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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://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. The reader should note that the address of the Court System's home page is new. The previously available cumulative subject matter index of all cases in the Report will be inoperative temporarily. However, a new search mechanism will be in place shortly. 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.*

Arbitration; motion to compel; absence of demand/notice; agreement to submit; non-signatory parties. Motion to dismiss and compel arbitration granted only to extent of compelling arbitration pursuant to clauses in partnership agreements and staying the balance of the action. Dismissal would have been inappropriate as judicial action might be required after arbitration. Since a motion to compel was made in a pending action and plaintiffs had had an opportunity to be heard, the absence of a demand or notice was not fatal. The court's duty on a motion to compel is to determine whether the parties agreed to submit to arbitration. Here partnership agreements constituted the necessary express, clear and unequivocal agreements. One entity did not sign but did not oppose arbitration and in light of interrelationships among the agreements and a certain management agreement and because the clauses were broad, the arbitration would include

that entity. However, as to another non-signatory entity arbitration was not compelled. General Realty Associates v. Reinhard, Index No. 605035/98, 6/30/99 (Cozier, J).

Arbitration; motion to compel by one defendant only; discretionary stay as to non-signatories. Procedure; amendment as of right and motion to dismiss. Contracts; statute of frauds (GOL 5-701(a)(2)). Tortious interference; liability of corporate officers. Action by investment bankers to recover fees allegedly due for arranging financing for a project. One defendant moved to compel arbitration. Plaintiffs argued that the entity had waived its right, contending that it had acted merely as agent of another defendant, the intended beneficiary of the agreement in question, and that the movant had been named on the signature line by error. The court ruled that plaintiffs had failed to present proof of these assertions and noted that they had not denied that the two entities were separate and thatmovant alone had signed. The motion was granted and the action stayed as to movant. The other defendants sought a stay based on the arbitration. A stay against non-parties to an agreement to arbitrate is discretionary where the same controversy is at issue. The court, however, declined to stay, noting that the entity in arbitration was a shell and the arbitrator's ruling would not necessarily be binding on the court, so the case would have to proceed. Certain defendants moved to dismiss, and plaintiffs amended as of right. Although an amended complaint replaces its predecessor, a defendant has the right to apply its motion to the new pleading, as movants here had chosen to do. As to a claim for guarantee of a contract, the court noted that a promise to answer for the debt of another must be in writing pursuant to GOL 5-701(a)(2), not here pleaded. The pleading also failed to allege that the promise represented an independent duty of payment and was based on new consideration. The claim of an oral promise was dismissed. A tortious interference claim was allegedly deficient as to corporate officers for failure to allege adequately commission of an independent tort or action for personal gain. The court ruled that the pleading was sufficient under Hoag, 246 AD2d 224. Devonshire Holdings, Inc. v. Knowaste Technologies, Inc., Index No. 606116/98, 5/27/99 (Shainswit, J.).

Attorney's fees and expenses; report of special referee. Motions regarding referee's report recommending award of almost $ 400,000 in counsel fees to defendant in defense of the action and prosecution of counterclaims. The court upheld the referee's rejection of plaintiff's argument that defendant had been inefficient in allowing two partners to perform most tasks on the case since the case was complex and ferociously contested and this approach avoided having to familiarize new attorneys with the facts, law and history of the case. The court upheld the redaction of a small part of the bills since the litigation was ongoing and counsel had asserted attorney-client privilege. The court upheld the referee's rejection of plaintiff's argument that it was error to award defendant expenses incurred in attempting to enforce a judgment. The court ruled that defendant had had every right to commence enforcement proceedings here and in Maryland and seek indemnification under an agreement. Report confirmed. Tauber v. Bankers Trust Co., Index No. 113339/94, 5/27/99 (Cozier, J.).

Banking. UCC. Forged checks; conversion; breach of contract; one-year limitation (UCC 4-406(4)); bank rules on reporting errors in statements; ratification; negligence; commercial bad faith. Action seeking recovery of monies paid out on checks over forged signatures. Motion to dismiss. The court ruled that plaintiffs had failed adequately to state a claim for conversion since a bank account is merely a debt and the funds are not specific and identifiable. The court upheld a claim for breach of contract. The court ruled, though, that the corporate plaintiff could not pursue the action insofar as it concerned checks as to which it had not reported fraud within one year after the checks and the bank statements had been made available (UCC 4-406(4)). Nor could this plaintiff proceed as to any alleged fraud that it had failed to report within 15 days of receipt of the statement, as required by the bank's rules. The court rejected an argument of the bank premised on the corporate plaintiff's issuance of a corporate resolution ratifying past transactions since the resolution permitted the corporation to withdraw the resolution, which it had done. A negligence claim was dismissed; such a claim cannot be based on breach of a contractual duty between a bank and customers. The court dismissed claims based on commercial bad faith since plaintiffs had not alleged complicity or dishonesty by the banks. A bank's failure to act in a commercially reasonable manner and to detect a check forgery scheme does not amount to bad faith. Wells v. Bank of New York Co., Index No. 605920/98, 5/24/99 (Cozier, J.).

Civil Rights Law 50 and 51; use of name of former law firm partner. GBL 349. Former name partner in law firm alleged that defendants had violated Civil Rights Law 50 and 51 by using his name on their stationery and signage against his wishes after he had left the firm. The court found that his name had been seen by a narrow class of existing clients and adversaries for a time and had not been given broad exposure for the purpose of soliciting patronage or as a promotion. There had been no advertising purposes under these sections, the court ruled. The court also ruled that the GBL 349 claim was defective since the case was one of a private contract dispute, not one involving broad impact on consumers at large. The court found issues of fact precluding summary judgment on plaintiff's breach of contract and accounting claims. Greilsheimer v. Ferber Chan & Essner, Index No. 116537/98, 6/18/99 (Cozier, J.).

Contempt; criminal; service. GBL 130(9) (assumed name certificate). Civil contempt; burden on movant to show violation and prejudice; damages. A motion for criminal contempt was denied because the order to show cause had authorized service only on defense counsel, which is only sufficient for civil contempt. The court rejecteddefendants' argument that the failure to file an assumed name certificate required denial of the motion since GBL 130(9) is inapplicable to a confidential customer lists case and such failure is not jurisdictional. Civil contempt discussed. The court found that plaintiff had met his burden to show that defendants had violated a prior court order and prejudiced his rights by registering a confusingly similar domain name and had sent solicitations to plaintiff's customers. A prima facie showing was made, but the court found that plaintiff had failed to submit proof as to actual damages. The penalty was limited to $ 250, plus costs and fees. A preliminary injunction was granted in view of defendants' repeated violations of the court's order. Strank v. Skolnick, Index No. 600657/99, 5/6/99 (Shainswit, J.).

Contracts; construction and related work; breach by work stoppage order. Alleged breach of contract for painting, refurbishment and other services. Work stoppage order issued. The court ruled that the order had no contractual basis. The defendant did not rely on specified contractual provisions for issuance of such orders. Rather, it asserted that it had been permitted to issue the order pursuant to a provision governing when the owner was authorized to terminate. The demand by defendant that a replacement supervisor be on the site by a set date had no contractual basis, the court found. The defendant had issued a seven-day notice of termination as required by the contract. However, it had already breached by improper issuance of the work stoppage order and insistence that the superintendent be replaced. Partial summary judgment for plaintiff. Onsite Metallizing, Inc. v. Monroe County Water Authority, Index No. 12163/97, 5/99 (Stander, J.).

Contracts; duty to negotiate in good faith. Claim of breach of an implied duty to negotiate formal closing documents in good faith in connection with failed acquisition. Motion to dismiss (CPLR 3211(a)(1)). Every contract contains an implied obligation to deal in good faith, but a duty to negotiate the finalization of a contract in good faith can only be found where there is a legal duty to do so. Enforceable legal rights do not arise until either an expression of mutual consent to be bound, or some equivalent event marking acceptance of an offer. Here, the court found, the Confidentiality Agreement and the Letter of Intent specifically stated that the parties did not intend to be bound until the acquisition was finalized. Hence, the implied duty claim failed. The court ruled that a claim against a corporate officer for misrepresentation was more than a dressed-up breach of contract claim. Dismissal granted in part. Bradley Business Forms v. U.S. Office Products Co., Index No. 604595/98, 5/20/99 (Shainswit, J.).

Contracts; interpretation; best efforts; impossibility of performance; specific performance; stipulation as to irreparable harm; implied covenant of good faith and fair dealing. Attorney's fees. Plaintiff and affiliates purchased shares of defendant. Under an agreement, plaintiff had the right to demand prompt registration of the shares. After defendant failed to register the shares, plaintiff started this action seeking specific performance. Plaintiff moved for summary judgment. The court ruled that defendant had breached the agreement. Defendant had a duty to use its best efforts to obtain registration. Performance was not excused by the claimed financial difficulty caused by defendant's alleged limited cash flow. The defense of impossibility of performance does not apply when there is merely financial difficulty or economic hardship. Here registration had been a major, bargained-for part of the transaction. Although "best efforts" may present a factual question under certain circumstances, there are instances in which it may be determined as a matter of law that a party failed to use such efforts. The court ruled that this was such a case. Plaintiff sought specific performance, relying on a stipulation as to irreparable harm in the agreement. After extensively discussing authorities on such stipulations, the court concluded that plaintiff was entitled to specific performance. Damages were not ascertainable. The court rejected the argument that plaintiff would not benefit from registration since equity does not relieve parties from bargains because they are unprofitable. The cost of registration was not a hardship, the court found. The court rejected a counterclaim for breach of the implied covenant of good faith and fair dealing since a party cannot breach that covenant by invoking its clear rights under a contract; where an unqualified right is set forth in a contract, courts will not inquire into whether its exercise was driven by an ulterior purpose. The court interpreted relevant contractual provisions as not providing for attorney's fees. The court searched the record and dismissed this claim (CPLR 3212(b)). Imprimis Investors LLC v. Industrial Imaging Corp., Index No. 605402/98, 6/14/99 (Cozier, J.).

Contracts; interpretation; duty of good faith and fair dealing. Unjust enrichment. Action arising out of licensing agreement. Defendant moved to dismiss on the ground that various provisions of the agreement meant that defendant owed royalties with regard to one chemical but not another. The court noted that if there is ambiguity in the terminology used and determination of the intent of the parties depends on extrinsic evidence or a choice among reasonable inferences to be drawn from such evidence, the determination should be made by the jury. The court stated that the provisions could be read in such a way that both patents and technical information would be embraced thereby, as urged by plaintiff. But the court also found that the provisions were susceptible of another interpretation. The absence of an express reference to the second chemical would not necessarily require dismissal, the court stated. No language in the

contract or extrinsic evidence had been pointed to that indicated what the parties' intent had been. The court ruled that dismissal was not in order. A claim for breach of a duty of good faith and fair dealing was stricken as duplicative of the contract claim. And a claim for unjust enrichment was dismissed in view of the express contract on the subject. Engelhard Corporation v. Research Corporation, Index No. 601847/98, 5/26/99 (Ramos, J.)

Contracts; merger clause. Oral understanding; variation from agreement and lack of proof caused failure of defense and barred amendments, which would have been futile. Summary judgment; request for further discovery. Summary judgment by plaintiff on claim for some $ 2 million due for certain products ordered by defendant but not paid for. Defendant argued that there had been an oral arrangement whereby defendant would get credit for, or be allowed to return, any unsold goods. However, the court found that the agreement between the parties stated that merchandise could not be returned and that, on termination, plaintiff had the right but not the obligation to repurchase unsold inventory. The president of defendant conceded at an EBT that there had been no explicit undertaking by plaintiff to repurchase. Thus, any amendment of the answer to assert defendant's new claims or defenses of rescission, reformation, and modification would be futile. The court found that defendant had failed to come forward with admissible evidence to support its claim of a side agreement and the affidavit of defendant's president could not give rise to an issue of fact in view of his prior testimony. Further, the contract contained a merger clause requiring that any change be in writing. Proof of the alleged oral understanding was inadmissible. Defendant's blunderbuss request for more discovery was found inadequate to bar summary relief, especially in view of defendant's failure to specify what information plaintiff had not supplied that would give rise to an issue of fact. Motion granted. H.M. Gousha Co. v. Rockwell Enterprises, Inc., Index No. 115636/96, 4/27/99 (Shainswit, J.).

Contracts; personal liability of corporate representatives. Unjust enrichment and quantum meruit; existence of contract. Fraudulent inducement. Fiduciary duty. Motion for partial summary judgment. Motion denied as to claims against individual defendants because they had signed the agreement in their representative capacity and plaintiffs failed to present proof that they had used control of the entity to further personal business. Unjust enrichment and quantum meruit claims against the corporation were found to be equitable claims precluded by the existence of an agreement. The court found that factual issues existed as to whether the individual defendants had fraudulently induced plaintiffs to enter into the agreement. A fiduciary duty claim was ruled defective due to existence of only a conventional business relationship. Williams v. American Softworks Corp., Index No. 116756/94, 6/7/99 (Cozier, J.).

Corporations; derivative action; corporate wrong; pleading compliance with BCL 626. The court found that the action was in the nature of a derivative case and thus not one that could be brought as an individual action, as the damages were allegedly suffered by the corporation. The court found that, as required (standards discussed), the plaintiffs had been shareholders at the time they started the action. But, the court ruled, they had failed to comply with BCL 626(c) by setting forth with particularity the efforts made to secure board action or the reasons for not doing so. Complaint dismissed. Rudolph v. Panish, Index No. 115585/98, 6/4/99 (Cozier, J.).

Dissolution; standards; preliminary injunctive relief in proceeding for. Proceeding to dissolve corporation. Application for preliminary injunction preserving assets. The court found that the petition alleged one of the specified grounds for dissolution, internal dissension and division among shareholders (BCL 1104(a)(3)). The directors were also alleged to be divided. Motion to dismiss petition for failure to state a claim or because the petition was premature or misconceived was denied since the petition properly set forth a claim for dissolution and the request for a preliminary injunction was within the authority of the court in its discretion to make such orders as are necessary to preserve property and carry on the business. Alternative request for arbitration denied since the only arbitration clause concerned inability to arrive at a new value within a set period after close of the fiscal year and was not broad enough to include the issue of dissolution or any of the underlying issues. Dissolution may be granted even when the business is being conducted at a profit (BCL 1111). Hearing directed on the allegations of the petition and the objections of respondent. Pending decision, an injunction was issued directing preservation of assets. In re Buzas, Index No. 2204/99, 5/7/99 (Stander, J.).

Employment dispute; various claims of former at will employee. Release. Various claims relating to termination of plaintiff as employee of IBM UK. A release was invoked by defendant. Plaintiff contended that English law applied and did not bar this action. Plaintiff did not plead foreign law (CPLR 3016(e)) but the court still reached the issue as a matter within its discretion. And sufficient proof of such law was presented. Although the grouping of contacts test might arguably apply on the ground that plaintiff was seeking to cloak what was basically a breach of contract claim in tort guise, the interests analysis has been widely employed by the Court of Appeals and even in contract, the court noted, policies underlying conflicting laws are readily identifiable and reflect strong governmental interests and should be considered. The court concluded that New York law should apply in view of the strong interest this state has in enforcing its policy as to suits for wrongful discharge of at will employees. The court found the release applicable as a bar to any suit against defendant other than one arising out of "personal injury." Various claims were thus doomed. A conclusory

assertion that the release had been the product of fraud was found unavailing. A claim of negligence was dismissed because a breach of contract is not a tort unless a legal duty independent of the contract has been violated, not here alleged. Claims of negligent misrepresentation were found to be really claims involving breach of an employment contract and thus not personal injury claims and so were barred by the release. Tortious interference claims were defective because plaintiff was an at will employee and there was a failure to allege that IBM had had knowledge of prospective contracts. Plaintiff failed to satisfy the strict standards for claims of intentional and negligent infliction of emotional distress. A defamation claim was found deficient in that in part it failed to allege thedefamation in so many words (CPLR 3016(a)) and in part, as no special damages were claimed, slander per se was not shown, as the words used involved only a general reflection on character or qualities. A prima facie tort claim was defective in that it was only a means to circumvent the at will doctrine, even though IBM had not been plaintiff's employer, but IBM UK. Churchhouse v. IBM, Index No. 2959/98, 5/28/99 (DiBlasi, J.).

Fiduciary duty; breach would not preclude former law partners from recovery of compensation, less damages caused. Action by former law partners to recover sums allegedly due them. The court had previously ruled after trial that they had engaged in breaches of fiduciary duty. At issue now was whether those breaches precluded plaintiffs from recovery. In some contexts, the court noted, breach of fiduciary duty causes forfeiture of the right to compensation. The court agreed with certain authorities that offending partners would not lose all right to compensation. The court allowed them to recover capital accounts and shares in firm profits up till their departure, less the damages caused by their departure. As the firm had proven lost business, it was allowed to recover lost profits for a reasonable time after the wrongs. Based on expert testimony, the court found that the damages had been some $ 1.8 million. The court ruled that the plaintiffs were jointly and severally liable for the wrongs, one having actively participated in the actions of the other. Attorney's fees and punitive damages were denied. Gibbs v. Breed, Abbot & Morgan, Index No. 37028/92, 6/25/99 (Cahn, J.).

Joint venture agreement; proof as to participation in profits and losses; fiduciary duty. Post-trial decision. The court credited plaintiff's account that he and defendants had had a joint venture agreement whereby he would set up and run a restaurant in return for a one-third interest and that they had reneged. The court drew an adverse inference from defendants' failure to produce a key document and noted defendants' failure to rebut various evidence. The court inferred an undertaking on plaintiff's part to participate in losses, the failure to allege which is not fatal where the other elements are present. The court found a fiduciary relationship from the fact of being joint venturers and family members. The court granted plaintiff a constructive trust in one third of the business. Accounting severed. Silvestri v. Ferrara, Index No. 602144/98, 5/17/99 (Shainswit, J.).

Misrepresentation; summary judgment; proof of falsity and knowledge thereof. Arbitration; fraud not affecting the arbitration clause or permeating the agreement. Alleged fraud in connection with stock purchase agreement. Summary judgment motion. Plaintiffs alleged that defendant had had knowledge that key customers would cease to do business with the entity in issue during a set period in violation of a representation in the agreement. However, defendant showed that the key customers had continued to do business, the representation did not concern a diminution in business, and plaintiffs had not challenged the authenticity of the proof. As to the representation of no material adverse changes, the allegations that substantial losses had been suffered and salary increases been demanded by staff after the closing were ruled insufficient to establish falsity. A representation regarding lack of knowledge of departure of key employees was not actionable since plaintiffs had known about one departure prior to closing but had closed anyway, thus effecting a waiver. A related statement about being able to maintain that person’s accounts was a statement of future intentions, not actionable. Thus, plaintiffs had failed to show falsity and also relied only on conclusory and unsubstantiated allegations of knowledge thereof. The fraud claim and a related rescission claim were dismissed. A motion to compel arbitration of claims relating to an employment agreement was granted. A basis for refusal was the assertion of fraud. But even if that had any merit, the alleged fraud did not concern the arbitration clause or permeate the entire agreement. Thus, the fraud issue, if there were any, would be for the arbitrator. Halcon Acquisition Corp. v. Russell, Index No. 605500/98, 6/29/99 (Cahn, J.).

Preemption; health care coverage. Contracts; duty independent of contract as basis for tort claims. Intentional infliction of emotion distress. Misrepresentation. Bad faith conduct by insurer. Punitive damages. Action alleging improper refusal to provide health care coverage for financial reasons. Partial summary judgment sought. Defendant asserted that ERISA preempted the claims of some plaintiffs. The court agreed as to two plaintiffs, including with regard to claims arising from "conversion" coverage, which flowed out of the group coverage. As to a third plaintiff, defendant had come forth with a prima facie case of preemption. The plaintiff had submitted an affirmation in opposition in which counsel recited statements made to him by the client, which the court rejected as incompetent evidence. Plaintiffs asserted tort claims and demands for punitive damages premised upon defendant’salleged conduct of denying coverage for financial reasons in breach of a purported duty independent of contract. The court rejected plaintiff’s reliance on Sommer, 79 NY2d 540, because of the unique public interest at issue in that case. The court also

rejected the argument that an independent basis for tort liability existed under the principle set forth in North Shore Bottling, 22 NY2d 171, where a contract is employed merely as a device in a broader scheme to defraud. A mere breach of a contract, even if deliberate, does not support tort recovery, the court stated. Insofar as plaintiffs alleged that defendant had intentionally inflicted physical trauma, the court concluded that what was at issue was a claim for battery, for which there was no supporting evidence. The court found that the conduct allegedly engaged in by defendant did not rise to the level sufficient to support a claim for intentional infliction of emotional distress. The court found that plaintiffs had neither alleged nor offered proof that defendant had engaged in specific misrepresentations. No fraud claim can stand where it only relates to a breach of contract. As to a claim for bad faith conduct by an insurer, the plaintiff must state a claim of egregious tortious conduct directed at the insured claimant, which had not been done in this case. Punitive damages, the court ruled, could not be recovered in view of the absence of an independent tort. Partial summary judgment granted. Logan v. Empire Blue Cross and Blue Shield, Index No. 20517/96, 5/4/99 (DiBlasi, J.).

Preliminary injunction; former employees in competing business. Discovery; priority. Application for preliminary injunction. The court found a questionable likelihood of success on a tortious interference claim in view of statements of the relevant third parties that they had initiated contact, and that the contracts of plaintiff did not bar these parties from seeking services elsewhere. Further, the agreement plaintiff had as to exclusive rights in certain areas did not purport to give plaintiff such rights as to entities other than the signatory. Thus, the court declined to issue an order prohibiting defendants from competing with plaintiff by soliciting any customers serviced by plaintiff during a particular period. A claim for unfair competition might succeed, though, the court said, if plaintiff could show that a defendant had been taking away plaintiff's customers by using its proprietary information. Relying on Restatement of Torts 757, comment b, the court granted an order enjoining defendants from using plaintiff's revenue-sharing information, given the harm that would flow to plaintiff and the lack of harm defendants would suffer if, indeed, they were not familiar with that information. The court noted that there was a confidentiality agreement here and that whether defendants were making use of such information was peculiarly within the knowledge of defendants. These factors justified a reversal of the normal priority of discovery. Injunction granted in part. Eagle Communications, Inc. v. Paetec Communications, Inc., Index No. 601724/99, 5/5/99 (Shainswit, J.).

Preliminary injunction; standards; investment partnerships and actions of general partners. Alleged breach of fiduciary duty and other wrongs in connection with Rockefeller family partnerships. Court denied plaintiffs' motion for a preliminary injunction. The court found that they had not now shown a likelihood of success. As limited partners, they were not entitled to interfere with control of the business and the defendant's exercise of control reflected certain objective realities. Certain self-dealing was permitted under the agreements, as were certain distributions other than in kind. Nor was the creation of a litigation reserve shown to have been improper under the agreements. The court also found that irreparable harm had not been shown. Plaintiffs did not allege that destruction of the partnerships was a risk. Plaintiffs had not shown that the balance of equities would tip in their favor. Plaintiffs had waited at least two years to complain of some wrongs. Elliman v. Elliman, Index No. 603377/96, 6/23/99 (Shainswit, J).

Procedure; lack of jurisdiction and improper service; New York subsidiary of foreign corporation; Hague Convention. Papers; notarization. Motion to dismiss for lack of personal jurisdiction and improper service. The court rejected the argument that plaintiff's failure to have his signature notarized was fatal. A court should ignore defects in legal papers unless there is prejudice. Plaintiff, who resides abroad, had been unable to contact the consulate to have the signature notarized. The declaration was made under penalties of perjury and defendant did not claim that the signature was not authentic or that there was prejudice. An affidavit in correct form could be submitted within 30 days. The court ruled that plaintiffs had met their preliminary burden of establishing jurisdiction. CPLR 301 and 302(a)(1). Defendant's employees allegedly had traveled to New York often for meetings on the effort to sell real estate at issue in the case and defendant's counsel "ran the deal" from New York. Service was made on defendant's subsidiary here. Defendant claimed that this service violated the Hague Convention. The court, citingVolkswagenwerk, noted that service on a foreign defendant in care of its wholly-owned subsidiary does not have Hague implications under certain circumstances, as here, where the defendant, the court found, appeared to have used its subsidiary's office as its own. The court did not actually decide the issue but quashed service on consent of plaintiff and gave it time to serve under the Convention. Eppley v. Kvaerner AS, Index No. 606006/98, 5/26/99 (Ramos, J.).

Procedure; law of the case; motions to dismiss and for summary judgment. Misrepresentation; damages; loss of alternative contract. Fraudulent inducement claim. Defendant moved for summary judgment. Plaintiff invoked the law of the case doctrine. This doctrine, the court noted, does not apply where the prior motion was one to dismiss and the current one is for summary judgment. The court had previously denied a motion to dismiss based on the adequacy of the pleadings. The current 3212 motion thus was not constrained by law of the case. The court found that the proof showed that the claim could not stand in light of the proof. Plaintiff claimed damages due to having been misled into giving a six-month termination clause, but nothing in the record indicated that defendant would have agreed had plaintiff insisted on a

one-year term. Plaintiff's witnesses admitted as much, in contradiction of plaintiff's claims. In any case, the loss of an alternative contract cannot serve as a basis for fraud damages, due to the speculative nature of such damages. Partial summary judgment for defendants. MTI/The Image Group v. Fox Studios East, Index No. 135489/94, 5/7/99 (Cozier, J.)

Procedure; leave to amend; joinder of necessary parties. Conspiracy. Misrepresentation. Judicial estoppel. Action for substantial fee allegedly earned for issuance of a commitment letter. At issue was leave to amend to assert counterclaims. The court noted that allegations of conspiracy are permitted to connect the actions of separate defendants with an actionable injury and to show that the acts flowed from a common plan. There must be an underlying tort. The court ruled that the underlying alleged fraud here was not validly stated. The court found the counterclaims insufficiently detailed as to plaintiff's participation in the alleged fraud (CPLR 3016(b)). The only meaningful allegations concerned others. The counterclaim for damages for lost profits due to failure to provide a proper commitment was sustained. The court rejected plaintiff's argument based on judicial estoppel that defendant could not argue that the commitment had been a sham having argued as to its validity in another action. The court stated that plaintiff had not demonstrated that defendant's position was successfully advanced in the other action; the other action was settled. The other court had granted a TRO in defendant's favor, but that was not an adjudication on the merits. Further, the parties were not the same as here. And a party is permitted to plead inconsistent theories. The court dismissed a defense of absence of necessary parties. CPLR 1001(a). That there is a possibility that a judgment could have an adverse effect on the absent party is not enough to indicate necessary joinder. Here, the court found, the decision would not affect directly the rights of the proposed parties so the defense lacked merit. Nomura Asset Capital Corp. v. BT Holdings, LLC, Index No. 600970/98, 5/18/99 (Cahn, J.).

Procedure; leave to amend. Partnership Law; renunciation of interest. Action against general partners on a note. Two defendants asserted that they had invested limited funds in the partnership, understood that they were limited partners, and had only realized that the partnership had recorded them as general partners during discovery herein, at which point they attempted to renounce interests therein. They moved to amend their answers to assert an affirmative defense of renunciation. The court rejected plaintiffs' argument that renunciation can only operate as among partners; in any event, plaintiffs were also partners, not third party creditors. The court rejected plaintiffs' argument that Partnership Law 100, on which defendants relied, is inapplicable to limited partnerships. The court ruled that the question of whether the movants should have learned of their status earlier than they did and so did not renounce promptly, as required by the statute, would not be resolved on a motion for leave to amend. Motions granted. Ashkin v. Hickory Finance Associates, Index No. 107068/95, 6/10/99 (Cozier, J.).

Procedure; motion practice; raising issue in notice of motion; motion to dismiss; terms of agreement prevail over assertions in complaint; meaning of document attached to complaint could be determined on motion to dismiss. Contracts; interpretation; clear and unambiguous. Statute of frauds (GOL 5-701(10)). Agreement whereby plaintiff was to serve as exclusive representative for the sale of an aircraft. Motion to dismiss. Defendant raised an issue in its moving papers but not in the notice of motion. Plaintiff addressed it at length. Since there was no prejudice from the error, the court would overlook it. The court found that the terms of the agreement must prevailover the complaint's conclusory assertions about its terms. The court found the terms clear and unambiguous. The court found that the defendant had terminated the agreement in accordance with its terms. Plaintiff argued that a statement anticipating cooperation in any transitional matters indicated an intention to continue to use plaintiff's services, which allegedly in fact occurred, meaning that the agreement had not been terminated or that a new agreement had been entered into. Or, plaintiff claimed, at least the matter was one of fact. The court rejected the argument. It stated that the meaning of the letter, which had been attached to the complaint, could be determined on a motion to dismiss. The court said that the statement had to be read in context and that it was plain that the purpose of the letter had been to terminate the agreement. Plaintiff claimed to have introduced the buyer after the termination, which would not permit recovery under a provision for post-termination sales where there had been a substantial contact prior to termination. The court stated that continued dealings after termination might give rise to an implied contract, which would require an analysis beyond the pleadings. However, the court ruled, the statute of frauds precluded recovery under any of plaintiff's various alternative theories. GOL 5-701(10). Motion granted. Wings Associates v. Warnaco Inc., Index No. 605071/98, 5/21/99 (Cozier, J.).

Procedure; motion to dismiss; adequacy of pleading; breach of contract; breach of implied covenant of good faith; anticipatory breach; alter ego liability. Tortious interference. Defamation per se. Motions to dismiss. Action alleging breaches of contracts giving plaintiffs rights to distribute software. The complaint sufficiently alleged various breaches; whether plaintiff could prove its case was not relevant on a motion to dismiss. A claim for breach of an implied covenant of good faith and fair dealing was upheld under Illinois law as a separate cause of action. The alleged breaches by defendants and a public statement that plaintiff would fail at achieving certain benchmarks (which allegedly could only occur if defendants had intended to breach in the future) did not suffice as an anticipatory

breach since they did not definitely and unequivocally communicate an intent not to perform. A tortious interference claim was dismissed for lack of an assertion of a contract breached. The statement was ruled to be a statement of opinion, not defamation per se. As plaintiff had alleged that it would suffer loss of good will and reputation as a result of defendants' conduct, a claim for a permanent injunction was found sufficient. As to one defendant, the court found that it had not signed relevant agreements and the assertion that it might be an alter ego indicated that the complaint was purely speculative as to it. This defendant was dismissed from the case. Motions granted in part. GT Interactive Software Corp. v. Midway Games, Inc., Index No. 600386/99, 5/21/99 (Cozier, J.).

Procedure; personal jurisdiction; doing business and solicitation plus; forum non conveniens; stay because of other action pending; pleading; breach of contract and anticipatory breach. Unjust enrichment. Ad services agreement between two Delaware corporations, one headquartered in New York and the other in Texas. At an early stage in the case, the court noted, plaintiff need only make a prima facie showing of jurisdiction. It ruled that such a showing had been made in view of defendant's staff of 25 or so in New York, the fact that a significant part of the work performed under the contract at issue had been done here, and the large amount of money spent by defendant on New York-directed ads. The court held that defendant was doing business in New York and that its contacts met the solicitation-plus test. The court found that defendant had done little more in support of a forum non conveniens motion than show that Texas presented an alternative forum; that branch of the motion was denied. The court refused to stay this action in favor of a Texas action under CPLR 3211(a)(4) since this action was commenced first. Nor was there a showing of prejudice to justify a stay under CPLR 2201. The court ruled that the complaint adequately pled claims for breach of contract and anticipatory breach. A contrary position was based on an erroneous reading of the agreement, the court found, since 90-days notice of termination was required. The provision relied on by defendant, the court ruled, concerned the right to terminate not the agreement itself, but work schedules. An unjust enrichment claim was found defective under Texas law given the existence of a written contract. J. Walter Thompson U.S.A. v. Dell Computer Corp., Index No. 605247/98, 5/4/99 (Ramos, J.).

Procedure; prior action pending; special proceeding; pleading; misappropriation of trade secrets; unfair competition. Motion to dismiss because of prior action pending and failure to state a claim (CPLR 3211(a)(4) and (7)). The prior action was in fact a special proceeding for pre-action discovery, now mooted by the commencement of this action. The court ruled that movants had failed to show an identity of claims or that the proceeding would resolve all the relevant substantive claims. The court found that the pleading sufficiently alleged misappropriation oftrade secrets as defendants were alleged to have solicited a key group of 2-300 investors from plaintiff's customer list. The court stated that the corporate defendant could be enjoined from using or benefitting from misappropriation allegedly committed by the other defendant. The court found an alleged breach of a separation agreement in the assertion that the individual defendant had allegedly gathered and retained investor information whereas he had warranted that he did not possess any documents or other property of plaintiff. The court upheld an unfair competition claim since the court found that that capacious form of claim was present in the assertion that there had been misappropriation of customer lists and trade secrets. Wien & Malkin LLP v. Wichman, Index No. 604634/98, 5/5/99 (Cozier, J.).

Procedure; reply papers. Contracts; exhaustion of contractual remedies; damages and filed rate doctrine; alter ego status; implied covenant of good faith. Preemption. Fiduciary duty. Misrepresentation. New arguments in reply papers. Purported class action for breach of contract due to defendants' alleged failure to provide health care as promised based on financial considerations. The court rejected an argument that dismissal was required because plaintiffs had failed to exhaust contractual remedies since it was not clear that the claim asserted here would fall within the scope of the grievance/appeals procedures in the agreements. This action did not concern damages for denial of a claim. Similarly, the court also did not find that the breach of contract claim was rendered moot or preempted by changes to the Public Health Law setting forth standards for utilization review procedures. But the court ruled that dismissal was appropriate as to the claim for a declaratory judgment voiding two provisions now regulated by recent legislation (concerning disclosure of information and termination of health care professionals); the area was now preempted. The court refused to dismiss the contract claim for failure to allege damages, it not being clear that the claim for restitution of premiums was necessarily barred by the Filed Rate Doctrine. Plaintiffs did not challenge the rates set, but sought restitution for failure to fulfill contractual undertakings. In any event, the court found, nominal damages would be in order and the claim thus should not be dismissed. Dismissal against Prudential was denied since the court found that plaintiff had sufficiently alleged alter ego status and defendants had failed conclusively to disprove that as a matter of law. A claim for breach of an implied covenant of good faith was dismissed as duplicative of the contract claim. Dismissal of a fiduciary duty claim was ordered. The court found that there might be a fiduciary duty between health care plan and insured, but here the claim was based upon a purported duty owed to potential subscribers and plaintiffs had not alleged overreaching or other circumstances such as would have given rise to a fiduciary relationship. The court ruled that a misrepresentation claim was sufficiently particularized to withstand attack; to require more would be to make it almost impossible to bring a class action for the theories alleged here. Batas v. Prudential Insurance Co., Index No. 107881/97, 5/20/99 (Cahn, J).

Procedure; statute of limitations; fraud; discovery; CPLR 202. Partnership; general; derivative action; demand; pleading; individual action by partner. Derivative and individual action alleging fraud in connection with limited real estate investment partnership. As the movants alleged that the fraud claim was time-barred, the court looked to CPLR 202. The court applied a "place of injury" test. The court found that there was no proof that the solicitations, provision of financial statements, misrepresentations, and any economic injury occurred other than where the plaintiff resided, in Washington, D.C. A three-year statute is applied there, with the time running from when the fraud is, or reasonably should have been, discovered. A plaintiff is required there to observe a duty to investigate matters at all times in a reasonable manner. The court noted that plaintiff had begun losing money shortly after investing in 1988; received nonconforming financials in 1992 and wrote complaining; but continued to invest until 1994. He did not follow up until 1997. The court ruled that no fraudulent activity after 1994 could be relied upon and that there had been a failure to investigate. The claim accrued at the latest in 1994 and thus was time-barred. It would also be barred under New York law. The law of the state of incorporation governs pre-litigation demands in derivative actions, here New Jersey. Either a limited partner must make a demand of the general partners that is rejected or it must be futile to do so. N.J.S.A. 42:2A-62. The court found that it would have been futile where the general partners' own wrongdoing was alleged. However, the court said, the complaint must still set forth with particularity the efforts made or the reasons for not doing so. N.J.S. A. 42:2A-64. The court ruled that the pleading was deficient in these regards, but granted leave to replead. Although generally a partner may not sue another at law unless there is a prior accounting or settlement of partnership affairs, there is an exception when there is a breach of an independent covenant in the partnership agreement. The court upheld a claim of breach due to failure to provide proper financials. Motiongranted in part. Von Hoffmann v. Taylor Simpson Group, Index No. 602320/98, 5/28/99 (Cozier, J.).

Summary judgment; issues of fact. Release. Contracts; defense of illegality. Amendment; illegality defense omitted from answer. Dispute over construction contracts. Defendant moved for summary judgment. A prior motion had been denied due to the existence of questions of fact. On this motion defendant again asserted the defense of release. However, the court ruled, recent deposition testimony did not differ materially from that offered on the prior motion disputing the authenticity of the signature thereon. A coercion and trickery argument by plaintiff concerned a different matter, a satisfaction of lien, and here too the court found that the testimony had been consistent and that there was some confusion in the record. An illegality defense based upon alleged extortion also gave rise to questions of fact. Where significant work had been performed, there were questions whether the payments had been collateral or incidental and as to defendant's relative culpability. The motion was denied. Defendant's motion to amend was granted. Although an illegality defense is generally waived if not raised in the answer, its assertion should not be precluded, the court ruled, where, as here, the papers reflect that there had been awareness of the issue. Long Industries v. Deluxe Development of New York, Index No. 29487/92, 3/7/99 (Shainswit, J.).

Trade secrets; employment contracts. Dispute over former executive search employee in the corporate bond field. Application of former employer denied. The court found that there was a factual dispute as to the extent to which the alleged confidential information was available from public sources and movant could not contradict at this stage the assertion that plaintiff had used her own recollection of previous experience, which is not prohibited. Movant had also failed to demonstrate misappropriation or use of confidential information. General suspicions do not suffice, the court stated, and the new employer showed that it had had a pre-existing relationship with certain former clients of movant. Not enough had been shown to warrant a hearing. Buhler v. Michael P. Maloney Consulting, Index No. 603246/98, 6/15/99 (Cahn, J.).

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