The **Commercial Division**

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COMMERCIAL DIVISION

LAW REPORT

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

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The* Report *and the complete text of all decisions discussed in it are available on the Unified Court System's Internet home page at http://www.courts.state.ny.us and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org/sections/comfed. Members of the Commercial and Federal Litigation Section may sign up at the Section's home page to receive copies of the* Report *by e-mail automatically. The* Report *is issued by the Commercial Division, not the State Reporter. The decisions as they appear on the home pages have not been edited and may differ from the final text published in the official reports.

Arbitration; motion to confirm; challenges to award. Proceeding to confirm NYSE arbitration award in matter arising out of alleged breach of agreement to retain petitioner to provide investment banking services. The court held that the award was final and definite. Respondent challenged the award insofar as it confirmed that petitioner was entitled to warrants for 17 % of the stock. Respondent asserted that there had been a lack of actual or apparent authority on the part of the person who, the award must have concluded, had bound the respondent. Respondent stated that the Board had not

approved the issuance of the warrants and that the panel had failed to apply the appropriate Canadian law in concluding that there had been authorization. Under the FAA, awards may be vacated if they are in manifest disregard of the law, meaning more than error or misunderstanding. The court concluded that although the panel could have made an error in interpretation of Ontario law, there was no evidence of manifest disregard. Award confirmed. In re Sands Brothers & Co., Index No. 604680/99, 3/15/00 (Ramos, J.).

Brokers; duty of full disclosure; fiduciary duty. Motion for summary judgment. Action seeking recovery for breach of an exclusive real estate brokerage agreement. The court stated that a broker must provide full disclosure of all relevant facts to the principal. A broker may not recover commissions if it appears that it entered into an agreement to secure commissions from another party to a transaction without the knowledge of the principal. The court found that plaintiff had violated its duty by failing to disclose several conflicts of interest. Where an agent violates its fiduciary duty to a principal, forfeiture of all compensation is required. Case dismissed. Kenneth D. Laub & Co. v. Bear Stearns Cos., Index No. 602179/97, 3/15/00 (Ramos, J.).

Champerty. Action against banks as trustees for certain certificates. The court held that plaintiff's purpose in purchasing first series certificates had been champertous, to have standing to begin litigation against the trustees. The

court found that plaintiff had been created in contemplation of this litigation, that litigation had been commenced immediately, and that no reason had been offered for the creation of plaintiff and its acquisition of the certificates other than litigation. Plaintiff had not acquired the debt to enforce payment against the obligor. Summary judgment for defendants. Bluebird Partners, L.P. v. First Fidelity Bank, Index No. 601365/97, 3/1/00 (Shainswit, J.).

Class actions; certification. Motion to certify class in action alleging unlawful practices in connection with collection of private mortgage insurance premium payments. The court found that plaintiff had alleged a number of class members sufficient to satisfy the statute but the defendant had failed to offer any challenge though having the exact information. The court found that common issues about billing practices predominated over individual ones. That there might be some individual issues as to damages would not defeat predominance. Plaintiff's claims were typical of the class. The fact that he had not sought cancellation of the insurance would not defeat typicality, the court ruled, since he would not have to be able to assert personally all claims made on behalf of the class. Nor was a request to cancel essential to a claim. The court held that plaintiff was an adequate representative. Given the small amount of individual claims, a class action would be superior. Motion granted. Walts v. First Union Mortgage Corp., Index No. 605222/96, 4/7/00 (Cozier, J.).

Collateral estoppel; agency proceedings. The court held that defendants were collaterally estopped to contest liability to plaintiff based upon the conclusion of administrative proceedings. This result was not altered by the fact that some findings concerned technical or paperwork violations. The matter of damages would be determined in a hearing. Waldman v. Baron Nissan, Inc., Index No. 9560/99, 4/12/00 (Austin, J.).

Commercial real estate; notice to cure. Preliminary injunction; CPLR 6312 (a). Long term commercial lease. Dispute arose over tenant's duty to maintain the property and right to assign. Purported notices to cure were sent to defendant. A notice to cure must set forth the cure period in clear language and must tie the cure demand to the forfeiture provisions of the lease. The court held that the notice here had been adequate since it had called plaintiff's attention to the lease provision granting the right to terminate and had informed defendant that plaintiff considered that there had been a default and of the duty to cure within the cure period. The court found that the notice would be defective because it had not been served by the landlord or the attorney named in the lease as required thereby. Plaintiff argued that defendant was

estopped by its failure to object to the fact that counsel had been acting for the landlord over time. The court agreed that a failure to object while dealing with an attorney could be an estoppel but concluded that the facts here did not support plaintiff. The first notice to cure was defective as was the termination notice. The court also found that there was a question of fact as to whether the notice had been served on time as the parties' intent with regard to counting of a Saturday was unclear. Since the termination notice was defective, the lease had not terminated when defendant obtained a Yellowstone TRO. The court ruled that defendant had shown that it had both the desire and the ability to cure any conditions found to constitute maintenance defaults. But the court required posting of a bond and imposed a deadline to ensure expeditious repair. A similar result was reached on two other Yellowstone motions. As to plaintiff's cross-motion asserting that assignment would be improper until all defaults were cured, the court stated that covenants limiting the right to assign are strictly construed. The court found conflicts between the parties as to defendant's efforts at repair. However, under CPLR 6312(a) the existence of issues of fact would not preclude a preliminary injunction. The court agreed with plaintiff that defendant's concessions about the amount of work to be done provided a basis for such relief. Also, an assignment would create a cloud on title and thus irreparably harm plaintiff. American Real Estate Holdings Limited Partnership v. Grand Union Co., Index No. 11732/99, 3/23/00 (DiBlasi, J.).

Contempt. Preliminary injunction. Motion for contempt. The court found that the prior order was not in effect at the time it had allegedly been violated in 1999. That order was to be in effect only during the pendency of the case, which had come to an end in 1997, when it was marked off. Plaintiffs could not have relied on a preliminary injunction indefinitely and never took any action to obtain a permanent injunction. Plaintiffs also failed to establish that defendants had had knowledge of the prior order since it had not been served with notice of entry until years later, when it was no longer in effect. Plaintiffs also failed to show prejudice from alleged violation of the order since they did not show that they were still engaged in any business activity that would be affected by defendants' use of the trade name. Apparent failure by plaintiffs to use the name for years may have constituted abandonment. Cross-motion to vacate the order granted. Action to be dismissed unless plaintiffs served an amended complaint in accordance with the decision. Uncle Steve, Inc. v. Uncle Tony, Inc., Index No. 121666/94, 3/20/00 (Cahn, J.).

Contempt; violation of TRO. Motion for contempt for violation of a TRO. The court ruled that the motion failed as to one defendant since the TRO had not applied to him. Although a person not named in a TRO can in some circumstances be as guilty of contempt as the primary contemnor, the attempt to recruit an employee was not within the reach of the TRO since the basis therefor, a severance agreement, contained a condition that had not been met. The other defendants likewise had not violated the TRO in this regard. Another alleged basis failed since the TRO did not prohibit contacts with a former client and an adequate factual basis in proper form had not been presented to show improper competition. Motion denied. Colin Service Systems, Inc. v. Rizzuto, Index No. 1402/00, 3/21/00 (DiBlasi, J.).

Contracts; auction house consignment. Negligence; damages. Agency; fiduciary duty. Action by dissatisfied seller at auction. Plaintiff alleged claims premised upon the defendants' consultation of an expert allegedly in violation of plaintiff's request. The court ruled that these claims failed since the consignment agreement gave the auction house absolute discretion as to consulting an expert. The court held that an alleged negligence claim failed since the expert's involvement in valuing the coins had only resulted in an increase in the estimated values so that plaintiff was not harmed. As to a claim premised upon a referral of plaintiff's collection to the auction house by an individual with whom plaintiff wished to have no dealings and defendants' misstatements about that, the court found that there were issues of fact and that, although plaintiff had not been proximately harmed by the referral or the auction house's payment of a referral fee out of its own fee, an agent may not recover a commission where a fiduciary duty is breached. The court rejected a fraud claim because of lack of proximate cause. The court upheld a withdrawal fee imposed by the auction house and rejected a related claim because the failure of a party to admit or disclose its own wrongdoing does not provide the basis for a claim. A claim that the auction house had not acted with reasonable care in publishing unreasonably low estimates failed since the consignment agreement provided that there were estimates only, not a representation or even a prediction. As to a negligence claim premised on the scheduling of the auction only 30 minutes before another coin auction, the court concluded that dismissal was required due to a lack of damages. The auction house had total discretion as to the manner

of conducting the sale, including the date, under the agreement, so there could he no claim for breach of a duty of good faith. A claim based upon a duty to disclose reserve policy failed since the consignment agreement disclosed its policy, which was required by law. The court rejected a counterclaim for legal expenses since the provision concerned breach of warranties, not at issue here. Summary judgment granted in part. Reale v. Sotheby's Inc., Index No. 604890/98, 4/13/00 (Cozier, J.).

Contracts; conclusory defense. Negligence; duty. Action on a subcontract to provide services. The court found that defendant had breached the contract by failing to do the work as required by the main contract. The court held that a counterclaim alleging failure of plaintiff to schedule and plan properly was supported only by conclusory assertions. The counterclaim alleging negligence was likewise defective and in addition plaintiff owed defendant no duty. Sealand Contractors Corp. v. Pittsford Tree and Landscape, Inc., Index No. 7598/1997, 3/00 (Stander, J.).

Contracts; conditions; statute of frauds. Damages; mitigation. On summary judgment motions, defendants argued that an escrow agreement was a condition precedent, never fulfilled, to their obligation to buy shares under an agreement. The court ruled that it was clear that the escrow was not a condition precedent as the agreement stated that it was fully enforceable without reference thereto. The intent to execute a subsequent escrow agreement did not mean that there was a condition precedent. As the date for completion of payments had passed, the court ruled that plaintiff was entitled to a judgment for the full amount. Guarantors were found liable, save one who has alleged to have made an oral guarantee, which would have violated the statute of frauds (GOL 701 (a) (2)). Although plaintiff had had a duty to mitigate damages, the court held that defendants had failed to meet their burden of proof in this regard. The fact that the stock price had floated up and down over a period did not show that plaintiff had failed to mitigate. It was not shown that plaintiff could have sold all the shares without adversely affecting the price and plaintiff had had a right to expect that defendant would purchase the shares as agreed. Summary judgment granted in part. Saffiotti v. MPEL Holding Corp., Index No. 600644/99, 3/17/00 (Ramos, J.).

Contracts; consideration; statute of frauds. Unjust enrichment. Legal malpractice. Fiduciary duty. Misrepresentation. Corporations; shareholder liability for corporate acts. Alleged agreement to issue shares to plaintiffs. The consideration was past. GOL 5-1105 did not render the agreement enforceable since the consideration was not expressed in the letter relied on. The letter was not sufficient to satisfy the statute of frauds. UCC 8-319. An oral contract for the exchange of shares for services is a contract for the sale of securities within UCC 8-319. The letter did not describe the services or state a price. As to an alleged agreement to issue shares in exchange for certain payments, there was no satisfactory writing (no quantity or price terms). The exchanges here were not unequivocally referable to the alleged agreements except that a question of fact was presented as to one payment by a check bearing the words "stock purchase." The court held that an unjust enrichment claim was barred because contingent on proof of an oral contract unenforceable under the statute of frauds. The other such claim was upheld. The court held that the statute (GOL 5-701) barred an alleged oral agreement to pay a commission for procuring an acquisition. The writing relied on by plaintiffs clearly referred to an agreement different from the one alleged. A claim for malpractice or breach of fiduciary duty against a law firm premised upon a conflict of interest failed since the allegations were speculative and conclusory. A misrepresentation claim failed since plaintiffs had clearly been in a position to ascertain the facts and the injury alleged had not occurred in reliance on the misrepresentation, but from breach of the alleged contract. Another such claim failed for lack of specificity. Claims against a shareholder were dismissed, in addition to the reasons given above, since mere ownership of stock and the control derived from it are not sufficient to create liability for corporate acts. Bronner v. Verdiramo, Index No. 600892/99, 3/10/00 (Cozier, J.).

Contracts; damages; reasonable certainty. Alleged breach of agreement by which plaintiff was to be given credit for having contributed to the creation of intellectual property. Damages for lost profits from breach of contract must be

capable of proof with reasonable certainty. The court concluded that enough had been shown to justify submission to a jury of the question of whether there had been damages due to loss of publishing contracts flowing from lack of the credit for past work agreed upon. The court also ruled that a triable issue existed as to whether defendants' course of conduct with Random House unreasonably limited advances received by defendants and in turn plaintiff's return under another agreement. Summary judgment denied. Robinson v. Princeton Review, Index No. 100899/97, 4/17/00 (Cahn, J.).

Contracts; duty of care. Action arising out of construction project alleging breach of contract and negligence by engineers which had failed to identify an obstacle to the project as planned. The court found that an issue of fact was presented as to whether one defendant had owed a duty of care independent of the contract given the nature of the damages, the services to be performed, and how the injury had happened. This defendant had had a limited contractual obligation. However, plaintiff had submitted proof that it had been advised by a co-defendant that it had to take into account site conditions and impediments and it had affixed a seal without reservations on the plans. Thus, issues of fact again existed. A similar result was reached as to a co-defendant. Rochester Pure Waters District v. Harza Associates, Index No. 13139/90, 4/18/00 (Stander, J.).

Contracts; interpretation. The court ruled that plaintiffs were entitled to specific performance of a buy back agreement. The fact that defendants had secretly not intended to be bound thereby was irrelevant since the parties had entered into a clear, binding contract. The court held that there was no basis to remove shares of stock from plaintiffs because of their alleged failure to have performed on an unrelated contract. Smith v. Long, Index No. 7530/1997, 3/00 (Stander, J.).

Contracts; meeting of the minds; cancellation. Procedure; motion to dismiss. Action arising out of real estate purchase agreement. Attorney letters had been exchanged and conditional approvals had been given. However, the parties had not signed off on changes. One attorney canceled the contract. The court determined that there had not been unconditional agreement as to key, material terms and thus no meeting of the minds. Further, the court found, the contract had been cancelable by its terms if there had not been full approval by counsel and all parties within an approval period, as there had not been. If a question can be raised as to whether a party to such a transaction acted unfairly and in bad faith, a motion to dismiss would have to be denied. However, the court held that an issue of fact had not been raised since the sellers had had a clear right to cancel and there had clearly been bona fide efforts to seal a deal, as shown by correspondence. Case dismissed. Jani v. Mason, Index No. 12795/99, 4/00 (Stander, J.).

Contracts; religious entity; jurisdiction; issues of religious doctrine. Action by former church ministry employees against church for breach of employment agreements. The court stated that contract disputes touching on religious concerns may be decided by a court only if it can do so without reference to religious principle. The court found that the complaint set forth claims for breach of employment agreements without raising matters of religious doctrine. The court noted, however, that the agreements had been entered into after the previous administrator of the local church, a priest who had been embroiled in a dispute over matters of doctrine with the church, had been advised that he was being terminated as administrator. The agreements had attempted to isolate the ministry employees from any possibility of being removed by the new pastor and included a provision that the employees would not be required to subscribe to the beliefs of any entity other than the mission statement of the local parish church. Whether the former administrator had had any authority to enter into the agreements presented a question of church law. The court stated that it might have jurisdiction if the suit involved non-payment of salary or concerned a non-ministry employee, but at issue instead was the right of a new pastor to terminate employees who declined to cooperate with him on matters of ministry because of a dispute over doctrine. The court held that it lacked jurisdiction. The court also ruled that the bishop could not be sued since he was not a party to the contracts or the making of any oral representations. A similar result was reached as to the diocese. Smith v. Clark, Index No. 1820/99, 4/24/00 (Stander, J.).

Contracts; restrictive covenant. Action by placement agency against consultant. Plaintiff alleged that defendants had violated a restrictive covenant in an agreement by accepting employment directly with a client of plaintiff. Defendants argued that the covenant governed conduct only after termination of the agreement. The court rejected this argument. The court found that the plaintiff was an employer fee paid employment agency and thus exempt from a license requirement (Gen. Bus. Law §§ 171, 191). Partial summary judgment granted. Trilogy Systems v. Kogosoft Corp., Index No.603904/99, 3/10/00 (Shainswit, J.).

Contracts; statute of frauds. Civil Rights Law 51. Action for breach of contract and unjust enrichment based upon defendants' alleged creation and distribution of a film involving incidents in which plaintiff had participated in violation of an agreement without plaintiff's consent. The court found that the pleading set forth the claims sufficient to withstand a motion to dismiss. A defendant argued that the statute of frauds barred the action. The court ruled, however, that the alleged agreement could have been performed within one year, as if defendants had obtained plaintiff's consent to showing of the film. Continued performance by defendant beyond one year did not establish that the statute controlled. The court rejected an argument that plaintiff had impermissibly sought to circumvent the applicable statute of limitations for a claim under Civil Rights Law 51. Britanov v. Home Box Office Corp., Index No. 603939/99, 4/13/00 (Cozier, J.).

Contracts; statute of frauds; part performance; estoppel. Breach of contract action. Motions for summary judgment. The agreement contained a clause providing that amendments were to be in writing. Defendant claimed that there had been a modification of the agreement, pointing to letters, notes, etc. The court held that a clear written modification containing all terms, not a mere note, was required to meet the writing requirement of GOL 15-301. There was no fully performed oral modification or waiver of the contractual provision. Defendant asserted that there had been part performance but the court held that it had not been unequivocally referable to the agreement and the plaintiff had repudiated the alleged modification. An estoppel was precluded by the repudiation and the fact that the conduct was compatible with the agreement as written. The court interpreted the agreement and held that defendant was required to make certain payments to plaintiff for enrollees without a primary care physician. Rochester Community Individual Practice Assn. v. Finger Lakes Health Ins. Co., Index No. 2975/98, 3/9/00 (Stander, J.).

Contracts; successor-in-interest. Procedure; leave to replead. Action alleging breach of contract for ad projects. A defendant moved to dismiss on the ground that the complaint was based on a successor-in-interest theory. The court ruled that this theory is an extension of tort law and is not available in a breach of contract case. Motion granted but with leave to file an amended complaint setting forth a claim under Debtor & Creditor Law, which plaintiff had claimed it wished to assert. SLP Productions v. Eastwind Airlines, Inc., Index No. 601656/99, 3/23/00 (Ramos, J.).

Employment relationship; breach of fiduciary duty; casual memory. Monies owed on share repurchase; breach of fiduciary duty as defense. Motion for preliminary injunction against misuse of misappropriated information. The court found that evidence had been presented sufficient to show that various parties, while still working for the employer, engaged in activities designed to bring about the formation of a competing business and utilized the employer's time, facilities, and proprietary secrets to do so. The court found that a hearing was required as to whether the parties had downloaded confidential information from the employer's computers such that their subsequent solicitation of the employer's producers may not have been the product of casual memory. In addition, summary judgment was granted to a party seeking monies due for repurchase of shares. Breach of a fiduciary duty did not bar these rights since compensation for services rendered was not sought. The court held that the employer was obligated to repurchase the shares owned up to the date of resignation. Murphy v. Axon, Index No. 605086/99, 3/31/00 (Ramos, J.).

Evidence; cross-examination as to problems with IRS; admissibility; prejudice. Procedure; bifurcation. Collateral estoppel. Action on disability policy. Insurer declined to pay on ground of material misrepresentation. The court held on a motion in limine that plaintiff could be cross-examined as to difficulties with the IRS that allegedly gave him a motive to obtain duplicative coverage. The court ruled, however, that the proof could not be admitted on defendant's case in chief on the affirmative defense of material misrepresentation because the prejudicial effect of the proof outweighed its probative value. The court ruled that although plaintiff's alleged statement about a plan to stage the fall was an admission, the recipient was deceased and that precluded a basis for statements the deceased allegedly had made to other employees. The court refused to bifurcate the case because of alleged prejudice from the IRS proof. The court held that plaintiff was not collaterally estopped from changing his claim from total to partial disability where the court in the other case had found plaintiff to have been totally disabled as defined by the policy there at issue. The court also refused to bar plaintiff from making such a change by supplementation of the bill of particulars. Campagna v. John Hancock Mutual Life Ins. Co., Index No. 4337/1993, 4/7/00 (Stander, J.).

Insurance; accumulation; occurrence. Tender; conditions. Employee dishonesty coverage. The court found that the policy did not contain any specific expiration date; that the amount of the insurance to be paid did not accumulate from year to year or period to period; and that the insurer did not have to pay on two proofs of loss when there was only one occurrence under the policy though it involved multiple acts. The court ruled that plaintiff was entitled to interest from the date of submission of proofs of loss although the insurer had tendered a check in the amount at issue since the tender had not been unconditional. Landmark Society v. Aetna Cas. & Sur. Co., Index No. 11597/1998, 3/9/00 (Stander, J.).

Insurance; Lloyd's market. Procedure; forum non conveniens. Misrepresentation; conclusory allegations; statute of limitations; discovery; estoppel. Continuing tort; continuous representation. Plaintiffs, 274 U.S. citizens or residents, alleged that they had been fraudulently induced to become Names in the Lloyd's market and suffered losses. Defendants, law firms, had revealed to certain Lloyd's insiders that large losses were likely and plaintiffs were then induced to become Names. Plaintiffs alleged that defendants had had a duty to disclose the facts to them arising out of their role as counsel to plaintiffs' agents, the Managing Agents. The court denied defendants' motion to dismiss insofar as it was premised on an assertion of English jurisdiction since defendants were not signatories to the Lloyd's General Undertaking containing a forum selection clause nor third-party beneficiaries. However, the court found, the information in question had been disclosed to plaintiffs' agents and the allegations that defendants must have known that the agents had been concealing the facts from plaintiffs were conclusory and based on speculation. Further, the claims were time barred, the court ruled, since they had accrued when the concealment had occurred or by 1991, when the concealed liabilities exploded in losses, and the action was commenced in 1999. The problem had been widely reported in the press. As there was no showing that plaintiffs had been induced by fraud or deception to refrain from commencing a timely action, an estoppel was not possible. The court found no continuing tort in the law firms' ongoing representation of Lloyd's as the assertion was conclusory, nor did the continuous representation rule apply. Case dismissed. Anthoine v. Lord, Bissell & Brook, Index No. 102420/99, 3/24/00 (Ramos, J.).

Insurance; subrogation; release. Action by subrogated insurer seeking recovery of monies paid the insured for a burglary loss. The lease provided for a release of liability for loss conditioned on inclusion in the respective insurance policies of a clause stating that such release shall not adversely affect said policies. Defendant had a policy that contained such a clause but plaintiff's policy did not. Defendant argued that having stepped into the shoes of the insured, the insurer had waived subrogation and its rights to recover in advance of the loss. The court rejected this argument, holding that the release had not been shown to be valid in view of the conditional terms of the lease. The court rejected an argument that the clause was implicit in the policy. Olef Creations, Inc. v. The Rector, Church Wardens and Vestrymen of Trinity Church, Index No. 113524/96, 3/15/00 (Crane, J.).

Joint venture; covenant not to compete. Action arising out of proposed merger of communications giants, Viacom and CBS. Plaintiffs and Viacom had entered into a joint venture to develop a major TV network. The agreement contained a covenant not to compete. The court found that CBS would not belong to Viacom until the merger closed, which had not yet happened. However, the court held, defendants erred in concluding that the covenant thus was not applicable since it provided that Viacom would not have any interest, financial "or otherwise" and the merger agreement bound CBS to Viacom even prior to the closing. Nevertheless, the court held that another clause permitted Viacom to acquire an interest in a competing network even if such an acquisition would not otherwise be allowable under the former provision. Viacom was required to offer the potential acquisition to the partnership not less than 45 days prior to the proposed closing. Thus, the court ruled, there had been no breach of the agreement nor breach of fiduciary duty. Viacom thus had the right to exercise a buy-sell provision. The non-compete provision could not survive enforcement of that provision since there was nothing in the provision to indicate that the non-compete provision was intended to survive the end of the joint venture. Summary judgment for defendants. BHC Communications v. Viacom, Inc., Index No. 600515/00, 3/16/00 (Cahn, J.).

Labor Law 191, 198. Counterclaims to recover unpaid commissions for placement services. The court held that the defendant had been a commission salesman and that the failure to pay full commissions violated Labor Law 191. The court also ruled that plaintiff had not been excused from paying defendant because of the latter's alleged breach of fiduciary duty since such self-help was not permitted and there was no proof of violation while he had been still employed. As the amount owed was not easily calculable and arguably in dispute, the court could not find that there had been a willful failure to pay so as to serve as a basis for liquidated damages (Sec. 198 (1-a)). Datamark Associates v. Dozier, Index No. 605077/98, 4/4/00 (Cahn, J.).

Letters of credit; strict compliance; notice. Standby letter of credit under Uniform Customs and Practice of Documentary Credits. Defendant had refused to pay based on alleged discrepancies in the documents presented. CPLR 3213 motion. Strict compliance is required. The court held that the documents here had not strictly complied so that refusal of payment had been justified (consignee inconsistent with customer, port of discharge on bill of lading inconsistent with that on drawing statement and invoice, inconsistent shipment weight, and failure of bill of lading to name carrier). The court rejected the argument that defendant was precluded because its notification of dishonor had not been made within seven days of receipt and had not stated whether defendant was holding the documents at the disposal of or returning them to plaintiff. The notice period did not begin to run until defendant had received the documents in its New York office, the issuing bank, rather than a foreign branch. The court found that the documents had been at the plaintiff's disposal. Motion denied. Cross-motion granted. C.I. Union de Bananeros de Uraba S.A. v. Citibank, Index No. 602314/99, 4/12/00 (Cahn, J.).

Misrepresentation; disclaimer; reliance. Action alleging fraud in connection with the sale of a business. The contract of sale provided that there were no representations except as set forth therein and the contract contained none on the subject about which plaintiffs complained in this action. Further, the court found, plaintiffs had released defendants by a general release and there was no actionable fraud. Finally, plaintiffs, by due diligence and reasonable investigation, could have established the facts allegedly misrepresented, thereby negating reasonable reliance. Case dismissed. Salazar v. Stefanutti, Inc., Index No. 31923/99, 3/6/00 (Austin, J.).

Preliminary injunction. In a proceeding to dissolve an LLC, the court ruled that a preliminary injunction was not appropriate. The petitioner had failed to demonstrate a likelihood of success as she had agreed that respondents would have control and it was she who had left the company to form a new business. The court found that damages would provide an adequate remedy. The balance of equities favored no injunction since the business would be penalized more

by it than would petitioner, who could rely on the fiduciary duties of respondents. Inspection of records was granted on consent but not a formal accounting yet. In re Quinn, Index No. 27831/99, 3/29/00 (Austin, J.).

Preliminary injunction; restrictive covenant; expiration; fiduciary duty. Motion for preliminary injunction against former officer and employee. The court held that plaintiff had failed to meet its burden. The restrictive covenant had expired in 1994. The written agreement was not extended in a writing that would satisfy the statute of frauds. The covenant by its terms was to run for more than one year. Continuation of work after expiration and payment therefor could not have impliedly imposed the obligations of the covenant on the officer. The factual support for a claim of competitive employment was absent. The court found that the claim for breach of a fiduciary duty was supported only by vague hearsay, that there was a lack of proof that the defendants had stolen or memorized customer lists and that the customers were publicly identifiable. Casual memory of information does not justify injunctive relief. Silver Line v. Kaplan, Index No. 600135/00, 3/23/00 (Shainswit, J.).

Procedure; bifurcation; attorneys' fees. Discovery. Indemnification for expenses, including legal fees; damages issue. Plaintiff sought to sever the question of fees owed to its attorney until after the trial on other damages so as not to invade the attorneys' preparation process for trial. Defendant argued that it was entitled to one trial before a jury. The court held that there was no right to a jury trial on the fees issue, the liability issue having already been determined by the Appellate Division. The court ruled that defendant should not be in a position to attack counsel for plaintiff before the jury on the question of that attorney's fees. The fees were also ongoing. Issue bifurcated. Plaintiff sought to bar discovery as to legal bills. The court ruled that the attorneys should submit representative samples of the bills to a Discovery Master for in camera inspection. If the bills provided detailed accounts of the services rendered, they would not be discoverable until after the damages trial since they would reveal strategy in preparation for trial. Paramount Communications Inc. v. Horsehead Industries, Inc., Index No. 125931/93, 3/13/00 (Shainswit, J.).

Procedure; counterclaim. Partnership; accounting; fiduciary duty. Motions to dismiss counterclaim by third- party defendants and summary judgment in real estate partnership matter. The plaintiff alleged fraud and breach of fiduciary duty in the purchase of her partnership interest. The court found that the entity bringing the counterclaim was related by name only to the entity involved in the events at issue and therefore was not the proper party to bring the counterclaim. The court held that the plaintiff had no right to an accounting because she was no longer a partner. Although defendant partner owed her a fiduciary duty prior to the transfer, it was not clear from the record what information plaintiff claimed had not been disclosed. She had been aware of the declining condition of the building, a possible sale and that other interests were being considered for purchase by the partner. Nor was intent alleged. Motions granted. Earley v. Malkin, Index No. 602499/97, 3/30/00 (Ramos, J.).

Procedure; CPLR 3213. The court held that plaintiff could seek expedited treatment (CPLR 3213) as to a promissory note, but not as to an agreement to pay. The latter was an agreement for the sale of corporate stock and a management agreement, with an option to purchase other shares. The court ruled that this was not a proper basis for a 3213 determination. Katz v. Knapp, Index No. 31000/99, 2/14/00 (Austin, J.).

Procedure; forum non conveniens. On forum non conveniens motion, the court found that communications about the product at issue had occurred in Washington State, that most witnesses resided there, that purchase orders were issued there and that these included a Washington choice of law clause, as did a related agreement. Plaintiff and one defendant were New York corporations, but the fact that the transaction out of which the claims arose occurred in Washington was more important. There was an alternative forum. Motion granted on conditions. Seneca Foods Corp. v. Starbucks Corp.,

Index No. 6673/1999, 4/00 (Stander, J.).

Procedure; forum non conveniens. Action for breach of fiduciary duty and other wrongs. Forum non conveniens motion. The court rejected the defendants' contention that the case was merely a corollary to an Israeli proceeding. New York had a greater interest than any other jurisdiction since the case concerned alleged misuse of trust assets by a New York attorney. The trust agreements and related documents had been entered into in New York and Belgium. Israeli law would not govern the claims asserted here. Defendants failed to show that New York would be an inconvenient forum. Motion denied. Handelsman v. Braun, Index No. 603389/99, 3/14/00 (Ramos, J.).

Procedure; motion papers; reply papers; personal jurisdiction; supplemental summons. Motion to dismiss. The plaintiff objected to the court's considering a jurisdictional argument as it had been raised for the first time in the reply papers. However, the court rejected this argument since it had given the plaintiff an opportunity to submit additional papers. Defendant argued that the court lacked jurisdiction because he had been served with a supplemental summons after the 120-day deadline of CPLR 306-b that was not identical to the summons that had been filed with the Clerk. The court found that the supplemental summons contained all of the information contained in the summons, which had named the moving defendant, plus the name of a newly-added defendant. The date of filing was different but that had no impact on timeliness. Defendant also had failed to identify any prejudice. Motion denied. Spitzer v. Dewar Foundation, Index No. 401717/99, 3/2/00 (Ramos, J.).

Procedure; motions; post-submission papers. Preliminary injunction. Contracts; franchises. Motion for preliminary injunction against former franchisee and cross-motion to dismiss. The court refused to consider post- submission letters. The defendant had continued to operate the same type of business at the same facility under a different name after the termination of the franchise agreement. The court held that as plaintiff had sold the property to defendant, it could not assert that the store was its store for the purposes of the non-compete provision of the franchise agreement. The court rejected an argument that language in the agreement providing that the relevant paragraph would survive termination supported plaintiff's position. The definition of the store was contained in a different paragraph which lacked language of continuing effect. The court upheld other claims. However, it found that plaintiff had not met its burden to show likelihood of success on a trademark dilution claim nor had it shown that plaintiff would suffer irreparable injury. Motion denied. Carvel Corp v. Silverman, Index No. 18819/99, 3/31/00 (DiBlasi, J.).

Procedure; motion to dismiss. Commercial premises rendered unusable. Dispute as to termination and duty to continue. Motion to dismiss denied. The court held that plaintiff had waived right to terminate for one year period during which restoration was to take place. The record did not conclusively resolve certain issues on motion to dismiss. Had the premises been restored ? What was duty of landlord to notify tenant that the restoration had been made ? Was plaintiff's notice to restore effective ? Motion denied. Vermont Teddy Bear Co. v. 538 Madison Realty Co., Index No. 602568/99, 4/11/00 (Cahn, J.).

Procedure; motion to reargue. Set-off; mutuality; charging liens. Motion to reargue. The court found that the issue of whether the judgment for certain sums owed should be set off against attorneys' fees had not been raised in any detail in the original papers. The court ruled that in contrast with the initial decision, mutuality did exist between the Bank and the parties regarding a portion of the Bank's claims for attorneys' fees and the judgment and that a set-off was thus proper. However, as to whether charging liens would attach only to proceeds after the set-off, the court held that the Bank was merely reasserting the same points previously made. The liens would take priority. Banque Indosuez v. Sopwith Holdings Corp, Index No. 121719/94, 3/15/00 (Shainswit, J.).

Procedure; personal jurisdiction. Action alleging breach of engagement letter and advisory agreement by financial advisor in connection with a large public sale of notes. Three defendants moved to dismiss for lack of personal jurisdiction. Plaintiff relied upon the presence of two subsidiaries here, alleged mere departments. Common ownership was established. The court found that there was sufficient basis to conclude that further discovery was needed to determine whether the New York subsidiaries were financially dependent on the defendants, whether there had been interference with personnel and failure to observe corporate formalities, and whether defendants exercised control over the subsidiaries. Autotech Leasing Associates v. Meespierson, Inc., Index No. 602430/98, 4/14/00 (Cozier, J.).

Procedure; personal jurisdiction; statute of limitations; FIRREA. Action to recover on note. The court granted a motion to dismiss as to one defendant since he had moved abroad, the plaintiff had had actual knowledge of his whereabouts and service on him at a former residence in New York was defective. As to the contention that dismissal was required on statute of limitations grounds, the court noted that a cause of action against the maker of a demand instrument accrues on the date of the instrument. UCC 3-122(1)(b). As the FDIC had been involved here, the FIRREA was applicable. It affords the FDIC or its assignee (as here) six years from the later of the date on which the FDIC took over as receiver or the date of accrual of the claim under state law. This action was untimely under either test. The court held that the fact that the creditor had unilaterally seized collateral and applied it towards reduction of the debt did not evidence an acknowledgment of the debt. The plaintiff also relied upon an alleged payment of interest but the printout cited was ambiguous and the court held that it had failed to meet its burden of proof to show that the payment was an absolute and unqualified acknowledgment by the debtor. Babin & Associates v. Puntillo, Index No. 602512/99, 3/13/00 (Cozier, J.).

Procedure; pleading; breach of contract; negligence. Medical malpractice; HMO. Misrepresentation and contract. Fiduciary duty. GBL 349. Action alleging failure to provide health care benefits. The decedent had sought coverage for admission to a facility for substance dependency. The court ruled that the first claim was procedurally defective in that it commingled claims of contract and negligence and was redundant of other portions of the complaint. The court upheld other claims against an argument of duplication since the plaintiff sought to recover for the death of the decedent due to defendants' alleged negligent processing of his requests for benefits and an appeal and these were claims that more commonly arise in tort than in contract, and damages beyond the contract ones were sought. The court noted that an HMO should be held to a high standard regarding decisions on requests for benefits and appeals from denials. The court held that a medical malpractice claim was barred by Public Health Law 4410(1) where the HMO has merely determined coverage issues. The HMO here had not erased the line between its administrative and medical treatment functions. The court rejected the argument that a utilization review constituted the practice of medicine since the defendants had not performed one as correctly defined. An HMO that does not itself render medical service or care cannot be held liable for malpractice. The court ruled that plaintiff had failed to allege a doctor-patient relationship as to the two medical defendants, who had only rendered coverage determinations, and they could not be individually liable on the HMO's contract. The court held that a fraudulent inducement claim was duplicative of the contract claim as the fraud related to the breach. The court held, however, that a claim that the HMO had made misrepresentations about the scope of coverage and the appeals procedure was viable. The court rejected a claim alleging malicious, wilful or bad faith breach as legally unfounded. The court also rejected a breach of fiduciary duty claim because it was merely a restatement of the breach claim. The court upheld a GBL 349 claim since more than a private dispute was at issue, managed care having a pervasive influence in the administration of health care (distinguishing New York University v. Continental Ins.). Punitive damages dismissed. Payton v. Aetna/US Healthcare, Index No. 100440/99, 3/22/00 (Cahn, J.).

Procedure; renewal. Champerty; action for damages. Motion to renew and to reinstate dismissed claims of breach of fiduciary duty and champerty based upon three default notices discovered recently in plaintiffs' voluminous files. The court ruled that renewal was appropriate in order not to defeat substantive fairness. The court found the excuse for non-

discovery sufficient, especially since the notices had been sent by defendants and they had represented to the court that only one notice, a different one, had been sent. The court also ruled that the claim had been adequately stated since the new notices cured a temporal gap keyed to when a defendant had become general partner of the partnership. The champerty claim was found still defective since it is not clear that this may be asserted as an affirmative basis for damages and since there was still no allegation that the primary purpose of the purchase of the notes had been to bring an action. The court rejected a proposed amendment since the doctrine of merger of estates relied upon had nothing to do with the allegations and since there were no allegations of an insolvency at or near the time of a transaction so as to support a claim of fraudulent conveyance. Krusch v. Affordable Housing LLC, Index No. 606076/97, 3/6/00 (Cozier, J.).

Procedure; stay of action. Class action against investment banking firm alleging negligence in its evaluation of a proposed sale of a corporation as a result of which shareholder value was not properly maximized. Relying on Schneider v. Lazard Freres, the court granted a motion to stay this action because many of the issues in a related action pending in Delaware raised possibilities for collateral estoppel here. Klotz v. Furman Selz LLC, Index No. 116005/97, 4/7/00 (Cozier, J.).

Procedure; summary judgment. Misrepresentations and contracts. GBL 349; public impact. Plaintiff alleged that defendants had failed properly to repair a boat. The court found on the facts presented that there were issues of fact as to whether the repairs had been made or there had been intervening events that had caused the damage alleged. The court held that the fraud claim was defective in that it only related to a breach of contract and that there could be no basis for a claim of infliction of emotional distress based upon the breach. A claim under GBL 349 failed for lack of an alleged impact upon consumers at large. Ziesel v. Capri Marina & Yachting Center, Index No. 19775/96, 2/24/00 (Austin, J.).

Procedure; vacatur of default. The court held that the failure to answer the complaint here had not been the result of willful dilatoriness but rather confusion of defendant about answering at the same time that he had been consulting counsel about commencing a suit against plaintiff involving the same issues. The delay was brief and plaintiff had not shown any prejudice. Affidavits submitted by defendant established that his defenses had merit. Highland Hospital v. Caputo, Index No. 9824/1999, 4/20/00 (Stander, J.).

Real property. Procedure; motion for summary judgment. Punitive damages. Duty. Misrepresentation and contract; disclaimer; inability to discover. Statutory implied warranty. Action arising out of purchase of house. The court held that plaintiff had failed to lay bare his proof in competent form so as to raise an issue of fact requiring trial on a claim for punitive damages on a negligence cause of action. Plaintiff was not an expert so his views as to how the house had been constructed were insufficient and no non-hearsay statements of an expert were offered. On a fraud claim there were questions of fact about the making of statements on the basis of which the jury might determine that punitive damages would be appropriate. The court found that no duty had been owed to plaintiff when the house had been built for defendant and that plaintiff had failed to show that he had been a third-party beneficiary. Further, plaintiff was seeking only economic damages. The court rejected the argument that the only fraud here had related to a breach of contract. The alleged misrepresentations did not concern obligations to perform under the contract but collateral matters of present fact (the condition of the house). But the court noted that various provisions in the contract and a limited warranty specifically disclaimed reliance on representations. This would bar the claim absent some exception. The court held as to one representation that the fact that the condition could not have been discovered by plaintiff without ripping up the walls was such an exception. The court held that the fact that there was a limited warranty did not preclude plaintiff from relying on the statutory implied warranty (GBL 777-a). Johnson v. Slater, Index No. 11161/97, 4/17/00 (DiBlasi, J.).

Tortious interference; sole purpose. Misrepresentation and contract; future performance. Action alleging breach of contract by author of children's books and others through the use of ghostwriters. On motion to amend, the court ruled that a proposed tortious interference claim was defective since it failed to allege that the author had used ghostwriters solely in order to harm plaintiffs. A fraud claim was defective since it merely restated a contract theory and since the allegations concerned performance in the future, not a basis for a fraud action. A claim as to memo agreement had to be pursued only in arbitration. Scholastic Inc. v. Parachute Press, Index No. 600512/99, 3/27/00 (Ramos, J.).

Venue; action involving damages to real property from contract for services. Motion for change of venue in transitory action arising out of alleged damages caused in connection with the provision of services on property located in Saratoga County. The fact that the contract had been signed in Nassau County was not significant, the court found, since plaintiff had used both Nassau and Saratoga addresses at times. But even if Nassau were plaintiff's permanent residence, other factors favored Saratoga. The court found that all identified witnesses resided in or close to Saratoga. Plaintiff resided at least part time in Saratoga and would not be prejudiced by a transfer. The alleged breach arose in Saratoga. Also plaintiff in the contract had represented his address as in Saratoga and should be estopped to assert otherwise. Plaintiff's wife, the title owner, was a Saratoga resident and would be an indispensable party. McFarlane v. Bernacki, Index No. 25428/99, 3/13/00 (Austin, J.).

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