The Commercial Division

of The State of New York

Law Report - May 1999

COMMERCIAL DIVISION

LAW REPORT

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

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

JUSTICES OF THE COMMERCIAL DIVISION:

JUSTICE HERMAN CAHN (N.Y)
JUSTICE BARRY A. COZIER(N.Y.)
JUSTICE JOHN P.DiBLASI(West.)
JUSTICE IRA GAMMERMAN (N.Y.)
JUSTICE CHARLES E. RAMOS(N.Y.)
JUSTICE BEATRICE SHAINSWIT(N.Y)
JUSTICE THOMAS A. STANDER (Mon.)

VOL.II, NO.2 MAY 1999 (COVERING DECISIONS ISSUED MARCH and APRIL 1999

***The* Report *and the complete text of all decisions discussed in it are available on the Unified Court System's Internet home page at http://ucs.ljx.com and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org/sections/comfed. Also available there is a cumulative subject matter index of all cases cited in any issue of the* Report. *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. Commencing with this issue, decisions of Honorable John P. DiBlasi, Commercial Division, Westchester County, will be included in the* Report.**

Agency; actual and apparent authority. Tortious interference. Action for breach of contract for signage space at Yankee

Stadium and tortious interference. The court noted that one who deals with an agent must make an effort to discover the actual scope of authority. Proof submitted on this summary judgment motion established that the agent had had no actual authority to bind the Yankees without prior explicit permission, not given here. The written agency agreement provided that all agreements reached by the agent would be subject to prior written approval of the Yankees. Further, the court pointed out, the writing on which plaintiff relied as an agreement stated that it should be returned so that "the contract procedure" could be started. The court also found that too many essential terms had been omitted and could not be supplied by implication. The intent was, the court concluded, that the parties were not to be bound in the absence of a formal written contract. Thus, there was no actual authority. As to apparent authority, the plaintiff must show the existence of such authority, which requires proof of some misleading conduct by the principal, not the agent. The court found that plaintiff had failed to adduce any such proof as to the Yankees. Hence, the alleged agreement was merely an agreement to agree. The tortious interference claim failed for lack of a valid agreement. Summary judgment for defendants. Omnipoint Communications v. New York Yankee Partnership, Index No. 601910/97, 4/7/99 (Cozier, J.).

Arbitration; exceptions; fraud. The court granted a motion to compel arbitration as it found that under no reasonable construction of the amended complaint could it be said that all the claims fell exclusively within the narrow exceptions to the broad arbitration clause. Arbitration cannot be avoided by convenient use of legal labels on claims as opposed to the facts alleged or joining arbitrable claims with those that may not be. A nebulous claim of fraud, not addressed specifically to the arbitration provision, will not defeat arbitration. Tenbroeck Medical Associates, P.C. v. Tenbroeck Management Corp., Index No. 603147/98, 3/18/99 (Cozier, J.).

Arbitration; tripartite arbitration. Attorney and client; disqualification; alleged prior related representation (DR 5-108 (A)(1)). Defendants moved to dismiss an action and to compel arbitration. Plaintiff had demanded arbitration pursuant to a stockholder agreement providing for tripartite arbitration. Defendants designated a certain attorney as their arbitrator. Plaintiff brought this lawsuit to compel that attorney to disqualify himself. Plaintiff alleged that 17 years earlier, she had consulted another attorney in the same firm as that of which the proposed arbitrator was a member. Back then, the other lawyer had written a letter in plaintiff's name regarding amendment of the certificates of incorporation of the same corporations plaintiff was now seeking to bring to the arbitration table. Also, a third lawyer at the firm had made some discovery requests on her behalf. The other lawyer had been gone from the firm for seven years and the third was now a member of the corporate department who had had no recollection of the earlier matter until the files had been retrieved from storage. The proposed arbitrator had conducted a conflicts check, which had revealed nothing about the earlier, modest job done for plaintiff. A party to a tripartite arbitration has the right to select the arbitrator of its choice. The court found that the firm here was like the firm in Solow v. Grace, 83 NY2d 303. There was only an antiquated file containing no secrets and plaintiff failed to rebut that the only lawyer left who had had any dealings with the matter possessed no secrets at all. The proposed arbitrator had no knowledge of the matter. The court held that there was no conflict and that the arbitrator could sit. Complaint dismissed and parties directed to proceed to arbitration. Katzman v. Katzman, Index No. 604369/98, 2/25/99 (Shainswit, J.).

Attachment; default and insolvency. Preliminary injunction; irreparable harm; dissipation of assets. Prejudgment mandatory injunction (UCC 8-112(e)). Fiduciary duty to creditors. Three foreign banks sought judgment on an alleged default on $ 30 million in debentures by defendants, a Russian bank and its Dutch subsidiary damaged by the recent Russian financial crisis. The court was satisfied that plaintiffs had shown a default and defendants' insolvency, which was enough to justify a requested attachment of New York assets. As to a request for a preliminary injunction against dissipation of assets, the court noted that injury is irreparable when monetary damages do not suffice. Here plaintiffs sought a monetary award but since they had established that defendants had been dissipating assets, irreparableness was shown. Plaintiffs sought a prejudgment

mandatory injunction (UCC 8-112(e)). The court concluded that plaintiffs incorrectly sought to transform the statute into a mechanism for generic debt collection whereas the legislature had intended it to apply to cases in which the securities sought are the subject matter of the action. As that was not the case here, the court denied the application. The court denied with leave to renew a cross-motion to dismiss a claim for breach of fiduciary duty on the ground that Russian law did not recognize such a claim. The plaintiffs had adequately pled such a claim as they had alleged the stripping of assets. The court found that defendants had not established that Russian law controlled and, even if it did, exactly how the new laws would be applied to the case. Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, Index No. 601621/99, 4/22/99 (Ramos, J.).

Attorney and client; disqualification; attorney/witness; necessity for and adversity of testimony; disqualification of entire firm. Motion to disqualify counsel as a necessary witness (DR 5-102). Whether a lawyer ought to be called as a witness means whether the testimony is necessary, which involves the significance of matters, weight of the testimony, and availability of other evidence. Just because an attorney was involved in a transaction does not make the testimony necessary. The court held that the movant had failed to show that it would be necessary to call the attorney here. There was a great deal of other evidence regarding the transaction. The court rejected the contention that in any event the entire firm should be disqualified; only the specific attorney witness should be disqualified. A movant must also identify the testimony and show how it would be so adverse as to require disqualification. Motion denied. Dunham v. Weissman, Index No. 100885/93, 2/23/99 (Shainswit, J.).

Champerty. Fiduciary duty of general partner. Misrepresentation; pleading of circumstances in detail (CPLR 3016(b)). Suit by limited partners alleging fraud by the general partner, the sole shareholder therein and a defendant. The court held that a purported cause of action for champerty founded on the misdeeds of a certain attorney failed because the plaintiffs had incorrectly sought to make champerty an affirmative cause of action rather than a defense, the complaint failed to allege, as required by law, that the purpose of the acquisition was to bring an action thereon, and the acquiring entity had not been organized until after the attorney had been disbarred. The court also dismissed a claim for breach of fiduciary duty as the general partner in question had not become so until after an attempt to foreclose on the partnership's interest in certain properties, the subject of the claim. However, the court refused to dismiss a fraud claim on the basis of CPLR 3016(b). That statute, the court stated, requires that fraud be set forth in detail so as clearly to inform a defendant with respect to the incidents complained of, not to prevent assertion of an otherwise valid claim in situations where it might be impossible to state in detail the circumstances of the fraud. The court found that the complaint, together with a certain affidavit, alleged enough to apprise the defendants of the alleged wrongs and that the facts were peculiarly within the knowledge of the defendants. Therefore, dismissal was not appropriate and plaintiffs were entitled to the discovery that they sought by cross-motion (CPLR 3211(d)). Krusch v. Affordable Housing LLC, Index No. 606076/97, 3/31/99 (Cozier, J.).

Commercial lease; interpretation of merger clause. Fraud in the inducement. Procedure; summary judgment. Affidavit of counsel held sufficient on summary judgment where it only presented documentary evidence (lease and guaranty). Opposing affidavit found deficient since not notarized. Defendants leased space for a restaurant and breached the lease by leaving. The court held that there was no merit to their defense that plaintiff had undertaken to operate a first-class hotel but had sold out. The court found that the lease did not bind plaintiff to continue to operate the hotel or preclude a sale. As to fraud in the inducement regarding an alleged commitment to continue to operate the hotel, the court found in the lease a specific merger clause which barred that claim. The court rejected an argument that the clause referred only to representations about the leased premises, not about the hotel. The court held that plaintiffs were entitled to summary judgment on liability. White Plains Realty Associates v. Colonial Caterers, Index No. 17777/98, 3/11/99 (DiBlasi, J.).

Contracts; interpretation; ambiguity as a question for the court; interpretation of unambiguous plan; plain meaning;

extrinsic evidence; interpreting against the drafter; violation of implied obligation of good faith. Attorneys fees and liquidated damages (Labor Law § 198). Post-trial decision in action for breach of two executive compensation plans. The court stated that whether or not a plan is ambiguous is a question of law for the court. The interpretation of an unambiguous plan is also a question for the court. If the plan is unambiguous, it should be construed according to its terms, without resort to extrinsic evidence. If it is ambiguous, the trier of fact may use extrinsic evidence to determine meaning and intent. Here, the court found, the language of a stock option plan was plain and did not allow defendants to adjust net income as they wished. The court rejected defendants' efforts to use terms as defined in the other plan as a cross-reference for the stock option plan. The court found that the defendants were advocating use of plain meaning when considering the incentive plan but implying terms for interpreting the stock option plan. The company should have employed the definition of operating profit in the stock plan if it wished it to be used there. If there was ambiguity, the court said, then the stock plan should be interpreted against the drafter, the defendants. The court rejected defendants' argument that they were permitted to terminate, amend or modify the stock plan and that this justified their course since the proof did not show that that was done before vesting took place. As to the incentive plan, the court ruled that in calculating operating profit, adjustments could be made to gross profit for "exceptional" or "extraordinary" items, which terms were to be accorded their ordinary meaning. Even if these words were treated as ambiguous, the proof was that the words were understood to mean "unusual" events, matters over which management had little control. The court rejected plaintiffs' argument that these words were coextensive with terms used under GAAP. The court pointed to other provisions of the plan that supported discretion in the company. However, the court ruled that the defendants had acted in bad faith in undertaking to finance certain litigation out of the company but then to decline, as agreed, to include the proceeds of the settlement thereof in operating profit. The court rejected a claim for attorneys fees and liquidated damages under Labor Law § 198(1-a) because plaintiffs brought common law causes of action, not ones under Labor Law Art. 6, and because the monies sought were not "wages" under Labor Law § 190(1). King v. Computer Consoles, Inc., Index No. 13880/92, 4/27/99 (Stander, J.).

Contracts; interpretation; market custom as part of agreement. Misrepresentation; justifiable reliance; damages for lost profits. Motion to dismiss claims arising out of sale of Eurotunnel bank debt. Plaintiff contracted with defendant to buy such debt through an assignment of a subparticipation interest but later refused to accept or pay for it. Plaintiff sued, claiming the debt was substandard in breach of the contract and that defendant had fraudulently concealed certain information and misrepresented facts. Standard on motion to dismiss. Plaintiff did not allege that plaintiff had failed to tender the particular subparticipation identified in the trade confirmation. Rather, the alleged breach was defendant's failure to tender standard debt which plaintiff had been led to believe was the subject of the trade in view of market customs. The court stated that market custom may be deemed part of a contract where it is reasonable, uniform, well-settled, not in opposition to fixed legal rules, and not in contradiction of the agreement. The court ruled that plaintiff's contention directly conflicted with a non-reliance clause in the confirmation. This defeated the breach claim and there was no justifiable reliance as required by the fraud claim. Further, compensation for lost profits is not a proper component of damages on a fraud claim. Complaint dismissed. Lazard Freres & Co. v. Murray Capital Management, Index No. 601603/98, 3/ 19/99 (Cahn, J.).

Contracts; interpretation of indemnification provision. Stock purchase agreement. The court held that an indemnification clause was not ambiguous or unclear. Defendants argued that the clause applied only to operating income or losses during 1997 and that they had to indemnify plaintiff only if a tax liability accrued due to income experienced by the company during 1997. They urged that distributions did not constitute any share of income to the company during 1997, but arose in earlier years. The court held that the clause did not limit indemnification to instances in which a tax liability accrued from operating income. The court noted that the parties were sophisticated business persons. Motion for summary judgment for plaintiff granted. Klemann v. Cosentino, Index No. 6010/98, 3/11/99 (Stander, J.).

Contracts; restrictive covenants; employment agreements; constructive discharge by hostile work environment as

defense. Preliminary injunction. Motion for preliminary injunction against former employees and their current employer. The court ruled that non-compete provisions in the agreements with modeling agency "bookers" were unenforceable because they prohibited these persons from working for any business for six months after the end of employment. This was so despite the fact that the plaintiff was obliged to pay them during this period. This violated public policy and plaintiff had not shown it was necessary. Plaintiff sought to enforce the agreements, which had not expired, independently of the non-compete provision. The court found that the employees had agreed not to work for a competitor during the terms of the agreements and that plaintiff was entitled to a preliminary injunction. The court ruled, though, that one of the employees had been constructively discharged due to a hostile work environment resulting from "same sex" sexual harassment. The court rejected a contention that there had been a constructive discharge of the two other employees. The court ruled that plaintiff would be irreparably harmed as these two employees were senior and important to the business. Wilhelmina Models v. Major S.R.L., Index No. 600672/99, 4/13/99 (Cahn, J.)

Discovery; letters rogatory; need for answers under oath. Attorney and client; work product; answers to interrogatories by foreign official witness. Motion to renew based on alleged new evidence, i.e., the testimony of a Venezuelan bankruptcy judge that supported defendants' reliance on the act of state doctrine. Cross-motion regarding discovery. Here letters rogatory had been sent to the judge, who had not answered under oath. The letters had not mandated an oath. Fed. R. Civ. Pro. 28(b), the court noted, does not require exclusion merely because letters are not answered under oath. The court ruled that the testimony of the judge would not be excluded for this reason. An allegation was raised that the testimony had been influenced by ex parte communications by defendants with the judge. The court ruled that the information about how the responses had been prepared was material and relevant and that interrogatories on that subject be answered by defendants notwithstanding claims of work product, which the court found to be too general and a mere assertion. Motion to renew held in abeyance. Alas Int. Ltd. v. Ramiz, Index No. 601817/97, 4/22/99 (Ramos, J.).

Finder's fee. Contracts; interpretation; oral modification. Quasi-contract. Issue as to whether plaintiff, who was to assist in bringing about the sale of a business, was a finder or broker. Standards discussed. The court found that plaintiff was a finder. A letter agreement provided for compensation if a sale to certain persons occurred; those persons, the court held, did not include the entity that actually purchased the company. Plaintiff claimed that an oral modification had occurred, which would have required the consent of all parties. The court held that plaintiff had failed to present proof that the parties had agreed to add the purchaser to the list of prospective purchasers introduced by him, thereby dooming his breach of contract claim and related claims. An implied or quasi contract theory failed due to the existence of a contract. Summary judgment for defendant. Rosenberg v. Helmsley Enterprises, Inc., Index No. 121885/94, 4/1/99 (Ramos, J.).

Insurance; action on disability policy; punitive damages; attorney's fees. Procedure; declaratory judgment. Tortious interference. The court dismissed plaintiff's claim for punitive damages because the complaint failed to spell out facts as to malice or moral culpability warranting such damages. The court also dismissed a claim for attorney's fees because neither a statute nor a contractual provision applied. The court ruled that as the complaint raised a justiciable controversy and a legally protected interest, it must deny the aspect of defendant's motion that sought dismissal of a declaratory judgment cause of action as redundant of the non-equitable claim for breach of contract. As to interference, the court found that the complaint failed to set forth any facts regarding acts allegedly engaged in by one insurer in informing another that a claim had been denied and that plaintiff had authorized the communication now complained of. McLarnon v. National Life Ins. Co., Index No. 100673/98, 3/22/99 (Cozier, J.).

Insurance; additional insured; certificate of insurance; rights conferred. Procedure; summary judgment; standards. Defendant insurer sought summary judgment dismissing a complaint and declaring that it had no duty to defend or indemnify plaintiff under a certificate of insurance naming plaintiff an additional insured. A certificate naming a person an additional

insured, the court noted, is evidence of an agreement to insure but is not conclusive nor is it itself a contract. Here a Named Insured endorsement had named a contractor as an additional insured but plaintiff's name did not appear thereon. The certificate disclaimed that it gave any rights to the certificate holder (plaintiff) and stated that it was issued for information only. The court held that there were questions of fact as to whether the insurer had agreed to provide coverage to plaintiff as an additional insured. Consolidated Edison Co. v. United Capitol Ins. Co., Index No. 124522/94, 4/7/99 (Cozier, J.).

Insurance; double indemnity accidental death benefits; interpretation; punitive damages; attorney's fees. The court held that there was no issue that decedent had been a fare-paying passenger within the meaning of the policy where his girlfriend had paid his fare. Further, the court held that discovery was not required to resolve the question whether the circumstances of the death were within the language of the policy for such benefits. The letter accompanying the policy had indicated that 24-hour protection was being provided. A summary indicated that the insured would have double indemnity coverage if injured while traveling in or on a public conveyance operated by a carrier. Although there was language in the policy limiting protection to an injury sustained while "riding (boarding and alighting)" as a passenger, that language was found ambiguous given the broader statements mentioned earlier. And a reasonable layperson could well have understood that language to mean that there was protection as long as injury occurred during the course of a cruise, including an excursion during the cruise, as in fact had happened. That the policy had been solicited by mail favored this interpretation. Baker, 158 A.D.2d 794. Ambiguous policy language should be resolved against the insurer. The court held that plaintiffs were entitled to summary judgment declaring that double indemnity benefits were owed by defendants. As for punitive damages, the court stated, in a first-party coverage case such damages are available only where the insurer's conduct involved an independent tort or other egregious wrong. As no such behavior had been alleged, nor any pattern of conduct directed at the public generally, summary judgment was awarded the insurers on this aspect of the case. The court held that plaintiffs could not recover attorney's fees as they had not been placed in a defensive posture by an action initiated by the insurers to be relieved of policy obligations. Meltzer v. CNA Financial Corp., Index No. 11523/98, 1/19/99 (DiBlasi, J.).

Insurance; interpretation; definition of accident under accidental death policy. Action alleging breach of contract on accidental death policy. The certificate of death listed the death as due to a certain disease and the manner of death as a natural cause. The widow sought partial summary judgment to the effect that if the cause of death was that illness, the death was an accident covered by the policy. The facts showed that the decedent had been unintentionally exposed to fungus at his office. The court ruled that there was no issue of fact presented and that the contracting of a disease through exposure and ingestion while sitting in the office doing work is an accident or accidental bodily injury. Partial summary judgment for the widow. Fleet Mortgage Corp. v. Sullivan, Index No. 7156/97, 3/11/99 (Stander, J.).

Letters of credit; Uniform Customs and Practice; applicability of common law; overpayment; unjust enrichment. Procedure; discrepancy in sums claimed. Suit to collect moneys overpaid on letter of credit. The defendant asserted that the bank could not recover because it had failed to comply with Article 13(b) of the Uniform Customs and Practice for Documentary Credits (1993) by failing to raise objections within days from receipt of the documents. Here the bank had not sought recovery until months afterward. The court held, however, that Article 13(b) did not restrict a bank from recovery if, after taking up and accepting documents, it discovers it has mistakenly overpaid the beneficiary of a letter. Absent conflict, case law antedating the UCC continues to apply to letters subject to the UCP. The parties did not cite any portion of the UCP that governs overpayments and so the court relied on the longstanding principle that a party who pays in error to one not entitled to it should be permitted to recover. This applies, the court noted, even if the error was due to the negligence of the payor. Thus, Chase was entitled to recover the overpayment, which had occurred in some amount. There was a discrepancy between the complaint and the motion for summary judgment, but the court granted judgment in the lesser amount established in the latter. Chase Manhattan Bank v. Am-Tak Furniture Importers, Index No. 600797/97, 4/20/99 (Cozier, J.).

Letters of credit; unilateral waiver of defects; waiver by bank. Promissory estoppel; reasonableness of promise. Bills and notes; conclusory defense as to amount owed. Monies overdue on note. There were discrepancies on four letters of credit, which the bank dishonored. The defendant's unilateral waiver of defects in the documentation was not dispositive. Strict compliance is the New York rule. Thus, the court stated, plaintiff's CPLR 3213 motion had to be granted unless an issue of fact was raised as to whether the bank had intentionally waived its right to demand strict compliance. Defendant alleged that an employee of plaintiff had assured defendants that once irrevocable letters of credit had been issued, plaintiff would honor them. The court ruled that defendants had not presented proof that prior to dishonoring the four letters, plaintiff, knowing they were nonconforming, after so informing the presenter, had accepted the documents and paid on the letter, thus intentionally relinquishing its right to demand strict compliance. The court struck a defense of promissory estoppel since defendants had not established the reasonableness of their view that the letters would be absolutely irrevocable, in the face of their own failure to provide the requisite documentation on which the arrangement was predicated. Defendants challenged the amount due on the note but did so only in conclusory fashion, which the court found insufficient. Summary judgment granted. Marine Midland Bank v. Sereti Ltd., Index No. 604242/98, 3/ 10/99 (Shainswit, J.).

Misrepresentation; reliance; substantial factor; reasonableness of reliance; "fraud on the market;" causation; supervening and intervening causes. Procedure; collateral estoppel; finding on a specific issue; findings necessary to a decision. Fraud claim with regard to the failure of a corporation to pay a price guarantee on shares plaintiffs had received in exchange for other shares. The court rejected defendant's argument that plaintiffs had acted because of the price guarantee, not because of financial statements audited by defendant. The court stated that though it was clear that plaintiffs would not have acted without the guarantee, that did not preclude a finding that plaintiffs had also relied on other factors. If the alleged misrepresentations had been a substantial factor in inducing plaintiffs to act, there would a basis to find reliance. Reliance and reasonableness were for the trier of fact. The court rejected the contention that it would have been unreasonable for plaintiffs to have relied on the 1990 statement since time had passed and there had been developments when the transaction occurred. The court stated that it could not be said that reliance here had been unreasonable as a matter of law, especially since the 1990 statement had been the most current one at the time of the transaction. However, the court held that the issues of whether the stock price of the corporation had been inflated and whether plaintiffs would have received more stock had the price not been so could not be raised by plaintiffs in a common law action for fraud because they rested on a "fraud on the market" theory. Intervening and superseding causes discussed. The court found that the losses had occurred due to the corporation's inability to honor the guarantee, which had resulted from a disastrous acquisition and market factors. Plaintiffs argued that had the financials been accurate, the corporation would not have been able to make the acquisition, but the court determined that that was only a bald assertion, devoid of evidentiary support. Therefore, the court held, the inability to honor the guarantee had been a supervening cause, for which defendant was not liable. Plaintiffs had cross-moved seeking collateral estoppel based upon findings in a federal action. The court held that as the Federal judge had declined to make any finding of scienter, that precluded estoppel on that issue. As the judge had found that the cause of the losses had been the acquisition and market conditions, the fact that he had also found that defendant had made misrepresentations did not aid plaintiffs; those findings had been unnecessary to the holding and could not be a basis for estoppel. Summary judgment for defendant; cross-motion denied. Aronoff v. Ernst & Young, Index No. 116731/95, 4/23/99(Cahn, J.).

Preliminary injunction; likelihood of success; irreparable harm; balance of equities. Dispute arising out of a cooperation agreement. Plaintiff alleged that the corporate defendant had not purchased systems from it as required by the agreement but had instead utilized plaintiff's design to manufacture its own product. Plaintiff failed on its motion for a preliminary injunction to establish a likelihood of success. Conflicting assertions about the design of the product and about the meaning of competitive behavior under the agreement meant that there was not a clear right to the relief demanded; injunctive relief was inappropriate at this stage. Only conclusory statements were set forth as to irreparable harm. Plaintiff suggested that as a new business, it needed continuous income if it wished to survive. Relevant data on revenue was not supplied. Damages compensable with money and capable of calculation, even with some difficulty, do not amount to irreparable harm, the court

stated. The equities favored defendant, the court said, since plaintiff had not shown that the harm it would suffer would be greater than that defendant would incur. As the contract was with the Army, defendant's failure to deliver could cause it to be cut off from future business. Powersystems International v. DHS Systems, LLC, Index No. 604766/98, 3/26/99 (Cahn, J.).

Preliminary injunction; standards; mandatory injunction; likelihood of success; irreparableness of harm. Motion for mandatory preliminary injunction to enforce joint venture agreement. A mandatory preliminary injunction is a drastic remedy that will not be granted unless a clear right to the relief is shown. The court held that that had been done here. Defendants had failed to show any right to void the contract unilaterally or that an amendment had been obtained through any breach of fiduciary duty. The court found that the defendants had breached the contract in many ways. The court ruled that plaintiff had shown he would sustain irreparable harm absent the injunction since defendant was competing with the joint venture through new business relationships in violation of the contract and was siphoning off customers who were unlikely to return. The court noted that loss of income generally does not alone constitute irreparable injury, but ordered defendants to continue to pay plaintiff a salary and health premiums in return for work he would continue to perform while declining to order payment at that time for joint venture profits. The court found that the equities tipped in plaintiff's favor. Steinfeld v. General Vision Services, Index No. 600942/99, 4/9/99 (Shainswit, J.).

Procedure; attachment; confirmation; quasi in rem jurisdiction; consent to jurisdiction; forum non conveniens. Motion to confirm ex parte order of attachment. Cross-motion to vacate and to dismiss the complaint. The court held that plaintiff had shown a likelihood of success by showing sales for which it had never been compensated. The court held that plaintiff had shown a sufficient nexus between the attached accounts and New York to justify quasi in rem jurisdiction where proceeds on which plaintiff claimed commissions were deposited in New York. The court rejected an argument that a clause provided for consent to jurisdiction in Venezuela since the consent was not to exclusive jurisdiction. Venezuelan law did not bar New York from jurisdiction. The court found that defendant had shown that New York was not a convenient forum. Defendant had to show additional factors. Further, the court stated, even then the final decision would be in the discretion of the court. The court held that the action would more properly proceed in Venezuela but that the suit here should be stayed, not dismissed. The court noted that defendant had secreted monies in violation of the court order so that the attachment could be confirmed under CPLR 6201(1) but also 6201(3). The court stated that it would permit defendant to post an undertaking to secure a recovery if it needed the funds. The court held defendant in contempt for violating the order. Order confirmed; cross-motion granted only in part. Carlos Godoy, C.A. v. Ciudad Commercial Porlamar, Index No. 604768/98, 4/12/99 (Ramos, J.)

Procedure; change of venue (CPLR 510(3)); required showing; consolidation. Change of venue sought by both sides for convenience of witnesses (CPLR 510(3)). The court found that neither side had made the requisite multifaceted showing. Unsubstantiated assertions ruled insufficient. This outcome did not necessarily doom a consolidation motion. The court found that common questions of law and fact pervaded the actions in the two counties. When two actions are consolidated, the court stated, they are often consolidated in the county of the earlier case. Where actions are pending in different courts, the Supreme Court can consolidate them before it but cannot consolidate the Supreme Court action with an action pending in a lower court in that court. Further, a motion to dismiss for lack of jurisdiction had been made in the other county. Consolidating the Monroe case in that county might result in having that case proceed in a county when no action existed any longer there. Consolidation granted in Monroe County. Marina K. Salva, Inc. v. No Gum, Just Cards, Inc., Index No. 6269/98, 4/28/99 (Stander, J.).

Procedure; change of venue; reply papers on motion. Contracts; duress; continuing duress; ratification; legal remedies. Breach of contract; post-option dividends; valuation of shares sold. Breach of fiduciary duty. Motion to change venue of transitory action to New York County, where the claims had accrued, for convenience of witnesses. CPLR 510(3). A four-part

showing must be made. O'Brien, 207 A.D.2d 169. The moving papers, the court found, failed to indicate that either witness had been contacted and was willing to testify nor did they show how the witnesses would be inconvenienced. A partial response in reply papers was ignored since such papers cannot be used to present new factual material or arguments. Motion denied. Defendants also sought dismissal. Plaintiffs sought a declaratory judgment to invalidate, and rescission of, a shareholders agreement and a purchase option thereunder on the ground of duress. Insofar as the duress concerned a threat to terminate plaintiff employees, that contention would fail since they were at-will employees. The court held, however, that an alleged threat to transfer the corporate assets and leave an empty shell would support the causes of action premised on economic duress. The court held that there were factual questions as to whether plaintiffs had been under a continuing duress that would prevent application of the doctrine of ratification by acceptance of benefits for 6-8 months. The court found that plaintiffs had failed to allege absence of an adequate legal remedy. The court stated that they could have commenced an action for breach of contract or fiduciary duty and could have sought preliminary injunctive relief if they had feared an asset transfer. Thus, these two claims were dismissed. Although, the court held, the complaint sufficiently pleaded the breach of contract claim, that claim had to be dismissed since it sought dividends on shares only for the period after exercise of the purchase option. The court upheld a claim that defendants had not reasonably determined the value of shares purchased under the option as required by the shareholders agreement, though the claim failed insofar as it was based on failure to pay fair market value as that was not the agreement. A breach of fiduciary duty claim was upheld insofar as premised on the alleged threat to transfer assets and the setting of the purchase price. Motion to dismiss granted in part. Araiz v. EQSF Advisers, Inc., Index No. 9908/98, 3/9/99 (DiBlasi, J.).

Procedure; enforcement subpoenas (CPLR Art. 52); service out of state. Judgment creditors sought an order compelling a judgment debtor to appear for a deposition pursuant to CPLR 5223. A subpoena and subpoena duces tecum are to be served in the same manner as a summons (CPLR 2303). Courts may issue a subpoena requiring the attendance of a person found in the state. Jud. Law 2-b. Here, the debtor was out of state so that the creditor was not entitled to an order compelling appearance. However, the court stated, an information subpoena can be served by mail under CPLR 5224(3), which does not preclude service out of state (following Banco do Estado (Ramos, J.)). Aquavella v. Equivision, Inc., Index No. 11451/96, 3/11/99 (Stander, J.).

Procedure; forum non conveniens. The court held that a third-party action alleging claims premised on a Dutch underwriter's duties toward a Dutch issuer regarding shares on the Amsterdam stock exchange which implicated unfamiliar Dutch law would, because of these connections, be better adjudicated in the Netherlands. On the main action, the court noted that the plaintiff's choice of forum should rarely be disturbed and that the defendants had a heavy burden of showing that plaintiff's choice of forum was inappropriate. The court found that the forum here would be more convenient for defendants than plaintiff. That there was related litigation pending in the Netherlands did not require that the main action be dismissed. Thus, the court dismissed the third-party claims but refused to dismiss the main action. Rodin Properties v. Ullman, Index No. 600901/95, 2/22/99 (Shainswit, J.).

Procedure; motion; timeliness; stipulation extending time. Restrictive covenants; termination of business; constructive discharge; consideration; trade secrets (customer names and preferences); special employee. Duty of fidelity of employee. Tortious interference with contract and economic advantage. Motion and cross-motion. The court ruled that it would consider defendant's motion even though it might have been untimely. It ruled that a stipulation to extend defendant's time that did not include the right to move under CPLR 3211 nevertheless permitted such a motion as defendant's failure to include specific language apparently had been inadvertent and that the lateness in moving, if any, was minimal. In this restrictive covenant case, the former employee argued that the clause became null and void by its terms upon plaintiff's termination of business, which had allegedly occurred. The court ruled that it could not determine that issue should be referred to a referee. Defendant claimed that she had been constructively discharged. Such a claim is difficult to establish, the court

stated: defendant would have to show that plaintiff had intentionally taken actions that effectively made it impossible, not merely difficult or unpleasant, to perform the functions of the job. That question was held to be one for trial, as was an issue on late payment of commissions. The court held that a new agreement had permitted termination at will by either party and that defendant had continued to accept employment under it, so that there was consideration for the covenant. The court found that the names of the customers were readily ascertainable in the trade and that plaintiff had not shown that the specific needs of the customers constituted a trade secret. But, the court said, a covenant can be enforced even absent trade secrets if it can be shown that the employee's services were special, unique or extraordinary. The court analyzed pertinent case law and concluded that there was a question for trial as to whether defendant had had a special relationship with clients so as to require the restriction. The court discussed standards for liability for breach of fiduciary duty by an employee and directed that plaintiff serve an amended complaint limiting the alleged breach to pre-termination solicitation of customers. A cause of action for tortious interference with contract was dismissed as it was not alleged that there had been a duty to continue purchases of art and that defendant had induced a breach of that obligation. A cause of action for interference with economic advantage was dismissed as it was clear that defendant had been motivated by a desire for profit rather than pure malice and that this claim merely duplicated a claim for breach of contract rather than alleged use of wrongful means. Burns Fine Arts, Ltd. v. Scott, Index No. 600709/98, 3/25/99 (Cahn, J.)

Procedure; motion to dismiss; standards. Banking; duty to monitor fiduciary accounts and duty of inquiry; insufficiency of funds. Illegality. Collateral estoppel; RICO and common law fraud. Misrepresentation; pleading with particularity. Fraudulent concealment; duty to disclose. Aiding and abetting; inaction; pleading knowledge and participation. Contracts; third-party beneficiary. Conversion; identifiable funds; unlawful dominion. Investors in supposed "mortgage flip" transactions who had been defrauded by an attorney sought to recover against banks on various theories premised on the banks' knowledge that escrow accounts were being used in the fraud. Motion to dismiss; standards discussed. A bank has no duty to monitor fiduciary accounts maintained by it or safeguard the funds against fiduciary misappropriation. However, the court said, a depositary bank may be held liable if it had actual knowledge or notice that a diversion was to occur or was ongoing. Facts may trigger a duty of inquiry. The mere transfer of trust funds is not enough to justify liability. There must be other indicia, e.g., chronic and very serious insufficiency of funds. The complaint here alleged that millions of dollars in checks had been returned for this reason. Although the banks were required to inform the Lawyer's Fund whenever an IOLA check was so returned, they failed to do so despite large insufficiencies. The court thus upheld a negligence theory. The court declined to dismiss on the basis that plaintiffs had taken part in illegal conduct, as that involved fact finding not appropriate on a dismissal motion. The court dismissed RICO and common law fraud claims based upon collateral estoppel from a federal case. Further, the court found that the fraud claims had not been pled with sufficient particularity (CPLR 3016(b)). The court rejected a fraudulent concealment claim since plaintiffs had failed to assert facts demonstrating that defendants had owed plaintiffs a duty to disclose (partial or ambiguous statement by defendants, fiduciary relationship, superior knowledge). The court stated that no showing had been made that reporting obligations to the Lawyers' Fund gave rise to a duty to disclose to an attorney's clients. The court found that mere inaction could not be the basis for an aiding and abetting claim and that the complaint failed to assert facts to indicate that the banks had had actual knowledge of and knowingly participated in the scheme. A third-party beneficiary theory was not pled adequately and a conversion claim did not contain allegations of specifically identifiable funds or unlawful dominion by the banks. Claims against the banks dismissed with leave to replead as to negligence. Bassman v. Blackstone Associates, Index No. 600891/98, 4/12/99 (Ramos, J.).

Procedure; personal jurisdiction; brokerage account dealings. Motion for attachment. Plaintiff sued a foreign corporation and non-resident individual defendants. Defendants objected to personal jurisdiction. Plaintiff pointed to several agreements as constituting submission to New York jurisdiction, but the court held that the agreements did not contain an agreement to submit to jurisdiction of a dispute over margin calls. The Margin Agreement, the only one that seemed relevant to the dispute, did not contain a forum selection clause or a submission to New York jurisdiction. As to long arm jurisdiction (CPLR 302(a)(1)), the court noted that the corporate defendant had entered into a contract by which it wired money to New York to fund a brokerage account with plaintiff pursuant to agreements; its agent transacted business through plaintiff's office; the agent sent the account documents to plaintiff's New York office. The court held that this was sufficient contact to require the defendant to

expect to defend actions here. However, the court held that the required showing had not been made as to the individual defendants. Therefore, the action was dismissed as to the individual defendants. A sufficient showing was made to justify an attachment against the corporate defendant. Refco Capital Markets v. Setland Ltd., Index No. 604072/98, 4/5/99 (Cozier, J.).

Procedure; Rule 130-1.1 certification; substantial compliance. Respondent argued that the court could not entertain the petition because petitioner's attorney had failed to sign it as required by Rule 130-1.1a. The rule provides that, absent good cause shown, the court shall strike any unsigned paper if the omission of a signature is not corrected promptly after being called to the attention of the attorney or party. Here respondent raised the issue in an opposition affirmation but petitioner did not correct it in connection with, or even address the argument in, its reply. It was argued that there had been substantial compliance due to counsel's having signed the verification in the petition. Verification, the court said, is a lesser attestation to the propriety of a litigation paper. He had also signed the litigation back here. Despite the different purposes of verification and certification under the rule, the court held that there had been substantial compliance and that to hold otherwise would be to exalt form over substance at the expense of precious judicial resources. On the merits, a framed issue hearing was ordered. Travelers Property & Casualty v. Zaborskaya, Index No. 113725/98, 4/5/99 (Ramos, J.).

Procedure; summary judgment; discovery, need for. Indemnity; construction; payments scrutinized for good faith and reasonableness of amount. Action by surety for breach of indemnity agreements in regard to construction projects. A party opposing summary judgment should be able to obtain discovery when it appears that facts supporting the opponent exist but cannot be stated, but discovery should not be allowed where there has been a failure to demonstrate that it would produce relevant evidence. Where relevant facts essential to justify opposition to a summary judgment motion are within the exclusive knowledge and control of the movant and may be revealed through discovery, summary judgment should be denied. But mere hope is insufficient to defeat such motion. The court noted further that indemnity agreements such as that present here have been enforced by the courts and payments thereunder are scrutinized only for good faith and reasonableness as to amount paid. Defendants claim that plaintiff acted in bad faith by failing to mitigate damages, declining to bond outstanding liens, or agreeing in principle to a substitute surety on certain projects. The court found that defendants had not merely stated conclusory assertions, but had shown in their papers that the discovery sought would produce relevant evidence. In view of this and since no discovery had occurred, the court denied plaintiff's summary judgment motion with leave to renew. American Home Ass. Co. v. Gemma Construction Co., Index No. 601042/98, 3/31/99 (Cozier, J.).

Procedure; summary judgment; issues of fact. Contracts; interpretation. Substantial secured revolving credit agreement for financing to obtain licenses and for working capital to market Star Wars toys. The parties disputed whether defendant owed plaintiff certain fees under the agreement and sought a declaration of the rights and obligations of the parties. The court found that defendant at minimum had raised a genuine issue of material fact as to whether plaintiff had declined to provide the facilities on the terms set forth in the initial commitment letter; and had raised issues as to what had been contemplated by a provision for the assignment of certain material contracts and what was meant by terms and conditions mutually agreeable in an intercreditor agreement. There were also issues as to whether the initial commitment letter was a benefit to defendant so as to warrant denial of its motion to the extent that it sought dismissal of an unjust enrichment cause of action. Motions of both parties for summary judgment denied. BT Commercial Corp. v. Galoob Toys, Inc., Index No. 601357/98, 2/10/99 (Shainswit, J.).

Real estate syndication; liability of agent under participation agreement; knowledge of investor as bar to suit. Misrepresentation; justifiable reliance. Attorney and client; attorney-client relationship in partnership context; standing to sue. Dispute over operation of the real estate syndication that leases and manages the Empire State Building.

Plaintiff purchased a participation years ago. He complained about accounting methods used in calculating overage rents, alleged diversion of monies due to deduction of expenses before distribution, and an alleged conflict of interest of a law firm a member of which had been involved in the transfer of an interest in the property. The practices and relationships complained of antedated plaintiff's purchase and were described in publicly-filed documents. In a prior action the court had ruled that the plaintiff here had no standing to bring a derivative action as a mere investor under a participation agreement and that his claims were not viable because he had known, or should have, of the practices and relationship complained of. The Appellate Division had affirmed that decision. In this case, the court found that plaintiff had not alleged that the named agent of the partnership who had transferred the interest to plaintiff had engaged in conduct that would rise to the level of willful misconduct or gross negligence, as required by the participation agreement. The court stated that plaintiff had taken the interest with knowledge, either actual or constructive, which would preclude liability. The court found that a fraud claim was defective in that plaintiff would be hard pressed to establish justifiable reliance. Claims addressed to the agent as attorney were held deficient in that the participation agreement strictly limited the capacity in which the agent could be sued. Further, the court ruled, plaintiff had not shown that there was an attorney-client relationship with the firm or attorney in question, which represented the partnership. A lawyer who represents a partnership does not become the lawyer for any partner. The court held that plaintiff lacked standing to challenge the partnership's hiring and use of counsel; an effort to disqualify therefore failed. Complaint dismissed. Studley v. Malkin, Index No. 119822/97, 3/31/99 (Gammerman, J.).

Real Prop. Law 442(a). Alter ego liability. Contracts; interpretation; plain and unambiguous provisions. Quantum meruit. Unjust enrichment; constructive trust. A real estate salesperson can be compensated only when working under the supervision of a real estate broker (Real Prop. Law § 442(a)). Plaintiff contracted with one defendant but the required registration with the Secretary of State named another. The question then was whether the first was the alter ego of the second. Under the appropriate test, the court found itself unable to conclude at this stage that the contracting defendant was not an alter ego. But another defendant was dismissed on this basis. After discussing standards of interpretation, the court held that the contract was plain and unambiguous, that it provided for payment of a sum per month for nine months, and that commissions would only be paid from the tenth month. As plaintiff had been terminated before then, the contract claim was defective. The court held that a quantum meruit claim was deficient in that such a theory is not available when there is an express contract. The court held that plaintiff had failed to state a claim for imposition of a constructive trust since there was no unjust enrichment. Complaint dismissed. Mandossian v. Essex 90th Street, LLC, Index No. 603389/98, 4/12/99 (Ramos, J.)

Restrictive covenants; publishing plans as trade secrets; employee's knowledge of the industry. Application for a preliminary injunction against continued employment of the individual defendant with the co-defendant until November 1999 based on restrictive covenants. The court noted that the uniqueness of an employee requires a showing that his/her services are irreplaceable or would cause special harm to the employer if lost. The court did not detect that here. The court rejected the contention that publishing plans are trade secrets. The court found that much of the information at issue was standardized, dictated by distribution channels. The names of authors and booksellers were not secret and the selection of titles to publish was not based on any formula, pattern or device. A certain report was ruled not to fit the definition either. Further, the court found, there had been no safeguards within the company to protect the alleged confidential nature of the information. The employee's knowledge of the industry is not utilization of confidential information. Skills obtained from prior employment may only be restricted to protect an employer from deliberate surreptitious commercial piracy. Motion denied. Pearson Education, Inc. v. IDG Books Worldwide, Inc., Index No. 102348/99, 3/4/99 (Shainswit, J.).

RICO; continuity. Statute of limitations; conversion; diversion of customers; unjust enrichment. Misrepresentation; parties misled. Unjust enrichment. Fiduciary duty. Procedure; motion to dismiss; extrinsic proof. Contractual duty of employee not to misuse employer's time and facilities. Unfair competition; appropriation of customer lists. Release. The court dismissed RICO claims based upon an employee's alleged diversion of customers to his business for lack of the necessary

allegations of continuity. The scheme alleged was brief and posed no threat of future repetition. A claim for conversion of customer lists was held untimely, as were claims premised on diversion of customer calls. As to the latter, the continued acceptance of calls years after the former employer went out of business was not analogous to a continuing trespass since the customers could no longer have been considered to belong to that entity once it was defunct. The court held a fraud claim deficient since it asserted that other parties, not plaintiff, had been misled. The court found that the complaint set forth a cause of action for unjust enrichment but that the claim was time-barred since the remedy sought was the same as that sought in the time-barred legal claims. The court rejected a claim of breach of fiduciary duty since plaintiffs had failed to present any proof that the employee had ever been an officer or a partner. (The defendant had attacked the complaint by extrinsic proof, as a result of which the allegations were no longer presumed to be true and the inquiry became whether plaintiff had a cause of action). The court ruled that the complaint alleged that the employee had made improper use of the company's time and facilities, which would violate a contractual duty as employee. The court also found that plaintiffs could proceed on a theory of unfair competition as they alleged that there had been misappropriation of customer lists and whether these constituted trade secrets should not be determined on a motion to dismiss and the claims were not time- barred. Defendants asserted that there had been releases signed. The court held that they had been issued in relation to other matters, or that that was an issue of fact. Motion to dismiss granted in part. Fisher v. Datavision Computer Video, Inc., Index No. 600721/98, 3/16/99 (Cahn, J.).

Settlement; rights to master recordings. Discovery; lack of diligence. Partial summary judgment. Litigation regarding rights to master recordings of deceased rock star. A settlement and consent decree in prior litigation underlie this case. See previous opinion in this case on this website (5/29/98). Plaintiff sought to avoid this motion by claiming the need for discovery. The court held that plaintiff had not been diligent. It had waited for over three years to make any demands and did so within one month of the discovery deadline. The demands were served by improper means, by unsubstituted counsel. The court found that plaintiff derived its rights only from the settlement agreement and the consent decree. The license under which plaintiff was to receive its royalties expired. The MCA defendants would be liable only if they had produced records without authorization from master recordings listed in the consent decree. The court found that the MCA defendants had not used those masters. Therefore, the court dismissed various causes of action. PPX Enterprises v. MCA Inc., Index No. 112136/95, 4/8/99 (Gammerman, J.).

Statute of frauds; placement fee agreement; part performance; written memorandum. A placement fee agreement must be in writing. GOL 5-701(10). A formal such agreement was proposed but not signed here. However, the court found that a certain letter, signed by defendant, demonstrated that it had engaged the brokers that plaintiff had introduced. Despite the absence of a written contract, an agreement may be enforceable if there has been part performance by one party that is unequivocally referable to the agreement. Disputed issues of fact were found to exist regarding the amount of a placement fee. Second, the letter established that defendant, although declining to pay the fee set out in the unsigned contract, agreed to pay some lesser amount, to be negotiated based on certain figures. This letter, the court held, was a signed written memorandum of a contract, which need only identify the parties, describe the subject matter of the agreement, and provide some detail as to terms and conditions. Defendant's motion for summary judgment denied. Prescott, James and Thomas v. May Davis Group, Index No. 602964/97, 3/9/99 (Cozier, J.).

Tortious interference with contract; standards; merger; economic justification privilege; fraudulent or other wrongful means. Tortious interference with prospective relations; standards. Procedure; summary judgment on unpleaded cause of action. Suit by entities that had had contractual relationships with E.F. Hutton alleging tortious interference with contracts by defendants in the Shearson Lehman/Hutton merger. Standards regarding tortious interference with contract and prospective relationships discussed. The court held that Shearson had acted in the merger out of economic interest, not malice, which undermined plaintiffs' case. The court rejected the argument that, until the merger had been formally completed, Shearson lacked the requisite ownership interest in Hutton to justify its assertion of an economic justification privilege. The court did not find any proof that Shearson's interests had been antithetical to Hutton's or that Shearson had used fraudulent or other wrongful means to induce Hutton to breach agreements with plaintiffs. Plaintiffs argued that Shearson had refused to release certain

provisions it had had that allowed for control over plaintiffs and had otherwise acted improperly. The court held that such events, had they occurred, had not been the means by which the alleged breach of the agreements had been effectuated. Certain other alleged wrongs were found to be unsupported by proof. Plaintiffs also urged that defendants' refusal to release the control provisions had been the cause for plaintiffs' failure to conclude a purported contract with Prudential Bache. The court noted that plaintiffs had not pleaded a cause of action for interference with prospective relations. A plaintiff seeking summary judgment may recover only on the basis of the cause of action pleaded, the court said. Summary judgment for defendants. E.F. Hutton Int. Associates v. Shearson Lehman Bros. Holdings, Inc., Index No. 27173/90, 4/23/99 (Cozier, J.).

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