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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.*

Attorney and client; disqualification. Discovery; deposition priority. Fiduciary duty; cooperative corporation. Indemnification. Motion to disqualify firm because partner will be a fact witness at trial. Standards discussed. The court ruled that movant had not met her burden to show that the testimony would be necessary. A non-attorney present at the key meeting may provide testimony on the issue. Further, the court found that disqualification before discovery would be premature. The court upheld defendant's priority on depositions. And the court ruled that a fiduciary duty counterclaim would not be dismissed since a cooperative corporation does owe such a duty to its shareholders to treat them evenly and fairly. A complaining shareholder need only plead unequal treatment in order for such a claim to be

upheld. The court dismissed a third counterclaim as to indemnification for certain claims since they had not been brought against the defendant as officer or director but personally. Since the action alleged breach of an agreement to sign a negative pledge agreement, not the proprietary lease, a counterclaim for indemnification of legal fees could not be sustained under Real Property Law 234. 240-44 East 87th Street Owners Corp. v. Carlesimo, Index No. 600036/99, 1/5/00 (Shainswit, J.).

Attorney and client; retainer agreement; burden of proof on fee terms. Account stated. Misrepresentation and RICO; pleading. Jud. Law 487. Conversion. Special proceeding to enforce attorney's lien. Petitioner moved to determine and enforce a lien (Jud. Law 475). Petitioner relied on a retainer agreement. The attorney bears the burden of showing that a fee contract is fair, reasonable and understood by the client. An ambiguous agreement must be construed favorably for the client. The parties disagreed as to how to compute petitioner's fee. The court held that the agreement was ambiguous as to the meaning of "any recovery" (including pre-judgment and post-judgment interest, based on the final amount owed by the plaintiff after an appeal?). The firm had not met its burden of showing that the client had understood these terms. The court also ruled that the firm had not established that the terms, even if unambiguous, were fair and reasonable. On its face, the firm's interpretation would result in its obtaining the better of the bargain (about 57% of the judgment). The firm did not offer witnesses to show that the client had understood that the agreement would have such a result. The court found questions of fact as to an account stated on hourly fees since defense witnesses averred that they had objected to bills. The court referred both issues to a referee to hear and report. The court ruled that fraud, RICO and Jud. Law 487 counterclaims were deficient as the client had failed to set forth details as to intentional misrepresentation. The court found the firm's arguments on breach of fiduciary duty and breach of contract counterclaims inadequate. The court refused to dismiss a conversion counterclaim because it was not clear how much of the proceeds the firm was entitled to and whether it had wrongfully disbursed funds to itself. The court refused to allow the client to commence a third-party action against all partners and associates of the firm and converted the proceeding to a plenary action. Kelley Drye & Warren LLP v. 23/23 Communications Corp., Index No. 110563/99, 1/3/00 (Cozier, J.).

Banking; crediting incorrect account; reliance on power of attorney; Banking Law 239(7); UCC 4-406(4); 15 USC 1693; implied covenant of good faith by bank; UCC 3-419; negligence; aiding and abetting fraud and conversion; actual knowledge; punitive damages. Procedure; cross-motions against non-moving party (CPLR 2215). Action by estate against three banks and an individual to recover value of assets converted by deceased defendant (Worden). The court concluded that the violation of a Treasury regulation by a bank did not give rise to a private claim. A contract claim would be viable, however, since the bank could not fail to credit the agreed account and credit another. But the claim would depend on who opened the second account and whether reliance on a power of attorney was reasonable. Summary judgment was not possible. As to a theft from a safety deposit box, the court held that a negligence claim was time-barred but a contract claim remained and as to it there were issues of fact, including as to reliance on the power of attorney. As to a claim that the bank was liable for breach of contract for payment over forged checks issued on the decedent's original and allegedly bogus accounts, plaintiff relied on Banking Law 239(7). However, the court read a previous ruling by the Appellate Division as declining by implication to apply that provision. Further, that section would not necessarily take precedence over UCC 4-406(4) and 15 USC 1693 since these are not statutes of limitations but create conditions precedent to suit. A key was whether the bank had sent statements to the customer at the address he had designated. As to the original account, that was done and no claim could be maintained. Decedent had not notified the bank within one year of any forgeries. Questions of fact requiring a trial existed as to the second account, as well as to ATM transfers based on a power of attorney. The court rejected as a basis for a claim of breach of the implied covenant of good faith conclusory claims of knowledgeable participation by bank employees in the embezzlement scheme of Worden. Also the court ruled that plaintiff had only alleged a failure by the bank to perceive that a fraud was in progress and that this was not sufficient to sustain a claim for breach of UCC 3-419 (duty to act in good faith and in accordance with reasonable commercial standards) and a common law counterpart. A negligence claim was found to duplicate a breach of contract claim and was time barred. The court stated as to claims for aiding and abetting the fraud and conversion that the bank had to have had actual knowledge of the wrong but that plaintiff had merely made conclusory allegations of constructive knowledge. The court held that punitive damages were not available against the bank. Plaintiff argued that motions brought by three other defendants were procedurally improper as they had been brought as cross-motions against a non-moving party

(CPLR 2215). This is not proper, but it is a technical defect that may be disregarded when there is no prejudice and the opposing party has had ample time to be heard, as here. Claims against two banks were upheld in that a deposit into a bogus account would have been actionable; a question of fact was presented. A factual question was also presented as to whether the possession requirement of UCC 3-419 had been satisfied. Motions granted in part. Liberman v. Worden, Index No. 601357/97, 2/24/00 (Gammerman, J.).

Collateral estoppel; foreign country judgment. Procedure; summary judgment; semblance of issue. Dispute over alleged "poaching" of employee-brokers. The parties had entered into a "no poaching" agreement. A dispute later arose with regard to Belgian brokers. This was litigated in the English courts and resolved adversely to plaintiff. The question now was whether collateral estoppel effect should be given on the issue of whether the defendant Liberty had induced the Belgian brokers to breach their employment contracts. The court ruled that the issues decided by the English appellate court and the allegations in this case were virtually identical and that nothing indicated that plaintiff had not had ample opportunity to litigate. Two causes of action were thus dismissed. The court found that despite an enormous amount of discovery, plaintiff had not found a single piece of paper that conclusively supported its theory that Liberty had breached the agreement. Liberty had presented evidence in admissible form supporting summary judgment in its favor, whereas plaintiff had offered only a shadowy semblance of an issue. Plaintiff offered only speculation that Liberty had contacted the brokers during the term of the agreement. Summary judgment for Liberty. Cantor Fitzgerald Int. v. Liberty Brokerage Investment Corp., Index No. 600318/97, 1/27/00 (Cozier, J.).

Contracts; agreement with Banking Dept.; ambiguity; third-party beneficiary; standing. **Misrepresentation; duty to speak. Unjust enrichment; statute of limitations. Banking; regulations; private right of action. Money had and received; statute of limitations. GBL 349; statute of limitations.** Action based upon settlement agreement between main defendant and the Banking Department regarding illegal charging of mortgage processing fees. As to whether the defendant had owed any duty to inform its customers of the right to a refund, the court found an ambiguity in the agreement. The court ruled that plaintiffs would be intended third-party beneficiaries of the agreement. But defendants argued that they nevertheless had no standing to enforce the terms of a consent decree. The court distinguished Supreme Court and Federal precedents, stating that the plaintiffs did not seek to enforce the agreement, but sought damages for common law misrepresentation consisting of a failure to speak where there was a duty to do so. Further, the court ruled that under the relevant regulations, the defendant had had a duty to inform its customers of the manner in which they could obtain a refund of any fee charged. The court rejected a defense argument that the processing fees could have been charged as application fees so that unjust enrichment would not lie. The regulations forbade the inaccurate denomination of fees. The court rejected the argument that there was no private right of action under the regulations since what the case involved was not such a right, but an application of the principle that a contract with a regulated entity is deemed to incorporate the relevant regulations. The court held that the case presented a cause of action for money had and received, distinguishing Walts, 259 AD2d 322. The court also determined that the conduct alleged fell within GBL 349. The court ruled that a six-year statute of limitations would apply to the 349 and unjust enrichment claims and that there could be an estoppel. Motion to dismiss denied. Kidd v. Delta Funding Corp., Index No. 601030/99, 2/22/00 (Gammerman, J.).

Contracts; implied covenant of good faith; consumer contracts; print size (CPLR 4544). Misrepresentation; breach of contract. GBL 349. Class actions. Alleged class action asserting claims arising out of offer for low APR on credit card cash advances and use of a formula for allocation of payments that did not produce the promised rate. Defendant had allocated payments first to the cash advance balance and then to the purchase balance. The court found that defendant had not breached the literal terms of the agreement since the promotional materials concerned cash advances, not purchase balances. However, the court found, plaintiff had set forth a viable claim for breach of the implied covenant of good faith. Also, the court found ambiguities in the cardmember agreement and the solicitation. Summary judgment denied as there was a factual question as to how a reasonable customer would have interpreted the allocation provision. The court noted that the information about payment allocation in the solicitation might be inadmissible (CPLR 4544) so as to render the contract provisions unenforceable. The court ruled that the fraud claim was defective because it related only to a breach of contract. Further, defendant had explained its practices on numerous occasions when plaintiff complained about billings. The court upheld a claim under GBL 349. The court

also determined that the action was a proper class action. Broder v. MBNA Corporation, Index No. 605153/98, 2/23/00 (Cahn, J.).

Contracts; interpretation. Action against rock music group asserting rights in certain musical compositions. The court dismissed a claim for specific performance since the complaint failed to allege the existence of an agreement granting plaintiff the right to ownership of defendants' compositions during any period. The court found that two agreements had not been entered into by plaintiff or did not establish a right of plaintiff to ownership. The court declined to infer a right to ownership based on plaintiff's assertions of parol evidence. Related claims also failed. Kerr v. Brown, Index No. 606131/98, 2/23/00 (Cahn, J.).

Contracts; interpretation; merger clause. Estoppel. Prima facie tort; special damages. Action for recovery of commissions based upon agreement to produce special advertizing sections for a magazine. A written agreement contained a merger clause. Giving the contract language its plain and ordinary meaning, the merger clause, the court ruled, was not limited to prior agreements about one country but related to any other agreements between the parties about ad sales. Correspondence offered by plaintiffs did not change this result as it showed discussions, but not a final agreement, about sections for other countries. Conduct bore this out. It was unlikely, the court found, that the parties would have formalized an agreement about 30 countries without details. In any case, any purported oral multi-country agreement had been superseded by the one-country written agreement. This applied also to an estoppel claim. However, the court ruled, activities commenced subsequent to the written agreement concerning Egypt had allegedly been endorsed by defendant and this sufficed to state a claim for estoppel. A prima facie tort claim was time-barred in part. But as to another part the court rejected defendant's argument that plaintiffs had failed to plead special damages. Plaintiffs did not allege the same damages in the contract claim and this claim and should, the court held, be allowed to provide special damage information in a bill of particulars. Motion to dismiss granted in part. Kindler v. Newsweek, Inc., Index No. 603385/99, 1/24/00 (Cozier, J.).

Contracts; interpretation. Unilateral mistake of fact. Criminal usury; loan. Action by company making cash advances to restaurants as part of credit card system. Motion for summary judgment. The defendant, which had signed certain agreements that recited a debt to plaintiff, asserted that a unilateral mistake of fact was made when an official relied on regular statements received from plaintiff as to the sum due. The court held that this defense failed since the official had not exercised ordinary care by questioning the balance. The court ruled that a defense of criminal usury was meritless since the transaction was not a loan of money as plaintiff bore the risk of non-payment. The court found that plaintiff had not properly applied certain charges. Applying principles of contractual interpretation, the court concluded that a certain agreement had to be read to provide for application of credits. Summary judgment denied, but granted as to the defenses/counterclaims. Transmedia Restaurant Co. v. 133 E. 61st Street Rest. Corp., Index No. 601140/98, 2/7/00 (Cozier, J.).

Corporations; board election; restrictions on voting shares; disclosure in share solicitation. BCL 612(a), 620(a). Motion for TRO and preliminary injunction. Defendant bank was a stakeholder as to certain bank accounts of plaintiff. There had been conflicting corporate resolutions and letters as to how the bank should handle the accounts. At issue was a board election. Certain defendants argued that the main stockholder had failed to disclose the inability of the founder to direct the stockholder's vote in the election as required by a shareholder's agreement because of detention in China. The agreement had been disclosed in a prospectus sent as part of an IPO. Under New York law, an omission may invalidate an election if the results would have been different if no improprieties had occurred. Plaintiff asserted that foreign law, the law of the country of incorporation of plaintiff, controlled and under it the election was valid. The court took judicial notice of the foreign law (CPLR 4511) and held that the election was valid. Even if New York law applied, the court ruled, plaintiff would prevail because no proof was offered that the shareholder's agreement was part of the certificate of incorporation (BCL 612(a)) and, if the agreement were applied to the shareholder's shares, he would be totally disenfranchised and the shares would be unvoteable. BCL 620(a) could not be construed to produce that result. Plaintiff had shown entitlement to a preliminary injunction requiring the bank to recognize the results of the election and the new signatories on the accounts. Asia Electronics Holding Co. v. HSBC Bank USA, Index No.

605030/99, 1/24/00 (Cahn, J.).

Employment law; restrictive covenant; geographical and temporal scope. Preliminary injunction; conflicting facts (CPLR 6312(c)). Motion for preliminary injunction against former employee in telecommunications business. Defendant agreed to a non-compete agreement. Defendant argued that the clause was not reasonable. As plaintiff's business is nationwide, the scope of the clause was very broad but that alone, the court stated, did not doom the clause since the temporal scope was only six months. Thus, the clause was not unenforceable as a matter of law. Relying on CPLR 6312(c), the court ruled that plaintiff had sufficiently established that it was likely that it would prevail on the merits as to a violation, despite defendant's presentation of some contrary facts. The court found, based on the inevitable disclosure doctrine, that plaintiff had sufficiently established that it would be irreparably harmed. The court found that defendant could retain his level of skill and knowledge if barred from working at the competing job by remaining current in published materials. Nor did he show that he could not obtain similar employment in some other part of the telecoms industry. The court held that the balance of the equities favored plaintiff. Motion granted. Tellabs Operations, Inc. v. Gerstel, Index No. 19042/99, 1/24/00 (DiBlasi, J.).

Employment law; restrictive covenant; sale of business. Covenant signed in connection with corporate purchase. The purchaser failed to make a complete earn-out payment. Plaintiff, the former executive, sued. The purchaser sought preliminary injunctive relief. The executive was competing with the former business but asserted that the covenant had been terminated by non-payment. The court found that the purchaser was by agreement, construed as a whole, entitled to 150 days to cure the default. The breach by plaintiff established irreparable harm without proof of specific loss since the claim was based on sale of a business and goodwill. As defendants had paid millions for the business, the balance of equities favored them. Aloni v. Unidigital Inc., Index No. 600247/00, 2/14/00 (Cahn, J.).

Franchises; notices of termination; frustration of performance. Preliminary injunction. Motion for preliminary injunction restraining defendants from using plaintiffs' proprietary marks. Defendants failed to make franchise payments and submit reports on time. Plaintiffs sent notices to cure and of termination as required by the franchise agreements. The fact that some notices were addressed to one defendant when the other was the franchisee did not render the notices ineffective, the court held. Both entities were owned and operated by the same persons and the notices were sent to the correct location. The court rejected an argument that plaintiffs had frustrated performance by taking actions that reduced revenue. The alleged actions did not prevent defendants from submitting reports and paying fees since both steps could have been taken even if revenue had declined (the fees were to be a percentage of revenue, whatever that was). The court found a likelihood of success and the other requisites for an injunction. Dunkin' Donuts Inc. v. Flack Park Avenue South Foods, Index No. 601132/99, 2/7/00 (Cahn, J.).

Freedom of speech; commercial speech; error in book. Action alleging deceptive practices (GBL 349) and other claims based on the overstatement in a book of the annual rate of return achieved by an investment group, authors of the book. Plaintiffs argued that their claims were based on the words used to market the book, not the book's contents. The court granted a motion to dismiss. The First Amendment and the New York Constitution protected the words used in the book, and on its cover and flyleaf. The suit here was against the publisher and a book packager, not the authors. The court ruled that the speech was not purely commercial. The phrases on the cover and flyleaf and in the introduction used to sell the book were at most only hybrid commercial speech and the challenged part of the words came from the book itself and could not be transformed into commercial speech because of their location. Other words were only non-actionable puffery. Defendants did not have a duty to investigate and verify the contents of the book. Case dismissed. Lacoff v. Buena Vista Publishing, Inc., Index No. 606005/98, 1/28/00 (Cahn,),

Insurance; misrepresentation; insurance application. Widow sued to recover on insurance policy. Defendant denied the claim on the ground that the decedent had made a material misrepresentation. The decedent had died from a disease from which the insurer found he had been suffering prior to his application. The decedent had answered a question on the application that he had worked at least 17 ½ hours each week during the preceding 90 days, with

"normal vacation" being a work day. The insurer concluded that the decedent had taken several days off from work to have chemotherapy treatments and that, excluding such days, the answer to the question was inaccurate. Plaintiff claimed that the decedent's time sheets showed that he had taken the days as "annual leave," and thus had met the necessary standard. The court held that the question was ambiguous as a matter of law. The court also concluded that despite the fact that the decedent had taken the time off to get treatments, the time, having been recorded as "annual leave," was considered vacation, personal, business or religious time. A person in the decedent's position, the court found, could have reasonably interpreted the question to mean that "annual leave" falls within the scope of "normal vacation." Summary judgment to plaintiff. Whalen v. American General Life Ins. Co., Index No. 20111/96, 2/15/2000 (DiBlasi, J.).

Limited Liability Company Law; liability of individuals. Action alleging breach of contract in connection with provision of digital video disks. Individual defendants moved to dismiss on the ground that plaintiff had done business with a limited liability company. Plaintiff argued that defendants had never disclosed the status claimed. The relevant documents named the entity but did not identify it as a limited liability company. Plaintiff had assumed that it was dealing with an unincorporated business entity or common law partnership. The court found that defendants had failed to comply with Limited Liability Company Law 204 by failing to use a proper name. Nor did defendants file a doing business certificate. Thus, the court held that the individual defendants would be liable. David and Joan LLC v. Siegel, Index No. 108221/99, 1/24/00 (Cozier, J.).

Partnership; alleged forced resignation; duress; fiduciary duty. Legal malpractice. Action by former law firm partner alleging breach of the partnership agreement. Defendant asserted that plaintiff had resigned after becoming the target of federal criminal charges. Plaintiff claimed that he had not voluntarily resigned but had been taken advantage of by the firm at a time of personal crisis. Plaintiff argued that he had not been dismissed by a proper vote nor had he submitted a written resignation, as required by the agreement. The court rejected the defense argument that the writing requirement was for the benefit of the firm or was waived as a matter of law. The court found that the jury could conclude that the firm had forced plaintiff to resign. Triable issues precluded summary judgment. This was also true as to a fiduciary duty claim. The court rejected the defense argument that the demand that plaintiff resign upon threat of discharge was not duress as a matter of law. The court rejected the argument that since the agreement permitted expulsion on a two-thirds vote, any threat to exercise that power could not constitute a breach of fiduciary duty. But plaintiff was expelled by the Management Committee, not by such a vote. The court did note that merely threatening plaintiff with an expulsion vote under the agreement would not, without more, be actionable. The court held that no legal malpractice claims could be brought against defendant arising out of its provision of legal help to plaintiff at the time of his resignation. The only alleged relationship concerned the criminal matter. Even if defendant had had a conflict of interest, such a breach by itself cannot give rise to a cause of action against the attorney. The court held that since plaintiff had made a conscious, not an uninformed, decision not to sue defendant because of his termination, his claim that defendant had not advised him of his rights to sue it failed. A defamation claim was time- barred and could not proceed by being cast as a different tort. Rosenthal v. Chadbourne & Parke, Index No. 604693/96, 1/28/00 (Cahn, J.).

Partnership; motion to dismiss. Labor Law 198-c. Preemption; ERISA. Individual liability. Action alleging a partnership arrangement with defendants and seeking profits therefrom. Standards discussed. The court held that plaintiff had adequately pled the existence of the partnership relationship. As to CPLR 3211(a)(1), the court rejected defendants' argument. Withholding of income taxes and social security contributions may tend to support a finding of an employee relationship, but the evidence did not, the court stated, resolve the issue as a matter of law. The court dismissed an alternative claim under Labor Law 198-c as to health insurance premiums because of preemption under ERISA and because professional employees whose earnings exceed $ 600 per week are excluded. Case against individual defendant dismissed since the relationship was with the firm. Aaron v. Audrey Golden Associates, Index No. 602612/99, 1/31/00 (Shainswit, J.).

Prima facie tort; malice. Misrepresentation; relationship to contract. Contracts; separability; delivery

deadlines; waiver. Action for payments due under a contract to create computer games. Defendant had terminated the contract because of alleged defects in plaintiff's games. Motion to amend. The court ruled that a proposed new claim of prima facie tort was defective for failure to allege malice as the sole motive and since evidence showed that the conduct had been motivated at least in part by business concerns. The court rejected a proposed fraud claim on the ground that it duplicated a contract claim, because an intent not to honor an agreement is not fraud and because the damages sought were for lost opportunities rather than out-of-pocket losses. A claim for fraud due to failure to report or underreporting of royalties was defective because the alleged fraud was not collateral to the contract. As to plaintiff's motion for summary judgment, the court found that one game had been timely delivered and accepted. Another had been delivered late but defendant had waived the deadline through a course of conduct in requesting modification. The court ruled that the agreement was divisible. The motion was granted as to payments for these two games. Questions of fact were found as to the other two games. Scavenger Inc. v. GT Interactive Software, Inc., Index No. 122083/98, 2/15/00 (Cozier, J.).

Procedure; choice of law. Misrepresentation; negligent; promise of future actions or intentions. Alleged misrepresentation arising out of commercial mortgage transaction. Defendants argued for dismissal on the ground that the action was in reality one for breach of contract. The court ruled that the law of New York as the forum state controlled how a claim was characterized. Further, a choice of law provision provided that New York law would control the parties' rights under the application. As New York had a reasonable relation to the transaction and there was no public policy issue, its law would be applied to determine whether the two claims at issue would survive the motion. The court held that allegations that the plaintiff had relied on claimed statements by defendants that the loan had been approved and closed would suffice to warrant denial of the motion as to a negligent misrepresentation claim, especially as there was some doubt whether there had been a binding contract. The court ruled that plaintiff's allegation that defendants had several times stated that the loan had already been approved was not merely a promise of future actions or intentions, but a claimed misrepresentation as to an existing fact. The demand for punitive damages was stricken. River Glen Associates v. Merrill Lynch Credit Corp., Index No. 605631/98, 1/31/00 (Cahn, J.).

Procedure; joinder of necessary parties. Disqualification; motion based on past representation of third party. Motion to dismiss, for nonjoinder of necessary parties, an action concerning Board actions in declining to approve a certain transaction involving co-op shares. The court found some ambiguity in the complaint, but concluded that it assumed a rival transaction had been completed and did not seek relief against the third party involved but against the co-op to compel it to sell shares to plaintiffs. Thus, joinder of the third party was not necessary. The court granted a motion to disqualify plaintiffs' counsel based upon prior representation of the third party in a substantially related, adverse matter, the dispute with the Board that had led to the sale challenged here, in which the plaintiffs here had been co-plaintiffs. Plaintiffs argued that defendants lacked standing to raise the issue as the confidences were those of the third party, but the court held that it may disqualify counsel even sua sponte. Slifka v. Sherry-Netherland, Inc., Index No. 605337/99, 1/25/00 (Cahn, J.).

Procedure; personal jurisdiction; consents. Motion to dismiss for lack of personal jurisdiction by Panamanian corporation with its sole place of business in Panama. Plaintiff had its principal place of business in New York City. At issue were repo transactions. The master agreement between the parties provided that English law would govern and that the parties submitted to the English courts. The transactions were done by phone calls placed from Panama to plaintiff's Miami office, which would telephone the New York office for quotes. Trades would be confirmed and booked by plaintiff in New York. A confirming letter and letter agreement would be generated in New York and sent to defendant by plaintiff's Miami office. The letter agreements provided that New York law would control and that the Supreme Court of New York or the U.S. District Court for the Southern District would have non-exclusive jurisdiction. The court held that defendant had agreed to accept New York jurisdiction by the letter agreements. Defendant did not argue in favor of setting the clause aside nor that New York would be too inconvenient. The court rejected the argument that acceptance of English jurisdiction barred jurisdiction here. A forum selection clause need not be mandatory or exclusive to be enforceable. Further, GOL 5-1402(1) applied; it need not have been pled in the complaint. The court also found that the clause in the master agreement did not provide for exclusive jurisdiction, but specifically allowed a party to take proceedings elsewhere. In addition, the confirmations by the terms of the master

agreement would control. Motion denied. Lehman Commercial Paper, Inc. v. P' Capital, S.A., Index No. 604317/98, 1/20/00 (Shainswit, J.).

Procedure; pleading with specificity (CPLR 3013, 3016); need for discovery (CPLR 3211(d)). Commercial bribery; private action; statute of limitations. Misrepresentation; falsity; reliance; causation. Fiduciary duty; inducement; statute of limitations. Unjust enrichment. Punitive damages. Procedure; personal jurisdiction; Hague Convention. Alleged scheme of worldwide cooper market manipulation. The court agreed that there was a certain lack of specificity in the complaint (CPLR 3013, 3016), but found that plaintiff had shown a need to take discovery before the pleadings were put to the test. Plaintiff demonstrated that facts essential to justify opposition may have existed but could not then be stated (CPLR 3211(d)) by submitting an affidavit of a witness in a related case who summarized key documents that had been placed under seal by a Federal court. The court followed the Fourth Department in upholding a commercial bribery claim. Those who had received the bribes could be sued on a constructive trust theory. The court applied a six-year statute of limitations, which permitted the action as pled to proceed. The court ruled that the cause of action had been pled adequately. The court upheld a misrepresentation claim because false representations had been made, it was not unreasonable on the face of the allegation for the plaintiff's corporate assignor to have relied upon statements of its own officers and directors, and causation was sufficiently alleged. The court found that a six-year statute would apply to breach of fiduciary duty claims brought against a former officer or director (CPLR 213(7)); also alleged breach of duty by employees would sound in contract. Plaintiff as assignee of the corporation's claims could invoke a six-year statute. Discovery could be pursued to determine when defendants had ceased to have fiduciary obligations to the corporation. A six-year bar would apply insofar as defendants who were employees, officers or directors had induced a breach of duty and with regard to equitable remedies (accounting, constructive trust). Also, the same statute applies to those who conspire with, and induce a breach of duty by, a corporate director. The court rejected an unjust enrichment claim, which also partly duplicated the fiduciary duty claim. The court ruled that the commercial bribery, fiduciary duty and inducement claims could support an award of punitive damages. The court rejected an argument by one defendant that it should have been served under the Hague Convention and that service under BCL 307 would not suffice. Case dismissed in part. Sardanis v. Sumitomo Corporation, Index No. 114409/99, 2/28/00 (Gammerman, J.).

Procedure; statute of limitations; accrual. Contracts; duty of good faith and fair dealing; tort claim; restitution; punitive damages; indefiniteness. Fiduciary duty. Action alleging breach of an agreement to provide a computerized management system. Statute of limitations defense. A breach of contract claim accrues at the time of breach, even though no damage occurs until later. A claim for breach based upon delivery of a defective computer system accrues when the system is installed. But the agreement in question concerned more than simple delivery of a computer, including data processing management and systems development over ten years. There was a question of fact as to whether the goods or services aspect of the contract predominated so that dismissal was not possible based on the face of the complaint. In a contract involving indivisible services, as here, accrual occurs when the agreement expires as there is a continuing performance exception. There is no computer consulting malpractice claim in New York, but the action here was framed as one for breach of contract. Motion to dismiss denied. The court dismissed a claim for breach of a duty of good faith and fair dealing as duplicative of the breach of contract claim. The court also found that plaintiff had not alleged breach of a duty by defendants independent of the contract, thus dooming a claim of negligent performance. The existence of a valid written agreement doomed a restitution claim. The court found that a later agreement did not clearly extinguish an earlier one and declined to dismiss claims of misappropriation of technology in violation of the earlier agreement. The court found that there had been an arms length relationship, not a fiduciary one. Punitive damages were unavailable. The court held that a letter by a key individual defendant in which he committed to make available to the corporate defendant the capital necessary to perform its obligations under the agreement with plaintiff was too indefinite to permit enforcement and a claim related thereto was dismissed. The Robert Plan Corp. v. Perot Systems Corp., Index No. 605045/98, 1/12/00 (Cozier, J.).

Procedure; subject matter jurisdiction; exclusive Federal jurisdiction; patent law issues. Motion to dismiss affirmative defense and two counterclaims on grounds they were within the exclusive Federal jurisdiction of patent claims. The Federal courts, the court agreed, have exclusive jurisdiction of patent infringement claims arising under

the Federal statute. The court distinguished claims only incidental to the Federal statute. A defense to a state common law cause of action that involves the assertion of an issue related to the validity or infringement of a patent is not one falling within the exclusive Federal jurisdiction. The same is true of counterclaims. The defense here asserted that goods received from plaintiff were not marketable because they infringed on a patent of a third party. The counterclaims asserted damages due to plaintiff's failure to participate in defending against the actions of that third party pursuing defendant for patent infringement and injury to defendant's reputation in the industry. The court ruled that the defense and claims were not within the exclusive Federal jurisdiction. However, an affirmative defense of failure to state a cause of action was dismissed. Promove, SRL v. International Tractor Co., Index No. 18145/97, 2/15/00 (DiBlasi, J.).

Real estate; brokerage commission; exclusive; continuation; procuring cause. Contracts; ambiguity; parol evidence. Action for real estate brokerage commission. Plaintiff had had an exclusive but had failed to find a new tenant. After the brokerage agreement expired, the Coop, owner of the premises, agreed to an extension of the lease of the existing tenant on modified terms. Plaintiff claimed a right to a commission on this agreement. The court held that the brokerage agreement ran afoul of Section 175.15 of the Licensing Services Regulations, which forbids automatic continuation of exclusive contracts. The court noted that cases had held that a violation would not bar an action for a commission. Further, defendants had not been harmed since the agreement had been terminated. The court found that the agreement was ambiguous as to the broker's role regarding the prior tenant and that parol evidence could be considered. The evidence was in conflict and an issue of fact for trial was presented. Defendants argued that plaintiff had taken no part in procuring the modification agreement. The fact that plaintiff had suggested an asking price, that the tenant had received a copy of plaintiff's flier, and that the price turned out to be the price agreed on did not satisfy the procuring cause requirement. The court found, however, viewing the proof in the light most favorable to plaintiff, that it could not say that defendants had not prevented plaintiff from dealing with the tenant such that defendants should be estopped. The trier of fact could find that defendants had failed to refer the offer to plaintiff during the term of the agreement as required thereby. Summary judgment denied. Garrick-Aug Associates Store Leasing v. Major Realty Co., Index No. 602709/97, 2/28/00 (Cozier, J.).

Set off; mutuality. Attorney and client; liens; set-offs. A jury determined that several defendants owed plaintiff bank $ 3.1 million as a result of foreign exchange transactions, but that the bank had converted funds of three other defendants to cover the losses and that the bank owed $ 2.4 million to these three. The judgment had been affirmed on appeal. The court had issued a TRO to prevent the three defendants from making any attempt to enforce the judgment against the bank. The bank argued that it was entitled to set off the two sums and recover a large amount of counsel fees. The court stated that mutuality required if there is to be a set off was lacking. Although the entities were related, the ownership was not identical. Further, the bank's request ran counter to the principle that attorneys' liens take priority over set-offs. The court declined to address the bank's claims for attorneys' fees as no motion with supporting documentation had been made. TRO vacated; injunction denied. Banque Indosuez v. Sopwith Holdings Corp., Index No. 121719/94, 1/12/00 (Shainswit, J.).

Summary judgment in lieu of complaint; resort to additional documents; economic duress; ratification; conditions; parol evidence rule. Action on note. Plaintiff met its burden as a matter of law, especially since the note specified that payments would be made without setoff, deduction or counterclaim. The court found that defendants' averments were insufficient to meet their burden to establish an issue of fact. The court rejected the argument that the note was not subject to CPLR 3213 because the only sum certain in it had been paid off and future billings by plaintiff were unknown. The note had indicated that it was to receive such treatment. Further, the court stated, caselaw indicates that such treatment is proper even if consideration of some other documents is required. The court also rejected a claim of economic duress. A party that is not being paid does not commit duress if it refuses to continue without payment or assurance. Also, defendants had ratified the contract by making various payments under it. Defendants argued that there had been conditions to defendants' continuation with plaintiff. However, there were none in the note, or if a covenant could be so construed, it had been complied with. Any oral agreement was barred by the parol evidence rule. Kenney, Becker Solicitors, LLP v. Andre, Index No. 601162/99, 2/3/00 (Cahn, J.).

Suretyship; economic duress/undue influence; standing; impairment of security; exhaustion of remedies; investigation. Conspiracy. Action to recover $ 10 million on a payment bond with respect to a construction project in Brazil. A prima facie case was established. The court rejected an economic duress defense since this was not a case in which a party to a contract had threatened a breach unless the other party agreed to some further demand. There was no basis for further discovery where there was no indication that proof existed. Vague allegations of undue influence were insufficient. The court also ruled that defendant sureties had no standing to raise an economic duress or undue influence defense on behalf of the principal. The court rejected an argument that plaintiff had allowed impairment of security. The court stated that the creditor has no duty to keep the surety informed of the debtor's financial situation and noted that it had not been in possession of the collateral. Under the relevant agreement, plaintiff had had no right to declare a default. The court held that there was a lack of probative evidence to support a conspiracy claim. The court rejected the argument that the plaintiff had had any duty to accept a tender of equipment in lieu of payment. The court rejected an argument that plaintiff had had a duty to cooperate with defendants in an investigation of the claims. The payment bond had no requirement for an investigation and defendants' actions belied the assertion that an investigation was required. Summary judgment for plaintiff. Marubeni America Corp. v. United States Fidelity & Guaranty Co., Index No. 604801/97, 1/6/00 (Cozier, J.).

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