The **Commercial Division**

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Law Report - May 1998

COMMERCIAL DIVISION

LAW REPORT

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

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The* Report *and the complete text of all decisions discussed in it are available on the Unified Court System's Internet home page at http://ucs.ljx.com and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org/sections/comfed. Members of the Commercial and Federal Litigation Section may sign up at the Section's home page to receive copies of the* Report *by e-mail automatically. The Court intends in the near future to create on the home pages a cumulative index for all cases cited in any issue of the* Report *and an appropriate search mechanism to facilitate legal research.

Condominiums; obligation to repair and maintain. Owner of ground floor commercial space claimed a right to services and repairs under condominium declaration and by-laws. As the Board failed to address certain aspects of defendants' motion for summary judgment, the court held that the owner was entitled to certain services with issues of breach and the amount of damages to be held for trial. Claim for percentage of staff time dismissed as the documents provided no basis for such a claim. The court held that under the documents the condo was obliged to provide facilities for electricity but not for the electricity itself; that the condo had to provide hot water but could do so by means of submetering; that the defendants were entitled to use the elevator for themselves or invitees. The court found a question for trial as to whether changes to air conditioning had had Board approval and whether the existing system could support the commercial unit. Board of Managers v. West 79th Street Corp., Index No. 104225/95, 3/11/98 (Cahn, J.).

Contempt; violation of preliminary injunction order re corporate election. Court issued preliminary injunction against designation in NRA journals of candidates for Board as official or insurgent candidates. See Law Report No. 1. The NRA

published a notice describing the lawsuit. The court held that the notice violated the order. The notice announced that the plaintiffs, who were named, had challenged the publication process and implied that they were not Nominating Committee candidates and were troublemakers. The notice failed to state that plaintiffs had only sought an order that the NRA follow its own by-law. Plaintiffs were prejudiced, the court found, as a result of the violation of the by-law despite the fact that plaintiffs had publicized the court victory over the Internet and otherwise. The court rejected the argument that NRA had been guilty of criminal contempt. Plaintiffs sought remedies setting aside the election and other things. The court found that NRA had been very cooperative in trying to ameliorate the effects of the notice by issuing a new notice, with the consent of plaintiffs' counsel, explaining the lawsuit in more detail and apologizing for any misunderstanding. The court refused to interfere with the election and found that the second notice had ameliorated the effects of the first to the greatest extent possible. The relief sought, the court found, was not authorized by the Judiciary Law or Not-for-Profit Corporation Law 618. Since plaintiffs had not proven any monetary harm from the contempt, the fine to be imposed would consist of $ 250 plus costs and expenses, including attorney's fees. Fezell v. National Rifle Assn., Index No. 600211/98, 4/20/98 (Shainswit, J.).

Contracts; exchange of draft agreements; failure to agree on material terms precludes any agreement. Motion for preliminary injunction by producer of TV talk show to prevent defendant from ending plaintiff's use of studio facilities. Motion denied as proof showed plaintiff has very little likelihood of success on the merits and the equities do not favor it. No formal agreement had been entered into for a continuation of the existing relationship. Drafts had been exchanged but there had been disagreements on two key issues. Plaintiff argued that the continuance of a relationship for a period indicated an acceptance of the terms of plaintiff's draft, and that though there had been no agreement on an option date (March or April 1998), the exercise of the option in January made the exercise date irrelevant. The court held that each side had failed to agree to terms the other considered material so that an agreement had never been reached. Further, the drafts had indicated that each side intended that a formal writing would result; since there never was one, there was no agreement. Conduct did not give rise to an agreement beyond the acts actually undertaken. Entrada Prods., Inc. v. Modern Telecommunications, Inc., Index No. 600952/98, 4/8/98 (Shainswit, J.).

Contracts; seller's representation of information furnished buyers and buyers' representation. Fraud; buyers' disclaimer; allegations of intentional conduct by defendant and plaintiffs' inability to discover facts by other means. Plaintiffs purchased right to receive excess cash flow from rental income from a pool of real estate. Plaintiffs sued the seller on grounds of fraud and the like. Plaintiffs and defendant moved for summary judgment. In the transaction documents, defendant represented that it had provided "material documents." Plaintiffs argued for a broad interpretation of this phrase, contending that defendant should have disclosed certain documents. The court held that the phrase referred more narrowly to information with respect to creation of the "Seller's Interest" since a contrary interpretation would have conflicted with representations by the buyers that the seller may possess material information with respect to the assignors not known to the buyers. This doomed the contract cause of action, the court held. As to fraud, the court found issues of fact regarding whether a disclaimer of reliance that should have barred plaintiffs would not be held to do so because defendant had acted intentionally to mislead or because plaintiffs lacked the ability to find out the facts by their own due diligence. However, the court dismissed claims for negligence and negligent misrepresentation since intentional conduct would be required if a disclaimer were to be overcome. Claims for rescission based on unilateral mistake and breach of an implied duty of good faith and fair dealing dismissed as duplicative. A rescission claim was upheld in view of issues of fact. Board of Pension Commissioners v. Apple Bank, Index No. 113700/96, 4/6/98 (Ramos, J.).

Debtor Creditor Law §§ 273-a, 276. Turnover proceeding (CPLR 5225(b)). Assignment of partnership interest by judgment debtor. The court found that there were issues of fact as to a fraudulent transfer (DCL § 273-a) where there were affidavits but not documentary proof in support of a claim that a transfer had been made to pay pre-existing debt, and with regard to whether the debtor was a defendant in the earlier action at the time of the assignment. The court held that most of the indicia of fraudulent intent (DCL § 276) were apparently present but that the proof was not clear and convincing and therefore a hearing was required. Cadle Co. v. Highland Realty Associates, Index No. 116569/97, 4/7/98 (Cahn, J.).

Defamation; libel; elements; public figure; proof of actual malice. Newspaper articles contained alleged libel. The court held that plaintiff had failed to submit proof that the statements were attributable to a defendant or that that party had had any control over the paper or its reporter. An alleged joint purpose to defame was not enough. Plaintiff was a public school principal. The court held that such an official is a public figure given the importance of education and the significant role played by principals. The court held that the reports had not been published with actual malice. The court reviewed the challenged statements and found that plaintiff had failed to show that there was an issue of fact as to actual malice as there were reports of witnesses and corroboration. Negligent reliance on a source was not enough. Summary judgment for defendants. Jee v. New York Post Co., Index No. 3994/91, 3/10/98 (filed) (Cahn, J.).

Employment agreement; restrictive covenant; medical needs of patients. Therapist ended employment and then began treating former patients of her past employer. Restrictive covenants can be enforced against health care professionals, but such covenants must be reasonable as to time and area, necessary, not harmful to the public and not unduly burdensome. The court held that the covenant here was reasonable as to time and area and not unduly burdensome as it was limited to one year and to patients the therapist had seen by virtue of employment with the plaintiff. On a prior motion, the court had been concerned whether plaintiff had reserved to itself the decision whether the transfer of patients to the departing therapist was clinically necessary. However, the court found that the therapistdid not allege that the transfer was necessary and had not attempted to follow procedures set forth in the employment agreement for clinically necessary transfers. The existence of a procedure for necessary transfers on its fact avoided violating public policy, the court stated. Summary judgment on liability for plaintiff. Washington Square Institute v. Speciner, Index No. 109492/95, 4/14/98 (Cahn, J.).

Foreign state judgment. Court's inquiry limited to determining jurisdiction. Filing of pleadings, participation in hearing, and unsuccessful attack on jurisdiction. In suit on sister-state judgment, review is limited to determining whether there had been jurisdiction, Court said. Here defendant had filed answers to the original and amended complaints and appeared and testified at a hearing to assess damages. Court held that defendant had appeared generally, which gave personal jurisdiction, and had attacked jurisdiction there, unsuccessfully. This ended the court's task here. Motion for summary judgment granted. Sarin v. Ochsner, Index No. 603829/97, 3/25/98 (Shainswit, J.).

Fraud; elements. Fraudulent inducement. Contractual context. Principles of fraud versus breach of contract summarized. Court found that claims for damages for fraud and fraudulent inducement failed in that the damages sought were for payment for goods sold and plaintiffs had stipulated that they had received payment. Demise of these claims defeated the demand for punitive damages and the conduct alleged did not meet the standards therefor. Auto Finishers Supply Co. v. Gabriele Ford, Inc., Index No. 871/97, 3/12/98 (Stander, J.).

Fraud; fraudulent inducement; pleading. Defamation; pleading. Abuse of court system by pro se. Disqualification. Plaintiff sued defendants for fraudulently inducing plaintiff's company to issue shares to defendants and for breaching promises to perform services. Defendants counterclaimed for fraud in inducing investments. Plaintiff named defense counsel as a party because of an alleged campaign of extortion. The court dismissed the complaint against counsel because it was not specific enough to permit a reasonable response and the only conduct specified was not actionable. A cause of action for defamation failed for failure to set forth what was said to whom. A second action against the other defendants was dismissed because it was duplicative of the first save as to a defamation claim that failed for the reasons stated. Defendants showed that plaintiff or a company controlled by him had been a party to 25 cases in this court alone and 50 cases in state and federal courts. The court stated that plaintiff's papers here were replete with scathing unsupported allegations. The court enjoined the pro se plaintiff from commencing a pro se action against counsel without leave of the Administrative Judge. The court dismissed defendants' counterclaims for slander and harassment because of failure to set forth the necessary allegations with the required detail. Plaintiff's cross-motion to disqualify counsel was denied since it was not shown that counsel's testimony was necessary. Couri v. Katz, Index No. 604496/96, 4/9/98 (Cahn, J.).

Insurance. Champerty; paying insurers and right to sue. Real parties in interest; insured and insurers. Mary Carter agreement. Breach of fronting agreement. Interpretation of "accident." Pleading affirmative defenses and waiver; absence of surprise. Fraud; failure to plead facts in detail. Plaintiff argued that contentions made by defendants had not been raised as affirmative defenses and so had been waived. The Court noted that a court may grant summary judgment simultaneously with leave to amend to assert the defense on which summary judgment is based. The defendants' arguments had been made in the summary judgment motion and there was no surprise to the plaintiff. Certain defendants argued that a deed of trust whereby all risk insurers paid some $ 56 million as their share of a loss suffered by plaintiff and providing that plaintiff agreed to hold in trust all sums recovered from boiler and machinery (B&M) insurers and the paying insurers would pursue claims against the B&M insurers and brokers in the name of plaintiff was champertous (Jud. Law § 489). To be barred, an assignment from one corporation to another must be exclusively for the purpose of bringing suit. The Court held that it could not find that the sole motivating purpose was to bring suit. The Court held that the paying insurers were not real parties in interest. CPLR 1004. Purpose of the rule is to avoid multiple litigations and here there were issues and claims which would not be brought if plaintiff was not named as such. Allegations of Mary Carter agreement not sufficiently established now to justify dismissal. Disqualification of counsel due to probable disclosure of confidential information did not alone warrant finding of collusion. Dismissal sought of cross-claim that there had been a breach of an oral fronting agreement. The terms alleged were so vague and indefinite that there was no enforceable agreement. Cross-claim for fraud dismissed for lack of necessary factual allegations (CPLR 3016(b)) (e.g., no allegation of reliance). Leave to replead not sought and denied. As to certain claims under the B&M policy, whether the facts showed an "accident" within an

endorsement, the Court adopted the most natural and obvious interpretation of the policy. Language used indicated intent to excludecoverage for damage caused by explosion of unspent fuel. Definition of "accident" predicated on cause, not effect. Jamaica Public Service Co. v. AIU Ins. Co., Index No. 602889/96, 3/23/98 (Ramos, J.).

Insurance. Disability policy. Incontestable clause; pre-existing conditions; toll. Insurer sought to avoid a claim and rescind the policy on grounds of misrepresentation. Insurer also asserted that there was no coverage because the sickness resulted from a pre-existing condition and plaintiff had been unemployed. Plaintiff sought declaratory relief. The court found the incontestable clause applicable. This clause applies to pre-existing conditions. The court rejected insurer's argument that the two-year period was tolled for a period of missed work days because the insurer had failed to demonstrate that plaintiff had been under regular care of a physician prior to the onset of disability. The record did not support the claim that plaintiff had been unemployed at the time of the onset although the employer had ceased operations. However, questions of fact were presented as to allegations of misrepresentation and pre-existing condition in regard to a policy change rider issued within the two-year period from onset. Summary judgment accordingly. Mahler v. New England Mutual Life Ins. Co., Index No. 115646/96, 4/22/98 (Shainswit, J.).

Insurance. Excess coverage; scope of underlying policy. Employee benefit liability coverage; exclusion. Various motions for summary judgment for a declaration of duty to defend/indemnify. The court held that the excess/umbrella carrier, having listed commercial general liability as an underlying policy, was obligated to provide employee benefit liability coverage since the underlying policy so provided. Under employee benefit coverage, the insured was covered for negligence and errors or omissions in administration of the employee benefit programs, but there was an exclusion for claims based upon failure of an investment to perform or the investment or noninvestment of program funds. The court reviewed the Federal lawsuit for which defense/indemnification was sought and concluded that those claims (e.g., failure to obtain documentation on plan assets) had to do not with plan administration but with failed investments and failure to invest. Under the plan, the administrator was not responsible for the investment in question. The exclusion barred coverage. Jasco Tools, Inc. v. American Manufacturers Mut. Ins. Co., Index No. 4195/87, 4/17/98 (Stander, J.).

Insurance; fraudulent payment of claims; conspiracy with adjusters. **Breach of contract; conversion; unjust enrichment. GBL 349**. Insurer sued to rescind a policy on which some $ 4.2 million had been paid out to certain defendants on the grounds that they had taken part in an insurance fraud scheme and paid bribes to adjusters. These defendants moved to amend their answer to assert counterclaims. As discovery was in progress, the court held that the motion was not fatally untimely, there being no prejudice. The court sustained the breach of contract claims; they alleged that proceeds had been improperly withheld and that this was a breach of the policy and the covenant of good faith and fair dealing, which are all the assertions required. The court held that a counterclaim that plaintiff had fraudulently undervalued the loss and withheld proceeds due under the policy sufficiently alleged fraud. Leave to amend to add claims for conversion and unjust enrichment was denied since an express agreement was at issue. The court held that a claim under GBL 349 could be added since alleged conspiracy with adjusters to fix many claims and promote bribery was serious harm aimed at the public generally. A malicious prosecution claim was held premature. Motion granted in part. American Home Assurance Co. v. Durawool, Inc., Index No. 106582/95, 4/6/98 (Cahn, J.).

Insurance; receipt of endorsement; estoppel from payment of past claims; implied covenant of good faith. GBL 349; harm to consumers at large. Plaintiff sued an insurer, an adjuster and the agent. The suit was based on the insurer's assertion that a provision in the policy meant the insurer would be obligated to pay only a part of damages suffered. Plaintiff asserted breach of contract and estoppel claims. The court held that there were questions of fact present as to whether plaintiff had ever received the endorsement at issue and with regard to the application and computation of insurance limits for damage on a non-reporting premium basis. The court held that the insurer could not rely on past transmission of the original policy as freeing it from a duty to transmit documents each year and assert at the same time that each year's policy was separate and distinct and past payment was irrelevant to an estoppel claim. Further, plaintiff claimed not to have received the complete original policy. Under GBL 349, acts must have a broad impact on consumers at large. The court held that that standard had not been met in this case; all that was at issue was a private insurance contract. The court also rejected a claim for violation of an implied covenant of good faith since such a claim is derived from the insurance policy and does not state a separate cause of action. Claims against the adjuster failed since his acts had been within the scope of his employ and no tortious conduct was alleged. Dismissal in part. Page One Auto Sales v. Commercial Union Ins. Cos., Index No. 412/97, 4/17/98 (Stander, J.).

Jury trial; demand for accounting. Joinder of additional limited partners; Part. Law § 115-a. Pleading; amendment; failure to submit proposed pleading. Retroactive modification of lease agreement to defeat lawsuit. Derivative action on behalf of limited partnership alleging breach of fiduciary duty by general partners. Motion to strike jury demand denied. Suit

was for damages. Demand for an accounting did not waive jury as accounting was merely a method to determine amount of damages. Request to join additional limited partners denied in view of protections afforded by Part. Law § 115-a(4)&(5). Request to amend answer and for summary judgment on proposed new affirmative defense denied in view of cursory allegations in support and failure of movants to submit copy of proposed pleading. Defendants sought summary judgment based upon a retroactive amendment to the lease agreement resolving various issues in this case in favor of defendants. The Court found that modification required the consent of all limited partners but not all had signed the modification and the limited partnership agreement provided that the partnership dissolved on the sale of substantially all assets, which had occurred here. The Court denied the motion and granted summary judgment to plaintiff dismissing any defense premised on the modification. Simonetti v. Plenge, Index No. 6861/88, 3/5/98 (Stander, J.).

Labor Law 193. Defendant, former university president, counterclaimed asserting that plaintiff had violated Labor Law 198 by withholding wages and benefits previously agreed to. The court found that under the agreement he was not entitled to separation pay prior to his death, permanent disability or expiration of the agreement, none of which had happened. Compensation for sabbatical leave was, the court held, similarly not due now. Assuming that the benefits constituted "wages," defendant's claim failed and its failure precluded a claim for costs, expenses and counsel fees (Section 198). Motion to dismiss counterclaims granted. Adelphi Univ. v. Diamandopoulos, Index No. 104646/97, 4/6/98 (Ramos, J.).

Not-for-Profit Corporation Law. Indemnification of university trustees. Liability of former president. The Attorney General sued to hold former trustees liable for mismanagement. The complaint asserted that the trustees had indemnified themselves in violation of the N-PCL. The court held that indemnification was authorized if the trustees had acted in good faith and that the complaint and the findings of the Regents contained the necessary allegations of bad faith so as to preclude dismissal. The court refused to authorize advance indemnification for this case (Sect. 724(c)). The court upheld a cause of action for unjust enrichment with regard to a retainer fee paid by the university to counsel for the former trustees but denied with leave to renew defendants' request to dismiss a conversion claim because of uncertainty whether the retainer constituted a specifically identifiable fund. The court held that the complaint pleaded sufficient facts to support a claim that the defendant former president caused or permitted himself to receive compensation in violation of a duty to act in good faith. Vacco v. Diamandopoulos, Index No. 401253/97, 4/6/98 (Ramos, J.).

Personal jurisdiction. Guarantor of notes bound by consent to jurisdiction clause in notes. Forum non conveniens. Motion to dismiss for lack of personal jurisdiction and forum non conveniens. Defendants are foreign corporations. Plaintiffs lent money to Taj. Indian Hotels signed guarantees. The notes provided for New York jurisdiction, payment here and control by New York law. The guarantor was bound by these obligations, having agreed to pay "without demur ... in the currency and in the manner as payable under the agreement ...." Defendant knew failure to pay would result in enforcement in New York. Defendants' cases distinguishable: guarantees here were payable in New York and, under contract law, the guarantees incorporated consent to jurisdiction clause. Service as provided in guarantees valid. Forum non conveniens argument rejected; dismissal would only enable defendants to circumvent contractual obligations. State Bank of India v. Taj Lanka Hotels Ltd., Index No. 602919/97, 3/23/98 (Ramos, J.).

Preliminary injunction; elements. Balance of equities; expenditures; untimely application for relief. Irreparable harm; adequacy of damages. Plaintiff (SK), a Russian publishing house, sought a preliminary injunction to prevent defendants from publishing or distributing the magazine Vogue Russia. SK had signed a letter of intent for a license from defendants to publish this magazine in Russia and a "Founders Agreement." By the latter a joint venture agreement was to be signed within 30 days but never was. SK contended, though, that defendants had undertaken substantial steps toward finalizing the arrangement and caused SK to invest sums and effort and forgo other opportunities. The Court held that SK had failed to show immediate, irreparable injury as damages were an adequate remedy. Also, the balance of equities favored defendants, which had brought out the first issue of the magazine at the expense of money and effort. The Court pointed out that SK had waited four months between termination and bringingon the order to show cause on this motion. Motion denied. SK Communications Int. v. Conde-Nast Russia, LLC, Index No. 606642/97, 3/12/98 (Shainswit, J.)

Primary jurisdiction; consumer fraud class action. General Bus. Law; pleading harm from deceptive practices. Plaintiff sued on behalf of a purported class alleging that defendants had deceptively advertised sun care products by failing to disclose the risks of exposure to the sun. Plaintiff moved to certify a class and defendants cross-moved to dismiss on grounds of primary jurisdiction, asserting that sunscreens are within the jurisdiction of the FDA, which is developing regulations on labeling. The court held that adjudicating this case would require the court to usurp FDA rulemaking authority and promote judicial legislation of matters affecting the entire industry. Furthermore, the court ruled, the complaint should be dismissed with prejudice for failure to state a claim. Either on the pleadings alone or on the evidence submitted (CPLR 3211

(c)), plaintiff had failed to allege that she was deceived or injured as required (GBL 349, 350). Plaintiff admitted she had not read the labels prior to purchasing the products and had not used them; she bought them on one occasion solely to commence this action. The result was the same as to plaintiff's Magnuson-Moss Act claim. Cross-motion granted. Archer v. Schering-Plough Corp., Index No. 603336/97, 4/15/98 (Ramos, J.).

Procedure; affidavits on summary judgment motion. Agency; authority established by agent; fiduciary duty of agent. Statute of frauds. Defendant moved for summary judgment with regard to a complaint asserting that defendant, through an agent (Viscomi), had agreed to sell shares. Plaintiff relied on testimony of non-parties taken in a case in which defendant had not been a party. Such proof is inadmissible and incompetent here, the court held. Plaintiff failed to take discovery here, did not claim it needed to do so (CPLR 3212(f)), and could not defeat summary judgment on that basis. Plaintiff relied on photocopies of two affidavits. Photocopies normally may not be used on a summary judgment motion, but as the originals had been filed in this case on another motion, judicial notice would be taken. Agent's authority may be established by in-court testimony of agent. However, the court held, plaintiff could not rely on Viscomi's affidavit because a document had put plaintiff on notice that his authority was in question and he admitted that he had been working for plaintiff, which was a breach of fiduciary duty. Plaintiff, the court found, was estopped from relying on Viscomi's uncorroborated testimony as to authority. In any case, agency so obtained does not bind the principal to the detriment of the principal and the benefit of the wrongdoer. The documents relied on failed to establish the price or the identity of the parties and so did not satisfy the Statute of Frauds. Motion granted. Filanto S.p.A. v. Guarino, Index No. 601546/96, 4/3/98 (Gammerman, J.).

Procedure; leave to amend; review of proposed claims. Abuse of process; bad faith; prima facie tort; tortious interference; disparagement. Suretyship; liability of surety for bad faith failure to pay. Plaintiff sued on a lien discharge bond. The court (Friedman, J.) granted summary judgment for plaintiff; a bad faith claim was left for trial. Defendant moved to assert counterclaims premised upon plaintiff's failure to withdraw certain outstanding restraining notices upon defendant's posting of an appeal bond. The court held that plaintiff was not required to withdraw notices served prior to the filing of a bond and had a reason for not immediately doing so (the fact that the undertaking had been issued by a subsidiary of defendant, casting doubt on its acceptability); that plaintiff had acted in furtherance of a valid purpose; and that the proposed amended answer did not contain allegations supporting inference that plaintiff had acted to cause harm without economic excuse. This doomed an abuse of process claim. A bad faith claim was doomed because it was founded on plaintiff's enforcement efforts, not a contractual relationship as required. The court held that the amendment failed to allege facts demonstrating that plaintiff had acted solely out of a desire to injure, thereby precluding a prima facie tort claim and one for tortious interference. A disparagement claim failed because of the absence of allegations that a false statement had been made. Motion to amend denied. The court granted summary judgment for defendant on the bad faith claim. Plaintiff could not recover punitive damages solely based on defendant's failure to perform its contractual obligations as surety. There was no extraordinary showing of a dishonest or fraudulent failure to carry out a contract. Caribbean Construction Services & Associates, Inc. v. Zurich Ins. Co., Index No. 123093/95, 3/30/98 (Cozier, J.).

UCC 3-403. Summary judgment; issues as to agreements between parties to transaction involving checks; representative capacity of signer. Personal jurisdiction; New York corporation headquartered outside New York. Plaintiff check-cashing business sued claiming that it was a holder in due course on four checks issued by Weiner, president of defendant DePass, to a non-party but on which payment was stopped. Defendants asserted lack of personal jurisdiction, noting that DePass and Weiner were residents of and did business in Connecticut. The court held that DePass, a New York corporation, had elected to avail itself of New York law, regularly conducted business with the non-party, which was located in Manhattan, and transacted business in New York by phone, fax and wire transfer, which suffices to give jurisdiction. The court also found jurisdiction over Weiner. The court held that there were issues of fact precluding summary judgment for plaintiff, such as what agreements existed between plaintiff and Weiner about the cashing of checks made out to the non-party (e.g., Weiner claimed that he had specifically told plaintiff that certain checks would not be honored due to deficient performance by the non-party). Also plaintiff claimed that Weiner was personally liable as the checks had not been signed in a representative capacity, but Weiner maintained that it was understood by plaintiff, from the face of the checks and through course of dealings, that he had signed solely as a representative. UCC 3-403. There was a question of fact here too. K.S. Finance Corp. v. J.W. DePass, Ltd., Index No. 604521/97, 4/30/98 (Cozier, J.).

Usury; miscalculation of interest; exemption. Fiduciary duty and lender's rights in collateral. Plaintiffs moved for a preliminary injunction against the sale of common stock of a corporation in which defendant claimed a security interest under a loan agreement. The corporation's asset is a $ 200 million office building in Manhattan. Defendant lent $5.5 million in return for which the shares were pledged. Plaintiffs argued that the agreement was criminally usurious. The court disagreed because plaintiffs' calculation factored in as interest defendant's contractual share of the proceeds of the sale. Further, the

amount made the agreement exempt from the usury laws. GOL 5-501(6)(b). Plaintiffs claimed the defendant had breached his fiduciary duty. But the court found that he had a right to act to protect his interest in the pledged collateral on default and the agreement did not impose a fiduciary duty that would vitiate that right. Finally, the court found, despite plaintiffs' couching their demands for relief in equitable and declaratory terms, the gravamen of the complaint was for a monetary judgment, meaning that plaintiffs had an adequate remedy at law. Motion denied. Brissago, S.A. v. Schwartz, Index No. 606187/97, 4/16/98 (Shainswit, J.).c 1998

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