The ***Commercial Division***

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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

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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. 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; survival of non-compete clause. Preliminary injunction (CPLR 7502(c)); loss of patient base. Respondent argued that there was no obligation to arbitrate disputes over a non-compete clause since the agreement had been terminated. The court discussed relevant case law and concluded that, based thereon, the argument was meritless. The court granted petitioner a preliminary injunction since competition would cause the loss of petitioner's patient base, which could not be compensated for solely by damages. (CPLR 7502(c)). The arbitration would proceed. Volcovici v. Albulak, Index No. 5741/00, 5/17/00 (DiBlasi, J.)

Arbitration; waiver of right by litigation. Construction contract dispute. A contract at issue contained an arbitration clause. The court found that this clause controlled unless there had been a waiver by the GC, which had appeared in one action and

commenced a second before demanding arbitration. The court ruled that the GC had manifested a desire to litigate and that there had been a waiver despite the claim that the clause had been overlooked. Actions consolidated. Arbitration stayed. German School v. Losco Group, Index No. 1657/00, 6/16/00 (DiBlasi, J.).

Attorney and client; disqualification; Matter of Beiny. Motion to disqualify plaintiff's counsel granted where counsel had obtained defendants' confidential documents from a third party without notice to defendants' counsel. Even if the error had been inadvertent, counsel was obliged to follow defendants' instructions about the records. That the records might ultimately be producible was held not dispositive. A protective order was issued. Leave granted to amend and add allegations against a named defendant. Schwartz v. Schwartz, Index No. 602276/99, 6/22/00 (Gammerman, J.).

Attorney and client; disqualification; professional services corporation; prejudicial testimony. Action by attorney against former firm. Motion to disqualify a member of defendant firm from representing itself. Though a corporation must appear through an attorney, a professional corporation of lawyers may appear by its members. The court ruled that this was so even though the members could not be held personally liable (BCL Art. 15) since their status as licensed attorneys enabled them to appear for defendant. Plaintiff argued that defendant should call the lawyer as a witness. The court found that plaintiff had failed to show that the testimony might be so prejudicial as to warrant disqualification at this time. Motion denied. Toren v. Anderson, Kill & Olick, P.C., Index No. 605660/99, 6/8/00 (Freedman, J.).

Champerty; guarantee. Action to recover on a guarantee. Defendant argued that the plaintiff's acquisition of the guarantee constituted champerty. Jud. Law § 489. The statute is violated only if the primary purpose of a purchase/assignment is to enable the purchaser to sue. Plaintiff argued that it had made the purchase to protect its principal, a co-guarantor, from being liable for a greater sum than the purchase price. Defendant responded that plaintiff could have simply purchased the debt. As there was a sharp dispute as to motivation, summary judgment was denied. Hope Realty v. Minskoff, Index No. 121899/99, 6/21/00 (Cahn, J.).

Contracts; construction; interpretation; change orders. Action arising out of construction contract. The court found that damages for which plaintiff sued had not been the subject of change order requests, although plaintiff had used the change order procedure for other items and understood it. The court held that plaintiff was barred by the contract from recovery as to these damages. Plaintiff's claims relating to the timing of work failed, the court held, in view of a "no damages for delay" provision. The court found that contract provisions indicated that delays caused by construction problems had been contemplated as possible, with the change order mechanism being the device to address the problem. Tougher Industries v. Board of Education, Index No. 6279/95, 6/00 (Stander, J.).

Contracts; interpretation; adjustments to purchase price; notice of claim; failure to object. Plaintiff purchased a corporate division from defendant for $135 million, subject to contractual adjustments. Plaintiff had sent a notice of claim seeking adjustments. As defendant had not objected to the notice on time, plaintiff moved for summary judgment. The court rejected defendant's argument that the notice did not comply with the agreement because it had incorrectly identified the date of the agreement as this was not a fatal irregularity; there had been only one agreement between the parties. The court further rejected the argument that accrual of a complete claim was a requisite for a proper notice under the agreement. The document had been a notice to which defendant should have responded. As the contract so required, that it might be harsh did not alter the result. The failure to object barred defendant from contesting that adjustments were due. Hexcel Corp. v. Hercules Inc., Index No. 602293/99, 6/16/00 (Cozier, J.)

Contracts; interpretation; anti-assignment clause. Action seeking declaratory judgment regarding right of a beneficiary of a settlement agreement to sell the right to receive future payments given anti-assignment language. A clause prohibited assignment, but the agreement elsewhere referred to assigns and successors in interest. The court ruled that the assignment was permissible since the agreement did not contain an express statement that an assignment would be void or invalid; a mere prohibition would give rise to a claim for damages but not invalidate the transfer. In addition, there was ambiguity in the agreement. C.U. Annuity Service Corp. v. Young, Index No. 602416/99, 6/19/00 (Cahn, J.).

Contracts; interpretation; option to purchase; ambiguity; extrinsic evidence. Bench trial on the issue whether plaintiff's option to purchase the Roosevelt Hotel for $36 million required payment of an additional $23 million to satisfy mortgage indebtedness of defendant. Defendant had refused to close unless plaintiff took the property subject to an obligation to pay two mortgages for $23 million on the theory that they were renewals, modifications, etc. of a mortgage defined in the lease and appearing on a schedule thereof. The property was to be conveyed free and clear of all liens and encumbrances except set forth in the schedule. The court ruled that plaintiff did not have to make the additional payment. The court found that the price term was unambiguous and could only be construed as a guaranteed maximum price. The court ruled that the later language requiring conveyance free and clear of liens and except as set forth in the schedule did not compel a different result since express, unambiguous language is required to impose mortgage liability. Taking a deed subject to a mortgage does not constitute assumption of the mortgage. The listing of the mortgage on Schedule B was meant to identify and acknowledge a lien in favor of a bank. Further, defendant's interpretation would do violence to other provisions of the document. The plaintiff's liability would be unlimited since the price would include all extensions, modifications, etc. of the listed mortgage. Defendant's effort to read a $23 million cap into the agreement to escape this problem was unjustified. None of the terms of the purported additional obligation of plaintiff were set forth. The lease was unambiguous. Assuming that extrinsic evidence could be relied on, that evidence supported plaintiff. Roosevelt Hotel Corp. v. Letoh Associates, Index No. 600379/99, 5/22/00 (Gammerman, J.).

Contracts; limitation of liability clause. Procedure; summary judgment; opposition. Contract for telecoms service. Plaintiff sued because of defective service. Defendant relied on a tariff containing a clause limiting liability; the court held that this was enforceable absent a showing of gross negligence or willful misconduct. On this motion for summary judgment, the court held that plaintiff, after full discovery, had failed to meet its burden in opposition of presenting facts raising an issue of fact as to gross negligence or willful misconduct. The proof presented tended to show defects falling short of this standard. Case dismissed. Starwise Communications v. Rochester Telephone Corp., Index No. 3616/96, 6/00 (Stander, J.).

Contracts; liquidated damages. Misrepresentations; merger provisions; reasonable reliance; due diligence. Rescission; mutual mistake. Action involving alleged breach of contract to purchase real property. On a counterclaim defendants sought to recover consequential damages. Although not all additional damages are barred by a liquidated damages clause, these were, the court held, because they were directly related to the alleged breach. Counterclaim dismissed. The court held that a claim asserting misrepresentations about the property failed. The agreement contained specific merger provisions. The court held that plaintiffs were precluded from asserting fraudulent inducement. Further, plaintiffs could have found the facts by reasonable diligence, which precluded reasonable reliance. The merger provisions and lack of diligence also doomed a claim for rescission due to mutual mistake. A claim premised on a change to the property failed since the contract permitted defendants to remedy any defect which prevented transfer of title. Summary judgment for defendants dismissing these claims and on their counterclaim for breach of contract. Spence v. Chernick, Index No. 914/00, 6/14/00 (DiBlasi, J.)

Contracts; promotional game; rules. Procedure; summary judgment; conversion; affirmation by person with knowledge. Action for breach of contract based upon defendants' failure to pay prizes in newspaper game. Plaintiffs claimed to have won where the paper had incorrectly printed numbers. Defendants relied upon a portion of the rules providing for random drawings where errors occur. Plaintiffs argued that the provision was unconscionable because the rules had been printed on the back of the game cards and defendants had unequal bargaining power. The court found that the rules controlled. The court treated defendants' motion to dismiss as one for summary judgment and granted it where plaintiffs had submitted an affirmation by counsel without personal knowledge of the facts. Mayfield v. Daily News, Index No. 125133/99, 6/27/00 (Cozier, J.).

Contracts; rescission; mutual and unilateral mistake; impracticability. Unjust enrichment.

Action to rescind agreements and recover payments made due to mutual mistake, commercial impracticability, unjust enrichment, and unilateral mistake. Plaintiffs licensed defendant's glass decorating technology, but found that it would not work on amber beer bottles, as intended. The contracts contained express disclaimers and a merger clause. The court found that plaintiffs had failed to produce proof of mutual mistake. The inference from plaintiffs' proof, the court found, was that plaintiffs had failed to test defendant's technology, despite acknowledgment in the agreement. This would not form the basis of mutual mistake or impracticability claims. The unilateral mistake claim failed since there was no proof of fraud and plaintiffs could have discovered the problem by use of due care. Given a valid contract, a quasi-contract remedy was unavailable. Case

dismissed. G & G Investments v. Revlon Consumer Products Corp., Index No. 604165/99, 4/24/00 (Shainswit, J.)

Contracts; statute of frauds; unjust enrichment; injunctive relief. Procedure; motion to dismiss. Alleged oral agreement (term depending on success during greater part of first year) to form LLC whereby defendant, stock market commentator, would produce subscription-based internet column. Defendant had allegedly violated agreement by taking plaintiff's project to another online company. The court rejected a statute of frauds argument because the allegations indicated that the LLC would continue beyond the first year only if successful. An issue of fact as to interpretation would not justify dismissal prior to answer. A breach and damages were sufficiently alleged. An unjust enrichment claim was sufficiently alleged since plaintiff claimed that plaintiff's business plan had been shared by defendant with another company without compensation to plaintiff. The court found that defendant had failed to demonstrate why plaintiff's cause of action for injunction could not be granted since defendant could be enjoined not to work for another company. Motion denied. Harrison v. Dorfman, Index No. 604841/99, 5/30/00 (Cahn, J.).

Corporations; derivative action; standing; conflict of interest; pleading corporate waste. Derivative action for corporate waste. Defendants challenged plaintiff's standing because as the proponent of a hostile takeover attempt, his interests conflicted with those of the shareholders generally. The court found that plaintiff would have a motive, as the takeover proponent, to minimize the purchase price, but that defendants had not set forth facts to show that he was actually acting in a manner antagonistic to the general interests. The court stated that even if plaintiff were disqualified as plaintiff, defendants had failed to show that the intervenor-plaintiffs would not be adequate representatives. The court held, though, that the amended complaint failed to state a claim for corporate waste because plaintiffs had failed to set forth specific allegations of wrongdoing, supported by detailed factual assertions as to improper ads, self-serving business trips, "sweetheart" leases, commingling of tenant deposits, or a conspiracy to purchase shares for personal gain. There was also a failure to allege facts to show that compensation paid was so excessive as to be subject to judicial review under prevailing law. The court declined to allow a further amended pleading since it too lacked the necessary detailed allegations. Case dismissed. Preefer v. Bernstein, Index No. 602164/99, 6/29/00 (Cozier, J.).

Franchise agreements; termination; waiver. Trademark infringement; remedies. Guarantees; knowledge of terms; personal liability. Dispute over franchise termination. Defendants argued that plaintiff had waived termination by continuing to deliver product afterward. The court rejected the argument in view of language in the agreement, plaintiff's concern that a total cutoff pending judicial resolution would damage its goodwill, and its prompt commencement of this suit. The court found that plaintiff was entitled to injunctive relief requiring defendants to cease operation as a franchisee because of trademark infringement. The court held that equity did not favor a monetary award therefor as defendants had not been engaged in fraud or palming off, but had continued to use plaintiff's product and its name. Recovery of ad and royalty fees was denied as they were post-termination. The court found that earlier fees were due irrespective of lack of profits. Other defenses were rejected. As to a guarantee, lack of knowledge of its terms was not a defense to its enforcement. Defendants had signed personally. Baskin-Robbins USA v. MAC II Enterprises, Index No. 603751/99, 6/14/00 (Cahn, J.)

GBL 349; deception; excessive charges; coercion. Class action alleging violation of GBL 349 based on false and inflated shipping and handling charges by defendant music club. The court found that a decision upholding a similar complaint in California was not binding nor of much persuasive value. The court also found that defendant had informed its customers of the charges prior to requesting payment. Thus, there had been no deception. That the charges might be excessive was not pertinent since they were not deceptive and there had been no coercion. Case dismissed. Zuckerman v. BMG Direct Marketing, Inc., Index No. 604003/99, 6/23/00 (Cahn, J.).

Guaranty; defense of fraud. Action on unlimited guaranty. Defendant argued that he had been fraudulently induced to enter into the guaranty by certain promises. The court ruled that the argument was defeated by the clear, unambiguous, absolute and unconditional language of the guaranty repudiating reliance on outside representations. Assertions of parol representations containing conditions did not overcome the clear language. Summary judgment granted; leave to amend denied. Merchants Bank v. Moralis, Index No. 603777/99, 5/31/00 (Cahn, J.).

Guaranty; writings sufficient to constitute. Misrepresentation. Fraudulent conveyance. Account stated. Contracts.

Settlement. Action for breach of contract to purchase goods. The court held that writings failed to support plaintiffs' claim that the individual defendant had signed a guaranty. He had been attempting to obtain a personal loan to enable the defendant entity to pay its debt. This doomed a fraud claim as well since the individual defendant had not represented that he would guarantee the obligation. A fraudulent conveyance claim against this defendant failed where he had not been a party to the agreement at issue and plaintiffs did not articulate why he would be otherwise liable. As no account had been rendered to this defendant, he would not be liable on that theory. The court held that the corporate defendant was liable, but that there were issues of fact as to damages. The court concluded that unsigned stipulations of settlement were not binding on defendants, especially where they contended that they had rejected the final settlement proposal. Holler v. JBQ Sport, LLC, Index No. 603500/98, 5/8/00 (Cahn, J.).

Indemnification; duties. Contracts; interpretation; extrinsic evidence. Fiduciary duty; insurer/insured relationship. Misrepresentation; failure to disclose; superior knowledge. Motion by plaintiff to dismiss affirmative defenses and counterclaims. The court held that the indemnification agreement at issue required plaintiff to provide retroactive coverage and issue a certificate of insurance, which it did, not to give notice of a settlement and to enter into a settlement for a reasonable amount only. The court declined to look to extrinsic evidence. This defeated a counterclaim for breach of agreement, as well as a counterclaim and defense based on the implied duty of good faith. However, the court upheld an affirmative defense founded on the notice and settlement issues. The court rejected a counterclaim and a defense for breach of policy regarding the right to settle, noting, inter alia, that the indemnification agreement barred a claim against plaintiff. A counterclaim for breach of fiduciary duty failed since there is no such relationship between insurer and insured. Though there are exceptions to this rule, the court held that this was not one of them. A fraud counterclaim and defense also failed. Failure to disclose could not be a viable theory on the ground that there had been a fiduciary relationship. As to plaintiff's superior knowledge, defendants knew well in advance that plaintiff was trying to settle with the third party but had made no inquiries. Motion to dismiss granted in part. National Union Fire Ins. Co. v. Red Apple Group, Index No. 601073/99, 6/8/00 (Cozier, J.).

Misrepresentation; reasonable reliance; CPLR 3016(b). Unjust enrichment. Contracts; pleading breach. Piercing corporate veil. Plaintiff alleged that it had been defrauded out of 44 condominium units in connection with certain financing arrangements. The court held that the fraud claims had to be dismissed since there could have been no justifiable reliance. Plaintiff's president, a sophisticated business person, had allowed an attorney associated with defendants to represent plaintiff; had signed two contracts at the closing though he had expected one; and had signed though he did not realize that agreed-upon guarantees were missing. The failure to read commercial contracts before signing was gross negligence and bound plaintiff. The fraud claims also lacked necessary detail (CPLR 3016(b)). Leave to replead denied. An unjust enrichment claim was barred by the existence of a contract. The court held that a breach claim had been adequately pleaded where facts were alleged to indicate that two agreements should be read as one. The court held further that the pleading adequately alleged the elements of claims to pierce the corporate veil (reverse piercing) as it asserted complete domination, inadequate capitalization and damage to plaintiff. Cancellation of notice of pendency denied. Manshion Joho Center Co. v. Norura Suzuki Properties, Index No. 114143/99, 6/12/00 (Cozier, J.).

Preliminary injunction; employment contracts; disputed facts; temporal and geographic limitations; trade secrets; liquidated damages. Action against former employees for breach of contract and other wrongs. Motion for preliminary injunction. The court noted that some recent appellate decisions had sustained denials of preliminary injunctions in favor of a speedy trial where the facts are in dispute. Though defendants had agreed not to deal for two years with customers with which they had dealt on behalf of plaintiff, there was a serious dispute as to whether plaintiff had fulfilled obligations to clients and which customers had been serviced by plaintiff. The covenant was not limited temporally or geographically. Plaintiffs had made conclusory assertions about trade secrets. Further, the agreements contained liquidated damages provisions. There was also no showing that new employees could not retain the customers. Motion denied. Synergy Sport Inc. v. Russo, Index No. 601445/00, 6/14/00 (Freedman, J.).

Preliminary injunction; right of first refusal. Plaintiff operator of a tennis facility under agreement with the Village sued for violation of its right of first refusal regarding an expansion. The Village sought new financial and other conditions for the new facility. Plaintiff contended that it had the right to perform under the last agreement with the Village. Motion for preliminary injunction. As to likelihood of success, the court rejected plaintiff's argument that a ten-day period for exercise of the right was too short since the Village had provided relevant information months in advance. The court also rejected the contention that plaintiff was not required to build and operate the larger facility because of the right of first refusal as that would limit the manner in which the Village uses the property, which would effectively violate the ban on alienation of public park land. The

court agreed with plaintiff as to likelihood of success that the financial and related terms had been imposed to defeat plaintiff's right. That right is an opportunity to match the terms of a third-party's offer. The nature of the terms and the lack of justification for aspects of them supported plaintiff. The court held that since the new facility had never existed, there was no basis for calculating damages to plaintiff if it were to prevail, so that the irreparable harm standard had been met. The balance of equities favored plaintiff. Motion granted; undertakings to be posted. Harbour View Racquet Club v. Village of Mamaroneck, Index No. 8543/00, 6/15/00 (DiBlasi, J.).

Procedure; collateral estoppel; prior court order bound plaintiff from litigating constructive trusteeship theory. Action raising question whether defendants had breached fiduciary duty by procuring a judgment in a prior action and executing on plaintiff's assets. The court rejected a claim that defendants held property as constructive trustees for plaintiff since a prior court order had upheld the sheriff's sales. The court also held that the prior order was binding on plaintiff and barred him from asserting the claims raised here. The court found that plaintiff had lost his interest and thus had no standing. Although plaintiff could have commenced this action, the prior order collaterally estopped plaintiff from relitigating issues here. Case dismissed. Fishgold v. C.O.F. Inc., Index No. 7539/97, 6/00 (Stander, J.)

Procedure; personal jurisdiction (CPLR 301, 302). Referee had held that jurisdiction was lacking. The court found that plaintiff had failed to show that the U.S. sub was financially dependent on defendant or that its operational policies were controlled by it. The record showed that the sub was not a mere department. CPLR 301. As to 302(a)(l), defendant had not signed the agreement in N.Y. The parties did negotiate a part of it via video conference, but there was evidence that plaintiff's representative may have signed a renegotiated version outside N.Y. The record sufficiently supported a finding that defendant had not transacted business here. Nor did the referee err in finding that the agreement did not list N .Y. as a place of contract performance or payment and services provided by the sub had occurred in New Jersey. Report confirmed; complaint dismissed. Libra Global Technology Services v. Telemedia Int., Index No. 604833/98, 6/26/00 (Cahn, J.)

Procedure; personal jurisdiction; reference. Default. Action alleging elaborate check-kiting conspiracy. One defendant raised an issue of personal jurisdiction, which was referred to a Special Referee. The Referee, faced with a credibility issue, had concluded that service had been proper and sufficient. The court upheld the Referee's report. Although the plaintiff had acted diligently, the record did not show that defendant had received a copy of the summons. Also, defendant had shown that he might have a meritorious defense. Motion to vacate default granted. Chemical Bank v. Hirsch, Index No. 117629/95, 4/27/00 (Shainswit, J.)

Procedure; personal jurisdiction; transacting business (CPLR 302(a)(1)). Standard discussed. The claims here related to requisition of a steel mill in Peru. The two key agreements were negotiated and executed and were to be performed there. Certain defendants had held a four-day meeting in New York to discuss other contracts; plaintiff was not a party to those and did not attend and its claims did not arise from them. That plaintiff's potential participation in dealings with defendants was discussed by defendants was immaterial given the significant contacts with plaintiff that had occurred outside New York. Defendants' retention of a N.Y. financial advisor was irrelevant since none of the claims arose from that relationship. Wire transfers that facilitated participation in the consortium by a defendant, not part of a transaction with plaintiff, were immaterial. Case dismissed as to certain defendants. Samsung America v. GS Industries, Index No. 604472/96, 6/20/00 (Cahn, J.).

Procedure; pleading; breach of contract; defamation; pleading in detail; qualified privilege; mixed opinions; special damages. The court rejected a contention that the complaint failed adequately to plead a breach of contract of employment of plaintiff securities portfolio manager. The court also rejected an attack upon a defamation claim. The court found that the words had been pleaded, as well as the circumstances, and that the words were not qualifiedly privileged because, though made between parties with an interest, allegedly motivated solely by malice. The statements - - that plaintiff had violated SEC rules, engaged in suspicious trades and should be investigated - - were mixed opinions and actionable if implied facts were false, as claimed here. The statements constituted slander per se so no pleading of special damages was required. Motion to dismiss denied. Feinberg v. Mackay-Shields, Index No. 604520/99, 6/19/00 (Freedman, J.).

Procedure; pleading; misrepresentation (CPLR 3016(b)); citation to indictment; stay pending outcome of criminal

case. GBL 349; effect on consumers. Donnelly Act; customer allocation. Damages. Action alleging scheme by defendants to allocate customers and fix prices for construction contracts. The court rejected an argument that the fraudulent conduct had not been spelled out in sufficient detail (CPLR 3016(b)) since plaintiff relied upon an indictment, which did contain adequate detail, and plaintiff was not required to rely on its own knowledge only. As to a GBL 349 claim, the court stated that the offers and sale of renovation services broadly affected consumers, in contrast with disqualified business-to-business transactions, as plaintiff had been acting on behalf of all coop shareholders. The court held that the complaint, based on alleged customer allocation, asserted a per se Donnelly Act claim. The complaint stated damages since it alleged that plaintiff had overpaid. The court ruled that the case should be stayed during the pendency of the criminal case. Valentine Gardens Cooperative, Inc. v. Kay Waterproofing Corp., Index No. 603384/99, 6/1/00 (Freedman, J.).

Procedure; pleading; third-party claims; relation to main claims. Partnership Law § 26(b). Action by law firm against former partner and secretary. The court ruled that a third-party complaint was defective since it was not based on the damages at issue in the main action. The other firm named as third-party defendant had not assumed any liabilities of the plaintiff firm. The individual partners of plaintiff firm were not liable on the third-party claims since they were improper individual claims against partners in a limited liability partnership based solely on that status. Partnership Law § 26(b). The claims for emotional harm and harassment were held deficient. Third-party complaint dismissed. Ferster Bruckman Wohl Most & Rothman v. Horowitz, Index No. 115490/97, 6/2/00 (Cozier, J.)

Procedure; renewal/reargument. Preliminary injunction. Indemnification (BCL 723(b),(c)). Shareholders derivative action. Motion to renew/reargue plaintiffs' motion for a preliminary injunction against defendants' use of corporate funds to pay legal expenses and enforcing a corporate resolution. Indemnification was authorized, the court had held and reiterated, because the shareholders' vote had validated the payments (BCL 723(b)(2)(B)). It made no difference when or whether the board had approved. Nor had the court erred in determining that the shareholders had made the finding required by BCL 723(b)(2)(B). Even if language supposedly approved had not been in the meeting notice nor in an earlier resolution, the statute had been met since the individual indicted defendant had owned 59% of the shares so his vote alone would have sufficed; his personal interest did not bar him from voting. The court found that there had been an error in the prior decision, premised on an attorney affidavit, that a certain person had been granted immunity whereas he had waived it. However, the court found that plaintiffs had not shown that the indicted defendant's actions had not been taken in the interests of the corporation. Indemnification of him would benefit the company because his conviction might expose it to license revocation or other sanctions. Plaintiffs had waited almost a year before filing the motion. The balance of equities had not shifted. Plaintiffs argued that the defendant's undertaking (BCL 723(c)) was invalid. The court rejected the argument that CPLR Art. 25 applied as the two undertakings served distinct purposes. The BCL had been complied with. Motion granted; decision adhered to except as to one paragraph, noted above. Pilipiak v. Keyes, Index No. 605120/99, 6/15/00 (Freedman, J.).

Procedure; standing; misuse of trust assets; statute of limitations; resignation as trustee; tolling agreement; equitable nature of relief; demand on trustees. Prudent Investor Act. Pleading; misrepresentation, unjust enrichment and accounting. Motion to dismiss motion alleging misuse of trust assets. The court rejected an argument that plaintiffs lacked standing because only trustees may sue since they had been made trustees and the court could correct any irregularity as to claims on which they might need to sue in that capacity and as beneficiaries. Also the rule relied on by defendant does not apply where the rights of the cestui que trust against the trustee are in issue; and beneficiaries can sue a fiduciary directly where he/she controls businesses and engages in self-dealing. A statute of limitations argument failed since the statute did not begin to run until defendant resigned as trustee in 1996 and a tolling agreement tolled the statute until after commencement of this action. Further, the court held that the breach of fiduciary duty claim here was equitable in nature and would be governed by a six-year statute, as would related claims. A claim under the Prudent Investor Act was upheld since defendant had usurped and exercised the power to control the investment and distribution of trust assets. The court held that the complaint stated claims based on fraud theories in adequate detail, unjust enrichment and a proper demand for an accounting. In view of the determinations above, the court held that no demand on the trustees was required. Motion to dismiss denied. Pressman-Neubardt v. Pressman, Index No. 603810/99, 6/6/00 (Cozier, J.).

Procedure; statute of limitations. Fiduciary duty. Conversion. Misrepresentation. Interference with contract. Action arising out of plaintiff's efforts to recover property stolen from her parents by the Gestapo during the Holocaust. The court ruled that causes of action relating to defendant's alleged interference with plaintiff's rights to property by defendant's filing of an objection to plaintiff's claim in Germany were time barred. The court held that an issue of fact had been presented as to whether defendant had owed a fiduciary duty to plaintiff because of questions as to defendant's mandate and its rights and

responsibilities as to property as to which it had filed a claim. A conversion claim was defective since the assets had never been in plaintiff's possession. A fraud claim failed since plaintiff had not alleged that she had relied on representations; defendant had made them to German officials. Interference claims failed since defendant had allegedly acted out of its own economic interest, not purely out of malice. Hammerstein v. Conference on Jewish Material Claims, Index No. 114355/98, 6/16/00 (Cozier, J.)

Procedure; summary judgment; monies due to non-party. Plaintiff moved for summary judgment on an account stated theory. However, the court found that the bills that had been sent had originated with a different corporation, a non-party, not a DBA. Further, the guaranty of the individual defendant sued on here had referred to the obligations owed to plaintiff, not the other entity. Motion denied. However, the court stated that the questions regarding the status of companies barred summary judgment for defendants. Hahn Automotive Warehouse v. Alrin Corp., Index No. 1871/00, 5/18/00 (Stander, J.).

Procedure; venue; specific performance counterclaim. Action for breach of contract, fraud, etc. Counterclaim for specific performance. Defendants moved to change venue because the counterclaim would affect real property. The court found that there were conflicting provisions for establishing venue. Since plaintiff had properly commenced the action in Monroe County, defendants asserted counterclaims for damages as well as specific performance, and plaintiffs had never occupied the premises as retail space and were not currently there, the court sustained venue in Monroe (CPLR 502). VJR Ski Corp. v. Lyndon Corners Group, Index No. 13420/99, 6/00 (Stander, J.).

Res judicata and collateral estoppel; foreign court judgment. Procedure; forum non conveniens. Action for breach of contract arising out of international equity swap and currency trade transactions. The court held that this case was barred by res judicata and collateral estoppel because of a judgment issued by the Taiwan District Court concerning the issues raised here. The court held that there was an identity of parties because the plaintiff here and its sole shareholder, a party there, were in privity. The issues actually litigated were the same as those present here, on liability and on damages. The court stated that, under transactional analysis, it did not matter that the claims here were for breach of contract while there they had concerned a personal guaranty. There was due process in the Taiwan proceeding; plaintiff had had a full and fair opportunity to contest issues. That the US does not have diplomatic relations with Taiwan did not matter where there had been neither fraud nor a violation of public policy. The court found that dismissal would also be required on forum non conveniens grounds as there was an almost total lack of nexus to New York. Case dismissed. Serano Ltd. v. Canadian Imperial Bank, Index No. 603377/99, 6/23/00 (Cahn, J.).

Unfair competition; inevitable disclosure. Contempt. Punitive damages. Unfair competition action arising out of sudden defection of employees of plaintiffs' division. The court dismissed a claim based on a theory of inevitable disclosure since that doctrine is not a basis for a cause of action. Another cause of action alleged the violation of a preliminary injunction in this case. But contempt should have been raised by motion or order to show cause in compliance with Jud. Law 756. This claim was dismissed. The court upheld requests for punitive damages on various claims on a motion to dismiss and allowed an amendment to add further such requests. U.S. Trust Corp. v. Newbridge Partners, Index No. 601272/99, 6/23/00 (Cozier, J.).

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