

The *Commercial Division*

of The State of New York



Law Report - May 2002



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*

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Accountant's malpractice; misrepresentation and aiding and abetting; pleading; inference of fraud; negligence; near-privity relationship. Negligent misrepresentation. Fraudulent conveyances; statute of limitations. Plaintiffs produced and marketed beauty products. After filing for bankruptcy, plaintiffs licensed certain trademarked fragrance brands to various subsidiaries of RCI. A separate subsidiary of RCI executed guarantees for the various agreements. After plaintiffs agreed not to act on certain defaults for a period of one year, RCI's annual report filed with the SEC showed a negative net worth. Plaintiffs thereafter terminated licensing agreements with RCI's subsidiaries, which then filed for bankruptcy protection. Plaintiffs alleged that they relied on RCI's intentionally false financial statements in determining whether to continue or terminate the various agreements. Plaintiffs alleged that the accounting firm was negligent in auditing RCI's financial statements. The accounting firm and several shareholders and employees, denominated insiders, moved to dismiss the complaint. The court dismissed the causes of action for fraud and aiding and abetting a fraud against the defendant accounting firm because plaintiffs' allegations of intent, based on the accounting firm's role in RCI's acquisitions, were conclusory.

JUSTICES OF THE COMMERCIAL DIVISION

Leonard B. Austin (Nass.)
Louis C. Benza (Albany)
Herman Cahn (N.Y.)
Helen E. Freedman (N.Y.)
Ira Gammerman (N.Y.)
Richard B. Lowe III (N.Y.)
Karla Moskowitz (N.Y.)
Charles E. Ramos (N.Y.)
Kenneth W. Rudolph (West.)
Thomas A. Stander (Mon.)

Jacqueline W. Silbermann
Administrative Judge
Supreme Court
New York County

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Decisions discussed were
issued March-April 2002

The court held that plaintiffs stated a claim of accounting negligence, based upon the allegations of a near-privity relationship with the accounting firm. The court found that the complaint sufficiently alleged misrepresentations in two financial statements and that statements in audit reports were actionable. The court held that plaintiffs had not set forth factual allegations that would support an inference of intent so that a fraud claim failed. As to aiding and abetting, substantial assistance to advance fraud was not pled with detail. On a negligence claim, the court applied the Credit Alliance test. The court held that defendant firm had had knowledge of plaintiff's reliance for a particular purpose and that plaintiff had so relied. The court further determined that plaintiff had adequately met the third facet of the test by alleging that, though the firm did not directly communicate with plaintiff, it had retained the right to approve the client's sending of audit reports to third parties and had consented to transmission to plaintiff. The court held that the individual defendants could be liable for fraud and misrepresentation only with respect to the modification agreement because plaintiffs alleged that they had been induced to enter into those agreements based upon misrepresentations in the financials and such allegations stated torts independent of a contractual duty. The court dismissed the causes of action for fraud and negligent misrepresentation against two of the individual defendants because they had not been involved in any of the false statements. The court held that plaintiffs stated a claim for

negligent misrepresentation against the remaining individual defendants and that the trier of fact would determine whether the insider defendants, by virtue of their superior knowledge and access, had a duty to plaintiffs. Plaintiffs stated a claim for fraud, even though they primarily alleged gross negligence with respect to the misrepresentations, because the trier of fact would ultimately decide whether to infer fraud. Consequently, plaintiffs also stated a claim for aiding and abetting a fraud. The court also held that the cause of action for fraudulent conveyance was not barred by the statute of limitations. Plaintiffs alleged that certain insider defendants conveyed large amounts of money when they knew that RCI was on the verge of insolvency at the time of the conveyance. [Houbigant, Inc. v Deloitte and Touche, LLP, Index No. 601471/2001, 4/8/2002 \(Lowe, J.\)](#).

Attorney and client; disqualification of counsel; conflict of interest; prior related matter; delay in moving.

Defendants, a corporation and its parent company, requested disqualification of plaintiff's in-house counsel member, on the ground that he had previously worked for the parent company as a member of its law department on a matter substantially related to the transaction underlying the action. Defendants sought disqualification of plaintiff's outside counsel on the ground that in-house counsel had consulted and assisted outside counsel in connection with the litigation. The court ruled that defendants had not established a reasonable probability that plaintiff's in-house or outside counsel had acquired relevant confidential information. The court also found that defendant parent company had impliedly waived any conflict. The fact that defendants waited approximately 17 months after learning of conflict to seek disqualification militated in favor of denial. Application for disqualification denied. [RAG Am. Coal Co. v Cyprus Amax Minerals Co., Index No. 604200/2000, 3/12/02 \(Cahn, J.\)](#).

Commercial lease; modification; equitable estoppel; waiver; oral modification; interpretation. Trial decision regarding commercial lease. A letter from plaintiff and defendant's check constituted a written modification of an amended lease. The parties agreed to modify the rent for a period not expressly defined. The court determined that, based on the conduct of the parties, the period was six months. Plaintiff was thus entitled to additional rent. The court rejected defendant's equitable estoppel argument. The court held that the parties knew that a writing was required so could not rely on oral discussions. The court held that plaintiff had not waived the higher amount and that there was no proof of an oral modification. The court determined that a 25% default surcharge as set forth in the lease was not available to plaintiff since the specific agreement of the parties took precedence. Judgment for plaintiff. [Flaum v. City Mattress Co., Index No. 1194/2000, 4/26/02 \(Stander, J.\)](#).

Contracts; interpretation; grant of TV rights. Action concerning TV rights to H.G. Wells's War of the Worlds. Wells's son assigned certain rights in the book to defendant. Years later, the heirs of the son assigned certain rights to another entity. The entity and the owners sued for a declaration of rights. Plaintiffs conceded that defendant had extensive motion picture rights, but argued that they were not TV rights, which the second contract concerned. The first contract gave defendant the right to "project transmit reproduce and/or exhibit such motion pictures by television." The court ruled that defendant was given TV rights; any picture it could produce, it could televise. The court rejected the argument that "such" motion picture referred only to the right to exhibit theatrical pictures on TV, not to make motion pictures for TV. The court found that the language was broad enough to encompass the use at issue, covering the right to reproduce the story by the art of cinematography or any process analogous thereto. The court further rejected a proposed distinction between motion pictures and TV miniseries. The court rejected the argument that interpreting the contract to extend rights to make a TV miniseries would render another clause, whereby the grantor retained TV rights, superfluous. The court reasoned that the retention of rights referred to live TV, which was the predominant form of TV broadcast when the contract was entered into. Plaintiffs' reading of the clause, on the other hand, would have required disregarding the plain meaning of the grant of TV rights. Summary judgment for defendant. [Hallmark Entertainment Productions, LLC v. Paramount Pictures Corp., Index No. 605200/2000, 4/9/02 \(Gamerman, J.\)](#).

Contracts; interpretation; liability of officer; guarantee (GOL 5-701). Plaintiff sold his business to defendant, which agreed to pay him compensation and also to pay an advance against future commissions. After defendant ceased retention of plaintiff, plaintiff sued. Plaintiff conceded that part of the compensation was payment for employment, which was terminable at will, but contended that the other part was payment for the business for life. The court concluded that the contract was ambiguous. It was unclear if the payment at issue was part of a commission or salary, or a separate payment to last for plaintiff's life or the life of the business transferred. A subsequent agreement did not clarify this one. Summary judgment could not be granted. However, plaintiff's claim was dismissed as to the individual co-defendant. He had signed the agreement as a corporate officer. He could only be liable if he had personally guaranteed the contract, but no written guarantee (GOL 5-701 (a)(2)) existed and there was no part performance relating to him. [Steinhandler v. Target Mailing Lists, Inc., Index No. 602881/2001, 4/12/02 \(Freedman, J.\)](#).

Contracts; interpretation; right of first refusal. Action alleging that defendant tortiously interfered with a contract between plaintiff and a TV anchor. Plaintiff contended that the contract prohibited the anchor from considering offers from rival networks or negotiating therefor until there was less than three months to run on the anchor's contract. The anchor did so and, plaintiff asserted, thereby breached the agreement. The court, however rejected this reading of the contract. The relevant paragraph was a "first refusal" rather than a "first negotiation" clause. If the anchor received an offer at any time, she had to give plaintiff an opportunity to match it. She was free to negotiate at any time. Plaintiff argued that this interpretation meant that the anchor might have received an offer almost three years before the contract was to end and plaintiff would have to decide whether to match it or not based on very limited data about the anchor's performance. The court stated that the contract permitted this. In fact, plaintiff had had over two years to evaluate the anchor's performance before being presented with an offer from a rival. As there had been no breach, defendant was entitled to summary judgment. [Fox News Network, LLC v. N.S. Bienstock, Inc., Index No. 604420/2001, 3/14/02 \(Gammerman, J.\)](#).

Contracts; margin deficiency; right to liquidate customer stock account; covenant of good faith; lack of consideration. Truth in Lending. Regulation T; NASO Rule 2520; NYSE Rule 431; private right of action. GBL 349; deception; consumer fraud. Fiduciary duty; broker and client. Money had and received. Conversion. Plaintiff established a trading account with defendants. A decline in the stock market caused a margin deficiency in plaintiff's account. Plaintiff alleged that defendants informed him that if he delivered a check by the close of business the next business day, defendants would not sell securities from his account. Nevertheless, defendants sold plaintiff's securities at a loss the morning of the next business day. Defendants moved to dismiss the action. The court dismissed the claim for breach of contract based upon the express language in the customer agreement that gave defendants the right to liquidate plaintiff's position without notice or an opportunity to cure. Neither the Truth in Lending Disclosure nor the implied covenant of good faith and fair dealing required defendants to give plaintiff notice or an opportunity to cure a margin deficiency. The court concluded that Regulation T, NASD Rule 2520, and NYSE Rule 431 did not create a private right of action requiring defendants to give customers notice or an opportunity to cure margin deficiencies. Plaintiff failed to address the argument that the oral promise to permit plaintiff to cure the deficiency was unenforceable for lack of consideration. Plaintiff's claim under GBL § 349 was based on unambiguous reservation of the right to liquidate. Thus, it was not deceptive. Moreover, neither plaintiff's private contract dispute, nor investments in general, were proper subjects of a consumer fraud claim. The court dismissed the claim for breach of fiduciary duty because a broker does not owe a general fiduciary duty to a client, and it merely duplicated the contract claim. Thus, the court also dismissed the claim for aiding and abetting against the President of the corporate defendant. The court dismissed the cause of action for money had and received because plaintiff alleged that the wrongfully collected commissions had been returned to him and the contract precluded such an action. Plaintiff's cause of action for conversion failed because it was merely a recasting of the claim for breach of contract. [Fesseha v TD Waterhouse Investor Services, Inc., Index No. 600093/01, 3/20/02 \(Ramos, J.\)](#)

Contracts; multiple agreements; promissory notes; waiver. Plaintiffs claimed rights as stockholders. After trial, the court found that a stockholder agreement, subscription agreement and promissory notes had to be viewed as a single agreement. The fact that they had been executed at different times was not relevant since the parties intended to be bound by all as part of a single transaction. No stock was to be issued until all conditions in the various agreements had been met. Under the subscription agreement, there were two conditions precedent to issuance of stock to plaintiff: the corporation's obligation to a former shareholder had to be satisfied and plaintiffs had to pay off the notes. Plaintiffs' non-performance barred enforcement of the other agreements against the corporate defendant. The court agreed that plaintiffs did not have to have stock certificates in order to be shareholders, but concluded that under the agreements, plaintiffs in fact did not have present status as shareholders. This doomed several causes of action. The court also rejected plaintiffs' argument that they had paid for the stock by paying the first installment and contributing "sweat equity". This alleged waiver could apply only to the second of six installments. Plaintiffs argued that further payments had been waived, but failed to establish an intentional abandonment by defendants. There was no writing waiving the payments. Although plaintiffs argued that some of defendants' actions were unequivocally referable to an agreement to forego payments, the court found supportive evidence lacking. The court held that plaintiffs had failed to prove misrepresentation and that their attempt to pierce the corporate veil failed. As to defendants' counterclaims, the court ruled that defendants had proven a breach of contract by plaintiffs, but had not established damages. The court found that defendants had also failed to prove damages flowing from plaintiffs' taking of records, but held that defendants were entitled to an injunction prohibiting plaintiffs from soliciting customers for three years. Judgment for defendants. [Smith v. Millenia Productions, Inc., Index No. 30487/1999, 4/26/02 \(Austin, J.\)](#).

Contracts; non-signatory as "affiliate" by virtue of acquisition of a signatory. Attorney and client; disqualification; current client; substantially related issues. Action alleging breach of an agreement by selling to prohibited customers and, alternatively, unjust enrichment. Defendant moved to dismiss on the ground that the agreement had not been entered into by defendant, nor assumed by it when it had purchased the stock of another company, a signatory. Plaintiff contended that defendant was bound as an "affiliate" of that company as defined in the agreement. The court, following various authorities, ruled that the claim should be upheld, since defendant could be considered an "affiliate" by virtue of a subsequent acquisition of a signatory. The unjust enrichment claim was upheld because pled in the alternative. On a motion to disqualify counsel for defendants, the court ruled that the firm had a current attorney-client relationship with the founder, manager and majority shareholder of plaintiff, having represented him for four years until a month after the case began and a few weeks before the firm was retained. The firm had advised him on his investment in plaintiff, never had terminated the relationship and asserted counterclaims based in part on an agreement the firm had worked on. The intermittent, "as needed" nature of the advice the firm provided did not release it from a duty of loyalty. The court further ruled that disqualification would be required if the representation was considered to have ended since the firm had worked on the operating agreement for plaintiff and, under the claims at issue in this case, that agreement and the master agreement at the center of the case were closely intertwined. The court was not persuaded by the fact that the firm had worked on an earlier version of the operating agreement. The court did not find that plaintiff had delayed in making the motion and, if it had, that delay was brief and not prejudicial. [The Credit Index, LLC v. Riskwise Intl. LLC, Index No. 604910/2000, 4/10/02 \(Lowe, J.\)](#).

Contracts; promise to act fairly and in good faith; unenforceable agreement to agree; breach of fiduciary duty. Plaintiffs alleged, among other things, that defendants blocked an IPO of an entity in which the parties were stockholders, causing various entities that plaintiffs indirectly owned or controlled to default on certain loans and promissory notes. Under a stockholders' agreement, defendants' consent was required for an IPO. Plaintiffs asserted thirty-three causes of action, such as breach of fiduciary duty, fraudulent inducement, breach of the covenant of good faith and fair dealing, tortious interference, negligent misrepresentation, corporate waste, and other torts. Defendants moved to dismiss the complaint. The court dismissed, among other things, claims relating to defendants' alleged promise to exercise their veto rights to the IPO "fairly," "in good faith", and only "defensively." The court held that defendants' later oral promise to support the IPO constituted an unenforceable agreement to agree. The court dismissed breach of fiduciary duty claims against defendants which were premised on either a joint-venture relationship with defendants, or the parties' status as shareholders in a closely-held corporation. [Richbell Info. Servs.,](#)

[Inc. v Jupiter Partners L.P., Index No. 605979/1997, 3/6/02 \(Moskowitz, J\).](#)

Contracts; receivable purchase and sale agreement; right to payments on foreclosure. Under a receivable purchase and sale agreement, plaintiff transferred the right to receive the proceeds of a mortgage to defendant's assignor. The mortgagor defaulted and defendant foreclosed. Plaintiff sued seeking payments claimed to be due under the agreement. On the facts, the court found, a particular subparagraph applied. Defendant had paid the full amount due at foreclosure, thereby satisfying the debt barring a deficiency judgment against the mortgagor. The outstanding principal balance was \$0. Under the relevant subparagraph, plaintiff had an option to purchase, which it declined to exercise. The court held that the agreement did not provide for plaintiff to receive the remaining proceeds, if any, after defendant was reimbursed the amount purchased. To grant plaintiff summary judgment would accord plaintiff a windfall. Plaintiff could have exercised its option had it wished. Summary judgment denied. [Livecchi v. Western United Life Assurance Co., Index No. 10588/1999, 4/26/02 \(Stander, J.\)](#)

Contracts; termination; deadline to object; covenant of good faith. Misrepresentation; due diligence; reasonable reliance. Action for breach of contract to sell real property and fraudulent inducement. Defendants contended that the contract had been properly terminated. Plaintiffs contended that they had been willing to close but only if title was free and clear of the claim of another party. The court held that plaintiffs had waived objections to title by not asserting them by a deadline as set forth in the agreement. The court found that plaintiffs had been aware of the claim of the other party prior to the deadline and that their refusal to close on subsequent dates had terminated the contract. There was no breach of contract, which also doomed a claim for breach of the covenant of good faith and fair dealing. Plaintiffs asserted a fraud claim based on defendants' alleged failure to inform plaintiffs of the claim. The court found that the other party had sent a letter, but that had not risen to the level of a claim as of the time in question. But even if it had, the court found that plaintiffs had been aware of the other party and its lease with defendants. Further, plaintiffs were required to make inquiry under the contract, in which the tenancy had been revealed. Reasonable reliance was lacking. Case dismissed. [Parker East 67th Associates vs. The Minister, Elders and Deacons, Index No. 601480/2001, 3/19/02 \(Ramos, J.\)](#).

Contracts; third-party beneficiary status; credit card company. GBL 349; consumer-oriented acts. Action complaining that excessive foreign exchange rates were charged by defendant on plaintiff's credit card purchases. Defendant was not party to a cardholder agreement between plaintiff and the issuing bank. Plaintiff alleged an agreement existed between the bank and defendant of which he was a third-party beneficiary. The court ruled that this alleged status was based on the cardholder agreement, to which defendant was not a party. The alleged status was merely a bare legal conclusion, and nothing on the application for membership evidenced an intent to create such a status for cardholders. Plaintiff also alleged a GBL 349 claim based on defendant's failure to disclose that it was exceeding a wholesale market rate and failure to disclose the processing date. Defendant did not issue credit cards to the public so the acts alleged were not consumer-oriented. Also, the issuing bank determined the rates to be charged. Case dismissed. [Kraus v. Visa International Service Association, Index No. 602168/2001, 4/9/02 \(Cahn, J.\)](#).

Contracts; third-party beneficiary status; SEC form; interpretation; right to take collateral as exclusive remedy. Procedure; summary judgment. Debtor & Creditor Law. Action arising out of planned acquisition of hotel properties. Plaintiff contended that he was a third-party beneficiary of a form filed with the SEC, which constituted an agreement whereby one defendant agreed to satisfy the obligations to plaintiff of another defendant. The court rejected this theory since there was no proof that one defendant had assumed the debt to plaintiff. The form was not itself an assumption agreement, but only a financial reporting mechanism. Plaintiff also contended that defendants had violated certain negative covenants. Defendants argued that plaintiff's sole recourse for a breach

would be to take pledged collateral, not to obtain repayment of a note made by one defendant by others. The court concluded that the agreements here gave plaintiff rights and remedies allowed under the UCC and other applicable law in addition to those set forth in the agreement. Plaintiff could ignore its statutory right to take possession of the collateral after the default and to pursue other remedies. A misrepresentation claim was not adequately supported by plaintiff in response to defendants' motion for summary judgment. The court held that two individual defendants were not liable for fraudulent transfers (Debtor & Creditor Law) since they had been neither transferees nor direct beneficiaries. The court held that questions of fact had been raised as to liability of certain defendants (Section 273), but that there was no proof of actual intent (Section 276). [Golisano v. Hudson Hotels Corp., Index No. 5671/1999, 3/02 \(Stander, J.\)](#).

Conversion. Unjust enrichment. Contracts; interpretation; custom and usage; third-party beneficiaries; limitation of liability. Plaintiffs, five hedge funds and their investment advisors, claimed wrongful terminations of repurchase and swap agreements that they had either entered into with, or financed through, defendants. Plaintiffs alleged, among other things, that defendants had made improper margin calls, failed to liquidate plaintiffs' securities in a commercially reasonable manner, and improperly offset payments and proceeds of one hedge fund against unrelated liabilities of another hedge fund, contrary to the agreements at issue. Defendants argued that plaintiffs' failure to redeliver certain securities, not the margin calls, was the reason for declaring plaintiffs' default. Plaintiffs then argued that, contrary to industry custom and usage, defendants did not give plaintiffs timely notice of the decision to require delivery of such securities, which otherwise would have been rolled instead of redelivered. Defendants claimed that such argument was barred by the express terms of the agreements at issue. Plaintiffs asserted causes of action for conversion, unjust enrichment, breach of contract, and breach of fiduciary duty. The investment advisors asserted claims as third-party beneficiaries. Defendants moved to dismiss several causes of action. The court dismissed the claims of conversion, which related only to defendants' alleged failure to make payments because such claims were not independent of their breach of contract claims. Unjust enrichment claims were dismissed in light of written agreements between the parties. Breach of contract and third-party beneficiary claims were not dismissed, because evidence would be needed to evaluate the merits of the parties' contentions. A limitation of liability clause barred breach of fiduciary duty claims against one of the defendants, who had acted as broker and agent for plaintiffs and defendants. Motion granted in part, denied in part. [Ellington Mortgage Partners, L.P. v UBS AG, Index No. 602560/2000, 3/18/02 \(Cahn, J.\)](#).

Corporations; dissolved corporation; assumed name; liability of officer; agent for disclosed principal. Plaintiffs moved to reinstate an individual as a defendant pursuant to a stipulation. As to one ground, the court found that a corporation of which the individual was an officer had filed an assumed name certificate and was in existence when the corporation under the assumed name signed a contract with a plaintiff (the corporation was later dissolved by the Secretary of State). A valid contract had thus been entered into. The addition of "Inc." to the assumed name was an act without legal significance; it did not alter the relationship of the parties. Gen. Bus. Law 133 did not mandate otherwise. The later dissolution of the corporation did not affect its status as a party here (BCL 1006 (a)(4)). The individual could not be liable solely because the corporation had been dissolved. Nor could the individual be liable on a breach of contract claim since he had signed as a corporate officer only. However, he would be reinstated on negligent misrepresentation and gross negligence claims. Motion granted in part. [Buller Family Limited Partnership v. Cosmos Environmental Services, Inc., Index No. 18696/1998, 4/9/02 \(Austin, J.\)](#).

Corporations; stockholders' action. Procedure; pleading; breach of fiduciary duty; prima facie tort. Conspiracy. GBL 349. Action by minority shareholders alleging wrongful transfer of various assets to certain other shareholders. The court ruled that a fiduciary duty claim failed to set forth the circumstances in necessary detail (CPLR 3016(b)). It failed to state what defendants did and when, who the beneficiaries were and why the transfers were wrongful. Further, plaintiffs should have proceeded by a derivative action and most of the claim was time-

barred. Dismissal of this claim also meant that a conspiracy claim based on the same facts had to be dismissed. The court ruled that a prima facie tort claim was defective for failing to set forth facts showing malicious intent to harm, special damages and lack of justification. Special damages must be alleged with particularity as to actual, causally-related losses. Finally, the court held that stockholder claims do not come within the ambit of GBL 349. Complaint dismissed. [Grace v. Peckham Industries, Index No. 8304/2001, 3/13/02 \(Austin, J.\)](#).

Discovery; depositions; direction not to answer; list of trial witnesses; documents. In an action in which a defendant asserted a defense of champerty, the court ruled that plaintiff's counsel had acted improperly in directing the client not to answer questions on the subject. The record did not establish that the witness had difficulties with English, defendant could not shield facts by claiming that they had been discussed with counsel and defendant had failed to establish that communications had been made for the purpose of facilitating the provision of legal services. The questions went to the heart of the defense. Questions regarding the supply of goods were likewise proper. Defendant was ordered to answer. Defendant was ordered to produce relevant documents, it being unsupported and irrelevant that the documents might be public. The court ordered the production of witnesses and the provision of a list of witnesses to be called at trial. Plaintiff sanctioned. [B.V. Jewels \(USA\) Inc. v. Cosmopolitan Gem Corp., Index No. 602274/2001, 3/20/02 \(Ramos, J.\)](#).

Employer/employee; solicitation of customers; misuse of trade secrets and confidential information; preliminary injunction. Action alleging breach of fiduciary duty by former employees, including misuse of confidential information and trade secrets and solicitation of plaintiff's customers while defendants were still employed by plaintiff. The parties submitted conflicting affidavits about defendants' alleged conduct. The court stated that plaintiff bore a significant burden of establishing a right to preliminary injunctive relief by clear evidence. The court noted the disputed facts and the absence of a formal non-compete agreement. The court found that plaintiff had not shown that money damages would not suffice nor that an injunction was needed to protect trade secrets or that defendants had engaged in fraudulent conduct. Motion for preliminary injunction denied. [American Armored Car, Ltd. v. Via Mat International \(USA\), Inc., Index No. 792/2002, 3/27/02 \(Rudolph, J.\)](#)

Forum non conveniens. Plaintiff commenced an action seeking, among other things, a declaration that the insurance policies that it issued to a defendant did not afford coverage for certain lawsuits filed against defendant, or its subsidiaries, in various jurisdictions. Same defendant moved to dismiss. Considering the factors in determining whether New York is an appropriate forum, the court found that this action had a sufficient nexus with New York because plaintiff was a New York corporation with its place of business in New York, and the pertinent parties, which included other insurers, maintained their principal place of business in New York. Documentation relating to the relevant insurance policies was likely to be located in New York. Defendant did not demonstrate that litigating in New York would be unduly burdensome, or that Texas was a more convenient forum. Motion denied. [Westchester Fire Ins. Co. v MCI Communications Corp., Index No. 117236/2001, 3/18/02 \(Cahn, J.\)](#).

Indemnification and contribution; tortious conduct; actions by bank causing its own losses. Misrepresentations. Procedure; summary judgment; supporting affidavits. Fiduciary duty; bank as trustee/agent. Damages; punitive. Plaintiff bank loaned money in two separate agreements to an individual. The two defendants purchased interests in the loans, entitling them to payment only if the lending bank was repaid. Pursuant to those participation agreements, the lending bank agreed to enforce a letter of credit if the borrower defaulted. The individual eventually declared bankruptcy and did not pay back his loan. The lending bank commenced the action against defendants for reimbursement for the monies paid to the bankruptcy trustee, who claimed that payments made to the bank by the individual were preferential transfers. The defendants moved for summary judgment dismissing certain claims by the lending bank. The lending bank also moved for summary judgment on its complaint. The court dismissed the claims for contribution because the lending bank did not assert any claims involving tortious conduct. The participation

agreements did not address indemnification. Indemnification could not be implied because the lending bank caused its own losses by not drawing on the letter of credit, which is not a preferential transfer. Accordingly, the court denied the lending bank's motion for summary judgment on its complaint. The lending bank asserted a cause of action for breach of contract against only one of the defendants. That defendant's motion to dismiss the claim for breach of contract failed because it failed to submit an affidavit of someone with personal knowledge that the contract was never signed, and thus, was not enforceable. That defendant moved for partial summary judgment on four of its counterclaims. The lending bank moved to dismiss all counterclaims. For each counterclaim, the remaining defendant sought attorneys' fees it incurred in the bankruptcy action of the borrower. Although defendant could not recover legal expenses incurred as a result of the lending bank's third-party claims against it, it might be able to recover such fees and expenses incurred when the bankruptcy trustee brought its own claims against defendant. Issues of fact concerning intent existed regarding the two counterclaims alleging fraudulent inducement to enter into the participation agreement. The lending bank also owed defendant a fiduciary duty as trustee/agent and an issue of fact existed to the breach of that duty. The court held that the lending bank breached the participation agreement by not drawing on the letter of credit, but whether the bank acted in good faith was a factual issue. The court dismissed the counterclaim for punitive damages because defendant did not allege any basis for imposing punitive damages under tort or contract law. [Sterling National Bank v Israel Discount Bank, Index No. 102369/00, 3/7/02 \(Ramos, J.\)](#).

Indemnification; summary judgment; negligence. Plaintiff suffered water damage when the owners of the apartment above had a problem with a pumping system installed by certain co-defendants. The owners signed an agreement with the building cooperative agreeing to indemnify adjacent apartment owners for any damage resulting from renovations. Plaintiff sued the owners for indemnification and negligence. Prior to discovery, plaintiff moved for summary judgment on the first cause of action based upon the terms of the Renovation Agreement. The owners cross-moved to dismiss on the ground that the contract was void. The Renovation Agreement provided that work was to begin within 30 days of the signing of the contract. The owners' failure to start the work, however, did not preclude plaintiff from recovering pursuant to that agreement, although it would have provided a ground for the cooperative to stop the owners from renovating their apartment. The cooperative, in effect, waived that condition by permitting the owners to renovate after the time limit passed. The court denied the cross motion to dismiss the cause of action for indemnification. The court held that plaintiff was an intended beneficiary of the indemnification provision, as he lived below the owners' apartment. The indemnification provision covered plaintiff's property and covered damage resulting from the renovation even after the renovation was completed. The owners claimed that plaintiff's wife owned some of the damaged property, creating an issue of fact, but the court joined plaintiff's wife as a plaintiff, with her consent. The court held that GOL § 5-322.1 did not bar the cause of action. The court held that plaintiff could enforce the indemnification provision, notwithstanding Section 5-322.1 unless his negligence was the proximate cause of his damages. Defendants only submitted a vague and conclusory affidavit, which instead implicated their own negligence. Defendants failed to raise an issue of fact with respect to plaintiff's negligence. Any issue of fact with respect to damages did not preclude granting summary judgment on the issue of liability. [Irving v Elghanyan, Index No. 601007/2001, 3/20/2002 \(Lowe, J.\)](#).

Partnerships; foreign; doing business in New York. Procedure; summary judgment; promissory note and guarantees. Defendants cross-moved to dismiss a case on the ground that plaintiff, a Florida limited partnership, was doing business in New York without a certificate of authority (Part. Law 121-907). Plaintiff had no certificate. Plaintiff contended that it did no business in New York, was the successor to an entity that had ceased doing so 12 years before, and its only link to New York was the fact that one of the shareholders of plaintiff's general partner resided in New York. The court ruled that defendants had failed to establish that plaintiff had engaged in systematic or regular business activities in New York (Part. Law 121-902). The court found that plaintiff had met its initial burden and established a prima facie case by proof of a note and guarantees and failure to make the required payments. Defendants sought to raise questions as to plaintiff's right to accelerate, whether the note sued on was the applicable note, and certain equitable defenses. The court held that defendants had failed to raise genuine issues of fact with regard to a viable defense. Summary judgment granted. [Valsirv Realty Co. v. Tenebaum, Index No. 11695/2001, 3/14/02 \(Rudolph, J.\)](#)

Partnerships; oral arrangements; statute of frauds; part performance. Plaintiff sued individually and derivatively on behalf of a certain corporation, alleging that defendants had deprived him of certain partnership interests, including certain premises owned by the corporation. The court found insufficient and conclusory plaintiff's allegation that he was a shareholder of the corporation, which contradicted his admission that defendants had excluded him from the acquisition of the property and refused to give him shares. Nor did the complaint adequately allege facts sufficient to establish that plaintiff had any beneficial interest by virtue of a partnership. There was no written partnership agreement. An agreement to acquire property and transfer it to a third party does not constitute a partnership and any such oral agreement would be unenforceable (GOL 5-703(3)). The court held that plaintiff's alleged part performance was not unequivocally referable to the alleged partnership, and the facts alleged did not establish an oral agreement to form a partnership to deal in real property. Further, any prior relationship had been terminated by an agreement distributing other corporations among the parties. Complaint dismissed. [Tal v. Malekan, Index No. 605572/2000, 3/27/02 \(Gammerman, J.\)](#).

Partnerships; powers of general partners; hiring managing agents. Actions by limited partners against general partners asserting that the operating general partner had breached the partnership agreement by transferring management rights to co-defendants without consent of the limited partners. Plaintiffs argued that while the partnership agreements may have authorized the general partners to hire and fire a management agent, they prohibited those partners from selling or assigning part of their duties. The court noted that the agreement gave the general partner to right to control and direct the business of the partnerships and the right to appoint the managing agent. The court further ruled that the general partner was free to designate itself or its affiliate as managing agent. Summary judgment for defendants. [Subsidized Housing Partners v. Property Resources Corp., Index No. 604423/1998, 3/6/02 \(Ramos, J.\)](#).

Personal jurisdiction. Defendant, a Delaware limited partnership with its principal place of business in Texas, moved to dismiss action for lack of personal jurisdiction. Plaintiff argued that defendant was doing business in New York under a "solicitation plus test," based on visits to New York by defendant's employees, the revenue that defendant derived from New York transactions, defendant's bank accounts with Chase Manhattan Bank, and its trading on the New York Mercantile Exchange. The court found all these factors insufficient to constitute "doing business." The court held that the visits were not sufficient to establish defendant's presence, where other purposes for the visits simply included attending professional conferences and training, defending a dissertation, relocating from New York to Houston, and attending business dinners and a bond road-show. The court did not impute to defendant an employee's three month stay in New York, because that employee was participating in an employee exchange with another company. Although defendant derived \$103.7 million from New York transactions, the court found that the revenue represented only 4.2% of defendant's total revenue. Defendant's bank accounts were not sufficient to confer personal jurisdiction, because defendant opened and managed its accounts from Texas. Last, the court held that the activities of independent brokers trading on NYMEX on defendant's behalf could not be attributed to defendant, because defendant merely ordered the execution of certain trades from the brokers, who also conducted trades for multiple customers. Long arm jurisdiction was not established because the claims in the action did not relate to defendant's New York activities. Motion denied. [Hess Energy Trading Co., L.L.C. v Axia Energy, L.P., Index No. 602643/2001, 3/8/02 \(Lowe, J.\)](#).

Procedure; forum non conveniens; action related to foreign estate proceeding. Action alleging fraud, breach of fiduciary duty, etc. An estate proceeding was pending in Switzerland. The court held that the case should be dismissed on forum non conveniens grounds, although both parties were New York residents and certain assets were located here. The pendency of an action in a foreign court related to administration of the estate of a decedent domiciled in that jurisdiction is a valid reason for dismissal (CPLR 327), the court stated. The issues here concerned the estate of

former Swiss residents and in part involved Swiss law. Case dismissed. [Chapin v. Zoullas](#), Index No. 602833/2001, 4/16/02 (Cahn, J.)

Procedure; motion to dismiss; tender of amended complaint. Corporations; derivative actions; demand on board. Where a motion to dismiss has been made and a plaintiff tenders an amended complaint, the movant may address either the original or amended complaint. Here there was a second amended complaint. As this could not be made as of right, defendants could choose to address the first or second. Where parties have a dispute over internal corporate management, the law of the state of incorporation controls. The complaint alleged that two directors were the key defendant's attorney and an important executive who would lose income if they acted contrary to the defendant's desire. Two others had merely been appointed by the defendant, which was not enough to show lack of independence. As to the remaining director, the pleading alleged that he was employed by the corporation on a short-term contract at a substantial rate and had been promised a large finder's fee and that he would be removed if he voted to initiate a lawsuit. The court found that the papers did not set forth sufficient facts to determine if this director would be independent; the issue was referred to a referee. [Murphy v. Jones](#), Index No. 602225/2001, 4/24/02 (Cahn, J.)

Procedure; prior plenary action; New York as preferred forum; stay of other action. A pool of reinsurers entered into an agreement with defendant to provide retrocessional coverage for defendant's reinsurance of certain workers' compensation risks. The reinsurers claimed the agreement was not binding, due to a lack of writing and termination of its agent's authority prior to his signing of the agreement at issue. Defendant demanded arbitration pursuant to the agreement, but some reinsurers obtained a permanent stay of the arbitration on the ground that the agreement had never come into being. Defendant then commenced an action in the State of Washington against the reinsurers, their former agent, and its own broker, withdrew the demand for arbitration, and appealed the judgment in the first New York action. The reinsurers then commenced this action. Thereafter, the Appellate Division declared that the agreement did not bind the reinsurers because their agent did not have authority and concluded that whether the reinsurers ratified the agreement was an issue of fact. The Washington court denied the reinsurers' motion in the Washington action to dismiss that action and ruled, among other things, that the ratification of the agreement remained an issue. The court agreed that the New York action was filed first and concerned the existence and enforceability of the agreement. The Appellate Division's conversion of the action regarding arbitration into a plenary action conferred it with the technical and equitable status as being the first-filed action. Thus, the court denied defendants' motion to dismiss this action. The court denied defendants' motion to dismiss this action based on the prior pending action in Washington state because normally New York would be the preferred forum based on numerous factors. The court also denied the reinsurers' motion to enjoin defendants from prosecuting the Washington action on the grounds that (1) the Washington court and counsel invested substantial time and resources in preparing the action for trial, (2) the Washington action was scheduled for trial the same month that this action was decided, and (3) all necessary parties were joined in the Washington action, but not in this action. [Connecticut General Life Ins. Co. v Zurich Reinsurance \(North America\), Inc.](#), Index No. 601334/00, 3/7/02 (Cahn, J.)

Procedure; summary judgment; counterclaims; separability. Misrepresentation; prediction of future; reasonable reliance. Contracts; best efforts. Tortious interference. Plaintiff sued to recover \$9.9 million for gas shipments. Plaintiff was held entitled to summary judgment. The court held that counterclaims were all deficient save one and that was separable from plaintiff's claims. There was also no basis for concluding that, absent a stay, prejudice would result. The court rejected a counterclaim that plaintiff had fraudulently misrepresented that super majority control provisions would not affect defendant's ability to receive certain certifications. The alleged misrepresentations concerned a prediction of future events. Further, a counterclaimant was an attorney expert in the energy industry who could not have reasonably relied on the representations as she was in at least as good a position to judge the legal effect of the provisions. The court declined to dismiss a counterclaim that defendant had breached the operating agreement requiring it to use its best efforts to assist defendant in securing and retaining certifications. The super majority provisions undermined defendant's status as needed for certification. Plaintiff argued that it was not required to amend the operating agreement, but the court held that questions of fact arose. Tortious interference claims failed for lack of pleading of the contracts that had been interfered with or wrongful means used. [Sempra](#)

[Energy Trading Corp. v. MEG Marketing, LLC, Index No. 600382/2001, 3/7/02 \(Cahn, J.\).](#)

Releases; executory accord; duress; fraudulent inducement; breach of contract; rescission. Corporations; derivative claims; pre-litigation demand. In a response to a motion, plaintiff contended that the general release relied on by defendants was part of an executory accord. The court ruled that the parties had not been contemplating a particular dispute when they signed the agreement in question so that there had been no executory accord. The court ruled further that plaintiff's assertions of duress and fraudulent inducement were insufficiently pleaded. However, the court held that the alleged failure of defendants to make almost all the payments required under the agreement that produced the release raised a question of breach and whether it was substantial enough to justify rescission. The court found that there was a question of fact as to whether plaintiff had owned stock, but ruled that various claims (breach of fiduciary duty affecting stock value, mismanagement, diversion or conversion of assets) failed because they were derivative and plaintiff did not assert that he had made a pre-litigation demand. Claims dismissed with leave to replead. [Sarapochillo v. Weiner, Index No. 604131/2000, 4/26/02 \(Cahn, J.\).](#)

Summary judgment in lieu of complaint; waiver of defenses; waiver. Tying arrangement. Fiduciary duty; bank. Tortious interference. Procedure; leave to replead. In a consolidated action, Chase Manhattan Bank moved for summary judgment in lieu of complaint to recover money owed from promissory notes and guarantees. Chase and another bank had extended a \$25 million credit to certain borrowers under the Credit Agreement and two notes. Chase presented a prima facie case that the borrowers stopped paying interest on the loan balance. The court held that the borrowers had no defense because, in the Credit Agreement, the borrowers waived the right to assert any claim as a defense. The court noted that the borrowers could bring a separate action to assert any claims against Chase. The borrowers also waived any claim of fraud or breach concerning Chase's alleged obligation to extend credit by continuing payments on the loans. The motion to dismiss the affidavit that established the borrowers' breach was denied because the borrowers did not contest the facts. The affidavit, from someone with personal knowledge, established the existence of the notes, the default, and nonpayment. Chase's waiver of a technical default did not preclude it from accelerating payment after the payment default. The borrowers untimely alleged coercion to enter into a contract, but such coercion was not related to the instruments on which Chase sought judgment. Two of the defendant banks sought to dismiss certain causes of action asserted by the plaintiff borrowers and guarantors. Those plaintiffs failed to plead the existence of a tying arrangement or that any alleged banking practice was unusual or anti-competitive. The Chase defendants allegedly conditioned an extension of credit on the use of services provided by Chase affiliates. Plaintiffs' admitted intention to use a single financial institution contradicted their allegations of tying. Furthermore, the allegations with respect to timing and the transactions undermined the claim of tying. Plaintiffs failed to allege anything suggesting an unusual banking arrangement that would support a tying claim. The court dismissed a breach of contract claim against the Chase defendants because only one of the Chase defendants was a party to the contract, and, in any event, the contract explicitly disclaimed the duty to perform the obligation that was allegedly breached. With respect to the common-law claims, plaintiffs failed to allege any facts demonstrating a fiduciary relationship with Chase, which was merely plaintiffs' creditor. The other Chase defendant had a limited contractual relationship which did not create any fiduciary duty to keep the guarantors informed as to the financial condition of the borrowers. Consequently, plaintiffs could not assert a claim for professional negligence or aiding and abetting. The claim for tortious interference with contract or prospective business relationships was, at most, a claim for breach of contract. Plaintiffs failed to identify in any detail any specific damage from the alleged interference. The cause of action for disgorgement was not a separate basis for liability apart from claims for breach of contract or fraud. The court denied plaintiffs' motion to replead because the affidavits submitted in opposition to the motion to dismiss did not provide any other grounds for sustaining any of the dismissed causes of action. [Bestolife Corp. v American Amicable Life, Index Nos. 602302/00 and 603465/00, 3/15/02 \(Moskowitz, J.\).](#)

UCC Article 3; restrictive endorsements; holder in due course. Plaintiff sought to recover on four promissory notes that defendants had allegedly endorsed to plaintiff. Defendant corporation was the original payee under the

notes, and endorsed the notes "Pay to the order of [plaintiff], For Deposit Only, [defendant corporation's account number]." Plaintiff moved for summary judgment. Defendant alleged that plaintiff was not a holder in due course on the ground that it had not given value for the notes. Court ruled that defendants had failed to provide evidence that a defense to the notes existed, and that the mere allegation that plaintiff did not give value was insufficient to create an issue of fact to defeat summary judgment. The court also held that the restrictive endorsement itself did not raise issues of fact as to whether plaintiff gave value because UCC 3-206 specifically provides that a transferee can be a holder in due course under a conditional endorsement such as "for deposit." The court held that the individual defendant, who signed the endorsement, was personally obligated on the promissory notes, even though he maintained that he had signed the notes in his corporate capacity. While the name of the corporation appeared below the individual's signature on the promissory notes, his title was not given. Motion granted. [The Merchants Bank of New York v Diamogem, Inc., Index No. 107727/2001, 3/20/02 \(Ramos, J.\)](#).

UCC 9-207; standing. UCC 1-203. Procedure; pleading; UCC 9-507. Tortious interference. Negligence; duties independent of contract. Collateral estoppel. Duty of good faith and fair dealing. Plaintiffs signed a guarantee for a loan from defendant Bank to Innomed Labs, LLC. The wife of a non-party guarantor who was also a business partner of one of the plaintiffs purchased the loan from the Bank. She immediately demanded payment of the Bank's loan to Innomed and thereafter obtained judgment against plaintiffs. The court dismissed plaintiffs' first two causes of action against the Bank for breach of various statutory duties imposed by Article 9 of the Uniform Commercial Code. Plaintiffs did not have standing because they did not put up the collateral at issue. The court held that UCC § 1-203 did not support an independent cause of action for not acting in good faith. The court disagreed with a civil court opinion that purportedly permitted a cause of action based solely upon the breach of good faith requirement of Section 1-203. Because a guarantee is not a negotiable instrument, Article 3 of the UCC did not support plaintiff's cause of action against the Bank for impairment of the collateral. The court permitted plaintiffs to replead the two causes of action based on Article 9 of the UCC regarding the disposition of the collateral with respect to the date of the default. Plaintiffs' cause of action for negligence was dismissed with leave to renew after discovery because the Bank had common-law and statutory duties independent of the contract. The court dismissed plaintiffs' claim for unlawful and tortious interference with their business and contract rights because plaintiffs only alleged damages and did not satisfy the remaining elements with respect to contract rights. Even incorporating all the other allegations, those regarding interference with business relations were not particular enough under CPLR 3013. The court dismissed the cause of action against the individual defendants, principals of the Bank, for aiding and abetting because the related substantive torts were dismissed. Plaintiffs also failed to identify any particular breach of the agreements by the Bank. Consequently, the court dismissed the cause of action against the Bank for breach of an implied warranty of fair dealing and of good faith under the common law. The cause of action for attorneys' fees survived based upon fees incurred in a prior action and the possibility of success in this action. Plaintiffs' fraud claim was not barred by the decision in a prior action concerning the guarantee. Likewise, plaintiffs' cause of action to declare a particular agreement void was not addressed in the prior action, and thus, collateral estoppel did not apply. The court granted plaintiffs' cross motion to amend the complaint only to the extent that the court recognized the need to replead. Otherwise, plaintiffs failed to propose any amendment in their cross motion. [Spector v Gotham Bank of N.Y., Index No. 19657/2000, 3/14/02 \(Austin, J.\)](#)

Unfair competition. Restrictive covenants; unenforceability; damages. Plaintiffs alleged unfair competition by defendants by virtue of defendants' misappropriation of plaintiffs' list of non-exclusive field representatives, which enabled a corporate co-defendant to run a program itself and terminate a contract with plaintiffs. Evidentiary materials showed, the court said, that plaintiffs were relying on speculation, such as shown in deposition testimony. Nothing in the record demonstrated that the list was confidential or that defendants had misappropriated or misused it. Plaintiffs claimed that a defendant had fraudulently expanded the scope of a non-solicitation provision in an agreement. The court noted that plaintiffs' representative had twice signed letter agreements containing the provision and was presumed to know their contents and assent thereto. However, the court held that the covenant was overbroad and unenforceable as applied to a major issuer of credit cards since expanding the restrictions to reach client affiliates did not foster any legitimate business interest of defendant; the issuer had been a client of plaintiffs prior to their dealings

with defendant. The court also ruled that the record failed to show that defendant had sustained any damage due to solicitation by plaintiffs. Neither plaintiffs nor defendant had obtained business from the issuer. The court rejected the contention that by terminating the contract and withholding payment based on solicitation of the issuer, defendant was precluded from seeking enforcement of the non-solicitation agreement. Here there were separate documents. The court found that there were issues of fact. [Elite Promotional Marketing v. Stumacher, Index No. 1474/1999, 4/9/02 \(Austin, J.\)](#).

Unjust enrichment; judicial estoppel. Plaintiff, an auction house, moved for summary judgment to recover sums due for breach of an agreement with defendant, an amusement park, to auction an antique carousel. By the terms of the agreement, plaintiff was entitled to a commission of the reasonable value of any items withdrawn from the auction, and payment for expenses if the sale could not take place due to "conditions beyond the control of the sellers." Defendant's carousel was condemned by the county, forcing defendant to withdraw it from the auction. The court held that plaintiff was entitled to both its commission and payment for expenses, under a theory of unjust enrichment, despite the existence of an agreement. The court reasoned by analogy to cases involving gallery commissions on the sale of artwork. In any event, the court found that defendant was judicially estopped because it had successfully contended in the condemnation valuation proceedings that the award included two items of damage which, under the agreement, constituted consideration for the specialized services of plaintiff auctioneer. Motion granted. [Norton Auctioneers of Michigan Inc. v Nunley Amusement Corp., Index No. 15185/2000, 3/5/02 \(Austin, J.\)](#).

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