The Commercial Division

of The State of New York

Law Report - July 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

HON. STEPHEN G. CRANE
ADMINISTRATIVE JUDGE
SUPREME COURT, CIVIL
BRANCH, NEW YORK COUNTY

JUSTICES OF THE COMMERCIAL DIVISION:

JUSTICE HERMAN CAHN
JUSTICE BARRY A. COZIER
JUSTICE IRA GAMMERMAN
JUSTICE CHARLES E. RAMOS
JUSTICE BEATRICE SHAINSWIT
JUSTICE THOMAS A. STANDER

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The Report and complete TEXT of all decisions discussed in it are available on Unified Court System Internet home page at http://ucs.ljx.com and at the home page of the New York State Bar Association Commercial Federal Litigation Section www.nysba.org/sections/comfed. Membersof the section may sign up to receive copies of the report by e-mail automatically.The Court is instituting on both home pages a cumulative index for cases cited any issue Report.

Accountants' liability. Res judicata. Standard on motion to dismiss (CPLR 3211(a)(7)). Liability to third party. Statute of limitations. As to whether a prior order dismissing a related case for failure to state a cause of action created a res judicata bar, the court held that a pre-answer dismissal is not on the merits unless the court says otherwise, not so here. On a 3211(a)(7) motion, the court stated, it must determine whether plaintiff can succeed on any reasonable view of the factual averments (assumed to be true) and without regard to the likelihood that plaintiff can establish its claims. The court held that the parties' alleged meetings, communications and relationships satisfied the Credit Alliance criteria. This also applied to a claim for negligent misrepresentation. The court held that the statute of limitations commenced to run when defendant's report had been received, which meant the complaint was timely (CPLR 214(6)) as to that report but untimely as to an earlier one. The court held that it was not clear at this early stage that there had been no continuous relationship sufficient to toll the statute. Motion to dismiss denied. Goldstein v. Price Waterhouse, LLP, Index No. 01541/98, 6/11/98 (Stander, J.).

Accountants' liability; third party. Negligence. Negligent misrepresentation. Fiduciary duty. Motion to dismiss claims of accountants' liability (negligence, negligent misrepresentation, aiding and abetting breach of fiduciary duty). Defendant valued shares of former officer and director pursuant to stock repurchase agreement. The valuation was allegedly improperly low, influenced by a scheme by a corporate insider. Court held that complaint adequately alleged facts under Credit Alliance and Prudential Ins. Co. and as to the fiduciary duty claim and that discovery should proceed. Parrott v. Coopers & Lybrand, LLP, Index No. 119393/97, 6/18/98(Shainswit, J.).

Arbitration; confirmation of award; punitive damages. Motions concerning arbitration award. The court stated that the Federal Arbitration Act applied and that the question was whether the arbitrators had manifestly disregarded the law. The court held that plaintiff erred in arguing that an earlier decision in this case had established entitlement to punitive damages since that was only a ruling on a motion to dismiss. The court rejected plaintiff's argument that a second decision bound the arbitrators to determine the punitive damages issue a certain way. That plaintiff disagreed with the weight given evidence by the arbitrators was unavailing, nor did he establish partiality within the meaning of the FAA by specific facts. Award confirmed. Mulder v. Donaldson, Lufkin & Jenrette, Index No. 125224/93, 6/22/98 (Cozier, J.).

Arbitration. Procedure; leave to amend. Contract versus fraud. Settlement checks. For arbitration to be required, there must be no substantial question whether a valid agreement was made. Here plaintiffs denied there was one and defendants, the court held, had failed to offer evidence of one. A blank, undated sales order form containing such a clause on the reverse was not sufficient proof. The form actually used in the transaction was similar but a different entity's name was typed in at the top and there was no copy of the back provided. Motion to compel arbitration denied. Leave to amend is within the court's discretion and should be liberally given absent prejudice or surprise, although the merits of the proposed pleading should be examined. Breach of contract claim sustained regarding provision of misrepresented goods. Fraud claim sustained as the claim was not that defendants had misrepresented intent to perform the contract, but rather misstated existing facts about the nature of the promised goods. Claims about settlement checks that bounced could be added as they set forth additional or subsequent occurrences (CPLR 3025(b)). The court held that plaintiffs were not basing these claims upon settlement negotiations but upon an executed agreement whereby the checks were issued. RICO claim held inadequate as it failed to sufficiently allege at least two acts of racketeering. Parties added, discovery not having begun. Massaha Tex, Inc. v. The Swatch Group Inc., Index No. 119717/96, 4/19/98 (Shainswit, J.).

Brokers. Procuring cause; breach of contract. Bad faith exclusion. After trial, court held that plaintiffs were entitled to a full commission. Representatives of the prospective lessee had known that plaintiffs had brought the site to the lessee's attention, shown the space and performed other services. Plaintiffs had been promised the right to represent the lessee if negotiations developed but a representative cut them out by misleading them. The court held that a broker cannot be excluded from final negotiations as a bad faith ploy and found that that had occurred. Claims of lack of authority were unsupported by the facts, not pleaded as a defense, and illogical. Harper-Lawrence Inc. v. Intershoe, Inc., Index No. 603573/96, 6/19/98 (Shainswit, J.).

Class actions; review of proposed settlement. Absence of class objections; likelihood of success; benefits to class; amount of attorneys fees. Submission of proposed settlement of class action. Settlement class consisted of retail cellular phone customers of defendant whose agreements contained an automatic renewal feature and an early termination fee. Fewer than .01% of recipients of notice sought to opt out and no one appeared at the hearing to object. The court stated that judicial approval is required (CPLR 908) to protect against collusive terminations in the best interests of nominal or representative parties but not class members. The court held that the hearing had failed to show that more than a portion of the class (current subscribers) would benefit from free air time and even these would not receive proceeds. The court found that the difficulty of success was purely speculative. The court stated that the case appeared ripe for settlement but its concern was with the terms on offer. Evidence was not presented that permitted the court to make an independent assessment of the value of the air time. As to counsel fees, only one law firm submitted evidence to support how claims were calculated and that proof was insufficient. The amounts sought appeared "extraordinary" given the work involved in the case. The court refused to infer from the absence of objections at the hearing that the settlement was fair. The court ruled that approval would not be given until a fair balance was struck between the value of the benefit being offered to the class and the amount of counsel fees. Kahn v. Bell Atlantic

Nynex Mobile, Index No. 603445/96, 5/21/98 (Ramos, J.).

Collateral estoppel. Private right of action; Insurance Law. Procedure; pleading; money had and received; GBL 349. Fiduciary duty; bank and customer. Procedure; summary judgment; need for discovery. Tortious interference. To prevail on collateral estoppel argument, a defendant must show that the identical issue was necessarily determined and is decisive and that the party precluded had had a full and fair opportunity to litigate. The doctrine does not apply to pure questions of law. The court held that Ins. Law 6503 does not provide for a private right of action in regard to mortgage insurance since such an action is incompatible with the administrative enforcement mechanism adopted by the legislature. Further, plaintiffs did not claim that they had been required to continue the insurance. A contract claim was not raised in the prior federal case. A claim for money had and received was properly pled. A claim under GBL 349 was not barred by the federal case and plaintiffs had adequately pled consumer-oriented conduct with a broad impact and deceptive or misleading practices causing injury. Defendant could be held to have knowledge superior to that of its customers regarding the terms of their own contracts, creating a duty to disclose. A bank's relationship with a borrower does not create a fiduciary duty unless there is confidence reposed that gives the bank an advantage or an assumption of control and responsibility. The complaint here, the court held, did not allege same. Thecourt upheld arguments of a co-defendant that it could not be liable under GBL 349 since it had had no relationship with plaintiff. Plaintiff failed to make the necessary showing that the motion was premature because of lack of discovery. This defendant acted only out of economic interest so as to defeat a claim for tortious interference. Motions to dismiss and for summary judgment granted in part. Bauer v. Mellon Mortgage Co., Index No. 103103/97, 6/24/98 (Cozier, J.).

Collateral estoppel; similarity of issues; availability of discovery; voluntary dismissal. Statute of limitations. Procedure; standard on 3211(a)(7) motion; leave to replead. Agency; establishing authority. Indemnity. Plaintiffs sued defendants for breach of an agreement and an implied warranty by negotiating bills of lading in connection with a large transaction in cotton. Defendants argued that a decision by a Korean court collaterally estopped plaintiffs. That doctrine requires that the issues be identical in the two cases and that there have been a full and fair opportunity to contest the prior case. While some of the same issues were present, the court said, the Korean court did not necessarily decide them. The Korean decision held plaintiffs liable to a bank, not that Continental, a non-party there, was not liable to plaintiffs. Further, it was not clear, the court held, that plaintiffs had had appropriate discovery available. The voluntary dismissal of a federal case did not estop plaintiffs since that was not a judgment on the merits. The court held that negligence and breach of contract and implied warranty claims were time-barred since the negotiation had occurred no later than April 1991 and this case was not commenced until August 1997. On a 3211 (a)(7) motion, the complaint must be liberally construed in the light most favorable to the plaintiffs and the factual allegations accepted as true. In order to recover on a theory of contractual indemnity plaintiff must show a contractual relationship with the party from which it seeks indemnity. The complaint, the court held, did not assert a direct relationship with defendants. A purported agency would require facts showing the agent had actual or implied authority. Reliance on the agent's own acts, as here, does not suffice. The implied indemnity claim failed because plaintiffs had not alleged that defendants had owed a duty to the bank. Leave to replead was granted despite failure to request same. Sea-Land Service Inc. v. Conticotton USA, Index No. 604089/97, 6/23/98 (Ramos, J.).

Contracts. Acceptance varying terms of offer. Fraud; promissory estoppel; breach of duty of good faith. Plaintiffs claimed that after extensive negotiations for a concert of the Three Tenors in Taiwan, an agreement had been reached when by two letters and the signing of a contract they accepted defendants' terms. The court stated that a valid acceptance must comply with the terms of the offer and that if it is qualified with conditions, it amounts to a counteroffer. But upon signing, plaintiffs had added a postscript about payment terms, a subject that had been much negotiated. The court held that there never had been a meeting of the minds upon the material terms. Plaintiffs' contract claim was dismissed on summary judgment. Plaintiffs' claims for fraud, promissory estoppel, and breach of an implied covenant were premised upon the contention that, though meeting with plaintiffs, defendants had already committed the Tenors to a concert in Miami for the same date. The court held that plaintiffs' theory was contradicted by documentary evidence showing that there had been no conflict of dates. These claims were dismissed as well. New Aspect Promotion Corp. v. Hoffmann Concerts, Index No. 104097/97, 5/12/98 (Gammerman, J.).

Contracts; "best efforts." Assignment. **Fraudulent inducement; intent not to perform. Settlement agreement/ release; fraud**. The parties entered into contracts for cable programming to be delivered to hotel/motel customers. An

agreement requiring defendants to use their "best efforts" to promote plaintiffs' services meant that defendants had to pursue all reasonable methods for doing so, which usually gives rise to questions of fact. Financial difficulty of performance would not excuse defendants. The same is true with a "reasonable business efforts" clause. The court held that defendants had not met their burden. Defendants had failed to give notice of departure of customers in the manner contractually required. Defendants' argument that they had transferred hotel/motel contracts with those properties but did not transfer the contract with plaintiffs in violation of an assignment clause ignored the reality that they had deprived plaintiffs of the benefit of the bargain. The court held that there were triable issues of fact as to plaintiffs' fraudulent inducement claim that defendants had never intended to perform, these promises having been collateral to the agreement itself. Thus, claims to set aside the settlement agreement and release survived for the present. Although a release or settlement agreement may not be treated lightly, they can be set aside if fraud, duress, illegality or mutual mistake is established, so that fraud here would provide a basis for rescission. Summary judgment denied. Showtime Networks Inc. v. Comsat Video Ent., Inc., Index No. 600849/95, 6/29/98 (Cozier, J.).

Contracts; plain meaning; any ambiguity to be construed against drafter. Real estate brokers; implied promise to pay commission; exclusive right; procuring cause. On summary judgment, defendants argued that agreementswere authorizations, not brokerage employment contracts. The court held that its task was to enforce the plain meaning of an unambiguous agreement rather than to accept a construction that would render a purposeful provision of the contract meaningless. The plain language and the facts in the record made clear, the court held, that all parties had anticipated that plaintiff was to pursue a contract to purchase the property on defendants' behalf, which implied a promise to pay a commission upon success. Defendants encouraged and ratified plaintiff's efforts. Any ambiguity was to be construed against the drafter, the broker. Here the agreements did not contain language of exclusivity; hence, the court ruled that they created an agency but allowed defendants to act on their own. To earn a commission, a broker must be the procuring cause. The court held that there were issues of fact as to whether under the second agreement a commission was due where the broker had introduced defendants to a property that was not sold but went to the mortgage holder at foreclosure and only obtained by defendants later after an alleged "flip" by a third party. It was held that an assignment of a successful bid was the functional equivalent of a contract to purchase. Abrams Realty Corp. v. Elo, Index No. 116077/95, 5/26/98 (Cahn, J.).

Contracts; restrictive covenant. Restrictive covenants are disfavored. To establish likelihood of success in order to obtain preliminary injunction, plaintiffs must show that the covenant is enforceable. The court held that plaintiffs had failed to demonstrate that the former official/employee was irreplaceable. He had had no experience prior to becoming president and learned the job without difficulty and others stepped in and carried out his duties when he left. The court held that customer and vendor lists, pricing information and the like were widely available and not confidential and also outdated. The court held that the covenant was not reasonable. Plaintiffs offered to restrict it from covering all apparel sales to wholesale boys' apparel only but that did not save it. The court rejected arguments that the former officer had induced at-will employees to go to work for him in such a way as to support a demand for injunctive relief. Preliminary injunction denied. Antebi v. Boys Brigade Clothing Corp., Index No. 601762/98, 5/14 /98 (Shainswit, J.).

Contracts; restrictive covenant. Plaintiff sought a declaratory judgment that a restrictive covenant in his agreement with former employer defendant was void. It prohibited him from associating with any person or entity engaged in the oil brokerage business in any country in which defendant or an affiliate engaged in business. The court held the clause invalid because of lack of specificity as to time. It was also void because it restrained plaintiff from competing in the entire US and in any country in the world in which defendant did even minor business, and because it barred him from working for competitors in any capacity. Crippen v. United Petroleum Feedstocks, Inc., Index No. 603182/97, 6/19/98 (Ramos, J.).

Contracts. Termination; adherence to notice provisions. Abandonment. Irregular execution; waiver. Plaintiff granted summary judgment on contract claim. Defendants had no right to attempt to cancel the agreement as it was "non-cancelable" until the end of the initial term. A notice provision was held material and defendants were found to have failed to comply with it. Certified mail was not used as required; the agreement said no other form of notice would suffice. Plaintiff notified defendants of an address change but defendants used the earlier address. Plaintiff's proof of non-receipt was not contradicted by admissible proof. Defendants' presentation about mailing procedures was wholly conclusory and insufficient to raise a presumption of proper mailing (assuming same could apply). The court rejected arguments that plaintiff had abandoned the contract or that execution had been irregular, the latter point

having been waived by years of acceptance of the agreement. Media Track, Inc. v. Bionaire Corp., Index No. 605097/96, 4/30/98 (Shainswit, J.).

Contracts; third-party beneficiary. Procedure; standard on 3211(a)(7) motion. Quantum meruit. Statute of limitations ; GOL 17-101. Plaintiff sued for breach of agreements to license a name under which to sell luxury cosmetics, breach of a certain directive and on a theory of quantum meruit. Plaintiff would have to show that he was a third-party beneficiary, that the parties intended at the time to confer the benefit claimed on him. The intention of the promisees (defendants) controls, as shown by the fact that performance will satisfy an obligation of the promisee to pay money or by circumstances indicating that the promisee intends to give the beneficiary the benefit of the promised performance. The complaint here did not allege either, the court held. Although on a motion to dismiss a court accepts as true facts alleged and determines whether they fit a cognizable legal theory, such consideration cannot be given where the allegations consist of bare legal conclusions. The directive did not on its face create an obligation to pay plaintiff and the conclusory allegations of the acknowledgement of a duty did not suffice. Plaintiff's conclusoryassertion that a defendant should be held liable on a debt of a predecessor corporation did not suffice to sustain claims for breach or quantum meruit. The court found that the complaint failed also against defendant Revlon since according to the complaint if anyone was unjustly enriched it was another party. Further, that claim was time-barred and not tolled by acknowledgment by the payor (GOL § 17-101). DiGrandi v. Borghese, Inc., Index No. 603500/97, 6/23/98 (Ramos, J.).

Employment agreement; pleading of oral agreement for fixed term. Tortious interference. Defamation; imprecise name-calling. Disqualification. Defendant Cooke Center offered plaintiff employment in a writing that omitted any end-date. Plaintiff claimed that she had been orally informed that the position was year-to-year. Absent an agreement fixing a duration, an employment is presumed to be at-will. The court held that allegations that Cooke had agreed to an extension after satisfactory performance and that it had been announced at a Board meeting that plaintiff would continue sufficed to defeat a motion to dismiss. A tortious interference claim against the other defendant failed for lack of adequate pleading of facts of individual wrongful acts. The court dismissed a defamation claim because the words "rich bitch" are too imprecise to be actionable and because statements that a person had resigned, should not return except accompanied by a Board member and should retrieve her personal belongings are not defamatory. Plaintiff's cross-motion to disqualify counsel because the Board secretary was a partner at the firm representing Cooke was denied as that attorney was not an advocate for Cooke and there was no proof her testimony would be adverse to Cooke (DR 5-101(c)). Culverhouse v. Cooke Center, Index No. 122332/97, 5/15/98 (Cahn, J.).

Judicial dissolution. Motion to dismiss petition for judicial dissolution. To succeed on the application, petitioner must make a prima facie showing of illegal, fraudulent or oppressive actions by the company. On a motion to dismiss for failure to state a cause of action, the court must look at the allegations to determine if they sufficiently state a claim based upon illegal, fraudulent or oppressive conduct. The court held that they did (reduction in salary, cutting off the line of goods petitioner sold on a commission basis, etc.). The court held that on the record before it, it could not conclude that petitioner performed any acts with a view to force an involuntary dissolution. Court extended the company’s time to buy petitioner’s shares. In re Flouris, Index No. 00147/98, 5/27/98 (Stander, J.)

Judicial dissolution; Cooperative Corporations Law. Pursuant to BCL 1104-a, petitioners sought to dissolve the respondent, a worker cooperative corporation under Art. 5-A of the Cooperative Corporations Law. The court noted that the Law states that each shareholder shall have only one membership share and that the certificate or the by-laws must provide for recall and redemption of the share upon termination of membership. The by-laws here provided that upon termination of employment the membership shares were automatically transferred to the corporation in return for specified consideration, in accord with the intent of the law to promote enterprise democracy. The court held that petitioners could not satisfy BCL 1104-a since their shares had been transferred to the corporation upon their termination of employment. Proceeding dismissed but with directive that respondent account to petitioners for their capital accounts. In re Mohney, Index No. 02675/98, 6/29/98 (Stander, J.).

Preliminary injunction. Adequate remedy at law; diversion of customers as irreparable injury in business possibly for sale; special services by employee. Disabled physician hired defendant Filstein to work for a term and to be a shareholder in plaintiff corporation, with a view toward purchase of practice if she was unable to return to work.

In February 1998, defendant terminated the agreement, due to expire July 30, 1998. Plaintiff claimed that defendant had worked for others on the corporation's time, discounted fees, diverted monies, diverted patients and referral sources to a competing practice, etc. Plaintiff sought broad preliminary injunctive relief. Although in the agreement defendant had waived the right to claim the existence of an adequate remedy at law, plaintiffs had failed to object on that basis. The court held that it appeared defendant may have breached the agreement and that plaintiffs might well succeed on the merits. If defendant had diverted patients and sources that could affect plaintiffs' practice, that could leave plaintiffs with no practice to sell, amounting to irreparable injury. Defendant's services were special so that his use of patient lists and his competition could be enjoined. The balance of equities tipped in plaintiffs' favor. The agreement provided for ADR in the event of disputes but defendant had not chosen that route himself. The application was granted but the scope of relief was reduced. Marjorie Cramer, M.D., P.C. v. Filstein, Index No. 600271/98, 5/15/98 (Ramos, J.).

Procedure. Reargument. **Retaliation claims; reasonable belief that acts were forbidden.** Plaintiff opposed a motion to dismiss retaliation claims (Exec. Law § 296(1)(e)) by asserting that the parties who received favors and werevictims were real estate brokers. In reply, defendants argued that they were independent contractors not covered by the law. The court agreed. Plaintiff argued in reargument that defendants had failed to plead the point as an affirmative defense. Plaintiff had not had a chance to address the point as it was made in reply. Defendants would not be held to have waived the point since the complaint did not make clear the identity of the alleged targets. However, the court held that it might be possible to prove here that defendants had committed acts prohibited by the law but against unprotected persons. The question would then be whether plaintiff reasonably believed the acts were forbidden even though, in fact, they were not. New York State Office v. New York State Division, 164 AD2d 208. Reargument granted as to retaliation claims and, upon reargument, summary judgment denied. Modiano. v. Douglas Elliman, Index No. 601249/96, 5/8/98 (Cahn, J.).

Procedure; summary judgment in lieu of complaint; venue. Summary judgment in lieu of complaint is not available when proof outside the instrument is needed. Motion denied in view of plaintiff’s reliance on material outside the notes and since questions of fact were raised (e.g., as to payment, dates of defaults). Venue transferred to county of defendant’s residence. Plaintiff failed to show that it had a place of business in New York. Court looked to residence of assignor, but that county could not be considered as neither party had requested it. Court added assignee as a plaintiff but refused to add that party or substitute it for the plaintiff nunc pro tunc because of possible prejudice to defendant. Midwest Financial Acceptance Corp. v. Webber, Index No. 02799/98 (5/27/98)(Stander, J.).

Receivership. Deadlock of board; usurpation of directors' role by Chairman; insolvent entity. Derivative action alleging fraud, waste, mismanagement, etc. The company had suffered large losses and there was deadlock on the board. No petition for dissolution had been presented. Plaintiffs moved for appointment of a receiver. The court held that a receiver was warranted since plaintiffs had shown present danger that the assets would be materially impaired and since the board was deadlocked and the Chairman had usurped the directors' authority, refused to put issues on the board's agenda, and blocked appointment of any new key officers so as to control those offices himself. The company was either insolvent or on the brink. The court stated that it believed that it might have equitable power to appoint an additional director but declined to do so. Rosan v. Vassell, Index No. 606166/97, 5/21/98 (Cahn, J.).

References; standard of review. Valuation of corporate shares (BCL 1118); net asset approach; illiquidity discount; distributions; interest. Motions addressed to Referee's report on valuation of shares in a corporation (BCL § 1118). The Referee had valued the shares at $ 1.3 million whereas plaintiff had argued for $ 2.56 million. The court stated that the findings of a Referee should be confirmed if supported by the record. Issues of credibility especially should be resolved by the Referee. The value of a corporation should be determined on the basis of what a willing arm's-length purchaser would offer for the corporation as an operating business. The Referee had applied a net asset approach to valuation based on expert testimony, rejecting other expert testimony using capitalization of income and discounted cash flow analyses. The court declined to second-guess the credibility findings about the witnesses. The witness relied upon took into account a formula for calculating goodwill in the absence of a non-compete clause, thus addressing concerns expressed in the case law about the net asset approach as applied to a going business. Plaintiff argued for a 10 % illiquidity discount instead of the 25 % applied. The court held that there was expert testimony in the record to support the latter. Plaintiff argued that the discount should have been applied to reduce the value of intangibles only. The court discussed a Second Department decision and concluded that it had been wrongly decided

in favor of plaintiff's position. The court stated that it would nevertheless be obliged to follow that Department unless its decisions were in conflict with pertinent Court of Appeals decisions, which the court stated "strongly appears," or decisions from the First Department. The court found such a decision of the First Department. Further, the court held that plaintiff was estopped because he had propounded expert opinion before the Referee inconsistent with his position on these motions. The court held that one of two post-valuation date distributions to plaintiff should be deducted from the value of plaintiff's shares but not the other because the latter had not been approved or ratified. The court awarded interest, rejecting a claim that plaintiff had been shown to have acted in bad faith, and held that plaintiff had waived a claim for salary by having failed to seek an adjustment upward therefor from the Referee. Hall v. King, Index No. 129037/95, 5/21/98 (Crane, J.).

Release. Res judicata. Breach of fiduciary duty. Tortious interference. Unjust enrichment. Prima facie tort. BCL 1312; LLC 808. In an action among parties claiming rights to exploit master recordings of Jimi Hendrix, the court held that defenses of release and res judicata did not bar one party's claims as contended by the successor toHendrix and his estate. A 1968 agreement purported to release all claims but it was subject to later agreements, including a consent decree, which provided that the party agreed not to sue except for recordings listed on addenda thereto, including the recordings involved here. The court held that there was an issue of fact for trial as to whether a certain license had terminated. The court held that a breach of fiduciary duty claim failed to state a cause of action against the successor to the estate since there was no fiduciary duty; neither Hendrix nor the successor had had a duty to account to the party under the operative agreements. The court held that the successor had had some control over licensing and its exercise of those rights could not be a valid basis for a claim of tortious interference with prospective business relations. An unjust enrichment claim was rejected because of the existence of an express agreement. A prima facie tort claim was rejected because there was no showing of intentional infliction of harm without justification and disinterested malevolence. The court found that it was unclear whether the successor was doing business in New York so as to be obliged to comply with BCL 1312 or LLC 808. In any event, any such defect could be cured during pendency of the action. Summary judgment granted in part. PPX Ent. v. MCA, Inc., Index No. 112136/95, 5/29/98 (Gammerman, J.).

Unfair competition; misappropriation of "hot news". Trade secrets; market report as secrets. Tortious interference; pleading. Plaintiff alleged that defendants had improperly gained access to its market research report during a contractual embargo period (prior to public release) and transmitted the information therein to their customers for a fee. On a motion to dismiss, the court held that plaintiff's claim for misappropriation of "hot news" stated a claim because there is a property right in the gathering of news that may not be pirated. The court followed Bond Buyer v. Dealers, 25 AD2d 158, and held that the criteria of NBA v. Motorola, 105 F.3d 841, had been satisfied. The court held that the information in the report during the embargo period constitutes trade secrets and upheld a claim for misappropriation thereof. The court dismissed a claim for tortious interference with plaintiff's contract rights with subscribers because plaintiff's allegations were bare conclusions. Lynch, Jones & Ryan v. Standard & Poor's, Index No. 117064/97, 6/11/98 (Gammerman, J.).

Unjust enrichment; defendant as non-party to written agreement. Agency; disclosed principal. Equitable estoppel; requirement of fraud. Defendant moved to dismiss. The court held that an unjust enrichment claim failed since plaintiff's services had been provided pursuant to a written contract. Even if defendant/non-party had derived benefits due to enhanced product recognition and goodwill, plaintiff could recover only if defendant had specifically agreed to guarantee payment or had derived benefit from the work done and such work fell outside the scope of the written agreement, not the case here. The court also rejected an agency theory. If the persons who had hired plaintiff had worked out of defendant's offices and represented themselves as agents of defendant, an agent for the principal, an agent for a disclosed principal is not liable on a contract unless it agreed to be bound. No such agreement was alleged here nor was there alleged to have been a non-existent principal. As to equitable estoppel, plaintiff had failed to allege fraud, but instead relied on its own false impressions. YAR Communications, Inc. v. Pepsico, Inc., Index No. 606224/96, 5/12/98 (Ramos, J.).

Uniform Commercial Code. Acceptance prior to TRO (§§ 4-303, 3-410). Liability in contract (§ 3-409). Acceptance versus deferred payment letter of credit. Defendant advising/negotiating bank moved for summary judgment on cross-claims against banks with respect to drafts drawn on letters of credit that movant had received from

the supplier of goods. Movant claimed that the drafts had been accepted prior to the court's issuance of a TRO and therefore had to be paid. UCC § 4-303. However, the court held that the banks had not "accepted" the drafts within the meaning of Section 3-410 because they had not so indicated in writing on the face of the documents. Movant argued that the banks were nevertheless bound contractually (3-409), but the court held that the facts did not indicate that the banks had had any contractual relationship with movant independently obligating them to pay. Despite movant's argument, the court held that the acceptance letter of credit here was to be distinguished from a deferred payment letter of credit. Motion denied; summary judgment of dismissal granted to the banks. Regent Corp. USA v. Azmat Bangladesh Ltd., Index No. 120865/94, 5/28/98 (Cahn, J.).

Uniform Commercial Code. Secured transactions. Perfection of security interests. Rights of assignee of primary interest as against holder of secondary interest. Plaintiff filed a UCC-1 as to shares of stock and proprietary lease for co-op. Prior thereto, defendant GE's assignor took possession of the collateral, at a time when it was permissible to obtain a security interest in that manner. The court held that the legislative intent in amending UCC 9-304 to requirefiling had been not to affect prior security interests not obtained by filing. The court rejected the argument that the filing of the notice of assignment subsequent to the filing of plaintiff's UCC-1 impaired the assignor's or GE's security interest and GE's rights were held superior. Even if no filing of the assignment occurred, that would not have invalidated the assignment (9-302). Hanil Bank v. Byun, Index No. 606164/97, 6/15/98(Shainswit, J.).

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[Law Report - May 1999] [Law Report - July 1999] [Law Report - October 1999]
[Law Report - January 2000] [Law Report - March 2000] [Law Report - May 2000]
[Law Report - July 2000] [Law Report - October 2000] [Law Report - January 2001]
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