The ***Commercial Division***

of The State of New York

THE LAW REPORT

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

VOL. 6, NO.2
MAY 2003

Agency; actual and apparent authority; license agreement. Procedure; preliminary injunction and summary judgment. Action arising out of agreement by which owner of building entered into agreement granting authority to communications company to make license agreements for the installation and operation of telecommunication facilities at the owner's premises. The court had granted preliminary injunctive relief to the plaintiff as it was likely to prevail on its claim that the communications company had had actual authority to enter into a license agreement and that, at the least, the codefendant, the managing agent of the premises, had had apparent authority to approve the license agreement. The court stated that this determination did not constitute an adjudication on the merits for purposes of summary judgment. However, the court concluded that summary judgment should be granted. The owner had granted actual authority to the communications company as evident from the terms of the agreement. That company was to use its best efforts to maximize use of the premises as a communications facility, which necessitated entering into license agreements. All agreements entered into by the communications company were to be subject to the owner's prior approval. However, the court stated, it was clear that the managing agent had approved various agreements without opposition by the owner. Assuming that the agent did not have actual authority, the record established that it had apparent authority, the court found. The president of the corporate owner had been aware of the license activity and had instructed the agent to handle all matters relating to the communications company. Further, the owner was aware, evidence indicated, that the communications company was entering into license agreements in view of its receipt of revenue reports and revenue income, the presence of equipment at the facility, among other things. The owner offered only conclusory assertions that the agent had not been authorized to execute contracts with the communications company and that the Board had not approved them. The court stated that the focus should be on the conduct of the principal, not that of the agent. The court rejected the argument that execution of an extension agreement violated GOL 5-703 (2). As the agreement was a license, not a lease, the statute was inapplicable.

Summary judgment granted accordingly. Sirius v. Chinatown Apartments, Inc., Index No. 602385/2001, 4/14/03 (Lowe, J.).

Attorney and client; disqualification; simultaneous relationships. On a disqualification motion, the court found that the firm had a current attorney-client relationship with certain defendants in this case in which they represented plaintiff. The fact that the legal advice may have been intermittent, on an "as needed" basis, did not release the firm from a duty of loyalty to the client. Further, the court found, the lawyer was introduced to and retained by plaintiff during and after a conference in which defendants took part and in which this case and its underlying details were discussed. The lawyer argued that two non-clients were present at the meeting. However, defendant would not have spoken openly with the attorney if he had thought the result would be a suit against him. Whether the discussions were privileged is not the point. The court found that the lawyer had not met his heavy burden to show that there would be no actual or apparent conflicts in loyalties or diminution in the vigor of the representation where simultaneous relationships are present. The firm, being small, must be disqualified too. Motion granted. Oil Heat Institute of Long Island Insurance Trust v. RMTS Associates, LLC, Index No. 603152/1999, 3/25/02 (Cahn, J.).

Bills and notes; credit when creditor/junior mortgagee purchases mortgaged property at foreclosure. Plaintiff moved for summary judgment on a loan. Defendants sought to offset a credit resulting from plaintiff's having purchased defendant's premises at foreclosure, where plaintiff was a second mortgagee, and having sold to a third party. The court held that defendants were not entitled to a credit. Plaintiff's prior mortgage was foreclosed, but the notes were not extinguished so plaintiff could proceed. A privacy claim was ruled invalid. HSBC Bank USA v. Palmisario, Index No. 602974/2002, 4/17/03 (Ramos, J.).

Class actions; predominance of individual issues. Motion to certify class action in "vanishing premium" case. Defendant argued that individual issues would predominate. Plaintiff contended as to GBL 349 that deception presented an objective issue and that no individual inquiries would be necessary. The court found, however, that the circumstances would involve subjective analysis that might vary from transaction to transaction depending on the mix of communications between the plaintiffs and the insurance agents who allegedly engaged in deceptive conduct. Further, plaintiffs would have to demonstrate injury. The court also found that in this case causation was intertwined with reliance. The mix of information made available to the purchaser was distinctive, if not unique, the court found, so that the question of causation would have to be decided as to each purchaser in the context of the particular information received. Class certification could not be based on advertising by defendant since there would be questions as to plaintiffs' exposure to and influence by the advertising. Motion denied. Gaidon v. Guardian Life Ins. Co., Index No. 605041/1996, 4/16/03 (Ramos, J.).

Contracts; commercial lease; interpretation; duty not to withhold consent unreasonably; assignment. Action alleging that defendants, commercial landlords, had unreasonably refused consent to plaintiff tenant's assignment of leasehold interests in two commercial buildings to co-plaintiff. In the case of an affirmative promise not to withhold consent unreasonably, refusal can only be based on consideration of objective factors, such as financial responsibility. The court ruled that plaintiff had failed to establish that defendants had withheld consent unreasonably, as a matter of law. Plaintiff did not challenge the doubtful impression of the proposed assignee's finances apparent on the face of the materials submitted to defendants. The lease did not require the landlord to perform independent due diligence. Plaintiffs did not formally guarantee the assignee's performance and in any case a guarantee would not add to what defendants were entitled to anyway. The lease did not oblige defendants to consider the assignor's financial condition or to accept its assurances. The construction favored by plaintiff would dilute defendants' rights. Defendants' rejection letter predicated withholding of consent on both the lack of financial responsibility and the fact that plaintiff's proposed consent would have also deleted a key lease provision regarding cross-default. Defendants reasonably withheld consent. A tortious interference claim with regard to subleases failed as seeking to recast a contract claim as tort. Ply-Gem Industries v. Inip Co., Index No.14520/2001, 3/4/03 (Austin, J.).

Contracts; commercial real property; lease and purchase option; easement by necessity. Rule against perpetuities. Option with price abatement. Defendant entered into lease and purchase option agreement with plaintiff. Action of plaintiff seeking an easement by necessity and to enforce its purchase option. Plaintiff alleged the property was landlocked and required an easement by necessity. Defendant claimed that there was a county or town paper road to which plaintiff had access. Plaintiff responded that it did not have permission to use that road, but there was, the court said, no evidence of objections. Defendant asserted that it had used the road for 20 years. Thus, the

court concluded, there were issues of fact precluding summary judgment for plaintiff. As to the option, that agreement was executed the same day as the lease, referenced the lease and incorporated a proposed contract of sale. This showed the parties intended to limit the option to the period of the lease, the court found. The option could not be exercised beyond the lease term. The court ruled that the option did not violate the rule against perpetuities. As to specific performance, plaintiff sought an abatement due to environmental problems with the land. The lease and proposed contract contained "as is" disclaimers. Plaintiff alleged that defendant had bulldozed the property to conceal the hazard. Defendant noted that the governmental action regarding the property had occurred before plaintiff signed the lease, and that though plaintiff claimed to have objected to the remediation, the objection concerned an adjacent parcel. Questions of fact barred summary judgment for plaintiff on this issue. Sharper Properties Enterprises, Inc. v. Hubbard Sand & Gravel, Inc., Index No. 21862/2002, 4/10/03 (Emerson, J.).

Contracts; intention to execute written agreement; alleged oral agreement; statute of frauds. Quantum meruit. The parties hereto engaged in negotiations regarding a possible future engagement. The negotiations looked towards a written contract, which defendant never signed. Plaintiff claimed that there was a valid oral agreement and that, in the alternative, it was entitled to compensation for certain work performed and unjust enrichment. Here, the court found, plaintiff, a consultant, had not provided any original ideas about cost savings. Plaintiff had provided a certain report to defendant, but did not designate it confidential or proprietary nor require, as it should have, that defendant sign a confidentiality agreement. It was clear, the court found, that there had not been an intention to be bound until the agreement was reduced to writing and signed so that there could be no contract in the interim, even if the parties had orally agreed upon all the terms of the proposed contract. Defendant had questioned the cost structure of plaintiff's report many times. This was a factor in the negotiations for the written contract. The parties did not contemplate an oral contract since there were unresolved material terms of this sort at issue. Furthermore, the court held, the oral agreement alleged could not have been performed within one year because performance depended on action by third parties. Thus, the agreement was barred by the statute of frauds. Partial performance by submission of the report did not take the agreement out of the statute of frauds. Since under the alleged contract plaintiff was to act as an intermediary, the alleged oral agreement would also have been unenforceable under GOL 5-710 (a) (10). The *quantum meruit* claim failed, too, since plaintiff did not perform substantial service and its actions were merely preparatory. In addition, plaintiff failed to provide evidence that defendant had utilized plaintiff's work. Case dismissed. Copywatch, Inc. v. St. John's University, Index No. 603719/1999, 4/16/03 (Ramos, J.).

Contracts; interpretation; international currency exchange transactions. Unjust enrichment; relation to contract. Conversion. Action arising out of international money exchange agreements. The key issue was whether defendants had properly established an Argentine peso/US dollar exchange ratio. Plaintiff argued that defendants breached the agreements by failing to settle non-deliverable exchange transactions on December 31 pursuant to a 1991 law after exchange transactions were suspended on December 21. Because of the extended Argentine bank holiday, the ARS Official Rate was not available on December 31. Under the agreements and the confirmations, a fallback rate was provided and one of the defendants calculated the rate on January 11, when currency trading resumed. The court held that defendants had acted properly in calculating the rate when and as they did. An unjust enrichment claim was defective since it was based on the same facts as the breach of contract claim. A conversion claim was defective since there can be no conversion where money damages are sought for breach of contract. Pharo Master Fund Ltd. v. Credit Suisse First Boston Corp., Index No. 600618/2002, 3/17/03 (Ramos, J.).

Contracts; interpretation; multiple agreements as one. Restrictive covenants; availability of information; proprietary nature of information; breach of agreement by party seeking enforcement. The court found that a series of agreements had been intended to be one overall agreement. One would make no sense unless read in conjunction with another. The court found the agreement clear and unambiguous. Defendant breached it by failing to pay invoices on time. Defendant asserted that plaintiffs had violated a restrictive covenant with regard to customer information, but the court found that the information was readily obtainable. Further, having breached the agreement, defendant could not seek to enforce restrictive provisions therein. Also, customer information at issue had not been developed by defendant but by its client and thus was not proprietary to defendant. Elite Promotional Marketing, Inc. v. Stumacher, Index No. 1474/1999, 3/3/03 (Austin, J.).

Contracts, interpretation; termination; commercially reasonable duty to seek approvals; third-party beneficiary. Plaintiff entered into purchase and sale agreements with defendants regarding real property. In this action, plaintiff argued that since it had not provided notice that approvals had been obtained prior to expiration of the zoning review period, the contract was automatically terminated. Defendants argued that plaintiff had an overriding duty to exercise commercially reasonable efforts to obtain the approvals. The court found that to construe the agreement so as to afford plaintiff unfettered discretion regarding the approvals would be to excise the duty from the

contract. Rather, to give effect to every provision, the court construed plaintiff's right to terminate as being subject to commercially reasonable efforts to secure the approvals. Triable issues were presented as to commercial reasonableness, as well as to whether plaintiff had waived its right to terminate on an alternate ground. On cross-claims, the court found no evidence that plaintiff's agreement had been entered into to confer a benefit on co-defendant, so that co-defendant was not a third-party beneficiary. BDG Oceanside, LCC v. RAD Terminal Corp., Index No. 14890/2001, 3/3/03 (Austin, J.).

Contracts; statute of frauds; purchase of securities. Procedure; raising issue in reply. Misappropriation of trade secrets. Action arising out of dispute between law firm and former alleged profit-sharing partner. The firm raised the statute of frauds. BCL 503(b) was not applicable to the facts, the court found, and UCC 8-113(a) exempted from the statute the oral agreement alleged here, which essentially involved a purchase of shares in the law firm. Alternatively, GOL 5-701(a) (1) did not apply since, though it was improbable that payment for the shares could be made within a year, it was not impossible for that to have occurred. Issues of fact existed. A legal argument of the firm was improper since raised for the first time in a reply brief. As to the firm's allegations that the former alleged profit-sharing partner had misappropriated information derived from the firm's internal client database, the court noted that trade secret protection for such information would require a showing that the information was not readily available from other sources. Whether a customer list is a trade secret is generally a question of fact. The court found issues of fact as to whether employee access to the data comported with the claim of confidentiality, whether the information was elsewhere obtainable, etc. Siegel, Fenchel & Peddy, P.C. v. Schroder & Strom, LLP, Index No. 12889/2000, 3/19/03 (Austin, J.).

Corporations; shareholders' derivative actions; BCL 627. Defendant moved for order per BCL 627 directing plaintiffs to post security in this shareholder derivative action in which plaintiffs contended that defendant directors of a country club had breached fiduciary duties, committed waste and engaged in self-dealing by mismanaging the club's main asset, real property. Plaintiffs did not hold more than five percent of any class of shares. Under Section 627, unless plaintiffs' shares had a a "fair value" of $50,000 or more, plaintiffs could be required to post security. Section 627 does not define a "fair value," the court noted. The court found that defendant's submissions fell short of demonstrating that the value of plaintiffs' shares was less than $50,000. Defendant contended that such share was only worth $3,500 but plaintiffs offered contrary proof and claimed that defendants' actions had depressed the market artificially. Further, the record showed only a limited market for the shares, so that defendant's market value approach would have limited weight. The court noted that the property had been appraised at $40 million so that, on a dissolution value, each share could arguably be worth $80,000. Shapiro v. Rockville Country Club, Index No. 15308/2002, 4/29/03 (Austin, J.).

Corporations; shareholders' derivative actions; Delaware law; forum non conveniens. Three shareholders' derivative actions arising out of the alleged inflation of advertising revenue at America Online, an Internet service provided by defendant AOL Time Warner. The court granted a motion to dismiss on grounds of forum non conveniens. Although the headquarters of defendant AOL is located in Manhattan, that entity was incorporated in Delaware and Delaware law governed the claims in these cases. The court concluded that a Delaware court, where various similar actions were pending, would be in a better position to adjudicate this foreign-based litigation. The fact that Federal securities actions were pending in the Southern District of New York, the court found, was not relevant since those actions involved the application of Federal law and Delaware's interest in deciding issues of corporate law with regard to Delaware corporations predominated. The court also concluded that it was not relevant that the actions filed in the Commercial Division were initiated before any related Delaware action. Siegel v. Case, Index No. 603282/2002; Pfeiffer v. Case, Index No. 119858/2002; Kelly v. Case, Index No. 602704/2002, 4/28/03 (Lowe, J.).

Corporations; shareholders' derivative actions; demand on Board; independence; fiduciary duty. Procedure; statute of limitations. Preemption; labor law. Shareholders' derivative action. Plaintiff alleged that management's mishandling of unionization issues amounted to breach of the directors' fiduciary duty, that defendants had engaged in self-dealing, etc. The court found that the complaint basically revolved around labor relations issues. The court granted defendants' motion to dismiss on preemption grounds. The court found that the complaint had failed to allege a reason (beyond the insufficient fact that the members had been chosen by him) why the Board would not have been independent in weighing the allegations regarding the Chairman and CEO so that dismissal for failure to make a demand was required. Fiduciary duty claim stated in that plaintiff alleged that defendants had an anti-union animus that harmed the quality of the product and the Chairman's self-dealing harmed the corporation. Alleged claim for abuse of control was found to duplicate the breach of fiduciary duty claim. The court held that a 1998 SEC disclosure provided knowledge of alleged wrongdoing so the case was beyond the three-year statute. The court held that, as plaintiff had purchased shares only after most of the alleged wrongs had occurred, it could sue only as to certain recent decisions. Case dismissed. Plumbers & Pipefitters Local 112 Pension Fund v. Brooks, Index No. 016012/2002,

3/6/03 (Warshawsky, J.).

Damages; UCC 2-714; special circumstances; value at acceptance; consequential; UCC 2-715. Implied indemnification. Decision re award of damages due to defendant's breach of warranty of good title to 15 vehicles. Under UCC 2-714, the court held that, as there were no special circumstances, the measure of damages would be the value of the property at the time and place of acceptance. As to consequential damages (UCC 2-715) (2)), plaintiff produced no evidence to show that defendants knew or had any reason to know that all 15 vehicles had been stolen and thus that the plaintiff would suffer extensive consequential damages. Incidental damages awarded per UCC 2-715 (1). Implied indemnification was allowed for those vehicles on which plaintiff suffered out-of-pocket loss. Page One Auto Sales, Inc. v. Annechino, Index No. 13353/2000, 3/12/03 (Stander, J.).

Discovery; commission; relevance; diligence. Action for breach of contract, conversion, etc. due to defendant's failure to deliver a Picasso to plaintiff, which had paid for it by turning funds over to defendant's alleged agent, who fled with the money. Plaintiff sought a commission to depose the person to whom defendant later sold the painting. The court ruled that this witness had no relevant testimony to offer as the claims did not concern him and plaintiff showed nothing to indicate he might have information on defendant's relationship with the alleged agent. The discovery deadline had passed and plaintiff had known about the witness for over a year but had done nothing to try to depose him. Plaintiff's motion for commission denied. Dark Bay Intl.,Ltd. v. Acquavella Galleries, Inc., Index No. 600122/2002, 4/16/03 (Ramos, J.).

Discovery; deposition errata sheets. Procedure ; summary judgment; errata sheets & affidavit contradicting deposition. GBL 349. The Appellate Division ruled that this case was not a proper class action. On a subsequent motion for summary judgment, plaintiffs submitted errata sheets and affidavits that conflicted with prior deposition testimony. On a remaining GBL 349 claim, defendant argued that plaintiffs had not been injured by reason of the alleged deception. The court found that the complaint asserted that defendant had misrepresented the facts and instructed consumers to change filters in defendant's product too frequently. The depositions of two plaintiffs revealed that they changed filters more often than recommended. The third plaintiff's theory was also inconsistent with the complaint. The errata sheets and affidavits were disregarded by the court because they contradicted the deposition testimony and were tailored to avoid the consequences of the earlier testimony. Plaintiffs did not suffer the loss alleged in the complaint. Thus, case dismissed. Hazelhurst v. Brita Products Co., Index No. 603367/1998, 3/31/03 (Cahn, J.).

Discovery; designation of representatives of corporation for deposition; relevance; witnesses from abroad; Hague Convention. Discovery dispute in action arising out of a fraudulent scheme by bank customer to convert 1.5 million shares of stock. Defendant sought to depose current employees and former employees of plaintiff. Plaintiff objected that defendant was not entitled to depose specific individuals on behalf of plaintiff. In response to a notice for deposition, a corporation can choose which of its corporate representatives to provide for examination but it must produce a representative with direct and personal knowledge of facts raised in the case. Plaintiff offered to produce certain employees who had no personal knowledge of the transactions at issue, which was clearly inadequate in this case, the court held. Plaintiff objected to defendant's designation of particular individuals as being inappropriate. However, the individuals defendant was to depose were employees at the time of the transactions at issue and would be able to testify at least about plaintiff's practices. Plaintiff argued that information regarding its general business practices and acts related to the transactions at issue were irrelevant since defendant could not seek indemnification under the agreement in question, as it had acted in a negligent manner. However, with regard to about one-third of the shares it was plaintiff that had instructed defendant to transfer the shares, so its acts would be relevant. The court rejected plaintiff's request that all depositions of the current employees be conducted by telephone or if in person, in Switzerland. Since plaintiff had commenced an action in New York, the court ruled, it must submit to examination in New York absent serious hardship. The mere fact that a foreign corporation must send its employees and documents to New York for deposition does not establish such hardship. As to plaintiff's former employees, it was not obliged to produce them and since these persons were non-parties and abroad, defendant must proceed under the Hague Convention. BNP Paribas (Suisse) S.A. v. Chase Manhattan Bank, Index No. 603778/2000, 3/7/03 (Ramos, J.).

Fiduciary duty. Negligent performance of contract. Procedure; CPLR 3211 (a) (1). Contract; interpretation; disclaimer. Misrepresentation; reliance. Motion to dismiss an action arising out of an investment in Eurobonds. Plaintiffs alleged that defendants had failed to provide plaintiffs with evidence of ownership of all of Eurobonds as a result of which plaintiffs were prevented from making a claim in a reorganization in Brazil. The breach of fiduciary duty claim was found defective since it did not allege breach of any duty independent of the account agreement involved. A negligence claim failed since a plaintiff cannot transform a contract claim into a negligence claim by asserting

negligent failure to perform a contractual duty. A contract claim was upheld since defendants had not presented evidence conclusively disposing of the claim as a matter of law under CPLR 3211 (a) (1). Defendants' documentation, the court found, raised a question as to whether the information provided to plaintiffs was sufficient to initiate a claim. Further, the court found that the clear and unambiguous language of the agreement reflected acknowledgment by plaintiffs of their responsibility in making their own independent investigation about securities and their agreement not to rely on defendants to review the financial condition and creditworthiness of an issuer. Therefore, the court found, the relationship of the parties was that of an ordinary broker-client relationship so that a fiduciary duty claim failed. A contract claim failed because plaintiff had not set forth any provisions that imposed a duty on defendants to advise plaintiffs about the risks of Eurobond investments. Plaintiffs could not have justifiably relied upon any alleged misrepresentations by defendants with respect to the safety of Eurobonds in view of their assumption of responsibility for investment decisions. Therefore, a negligent misrepresentation claim also failed. Motion to dismiss granted in part. Jordan v. UBS AG, Index No. 600816/2002, 4/16/03 (Ramos, J.).

GBL 349; consumer impact. Misrepresentation; puffery. Implied duty of good faith and fair dealing. Action arising out of contract for computer-assisted research services. The court held that a GBL 349 claim failed since the fraud about pricing alleged was a private commercial dispute not having an impact on consumers generally. The fraud claim rested on the assertion that defendants had stated that the defendants' prices were the lowest then available. This, the court held, was puffery a commercial entity could not rely on. Plaintiff was not obliged to enter into additional agreements and it had passed the costs on to its customers. An implied duty of good faith could not be used to create independent obligations beyond those agreed on. Case dismissed. Leave to replead denied in absence of demonstrable merit. Sutton Associates v. Lexis-Nexis, Index No. 4098/2002, 4/29/03 (Austin, J.).

GBL 349; consumer-oriented conduct. Tortious interference with contracts and contractual relations. Injurious falsehood. Trade libel. Product disparagement. Defendant beverage distributors operated through a network of distributors. Plaintiff sought to make trucks available to the distributors. Plaintiff alleged that defendant discouraged this and thus violated GBL 349 and engaged in tortious interference and other wrongs. The court ruled that the lease/sale of trucks in a market for commercial distributors was not a consumer-oriented transaction. The court rejected a claim for interference with contract because plaintiff did not show it had any contracts. A claim for tortious interference with prospective contractual relations failed since defendant had not acted exclusively to harm plaintiff but was pursuing its own economic interest in regard to truck quality and there was no proof that wrongful means were used. Claims of injurious falsehood, trade libel and product disparagement failed since defendant's statements were reasonably accurate. Case dismissed. Newport Service and Leasing, Inc. v. Meadowbrook Distributing Corp., Index No. 007990/2002, 4/21/03 (Warshawsky, J.).

GOL 5-903; domain names as contractual right. Quasi-contractual claims. Action commenced as class action seeking declaratory judgment and damages arising out of services agreement for the registration of domain names. Plaintiff complained that the agreement was renewed automatically without notice as provided in GOL 5-903. The court ruled that domain names are more similar to a contractual right than they are to a property right, that the statute concerned contracts involving real or personal property and that it would be unwarranted to extend the statute to include domain name registration services agreements. Thus, claims for declaratory judgment and breach of contract were dismissed. Quasi-contractual claims were barred by the existence of a valid and enforceable contract. The court stated that it could not agree that the plaintiff was bound to the terms of the modified agreement merely because he had not taken advantage of canceling or transferring administration of the domain name registrations prior to renewal. At the least, the court stated, plaintiff's contention that he had never received renewal notices warranted the denial of defendant's motion to dismiss quasi-contractual claims. Complaint dismissed in part. Wornow v. Register.Com, Inc., Index No. 109041/2002, 4/14/03 (Ramos, J.).

Insurance; duty of utmost good faith; collateral estoppel; cooperation clause. Action to recover for $ 4.3 million in insurance proceeds under a policy in connection with a credit facility that plaintiff had extended for a movie. Plaintiff sued the insurer and a reinsurer under a Cut Through Endorsement. The reinsurer asserted affirmative defenses and counterclaims. The court ruled that the reinsurer's claims of fraud or breach of warranty were barred by the law of the case doctrine in view of prior decisions in the case with respect to the insurer. The reinsurer argued that plaintiff was bound by duty of utmost good faith and thus had an obligation to disclose information about the risks associated with the policy that were known to plaintiff. The reinsurer relied upon the Code of Conduct for Lloyd's Brokers, which, the reinsurer argued, was applicable because the policy had been brokered in London by an English broker. The court held that the broker, as a member of Lloyd's, was charged with a duty of utmost good faith to the insurer and reinsurer with regard to agreements that it brokered in London. If a heightened duty to disclose existed, it ran from the insurer and the broker to the reinsurer, not between plaintiff and the reinsurer. The law of the hearing forum governs

the scope of the duty to disclose. Stringent disclosure rules only govern marine insurance and reinsurance contracts in New York, the court stated. Thus, various defenses and counterclaims were defective. The reinsurer argued that it could not be liable because the loss alleged was not fortuitous. The court held, however, that this argument was barred by collateral estoppel in view of the determination by Justice Gammerman in another case. The reinsurer argued that the plaintiff had failed to produce certain information sought by the reinsurer in connection with the claim and that this constituted a breach of a cooperation clause. The court held that the reinsurer's failure to state what requested information the plaintiff had allegedly refused to provide doomed this claim and defense. Chase Manhattan Bank v. New Hampshire Ins. Co., Index No. 600996/2000, 3/3/03 (Ramos, J.).

Misrepresentation; relationship to contract. Unjust enrichment. Action arising out of failed marketing campaign. The court ruled that plaintiff's fraud claim was a restating of its contract claim. The wrong alleged in both was the same; no promises collateral to the agreement were at issue, as required. If a marketing list was not developed properly, that would be a matter of a breach of contract. Plaintiff did not allege the existence of a list prior to the contract that defendant had misrepresented. An unjust enrichment claim cannot survive where it is duplicative of a contract claim. Here, the identical facts were asserted and the same damages sought. Causes of action dismissed. Rolls-Royce & Bentley Motor Cars, Inc. v. Veritas Group, Ltd., Index No. 603292/2002, 3/27/03 (Ramos, J.).

Preliminary injunction; irreparable harm. Tortious interference with contract. Misrepresentation; reliance and damages. Contract; breach; meeting of the minds. Constructive trust. Motion for preliminary injunction and cross-motion to dismiss. Plaintiff, CEO of defendant corporation, negotiated for an equity stake. An agreement was never signed and plaintiff was terminated. Plaintiff sought injunctive relief restoring him to his post but the court rejected the application for lack of irreparable injury since plaintiff could be compensated by damages. A claim for tortious interference with contract failed for lack of an interfering entity independent of the corporation. A claim that defendants misrepresented that plaintiff would become a shareholder failed, the court ruled, since plaintiff had failed to allege reliance and damage in that he had not asserted that he abandoned other opportunities because of the representation. A contract claim failed since there clearly had been no meeting of the minds. A constructive trust claim failed as plaintiff had failed to allege a pre-existing interest in the shares and a transfer in reliance on defendants' promise. Ax v. Basch, Index No. 000904/2003, 4/4/03 (Warshawsky, J.).

Procedure; dismissal; documentary evidence. Misappropriation of trade secrets. Sanctions. Action by mortgage broker alleging misappropriation of customer lists by former employee. On motion to dismiss, defendants submitted documentary evidence to which plaintiff did not respond. A complaint must be construed in light most favorable to non-moving party, but a complaint sufficient on its face will be dismissed if essential facts are contradicted by documentary record. The court held that the complaint set forth only bare legal conclusions and factual claims that were either incredible or flatly contradicted by the record. Evidence showed customers were publicly available. Motion granted. Date set to consider imposition of sanctions. Fast Track Funding Corp. v. Perrone, Index No. 16519/2002, 3/19/03 (Austin, J.).

Procedure; leave to amend; prejudice; merit. Tortious interference; economic interest. Judicial estoppel. Misrepresentation. Action for breach of contract to recover commissions under contracts for sale of telecoms services. Motion for leave to amend to claims for tortious interference and the like. The court found that no prejudice would result from the passage of time in the case and it appeared that plaintiff had only learned the basis for the claims during discovery. However, a proposed amendment that is devoid of merit should be denied. The court found that the evidence was clear that defendant AT & T bought the co-defendant for business reasons and cut costs and operated it in such a way as to advance its economic interests. This was not action taken solely to harm plaintiff. Also, judicial estoppel barred a contract claim based on a supposed merger between the defendants when plaintiff was urging as a ground for amendment to add tort claims that the entities had a separate identity. A misrepresentation claim failed since plaintiff alleged only a statement to a third party, not plaintiff. Motion denied. AYW Networks, Inc. v. Teleport Communications Group, Index No. 004586/1999, 3/27/03 (Warshawsky, J.)**.**

Procedure; personal jurisdiction; service of process; forum non conveniens. Motion to dismiss. Corporate defendants, foreign corporations, had no offices, bank accounts, employee or property here. Periodic sending of officers or employees to New York would not be enough to find them doing business here. Plaintiffs cited an agreement, but the corporate defendants were not parties to it. The corporations did all their business abroad. Facts were not alleged, the court found, sufficient to support long-arm jurisdiction. The court found that the individual defendants had been lured into New York by trickery so that service on them then was invalid. Dismissal was required. Further, dismissal would in any event be necessary on forum non conveniens grounds**.** The court ruled that this was a shareholder dispute regarding two foreign corporations; all parties except plaintiff and one other were

located abroad, where the acts occurred and documents and witnesses could be found. Stevens v. Reek, Index No. 26632/2002, 4/23/03 (Emerson, J.).

Procedure; pleading; piercing and alter ego claims. Corporations; liability of individual for transactions of dissolved corporation. Contracts; interpretation; ambiguity. Action by song writers/publishers/producers against rock musician and related persons and entities to recover royalties. Piercing and alter ego theories dismissed as separate cause of action; maintained as theories in other causes of action. The contract in question was between plaintiff entity and a defendant corporation. No evidence had been presented that the musician had signed a guarantee so it could not be enforced against her. Plaintiff showed that the corporation had been dissolved for non-payment of franchise taxes. As the musician had been carrying on the corporate business, she could be personally liable. As to an individual defendant, there was a question as to whether he had signed the guarantee. In any case, he could not be dismissed because of the defunct corporation issue. Evidence was submitted that various corporate defendants were intertwined. Also, these entities acted as agents for the defunct corporation. The court found that defendants could not dispute that monies were owed to plaintiffs. Defendants argued that a recent Court of Appeals case had changed the law on synchronization rights. However, unlike that case, the contract here, the court noted, addressed such rights. The contract in this regard was unambiguous, the court found. Defendants had paid royalties on such rights since the contract began and it was clear such rights were included. Case dismissed in part. Rosenblatt v. Laguna, Index No. 604012/2001, 4/23/03 (Ramos, J.).

Restitution; continuation of contract; illegal or immoral contracts; damages. Unjust enrichment. Money had and received. Alleged class action arising out of membership in health club. Plaintiff's contract failed to set forth certain consumer protection provisions required by statute as a result of which her contract was void. Plaintiff, however, did not seek a declaration that her contract was void, but rather restitution of the contract amount with interest and punitive damages. However, plaintiff remained a club member and continued to pay her dues. In view of this, case authority regarding restitution was distinguishable. Further, the court noted, a contract of the type at issue would be neither illegal nor immoral. Plaintiff was not entitled to restitution. Plaintiff lacked standing to bring her claims. Plaintiff had suffered no damages as a result of the violation of the statutes. Claims for unjust enrichment and the money had and received were defective since defendant was not obtaining a benefit without compensating the plaintiff therefor; plaintiff had bargained for use of the facility and had received same. Case dismissed. DeRiso v. Synergy USA, Inc., Index No. 118287/2002, 3/14/03 (Ramos, J.).

Restrictive covenants. Defamation affecting professional standing. Plaintiff claimed that defendant had violated a restrictive covenant by going to work for a competitor and diverting patients. Defendant claimed that she had been constructively discharged because of the difficult work environment. The court found that there were issues of fact that precluded plaintiff's motion for partial summary judgment. On defendant's defamation counterclaim, the court ruled that plaintiff's letter to patients, which stated that defendant did not have authority to discharge patients and that plaintiff might have to report any unauthorized discharges, presented a prima facie instance of defamation since it tended to hold defendant up to public disgrace in regard to her profession. Factual issues were present on this claim. George v. McClune-Sweeney, Index No. 6409/2002, 4/11/03 (Benza, J.).

Restrictive covenants; preliminary injunction; use of confidential information; damages. On a motion for a preliminary injunction, the court found that plaintiff had failed to present sufficient evidence of the use of confidential information in violation of any contractual or common law right, or to demonstrate any harm outside of speculative money damages. As defendant had never signed a restrictive covenant, solicitation of customers would be actionable only where the employee had physically misappropriated or copied files or utilized trade secrets or other confidential information. The court found that plaintiff had presented wholly conclusory speculation as to the misappropriation or use of information. Plaintiff had not established the confidentiality of the materials allegedly taken nor had plaintiff identified any clients improperly solicited. Further, monetary damages would be adequate. Motion denied. Johnson Belt, Inc. v. David E. Belt, Index No. 603251/2002, 4/11/03 (Ramos, J.).

Restrictive covenants; solicitation; client lists; recollection of information. Action by a corporation against former officer and employee. As the case did not involve a restrictive covenant, plaintiff relied upon alleged trade secrets consisting of client lists, lists of temporary employees, pricing policy and some other information. The court found that it could not conclude that plaintiff would be likely to succeed on the claim of breach of fiduciary duty against the former officer in the absence of evidence of solicitation prior to departure. The court concluded that plaintiff had failed to demonstrate that its client lists or pricing policy constituted protected trade secrets since the formation was readily available. As to plaintiff's lists of temporary worker employees, an employee's recollection of information concerning the specific needs of particular customers is not confidential. As plaintiff had not demonstrated that

anything other than personal recollection was involved, its argument failed. Motion for preliminary injunction denied. T&T Group, Inc. v. Kampel, Index No. 604282/2002, 3/27/03 (Ramos, J.).

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