THE COMMERCIAL DIVISION LAW REPORT

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

Hon. Jonathan Lippman
Chief Judge of the State of New York

Hon. Ann Pfau
Chief Administrative Judge of the State of New York

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Arbitration; arbitrator qualifications; disqualification; "disinterested" arbitrators; arbitration agreement; interpretation. Procedure; petition to stay arbitration; CPLR 7503(b); declaratory relief. Plaintiff leased a building from defendant. When negotiations over renewal of the lease failed, defendant demanded arbitration in accordance with the terms of the parties' lease. The arbitration clause in the lease authorized plaintiff and defendant each to appoint a "disinterested person of recognized competence in the field" to serve as an arbitrator. The two arbitrators chosen by the parties then would appoint a third arbitrator, also required to be a "disinterested person of recognized competence in such field." Defendant notified plaintiff that it had selected as its arbitrator the appraiser who had been involved in negotiating the renewal of the lease on defendant's behalf. Plaintiff thereafter commenced the instant action for a declaratory judgment, seeking, among other things, an order disqualifying defendant's arbitrator on the ground that he was not a "disinterested person." Defendant moved to dismiss the complaint. As an initial matter, defendant argued that instead of commencing a declaratory judgment action, plaintiff should have instituted a special proceeding pursuant to CPLR § 7503(b). Although the court agreed that the proper procedure was for plaintiff to commence a special proceeding, it held that it could disregard this defect as long as a substantial right of a party is not prejudiced. Accordingly, the court converted plaintiff's action for a declaratory judgment into a petition for a stay of arbitration. The court next granted plaintiff's request for an order disqualifying defendant's arbitrator. The court explained that the involvement of defendant's arbitrator in the parties' renewal negotiations went far beyond the kind of "casual and occasional dealings which might be expected where arbitrators are chosen because of familiarity with an industry." Plaintiff additionally asked the court to enter an order declaring that the third arbitrator must be an attorney with competence in the field of real estate law. The court rejected this request. It explained that the lease made no reference to legal training or experience as a qualification or condition of appointment for the third arbitrator. Rather, the lease clearly and unambiguously stated that each of the three arbitrators merely needed to be a "person of recognized competence in the field involved," which, in this case, meant that each of the arbitrators had to have recognized competence in the determination of the fair market value of rent for commercial real estate in midtown Manhattan. Swiss Center, Inc. v. 608 Company, LLC, Index No. 651999/2010, 4/04/11 (Kapnick, J.).

Arbitration; motion to compel; CPLR 7503(a); waiver. Procedure; motion to dismiss; CPLR 3211(a)(5); arbitration and award. Defendant agreed to provide financial advisory and investment banking services to plaintiff in connection with a corporate acquisition. The agreement provided that plaintiff would pay defendant a $50,000 retainer plus 1.5% of the aggregate value of the consummated transaction. Plaintiff paid defendant the retainer but failed to pay the 1.5% commission. Defendant subsequently commenced an arbitration proceeding against plaintiff. But when defendant was unable to produce a fully executed copy of the parties' arbitration agreement, the arbitration tribunal stated that it would hear the case only if plaintiff voluntarily submitted to its jurisdiction. Plaintiff refused and sued to recover the $50,000 retainer. Defendant moved to dismiss, or, in the alternative, to compel arbitration. Defendant asserted that it was entitled to dismissal pursuant to CPLR 3211(a)(5) because the parties had agreed to arbitrate their dispute. The court denied this portion of defendant's motion. The court explained that CPLR 3211(a)(5), which provides for dismissal on the ground of an "arbitration and award," applies only when the dispute has already gone to arbitration and an award has been made. The court held that the proper remedy was an order compelling arbitration pursuant to CPLR 7503(a) and rejected plaintiff's assertion that defendant had waived its right to compel arbitration. First, the court found that defendant had not waived its right to arbitrate by previously threatening to commence an action in state court. Additionally, it found that defendant's participation in the instant action was insufficient to waive its right to arbitrate, particularly since defendant promptly moved for dismissal and to compel arbitration and neither sought nor engaged in any discovery. The court stayed the action and directed the parties to proceed to arbitration. TII Network Technologies, Inc. v. Newoak Capital Markets LLC, Index No. 45255/2010, 5/31/11 (Emerson, J.).**

Contract; Conditions Precedent; Failure to Perform; Estoppel; Waiver; Breach. Plaintiffs, two individuals and their realty company, brought an action against defendant bank for breach of a commitment to provide a building construction loan. Plaintiffs' mortgage brokers had approached defendant regarding construction financing for the applicable premises. Pursuant to the initial documents, the bottom floors were to be used as a day care center. Plaintiffs allegedly retained an architect who confirmed that this use was permitted without changing the zoning or permits. Following the approval of plaintiffs' loan application, defendant issued a Commitment Letter ("Letter") to lend plaintiffs $9,975,000. The Letter stated that defendant's commitment would expire if the loan did not close by a certain date and that the funds were contingent upon, among other things, plaintiffs' compliance with 27 items of due diligence. The Letter also contained a provision that gave defendant sole discretion to approve or disapprove the loan and set forth that all waivers by defendant must be in writing. A closing was scheduled for a date approximately ten days before the closing deadline. The appraiser retained

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by defendant informed defendant that it had the information wished for the appraisal to be conducted by the end of the following week. Defendant instructed the appraiser to hold the appraisal until it received the architectural plans showing the day care as a permissible use. The parties were still negotiating options to remedy the situation when the closing date passed and the deadline set by the Letter expired. Plaintiffs claimed they had been ready to close for weeks and that defendant purposefully failed to obtain the appraisal because it no longer wished to make the loan. Plaintiffs further contended that defendant's direction to postpone the appraisal was a material breach of the loan agreement. Defendant argued that plaintiffs failed to comply with the due diligence items required, including delivery of the approved, revised plans showing permissible use as a day care center, and that adverse change in the real estate market permitted the Bank to terminate the Letter. Plaintiffs asserted causes of action for specific performance and recovery of sums paid by plaintiffs. Defendant moved for summary judgment dismissing plaintiffs' complaint. In holding that issues of fact existed preventing summary judgment, the court first analyzed the Letter between the parties, which gave defendant the right to demand additional information and the sole discretion to accept, approve or disapprove plaintiffs' due diligence. The court noted that the Letter was unilaterally drafted by defendant, making it a contract of adhesion to be construed against the drafter. Although the Letter appeared to give defendant the right to make any demand on the plaintiffs, the court pointed out that under the covenant of good faith and fair dealing in all contracts, defendant was prohibited from acting arbitrarily or irrationally in exercising that discretion. Accordingly, defendant was not permitted to use its discretion to interfere with plaintiffs' rights under the Letter by imposing new requirements, such as an approved plan for a day care center. While defendant also argued that the Letter expired by its own terms, the court pointed out that time was not of the essence in the Letter and that the closing date passed due to defendant's own inaction. The court stated that the failure to perform an act that must be performed to allow another party to complete its performance within a time limit amounted to a waiver of such time limitations. Therefore, it held that defendant's failure to obtain the necessary appraisal prior to the expiration date raised a question of fact as to whether it waived the deadline. Moreover, defendant's continued processing of the documentation presented by plaintiffs after the expiration date and its own failure to complete due diligence equitably estopped defendant from enforcing the time restriction. Since the Letter did not explicitly require that changes to the closing date be stated in writing, the time for performance could have been extended orally or by conduct, thus creating an issue of fact. Because plaintiffs' outstanding due diligence would only have become due at or around the time of the closing and plaintiffs had established substantial performance of their due diligence, the court excused plaintiffs' failure to complete these tasks and rejected defendants' argument. Finally, the court agreed with plaintiffs' contention that they were excused from compliance due to defendant's failure to set a closing date, since a party who has repudiated and terminated an agreement without justification relieves another party to a contract from satisfying the conditions that might otherwise be required of it. The court therefore concluded that the interpretation of the provisions of the Letter and the parties' performance raised issues of fact warranting a denial of summary judgment. 55 Eckford Realty LLC v. The Bank of East Asia (U.S.A.) N.A., Index No. 31923/2008, 5/20/11 (Demarest, J.). **

Contract; partnership agreement; breach. Trade secret. Unfair competition. Contract; notice provision; non-compete provision; confidentiality provision. Fiduciary duty. Solicitation of employees. Fraudulent inducement. Preliminary injunction; wrongful injunction. Plaintiff alleged that the corporate defendant had schemed to produce a mass defection of its senior personnel in Kentucky and London, to coerce plaintiff into giving over its entire institutional fixed income business. According to plaintiff, defendant lured away four "Global Partners" who led its Kentucky worldwide fixed income group, and nine investing professionals, including experts in plaintiff's unique software. In a prior action, a Federal court in Kentucky had enjoined the Global Partners from leaving plaintiff for four months after resigning. In the instant case, the court had granted a preliminary injunction enjoining defendant from using plaintiff's trade secrets and soliciting certain employees; subsequently, the court granted a preliminary injunction barring defendant from using trade secrets related to plaintiff's software, which was unanimously affirmed on appeal. Here, the court considered cross applications for summary judgment. The Global Partner defendants moved to dismiss claims against them for breaching the notice, non-solicitation, and confidentiality provisions of their contracts and for breach of fiduciary duty. The defendants argued that their agreements were unenforceable because plaintiff made misrepresentations that fraudulently induced them to sign, and because plaintiff eschewed its own obligations by removing the defendants from their contractual duties after they gave notice and putting them on administrative leave. The defendants also argued that their alleged breaches merely were reasonable preparations to compete with plaintiff, that there was no evidence they had exceeded their privilege to prepare, that they were not prohibited from competing after leaving, and that there was no evidence they had disclosed confidential information. Plaintiff argued that the defendants had been performing important business activities for corporate defendant well before leaving and violated their fiduciary duties by impermissibly soliciting plaintiff's employees and clients. Plaintiff pointed to testimony by a senior executive of corporate defendant that he had gotten names of a "second wave" of plaintiff's employees from the Global Partner defendants. Plaintiff also pointed to an email a Global Partner defendant sent corporate defendant promising to provide information in the public domain and stating that the author "would appreciate more detailed discussions face to face." The email further stated that this was "far less information than we discussed" but useful for dialog. Plaintiff contended that the email contained information not publicly available and that the author later provided highly confidential information. The court declined to dismiss the breach of contract claims, finding triable issues of fact, and, consequently, also declined to dismiss claims against corporate defendant for tortious interference and aiding and abetting breaches of fiduciary duty. The court did dismiss a claim of breach of fiduciary duty against individual defendants who, unlike the Global Partners, were neither corporate officers, directors, nor partners; plaintiff failed to allege any facts showing they exercised superiority and influence. An unfair competition claim against all defendants survived, plaintiff arguing that there were issues of fact, demonstrated by the facts underlying the granting of the preliminary injunction. The court turned to plaintiff's motion to dismiss the Global Partners defendants' counterclaims. The first, for breach of contract, was based on the defendants' removal to administrative leave. Plaintiff argued that the defendants continued to receive salaries and bonuses and received large signing bonuses from corporate defendant and thus suffered no damages. The defendants contended that their removal before the year's end resulted in their missing the year-end bonus that formed most of their compensation. The court found it would be premature to dismiss that counterclaim. As to the fraudulent inducement counterclaim, plaintiff said the Global Partner defendants failed to prove that they were injured by or reasonably relied on statements, or "puffery," by their manager and plaintiff's president. The defendants contended that the manager misrepresented that the new agreements dealt with a "troubling" non-compete provision found in the earlier agreements. But the defendants argued that no amount of business acumen could have let them foresee the use of a notice provision as a non-compete provision. The court found that whether material misrepresentations were made and reasonably relied on involved issues of fact. In another counterclaim, the defendants argued that the injunction in the Kentucky Federal action was wrongfully obtained, among other things, because there was no bond or undertaking and it violated the Federal Norris-Laguardia Act. In their memorandum of law the defendants further claimed that plaintiffs had used injunction motions in different court systems to harass them and terrorize fellow employees, but did not include these allegations in their Answers and Counterclaims. Moreover, the court stated, the Kentucky order was never appealed and the case dismissed for lack of jurisdiction. Thus, there was no basis for the court or jury to determine that the Kentucky injunction was wrongful. That counterclaim was dismissed. Invesco Institutional (N.A.), Inc. v. Deutsche Investment Management Americas, Inc., Index 650154/2007, 4/12/11 (Kapnick, J.).

Conversion; damages; proof of property's market value. Jewelry consignment; all risk memorandum-randum; jewelry's actual value; consignee's liability for loss or damages. In a dispute between two diamond merchants, defendant asserted counterclaims for conversion and breach of contract in relation to a necklace it had consigned to plaintiff. Defendant contended that the two parties' principals had agreed to a price for the necklace; plaintiff denied this. But it was not disputed that plaintiff received the necklace with an "all risk memorandum" stating that its price was $225,000, that plaintiff would be "legally liable to [that amount]... for any loss or damages," and that plaintiff's acceptance of the necklace constituted agreement to the memorandum's terms. Subsequently defendant asked for its necklace back several times, but plaintiff indicated that it would keep the item until defendant paid an overdue balance on diamonds previously purchased from plaintiff. Defendant sent plaintiff an invoice demanding $225,000 that listed defendant's balance of $165,000 for the diamonds and proposed that plaintiff credit itself that balance toward the necklace price. Instead, plaintiff had brought its claims and won a default judgment, which the court declined to vacate. Here, defendant moved for summary judgment on its counterclaims. The court noted that plaintiff had wrongfully exercised control over defendant's necklace once it refused to return it. Where a converted item has an ascertainable market value, damages for the item's conversion are its market value at the time and place of conversion, for which proof is required, plus interest. Defendant argued that the $225,000 set forth in the all risk memorandum was both the necklace's price and unobjected-to value at the time of its conversion. It relied on a case in which a consignor's default judgment for almost $35,000 was vacated when the court determined that the all risk memorandum unequivocally limited the defendant's liability to the lower amount the memorandum set forth for loss or damages. The court explained, however, that the issue in that case was whether damages for the item's loss must be fixed at the item's actual value or limited to the value in the all risk memorandum. Here, the necklace was not lost or damaged, and although the value set forth in the memorandum limited plaintiff's liability if it were, it did not constitute unequivocal proof of defendant's damages on a conversion claim. The court found that defendant did not contend that the necklace did not have an ascertainable market value, but did not submit sufficient evidence to show its value at the time of its conversion. Defendant also failed to demonstrate that it was entitled to summary judgment as to damages on its breach of contract counterclaim, pled in the alternative to conversion. The court directed the parties to appear for a hearing on damages concerning the necklace's market value at the time of the conversion. Tache USA Inc. v. T.S.T. International Ltd., Index No. 114886/2009, 5/23/11 (Ramos, J.).

CPLR 3211(a)(7); Assignability of Causes of Actions; Breach of Contract; Fraud; Negligence Misrepresentation; Professional Negligence; GBL § 239-c. Plaintiff funds, who were assignees of certain commercial loans, sued defendant appraisers for fraud, negligent misrepresentation, professional negligence, breach of contract and breach of GBL § 239-c arising from defendants' appraisal of collateral for the loans. Between December 2006 and December 2007, nonparty lender agreed to make certain commercial loans to two nonparty borrowers. As a condition of making the loans, lender required that borrowers pledge collateral with an aggregate appraised value that met certain minimum requirements. To satisfy the appraisal requirement, the parties agreed to use defendant appraisal company and its principal because of their purported expertise in determining the market value of the pledge collateral, which consisted of collections of art, antiquities, and jewels. Defendants' appraisal valued the collateral "well in excess" of the requirement under the loan agreements. In late 2008 and early 2009, respectively, both borrowers defaulted on the loan and lender took possession of the collateral. A subsequent valuation of the collateral revealed that its value was "considerably lower" than the appraisals defendants had provided. Thereafter, lender assigned all of its rights under and relating to the loan agreements and all related documents to plaintiff funds. In June 2010, plaintiff funds brought suit against the defendants, seeking over $60 million in damages. Defendants moved to dismiss the complaint for failure to state a cause of action. The court rejected the defendants' argument, which characterized plaintiffs' causes of action as arising outside of the loan documents and therefore not covered by the assignment. The court reasoned that the assignment assigned all rights under the loan agreements and all documents and instruments "related to" the loan agreements, which encompassed the appraisals of the collateral. Defendants next argued that, because the lender was paid the full value of the loans at the time of the assignment, it had no damages and therefore no causes of action to assign to plaintiffs. Rejecting this argument, the court held that the causes of action could be assigned to plaintiffs because at the time of the assignment the loans were undisputedly outstanding and unpaid. The court next examined each of the causes of action. With regard to fraud, the court held that the complaint properly alleged that defendants made a material misrepresentation, i.e., the appraisals; that defendants knew or should have known of the falsity of the appraisals and intended to use them to deceive the lender; that defendants knew that the lender would rely on the appraisals; that the lender and plaintiffs reasonably relied on the appraisals to fund/participate in the loans; and that plaintiffs as assignees of the lender suffered significant damages. The court rejected defendants' argument that the alleged misrepresentations were made to the lender and not the plaintiffs, holding that an assignee steps into the shoes of the assignor, and therefore, the plaintiffs could sue on the misrepresentations made to the lender. The court also held that the appraisals contained facts and thus were not non-actionable opinion letters. Because the defendants knew that the appraisals were a condition of funding the loans, the court also found unpersuasive defendants' argument that plaintiffs could not rely on the appraisals because they had not paid for them. The court distinguished other cases where experienced parties entered into arm's-length negotiations, finding that the lender (and by extension, the plaintiffs) did not have the necessary expertise to evaluate the collateral, and had obtained the appraisals as part of their due diligence. With regard to negligent misrepresentation, the court found that, although there was no direct contractual relationship between the lender/plaintiffs and defendants, the loan agreement stated that the defendants were jointly chosen by the parties and required delivery of the appraisal to the lender. Therefore, the relationship was so close as to approach that of privity. The court declined to dismiss the professional negligence cause of action, allowing it as an alternative legal theory and finding actual privity of relationship necessary to sustain such claim. On the breach of contract cause of action, the court found that plaintiffs had sufficiently pled a breach even absent the actual terms of the contract because in the pre-discovery stage of the litigation it was the defendants and not the plaintiffs who presumably possessed copies of the contracts. Finally, the court sustained the cause of action for breach of GBL § 239-a, which provides for civil liabilities of appraisers of certain items, finding that the statute's legislative history belied defendants' argument that the statute only protects an entity who directly receives the appraisals. <u>Stewardship Credit Arbitrage Fund LLC v. Charles Zucker Culture Pearl Corp.</u>, Index No. 600634/10, 5/4/11 (Fried, J.).

CPLR 3212; "Claims Made" Insurance Policies. Plaintiff insurer denied coverage to defendant architectural firm in connection with a nursing home project and initiated an action for declaratory judgment. The defendant firm initiated a third-party action against another insurer, seeking insurance coverage from either of the two insurers. All parties moved for summary judgment. Based on the undisputed facts established through documentary evidence, the court found that plaintiff insurer was liable to defendant/third-party plaintiff firm, and that third-party defendant insurer bore no liability. Defendant firm held several "claims made" insurance policies with plaintiff insurer and third-party defendant insurer. The policies had consecutive coverage periods, during which all reported claims would be covered. This type of insurance policy existed in contrast to an "occurrence" policy, where claims based on events occurring during the coverage period are covered, even if reported outside of the coverage period. At issue was whether defendant firm's notice to plaintiff insurer of potential claims against the firm by certain sureties in connection with the nursing home project was timely. Reasoning that notice requirements were to be liberally construed in favor of the insured, and that merely substantial, rather than strict, compliance is required, the court found that the notice was sufficient to trigger coverage. Plaintiff insurer argued that defendant firm's correspondence to the insurer mentioning problems with the nursing home project and anticipating unspecified claims was insufficient to constitute adequate notice. The court disagreed, holding that the correspondence established that defendant firm reasonably expected litigation by the sureties to ensue, and it properly informed the plaintiff insurer. With respect to the third-party defendant insurer, the court found that this insurer was not liable because the claim was barred by the exclusion provision in the policy that required any such claims to be disclosed in the application for the policy (and its annual extensions). Because defendant firm twice failed to disclose the existence of the claim on its applications, the court found that the claim was excluded. Defendant firm argued that third-party defendant insurer was estopped from denying coverage because it delayed in issuing a reservation of rights letter. The court rejected this argument, finding that the insurer had promptly reserved its rights to deny coverage, and that there was no detrimental reliance by defendant firm on any undertaking by the third-party defendant to cover the claim. <u>Liberty Insurance Underwriters, Inc. v. Perkins Eastman Architects, P.C.</u>, Index No. 113946/2006, 5/3/10 (Fried, J.).

Disclosure; motion to compel; attorney-client privilege; work product doctrine. Choice of law; privilege questions; center of gravity test; grouping of contacts test. Insurance; cooperation clauses. Plaintiffs sued defendants, all excess insurers, claiming that they wrongfully failed to indemnify plaintiffs for monies paid to defend and settle claims in an Illinois litigation that was brought against plaintiffs' predecessors-in-interest. Defendants moved to compel plaintiffs to produce all files relating to the defense of the Illinois litigation, including documents in the possession of in-house and outside counsel. Plaintiffs had withheld the files from production based on the attorney-client privilege and the work product doctrine. Defendants argued that Illinois law governed the dispute and that under Illinois law, they were entitled to production of the files because of the cooperation clause contained in the relevant insurance policies and because the insured and insurer had a common interest in defending the Illinois action. The court rejected these arguments, holding that New York law governed the question whether the documents at issue were protected by the attorney-client privilege. The court explained that New York law controls questions of privilege in cases where discovery is taking place in New York for the purposes of preparing for trial in New York. Moreover, even under a center of gravity or a grouping of contacts analysis, the court held that New York law still would apply because the jurisdiction in which the allegedly privileged communications were made is of "paramount importance," and the majority of the communications being sought involved lawyers who were situated in New York. After concluding that New York law applied, the court then held that the documents at issue were protected by the attorney-client privilege. The court explained that under New York law the existence of a cooperation clause does not entitle an insurer to learn any and all legal advice that the insured may have obtained. Additionally, the court held that there was no automatic waiver of the attorney-client privilege merely because plaintiffs and defendants may have had a common interest in the Illinois litigation. <u>JP Morgan Chase v. Indian Harbor Insurance</u>, Index No. 603766/2008, 5/26/11 (Kapnick, J.).

Indenture contract; indenture trustee; breach of indenture agreement; indemnification; attorneys' fees. Defendant bank agreed to serve as the indenture trustee for the issuer of $425,000,000 in notes that were secured by collateralized debt obligations. The holders of the notes were third-party beneficiaries of the indenture agreement. After the business relationship between the issuer and various holders of the notes broke down, plaintiff note holder filed a complaint against the issuer alleging breach of contract, fraud, and breach of fiduciary duty, among other claims. Plaintiff subsequently amended its complaint to name the indenture trustee as a defendant. Plaintiff alleged that the indenture trustee had breached the indenture agreement by transferring more than $1.4 million in interest proceeds from the note issuance to a separate account and then refusing to disburse any of those funds. Defendant indenture trustee moved for summary judgment dismissing plaintiff's breach of contract claim. The indenture trustee also asked the court to grant summary judgment on its counterclaim, in which it demanded indemnification for the legal fees incurred in connection with the instant action. The court denied the indenture trustee's motion in its entirety. First, the court held that there were material issues of fact that precluded a finding as a matter of law that the indenture trustee had not breached the indenture agreement. The court explained that according to the terms of the indenture agreement, the indenture trustee could not be held liable for any action that it took "in good faith that it reasonably and prudently believe[d] to be authorized or within its rights or powers" under the indenture agreement. The court held that there were material questions of fact regarding whether the indenture trustee reasonably believed that its actions were authorized by the indenture agreement. Second, although the court found that the indenture trustee was entitled to indemnification from the issuer under the terms of the indenture agreement, the court could not order the issuer to indemnify the indenture trustee because the instant action previously had been discontinued as against the issuer. Moreover, the court held that the indenture trustee could not seek indemnification directly from the funds held in the separate account. <u>Harch International Limited v. Harch Capital Management</u>, Index No. 601312/2005, 3/16/11 (Bransten, J.).

Judgments; enforcement of foreign judgments; full-faith-and-credit doctrine. Procedure; personal jurisdiction; forum selection clauses. Plaintiff, a Texas corporation, obtained a default judgment in Texas against defendant, a New York resident and the president of a New York corporation that had purchased doors from plaintiff pursuant to a sales credit agreement. Based on the Texas default judgment, plaintiff moved for summary judgment in lieu of complaint. The court granted the motion. The court explained that the full-faith-and-credit doctrine requires recognition of a foreign judgment upon proof of the prior out-of-state litigation, and that a New York court can review judgments of sister states only to determine whether the out-of-state court possessed personal jurisdiction over the defendant. Although defendant argued that the Texas court did not have personal jurisdiction over him and that the Texas judgment was, therefore, not enforceable in New York, the court rejected this argument, finding that defendant had consented to personal jurisdiction in Texas by signing a personal guarantee in which he agreed to submit to the jurisdiction of Texas courts. The court explained that a forum selection clause is prima facie valid and should not be set aside absent a strong showing that it is "unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or that a trial in the selected forum would be so gravely difficult that the opposing party would, for all practical purposes, be deprived of his day in court." The court found that defendant failed to make such a showing. Defendant argued, first, that the forum selection clause should be set aside on the ground that his personal guarantee was procured through coercion or economic duress because plaintiff allegedly threatened to withhold the delivery of future orders unless defendant guaranteed payment. The court explained, however, that a threat by one party to breach a contract by not delivering required items does not constitute economic duress. Rather, defendant was required to show that he could not obtain the goods from another source and that the ordinary remedy of an action for breach of contract would not be adequate. Defendant made no such showing. Defendant also argued that his personal guarantee was void due to an absence of consideration. The court also rejected this argument, finding that as consideration for defendant's guarantee, plaintiff continued to extend credit to defendant's company and to supply it with doors. For these reasons, the court held that defendant failed to establish that the forum selection clause was invalid. Additionally, the court held that defendant failed to establish that enforcement of the forum selection clause would be unreasonable, unjust, or contrary to public policy. Lastly, the court held that the defendant was properly served with process in the Texas action pursuant to Texas procedure. As such, defendant received adequate notice of the Texas lawsuit and the Texas court ultimately obtained personal jurisdiction over him. Steves & Sons, Inc. v. Pottish, Index No. 39918/2010, 5/11/11 (Emerson, J.).**

Liquidated damages provision; enforceable or not; stipulated loss value. Contract; equipment lease; aircraft. An airline restructured through Chapter 11, of which defendant was parent corporation, leased an aircraft; defendant served as guarantor on the lease. After the airline filed for bankruptcy again, it surrendered the aircraft to plaintiff, which sold it for $9,500,000. The court granted plaintiff summary judgment on its suit to enforce the guarantee. It turned to the lease's liquidated damages provision and explained that if the amount fixed in such a provision is plainly or grossly disproportionate to the probable loss, it is a penalty and will not be enforced. Here, the relevant clause used a stipulated loss value (SLV), a liquidated damages provision common in aircraft leases that sets the amount for which a lessee must insure an aircraft and which is also used to calculate damages after a default. The SLV in this instance was defined as "equal to 110% of the "Current Market Value" of the aircraft but in no event less than $35,000,000"(emphasis added) and hence remained static over the lease term. Static SLVs are inherently unreasonable, the court said, and New York courts do not enforce them. Plaintiff cited case law that upheld liquidated damages provisions where the formulas factored in anticipated depreciation and lease payments and avoided static SLVs. The court discussed a case in which the liquidated damages provision was held unreasonable because it unfairly shifted the risk of the aircraft's market depreciation to the lessee, and was not intended to provide fair compensation but to secure performance by compulsion. A similar situation existed here. The court found that if the breach here had occurred during the last month of the lease, plaintiff's damages would be the difference between the proceeds of a sale and the $35,000,000 static SLV; plugging in the aircraft's estimated value of $10,000,000 at the end of the lease, plaintiff's hypothetical liquidated damages for the default would be a windfall of over $24,000,000. Plaintiff argued that the parties had entered willingly into the lease, were sophisticated, and represented by capable counsel. But contracts void as against public policy are unenforceable no matter how freely entered into, the court said. It stated that the actual damages had to be calculated according to statute, and explained that UCC § 2A-528 applies to leases where the lessor repossessed and sold the equipment. Parties were directed to conclude discovery and proceed to a damages trial to ascertain any monetary values to be applied under the statutory formula that remained in dispute. Wilmington Trust Co. v. Global Aero Logistics, Inc, Index No. 600401/2009, 4/11/11 (Ramos, J.).

Location of Real Property; Venue; CPLR §§ 502, 503, 510(3). Three defendants moved to change venue from New York County to Kings County on the g round that the action would affect title to or the possession, use or enjoyment of real property located in Kings County. In fact, the properties at issue were located in Kings, Queens, and Nassau counties, and plaintiff argued that since its principal office was located in New York County and its claims were of a transitory nature, the action should be prosecuted in New York

County. Plaintiff further argued that the moving defendants waived their defense of improper venue by availing themselves of the benefits of the court, since the motions to change venue were brought after significant motion practice already had occurred in the case. The court found that because the majority of claims asserted by plaintiff in its complaint were transitory in nature, plaintiff's designation of New York County as the venue of this action was appropriate based on the corporate residence provisions of CPLR §503. However, the court also noted that because four of the 17 causes of action in the complaint were local in nature in that they "affected" title to real property, then venue also would have been proper in any of those counties where the real property in question was located. Given this conflict over venue, CPLR §502 authorized the court to determine the most appropriate venue by taking into consideration a number of discretionary factors, including the convenience of witnesses and the ends of justice set forth in CPLR §510 (3). Plaintiff argued that New York County was the most convenient venue since multiple parties and witnesses resided in New York County while no parties resided in Kings County. The moving defendants failed to make any argument regarding this question. In choosing to maintain venue in New York County, the court held that plaintiff undoubtedly would suffer prejudice by a transfer of venue, since significant litigation activity had already taken place in New York County and therefore the moving defendants had forfeited their right to obtain change of venue "as of right." The court also rejected the defendants' argument that service of an amended complaint automatically revived defendants' right to invoke the demand procedure of CPLR 511. DLJ Mortgage Capital, Inc. v. Kontogiannis, Index No. 104675/2010, 5/5/11 (Ramos, J.).

Motion to sever; CPLR 603. Plaintiff, the owner of a building in New York City, hired defendant to procure insurance coverage for a renovation of the building. During renovations, the building collapsed. Plaintiff subsequently filed an insurance claim, and the claim was denied because of alleged misstatements made by defendant on the policy application. Plaintiff sued defendant and others for negligence and/or breach of contract. In a prior decision, the court granted plaintiff summary judgment as to liability on its negligence claim against defendant. Thereafter, plaintiff moved, pursuant to CPLR 603, to sever the issue of damages on its negligence claim against defendant and allow it to proceed to trial for a determination of that issue. Plaintiff argued that requiring it to wait until the outcome of all pending claims, counterclaims and cross-claims in order to recoup its damages as against defendant would be burdensome and that severing its damages claim against defendant could potentially dispose of the entire case if the damages collected were sufficient to cover plaintiff's alleged losses. The court denied the motion. Though CPLR 603 provides trial courts with discretion to sever claims or issues from others within a case in furtherance of convenience or to avoid prejudice, the court held that severance here would accomplish neither. Although plaintiff might recover sufficient damages from defendant to end plaintiff's involvement in the case, such an award would not dispose of the indemnification and contribution claims pending among the other remaining parties. As a result, severing plaintiff's damages claims would lead to "fragmented litigation where unified litigation is perfectly plausible." Additionally, the court held that it was disingenuous for plaintiff to argue that, upon the court finding one of seven defendants liable, it would be prejudiced because other aspects of the litigation would proceed to trial. Rather, where, as here, complex issues are intertwined, the court stated that it is preferable "to facilitate one complete and comprehensive hearing" to determine all issues and claims at the same time. East 115th St. Realty Corp. v. Focus & Struga Building Developers, LLC, Index No. 604164/2007, 5/31/11 (Bransten, J.).

New York Franchised Motor Vehicle Dealer Act; incentive programs; use of captive finance company; safe harbor. Plaintiffs, two franchised motor vehicle dealers, commenced this declaratory judgment action, seeking a declaration that defendant, a franchisor, had violated the New York Franchised Motor Vehicle Dealer Act (the "Dealer Act"). More specifically, plaintiffs alleged that two of defendant's dealer incentive programs, both of which provided certain pricing benefits based on the percentage of returning off-lease vehicles that they purchased, violated the Dealer Act by allegedly treating new franchise dealers more favorably than existing ones. Plaintiffs and defendant each cross-moved for summary judgment. The court granted plaintiffs' motion and denied defendant's cross-motion. With respect to the first incentive program, defendant argued that it did not violate the Dealer Act, which prohibits discriminatory pricing by franchisors, because the program was run by defendant's wholly-owned subsidiary, which is a captive finance company rather than a franchisor. The court rejected this argument, explaining that the statute specifically prohibits franchisors from using a subsidiary corporation, including a captive finance company, "to accomplish what would otherwise be unlawful conduct on the part of the franchisor." With respect to the second incentive program, defendant argued that it fell within the Dealer Act's "safe harbor" provision. The court rejected this argument as well, finding that the safe harbor applies only where pricing discounts are applied on a proportionate basis to all franchised dealers and that, in this case, the discounts offered to new franchise dealers were not proportionately similar to the discounts offered to existing dealers. Audi of Smithtown, Inc. v. Volkswagen Group of America Inc., Index No. 12372/2008, 5/26/11 (Pines, J.). **

Service of process; the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters; Israeli law. Plaintiff, a New York corporation, brought suit against defendants, an Israeli corporation and an individual residing in Israel. Plaintiff served defendants in Israel by personally serving them, in accordance with Israeli law, and also by mailing copies of the summons and complaint to defendants by registered mail. Following defendants' failure to file an answer or otherwise appear, plaintiff moved for entry of an order of default. Defendants cross-moved to dismiss the complaint, claiming that they were not properly served in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention") because plaintiff did not serve defendants through Israel's Central Authority. The court denied defendants' motion to dismiss. The court explained that service through the Central Authority is not mandatory under the Hague Convention. Rather, Article 19 of the Hague Convention permits service by any method permitted by the internal laws of the country in which service is being made. Additionally, Article 10 permits service by mail provided that the signatory nation does not object to such service. The court noted that Israel had not objected to paragraph (a) of Article 10, which provides that the Hague Convention "shall not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad." While recognizing that the First and Third Departments have interpreted this provision to authorize the mailing of documents other than service of process, the court explained that the Second Department reads Article 10(a) to allow the service of all documents, including service of process, through postal channels. Because plaintiff had personally served defendants in accordance with Israeli law and also sent defendants a copy of the summons and complaint by registered mail, the court held that plaintiff properly served defendants. Sbarro, Inc. v. Tukdan Holdings, Ltd., Index No. 13016/2010, 4/28/11 (Emerson, J.). **

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