The ***Commercial Division***

of The State of New York

Law Report - October 1999

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

VOL. II, NO.4 OCTOBER 1999 (COVERING DECISIONS ISSUED JULY-SEPTEMBER 1999)

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Accountant's malpractice; privity. Action against accounting firm based upon alleged negligence in preparation of reviews of balance sheets and other financial documents for several years. Plaintiff bank had lent money to the defendant's client. Defendant moved for summary judgment on the ground of lack of privity. Defendant had done the work for the client, not with plaintiff in mind. The proof presented, the court found, did not show that defendant had arranged a meeting between the client and plaintiff to secure the loan. The engagement letters did not mention plaintiff or suggest any linkage between plaintiff and the accounting firm. The loan agreement did not establish any obligation by the client to furnish plaintiff with any financial statements. A loan officer had had occasional conversations with defendant's representatives, but his testimony did not provide proof of privity. There was no proof of writings sent to the

bank about the client's financial condition. The court held that there was not enough to satisfy Credit Alliance. Summary judgment granted. Israel Discount Bank v. Miller, Ellin & Co., Index No. 114215/97, 8/30/99 (Ramos, J.).

Agency; disclosed principal; contract claims. Insurance; reinsurance agent; equitable and promissory estoppel; negligent misrepresentation; relationship. Action seeking declaratory relief and specific performance regarding reinsurance treaties against a reinsurer and a managing general agent. The latter allegedly had had written authority to act and had signed writings initiating the treaties, but the reinsurer later refused to sign and stated that it was not bound. The court dismissed the breach of contract and good faith claims against the agent as it was clear that as an agent for a disclosed principal it could not be held liable for the principal's failure to perform. The court stated that an equitable estoppel cannot be used to create insurance coverage where there is none under the policy and that plaintiffs incorrectly sought to do this by seeking to impose liability on an agent for a disclosed principal. Similarly, promissory estoppel was unavailing. A misrepresentation claim was found duplicative of the breach claim and thus barred. As there was no special relationship between plaintiffs and the agent, the court held that there had been no duty to use reasonable care to support a negligent misrepresentation claim, which in any case duplicated the breach claim. The court ruled that plaintiffs had failed to prove the existence of a contract between them and the agent, rather than the principal, so a specific performance claim failed. Claims against agent dismissed. AIU Insurance Co. v. Unicover Managers, Inc., Index No. 600744/99, 10/5/99 (Cozier, J.).

Agency; liability of agent; custom and course of dealing; right to proceed for principal; damages. Indemnity; faithless agent; immoral conduct. Procedure; summary judgment on unpleaded claim. Action by media buying service. Agent for a disclosed principal is not personally bound unless there is clear and explicit evidence of an intent otherwise. The question raised was whether custom and usage in the TV commercial time industry and the course of dealing among the parties overcame the presumption. Summary judgement dismissing counterclaims was denied since the authorities cited did not resolve the issue, and the evidence submitted was equivocal. The court found that it was not clear whether plaintiff was seeking damages for itself or its client for allegedly overrun commercials. If the former, the court stated, the damages issue was intertwined with that of responsibility for the invoices of the network. Plaintiff might be entitled to contractual benefit of the bargain damages and nominal damages even if it incurred no out-of- pocket tort damages. If plaintiff was proceeding on behalf of the client, there was a question of fact as to its right to do so on an implied authority theory or on a ratification theory. The client sought to dismiss an indemnification claim on the ground that the agent had been faithless in that it had engaged in an undisclosed deal with the network. However, the client did not raise these matters in its third-party answer and counterclaim and did not indicate that it was seeking return of commissions already paid. Although summary judgment may be granted on an unpleaded claim if the proof supports same and the opposing party has not been misled to its prejudice, the court found these omissions too significant and too numerous and prejudicial. A like result obtained with regard to the client's argument that the agent should be precluded from recovery because its conduct had been immoral. Further, the court stated that the undisclosed use of a trade deal, possibly customary in the industry, was not either illegal or so immoral as to bar recovery. The court determined that termination of the agreements would have been effective only as to an obligation to indemnify that had not yet arisen, not the case here. The court rejected waiver and laches arguments. Summary judgment denied. Winner Communications, Inc. v. USA Networks, Index No. 113355/94, 9/16/99 (Cozier, J.).

Attorney and client; privilege; work product; burden on party asserting; waiver by injection into case. Action by Major League Baseball against its insurance broker to recover a settlement payment and legal fees incurred in a certain lawsuit. Baseball alleged that the broker had failed to obtain proper coverage. The broker argued that the allocation of the settlement only to insurable claims was unreasonable and constituted an attempt to manipulate coverage. The broker demanded documents relating to the lawsuit, including legal bills, evaluations of the claims, etc. Baseball asserted attorney-client privilege and work product protection. The court stated that the burden rested on Baseball. The court found that Baseball had not proffered a privilege log, the actual documents for inspection, or any other evidence to show that the documents were privileged. Mere assertion of privilege or work product does not suffice. The court stated further that even if attorneys' notes and analyses of claims were privileged, the privilege had been waived. A party makes a prima facie showing of entitlement to production when it shows that waiver occurred by injection of material into the case. The court found that plaintiffs could not establish that the settlement agreement had been reasonable without placing in issue the motive and rationale of the allocation provision therein. Production of documents required. Baseball Office of

the Commissioner v. Marsh & McLennan, Index No. 112619/95, 9/10/99 (Ramos, J.).

Bills and notes; UCC 3-419; conversion of check. Motions concerning claims that the endorsement on a check for $ 250,000 was a forgery and a defendant collected and deposited proceeds into a corporate account. Plaintiff argued that Fleet Bank could not establish that its handling of the check had been in good faith and in accordance with reasonable commercial standards (UCC 3-419(3)). Defendant contended that plaintiff lacked standing to allege a conversion claim. The court stated that a named payee of an undelivered check cannot bring a conversion action (UCC 3-419 (1)(c)) against a depositary bank which cashed the check over a forged instrument unless the payee had possession of the check. Plaintiff must show that the payee attained the status of a holder, i.e., that he had had possession. A payee need not acquire actual possession. Delivery to a payee's agent may constitute constructive possession. The check here had been delivered to someone other than the payee; the key issue was whether that person had been the payee's agent. Did he have authority ? Whether there was actual or apparent authority is usually a fact question for the jury. Therefore, the motions were denied. Carrafiello v. Massachusetts Mutual Life Ins. Co., Index No. 600386/97, 8/2/99 (Cozier, J.).

Champerty. Action for breach of contract and other wrongs. Defendants moved to dismiss on the ground that plaintiffs had engaged in champerty (Jud. Law 489). Standards discussed. The court concluded that the sole or primary purpose of the creation of an entity and the assignment thereto was to pursue the action. The fact that the assignment had been made after the action began did not lead to the conclusion that the assignment did not violate 489. Additional claims were asserted based on the assignment. The bankruptcy exception did not assist two of the plaintiffs since the assignments had not been made by the persons listed in 489 and had been made prior to the bankruptcy declaration. But the court declined to dismiss the case, allowing the retention of the pre-assignment causes of action. Richbell Information Services, Inc. v. Jupiter Partners LP, Index No. 605979/97, 8/2/99 (Cozier, J.).

Class actions; certification; numerosity; liquidated damages and counsel fees; adequacy; preferability of class action device. Action for reimbursement of the employer's share of payroll taxes that had been paid by the employee (Labor Law 193) and for a penalty, counsel fees and disbursements (Labor Law 198(1-a)). Plaintiff moved for certification of the purported class action. The court found that plaintiff had failed to meet the numerosity prerequisite. Plaintiff bore the burden on this and defendant had submitted an affidavit, not actually challenged on the facts, asserting that the number of persons similarly situated was tiny. Further, denial was necessary, the court held, because plaintiff was seeking liquidated damages and attorney's fees and such relief constitutes a penalty requiring denial of class action status. Were plaintiff to offer to drop the request for this relief, that would raise questions as to her adequacy as a class representative and as to why a class action was the best method of resolving the controversy. Hardy v. Stevens Travel Management, Index No. 604044/98, 6/22/99 (Shainswit, J.).

Contracts; construction; interpretation. GOL 5-322.3. Action by subcontractor to recover monies owed for work on a project. Plaintiff alleged, inter alia, a GOL 5-322.3 claim. The owner started a third-party action seeking indemnification from the GC with regard to this claim. The GC moved to dismiss. The court rejected the GC's policy argument that, under 322.3, an owner may not shift responsibility for filing a bond to a contractor or subcontractor. The court found nothing in the language of that section so providing. The question then was whether the contract imposed on the GC the obligation to assume the owner's duty to file the bond. The court concluded that it did not. Under one paragraph, the GC could be held to knowledge of 322.3. However, the court rejected the argument that the language of the contract was so encompassing as to what constituted "performance of the Work" as to include an owner's duty to file. A contract provision relating to the GC's obligation to inform the owner if any of the contract documents failed to conform to governing laws did not assist the owner. The problem in the case did not arise from a failure of documents to meet statutory or regulatory requirements, but rather from a failure of the obligated party to comply with the bond filing requirement. Last, the court agreed with the GC that the owner had failed to raise an issue of fact with respect to the contention that the GC had voluntarily assumed the duty to file the bond. Motion to dismiss granted. Orange Steel Erectors, Inc. v. Tartaglione Consultants Corp., Index No. 17317/98, 9/28/99 (DiBlasi, J.).

Contracts; employment; at will; duty of loyalty. Discretionary compensation plan. Tortious interference; existence of contract; affiliates. Defamation; U-5. The presumption of an at-will employment can be overcome if a plaintiff can show that he/she was made aware of a written policy limiting the employer's right to discharge at the time employment started and detrimentally relied thereon. The court found plaintiff's allegations in this respect insufficient. There were only vague assurances as to the period of the employment and the handbook did not restrict defendants to firing only for cause. Plaintiff failed to allege that in accepting the promotion he had refused outside opportunities. The existence of a grievance procedure did not restrict defendants' right to discharge an at-will employee. Breach claims were therefore dismissed. The court declined to dismiss a quantum meruit claim for recovery of a bonus on the ground that plaintiff had breached a duty of loyalty by misconduct since plaintiff alleged that he had disclosed the conduct later said to have been wrongful and it had been approved by superiors. The court dismissed a claim for compensation under a discretionary compensation plan since plaintiff had had no vested rights. A tortious interference claim was dismissed for lack of a contract and since the allegedly interfering parties were affiliates of the employer. A defamation claim as to certain articles failed since defendants were not responsible for a recommunication without authority and two of them did not set forth any precise statements by defendants. Some statements were not susceptible of a defamatory connotation. A claim as to the U-5 also failed since such statements are privileged. A statement that plaintiff had filed a document known to be false was true and thus not actionable. Also the single instance rule applied. Grieve v. Barclays Capital Securities Ltd., Index No. 602820/98, 9/9/99 (Cahn, J.).

Contracts; interpretation; ambiguity. Action for breach of contract regarding music licensing fees. Plaintiff claimed that defendant had agreed to give it any benefits achieved by rival networks in their licensing contracts (MFN clause). Defendant argued that summary judgment must be granted as the agreement of a rival on which the suit was based was not a "final license agreement" as provided in the MFN clause. The court ruled that the other agreement was such an agreement. As to whether the MFN intended to take into account the time value of money, the court ruled that the key words were not ambiguous. The court found that the use of those words in a specific place made sense only if the time value of money was excluded as a consideration. Summary judgment granted. CBS, Inc. v. American Society of Composers, Authors and Publishers, Index No. 129449/94, 8/5/99 (Cozier, J.).

Contracts; interpretation; ambiguity. Statute of frauds; securities. Action for breach of contract and inducement based upon failed efforts to effect a merger. Plaintiff claimed that defendant had breached merger agreements and covenants of good faith by refusing to complete the merger. The court ruled that plaintiff had satisfied the temporal aspect of the requirement to deliver a financing letter by a certain date. However, the court found issues of fact as to whether the letter was "reasonably acceptable," as required, where it had covered only debt financing and contained conditions. The court concluded that a cause of action based on an oral assurance to complete the merger ran afoul of the then-applicable statute of frauds (UCC 8-319). The court also determined that a claim for alleged breach of a "no shop" clause failed because the contractual basis of the claim applied only when plaintiff terminated, not defendant, as here. Starrett Acquisition, Inc. v. Starrett Corp., Index No. 605392/97, 7/8/99 (Cozier, J.).

Contracts; interpretation; option rights; IPO lock-up period; oral understandings. Suit by former officers alleging breach of contract to enforce stock options. Plaintiffs had a contractual right to exercise option rights within 90 days of their last day of service or during a separation period. They did not do so. They argued that they had an indefinite right to exercise when defendant initiated an IPO. The contracts provided for exercise within 90 days from expiration of a "lock-up period" for an IPO. However, the court found, the obligation was discretionary with the company and the managing underwriter and the lock-up would have to apply to all officers, directors and holders of 5 % of the stock. Since the company did not request that shares be held up and all officers and directors had not agreed as required, the court ruled that plaintiffs had not been entitled to exercise options under the lock-up clause. The court rejected the flat assertion that the options would remain exercisable until an IPO and stated that plaintiffs could not rely on any oral understandings, having agreed in writings that any such would not be enforceable. Case dismissed. Bennett v. Prodigy Communications, Index No. 601672/99, 8/31/99 (Ramos, J.).

Contracts; interpretation; opt-out; illusory agreements; time of the essence; integration clause; oral agreements. Procedure; motion to dismiss. Actions arising out of failed relationship between two groups of limited partnerships. A redemption and sales agreement was signed. One group asserted that it was binding and the other relied on a provision therein to claim that it was not. The court found that there were questions of fact arising out of the broad language of the provision, e.g., whether the closing required additional material agreement and whether the language was intended to allow either party to back out at any point prior to closing for no cause. As for dismissal, contractual provisions prevail over the conclusory allegations of a complaint. But unless it is established conclusively that the plaintiff has no cause of action the motion must be denied. The court noted that although the provision appeared to be an escape clause allowing either party to choose not to close for any reason, other language indicated otherwise. Another clause referred to breaches of the agreement, "including the failure of a party to close hereunder...." Thus, the court refused to dismiss a specific performance claim. The court also rejected the argument that dismissal of that claim and a breach claim was required because neither party had been ready to close on time. The court noted that there was no affirmative appearance that the parties had regarded time as of the essence; also a party may waive its right to such performance and here there had been negotiations beyond the closing date. If the redemption and sale agreement were found to be valid and binding, then an agreement to purchase a partnership interest would appear to be unenforceable, the court stated, since that agreement was oral and the integration clause of the redemption and sale agreement would have barred any such agreement. But if it were to be found that either party could have walked away from the redemption and sale agreement without cause, then the agreement or certain provisions might be found illusory. Thus, it was premature to dismiss claims until resolution of those issues. 625 Partners, L.P. v. Related- Madison Associates, L.P., Index No. 604373/98, 7/6/99 (Ramos, J.).

Contracts; interpretation; shareholders agreement; minority shareholders' option to sell. Minority shareholders alleged breach of contract based on the claim that a defendant had sold its majority stock in a company without providing plaintiffs with written notice in conformity with the shareholders agreement. Plaintiffs were to be and were provided with a 30-day option to sell on identical terms as those agreed to by the defendant. Plaintiffs argued that the sale of the majority interest was for worthless consideration. However, the court stated, the agreement did not give the minority any right based on the value of the transaction. Plaintiffs also argued that the agreement had been designed to allow minority shareholders an opportunity to stop the transaction from being consummated if they felt the sale was unsuitable. The court found nothing in the agreement that mandated notice to the shareholders prior to a sale's being entered into. The only limitation on the majority's right to sell that interest was the requirement that minority shareholders be given access to the same terms of sale. The court stated that plaintiffs were seeking to have the court re-write the agreement. Summary judgment granted. Batkin v. Softbank Holdings Inc., Index No. 601908/98, 9/2/99 (Ramos, J.).

Contracts; specific performance; impossibility; requirements contract; good faith termination of business. Promissory estoppel; reliance; reasonability. Procedure; pleading; fraudulent inducement (CPLR 3016(b)); scienter; negligent misrepresentation; privity. Agency; personal liability of corporate agent. Action for breach of contract, specific performance and other claims. The specific performance claim had to be dismissed, the court found, since defendant had sold its stores to a non-party, rendering compliance with the contract at issue impossible. The agreement in issue was a requirements contract (UCC 2-306(1)), the court decided. The court rejected the argument that a requirements buyer which had ceased to do business had breached a contract absent a showing of bad faith. Good faith cessation of production terminates any further obligations under an exclusive dealings contract and excuses further performance by the terminating party. The court found no allegation that the sale had been done in order to avoid duties under the contract. Breach claim dismissed. As to promissory estoppel, the court found that plaintiff did allege that it had relied on reports from defendant that there would be no sale, making a non-refundable $ 1 million payment. Whether reliance had been reasonable should not be addressed by the court prior to joinder of issue and discovery, the court concluded. Unartful pleading of this claim was not a basis for dismissal. The court also found that plaintiff had sufficiently alleged fraudulent inducement in detail (CPLR 3016(b)). Although the complaint did not allege that defendant had known that the misrepresentations had been false, that could be inferred from affidavits submitted by plaintiff to remedy any defects in the pleading. The court held that, under Berkshire Fashions, 682 N.Y.S.2d 172, the complaint sufficiently alleged privity so as to support a negligent misrepresentation claim. The court found that individual liability of the alleged corporate agent had been sufficiently set forth. Dismissal granted in part. Gibson Greetings, Inc. v. Rock Bottom Stores, Inc., Index No. 604435/98, 8/31/99 (Ramos, J.).

Contracts; specific performance; uniqueness; interpretation; ambiguity. Misrepresentation; duplication of contract claim. Negligent misrepresentation; special relationship. Action by members of health club seeking specific performance and damages for breach of contract and other wrongs. Motion to dismiss. The court held that the services provided by the Vertical Club were not so unique as to be incapable of valuation and thus dismissed the claim for specific performance. A clause in the contract reserved rights to close facilities with a refund to be provided. Here the Club was closed for renovations. Plaintiffs argued that "facilities" was ambiguous, that it was unclear that defendant could close the entire Club and that the ambiguity had to be construed against the drafter. The court noted that clear, complete writings should generally be enforced according to their terms; words and phrases should be given their plain meaning. The court held that the reservation of rights clause gave defendant broad powers to close any facilities at any time. It was not a breach to close for renovation. As to a fraud claim that defendant had misrepresented that the Club would be open throughout the term of the contract, the court held that it was duplicative of the contract claim and thus defective. The court held that plaintiffs had failed to allege a special relationship such as would have given rise to a duty to impart information; a negligent misrepresentation claim failed. GBL 625-26 claims were also rejected. Motion granted. Chanler v. Sports Club Co., Index No. 600435/99, 7/27/99 (Ramos, J.).

Declaratory judgment. Discontinuance (CPLR 3217(b)). Contracts; interpretation. Indemnification. Motion for summary judgment dismissing counterclaims; cross-motion to discontinue. Declaratory judgment and discontinuance standards discussed. Plaintiff failed to show prejudice from discontinuance in the sense of hindrance in the preparation or support of the case. However, in the interests of judicial economy and substantial justice, the court decided to deny the motion and to render an appropriate declaration regarding the indemnification provision in issue. Standards of interpretation discussed. The court determined that the clear purpose of the provision was to protect a managing agent against liability arising out of personal injury actions or property damage claims, not claims for breach of contract and the like as asserted in the related action. The managing agent had been acting as agent for a disclosed principal, the cooperative, whose employee the plaintiff in the other action had been. Any claim would be against the principal. Thus, the court granted the motion to the extent of declaring that plaintiff had no obligation to defend and/or indemnify the counterclaiming defendants. 229 E. 28 St. Owners Corp. v. Chase Manhattan Bank, Index No. 601615/98, 8/4/99 (Cozier, J.).

Defamation; limited purpose public figure; burden of proof; truth as defense; falsity; actual malice. Action for defamation arising out of book about alleged insider trading and Ivan Boesky and Michael Milkin. Plaintiff, a prominent New York attorney, represented a certain lawyer during a government investigation. Plaintiff alleged that a statement in the book falsely suggested that he had attempted to have his client sign a false affidavit exonerating another client. The court stated that whether plaintiff was a public figure and, if so, what kind was a question for the court as the facts were set forth sufficiently and were not in dispute. An attorney does not become a limited purpose public figure merely by representing a client in a public controversy. The court found that plaintiff was such a public figure as the dispute was one of considerable notoriety that affected the public generally and he had maintained a public posture during it through extensive dealings with the media. Thus, it was up to plaintiff to show that the passage in question was false and had been published with actual malice. Truth is an absolute defense and that defense applies if the statement was substantially true. The court concluded that the plaintiff had failed to raise issues of fact on the falsity question as defendants had made a prima facie showing that the statement was substantially true. Further, the court found that plaintiff had failed to raise an issue of fact as to whether defendants had acted with actual malice, which must be shown by clear and convincing evidence. The fact that the subject of an allegedly libelous statement contacts the author and denies the truth of the statement is not sufficient to show actual malice. Even if defendants had failed to investigate the truth at all, this would be insufficient to show actual malice absent a showing, not made here, the court found, that defendants had been aware of the probable falsity of the statement. Summary judgment granted. Armstrong v. Simon & Schuster, Index No. 25863/92, 9/22/99 (Cozier, J.).

Forum non conveniens. Suit brought by heir against a not-for-profit New York corporation representing Holocaust victims with regard to property in Germany that had been seized by the Gestapo. At issue was an objection to plaintiff's claim that defendant had raised in Germany for a time and defendant's alleged duty to plaintiff with regard to the value of business assets. On a forum non conveniens motion, the court found that, though the parties were New York residents, most of the relevant factors favored resolution in Germany: the property was located there, the documents were located there and were in German, German law was applicable to most claims, a German court can best resolve disputes about German laws, the acts involved occurred there, and non-party witnesses were there. The court also noted that plaintiff could retain lawyers in Germany, as she had done before, and that public policy favored resolution in German courts

as Germany has the greatest and most direct interest in resolving disputes regarding its efforts to compensate Holocaust survivors. Motion granted. Hammerstein v. The Conference on Jewish Material Claims, Index No. 114355/98, 8/6/99 (Cozier, J.).

Forum non conveniens. Disputes arising out of asset purchase agreement. Forum non conveniens motion. The court held that dismissal was proper. The parent corporation of the other two plaintiffs, a New York entity, was not a party to the employment agreements at issue. The other plaintiffs, which were parties, were Delaware corporations with their principal place of business in Washington State, where a related action was pending. Although New York law would govern this case, the court noted that a choice of law provision is not the same as a consent to jurisdiction. The vast majority of defendants' activities occurred in Washington and the majority of relevant documents were produced and would be found in Washington. Potential employee witnesses in Washington had had more contact with defendants than some New York residents cited by plaintiffs. Defendants and their witnesses were connected to Washington, not New York. Swissray International, Inc. v. Durday, Index No. 603512/98, 6/1/99 (Shainswit, J.).

Fraudulent conveyances (Debtor & Creditor Law); fraud; liability of attorney. Procedure; pleading fraud with particularity. Alleged scheme in violation of the Debtor and Creditor Law to create a new entity and transfer assets of an existing debtor entity in order to avoid obligations under an indemnification agreement. A defendant attorney moved to dismiss claims alleging that he had participated in the scheme and fraud. Plaintiff alleged that the movant had benefited from the scheme since his fees had been paid as a result of it. The court ruled that the amended complaint stated a claim against the attorney. A creditor may recover for fraudulent transfers only from transferees of the assets or beneficiaries of the conveyance. It was not alleged that the attorney had been a transferee and he had not benefited from the incorporation of the new entity. However, an attorney may be liable under the Law where some of the transferred assets are used to pay legal fees and expenses. Mere receipt of a past due fee, the court stated, would not subject an attorney to liability, but if the payment was of more than that, there could be liability. And if the attorney counseled the client to engage in fraud, the attorney might be liable for fraud and/or for violations of professional ethical obligations. The court found that enough had been pled to permit discovery to proceed. The court also ruled that the complaint stated a fraud claim against the attorney with sufficient particularity (CPLR 3016(b)). Motion denied. Contractors Casualty & Surety Co. v. I.E.A. Electric Group, Index No. 603044/98, 7/7/99 (Cahn, J.).

Indemnity of officers and directors (BCL 724). Forum non conveniens. Procedure; venue; need for motion to dismiss (CPLR 327), for change of venue, and to disqualify. Attorney and client; disqualification. Petition seeking judgment directing respondent to indemnify petitioners for counsel fees and expenses incurred by them in ongoing lawsuit against them in California. BCL 724. Respondent contended in response that the matter should be dismissed on forum non conveniens grounds. The court rejected this since no motion for such relief had been made (CPLR 327(a)). Further, the court found that the matter did not constitute a burden given its familiarity with a related matter out of which the lawsuit arose. The potential hardship arguments were meritless. A change of venue could not be granted since again no motion for it had been made and the certificate designated New York as the county of residence of respondent. The court held that petitioners had raised genuine issues of fact or law in the California action (BCL 724(c)). The court concluded that petitioners were entitled to pendente lite indemnification. The fact that the bylaws did not provide for indemnification did not require a different result given the terms of the BCL, nor did the fact that one of petitioners was being sued by the corporation. The respondent argued that the attorneys for petitioners should be disqualified but the court rejected the argument since no motion had been made for that relief and respondent had failed to present any proof that the law firm had acquired confidential information relating to the matters in issue in a prior representation. Iberti v. Walker & Zanger (West Coast) Ltd., Index No. 602113/99, 9/22/99 (Cahn, J.).

Internet; personal and subject matter jurisdiction. Corporations; piercing the corporate veil. Gambling via the Internet. Martin Act. Action by Attorney General to enjoin respondents from operating in New York offering gambling over the Internet and from selling unregistered securities in violation of the Martin Act. The issue presented was whether the State could enjoin a foreign corporation legally licensed to operate a casino offshore from offering gambling to Internet users in New York. N.Y. Constitution Art. 1, Section 9(1). The court stated that traditional jurisdictional

principles have proved sufficient to resolve Internet issues. The court held that respondents were doing business in New York for personal jurisdiction purposes. Although the lead respondent was incorporated in Delaware, it had a corporate headquarters in New York, where actions relating to the website were taken. Cold calls to investors were made from here. Further, even without physical presence, the minimum contacts standard had been met. Work on the Internet site was done here and ads sent out from here that reached, inter alia, New Yorkers; no effort was made to exclude New Yorkers from the reach of the ads. The court held that a co-respondent was completely dominated by its parent. The court rejected the argument that subject matter jurisdiction was absent because the gambling occurred outside New York. The court held that under the Penal Law, if the person engaged in gambling is located in New York, then that is where the gambling occurred. It was irrelevant that gambling is legal in Antigua, where the bet was accepted, as entry of the bet in and transmission of the information from New York via the web sufficed to constitute gambling activity in the State. The court held that the respondents had violated the Penal Law, as well as Federal statutes (the Wire Act, the Travel Act, Interstate Transportation of Wagering Paraphernalia Act). The court rejected the contention that respondents had unknowingly accepted bets from New Yorkers. The court held that gambling via the Internet from New York to Antigua is indistinguishable from any other form of gambling since the Wire and Travel Acts apply to the transmission of information into a foreign country. The court also ruled that various New York registration requirements had been violated, including the Martin Act, and that injunctive and other relief should be awarded. People v. World Interactive Gaming Corp., Index No. 404428/98, 7/22/99 (Ramos, J.).

Judgments; foreign country; enforcement; public policy. Attachment. Mexican judgment creditor moved for an attachment and summary judgment based on a Mexican judgment. Plaintiff sought to attach settlement proceeds to be paid to certain defendants here, plaintiffs in a Federal action. The court rejected an argument that a clause selecting a Mexican forum in an agreement whereby those defendants agreed to be liable for certain debts precluded an effort to enforce a judgement in New York. The court ruled that the clause designated where disputes regarding the terms of the agreement might be brought, but did not affect where any resulting judgment might be enforced; language would have to be airtight to accomplish that end and the court found that the clause was not of that character. Defendants argued that the judgment could not be enforced here as appeals were pending in Mexico, making it nonfinal (CPLR 5302). New York will not enforce a judgment if the foreign country will not permit its execution pending appeal. Here the court noted that the Mexican court had not stayed execution against other than one defendant. Further, under Mexican law, where, as here, defendants are jointly and severally liable, the debt can be claimed from all or any one of them so that the judgment could be executed against the defendants here even though another party was taking an appeal in Mexico. Later, these defendants here obtained stays in Mexico pending an appeal but these stays were lifted as to some of them and to maintain stays a bond is required but was not posted. The court rejected an argument that plaintiff had waived its right to a deficiency judgment by the manner in which it proceeded in Mexico. Defendants argued that because plaintiff had purchased in properties that had served as collateral at auction for just over two-thirds of their fair market value, the judgment should not be executed upon as a matter of public policy (CPLR 5304(b)(4)). The court rejected the argument. It stated that the sale had been done in accord with Mexican procedures and that defendants, Mexican citizens, had had notice and an opportunity to be heard. The auction was presided over and reviewed by a judge. The judgment was not repugnant to public policy even if New York law affords greater protection to a mortgagor than does Mexico. The court ruled that plaintiff had met its burden for an order of attachment (CPLR 6212(a)) and that it was probable that it would succeed in view of the existence of a final and enforceable judgment. The court also ruled that sufficient showing of Mexican law had been made to permit an award of summary judgment to plaintiff to the extent the judgment exceeded the settlement proceeds. Harris S.A. de C.V. v. Grupo Sistemas Integrales de Telecomunicacion S.A. de C.V., Index No. 600801/99, 9/17/99 (Cozier, J.).

Misrepresentation and fraudulent concealment; pleading; particularity (CPLR 3016(b)). Attorney and client; malpractice; responsibility of corporate counsel. Procedure; leave to amend; speculation. Derivative action alleging submission of erroneous information to the SEC by the corporation's chairman and related wrongs. A defendant, counsel to the corporation, moved to dismiss. The complaint alleged that he had breached his duty of loyalty to the corporation by ensuring entrenchment of the chairman and putting his interests first and permitting the chairman to assume other corporate positions, to enter into a challenged employment agreement, and to contract with financially unstable companies. Also, it was charged that the movant had drafted a shareholders agreement that violated public policy and prevented a majority of the board of directors from voting on removal of a director, thus ensuring deadlock. Claims for fraud and breach of fiduciary duty were not pleaded with sufficient particularity (CPLR 3016(b)). The court noted that particularity is especially important when liability for fraud is sought to be imposed on persons who only aided and abetted a scheme. The court found that there was a lack of specificity as to how the counsel had permitted the chairman

to commit fraud and waste. As to an alleged failure to disclose, the court ruled that plaintiffs had failed to specify just what had been concealed and how the counsel had participated in that action. The court also noted that most of the information at issue was either actually disclosed in public filings or minutes or easily ascertainable. As to malpractice, the court stated that attorneys are not held to a standard of infallibility and that a mere violation of ethical obligations will not give rise to liability; the plaintiff must show that actual damages were sustained and were the proximate result of the violation. The court noted that beyond the conclusory assertions of fraud and concealment, the only malpractice alleged concerned the drafting of the agreement. The court found that plaintiffs had not shown how the corporation had been damaged thereby. The court also stated that plaintiffs' theory of the responsibility of corporate counsel overstated counsel's responsibility or authority. Plaintiffs would require counsel to veto any corporate or board action that might later be complained of. Leave to amend was denied. Plaintiffs failed to submit a proposed amended complaint and offered little more than speculation that the facts which could support an amendment were in the possession of defendants. Rosan v. Vassell, Index No. 606166/97, 8/27/99 (Cahn, J.).

Misrepresentation; reliance; merger clause; prediction; opinion; falsity; scienter. Action for fraud, negligent misrepresentation and breach of warranty arising out of purchase of condominium units at 100 United Nations Plaza. Plaintiffs alleged that the height of an adjacent building under construction had been misrepresented to them. The court found the claims deficient. The purchase agreements contained no warranty but a specific merger clause, thereby barring plaintiffs from claiming reliance. The defendant brokers had not been parties to the agreements but the clause inured to their benefit because it made reference to "any broker" or "anyone acting ... on behalf of seller." In any event, the court ruled, plaintiffs could not prove their claims since the statement was a non-actionable prediction and involved a matter of subjective opinion and plaintiffs could not show the statement was false. There was also no scienter. Reliance was also unreasonable as the complainants had had constructive notice of the facts and the means to discover them. Khatchadourian v. American Realty Mortgage Corp., Index No. 602187/97, 8/24/99 Cahn, J.).

Procedure; consolidation; motion to dismiss (other action pending). Motion to dismiss because of other action pending (CPLR 3211(a)(4)) or to consolidate. The court ruled that consolidation of this action with a divorce action was not appropriate as there were parties here not present in the divorce action, which might be delayed. Further, consolidation would conflict with a prior ruling in the divorce case, which was law of that case. The court stayed this action since plaintiff would not be prejudiced thereby and an equitable distribution award might moot plaintiff's claim that a business restructuring should be set aside. Gober v. Gober, Index No. 600395/99, 9/14/99 (Cozier, J.).

Procedure; CPLR 3213; settlement agreement. Defenses; fraudulent inducement; mistake; fiduciary duty. Motion under CPLR 3213 to recover on a settlement agreement. The court found that the agreement permitted such an action as the only obligation defendant had under it was to pay plaintiff a fixed sum by a fixed date. The court found that plaintiff had made out a prima facie case and that defendant had failed to substantiate a defense. Defendant asserted that plaintiff had fraudulently induced him to enter the agreement by misrepresenting the authenticity of a painting. However, the court found that plaintiff had had the exclusive, discretionary right to rescind any sale. Defendant also relied on mistake but failed to offer any non-conclusory proof that plaintiff had had knowledge that the painting had been authentic. A breach of fiduciary duty claim failed since a separate transaction underlay that claim and such a transaction cannot defeat a 3213 motion. Motion granted. Christie's, Inc. v. Rothberg, Index No. 604972/98, 7/21/99 (Ramos, J.).

Procedure; leave to amend; prejudice from late assertion. Motion for leave to amend. Plaintiffs sought to change a contract-based case by abandoning those claims and adding fraud claims. Expedited discovery had closed. Defendants asserted prejudice from plaintiffs' intentionally delaying the raising of the new theories until after completion of discovery. Plaintiffs had learned of facts allegedly supporting fraud claims during discovery and yet had not sought leave to amend. Nine depositions had been taken thereafter, many abroad. The court stated that there was some support for the defendants' assertion that plaintiffs had deliberately misled them. Even if defendants had had notice of the underlying facts, they were entitled to notice of the claims. As defendants had not shown that discovery on the new claims was unavailable, the court granted the motion while providing that defendants would be reimbursed for actual expenses and reasonable attorneys' fees relating to discovery on the fraud claims. Genira Trade & Finance Inc. v. Refco Capital

Markets Ltd., Index No. 603233/98, 9/28/99 (Ramos, J.).

Procedure; leave to amend; timeliness of motion. Statute of frauds (UCC 8-319); adequacy of writing; signature as agent. Misrepresentation; breach of contract. Fiduciary duty. Suit by former convertible securities trader against ex-employer regarding sums allegedly due plaintiff. Motion by defendants for leave to amend and partial summary judgment. The court found that defendants had not offered an explanation for only bringing the motion months after the filing of the note of issue. However, the court concluded that plaintiff had failed to make an adequate showing of prejudice from the delay. Leave granted conditioned on payment of costs and fees of $ 500. Defendants argued that an alleged agreement whereby plaintiff would receive a percentage of profits in an account traded by him was barred by the statute of frauds (UCC 8-319(a)). The court found that the complaint alleged a sale of securities, not a modification of an interest in an account. Plaintiff argued that a daily activity sheet constituted a writing and that he had signed it as agent for plaintiff. The court rejected the agency claim. The signature was done in plaintiff's own interest. Therefore, the claim was barred. The court found that a fraud claim was duplicative of the contract claim as the fraud alleged was defendant's failure to perform under the alleged agreement. A breach claim may not be the basis for a tort claim unless a legal duty independent of the contract itself has been violated. Plaintiff alleged a breach of fiduciary duty because he had been a partner of the individual defendant. However, the plaintiff had stated in an affidavit previously that he had had no ownership rights in the entity and he had received 1099 forms showing that the entity had been converted to a limited liability company. Leave to amend granted. Summary judgment granted in part. Kleinser v. Rockrimmon Securities, Index No. 606139/96, 7/22/99 (Ramos, J.).

Procedure; limitations; contractual; equitable estoppel. Quasi-contract. Action to recover as assignee under patients' health care policies. Certain sums were billed and paid. Plaintiff rebilled and the insurers refused to pay. The insurers argued that the claims were time barred under limitations provisions in the policies. The court agreed that the policies contained shortened times to sue, which are enforceable if agreed upon, reasonable and in writing. The court found the three-year period reasonable. Whether as assignee or third-party beneficiary, the hospital would be subject to the same defenses as the patients. The hospitals' mere suspicion that the patients had not received the policies and thus not been aware of the limitations period was found insufficient to defeat the motion. Plaintiff sought to argue that no "loss" had occurred until after discharge, but it had billed the insurers for and been paid for services to the patients. Further, the court stated, plaintiff's position effectively was that the deadline for filing a claim and for a limitations period would be determined by the billing practices of the hospital. The hospital argued that the insurers should be equitably estopped from asserting the defense because their conduct had led plaintiff to believe that payment would be made. Investigation of a claim or settlement negotiations by themselves do not rise to an estoppel where there is no evidence that a defendant engaged in protracted investigation, etc. intending thereby to lull the plaintiff into inactivity. The court determined that there was an absence of proof to establish an estoppel or a waiver. The hospital's quasi-contract theories failed since there was a contract governing the parties. Motion to dismiss granted. Presbyterian Hospital v. Aetna Life Ins. Co., Index No. 601337/98, 7/9/99 (Cahn, J.).

Procedure; motion to dismiss (CPLR 3211(a)(1)&(7)). Contracts; interpretation. Fiduciary duty; relationship giving rise to duty. Action by trustee of two investment funds arising out of three non-deliverable forward contracts for Russian rubles. A controversy arose after the Russian Central Bank altered the process for trading rubles by creating a morning session for purchases in connection with export/import contracts and an afternoon session for commercial bank trading. The parties disagreed on the exchange rate set by defendant under the contracts. Plaintiff claimed that the morning session had not been a true exchange market session due to government regulations and that the rate set thus violated the contracts. The court ruled that it did not matter that the rate set at the morning session had been rejected by other market participants for these sorts of contracts. The contracts contained procedures for determining the rate and defendant had followed them. The fact that the parties had not foreseen the creation of the special morning session did not create a breach of contract when the procedures therein had been adhered to. As the parties had engaged in an arms-length business transaction, defendant had owed no fiduciary duty to plaintiff. Motion to dismiss granted. CIBC Bank & Trust Co. v. Credit Lyonnais, Index No. 606202/98, 8/30/99 (Ramos, J.).

Procedure; motion to dismiss (CPLR 3211(a)(7)); motion to amend; papers in support; reply papers. Contracts; interpretation. Such a motion will be denied unless affidavits conclusively establish that the plaintiff has no cause of action. The motion may be granted where the terms of the contract prevail over the conclusory allegations of the complaint. A breach claim by franchisees alleged that the franchisor had improperly changed rules governing vouchers and tickets. Defendant argued that language referring to company policies in effect "from time to time" allowed it to change the rules. The court found, however, that the agreement was not conclusively clear as to this. The court ruled otherwise as to language permitting the franchisor to create new franchises and as to means for calculation of commissions, which plaintiffs had challenged. Motion granted in part. A cross-motion to amend was denied as it was supported only by an attorney affirmation (CPLR 3211(e)). A proposed amended complaint and an affidavit from a plaintiff submitted in reply came too late, depriving defendant of a chance to respond. Cross-motion denied with leave to renew. US Shuttle Inc. v. Gray Line Shuttle, Inc., Index No. 120642/98, 6/30/99 (Shainswit, J.).

Procedure; motion to dismiss on documentary evidence. Conversion; duplication of breach of contract. Misrepresentation; breach of contract; reliance. Punitive damages. Suit by apparel manufacturer arising out of sales representation agreements. The court declined to dismiss claims on documentary evidence that plaintiff was to have been repaid on a loan out of commissions. Although an agreement so provided, it was unclear what had been intended in the event that the loan had not been repaid prior to the defendant earning commissions. The court declined to dismiss other claims because of conflicting clauses in a document relied on. The court dismissed certain conversion claims because they duplicated a breach of contract claim, seeking damages for the same conduct alleged in the latter, and because there is no tort of "negligent conversion." As to fraud, a claim therefor will not arise, the court stated, if the alleged fraud merely relates to a breach of contract. The court found such overlap here and dismissed claims. The court rejected a particularization argument but did direct dismissal of another claim where plaintiff had failed to allege reliance (false representations to third party vendors). Claims for punitive damages were dismissed for failure to allege harm to the public generally. Marubeni America Corp. v. Grossman, Index No. 605635/98, 7/19/99 (Cozier, J.).

Procedure; motion to dismiss (other action pending). The court found that the New York action had been filed prior to the Connecticut action. The subcontract agreement at issue contained a clause in which the parties agreed that any disputes would be resolved in this court. Further, the Connecticut action was not between the same parties and did not seek the same relief. Defendant in the alternative sought a stay of this action. Such relief may be granted in a proper case, on such terms as may be just. The court found that this was a proper case for a stay. The complaint sought a declaratory judgment that plaintiff had no further obligation under the subcontract. The Connecticut action sought damages for delays. Thus, the Connecticut claims were intertwined with the New York ones. Dismissal denied; stay granted. A.A. C. Contracting, Inc. v. Dobco, Inc., Index No. 12579/98, 8/5/99 (Stander, J.).

Procedure; motion to renew. The court found that the defendants had submitted facts that had not been presented on the original motion, but that these facts had been known and available to, and in the possession of, the defendants at the time of the original motion. The defendants argued as justifiable excuse for not presenting such information originally that the relevant files had been in storage and/or there had not been time to obtain the facts. The court noted that the facts had been in the possession of defendants in early September when the motion had been brought on and that they had been given a lengthy adjournment and yet had not retrieved the files from storage. One of the affidavits now submitted was merely a more comprehensive presentation in light of the court's unfavorable ruling. This did not satisfy the standards for renewal. Motion denied. Braitman v. Minicucci & Grenga, Index No. 11190/97, 9/99 (Stander, J.).

Procedure; personal jurisdiction; meetings in New York. Forum non conveniens; alleged breach of non-compete abroad. On motion to dismiss for lack of personal jurisdiction, the court noted that New York is a single act jurisdiction (CPLR 302(a)(1)). The court found that the action arose out of contacts with this state. There had been three-five meetings in New York in furtherance of the business at issue here. Jurisdiction was upheld. As to forum non conveniens, the court noted that the burden of retaining the action here would not be great, nor would that of construing Ontario law. But, the court stated, defendant was a Canadian resident employed there; the challenged conduct of improperly competing had occurred there; presumably his documents were to be found there, as were those of one

plaintiff; and any non-party witnesses would be found in Canada. Plaintiffs argued that they would be inconvenienced by having to send documents and persons to Canada, but the only potential New York witnesses were employees of plaintiffs, over whom they had control, whereas defendant's were non-parties located in Canada, and more documents were likely to be in Canada than here. The only New York resident was one plaintiff, the parent of the other, a Canadian entity, which had been defendant's employer. This residency did not justify keeping the case here. Any injunction that might be issued would have to be enforced in Canada. Case dismissed. Leveraged Technology, Inc. v. Flanz, Index No. 601695/99, 9/17/99 (Cozier, J.).

Procedure; pleading; prima facie tort; intentional interference with prospective economic advantage; malice; libel; falsity; innuendo. Action for libel and other wrongs arising out of Federal copyright infringement case regarding "Star Trek" television program and movies. Attorneys for the defendant here had there written to booksellers describing a Federal preliminary injunction issued against the publisher and author, but failing to mention that the booksellers had been held by the Federal court not to be bound by the injunction as non-parties to that case. The court here found that the complaint failed to set forth any factual basis for the assertion that Paramount had been motivated solely by malice, thus defeating prima facie tort and intentional interference claims. The court stated that the letter had not been directly false, but that the implications and omissions had allegedly been intentionally. misleading. The court noted that the scope of the injunction had been unclear, requiring supplemental action from the Federal Judge. Confusion alone is not sufficient to state a libel claim. Innuendo may help to explain, but it cannot enlarge, the meaning of words. Complaint dismissed. Carol Publishing Group v. Paramount Pictures Corp., Index No. 604389/98, 6/18/99 (Shainswit, J.).

Procedure; pleading; unfair competition; tortious interference; assault; infliction of emotional distress; trespass. Action for misappropriation of trade secrets. Motion to dismiss counterclaims for failure to state a claim. Defendants attempted to allege a counterclaim for unfair competition. However, the court found, allegations of threats or disparaging statements do not constitute alleged misappropriation of skill or labor. General allegations of contact with defendants' customers do not suffice either. An interference with business claim failed for that reason as well. As to alleged assault, threats alone do not rise to that level. One confrontation alleged here did not amount to more than a threat. As to another confrontation, defendants cannot allege that there was intent to place a defendant in apprehension of imminent harm as the defendant had not been present at the time. Phone calls were not assault for like reason. Nor were there allegations linking intruders to plaintiffs. The allegations of severe emotional distress were found conclusory and there were no allegations as to who had made the threats. The court sustained a claim for trespass asserting that plaintiffs had entered defendants' premises uninvited and rummaged through papers and desks. Business Networks v. Complete Network Solutions, Index No. 605463/98, 8/31/99 (Ramos, J.).

Procedure; summons; date of filing; leave to amend; pleading; breach and misrepresentation. Summons failed to contain the date of filing with the County Clerk's office. However, the adversaries did not demonstrate or even allege that they had suffered prejudice as a result and the court did not find any. The service with an index number but lacking the filing date was, the court held, a mere irregularity, not a jurisdictional defect. On a motion to amend a pleading, the claim for breach of contract would be plainly insufficient since it alleged action by an agent of the bank to undertake to supply money to defendants/counterclaimants but did not assert that the defendants/counterclaimants had ever applied to Citibank for loan monies or that the bank had denied any. For similar reason, the court ruled that a proposed misrepresentation claim was deficient. Transit Management, LLC v. Watson Industries, Inc., Index No. 10524/97, 7/26/99 (Stander, J.).

Real property; commercial lease; interpretation of terms. Lease extension. As the tenant had not agreed to extend the term for certain space, under the amendment the parties were required to agree by a fixed date on a suitable method of restoring a portion of the premises to their original condition. They were unable to agree by the date. The court found that the parties had considered what would happen in the event that they were unable to agree. The court based this on the language of the extension and a successor, extensive negotiations and meetings between them as to the lease, and the exchange of proposals. As set forth in the extension, if the parties failed to agree, the lease would be extended into 2001, and would then terminate. Charter One Bank v. Midtown Rochester, LLC, 13745/98, 8/11/99 (Stander, J.).

Real property; Real Estate Settlement Procedures Act (12 USC 2601); standing; statute of limitations. Inaccurate reporting of credit information. Money had and received; mortgage payments. Action under RESPA and the common law. The court rejected defendant's reading as to the portion of the Act that plaintiffs were proceeding under. The court also rejected plaintiffs' analysis, noting that plaintiffs had erroneously conceded defendant's contention that the relevant section (6) had been repealed. The court found that the complaint stated claims under section 6 and that plaintiffs had standing to sue thereunder. The court rejected defendants' contention that the claims were time barred because brought more than three years after the closing. The proper calculation was three years from the violation, which had not occurred at the closing, but after, when defendant had failed to respond to inquiries from plaintiffs about insurance. The court rejected plaintiffs' contention that the wrongs were continuing ones. The court concluded that the claims were time-barred but only in part. The common law claims were based upon allegedly inaccurate reporting of information to a credit reporting agency and for wrongfully obtaining monies for flood insurance and late charges. The court disagreed with defendant that these claims were dependent on the RESPA claims, although on that theory they would stand in part anyway. The court determined that the claims could stand independently of the RESPA claims. Summary judgment granted to defendant in part. Shofi v. Mercantile Mortgage Bankers, Ltd., Index No. 17570/98, 9/24/99 (DiBlasi, J.).

Real property taxes; right to refund. Quasi-contract; effect of written contract; wrongful conduct as bar to equitable relief. Procedure; summary judgment. Tenant of commercial building sued and achieved a refund of real property taxes after its leases had ended. It commenced this action for a declaratory judgment that it was equitably entitled to so much of the refund as covered the period up to lease termination. Plaintiff had paid the taxes as additional rent. Defendants counterclaimed for damages for plaintiff's failing to leave the property in good condition and repair. The court noted that the party who has paid the tax is entitled to receive any refund. A quasi-contract remedy generally cannot be brought where there is a valid and enforceable written contract. However, one may so proceed where there is a bona fide dispute whether a contract exists or where the contract does not cover the matter in question. The court discussed cases on point and noted that the key distinction was whether the writing in question appears to contemplate the subject matter of the dispute in any way, or whether the document is entirely silent. Here the court held that the leases were entirely silent as to the question of the allocation of refunds in the event of surrender. Thus, the plaintiff was permitted to seek a recovery on a theory of unjust enrichment. The court found that defendants had failed to show even a remote possibility that there was any evidence on the question of the parties' intent regarding the refunds. Discovery was not needed. Defendants had failed to meet their burden on summary judgment. The court stated that even if it were to consider the alleged breaches as directly related to plaintiff's right to the refunds, the breaches did not rise to the level of immoral or unconscionable conduct such as would bar equitable relief nor was the counterclaim intertwined with plaintiff's claim. The court found that defendants had been unjustly enriched by retaining the refunds. Partial summary judgment granted to plaintiff for a declaratory judgment. Investment Properties Associates v. Newark Building Associates, Index No. 601577/97, 9/13/99 (Cahn, J.).

UCC Art. 2; application to software; statute of frauds; part performance. Misrepresentation; duplication of contract. Joint venture; sharing losses; joint control. Corporations; piercing the veil. Motion to dismiss. The court held that an agreement to develop software fell within UCC Art. 2. The main thrust was the development and delivery of software; the intellectual work was subsumed into tangible items for sale. The court held that a jury could find that there had been part performance sufficient to take the case out of the statute of frauds (UCC 2-201) where substantial payments had been made and work done. The court upheld a fraud claim against an argument that it duplicated the contract claim. The court ruled that a joint venture claim failed since there was no agreement to share losses alleged (agreeing to work at a lower than normal hourly rate did not so signify) and there was no allegation that there had been joint proprietorship and control. The court found that the veil could not be pierced since domination did not suffice and not enough had been alleged as to a wrongful or unjust act. ReadQ Systems, Inc. v. FrameContext, Inc., Index No. 604670/98, 8/19/99 (Cozier, J.).

Undertaking; vacatur on settlement. Motion to vacate undertaking (CPLR 6212). A TRO restrained two accounts of defendant at non-party Bank of New York. An undertaking had to be and was posted. The litigation had been settled. However, BNY argued that the undertaking should remain in place because the judgment entered had not been fully satisfied. On a prior motion, the court had ruled that the bond was not to be a blanket indemnity. The court now found

that BNY had failed to present any authority to support the proposition that the undertaking had to remain in place indefinitely. Further, the court noted, the law of the case had been settled. The surety is entitled to be discharged where an action in which an undertaking has been given to secure a judgment has abated; settlement would warrant the same result. Cargill Financial Serv. Int. Inc. v. Joint Stock Bank Inkombank, Index No. 604377/98, 9/28/99 (Ramos, J.).

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[Home] [Inaugural Issue March 1998] [Law Report - May 1998] [Law Report - July 1998]
[Law Report - October 1998] [Law Report - January 1999] [Law Report - March 1999]
[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]
[Law Report - March 2001] [Law Report - May 2001] [Law Report - October 2001]
[Law Report - January 2002] [Law Report - March 2002]