THE LAW REPORT

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

Hon. Judith S. Kaye *Hon. Jonathan Lippman*

Chief Judge of the *Chief administrative Judge of the*

State of New York *State of New York*

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Arbitration; CPLR 7503 and 7503 (a); motion to compel; need for affirmative evidence of express agreement; "substantial question" of agreement goes to court, not arbitrator, in New York. Conversion. The plaintiff, an international supermodel, alleged that her stepfather, entrusted to invest her assets, had converted at least $3 million of hers with the help of other defendants here. The stepfather had gone to prison after pleading guilty in a criminal prosecution. The current claims concerned checks issued by a brokerage firm from an account that the stepfather had opened in the plaintiff's behalf. According to the plaintiff, her stepfather had endorsed checks payable to her with her forged signature and converted them. Defendants, a brokerage firm and its employee, moved for an order compelling arbitration of the claims as against them pursuant to an arbitration provision in the account agreement. The plaintiff, however, alleged that her stepfather had opened the account without her knowledge or consent and fraudulently endorsed the agreement with her signature. She argued that the defendants had failed to affirmatively establish that the parties had entered into an arbitration agreement. The employee defendant alleged that he had spoken to the plaintiff by phone when the account was opened and that she had confirmed that her stepfather was managing her finances and could open the account for her. He also alleged that he had spoken to her subsequently about two large checks drawn on the account, and that she had told him she was withdrawing money to build a summer home and buy an apartment. While noting the strong Federal policy favoring arbitration, the court found that the parties had raised an issue of fact as to whether plaintiff or duly authorized representatives had entered into an arbitration agreement that was express and unequivocal and could be considered valid. Under New York law the court, not the arbitrator, decides whether both parties have made such an agreement. The court referred the parties to a special referee to hear the issue and report with recommendations. Rizer v. Breen, Index No. 601676/2005, 11/23/05 (Cahn, J.).

Attorney and client; disqualification; simultaneous representations (DR 5-105); per se rule. Motion to disqualify counsel granted because of excessive entanglements involving plaintiff's counsel. There had been continuous representation of plaintiff during a period in which it was alleged that plaintiff had acquired a 98% interest in defendant and thus was acting adversely to another defendant's claimed 100% interest in the former defendant, and while plaintiff's counsel had represented the former defendant in another matter. A per se rule, the court stated, applies if an attorney simultaneously represents clients with differing interests even if the representation ceases before the filing of the motion to disqualify. Portfolio Management Associates, LLC v. Long Consulting & Management Group Inc., Index No. 8132/2004, 12/2/05 (Fisher, J.).**

Attorneys; partnership; agreements as to extra compensation by law firm to partner; scheduled reductions. Contracts; interpretation; ambiguity. Action by law firm partner seeking additional compensation alleged to be owed under partnership compensation agreements. An agreement provided plaintiff with a percentage of collections of earnings from certain clients for a number of years and that the compensation would be reduced in steps over several years ("decompression"), a provision applied to all partners on their reaching age 65. Plaintiff sought to avoid reduced compensation and defendant firm agreed in 2001 to provide a defined bonus then and to consider plaintiff's request for a similarly structured bonus year by year thereafter using the same analysis of plaintiff's contributions as was conducted for that year. Plaintiff contended that defendant was obligated to provide him the same formulaic calculation of a bonus without decompression since giving defendant discretion in granting bonuses would render the 2001 agreement illusory. Plaintiff claimed that he had satisfied the original criteria as to collections. Defendant argued that the 2001 agreement suspended decompression for 2001, but gave it discretion to award later bonuses. The court held that the meaning of the 2001 agreement was unambiguous. The court stated that the word "consider" meant that the firm had discretion as to subsequent years. The reference to consideration consisting of the same analysis as in prior years clarified what would be looked at by the firm, but did not change the plain meaning of the word "consider." The firm would consider plaintiff's "contributions," which was a broad word, not limited to client collections. The agreement also stated that it did not constitute a waiver of future noncompliance with the original agreement. The parties were sophisticated lawyers. Had the firm intended to revoke the decompression schedule or extend application of the formula, it would have done so explicitly. The court examined the firm's actions for particular years. It found that the firm had awarded plaintiff bonuses over the decompression amount, though in one year less than plaintiff had claimed, and that there was no showing of arbitrariness or bad faith. The court further ruled that when the original agreement expired in 2004, the firm was free to pay plaintiff just as it did other decompressed partners, nothing in the 2001 agreement having provided for an extension of the original agreement. The court found no bad faith or arbitrariness as to 2004. Plaintiff's motion for summary judgment was denied and defendant's cross-motion was granted except as to a modest sum. Lo Frisco v. Winston & Strawn LLP, Index No. 117807/2003, 12/14/05 (Freedman, J.).

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Breach of contract; fraud; contest in a newspaper. Pair of cases which arose out of a game in a newspaper. The Daily News had published an incorrect set of game numbers in the newspaper. The News had printed a notice of the error the next day. The error had caused more prizes to be claimed than the News had intended to award. The News refused to honor the additional prize claims, and, in accordance with posted official rules for the game, held a random drawing to determine the winners. Plaintiffs in both cases sued, contending that they were entitled to the prize money on a breach of contract theory. In one case, plaintiff also had asserted causes of action for negligence and fraud. Defendants moved to dismiss on the grounds that the defense was founded on documentary evidence and for failure to state a cause of action. The court granted the motion to dismiss. The court explained that under the rules of the game, defendants were not bound to award more than the number of prizes stated in the rules. A failure by contestants to read or understand contest rules does not create a claim for breach of contract. The court pointed out that once plaintiffs began scratching off the numbers on the game card, they were on notice of the existence of the official rules as each game card had a printed statement on its face which directed the contestant to the official rules posted on the other side. Moreover, the advertisements containing the daily numbers also directed contestants in large print to see the official rules inside the paper. Neither plaintiff had stated a cause of action for breach of contract. The court further found in one case that no cause of action for negligence existed as plaintiff had failed to allege any legal duty owed to her outside of the official rules of the game, and she had not alleged any violations by defendants of those rules. The court also found that the plaintiff had not made out a cause of action for fraud as plaintiff had not alleged any deception or misrepresentation of a material fact other than her assertion that defendants had intentionally printed incorrect numbers, which allegation

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was found to be without factual support. Defendants' motion to dismiss the individual defendant was also granted since there were no allegations that he was a party to the contract or had any involvement other than his position as chairman and publisher of the Daily News. McFarlane v. Daily News, L.P., Index No 17237/2005, 12/15/2005; Henry v. New York Daily News, Index No. 20627/2005, 12/19/2005 (Demarest, J.).**

Class actions; attorney's fees; lodestar amount; incentive award to named plaintiff. Plaintiff had initiated a class action asserting that defendant and its predecessor had improperly calculated the amount of interest due from borrowers resulting in overpayment. The parties had reached a settlement which consisted of monetary and non-monetary relief. The non-monetary relief was to include an agreement by defendant to perform a system-wide review of its files and an agreement to waive any claim for contractual attorneys's fees against plaintiff and other class members. The monetary relief provided for a cash payout of $850,000. The court had granted preliminary approval of that settlement in 2004. The court again determined the settlement to be fair. As to attorney's fees, the court allowed class counsel the sum of $49,633.98 for reimbursed costs and $240,109.98 in counsel fees. The court explained that it had awarded a lesser amount than what had been sought by counsel because to have awarded the lodestar amount would have worked an inequity on the class members. The court further allowed an "incentive award" to the named plaintiff in the sum of $25,000 with the remainder of the recovery to be distributed among the class members as set forth in the settlement agreement. Mark Fabrics, Inc. v. GMAC Commercial Credit LLC, Index No. 604631/2002, 12/14/05 (Cahn, J.).

Contracts; asset purchase agreement; merger clause; waiver and survival terms; issue of fact. Money had and received. Misrepresentation; reliance. Action arose out of the purchase by plaintiff of a Mercedes Benz dealership from defendants for over $15 million plus the value of inventory and adjustments. Plaintiff sought recovery for breach of contract, money had and received, deceptive business practices, conversion and fraudulent misrepresentation. Plaintiff claimed that it had found the dealership building in a damaged state after closing, and that defendants had breached their agreement by their failure to pay vendors retained to cover service contracts. Plaintiff also alleged that defendants had removed certain equipment from the dealership premises that had been present during a pre-closing walkthrough, had failed to pay bonuses to employees and failed to disclose unpaid vendors. Defendants moved to dismiss on documentary evidence and for failure to state a claim. Defendants contended that plaintiff's claims were barred by the express terms of the asset purchase agreement, which contained a merger clause and in which plaintiff expressly acknowledged that defendants had complied with all terms. The court examined the parties' agreement and denied defendants' motion to dismiss based on documentary evidence, pointing out that there was a conflict between the waiver and the survival terms of the parties' agreement, thus creating a contract construction issue. The court found that plaintiff's claim for money had and received could survive defendants' motion to the extent that the claim alleged defendants' receipt of down payments before closing on vehicles that it had transferred to plaintiff. The court granted defendants' motion to dismiss on the conversion claim. The court pointed out that the agreement addressed specific equipment which was to remain on the premises and the documentary evidence did not support plaintiff's claim that it was entitled to everything on the premises at the time of the walkthrough. The court dismissed plaintiff's claim for fraudulent misrepresentation. The court explained that plaintiff had made specific representations that it had not relied on any documents or oral statements related to financial information not included in the parties' agreement, and thus could not now rely upon same as a basis for fraud. The court did, however, grant plaintiff leave to replead in order to allege a claim of conversion against one defendant for allegedly retaining payments in a personal account that belonged to plaintiff. Finally, the court dismissed plaintiffs' claim for intentional interference with business relations as it was insufficient to state a cause of action. Recovery Racing LLC, v. Sunrise Motors LLC., Index No. 12834/2004, 11/23/05 (Austin, J.).**

Contracts; commercial real estate master agreement; allocation of rental increases; bankruptcy; guarantee; interpretation. Judicial estoppel; factual assertions as requirement. Collateral estoppel; actual determination of issue. Action involving leases to 19 locations. Plaintiff supermarket corporation and a defendant were parties to a master agreement and guaranty whereby defendants had leased locations to plaintiff, which had assigned them to Bradlees, which required defendants' consent. Thereafter, that entity had proceeded to Bankruptcy Court to liquidate its business. The Judge there had held that an "allocation provision" in the master agreement was a de facto anti-assignment provision and was invalid under the Bankruptcy Code. The parties here disagreed as to the effect of that provision, with defendants claiming that it allowed defendants sole discretion to allocate rental increases among the leases every five years or whenever a lease expired. After proceedings in the Bankruptcy case, the District Court froze the allocation of rental increases, with no right to Bradless or plaintiff here to reallocate. After the leases expired, defendants sought to reallocate the increases, which plaintiff challenged. On motions for summary judgment by both sides, the court held that issues of fact existed. Defendants contended that the court could grant their motion by reference to a provision whereby plaintiff had unconditionally guaranteed all of Bradlees' obligations under the Master Agreement, including in regard to bankruptcy. However, the court found that there might be merit to plaintiff's argument that defendants' actions, not the bankruptcy itself, had caused the freezing of the increases, although to the extent that plaintiff argued that it could not be liable as guarantor because the primary obligor was no longer liable, that contention might be without merit because such a discharge would contradict the plain language of the provision. The court also rejected defendants' claim of judicial estoppel based on plaintiff's supposed acknowledgement in the Bankruptcy case that plaintiff would remain liable as guarantor. However, the court found that plaintiff's statements were generalized interpretations of legal consequences, not factual assertions. Thus, judicial estoppel would not apply. Defendants also urged collateral estoppel based upon the Bankruptcy Judge's statement regarding the lack of a detrimental effect on defendants because of their right to assert claims against plaintiff. The court held, though, that the extent of the guarantor's liability had not been resolved. Collateral estoppel does not apply unless a matter has been determined in the prior action. Plaintiff's motion would have to be denied for the same reasons. Motions denied. Stop & Shop Supermarket Co. v. Vornado Realty Trust, Index No. 105819/2003, 12/9/05 (Fried, J.).

Contracts; construction; interpretation; rendering provisions meaningless. Misrepresentation; specificity of allegations (CPLR 3016(b)); breach of contract claims; merger clause; release; reliance. Agency. Action arising out of construction of power plants in New Jersey for about $290 million. Plaintiff (or related entities) was responsible for the construction pursuant to an agreement with defendant, the owner. Plaintiff sued and asserted that defendant's draw on a letter of credit in the amount of some $30 million had been wrongful on various theories. Plaintiff moved for partial summary judgment on a claim for a money judgment for some $16 million and to dismiss counterclaims. Plaintiff argued that defendant, when it had drawn on the letter of credit, had not incurred any actual expense with respect to performing estimated work, nor made a demand on plaintiff for repayment of such expenses, as required by the agreement. Plaintiff contended that this was so even if it had breached the contract by failing to meet the final acceptance or project completion dates. Defendant argued that plaintiff's breaches constituted defaults under the agreement, allowing defendant to exercise remedies, including the draw. The court looked to principles of contract interpretation. The court held that defendant's reading would render meaningless the more specific provisions of the agreement that authorized defendant to collect from plaintiff, on demand, costs reasonably incurred in completing claimed work. Defendant thus did not have an unfettered right to collect any damages permitted by New York law. Plaintiff was entitled to partial summary judgment. In the counterclaims, defendant asserted that a settlement agreement should be rescinded due to plaintiff's alleged fraud regarding turbines and other equipment. The court held that defendant's allegations were conclusory (CPLR 3016(b)). Further, they were merely breach of contract claims defendant had sought to transform into fraud claims. A fraudulent inducement claim contravened a merger clause in the settlement agreement, and defendant had therein issued a release, which provisions undermined any claim by defendant that it had relied upon alleged contrary statements. A claimed breach of an agent's duty to its principal failed since the agreement provided that plaintiff had no fiduciary or other agency duties. Motion granted. Raytheon Co. v. AES Red Oak, LLC, Index No. 603550/2004, 12/7/05 (Freedman, J.).

Contracts; employment; restrictive covenants; stock purchase. Tortious interference; maliciousness. Misappropriation of trade secrets. GBL 340. Action arose out of restrictive covenants in employment agreements. Plaintiff had purchased stock in a company. Defendants, employees of that company before and after plaintiff's stock purchase, argued, inter alia, that the employment agreements effective under the company's former owner were no longer enforceable under the new ownership. One group of defendants moved for summary judgment; another moved for partial summary judgment on their counterclaim against plaintiff on the issue of liability. Plaintiff moved for an order granting it leave to amend the complaint. The court first granted plaintiff's motion to add the former company as a party plaintiff. The court then applied a three-pronged test to determine the reasonableness of the restrictive covenants and concurred with defendants' contention that the former company had no protectable interest in enforcing the restrictive covenants and granted summary judgment to defendants on that issue. The court dismissed plaintiff's claim for tortious interference because plaintiff had not shown that defendants had acted for the sole purpose of harming plaintiff. The court dismissed plaintiff's claim for misappropriation of trade secrets since the subject matter of the claim did not merit trade secret status. The court denied plaintiff's motion to assert new causes of action for breach of fiduciary duty, for intentional procurement of breach of employment contracts, unfair competition, and aiding and abetting. The court found that plaintiff had not produced evidence that the individual defendants had exploited customer contact and pricing information. Finally, the court denied defendants' motion for partial summary judgment on the counterclaim, and granted plaintiff's cross-motion for summary judgment on the issue of violation of GBL § 340, finding that contracts or agreements between the former and current companies did not run afoul thereof as such business organizations would be considered single entities and therefore could not engage in anticompetitive acts. ENV Services, Inc. v. Alesia, Index No. 11777/2004, 11/28/05 (Austin, J.).**

Contracts; interpretation; principles; standing of lender to sue under contract documents; action by vote of lenders. Contract action arising out of a keep-well agreement, part of a syndicated loan arrangement made in connection with the development of a Las Vegas casino. Plaintiff bank sought to recover as an individual lender. Defendants moved to dismiss. The court held that the loan documents precluded plaintiff from suing individually. The keep-well agreement relied on by plaintiff was a part of the transaction. The related credit agreement defined events of default and mechanisms for recovering judgments based thereon. That agreement provided that the administrative agent, at the direction of the required lenders, could sue on the keep-well agreement. The court found no inconsistency between these provisions and the portion of the keep-well agreement cited by plaintiff; the latter was being read out of context by plaintiff. If each lender were free to sue separately, there would be no point to a vote and direction by the required lenders, which would render part of the credit agreement meaningless, in violation of a basic principle of contract interpretation. Here, 95.5% of the lenders had decided that it was better to accept a settlement than to sue. Further, the agreements as a whole created a scheme of collective lender action, which barred an individual lender from acting unilaterally. The broad grant of power to the administrative agent supported the notion of collective action, as did the requirement that if any lender obtained any payment in excess of its pro rata share, it had to share the payment with each other lender. Complaint dismissed. Beal Savings Bank v. Sommer, Index No. 601222/2005, 12/15/05 (Fried, J.).

Contracts; meeting of the minds; indefiniteness. Judicial estoppel against non-party to other action. Bankruptcy; absolute priority rule. Action to enforce alleged oral agreement to invest and participate in a venture utilizing assets purchased from the bankruptcy estate of two oil and gas companies. The court held that the record established that plaintiffs and defendants had never reached a meeting of the minds on the alleged agreement or completed negotiation on its terms. At most, there had been a general understanding that one or both of the plaintiffs would participate in the new venture and plaintiffs had failed to rebut the showing of indefiniteness by defendants. Plaintiffs cited different versions of the alleged agreement, but did not settle on one. Plaintiffs, the court held, were also judicially estopped based upon testimony in bankruptcy proceedings and representations in several disclosure statements filed in court. The court rejected plaintiffs' argument that they had not been parties to the bankruptcy case and that judicial estoppel was thus barred. One plaintiff had been a principal of the bankrupt companies and had filed formal claims therein and had received release of a $90 million guarantee. The doctrine applies even in the absence of a judgment in the estopped's favor. The court held further that the absolute priority rule barred the contract claims. Related claims also failed for these reasons. Summary judgment granted to movants. Galesi v. Galesi, Index No. 127903/2002, 11/17/05 (Freedman, J.).

Contracts; negotiations; binding agreement. Action arising out of failed attempt by defendant to purchase worldwide rights to four cardiovascular drugs from defendant. Plaintiff claimed that the parties had reached agreement on all material terms. Plaintiff claimed that defendant had made a binding agreement to sell, or a binding preliminary agreement that obligated defendant to negotiate a final document in good faith. The court granted defendant's motion to dismiss on the basis that a confidentiality agreement precluded any liability by defendant regarding the execution and delivery of a definitive agreement. KV Pharm. Co. v. Pfizer, Inc., Index No. 601661/2005, 11/4/05 (Freedman, J.).

Contracts; privity; contract form with corporate name suggesting representative's authority. Fraud in the inducement; protected opinion; representations not of matters peculiarly within the representor's knowledge; unreasonable failure to investigate. Procedure; motion to renew; reasonable justification for not presenting new facts previously. Motion to reargue; court's misapprehension or overlooking of facts. Motion to stay; aim to delay. In action involving two maintenance and monitoring contracts, one defendant moved for summary judgment on the basis that the plaintiff had formed the earlier contract not with it but with an entity the assets of which it had subsequently acquired. It was true that when the contract had been executed the defendant's purchase of the assets had not yet been approved by a bankruptcy court. However, the plaintiff's representative testified that at the signing he had not been certain which entity the other party had worked for, but inferred it was the defendant, seeing no attempt to correct a heading of defendant's name that appeared on the contract form. The defendant's conclusory statement that the plaintiff had known that the representative represented the other entity was not enough to dispel a question of fact as to apparent authority. Further, if less persuasive, the plaintiff and others had received a letter saying that invoices during a period that encompassed the contract date would be honored by the defendant. The motion was denied. Motions to dismiss claims as against the second defendant, of which the first was a subsidiary, were granted since no issue of fact was raised that this defendant had disregarded the separateness of the other defendant or exercised daily control over it. The remaining parties cross-moved for summary judgment on claims concerning the second contract, executed after the asset purchase. As to whether the fraud alleged was a protected expression of opinion, the court agreed that generally opinions cannot amount to fraud in the inducement, but concluded that the representation here, that the defendant's premises were not in fire code compliance, might

be of an actionable type. Nevertheless, the defendant's affirmative defense had to be dismissed because the defendant had failed to investigate the alleged misrepresentations. Their truth could have been gauged with an exercise of ordinary intelligence, as evidenced by the defendant's own allegation that it had discovered the reality a day after executing the contract; it could easily have discovered it before. The defendant was liable for obligations under the agreement. The defendants moved to renew and reargue. Leave for renewal must be based on new facts and there must be a reasonable excuse as to why they were not presented previously. But why defendants submitted affidavits casting doubt on the plaintiff's expert only at the last minute was not explained. In any case, the court had originally assumed, as it had to in order to grant summary judgment to the plaintiff, that the premises complied with code, as alleged in the affidavit of the defense experts; thus, the credibility of the plaintiff's expert was beside the point. Leave to renew denied. In arguing for reargument, the defendants said that the court had misapprehended the law of fraudulent inducement as it applies to an affirmative defense. The court found just one new thread, that it should have dismissed only the affirmative defense and left for trial the question of a meeting of the minds. Yet that question had been fully dealt with in the plaintiff's cross-motion, which pointed to a signed contract challenged only by reference to fraud. It had been incumbent on the defendants to show that no meeting of minds had occurred, or that, entirely aside from the asserted fraud, other formalities of contract making had been absent. To the contrary, one of the defendants' affidavits showed them taking steps consistent with participating in a valid monitoring and maintenance contract. Finally, the court denied the defendants' request for a stay of the trial, the timing of the motions hinting that the real aim was just to delay, not avoid true prejudice. Casco Security Systems, Inc. v. Davenport Machine, Inc., Index No. 09484/2003, 12/14/05 and 12/15/05, (Fisher, J.) Reargument.**
Summary Judgment**.

Contracts; privity; relationship approaching privity. Contribution; contract claims. Common law indemnification. In connection with a possible purchase of a building site, plaintiff had hired one defendant, an environmental consulting company, to perform an environmental assessment. A radar survey had been contemplated and one of the purposes of the assessment and survey had been to check for chemical storage tanks. Defendant had hired a co-defendant to perform the radar survey, which had been negative, as was the assessment. Plaintiff had purchased the lot, it alleged, in reliance on these findings. Later, underground petroleum tanks had been found and these had leaked. Plaintiff sued. The co-defendant moved to dismiss on the ground that plaintiff had not been in privity with it. The court ruled that a relationship approaching that of privity was alleged here: plaintiff was not a member of the general public; defendant had known the purpose of the survey and that a party with an actual or prospective ownership interest in the property in question would rely on it. That defendant may not have known the name of that party did not matter, the court indicated. The court therefore denied this defendant's motion for summary judgment on negligent misrepresentation and negligence claims. The court dismissed the other defendant's cross-claim for contribution since it had previously dismissed tort claims against that defendant, but it declined to dismiss a claim for common law indemnification. Mercy Center, Inc. v. JLC Environmental Consultants, Inc., Index No. 600476/2003, 12/12/05 (Cahn, J.).

Corporations; class action; settlement; merger of New York Stock Exchange; evaluation of fairness of settlement; likelihood of success of the action; full disclosure; fairness opinions. Action arising out of proposed merger of New York Stock Exchange (NYSE) and Archipelago Holdings, Inc. The action, brought by NYSE seatholders, alleged conflicts of interest, that the allocation of shares was unfair, etc. See 8 Law Rep. No.3, at 6 (Nov. 2005). Application to approve settlement (CPLR 908). The court reviewed the history of the transaction and proceedings in court. It discussed concerns about the perceived need to move quickly and to conduct the vote set for Dec. 6, 2005. A request to delay the vote was denied because the court found the settlement fair and reasonable, and the heart of the settlement was full disclosure in exchange for a vote on time. As to success on the merits, the court found that plaintiffs faced huge challenges. The court did note that the NYSE CEO had placed his assets, including large holdings in Goldman, Sachs, facilitator of the transaction and second largest shareholder in Archipelago, in a hidden trust, but the assets were not fully hidden because information had to be supplied to the CEO at year end for tax purposes. The CEO had an indirect interest in Archipelago through his ownership of Goldman shares; normally, such a relationship would be considered remote, but here the size of the holdings raised the specter of a disqualifying indirect interest. Plaintiffs had shown a prima facie case of conflict by Goldman because of its close links to Archipelago. They had also shown prima facie conflict between Goldman and Lazard, which had given a fairness opinion. Although all investment banks would have ties to the NYSE, a fairness opinion from an independent firm could have helped to purge the other conflicts, but the involvement of Lazard multiplied those. The court concluded that reasonable disclosure of the roles of conflicted participants would allow the seatholders, a relatively small class of very sophisticated persons, to evaluate the impact of the conflicts, if any. There would also need to be disclosure of the pros and cons of the merger itself. As part of the settlement, a new fairness opinion was issued. The court found this opinion to be flawed. The court discussed weaknesses in fairness opinions as often framed, that they have become watered down and toothless, and pointed out that boards tend to rely upon them without question or scrutiny. The court stated that fairness opinions too often fail to analyze adequately but simply take at face value facts, figures and assumptions of management. The additional opinion here was illustrative. In view of this, Goldman's role and the conflicts of the participants, plaintiffs' claims, the court concluded, would likely have been meritorious. But the disclosure goal was achieved by the new fairness opinion and a critical report submitted by plaintiffs, which was to be given to the seatholders as part of the settlement. Unlike the typical fairness opinion, the competing presentations here provided seatholders an opportunity to exercise their own business judgment with eyes wide open. The settlement was found to be fair. The vote would proceed as scheduled. The attorney's fees question was reserved. In re New York Stock Exchange/Archipelago Merger Litigation [Higgins v. New York Stock Exchange, Inc.], Index No. 601646/2005, 12/5/05 (Ramos, J.).

Corporations; Limited Liability Corporation Law 407; written consents by fewer than all members in lieu of meetings; restrictions in operating agreement; quorum requirement; restrictions on minority. Matter arising out of disputes among the members of a limited liability corporation. Two of the three members purported to vote to terminate the LLC's lease, terminate the employment of all of the LLC's employees, and accept a notice of default on a promissory note. The case presented an issue of interpretation of LLC Law 407(a). Two of the members relied upon a written consent by them to support their actions. The third member argued that Section 407 was inapplicable to this LLC because its operating agreement required a quorum of all members to be present at any meeting. The court held that the operating agreement did not bar action by written consent of fewer than all members under all circumstances. The quorum requirement applied only to meetings. To rule otherwise, the court stated, would permit a minority member to stonewall any action by refusing to attend meetings. However, the court also ruled that the two members had purported to take actions by written consent for which the approval of all was required by the operating agreement. Under the agreement as read in light of the statute, there was a 100% quorum requirement for action at a meeting, but neither there, nor in a written consent, would there be a requirement of unanimity of consent on all issues. The court stated, however, that the operating agreement provided safeguards against oppression of minorities by requiring unanimous consent as to certain actions, such as actions taken by the two members to terminate the business. These actions were found null and void. Overhoff v. Scarp, Inc., Index No. 8922/2005, 12/27/05 (Fahey, J.).**

Dissolution of LLC; judicial supervision of windup; receivership. Arbitration; arbitrability; waiver. Contracts; interpretation; disability of LLC member; right to dissolve. Proceeding for the wind-up of an LLC (LLC 703(a)), the two members of which were in a state of discord. Following an arbitration award and before commencement of this proceeding, the other member, Barnes, had sought a medical exam of petitioner pursuant to the operating agreement, which the latter had opposed. The arbitrator had refused to consider the issue because he had retained jurisdiction only over a narrow question. The court held that the dispute over the exam was arbitrable, the agreement covering any controversy or claim arising out of or relating to the agreement, although the arbitrator had correctly ruled that he lacked jurisdiction. Barnes had not proceeded to submit the dispute to the AAA, nor had he moved in this proceeding to compel the examination. The court held that Barnes had waived his right to arbitrate because of his failure to pursue or move to compel arbitration, and his submission of papers and activity in this case. His answer sought as a counterclaim the same relief he would seek in arbitration. Barnes had not made a motion to compel the exam, and the general relief clause of the petition would not provide a basis for doing so. The court concluded that it would not sua sponte require an exam. Pursuant to settled principles of contract interpretation, the court disagreed that a finding of disability would be retrospective; rather, disability would be found only where it was observed to continue for at least 180 days. Barnes' interpretation would render a portion of the provision meaningless. Petitioner had the right to dissolve the LLC when he signed the petition (LLCL 701) and compelling the exam would not forestall dissolution and would complicate decision-making. The court found that the two members would be unable to wind up the affairs of the LLC on their own and so judicial supervision was granted. A receiver was appointed. In re Swett, Index No. 10260/2005, 11/22/05 (Fisher, J.).**

Fiduciary duty; insurance broker. Procedure; CPLR 3211(d). Action against insurance broker. Defendant had obtained insurance coverage for plaintiffs, not including business interruption insurance. After a loss, plaintiffs sued for damages due to the failure to procure said insurance. With regard to a breach of fiduciary duty claim, the court observed that the relationship between agent or broker and customer is not a fiduciary one. Although additional duties can arise under certain circumstances, the court concluded that on the facts alleged, there could be no fiduciary relationship; only a longstanding relationship had been claimed. The court rejected a contention that discovery should be permitted (CPLR 3211(d)). Breach of fiduciary duty claim dismissed. Scotto Princeton LLC v. Felsen Associates, Inc., Index No. 1702/2004, 12/27/05 (Austin, J.).**

GBL 349; consumer injury; practice deceptive to a consumer; reasonable consumer. Two actions arising out of a failed exclusive distributorship agreement. Plaintiff in one action, a national manufacturer and distributor of beverages, asserted a GBL 349 claim alleging deceptive conduct by defendant, wholesale distributor, in steering customers away from plaintiff's products, failing to restock them, persuading prospective purchasers to purchase other products, etc. The court held that plaintiff had alleged a private contractual dispute. Plaintiff urged that it had alleged injury to consumers from deceptive conduct that reduced availability of plaintiff's products. The court expressed considerable misgivings that GBL 349 would reach such consumer injury. Assuming that, the court held that plaintiff did not allege a deceptive practice within the meaning of 349. The court stated that the alleged diversion and concealment were not directed to a consumer, much less misleading to a reasonable consumer. Motion to dismiss granted. Eber-NDC LLC v. Star Industries, Inc., Index No. 07137/2005, 11/30/05 (Fisher, J.).**

Insurance; commercial property; policy period; period of limitations; ambiguity; proof of loss (Ins. Law 3407(a)); completeness; signature; substantial compliance; fraudulent proof of loss; standing; notice of claim; timeliness; misleading notice of policy extension and proof of loss form (GBL 349). Plaintiffs owned a building for which defendant provided commercial property insurance. A business in the building as a tenant had engaged in work on its space, which damaged the integrity of the building. Plaintiffs had undertaken certain repairs and believed that they had stabilized the building, but that effort had failed. Defendant had rejected proofs of loss. Plaintiffs sued. The court rejected defendant's argument that the loss was outside the policy period; this was based upon the policy having expired in June. But defendant, when notifying plaintiffs that it would not renew, had indicated that the policy would expire in July. Defendant tried to argue that this extra month applied only if plaintiffs had sought to renew and to pay a premium. But the court noted that plaintiff's act in trying to renew would have been futile and that defendant's argument was premised on this. The court held that the notice was deceptive. A question was raised as to whether a period of limitations was clear. The clause required a suit within two years after the date on which "the direct physical loss or damage occurred." The issue was whether the time bar began when plaintiffs realized the building was in danger of collapse or once the process leading to collapse had begun (collapse was avoided because plaintiffs had taken remedial steps). The court held that the policy did not unambiguously define the trigger for "direct physical loss or damage" and that the clause must be construed against the drafter, defendant. The time bar was unenforceable.

Defendant had rejected plaintiffs' proof of loss because it had not specified the date of loss and contained an indecipherable signature. The court held that the proof of loss satisfied plaintiffs' obligations under the policy. Defendant was notified of a threatened collapse of the north wall of the building; a date of actual collapse could not be provided because none had occurred. The insureds' obligation was limited to supplying a proof of loss as contractually defined and only to the extent required by the insurer's form. Ins. Law 3407 (a). The form sent by defendant was not "suitable," as statutorily required, because it asked about a loss, a collapse, that had not yet occurred. The form did not ask when plaintiffs had learned that a collapse was threatened. Plaintiffs had not breached their obligations by failing to print the signer's name under the signature on the proof of loss since the form did not so require. Defendant did not notify plaintiffs that it was accepting or rejecting the claim, as required by regulation. Nor did defendant ask for more information. Defendant should have, at least by a certain point, the court stated, disclaimed on the ground that proper proof of loss had not been timely received, but defendant had never disclaimed at all. In any case, the proof of loss as initially filed, the court, citing Ball and other cases, ruled, had been in substantial compliance. Further, the court stated, there was no need for plaintiffs to provide any additional proof of loss since the items omitted from the first proof of loss were items plaintiffs were not obliged to supply and in any event were supplied in a corrected proof of loss and information regarding the "date" was supplied by plaintiffs in affidavit form. The insurer contended that the proof of loss was fraudulent because it misstated the date of loss, but the court found this argument to be specious. Plaintiffs first omitted a date and then supplied the challenged one when defendant insisted, but what was at issue was, as defendant knew, a threatened collapse, not an actual one. Under the circumstances, the citation of a date was at most incorrect, not fraudulent. The court held that the corporate plaintiff lacked standing as it had not been named in the policy, nor did it have a certificate. The court rejected defendant's contention that the notice of claim was untimely, finding that plaintiffs had thought that their repairs had corrected the initial problem and that they had made a timely notice when they learned of the current problem. Finally, the court ruled that defendant's transmission of notice of an extended expiration date in a notice of non-renewal and then refusing to acknowledge that date unless the insured sought to renew and to pay a premium was deceptive conduct within GBL 349. The court reached the same conclusion as to defendant's use of a proof of loss form that did not call for a printed signature, and failed to advise the insureds that the form would be rejected if a genuine signature was illegible. Plaintiffs did not need to prove that other insureds had been subjected to the same conduct since the conduct was consumer-oriented. Motion to dismiss granted as to one plaintiff only and otherwise denied. Korn v. Fidelity & Guaranty Ins. Underwriters, Inc., Index No. 601756/2004, 12/8/05 (Gammerman, J.).

Insurance; interpretation of policy; selling price of goods; loss of profits; replacement of damaged goods; business interruption coverage; consequential losses. The plaintiff sued for $2.2 million alleging breach of the business interruption section of an insurance policy under which it had received over $16 million to cover losses and damages due to the World Trade Center attacks. The defendant moved to dismiss. One section of the insurance policy provided "replacement cost coverage," in essence, the cost to replace damaged property with other property, but the plaintiff had paid an additional premium for damaged property to be covered at the selling price, assumed to be higher than the cost of replacement. After September 11 the plaintiff had submitted a claim under the business property section of the policy for damaged merchandise, and the defendant had paid the plaintiff at the selling price, including loss of profits thereon. The defendant had subsequently paid the plaintiff for a claim under the business interruption section of the policy, deducting as "stock value paid" the previous payment. Plaintiff contended that it was entitled to claim damaged goods under both portions of the policy and appeared to try to characterize the goods as part and parcel of its loss of business income. The plaintiff pointed to various business losses it said stemmed from loss of cash flow due to damaged goods, for example, that it had had to postpone opening a new store and had had to reduce its advertising, which had hurt sales. The plaintiff acknowledged that the policy did not cover consequential losses; it was, it stated, merely identifying them as business losses ultimately ascribable to the damaged goods. It argued that because the policy did not preclude recovery under the business interruption section for items also covered on a sales price basis it could claim the items under both sections. If not, it would have received nothing for its additional premium. The court rejected this interpretation. Once the defendant had covered a loss, the court said, the plaintiff could not recover for it again just because it might be covered by a different section of the policy. Nor was it true that the plaintiff had paid its additional premium for nothing. There could be damaged merchandise without business interruption, for example if goods had been damaged during shipping. In such a case the defendant would be reimbursed for the goods at the selling price, exactly what it paid its premium for. Summary judgment for the defendant. J&R Electronics Inc. v. One Beacon Insurance Co., Index No. 603284/2004, 12/13/04 (Moskowitz, J.).

Misrepresentation; aiding and abetting; existence and knowledge of underlying fraud; substantial assistance; banks; duty to disclose. Contracts; primary loan agreement; subordinated loan agreement; reasonable reliance; duty to exercise ordinary diligence. Investors who had loaned $900,000 to a technology start-up company pursuant to a subordinated loan agreement sued the company's senior lender, party to its primary loan agreement worth $20 million. The plaintiffs alleged fraudulent misrepresentation and breach of duty to disclose information. Before the plaintiffs' investment, the company had defaulted on its primary loan agreement. The defendant and company had amended the agreement to waive the defaults and the company had then distributed to potential investors subordinated loan agreements stating that the company was not in default on any loan. The plaintiffs had entered into a subordinated loan agreement, which among other things gave them "a first priority security in and lien on" the proceeds of three lawsuits in which the company was the plaintiff. However, the subordinated agreement provided that the loan was "expressly subordinated" to payment of the primary lenders. The company, subsequently, had once again defaulted on its primary loan agreement, the defendant had again waived the defaults, and in a short time two of the lawsuits composing the basis of the plaintiffs' collateral had yielded sums that had gone to the defendant. The company had thereafter filed for bankruptcy. The plaintiffs argued that the subordinate agreement's statement that the company was not in any default was misleading because the company would have been in default had the defendant not waived the default, and plaintiffs alleged that they had reasonably relied on the misrepresentation. When the plaintiffs had brought suit they had believed that the defendant itself had prepared the subordinated agreement and thus had committed fraud on the prospective investors to whom it it had been given. The plaintiffs consented to the defendant's motion to dismiss the first amended complaint and moved for leave to amend it a second time. They contended that the defendant had aided and abetted the company's fraud in order to lure investors into providing assets with which the company could repay the defendant. The defendant opposed the motion on the grounds that the subordinated agreement's statement that the company was not in default was true and that the defendant had never made any representation to the plaintiffs. The court found that the statement in question was not false and the plaintiffs did not allege sufficient facts to show that the defendant and the company had schemed to deprive the plaintiffs of their property. The plaintiffs were sophisticated investors and the subordinated agreement contained, preceding the section they deemed misleading, lenders' representations and warranties that they had had access to the company's records. Plaintiffs had had a duty to exercise diligence and conduct an independent appraisal of the risks. They did not allege that they had asked to see the company's records and been refused. The defendant's waiver of its lendee's defaults and permission to obtain subordinated lenders did not constitute a common scheme, nor did the defendant's consent to the terms of the subordinated agreement constitute "substantial assistance." Generally, the court noted, a bank does not have to disclose information on a borrower to the borrower's investors even when its silence might benefit the bank. The court cited *Albion Alliance Mezzanine Fund, L.P. v. State Street Bank and Trust Co*., 8 Misc.3d 264 (Sup. Ct. N.Y. Co.), affd, 2 A.D. 3d 162 (lst Dept. 2003), in holding that silence and inaction cannot provide a basis for a claim for aiding and abetting fraud unless the defendant has an independent duty to the plaintiff. A bank's superior knowledge regarding its borrower does not create a duty to disclose. The complaint was dismissed without leave to amend. Jebran v. LaSalle Business Credit, LLC, Index No. 601757/2005, 12/22/05 (Freedman, J.).

Misrepresentation; breach of contract claim; intention not to fulfill promise. Contracts; statute of frauds. Defendant moved for summary judgment to dismiss plaintiff's causes of action arising out of various business transactions. Plaintiff's first cause of action alleged that defendant had defrauded her into personally guaranteeing a loan for purposes of running a business in exchange for defendant's giving her a 50% interest in the business. Plaintiff alleged that she had posted the collateral for the loan and made payments on the loan, but that when she had requested that defendant reduce their agreement to a writing, defendant had refused. Plaintiff alleged in a second cause of action that defendant had written eleven checks, signing plaintiff's name on the account of a separate business of which plaintiff was the principal. Plaintiff also asserted claims for conversion and unjust enrichment with regard to two checks; plaintiff alleged that defendant had forged her name on them, cashed them, and kept the proceeds. Defendant contended that plaintiff had given him the two checks and told him to invest them in a business and that he also had used some of the funds to purchase a car. The court determined that the plaintiff's first cause of action was properly one for breach of contract, not for fraud. The court explained that plaintiff had not put any facts before the court showing that defendant had not intended to convey the shares to plaintiff. The alleged oral arrangement between plaintiff and defendant would ordinarily be unenforceable but for plaintiff's allegation that she had secured collateral for and made repayment of the loan, which defendant did not convincingly refute. Such circumstance could take the agreement outside the statute of frauds. The court granted plaintiff leave to replead her first cause of action as one for breach of contract. The court denied defendant's motion to dismiss plaintiff's claim that defendant allegedly had taken and forged checks from plaintiff's business, finding that the parties' differing accounts about what had happened created issues of credibility that could not be disposed of by motion for summary judgment. The court denied defendant's motion as to plaintiff's claims arising from defendant's alleged conversion of the proceeds of two checks since defendant had failed to establish entitlement to summary judgment on those causes of action. Finally, the court denied plaintiff's request for sanctions, finding that defendant's motion had not been made in violation of Rule 24 of the Rules of the Commercial Division. Kim v. Kim, Index No. 9459/2004, 11/23/05 (Austin, J.).**

Misrepresentation; securities fraud; WorldCom; piercing corporate veil; domination and abuse; "holder" claims in regard to stock retention; "Martin Act;" out-of-state purchases; CPLR 3016 (b). Fiduciary duty; breach; duty of officers and directors. Negligent misrepresentation; aiding and abetting. In action arising from the collapse of WorldCom, the plaintiff asserted factual allegations nearly identical to those made against the company in the Federal Class Action, which had ended in a $6 billion settlement and which this plaintiff had "opted out" of. The class action had been brought on behalf of people who had bought stock in Worldcom while it was overstating its earnings. The defendants here were stock analyst Jack Grubman, his former employer, Salomon Smith Barney (SSB), and SSB's parent company, Citigroup. The plaintiff said that he had bought and held WorldCom stock in reliance on false and misleading SSB reports authored by Grubman. He alleged that Grubman himself did not believe the reports, that they were part of a quid pro quo arrangement: the defendants gave WorldCom "bullish" reports, gave its officers valuable IPO securities and loaned its president hundreds of millions of dollars, and in exchange, SSB's banking division got the lucrative job of underwriting WorldCom's securities offerings. The defendants moved to dismiss all the claims, which involved fraud, breach of fiduciary duty, and negligent misrepresentation, as against CitiGroup, on the ground that the complaint alleged no wrongdoing by it. The plaintiff responded that his complaint alleged that Citigroup was an active wrongdoer in that it had lent WorldCom money as part of the quid pro quo. However, the court found that the allegation was flatly contradicted by documentary evidence showing that the loans had been extended by other entities. The plaintiff contended that he stated grounds for piercing the corporate veil, but the allegations were found to be conclusory and did not justify piercing the veil. Nor did the complaint adequately allege that the parent had used its subsidiary to abuse the corporate form to perpetrate a wrong or injustice. The claims against Citigroup were dismissed. The defendants sought dismissal of all claims to the extent that they were based not on purchases of stock, but on "holding" it. The court cited a First Department decision that upheld such claims in the case of plaintiffs who had retained stock to their detriment based on false stock reports. The defendants suggested that the Court of Appeals would reject such claims, which it has never considered, based on the Supreme Court's reasoning in Blue Chip Stamps (regarding Sect. 10(b)), but the First Department's decision was determinative here. A claim of aiding and abetting negligent misrepresentation by

WorldCom was dismissed because there cannot be a conspiracy to commit a non-intentional tort. Regarding a claim of aiding and abetting breach of fiduciary duty, the plaintiff conceded that, as the defendants pointed out, WorldCom did not stand as a fiduciary to its shareholders, but he contended that the claim was not based on a breach by the company, but by its officers. The claim survived insofar as it was thus based. The defendants argued that the Martin Act, enacted in New York State as a weapon against fraudulent securities' practices but not providing for a private right of enforcement, preempted the breach of fiduciary duty and negligent misrepresentation common law claims. The plaintiff's attorney contended for the first time that the plaintiff had not bought his stock in New York. The court found that the only two cases - - from SDNY - - that bore directly on whether the Martin Act preempted claims involving stock sales outside of New York agreed that it did not and the court found the reasoning thereof persuasive. The court gave the plaintiff time to supply an affidavit in support of his attorney's contention. The defendants argued that the fraud claims failed for lack of specific factual allegations (CPLR 3016(b)). The court, however, found that the allegations met the higher pleading standard for fraud because they contained enough detail to clearly inform the defendant what incidents were complained of, including the knowing issuance of false reports and not disclosing the quid pro quo relationship among WorldCom and the defendants. The claims stood. Babcock v. Citigroup Inc., Index No. 602965/2004, 12/22/05 (Freedman, J.).

Preliminary injunction; sports management agreement; irreparable harm and damages; likelihood of success; balance of equities. Plaintiffs moved for a preliminary injunction enjoining defendant, a cruiserweight boxer who was then the world champion, from fighting. Defendant had entered into a written agreement with plaintiffs whereby they were to represent him for a three-year period. The agreement had provided that plaintiffs would negotiate the terms and contract with promoters for all of defendant's fights. In return, plaintiffs were to receive one-third of the purses from his fights and endorsements. Defendant had thereafter notified plaintiffs that he no longer wanted them to act as his managers. Plaintiffs later learned that defendant had been scheduled to fight in Florida. Plaintiffs moved to enjoin defendant from participating in that fight, enjoin co-defendants from promoting or sanctioning that fight, and enjoin co-defendant from acting as defendant's manager. The court ruled that plaintiffs had established a likelihood of success on the merits against defendant fighter. The court found that there had been an agreement in effect that defendant had breached. As to the co-defendant manager, the plaintiffs sought to proceed on a tortious interference theory, but the court determined that plaintiffs had not alleged that this defendant had known of the contract between plaintiffs and defendant or that he had taken any action to induce defendant to breach the contract. Thus, plaintiffs had not shown a likelihood of success as to this defendant. Although there ordinarily will be no irreparable harm if the plaintiff can be compensated by damages, the court can grant equitable relief to enforce contractual rights. The court held that plaintiffs had shown irreparable harm. The defendant fighter contended that he had terminated the agreement, but the court held that he had not exercised his right to do so properly. The court further found that the balance of equities favored plaintiffs and directed defendant to deposit a third of his prize money and proceeds of endorsement deals in escrow. Brettschneider v. Bell, Index No. 12701/2005, 12/19/05 (Austin, J.).**

Procedure; default judgment; motion to vacate (CPLR 5015 (a)); "interested person;" garnishee; avoidance of injustice. Motion to vacate a default judgment entered against a defunct Russian bank brought by a non-party, a party to a related special proceeding seeking to collect funds allegedly belonging to the bank. The non-party bank sought to vacate the judgment based upon the Appellate Division's ruling regarding claims against the Bank of New York (BNY). The court had held that plaintiffs were bound by statements in Federal court that showed they could not have relied upon alleged misrepresentations by BNY. The movant claimed that the default judgment must fail for the same reason. The court held that movant had failed to establish that it was an "interested person " (CPLR 5015(a)) since it did not claim an interest in funds subject to the judgment, but was merely a garnishee. Its general reputational interest would not suffice, the court held. Nor did movant show that vacatur would avoid injustice, an element required. Movant did not claim that the Russian bank had not engaged in fraud. That bank was in a different posture than BNY. The Russian bank had engaged in fraudulent acts, not merely making misrepresentations. Motion denied. Morgenthow & Latham v. Bank of New York Co., Index No. 604598/2000, 12/7/05 (Cahn, J.).

Procedure; forum selection clause. Action arose from an asset purchase agreement and promissory notes executed by the plaintiffs for their purchase of defendants' Missouri-based businesses. Plaintiffs commenced the instant action seeking reformation of the purchase price and declaratory and injunctive relief after defendants had notified plaintiffs that plaintiffs were in default on the notes. Defendants moved to dismiss pursuant to the forum selection clause in the notes, which provided that any legal action taken against defendants with respect to the notes be initiated in Federal or State court in Missouri. Plaintiffs opposed, claiming that their three causes of action arose out of the asset purchase agreement only, not the promissory notes. The court found that plaintiffs' claims did not arise solely from the asset purchase agreement, but in fact were all entwined with the terms contained in the notes. The court pointed out that the notes had been incorporated by reference into the parties' agreement, which also contained a clause specifying that it was to be governed by the laws of Missouri. Thus, Missouri was found to be the appropriate forum for determination of the parties' dispute. Motion granted. Devos Ltd. v. Rx Recall, Inc., Index No. 13016/2005, 12/2/2005 (Emerson, J.).**

Procedure; long-arm jurisdiction; destination of goods at airport international area; advance payment abroad; purposeful activity. Plaintiff had sued defendant, a clothing manufacturer based in India, claiming that defendant had tendered nonconforming goods. Plaintiff had obtained a default judgment against defendant. Defendant had moved for reargument of the denial of its motion to vacate the default judgment, and for dismissal of the underlying complaint on the grounds that there was no basis for personal jurisdiction in New York. The court noted that defendant had contracted to supply the goods to plaintiff in New York, and that the purchase orders and invoices supported that. Although the airway cargo bill had identified the goods' destination as the JFK airport international area, rather than plaintiff's business in New York, long-arm jurisdiction was not destroyed, the court ruled, since the document also identified the consignee bank and ultimate recipient, plaintiff, as having New York State addresses. The court further determined that the fact that plaintiff had made an advance payment in India and had also paid the shipping costs did not preclude jurisdiction since CPLR 301(a)(1) does not permit sellers to insulate themselves from long-arm jurisdiction in New York by shipping goods f.o.b. their own jurisdiction. The court concluded that defendant had purposefully availed itself of the privilege of conducting activities in New York by having solicited business in New York, thereby establishing the requisite minimum contacts. Motion to reargue denied. Gunther By Nash v. Panna Impex Ltd., Index No. 602969/2000, 12/8/05 (Freedman, J.).

Procedure; preliminary injunction; counterclaim for money damages; counterclaim for fees and sanctions; 22 NYCRR 130-1.1; CPLR 8303. Defendants moved for a preliminary injunction enjoining plaintiff from accessing its computer system and directing plaintiff to provide the names of anyone who had accessed or attempted to access that system. The court denied defendant's motion finding that CPLR 6301 requires a specific subject matter and here a potential counterclaim for money damages only did not qualify under the statute. Plaintiff moved to dismiss defendants' first affirmative defense and counterclaim for attorney's fees and sanctions on the ground that it failed to state a claim. The court dismissed the counterclaim because claims for fees and sanctions to penalize specific frivolous conduct may not be pled as distinct causes of action. The court did, however, allow the allegations to remain as an affirmative defense. Camp Systems Int. v. Argyros, Index No. 17513/2005, 12/20/05 (Emerson, J.).**

Procedure; statute of limitations; claimed ongoing breaches of contract; ongoing damages; GBL 349;CPLR 214(2); deceptive conduct. Class action by holders of participating ordinary life insurance policies issued by a mutual life insurance company alleging improper conduct by the insurer with regard to distribution of "surplus" in the form of dividends. The conduct by defendant involved real estate investments and the allocation of income therefrom, from 1979 through the late 1980's. Under the borrowing statute, the out-of-New York plaintiffs would have to meet shorter limitations in various instances, and the class would have to be timely under New York's statute. The court found as to a contract claim that plaintiffs failed to satisfy the statute because the proof showed the actions at issue had occurred prior to 1992. Persistence of some of the original allocations after a restructuring was not a new breach. The court rejected plaintiffs' argument that a new breach occurred annually with each calculation of the dividend. The acts complained of (the allocations of income) had occurred in a discrete period, and the fact that plaintiffs may have continued to suffer damages therefrom was not relevant, the court stated. Plaintiffs' GBL 349 claim was also found time-barred. Such a claim is governed by CPLR 214(2) and accrual would occur when a plaintiff was injured by a deceptive act or practice violating 349. Plaintiffs relied upon a theory of injury based on omissions in the yearly dividend statements. However, defendant had provided notice about a reduction in dividends well before commencement of the action. The claim also failed for failure to show a deceptive act or omission likely to mislead. Defendant's proof, uncontradicted, was that the dividend statements, relied on by plaintiffs, simply provided information about the amount and how that sum was applied, and the failure to explain therein how defendant had allocated income and arrived at that dividend did not constitute a deceptive act or practice. Summary judgment for defendant. Rabouin v. Metropolitan Life Ins. Co., Index No. 111355/1998, 11/23/05 (Cahn, J.).

Procedure; statute of limitations; financial advisor; investment specialist; fiduciary duty; CPLR 214 (6); malpractice claims; investment specialist as professional; duty to advise; doctrine of continuous treatment or representation; negligence; pleading; breach of contract; failure to state a claim. The plaintiff sued after his lump-sum pension payment, which had been invested in a variable annuity recommended and procured by the individual defendant, an investment specialist, had dwindled from $448,000 to $162,000. The plaintiff had opened the account with the defendants by means of a document that stated his investment goal as long-term growth and stability. The plaintiff, alleging, among other things, that the individual defendant had repeatedly visited his house to advise him to stay in the flagging annuity and not "get discouraged," claimed breach of fiduciary duty and contract and other wrongs. The defendants argued that the fiduciary duty claim was time-barred because it sought monetary relief and a three-year period applied. The plaintiff contended that the case was based in a contractual relationship and that therefore a six-year, not three-year, limit applied. But a 1996 legislative amendment to CPLR 214 (6) specified that the three-year limit applied to non-medical malpractice claims whether based in contract or tort. That claim was dismissed. The defendants argued that the breach of contract claim was, in essence, a malpractice claim governed by the three-year statute. The court noted that the Court of Appeals has found that alleging breach of contract based on ordinary obligations made in express terms of an agreement does not make a breach of contract action out of what is really a malpractice action. In the case prompting that finding the Court had applied the three-year limitation applicable to malpractice. The defendants' theory was dependent on the investment specialist's being a "professional" who had committed malpractice. At the same time–the Court of Appeals having so far left open the professional status of investment specialists–the court here, lacking evidence of the defendant's training or expertise or advanced status, declined to find that the defendant was a professional. Therefore, the shorter, three-year limit did not apply to the breach of contract claim as stated. A negligence claim was dismissed because when an individual is not a professional the continuous treatment or representation doctrine that could potentially extend the accrual date does not apply. Regarding whether the plaintiff's breach claim stated a cause of action, the plaintiff alleged that the parties had formed a contract pursuant to which the defendants would provide investment advice and placement consistent with the plaintiff's need for financial stability, and had breached it by recommending a high-risk investment and failing to monitor and re-evaluate. The plaintiff had provided the parties' contract, the document that had opened his account and that specified his investment objective. However, the court found that plaintiff had failed adequately to allege a breach of contract in that plaintiff had not pled the terms of the purported contract that allegedly bound defendants to provide continuing investment advice, or the consideration paid therefor. The defendants' responsibilities and the contract duration were not provided. Further, the defendants argued that the individual defendant was not a professional and owed no contractual duties except the common law duty to procure the annuity. Again the court agreed, finding that the plaintiff had failed in its burden to allege that the defendants had undertaken by contract a different, ongoing relationship. An implication that the defendant had undertaken to give ongoing advice was not sufficient. Courts have found that advice-giving is a common characteristic of broker-client relationships that does not create an ongoing duty to advise or to monitor. The claim was dismissed, as were two further claims based on alleged violations of NASD rules, for which there is no private right of action. Cator v. Bauman, Index No. 8851/2005, 12/13/05 (Fisher, J.).**

Procedure; vacatur of default. Corporations; demand on the board; excuse. Minority shareholder moved for leave to intervene and interpose or answer on behalf of the corporation and herself and vacate a default judgment against the former. The movant claimed that the default had occurred as part of the scheme by which the plaintiffs, shareholders and directors, would take over a building owned by the corporation, which operated as a theater. Plaintiffs asserted that loans had been made to the corporation that had not been paid back, but the movant challenged this claim, pointing out that the underlying notes had been lost. The court granted the motion on the ground that movant's substantial interest in the case and potential for harm to her outweighed other factors; movant had made a prima facie showing and it would be premature to reach the merits. Movant did not have to demand formally that the Board defend the corporation since plaintiffs had made clear at a meeting that they would let it default. Loewentheil v. White Knight, Ltd., Index No. 601761/2005, 11/21/05 (Freedman, J.).

Tortious interference with contract; letter agreement; termination at will; awareness; "but for;" lost fees and expenses. Tortious interference with prospective business relations; contemplation of ongoing relationship; wrongful means; defendant as non-party to agreement creating obligations. Procedure; personal jurisdiction; transacting business through investment bank and principal-in-charge; phone and electronic communications and letters; nexus; CPLR 302(a) (4); future purchase; CPLR 302(a) (2) and (3)(ii); due process; forum non conveniens. Contracts; breach; pleading. Breach of duty to negotiate in good faith. Damages; determination of lost profits. Action by a limited partnership that purchases financially troubled companies, restores them to profitability, and sells them against a corporation that it had considered purchasing, shareholders thereof, and another entity in the same business as plaintiff, which had succeeded in purchasing the corporate defendant. There had been a period of exclusive negotiations favoring plaintiff and confidentiality restrictions. Motions to dismiss. On a tortious interference claim, the court found that plaintiff had adequately pled the existence of a valid contract in that a letter agreement with certain defendants for a period of negotiations did not grant the corporate defendant the right to terminate at will, a commitment letter can constitute a binding contract, and the termination provision was at least susceptible of different reasonable readings, which would bar dismissal. The court found that plaintiff had adequately alleged that the competing defendant had been aware of the letter agreement in that there had been negotiations between that defendant and a representative of the defendant corporation during the exclusive negotiation period favoring plaintiff and other conversations that could support an inference that the defendant had been aware. Defendants argued that the complaint did not meet the "but for" element of tortious interference due to contradictions therein, but the court rejected this contention. As to damages, the court found sufficient allegations that plaintiff had lost $1 million in fees and expenses. The court held that plaintiff had adequately pled a claim for tortious interference with prospective business relations because the letter agreement that plaintiff and the corporation had had, referred to in the complaint, indicated that the parties had contemplated on ongoing relationship. The complaint cited as wrongful means used by the competing defendant disclosure of information covered by a confidentiality provision, but the defendant had not been a party to the confidentiality agreement so this was insufficient, the court held. Certain obstacles were cited by the complaint, but these did not involve the competing defendant. The claim was therefore dismissed. Defendants connected to the corporate target of the purchase efforts moved to dismiss. On a jurisdictional issue, the court noted that the plaintiff, which had not yet had a chance to conduct substantial discovery, needed only to make a "sufficient start" on that issue by showing that facts may exist supporting jurisdiction. The normal remedy is for the court then to order discovery thereon per CPLR 3211(d). Plaintiff did not request that relief. Considering then whether plaintiff had in fact shown jurisdiction over defendants by a preponderance of the evidence, the court concluded that it had. The court, distinguishing a Federal case, determined that these defendants had transacted business (CPLR 302(a)(1)) through an agent, an investment bank which had also agreed to provide services for a restructuring. The defendants had purposefully availed themselves of New York because they had designated a specific New York individual as the bank's principal-in-charge of these services for the defendants. Phone calls, e-mails and document exchanges had allegedly occurred in New York. The court rejected the individual defendants' efforts to distinguish themselves from the defendant company in which they held shares. There had been e-mail exchanges with those individuals about their interests in the transaction being negotiated. The bank and the principal were agents-in-fact for the individual defendant shareholders. The court held that there had been a nexus between the New York activity and plaintiff's claims (the principal's conducting shadow negotiations with the competing entity from New York during the period of exclusive negotiation with plaintiff at the behest of defendant shareholders). The court, however, rejected plaintiff's argument under CPLR 302 (a)(4) since the letter agreement only indicated that the parties had contemplated a future purchase of defendant's New York real property. As to due process (International Shoe), the court ruled that plaintiff had sufficiently alleged that defendants had, by electronic and telephonic communications and letters, projected themselves into business transactions in New York so as to provide sufficient minimum contacts. The court also concluded that the suit here would not offend traditional notions of fair play and substantial justice. Next, defendants urged dismissal on forum non conveniens grounds. The court held that defendants had not met their burden on this point. They had failed to show a burden to the court system and assertions of hardship to defendants were conclusory. Depositions would occur where convenient to defendants, plaintiff having so agreed. No litigation was pending in Texas, the venue cited by defendants. The court found that plaintiff had adequately alleged a breach of contract (confidentiality, exclusivity and notification provisions of the letter agreement). The court refused to dismiss plaintiff's claim for breach of a duty to negotiate in good faith as redundant of the contract claim since plaintiff claimed that there had been efforts to obstruct its intended purchase of the defendant corporation. As to damages, defendants argued that breach of the exclusivity provision would not be a basis for recovery as a matter of law; defendants had had no obligation to enter into an agreement with plaintiff so that it would be illogical that the claimed breach would result in damages, it being impossible to determine what agreement would have been reached. The court ruled that plaintiff could establish claimed lost profits with reasonable certainty and it rejected defendants' contention. Defendants associated with the target entity also moved to dismiss. Jurisdiction was present for reasons stated earlier and also because these defendants came within CPLR 302(a) (2) and (3) (iii), and the court held that due process was satisfied as to these defendants. Other aspects of these motions were denied for reasons stated earlier. Cerberus Capital Management, LP v. Snelling & Snelling, Inc., Index No. 600454/2005, 12/19/05 (Moskowitz, J.).

Tortious interference with contract; standing; economic interest; fraudulent conduct; elements of fraud; duty to disclose; causation. Agency; independent contractors. Action alleging that defendants had intentionally induced three of plaintiff's debtors to breach loan agreements entered into with plaintiff. Defendant Burger King had had franchise agreements with various entities to which plaintiff had lent money. The franchisees had failed to pay defendant royalties or to make loan repayments. Defendant had sponsored a restructuring program, which co-defendant Trinity was to implement as an independent contractor. Ultimately, this program had failed. Plaintiff sued, asserting that defendants were responsible for plaintiff's losses due to nonpayment by the franchisees. As to some loans, the court held that plaintiff lacked standing because it had conveyed all of its rights in the loans to Burger King and the parties, the court ruled, had intended the claims here to be released. Plaintiff was also barred in pursuing its action as to these loans against Trinity though it had not been a party to the assignment. As to a second group of loans, the franchisees had already defaulted on some loans prior to Trinity's involvement with the restructuring. Therefore, plaintiff could not show that defendants had induced them to breach. As to a third group, the court found that Burger King had acted to preserve its own interest as creditor and thus its actions had been economically justified. Plaintiff would have to show that it had used fraudulent or illegal means. Plaintiff argued that fraud had occurred because the franchisees had not been told enough about Trinity's fees. However, they were not parties to the engagement letter, and Burger King owed them no duty to disclose. The court found no intent by Burger King to defraud the franchisees or harm plaintiff. Further, the court found, causation was lacking as the franchisees would have been in the same financial condition had defendants not acted. Thus, plaintiff's claims failed regardless of its desire for more discovery. In addition, since Trinity had been an independent contractor, Burger King would have no liability for its actions. The claims against Trinity similarly failed. Summary judgment for defendants. Wilmington Trust Co. v. Burger King Corp., Index No. 111719/2004, 11/10/05 (Ramos, J.).

UCC; prejudgment interest; 2-709 and 2-710. Purported class action by vendors of merchandise to defendants, large department stores, asserting claims under UCC 2-709, seeking the price due based on alleged improper chargebacks and failure to pay fully and on time. Defendants sought to dismiss plaintiffs' claims insofar as they sought prejudgment interest. Defendants argued that plaintiffs failed to state a claim for prejudgment interest on the portion of the price already paid since a claim for incidental damages under 2-710 required that there be a claim under some other provision of Art. 2 (e.g., 2-709), not the case here, defendants urged, as to the portion of the price already paid. The court agreed with defendants' general proposition. However, the court found that plaintiffs asserted only one claim for the price, not one as to late payments made and another as to sums yet unpaid. Late partial payments did not make divisible or extinguish any part of the alleged breach, though partial payment might reduce the extent of plaintiffs' damages; a valid claim under 2-709 had been asserted. Motion denied. CLC/CLI Liquidating Trust v.

Bloomingdale's Inc., Index No. 603859/2003, 12/8/05 (Fried, J.).

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