendant had failed to submit a proposed answer with its papers. Defendant's cross-motion to compel acceptance of the answer denied; motion for a default granted. The court also held that defendant had waived its right to enforce an arbitration clause by failing to answer. Further, the court held that defendant had accepted a judicial forum by engaging in settlement discussions, participating in court conferences and adjourning the motion for a default for over three months. Charming Shoppes v. Overland Construction, Inc., Index No. 1224/2000, 11/3/00 (Stander, J.).

Procedure; statute of limitations; action related to audit; post-audit discussions and accrual. Contract action. Defendant conducted an audit and informed plaintiff of its finding that plaintiff had not met the wage and benefit standard set forth in the contract. Defendant contended that a one-year statute of limitations began to run from that time. Rejection of a claim for payment and thus breach occur when the defendant refuses to pay or to try to resolve a dispute about payment. Plaintiff argued that this did not occur until the later date when defendant advised plaintiff of its final position. Defendant argued for either the date when defendant told plaintiff of the audit results or the date the contract ended since plaintiff then knew how much defendant was going to deduct and how much it thought it was entitled to. Settlement negotiations generally do not extend the statute of limitations. Plaintiff urged that there had been no such negotiations. The court ruled that defendant had shown a willingness to consider whether its audit figures had been in error, not whether it would accept less than it believed it was entitled to in order to settle a dispute. The court also held that a contract action had been properly brought rather than an Article 78 proceeding. Dynaserv Industries, Inc. v. Port Authority, Index No. 600742/00, 10/24/00 (Cozier, J.).

Procedure; statute of limitations; continuous violation. Res adjudicata and collateral estoppel. Attorney and client. Action alleging an unlawful taking and claims for violation of equal protection and due process rights. Defendants sought to

dismiss on statute of limitations grounds. Plaintiffs argued that a continuous violation had tolled the running of the statute. The court held that the claims here related to events that had been in dispute for years and that plaintiffs should have commenced an action long before. The court also held that the municipal defendant was entitled to dismissal under CPLR 3211(a) (l) as various judgments and court decisions in other litigation undermined plaintiffs' claims. The court ruled that collateral estoppel and res judicata barred these claims since plaintiffs had had a full and fair opportunity to litigate these claims in prior related actions but had failed to do so, and issues had been decided against plaintiffs there that defeated their claims here. As to a defendant law firm, the court held that a firm does not act under color of state law when representing a party in a legal proceeding. A Section 1983 claim thus failed. Since plaintiffs had never been clients of the firm, a negligence claim failed. Leave to amend denied. Sanctions ordered against plaintiffs. Manitou Sand & Gravel Co. v. Town of Ogden, Index No. 10120/1999, 11/3/00 (Stander, J.).

Procedure; statute of limitations; conversion; equitable estoppel. Attorney and client; disqualification; obtaining information. Action arising out of alleged "ponzi" scheme perpetrated by former employee of defendant who misappropriated plaintiffs' funds. At issue were conversion claims based on defendant's having permitted the employee to deposit monies received from plaintiffs to his accounts at defendant. The court ruled that the statute of limitations ran from the date the employee had obtained plaintiffs' funds (CPLR 214(3)), not when plaintiffs had allegedly discovered the wrongdoing or the date of their demand for repayment. The bulk of plaintiffs' claims were thus time-barred. Plaintiffs could not recharacterize these claims as fraud claims since the Appellate Division had ruled that they were conversion claims. The court rejected an argument that defendant was equitably estopped from asserting the statute since the complaint failed to allege actual misrepresentations by defendant and defendant had had no fiduciary duty to advise plaintiffs of any facts. Plaintiffs requested an opportunity for discovery but failed to raise a substantial issue of fact for trial. The court denied defendant's motion to disqualify plaintiffs' counsel on the ground that counsel had improperly obtained a report written by defendant since the report was not privileged material. Summary judgment granted. Heffernan v. Marine Midland Bank, Index No. 100589/98, 10/16/00 (Ramos, J.).

Procedure; waiver by purported reservation of ground to dismiss (CPLR 3211 (a) (8)). Contracts; liability of parent; pleading alter ego and piercing theories. Covenant of good faith. Tortious interference. Action alleging wrongful termination of a distribution agreement. Plaintiff claimed that the stated reasons were pretexts, part of a plan to eliminate plaintiff as a distributor so defendants could take over the retail outlets directly. The court rejected one defendant's motion to dismiss pursuant to CPLR 3211 (a) (8) since such an objection is waived if not included in a 3211(a) motion and, though defendant's papers cited 3211(a) (8), defendant had purported to preserve the defense for a later motion. However, the court found that the papers showed conclusively that the defendant had not been a party to the agreement; the other defendant had purchased the previous contracting party and assumed its contracts. The fact that the movant was the parent of the other defendant was unavailing since no alter ego or veil piercing theory had been alleged in the complaint. As to the other defendant, the court found that a claim for breach of the covenant of good faith was duplicative of a contract claim. A cause of action asserting that defendant had tried to frustrate performance failed since the allegation was not tied to a theory of breach or damages. A tortious interference claim was held defective because a pricing policy and decision to terminate plaintiff were not wrongful or purely malicious. Punitive damages stricken. Lantis Eyewear Corp. v. Luxottica Group, Index No. 605349/1999, 10/11/00 (Freedman, J.).

Restrictive covenants; harm to plaintiff; proprietary formula, maintenance of secrecy; breadth of non-compete agreement. Motion for preliminary injunction against former employee. The court found that over three months between defendant's departure and oral argument, no order or customer had been lost so far as plaintiff showed. Further, plaintiff had not identified any unique proprietary formula or blend of spice that plaintiff was marketing. Customers are easily identified. Thus, plaintiff had failed to establish irreparable harm. Assuming that defendant had signed a non-compete agreement (this was disputed), the agreement was unenforceably broad, both temporally (four years) and geographically (the U.S.). Absent a valid agreement, plaintiff could not show a likelihood of success since plaintiff had failed to show misappropriation of trade secrets or confidential customer lists or that the services of the former employee were unique or extraordinary. The plaintiff's formulas had not been protected by patents nor by a history of imposition of restrictive covenants. The balance of equities favored defendant. Motion denied. Wm. E. Martin & Sons v. Demos, Index No. 9313/2000, 11/21/00 (Austin, J.).

Restrictive covenant; liquidated damages clause. Tortious interference. Misappropriation of trade secrets. Motion for injunctive relief against former employee and new employer. Here the motion failed as to the employee since he was not a party, plaintiff having withdrawn the complaint as to him in light of an arbitration agreement. As to the employer, the plaintiff's contract with the former employee contained a liquidated damages clause related to violation of the non-compete, which indicated that an adequate remedy at law existed. Also, that agreement had been proffered by plaintiff only after the employee had worked there for a year. A tortious interference claim failed since the new employer had hired the employee to advance its economic interests. A claim for tortious interference with prospective economic advantage failed for the same reason and because wrongful means were not alleged. A claim for misappropriation of trade secrets failed since plaintiff did not actually allege that trade secrets had been taken, only general knowledge, not studiously memorized or copied information. An employee's knowledge of the business habits of particular customers does not constitute a trade secret. Preliminary injunction denied. Prebon Financial Products, Inc. v. GFI Group, Index No. 603085/2000, 10/31/00 (Ramos, J.).

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