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Commercial Division - NY Supreme Court

Law Report

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

Chief Judge of the State of New York
Honorable Judith S. Kaye

Chief Administrative Judge of the State of New York
Honorable Ann T. Pfau

This issue marks the 10th year of publication of the Commercial Division Law Report. Beginning with this milestone issue, the editors will, for the first time, provide identifying information, to the extent possible, about appellate review of cases that have been summarized in the current issue or previous ones. Citations to such appellate decisions will appear on the last page of the Law Report, and the online publication will contain hyperlinks to those decisions. We are grateful to our partners at the Commercial and Federal Litigation Section of the New York State Bar Association and to the Section's Committee on Appellate Practice for helping us to add this new feature to the Report.

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Justices of the Commercial Division

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LAW REPORT Editors:
Cecilia Blackburn, Esq.
Loren Schwartz

Section Chair:
Lesley Friedman Rosenthal, Esq.

Co-Editors for the Section:
Jonathan D. Lupkin, Esq.
Paul D. Sarkozi, Esq.

The following members of the Section contributed to the preparation of summaries contained in this issue: Mark Berman, David L. Carey, Lisa A. Coppola, Deborah Deitsch-Perez, Ian M. Goldrich, Matthew R. Maron, Paul G.

Marquez, Ira B. Matetsky, James E. Pfeffer, John Siegal, Mark I. Silberblatt, Colleen M. Tarpey, and Victoria Zaydman, Esqs

Gratitude is also extended to the Appellate Practice Committee of the Section and to its Co-Chairs, Preeta D. Bansal and David H. Tennant, Esqs..

Arbitration; arbitrability; stay of arbitration; CPLR 7503.

Petitioners had purchased two nuclear power plants from respondent. As part of the consideration for the purchase, petitioners had agreed, pursuant to two value sharing agreements, to make annual deferred payments to respondent for some years. The parties had agreed that the amount of the deferred payments would be calculated according to a formula that was set forth in the agreements. The agreements contained a clause providing for arbitration of any dispute arising as to "any value sharing amount." A dispute had arisen under the agreements. Petitioners had advised respondent that they owed no payments under the agreements for 2005. Respondent had claimed that, by its calculations, petitioners owed in excess of $90 million. Arbitration; arbitrability; stay of arbitration; CPLR 7503. Petitioners had purchased two nuclear power plants from respondent. As part of the consideration for the purchase, petitioners had agreed, pursuant to two value sharing agreements, to make annual deferred payments to respondent for some years. The parties had agreed that the amount of the deferred payments would be calculated according to a formula that was set forth in the agreements. The agreements contained a clause providing for arbitration of any dispute arising as to "any value sharing amount." A dispute had arisen under the agreements. Petitioners had advised respondent that they owed no payments under the agreements for 2005. Respondent had claimed that, by its calculations, petitioners owed in excess of $90 million. After the parties had failed to resolve the dispute on their own, respondent filed a demand for arbitration. Petitioners had commenced the instant action, seeking a stay of the arbitration (CPLR 7503). Although petitioners argued that the parties had never intended to arbitrate disputes that would require contractual interpretation, the Court rejected this argument based on the broad wording of the arbitration clause. The Court found that the parties had "vested a CPA arbitrator with authority to resolve the full range of disputes that could arise as to the [value sharing agreement] amounts." In the absence of any language suggesting that the parties had wished to limit the arbitrator's authority, the Court found no reason to read any limitation into the arbitration clause. The Court also rejected petitioners' claim that, by providing for a CPA arbitrator, the parties had intended to submit only accounting issues to arbitration, not issues involving legal interpretation. The Court stated that arbitrators routinely determine legal as well as factual issues and, unlike judges, are not required to possess legal expertise. Because the disputed issue between the parties – whether the amount owed to respondent under the agreements had been properly calculated – fell squarely within the plain language of the parties' broad arbitration clause, the Court denied petitioners' application for a stay of the arbitration proceedings. Entergy Nuclear Indian Point 3, LLC v. Power Authority, Index No. 603949/2006, 2/8/07 (Fried, J.).

Arbitration; stay of action pending arbitration; stay as to non-signatory defendants.

Motion by corporate defendant for an order staying the action and compelling arbitration and cross-motion by plaintiff to stay arbitration. Action arose out of sale of a corporation to a corporation controlled by the individual defendants, who had not been served. The corporate defendant was subject to arbitration but co-defendants were not. The corporate defendant nevertheless sought to stay the action as to all defendants. The court held that the motion to compel arbitration must be granted and the action stayed as to the corporate defendant. The court stated that a court has inherent authority to issue an order staying as to other parties, citing different outcomes in two Commercial Division cases. A non-signatory to an arbitration provision cannot obtain a stay under FAA § 3, but can obtain one pursuant to the court's inherent power to control its docket. A stay can be granted (CPLR 2201) without a motion by a person on whose behalf the stay is granted or who benefits from it if the stay would otherwise be appropriate. The court determined that claims against the individual defendants were derivative of those against the corporation. In such circumstances a stay was warranted. Stay granted. David v. Total Identity Corp., Index No. 10766/2006, 1/07 (Fisher, J.) .**

Banking; power of attorney; alleged duty of bank to monitor accounts; aiding and abetting; knowledge; substantial assistance; unjust enrichment; authority of attorney-in-fact on checks; negligence; collecting bank (UCC 4-207); investment firm; account agreement; duty to review account statements; annuity company; surrender of annuity; conversion. Procedure; summary judgment; mere hope of future proof.

Plaintiff, a super-model, had given her stepfather power of attorney (POA) to invest her assets. He had embezzled at least $3 million. Plaintiff had sued banks, investment firms and others seeking to hold them responsible. Plaintiff had executed a POA with respect to certain accounts; it extended power as to banking transactions, but was otherwise unlimited. Plaintiff asserted that HSBC bank had had a broad duty to police her accounts. The court pointed out that plaintiff had given the attorney-in-fact broad general authority with regard to banking transactions. The failure of a bank to accept a properly executed short form power is unlawful. HSBC could not be held liable for acting on the authority established by the POA unless actual notice of revocation or termination had been received. GOL 5-1504 (4). Plaintiff did not allege that the POA had been improperly executed, or that she had been under a disability when it was signed, or that she had revoked the authority. Thus, HSBC had been entitled to rely upon it, and the bank did not have a duty to police or monitor accounts and the actions of the attorney-in-fact. The accounts in question were ordinary ones, the bank did not owe a fiduciary duty, and the appointment of the attorney-in-fact did not create such a duty. The amount and number of the transactions might have triggered some inquiry by the bank, but the POA did not limit the transactions and so it would be difficult to impose a duty of inquiry on the bank. The court rejected plaintiff's argument that the personal conduct of the attorney-in-fact have should alerted the bank to the defalcations. To require a bank to police the attorney-in-fact or verify the actions thereof would defeat the purpose of a power. Plaintiff had failed to monitor the accounts, though she had used an ATM card to obtain cash regularly. The court held that plaintiff had only conclusorily alleged knowledge on the part of HSBC in regard to aiding and abetting. Processing bank transactions did not constitute substantial assistance, nor did inaction. No claim for unjust enrichment existed since a contract controlled. A contract claim failed. There is no requirement that an attorney-in-fact list his authority on checks. Plaintiff on a negligence theory asserted that the bank had owed her a duty of care, but the court ruled that a depositor cannot sue a bank in negligence based solely on the contractual relationship between bank and depositor. The bank did not owe an independent common law or fiduciary duty to plaintiff. The court rejected plaintiff's request for further discovery since mere hope is not a reason to postpone summary judgment. Plaintiff sought to hold a collecting bank accountable, but the court declined to do so. Plaintiff had had no relationship with that bank. This bank had made warranties to the payor bank, but not to the drawer of the check (UCC 4-207) and plaintiff as drawer had no cause of action against a collecting bank. A collecting bank is not required under NY law to inquire about the circumstances under which a check was written. Plaintiff sued an investment firm with regard to improper withdrawals by her stepfather. The account agreement required that the firm transmit account statements periodically and that plaintiff would have to notify the firm within 10 days or the statements would be conclusively deemed accurate. Plaintiff had not presented an objection. Aiding and abetting failed. An unjust enrichment claim failed since there had been a contract between the parties. Plaintiff asserted claims against an annuity company that had paid over to plaintiff's account sums in surrender of an annuity upon forged requests. The court held that plaintiff had failed adequately to allege actual knowledge of defendant on an aiding and abetting theory, nor did payment on forged documents establish substantial assistance. Again, an unjust enrichment claim failed. On aiding and abetting conversion, the wrongdoer had transferred funds from one account owned by the victim to another owned by the victim; the proximate cause of injury had been conversion from the second account. Thus, plaintiff could not recover from this defendant. As to another annuity company, plaintiff asserted that substantial early withdrawal fees should have been "red flags" that put the defendant on notice that something was wrong. But mere allegations of constructive knowledge or that defendant was on notice are not, the court stated, enough to allege aider and abetter liability. Certain other claims against other defendants also resolved. Rizer v. Breen, Index No. 601676/2005, 1/29/07 (Cahn, J.).

Contracts; breach; implied covenant of good faith and fair dealing; anticipatory breach. Procedure; choice of law; collateral estoppel; res judicata; foreign judgments.

Plaintiff, a Cayman Islands joint venture, brought a breach of contract action against defendant, a French airplane manufacturer, alleging that defendant had wrongfully terminated a contract that provided for the purchase and

manufacture of several aircraft. Defendant moved for summary judgment. First, the court refused to give preclusive effect to a prior judgment in which the Grand Court of the Cayman Islands had found that defendant had properly terminated the parties' contract. The court explained that, under New York law, a foreign judgment must receive the same preclusive effect in New York that it would enjoy in the foreign jurisdiction. Since a Cayman Islands court would not give preclusive effect to its own judgment, the court held that the Cayman Islands judgment could not be given preclusive effect in this New York litigation. The court also denied defendant's motion for summary judgment with respect to its claim that it had properly terminated the parties' contract as a matter of law, although the court authorized defendant to renew the motion upon close of relevant discovery. Even assuming that it had wrongfully repudiated the parties' contract, defendant argued that it was entitled, as a matter of law, thereafter to terminate because plaintiff had elected to continue the contract and yet had failed to make any of the payments due. The court rejected this argument, explaining that there were questions of fact with respect to whether plaintiff had elected to continue the contract or accept defendant's breach, and also with respect to whether plaintiff owed defendant any money under the contract at the time of its alleged default. Defendant alternatively claimed that it was entitled to terminate the contract as a matter of law because the contract specifically authorized termination if plaintiff was unable to pay its debts as they came due or if plaintiff became the object of any liquidation, winding up or the like. But the court again found questions of fact that precluded summary judgment. Specifically, the Court held it could not determine as a matter of law that plaintiff was insolvent or that the efforts of plaintiff's two shareholders to dissolve the joint venture amounted to a winding up or analogous event. GATX Flightlease Aircraft Co. Ltd. v. Airbus S.A.S., Index No. 650194/2005, 1/3/07 (Moskowitz, J.).

Contracts; breach; malpractice by environmental consultant; compliance with public health regulations; ambiguity as to services to be performed; course of dealing. Procedure; equitable assignment; joinder; judicial estoppel.

Action by environmental consultant as equitable assignee of claims of school district against defendant environmental consultant that the district had retained to provide certain services. Plaintiff claimed that defendant had breached the contract. The court ruled that other defendants in a prior case along with plaintiff as equitable co-assignees could be affected by a judgment here and should be joined. The court held that defendant, a firm of engineers and architects, should be considered a professional when acting as environmental consultant, there being no proof that defendant's professional obligations were diminished when it acts in that capacity. Defendant relied upon Public Health regulations. The court held that such compliance would be some evidence that the professional had engaged in good and accepted practice, but would not establish a lack of malpractice as a matter of law. Defendant argued that the contract here was ambiguous as to the kind of services to be performed and that extrinsic evidence would have to be considered, that a course of dealing should be considered, and that there had been one here because defendant had performed services with respect to another school. The court agreed that extrinsic evidence should be considered. But the court held that course of dealing is not an aid for determining contractual intent in a professional services contract since the party for whom the services are to be performed generally lacks knowledge of the appropriateness of the services and has to rely on the professional's ability. Thus, course of dealing as to the other school would not be relevant in regard to the meaning of the contract. The meaning of the contract would be determined with reference to the standard of good and accepted practice of engineers acting as environmental consultants. Defendant argued that the school district and therefore plaintiff should be judicially estopped from taking an inconsistent position, the district having asserted in the earlier litigation that defendant's testing had been proper. The court rejected this contention. Estoppel is not normally available against a governmental agency. A school district is a governmental unit on a par with general municipal corporations. The district here had been exercising a governmental function in hiring defendant and then proceeding against plaintiff. A settlement between a district and a contractor is not an unusual situation by which the district should be precluded from proceeding against an environmental consultant on an inconsistent theory. Precluding a district in these circumstances would affect the public fisc and the separation of powers. Plaintiff could not be precluded because it stood in the district's shoes. Further, there had been a settlement in the prior case, not a judgment on the merits, which is required for judicial preclusion. Motion denied. Tyree Organization, Ltd. v. Cashin Associates, P.C., Index No. 12361/2005, 1/22/07 (Austin, J.).**

Contracts; construction; condominium sales; third-party beneficiary; privity. Martin Act; jurisdiction. Common law fraud. Advertising; deceptive practices; GBL § 349. Certification; requirement of condominium offering plan.

In connection with allegedly defective condominium units, plaintiff sued the contractor, seller and others. Plaintiff alleged that it was a third party beneficiary of the contract between the contractor and seller and that the contractor had breached its contractual obligation to plaintiff. Plaintiff argued that according to the general scheme of the contract it was clear that the contractor had intended plaintiff to be a beneficiary because the work described in the contract, partly by reference to various plans and drawings, must be the same work outlined in the architect's report, which was described in the offering plan, and the purchase agreement stated that buyers had relied upon that. Plaintiff also argued that the contractor's warranties had been effective while condominium buyers were looking and buying, and that these and indemnification and insurance provisions in the contract showed that the contractor had intended to protect buyers from building defects. The court noted that ordinarily construction contracts do not give enforcement rights to third parties who contract with the promisee. Furthermore, plaintiff's contentions were contradicted by documentary evidence, an explicit provision in the contract stating that it did not create any contractual relationship between parties other than the owner and contractor, and this clearly negated an intent to permit third party enforcement. The court distinguished a case plaintiff relied on, where, although the body of the contract included a disclaimer of obligations to third parties, a rider explicitly named unit owners as beneficiaries of the warranties. Finding no contractual privity here, the court dismissed the breach claim as against the contractor and likewise one for negligence. Regarding the latter, it noted that plaintiff had failed to establish an independent duty of care and that there was no allegation of a personal injury giving rise to a tort liability. Moreover, plaintiff, not being an intended beneficiary, could not reasonably have relied upon the contractor's performance. Plaintiff's claims of breach of contract and breach of warranty as against a member of the LLC condominium seller and that LLC member's own sole member, an individual, had to fail because members of a LLC are exempt from individual liability. The defendants were not parties to the purchase agreement and the court rejected an argument that a certification of the offering plan the two had executed established privity. A claim for breach of fiduciary duty sounded in contract and was dismissed. Plaintiff's claim of fraud against the two was sustained, however. Plaintiff was persuasive that its claim was in common-law fraud, not precluded by the Martin Act, as it alleged that defendants had certified the offering plan knowing that statements it contained from the architect's report were false and intended to deceive, and the purchase agreement acknowledged that buyers had relied upon information in the offering plan. However, the claim lacked merit to the extent that it was based on allegedly false promotional materials, the purchase agreement expressly stating that buyers had not relied on advertisements. The court also upheld claims for deceptive trade practices and false advertising. Defendants were wrong that GBL § 349 aims merely at modest consumer-oriented transactions, not substantial single-shot contractual transactions; a holding in the Second Department that GBL § 349 permits a private claim to be brought for deceptive practices in advertising and condominium sales, not a contrary holding in the Third Department, controlled here. Board of Managers of the Arches at Cobble Hill Condominium v. Hicks & Warren, LLC, Index No. 19643/2006, 2/20/07 (Demarest, J.).**

Contracts; employment; covenant not to compete; covenant not to solicit; misappropriation of trade secrets; inevitable disclosure. Preliminary injunction; standard for preliminary injunction; standard for evidentiary hearing.

Plaintiffs sought a preliminary injunction enjoining defendant, a former employee, from (1) participating in business activities in competition with plaintiff, (2) disclosing or using confidential and trade secret information belonging to plaintiff, and (3) soliciting clients or employees of plaintiff. Defendant had concededly signed an employment agreement which contained a "non-compete" clause and also restricted defendant from the activities for which injunctive relief was sought. Defendant claimed that the employment agreement was unenforceable for lack of consideration, denied that he had solicited employees of plaintiff or misappropriated confidential information, and denied that plaintiff had a legitimate interest that justified specific performance of the non-compete clause. The court denied the motion and the alternate request for an immediate hearing to resolve any issues of fact concerning the motion for injunctive relief, noting that plaintiff had failed to demonstrate in its moving papers the presence of all the elements required for preliminary injunctive relief. The court noted the reluctance of New York courts to enforce non-compete provisions. The court pointed out that these covenants are enforced when an employer demonstrates a

legitimate interest in protecting against misappropriation of trade secrets or confidential information, or protecting against competition by a former employee who provided unique or extraordinary services. The court held that plaintiff did not demonstrate that defendant's services were unique or extraordinary or that there had been actual misappropriation of trade secrets or confidential information. The court rejected plaintiff's argument that defendant would "inevitably disclose" trade secrets in his new employment, finding that plaintiff had failed to provide sufficient evidence regarding the nature of the information at issue, or that such information represented trade secrets under New York law. In contrast, with regard to the enforcement of the provisions of the employment agreement restricting solicitation of clients or employees and prohibiting defendant from using trade secrets or other confidential information, the court held that plaintiff had established a likelihood of success in light of defendant's express contractual agreement not to solicit or disclose such information and the lack of a public policy disfavoring such agreements. The court rejected defendant's contention that additional consideration was required to support the non-solicitation agreement, noting that defendant's continued employment by plaintiff had provided consideration for the restrictive covenant. Nevertheless, although it had satisfied one element essential for injunctive relief, plaintiff had failed to demonstrate immediate and irreparable harm in connection with the non-solicitation and non-disclosure agreements. Although the defendant's new employer was a competitor, it had expressly directed defendant not to solicit plaintiff's employees and not to disclose or use plaintiff's alleged confidential and proprietary information, and plaintiff had failed to show that there had been any such disclosure. Accordingly, the court denied the motion for preliminary injunctive relief in its entirety. Capital District Physicians' Health Plan v. Henderson, Index No. 1147/2007, 3/12/07 (Platkin, J.).**

Contracts; interpretation; ambiguity.

Action by plaintiff to recover fees for introducing defendant to investors and transaction and acting as financing advisor pursuant to an agreement. Plaintiff had introduced defendant to an entity and a reverse merger had been effected. A letter agreement stated that plaintiff would perform due diligence for a named fee and that he would not be entitled to any other fees in regard to the acquisition, if consummated. Defendant moved to dismiss. The court ruled that the letter agreement was dispositive of the issues. Where a clear and complete agreement is entered into, the court stated, it must be enforced according to its terms. Absent ambiguity, there is only a question of law for the court. The court held that the agreement here was unambiguous. Plaintiff argued that the agreement had been restricted to due diligence fees and did not apply to other fees, but the court held otherwise. Plaintiff had drafted the agreement and could easily have qualified the limitation had he wished. A court should be extremely reluctant to interpret an agreement as impliedly stating something that the parties neglected to include specifically. Motion granted. Vuono v. Interpharm Holdings, Inc., Index No. 13985/2006, 3/29/07 (Emerson, J.).**

Contracts; merger agreement; BCL 501(c); full compensation. Collateral estoppel; res judicata. Fiduciary duty; Board approval of merger. Fraud; intent to perform contract.

Action arising out of merger. Plaintiff shareholders claimed that defendants had violated BCL 501(c) by paying them less than others. Although BCL 623 (k) generally provides that an appraisal is a dissenting shareholder's exclusive remedy, there is an exception where an unlawful act has been committed by the corporation. The court held that the complaint adequately pled that defendants' failure to pay full compensation had violated the merger agreement, resulting in a de facto violation of 501(c), although plaintiffs could not pursue an aspect of the complaint because they conceded that they had failed to submit timely an assignment required by the agreement as a condition precedent. That the merger had been court-ordered and approved did not bar the claims on res judicata or collateral estoppel grounds since plaintiffs did not challenge the merger or the stock valuation, but rather the failure to pay contractually-required compensation after the merger. That issue had not been involved in the prior merger-approval hearings nor passed upon by any of the reviewing courts. The court rejected defendants' argument that the complaint failed to plead discriminatory treatment under 501(c) because the terms of the agreement treated all equally and because plaintiffs had received all they were entitled to after deductions for certain obligations. The court found that plaintiffs challenged, not the terms of the agreement, but the failure to comply with the terms. Whether plaintiffs had received what they were entitled to could not be resolved on a motion to dismiss. This claim,

though, was dismissed against the Board defendants where the Board had ceased to exist after the merger and before the alleged discriminatory conduct. A claim for breach of fiduciary duty against the Board failed because the Board could not be held liable merely for approving the merger, which the courts had approved. A fraud claim was dismissed since plaintiffs could not claim they had relied upon misrepresentations when the written merger agreement covered the subject and proof established that plaintiffs had been aware of the terms of the agreement. Also, the claim amounted merely to a contention that defendants had not intended to perform, thereby duplicating a contract claim. Unjust enrichment and constructive trust claims were barred because the merger agreement covered the subject matter. A claim that the shareholder defendants had breached a 1963 agreement by agreeing to sell their shares before the merger was barred by collateral estoppel in view of the merger order of the Bankruptcy Court. One of the plaintiffs had argued then that the merger would breach a 1976 shareholders agreement; plaintiffs could have invoked, but did not, the 1963 agreement at that time. A claim against the disbursing agent for breach of fiduciary duty failed because it merely alleged that she had failed to perform her duties under the merger agreement, without identifying any duties extraneous to the contract. Kassover v. Prism Venture Partners, LLC, Index No. 602434/2005, 1/19/07 (Freedman, J.).

Contracts; recording contracts; interpretation; choice of law. Procedure; leave to amend; preliminary injunctions.

Plaintiff, a New York recording company, filed an action for breach of contract and injunctive relief against defendants, a California recording artist and his wholly-owned company, alleging that defendants were recording, promoting and selling music recordings in alleged violation of plaintiff's exclusive rights. Plaintiff moved for leave to amend the complaint to add an additional defendant; for partial summary judgment on the issue of which state's law governed the recording contract at issue; and for a preliminary injunction enjoining defendants from recording or selling albums in violation of plaintiff's exclusive rights. The court granted leave to amend. With respect to the motion for partial summary judgment, the court held that the parties' contract was governed by New York law. The court noted that the contract contained a choice-of-law provision, which specifically called for the application of New York law. Moreover, the court found that New York law had a reasonable relationship to the parties and to their dispute because plaintiff's principal place of business was in New York, and, even in the absence of the parties' choice-of-law provision, a "grouping of contacts" analysis likely would lead to the application of New York law. Finally, with respect to plaintiff's motion for a preliminary injunction, defendants argued that plaintiff could not show a likelihood of success on the merits because the contract at issue had lapsed when plaintiff allegedly had failed to timely exercise an option to extend it. The court rejected this argument. Although plaintiff had failed to provide proper notice of its intention to extend the contract, defendants were contractually required to notify plaintiff that it had not exercised its option and that it had a 20-day grace period to do so. The court found that defendants had failed to provide proper notice of this grace period. The court said there was no doubt that plaintiff had had no intention of releasing defendants from the contract and that it would have exercised the option if notified. Defendants also argued that plaintiff was unlikely to prevail on the merits because its own breaches of the contract, namely, its alleged failure to properly account for royalties generated from defendants' recordings, precluded it from obtaining injunctive relief. The court found that there were issues of fact that could not be resolved on the record concerning whether plaintiff was in material breach of the contract, and it referred this question to a special referee. Finally, given defendants' unique talents as a recording artist, the court held that plaintiff would suffer irreparable harm if defendants were permitted to record and sell albums in violation of plaintiff's exclusive rights. Given the one outstanding issue of fact, the court held the motion for a preliminary injunction in abeyance pending a report from the special referee. Zomba Recording LLC v. Williams, Index No. 600639/2006, 2/19/07 (Cahn, J.).

Contracts; renovation; requirement for monthly submission of bills. Account stated; mistake by rendering party; timeliness of correction; reliance on bills as submitted.

Defendant Brooklyn Historical Society had hired plaintiff as construction manager for a renovation project at defendant's building. Defendant had been required to pay certain costs incurred by plaintiff, including insurance premiums. Defendant had paid premiums billed to it. All reimbursable expenses were to be billed monthly. After the

project had been completed, plaintiff had submitted a bill for insurance premiums of almost $200,000, which defendant had refused to pay. This action followed. Defendant moved for summary judgment. The court granted the motion. The court held that an account had been stated. Plaintiff argued that it had failed to bill correctly due to mistake caused by staff reductions and business retractions. The court said that an account stated can be reopened on a showing of mistake. The burden is on the proponent of the mistake. However, failure promptly to contest an account or act to correct a mistake precludes a reopening based on mistake, especially where knowledge of the mistake is exclusive to the party seeking to modify. Here, the court found, plaintiff had been in exclusive possession of accruing insurance bills, had rendered bills to defendant over a two-year period and defendant had paid them in reliance upon them. Only nine months after completion had plaintiff made known the alleged errors to defendant. Plaintiff's errors were due to failure to perform competently. Had defendant known of the true state of the bills as they had accrued on a monthly basis, it might have taken actions to curb costs. The equities favored defendant because plaintiff's position would deprive defendant of that right. Further, the contract here was unambiguous. The failure to submit accurate bills on a monthly basis was a breach of the contract and precluded plaintiff from recovering. The intent of the clause in question had clearly been to allow defendant to monitor its costs, which right plaintiff would defeat were it to succeed. Motion granted; complaint dismissed. York Hunter Services, Inc. v. Brooklyn Historical Society, Index No. 36315/2005, 1/8/07 (Demarest, J.) .**

Contracts; securities transactions; unconscionability; unjust enrichment; unilateral mistake; rescission. Laches.

Plaintiff, a brokerage firm, sued to rescind two separate securities transactions, including its short sale of securities to one defendant and that defendant's subsequent sale of the same securities to the remaining defendants. Defendants moved to dismiss the complaint and the court granted the motion. First, the court dismissed plaintiff's claim to rescind the securities transactions in question based on unconscionability. Even accepting as true plaintiff's allegations that defendants had known when they purchased the securities that plaintiff was confused about which securities it was selling and about what the actual value of those securities was, and that defendants had taken advantage of plaintiff's mistake, the court explained that plaintiff still failed to state a claim because there was no allegation that plaintiff had lacked meaningful choice, nor any allegation of oppression or unfair surprise. The court also dismissed plaintiff's claim to set aside the securities transactions based on its alleged unilateral mistake. In order to plead unilateral mistake, the court explained, a party must allege that the mistake occurred despite the exercise of reasonable care. While acknowledging that plaintiff had alleged that it had exercised reasonable care, the court held that this "bare allegation" was inadequate even on a motion to dismiss. The court found that it would not be considered reasonable care under any construction of the facts for a sophisticated investor to mistakenly sell shares of a security with a different symbol, at a different-than-market price. Plaintiff's claim for rescission based on unilateral mistake also failed for the separate reason, the court held, that plaintiff did not allege how the parties could be restored to the status quo ante. The court held that plaintiff's final claim seeking rescission based on unjust enrichment likewise had to be dismissed. In dicta, the Court noted that an action for rescission of a contract must be brought promptly after fraud is discovered and, in this case, plaintiff had waited two years after the transactions to seek their rescission and had provided no explanation for its delay. Finally, the court stated that any doubt it may have had about dismissing the complaint vanished when it considered the repercussions of unwinding or rescinding an accepted and adopted sale of securities to a third party based on a two-year-old contract between the first two parties. Doing so would render an innocent market participant unsure that a purchase or sale had actually been completed, or leave that party to wonder whether such a completed purchase or sale might be rescinded by the later action of a court based upon a collateral transaction. Wachovia Securities, LLC v. Joseph, Index No. 104326/2006, 2/7/07 (Fried, J.).

Contracts; shareholder and stock purchase agreement; preemptive rights; BCL 623. Fiduciary duty; breach; waste and diversion of assets; close corporation; derivative claims.

Action concerning shareholder and stock purchase agreement. Former employee plaintiff sought in the complaint an order directing defendants to purchase his shares at an appraised price. However, the court held, a preemptive right

was established by the agreement and such a right gives the named buyer a right to purchase but not the obligation to do so. Nor had plaintiff followed the procedures set out in BCL 623. The claim therefore failed. Plaintiff asserted breach of fiduciary duty due to waste of corporate assets and diversion of corporate opportunities. Generally, such claims must be brought derivatively. But if the allegation of breach of fiduciary duty by a shareholder/employee of a close corporation is independent of the employer/employee relationship itself and a claim of breach may be made out against a co-shareholder of a close corporation by another shareholder independent of the claims the shareholder might pursue derivatively on the corporation's behalf, the plaintiff may sue individually. The court found that plaintiff's allegations were rooted in an alleged diversion of corporate opportunity by virtue of the purchase of other concerns through which business was allegedly channeled. Plaintiff pled no breach of the shareholder and stock purchase agreement. These claims were therefore dismissed. Petereit v. Battaglia, Index No. 9097/2006, 1/11/07 (Fisher, J.)**.

Constructive trust; fiduciary relationship; promise by defendant; corporate investors and landlord of corporation. Unjust enrichment; privity. Procedure; CPLR 3212(f).

Plaintiffs invested money in defendant corporation through a shareholder agreement. At the time, defendant owed money to its corporate landlord. One plaintiff alleged that it rendered improvement services to defendant. Defendant paid various sums to the landlord and was permitted to continue in occupancy. Thereafter, defendant was evicted. Plaintiffs named the landlord as a defendant, asserting that it had reaped the benefit of plaintiffs' contributions to the business and sought to impose a constructive trust on the premises. Defendant landlord moved for summary judgment. The court rejected plaintiffs' demand for imposition of a constructive trust since there had been no confidential or fiduciary relationship between plaintiffs and defendant, nor did plaintiffs show that they had transferred money to the main defendants in reliance upon a promise by movant. Plaintiffs did not allege that they had had any relationship or dealings with movant or that it had known of their participation in the business. An unjust enrichment claim failed, the court held, because there had been no privity between plaintiffs and movant had assumed no obligations to plaintiffs. The court rejected plaintiffs' argument that summary judgment should not be granted until discovery was completed (CPLR 3212(f)) since there was no proof of an outstanding demand which, if complied with, might reveal information upon the basis of which the motion might be successfully opposed. Plaintiffs relied only upon speculation. A motion by plaintiffs to add the current tenant as a defendant on an unjust enrichment theory failed for the same reasons. Summary judgment granted. Plaintiffs' motion denied. Shabbir v. Hussain, Index No. 4342/2006, 1/24/2007 (Demarest, J.).

Debtor & Creditor Law; fraudulent transfer of real property; fair consideration.

Action asserting claims under the Debtor & Creditor Law with regard to a transfer of real property by defendant judgment debtor. The property had been transferred to defendant's son for no compensation, but, it was claimed, for estate planning purposes. Plaintiff sought summary judgment. Love and affection and the conjectural promise of future support are not, the court stated, fair consideration. Where a transfer is made in consideration of a promise of future support at a time when the transferor is in debt, insolvency is presumed and the burden of overcoming the presumption is on the grantee. The court found that plaintiff was entitled to the presumption that the transfer had left defendant insolvent. No showing was made to rebut the presumption. Plaintiff was entitled to summary judgment on the Section 273 claim and the deed was declared void. There were issues of fact as to a Section 276 claim and punitive damages were unavailable. Motion granted in part. Twin Brothers Elec. Supply Corp. v. Takis & Valentis Maintenance, Inc., Index No. 16346/2006, 2/28/07 (Kitzes, J.).**

Discovery; attorney-client privilege; work product; communications between members of litigation committee.

Dispute regarding two instructions at deposition not to answer questions on grounds of privilege. The privilege asserted concerned communications among members of a party's Litigation Committee, created for the purposes of

this litigation. In support of the claim it was asserted that conversations, minutes, and documents of a litigation committee are protected unless primarily the privilege has been waived. The court ruled that there is no blanket privilege for every communication between members of a litigation committee based solely on their membership in such a committee. Conversations among the committee outside the presence of counsel or when the record is not clear that conversations with counsel were the subject are not protected, the court stated. The court found that the record of the deposition did not indicate that a response would be divulging communications involving counsel. One of the questions concerned communication between the deponent and another, both non-lawyers. The court also concluded that there was no proof that the work product of the Committee was the subject of work performed by an attorney or completed at the behest of an attorney. The work-product protection therefore did not provide a basis to shield the questions. The witness was directed to answer both questions. Delta Financial Corp. v. Morrison, Index No. 011118/2003, 1/26/07 (Warshawsky, J.). **

Discovery; third-party claim for indemnification; settlement of main action as subject of discovery; mediation proceedings; confidentiality.

Action arising out of construction project. Motions regarding discovery. Defendant paid $25 million to plaintiff in settlement and sought to recover some in a third-party action. The third-party defendants asserted that the reasonableness of the settlement had been put in issue and that this entitled them to discovery. Absent discovery, they argued, it would be virtually impossible for the indemnitor to investigate the reasonableness of the indemnitee's action, the settlement amount or the decision to settle. Defendant responded that the parties had engaged in extensive negotiations that ended in mediation, and that mediation proceedings were confidential. Where the indemnitee does not disclose negotiations to the indemnitor, it must, to recover reimbursement of a settlement, establish that in the absence of the settlement it would have been liable, that there was no just defense and that the amount paid was reasonable. Whatever defendant's reason for negotiating a settlement without participation of the indemnitor, it would bear the burden of proving reasonableness of the settlement. Therefore, the court ruled, third-party defendants were entitled to discovery. The third-party plaintiff, which was now seeking a protective order, had not previously sought one and did not explain why it had waited. It had effectively engaged in self-help by failing to comply with directives of a JHO to provide discovery, which was improper. The court ordered that discovery be provided. As to documents submitted to the mediator or drafts thereof, the court ordered that a privilege log be prepared, but that it need not be served or filed till further order. The court noted that the procedure of the Commercial Division is that mediation proceedings are confidential. This is done to encourage openness of the parties during the process, which makes resolution of disputes possible. Disclosure of these documents or even production for in camera review would therefore not now be ordered, the court stated; a partial protective order was granted. NYP Holdings, Inc. v. McClier Corp., Index No. 601404/2004, 1/10/07 (Cahn, J.).

Discovery; work product; material prepared for litigation; communications with testifying expert; deposition.

In this class action, a deposition was held of an actuary who, as the court ruled, had been hired by defendant as a litigation consultant and a testifying expert at the time be began work. Defense counsel directed the witness not to answer certain questions unless he could do so without disclosing counsel's thought process in connection with the litigation, which the witness could not do. The issue was then presented to the court. The witness had taken part in teleconferences and conversations with defense counsel and, in some cases, others from defendant. Defense counsel argued that the questions objected to would violate work product by revealing counsel's mental impressions. The burden here was on defendant. The court stated that what the expert did, said or wrote would not be protected, but what counsel did or said reflecting the theory of the case would be. The difficulty here, the court noted, was that counsel's communications reflecting mental impressions allegedly had been intertwined with others concerning the facts. The court rejected defendant's argument that communications with the witness were protected as those with a sort of translator. Defendant further contended that the communications were protected as material prepared for litigation (CPLR 3101(d)(2)). The court so found. Plaintiff argued that necessary explanations provided by counsel so the witness could render an opinion would not constitute mental impressions and should not be

shielded under 3101(d)(2) because plaintiff had a substantial need for the information since the bases for the opinion had not been furnished with the report. The court recognized a risk that questions at the deposition might reveal work product. The court ruled that plaintiff could end the deposition, or submit written questions that avoided inquiry into mental impressions but called for what the witness had been told that he had used as grounds for his opinion, or proceed with a re-opened deposition within the same limits, with court supervision. Beller v. William Penn Life Ins. Co., Index No. 4845/2002, 1/26/07 (Warshawsky, J.) .**

Exchanges; NY Board of Trade; merger; Not-for-Profit Corporation Law; rights of Permit Holders; breach of fiduciary duty; contract rights by course of conduct; breach of covenant of good faith and fair dealing; estoppel; fraud.

Action under the Not-for-Profit Corporation Law by Permit Holders against the New York Board of Trade (BOT), a major U.S. commodity exchange. A Permit Holder holds a Trading Permit that allows him/her to trade specific futures contracts and/or options traded on BOT. The action arose out of a proposed merger between BOT and Inter Continental Exchange. Plaintiffs claimed that their rights would be violated by the merger in that no cash or stock would be distributed to them, they would not be allowed to vote on the merger, and they would lose significant existing rights and protections that would damage their ability to maintain floor operations and reduce the value of their permits. Plaintiffs had not sought a preliminary injunction initially. BOT's Equity Members overwhelmingly approved the merger. Thereafter, plaintiffs sought a TRO and a preliminary injunction against closing of the merger. Defendants moved to dismiss. Plaintiffs sought declarations that they were "members" of BOT under the Not-for-Profit Corporation Law. The definition of "members" (Sect. 102(a)(9)) refers to the certificate of incorporation and by-laws. The court examined these. The court found that Permit Holders were clearly excluded from the rights and privileges of Equity Members, including voting rights, and were not "members" under the Law. Plaintiffs attempted to argue that Sect. 903(a) of the Law applied regarding notice of a vote and the right to approve a merger. However, the court ruled, Sect. 102(a)(9) allowed the by-laws to determine who are "members" for the purpose of voting rights. The by-laws and BOT rules were clear and undermined plaintiffs' position. Plaintiffs also argued that the merger involved a breach of fiduciary duty and self-dealing by the BOT Board of Governors and was therefore void under the Law. The court held that since plaintiffs were not members, a claim for breach of fiduciary duty based on such an argument failed. Further, plaintiffs argued that their contract rights were violated, citing a course of conduct over years that had extended them rights. The court found that they had had some of the rights enjoyed by Equity Members, but clearly had not exercised a right to vote on a plan of merger nor participated in the profits thereof, as in the merger of two predecessor exchanges (the Coffee Exchange and the Cotton Exchange). Plaintiffs would not be left with no rights under the merger as SEC filings showed that they would retain their trading privileges and new by-laws would preserve their current rights. There was, the court determined, no breach of the covenant of good faith and fair dealing because plaintiffs sought to create contract rights that were denied by the by-laws and rules. A claim for unjust enrichment failed. An estoppel claim failed because plaintiffs failed to plead that they could not have known they were not members nor entitled to participate in the merger when the by-laws and rules were clear on this. Plaintiffs also failed to allege detrimental reliance. A fraud claim was time barred by plaintiffs' notice of their limited rights as Permit Holders, and the allegations of fraud were refuted by the record. Motion to dismiss granted. Altman v. New York Board of Trade, Index No. 604220/2006, 3/28/07 (Lowe, J.).

Fraud; damages. Conversion; specific fund. Guaranties; GOL 5-701.

Plaintiffs sued to recoup on loans. Plaintiffs claimed that they had invested the money in reliance on representations that their son would become a partner in defendants' business. The court held that a fraud claim failed because, if plaintiffs recovered on their loans, they would have no damages; their only damages duplicated those on the non-payment claim. A conversion claim failed because plaintiffs did not identify a specific fund converted and did not allege that the fund was to be used for a particular purpose on a set deadline. Plaintiffs were entitled to summary judgment on liability against the corporate defendant. The individual defendants were entitled to dismissal as plaintiffs pointed to no documents or testimony to show that loans had been made to them or that they had

guaranteed them (GOL 5-701). Summary judgment for defendants in part and for plaintiffs in part. Donato v. Rapid Transportation Services, Inc., Index No. 32113/2004, 3/30/07 (Demarest, J.).**

Fraudulent conveyance; piercing veil; Debtor & Creditor Law; standing; lack of harm; antecedent debt as consideration. Procedure; summary judgment; facts alleged on information and belief; arguments first made in reply.

Action by judgment creditor against judgment debtors and others alleging fraud and other wrongs. On a veil-piercing theory, defendants sought summary judgment. The court found that there was evidence of the individual defendants' domination over the main debtor, including management authority, substantial ownership interests, personal guaranties and ownership interest of the entity to which the main defendant had transferred its assets, all of which raised an issue of fact. Defendants argued that plaintiff could not show that domination had been used to commit a fraud that harmed plaintiff since had the transfer not occurred, the main defendant's assets would have all gone to a bank, leaving nothing with which to pay plaintiff. But, the court said, defendants had not shown that the bank, had it foreclosed, would not have had a surplus. On DCL claims, defendants urged that plaintiff was not a creditor of the transferor and that that barred the claims. The court held otherwise. Standing does not require creditor status; the creditor as against any person, except a purchaser for fair consideration without knowledge of the fraud or one who derived title from such a person, may set aside a fraudulent conveyance. If, as defendants asserted, the transfer of assets had been for fair consideration, that would not undermine a DCL 276 claim. The court held that defendants had failed to make a prima facie showing that satisfaction of an antecedent debt constituted fair consideration since they had not shown a fair equivalency between the values involved (they offered vague, conclusory assertions made on information and belief) and that there had been good faith. Material facts asserted on information and belief will not support a summary judgment motion. It is not proper practice to attempt to remedy basic defects by means of reply papers, as was attempted here. One defendant's control of parties on both sides of the transaction was, the court held, sufficient to raise a question of fact as to good faith. Motion denied. Palmone, Inc. v. R.C.S. Computer Experience, LLC, Index No. 600947/2003, 3/29/07 (Cahn, J.).

Insurance; alleged kickbacks and bid rigging; contingent commissions; brokers and agents; fiduciary duty; Donnelly Act; Ins. Law 2316; statutes of limitations; action by Attorney General; parens patriae standing. Fraud; particularity. Damages; Exec. Law 63(12); punitive damages.

Action by the Attorney General under GBL 340 and 349, the Executive Law, the Insurance Law and common law against insurers arising out of alleged kickbacks paid to brokers or independent agents to steer business to defendants. Plaintiff also claimed that defendants had colluded to rig bids and submit false quotes for excess casualty insurance. On a motion to dismiss, the court rejected defendants' argument that a fraudulent practices claim failed because it was based on contingent commissions claims and such commissions are not unlawful. The court held that the complaint set forth the claim in adequate detail and, even if contingent commissions are lawful, bid-rigging was also alleged. A six-year limitations period applied and under it the alleged wrongdoing fell within the period. On a claim for anti-competitive conduct, defendants argued that the AG was not authorized to bring a claim under Ins. Law 2316(a). However, the court held, the Superintendent through the AG can bring an action to enjoin a violation of 2316, and that was one of the forms of relief sought here. Also, the Superintendent had authorized the AG to take enforcement action in matters argually encompassed by this action. Defendants argued that the civil penalty in the Donnelly Act is inconsistent with the civil monetary penalty in Ins. Law Art. 23. That argument failed, the court determined, because the complaint invoked the Donnelly Act to the extent the conduct was not regulated by Art. 23. Some claims under 2316 were time -barred (CPLR 214(2)). On a fraud claim, the court rejected an argument that particularity was lacking. On a cause of action alleging that defendants had induced brokers/agents to breach fiduciary duties to their clients, the court found that cases cited by defendants did not stand for the proposition that an agent does not act in derogation of duties owed the insured by taking part in a bid-rigging scheme. The court noted that the court on a motion to dismiss must accord plaintiff the benefit of every possible favorable inference and determine only whether the alleged facts fit within any cognizable legal theory. The court upheld a punitive damages claim because such can be awarded where management has authorized, participated in, consented to, or ratified the conduct of employees. It was relevant that there was a pre-answer motion. Despite Exec. Law 63(12), punitive damages were available for common-law fraud. Defendants argued that plaintiff had failed adequately to plead a basis for parens patriae standing, but the court disagreed, stating that plaintiff had

alleged quasi-sovereign interest in an economic area likely to affect broadly a large part of the population. The court granted a motion to dismiss a holding company defendant because plaintiff had not alleged control over a subsidiary so complete that the latter was a mere department of the parent. People v. Liberty Mutual Holding Co., Index No. 401726/2006, 3/27/07 (Fried, J.).

Insurance; claims-made policy; occurrence policy; extended claims-made policy; reservation of rights.

Defendants moved pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint. The issue before the court was whether a letter submitted by plaintiffs provided the moving defendants, who were excess insurers, with sufficient notice of a potential claim in the matter as required by the insurance policies. Plaintiffs' predecessors in interest had obtained an insurance policy which provided various lines of coverage, including coverage for directors and officers liability. The policy provided that plaintiffs could secure coverage in advance of filing an actual claim if plaintiffs provided notice of an "act, error, or omission" that might subsequently give rise to a claim. After the policy had gone into effect, plaintiffs and their carriers had agreed that the term "act, error, or omission" would be changed to "Wrongful Acts." The insurance claims at issue arose from plaintiffs' involvement in the collapse of Enron and their potential resulting liability. Plaintiffs had informed their carriers in two letters written on the same day that their involvement with Enron could subject them to actions for breach of fiduciary duty, error and omissions, securities fraud, negligence, fraudulent conveyance, equitable subordination and misrepresentation. The day after receiving these letters, the underwriters' counsel had informed plaintiffs that their clients reserved their rights, remedies, and defenses under the policy. Enron had subsequently filed for bankruptcy and plaintiffs had been sued by Enron's investors. Plaintiffs had settled the Enron claims for $2.2 billion and claimed more than $200 million as reasonable defense costs. Plaintiffs brought this action seeking a declaratory judgment that their losses were covered by the policy, as well as damages for breach of contract. In support of their motion to dismiss, defendants argued that plaintiffs' notice was not specific enough and that they therefore did not have to provide coverage. The court found that the notice was proper and defendants' motion to dismiss was denied. The court found that the policy was not a “claims-made” or “occurrence” policy, but rather an “extended claims-made” policy, which required the insured to report circumstances that it reasonably believed could give rise to a claim in the future. The court held that plaintiffs' notice was sufficient since it identified acts which, while they did not admit them to be wrongful, could have led to claims within the meaning of the policy. The court ruled that plaintiffs could not speculate as to the unfiled complaint or assert wrongdoing that could later be used against them and were not required to provide specific details of these acts. Plaintiffs had described circumstances that they reasonably believed could give rise to a claim in the future by listing all services they had rendered to Enron and identifying potential causes of action which could be, and eventually were, asserted against them. The court rejected defendants’ argument that their response to plaintiffs' notice reserving their rights, remedies, and defenses constituted a rejection of coverage. The court found that the boilerplate language in the response was not a rejection of coverage because it did not indicate the notice's deficiencies. Finally, the court held that the excess insurers had had constructive notice of plaintiffs' claims because of the publicity surrounding plaintiffs’ involvement with Enron. This should have been sufficient to alert defendants to the possibility that plaintiffs would file claims and they therefore should have objected to plaintiffs’ notice within a reasonable time of receipt. JP Morgan Chase & Co. v. Travelers Indemnity Co. Index No. 600674/2006, 3/19/07 (Ramos, J.).

Insurance; excess liability coverage. Declaratory judgment; ripeness; one policy’s incorporation of others’ restrictions. Liability insurance; deferment of payment. Motion to dismiss insurer’s suit for declaratory judgment.

Defendants, former directors and officers of a bankrupt corporation, held five policies of which plaintiff’s excess liability policy for $10,000,000 was last tier and incorporated all restrictions found in the upper tier policies. Defendants, also defending civil suits related to a criminal trial of the former CEO, argued that the action was unripe and should await the outcome of the criminal action. The court stated that to maintain a declaratory judgment action plaintiffs must face present, not hypothetical, contingent or remote prejudice. Here, the chances were remote that

plaintiff's coverage would be reached since $40,000,000 in coverage provided by the other policies would have to be exhausted first. The action was premature and was dismissed on that ground. Plaintiff argued that a prior knowledge exclusion in the policy as well as in the third tier excess carrier's policy barred coverage because the former CEO had had prior knowledge of misleading financials. The court found that the accusations against the CEO were central to the defendants' civil suits and had to be adjudicated there. Plaintiff argued that, because the first tier excess carrier's policy did not cover legal defense costs, its did not either–although the first tier carrier was advancing costs with the agreement that defendants would repay them if it were found that they were not covered. The court found that the count pertaining to defense costs was especially unripe as it was particularly unlikely that defendants' defense costs alone would exhaust the other coverage. The officer defendants argued that to litigate would conflict with defendants' right pursuant to the third tier excess liability policy to resolve coverage disputes through ADR, but the court stated that the issue did not need to be reached because plaintiff's policy did not afford the same right. Director defendants also sought dismissal on the ground of the Appellate Division's recognition that a liability insurer cannot defer defense costs because claims in the underlying litigation, if proven, would bar coverage. This argument did not provide an independent basis for dismissal. As to the CEO defendant's motion to stay or dismiss because defending this lawsuit would jeopardize his criminal defense, relevant factors did seem to weigh in favor of a stay. This question, too, however, need not be reached. Dismissed without prejudice as premature. Arch Ins. Co. v. Bennet, Index No. 600805/2006, 2/20/07 (Freedman, J.).

Insurance; extended business income provision; World Trade Center disaster. Procedure; motion to amend; merit; claim previously rejected.

Insurance coverage action arising out of 9/11 attacks and damage to Brooks Brothers store located across the street f rom the World Trade Center. Plaintiff sought coverage for business income losses under a local policy and a master policy issued by its UK insurer. In 2006, the court had granted the insurer's motion for partial summary judgment, which decision had been affirmed. Coverage under both policies was limited to business income losses during the time needed to reopen the store, plus 30 days. An extended business income provision did not, it was held, apply. The owner moved to amend its complaint. Movant sought to add a claim for extended business income coverage. Movant argued that this court and the First Department had focused solely on the argument that the owner had lost income because customers had not been shopping in lower Manhattan after 9/11 and ignored plaintiff's contention that the closure of the store for a year during reconstruction had caused its customers to find alternative stores and not return once the store reopened. Although leave should be freely granted, a proposed pleading must state viable claims. The court held that that was not the case here because the proposed claim did not differ substantively from the claim in the original complaint previously rejected. Plaintiff asserted that the new claim had not previously been ruled upon. But the court stated that the thrust of Brooks Brothers' argument was that its income losses after the period of restoration had been caused by damage to the WTC because fewer customers were shopping in lower Manhattan. But because the reason for the decreased sales volume after reopening had appeared to be destruction of the WTC rather than an "incident at the premises," as required by the policy, the extended business interruption provision had been ruled inapplicable. Plaintiff had raised the court's ruling regarding the extended coverage in its brief on appeal, and the court rejected plaintiff's argument about damage to the WTC on appeal. An amendment, the court held, would therefore be futile. Further, calculation of losses more than 30 days after reopening and resulting solely from damage to the store would be speculative. Motion denied. Royal Indemnity Co. v. Retail Brand Alliance, Inc., Index No. 601164/2004, 1/8/07 (Freedman, J.).

Insurance Law §§ 7408, 7414; special proceeding. Exhaustion of remedies; ripeness.

Petitioner, a claimant under a surety bond, brought a special proceeding under Article 74 of the Insurance Law for an order directing the Superintendent of Insurance, acting as Rehabilitator of the surety, to pay a $2.7 million default judgment that had been entered in Federal District Court against the surety. Notwithstanding that the Appellate Division had found that the default judgment against the surety was entitled to full faith and credit in New York, the court denied petitioner's application. First, the court noted that the Superintendent had become a rehabilitator of the surety by bringing a "delinquency proceeding" against the surety under Insurance Law § 7408 (which defines a

delinquency proceeding as “any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer”). Under Insurance Law § 7414, no proceeding in the nature of an execution of a judgment may be brought during the pendency of delinquency proceedings. Consequently, the petition, fundamentally in the nature of an execution on the default judgment, was barred by Section 7414. That section, however, did not leave petitioner without a remedy. Instead, the court found, the petitioner was required to follow an interim order of the court, developed pursuant to the statutory framework of Article 74 of the Insurance Law, which provided for claims against the surety to be handled through procedures established by the Superintendent, with judicial review via a summary proceeding if the administrative resolution was deemed unsatisfactory. Petitioner had failed to follow that procedure. Thus, the court dismissed the petition. In the Matter of Frontier Ins. Co., Index No. 97/2006, 3/7/07 (Platkin, J.).**

Labor law; Immigration Reform and Control Act; Labor Law § 220; prevailing wage; undocumented workers.

Plaintiffs, undocumented aliens, sued defendants, a construction company and two sureties, for, inter alia, breach of contract, quantum meruit, and unjust enrichment. Plaintiffs alleged that defendants had failed to pay them the prevailing wage, as required by Labor Law § 220, during the time that they had worked on defendants’ municipal construction projects. Defendants moved for summary judgment, arguing that plaintiffs were precluded as a matter of law from recovering prevailing wages because they had submitted fraudulent documents in order to secure their employment. Relying upon the Immigration Reform and Control Act (“IRCA”), defendants argued that only individuals who are legally authorized to accept employment in the United States have any claim to recover prevailing wages. The court denied the defendants’ motion. While recognizing that the IRCA prohibits the hiring of undocumented workers and makes it unlawful for an undocumented worker to knowingly use false documents in order to obtain employment, the court held that the IRCA does not limit the power of the State or federal government to remedy unfair labor practices committed against undocumented employees. First, the court held that the IRCA did not expressly preempt Labor Law § 220. Second, the court found that the goals of the IRCA and Labor Law § 220 – to decrease the employment of undocumented workers – are consistent. The court distinguished this case from cases in which undocumented workers had sought unsuccessfully to recover back pay or lost wages for the period during which they had been injured and unable to work. In this case, by contrast, the court noted, plaintiffs were seeking to recover wages that had been earned, but not paid. Under these circumstances, the court held that public policy requires payment so that employers do not intentionally hire undocumented workers for the express purpose of citing the workers’ undocumented status or use of fraudulent documents as a way to avoid payment of wages. In any event, and even assuming that a worker’s use of fraudulent documents precluded a subsequent claim for unpaid wages, the court found issues of fact that precluded summary judgment, in particular, with respect to whether defendants had been negligent or even criminally liable in connection with the hiring of plaintiffs. The court also found questions of fact with respect to which, if any, of the plaintiffs had actually used fraudulent documents to secure employment. For all of these reasons, the Court denied defendants’ motion for summary judgment. Pineda v. Kel-Tech Construction, Inc., No. 600313/2001, 1/10/07 (Moskowitz, J.).

Not-for-profit corporations; fiduciary duty; merger negotiations; duty to disclose; business judgment rule.

Plaintiffs were members of the New York Stock Exchange (“NYSE”), which had entered into an agreement to merge the NYSE with another company. Plaintiffs sued the NYSE and its chief executive officer for breach of fiduciary duty and negligence, alleging that defendants had failed to disclose the merger negotiations fully and had failed to keep the negotiations confidential to prevent market fluctuations. As a result, plaintiffs claimed, they had sold their seats on the NYSE before the merger was announced and had lost the opportunity to profit from the merger. In addition, plaintiffs noted that a member of the NYSE’s advisory committee (which was exploring merger options) had used the non-public information he had about the NYSE’s negotiations to his benefit by arranging for companies he controlled to purchase five NYSE memberships in the period immediately before the announcement of the merger. Defendants moved to dismiss the complaint. The court noted that there is generally no duty to disclose confidential

business negotiations. However, a duty to disclose may exist under special circumstances such as insider trading, the presence of a statute or regulation requiring disclosure, or inaccurate, incomplete, or misleading prior disclosures. Here, the NYSE's chief executive officer had stated at a meeting that a merger that would convert the NYSE to a for-profit corporation was a mere theoretical possibility and had failed to disclose that talks with the potential merger partner had actually begun. The court held that if the statement made was misleading, then the NYSE would have a duty to correct it promptly. In addition, the insider trading allegations could not be disposed of on a motion to dismiss. The court further rejected defendants' argument that the NYSE did not owe a fiduciary duty to its seatholders, holding that although no such general duty existed, an exception applied because the alleged breach affected the seatholders disproportionately and was independent of any duty owed to a corporation. Furthermore, the court held that the business judgment rule did not protect defendants' decision to keep the merger negotiations confidential because the rule did not apply to misleading and incomplete statements. Accordingly, the court denied defendants' CPLR 3211(a) motion to dismiss the claim for breach of fiduciary duty on account of the alleged misleading or incomplete statements. With regard to plaintiffs' second and third causes of action based on the alternate theories that defendants had breached their duty or had been negligent in failing to keep the merger negotiations confidential, the court held that plaintiffs had failed to adequately plead causation or damages. The court held that plaintiffs had failed to demonstrate a causal connection between the alleged leaks of information and the premature sale of plaintiffs' memberships and, if anything, the leaks could only have inflated the value of plaintiffs' shares. Accordingly, the court dismissed the second and third causes of action. Hyman v. New York Stock Exchange, Index No. 600709/2006, 1/3/07 (Ramos, J.).

Partnerships; limited; conversion to limited liability company; rights of limited partners; disclosure; fiduciary duty of general partner.

Two limited partnerships, one the sole member of a class of partners, sued the New York limited partnership and the general partner complaining that a conversion to a Delaware LLC had been done improperly, in violation of their rights. The court held that the law of New York applied. The court rejected defendants' argument that the New York Limited Liability Company Law applied only to companies formed under the law and would not apply to the new Delaware LLC; this ignored the fact that the only authority for conversion of a New York limited partnership to a Delaware limited liability company is Section 1006. The court held that this section is not applicable only to conversions into a New York limited liability company. Under that law, the consent of a majority in interest in each class is required. The conversion here was therefore a nullity. Further, the court held that the general partner had violated his fiduciary duty by failing to provide disclosure of the entity's affairs, as requested. The court rejected an argument that conversion without intermediate steps was allowed by the partnership agreement. Section 1006 controlled. Summary judgment for plaintiff. Miller v. Ross, Index No. 600986/2006, 2/6/07 (Ramos, J.).

Preliminary injunction; CPLR 6301; Delaware law; laches. Stockholder class action; merger; breach of fiduciary duty; business judgment rule.

Plaintiff brought a putative stockholder class action suit against defendant Delaware corporation, its directors and its proposed acquirer, alleging breach of fiduciary duty and/or aiding and abetting breach of fiduciary duty. Plaintiff claimed that the proposed acquisition of defendant corporation by co-defendant was not in the stockholders' best interests and that the proxy statement delivered to the stockholders omitted material information. More than two months after its complaint had been filed, and only nine days before the shareholders were to vote on the proposed merger, plaintiff moved for a preliminary injunction pursuant to CPLR 6301 to enjoin the shareholders' meeting, requested that the corporation be ordered to issue further disclosure statements prior to the vote and sought expedited discovery. The court denied the motion. As a threshold matter, the court observed that the standards for injunctive relief under the CPLR and Delaware law were substantially the same. Noting that plaintiff's late application did not give it much time to deliberate, the court found that plaintiff had failed to demonstrate that it was (i) likely to succeed on the merits, (ii) that it would be irreparably injured if the injunction were denied, or (iii) that the balancing of equities was in plaintiff's favor. With respect to likelihood of success, the court concluded that plaintiff had failed to demonstrate that the company and individual defendants had violated their duty of care in approving the proposed

merger in light of the business judgment rule or that individual defendants had violated their duty of disclosure to the shareholders. The court determined that defendant company's board had engaged in a process reasonably designed to achieve the best available price for the company and there was nothing to indicate that the sales process defendant company had used was flawed. With regard to the claim of non-disclosure, the court found that the proxy statement did, in fact, disclose certain of the information that plaintiff claimed defendants had failed to disclose. As to the other information cited – about potential conflicts involving defendant corporation's financial advisor or possible equity participation management might seek after the merger – the court found such cumulative information would be unlikely to alter significantly the total mix of information available or that a reasonable stockholder would have considered the omission of such information to be material. The court also stated that it was difficult to see how the purportedly omitted information would affect the outcome of the vote, noting that the defendant company's Form 8-K filing with the SEC summarized and attached the Amended Complaint, thus disclosing to stockholders all of the alleged omissions and misstatements. As to irreparable injury, the court held that plaintiff had failed to prove that it would sustain irreparable injury because the damages were not difficult to quantify or speculative. Moreover, the court could not conclude that monetary damages were an inadequate remedy. In addition, defendant company's 8-K filing effectively constituted a supplemental disclosure that substantially mitigated any real risk of irreparable injury because it provided stockholders with the substance of plaintiff's claims. The court also determined that the balancing of the equities and of the relative harms favored denial of preliminary injunctive relief. The court noted that it would not presume a class action would be adequately pled or that all class members would be injured. In the absence of a class, based on plaintiff's own stock valuation, the individual plaintiff would only incur a loss of $13,500 if an injunction were not granted. In contrast, if an injunction were granted, the proposed merger could be called off because of the existence of a material adverse change. In addition, the company's stock price could decline and hurt stockholders of the company, for which no other competing offer was pending despite numerous solicitations. Finally, the court underscored plaintiff's lack of diligence in pursuing the motion and stated that delay, or laches, is a factor under New York law militating against provisional relief. Finally, the court found no good cause to change the discovery schedule and denied plaintiff's discovery request. Levy Investments, Ltd. v. USI Holdings Corp., Index No. 1011/2007, 3/26/07 (Scheinkman, J.).**

Procedure; attachment; proceeding to vacate restraint on bank account; LLC; fraudulent formation; interest in LLC; levy.

Application to vacate restraint on petitioner's bank account in a proceeding to determine adverse claims to property attached in an underlying action by respondent against Kumar, its former official, to recover legal fees and expenses advanced to him pursuant to an indemnity agreement. Petitioner was a Delaware limited liability company and Kumar was one of its three members. Since Kumar had no interest in petitioner's bank account as such, it could not be attached by Kumar's creditors. Respondent argued that the restraint should be upheld because the LLC had been formed to defraud creditors. It had been created two weeks before Kumar's indictment. Respondent did not bring an action against the LLC, nor name it as a party in the underlying case. It could not, the court stated, circumvent the need to prove fraudulent formation of the LLC by enforcing the order of attachment against the LLC's specific property. Although the basis of the order of attachment was that Kumar had disposed of assets with the intent to frustrate enforcement of a judgment, no evidence had been presented and no findings had been made regarding formation of the LLC. Respondent could, however, levy against Kumar's interest in the LLC, including right to a share in its profits, without regard to fraudulent formation. The CPLR is not clear, the court stated, how such a levy is made. The court noted that under the view of a commentator, if a certificate had been issued, the sheriff would take it into custody, the interest being considered a security. If none had been issued, the LLC or a manager or member would be the garnishee. The court concluded that it did not need to determine the proper method of levy in the proceeding. The court further concluded that it could impose reasonable conditions on the voiding of a levy. The restraint was voided on condition that petitioner stipulated to accept service of the order of attachment. On Demand Partners, LLC v. CA, Inc., Index No. 000065/2007, 2/9/07 (Bucaria, J.).**

Procedure; consolidation; venue of consolidated matter; venue of first filing.

Motion to consolidate four class actions alleging an international conspiracy to inflate prices of computer chips. All parties consented to consolidation and there were common questions of fact and law, a need to coordinate discovery, and considerations of judicial economy and a need to avoid inconsistent rulings. The question was where to venue the case. Generally, a case should proceed in the county where a matter was first filed, here Albany. Two cases had been commenced in New York County and one in Westchester and defendants favored the former, whereas none of plaintiffs objected to Albany. The court held that considerations cited by defendants failed to rise to the level of special circumstances sufficient to warrant a departure from the general rule. Duker v. Micron Technology, Inc., Index No. 6184/2004, 3/7/07 (Platkin, J.).**

Procedure; forum non conveniens.

Plaintiffs, a Spanish company and its Spanish successor, filed this insurance coverage action against defendants, a Spanish insurance company and its Spanish successor, alleging that defendants had wrongfully failed to provide insurance coverage in connection with a Chilean arbitration proceeding that related to the construction of a power plant in Chile. Defendants moved to dismiss on, inter alia, forum non conveniens grounds. After listing the factors that courts consider in determining whether to dismiss an action on forum non conveniens grounds – including, the existence of an adequate alternative forum, the situs of the underlying transaction, residency of the parties, the potential hardship to the defendant, the location of documents and witnesses, and the burden on New York courts – the Court concluded that the relevant factors in this action favored Spain. Considering, first, the situs of the underlying transaction and the residence of the parties, the court stated that the fact that the dispute was between two Madrid companies, and concerned events in Spain or Chile strongly favored dismissal. Turning next to the burden on New York courts, the court noted that the insurance policy in this case would be governed by Spanish law. Because New York courts "commonly" dismiss actions that may require the interpretation of foreign law, the court held that this factor also favored dismissal. Further, the court held, the location of the relevant witnesses and documents also militated in favor of dismissal. Finally, with respect to the availability of an adequate alternative forum, the court held that Spain was an available and more appropriate alternative forum. The court dismissed the action on forum non conveniens grounds, subject to defendants' consent to jurisdiction in the courts of either Spain or Chile. Foster Wheeler Iberia S.A. v. Mapfre Empresas S.A.S., Index No. 601916/2006, 3/29/07 (Fried, J.).

Procedure; leave to amend; delay of four years; lack of proper showing of merit.

Motion by defendant surety to serve an amended answer asserting defenses of release, waiver and estoppel against school district based on tender of full amount of performance bond. An inordinate, unexplained delay coupled with lack of merit give the court little basis for granting such an application. Here there had been a four-year delay, for which there was no excuse. As to merit, a proper evidentiary showing must be made. Here movant's counsel asserted that his client intended to dispute the issue of the surety's presence on the job, which is insufficient when countered by deposition testimony of witnesses with knowledge. Motion denied. David Christa Construction, Inc. v. Board of Education, Index No. 17403/2001, 3/19/07 (Pines, J.).**

Procedure; misjoined plaintiff; CPLR 1003; proper plaintiff; CPLR 1301; standing; GBL § 352; Executive Law § 63(12).

Defendants moved pursuant to CPLR 1003 to remove the Superintendent of Insurance as a misjoined plaintiff in an action brought by the State of New York by the Attorney General and the Superintendent against defendants, asserting claims for securities fraud pursuant to GBL § 352 ("the Martin Act"), fraud pursuant to Executive Law § 63(12), and common law fraud. The question considered by the court was whether the Superintendent had standing and capacity to bring this action as a co-plaintiff. Defendants argued that they were prejudiced by the Superintendent's presence as plaintiff because having two plaintiffs instead of one delayed discovery. The court found that defendants had failed to show prejudice sufficient to dismiss the Superintendent. The court noted that the Superintendent had produced documents to defendants after the Attorney General's production, but not at such a

later time as would have resulted in prejudice. Defendants further argued that since private parties had no standing to bring an action under either the Martin Act or Executive Law § 63, the Superintendent was likewise barred. The court analyzed whether the Superintendent functioned within his zone of interest and authority pursuant to CPLR 1301 and found that he did. The Superintendent has supervisory and regulatory authority over insurance matters in the State of New York, including the authority to investigate insurers and to prevent insurance fraud. In addition, the court found that Executive Law § 63 gave the Attorney General the power to authorize the Superintendent, or any other agency, to bring or defend an action or proceeding without the Attorney General. Therefore, the Attorney General could choose whether or not to participate in the present action. Furthermore, with regard to the Martin Act, the court found that the Superintendent had brought the instant action appropriately because he had a connection to the matter being investigated, which involved allegations of fraud in the insurance industry. Finally, the court held that no clear legislative intent prohibited the Superintendent from bringing this action jointly with the Attorney General, and allowing the Superintendent to do so was consistent with his supervisory and regulatory authority. People ex rel. Spitzer v. Greenberg, Index No. 401720/2005, 2/21/07 (Ramos, J.).

Procedure; motion to vacate default; required excuse; summary judgment. Faithless servant; damages.

On motion to vacate default, court stated that failure to submit any excuse for failure to respond to the original motion and failure to give a reasonable excuse for a lengthy delay in moving to vacate constitute a pattern of willful neglect and default that should not be excused, which is properly imputed to the client. The court found both sorts of failures present here. An affidavit by a client stating that the client had believed that the attorney was diligently handling the case is insufficient. Defendants were also negligent throughout the proceedings. Further, defendants raised an argument that plaintiff's moving papers on the motion for summary judgment were not sufficient to justify the judgment awarded. In this faithless employee case, the court held that disgorgement of compensation earned prior to resignation and after the first act of faithless service was proper and supported by proof. An award for lost profits from diverted business opportunities was also proper. However, the court ruled that vacatur was required as to the portion of the judgment fixing the amount of these awards as they had been supported only conclusorily. An accounting was ordered. Evolution Impressions, Inc., v. Lewandowski, Index No. 6051/2005, 1/25/07 (Fisher, J).**

Procedure; stay; order of commencement of actions; excuse for delay; bad faith commencement of parallel action; GOL 5-1402; forum non conveniens arguments; law of the case. Summary judgment; loans and guarantees; workout agreement; additional discovery; speculation.

Action to recover over $105 million on loans and guarantees issued in connection with development of a hotel and conference center in Vietnam. Defendant sought a stay of this action in favor of an action in Korea. However, the latter had been commenced recently, two years after this action had been instituted. NY courts rarely defer to a later-commenced action. Further, defendant did not offer any excuse for its delay in commencing the Korean case. It had known about the relevant facts long before. A court should also deny a stay when, as here, the court found, deference is sought toward a parallel proceeding that had been brought in bad faith. In addition, the relevant agreements contained an exclusive NY forum selection clause. GL 5-1402. Forum non conveniens arguments made by defendant had previously been rejected by the court and law of the case precluded relitigation. Stay denied. The court found that summary judgment was proper as to loans and guaranties. The court rejected defendants' argument that summary judgment was premature in view of a workout agreement. Defendants contended that guaranty claims could not be pursued until defendant principal obligor went into bankruptcy. However, defendant relied upon an incorrect version of the workout agreement in support of this assertion, as it had itself recognized in a prior case in Federal court, which admission was binding here. Taking a position inconsistent with a prior sworn statement does not create a material issue of fact. Further, the court noted, plaintiff was not a party to, or bound by, that agreement. The court rejected an argument that plaintiff was bound because its parent had been a signatory. Defendants urged the need for more discovery, but were relying solely on speculation, which is insufficient. Motion granted on liability; interest question referred to Referee. DWHK Recovery Co. v. Daeha Company Ltd., Index No. 116222/2004, 1/30/07 (Lowe, J.).

Securities; sale; UCC 8-204; restrictions on sale of shares.

Plaintiff, Delaware limited partnership, an emerging companies equity fund, sued in connection with a transfer of shares in corporate defendant in exchange for a partnership interest in plaintiff. Defendant had made a first public offering of its shares. Plaintiff, seeking to sell its shares, requested defendant's customary opinion for removal of the Securities Act legend on the stock certificate. Defendant refused on the ground that plaintiff was subject to a 90-day lock-up under certain agreements. The court applied Delaware law (UCC 8-204). The court noted that plaintiff had not been party to a co-sale agreement, relied on by defendant, and even if it had been, the restrictions set out there had expired on the date of the public offering. Any restrictions in a third agreement were not relevant since plaintiff had not been a party thereto and that agreement and its restrictions had been superseded by a fourth, to which plaintiff had also not been a party. Defendant had had no reasonable basis to refuse to register the shares. Summary judgment was granted on liability, but there were questions as to the amount of damages. CHVP Founders Fund I v. Arbinet - Thexchange, Inc., Index No. 601200/2006, 1/5/07 (Moskowitz, J.).

Shareholder litigation; proposed merger; breach of fiduciary duty. Procedure; actions pending in Delaware; motion to dismiss (CPLR 327, 3211(a)(4)).

Action arising out of merger transaction. Four class actions were commenced in Delaware, where the main corporate defendant had been incorporated, challenging the merger of that defendant. Plaintiffs in a consolidated amended complaint alleged that the officer and director defendants had breached their fiduciary duty by failing to maximize shareholder value and to make adequate disclosure to the shareholders. A shareholder commenced this action challenging the proposed buyout. Defendants moved to dismiss (CPLR 327, 3211(a)(4)). The key question, the court stated, was which court should defer, as a matter of comity, to the other to avoid vexatious and duplicative litigation and possibly divergent rulings on similar issues. Plaintiffs were not the same, but all sued for the same thing. All NY defendants were defendants in Delaware. The presence of additional defendants in Delaware would not prevent a dismissal here. The cases all arose out of the same subject matter and asserted breach of fiduciary duty. Some of the relief sought was the same and none was antagonistic or inconsistent. The court concluded that the relief was substantially the same. Priority of filing was not a significant factor in this case. That the defendant had been incorporated in Delaware was a factor favoring dismissal, though not decisive by itself on forum non conveniens grounds. The existence of a substantial nexus between this case and NY weighed against dismissal. The court held that the most compelling factor was the risk of divergent rulings. Case dismissed. Ingram v. Netsmart Technologies, Inc., Index No. 32611/2006, 2/6/07 (Emerson, J.)**.

Shareholders' derivative claims; BCL 626(c); demand on board; excuse; interested directors; damage to corporation. Removal of directors (BCL 706(d), 716(c)).

Motion to dismiss derivative claims under BCL 626 (c), and CPLR 3013. The court rejected defendant's res judicata/collateral estoppel argument because the previous ruling cited did not hold that plaintiffs could never meet the demand requirement, only that the pleading there was too generalized and conclusory. Defendants argued further that the complaint failed to establish that a demand would have been futile. The court held, however, that the amended complaint set forth specifics regarding alleged corruption by the board members, by name, indicating that all the board members were personally interested in the challenged transactions. The reasons for not making a demand were stated with sufficient particularity to satisfy 626(c). Plaintiffs had also satisfied 3013. In addition, the court ruled that plaintiffs had alleged injury to the corporation, not damages to individual shareholders. Plaintiffs sought to remove the director defendants (BCL 706(d) and 716(c)). Plaintiffs held far fewer than 10% of the shares, but plaintiffs sought to add additional persons as plaintiffs under pseudonyms. Proceeding under a fictitious name is allowed only in the most extreme circumstances. The court held that plaintiffs had failed to present adequate reasons for so proceeding, which would prejudice the director defendants and violate the principle of openness.

Defendants could not evaluate whether 10% of the shareholders truly supported the case. Motion to dismiss granted in part. Malkinzon v. Kordonsky, Index No. 20932/2006, 3/27/07 (Demarest, J.).**

Statute of Frauds; GOL 5-701 (a)(10); business opportunity; licensing agreement; writing evidencing contract; subscription; partial performance.

Plaintiff sued performer Beyonce Knowles and a second defendant for breach of contract. Plaintiff alleged that Knowles had engaged him to find her a licensing and business opportunity and that the second defendant had entered with plaintiff into an agreement whereby plaintiff would help it obtain a licensing agreement with Knowles. Plaintiff contended that both defendants had known both would compensate him, Knowles had profited handsomely under the agreement plaintiff had facilitated, and the defendants now owed him money for his services. Defendants moved to dismiss. The court found that the purported agreements fell within GOL 5-701 (a)(10) of the Statute of Frauds, which provides that a contract to pay for services rendered in negotiating a business opportunity, which, the Court of Appeals has held, a licensing agreement represents, is not enforceable unless evidenced by a writing subscribed to by the party to be charged. There were no executed writings here. Plaintiff pointed to a copy of a draft contract with second defendant, but defendant's fax legend at the top did not amount to a signature affixed so as to fulfill the subscription requirement. Checks and stubs did not fulfill the Statute's writing requirement because although signed by the parties they did not indicate the contracts' duration, rate of payment, or services to be exchanged. Plaintiff's argument that they demonstrated partial performance and hence a partial agreement that took the contracts out of the Statute was wrong, because the judicially - created part performance exception adopted with regard to GOL 5-701 was not paralleled in the relevant provision here, GOL 5-701 (a)(10). Even had the doctrine of partial performance applied, the checks and stubs were not unequivocally referable to the claimed oral contracts. Plaintiff's request for discovery was rejected since he had failed to show that facts essential to justify opposition to the motion to dismiss might exist that could not be stated. Claims dismissed. Walker v. Knowles, Index No. 602499/2006, 3/16/07 (Cahn, J.). **

Statute of limitations; New York law; FAA; arbitration; whether timeliness is threshold question for courts or arbitrator. NASD; membership evincing agreement to application of FAA. CPLR 202 ("borrowing statute").

Motion by petitioner broker to stay arbitration on the ground that the statute of limitations had run; it argued that under New York law timeliness was a threshold question for the court. After watching his accounts lose $660,000 while being advised, in essence, to wait out the market, respondent had brought claims, including claims for negligence and breach of fiduciary duty. The parties' agreement provided for a New York choice of law. The court agreed that statements of New York law contained in Luckie and Diamond Waterproofing Systems, cited by petitioner, were important: the former reaffirmed that where governed by New York law, timeliness was a question for the courts; the latter said that a choice of law provision saying that New York law shall govern "the agreement and its enforcement," as here, adopted New York's rule that threshold timeliness questions were for the court. However, Diamond was a construction case involving a voluntary arbitration agreement whereas here petitioner, a NASD member, belonged to an industry that agreed that client-broker disputes should be decided in an expert forum. Here the arbitration provision stated that the FAA would apply, but in Luckie it did not. Where the FAA applied, the court explained, there was a presumption that the arbitrator should decide allegations of waiver, delay, and the like. The court found that the parties had not intended to carve out of the FAA and NASD jurisdiction the provision of New York law that reserves limitations questions for the court, particularly as the question here was one of substantive law, with considerations such as whether petitioner should be able to invoke the statute of limitations when it might have played for time to reverse any mismanagement through stock market changes. The parties were directed to arbitration. Joseph Gunnar & Co., LLC v. Bridgeman, Index No. 015603/2006, 3/7/07 (Warshawsky, J.).**

UCC 3-804; lost instrument; showing by owner of line of credit and guaranty.

Action by successor of Bank of America, successor in interest to another bank on line of credit and a guaranty. On motion for summary judgment, plaintiff conceded that it could not produce a copy of the agreement and guarantee as the instruments had been lost. The court ruled that plaintiff failed to meet its burden under UCC 3-804. The court noted that plaintiff had failed to submit any document or copy bearing defendants' signature indicating acceptance of the terms or receipt of any money or a document indicating that any kind of instrument had been issued to defendants or that an account had been established for defendants. Plaintiff had submitted a copy of the application, but the court held that this did not prove that a loan had been made. Further, plaintiff merely asserted that the agreement and guaranty had been lost, which was not sufficient to provide a reason why the documents could not be produced; some showing of the efforts made to find the documents was necessary. Summary judgment denied; certain affirmative defenses dismissed. NC Two, L.P. v. QAB Enterprises, Inc., Index No. 3967/2006, 2/6/07 (Kitzes, J.).**

APPELLATE REVIEW OF LAW REPORT CASES

The editors are aware of the following appellate action with regard to cases summarized in this issue of the Law Report.

This information is provided for general information and the editors do not warrant the completeness or accuracy of this information. Counsel are advised to conduct their own cite checking of cases that are of interest to them.

Gatx Flightlease Aircraft v. Airbus: 2007 NY Slip Op 4359; 40 A.D.3d 445; 834 N.Y.S.2d 659; 2007 N.Y. App. Div. LEXIS 6267

Hyman v. New York Stock Exchange: 2007 NY Slip Op 9909; 46 A.D.3d 335; 848 N.Y.S.2d 51; 2007 N.Y. App. Div. LEXIS 12725

Miller v. Ross: 2007 NY Slip Op 6803; 43 A.D.3d 730; 841 N.Y.S.2d 586; 2007 N.Y. App. Div. LEXIS 9722

Erratum:
The printed edition of The Commercial Division Law Report, Volume 10, No.1, indicated that there had been appellate review of the **Royal Indemnity v. Retail Brand Alliance** decision rendered on 1/8/07 by Helen Freedman and summarized above. The Appellate Division had reviewed a prior decision in the case, but there has been no appellate treatment of the current decision. We regret the error.

** The decisions discussed have been posted in PDF format, but the reader should be aware that these PDF copies may not be exact images of the original signed text as filed in the County Clerk's Office.