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Law Report

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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

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Justices of the Commercial Division

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Arbitration; bias of panel member; NASD Code of Arbitration Procedure. Procedure; motion to reargue/renew.

Petitioners moved to renew and reargue the courts's previous decision, which had denied petitioners' application to vacate an arbitration award rendered by a panel of the NASD and had confirmed the award. In their motion to vacate, petitioners had challenged the NASD's removal of the panel's chairman just before hearings had commenced. Petitioners claimed that NASD's action evidenced misconduct in the procurement of the award. In a

prior decision, the court had concluded that, in removing the panel chairman, the NASD Director of Arbitration had properly exercised his discretion under the rules to ensure the neutrality of the panel. There had been some evidence of bias against the respondent and a failure by the chairman to disclose a prior representation of claimants against a predecessor of that respondent in another arbitration. The court concluded that petitioners had known of the facts regarding the former chairman prior to submission of their papers on the original application so that the information proffered was not new evidence. Petitioners also improperly sought to raise new issues on the present motion. Thus, this motion was procedurally defective. In any case the court explained, under the NASD Code of Arbitration Procedure, it was the Director of Arbitration's role to interpret the NASD rules and their application in the instant case. The court concurred that there was compelling evidence to support the finding of the Director that the former chairman had been an inappropriate panel member whose history warranted removal from the panel. There was no proof of impropriety, misconduct, etc. that would justify vacatur of the award. Motion denied. Raitport v. Salomon Smith Barney, Inc. , Index No. 4153/2006, 12/1/06 (Demarest, J.).**

Arbitration; Federal Arbitration Act; confirmation of award; manifest disregard of the law. Contracts; interpretation; termination-for-convenience clause; consequential damages; lost profits.

Petitioner, a contracting company, had entered into a contract with respondent, an investment banking firm, to provide caulking and cleaning services on the exterior facade of defendant's building in lower Manhattan. After respondent had cancelled the contract, plaintiff had commenced arbitration proceedings, seeking more than $1 million in damages, including lost profits. The arbitration panel had found for petitioner and awarded it approximately $700,000 in damages, representing a combination of lost profits, overhead expenses, and un-reimbursed expenses, plus interest. The arbitrators had provided no discussion of the evidence nor any explanation of their reasoning. Petitioner applied for an order confirming the award, and respondent applied for an order vacating the award on the grounds that the arbitrators had exceeded their powers and manifestly disregarded the law, and that the award was irrational. Among other things, respondent argued that it properly had terminated the contract under a "termination for convenience" clause in the contract and that the parties' contract did not permit petitioner to recover damages for lost profits and overhead expenses. The court confirmed the award. After noting that this was a transaction that affected interstate commerce and that the Federal Arbitration Act ("FAA") governed, the court held that none of the specific grounds that are set forth in the FAA for vacating an arbitration award, all of which involve fraud, corruption, and misconduct by the arbitrators, applied in this case. As a result, the court explained that it could vacate the award only if it found a manifest disregard of the law, a judicially created ground for vacatur under the FAA. The court held that respondent had failed to meet its "heavy burden" to satisfy this standard. First, the court found no evidence that the arbitrators had known of a governing legal principle yet refused to apply it or ignored it altogether. Second, the court held that respondent could not demonstrate that the law was well defined, explicit, and clearly applicable. Indeed, the court noted that, in a case such as this, where the parties "hotly dispute[d]" the applicable law and facts, there could be no well-defined, explicit, and clearly applicable law for the arbitrators to disregard. Finally, to the extent that the FAA permits vacatur of an arbitration award on the ground that the award is irrational, the court rejected respondent's claim that it was irrational for the arbitrators to determine that plaintiff was entitled to the damages awarded. RSG Caulking & Waterproofing, Inc. v. J.P. Morgan Chase & Co ., Index No. 601738/2006, 10/5/06 (Fried, J.).CD

Arbitration; motion to vacate; FAA; manifest disregard of the law; irrationality; exceeded powers.

Petitioner moved pursuant to Article 75 of the CPLR to vacate an arbitration award issued in favor of the respondent by the National Association of Securities Dealers ("NASD"). Petitioner had been respondent's broker for certain non-discretionary corporate accounts that qualified for options trading. After respondent had suffered approximately $8.7 million in losses on its account and closed its account with petitioner, respondent and petitioner had both been sued in Massachusetts because the corporate accounts that had suffered losses consisted of funds that had been entrusted to respondent by individuals and businesses for investment in conservative securities, not the options trading that respondent had authorized. In the Massachusetts action, petitioner (broker) had been granted summary

judgment, but respondent had been found liable for fraud and misrepresentation, breach of duty and other torts. Thereafter, respondent had filed an arbitration claim against petitioner, alleging that the losses resulted from petitioner's lack of due diligence in allowing respondent to make speculative trades instead of the conservative trades respondent's customers had required. The NASD arbitrators awarded respondent $8.7 million in damages, as well as interest and attorney's fees, and petitioner moved to vacate the award. In support of its motion, petitioner alleged that the NASD arbitration panel had (1) exceeded its powers under the Federal Arbitration Act ("FAA") by refusing to consider or decide legal issues; (2) failed to consider material evidence; (3) manifestly disregarded applicable law; and (4) rendered an irrational award. Noting that judicial review of arbitration awards is extremely limited and an award will be upheld so long as there is even a "barely colorable justification for the outcome," the court denied the petition to vacate. The court found that petitioner failed to prove that the arbitrators had exceeded their power under the FAA. Although the panel members had expressed reluctance to make judgments on certain legal considerations, the court found that the arbitrators had, in fact, considered the legal issues and evidence presented, and made legal conclusions necessary to foster a rational decision. Furthermore, the Court found that petitioner had been given the opportunity to introduce relevant evidence during the arbitration proceeding, including the summary judgment order from the Massachusetts action that exonerated petitioner. Although petitioner believed that that order should have been given res judicata effect, the court noted that the arbitration panel had found that the issues in the Massachusetts action had not been identical to those in the arbitration. The court also found that the arbitrators had not manifestly disregarded the law. That doctrine requires an egregious impropriety, not merely erroneous interpretation or failure to understand or apply the law. Here, petitioner contended that the arbitrators had disregarded the argument that respondent's own unclean hands had barred recovery. However, the court noted that the panel had considered the unclean hands arguments, had observed distinctions between how the parties believed it applied and had apparently been persuaded by respondent's counter arguments such that there was at least a barely colorable justification and no egregious impropriety. Finally, the Court held that the award could not be vacated on the grounds of irrationality since petitioner failed to show that there was no rational basis upon which the arbitrators could have rendered the award. In fact, rejecting petitioner's arguments, the Court found that the arbitration panel had considered the applicable law when rendering its award. UBS Painewebber Inc. v. Benistar Property Exchange Trust Co., Inc., Index No. 600156/2006, 11/16/06 (Ramos, J.).**

Attorney-client privilege; choice of law; inadvertent disclosure; waiver.

In the context of a dispute concerning the scope of documents demanded from a non-party witness and the witness's failure to provide a privilege log, the witness from whom the documents had been demanded had inadvertently sent to counsel for the party that had issued the subpoena an e-mail that he had intended to send to his own counsel. Thereafter, another party to the litigation took the position that the witness's e-mail was not protected by the attorney-client privilege because it did not seek legal advice, and, if protected, such protection had been waived when the witness had sent the e-mail to counsel for the subpoenaing party. Counsel for the witness responded that the e-mail was protected because it sought advice concerning disclosure obligations and had clearly been disclosed inadvertently because the salutation of the e-mail specifically indicated that the witness's counsel – not the subpoenaing party's counsel – was the intended addressee. The court found that under South Carolina law, the e-mail was protected by the attorney-client privilege and the privilege had not been waived. The court found that South Carolina law applied because the e-mail had been written in South Carolina and New York courts apply the attorney-client privilege law of the jurisdiction in which the assertedly privileged communications were made, which in most cases is also the jurisdiction in which the party that made the communications resides. The court noted that clients must be able to comment and express their reactions to case developments and issues related to the case to their counsel, including discovery issues, without the fear that those comments would be discoverable. Here, the court held that the e-mail was protected by the attorney-client privilege as it was a confidential communication sent to counsel in response to the subpoena. The court also found that there had been no waiver because the e-mail had not been intended to be received by anyone other than the recipient's counsel, and counsel for the non-party had demanded the return and/or destruction of the e-mail within a reasonable time, one week after the e-mail had been sent. Delta Financial Corp. v. Morrison, Index No. 011118/2003, 10/24/06 (Warshawsky, J.)**.

Contracts; banking; UCC, Article 4-A; good faith and fair dealing; statute of limitations. Corporations; piercing the corporate veil.

International Emergency Economic Powers Act; private right of action. Unjust enrichment; restitution; quasi contract; alternative pleading. Plaintiff, an English bank, sued defendants, a New York bank and its corporate parent, to recover more than $30 million that plaintiff had deposited with defendants or their predecessors-in-interest. Plaintiff's accounts with defendants had been frozen when the President of the United States issued a series of executive orders directing the freezing of certain assets that had any connection with the governments of Serbia, Montenegro, Yugoslavia, Bosnia, and Herzegovina. After plaintiff's accounts had been unfrozen by executive order in 2003, defendants had notified plaintiff that they were removing approximately $16.8 million from plaintiff's accounts as a set-off for amounts that plaintiff allegedly owed defendants' predecessors-in-interest. Plaintiff had demanded the return of all funds remaining in its accounts. Defendants had refused and plaintiff had sued, asserting four claims for breach of contract, as well as four other causes of action. Defendants moved to dismiss the entire complaint as against the corporate parent defendant and to dismiss seven of plaintiff's claims as against both defendants. The court dismissed plaintiff's claim for breach of the implied duty of good faith, but otherwise denied the motion. First, defendants moved to dismiss all claims asserted against the corporate parent defendant on the ground that plaintiff had failed to plead sufficient facts to justify piercing the corporate veil. The court found, however, that plaintiff adequately alleged that the corporate parent defendant exercised complete dominion over its subsidiary and that the two defendants had operated in concert to harm plaintiff. The court held that these allegations were sufficient to raise an issue at the pleading stage as to whether the corporate veil should be pierced and also noted that the facts necessary to evaluate the propriety of alter ego liability in this case might only be available after discovery. The court explained that the defendants had been involved in multiple mergers and/or acquisitions, which had resulted in a complex corporate structure, and that plaintiff did not know which defendant or defendants held the deposits at issue. Further, the court declined to dismiss plaintiff's two claims, characterized as claims for breach of contract and breach of duty, that defendants had failed to credit plaintiff's accounts with a "commercially reasonable rate of interest" during the time period that the accounts were frozen, as plaintiff alleged was required by the regulations that had been promulgated pursuant to the various executive orders issued by the President. Although defendants argued that the regulations did not provide for a private right of action, the court found that the explicit language of the regulations barred private suits only as against government employees, not private actors like defendants. In any event, the court held that the regulations merely supplemented, and did not preclude, plaintiff's common law claims for breach of contract and breach of duty. With respect to plaintiff's claim that defendants had breached the parties' contract by failing to pay plaintiff the funds on deposit upon demand, defendants argued that some of the funds in plaintiff's accounts were the proceeds of wire transfers and that plaintiff could establish its entitlement to those funds only by satisfying the requirements of UCC Article 4-A. Because plaintiff had failed to allege facts that were necessary under Article 4-A, defendants argued that plaintiff's claim must be dismissed. The court rejected this argument because defendants had not established conclusively that plaintiff's accounts had contained only the proceeds of wire transfers. The court also rejected as premature defendants' claim that their actions in applying the set-off to plaintiff's accounts had been proper as a matter of law, and it refused to dismiss plaintiff's breach of contract claim on this basis. The court did, however, dismiss plaintiff's claim that defendants had breached their implied duty of good faith on the ground that this duty is implied in every contract, and, thus, it is unnecessary to plead such a claim as a separate cause of action. As for plaintiff's claim for unjust enrichment and restitution, the court rejected defendants' argument that plaintiff could not plead breach of contract claims and quasi contract claims in the alternative. Finally, the court rejected defendants' claim that certain of plaintiff's claims were barred by the six-year statute of limitations. AY Bank Ltd. v. JPMorgan Chase & Co., Index No. 604190/2004,11/29/06 (Cahn, J.).**

Contracts; commercial lease; interpretation; recitals; omissions.

Plaintiff had extended $13.5 million in leasehold financing to defendant's lessee, which had defaulted on the loan and gone bankrupt shortly before an arbitration award raising the leasehold rent tenfold. Had plaintiff assumed the lease, income from subtenants would not have covered both its own loan repayment and increased rent owed to defendant lessor. Plaintiff sued lessors and agents for breach of contract and other wrongs, claiming that they had unjustly crafted a plan to re-characterize a lease for land only to include the buildings later built on it. Defendants moved to dismiss. The threshold issue was whether an acknowledgment and a certificate signed by lessors

represented that only land was being leased. The court found that the documents referred to the lease and could only be construed in conjunction with the lease, which specified that the property included land and any buildings to be built on it. True, the acknowledgment's description of the property did not include the buildings. Nor did two amendments to the lease. However, the omissions were not deception that would support plaintiff's desired remedy of equitable estoppel. The acknowledgment did not constitute the terms of the lease. Rather, it was intended to establish plaintiff's rights under the lease, and it was the lease that plaintiff should have reviewed as a matter of basic diligence. Plaintiff's claim that by referring to the "Ground Lease" the acknowledgment and certificate falsely suggested that only land was being leased did not persuade the court. Nor did plaintiff have a claim for breach of implied duty of good faith and fair dealing, as defendant lessor had merely exercised its rights under the lease when it had sought to maximize its return on the property. General Electric Capital Corp. v. Bank of New York, Index No. 600993/2006, 12/20/06 (Freedman J.).

Contracts; commercial real estate; leases; interpretation; good faith and fair dealing.

Defendant landlord had leased a commercial property, which included a hotel, to plaintiff tenant. The lease obligated plaintiff to pay monthly rent plus a portion of certain real estate taxes. According to the original lease, plaintiff was responsible for 1/8 of the real estate taxes that were assessed on the entire lot on which the hotel was located. In 1996, the lease was amended, giving defendant the unilateral right to subdivide the lot into two independent tax lots. The lease provided that, upon such a subdivision, plaintiff would become obligated to pay 100 percent of the taxes assessed on the lot on which the hotel was located. In 2003, defendant had subdivided the lot into two separate lots, and in 2005, the State issued a tax bill to defendant. Defendant had advised plaintiff that the lot had been subdivided and that real estate taxes had been imposed and it demanded payment of 100 percent of the amount billed for the lot on which the hotel was located (offset by an amount held in escrow by defendant). Plaintiff paid the amount demanded "under protest" and commenced the instant action, seeking, among other things, a declaratory judgment that it was not obligated to pay the real estate taxes. Defendant moved to dismiss the action in its entirety and plaintiff cross-moved for partial summary judgment. With respect to plaintiff's claim for a declaratory judgment, the court explained that the only issue bearing on plaintiff's liability for the taxes was whether there had been an "assessment of taxes" as that term was used in the lease. Defendant argued that the term merely contemplated the issuance of a tax bill from the State. Plaintiff, by contrast, argued that the term referred to an "assessed valuation," as defined in the New York City Charter, which requires a valuation of the property. Because such an "assessed valuation" was never performed, plaintiff argued that taxes had never been assessed and that its obligation to pay them had never been triggered. Applying principles of contract interpretation, the court found that the "plain and unambiguous meaning" of the term "assessment of taxes" was consistent with defendant's interpretation of the lease. The court explained that the lease did not refer to the New York City Charter and that the parties' use of the words "assess" and "assessment" throughout the lease suggested that they intended it to be interchangeable with the words "levy" or "levied." As a result, the court granted defendant's motion to dismiss plaintiff's claim for a declaratory judgment, and it denied plaintiff's cross-motion for partial summary judgment. The court also granted defendant's motion to dismiss plaintiff's second cause of action for breach of contract, which was based on plaintiff's allegations that defendant had failed to notify plaintiff of the proposed subdivision in advance, that it had failed to give plaintiff an opportunity to submit financial information in connection with the subdivision application, and that it had failed to provide accurate financial information to the State to ensure an accurate apportionment of taxes. The court held that the lease did not impose any explicit or implicit obligation on defendant to provide plaintiff with advance notice of the subdivision or with an opportunity to submit financial information. The court also found that the financial information that defendant had provided to the State was accurate. Accordingly, the court granted defendant's motion to dismiss plaintiff's breach of contract claim. JRK Franklin, LLC v. 164 East 87th Street LLC, Index No. 604313/2005, 10/3/06 (Cahn, J.).

Contracts; commercial real property; closing date; waiver; merger clause; parol evidence; misrepresentations; reliance; breach of contract.

Unjust enrichment. Action arose out of a contract for sale of real property. The parties had agreed that plaintiff would close the sale on a set date, time being of the essence. Plaintiff had not been able to secure a mortgage and had been unable to close the sale on time. Plaintiff alleged in its complaint that defendants had orally indicated that an extension of the closing date would be granted for the purpose of closing the sale. Defendants pointed to a notice sent to plaintiff prior to the scheduled date which stated that defendants would not give any extensions. Defendants argued that documentary evidence established that extensions were neither intended nor granted by defendants. The court found that the contract of sale expressly provided the closing date and that a rider stated that time was of the essence against the purchaser only, and that the contract would become null and void if the sale did not take place as scheduled. The court determined that plaintiff had breached the contract when plaintiff failed to close on time, thus rendering the contract null and void. The court held that plaintiff's contention that defendants had made oral statements which waived the closing date provision was meritless in light of the contract's merger clause, which clearly provided that neither party would rely on statements not contained within the written contract and that any modifications of the original agreement must be in writing. The pre-closing notice reminded plaintiff of the terms of the contract, which precluded reliance on the alleged oral modification. Therefore, the court held that plaintiff had no cause of action for breach of contract. The court denied plaintiff's claim for specific performance in light of its finding that plaintiff had been in breach of contract. Plaintiff could not demonstrate, as required, that plaintiff had been ready, willing, and able to perform under the contract. The court also concluded that plaintiff's complaint failed to state a cause of action for fraud. The parol evidence rule barred reliance on alleged misrepresentation. The court explained that even if there had been no merger clause in the contract, plaintiff's claim for fraud failed because plaintiff had failed to establish justifiable reliance. The court also determined that plaintiff's fraud claim was duplicative of its breach of contract claim and failed for that reason. The court rejected an unjust enrichment claim based upon the assertion that plaintiff had paid a sum to defendants as a deposit. The court concluded that according to the price rider in the contract, the payment had been intended only as an accommodation to assist the plaintiff in reducing the purchase price. Further, the unjust enrichment claim was duplicative of the contract claim. Motion to dismiss granted. Kym Group v. East Park Holding Co., LLC. ,Index No. 24516/2006, 12/5/06 (Demarest, J.).**

Contracts; employment; restrictive covenants; non-compete agreements; enforceability.

Plaintiff corporation had sued defendant for breach of contract, breach of fiduciary duty, unfair competitive practices, and misappropriation after defendant had accepted a position to work at plaintiff's chief corporate competitor. Plaintiff had moved for a preliminary injunction enjoining defendant from working for the competitor and from using or disclosing plaintiff's confidential information. In order to determine whether plaintiff was likely to succeed on the merits of its claims, the court analyzed whether or not the non-compete agreement that the individual defendant had signed during his employment was enforceable. Because the individual defendant's services were not "unique or extraordinary," the court found that plaintiff's interest in enforcing the non-compete agreement was limited to protecting against the misappropriation of trade secrets or of confidential customer lists. However, the court held that the non-compete agreement was not focused on those issues and, thus, was too broad to be enforced. The court also rejected plaintiff's request for severance and partial enforcement of the non-compete agreement. Although the court noted that defendant had copied trade secret and confidential information onto a CD disk before leaving plaintiff's employ, and that he had sent an e-mail to one of plaintiff's customers expressing his desire to contact the customer in the future, the court found that neither fact showed an actual misappropriation of confidential information or altered its analysis. As for the CD, the court found there was no evidence that any information on the disk had been shared, and, in fact, defendant had destroyed the disk on the advice of counsel. As for the e-mail to plaintiff's customer, the court held that plaintiff had not shown that the customer could be identified only through confidential or proprietary sources or that it would be "unfair" for defendant to solicit the customer once he began his new position. Finally, the court questioned whether plaintiff could establish irreparable harm in a case where there had been no use or threatened use of confidential information. The court vacated a previously-issued temporary restraining order and denied plaintiff's motion for a preliminary injunction. Nalge Nunc International Corp. v. Warren , Index No. 11195/2006, 10/02/06 (Fisher, J.).**

Contracts; employment; restrictive covenants.

Preliminary injunction. Plaintiffs moved for a preliminary injunction enjoining defendants from engaging or participating in the temporary staffing business within Nassau and Suffolk Counties and, from soliciting plaintiff's customers. A defendant had been employed by plaintiff employment agency as an account manager and had executed restrictive covenants that barred him from working competitively in the staffing business within a 50-mile radius of plaintiff's offices for a period of one year after his employment ended, soliciting or diverting plaintiff's customers or personnel for a period of one year after his employment ended, and using or disclosing plaintiff's confidential or proprietary information. After defendant terminated his employment with plaintiff, he went to work for defendant employment agency, where his assigned territory was Suffolk County. Plaintiff then commenced this action. The court noted that defendant had had notice of the terms of employment before he signed the contract with plaintiffs and that there was no evidence that defendant had been coerced into accepting those terms. Plaintiff did not argue that defendant's services had been unique or extraordinary. Having worked for plaintiff as an account manager defendant had obtained familiarity with plaintiff's business, clients, customers, personnel and prices. Such confidential information, the court determined, was properly subject to the protection of the covenants in the employment agreement. Defendant had gone to work for a direct competitor of plaintiff. Defendant argued that plaintiff had failed to show that he had misappropriated any confidential information, but, the court stated, this missed the point. Plaintiff had a legitimate interest in enforcing the restraints and had shown a likelihood of success. The court next determined that plaintiff had shown it would suffer irreparable harm if its motion was denied because if plaintiff lost the right to enforce the covenants, it would lose revenue, customers and goodwill, the extent of which would be difficult to quantify. The court determined that defendants had neither suffered nor would suffer in the future any significant professional hardships from the limited restraints imposed by an injunction, but that plaintiff would suffer injury should the injunction be denied. The court, however, did conclude that although the restrictive covenant was reasonable in its prohibition of defendant's working in a similar business for one year, it was unreasonable in terms of the 50-mile restriction. The court ruled that prohibiting defendants for a period of one year from soliciting business from plaintiff's customers with whom the former employee had dealt was sufficient to protect plaintiff's trade secrets and confidential information. Motion granted as indicated. Greystone Staffing, Inc., v. Goehringer , Index No. 13906/2006, 11/27/06 (Austin, J.).**

Contracts; good faith and fair dealing; statute of limitations; equitable estoppel. Tortious interference with contractual relations.

Plaintiff, a screenwriter, had written a screenplay for a book and negotiated its sale to a film producer. Plaintiff and the film producer had entered into a contract, which provided that, if the producer decided to sell its interest in making a feature film based on plaintiff's screenplay, plaintiff would have the right to match the sales price that the producer was willing to pay and to acquire the producer's interest in the film project. The film producer had never produced a film based on the book, nor had it offered to sell plaintiff the film rights. Rather, in 2002, another movie studio had released a film based on the book, which grossed more than $200 million. Plaintiff sued the successor in interest to the film producer, along with the movie studio, the author of the book, and the individual producers of the released film, claiming that the film producer had breached the parties' contract by selling the film rights to a third party without offering plaintiff the right to match, and that the other defendants had tortiously interfered with the parties' contract. Some defendants moved to dismiss. First, the film producer defendant moved to dismiss plaintiff's breach of contract claim based on documentary evidence that allegedly showed that the film producer had never sold the film rights to a third party. More specifically, the film producer defendant alleged that the film rights had reverted back to the author of the book in 1988 pursuant to a series of agreements to which plaintiff had not been a party. The court held that it could not dismiss plaintiff's breach of contract claim as a matter of law given unresolved questions as to whether all of the agreements at issue had been intended to be part of a single contract. The moving defendants also argued that plaintiff's breach of contract action was time-barred. However, the court found that plaintiff had brought his claim within three years after the advertisements for the film first appeared and that this delay was not unreasonable as a matter of law. The court also declined to dismiss plaintiff's tortious interference with contract claim, finding that the claim was adequately pleaded, that it was not duplicative of plaintiff's breach of contract claim, and that it was timely. Lazzarino v. Warner Bros. Entertainment, Inc. , Index No. 602029/2005, 10/30/06 (Fried, J.).

Contracts; guarantee agreements; good faith and fair dealing. Tortious interference with business relations. Breach of fiduciary duty; duty of loyalty; debtor and creditor law.

Plaintiffs, several loan receivable trusts and the servicer of those trusts, had sued defendant, the majority owner of a group of fast food restaurant franchises, to recover the amounts owing under two personal guarantees. Defendant asserted various counterclaims against plaintiffs as well as against two additional counterclaim defendants, a loan servicer and an individual who acted as a director of one of defendant’s companies pursuant to a restructuring agreement. Plaintiffs and counterclaim-defendants moved for summary judgment dismissing defendant’s counterclaims. Plaintiffs also moved for summary judgment on their claim that defendant was liable under the second of the two guarantees. Defendant cross-moved for summary judgment, seeking dismissal of plaintiffs’ claims under the first guaranty. The court granted the motions of plaintiffs and counterclaim defendants to dismiss all of defendant’s counterclaims, it granted plaintiffs’ motion for summary judgment on the second guaranty, and it denied defendant’s cross-motion for summary judgment on the first guaranty. With respect to the motions by plaintiffs and counterclaim defendants for summary judgment on all of defendant’s counterclaims, the court, first, dismissed defendant’s breach of contract claims on the ground that there was no evidence that the lenders had violated the payment priority provisions of the restructuring agreement. The court also rejected defendant’s claims that plaintiffs had breached the implied covenant of good faith and fair dealing, finding no suggestion in the record that plaintiffs had exercised their contractual rights malevolently or as part of a scheme to deprive defendant of the benefits of the restructuring agreement. In any event, the court noted that, because defendant had based both a breach of contract claim and breach of implied covenant claims on the same facts, the breach of implied covenant claims should be dismissed as duplicative. With respect to defendant’s breach of fiduciary duty claims, defendant conceded that there is no fiduciary relationship between creditors and debtors and thus that the claims against plaintiffs and against the loan servicer counterclaim defendant should be dismissed. However, defendant argued that he should be permitted to maintain his breach of fiduciary duty claim as against the individual counterclaim- defendant, who had served as a director of defendant’s company pursuant to the terms of the restructuring agreement, which gave the lenders the right to appoint a director to the company’s board. Defendant argued that the individual counterclaim-defendant had breached his duty of loyalty by favoring the interests of his lender-employer over the interests of defendant. The court rejected this claim, finding no evidence that the individual counterclaim-defendant had acted improperly or illegally. The court also noted that, under Delaware law, when a corporation is operating in the zone or vicinity of insolvency, its directors’ fiduciary duty extends not only to the corporation’s shareholders, but also to its creditors. Thus, the court explained that it would not have been improper for the individual counterclaim-defendant, as a director of defendant’s company, to consider the interests of creditors in deciding how the company’s assets should be used to satisfy its various obligations. Finally, the court dismissed defendant’s claims that plaintiffs and the loan servicer counterclaim-defendant had tortiously interfered with contractual and business relations by wrongfully taking money that was earmarked for defendant’s franchisor, thereby making it impossible for defendant’s company to fulfill its obligations under the franchise agreements. The court held that the record did not support the allegation that plaintiffs or the counterclaim-defendant had intentionally induced the franchisor to terminate its franchise relationship with defendant. Indeed, the court noted that it would have been “economic suicide” for plaintiffs and the counterclaim-defendant to have done such a thing because that would have extinguished any hope of getting repaid on the debts that defendant owed. On plaintiffs’ motion for summary judgment with respect to the second guaranty, the court concluded that defendant was liable, as a matter of law, under the plain language of the agreement. Finally, the court denied the defendant’s cross-motion for summary judgment on the first guaranty on the ground that there were issues of fact concerning whether various “trigger events” had occurred, triggering defendant’s liability under the guaranty. Wilmington Trust Co. v. Strauss, Index No. 601192/2003, 10/30/06 (Fried, J.).

Contracts; investment opportunity commission agreements; interpretation. Procedure summary judgment (CPLR 3212(b)). Partnership law.

Plaintiffs had entered into a commission agreement with defendant. In the agreement, defendant had agreed to pay plaintiffs a commission of up to $ 4 million in return for introducing him to investors for a development property in which defendant held a limited partnership interest. Defendant had agreed to pay a base commission of $2 million,

plus an additional percentage commission of up to $ 2 million. Upon an event of default, defined in the agreement to include a transfer by defendant of his interest, the agreement required defendant to pay plaintiffs immediately any outstanding portion of the $ 2 million percentage commission. After the property had been sold for $1.76 billion, plaintiffs had claimed that the sale constituted an event of default. When defendant had refused to pay the balance of the percentage commission owed under the agreement, plaintiffs had sued for breach of contract. Plaintiffs moved for summary judgment. The court denied plaintiffs' motion and, instead, granted summary judgment for defendant, dismissing the complaint. The court held that, under the plain language of the agreement, a default would occur only if defendant personally transferred his interest in the development property. Because the sale of the development property was consummated not by defendant personally, but rather by the limited partnership and related entities, in which defendant had no control or management authority, the court found that plaintiffs could not establish, as a matter of law, that there had been a default as defined in the agreement. Even though defendant had not cross-moved for summary judgment, the court searched the record and found that defendant was entitled to summary judgment. Specifically, the evidence in the record established that defendant had not disposed of his limited partnership interest in the development property. The court also rejected plaintiffs' attempt, under agency and partnership law, to attribute the sale of the property by the limited partnership to defendant personally. Corcoran v. Trump, Index No. 604347/2005, 10/24/06 (Lowe, J.).

Contracts; lease and sublease; interpretation; contingent tax rent; liability for taxes accruing before sublessee's occupancy.

Plaintiff sued sub-tenant NYCHA to recover $600,000 allegedly owed as its share of taxes. The reimbursement sought represented taxes accruing from years prior to NYCHA's tenancy, but plaintiff argued that NYCHA's obligation to pay a proportional share of the taxes, or "contingent tax rent," extended to all such taxes imposed on plaintiff, and was determined by when the City levied the tax and plaintiff paid it. Pursuant to plaintiff's master lease with landlord, plaintiff had to pay the taxes for the first 20 years of its occupancy when a certain cash flow became available to it. Plaintiff had begun to pay soon after NYCHA's term under a sublease and occupancy had begun. NYCHA argued that plaintiff was not entitled to seek reimbursement for taxes accruing from years prior to its occupancy and, further, was barred from suing because it had failed to serve notice of default. The parties moved for summary judgment. Plaintiff argued that it had met the sublease requirements of a written default notice by service of the summons and complaint. The court rejected this contention. The court found that a 15-day interval specified by the sublease constituted NYCHA's opportunity to cure, and that only failing that could notice of default be served. There was also no factual evidence to support plaintiff's contention that a certain letter had satisfied its notice obligation. The action was premature but the court considered the merits nevertheless. Plaintiff pointed to a section of the sublease that, it argued, defined the contingent tax rent and did not limit NYCHA's obligation to the years of its lease terms in that it described the taxes as "...all...charges...imposed against the building." However, elsewhere the sublease specifically stated that NYCHA's payment was required during "then current" lease years, and defined lease year as an interval within the lease term. The court found that reading the sublease as a whole made clear that the tax was to be prorated according to NYCHA's lease term, and that if the arrangement were to have been otherwise NYCHA would have had to explicitly agree. The master lease section tying payment obligation to cash flow was not referred to in the sublease, which further clarified that whether payment timing reflected plaintiff's voluntary deferment or satisfaction of a condition precedent, NYCHA could not be liable for tax accruing before its occupation. One Fordham Plaza, LLC v. New York City Housing Authority, Index No. 603653/2004, 10/11/06 (Ramos, J.).

Contracts; meeting of the minds; more definitive writing.

Plaintiff alleged that it had performed over $400,000 in architectural and design services for defendant in connection with a joint proposal for development of a project, which had been successful. Despite agreement, it was claimed, defendant had failed to allow plaintiff to take part in the development work and related fees and profits. Plaintiff asserted that the parties had entered into an oral agreement that had been confirmed in a later e-mail. Plaintiff argued that the parties had intended to and did enter into a binding agreement and that, although the agreement

had contemplated development of a more definitive agreement, it had not provided that it would be unenforceable until such an agreement had been produced. The court held that there had been no meeting of the minds on a binding agreement. The fact that the e-mail did not expressly condition agreement upon production of a formal, written agreement did not prevent this conclusion. The e-mail reflected an intention not to be bound until there was a formal writing ("More definitive agreements to be developed if our team is selected....") and the e-mail did not address all essential terms, such as respective obligations of the parties on the construction project. A breach of contract claim and related claims dismissed. Peter F. Gaito Architecture, LLC v. Simone Development Corp., Index No. 22157/2005, 11/3/06 (Rudolph, J.).**

Contracts; oral agreement to extend closing date; part performance; estoppel. Negligent misrepresentation.

Plaintiffs had contracted with defendants for the sale of three commercial properties. After closing on one, defendants had refused to close on the remaining two, claiming that the contract had terminated on the final scheduled closing date, time having been of the essence. Plaintiffs brought an action to compel defendants to sell them the two properties. Plaintiffs argued that the parties had made an oral agreement to extend the contract and that defendants had partially performed in the preparation for a later closing date. Plaintiffs further argued that the equitable doctrines of waiver, estoppel and part performance barred defendants from reliance on GOL § 15-301 or the contract's requirement of a writing. Plaintiffs moved for an order preliminarily enjoining defendants from transferring or encumbering the two properties and other relief. Defendants cross-moved for summary judgment. Defendants argued that the contract had automatically terminated on the scheduled closing date and that any oral agreement to extend the contract was unenforceable as the contract had provided that all amendments be in writing and signed by the party to be charged. Defendants further argued that plaintiffs' claim for specific performance was time-barred as the contract had provided that plaintiffs only had thirty days after the scheduled closing date to sue for specific performance. The court found, first, that the merger provision of the contract controlled and that statements made by defendant's president to plaintiffs' representative had not constituted an extension of the contract's closing date. In any case, the statements did not constitute an extension or waiver. The court further ruled that defendants had not waived the contract's requirement of a writing since plaintiffs had failed to establish that there had been partial performance by plaintiffs which had been unequivocally referable to the waiver. As to two emails sent by defendants to plaintiffs, the court noted that they were not proof of conduct by plaintiffs. The court determined that the emails were non-committal and merely an inquiry to plaintiffs as to whether or not there would be a closing. The court also pointed out that both emails contained statements that emails were not intended to create binding agreements. The court held that plaintiffs' estoppel claim failed because plaintiffs had not shown that their conduct had been unequivocally referable to the alleged oral amendment and plaintiffs' reliance on the alleged waiver was not reasonable. The court pointed out that plaintiffs were sophisticated investors who had been represented by counsel and had already modified the contract in writing on five previous occasions. The court held that plaintiffs' claim for negligent misrepresentation was meritless because there had not been any fiduciary or confidential relationship between the parties. The court granted defendant's cross-motion and denied relief to plaintiffs. Prime Income Asset Management Inc. v. American Real Estate Holdings L.P., Index No. 603164/2005, 11/30/06 (Freedman, J.).

Contracts; oral joint venture agreement; definiteness of terms; intent to be bound; sharing of losses; control over venture; contribution to venture.

Action asserting breach of contract based on an alleged oral agreement to include plaintiff in a joint venture to purchase and exploit commercially certain Trump real estate properties. Plaintiff contended that an e-mail by defendant had confirmed plaintiff's 15% ownership interest. Oral agreements containing sufficiently definite terms to form a joint venture concerning real property may be enforceable, the court stated. The court found that the e-mail's statement that the parties had time before they finalized the partnership and funding plan suggested that they had contemplated further negotiation before they had intended to be bound contractually. Also, the complaint did not allege that plaintiff had agreed to share in losses, had undertaken any control over the enterprise, or had contributed

anything of value. Plaintiff urged that there had been no reasonable expectation of losses and that joint ventures need not share equal management control. But, the court stated, bare legal conclusions do not suffice. Although joint venturers need not share control equally, the inquiry is limited to whether a member had any measure of control; here the complaint alleged that defendant alone was to direct the enterprise. The court found that plaintiff had not alleged that he had contributed anything of value to the venture, the assertion that he had set aside a sum falling short. A breach of contract claim failed, as did two based on an alleged fiduciary duty. Complaint dismissed. Langer v. Dadabhoy, Index No. 105198/2006, 11/9/06 (Freedman, J.).

Corporations; business judgment rule; excessive compensation; preferred dividends; severance payments; breach of fiduciary duty.

Minority common shareholders in a family-owned business sued majority shareholders, claiming, among other things, that defendants had authorized the payment of excessive compensation to the company's president, improperly issued preferred dividends, and breached their fiduciary duties. Plaintiffs moved for partial summary judgment on the excessive compensation claim and for summary judgment on the preferred dividend and breach of fiduciary duty claims. Defendants cross-moved for summary judgment on all three claims. With respect to plaintiffs' excessive compensation claim, the court granted plaintiffs' motion for partial summary judgment and granted defendants' cross-motion in part. This claim was comprised of two parts, the first alleging that defendants had authorized improper "severance" payments in the amount of $1.3 million to the company's president, and the second alleging that the president's annual salary was oppressive. Plaintiffs moved for partial summary judgment only with respect to the allegedly improper "severance" payments, claiming that the company had had no legitimate basis to make those payments because the president was still employed by the company. Although defendants argued that their decision to authorize the payments was protected by the business judgment rule, the court held that the rule did not apply to interested transactions such as self-compensation decisions. Rather, the court explained that defendants had to show affirmatively that the "severance" payments were fair to the company. The court held that defendants had failed to satisfy this burden as a matter of law and it granted plaintiffs' motion for partial summary judgment accordingly. With respect to plaintiffs' challenge to the president's annual salary, however, the court found that his salary was consistent with the president's employment agreement and that plaintiffs had failed to raise any factual issue as to the existence of fraud or oppressive conduct. Therefore, the court granted defendants' cross-motion for summary judgment on this aspect of plaintiffs' excessive compensation claim. As to plaintiffs' claim that defendants had improperly issued preferred dividends, the court found again that the business judgment rule did not apply and that defendants had failed to carry their burden to establish the fairness of their decision. Specifically, the court held that the record was "clear" that defendants had decided to issue a dividend to preferred shareholders in order to avoid paying a distribution to plaintiff, and that that decision "was not fair, legitimate," or made in good faith. Accordingly, the court granted the plaintiffs' motion for summary judgment on this cause of action and denied defendants' cross-motion for summary judgment. Finally, with respect to plaintiffs' claim that the issuance of preferred dividends reflected a breach of fiduciary duties, the court likewise granted plaintiffs' motion for summary judgment and denied defendants' cross-motion. Lippman v. Shaffer, Index No. 10180/2003, 11/02/06 (Fisher, J.).**

Corporations; de facto merger; continuity of business.

Plaintiffs, individuals, sued to recover bonuses, salary and unreimbursed expenses allegedly owed them by first defendant, a gunsmithing company that had gone bankrupt. Prior to the bankruptcy a second defendant had purchased the gunsmith's bank debt of $1.9 million and the bank's interests in the collateral, pursuant to a security agreement and promissory notes. As the gunsmith went broke, one plaintiff, its president, had transferred funds from his personal account to cover payroll and another employee had allegedly covered some expenses with her personal funds, too. Subsequently, attachment of the gunsmith's bank accounts had triggered terms in the security agreement and second defendant had taken possession of the gunsmith's assets and deposited its collateral in the account of its own subsidiary, third corporate defendant. Defendants alleged that after this they had merely liquidated assets. Plaintiffs, however, said that that they and other gunsmith employees had been addressed by an

individual defendant who had told them that the subsidiary company would continue the gunsmith's business. Subsequently, allegedly, two individuals identified as prospective buyers had arrived and run the company for several weeks. Plaintiffs alleged that business had not ceased until the individuals had decided not to buy. Plaintiffs asserted, among other things, breach of contract, and were granted leave to amend the complaint to add breach of fiduciary duty. On summary judgment motions the issue was primarily whether a de facto merger had occurred, making the acquiring defendant liable for the gunsmith's liabilities, some of which were conceded. To establish de facto merger, the court said, four conditions must be met. The court found that the gunsmith and acquiring defendant had been owned by the same seven individuals and the latter owned its subsidiary, hence continuity of ownership, the hallmark, had been established. Plaintiffs had also demonstrated that the gunsmith had ceased ordinary business and been dissolved as soon as possible, lingering briefly only on paper. The second condition was met. Plaintiffs further showed that the acquiring defendant had assumed the gunsmith's liabilities, paying its debts as necessary for uninterrupted continuation of business, the third condition. The fourth, continuity of management, personnel, location, assets and general business operation, had also been satisfied. The gunsmith and acquiring defendant had not only been owned, but managed by the same individuals, many of the same employees continued to work and locations and assets were the same. Defendants' allegation that the gunsmith had been liquidated commencing right after surrender of the assets was inconsistent with the record, which showed that gun making, selling, and repairing had continued up until the prospective buyers had departed. The court noted that the Second Circuit has held that all four factors must be established, but New York case law is to the contrary. Defendants stated that once the gunsmith's assets had been surrendered, no new orders had been taken, but the court found enough undisputed evidence on business continuity to grant summary judgment against both the gunsmith and second corporate defendant for the conceded liabilities of the gunsmith and the president's un-reimbursed payroll expenses. Summary judgment was denied as to the subsidiary and individual defendants and a cross-motion for summary judgment on discrete claims, brought on behalf of all defendants, was granted except as to the acquiring defendant and its subsidiary, leaving for trial the subsidiary's liability. Simpson v. Ithaca Gun Co. LLC, Index No. 0687/2005, 12/8/06 (Fisher, J.).**

Disability discrimination; "disability" under City and State law; "major life activity;" dismissal of prior federal suit; ADA's numerosity requirement; CPLR 204.

Motion for summary judgment in an action brought under State and City Human Rights Laws (Exec. Law § 290 and Admin. Code § 8-10). While employed by defendant, plaintiff had been diagnosed with breast cancer. After surgery she had undergone chemotherapy and radiation treatment while working full time. She had then been granted six months' unpaid medical leave to undergo further treatment. She had advised defendant that she was ready to return to work prior to the end of her leave. In response, defendant had told her that her job had been eliminated. Subsequently, even though defendant was then recruiting for a new position, defendant had refused to consider plaintiff for employment. Defendant argued that under a 2001 Appellate Division decision, as a matter of law plaintiff was not disabled; that plaintiff's job was eliminated as part of a downsizing program; and that defendant's refusal to consider plaintiff for reemployment was unrelated to her cancer. The Federal ADA expressly provides that to qualify as a "disability," an impairment must substantially limit the claimant in a "major life activity." The State and City statutes contain no such provision, but the cited decision had held that to qualify as a "disability" under the State and City statutes, an impairment must substantially limit the claimant in a "major life activity." The court concluded that the decision was contrary to prior Court of Appeals precedent, but that the court was bound by the Appellate Division's holding. However, the present case was distinguishable. First, subsequent to the 2001 Appellate Division decision, New York City had enacted Local Law 85/2005, which amended the City statute to overrule legislatively cases such as the 2001 decision setting the Federal requirements as a "ceiling above which the local law cannot rise." Second, defendants had failed to demonstrate the lack of a triable issue of fact as to whether plaintiff's chemotherapy had affected a "major life activity." Third, defendants had failed to address the "record of impairment" and the "employer's perception" branches of the statutory definition. The court held that, notwithstanding any issues of downsizing, defendant's own moving papers would permit the conclusion that the decision to eliminate plaintiff's job had been influenced by plaintiff's absence on medical leave, which would support the claim of discrimination. In addition, the motion was based on defendant's manager's thought processes, making summary judgment inappropriate. Rejecting defendant's contention that the action was untimely, the court held that dismissal for lack of Federal subject matter jurisdiction is within the scope of CPLR 204, and in any event, numerosity does not go to

Federal subject matter jurisdiction. The court rejected defendant's contention that plaintiff's subsequent employment at a higher salary had canceled out the damages she sustained. Motion denied. Pasaturo v. Home Sewing Association, Index No. 100018/2004, 9/7/06 (Gammerman, JHO).

Employment agreement; termination; physicians. Public Health Law §§ 17, 18(2)(d); right to medical records; medical practice.

A pediatric ophthalmologist sued her former partners for wrongful termination and refusal to supply her with the medical records of her patients upon her termination. An employment agreement governing the relationship of the parties provided that upon termination, the plaintiff would have the right to copy the medical records of plaintiff’s patients, but that the records would remain in possession of the professional corporation. The court initially granted plaintiff’s requested temporary restraining order, directing the defendants to supply the plaintiff with the names and contact information of all of her patients, including new patients scheduled to see her in the future. In plaintiff’s reply affidavit, plaintiff demanded for the first time that the defendants return the original records to her. Following oral argument, the court ordered defendants to provide records to plaintiff when the patient so requested, and to retain copies for themselves. The parties settled all disputes except for the custody of the original records. The court then granted defendants’ request to re-argue. The plaintiff cross-moved to modify the court’s order to (1) permit her to obtain copies of her patients’ records without first obtaining written authorization from the patients and (2) order the defendants to provide her with original copies of all of her patients’ medical records. The court granted plaintiff’s first request. Noting that Public Health Law §§ 17 and 18 (2)(a) and (d) provide a patient access to medical information in the hands of a health care provider and that both plaintiff and defendants were health care providers, the court did not view it necessary to require the plaintiff to obtain written authorization from the patient to obtain a copy of the records. The court rejected defendants’ argument that the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 USC § 1301 et seq.) prevented them from providing the patient records to plaintiff without prior written authorization, holding that it was contrary to New York precedent and that it was “ludicrous to insist that one ‘covered entity’ [a health professional subject to HIPPA] must withhold the records of a patient from the very treating physician, also a ‘covered entity’, that created such record on the basis of confidentiality.” The court explained that the professional corporation owned the medical records, but that the employee had the right to copy all records of the patients that the employee had treated upon employee’s termination. Accordingly, the court ordered the defendants to provide copies of plaintiff’s patients’ records to her without written authorization from the patients. The court denied plaintiff’s second request, holding that there was no basis to set aside the parties’ agreement and order the original copy of plaintiff’s patients’ medical records to be turned over to plaintiff. Plaintiff argued that she needed the original copies to comply with Education Law § 6530, which defines professional misconduct as the failure to retain medical records of minors until the first anniversary of the minor’s eighteenth birthday, and 8 NYCRR § 29.2(a)(3), which defines unprofessional conduct as the failure to retain medical records until the first anniversary of the minor’s 21st birthday. The court noted that there was no reason to think that defendants would not comply with these provisions by retaining the records for the requisite period of time. Pullman v. Gormley, Index No. 11999/2006, 11/3/06 (Demarest, J.).**

Fiduciary duty; limited liability companies. Contract; interpretation; breach. Nursing homes; Department of Health.

Plaintiff nursing homes, limited liability companies of which defendant was a member, sued for damages and specific performance claiming that defendant had breached fiduciary duty and operating agreements. Defendant asserted counter-claims and moved to dismiss. Defendant had, among other things, refused to execute documents plaintiffs needed for loans. The first plaintiff’s failure to publish its articles of organization (in compliance with Limited Liability Company Law § 206) was not a jurisdictional defect warranting dismissal, the court found, since “unless and until” language in the statute afforded an opportunity to cure and plaintiff had cured. The court stated that company members’ fiduciary duty was formalized in the first plaintiff’s operating agreement, although it did not necessarily have to be; the relationship among LLC members is analogous to that of partners who owe their shared concern undivided loyalty. Issues of fact remained as to all the claims, so all survived. Defendant contended that the

operating agreements did not expressly require her to execute certain specific documents, in the case of the first plaintiff a reaffirmation needed to convert a revolving line of credit to a fixed term loan. But that plaintiff's agreement stated that no member could "unreasonably withhold consent" vis à vis borrowing. Similarly, defendant's argument that another operating agreement did not expressly obligate her to sign a certificate for a HUD loan did not persuade the court. A third plaintiff, the only corporate entity, had allegedly been forced at the cost of $100,000 and risk of forfeiting a deposit to postpone closing on a property because defendant had admittedly refused to provide documents. The court noted that in so doing defendant had failed to cooperate in ensuring that all the plaintiffs could meet existing obligations to the lender, a condition of the corporation's mortgage financing, and that as a director defendant had been obligated not to deprive the company of any corporate opportunity. Two other plaintiffs each claimed breaches based on defendant's refusal to pay her share of capital calls made to retire credit lines in order to avoid violating a mortgage agreement. Defendant argued that the claims were based on amended operating agreements and had never been approved by the DOH. But the court found the original and amended agreements identical in relevant part and gave plaintiffs leave to amend the claims to reference both. Further, as the amendment involved a less- than-10% transfer in interest, plaintiffs appeared correct that DOH approval was not needed. The agreements differed in regard to the remedies available when a member refused to make an additional capital contribution, though. Under the circumstances, whether or not defendant's refusal was a breach of the operating agreements and her fiduciary duty under them was an issue of fact. Factual issues also existed concerning whether defendant had breached her duty of care to the first plaintiff by allegedly having helped falsify patient assessments, including artificially inflating scores; plaintiff alleged that had these been submitted to the DOH and audited, it could have exposed plaintiff to lawsuits and that plaintiff had had to pay for expert investigation and review. That claim also survived. Finally, defendant's motion for a temporary receiver was denied. Defendant had not shown any danger of irreparable loss. The court also noted that the motion's stated purpose was to afford defendant the ultimate relief she sought in the action and that it would be highly inappropriate to compel that result before trial. Willoughby Rehabilitation and Health Care Center, LLC v. Webster , Index No.12431/2004, 10/26/06 (Austin, J.).**

Insurance; larger settlement rule; relative exposure rule; allocation clause.

Plaintiffs, two affiliated law firms, had filed with defendant insurance company a claim for reimbursement for the total amount they had paid out under a settlement, plus the amount of all legal fees and expenses they had incurred in excess of $2 million, to resolve litigation that arose after 17 partners from a California law firm had defected to join plaintiffs' offices. Defendant had reimbursed plaintiffs for only 40% of the settlement amount and denied plaintiffs' demand for legal fees in its entirety, claiming that the remaining 60% of the settlement and all legal fees and expenses in excess of $2 million were allocable to uninsured parties, namely, the defecting partners from the California law firm. Plaintiffs moved for summary judgment on their sole cause of action for breach of contract. The court denied the motion. Although plaintiffs argued that the "larger settlement rule" precluded defendant, as a matter of law, from allocating a portion of the settlement, as well as all legal expenses in excess of $2 million, to uninsured losses, the court held that that rule, which has never been applied in New York, was inapplicable in this case. In any event, the court noted that the insurance policy at issue here contained an allocation clause, which expressly permitted defendant to allocate losses between insured and uninsured parties. Under that clause, plaintiffs and defendant were required to "use their best efforts to determine a fair and appropriate allocation of Loss between that portion of Loss that is covered under the Policy and that portion of Loss that is not covered under this Policy." In determining this fair and appropriate allocation, the policy directed the parties to "take into account the relative legal and financial exposures of, and relative benefits obtained in connection with the defense and/or settlement of the Claim by the Insured." Because determining the relative exposure and weighing the relative benefits of the settlement and the costs incurred was a fact-based analysis, the court held that it could not determine whether, as a matter of law, defendant had properly allocated 60% of the settlement and all of the legal fees in excess of $2 million to uninsured parties. Motion denied. Clifford Chance LLP v. Indian Harbor Insurance Co. , Index No. 602862/2005, 12/27/06 (Fried, J.).

Judgment and creditor; property of foreign government; Foreign Sovereign Immunities Act; commercial activity.

Motion by judgment creditor seeking to execute on a claim by the Republic of the Congo in Federal court. In this case, the Republic sought to recover damages alleged to have been sustained by it due to negligent performance of work by the defendant there on the Congo's embassy building. The court stated that, under the Foreign Sovereign Immunities Act (28 U.S.C. § 1610), a waiver of immunity from attachment and execution made by a foreign state subjects only the property of the state located in the U.S. and used for commercial activity to attachment and execution. What matters is how the property is used. The court further stated that the contract between the Republic and the Federal defendant had been a commercial activity. But, the court ruled, the Republic's claim was not property used for commercial activity; embassies and related facilities are sovereign and not deemed to be used for commercial activity. The claim here sought to restore the Republic's embassy and did not involve commercial activity. Motion denied. Brant Point, Ltd. v. Republic of Congo, Index No.4238/2004, 12/12/06 (Rudolph, J.).**

Judgments; judgment creditors. Partnerships; limited partnership; dissolution; charging orders; derivative claims; standing. UCC foreclosure; notice. Fraudulent transfer; DCL § 276. Receivership; winding up.

Plaintiffs were judgment creditors who sought to assert claims that their judgment debtors possessed in connection with the judgment debtors' interest in a limited partnership. In particular, the judgment creditors asserted that the limited and general partners had caused the partnership to transfer all of its assets to a new entity in which the judgment debtors had not been partners. Plaintiffs sought summary judgment on breach of fiduciary claims, seeking either a constructive trust or a declaration that the judgment debtors were members of the new partnership in their pro rata shares of the old partnership. The court denied the motion and dismissed the claims because a judgment creditor has only the rights of an assignee of a partnership interest, and under RLPA § 121-702(a)(2), an assignee cannot exercise the rights and powers of a partner; it only has the assignor's economic interest. Consequently, plaintiffs, as judgment creditors, lacked the power to bring a derivative action, such as plaintiffs' breach of fiduciary duty and breach of contract claims. Likewise, the court held, a judgment creditor of a partner has no right to seek satisfaction of its judgment against the individual assets of the partnership. However, the court declined to dismiss plaintiffs' claim for a charging order, holding that a judgment creditor is entitled to seek satisfaction of its judgment by obtaining a charging order against the debtors' partnership interests. The court so ruled notwithstanding defendant's assertion that it had "informally" and/or formally foreclosed on the judgment debtors' partnership interests prior to the dissolution of the partnership. The court found that any "informal" foreclosure was ineffective because neither the judgment debtors nor any other partnership creditors had been provided with notice. Any formal non-judicial foreclosure attempted was equally ineffective because of defendants' failure to send an authenticated notification of the disposition to the debtor and any person from which the secured party had received a claim of interest in the collateral. Defendants conceded that they had not sent any such notice and thus the court concluded there was, at a minimum, an issue of fact whether defendants had effectively foreclosed, which precluded summary judgment. The plaintiffs requested leave to add a claim that defendants' efforts to foreclose had been fraudulent transfers because they had been intended to hinder, delay, and prevent plaintiffs from collecting on their judgment. The court denied leave because plaintiffs had not alleged, as required by DCL § 276, that their debtors had participated in the challenged transactions. Finally, the court granted plaintiffs' motion to appoint a receiver to wind up the partnership and distribute any remaining assets, finding that the winding up of a dissolved limited partnership is not optional under RLPA § 121-801. The court refused to allow any of the interested parties to be appointed as the receiver, finding that, particularly when some members authorized and benefited from challenged transfers at the arguable expense of other members, an impartial non-party should be appointed instead. Darvesh Holdings, LLC v. Brightwater Towers Assocs., L.P., Index No. 601878/2004, 10/19/06 (Moskowitz, J.).

Procedure; amendment of complaint. Derivative action; limited liability company. Delaware law; waste; material misrepresentation; breach of fiduciary duty; direct versus derivative claims.

Plaintiff sought leave to amend its complaint to add individual and derivative claims in its capacity as a member of a limited liability company (the “LLC”) for waste, breach of fiduciary duty and material misrepresentation. The court noted that while leave to amend should be freely given, the movant must make some evidentiary showing that the proposed amendment has merit and a proposed amendment that is plainly lacking in merit will not be permitted. Applying that standard, the court denied plaintiff’s motion. In assessing the merits of the proposed amendment, the court applied Delaware law because the LLC was a Delaware entity. As to the claim for waste, the court held that plaintiff had standing as a member of the LLC and could serve as a fair and adequate representative of the LLC’s members even though it had its own individual disputes with the LLC that went beyond the interests of the class and made it particularly hostile to the LLC. The court noted that the “true measure of adequacy of representation” is “how well [plaintiff] advances the interests of the other similarly situated members,” and found that plaintiff had standing to allege derivative claims of waste, misrepresentation and breach of fiduciary duty. However, the court then held that plaintiff had failed to state a claim for, or provide the requisite evidentiary showing of, waste. Under Delaware law, a claim for waste is satisfied “only in rare and unconscionable cases where directors irrationally squander or give away corporate assets.” There must be a “complete failure of consideration received.” The court found that plaintiff failed to meet this “onerous standard” where waste was predicated upon defendant’s expenditure of money in commencing or prosecuting ongoing litigation against plaintiff or for the payment of fees for investigation into plaintiff’s conduct. As for the material misrepresentation claim, the court found that the proposed pleading failed to allege what action plaintiff had taken in “justifiable reliance upon a representation or an allegation that no reliance is necessary” because the misstatements affected a vote. Moreover, to the extent the misrepresentation claim was predicated on a failure to disclose detailed information concerning ongoing litigation expenses and strategy, the court indicated that it was aware of no precedent that imposed such an obligation on fiduciaries. As for the fiduciary duty claim, the court held that plaintiff failed to state a derivative claim for breach of fiduciary duty based on its allegations that the LLC had exposed itself to litigation by disregarding demands made upon it; devoting company resources to litigation; and indemnifying a member of the LLC. Finally, the court held that plaintiff was unable to assert a direct claim for waste or breach of fiduciary duty because it was unable to establish any injury to plaintiff independent of that alleged to have been suffered by the LLC. Where the alleged injury would be shared by all LLC members, only a derivative, not a direct action, could lie. Delta Financial Corp. v. Morrison, Index No. 011118/2003, 11/2/06 (Warshawsky, J.).**

Procedure; CPLR § 3213; instrument for payment of money only.

Action to recover on a promissory note was brought by motion for summary judgment in lieu of complaint. Defendant gave a promissory note to plaintiff, but failed to pay as provided therein. Defendant argued that the note was not an instrument for the payment of money only within the meaning of CPLR § 3213, but rather was conditioned and dependent on a promise by plaintiff to supply services in response to defendant’s “needs and requests.” Defendant further argued that plaintiff had failed to perform in accordance with the contract of sale and that disputes existed as to the amounts owed. The court held that the note qualified as an instrument for the payment of money only. The court further found that the note was a proper negotiable instrument under UCC § 3-104 as it contained an unequivocal and unconditional promise by defendants to pay plaintiffs for the services provided. The court pointed out that Rider A had not conditioned payment under the note on defendant’s performance, but rather had just set forth prices for which plaintiff would charge defendant if plaintiff had performed any work for defendant. The court ruled that defendant’s claims that payments had been made towards the debt were insufficient to defeat plaintiff’s motion or to raise any triable issues as plaintiff had shown that those payments had actually been made for other accounts on separate work projects. Plaintiff’s motion for summary judgment was granted. Defendant’s cross-motion for an order dismissing the complaint was denied. Peri Formwork Systems, Inc. v. Tadco Construction, Inc., Index No. 19034/2006, 12/15/06 (Kitzes, J.).**

Procedure; forum non conveniens (CPLR 327). Corporations; derivative claims.

Plaintiff, a 25% shareholder in a closely-held corporation, had sued the corporation's president and its chief financial officer ("CFO"), alleging breaches of fiduciary duty, unjust enrichment, and conversion. Defendants moved to dismiss the complaint and the court granted the motion conditionally. Defendants argued, first, that the case should be dismissed because it should have been brought as a shareholder derivative action. Because the closely-held corporation had been organized under the laws of Ohio, the court held that Ohio law controlled whether plaintiff had standing to sue. The court explained that, under Ohio law, a minority shareholder in a close corporation can sue the majority or controlling shareholders for breach of fiduciary duty as long as the injuries to the minority shareholder are "separate and distinct from the injuries sustained by the corporation." Although the corporation's president owned only 50% of the corporation's stock and thus was not a majority shareholder, the court found that defendant was a controlling shareholder given his sole authority over the company's day-to-day business operations. The court found that plaintiff's injuries also were sufficiently distinct under Ohio law to permit him to sue in his individual capacity. Turning to defendants' motion to dismiss the complaint on forum non conveniens grounds, the court held that Ohio had a greater interest in adjudicating the case than New York. The court explained that the only nexus between the case and New York was that plaintiff and one of the defendants resided there. By contrast, the corporation was an Ohio corporation and all of the transactions that had given rise to the action had taken place in Ohio. The court noted that personal jurisdiction could be obtained over the corporation's president in Ohio because he was an Ohio resident. The court stated that personal jurisdiction also could be obtained over the corporation's CFO because "he is regularly in Ohio in connection with his position." Regardless of whether those contacts would suffice for personal jurisdiction purposes, however, the court also held that, under CPLR 327(a), it could condition dismissal "on such terms as may be just." As a result, the court conditioned the dismissal of the action on the corporation's CFO consenting to personal jurisdiction in the courts of Ohio. Glaser v. Kratz, Index No. 1724/2006, 10/5/06 (Austin, J.).**

Procedure; motion to reargue; CPLR 2221. Preliminary injunction. Contracts; interpretation; parties' intent and rules of grammar.

Plaintiffs, various insurance companies, moved to reargue the court's prior decision preliminarily enjoining plaintiffs to provide certain claims and actuarial data to defendants for use in pricing "buy-out" contracts (contracts in which defendants assumed the assigned risk obligations of insurance carriers for a "buy-out" fee). The court granted plaintiffs leave to reargue but, upon reargument, affirmed its prior decision. Plaintiffs argued that the court had erred in concluding that defendants were likely to succeed on the merits of their claim because, according to the parties' agreement, defendants were not entitled to access and copy the claims and actuarial data at issue. While the court noted that strict grammatical rules, and, in particular, the rules governing proper usage of the terms "which" versus "that," could lead to the result advocated by plaintiffs, it held that "strict rules of grammar do not have the last word, when a grammatical construction of a contract is inconsistent with the parties' intent." The court explained that its "job [was] not to police the rules of grammar," but rather to interpret the agreement between the parties fairly and consistent with their intent. Thus, although plaintiffs' reading of the parties' agreement may have been grammatically correct, the court held that it "clashe[d] with other contextual clues of the parties' intent," as well as with the way business is done in the assigned risk industry. As a result, the court affirmed its prior decision, granting defendants a preliminary injunction. AIU Insurance Co. v. Robert Plan Corp., Index No. 603159/2005, 12/26/06 (Fried, J.).

Procedure; personal jurisdiction; CPLR § 302 (a) (1) and (3); business by interactive electronic and telephonic means; substantial client solicitation; unfair competition; tortious act outside state.

A jet charter company sued its answering service and a second charter company for misappropriation of client information, tortious interference with contract and other wrongs. Answering service defendant, based in Indiana, moved to dismiss claims as against it based on lack of personal jurisdiction. The court noted that CPLR § 302 (a) (1) permits a court to exercise personal jurisdiction over a non-domiciliary, even based upon a single act, as long as the party conducts purposeful activities within the state and the claim against it involves a transaction bearing

substantial relationship to the activities. Mere solicitation of business in New York does not establish the requisite contacts but, for example, businesses using means such as interactive websites to project themselves into New York to conduct business or substantially solicit clients have been found subject to long-arm jurisdiction. Here, answering service defendant had solicited clients nationally through its interactive website where prospective customers could directly post questions to its employees. This defendant had emailed to plaintiff a service agreement that had been executed in New York, had sent regular invoices to New York, and had collected monies paid from a New York account. Further, defendant had participated in countless telephone calls placed, sent and received to and from New York by its employees, New York residents trying to contact plaintiff, and by plaintiff itself, and although plaintiff's phone calls had been answered in Indiana, customers had called a New York phone number. Defendant was not only placing interstate phone calls, which may not be sufficient to transact business, but acting as plaintiff's agent for clients who would do business with plaintiff in New York. Defendant had also done business with other New York clients, including jet charter defendant. The circumstances as a whole made clear that defendant had transacted business within the meaning of CPLR § 302 (a) (1), the court found. Due process was also satisfied as defendant should have reasonably expected to defend actions in this State. Plaintiff's unfair competition claim also provided a basis for jurisdiction. The claim here was predicated on misapplication of trade secrets and other confidential data, circumstances in which courts have recognized a tortious act outside the state causing injury within it. Motion to dismiss for lack of personal jurisdiction denied. Blue Star Jets, LLC v. Revolution Air, Index No. 600877/2006, 10/4/06 (Freedman, J.).

Procedure; personal jurisdiction; forum selection clause; "service of suit clause."

Plaintiff, pointing to a jurisdiction provision in merger agreement with defendants, moved to enjoin them from proceeding with a California lawsuit. Defendants had brought the California suit claiming breach of contract for failure to make earn-out payments and before answering that complaint plaintiff had brought this suit, which also sought a declaration that defendants were not entitled to the earn-out payments. The merger agreement was clear that New York law was to govern, the court found, but the jurisdiction provision was not an unequivocal forum selection clause. Agreements lacking definitive words such as "shall" or "exclusive jurisdiction" have been held to indicate permissive or inclusive jurisdiction, the court stated. The SDNY considering a comparable provision had deemed it to mean that the parties consented to jurisdiction in State or Federal courts in New York City, but not that New York County was the exclusive jurisdiction. Plaintiff wrongly relied on a case where the provision "expressly waive[d] any privileges contrary to [the] provision." No similar language appeared in the merger agreement here. The jurisdiction provision was inclusive and permissive, the court held; it allowed process to be served in New York and the parties had agreed to submit to any action brought in New York. But it did not contain specific language of exclusion and hence was not grounds for the injunction plaintiff sought. The court added, though, that an action was pending here and this court clearly had jurisdiction, and noted that it was not deciding whether it would be more appropriate to continue this or the California action.
Investools Inc. v. Waltz, Index No. 6002876/2006,11/28/06 (Cahn, J.).

Procedure; preemption; Federal Communications Act; state consumer protection statutes. GBL § 349; injury; deception, federal regulation safe harbor; passive advertising defense. Executive Law § 63 (12); independent cause of action for Attorney General.

Defendant radio companies moved to dismiss the complaint, which asserted that defendants had engaged in deceptive and fraudulent business activities in violation of GBL § 349 and Exec. Law § 63 (12), on the grounds that the complaint failed to state a cause of action and that the claims were preempted by the Federal Communications Act ("FCA"). The complaint alleged that defendants had broadcast songs in exchange for undisclosed payments by promoters (a practice known as "pay for play" or "payola") and had also arranged for certain paid-for programming to be broadcast repeatedly late at night so that monitoring services that tracked song popularity would misleadingly report that the paid-for songs were highly requested. Defendants argued that any alleged misconduct concerning radio broadcasts was subject to Federal payola laws and that the New York Attorney General could not supplant the FCC as regulators of the airwaves. The court, however, found that while the Attorney General could not enforce the

FCA, Congress had not unambiguously manifested an intent to disallow state deceptive practice claims based on payola. The court further found that while a private claimant under GBL § 349 (h) was required to prove injury, because the Attorney General was authorized by § 349 (b) to bring an action against a party "about to engage" in prohibited acts, injury was not a required element of a claim under § 349 (b). As to the material deception requirement in GBL § 349, the court rejected defendants' argument that the Attorney General must establish that the payments affected consumer behavior; instead, noting that Section 349 was modeled after its Federal counterpart, the court relied on an FCC news release that lauded the Attorney General's actions and FTC consent decrees that characterized payola as inherently deceptive – because it misled consumers into believing songs were played because they were popular when in fact they were played for a fee – to find that the alleged acts met the materially deceptive threshold. Defendants next contended that the complaint should be dismissed because their on-air announcements of "sponsorship" of recordings were sufficient to meet federal disclosure requirements. The court disagreed. Because songs were electronically counted for ratings purposes, and there was no disclosure to those electronic counters that the songs were played for a fee, the allegations that the electronic counters were misled and the reports generated for consumers were thus misleading as a result of defendants' conduct were sufficient to withstand a motion to dismiss. Further, the court rejected defendants' contention that their conduct was protected by GBL § 349 (d), which provides immunity from liability if the conduct complies with Federal law regulating the area. Although defendants did make on-air sponsorship announcements when the paid-for programming was broadcast, such announcements only insulated the defendants from liability resulting from direct, traditional payola schemes. Defendants' conduct had also allegedly been designed to deceive the electronic counters that monitored song popularity, and defendants had taken no steps to distinguish for the electronic "popularity" counters that tracked the frequency at which songs had been broadcast which songs were requested and which had been played for pay. Therefore, the court found, the radio stations had not complied with the Federal provision requiring the announcement of "payola." The court also rejected defendants' claim that they were exempt from liability under GBL § 349 (e), which protects mere passive purveyors of deceptive advertising. Defendants argued that to the extent that any conduct had been deceptive, it was the record companies that had paid for the programming, not the radio companies, that sought to deceive consumers. However, the court found that the deception was not in the content of the advertisement, but in the failure to inform the "listener" that what was being broadcast (the paid-for music) was, in effect, an advertisement. Finally, the court held that Executive Law § 63 (12) gave the Attorney General an independent cause of action to enjoin or seek damages for fraudulent and/or illegal acts, regardless of whether a separate cause of action could be pled under GBL § 349. Motion to dismiss denied. Spitzer v. Entercom Communications Corp., Index No. 401002/2006, 10/12/06 (Gammerman, JHO).

Tortious interference with prospective economic advantage. Banking. Fiduciary duty. Unjust enrichment. Misrepresentation.

Law suits were commenced involving a bank, its former employee, and others. Here, plaintiff had worked for defendant mortgage bank screening and referring loan applicants on commission. Later, plaintiff had managed a branch office opened by the bank, and plaintiff and an individual defendant had formed a management company on behalf of which plaintiff also sued. The equally-owned company had leased the premises in which the branch was located, later assigning the lease to the bank for one dollar per year but continuing to pay the rent. Plaintiff's allegations included that he had spent $40,000 to open a Florida branch and train personnel there based on bank defendants' promises that they were preparing a public offering, of which he would get 5%, and that he had been fired in the context of the bank and his co-owner conspiring to take his clients. Defendants said that plaintiff had alienated bank staff and customers. Considering plaintiffs' claim of tortious interference with prospective economic advantage, the court noted that plaintiff was not a licensed mortgage broker entitled to contract to provide mortgage services. Plaintiff neither alleged that contracts had existed between himself or the management company and third parties, or that there had been proposed contracts. The claim was dismissed. Plaintiff alleged that the bank had had dominance over plaintiff and the management company and breached its fiduciary duty. The court noted that the bank's relationship with the management company was not well defined. The relationship between the bank and individual plaintiff arose in an oral agreement that plaintiff would screen and refer loan applicants. According to documentation, the relationship was one of employer-employee, or at most the individual plaintiff was the bank's independent contractor. Plaintiffs' allegations that they had had to give full access to the management company's records, including prospective customer lists, were merely consistent with these and with a conventional business

relationship characterized by arms' length bargaining. The claim was dismissed as against the bank defendants. On the other hand, plaintiff might have been owed a fiduciary duty by his co-owner since an equal shareholding relationship is akin to a partnership. The court noted that partners' fiduciary relationship terminates upon notice of dissolution. Plaintiff alleged that his co-owner had negotiated with the bank defendants for a franchise in competition with the company, conspired with another defendant to open a business in competition with the company, and wrongfully copied and used the company's materials and methods, and, further, plaintiff alleged that this behavior had begun before his termination. These sufficiently stated a cause of action against the co-owner. Plaintiff's claim of unjust enrichment was dismissed as to one defendant not alleged to have sought the services bestowing benefit. Bank defendants argued that an express oral agreement precluded a quasi-contract claim, but plaintiff did not contend that there had been either an oral or written agreement; hence, further discovery was needed and the claim remained as against them. Plaintiff's fraud claim alleged that the bank defendants had defrauded him of work and money in that they had never intended to make a public offering or give him stock. Defendants said that the claim arose out of a contractual relationship and could not be maintained absent allegation of a breach of duty apart from a contractual one. The court, however, found that absence of a contract claim necessarily prevented the fraud claim from being dismissed, and that since plaintiff alleged that the misrepresentations had continued into the present, further discovery was needed to see if it was time-barred. It remained for now. Other claims dismissed or withdrawn. Finally, the court ordered plaintiff to comply with discovery orders and promptly supply, among other things, the co-owned company's corporate kit and documentation as to every mortgage commission claimed, or be precluded at trial from offering evidence of same. Gurevich v. Gelt Funding Corp., Index No. 28610/2005,10/25/06 (Demarest, J.).**

UCC; Art. 2A; finance leases; warranties. Procedure; provisional remedies; CPLR 7102; seizure.

Plaintiff, a finance lessor, moved for summary judgment against defendants for breach of a finance lease contract for photo printer equipment and default under a related personal guaranty. Plaintiff additionally moved to dismiss defendants' affirmative defenses and for an order prohibiting the removal, transfer, concealment, disposition, sale, pledging, and/or assignment of the leased equipment and directing the sheriff in the appropriate county to seize the equipment. The equipment at issue had been provided to defendants by a vendor, who was a third-party defendant in this action. Granting plaintiff's motion for summary judgment, the court held that UCC 2A-103(g) insulated a financial lessor from the warranties made by the vendor where, as here, defendants had selected the equipment and vendor, paid the vendor a down payment, and entered into a lease with plaintiff merely to finance the transaction. The court found that plaintiff had established entitlement to judgment by submitting the lease and proof of default. Even if the equipment were defective, as defendants contended, the finance lease expressly disclaimed any express or implied warranty, and plaintiff had the right to enforce the lease regardless of defendants' disputes with the supplier of the equipment concerning the supplier's separate warranty. As for the lease's disclaimer of warranty, the court agreed with defendants that the disclaimer was not conspicuous, as would ordinarily be required by UCC 2-316. However, because the action involved a finance lease, those requirements were superseded by UCC 2-A-214, pursuant to which no bold typeface or capital letters were required to exclude implied warranties so long as the lease stated that the equipment was being accepted "as is." The court granted plaintiff's motion to dismiss defendants' affirmative defense that plaintiff was barred from recovery because the vendor had defaulted under its contract with defendants by providing defective equipment; plaintiff had made no representations or warranties to defendants regarding the equipment and the finance lease was independent of the agreement between the vendor and the lessee. Finally, the court found that the lease gave plaintiff the right to repossess the equipment in the event of a default, and thus held that plaintiff was entitled to an order prohibiting the removal, sale or assignment of the equipment and an order directing the sheriff to seize the equipment. Direct Capital Corp. v. New ABI Inc., Index No. 5675/2006, 10/4/06 (Demarest, J.). **

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