

The *Commercial Division*

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Law Report - July 2002



THE LAW REPORT

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of the Supreme Court of the State of New York

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Accountants' liability. Action by plaintiff, shareholder in an entity that was sold to defendant. Plaintiff received shares in defendant that could not be sold for 17 months. After the closing, a criminal investigation of defendant was announced and the individual defendant was indicted. Plaintiff alleged misrepresentation and that the co-defendant accounting firm, which had been retained by plaintiff's company, had failed to discover the wrongdoing. Defendants argued that the decline in the stock price of defendant could have been attributed to factors other than the indictment and investigation. The court ruled, however, that plaintiff had sufficiently raised an issue of fact by citing defendant's SEC filings indicating a link between the investigation and the price decline. The defendant accounting firm argued that it had conducted only a brief due diligence, but plaintiff raised an issue of fact by citing testimony showing that the firm had found evidence of a consulting contract with an FBI sting company but had not reported this to plaintiff and billing records showing that defendant had spent 60 hours on the work. Summary judgment denied. [Prince v. Community Care Services, Inc.](#) Index No. 6456/2000, 5/8/02 (Austin, J.).

Accountant's liability; privity and relationship approaching privity. Procedure; sealing of court file. Misrepresentation; affirmative defense; pleading (CPLR 3016 (b)). Defendant, an accounting firm, sought summary judgment dismissing the remaining causes of action for professional malpractice and breach of contract. The plaintiff medical center failed to raise an issue of fact as to whether it was in privity of contract with defendant. The court held that the engagement letters did not indicate that the medical center was a party to those agreements.

JUSTICES OF THE COMMERCIAL DIVISION

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Decisions discussed were
issued **May-June 2002**

The letters concerned services for the plaintiff nursing home and only one included the medical center's name, solely as part of the address to which the letter was sent. Because the contractual terms and obligations were clearly set forth in the writings, the signatories' dual responsibilities for the medical center and the nursing home were insufficient to raise an issue of fact regarding privity of contract. As to whether there had been a relationship sufficiently approaching privity, the evidence revealed that defendant was plainly aware of the close relationship between the two plaintiffs. Whether the medical center's forgiveness of the nursing home's debt was a superseding cause of the medical center's damages could not be determined on summary judgment. The court rejected defendant's arguments to dismiss the nursing home's malpractice and breach of contract claims. Defendant had failed to address all of the grounds asserted by the nursing home constituting malpractice. The exact import of the nursing home's statements regarding its responsibility was an issue for the trier of fact because the nursing home did not admit sole responsibility that would relieve defendant of liability. The court held that defendant had failed to establish that the board of the nursing home had had actual knowledge of its deficient billing procedures. Even if the nursing home was negligent in its billing, that negligence would not be sufficient for finding that the defendant was not liable for its own negligence. The court granted defendant's motion to seal certain papers on the motions. The court denied the plaintiff's motion to dismiss several affirmative defenses prior to trial, but granted the motion to the extent of dismissing the affirmative defense based on fraud because the circumstances were not stated in detail, as required by CPLR 3016(b). The defense based on estoppel was dismissed, because the defendant failed to articulate any factual basis for the defense and failed to plead certain elements of that defense. The court denied the plaintiffs' motion to seal certain documents, because the plaintiffs did not identify the specific documents to be sealed or explain why redaction was not adequate. [BI Nursing Home Co. v KPMG Peat Marwick, LLP, Index No. 602503/1999, May 2002 \(Cahn, J.\)](#).

Attorney and client; disqualification. Motion to disqualify plaintiff's attorney and firm. The attorney had represented a company of which defendant was an officer and sole shareholder in a collection matter. After obtaining a judgment, the attorney received a fax from the debtor's attorney threatening to bring a securities action against defendant concerning his investment in a corporation. Plaintiff in this case sued defendant alleging misrepresentations regarding plaintiff's investment in the same corporation. The attorney and defendant had a conversation about the threat the extent and substance of which were in dispute. Although the attorney and the company had had an attorney-client relationship, it was, the court said, less clear if defendant as a corporate officer was entitled to the privileges of an attorney-client relationship. The court pointed out that the attorney-client relationship exists if the communicating party believes he or she is approaching the attorney in a professional capacity to secure legal advice. Defendant asserted that he had thought the attorney was acting as his attorney since the threat had been against him, not the company, and that he had approached the attorney in a professional capacity to obtain legal advice. Defendant claimed that he had revealed confidential information. If so, the court stated, it would be reasonable to conclude that defendant believed that the attorney was acting as his personal attorney and sought legal advice. An attorney-client relationship may well have existed. On the other hand, the court stated, there was no relationship if the attorney's version of the conversation were accepted as true. In evidentiary hearing was directed. If the hearing established the relationship, the second and third requirements of DR 5-108 will have been met in that the issues were similar to those involved in this case and the present and former client had adverse interests. Defendant's failure to make this motion in Federal court, where this case had originated, followed by an 18-month delay, did not amount to laches requiring denial of the motion. The court has the duty and the power to regulate attorneys before it, which cannot be defeated by laches, absent prejudice. No proof of prejudice had been proffered, the court found. The fact that disqualification had been denied in another case was not relevant because that case was different from this one. Hearing directed. [Tanenbaum v. Rahr, Index No. 605338/2001, 5/28/02 \(Freedman, J.\)](#).

BCL 630 (a); unpaid salary and commissions. Shareholder status; motion to dismiss; documentary proof. Action for unpaid salary and commissions and share of profits as a shareholder. The court ruled that some claims improperly relied on BCL 630 (a) since plaintiff had not obtained a judgment against the corporation. These claims could stand against the company, not against the principal thereof. The court ruled that a letter of intent offering plaintiff shares was ambiguous in stating that it had to be formalized. Defendants' documentary proof did not conclusively establish that plaintiff was not a shareholder. Dismissal granted in part. [Ilas v. Nihagen & Co., Index No. 605294/2001, 6/4/02 \(Freedman, J.\)](#).

Brokerage commission; purchaser's ability to buy; finances. Action for brokerage commission. The court held that plaintiffs had not made a prima facie demonstration of entitlement to a commission. Plaintiff had not shown that the person introduced was financially able to buy on the terms set by defendants. The person introduced had not persuaded the bank to accept an assignment of the mortgage on terms offered by defendants, nor had he had personal finances to complete the transaction. The burden was on plaintiffs to show that the buyer was ready, willing and able to purchase. Here there had been a counteroffer. Case dismissed. [BMD Realty Concepts, Inc. v. Columbia Realty Associates, Index No. 10401/2000, 5/9/02 \(Austin, J.\)](#).

Collateral estoppel; action of administrative agency. Contracts; third-party beneficiaries; quasi-contractual remedies. Class actions; numerosity. Purported class action asserting various claims based upon alleged failure to pay prevailing wages. The Comptroller's Office investigated certain claims made by a named plaintiff. The court held that it had not been shown that a rejection letter was a valid, final adjudication nor that the Office is a tribunal employing procedures substantially similar to those used in a court. Thus, collateral estoppel did not apply. The court ruled that plaintiffs and the proposed class were third-party beneficiaries of bonds and public works contracts as provisions to benefit workers had been included pursuant to statutory requirement. A quasi-contractual recovery is ordinarily barred when a valid enforceable contract is in place. This applies when the plaintiff is a third-party beneficiary. Thus, claims for unjust enrichment and quantum meruit were barred. The court stated that the exact number of potential class members need not be specified in order to establish numbers sufficient for a class action. The court, however, ruled that plaintiffs had not demonstrated that the requirement would be met. Plaintiffs referred to 100 or so workers but did not attest how many had been employed by defendant. A conclusory and unsupported assertion that the class would comprise over 100 did not suffice, especially since plaintiffs stated that some workers would be reluctant to get involved in the case. Class action certification denied. Partial summary judgment for defendants. [Infante v. Permis Construction Corp., Index No. 103831/2001, 5/20/02 \(Ramos, J.\)](#).

Commercial lease; ground lease; action for breach of contract. Plaintiff entered into a ground lease to develop a site for a pharmacy that would sublease the site and construct a building. Plaintiff agreed to reimburse the pharmacy for the development costs and obtain leasehold financing. The ground lease stated that plaintiff could require the ground lessor to execute necessary instruments to secure financing as long as the instrument did not alter the ground lessor's rights or obligations. The sublease required the plaintiff to pay the pharmacy upon completion of the building and non-payment of that amount could be deducted from future rent payments. The pharmacy also paid part of the rent directly to the ground lessor. Based on environmental concerns, plaintiff and the ground lessor amended the lease to require the ground lessor to pay for any environmental work. When plaintiff discovered antifreeze liquid in the soil, plaintiff completed the environmental work because the ground lessor did not. The ground lessor refused to allow plaintiff to offset the costs due to a second amendment to the ground lease which contained a waiver of contingencies. The pharmacy then notified the other parties that it would withhold rent until the property was remediated, but eventually resumed paying the ground lessor. After completion of the environmental work and improvements to the property, plaintiff applied for financing and needed to submit an estoppel certificate, in which the ground lessor would, in part, verify that plaintiff was not in violation of the lease. The ground lessor did not provide verification and the pharmacy began withholding rent from plaintiff. Plaintiff sued for breach of the ground lease and sublease and moved for summary judgment. The ground lessor cross-moved for summary judgment. The pharmacy moved to dismiss plaintiff's complaint and for summary judgment on its counterclaims. The court held that the first amendment to the ground lease required the ground lessor to reimburse plaintiff for environmental work and was not contingent upon anything. The amendment did not incorporate any letter from the State DEC that would alter the ground lessor's obligation. The court awarded plaintiff an amount for the actual expenses incurred to complete environmental work on the property. The plaintiff failed to brief the issue of contingent or consequential damages. The court held that the ground lessor did not breach the lease by failing to execute and deliver the Landlord's Agreement required for plaintiff's financing because that agreement would have materially impaired the ground lessor's rights and increased its obligations under the lease. Among other things, the Landlord's Agreement required the ground lessor to state that the successor-tenant would not be liable for any previous act or omission of the ground lessee under the ground lease and was required to waive the right to trial by jury. The court dismissed plaintiff's causes of action against the pharmacy for failure to pay for environmental costs and tortious interference with contract. The court held that the sublease did not require the pharmacy to account for any offsets or deductions due from the ground lessor to the plaintiff, prior to making monthly payments to the ground lessor. Plaintiff did not oppose the pharmacy's cross motion for summary judgment on the counterclaims for the costs of construction and attorneys' fees. The court held that plaintiff's counsel's letter, submitted after argument of the motions, was insufficient to challenge the pharmacy's counterclaim for attorneys' fees because plaintiff had previously failed to respond to the written arguments. [Long Pond Romeo Land Co. v Tasillo, Index No. 03740/2000, May 2002 \(Stander, J.\)](#).

Contracts; breach. Fiduciary Duty. Tortious interference with contract. A dispute regarding charge backs arose between an Internet store front and a company which processed its credit card transactions. At the behest of the company and of a clearinghouse for the credit card transactions, a bank placed a hold on the bank accounts of the Internet store front and on the personal account of its president. Plaintiffs commenced an action for "wrongful freeze" of the bank accounts against the company, the clearinghouse, the bank, and a credit card processor which had allegedly serviced the Internet store front's merchant account on behalf of the company. The company, the bank, and the credit card processor moved for dismissal of the complaint for failure to state a cause of action and on the basis of documentary evidence. Plaintiffs cross-moved for leave to amend the complaint and for a preliminary injunction. The court granted plaintiffs leave to amend and directed defendants' motion to dismiss to the amended complaint. The court denied defendants' motion to dismiss as to claims against the bank that were based on breach of the bank's depository agreement with plaintiffs. Although the terms of bank's depository agreement allowed the bank to refuse withdrawals in the event of a dispute about the account, the court found that the issue of breach could not be determined on the present state of the record. The court dismissed breach of fiduciary duty claims against the bank, as a bank-depositor agreement, standing alone, creates no fiduciary relationship. The court dismissed plaintiffs' claims for tortious interference with contract. Although various third-parties had canceled their contracts with the Internet store front, the court found that the freeze of plaintiffs' bank accounts had not induced the cancellations. Plaintiffs' request for a preliminary injunction was denied because plaintiffs' injuries were compensable in money damages. Defendants' motion granted in part; plaintiffs' motion denied in part. [Garnett v. First Data Merchant Servs., Index No. 7681/2001, 5/1/02 \(Austin, J.\)](#).

Contracts; employment agreement; wrongful termination. Following termination, plaintiff, a "vice president of Corporate Development," sought the remainder of her salary due under a three-year employment contract with defendant. The employment contract provided that defendant would pay any unpaid base salary until expiration of the contract if plaintiff was terminated "for any reason other than Cause." Defendant maintained that, because plaintiff had acted as its in-house counsel, it had an unfettered right to discharge her at any time. Defendant also argued that the employment contract was unenforceable because plaintiff had failed to inform defendant that the agreement conflicted with its absolute right to discharge counsel and failed to advise it to seek independent legal counsel. The court held that an attorney who is retained for a term of years to perform general legal services, such as an in-house counsel, is nevertheless entitled to recover severance fees under the terms of an employment agreement. The court also found issues of fact as to whether plaintiff was hired as an attorney, and found that definition of "cause" in the agreement was ambiguous. Plaintiff's motion for summary judgment and sanctions denied; defendant's cross-motion for summary judgment denied. [Junowicz v WeMedia, Inc., Index No. 600250/2001, 5/10/02 \(Ramos, J.\)](#).

Contracts; interpretation; ambiguity. Misrepresentation; reasonable reliance. Defendants purchased molds used to manufacture surgical preparation devices. Plaintiffs sued to recover sums unpaid therefor. Defendants argued that defendant had only intended to take ownership if the molds were proven to produce devices satisfactorily and that the individual defendant was not to have been a party to the contract. The court held that the agreement was unambiguous, bound the individual defendant and did not contain the condition asserted by defendants. Defendants also claimed that plaintiffs had misrepresented the facts. The court ruled that defendants could not have reasonably relied since they had had possession of the molds for two years prior to execution of the contract and should have examined and tested them. Defendants' allegations were unsupported and conclusory. Partial summary judgment for plaintiffs. [Gordon v. Bio-Med Plastics, Inc., Index No. 14333/2001, 6/24/02 \(Austin, J.\)](#).

Contracts; interpretation; commercial financing agreement; ambiguity. Action arising out of agreement creating a commercial lending facility. Pursuant to an amendment, monies were deposited in an excess spread account. These funds were to be held for the benefit of defendant or bank investors at all times, including after the date on which the net investment had been reduced to zero and all aggregate unpaids had been paid in full. When the agreement terminated, defendants rejected plaintiff's demand for return of \$1 million in the account. The court stated that at first blush, defendants' interpretation seemed more logical as language suggested that the parties contemplated that the account would be held after the agreement was fully performed. The court concluded, though, that the agreement was ambiguous. The court noted conflicts of interpretation in the evidence. Plaintiff said that it had been intended that the amount serve as security in the event of bankruptcy. Defendants cited conflicting communications. The court held that sufficient ambiguity existed to justify a trial. [Amresco Builders Funding Corp. v. Kitty Hawk Funding Corp., Index No. 605664/2000, 5/10/02 \(Freedman, J.\)](#).

Contracts; interpretation; dispute resolution mechanism; waiver. Proceeding arising out of purchase by

petitioners of assets of respondent corporation. The asset purchase agreement provided the buyer would, within a defined period, submit to seller a statement setting forth earnings and costs and its calculation of the earn-out amount due respondents if earnings targets were met. The seller would be deemed to have accepted the earnings statement unless a written notice challenging particular items was sent. The agreement further provided that if the parties could not resolve the dispute, it would be submitted to an independent appraiser. The parties exchanged the statement and exceptions. Respondents argued, however, that petitioners had waived the right to proceed because respondents had submitted monthly earn-out reports to which petitioners never objected. The court held that the agreement was unambiguous insofar as the dispute resolution mechanism was concerned. That respondents had sent monthly reports could not deprive petitioners of their rights. Also, a waiver under the agreement had to be in writing and signed. Petitioners' motion directing an appraisal granted. [Creative Communication of America, Inc. v. Green Harbour Communications, Index No. 604530/2001, 6/14/02 \(Cahn, J.\)](#).

Contracts; interpretation; intent of parties; privity; action by auditor. Unjust enrichment; existence of contract. A building owner had retained an auditor to identify overcharges in fees that the owner had paid for building services. As a result of the auditor's efforts, the building owner had received a reduction in fees for building services and the auditor received monthly payments representing a percentage of the savings going forward. The owner had then sold the building and the new owner's costs of building services reflected the savings and reductions effectuated by the auditor. The auditor brought an action against the former owner and the new owner to recover its share of the building's savings and reductions for the period following the building's sale. The court held that merely identifying an overcharge was not sufficient to earn a fee because the intent of the parties was that the former owner was not to pay any monies unless it actually received a refund. The court dismissed claims against the new owner, reasoning that a valid enforceable contract precluded the auditor's claim for unjust enrichment. The court also held that, absent privity, the auditor could not proceed against the new owner on a theory of breach of contract. Motion and cross motion for summary judgment dismissing the complaint and cross claims granted. [Commercial Tenant Servs., Inc. v First Union Natl. Bank, Index No. 605533/2000, 5/28/02 \(Lowe, J.\)](#).

Contracts; interpretation; parol evidence; liability of principal of dissolved corporation; alter ego theory. Action for breach of contract against media company and its sole principal. The court found that defendant company was jointly and severally liable with any assignee of broadcast rights so that defendant's argument that it was obliged to pay only if the assignee paid it was unavailing. Parol evidence could not be admitted to vary a clear, unambiguous provision. That the company had been dissolved for unpaid taxes when it entered into the agreement with plaintiff did not render the principal liable. The reinstatement of the corporation retroactively validated the transaction. The breach alleged here did not occur until after reinstatement. Questions of fact existed on a piercing theory, for which, in any event, the principal would be liable only up to the amount wrongfully transferred. [New World Entertainment v. Intermedia Export Corp., Index No. 601049/2001, 6/26/02 \(Freedman, J.\)](#).

Contracts; interpretation; successor corporation; merger; piercing corporate veil. Plaintiffs, wholesale bread distributors, sought a declaration of rights arising under agreements with a baker, a defunct, once-privately held company. The court found the agreements unambiguous. It interpreted them to mean that they applied only to baked goods to be sold under the "Arnold" name. The court found that a separate company, using the Arnold name, had acquired all of the baker's assets, and that that entity was different from defendants, although one defendant owned it. The court found no evidence that the defendant parent was the successor by merger of the original baking company, nor that plaintiffs had shown that the defendant had exerted control over its subsidiary baking company, so as to warrant disregard of the corporate form; there was proof of neither domination nor commission of fraud. The court was unpersuaded by plaintiffs' argument that the interpretation adopted by the court would negate the exclusivity plaintiffs had paid for, allowing defendants to compete with plaintiffs using other brands. Summary judgment for defendants on claim at issue. [Nature's Best Group v. CPC International Inc., Index No. 10253/1997, 6/10/02 \(Austin, J.\)](#).

Contracts; inter vivos gift; interpretation; restrictions. Procedure; statute of limitations; equitable estoppel. Revocable license; pleading. Fiduciary duty; relationship. Action for breach of contract and on other theories arising out of substantial inter vivos gift. Defendants pointed to two letters as the gift instruments and stated that dismissal was required because the terms plaintiff sought to enforce were not included. The court noted that in order to find that a restriction has been placed on the use of a gift, the restriction must be clearly expressed. In one letter, the grantor had set forth the right to approve detailed project plans and staff appointments, thus indicating that the two letters did not contain all terms. Plaintiff cited other letters and documents supporting her claim that the grantor had wanted certain restrictions observed. The court ruled that the agreement was not unambiguously encompassed

within the gift instruments. Material factual questions existed. Further, the court ruled that documentary evidence did not conclusively establish that proceeds of a certain sale of property had been properly allocated to the gift fund and that the grantor had approved. Although this case was commenced more than a decade after the sale, plaintiff alleged that defendants had engaged in deception justifying equitable estoppel against application of the statute of limitations. The court ruled that this issue could not be resolved at the current stage of the case. Plaintiff alleged a revocable license theory involving the grantor's name. The court stated that the claim must be based on evidentiary facts indicating that the grantor retained interest in or control over his name in connection with the gift. The court found that such facts had not been pleaded. On a fiduciary duty claim, the court held that a fact finder might find that a fiduciary relationship arose between the grantor and defendant hospital as result of their work closely together on the center established by the grantor and that the grantor had relied on the hospital to provide him with information needed to allow him to follow and participate in the progress of the center. This claim was upheld. Amended complaint dismissed in part. [Smithers v. St. Luke's - Roosevelt Hospital Center, Index No. 604578/1998, 5/13/02 \(Lowe, J.\)](#).

Contracts; manufacture of goods; statute of frauds; (UCC 2-201 (1)); specially manufactured goods (UCC 2-201 (3) (a)). Action arising out of contract whereby plaintiff manufactured a line of cosmetics for defendant. Defendant contended that it had not entered into such contract. The court ruled that the writings referred to in the complaint were not, and did not constitute evidence of, a written contract. The documents at most showed that there had been discussions. UCC 2-201 (1). A claim for storage of the goods as additional damages failed as an independent claim for relief. However, the court ruled that a third claim might stand under 2-201 (3) (a), referring to an e-mail message that mentioned discussions. Complaint dismissed with leave to plead stated cause of action. [Added Extras, Inc. v. Party City Corp., Index No. 605707/2001, 6/11/02 \(Freedman, J.\)](#).

Contracts; statute of frauds; part performance; promissory estoppel; finder's fee. The court granted defendants' motion for summary judgment dismissing the complaint. Plaintiff alleged breach of an oral agreement, but failed to satisfy the statute of frauds or to demonstrate partial performance. Defendants owned three million shares of Consoltex and, in October 1997, had hired plaintiff to identify potential purchasers of the shares, among other things. The agreement was initially for a six-month term and promised a fee to plaintiff if it identified a party that ultimately entered into a deal with Consoltex and closed within 12 months of the agreement's expiration. Plaintiff had identified numerous potential purchasers, including American Industrial Partners (AIP), but another major shareholder of Consoltex had rejected AIP's offer. AIP had increased its offer, but Consoltex had conducted an auction instead. A few months after the auction commenced, Consoltex's financial picture worsened. Plaintiff sought an extension of its agreement, but defendants never executed a written extension. Plaintiff claimed that the parties had then reached an oral agreement to extend the agreement and defendants had promised to pay the fee if and when the AIP deal closed. Defendants allegedly had asked plaintiff whether it would be willing to buy Consoltex. Plaintiff had made two bids, but claimed that it had been asked to make a bid to discourage another purchaser and increase offers from others. AIP's bid was accepted. Afterward, plaintiff had attempted to collect its commission. Defendants had refused because the agreement had expired. In a prior decision, the court determined that the alleged extension of that agreement was subject to the statute of frauds. After the completion of discovery, plaintiff was unable to identify an issue of fact in regard to part performance, which would excuse the lack of a written agreement. The court held that plaintiff's performance had not been unequivocally referable to the alleged oral agreement because the acts could be explained by plaintiff's continued performance under the initial agreement and by its own attempt to acquire Consoltex. Plaintiff's efforts to purchase the shares had not been required solely by the oral agreement. The court also rejected plaintiff's claim for out-of-pocket expenses based on promissory estoppel because promissory estoppel is not available where the only damage sustained is the inability to obtain a finder's fee. [Lincolnshire Management, Inc. v Les Gantiers Holdings, B.V., Index No. 604633/99, 5/23/2002 \(Cahn, J.\)](#)

Corporate waste; breach of fiduciary duty; pleading particularized facts (Delaware law). Action for corporate waste and breach of fiduciary duty. The complaint alleged that defendants used their control over the corporation to deplete the value of the corporation and its shares by causing the corporation to give debt-to-equity conversion rights to a corporate defendant on outrageous terms, forcing out management-level employees, and declining to spend money on marketing. Delaware law controlled. Under that law, a complaint for corporate waste must allege particularized facts. The court ruled that the complaint here did not do so. The complaint did not allege facts to show that the conversion terms had been outrageous. In papers on the motion, plaintiff speculated as to the value of the company based on an examination of the prices at which other allegedly similar companies had been sold, but the factors behind those prices varied. The court also found that plaintiff's argument was undermined by the fact that he had approved the transaction as a director and waived his preemptive right in connection with it. Further, plaintiff sought to assert appraisal rights, but the cause of action did not arise from a merger or sale of all or almost all

assets. Complaint dismissed with leave to plead some claims. [Wallace v. Elfassy, Index No. 601850/2000, 6/24/02 \(Cahn, J.\)](#).

Debtor & Creditor Law; fraudulent conveyance. Decision after non-jury trial regarding alleged fraudulent conveyance of a building. One defendant owed \$15 million to plaintiff. The court found that the debtor corporation's sole shareholder had caused the transfer of the building to the co-defendant, of which the shareholder was also the sole shareholder. The court found that the transfer was in derogation of plaintiff's rights and was fraudulent. The co-defendant was a holding company and had no other function. The court may rely upon indicia of fraud. Here, the corporations were controlled by the same person. The co-defendant knew that the transfer would defeat any possibility that the debtor could pay plaintiff. Other than the formal change in ownership, no change occurred in possession. The court ruled that the property's value was \$4.2 million. The consideration for the transfer had been the assumption of debt owed by the debtor corporation to the sole shareholder's brother and was worth far less than the actual value. The court held that the debtor had not received fair consideration for the transfer. Judgment for plaintiff. [Insilco Corp. v. Star Services, Inc., Index No. 605676/1997, 6/21/02 \(Cahn, J.\)](#).

Discovery; contempt order; bifurcation; interrogatories; burden; prior use of EBTs; note of issue; waiver of further discovery. Plaintiff sought an order holding defendants in contempt. A motion to quash was made after the return date of plaintiff's subpoenas and was never filed. However, the court found that there had been partial compliance. The court rejected defendants' objections to certain questions. It found that a confidentiality order would address defendants' concerns about production of records relating to persons formerly represented by plaintiff and represented now by defendant. Motion for contempt order denied. The court determined that bifurcation of discovery was warranted. The benefit from combined discovery had to be balanced against harm to defendants in operation of their new business if customers were to be intimidated by unnecessary involvement in the litigation. With regard to a motion for a protective order against plaintiff's interrogatories, the court found that the interrogatories were not burdensome or improper. The court rejected the argument that as plaintiff had taken depositions it should not be allowed to obtain answers to interrogatories. The CPLR does not prohibit simultaneous use of different disclosure devices. Further, the disclosure was not duplicative since individual defendants had been deposed whereas the interrogatories were directed to the corporate defendant. The court denied plaintiff's motion to strike the note of issue. Having filed it, plaintiff had waived further disclosure. Outstanding disclosure would, however, have to be furnished. [Don Buchwald & Associates v. Marber-Rich, Index No. 600878/2000, 5/2/02 \(Ramos, J.\)](#).

Discovery; motion to quash subpoena; journalist's privilege. A debt rating agency moved to quash a subpoena for documents and a deposition to be used in an action in Massachusetts based on the journalist's privilege under the First Amendment, the New York State Constitution, and New York's Shield Law. The court held that New York law applied with respect to the issue of privilege. Although Massachusetts may not recognize the journalist's privilege, or may interpret it more narrowly, the debt rating agency had contacts with New York. The debt rating agency has its headquarters in New York, the disclosure would be made in New York, and New York, as a world media capital, has a significant interest in protecting the autonomy of the press. However, issues of fact arose as to whether the journalist's privilege applied, because it was disputed whether the debt rating agency had published its information to the general public and whether it had had the requisite intent to disseminate to the public at the inception of its news gathering. Motion to quash held in abeyance pending a reference. [National Medical Care, Inc. v. Home Med. of Am., Inc., Index No. 103030/2002, 5/20/02 \(Cahn, J.\)](#).

Good faith purchaser; duty to make inquiry; purchase from thief. Action for declaratory judgment regarding title to luxury motor vehicle. The court ruled that petitioner had established that it was the owner and lessor of the vehicle as shown by a lease agreement between itself and a lessee, a bill of sale from the importer and a registration application. After the lessee defaulted, petitioner had the right to repossess the vehicle. Respondent argued that he was a good faith purchaser for value, but the court concluded otherwise since he had purchased the vehicle for only one-fifth of its value although it was undamaged. Respondent did not allege that he had asked for credentials from the person from whom he bought the car although that person purported to be petitioner's president. Respondent should have been alerted to make further inquiries. A purchaser for value does not acquire good title from a thief because a thief holds only void title. Further, petitioner averred, without challenge, that it disposes of delinquent leased vehicles at auction, not private sale. The court found for petitioner. [General Electric Capital Auto Financial Services Inc. v. New York State Department of Motor Vehicles, Index No. 1184/2002, 6/02 \(Benza, J.\)](#)

Insurance; declaratory judgment as to coverage. Action for declaratory judgment regarding insurance coverage. The plaintiff was the victim in an incident. The court held plaintiff lacked standing since he was a stranger to the policy and a judgment had not been rendered. Defendants who had been hosts of the defendant who caused the

incident did not give notice to their homeowners' insurer until about a year and a half later when suit was commenced. The court found that the circumstances were such that these defendants reasonably did not anticipate being sued. The delay was reasonable as these defendants were ordinary homeowners who were told by the family of the victim that they were not considered responsible. The court ruled that it could not say as a matter of law that one insurer did not owe a defense to the defendant who had caused the incident because that defendant had acted intentionally rather than negligently or recklessly. Thus, a defense was required. [Lipson v. Standard Fire Ins. Co.](#), Index No. 2496/2001, 6/28/02 (Stander, J.).

Insurance; reciprocal; termination of attorney-in-fact; applicability of statutory requirements. Plaintiff, reciprocal insurer, terminated defendant, its attorney-in-fact, by written ninety-day notice specifying no cause. Defendant argued that 1996 legislation required insertion in agreements of a provision that the attorney-in-fact could be terminated only by vote of two-thirds of the subscribers after notice to the attorney-in-fact of a cause for the termination. The court ruled that defendant's argument was sound. First, language pointed to by plaintiff ("subject to the provisions of any management agreement approved by the superintendent") did not mean "unless otherwise provided"; plaintiff's reading would render meaningless other portions of the statute. Further, since the superintendent must approve every management agreement and amendments, under plaintiff's reading the statute would not apply to any reciprocal and the superintendent would have discretion as to which reciprocals would have to follow stated procedures. The reading would conflict with principles of construction. The clause means, the court ruled, that an agreement could establish a more stringent termination procedure. The court rejected plaintiff's argument that the provision did not apply to plaintiff until a new management agreement was put in place; it became effective one year after the effective date of the statute. Third, the court rejected plaintiff's argument that the statute did not apply to agreements of indefinite duration. The purpose of the legislation was to provide greater oversight over relationships between reciprocals and attorneys-in-fact; an agreement of indefinite duration requires more oversight, not less. The termination was invalid. [Academic Health Professionals Ins. Assn. v. MQ of New York, Inc.](#), Index No. 605452/2001, 6/20/02 (Freedman, J.).

Insurance; title coverage; tax lien and lost deposit; exclusion. The court granted the defendant title insurance company's motion to dismiss plaintiff's action. Plaintiff sought a declaration that the policy of title insurance should pay her for the amount of a tax lien and a lost deposit when potential purchasers backed out of the sale upon discovery of the lien. Plaintiff had divorced her husband, whose failed business had resulted in federal tax liens against him, and commenced a partition action on the family premises. The defendant insurance agent allegedly told plaintiff not to worry about her husband's tax liens, which would be omitted in any title insurance policy issued. In another case, plaintiff had obtained a court order granting her an undivided half interest in the premises and declaring that the husband's tax liens were not liens or claims against plaintiff's interest. Plaintiff then obtained the husband's share of the premises and the title report showed a federal tax lien, which was allegedly a duplicate of one of her husband's liens. Because the agent had told her the lien would not reattach to the premises, plaintiff did not assign her interest to her daughter. When plaintiff attempted to sell her home, the purchasers' title company refused to omit the tax lien, and the purchasers demanded that plaintiff dispose of or satisfy the lien. Plaintiff had commenced an action against the purchasers, but the court had ordered plaintiff to return the down payment. In this action, defendants sought a declaration that plaintiff was not entitled to indemnification pursuant to the title insurance policy. The title insurance policy excluded liens assumed or agreed to by the insured claimant. The court held that the policy clearly did not require the insurance company to indemnify her. The title insurance did not vacate or expunge the lien. The court held that plaintiff sustained no loss attributable to a title defect, except as to her pre-existing tax lien obligation that caused her to lose the deposit on the premises. Plaintiff voluntarily assumed the pre-existing tax lien and the insurance company never waived any part of its contract as to the exclusion of the tax lien from its policy. Plaintiff did nothing to demonstrate that the lien was totally her husband's prior to obtaining the policy of title insurance. The insurance company only omitted her husband's liens, not plaintiff's obligations. [Alberti v Fidelity National Title Ins. Co.](#), Index No. 14222/01, 5/2/2002 (Austin, J.).

Joint ventures; right of first refusal. Contracts; interpretation; statute of frauds. Procedure; statute of limitations; affirmative defense. Action arising out of joint venture. Plaintiff claimed that a certain project fell within the venture. Plaintiff argued that the project became part of the venture because plaintiff had managed it and that would bring the project within the venture as defined by the agreement. However, the court noted, plaintiff had not brought the project to defendant. The agreement gave defendant a right of first refusal to have projects entered into by plaintiff brought within the venture. Since plaintiff had not brought the project to defendant, it could not have been included. Also, the court noted, plaintiff had not listed the project in its response to defendant's request for a list of joint venture projects or in a profit analysis. The court ruled that accepting plaintiff's argument would have rendered one clause (allowing defendant to hire plaintiff's employees to work outside the venture) meaningless. The court

concluded that the project was not part of the venture. The statute of frauds was held a bar to plaintiff's claim since the inclusion of the project would have required a modification of the written agreement. An oral agreement would be barred by the statute of limitations since a joint venture cannot be formed by an oral agreement if the project involved longer than a year. The defendant had not pleaded the statute as an affirmative defense, but that obligation had not been triggered since plaintiff had not pleaded an unwritten agreement. The court denied defendants attorneys fees since a claim therefor was not included in the answer. Case dismissed. [DDP Construction Group v. K & J Construction Co., Index No. 604291/2000, 5/22/02 \(Ramos, J.\)](#).

Limited Liability Company Law 402; transfer of all assets. Release; purpose; bad faith and intentional conduct. Action arising out of agreement to transfer plaintiff's interest in assets of a non-party to the corporate defendant. Plaintiff sought summary judgment declaring that it had sole title to the assets. The court declined to grant such a judgment because of the absence of the non-party, which might be inequitably affected. However, the court ruled that plaintiff was entitled to a more limited declaration that the purchase agreement was void because the co-defendant who had signed on behalf of plaintiff lacked authority. Unless otherwise provided, the vote of at least a majority of the members would be required to approve a transfer of all plaintiff's assets. Limited Liability Company Law 402(d)(2). Defendants argued that the operating agreement gave the co-defendant manager broad authority, which would include the power to effect such a transfer. The court stated that none of the powers given the manager overrode the voting requirement set out in the law. The agreement also provided that the powers of the manager would be subject to the requirements of applicable law. The manager's authority to sell plaintiff's assets in the ordinary course would not extend to a sale of all plaintiff's assets. The failure of members to respond to an e-mail was not the equivalent of an affirmative vote. Further, plaintiff had the right to terminate the agreement since the corporate defendant had failed to comply with all conditions on time. The individual defendants moved for summary judgment on the ground that they had been released by a provision in the operating agreement. The court ruled that it could not so find as a matter of law. The release had been intended to protect the released parties from liability with regard to conflicts of interest that would arise in connection with their involvement in both plaintiff and the non-party, not all actions taken by released parties in their self-interest. The court rejected the argument that a release of the manager for actions taken in that capacity applied since the complaint focused on actions taken outside the manager's authority. Moreover, the complaint included allegations of bad faith and intentional conduct and Limited Liability Company Law 417(a)(i) prohibits elimination of liability for such conduct. [TIC Holdings, LLC v. HR Software Acquisition Group, Index No. 105876/2001, 6/28/02 \(Cahn, J.\)](#).

Misrepresentation; reliance. Contracts. The court granted defendant's motion for summary judgment dismissing the complaint. Plaintiff sought a declaratory judgment and specific performance and asserted claims for fraud and breach of contract. Plaintiff had held several positions in a bank that had merged with defendant. The merger agreement had provided that plaintiff would become a member of the defendant's board of directors. In the event of his death, disability, or other circumstances impeding his membership, another member of plaintiff's former bank was to be elected or appointed to the board. Defendant had terminated plaintiff as a member of the board when plaintiff reached 70, as clearly required by defendant's by-laws. The merger agreement provided that the by-laws were available to plaintiff. The court dismissed plaintiff's cause of action for fraud because plaintiff had failed to identify any knowing misstatements of fact by defendant upon which plaintiff detrimentally relied. Because the merger agreement stated that the by-laws had been made available and those by-laws clearly spelled out that retirement was mandatory at the age of 70, plaintiff could not reasonably rely on any statement that his term would continue after he reached the age of 70. The court also rejected the argument that the shareholders had been defrauded by the termination of plaintiff's role on the board. The court held that defendant had fully performed its obligations under the merger agreement. The termination of plaintiff's position did not breach that agreement. Accordingly, plaintiff was not entitled to a declaratory judgment or specific performance. Plaintiff also sought Article 78 review of the enforcement of the defendant's by-laws. Although defendant did waive the mandatory retirement age for a non-party board member, plaintiff had failed to demonstrate a clear legal right to stay on as a member of defendant's board even though he did not serve a full three-year term. The court held that defendant did not abuse its discretion when it did not grant plaintiff a waiver or exemption with respect to his continued tenure on the board beyond the age of 70. [Adikes v North Fork Bancorporation, Inc., Index No. 13703/01, 5/29/2002 \(Austin, J.\)](#)

Personal jurisdiction; correspondent banking relationship. Forum non conveniens. Comity. Act of state doctrine. A New York bank sought an order of attachment against another bank, which was organized under the laws of the Republic of Turkey. The Turkish bank cross-moved for dismissal on the grounds of lack of personal jurisdiction, forum non conveniens, the pendency of a prior action, international comity, and the act of state doctrine. The court found that long arm jurisdiction was lacking because it was based solely on a correspondent bank relationship. The court also found that the Republic of Turkey was a more suitable forum since the disputed property

was located there, the claims arose after intervention by the government of Turkey, nearly all of the witnesses and relevant documents were located there, and the agreement at issue was governed by Turkish law. Dismissal was also appropriate in the interests of international comity and under the act of state doctrine since determining the rights of the parties would have required a review of the acts of regulatory banking authorities in Turkey. [Park Ave. Bank, N.A. v. Iktisat Bankasi Turk A.S., Index No. 603576/2001, 5/20/02 \(Ramos, J.\)](#).

Preliminary injunction; issues of fact (CPLR 6301(c)). Motion by plaintiffs for preliminary injunction against interference with contracts with plaintiffs' customers. The court stated that a preliminary injunction is extreme relief, which should not be granted where the dispute is rife with questions of fact. However, the mere existence of an issue of fact is not alone a basis to deny relief (CPLR 6301(c)). Plaintiffs relied on an unsworn letter from a customer asserting interference by defendants; the court found the document had no probative value. Plaintiff also relied on an affidavit from a customer. But defendants submitted an affidavit that raised a sharp dispute on plaintiffs' claims and asserted that plaintiffs had taken some of defendants' customers. The court concluded that the record revealed a paucity of proof of plaintiffs' allegations, a version of events hotly disputed by defendants, and defendants' claims that plaintiffs had engaged in interference, and that plaintiffs thus had failed to establish a likelihood of success. Motion denied. [Kerman Protection Systems v. DGA Security Systems, Index No. 600909/2002, 5/21/02 \(Ramos, J.\)](#).

Preliminary injunction; restrictive covenant; breach of contract. Plaintiff sued defendant for breach of a wholesale supply agreement. Plaintiff then moved to enjoin its former employee from working for defendants based on a restrictive covenant in an employment agreement and on the ground that the employee would be a key witness in the action. The employee had been plaintiff's Vice President of Business Development. The employee interviewed with one of defendants' subsidiaries and was hired as Executive Vice President. After plaintiff heard of the employee's new job, plaintiff offered him the position of Senior Vice President. The employee accepted plaintiff's offer and signed an employment agreement that contained a restrictive covenant preventing him from working at any other competitor for two years after termination. According to plaintiff, the purpose of the covenant was to prevent the employee from working for defendants during the pendency of the actions for breach of contract. The evening after signing plaintiff's employment agreement, the employee changed his mind and decided to work for defendants. Plaintiff sought to enjoin the employee from working for defendants. The court held that the restrictive covenant was unenforceable because, among other reasons, it contained no geographical restriction, was vague, and prohibited the consideration of offers. The court concluded that plaintiff's fear of disclosure of confidential information was not a sufficient basis for an injunction. The court also held that defendants had not tortiously interfered with plaintiff's employment contract because no contract existed at the time defendants offered the job and defendants did not have wrongful motives. No evidence was presented that defendants had intentionally tried to induce the employee to breach his contract with plaintiff. The court rejected plaintiff's arguments based on public policy because plaintiff produced no evidence that the employee had ever disclosed privileged information and the law already protected plaintiff's concerns through trial rules. Public policy weighed in favor of not restraining the employee from pursuing his livelihood. Consequently, the court found that plaintiff was not likely to succeed on the merits. The court also held that plaintiff failed to demonstrate irreparable harm or any equities in its favor. [Duane Reade v Cardinal Health, Inc., Index No. 600635/2002, 6/7/2002 \(Lowe, J.\)](#).

Procedure; motion to dismiss; prior action pending. Action arising out of disputes under an agreement of restructuring and merger. The court noted that when two pending actions involve substantially identical parties, issues and relief, the later-filed one should be dismissed. A second action seeking relief based on the same contractual obligations as the first should be dismissed. The court ruled that the instant, later-filed case should be dismissed. The parties were identical and both actions called on the court to interpret the same agreements, evaluate the parties' performance and determine the effect of actions of a regulatory agency. Case dismissed without prejudice to assertion of claims as counterclaims or affirmative defenses. [Western Resources, Inc. v. Public Service Co., Index No. 605561/2001, 5/2/02 \(Freedman, J.\)](#).

Receivership. Corporations; agents; apparent authority. Action by the purported general manager of a real estate purchaser and developer against persons who had allegedly misappropriated its assets. According to plaintiff, defendants had, without corporate authority, entered into an agreement to swap the developer's interest in one project in Manhattan with an interest in another project in Moscow. Plaintiff moved for appointment of a receiver to protect the developer's main remaining asset, a building, while defendants cross-moved for summary judgment. Defendants claimed that they, not plaintiff, were the only members and owners of the real estate purchaser and developer. The court ruled that plaintiff had not established his capacity as general manager and attorney-in-fact to commence action on behalf of the developer or that defendants had no right to dispose of property at issue. Plaintiff had failed to establish that the sale of the building would result in harm (plaintiff had already filed a lis pendens

against the property, barring its sale during the pendency of this action). The court held that defendants had had apparent authority to enter into the swap arrangement because the developer had ratified previous contracts entered into by defendants on the developer's behalf. Plaintiff's motion for receiver denied; defendants' cross motion for summary judgment granted. [Rombotex, LLC v Percy, Index No. 604766/2000, 5/17/02 \(Ramos, J.\)](#).

Restitution. Procedure; sanctions; personal jurisdiction. Plaintiff, manufacturer of networking conversion products for communication networks, commenced an action against an out-of-state long distance provider and a New York telecommunications services distributor for, among other things, breach of contract. Plaintiff moved for a default judgment against the defendants. After the court granted the default, plaintiff notified the distributor's bank, which sent the distributor's assets to plaintiff's counsel. Defendants moved to vacate the default judgment. The court vacated the default with respect to both defendants. The plaintiff acknowledged that New York did not recognize a cause of action for open book account, but failed to move to amend the complaint to restate the cause of action as one for an account stated. The court granted, pursuant to CPLR 317, the motion for restitution, because the judgment was vacated and plaintiff did not establish that it was entitled to the distributor's money. The court denied defendants' request for sanctions because no basis for sanctions was included in the motion. In a letter to the court, defendants merely claimed that plaintiff had repeatedly adjourned the instant motions. After noting that plaintiff had the burden to establish jurisdiction over defendants, the court dismissed the complaint against the provider. The provider's president attested that the transaction did not take place in New York and that the provider did not have an employee, agent, or office conducting business in New York. Plaintiff based its argument for jurisdiction on the affidavits of its own chief financial officer and director of network engineering. The court concluded that those affidavits included rank, unsubstantiated speculation and self-serving hearsay, and did not provide a basis for trial. Thus, the court did not have jurisdiction pursuant to CPLR 301 or 302. The court dismissed the only claim asserted against the distributor, because plaintiff did not provide any evidence that it had entered into any agreement with the distributor. The distributor only had an agreement with the provider to pay certain of its debts by paying plaintiff. The distributor stopped payment on checks that it tendered to plaintiff when the provider determined that plaintiff's equipment was defective and unusable. [Fastcomm Communications Corp. v CNS Communications Ltd., Index No. 602004/2001, 5/1/2002 \(Ramos, J.\)](#).

Restrictive covenants; irreparable harm; delay in bringing action; publicly advertized customers; available information; efforts to protect secrecy; unique or extraordinary services. Plaintiff sought a preliminary injunction enforcing a restrictive covenant. The court held that plaintiff had failed to demonstrate irreparable harm in adequate detail. Potential loss of revenue alone was not enough. The court also relied upon the fact that plaintiff had waited a year before bringing the action. The court found that plaintiff had not shown that money damages would not suffice. Further, the court determined that solicitation of identified customers was not in violation of the agreement as they all advertized publicly. The court ruled that plaintiff's customer lists, pricing information and the names of contact persons were publicly available and that plaintiff had not shown that it had gone to efforts to protect the information, apart from the restrictive covenant. The identity of customers was readily available and plaintiff had failed to show that the former employee had left with any restricted lists or information. The employee's services and knowledge were not unique or extraordinary. Motion denied. [Interparts Industries, Inc. v. Phung, Index No. 16722/2001, 5/1/02 \(Austin, J.\)](#).

Restrictive covenants; preliminary injunction; trade secrets; computer software; inevitable disclosure doctrine. Licensor of medical practice management program sought preliminary injunction against an international supplier of health care equipment and services and four of its former employees who had joined supplier. The supplier allegedly had misrepresented to the licensor that it was interested in distributing the management program to the supplier's customers solely to gain access to the program. The supplier then had allegedly lured away the licensor's key employees and, with their help, reverse-engineered the program and went into competition with the licensor. The licensor sought a preliminary injunction for misappropriation of trade secrets, breach of fiduciary duty, and breach of confidentiality and employment agreements. The court granted an injunction only as to one former employee, who had used knowledge of specific flaws in the management program as a sales pitch for the supplier's competing program. The employee's knowledge had been acquired during his former employment. The court applied the doctrine of inevitable disclosure even though it acknowledged that the confidential and proprietary information (marketing, pricing, and customer lists) was not "highly technical." The court held that the former employee's solicitation of the licensor's clients would constitute irreparable harm even though the licensor sought monetary damages. The court rejected the licensor's argument that reverse engineering of the management program would constitute a violation of its trade secrets. Like the plaintiff-licensor, the defendant-supplier had customized the program for a radiology practice. However, the court stated that the argument was tantamount to the proposition that having a marketing concept for someone else's product gives one a property right to that product.

Motion for preliminary injunction granted in part. [Mantis Technology, LLC v Siemens Med. Sys. Inc., Index No. 605278/2001, 5/13/02 \(Lowe, J.\)](#).

Stipulation of settlement; interpretation. Donnelly Act; pleading. Motion for entry of a judgment pursuant to a stipulation. Plaintiff asserted that defendants had failed to make a required payment on time, allowing entry of judgment under the stipulation. Defendants argued that plaintiff had breached the stipulation by terminating them as a dealer of plaintiff's watches. Defendants contended that a clause purporting to allow plaintiff to terminate defendants as a dealer was in conflict with a clause that permitted defendants to purchase merchandise for cash in advance. Defendants argued that the clauses could be reconciled only if construed to mean that plaintiff could cease doing business with defendants only on a credit basis. The court rejected this reading because it required the insertion of words that were not there and gave no effect to the portion of the final sentence permitting plaintiff to terminate defendants. A court is required to reconcile seemingly conflicting provisions. The court determined that that could most readily be done by considering the clauses to address two distinct subjects - the threshold question of whether defendants would continue as an authorized dealer and, if so, how payment would be made. Defendants also urged that plaintiff's refusal to sell was an illegal restraint of trade (Donnelly Act, GBL 340). The court ruled that defendants' allegations were vague, conclusory and legally insufficient; they were made on information and belief and contained no details, only suspicions. Defendants did not allege facts indicating a conspiracy. Further, antitrust defenses in contract actions are disfavored. The court held that the notice of default was adequate even though not signed by plaintiff. The court referred the case to a referee to hear and report regarding the amount due plaintiff. [Movado Group v. Glaub Jewelers, Index No. 602136/1997, 6/28/02 \(Cahn, J.\)](#).

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