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

Hon. Judith S. Kaye

Chief Judge of the State of New York

Hon. Jonathan Lippman

Chief Administrative Judge of the State of New York

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Accounting malpractice; statute of limitations. Attorney and client; alleged fraud and negligence by attorney; liability to a third party. Release; fraud as bar. Defendant, both a certified public accountant and an attorney, moved to dismiss the four causes of action in which he was named in the complaint in his individual capacity. The court granted the motion in part. The first two claims at issue related to accounting services that defendant had provided to plaintiff. Although nominally framed as breach of contract and negligence claims, the court said that both claims should be construed as accounting malpractice claims. The court determined that defendant was entitled to dismissal of these claims on statute of limitations grounds. The court explained that an accounting malpractice cause of action accrues when the malpractice allegedly occurred, not when it was discovered by plaintiff. In other words, a cause of action for accounting malpractice accrues upon receipt of the accountant's work product by the client. Because defendant had last performed accounting services for plaintiff in March 2002, plaintiff had had until March 2005 to file its claim for accounting malpractice. Plaintiff did not commence the instant matter until August 2005. The second set of claims at issue on the motion, a fraud claim and a negligence claim, related to legal services that defendant had performed for his co-defendant accounting firm. After plaintiff had discovered that he owed tens of thousands of dollars to the IRS in overdue taxes, defendant, in his role as an attorney, had prepared a legal release that purported to release him and the accounting firm from liability and he had persuaded plaintiff to execute it. Although an attorney ordinarily cannot be held civilly liable to a third party for actions taken on behalf of a client, the court explained that such a claim could withstand a motion to dismiss if plaintiff could plead "fraud or collusion, or a malicious or tortuous act." Here, the court held that plaintiff had, in fact, pleaded fraud in the complaint by alleging that it had executed a legal release in favor of defendant in reliance upon defendant's misrepresentations. The court similarly found that the release itself was invalid and that it did not bar plaintiff's claim because it had been obtained through fraud. Finally, the court dismissed plaintiff's cause of action for negligence, concluding that the allegations did not contain the requisite malicious intent needed to impose liability on defendant for actions that he took on behalf of a client. Motion granted in part. A. Morrison Trucking, Inc. v. Bonfiglio, Index No. 25917/2005, 9/18/06 (Demarest, J.).**

Appraisals; motion to confirm; timeliness; scope of review; CPLR 7601; election of remedies; statute of limitations. Plaintiff, former president of defendant limited liability company ("LLC"), moved to confirm an appraisal of his equitable interest in the LLC. Plaintiff had sought to exercise a "Put Option" under the LLC's Operating Agreement when the LLC's majority member had removed plaintiff from his position as president after information had allegedly surfaced that plaintiff had been receiving kickbacks from one of the LLC's suppliers. The Put Option required, depending upon whether plaintiff was terminated as president for cause or without cause, either the defendant LLC or the defendant majority member to purchase plaintiff's membership interest. The Operating Agreement provided for the membership interest to be purchased at a defined "Appraisal Price." If the members of the LLC could not agree upon a fair market value, each member was to select a "Certified Valuation Expert" to make an appraisal and the Appraisal Price would equal the average of the valuations provided by the appraisers. After the parties exchanged appraisal reports, plaintiff brought an action, *inter alia,* for breach of contract to challenge the appraisals of the defendant LLC members. The court dismissed the breach of contract claim on the ground that plaintiff had failed to allege that defendants had breached the Operating Agreement by obtaining their appraisals fraudulently and in bad faith. Plaintiff both appealed the dismissal and moved to confirm the Appraisal Price – in effect seeking a confirmation of the amount calculated under the Operating Agreement's formula, while challenging defendant members' appraisals. Defendants opposed confirmation on the ground that the motion to confirm was barred by plaintiff's election of remedies – pursuing a breach of contract action that sought to vacate defendants' appraisals and enforce his own appraiser's valuation. Defendants also opposed on the grounds that the motion to confirm was time-barred, since it was brought more than a year after the appraisal, that plaintiff's appraisal was the product of bias, fraud or bad faith and that outstanding litigation issues between the parties – including whether plaintiff's termination was for cause – rendered the motion premature. The court confirmed the Appraisal Price because it found that it had been determined in accordance with the terms of the Operating Agreement. The court held that the motion to confirm was not barred by the election of remedies doctrine because the motion was not inconsistent with plaintiff's first cause of action for breach of contract; both sought to affirm rights under the Operating Agreement; the dispute was just over the amount and propriety of the appraisals. In addition, the court held that the motion was not barred as untimely. Although CPLR 7601 provides that the "court may enforce" an agreement to obtain an appraisal "as if it were an arbitration agreement," an appraisal and an arbitration are "not subject to all of the same formalities." Also, while arbitration usually resolves the entire controversy between the parties, an appraisal usually does not, leaving all questions other than valuation to be determined at trial. Accordingly, the court found that the one-year statute of limitations to confirm an arbitration award under CPLR 7510 and/or the one-year period under CPLR 215(5) for "an action on an arbitration award" do not apply to a motion to confirm an appraisal award since the appraisal does not resolve all of the issues between the parties. The court also rejected defendants' objections to the valuation of plaintiff's appraiser because defendants did not demonstrate any fraud or bad faith on behalf of the appraiser, the appraiser had broad discretion to determine which factors were relevant to the valuation, and the market-based valuation method he had used was reasonable and was not prohibited by the Operating Agreement. However, the court stayed entry of judgment until the other issues between the parties were resolved. Pianin v. Spier, Index No. 601230/2005, 08/9/06 (Freedman, J.).

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manufacturer that did not itself use defendant but bought from vendors all over the world that periodically shipped its purchases via defendant, and a Westchester woman who had bought a coat from a vendor abroad that had shipped it via defendant. They alleged that the Airwaybill was a contract between defendant and a class of recipients, who were either direct parties to it or third party beneficiaries of it. Plaintiffs claimed that defendant had breached its contract. The shipper had removed the action from state to federal court, which had remanded it because the Airline Deregulation Act did not completely preempt the state law claims and because claimed damages were below the $75,000 threshold for diversity jurisdiction. On commonality, plaintiffs argued that two questions of law relating to breach and liability to the class overshadowed any individual issues. The court, however, held that plaintiffs were not parties to the contracts involved here. By plaintiffs' own allegations, the contracts were between defendant and the vendors. Thus, there was no common issue as to whether defendant had breached its contracts with class members. Further, plaintiffs lacked standing, which impacts the CPLR 901 analysis. The vendors were likely to know of defendant's billing policy, which was the issue here. In determining certification, the court may consider the merits with a view toward eliminating deficient suits as early as possible. Moreover, the Conditions of Carriage provided that disputes were governed by the law of the country of origin of the shipment; thus even if plaintiffs and the proposed class members had had standing as third party beneficiaries, class certification would have required the court to distill the laws of numerous foreign jurisdictions. The problem would worsen with the second proposed sub-class of non-New York residents. There would be a series of mini-trials. Plaintiffs also failed to demonstrate that their claims were typical. The individual plaintiff, defendant contended, was subject to unique defenses because she had waived her claim by not bringing it within 30 days. Plaintiffs argued that defendant had waived that defense by not raising it earlier, but the waiver argument would not apply to other putative class members. Regarding the manufacturer plaintiff, obtaining goods had not been conditioned on its paying the processing fees. It complained that it had paid the fees under duress, in the face of threatened actions by defendant that would have tarnished its credit rating. There was, however, no indication that this matched the situations of other proposed class members. Plaintiffs failed to establish that questions of fact common to the proposed class predominated over individual questions. Class certification denied. King's Choice Neckwear Inc. v. DHL Airways, Inc., Index No. 120513/2002, 4/6/2006 (Cahn, J.).

Class actions; certification; commonality; predominance; superiority. Defendant had manufactured, distributed and sold purported diet food products under the name of "Stay Slim." The products had been marketed to health conscious consumers interested in weight loss. Plaintiff alleged that the nutritional information printed on the products inaccurately represented the products as low in calories,

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carbohydrates, fat and sodium. Under GBL 349 and on other theories, plaintiff sought compensatory damages and a fund of defendant's improperly retained profits. Plaintiff moved pursuant to CPLR § 901 for an order determining that the action was a proper class action. Plaintiff urged that the class include all New York State citizens who had purchased products during a certain period. The court denied plaintiff's request for certification, finding that plaintiff's motion failed to satisfy all of the elements of CPLR § 901. The court explained that the purported common issues asserted by plaintiff were dependent on resolution of individual issues of causation and reliance as to each member of the class. Members of the class could have had a variety of reasons for using defendant's products and might not have purchased the products based on the nutritional information printed on the packages. Further, defendant's statute of limitations defense could not be determined on a class-wide basis. Motion denied. Gentile v. Stay Slim, Inc., Index No. 19139/2005, 4/3/06 (Kitzes, J.).**

Class action; certification; numerosity; commonality; typicality; adequacy of representation. Insurance; demutualization; Insurance Law § 7312 (the Conversion Law). Fraud; reliance. Under a Plan of Reorganization (the Plan), defendant insurance company had converted itself from a mutual life insurance company to a domestic stock company through a process called "demutualization" ("the Conversion Law"). Before they voted to approve the demutualization, all the company's policyholders had received a copy of the Plan, on the effective date of which each policyholder's intangible interest in the insurance company was extinguished in return for common stock in the reorganized company. Plaintiff policyholders filed a series of lawsuits, later consolidated, that challenged the Plan's fairness and the insurance company's compliance with the Conversion Law. After defendant moved to dismiss, plaintiffs had sought to certify a class pursuant to CPLR 901 for their two surviving claims: (1) that defendants had violated the Conversion Law based on (a) defendants' undisclosed preferential treatment of certain large and/or complaining policyholders by giving them shares of stock that exceeded the amounts calculated under the formula set forth in the Plan; and (b) defendant insurance company's undisclosed plan to buy back its own shares after the IPO; and (2) for common law fraud, based on defendants' failure to disclose the stock buy back in the materials sent to policyholders prior to the demutualization vote. The court partially certified the class. It held that plaintiffs had satisfied the numerosity requirement for both claims because defendant insurance company had millions of policyholders. With respect to commonality, the court held that there were common questions relating to the class, such as whether the company had planned to buy back stock after the initial public offering and whether the failure to disclose the claimed preferential treatment injured policyholders. The court found that these common questions predominated over questions affecting individual members for the Conversion Law claim. For the common law fraud claim, however, the court raised concerns that individual questions predominated; the evidence indicated that multiple factors had influenced how the policyholders voted, and plaintiffs failed to establish that reliance, an essential element of fraud, could be presumed or readily inferred for each policyholder or that the alleged omissions were material and would have affected the way policyholders voted. Moreover, while reliance is not required where causation is shown for actions brought under GBL § 349 and certain federal securities laws, the court found that plaintiffs had cited no authority to establish that causation alone is sufficient to plead and prove common law fraud. The court then held that plaintiffs had satisfied the CPLR's typicality requirement for the Conversion Law claim because plaintiffs' alleged injuries and claims derived from the same acts and conduct as those of the class, and plaintiffs' legal theories were identical to the class's. The court further held that plaintiffs had satisfied the adequacy of representation test in that their general awareness of the claims and competence of their counsel were adequate to protect the class. The court noted, however, that to the extent that certain class members may have allegedly received compensation beyond that set forth in the Plan's formula, such class members would be excluded. The court next held that a class action would be superior to other methods to litigate the controversy because the class was large and the amounts sought per policyholder were relatively small. Finally, the court held that the prerequisites for CPLR 902 were satisfied because of the impracticability of bringing individual suits for violation of the Conversion Law and the desirability of concentrating litigation relating to that New York statute in New York. After narrowing the class definition, the court granted plaintiffs' motion for class certification with respect to the Conversion Law claim. Fiala v. Metropolitan Life Ins. Co., Index No. 601181/2000, 5/2/06 (Cahn, J.).

Collateral estoppel; unclean hands; full and fair opportunity to litigate. Statute of limitations; equitable claims; tolling. Procedure; CPLR 3016(b); pleading with particularity. CPLR 3001; motion to dismiss; prior

action pending. Unjust enrichment. Tortious interference with prospective business relations; malice. Damages; punitive damages. Attorney and client; disqualification; attorney-client relationship; substantial relationship test; receipt of confidential information. Two cases involving the same parties arose from a dispute between IDT and Morgan Stanley, its former advisor, involving Morgan Stanley's alleged interference with IDT's planned equity investment in and agreement to become the anchor tenant of a third party fiber-optic cable system. IDT alleged that Morgan Stanley had misappropriated confidential IDT information and shared it with the third party to induce it to breach its agreement with IDT so that Morgan Stanley, which also represented the third party, could earn investment banking fees by arranging for an alternative investor for the third party. IDT alleged breach of fiduciary duty, intentional interference with contract, intentional interference with prospective business relations, misappropriation of confidential and proprietary business information, and unjust enrichment. In the other action, Morgan Stanley sought indemnification for legal fees and expenses that it incurred in defending against IDT's claims, and related declaratory relief regarding the indemnification agreement and engagement letter it had previously entered into with IDT. Morgan Stanley moved to dismiss IDT's action on grounds of collateral estoppel, statute of limitations, and failure to state the claims asserted. The court rejected Morgan Stanley's collateral estoppel argument that the claims upon which the action was premised had been resolved in an arbitration between IDT and the third party. In particular, the court noted that IDT had alleged that Morgan Stanley had perpetrated deception on both IDT and the arbitration panel; such allegations of unclean hands raised questions as to whether IDT had had a full and fair opportunity to litigate the issues in the arbitration and whether Morgan Stanley should be precluded from asserting the equitable doctrine of collateral estoppel, and warranted discovery. The court also rejected Morgan Stanley's statute of limitations argument in its entirety, holding that its tortious interference with contract claim had not accrued until the arbitration panel had found the existence of a contract between IDT and the third party; its breach of fiduciary duty claim was equitable in nature and therefore governed by a six-year statute of limitations; its unjust enrichment claim was also brought within the six-year limitations period for that cause of action; and its misappropriation claim presented triable issues as whether equitable estoppel tolled the statute of limitations until IDT's discovery of Morgan Stanley's alleged conduct. The court sustained Morgan Stanley's motion to dismiss for failure to state a cause of action only with respect to IDT's claim for tortious interference with prospective business relations. With regard to that claim, the court held that IDT's allegation that Morgan Stanley had engaged in wrongful conduct in order "to earn lucrative investment banking fees" was fatal to the claim that Morgan Stanley was motivated solely by malice or anything other than economic considerations. As to IDT's causes of action for breach of fiduciary duty and misappropriation of confidential information, the court found the claims to be pled with sufficient particularity to withstand a CPLR 3016(b) challenge; IDT's complaint set forth numerous instances in which Morgan Stanley had allegedly provided confidential IDT business information to the third party and allegedly disparaged IDT to the third party. As to IDT's unjust enrichment claim, the court held that the alleged existence of a contract between the parties - - IDT's engagement letter with Morgan Stanley for investment banking services - - did not preclude the quasi-contract cause of action; IDT alleged that the engagement letter had been coerced and thus void, and even if such allegations failed, the court found that the engagement letter did not govern the subject matter of the action (*i.e.*, Morgan Stanley's alleged misappropriation of confidential IDT information for its own benefit), and thus did not preclude a claim for unjust enrichment. The court also rejected Morgan Stanley's motion to dismiss IDT's request for punitive damages, holding that punitive damages are available in a tort action for conduct involving deliberate action conducted for profit, even if the wrongful conduct had not been aimed at the general public. In regard to IDT's motion to dismiss Morgan Stanley's complaint as a matter of discretion pursuant to CPLR §§ 3011 and 3211(a)(4), the Court held that Morgan Stanley's claims would not be dismissed because only some of the claims were for declaratory relief, the other claims were not entirely co-extensive with the request for declaratory judgment, and forum shopping and conflicting legal rulings were not a concern because both Morgan Stanley's action and IDT's action were pending before the same court. Finally, the court denied IDT's motion to disqualify Morgan Stanley's counsel, holding that counsel had not had a prior attorney-client relationship with IDT, that there was no substantial relationship between the issues in the current litigation and those in the alleged prior representation, and that IDT had failed to show that counsel had received specific confidential IDT information. Morgan Stanley & Co., Inc. v. IDT Corp, Index No. 603194/2004; IDT Corp. v. Morgan Stanley Dean Witter & Co., Index No. 603710/2004, 4/10/06 (Cahn, J.).

Contracts; asset sale agreement; duty of seller not to interfere. Procedure; pleading; liability of parent corporation. Defendant had entered into an asset sale agreement with plaintiff for a 185 bed nursing facility. The agreement had expressly included goodwill associated with the facility. After the closing, plaintiff had continued to operate the premises as a nursing facility. A co-defendant had executed two guarantees in connection with the sale and was described in the agreement as a third-party beneficiary of a provision whereby between the signing of the agreement and the date of closing, defendant was required to operate the subject facility in the ordinary course, consistent with past practice. Plaintiff alleged that defendant was owned and/or controlled by the co-defendant. Plaintiff claimed that instead of operating the facility in the ordinary course, defendants had caused representatives of a government agency to persuade residents to move to other facilities owned or controlled by co-defendant. Plaintiff asserted causes of action for breach of contract and other wrongs. Defendants moved to dismiss. Defendants argued that co-defendant had not been a signatory to the parties' agreement and thus owed no duty to plaintiff. Defendants further contended that the agreement contained no written obligation requiring defendant to refrain from soliciting facility residents, and that plaintiff had failed to allege facts that established that defendant had solicited residents or breached the agreement. Moreover, defendant's contacts with the residents, it urged, had been made in good faith and pursuant to direct request by State officials. The court determined that the co-defendant had not been a signatory to the agreement and that it could not be held liable solely on the basis of ownership of the subsidiary. The complaint did not contain the requisite allegations of complete dominion necessary to establish liability. The court therefore dismissed the complaint as against the co-defendant but granted plaintiff leave to replead. The court next found that although the agreement had not contained a restrictive covenant barring UCP-Bayview from soliciting residents from plaintiff's facility, that duty was one implied by law. A seller of a business cannot actively interfere with the buyer's relationship with its new customers, although the latter may freely choose whether to continue to patronize the business. The court ruled that claims were stated for pleading purposes and defendant's argument that its conduct was immunized because any actions taken had been engaged in in good faith and at the direction of State officials should be pled and proven as a defense. Motion denied. Bayview Manor LLC.v. United Cerebral Palsy of Nassau County, Inc., Index No. 17974/2005, 5/1/06 (Bucaria, J.).**

Contracts; breach; damages; equitable versus legal; option pricing models; speculative and hypothetical damages. Attorney's fees. Action arising out of a securities purchase agreement between plaintiff funds and defendant whereby defendant sold a note convertible into American Depository Shares and a note-linked security that gave plaintiffs a right to acquire additional ADSs (a type of call option) at an exercise price. After a dispute arose and this action began, the court ordered specific performance in favor of plaintiffs with respect to adjustments whereby plaintiffs could acquire shares. The court tried the issue of damages. Since the award of specific performance produced only defective or partial performance, plaintiffs were entitled to damages that would, as nearly as possible, place them in the positions they would have been in had defendant performed fully and on time. The court looked to what would naturally flow from the breach by way of damages, be within the contemplation of the parties and be proven to a reasonable degree of certainty. Plaintiffs were entitled to the difference between the value of what had been received and the value of what would have been received if the contract had been performed according to its terms. An option is a wasting asset, the court stated, and defendant's delay had produced a loss that naturally flowed from the delay. Such a loss was or should have been within the contemplation of the parties. The plaintiffs had offered at trial pricing models to obtain valuations and the court found these credible. The court also noted that the models had been accepted in other cases, had not been disputed by defendant, and found some support in the options here. The court rejected defendant's contention that the plaintiffs' damage calculations were hypothetical and speculative. The court also rejected defendant's argument that the damages measure was not appropriate because defendant had rendered some performance here, though belatedly. The court distinguished cases cited by defendant, including Freidus, wherein real property, which is not a wasting asset, was at issue. In any event, plaintiffs had met their standards for an award of equitable damages. The court fixed the date of breach and a damages cut- off date, the date of defendant's delayed, partial performance. The court refused to award plaintiffs counsel fees because it ruled that the clause relied upon by plaintiffs had to do with indemnification on a third-party claim. HFTP Investments, LLC v. Grupo TMM, S.A., Index No. 602925/2003, 5/06 (Gammerman, JHO).**

Contracts; breach; exculpation and indemnification clause; litigation fee-shifting clause; public policy. Choice of law; effect of contractual choice of law provision. Breach of fiduciary duty; duty independent of contract; self-dealing. Forum non conveniens. Release. Accountants; malpractice; contractual privity. Collateral estoppel; privity. Liquidators of hedge fund sued the fund's: (i) investment manager for breach of contract; (ii) investment manager's principals for breach of their fiduciary duty of care, self-dealing, and negligence; (iii) offshore auditor and the auditor's U.S. affiliate for professional malpractice and aiding and abetting breach of fiduciary duty; and (iv) administrator for breach of contract, breach of fiduciary duty and aiding and abetting a breach of fiduciary duty. The investment managers had allegedly overvalued the fund's portfolio by failing to adhere to the valuation methodology set forth in the investment management agreement and the auditor and administrator had allegedly failed to detect and/or report the improper valuation. The principals of the investment manager had allegedly arranged for trades between the hedge fund and their own personal funds at prices that substantially favored their personal interests over the fund's. Defendants moved to dismiss the complaint. First, the court held that plaintiffs had stated a claim for breach of contract against the fund's investment manager for failure to adhere to a contractually-agreed-upon valuation methodology; plaintiffs had identified an obligation in a contractual provision with which, they alleged, defendant had failed to comply. Noting that the contract had a New Jersey choice of law provision, the court then examined whether the contract's indemnification and exculpation clause, which limited defendant investment manager's liability only to grossly negligent conduct and intentional malfeasance, provided a basis for dismissal of the contract claim. The court rejected plaintiffs' contention that such a clause violated New Jersey public policy since public policy only was contravened by contractual provisions that limited liability for all negligent acts; here defendants could be liable for gross negligence. Moreover, such public policy concerns had not been applied where all parties were sophisticated and there was not a concern about unequal bargaining power. Still, the court found that the complaint made sufficient allegations of intentional wrongdoing and/or gross negligence to withstand dismissal of the contract claim (or a claim of breach of the covenant of good faith and fair dealing). Plaintiffs then sought to disavow the contract's provision that required the fund to advance the investment manager's litigation defense costs unless and until intentional and/or gross negligent conduct is found. The court found for defendants, holding that such a fee-shifting provision is not void as against New York or New Jersey public policy, and that courts will enforce the agreements made by sophisticated parties in the absence of unconscionability. With respect to the claims against the investment manager's principals, the court first held that New York law would apply to the tort-based breach of fiduciary duty claims, even though the court applied New Jersey law, based on the choice of law provision in the investment management agreement. The court noted that under New York law, a choice of law provision that does not encompass the parties' entire relationship does not mandate application of that state's law to tort claims. Here, the agreement provided that New Jersey law would apply to the terms and provisions of the agreement. In any event, the court determined that there was no discernible difference between New Jersey and New York substantive law on the fiduciary duty claims, so the law of the forum state would be applied. The court found that no claim for breach of the fiduciary duty of care would lie because it was duplicative of the breach of contract claim; plaintiffs relied on the same allegations and the conduct and duty constituting the breach - - the failure to adhere to the contractual valuation scheme - - did not exist independently of the duty itself. The court did not dismiss the claim for self-dealing (*i. e.*, breach of the duty of loyalty). The court found that independent of the agreement, the fund had entered into a relationship with the investment manager whereby the investment manager was given full discretionary authority to purchase, sell and manage the funds; the fund had relied on the investment manager's superior knowledge, experience and expertise and had placed confidence in the investment manager. Nonetheless, as to the individual principals, the court found that to the extent they, as members of a limited liability company, had participated in the tort in furtherance of the company's business, they were insulated from liability. Thus, they were insulated from liability based on their alleged participation in the alleged overvaluation scheme. However, the allegations concerning trades between the fund and the individual principals' own trading funds were not done in furtherance of their company, and properly stated a claim for breach of fiduciary duty for self-dealing. With regard to the auditor and its affiliate's motion to dismiss, the court first rejected their argument that New York was an inconvenient forum for the Cayman Island-based auditor. That defendant had been and was currently defending a related Federal action in New York (in which it had not raised forum non conveniens concerns) and the audit work had allegedly been performed in New York, thus establishing a factual nexus between New York and the dispute. Although the defendant's residency outside New York weighed in defendant's favor, the lack of the availability of a trial by jury in the Cayman Islands militated against an alternative forum. As to the substance of their defenses, the court found that, under Cayman Islands law (the law chosen by the parties in the retainer agreement for the auditor), the release set forth in the retainer agreement would be strictly construed against the party seeking release. Based on that standard, the release, which appeared to insulate the auditors only from liability attributable to the malfeasance of the fund's management, did not exculpate the auditor from liability for its own tortious acts, including professional malpractice. As for the claim of professional malpractice, the court distinguished between the claims against the Cayman auditor and against its US affiliate. The court found that plaintiffs had sufficiently stated a claim for professional malpractice against the Cayman auditor, which had been retained by the fund, had issued an audited report upon which the fund allegedly relied, and which had allegedly negligently failed to discover the overvaluations in the financial statements. The US affiliate, however, had not been in contractual privity with the fund. Under such circumstances, the potential for accountant liability under New York law is carefully circumscribed. Here, the US affiliate had not provided any report to the fund, and there was no allegation either that the US affiliate's work had been incorporated into the audited financial report that the Cayman auditor had provided, or that it had been foreseeable that such work would be incorporated. Since there were no tangible representations by the US affiliate upon which the fund had relied, the court dismissed the malpractice claims asserted against it. Finally, with respect to the fund administrator, defendant argued that plaintiffs' claims were collaterally estopped by virtue of the federal court's dismissal of claims against the fund administrator brought by investors in the fund. The court agreed. The court found that the plaintiffs in this case had been in privity with the fund's shareholders and limited partners in the prior action, who were akin to its "organizational agents." The court then held that the issues in the prior Federal action - - the administrator's alleged failure to verify independently the accuracy of the valuations - - were identical to the issues in the case at bar relating to the fund administrator's contractual duties under the administration agreement. Thus, the court dismissed the breach of contract claim. Although collateral estoppel did not apply to the remaining claims, the court found that they also should be dismissed: the breach of fiduciary duty claim was duplicative of the contract claim, and the claim for aiding and abetting breach of fiduciary duty could not stand in the absence of a viable breach of fiduciary claim. Bullmore v. Ernst & Young Cayman Islands, Index No. 104314/2005, 4/12/06 (Ramos, J.).

Contracts; **construction; Education Law § 3813 (1); notice of claim; extension to serve; damages; "no-damages-for delay" clause. Procedure; statute of limitations. Arbitration; waiver by litigation.** After a bidding process, plaintiff had received a contract to perform construction work for a school district. Plaintiff had submitted a letter requesting additional monies over the contract price due to alleged costs from delays which had extended the progress schedule. At a certain point, plaintiff had mailed a notice of claim to the Superintendent of Schools. Then plaintiff had mailed a demand for arbitration to the Superintendent of Schools but had not filed it with the American Arbitration Association as the parties had agreed that plaintiff would wait to file pending settlement discussions. Plaintiff had commenced this action for breach of contract and damages and had filed a mechanic's lien against the property. Defendant moved for an order permanently barring arbitration of plaintiff's claims and dismissing the complaint. Plaintiff cross-moved for an order compelling defendant to arbitrate and, if necessary, granting it an extension to re-serve its notice of claim. The court first found that defendant had not failed to timely move to stay arbitration, citing the parties' agreement that defendant's time to move had been extended. The court ruled that, by serving the Superintendent of the school district (Educ. Law § 3813 (1)), plaintiff had not properly served its notice of claim on the governing body of the school district, and stated that it was without authority to grant leave to serve a late notice of claim. The court found further that the action had been brought more than one year after accrual and so was time barred. The contract here contained a "no-damages-for-delay" clause. The damages alleged in the complaint, the court ruled, did not fall into the categories recognized as exceptions to the general rule allowing enforcement of such a clause (e.g., bad faith). The damages here had been due to the work of other trades, a reality that had been contemplated by the contract. Thus, a claim based on a valid lien failed. In addition, the court held that plaintiff had waived arbitration by commencing this case. Arbitration stayed and complaint dismissed. Naber Electric Corp. v. Hawthorne Cedar Knolls Union Free School District, Index No. 8985/2005, 4/4/06 (Rudolph, J.).**

Contracts; construction; termination; ultra vires; apparent authority of president; conditions; offset; suit in contract or quantum meruit. Action arising out of construction contract whereby plaintiff had undertaken to perform certain work for defendant. At issue was the termination of plaintiff. Defendant did not argue that it had complied with procedures for termination for cause, but rather that the contract was ultra vires in that it had not been approved and executed in compliance with the by-laws of defendant condominium. Only the president had signed the contract although the by-laws required two signatures. The court concluded that the president had had the apparent authority to act and that defendant had failed to raise an issue of fact on this point. Even though plaintiff had appeared to be about to breach an extension contract regarding timely completion, defendant, the court ruled, was required to provide notice and a time to cure, although with a certificate of the architect if the contractor was to be terminated for cause, which defendant had failed to do. The court found no evidence that defendant had terminated the contract under a termination for convenience clause. In view of that, defendant could still seek an offset for reimbursement for payments made to correct plaintiff's defaults. Plaintiff was entitled to summary judgment as to defendant's liability for breach of contract, but not as to dismissal of defendant's first counterclaim. The second counterclaim had to be dismissed insofar as it sought dismissal on the theory that the contract was unenforceable. Plaintiff was entitled to sue either on the contract or in quantum meruit, subject to possible setoff. Paragon Restoration Group v. Cambridge Square Condominiums, Index No. 12472/2004, 5/11/06 (Fahey, J.).**

Contracts; interpretation; ambiguity; distributorship agreement; exclusive. Plaintiff had purchased exclusive area routes to market, sell, deliver and distribute Snapple products. Plaintiff brought this action against Snapple defendants after having learned about exclusive marketing agreements that had been entered into between defendants and the New York City Department of Education and the New York City Marketing Development Corporation. Plaintiff maintained that those agreements contravened the distributorship agreement with plaintiff. Plaintiff alleged breach of contract and other wrongs. Defendants moved for summary judgment. Defendants argued that the exclusive right granted to plaintiff was with respect to "retail outlets in the Territory," and that defendants thus had been free to arrive at other arrangements with other types of accounts, including institutional accounts. Defendants further asserted that plaintiff's waiver and estoppel claim failed as a matter of law in that the distributorship agreement provided that prior conduct would not operate as a waiver of contractual rights. Plaintiff argued, inter alia, that during discussions of the terms and conditions of the agreement, there had never been any reliance upon an industry standard of institutional accounts versus retail accounts. Plaintiff further maintained that it should be able to freely market, sell and distribute Snapple products to public schools and municipal institutions, without restriction, as it had done. The court held that the plain language of the distributorship agreement showed that defendants had met their prima facie burden of proving that the agreement was clear and unambiguous, plaintiff having been granted an exclusive only as to retail outlets. Plaintiff had failed to raise any triable issue of fact as to ambiguity or breach. Summary judgment granted to defendants. McGuckin v. Snapple Distributors, Inc., Index No. 17920/2003, 4/10/06 (Rudolph, J.).**

Contracts; interpretation; clear and unambiguous writings; bond conversion; anti-dilution; covenant of good faith and fair dealing. Plaintiffs, holders of convertible bonds, sued the issuers alleging breach of contract and breach of the covenant of good faith and fair dealing. Plaintiffs' contract provided for certain anti-dilution protection if issuers paid dividends on common stock in the form of ordinary shares, in particular, an adjustment to the exchange rate at which the bonds could be converted to common stock. Defendants had paid cash dividends, but had funded the cash payment through the sale of newly-issued shares and also permitted those who received cash dividends to purchase new shares. Plaintiffs claimed that this arrangement, in the absence of an adjustment to the exchange rate at which plaintiffs could convert their bonds to equity, breached their contract because the arrangement purportedly constituted an indirect issuance of a dividend payable in ordinary shares and diluted the value of plaintiffs' option to convert their bonds to stock. The court held that the language of the plaintiffs' contract was clear and unambiguous such that extrinsic and parol evidence would not be admissible to create ambiguity. The court found that the contract did not require an adjustment to the exchange rate under these circumstances. The court noted that separate provisions of the contract covered cash dividends and reinvestments of cash dividends in stock, and neither of those provisions required an adjustment of the exchange rate. Consequently, the court rejected plaintiffs' efforts to recast the cash dividend as a stock dividend and dismissed plaintiffs' breach of contract claim. In addition, the court rejected the claim for breach of the covenant of good faith and fair dealing because the conduct alleged was within the parameters of defendants' contractual rights. Defendants' motion to dismiss converted to summary judgment and granted; plaintiffs' cross-motion for summary judgment denied. Amaranth LLC v. National Australia Bank Ltd., Index No. 601656/2005, 5/25/06 (Moskowitz, J.).**

Contracts; misrepresentation collateral to contract; conspiracy to commit fraud; tortious interference; breach. Claims arose from business dealings between two ophthalmologists. Plaintiff and defendant had been sole members of a PLLC. Plaintiff contended that he had been fraudulently induced by defendant to enter into a memorandum of agreement, supplementing and amending previous agreements, that established a separate PLLC, corporate defendant here, to allow defendant to undertake professional obligations as a division head at an eye institute. Plaintiff alleged that defendant had promised that division-head status would help defendant to promote the parties' own PLLC and that plaintiff could partake in the new PLLC's financial and educational activities. These alleged misrepresentations related to defendant's performance of the MOA, however, and did not state a cause of action separate from the breach of contract claim, the court found. Further, plaintiff failed to allege damages not recoverable under a contract measure of damages. Therefore, the misrepresentation claim failed. A conspiracy claim cannot stand as an independent claim, and thus a claim of conspiracy to commit fraud failed, too. A claim against the corporate defendant of interference with contract in regard to agreements governing the individual parties' PLLC failed, too. That defendant could not have tortiously interfered in a contract between plaintiff and a third party because there was no third party - - the individual defendant was the corporate defendant's sole member. Defendants argued that breach of contract claims should be dismissed because the MOA had allowed defendant to compete with plaintiff. But this too narrowly construed plaintiff's claim. Plaintiff adequately alleged breach of provisions of the agreements, plaintiff's performance, and details of defendant's breach, for example, defendant's failure to compensate plaintiff as promised. The court let the claim stand, and did not dismiss another claim that also sounded in breach of contract, but instead partially granted plaintiff's motion for leave to serve an amended complaint combining the claims. Defendants were not prejudiced since allegations in the original and proposed amended pleadings would be similar. The court denied plaintiff's motion to strike defendants' answer for alleged noncompliance with outstanding discovery demands as plaintiff had not shown the noncompliance to be willful and contumacious. Mayron v. Beer, Index No. 3028/2003, 5/06 (McCarthy, J.).**

Contracts; parol evidence; merger or integration clause. Fraudulent inducement; fiduciary duty; reliance. CPLR 3013; insufficient pleadings. Conversion. Standing. Plaintiff had entered into an Amended and Restated Operating Agreement with defendants pursuant to which the limited liability company that the parties had formed would acquire property plaintiff owned for the purpose of developing condominium units. The parties' original operating agreement had provided for one of the defendants to contribute approximately $4.5 million in cash. The amended agreement, however, had provided that defendants' capital contribution could consist of both cash and a personal guarantee of the limited liability company's obligations by one of the defendants. Plaintiff nonetheless contended that the parties' understanding had been that defendants would make their contribution in cash. When defendants had failed to do so, plaintiff brought this action, alleging that defendants had fraudulently induced him to enter into the amended agreement and converted plaintiff's property. Defendants moved to dismiss. On the fraudulent inducement claim, defendants argued that because the amended agreement contained an integration clause that provided that the amended agreement was the "entire agreement of the parties" and "sole source of agreement," the parol evidence rule barred the introduction of extrinsic evidence to contradict the agreement's provision that capital contribution could consist of both cash and the guarantee. The court agreed, holding that the integration clause was strong evidence that the parties had intended for the amended agreement to be a "final, complete, and an exclusive statement" of the parties' agreement. The court rejected plaintiff's contention that parol evidence could be introduced to establish fraudulent inducement because plaintiff had failed to allege the essential elements for fraud, particularly reasonable reliance. Here, reliance on defendants' alleged assurances that payments would be made in cash could not be reasonable as a matter of law since the misrepresentations were contradicted by the parties' express contractual terms. Moreover, even if defendants had owed plaintiff a fiduciary duty based on the fact that one of the defendants was managing member of the company, plaintiff's reliance would still have been unreasonable since it had had ready and efficient means – the written terms of the contract – to know that the representations were not accurate. The court also dismissed plaintiff's conversion causes of action. Even under liberal notice pleading (CPLR 3013), a plaintiff must still allege each material element of the cause of action. Here, the court found, plaintiff had failed to allege that defendants had exercised unauthorized dominion or control over specifically identified property over which plaintiff had a basis for claiming superior ownership; allegations of payments of excess commissions and diversion of company funds would not suffice. Finally, the court found that plaintiff, as a non-managing member, lacked standing to bring an action in its name on behalf of the limited liability company. Motion to dismiss granted. Bondgof Enterprises, Inc. v. Alchemy Noho, LLC, Index No. 108197/2005, 4/25/06 (Ramos, J.).

Discovery; attorney-client privilege; attorney work-product doctrine; waiver of privilege; "at issue" doctrine; reopening depositions. Subsequent to defendant's resignation as chairman of defendant stock exchange, the exchange had retained special outside counsel to investigate and prepare a report concerning whether the compensation paid to the former chief executive officer had been reasonable. The exchange then provided the report to the New York Attorney General, in part to obtain more favorable treatment amidst growing public concerns about the compensation. The Attorney General subsequently had commenced this litigation, and the court ordered the production of the report and certain interview memoranda upon which it had been based. When the exchange's general counsel was deposed in the action, he had repeatedly invoked the attorney-client privilege, but testified that the report was accurate. Two weeks later, the exchange produced documents in which the general counsel had questioned the accuracy of the report. Defendant CEO and a third-party defendant moved to reexamine the general counsel in light of these subsequent disclosures and to compel the exchange to produce drafts and further interview memoranda relating to the report. The court granted the motion to compel with regard to the drafts of the report and interview memoranda, holding that the exchange, by producing the report to third parties, including the Attorney General and the Securities and Exchange Commission, and by asserting to regulators that the report was highly reliable, had placed the report's accuracy "at issue," and thus had waived the attorney-client privilege and the work-product doctrine as to the report itself and as to underlying draft documents and notes necessary to evaluate the report's reliability. The court also ordered a limited reexamination of the general counsel, finding that defendants had not been afforded an adequate opportunity to conduct discovery because of the belated production of highly relevant documents. People ex rel. Spitzer v. Grasso, Index No. 401620/2004, 4/10/06 (Ramos, J.).

Discovery; attorney-client privilege; insurance claims and investigation files; confidential communications; depositions; non-resident deponents; right to depose and location of deposition. In an action claiming wrongful failure and refusal to defend and/or indemnify, plaintiff moved to compel defendant insurance carrier (1) to produce certain claims and investigation files relating to insurer's denial of coverage for plaintiff's claim, and (2) to appear for a deposition in New York. (Defendant's witness resided and worked in London.) Defendant opposed the motion to compel production on the grounds that its investigation of plaintiff's claim had been conducted by its legal counsel and that, as such, all files related to the investigation were protected attorney-client communications. The court ruled that reports and communications between attorneys and their client-insurers resulting from the attorneys' factual investigation of claims, made prior to the insurer's denial of coverage, are not protected from disclosure as either work product or materials prepared in anticipation of litigation. The court further found that in order to invoke the privilege, the insurer was obligated to demonstrate that the documents in question were "confidential communications" made in the context of legal advice or services rendered by its attorneys. The court held that communications between defendant and its legal counsel regarding defendant's counsel's factual investigation of plaintiff's claims for purposes of determining coverage were prepared as a part of the "regular business" of an insurance company and were not entitled to protection as imparting legal advice or services. The mere fact that the investigation had been undertaken by defendant's attorneys did not cloak the attorney's reports and communications with privilege. With regard to plaintiff's demand that defendant produce a witness for deposition within New York State, the court noted that, pursuant to CPLR 3110 (1), where the deponent is a party to the action, the deposition may be scheduled either within the deponent's residence or business county, or in the county where the action is pending. The court further noted that in the absence of a showing of substantial hardship, which defendant had failed to make, the deposition should be held in the forum of the litigation. The court ordered that defendant's witness be produced for deposition in New York. However, the court also found that, should defendant prevail in the action, travel expenses of the witness would be recoverable as a taxable disbursement. Geneva Mortgage Corp. v. Certain Underwriters at Lloyd's, Index No. 013041/2004, 05/31/06 (Bucaria, J.).**

GBL § 349; alleged "off label" use of drug. Fraud; pleading with particularity. Unjust enrichment. Class action; class certification. Plaintiff sought class certification on behalf of herself and all New York residents who had allegedly been damaged when they purchased the drug Neurontin for "off label" use (*i.e.*, for purposes other than treating epilepsy, allegedly the only use that had been approved by the FDA). Plaintiff alleged that defendant had deceptively marketed Neurontin by, *inter alia,* sponsoring studies for publication in scientific journals that touted other benefits of Neurontin besides those approved by the FDA and by hiring medical liaisons to solicit physicians to promote "off label" uses of Neurontin, particularly for treating bipolar disorder. Plaintiff herself alleged that she had been prescribed Neurontin for neck pain. Plaintiff brought claims for violation of GBL § 349, fraud, and unjust enrichment. Defendant moved to dismiss the proposed class-action complaint for failure to state a cause of action and failure to plead fraud with particularity (CPLR § 3016 (b)). Defendant argued that plaintiff had not pled the existence of any actual injury she had suffered or any connection between defendant's alleged deceptive marketing and plaintiff's receipt of a prescription for Neurontin. The court agreed, granting the motion and dismissing the complaint in its entirety. As to the Section 349 claim, the court noted that the prescription of drugs for off-label use was a common practice in the medical community and that plaintiff had not alleged that Neurontin had failed to treat her neck pain. As to the fraud claim, the court concluded that the complaint lacked the required detail to survive a motion to dismiss; there were, for example, no specific allegations regarding whether plaintiff's physician either received or relied upon any information from defendant. As for the unjust enrichment cause of action, the court dismissed the claim because the complaint failed to link plaintiff's alleged injury to any deceitful conduct by defendant. Finally, the court dismissed plaintiff's motion for class certification, finding that because plaintiff did not possess a valid cause of action, she could not represent the class. Baron v. Pfizer, Inc., Index No. 6429/2004, 5/2/06 (McCarthy, J.).**

Insurance; interpretation; definition of occurrence; applicability of non-cumulation clauses. Plaintiffs had manufactured allegedly defective hoses that had caused flooding damage, subjecting them to thousands of subrogation actions commenced by first-party property insurers. Plaintiffs sought insurance coverage from defendant liability insurance carrier, which had issued consecutive, annual, primary liability insurance policies containing per occurrence limits of $2 million and aggregate limits of $4 million. The policies also contained a non-cumulation of limits provision that limited total payments per occurrence to $2 million even if the same occurrence caused injury during one or more prior and/or future policy periods. Relying on a New Jersey decision that held non-cumulation of limits provisions unenforceable in certain circumstances, plaintiffs moved for summary judgment for a declaration that the non-cumulation of limits provision did not limit plaintiff's right to recovery of the full $2 million policy for each of the four policies at issue. Defendants cross-moved for summary judgment seeking a declaration that the non-cumulation provision limited total liability to $2 million. The court held for defendants, finding that a repeated and continuous manufacture and sale of a defectively-designed product constitutes a single occurrence. The court distinguished the New Jersey decision on the grounds that New York courts had not adopted the public policy rationale on which it was based and that the New Jersey case involved concerns about environmental hazards not present here. Consequently, the court concluded that the insurance policies' non-cumulation provisions were applicable to the defective hoses. Mark IV Industries, Inc. v. Lumbermens Mutual Casualty Insurance, Index No. 2029/2005, 04/28/06 (Fahey, J.).**

Insurance; interpretation; insurable interest; underwriter's fee; assignment of coverage; additional insured; equitable estoppel. Plaintiff, assignee of the original insured, moved for summary judgment to establish liability for breach of a contract to insure, and for a declaration of entitlement to coverage under that insurance policy. In 1998, defendant's predecessors-in-interest had issued a claims-made insurance policy to an underwriter of a loan for creditor reimbursement as to environmental damages on gas station/convenience store properties that had been pledged as collateral. The loan had later been assigned to plaintiff. The owners of the properties had defaulted on the loan in 2002. Plaintiff had claimed that the default, coupled with the discovery of pollution conditions at the properties, had triggered coverage. However, defendant argued that the policy had not been triggered for several reasons, including that the policy was void from the outset because the underwriter had had no insurable interest and the policy had been assigned without obtaining the insurer's consent. The court granted summary judgment in favor of plaintiff. First, the court noted that the underwriter of the loan secured by the property did have an insurable interest, which is defined broadly by New York's Insurance Law as any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage. The court noted that the underwriter had had an interest in receiving its fee, which would have been eliminated if loss, destruction or damage had devalued the mortgaged property prior to the closing of the loan. The court also held that plaintiff had a right to coverage as an additional insured under the policy and as a party with an interest in the properties because defendant's predecessor-in-interest had issued a valid and enforceable endorsement under the policy that named plaintiff as an additional insured and recited the chain of assignment of the policy to plaintiff. Finally, the court found that defendant was equitably estopped from denying coverage to plaintiff because it had retained premiums on the policy and ratified the existence of coverage. Therefore, the court held that plaintiff had made a prima facie showing of entitlement to coverage and that defendant's defenses were without merit. Since defendant had failed to raise any issues of material fact, the court held that plaintiff was entitled to summary judgment. Wells Fargo Bank, N.A. v. Zurich American Insurance Company, Index No. 601562/2005, 5/23/06 (Ramos, J.).

Preliminary injunction; CPLR 6301; violation must respect the subject matter of action; specific fund. Procedure; effect of prior findings in motion to dismiss on preliminary injunction motion. Plaintiffs sought a preliminary injunction preventing the defendant condominium converter from distributing net proceeds of apartment sales, and instead requiring him to hold the funds in escrow pending determination of plaintiffs' declaratory judgment action construing their rights as third-party beneficiaries under a prior agreement arising from the business divorce of defendant and his previous partner. Relying on *Credit Agricole,* 94 N.Y.2d 541, the court held that preliminary injunctive relief was unwarranted under CPLR § 6301 because plaintiffs were asserting an action on a contract for the recovery of money only and not for a specific fund that was the subject of the action. In such a situation, the court held, the plaintiffs have no rights as against the property of the defendant until he obtains a judgment. The court noted that plaintiffs' possible basis for interim relief would have been for an order of attachment, but that no such application had been made. The court distinguished the decision of the Appellate Division, First Department, in *Ma v. Lien*, 198 A.D.2d 186, because (1) it had been superseded by *Credit Agricole,* and (2) the condominium sale proceeds at issue were contractual proceeds unlike the specific fund, a winning lottery ticket, at issue in *Ma*. Finally, the court noted that it was not constrained by the preliminary conclusions it had made in denying defendant's prior motion to dismiss; those conclusions, which required all factual inferences to be drawn in plaintiffs' favor, carried no weight in making factual determinations relating to the preliminary injunction motion. Purchase Partners II, LLC v. Westreich, Index No. 604219/2004, 04/19/06 (Fried, J.).

Procedure; forum non-conveniens; forum selection clause. In a putative class action, plaintiffs alleged fraudulent misrepresentation by a non-party in the leasing of telephone equipment to plaintiffs. This fraud was allegedly known to defendants, assignees of the non-party's leases, at the time of the assignments, thereby giving rise, plaintiffs argued, to liability on defendants' part. After the telephone equipment failed to work, plaintiffs commenced this action seeking a declaratory judgment, rescission, and money damages. A defendant moved to dismiss on the grounds of forum non-conveniens or, in the alternative, a forum selection clause in the lease agreement. New York was the situs of plaintiff, the transaction and the leased equipment. The non-party was located in New Jersey. Defendant was incorporated in Delaware with its principal place of business in Missouri. Any documents or witnesses to the alleged acts of fraud and misrepresentation were located in Missouri or New Jersey. Defendant had already commenced in Missouri approximately 530 actions for non-payment under the leases, 40 of those against New York residents. Fourteen cases had been instituted against movant in Missouri. The court stated that a forum in Missouri was available to plaintiffs and that all of the actions pending in Missouri involved the same issues presented in this instant case. The case ought to proceed in Missouri, the court held. The court noted that the lease's forum selection clause had been found to be unenforceable by some courts because it failed to specify a venue. However, the court concluded, whether the clause was enforceable or not, the result would be the same - - that the case should proceed in Missouri. Motion granted, action dismissed. Glen & Co. v. Popular Leasing USA, Inc., Index No. 15952/2004, 4/24/06 (Rudolph, J.).**

Procedure; one-motion rule; motion to dismiss; dismissal based on documentary evidence; stay of proceedings; international comity. Bankruptcy; set-off. Defendant financial services institution had purchased bonds of a corporation with which it had entered into an ISDA swap agreement. A month later, the High Court in London had placed the corporation in voluntary administration proceedings. The English court had named the plaintiffs as administrators and assigned them to manage the insolvent corporation and liquidate and distribute its assets among its creditors. Plaintiffs then had filed an ancillary proceeding in the Bankruptcy Court for the Southern District of New York, and subsequently brought this action against the defendant for money owed under the swap agreement. Defendant had moved to dismiss, arguing that under the swap agreement's terms and at common law it owed nothing because the corporation owed defendant money on corporate bonds, and the parties' mutual debts (the bonds and the swap) extinguished each other under the theory of setoff. After the Court had denied the motion, plaintiffs had filed an amended complaint, adding the defendant's affiliate as the swap's guarantor. Defendants had then filed a second motion to dismiss (and a motion to stay) again asserting setoff, but also arguing that the defendants and insolvent company were both parties to Company Voluntary Arrangements (CVAs) in England, agreements that served as a form of global settlement agreement between the insolvent and its creditors, and that the CVAs required either the dismissal or stay of the New York action in favor of dispute resolution proceedings relating to the CVAs that had been commenced in London. In opposition, the plaintiffs had argued that the second motion violated the one-motion rule (CPLR § 3211), which precludes a party from filing more than one motion to dismiss an action. On procedural grounds and on the merits, the court denied defendants' second motion. First, the court explained that defendant should have raised its CVA defense in its first motion to dismiss, and, even if the defense had not been ripe when it wrote its brief, the court explained, defendant should have mentioned the CVA to the court at oral argument. Second, the court held that the defendants had failed to show as matter of law that the CVA resolved the plaintiffs' claim that the defendant creditor had breached the swap agreement. The court also rejected the defendants' argument that international comity dictated that the court dismiss the complaint, holding that this case involved an insolvent's efforts to recover its assets so that the administrators could distribute funds to the insolvent's creditors in a foreign administration proceeding. The court then denied defendants' request for a stay, holding that a stay would only delay the distribution of assets, as the administrators had been directed to do by the English Court. Wallace v. Merrill Lynch Capital Servs., Inc., Index No. 602604/2005, 05/16/06 (Fried, J.).

Statute of limitations; accounting malpractice; negligent misrepresentation; fraud; breach of fiduciary duty; basis to determine appropriate statute of limitations. GBL §§ 349, 350; investment advice relating to securities. Promissory estoppel; conclusory allegations. Unjust enrichment; adequate remedy at law; alternative pleading. Damages; interest paid to taxing authorities. Plaintiffs alleged that big four accounting firm and tax attorney had marketed investment strategy that was really an illegal tax shelter. Plaintiffs alleged fraud-based claims, breach of fiduciary duty, negligent misrepresentation, violation of GBL §§ 349 and 350, promissory estoppel, and unjust enrichment. Plaintiffs sought, among other damages, interest they had paid to the IRS in settlement of tax claims. Defendants argued that all of the claims sounded in accounting malpractice and thus were barred by CPLR 214 (6). Noting that it must look to the essence of the stated claims instead of their labels, the court held that only the negligent misrepresentation claim was duplicative of an accounting malpractice claim and thus barred by the 3-year malpractice statute. The court found that the fraud and breach of fiduciary duty claims had different elements and therefore were not disguised malpractice claims. With respect to the GBL claims, the court ruled that GBL §§ 349 and 350 did not apply to investment services for the purchase or sale of securities. On the promissory estoppel claim, the court ruled that a single conclusory allegation that plaintiffs "sustained and suffered unconscionable injuries totaling over $15 million" failed to plead unconscionable injury. With regard to the unjust enrichment claim, the court ruled that at the pleading stage it was too early to determine if an adequate remedy at law existed, and alternative pleading under CPLR 3014 would be allowed. Finally, the Court held that plaintiffs' demand for interest paid to the IRS failed because such payments were not damages, but rather payments to the taxing authority for a plaintiff's use of money during the time a plaintiff was not entitled to have it. Assuming the taxes were required to be paid but for the allegedly illegal shelter, reimbursing the interest would put plaintiffs in a better position than if they had not participated in the shelter. The court dismissed the negligent misrepresentation, GBL, and promissory estoppel claims, struck the claim for interest paid to taxing authorities, and sustained the claims for fraud, breach of fiduciary duty and unjust enrichment. Rosenbach v. Diversified Group, Inc., Index No. 602463/2005, 5/10/06 (Moskowitz, J.).

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