The ***Commercial Division***

of The State of New York

THE LAW REPORT

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

VOL. 6, NO.3
JULY 2003

Accountants; fraud; scienter; negligence; near-privity relationship. Action against accountants arising out of auditing of financial statements of movie production company. On motion to dismiss, court held that allegations that defendant knew the company lacked internal controls and proper reporting, that defendant's report was based on such flimsy grounds that no proficient auditor in accordance with GAAS could have issued unqualified opinions or certified the financials and that defendant gave in to the company's request to present a positive report to preserve its fees sufficed to support reasonable inference of scienter. The court ruled further that allegations sufficed that the financials would be used to attract investors and that plaintiffs were actual and potential investors. As to some plaintiffs, they argued on a negligence claim that defendant knew that they, having invested before, would invest again, which created a near-privity relationship. The court held this insufficient. The court declined to find that White supported a holding of near-privity; rather, the case was like Parrot. DaPuzzo v. Reznick Fedder & Silverman, Index No. 602750/2002, 6/23/03 (Lowe, J.).

Arbitration; waiver by litigation. An agreement provided that any future disputes would be submitted to arbitration. Plaintiff commenced the action. Defendants did not raise the right to arbitration for 14 months; defendants made a motion and then served an answer with counterclaim, but did not raise the issue; and defendants participated in a discovery conference. The court held that defendants had waived the right to arbitrate. Pizzo v. Givens, Index No. 14626/2001, 6/03 (Stander, J.).

Attorney and client; disqualification; attorney as witness. At deposition of a defendant, plaintiff's counsel asked witness about conversation he had had with plaintiff's counsel eight years before regarding possible financing for company that then employed counsel. No agreement was ever reached. Defendants sought disqualification of counsel due to advocate-witness conflict. However, court found that there had been only a single conversation and it had led to no relationship. Court noted that defendants had previously argued that other transactions were irrelevant and the court had denied plaintiffs' motion to amend to add other transactions. The court found that defendants had not made showing that testimony of the attorney would be necessary. Motion denied. Robert Green Consulting, Inc. v. Thacher Vending & Co., Index No. 603273/2001, 6/24/03 (Ramos, J.)

Class actions; certification; typicality; plaintiff as adequate representative. Purported class action seeking to enjoin a proposed merger and for damages. Plaintiff alleged that the company to be merged had breached fiduciary duties to preferred shareholders by failing to ensure payment to them of a required liquidation preference in the merger. The court stayed the transaction. On a motion to certify a class, the court rejected defendants' argument that plaintiff did not satisfy the typicality requirement because he had engaged in purchases and sales of the preferred stock during the proposed merger. Defendants argued that plaintiff was a strawman for others who could not represent the class and was unwilling to take the views of other shareholders into account or to be sufficiently involved in the case. The court rejected these arguments as unfounded. The court also found that defendants had failed to demonstrate the financial commitment required of a class representative. Class certified. Kimeldorf v. First Union Real Estate Equity and Mortgage Investments, Index No. 107176/2002, 6/27/03 (Ramos, J.).

Contracts; liquidated damages; penalty. In contract action plaintiff sought liquidated damages because of failure to comply with mandated minority employment targets. The court held that the clause was clearly disproportionate to the harm suffered and thus not enforceable. Cause of action dismissed. City of Rochester v. E&L Piping, Inc. Index No. 12094/1999, 6/2/03 (Stander. J.).

Contracts; recording contracts; apportionment; rights to digital format; fiduciary duty; negligence; copyright. Procedure; statutes of limitations. Recording artists sought share of proceeds from Federal MP3 litigation. The court ruled that plaintiffs' contracts transferred ownership in recordings to defendants, who were entitled to exploit them in digital form since there had been no express reservation of rights. This result was not changed because the contracts were subject to union contracts or codes. Thus, plaintiffs' contract claims were defective. Absent a duty separate from the contract, no fiduciary relationship was established. The alleged breach occurred in the 1980's when digital CD's were released and there was no continuing breach. The court further ruled that there was no independent claim for breach of a duty of good faith and fair dealing. It was not alleged that defendants had interfered with plaintiffs' rights to obtain royalties. A claim that defendants had been negligent in allowing release of digital files that were subject to piracy failed since plaintiffs could not convert a contract claim into a negligence claim and any such claim would be time barred. A claim for equitable apportionment failed under the Copyright Act since Federal jurisdiction is exclusive. No such claim is supportable under state law, the court found, since apportionment only occurs in the tort context. Motion to dismiss granted. Silvester v. Time Warner, Inc., Index No. 602830/2002, 6/20/03 (Freedman, J.).

Corporations; BCL Art. 16 and 505(d); stock purchase; inspection of corporate books and records. Respondent had joined the corporation as president, CEO and board member. At a shareholders meeting, the owners of a majority of shares voted to authorize him to purchase 20% of the company's stock. The court found that this had been done in compliance with BCL 505(d). Petitioner argued that the transaction was not exempt from BCL Art. 16. The court held, however, that the transaction was not a "takeover bid" so that compliance with Art. 16 was not required. With regard to petitioner's demand to inspect corporate books and records, the court held that there were questions as to the good faith of petitioner, deposed president and CEO, and that a hearing was required on that issue. In re Presher, Index No. 4558/2003, 6/19/03 (Stander, J.).

Corporations; employment rights of shareholders; shareholders agreement; conditional acquisition agreement; condition precedent. Defendant fashion designer owned shares in a corporation which was involved in various ownership and licensing transactions. Defendant asserted counterclaims and the counterclaim defendants moved to dismiss. The court ruled that under New York and California law, an employee with stock in the employer does not thereby gain any greater right to protection against discharge than any other employee. Also, defendant's employment was governed by the shareholders agreement, which allowed for termination. Defendant claimed a conditional acquisition agreement had been violated. However, there was a condition precedent and the court rejected defendant's argument that substantial performance is applicable to a condition precedent. Counterclaims dismissed. Markov, Inc. v. Eisen, Index No. 601332/2001, 5/5/03 (Ramos, J.).

Derivative actions; business judgment rule; interested directors. Motion by plaintiffs in putative derivative action to recover fees paid to investment bankers allegedly in violation of GOL 5-531. Plaintiffs moved for leave to serve a third amended complaint, to renew and to reargue. The court had previously dismissed the action because the business judgment rule permitted the board to decline to sue and the board was not obligated to provide a detailed rebuttal of the plaintiffs' claims. Plaintiffs argued that the board was not disinterested because three directors had previously used the bankers to broker personal stock sales. The court found that plaintiffs had failed to set forth

sufficient facts to indicate that a broad majority was self-interested. A court will not use 20/20 hindsight to second guess a board's decision except in regard to egregious transactions that could not meet the test of business judgment. The court rejected plaintiffs' argument that exercise of business judgment violated public policy when the board concluded the bankers were not mere brokers under the statute. Motion denied. Leen v. Credit Suisse First Boston Corp., Index No. 601271/2002, 6/16/03 (Ramos, J.).

Derivative actions; plaintiff's right to maintain double derivative action. Defendants moved to dismiss various causes of action because plaintiff lacked capacity to bring them derivatively. Plaintiff was a shareholder with a defendant in defendant limited liability company, which in turn was sole general partner of a limited partnership (in which plaintiff was not a partner), which owned and operated a restaurant. Plaintiff, defendants argued, could not demand an accounting of the partnership or assert other derivative claims. However, the court stated, so concluding would mean that, if defendant converted sums of the partnership, plaintiff could not sue, directly or derivatively, no matter how much the company had been damaged. Thus, plaintiff, the court ruled, should be allowed to maintain a double derivative suit. Elbroji v. Lyle, Index No. 601849/2002, 5/30/03 (Ramos, J.).

Discovery; Hague Convention; production of documents from foreign entity. A Special Referee directed production of documents relating to a foreign entity. Defendants appealed to the court. The court rejected defendant's argument that plaintiff was obliged to proceed under the Hague Convention. This is not the exclusive means for obtaining discovery from a foreign entity, the court stated. The court found that defendants had failed to establish that production would be an affront to Polish sovereignty. A party to a New York case over which there is personal jurisdiction should be required to produce in New York documents over which it has control through a subsidiary. The defendant here did not submit proof or argue that the documents were not in its control or not obtainable. Motion denied. Krasinki v. Polimeni Organization LLC, Index No. 5563/2002, 6/9/03 (Austin, J.).

Discovery of Mexican records; Mexican banking law; controlling effect; comity. Motion to compel non-party Mexican bank to disclose records in Mexico. Service was made on an agency office in New York. This service would be sufficient. However, the bank argued that Mexican bank secrecy laws prohibited disclosure. A Mexican statute barred disclosure except as requested by "judicial authority" in a suit to which the owner is a party. Plaintiffs argued that "judicial authority" is not limited to Mexican courts. The bank relied on a contrary interpretation in a letter from the Mexican National Commission for Banking and Securities. The court stated that the burden was on the bank to show that Mexican law barred production. The court found that the bank had failed to proffer proof as to the precedential value of the Commission opinion. No Mexican court opinions were cited. The statute did not specify Mexican courts, as it easily could have. Further, the bank's interpretation would violate concepts of international comity. Under the comity doctrine, enforcing the subpoenas would not threaten Mexican national interests, but New York and the US have a compelling interest, the court found. The information would not be available elsewhere. Motion granted. Lipstick, Ltd. v. Grupo Tribasa, Index No. 603740/1999, 6/3/03 (Ramos, J.).

Employment agreements; stipulation of settlement; preliminary injunction. Application for preliminary injunction against entry of default judgment under stipulation of settlement on the ground that plaintiff, former employee, had engaged in contacts in violation of said stipulation**.** Defendant relied on electronic communications but these, the court found, did not satisfy the burden of showing that plaintiff had been engaged in wrongful contacts. Likelihood of success was thus not shown. Although plaintiff had stipulated that she would not claim that defendant had an adequate remedy at law, there was only a possibility of breach by plaintiff, which was not enough. The balance of equities favored plaintiff. Motion denied. Brazer v. HelloNetwork.com, Inc., Index No. 601428/2002, 5/30/03 (Ramos, J.).

Insurance; arbitration; policy interpretation; requirements. On a motion to compel arbitration, the court found that the insured had chosen an investigator from a specified list, as required. Defendant had never objected. The fact that the investigator had had a relationship with defendant could not provide a basis to conclude that there was a conflict of interest. The court rejected defendant's argument that the investigation was not independent since defendant had not shared in the fee. The policy did not so mandate; defendant's argument would require re-writing of the policy. Plaintiff had a right to and demanded arbitration. Therefore, it had demonstrated its right to arbitration. Defendant's argument that a process of streamlined claims processing was a condition precedent was rejected as not clearly recited in the policy. Motion granted. Interpublic Group v. National Union Fire Ins. Co., Index No. 603570/2002, 5/28/03 (Cahn, J.).

Insurance; GBL 349; vanishing premium class action; de-certification. Motion to de-certify class in vanishing premium case based on Goshen decision, due to lack of commonality. Class certification, court noted, was denied in

another vanishing premium GBL 349 case. The court here noted that the class in this case might be too broad, but that a more narrow class might be appropriate. The court ruled that de-certification should be held in abeyance pending appeals in related cases and a hearing. DeFilippo v. Mutual Life Ins. Co., Index No. 600466/1995, 5/6/03 (Freedman, J.).

Insurance; reciprocal insurer; claims by terminated attorney-in-fact; management agreement; contract versus tort or unjust enrichment. Action by terminated attorney-in-fact of a reciprocal insurer alleging that defendants had conspired to destroy plaintiff and steal its business. The court ruled that plaintiff was not entitled to recover start-up costs under the management agreement, which was unambiguous. Conversion of time, assets, associations is not actionable. Further, the court stated, a plaintiff seeking recovery of economic loss under a contract may not sue in tort. Work preparatory to contract performance cannot be recovered based on unjust enrichment; a valid contract governed the subject matter. Plaintiff had no claims for wrongful termination. Fees would be due only on premiums paid. Plaintiff could not sue individual defendant officers or members of an unincorporated association until entry of a judgment that is unsatisfied or unexecuted. Motion to dismiss granted. MQ of New York, Inc. v. Dillon, Index No. 603512/2002, 6/20/03 (Freedman, J.).

Letters of credit; fraudulent inducement; transaction involving Enron. Motion for summary judgment (CPLR 3213) on letter of credit for $57 million. Defendant issued two irrevocable letters at request of Enron subsidiary. Later, Enron requested that defendant extend the term of the letters and delete documentary requirements. Defendant complied and amended the letters. Plaintiff notified defendant that it wished to draw on the letters and submitted certificates setting forth the amended language. Defendant refused to honor the letters. The court held that the draw requests complied exactly with the inserted language, which did not require that plaintiff prove anything, something that would be inconsistent with a letter of credit. The court rejected defendant's argument that plaintiff had fraudulently induced it to amend the letters since the amendment had occurred at request of Enron, not plaintiff. Motion granted. Pacific Gas & Electric Co. v. Banca Nazionzale del Lavoro SpA, Index No. 604225/2002, 5/7/03 (Ramos, J.).

Misrepresentation; reliance; waiver. Contracts. Fiduciary duty; punitive damages. Plaintiff and a defendant owned a defendant limited liability company. Pursuant to a redemption agreement, defendants acquired plaintiff's interest. After the offer was accepted but before the agreement was executed, defendant allegedly breached the operation agreement by concealing an opportunity to purchase a building. The court ruled that claims for fraudulent concealment, fraudulent misrepresentation and negligent misrepresentation must be dismissed because plaintiff's reliance was not justified in light of information disclosed to plaintiff, a sophisticated investor. Further, the court found that the plaintiff had agreed in the redemption agreement that he would forego any claim other than breach of fiduciary duty, and thus, these claims failed. However, claims for breach of fiduciary duty and breach of contract were ruled sufficient in view of alleged unfair dealing by defendants. Punitive damages, though, were ruled unavailable as the claims failed to state an egregious tort independent of the contract and the action involved only a private wrong. Case dismissed in part. Kalikow v. Hochfelder, Index No. 602965/2002, 6/18/03 (Ramos, J.).

Misrepresentation; representation collateral to contract. Tortious interference with contract and business relations. Unjust enrichment; conversion; relation to contract. Corporations; officer liability; contract and tort. Plaintiff alleged that defendants had misrepresented that they had actual possession of goods in a warehouse, in reliance on which plaintiff had entered into a contract. The court found that plaintiff had sufficiently alleged a collateral fact to state a claim for fraudulent inducement. The court upheld a claim for tortious interference with contract, but found insufficient a claim for tortious interference with business relations as plaintiff had not alleged that defendants' actions had been prompted solely by malice or ill will. Unjust enrichment claim dismissed as precluded by existence of contract. Conversion claim could not be predicated on mere breach of contract. As to claims against corporate officer, contract claim dismissed for lack of allegations that defendant bound himself personally, but upheld as to misrepresentation claim due to defendant's alleged personal involvement. International Technology Integrators, Inc. v. ETI, Index No. 3940/2003, 5/13/03 (Emerson, J.).

Preliminary injunction; elements. Plaintiff moved for a preliminary injunction barring defendant from cutting off plaintiff's phone service. The court found that plaintiff had established that irreparable harm would occur from a cutoff since plaintiff required phone service for its business and could lose customers or go out of business if the service were cut off. The balance of equities favored plaintiff. Plaintiff had shown a likelihood of success that it had never ordered or used the data circuit equipment service defendant had added to plaintiff's bill. A preliminary injunction would be granted, but conditioned on plaintiff's paying for its phone service. ACT Telecom, Inc. v. Cablevision Lightpath, Inc., Index No. 13289/2002, 5/21/03 (Austin, J.).

Procedure; collateral estoppel; judicial estoppel. Debtor & Creditor Law 273-a; standing. Corporations; officers; fiduciary duty. Misrepresentation; **CPLR 3016(b).** In action alleging that shares should have been transferred in 1997, the court held that plaintiffs were collaterally estopped from so litigating since the court in a prior action had held that a debt which had been the purported consideration for the transfer had been fictitious and that the transfer had occurred in 1998. Plaintiffs were also judicially estopped since the allegation in this case contradicted that urged in the prior action. Even if the transfer had occurred in 1997, the court further ruled, it would have been fraudulent (Debtor & Creditor Law 273-a). The creditor had the right to set aside the transfer, but did not do so, instead taking stock distributions. The court held that the co-plaintiff no longer owned the shares and lacked standing. Since divestiture of the stock under the shareholder's agreement could not be enforced against the trustee because that would require entry of a judgment against the trustee, which had not occurred, the claim seeking to void provisions of the agreement failed to state a cause of action. The court also held that the trustee's claim against the president of the corporation for breach of fiduciary duty failed since plaintiff had not alleged unfair or unequal treatment or any other breach of duty. Fraud claim failed for lack of specific pleading (CPLR 3016(b)). Motion to dismiss granted. Leave to replead denied. Mottahedeh v. Old Cedar Development Corp., Index No. 13614/2002, 5/27/03 (Austin, J.).

Procedure; counterclaims; derivative claims; **CPLR 3019(a). Discovery; search of back-up tapes for database.** On motion for leave to amend answer to add counterclaims, the court stated that counterclaims can be imposed regardless of subject matter. An agreement between the parties did not apply to intentional torts, the basis of counterclaims here, since agreements that purport to grant exemption from liability for willful or grossly negligent acts will be considered void. Under CPLR 3019(a), a counterclaim must be brought against plaintiff, but some claims here, the court found, were derivative and therefore would have to be dismissed. The court also ordered plaintiff to conduct a search of 300 back-up tapes, at its expense, in an effort to locate a certain database. Motion for leave to amend granted in part. Motion to compel discovery granted. Storerunner Network, Inc. v. CBS Corp., Index No. 604022/2001, 6/25/03 (Ramos, J.).

Procedure; CPLR 2101 (b); supporting affidavit. Attachment; forum non conveniens factors; judicial economy. Action by foreign bank regarding international CD's worth about $7 million. Motion for order of attachment. Defendant argued that it was barred by decrees of the Central Bank of Argentina from making repayment and that the courts of the Cayman Islands, where defendant had its principal place of business, would probably enforce the decrees. The court stated that, even if it were held that the law of the Cayman Islands governed, defendant had failed to submit evidence that those courts would enforce the Argentine decrees. Defendant had failed to submit a copy of relevant decrees in English. The court therefore was unable to conclude that the documents would apply or evaluate whether any exceptions would have governed. The court found that defendant had also failed to submit an affidavit of a qualified expert to explain the significance of the documents. The court rejected defendant's argument on jurisdictional grounds because defendant had elected to use a New York bank to receive $ 7 million in payment. The court considered traditional forum non conveniens factors in concluding that New York was an appropriate site for the litigation. Judicial economy also suggested retention of the case since plaintiff, if successful in another jurisdiction, would ultimately have to return to New York to freeze the assets located here. Motion granted. Raiffeisen Centrobank AG v. Banco B.I. Creditanstalt SA, Index No. 600142/2003, 6/24/03 (Lowe, J.).

Procedure; CPLR 5011. Plaintiff, commercial tenant, sued the landlord to compel it to comply with the lease and remove an improper sign located on adjacent commercial property. Plaintiff also sought money damages. Plaintiff moved for an order allowing it to deposit its rent and additional rent into court under CPLR 5011. The court held that this provision is applicable only to judgments, not motions. Further, it applies only when there are special circumstances or where the party entitled to receive the property would not have benefit or use of the property. The creation of a security fund for the satisfaction of a possible judgment did not suffice. Motion denied. Auto Barn of Commack, Inc. v. Heatherwood Towers Realty, Index No. 19979/2002, 5/8/03 (Austin, J.).*

Procedure; CPLR 5523; good faith purchaser. Rescission. The court held that a purchaser of a business who had been notified by plaintiff of the pendency of an appeal was a good faith purchaser under CPLR 5523 despite its knowledge. A rescission of the sale was therefore not in order. Also, the sale was tied in with the sale of another business and undoing the former would create difficulties. Plaintiff had failed to show why monetary damages would not fully compensate plaintiff. Plaintiff failed to articulate harm that would outweigh that which would be caused by rescission. Defendants' motions granted. Sakow v. 633 Seafood Restaurant Inc., Index No. 603393/2002, 5/12/03 (Lowe, J.).

Procedure; leave to replead; CPLR 3211(e); dismissal by Appellate Division. Claim for consequential damages from breach of contract dismissed on appeal. Plaintiff moved for leave to replead. Plaintiff did not request leave to replead on original motion to dismiss (CPLR 3211(e)) or before Appellate Division. Although the trial court has some discretion to grant leave, here, the court noted, the Appellate Division had dismissed the claim and plaintiff should have moved before that court. Motion denied. In any case, the court ruled, plaintiff had failed to show good cause since it failed to establish that consequential damages had been contemplated by the parties. Atkins Nutritionals, Inc. v. Ernst & Young LLP, Index No. 8956/2001, 5/28/03 (Emerson, J.).

Procedure; motion to dismiss; single motion rule; judicial estoppel. On motion for preliminary injunction, defendant appeared and asserted lack of subject matter jurisdiction in letter briefs, and asked in the alternative for dismissal for failure to state cause of action. Court held that defendant could not, under single motion rule, now make a formal dismissal motion. Further, the court noted, defendant had taken the position that his time to answer had been tolled pending decision on the jurisdictional issue. Judicial estoppel precluded a different position. In any case, the court would reject defendant's motion. The letter cited by defendant failed to establish termination as a matter of law as negotiations had continued, and the court declined to find that the licenses had no value. Motion denied. Auerbach v. Klein, Index No. 15391/2002, 6/25/03 (Emerson, J.).

Procedure; personal jurisdiction; international currency transactions; correspondent bank account. Service of process; Hague Convention. Forum non conveniens; burden. Forum selection clause. Swiss corporation sued a Russian company headquartered there on claims arising out of international currency transaction. Plaintiff argued that personal jurisdiction existed because defendant had an account with a New York bank through which it consummated large currency transactions. Plaintiff pointed to no office, staff or other factors supporting "doing business" jurisdiction here. Maintenance of a correspondent bank account in New York does not alone suffice. It did not appear that defendant did all or almost all of its business through a New York account. Maintenance of a correspondent account here alone does not form the basis for long-arm jurisdiction (CPLR 302(a)(l)). The court also found insufficient the fact that defendant was contractually obligated to make a contingent payment in New York as defendant had not chosen New York, but had accommodated the payee. The court also found service of process deficient for failure of compliance with the Hague Convention and other reasons. In any case, the court ruled, the case would have to be dismissed on forum non conveniens grounds. The case would burden the courts with the need to deal with Russian translators and Russian law. Defendant would be burdened by defending here. Russia was a preferable forum since most witnesses were Russian, most documents would be in Russian, and Russian choice of law and choice of forum provisions applied. Plaintiff raised a concern about receiving a fair hearing, but should have known about the forum selection clause prior to acquiring assignment of the claim. Residency of the parties did not favor New York and the transactions occurred primarily in Russia. The forum selection clause was mandatory and would require dismissal by itself, even though plaintiff was an assignee and not a direct party. Case dismissed. Societe Financiere et D'Investissement Providence S.A. v. Joint Stock Commercial Bank Avtobank, Index No. 604587/2001, 5/5/03 (Ramos, J.).

Procedure; preliminary injunction; irreparable harm; non-compete agreement. Action arising out of purchase and sale of defendants' business. Plaintiff moved for a preliminary injunction, which was denied. On motion to reargue, the court held that the court had not misapplied a provision of a non-compete agreement whereby parties had agreed that plaintiff would suffer irreparable harm if the agreement were violated. Plaintiff, the court stated, effectively argued that the court lacked discretion as a result of this clause. The court rejected the argument. The transaction documents provided an adequate measure of damages. Thus, plaintiff had failed to show irreparable harm. Also, much of the loss of business was due to departure from plaintiff of defendant's former employee, who took clients with him. He was not a party to the non-compete agreement and could not be enjoined. Motion denied. GM Financial Group v. Northacker & Co., Index No. 9500/2002, 5/8/03 (Austin, J.).*

Procedure; receivers; necessity. Corporations; piercing; domination. Debtor and Creditor Law 273, 276. Constructive trust. Punitive damages. In an action to recover sums owed by the corporate defendant where plaintiff alleged that its shareholders had taken its assets, the court ruled that plaintiff had failed to allege why a receiver would be necessary for plaintiff to recover from the individual defendants. The complaint, it was held, adequately alleged domination by defendants so that they could strip the corporate defendant of assets. The complaint sufficed under Debtor and Creditor Law 273 in that it alleged that the individual defendants had withdrawn assets, which was done without fair consideration and rendered the corporation insolvent. As intent to defraud could be inferred, the allegations were also sufficient under Debtor and Creditor Law 276. A constructive trust claim was upheld since a transfer to a shareholder in derogation of creditors' rights can be set aside. An accounting claim failed since no fiduciary duty was alleged (only a contractual relationship was involved). A demand for punitive damages

failed as no harm to the general public was alleged. MRA Systems, Inc. v. Interactive Futures, Inc., Index No. 603655/2002, 5/30/03 (Freedman, J.).

Procedure; venue; timeliness of demand; extension. Motion to change venue. The court ruled that defendants' demand to change venue was untimely in that defendants did not answer but removed the case to Federal court, where they failed to answer or object in timely fashion. When the case was remanded, defendants did not timely answer or move. However, plaintiff requested service of an answer thereafter, which the court ruled was an extension of time. This extension also extended the date by which to make the venue motion. The court held that the motion should be granted. North County Communications Corp. v. Verizon New York, Inc., Index No. 5300/2002, 5/19/03 (Benza, J.).

Real property; commercial; non-waiver clause; waiver. Plaintiff commercial landlord failed to bill defendant tenant for tax increases as provided in the lease over several years. Plaintiff had then commenced this action to recover those sums. The court ruled that plaintiff was obliged under the lease to provide information on taxes yearly to defendant and that defendant would then pay the increases; this was a condition precedent. The court rejected plaintiff's argument that a non-waiver clause prevented creation of the condition since that clause referred to defendant's obligations; construing it to cover plaintiff's obligations would be to release plaintiff of all of its promises. The court further ruled that plaintiff's acceptance of rent did not amount to a waiver of the right to increased base rents since the reasonable expectations of the parties had not been modified by their subsequent actions. Summary judgment for plaintiff in part. Press v. Monroe Wheelchair, Inc., Index No. 9486/2002, 6/6/03 (Stander, J.).

Restrictive covenants. Employment company moved for preliminary injunctive relief against former employees. The court found that plaintiff had not shown that trade secrets were involved (some information was public). Although as to a restrictive covenant two defendants admittedly had had access to plaintiff's client and candidate databases, more would be required to justify injunctive relief. The court also found plaintiff had failed to establish likelihood of success in proving these defendants had breached a covenant prohibiting misuse of plaintiff's name. Plaintiff failed to show that defendants had known that plaintiff's name would be used in a press release or website notice. As to a third former employee, plaintiff's showing was insufficient; even if communications relating to plaintiff's clients were improper, the only person who had access to the information was this person, a non-party beyond the court's jurisdiction. Plaintiff failed to show that it had suffered or would suffer harm. If it had shown harm, money damages would be sufficient remedy. Motions denied. Robert Half Intl. v. TMP Worldwide Inc., Index No. 604050/2002, 6/12/03 (Ramos, J.).

Shareholders' derivative actions; usurpation of corporate opportunity; inability to finance transaction. In connection with a recapitalization transaction, plaintiff was given a membership interest in the nominal defendant formed to hold securities. Plaintiff sued derivatively on behalf of that defendant alleging that other defendants had usurped a corporate opportunity and breached fiduciary duty. Defendants argued that the nominal defendant had not been financially able to undertake the opportunity as it had no cash or other liquid assets and its operating agreement provided that no member had any further obligation to contribute capital. Relying on Delaware law that held that an entity with no cash on hand but owning a valuable position and having engaged in sophisticated transactions could have obtained the needed financing, the court declined to grant a motion to dismiss. Defendants had not conclusively demonstrated the entity's inability to purchase the units. Motion denied. Alpine Consolidated III, LLC v. Friedman, Index No. 602612/2002, 6/18/03 (Ramos, J.).

Trade secrets; misappropriation; definition of trade secret. Procedure; statute of limitations; CPLR 205. Fiduciary duty; joint venture. Action arising out of securitization of intellectual property royalties (issuance of bonds secured by royalty stream on musical recordings of David Bowie). The court rejected defendants' argument that fiduciary duty and misappropriation of trade secrets claims were barred by the statute of limitations. A prior action had been dismissed for lack of standing and CPLR 205 gave plaintiff time to recommence. The prior dismissal was not res judicata. The court dismissed a fiduciary duty claim premised upon a joint venture since no such venture had been completed. Various other claims depended on the validity of plaintiff's claim that he owned trade secrets regarding securitization of music royalties. The court rejected plaintiff's argument that he had created formulae used in the financial analysis methodology for the music royalty transaction and that these constituted trade secrets. The court stated that specificity is required and found that the complaint, discovery responses by plaintiff and plaintiff's motion papers failed to reveal what the alleged formula was. The court concluded that plaintiff did not possess any unique formula. Legal closing and loan documents were not trade secrets. Nor were lists of prominent musical performers, readily available information, or books of publicly available information. Further, if there were any secrets, the permission of Bowie (not granted) would have been required for plaintiff to use them. Plaintiff also had not shown that

defendants had engaged in a single music royalty transaction. Summary judgment granted to defendants. Pullman Group v. Prudential Ins. Co., Index No. 600771/2001, 6/24/03 (Gammerman, J.).

UCC; improper payment of checks; power of attorney. Action involving improper payment of checks based upon statutory short form power of attorney. Defendant bank argued that a bank is obliged by statute to honor such a power and that the individual here had had such a power. The court found that there was no proof defendant had received a power, nor that it had made any attempt to determine whether the individual had such authority before honoring the checks. Defendant had not shown that such a delegation of authority was permitted under the terms of the trust. Defendant's motion for summary judgment denied. However, plaintiff's motion could not be granted as it was unclear whether the trustees were negligent in not examining statements and notifying the bank. In the third-party complaint against a broker-dealer with which the trust had opened an account, the court found no allegation that this party had instructed defendant to pay an unauthorized check or that it had entered incorrect information regarding the trust account into the bank's systems. Insofar as it was alleged that the broker had violated its agreement with respect to the trust account, defendant did not allege that it had honored the checks as a result of such violations. Motion to dismiss third-party complaint granted. Burton v. PNC Bank, Index No. 603136/2001, 6/27/03 (Cahn, J.).

UCC 8-108; warranties; broker-dealer; transfer agent. Plaintiff, transfer agent for a company, sought damages from a broker-dealer and its customer due to issuance to the customer, in response to improper request, of shares in the company, which had caused an overissuance of stock. The customer had not returned the shares. Defendant broker-dealer moved to dismiss. Plaintiff contended that defendant as clearing broker had breached warranties under UCC 8-108. Plaintiff argued that it was subrogated to the rights of the company, including the right to proceed on the basis of breach of warranties. The court stated that under 8-108(i), a broker makes warranties to the issuer. The Official Comment thereto refers to 8-201, which defines an "issuer" so as to exclude a transfer agent. Plaintiff was a transfer agent. The statutory meaning was clear, the court ruled. Motion granted. Computershare Trust Co. v. Endeavour Capital Fund S.A., Index No. 605661/2000, 6/5/03 (Ramos, J.).

The *Report* is issued five times per year by the Commercial Division. The complete texts of decisions discussed in the *Report* are available by hyperlink on the website of the Commercial Division at www.courts.state.ny.us/comdiv (under the "Law Report" section), and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org/sections/comfed. Members of the Commercial and Federal Litigation Section may sign up at the Section's home page to receive copies of the *Report* by e-mail automatically. The decisions as they appear on the home pages have not been edited and may differ from the final text published in the official reports by the State Reporter.

THE NEXT ISSUE WILL BE POSTED ON THE HOME PAGES OF THE COMMERCIAL DIVISION AND THE COMMERCIAL AND FEDERAL LITIGATION SECTION ON NOVEMBER 28, 2003 COVERING DECISIONS ISSUED JULY-SEPTEMBER 2003.

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