The Commercial Division

of The State of New York

Law Report - October 2000

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

VOL. III, NO. 4

OCTOBER 2000 (COVERING DECISIONS ISSUED JULY-SEPTEMBER 2000)

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.

Accounting malpractice; privity; third-party beneficiary. Fraud. Punitive damages. Action by lenders against accounting firm for malpractice. The court held that the complaint satisfied Credit Alliance. It alleged that defendant had been told that the primary reason it had been hired was to perform an audit that would be delivered to the lenders so they could continue to lend. This was sufficient, though the pleading did not allege who had advised defendant or when. The details could be developed in discovery. The purpose of the audit had been reinforced over time. Further, plaintiffs alleged a series of communications advising that the lenders were relying on defendant's work in regard to credit for the debtor. A contract claim was also upheld on a third-party beneficiary theory. The court upheld a fraud claim that defendant had knowingly or recklessly failed to disclose certain facts. A punitive damages claim was dismissed for lack of a fiduciary relationship or conduct aimed at the general public. Motion denied. LaSalle National Bank v. Ernst & Young,

LLP, Index No. 115040/99, 8/30/00 (Cahn, J.).

Arbitration. Partnerships; individual liability. Aiding and abetting breach of fiduciary duty. Fiduciary duty; nature of relationship; auditor and client. Tortious interference. Misappropriation of trade secrets. Action alleging breach of fiduciary duty, aiding and abetting, etc. based on alleged "theft" of a risk management group from plaintiff by defendants acting in concert. A defendant, former employee of plaintiff, moved to stay the case pending arbitration. The court found that the breach of fiduciary duty claim fell within the reach of the arbitration clause. The court held that individual defendants, members of defendant partnership, could be held liable personally (Part. Law 26 (2) (c) (i) (ii)). This had been adequately pled. The court rejected an argument that a fiduciary duty could not exist between an independent auditor and its client. Tortious interference claim and misappropriation of trade secret claims found sufficiently pled. Emcor Eurocurrency Management Corp. v. Ernst & Young LLP, Index No. 605006/99, 9/27/00 (Cahn, J.).

Attorney and client; contacting represented client; criminal context. In breach of contract action, plaintiff moved to suppress transcripts of tapes made in a criminal undercover investigation on the ground that the authorities were barred from contacting persons known to them to be represented by counsel in directly related civil proceedings. The court found that there had not been a sufficient showing of a direct relationship between the civil litigation and the bribery investigation. Further, the court found no authority for suppressing tapes in this case, a civil matter, in which illegality was raised for the first time. The ethical bar on communicating directly with a litigant was raised, but the court held that the rules do not give rise to a private right of action and do not have the force of law. Motion denied. Milnor Construction Corp. v. New York City School Construction Authority, Index No. 402730/99, 9/14/00 (Cahn, J.).

Attorney and client; disqualification. One party moved to disqualify the law firm for an adversary because it had hired a former associate of the firm representing the party who had worked on this case. However, the attorney never went to work for the second firm, the offer having been withdrawn, and there having been no showing of a reasonable probability that confidential information was disclosed during interviews. The court denied sanctions since the client had not been prejudiced by the second firm's having interviewed the lawyer while he was still an adversary on this case. The court stated, though, that it was wrong for the second firm to have approached the associate and it was wrong for the firm and the associate to have had even preliminary talks about employment while adversaries. Ogden Allied Abatement & Decontamination Services v. Consolidated Edison Co., Index No. 606301/96, 9/12/00 (Cahn, J.).

Bankruptcy; estoppel for failure to list claim. A debtor's failure to list a legal claim as an asset in its bankruptcy proceeding precludes the debtor from pursuing the claim on its own behalf. Awareness of the facts is enough. The court found that plaintiff had knowledge of a potential claim long before the case was closed. Thus, plaintiff, having failed to list the claim, was barred from proceeding itself. The trustee could not be substituted in this case. Case dismissed. I. Appel Corp. v. Republic Factors Corp., Index No. 604333/99, 8/30/00 (Cozier, J.).

Bills and notes; alleged permitted offset. Guaranty. Misrepresentations; materiality. Sale of business. The court ruled that plaintiffs had made a prima facie case of nonpayment of a note and that a "permitted offsets" provision in the note did not apply. The court held that a question of fact had been created as to whether representations were sufficiently material to support a rescission claim. The individual defendants were therefore also liable on an absolute and unconditional guaranty. Vottis v. Diamond Enterprises, Index No. 1875/00, 7/18/00 (Stander, J.).

Class actions; certification; commonality; typicality; adequacy. Action for breach of contract and other wrongs arising out of 1999 power blackout. Motion to certify class. The court found that the numerosity element was satisfied. The court ruled, however, that common issues of law and fact did not predominate. Some individual issues were the standing of the class members, whether there were any legally cognizable damages, and what they were. Plaintiffs sought to establish a class including non-Con Ed customers. The issue of the gross negligence of Con Ed could be litigated in one case and be determinative by collateral estoppel of other cases so this issue did not warrant certification. Damages would not be easily computable. Amount and causation and issues as to GBL 349, 350 would predominate over common questions. The court found further that the named commercial plaintiff had failed to demonstrate that its claims were typical of the commercial subclass since it was not seeking to recover for food spoilage. The court held that the individual plaintiffs' claims were not adequate to protect the class since they omitted personal injury claims and future plaintiffs of that sort would be barred by res judicata. Motion denied. Tegnazian v. Consolidated Edison, Inc., Index No. 603258/99, 8/3/00 (Cozier, J.).

Conflicts of law; foreign country law; establishing the law. Tortious interference. Procedure; summary judgment. Issue of application of Italian law. General principles discussed. The submissions of the parties did not conclusively establish what the relevant law provides. The court held that summary judgment was thus inappropriate. Certain proposed amended claims were allowed to be added pending resolution of foreign law issues. However, a claim of tortious interference was not governed by Italian law since the defendant at issue had not signed the agreement that was the premise for invocation of Italian law. The court declined to grant summary judgment dismissing the claim based on the question of knowledge of the contract, since discovery was still under way. Saldarini & Saldarini, S.R.L. v. Babiarz, Index No. 605522/98, 9/27/00 (Cahn, J.).

Construction contracts; change order. The court ruled that a subcontractor agreement was unambiguous. Without a valid change order, there was no contractual right to further payment for additional work. The subcontractor properly stopped work due to the failure to issue a change order. Summary judgment accordingly. Midwest Soil Remediation v. Site Remediation Services Corp., Index No. 7748/99, 8/30/00 (Stander, J.).

Contracts; employment; interpretation; ambiguity as to duration. An employment agreement did not set forth a specific duration, but indicated that defendant would guarantee a minimum base pay for three years. The court ruled that the agreement on its face was susceptible of more than one meaning. Summary judgment denied. Humphreys v. Skiview, Inc., Index No. 12959/1999, 9/00 (Stander, J.).

Contracts; failure to compensate financial adviser; assumption of the contract; statute of frauds; equitable estoppel. Quantum meruit and unjust enrichment. Implied covenant; duplication. Action by financial advisor alleging that defendants conspired to use its work product to acquire another entity without compensating it as required by contract. The court held that a contract claim had been stated since there was a question whether one defendant had assumed the contract, and if it had not, the other defendant would have breached its contract to obtain that result. A statute of frauds argument failed since one defendant had entered into a contract that the other may have assumed, and enough had been pled to justify discovery on the theory of an equitable estoppel due to defendants' inducement to plaintiff to continue work. Because defendants were contesting the existence of a valid contract and its assumption, quantum meruit or unjust enrichment could be asserted as alternatives. The court held that a claim for breach of an implied covenant did not duplicate a contract claim since the former concerned defendant's efforts to structure the deal so as to destroy plaintiff's right to a contractual fee. Related claims also sustained. Painewebber Inc. v. Aviation Sales Co., Index No. 600113/99, 6/28/00 (Gammerman, J.).

Contracts; interpretation; anti-assignment clause; impossibility of performance. Action for breach of contract. Defendant argued that plaintiff had violated a clause prohibiting assignments without defendant's consent. A transfer of

stock ownership occurred here. The court stated that such transfers do not affect the contractual rights and obligations of a corporation. The court held that finding a violation of the contract here would be inconsistent with contractual intention as shown in the clear and unambiguous terms of the agreement. Merger would not violate the clause. Nor was there a breach when the local government changed licensing rules for the industry involved, which was unforseen and could not have been guarded against. Summary judgment for plaintiff. American Transfer Co. v. Hunt-Liedtke Management Co., Index No. 24178/1998, 8/15/00 (Austin, J.).

Contracts; interpretation; clear and unambiguous language. The court found that an agreement providing an exclusive option to purchase was unambiguous and rejected resort to parol evidence offered by the drafter. The court ruled that defendants owed plaintiff $100,000 and had an exclusive right to purchase for $500,000, and that the former sum was not included in the latter under the terms of the agreement. Summary judgment granted. Siegel v. Golub, Index No. 04278/2000, 9/l8/00 (Austin, J.).

Contracts; interpretation; right to terminate; waiver. Corporate merger transaction, with termination provision. Plaintiff terminated and sought a declaratory judgment that it had done so properly due to a deterioration in defendant's financial condition, which would have adversely affected the financing of the transaction. Defendant contended that the termination was due to changes in the high yield debt market, rather than a genuine decline in defendant 's financial posture. The court found that the term "Material Adverse Effect" was ambiguous. Opposing parties offered reasonable but contrary interpretations and the term was undefined. The court found that it was unclear whether defendant's financial condition had changed materially. It also held that there was a question of fact as to whether plaintiff had waived a requirement regarding defendant 's debt level. Summary judgment and related motions denied. SPS International Holdings, Inc. v. CPI Corp., Index No. 604645/99, 7/20/00 (Cozier, J.).

Contracts; statute of frauds. Fiduciary duty. Partnership. Action alleging breach of contract, fraud and breach of fiduciary duty in regard to a stock transaction. Motion to reargue. The court had previously held that the breach of contract claim was defeated by the statute of frauds. Labeling such a claim as one for breach of fiduciary duty cannot resurrect the claim. The alleged breach of duty consisted of the individual defendant's failure to adhere to the terms of the alleged oral investment deal. Plaintiff, the court held, had also failed to establish an alleged agreement to share losses. Reargument granted; claim dismissed. Kleinser v. Rockrimmon Securities, Index No. 606139/96, 7/17/00 (Ramos, J.).

Contracts; third-party beneficiaries; limitation of liability; unconscionability. Negligence; relation to contract; duty. Injurious falsehood. Trade defamation. Tortious interference. Action for breach of contract alleging that defendant had failed to provide ticket services for plaintiffs in connection with a festival. Defendant sought to dismiss a contract claim as to most plaintiffs since they had not signed the contract. The court ruled that these plaintiffs were not third-party beneficiaries since the benefit to them was incidental only. The agreement showed no intent to benefit anyone other than the signatories. The court upheld a provision that liability was limited to $150 since there was no special relationship between the parties, a statute or public policy requiring otherwise. The agreement was not unconscionable. The conduct alleged did not rise to the level of gross negligence. A negligence claim was held defective since no independent legal duty had been violated and no special duty of care was owed to the non- contracting plaintiffs. An injurious falsehood or trade defamation claim was held defective since there was no allegation of malicious intent or reckless disregard, nor adequate allegation of special damages. Tortious interference had not been properly alleged. Motion to dismiss granted. Tripp-Mixx Music v. Ticketmaster New York, Inc., Index No. 606209/98, 8/30/00 (Ramos, J.).

Declaratory judgments. Fiduciary duty; nature of relationship. Defamation; pleading; publication; truth as defense. Action for accounting and other relief. The court declined to dismiss the complaint insofar as it sought a declaratory judgment because plaintiff, under the Operating Agreement, was not entitled to a one-third interest in the entity at issue

but about eight percent. An appropriate declaration rather than dismissal was in order, and the court made such a declaration. The court found that, under the Agreement, the parties were to be independent contractors; thus, a fiduciary duty claim failed. As to a defamation claim, the court held that the complaint failed to allege publication to a particular person. A hearsay affidavit by an attorney lacking in detail did not cure the defect. The court held that, in view of documentary evidence showing government investigations, the alleged defamatory statements were true. Claim dismissed; repleading refused. Giacchetto v. Sachs, Index No. 605598/99, 8/3/00 (Cozier, J.).

Employment contracts; former employee; preliminary injunction. Motion for preliminary injunction against former employee. The court ruled that plaintiff had failed to show that it continued to do business similar to that of defendant's new employer. Plaintiff appeared to have abandoned the line of business. Plaintiff had failed to show that defendant had special skills. The court found that a money judgment would suffice. The court also ruled that plaintiff had failed to show the existence of trade secrets. Motion denied. Inter-work Systems v. Vickers, Index No. 3053/2000, 8/17/00 (Austin, J.).

Employment contracts; pleading; implied covenant. Unjust enrichment. Employee signed an employment agreement that contained restrictions on proprietary information. Plaintiff employer's claims alleged behavior in violation thereof or of common law duties and were adequately particular. As to a breach of contract claim, the court held that it was unclear whether contractual language prohibited defendant from undertaking his own business activities based on existing ideas. A claim for breach of the implied covenant of good faith was dismissed as duplicative. An unjust enrichment claim survived since it was unclear whether defendants were unjustly enriched or entitled to exploit the ideas at issue. Dismissal granted in part. Funomenon! LLC v. Canner, Index No. 605606/99, 8/3/00 (Cozier, J.).

Employment relationship; at-will employee. Negligent misrepresentation; absence of duty of care. Constructive fraud; absence of fiduciary duty. Action by physician alleging wrongful termination. Plaintiff asserted a breach of contract claim on a Weiner theory premised on one doctor's alleged statements. But though plaintiff was terminated from one hospital post, she continued to work there for almost a year, when she was terminated for not having been chosen for a new program. The doctor's statements were oral and could not overcome an at-will presumption. Plaintiff left one at-will position for another. The court rejected a negligent misrepresentation claim since defendant had owed plaintiff no special duty of care. As for constructive fraud, no fiduciary duty was owed. Complaint dismissed. Bloch v. Memorial Sloan-Kettering Cancer Center, Index No. 602806/99, 9/7/00 (Cahn, J.).

Full faith and credit. This court determined at inquest how much plaintiff was entitled to for defendants' commencement of a frivolous action. Plaintiff then commenced an action in California for abuse of process involving the New York case. The California court granted plaintiff a default judgment in an amount this court had rejected. This court held that the California court had had personal jurisdiction but had lacked subject matter jurisdiction. The California court should have honored this court's decision. Academy of Motion Picture Arts and Sciences v. Olsen, Index No. 114914/99, 7/31/00 (Ramos, J.).

Insurance; lost inventory; notice of loss; duty to cooperate. Action to recover on an insurance policy covering lost inventory worth $1.7 million. Law on notice obligations discussed. Defendants claimed that this provision had been violated since written notice had not been provided until December 1997. Plaintiff argued that it first suspected it had suffered losses in November-December 1995, took steps to confirm the losses, and, upon doing so, notified the broker in February 1996. The court found that summary judgment was barred in view of disputes of fact as to when defendant had actually received notice of the losses. Also, requirements as to notice and proof of loss are liberally construed in favor of the insured. Absent definition of a "loss", the court declined to say as a matter of law that plaintiff had been required to give notice when it first advised the broker that the inventory in question was missing, but was being searched for. The court also found a sharp conflict of fact as to whether, and to what extent, plaintiff had cooperated with defendants ' investigation and whether defendants waived, or should be estopped by their conduct. Defendants also had allegedly failed to advise plaintiff of

the alleged lack of cooperation until after the suit began. Simplexdiam, Inc. v. Brockbank, Index No. 604216/98,9/5/00 (Cozier, J.).

Investment Company Act; assignment of contract. Contracts. Motion to dismiss action seeking declaratory judgment that certain agreements executed by the parties were illegal as an impermissible assignment of an investment advisory contract in violation of the Investment Company Act of 1940. Allegedly, the shareholders and directors had not known about the agreements when approving a new investment advisor contract. The court upheld several causes of action since defendant had presented nothing that conclusively refuted the allegations of the complaint. The court also upheld a breach of contract claim premised upon failure of consideration because licensing and consulting contracts had not been complied with. Motion denied. Cornerstone Equity Advisors v. Brofman, Index No. 601856/99, 8/16/00 (Cozier, J.).

Joint venture; sharing of profits and losses. Statute of frauds. Alleged joint venture. The court held that the complaint failed to allege sharing of profits and losses. The court found that the agreement created two independent businesses. The fact that both parties might suffer losses from failure of the entire development did not mean the losses were "shared." The court also held that the documents showed that the parties had been negotiating a sale of the property, which encountered a statute of frauds bar. Further discovery denied (CPLR 3212(f)). Seavey Organization v. Cineplex Odeon Corp., Index No. 600927/99, 7/l l/00 (Cozier, J.).

Misrepresentation; private placement; duty to conduct due diligence; pleading justifiable reliance. Action to recover damages from placement agents and advisors in a private placement based upon alleged misrepresentations about FDA clearance of a product. The court found on a motion to dismiss that there were no substantial factual allegations indicating that plaintiffs had justifiably relied on defendants rather than the company. The Offering Memo had warned the reader about defendants' limited role and plaintiffs had signed disclaimers. Plaintiffs' allegations about representations by defendants lacked specificity. Plaintiffs as sophisticated investors should have performed due diligence. Case dismissed. UST Private Equity Investors Fund v. Salomon Smith Barney, Index No. 603882/99, 7/31/00 (Ramos, J.).

Misrepresentation; relation to contract. Breach of covenant of good faith. GBL 349; consumer impact. Punitive damages. Action to foreclose mortgage. Defendant pleaded fraud and rescission defenses and counterclaims premised on an alleged lack of intent to honor a forbearance agreement. The court noted that where a party seeks only to enforce a bargain, a tort claim will not lie. The court held that the pleading sufficed here since plaintiff allegedly had made a commitment collateral to the contract. The court upheld a defense/counterclaim for breach of a covenant of good faith and fair dealing since the defendant had not pled a contract claim and the bad faith claim did not overlap with the fraud claim. A defense/counterclaim premised on GBL 349 failed for lack of consumer impact. A punitive damages demand similarly failed. Banc of America Commercial Finance Corp. v. Issacharoff, Index No. 601002/00, 9/19/00 (Crane, J.).

Partnerships; dissolution; accounting. Plaintiff sought an accounting of a dissolved partnership. Plaintiff had signed a dissolution agreement and a release discharging all actions "known or unknown" arising out of his affiliation with the partnership. Plaintiff, an attorney, had drafted the release. The court found that plaintiff should have known the significance of the release. Further, plaintiff had had access to the partnership records and thus could have discovered alleged wrongdoing prior to or at the time of dissolution. Rather, plaintiff chose not to complain until completion of a payout over 12 months. Plaintiff no longer had a right to an accounting. Summary judgment for defendant. Tryon v. Westermann, Index No. 23184/1999, 9/l8/00 (Austin, J.).

Partnership; nature; renunciation; contribution; accounting; fiduciary duty. Champerty. Action by partners to

recover on note from fellow partners. Defendants argued that they were not liable because the partnership was a limited one. The court held otherwise, relying on the partnership agreement, a note, tax returns, etc. A limited partnership cannot be created orally, and the relevant statutory requirements were not met. The court rejected an argument by some defendants that they had renounced their partnership interests (Part. Law 100) since commencement of this suit had put the defendants on notice that the partnership was allegedly a general one yet defendants took no action for two years. The court held that plaintiffs were precluded from purchasing the note and guarantees and suing fellow partners and co-guarantors for the full amount, but rather were limited to contribution. Because plaintiffs had paid less than their proportionate share on the note, they could not receive contribution from the defendant co- guarantors. The court held that, under Part. Law 40 (2), the defendant partners would be potentially liable for their pro rata share of the partnership debt paid by plaintiffs. No accounting was required since the percentage interests were clear. The court held that it could not be said as a matter of law that plaintiffs' purchase of the note and guarantees was not a breach of fiduciary duty, but plaintiffs could still recover. A provision of a certain agreement among plaintiffs was held not to have released defendants since it had reserved rights against other partners and plaintiffs had not been creditors at the time. The court rejected a defense based on an alleged oral agreement with a bank for the bank to pay real estate taxes. The court rejected a champerty argument since plaintiffs had not been strangers to the transaction but were liable on the debt purchased. Ashkin v. Hickory Finance Associates, Index No. 107068/95, 7/7/00 (Cozier, J.).

Personal jurisdiction; foreign corporations. A derivative action and one for a declaratory judgment, the court held, should be brought in Puerto Rico, where the corporate defendants did business. The physical presence of an individual defendant in New York on a few occasions several years ago would not transform defendants' business dealings into business transactions that would subject defendants to long-arm jurisdiction. Phone and mail contracts would not suffice. Motion to dismiss granted. Goldstein v. Thuna, Index No. 30274/l999, 8/l7/00 (Austin, J.).

Preemption; attack on rates; common law fraud and other claims. Misrepresentation; relation to contract. GBL 349, 350. Proposed class action alleging breach of contract by customer of certain wireless phone service. Motion to dismiss on preemption and other grounds. The court stated that an attack on rates or market entry would require preemption, but it was intended that conditions and terms of service would not be preempted. The court distinguished a federal Court of Appeals decision in part since there had been here no attack related to market entry. However, as in that case, the court ruled that plaintiffs' breach of contract claim due to poor service amounted to an attack on the rates charged. There was here no basis for avoiding preemption because of claims that defendants had wrongfully failed to disclose certain practices. Since standardization of rates and services would be defeated otherwise, plaintiffs' breach of contract claim was held to be preempted. The court upheld, however, plaintiffs' claims for deceptive practices, false advertising and common law fraud as these did not require retroactive rate-setting nor attack market entry conditions. The court found substantial similarities between the fraud and contract claims. Plaintiffs argued that the misrepresentations caused them to enter into the contract, but this merely duplicated the contract claim. A GBL 349 claim was upheld; a GBL 350 claim was upheld as stating in sufficient detail the false advertising and general impact. Motions granted in part. Naevus International, Inc. v. AT & T Corp., Index No. 602191/99, 7/13/00 (Cozier, J.).

Preliminary injunction; consignment of art works. Arts and Cultural Affairs Law. Action arising out of dispute between artist and gallery. Both sides sought a preliminary injunction. The court held that plaintiff, who sought the return of his work, had established irreparable harm, artwork being unique. Defendant would be enjoined from transferring the art. The gallery was plaintiff's agent (Arts & Cultural Affairs Law 12.01) and was bound to act in accordance with plaintiff's reasonable instructions but had acted inconsistently therewith on occasion. Plaintiff had thus made a showing of likelihood of success. The gallery was a consignee of the art, which was trust property. Defendant had not shown a likelihood of success by relying on an agreement since it appeared that it might be found unconscionable. The balance of equities tipped in plaintiff's favor. Plaintiff was entitled to an inventory and an accounting. Hirschfeld v. Margo Feiden Galleries, Index No. 602067/00, 7/26/00 (Cahn, J.).

Procedure; appearance; motion to dismiss inapplicable claims. UCC 9-104; security interests;

compensation overpayments. Contracts; third-party beneficiary. Fraud; breach of fiduciary duty; specificity. Conversion. Unjust enrichment; relation to contract. Motion to dismiss; cross-motion for a default. Plaintiff argued that since the claims at issue on the motion concerned the individual defendants, the corporate defendant had no standing to bring the motion and did not make an appearance (i.e., defaulted). Since an amended complaint had been served only on the individual defendants, that did not restart the corporate defendant's time to answer. Although the defendant did not have standing, the court said, it unquestionably intended to join the motion and the attorney was the same for all defendants. Whether it could have obtained the relief requested was irrelevant; it definitely had appeared in the case. Further, service was made on "the attorney for the defendants" and was not limited to the individual defendants so the time began anew. Plaintiff sought to recover, under UCC-1s, unreimbursed salary advances owed by the individual defendants to the corporate defendant. The court ruled that, under UCC 9-104(d), the overpayments were excluded from security interests. Further, the overpayments did not fall within the definitions of "eligible receivables" or "receivables" set forth in the security agreements. As for a claim that plaintiff was a third-party beneficiary of executive employment agreements governing the overpayments, plaintiff was not referred to therein and letters relied on by it did not support its position. Claims for fraudulent conveyance and breach of fiduciary duty failed for lack of specificity (CPLR 3016(b)). A conversion claim failed as a duplication of a breach of contract claim. An unjust enrichment claim was not dismissed since, though there was a contract, the contract was silent as to the dispute at issue. TMP Worldwide Inc. v. Chalam Advertising, Inc., Index No. 602119/99, 7/20/00 (Cahn, J.).

Procedure; motion to reargue/renew. Insurance; exclusions for sale of life insurance; occurrence. Motion to reargue/renew. Court had held that policies did not provide coverage for defendant in a series of actions alleging a pattern of fraud and deceit in the sale of life insurance policies since there were exclusions that would cover the sale of life insurance and that there had not been an "occurrence". The court held that defendant was merely representing arguments previously made or advocating meritless positions. Exclusions applied to the conduct at issue. Where conduct is excluded, negligence claims premised on that conduct are also excluded. A 4th Circuit case relied on by movant applying South Carolina law was not binding and did not reflect New York law on coverage for supervision claims arising out of fraudulent sales practices. The decision was unpublished and citation to it is disfavored under the court's own rules. The court also rejected an argument premised on a New York case that there was a covered occurrence; that case had involved an unforeseeable event, not present here. The court granted a motion to supplement the record nunc pro tunc and for partial summary judgment even though at issue were policies not involved on the original motion. The language of the policies was the same and so were the arguments. Westchester Fire Ins. Co. v. Metropolitan Life Ins. Co., Index No. 602970/98, 7/31/00 (Ramos, J.).

Procedure; motion to renew/reargue. Breach of contract action. Motion to renew/reargue prior decision that held that defendants had scheduled a boxing event in violation of the contract. The court stated that movants had failed to submit almost all of the documents now put forward and the arguments now raised. By failing to produce evidentiary proof in admissible form, the movants had failed to oppose the summary judgment motion properly. In any event, the court said, the previous ruling would stand, in light of an Appellate Division ruling in this case. Quartey v. AB Stars Productions, Index No. 600554/98, 8/28/00 (Ramos, J.).

Procedure; motion to vacate default. Contracts; individual liability. Motion to vacate default. Movant claimed that non-appearance at a hearing was due to law office failure (clerical error). A pattern of neglect is not excused as law office failure. Defendant had offered no excuse for failure to respond to a 3213 motion nor explained failure to move promptly to vacate. Service at defendant's usual place of abode was sufficient. The court rejected an excuse that defendant had not known the action was against him personally because he claimed that he had signed the note and guarantee as a corporate representative. However, the documents referred to joint and several liability and defendant had been served with income executions and restraints on his bank accounts. The delay here, the court held, was unreasonable. Nor did defendant have a defense. The documents had separate sections; the note clearly indicated that defendant signed as an officer whereas the guarantee indicated that he signed as an individual. The fact that defendant wrote "Chairman" after his guarantee signature did not mean he signed in a representative capacity. Motion to vacate denied. Total Dollar

Management Effort, Ltd. v. Balsamo, Index No. 601718/96, 7/12/00 (Ramos, J.).

Procedure; necessary party; motion to dismiss or stay; effect of bankruptcy injunction. Action arising out of share purchase agreement for $11 million. Defendants moved to dismiss or stay this action in light of a preliminary injunction issued by the Bankruptcy Court staying all proceedings against a non-party hereto which had entered into the agreement. Defendants contended that participation by this non-party was necessary but barred by the injunction. The court found, though, that it had had no duties or obligations under the agreement and was merely to receive payments on behalf of plaintiff. Plaintiff had not assigned rights to this entity. Thus, complete relief here was possible without presence of this entity. Since plaintiff was the sole beneficiary under the agreement and parents and subsidiaries are separate entities in bankruptcy, the property here was not to be considered property in the bankruptcy proceeding against the related non-party. Strong Growth Enterprises Ltd. v. American Phosphate Corp., Index No. 603972/99, 7/3l/00 (Cozier, J.).

Procedure; personal jurisdiction; consent. Guarantees; consideration; misrepresentation defense. Action to recover on note and guarantee. The monies claimed were unquestionably due plaintiff. An individual defendant guarantor asserted lack of personal jurisdiction. However, the court ruled, the guaranty contained provisions providing jurisdiction. Defendant argued that without consideration, the guarantee could not be enforced against him. The court ruled that by executing the agreement, the defendant had consented to the jurisdictional provision. Whether or not he was a shareholder or officer was inconsequential as he had bound himself individually. The court held that plaintiff's extension of the due date of the total debt was a sufficient form of consideration. It was not necessary for the defendant to have received a benefit as a guarantor. The court rejected a fraud defense since the guarantee was stated to be absolute and unconditional. In view of language therein, resort to parol evidence was barred. In any event, defendant relied only on conclusory and unsubstantiated statements. Plaintiff's motion granted. Hanshin Entertainment Intl., Inc. v. Bell, Index No. 601655/99, 7/24/00 (Ramos, J.).

Procedure; personal jurisdiction; forum non conveniens. Attorney and client; disqualification. Action by Canadian citizen and resident against Delaware corporation, of which he had been CEO and COO, concerning right to exercise stock options. The court held that personal jurisdiction had not been established under CPLR 301. As for CPLR 302, the court held that plaintiff had not established that the cause of action arose from a transaction of business in N. Y. However, plaintiff alleged that defendant's transfer agent had engaged in conversion in N.Y. that would subject the principal to jurisdiction; the merits were thus intertwined with the jurisdictional defense and dismissal was not appropriate. Forum non conveniens principles discussed. The contract here had been entered into and was to be performed in Canada. The only link to New York was the presence of the transfer agent here. The court held that the case should be dismissed in favor of a Canadian forum, on conditions. As to disqualification, the court found that defendant had failed to show that any confidential information relevant to the case had been imparted to a lawyer who had been of counsel to a firm that had represented defendant. This attorney had performed corporate services for defendant for only 6.5 hours. Berry v. Cypost Corporation, Index No. 601448/00, 9/5/00 (Cozier, J.).

Procedure; stay pending appeal (CPLR 5519). The court had ruled that one plaintiff was entitled to certain corporate shares. Defendants sought a stay (CPLR 5519 (a)) upon the delivery of the shares to the court. However, the court ruled that the issuance of the shares to plaintiff but the holding of by a third party created problems (tax status, shareholder rights, etc.). The court ruled that defendants would be entitled to a stay upon posting of an undertaking instead. A discretionary stay was issued on conditions. Smith v. Long, Index No. 7530/1997, 8/4/00 (Stander, J.).

Procedure; summary judgment; required showing in opposition. Alleged scheme to siphon off assets and customers of one corporation to two competing corporations. Certain defendants moved for summary judgment, producing deposition excerpts and other proof of limited roles and authority for their actions. Summary judgment standards discussed. Plaintiffs relied on mere conclusions or unsubstantiated allegations. Motions granted. Imisk, A. S. v. Kesicier, Index

No. 685/00, 9/l l/00 (Austin, J.).

Reinsurance. Contracts; intent to be bound; statute of frauds. Principal and agent; actual authority; apparent authority; ratification. Implied covenant of good faith and fair dealing. Equitable estoppel. Promissory estoppel. Misrepresentation. Negligent misrepresentation. Action arising out of dispute over obtaining of reinsurance coverage. Complex communications and negotiations took place. At the end, plaintiffs sued arguing that the moving defendant had agreed to provide coverage. The court found that movant's offer to serve as a "fronting" entity for a coverage program had been conditioned on satisfactory retrocessional protection, properly documented, and that the listed documents had never been successfully executed. Plaintiffs argued that another entity had had authority to sign for defendant. However, the court found, had plaintiffs believed that at the time, they would not have worried about obtaining movant's signature, as they had. Further, plaintiffs had paid no premiums, no claims had been processed and no commissions had been paid or demanded. Plaintiffs had had no intention of performing until movant had signed the slips. Contractual intent discussed. Here, there had been no intent to be bound in the absence of movant's signature. All of the conduct had been consistent with the absence of a contract. Further, the alleged reinsurance agreements purported to require coverage for two years. The statute of frauds would bar enforcement unless a satisfactory writing had been signed and the only possible writing, the slips, had never been executed by movant. Plaintiffs argued that the other entity had had authority to sign for movant. However, the court ruled that there was no actual authority and that the principal had not engaged in acts sufficient to confer apparent authority. Plaintiffs had not demonstrated actual belief in the apparent authority nor any alleged belief that would not be unreasonable on the facts. Indeed, plaintiffs had been on notice of a limitation placed on the purported agent's authority. Movant had reasonably understood that it would not be bound until it had signed; thus, its receipt of slips bearing the purported agent's signature would not have given rise to a reason to complain such that the failure to do so could have constituted ratification. A claim for breach of the implied covenant of good faith and fair dealing could not stand here in the absence of any contract from which such a duty could arise. An equitable estoppel claim failed for lack of detrimental reliance and lack of any misrepresentation of material fact by movant regarding authority or intent to sign the slips. A promissory estoppel claim was held deficient since none of the alleged promises by movant had been unilateral, nor had they been clear and unambiguous. Alleged misrepresentation claims were clearly duplicative of the contract claims and a negligent misrepresentation claim failed since plaintiffs had had no special relationship with movant and the claim was also duplicative. Summary judgment granted. AIU Insurance Co. v. Unicover Managers, Inc., Index No. 600744/99, 7/11/00 (Cozier, J.).

SLAPP action. Release. Tortious interference with contract and prospective contractual relations. Fiduciary duty. Unfair competition and misappropriation. Defamation. Action alleging breach of contract and other wrongs. Counterclaims/third-party claims alleging false statements about defendant's insurance rates made to government agencies were found to be SLAPP claims and thus barred. The court held that a letter demanding cessation of comments made in violation of a settlement agreement satisfied a provision for a notice and demand. Some claims were barred by release. Defendant asserted claims of tortious interference. Standards discussed. Defendant was not required to plead that but for plaintiff, there would not have been a breach, or that the actions lacked economic justification. Alleging that plaintiff had induced the third-party defendant to breach by relaying confidential information in violation of an agreement stated a claim. A claim for tortious interference with prospective contractual relations based on misuse of confidential information was upheld. A fiduciary duty claim failed since a release covered the period the third-party defendant had been an employee and no duty was owed after that period. Unfair competition and misappropriation claims were upheld against plaintiff based upon its having obtained defendant's confidential and trade secret information through the third-party defendant after he left defendant's employ. A defamation claim failed for lack of specification as to the where and how of the alleged defamation. Travers O'Keefe & Associates v. Oxford Health Plans, Index No. 604463/99, 7/10/00 (Ramos. J.).

Summary judgment; "poaching" of employees. Renewal of a previous cross-motion for summary judgment in an action arising out of an alleged breach of a "no poaching" agreement between competing brokerage firms due to defendant's "purloining" of German brokers. Defendant contended that certain business changes made by plaintiff had been very unpopular with its European brokers and harmed the European bond business and that this had alienated the German brokers and caused them to look for work elsewhere. The court found that plaintiff relied on speculation to support

its assertions that defendant had induced the brokers to leave plaintiff, while defendant insisted that the brokers had approached it as a result of their unhappiness with plaintiff's policies. Summary judgment therefore was denied. Cantor Fitzgerald International v. Liberty Brokerage Inv. Corp., Index No. 600318/97, 9/13/00 (Cozier, J.).

Summary judgment in lieu of complaint; note; related agreement. Parol evidence. Plaintiff moved for summary judgment in lieu of complaint on a note. Defendant contended that the note was connected to a transaction whereby defendant bought back shares conditioned on plaintiff's continued employment as an officer of defendant at least for a period. Defendant presented affidavits supporting its position and contending that plaintiff had failed to provide consideration by resigning. Parol evidence was held to be appropriate since it is admissible to show that a purported contract is none at all. The court held that there were issues of fact. Further, defendant contended that it was entitled to repurchase shares under an agreement at market value rather than the amount due under the note. Breach of a related contract can defeat a motion for summary judgment on an instrument for money only where the contract and instrument are intertwined, which the court found to be the case here. Also, there was an issue as to whether plaintiff was a holder in due course. Motion denied. De Guardiola v. PLGT Group, Index No. 601988/00, 9/l5/00 (Cozier, J.

UCC 9-504; auction sale; commercial reasonableness. Security interest in vehicles pursuant to security agreement. Upon default, the plaintiff took possession and sold the vehicles at auction. The court held that the sale was done in a commercially reasonable manner, as was advertisement. Notice was provided. Plaintiff was not required, as claimed by defendants, to conduct inventory verifications and assist the management of the inventory and account balances due. Summary judgment for plaintiff. Associates Commercial Corp. v. Liberty Truck Sales & Leasing, Index No. 30171/1999, 9/18/00 (Austin, J.).

THE NEXT ISSUE WILL BE POSTED ON THE HOME PAGES OF THE COMMERCIAL DIVISION AND THE COMMERCIAL AND FEDERAL LITIGATION SECTION ON JANUARY 25, 2001, COVERING DECISIONS ISSUED OCTOBER-DECEMBER 2000.

Please forward any comments on this website to the Webmaster at rboucher@courts.state.ny.us

[Home] [Inaugural Issue March 1998] [Law Report - May 1998] [Law Report - July 1998]
[Law Report - October 1998] [Law Report - January 1999] [Law Report - March 1999]
[Law Report - May 1999] [Law Report - July 1999] [Law Report - October 1999]
[Law Report - January 2000] [Law Report - March 2000] [Law Report - May 2000]
[Law Report - July 2000] [Law Report - October 2000] [Law Report - January 2001]
[Law Report - March 2001] [Law Report - May 2001] [Law Report - October 2001]
[Law Report - January 2002] [Law Report - March 2002]