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Agency; authority; express; implied; apparent. Consignment. Invoice; bill of sale. Provenance; duty to inquire. Art gallery. On summary judgment in action concerning Picasso painting, *Les Deux Enfants*, court dismissed complaint alleging breach of contract and conversion. Plaintiff art gallery had paid $2.7 million to art world "runner" who had shown its founder the painting and who had allegedly been defendant gallery's agent. The painting had not been delivered. Plaintiff sought damages, or, alternatively, replevin and specific performance of the sale. Defendant argued that it did not have a contract to sell the painting to plaintiff. It claimed to have sold runner the painting and pointed to an invoice relating to the transaction that said payment was due by a certain imminent date; payment had not been rendered and the painting had been returned to defendant. Due to lack of evidence or allegation that defendant had had control over runner, plaintiff's agency theory failed. The court disagreed with plaintiff's argument that the painting had been obtained by the runner in a consignment sale that authorized him as agent. Based on an 1875 US Supreme Court decision, plaintiff argued that an invoice is not a bill of sale and may be appropriate to a consignment. However, it was undisputed that although defendant's three previous consignments to runner had been evidenced by unambiguous consignment agreements, for the Picasso there was no such agreement. Its absence, not the invoice, undermined plaintiff's theory. Further, no words or conduct by defendant had communicated to plaintiff the appearance of runner's agency. Even had an appearance been communicated, and had plaintiff demonstrated reliance, to establish an apparent agency would also require that plaintiff had made reasonable inquiries as to the runner's actual authority. It had not, and indeed maintained it was not required to. Court distinguished Graffman v. Delecea, where a consignment agreement created ambiguity and need to examine industry custom and practice at trial. Dark Bay International, Ltd. v. Acquavella Galleries, Inc., Index No. 600122/2002, 11/6/03 (Ramos, J.).

Arbitration; award; accounting; motion to vacate; interest; attorney's fees; punitive damages; modification of prior awards. Arbitration resulted in three decisions in dispute after petitioner was found to have been constructively expelled from respondent law firm. A 1998 decision made several awards and ordered an accounting to determine the worth of petitioner's interest in the firm at the time he left. A second decision in August 2002 did not make mention of any interest on awards granted or attorney's fees and costs. The arbitrator also stated at that time that he lacked the power to grant petitioner's request for punitive damages. However, he entertained a subsequent application by petitioner which revisited punitive damages as well as the matter of attorney's fees and costs, all of which resulted in a February 2003 decision. Respondent moved to vacate the February 2003 decision, claiming it was not the arbitrator's final decision, and that it was a wrongful modification of the August 2002 decision. Petitioner moved to confirm the February 2003 decision, which had awarded prejudgment interest, as well as 16.1 % interest on petitioner's interest in the firm at the time he left. The court found that the arbitrator's statements regarding the issue of attorney's fees, interest and punitive damages in the February 2003 decision conflicted

with those in the August 2002 decision, which had left open only the issue of attorney's fees and made no reservation for later determination of interest or punitive damages. The court first determined that February 2003 was the date of the final arbitration award, and vacated the part of that award relating to prejudgment interest and interest at the rate of 16.1 %, holding that it had been inappropriate for the arbitrator to have revisited issues previously resolved in the 2002 decision. The court further held that the arbitrator had not exceeded his authority by determining to use an accrual method for the accounting rather than a cash method. The court found that respondent's motion to confirm the October 1998 awards was timely under CPLR 7510 as all

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interlocutory decisions were subsumed into the final February 2003 award. Finally, the court upheld the arbitrator's decision not to award prejudgment interest on outstanding promissory notes signed by petitioner since the respondent had caused the payment to become due when it had forced petitioner to leave the firm. The court determined that interest on both parties' awards would be thus calculated as of the final award of February 14, 2003 at the statutory rate of 9%. Joseph v. Milbank, Tweed, Hadley & McCoy LLP., Index No. 105850/2003, 12/23/03 (Ramos, J.).

Attorney and client; attorney as witness; disqualification; conflict of interest. In litigation concerning whether defendant had violated his fiduciary duty to an incorporated care facility, defendant moved to disqualify plaintiffs' attorneys, asserting that allegations in the complaint and counterclaims created a conflict of interest between the parties, and that plaintiffs' attorneys were on retainer to both of the care facilities named in the action. Defendant further asserted that the advocate-witness rule would bar their representation of the plaintiffs in the event they were called as witnesses at trial. The court found defendant's allegations conclusory and insufficient to warrant disqualification**,** and stated that defendant had failed to make the requisite showing that any attorney currently associated with the law firm would have to be called as a witness or that the attorneys' testimony would be prejudicial to the client. The court further refused to disqualify the attorneys on the basis of conflict of interest, finding that the law firm had not acted as general counsel to the two care facilities over the past several years, but rather had served both entities on an ad hoc basis in regard to collection and regulatory matters. The court further found that the law firm had never represented defendant individually, nor did defendant demonstrate that the law firm had obtained any confidential information regarding him in connection with its representation of either care facility. Defendant further had claimed that plaintiffs' allegation regarding breach of a related security agreement created a conflict. The court disagreed, having found no conflict, and stated further that any possible conflict would have come from defendant's actions and not plaintiffs' allegations. Finally, the court found that there was no evidence that established that the law firm had represented either care facility in connection with any of the transactions which gave rise to plaintiff's complaint or defendant's counterclaims, and that there was neither conflict nor appearance of impropriety. Thus, disqualification was denied. Landa v. Bleier, Index No. 5929/2003 11/19/03 (Austin, J.).

Attorney and client; malpractice; proximate causation; breach of fiduciary duty; substantial causation; conflict of interest. Lanham Act § 43 (a) (1) (B); advertising; promotion; disparagement. CPLR 3211 (a) (1). Action for unpaid legal fees. Counterclaim plaintiffs had operated a New Jersey boutique that sold only Fendi merchandise. Counterclaim defendant law firm had represented them in a civil action in Federal court against a competing boutique in Manhattan and parent company Fendi USA. That court had dismissed a claim made under the Federal Lanham Act, leaving alleged violations of New York State laws concerning product disparagement and slander. For these claims, counterclaim plaintiffs had rejected a $1.4 million settlement offer, and at jury trial prevailed on each; damages awarded had totaled $110,000. Counterclaim plaintiffs alleged that counterclaim defendants' simultaneous representation of high-end fashion house Prada, then poised to acquire an ownership interest in Fendi, entailed an undisclosed conflict of interest. The court found that counterclaim plaintiffs had failed to establish the proximate cause essential to establish malpractice. Counterclaim plaintiffs pointed to an E-mail that a Fendi executive had sent to the law firm. But the court determined that its contents failed to show that the competitor boutique's employees had engaged in advertising or promotion within the Lanham Act's meaning, refuting the theory that but for the firm's failures, the executive could have given testimony that would have altered the Federal court's disposition of the claim based on the Act. Further allegations of malpractice constituted merely dissatisfaction with the firm's strategic choices, the court stated, and it disagreed that the E-mail and court transcripts counterclaim defendants submitted were not documentary evidence as the term is used in the CPLR. However, the court declined to dismiss the counterclaim for breach of fiduciary duty, stating that it might be inferred from alleged facts that the alleged conflict of interest had been a substantial factor in a less vigorous prosecution. The court noted that attorneys must

not only be alert to obvious conflicts, but to forces that might operate more subtly on them to diminish their work. Weil, Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc., Index No. 100630/2003, 12/3/03 (Lowe, J.).

Attorneys; of record; "per diem." Rules 1, 9, and 13 of the Justices of the Commercial Division. Uniform Rule § 202.27. A "per diem" attorney who failed to appear both at an initial conference and at the conference re-scheduled to accommodate him moved to vacate the sanction incurred. His opponent, to whom the sanction was to have been paid as compensation for wasted time, did not oppose the motion. The court granted it, but expressed concern over ethical dilemmas raised. The per diem admitted having missed the first conference because he had accepted conflicting assignments requiring presence in two courtrooms at once; he and the lawyer of record battled over who had been responsible to cover the second conference. The court declared that notwithstanding that a per diem lawyer is not the attorney of record, responsibility attaches once any agreement, action or appearance is taken in furtherance of a representation. At the same time, no attorney of record can absolve herself of responsibility for a per diem's violative behavior. Here, the court stated, both attorneys were responsible to the client and answerable to the court. The court further stated that attention must be given to communications between the attorney of record and the per diem. If a per diem fails to show up in court and the case is dismissed, the attorney of record shall be accountable to the client. Likewise, per diem attorneys who attend conferences are required to be prepared. The per diem's reputation is at stake if an appearance is not adequately described, and, lack of preparedness can be equivalent to no appearance and cause the case to be dismissed. George Constant, Inc. v. Meyer Aba Berman, Index No. 604507/2001, 11/21/03 (Ramos, J.).

BCL § 1505. CPLR 3211(a)(7). Contracts; escrow agreement interpretation; breach of fiduciary duty. In litigation over interpretation of terms in an escrow agreement, defendant law firm's pre-answer motion to dismiss was denied. The court held under BCL **§** 1505 that it could not determine on the motion whether the services rendered by defendant fell within the meaning of "professional" services as the term is used in the statute. The court stated further that defendant law firm was not entitled to dismissal pursuant to CPLR 3211 (a)(7) as the allegations regarding instructions in the escrow agreement were sufficient to support a breach of contract claim against the law firm. Plaintiff's breach of fiduciary duty claim survived, as an escrow agent can be held liable for breach of the escrow agreement as well as for breach of fiduciary duty. Barbi v. Law Firm of Jeffrey Dweck P.C., Index No. 602551/2002, 12/17/03 (Cahn, J.).

Breach of contract. Procedure; motion to dismiss; personal jurisdiction; subject matter jurisdiction; derivative action; foreign corporations. In a derivative action for breach of contract, defendants moved to dismiss. Plaintiff cross moved for production of records, to compel depositions and to strike defendants' motion. The court found that none of the parties were New York residents, the corporation at issue had been incorporated under the laws of Gibraltar, and Gibraltar was a viable alternative forum and provided jurisdiction over all parties to the action. The court further found that plaintiff's failure to obtain personal jurisdiction over one of the defendants, a resident of France, also mandated dismissal for failure to join a necessary party. Horowitz v. Sax, Index No. 126212/2002, 10/6/03 (Ramos, J.).

Breach of fiduciary duty; trust fund; beneficiary as co-trustee; conflict of interest; incompetence; mental illness. Action alleging breach of fiduciary duty brought by beneficiary of $3 million trust fund. According to plaintiff, when defendant bank, his co-trustee, had transferred the principle to him at the fund's legal termination, it had known that he was suffering from bipolar disease and incapable of handling his financial affairs. Plaintiff alleged that defendant had failed to suggest that plaintiff retain counsel before signing documents relating to the monies' transfer and had given him improper power over the funds by initiating his installation as co-trustee. Plaintiff claimed further that defendant's suggestion that he place the funds in its brokerage division had entailed a conflict of interest. However, upon the trust's termination, defendant had owed plaintiff no duty and no longer had power to exercise discretion, the court stated. Thus, it was not a breach to disburse the trust funds but a ministerial duty. Nor was it a breach not to advise plaintiff to hire an attorney; advice to invest with the bank entailed no conflict since there was no duty with which to conflict. Even had there been, plaintiff had presented insufficient evidence that he had been incompetent. For example, during the period for which he was co-trustee, the principle had grown by over 14%. Complaint dismissed on summary judgment. Knox v. HSBC Bank USA, Index No. 101734/2003, 11/17/03 (Ramos, J.).

Contracts; construction project; duty to cooperate; abandonment; waiver of damages; delays; bad faith versus ineptitude. Contract dispute over costs for delays and additional work entailed in MTA's restoration of Grand Central Terminal. Plaintiff construction contractor alleged that defendants had breached contract warranties and representations that required them to cooperate with its performance. At issue was an electrical project that had been

plagued by delays largely due to design changes. Defendants sought to dismiss the cause of action as barred under the main contract, which provided that certain delays were to be expected and limited costs to plaintiff's actual costs, and under the subcontract, which contained an unconditional waiver of damages due to delay. Plaintiff argued that these had to be read in light of a "global settlement" of $5 million-worth of change orders that the parties, and the subcontractor, had reached after defendants had acknowledged the impediment caused by design changes. During negotiations representations had been made, which plaintiff had relied on, that there would be no more extensions or changes, but both had continued to abound. Plaintiffs had raised triable issues of fact, the court found. If the delays were caused by defendants and unanticipated by plaintiff, or, if they were expected but caused by bad faith or intentional abandonment of the contract, the provisions upon which defendants based their motion would not bar plaintiffs' recovery. Defendants' motion for summary judgment was denied. Bovis Lend Lease LMB Inc. v. GCT Venture, Inc., Index No. 105398/2000, 11/14/03 (Ramos, J.).

Contracts; implied-in-fact; intention to form; consideration. Estate. Rabbinical Court; *beth din*. Statute of limitations. On partial summary judgment, the court found that an implied-in-fact contract existed and that defendant beneficiary was legally liable to share equally with plaintiffs a multi-million dollar estate. Parties were entities within the Lubovitch movement. All had received distributions from the estate prior to the 1994 death of the Lubovitch Rebbe, who was plaintiffs' president and had had unilateral authority, worldwide, over organizational resources. The Rebbe's acceptance of unequal distributions showed an absence of commitment to 50/50 sharing, defendant argued. But the court found that parties had engaged in what all characterized as "joint fund-raising." They had shared equally the efforts and expense in securing the bequest for defendant and sporadic inequality could not overcome overwhelming evidence of their intent to ultimately share equally. This intent, the court noted, was corroborated directly or circumstantially by all six individuals with personal knowledge of events that had surrounded the will's execution. Regarding defendant's cross-motion for dismissal based on the statute of limitations, plaintiffs' suit was premised on an alleged contract that it had established existed, not upon the terms of the will. The Appellate Division's reversal of plaintiffs' joinder in a related Surrogate's Court proceeding that defendant had initiated made this clear. The period of limitations was therefore six years. A letter warning plaintiffs of an emerging dispute had not triggered accrual. It was not unequivocal. Moreover, no claim could be interposed absent a distribution to defendant which put it in a position to perform under the agreement. The estate's fluctuating value demanded that amounts due plaintiffs be assessed according to a particular distribution to defendant. Thus, plaintiffs' cause of action had accrued separately as to each breach, or failure to pay over 50 percent. As the record did not identify exactly when the first breach occurred, the court determined that claims made prior to six years before the current action were barred. Merkos L'inyonei Chinuch, Inc. v. United Lubavitcher Yeshivoth, Index No. 30793/2002, 10/29/03 (Demarest, J.).

Declaratory judgment; subject matter jurisdiction; securities; forum non-conveniens. Procedure; summary judgment; leave to amend; Part 130. Action arose out of a securities transaction. The court declined to rule on plaintiff's request for a declaratory judgment that the transaction between defendants was improper, determining that the court had no subject matter jurisdiction under Section 27 of the Securities and Exchange Act of 1934, and thus granted defendant's motion to dismiss with respect to that issue. The court found, however, that it did have jurisdiction over the second aspect of plaintiff's motion, which alleged that defendant had violated a non-disclosure agreement in the sale of plaintiff's securities to another defendant. The court found that neither defendant nor plaintiff had secured the execution of the non-disclosure agreement; thus, there had never been an agreement reached between these parties and defendant should be dismissed from the action. The court further concluded that, absent a justiciable controversy calling for declaratory judgment, it was unnecessary to reach the question of forum non conveniens. The court denied plaintiff's request to amend the pleadings to include the injunctive relief of unwinding the securities transaction between defendants because the non-disclosure agreement had never been executed. The court further stated that unwinding the transaction was not a recognized remedy for insider trading. The court then granted defendant's motion for summary judgment as plaintiff had adduced no reasonable basis for its assertion that the securities transfer was in violation of federal law, and that the allegations of insider information and knowledge of plaintiff's adverse claim were conclusory and insufficient to deny summary judgment. Finally, the court denied motions for sanctions and/or costs against plaintiff for frivolous conduct. The court stated that although plaintiff did not prevail on its motion for declaratory judgment, the request was not frivolous as contemplated within Part 130. Hanover Direct Inc. v. Richemont Finance, S.A., Index No. 602269/2003 10/27/03, (Ramos. J.).

Insurance; contract to effect coverage; privity. Action arising out of transactions for the export of poultry products to Eastern Europe. When large sums were lost due to lost or stolen products, insurance claims were made to Lloyd's. A Federal action was settled. In this action, plaintiff claimed breach of contract to effect insurance coverage. One defendant, Lloyd's London brokers, moved for summary judgment. It had had no contractual relationship nor any contact with plaintiff. Plaintiff had made no request to this defendant, which had not made any representations to plaintiff. In any case, this defendant did not breach a duty: a broker has no duty to advise as to coverage to be

obtained unless a special relationship exists, not the case here, the court held. Other defendants also moved. They were brokers for a non-party, the purchaser; only the purchaser could instruct them as to coverage. Absent privity, the court ruled, plaintiff could not recover from these defendants. A duty to provide continuing advice, the court held, is not within the scope of a broker's obligations absent a special relationship. Also, the defendants were agents for disclosed principals and would not be liable absent specific agreement to be bound. Since the Federal case was settled, proof of damages would be impossible. Complaint dismissed. Bowman Import/Export, Ltd. v. B&P International, Index No. 601762/2002, 12/23/03 (Freedman, J.).

Insurance; duty to disclose; fraudulent concealment. Plaintiff sought recovery under a blanket policy issued by defendant insurance company to indemnify plaintiff for loss caused by the fraudulent and dishonest acts of its employees. The key issue was whether, prior to obtaining the policy, plaintiff had known of its CEO's dishonest acts, but had concealed the information from defendant in violation of the policy's terms. The court granted defendant's motion for summary judgement finding that plaintiff had had more than a mere suspicion of knowledge that the CEO's conduct and claimed ownership of a subsidiary company were likely to become the subject of litigation. Moreover, plaintiff had been acutely aware of the CEO's actions long before it terminated his employment in October 1999, and events prior to the policy application, including a prior fraud litigation against the same CEO in Texas, had placed plaintiff under a duty to disclose this information to defendant. American Rice, Inc. v. National Union Fire Insurance Co., Index No. 601064/2001, 12/5/03 (Cahn, J.).

Insurance; Insurance Law § 3404, 3407. Appraisal; CPLR 7601, 7503. Plaintiff, owner of building at 130 Liberty Street that had been damaged in the events of 9/11, alleged that the building was a "total loss", representing damages of over a billion dollars. The court granted defendant insurers' motion to compel plaintiff to participate in an appraisal process pursuant to a clause in the policies, and denied plaintiff's motion for a preliminary injunction to stay the appraisal. Plaintiff argued that issues of total loss required judicial adjudication, but the court found that the CPLR allows commencement of special proceedings to enforce provisions such as those regarding valuation or appraisal, and that the court may enforce an agreement to seek appraisal. The parties' disputes concerned loss value, not issues that could be resolved only by analysis and application of the policy. The court distinguished cases plaintiff cited which involved "valued" policies that state a property's value or amount of total loss; when a total loss exists, there is nothing for appraisers to decide and the appraisal clause is inoperative. It distinguished, too, cases where the insurer had denied liability. That serves as repudiation to excuse the insurer from performance, and appraisal clauses in the policy hence do not apply. Plaintiff argued that initiation of an appraisal would be premature because pursuant to the policies, a demand for appraisal could only be made after the insurer's receipt of proof of loss. But the court deemed that an interim proof of loss plaintiff had submitted had satisfied the requirement; the appraisal's results would shape the final proof of loss. Plaintiff had also, in support of its motion for expedited discovery, submitted a joint affidavit by the Port Authority and Lower Manhattan Development Corporation stating that the World Trade Center Memorial and Redevelopment Plan incorporated the 130 Liberty site. Noting that the affidavit did not alter its decision that the disputed issues would be submitted for appraisal, the court stayed the motion for expedited discovery. Taunus Corp. v. Allianz Insurance Co., Index No. 602519/2003, 11/14/03 (Lowe, J.).

Notice of pendency; breach of agreement; injunction. Plaintiffs, producers and marketers of a popular Chinese beverage in the United States, moved to cancel a notice of pendency imposed by defendants. Defendants had filed the notice with regard to their counterclaims, which alleged breach of agreement. Defendants had requested money damages and wanted plaintiffs to grant them the use of a New York property so that defendants might recoup fees owed by plaintiffs. Defendants also wanted an injunction as they feared that plaintiffs might sell the property, take the proceeds to China, and leave no assets in New York from which defendants might recover. The court held that since defendants sought both money damages and equitable relief which involved the use and possession of the New York property, a notice of pendency was appropriate. The court further held that plaintiffs had failed to show that they had suffered a hardship as a result of the notice and denied their motion to cancel. Jianlibao Holdings (HK) Co., Ltd. v. Lin Qishu, Index No. 600705/2003, 11/18/03 (Ramos, J.).

Partnership; dissolution; Partnership Law § 71, 71(b); stipulations. Litigation arose from disagreement between former partners in a law firm over distribution of payments. Two successor firms formed after the partnership's dissolution agreed by stipulation to a formula allocating payment of legal fees earned on cases which had begun prior to the dissolution. Plaintiff argued that an issue over capital distributions fell under Partnership Law § 71(b). The court, however, maintained that because there was already a written stipulation which defined partnership assets, the provisions of Partnership Law § 71(b) did not apply. The court further held that the clause in the stipulation requiring that disputes be decided by special referee referred to specific matters regarding accounting and distribution of settlement and judgment funds, whereas the instant issue was one of interpretation of the stipulation and thus was

properly before the court. Joachim and Frommer v. Flanzig, Index No. 3215/2002, 11/6/03 (Austin, J.).

Preliminary injunction; conversion; trade secrets; tortious interference with contract. The court denied plaintiffs' motion for a preliminary injunction, finding no basis for allegations that defendants' acts constituted conversion, misappropriation of trade secrets, or tortious interference with contract. There had been no evidence produced that defendants had physically removed books, records, or other documents from plaintiffs' premises. Plaintiffs had also failed to provide any support for the assertion that various lists were confidential and not, as defendants stated, composed of information readily available from public sources such as the Yellow Pages and media serving the Russian community. Nor did plaintiffs allege the required elements of tortious interference with contract, as they failed to identify a specific contract, and to state that defendants had knowledge of it and intentionally induced a third party to breach it. A mere unsubstantiated assertion of a course of conduct that might not even be contemplated by defendants was not sufficient to state a danger of imminent irreparable injury. SK Productions, LLC v. New Life Broadcasting, Index No. 113518/2003, 10/21/03 (Ramos, J.).

Preliminary injunction; CPLR 6301. Class action; class certification. GBL §§ 349, 350. Fraud. Warranty; express; implied. Unfair competition. FDA. In purported class action, plaintiffs moved for an order preliminarily enjoining the sale of beverages sold under the name "AriZona Rx Memory Herbal Tonic" and others containing an "Herbal" and in some cases the "Rx" designation. Defendants opposed the motion and moved to dismiss the causes of action. Plaintiffs averred that they had bought and drunk the beverages for two years in expectation of enjoying health benefits that they alleged defendants' labeling had fraudulently conveyed would accrue. Plaintiffs had failed to establish the elements essential to the GBL claims, the court ruled. Individual claims of deception and reliance might have survived the motion to dismiss, but the court could not imagine any injury plaintiffs could prove or quantify. They had paid no more for the beverages than they would have for others, and although they had not experienced health benefits, they had continued for two years to consume the beverages. A fraud claim failed in view of the product labels' express disclaimer, which appeared pursuant to an agreement with the FDA. Claims for implied warranties fared no better, as the warranties of merchantability and fitness for purpose were met by the beverages being drinkable and causing no ill effects. Moreover, implied warranties do not extend to those not in privity unless personal injury is alleged. Plaintiffs had no standing for their claim of unfair competition inasmuch as they did not manufacture or sell competing beverages. A California Court decision had appeared to require defendants to remove the "Rx" from their products and an FDA letter to defendants had criticized it. Although the court found that CPLR requirements for a preliminary injunction had not been met, it scheduled a hearing on whether a limited injunction should be imposed. Donahue v. Ferolito, Vultaggio & Sons, Index No. 600152/2003, 11/20/03 (Freedman, J.).

Procedure; CPLR 3213; lease agreements; guaranties. Plaintiff moved pursuant to CPLR 3213 on the grounds that there had been a default by defendant under the master lease agreement, equipment schedules and guaranties. The court stated that CPLR 3213 applies to leases as long as the instrument by its terms was "for the payment of money only." The court determined, however, that plaintiff's lease agreement imposed multiple obligations on defendants beyond mere payment of money so that relief under CPLR 3213 was precluded. The court further denied 3213 relief to plaintiff on the guaranties executed by defendants. The court explained that such instruments cannot come under the ambit of 3213 when they guarantee performance in addition to payment. Real Lease, Inc. v. SMG Direct, Inc., Index No. 07759/2003, 11/19/03 (Stander, J.).

Procedure; forum non-conveniens; Cayman Islands parties. Dispute between Cayman Islands entities. Defendant claimed that it operated from Moscow, but plaintiff asserted that defendant's operations were conducted through a holding company with its principal place of business in New York. Defendant had opened a bank account with plaintiff. The plaintiff had transferred monies from the account pursuant to fax instructions received from Moscow. Defendant had later claimed that it never received the benefits of the transfers. Plaintiff sued for mistaken payment and conversion. The court ruled that dismissal on the grounds of forum non conveniens was required. The parties were Cayman corporations, the alleged errors occurred there following instructions sent there from Moscow, and the parties agreed in a writing governing fax instructions that any disputes relating thereto would be controlled by Cayman Islands law and resolved in Cayman courts. The court found no nexus to New York. The court found the Cayman Islands an appropriate and adequate alternative forum. As noted, the parties had agreed to the forum. Although plaintiff had argued that defendant was not authorized to do business there, the court found that plaintiff had failed to establish that this affected the forum non conveniens analysis. Plaintiff had already started a suit against defendant there. No special circumstances were present to warrant taking a suit between non-residents over out-of-state activities. Documents and witnesses of plaintiff were located in the Cayman Islands and most of defendant's were in Moscow. New York would have to apply Cayman Islands law. The Islands would have a greater interest in this case than New York. Case dismissed. Caledonian Bank & Trust, Ltd. v. Beverage World Corp., Index No.

603424/2002, 10/31/03 (Ramos, J.).

Procedure; forum non conveniens; motion to dismiss. In a breach of contract action, defendant, a Pakistani bank, moved to dismiss on the grounds of forum non conveniens. In support of the motion, defendant argued that the lawsuit had no connection to New York because the contract involved the shipment of goods from Japan by a Japanese seller to a Pakistani buyer in Pakistan. Further, all relevant negotiations, documents and witnesses were to be found in Japan and the court would have had to apply Pakistani law because the underlying contractual obligations arose in Pakistan. Plaintiff argued that Pakistan was an unacceptable alternative forum because of delays in the courts there. The court granted the dismissal because of lack of connection to New York. The court further pointed out that the determination of the dispute required interpretation and application of Pakistani law and, citing defendant's expert, that Pakistan was available as an adequate forum with its own well-developed body of commercial and contract law and a Financial Institutions Ordinance that would insure that this matter would be adjudicated without inordinate delay. The court also took note of plaintiff's concerns about litigation delays in Pakistan and ordered that if, through no fault of the plaintiff, the litigation in Pakistan were not to move forward as represented by defendant, the instant motion could be renewed. Shin-Etsu Chemical Co., Inc. v. United Bank Limited, Index No. 604406/2002, 11/21/03 (Ramos, J.).

Procedure; leave to amend; eve of trial; additional parties. Action arising out of transactions involving interests in a New York City hotel. Leave sought to interpose additional claims on eve of trial. The court found that defendant had known of the claims almost since beginning of case. The court allowed one counter claim against a plaintiff based on facts that were or should have been known to this plaintiff. The claim arose out of discovery in the case. Interposition of this claim would not, the court found, require additional discovery or delay trial. The court denied the motion as to other proposed counterclaims. Prompt resolution of the issues in the case would be important to the parties. Hence, there had been expedited discovery and an early trial date had been set. The claims at issue would add new parties, which might generate other claims. Discovery would be needed. Trial might moot the proposed claims. The defendant had known of the claims for months and offered no reasonable excuse for waiting until the eve of trial. Motion denied except as to one counterclaim. GPH Acquisition LLC v. Gramercy Park Hotel Ltd., Index No. 13591/2003, 12/19/03 (Austin, J.).

Procedure; motion to dismiss; amended pleadings. Defendant moved to dismiss plaintiffs' amended complaint in a breach of contract action. Plaintiffs cross moved for leave to file a second amended complaint. The court granted defendant's motion and concluded that the release executed by the borrower, as well as return of the loan application deposit to plaintiff, discharged defendant of its obligation; thus plaintiffs' claim for breach under the application letter failed. The court further held that additional factual allegations offered by plaintiff in support of request to amend complaint failed to remedy defects in the prior pleading and thus failed to state a cause of action. Morgan Capital, LLC v. Salomon Brothers Realty Corp., Index No. 603151/2002, 10/28/03 (Ramos, J.).

Procedure; settlement; enforcement; motion or plenary action; terms. Action settled. Stipulation of discontinuance to be filed. Defendants sought enforcement of the stipulation as they had paid the sums due, but plaintiff refused to provide a satisfaction of mortgage. The court rejected plaintiff's argument that it lacked jurisdiction. Although the parties agreed upon a discontinuance, it was not intended to discontinue at that time as a portion of the stipulation remained executory (for future payments). As the action had not been terminated unequivocally, an application relating to enforcement or interpretation of the stipulation could be made by motion rather than plenary action. Defendants had made a lump sum payment as required and had later paid installments and then the full balance due. Plaintiff did not dispute this, but asserted that some of the payments had not been timely and that some of defendants' subcontractors had threatened to sue. The court held that these arguments did not excuse plaintiff from delivering a satisfaction of mortgage as required by the stipulation. Although some payments had been late, defendants had timely cured each default and paid all required late charges. The stipulation required defendants to indemnify plaintiff if any defined claim were brought. One had been threatened but not brought. However, the court ruled, the stipulation did not authorize plaintiff to refuse to deliver the satisfaction for that reason until the statute of limitations had run on all potential claims. Plaintiff directed to deliver satisfaction. Sanctions granted to defendants in amount to be determined at a hearing. Haligiannis v. Bristol-Halsey, Inc., Index No. 20104/2000, 10/2/03 (Austin, J.).

Procedure; statute of limitations; acknowledgment (GOL 17-101). Action arising out of defendant's alleged failure to issue share certificate. The statute of limitations had expired. However, the court cited letters by counsel for defendant corporation acknowledging defendant's continuing obligation to issue stock under the agreement in question. GOL 17-101 requires the acknowledgment to be signed by the party to be charged. The president of defendant had received a copy of the letters, which often reflected his directive. The signature of counsel was held to

be sufficient. Defendant's motion for summary judgment denied. Sullivan v. Troser Management, Inc., Index No. 3022/2003, 11/19/03 (Stander, J.).

Res judicata; collateral estoppel; non-competition agreements; tortious interference with prospective economic advantage. In litigation stemming from sale of business interest, summary judgment granted in favor of defendant regarding plaintiffs' cross-claim for attorney's fees incurred in a 1996 action between the same parties, which had been denied. The court found plaintiff was attempting to base its instant claim for attorney's fees on a different theory, and given that plaintiff had had a full and fair opportunity to litigate the issue in 1996, res judicata barred plaintiff from now seeking the same relief under a different theory. The court further determined that under collateral estoppel, defendant could not reargue that he was not bound by the implied covenant not to impair good will. Plaintiff's claim for tortious interference was dismissed on grounds that prospective economic advantage cannot be premised on a contractual obligation of a defendant. Finally, the court denied plaintiffs' request for an accounting as there were no allegations of a fiduciary relationship. Sager-Spuck Statewide Supply Co., Inc. v. Meyer, Index No. 4145/2003, 12/2/03 (Benza, J.).

Breach of confidentiality agreement; misappropriation of trade secrets; unfair competition; CPLR 3211. In an action for breach of confidentiality agreements, misappropriation of trade secrets and unfair competition, plaintiffs opposed defendants' motion to dismiss their verified complaint or in the alternative sought leave to replead. Plaintiffs asserted as a trade secret a proprietary computer system that created an internet marketplace for the purchase and sale of electric power, along with related systems. The court cited the definition of trade secret from the Restatement of Torts § 757, and concluded that plaintiffs' computer program was a product of the interaction of specific components and thus that the plaintiffs' allegations sufficed for the purposes of the motion to qualify the system as a trade secret. The court further found that documentary evidence did not conclusively prove that defendants had not breached the confidentiality agreement or misappropriated confidential information. Thus, the court concluded that plaintiffs had adequately set forth a claim for unfair competition. The court then dismissed claims as against individual defendants and found no factual allegations by plaintiffs that supported piercing the corporate veil. Finally, the court denied plaintiffs' request for leave to replead and stated that plaintiffs had not submitted any new evidence nor had they proffered a proposed pleading to the court. Harbor Solutions.com, LLC. v. The Kensington Group, Index No. 601109/2003, 12/19/2003 (Freedman, J.).

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