The ***Commercial Division***

of The State of New York

Law Report - March 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

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

JUSTICES OF THE COMMERCIAL DIVISION:

JUSTICE HERMAN CAHN — JUSTICE BARRY A. COZIER

JUSTICE IRA GAMMERMAN — JUSTICE CHARLES E. RAMOS

JUSTICE BEATRICE SHAINSWIT — JUSTICE THOMAS A. STANDER

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The Report and the complete text of all decisions discussed in it are available on the Unified Court System's Internet home page at http://ucs.ljx.com and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org/sections/comfed. Also available there is a cumulative subject matter index of all cases cited in any issue of the Report. Members of the Commercial and Federal Litigation Section may sign up at the Section's home page to receive copies of the Report by e-mail automatically. The Report *is issued by the Commercial Division, not the State Reporter. The decisions as they appear on the home pages have not been edited and may differ from the final text published in the official reports.*

Agency; reasonable reliance and inquiry. Respondeat superior. Negligent hiring and supervision. Fraudulent scheme engaged in by former employee of defendant bank. For a principal to be held liable to a third party for the acts of its agent, there must be some conduct of the principal communicated to the third party giving rise to the appearance and belief that the agent possesses authority. The acts must be those of the principal, not the agent. There must be reasonable reliance and inquiry. Although the bank had given the agent authorization to sell trust products, it had not given him authority to sell interests in a product that was available only to bank employees, as he had done. Plaintiffs had known that the trust account was for employees only, which, the court found, undercut any possibility of reasonable reliance. Furthermore, the court found, no facts showed that plaintiffs had satisfied their duty to inquire, even after his termination. A respondeat superior theory failed since plaintiffs had to show, but could not, that the actions had been done with a view to furtherance of the master's business and interest. Plaintiffs were not bank clients and, absent privity, the bank owed no duty to them in the hiring or supervision of their employees. Complaint dismissed. Heffernan v. Marine Midland, Index No. 100598/98, 1/20/99

(Ramos, J.).

Arbitration; incorporation by reference. Demand for arbitration concerning an alleged breach of an indemnity provision in a merger agreement pursuant to an arbitration clause in a partnership agreement. Incorporation by reference is permissible, but must clearly evidence intent to arbitrate. The court held that such evidence was lacking here. The court also held that the dispute did not relate to the partnership agreement in such manner as to bring it within the scope of the arbitration clause. The right of indemnification, the court stated, was a right claimed as a party to the merger agreement rather than as a partner under the partnership agreement. Arbitration stayed. In re Weinick Sanders Leventhal & Co., Index No. 116240/98, 2/11/99 (Cahn, J.).

Arbitration; waiver. Motion to stay a case pending arbitration. The action was brought against a contractor and architects for damages allegedly caused in a renovation project. Each of two contracts had an arbitration clause. Where a party knowingly, intentionally and voluntarily invokes the judicial process, that party may not invoke an arbitrationclause. The court held that defendants who had filed a mechanic's lien and asserted a counterclaim had not actively participated in the litigation process so as to have waived their right to arbitration. The counterclaim related directly to plaintiff's claim. The filing of a lien does not constitute waiver. Action stayed. Peckwall Associates v. Lombardi, Index No. 112667/97, 2/24/99 (Cahn, J.).

Arts & Cultural Affairs Law; TRO. Claimant of a Pollock painting sought discovery of the owner and a restraint on MOMA's removal or return of the painting. MOMA objected to a TRO obtained by plaintiff on the grounds that the owner is a non-resident and MOMA is a non-profit institution (Arts & Cultural Affairs Law 12.03). The court stated that requiring MOMA to notify plaintiff's counsel at least seven days in advance of any transfer arguably would violate the statute because it likely would restrain transfer, though only briefly. The statute is intended to bar use of a temporary prohibition as a means to seize art. The court thus amended the TRO to delete that language and to provide that, on receipt of a demand, MOMA would furnish counsel with information on the party demanding the painting and the conditions of transfer. The court held that plaintiff was entitled to know the identity and address of the demanding party in order to ascertain whether MOMA was properly invoking Section 12.03, as well as to prepare a complaint. The amendment would not violate 12.03. MOMA claimed that it had entered into a confidentiality agreement with the lender, but the court held that the statute does not contain language giving special protection to identity in these circumstances. Matter v. Museum of Modern Art, Index No. 606170/98, 1/19/99 (Cahn, J.).

Attachment. Attorney work product; waiver. Motion for pre-judgment attachment as to all property. Attachment is a drastic remedy, to be strictly construed. There was a default on notes. However, an attachment against guarantors had to be limited to the collateral securing the notes as the notes were non-recourse as to these defendants. As there was no cause of action for fraud, that theory provided no basis for an attachment. The court also held that plaintiff had failed to show intent to defraud or frustrate a judgment. Defendants argued that plaintiff had obtained information in violation of a privilege. The court ruled that a memorandum was attorney work product. The proponent of a privilege has the burden of proving non-waiver. The court held that defendants had failed to carry this burden because they had failed to show an intent to maintain confidentiality, reasonable precautions, and a prompt objection. Gruppo Covarra v. Fashion Cafe Int. Inc., Index No. 604944/98, 2/25/99 (Cahn, J.).

Attachment; lack of jurisdiction and forum selection clause. Contract dispute between a Texas company and a Mexican company over goods shipped outside the U.S. The co-plaintiff was an alleged subrogee. Motion for attachment. Defendant argued lack of jurisdiction, claiming not to transact or do business in New York and that the transaction and signing of a note had not occurred here. Also, defendant pointed to a forum selection clause. The court noted that defendant had not denied that it was unauthorized to do business here, and that plaintiffs had submitted evidence showing a prima facie case that defendant was indebted to plaintiff in the amount stated. The court held that attachment was appropriate as to one plaintiff, but not as to the claimed subrogee for absence of a showing that it was such. The court pointed out that defendant would waive its defense if it neither moved nor asserted the point in its answer, but it had not yet done either. The court granted the attachment but stayed its implementation pending the motion to dismiss, which had to be served by a set deadline. FCIA Man. Co. v. Construcciones Protexa S.A., Index No. 605253/98, 1/25/99 (Ramos, J.).

Banking; duty as to checking account. Contract and tort. UCC 4-103. Action against bank due to fraudulent withdrawals from a checking account. The bank sought dismissal of a negligence claim on the ground that there was no alleged duty independent of the contractual relationship. Relying on New York Univ. v. Continental Ins. Co., 87 NY2d 308,

the court upheld this claim. The court noted that under both common law and UCC 4-103, a bank has a duty to use due care in protecting customer funds. The court ruled that facts had not been alleged showing morally reprehensible conduct or criminal indifference to civil obligations sufficient to sustain a punitive damages claim. A claim for consequential damages was dismissed in view of UCC 4-103(5). G&G DiPol USA v. Citibank, Index No. 123839/97, 1/25/99 (Cozier, J.).

Broker's commission; finder's fee. Fiduciary duty; duty of undivided loyalty. Suit to recover finder's fees for having introduced parties to a business transaction. A finder brings parties together, with no obligation or power to negotiate a transaction, while a broker usually also brings the parties to agreement. The latter, unlike the former, has a defined fiduciary duty. The court held that agreements relied on by plaintiffs provided for commissions on ordersplaintiffs brought, making plaintiffs brokers. As to another agreement, the court held that the plaintiff there was to act as an agent and that since he had breached a fiduciary duty of loyalty by agreeing to act as agent for another, no compensation was possible. Motions for summary judgment granted. E.I. North America Corp. v. Maidstone Enterprises, Index No. 602752/96, 1/29/99 (Ramos, J.).

Brokers; real estate; commissions. Absence of writing. Employment relationship with defendant. Procuring cause. Broker sought commission on sale of GM Building to Trump Organization. Plaintiff did not allege a written agreement but a licensed broker need not have a written contract. GOL 701(a)(10). That defendant did not own the building at the time of the alleged contract did not bar this action. A broker, tho, is not entitled to a commission if it fails to establish an employment relationship with defendant, even if the broker inquires as to the price and then sends a person who agrees to take the premises. An agreement as to amount of compensation is essential to an enforceable agreement. Plaintiff failed to allege that here. Nor had it asserted sufficient allegations to support a claim that it had been the procuring cause, the court held. The court pointed to letters at least putting plaintiff on inquiry that it was supposed to be paid by its client and the fact that plaintiff had known that Morgan Stanley was defendant's exclusive broker. Accepting the allegations of the complaint, the court held that plaintiff nevertheless was barred as a matter of law. Motion to dismiss granted. Sullivan-Jenrette, Inc. v. Simon DeBartolo Group, Index No. 603802/98, 1/5/99 (Shainswit, J.)

Class actions; certification; decertification; renewal and reargument; notice. Insurance; contracts; good faith and fair dealing. GBL 349; impact on consumers. Class action involving termination under a certain health plan. Class and sub-class previously certified. Defendants moved to decertify part of the class and sub-class based on a revised contract with different termination provisions. Plaintiffs objected that movants sought to reargue or renew improperly as the evidence had been available on a prior certification motion. The court has discretion to decertify a class or a part of it. Certification is to be liberally construed, which allows a judge to decertify later if warranted. A motion to decertify, the court stated, differs from one to reargue or renew. The court held that the class and sub-class should be redefined to reflect the changed contract, with notice to be given. Plaintiffs argued that subscribers under the revised contract should still be included in the class because advance notice of termination is part of the insurer's obligation of good faith and fair dealing. The legislature, the court noted, has not required advance notice for health insurance. A court may not rewrite an insurance contract nor construe it contrary to its express terms. The court held that there could be no implied covenant contrary to the express terms. Further, the named plaintiffs were not appropriate class representatives of parties to the revised contract. Common issues were found lacking. Further, parties to the revised contract were not in the same situation as other class members with regard to the non-contract claims. The court rejected defendants' contention that plaintiffs should pay for the cost of new notice; the fault lay with defendants for not presenting evidence of the changed contract. Plaintiffs moved for partial summary judgment due to termination without advance notice. Defendants contended that the purported duty to give notice was the result of a typographical error, as was clear from the plan as a whole. The court stated that contracts are strictly construed against the drafter. Defendants created the discrepancy and must bear the consequences, the court ruled. This was not a case of mutual mistake or fraud. Summary judgment granted in part. Summary judgment was denied to both sides as to whether defendants had engaged in negligent misrepresentation by pre-certification of subscribers who had already been terminated. Same result as to other theories. The court held that since what was at issue was a form contract used for thousands of subscribers, there was broad impact on consumers at large sufficient for a GBL 349 claim. Since the contract had been misleading, there was liability, the court held. Makastchian v. Oxford Health Plans, Index No. 603653/96, 1/27/99 (Crane, J.).

Contracts; employment agreement. Misrepresentation; relation to contract claim. Prima facie tort. Intentional infliction of emotional distress. The court found that the complaint stated a cause of action for breach of a written contract of employment, though one terminable at will. The second claim alleged that defendants had fraudulently induced plaintiff to close down his prior business by promising him an annual compensation package and that defendants had not intended to honor the agreement at the time it was made. The court found that the complaint set forth allegations of injury separate from the claim for breach of the employment agreement. However, the court stated, the wrongful act alleged in support of the

fraud claim did not differ from the purely contract-related allegation that defendants had not intended to perform at the time of the agreement. Thus, the claim failed. The court found a prima facie tort claim deficient in that no special damages had been pled. The court held deficient a claim for intentionalinfliction of emotional distress since the conduct alleged was not sufficiently egregious. Bihn v. Bagland USA, Index No. 123933/97, 12/23/98 (Cozier, J.).

Contracts; illegality; choice of governing law; ratification. Dispute over boxing contract. The contract had provided that it would be governed by New York law. Thus, the court held, New York boxing regulations applied to all fights under the agreement, not just to one in New York. The agreement had never been filed with the NYS Athletic Commission and a promoter had never been licensed thereby. Thus, the contract was void. There were no claims for unjust enrichment that under some authorities might have allowed for recovery. The court rejected an argument that the illegal contract had been ratified since the regulations did not involve merely malum prohibitum, were not disproportionate to public policy, and expressly stated that violation invalidated a contract. Quartey v. AB Stars Productions, Index No. 600554/98, 2/4/99 (Ramos, J.).

Declaratory judgment; issues of fact as to continued existence of former employer and whether it retained interest in non-compete agreement. Counterclaims as to repayments due on past benefits. Declaratory judgment action against non-compete agreement. The court held that plaintiff had not shown that she was entitled to summary judgment on this claim. Questions of fact existed as to whether her former employer still existed after a corporate transaction and whether it had any enforceable interest in the non-compete agreement. The court declined to dismiss a counterclaim that plaintiff had breached an obligation to repay certain educational benefits since the policy showed that it had been offered by the former employer. The court dismissed a counterclaim for reimbursement of payments on a rented apartment since defendant had failed to offer any proof that an oral agreement to repay had ever been entered into. The court declined to dismiss a counterclaim alleging damage due to plaintiff's having failed to give certain advance notice of her resignation. Gelsomino v. Trade Advisory Services, Inc., Index No. 600886/98, 2/5/99 (Cozier, J.).

Disclosure; failure to obey or challenge a prior discovery order; mere disagreement therewith does not constitute good excuse; contingent striking of answer and sanctions. Action for $ 11 million based on alleged fraud. Motion for default based on defendants' failure to provide discovery as ordered by Justice Friedman. The court found that defendants had willfully and contumaciously failed to appear for depositions despite two prior orders and more than two and one-half years after they had first been noticed. The court found that the only excuse offered was the unacceptable one that defendants disagreed with Justice Friedman's decision, which they had failed to challenge by way of motion to reargue. The court ordered the depositions to proceed on a date certain and payment of sanctions. If a defendant failed to appear or to pay, an order could be settled striking the answer thereof and entering a default judgment. Swiss Bank Corp. v. Geecee Exportaciones Ltd., Index No. 601910/96, 2/5/99 (Cozier, J.).

Guaranty. Fraudulent conveyances. The court held that defendants had presented no defense to claims for commercial rent. As to another claim on a guaranty, the court stated that a guaranty is to be construed to effect its apparent purpose and any ambiguity is to construed against the drafter. The court ruled that the language clearly obligated the guarantor to pay the sums sought. Fraudulent conveyances summarized. The court found material issues of fact as to whether the transfers had been made without fair consideration or whether defendants had been insolvent. Summary judgment granted in part; hearing directed. 342 Madison Ave. Associates LP v. Parks Associates, Index No. 605640/97, 2/12/99 (Cozier, J.).

Guaranty; liability of guarantor deceived by third party. A corporate line of credit was opened and was guaranteed by the individual defendant. That defendant contended she understood that the line would not be made available until she retired from another job. In fact, a friend of her daughter forged defendant's signature on checks and drew down the entire line. After a corporate default, the friend executed an agreement with the bank without defendant's knowledge and committed other wrongs. The corporation having defaulted, the court ruled that judgment was in order. The court held that the bank had made a prima facie case against the guarantor and that her defense did not suffice. The court held that she had not expressly denied the execution of the line of credit. Her claim that the friend had defrauded her by misleading her as to the nature of her liability was defeated by the clear, unambiguous terms of the guaranty. The friend's unauthorized signing of an extension agreement did not discharge defendant as the guaranty had so provided. Further, by failing to take action in response to inaccurate bank statements sent to her home, defendant had delegated her authority to the friend and clothed him with apparent authority. Judgment for plaintiff. Citibank v.All Saints Janitorial, Inc., Index No. 601472/98, 2/1/99 (Gammerman, J.).

Indemnification. Contribution; nature of injury; underlying contract claims. Procedure; dismissal without prejudice or severance. Action alleging failure by defendants to protect the interests of bondholders whose collateral deteriorated in value during the bankruptcy reorganization of Continental Airlines. One trustee defendant brought a third-party action against the successor trustee. The court held that any potential tortious liability of the trustee could not possibly arise solely from the misconduct of the successor. An indemnification claim and one for counsel fees failed. A contribution claim was sustained since it could not be said as a matter of law that the original and the successor did not share responsibility for the same injury, which had been alleged in undifferentiated fashion. An argument that the indenture and indemnity barred the third-party action failed since the court found that the agreements exempted negligent conduct. However, the court dismissed the contribution claim insofar as it was premised on causes of action for breach of contract. The court denied a motion to dismiss without prejudice or sever the third-party complaint because the third-party defendant had come late to a case in which discovery had been extensive; additional time would be provided to complete discovery. Further, the third-party complaint and the main case were too intertwined. Bluebird Partners v. First Fidelity Bank, Index No. 601365/97, 2/2 /99 (Shainswit, J.).

Indemnity agreement; settlement of prior action; covered claims. Assignee sought damages under indemnity agreement. Pursuant to express contract or quasi-contract, indemnity involves an attempt to shift an entire loss from one compelled to pay, without regard to fault, to another who should more properly bear responsibility as actual wrongdoer. Defendant claimed that its subsidiary had sued the assignor because of an opinion letter, that the assignor had settled the case, and that as part of the settlement defendant had signed the indemnity agreement in order to indemnify the assignor against any post-settlement claims brought by a party claiming rights under the letter. The court found that plaintiff was the indemnitee by assignment whom defendant had agreed to indemnify if certain conditions were met. However, the court held, no party to the other case had obtained relief against the indemnitee on a claim arising out of the action; the mere settlement of the action by the assignor did not trigger any rights the assignee had under the indemnity agreement. Nor were there any "claims, judgments or settlements" made against the indemnitee arising out of the opinion letter. Case dismissed. Wald v. Marine Midland Business Loans, Inc., Index No. 602038/98, 12/21/98 (Cozier, J.).

Insurance; misrepresentation on application. Insured died during contestable period. Insurer claimed that the insured had lied on the application about substance abuse. Misrepresentations in an application may entitle the insurer to rescind. The court held that the insurer had raised a question of fact by offering proof that the insured had lied. The court held that the insurer was not entitled to summary judgment since a death certificate is not dispositive if controverted by probative affidavits, as here. Summary judgment denied. Raffaele v. United States Life Ins. Co., Index No. 602042/98, 1/12/99 (Cahn, J.).

Insurance; professional services exclusion; foreclosure activity by insured bank. Procedure; declaratory judgment. Declaratory judgment action concerning insurer’s obligation to indemnify and defend plaintiff in a suit brought against it by a mortgagor. Insurer had provided certain coverage but with an exclusion for injuries arising out of "professional services." In the underlying action, the plaintiff claimed that the bank had commenced foreclosure proceedings after having incorrectly allocated payments on two mortgages. The court held that all of the claims in the underlying action, however denominated, arose out of the bank’s claimed negligent administration and foreclosure of a mortgage loan. Thus, they were squarely within the professional services exclusion. Though the court found no New York authority on point, cases from other jurisdictions were determined to be persuasive. The proper remedy in a declaratory judgment case is not to dismiss the complaint but to issue a declaration for defendant. Declaratory judgment for defendant. Greenpoint Bank v. Federal Insurance Co., Index No. 602653/97, 1/8/99 (Cahn, J.).

Lien Law 2(7); liens on public property. Dispute over validity of liens and effect of Lien Law 2(7). Prior to 1992, no private lien could attach to public property even though leased for private purposes. It was argued that an amendment to that section changed this rule. The court stated that Section 2(7) is ambiguous. Looking to its history, the court stated that the Governor’s Bill Jacket made clear the limit of the amendment to real property owned by industrial development agencies. Legislative history indicated that the bill was aimed at removing the ability of private concerns to use Industrial Development Agency financing to avoid commitments to contractors. An earlier versionreading the way parties in this case argued for had been vetoed. The court held that as the land here was not owned by an industrial development agency, Section 2(7) was inapplicable. The liens were invalid. H. Weiss Equipment Corp. v. New York Mercantile Exchange, Index No. 604862/97, 1/13/99 (Crane, J.).

Martin Act; absence of private cause of action and common law claims. Misrepresentation; negligent

misrepresentation. Fiduciary duty. Warranties. Plaintiffs sued condominium sponsor alleging that it had depressed the value of their unit by below-market bulk sales of units and the effects thereof. Plaintiffs asserted common law claims for fraud and the like. Defendants moved to dismiss on the ground that plaintiffs were attempting to assert a private cause of action under the Martin Act. There is no private cause of action under this statute. Although the Act does not extinguish common law claims, a private plaintiff may not press a claim based on the sort of wrong given over to the Attorney General to control. Thus, the court stated, no common law fraud claim will lie where the plaintiff endeavors to redress information withheld or misrepresented by the sponsor where the necessary elements of fraud, such as reliance and scienter, are absent. The court held that as the plaintiffs had not purchased from defendants and had had no contact with them, and it was not alleged that defendants had made any misstatements directly to plaintiffs, they could not demonstrate an essential element of fraud -- that defendants had made a misrepresentation for the purpose of inducing plaintiffs to rely on it. A negligent misrepresentation claim could not stand as there had been neither privity nor a link forming a basis for liability. The sponsor owed no fiduciary duty to plaintiffs and there had been no express warranty made to them. Complaint dismissed. Shah v. Infinity Corporation, Index No. 600572/98, 1/22/99 (Cahn, J.).

Partnership; fiduciary duty of general partners; ratification; counsel fees. Post-trial decision in derivative action against general partners and their management company. General partners are in a fiduciary relation to all limited partners. Because of their opportunity for greater knowledge and control, general partners owe a fiduciary duty to the limited partners similar to the duty owed by a corporate director to shareholders, a duty of candor, fairness, good faith, honesty, loyalty and unselfishness. The burden is on the general partners to show that a transaction is fair and in the best interests of the limited partners. An action may, however, be ratified or authorized after full disclosure. The court held that the general partners had breached their duty by allowing the management company to make annual rather than the required monthly payments of rent to the partnership. The general partners claimed that there had been authorization but under the partnership agreement that would have had to have been in writing by 2/3ds of the limited partners and no proof of such a writing was presented. However, as plaintiff had failed to prove what the lost interest would have amounted to, only nominal damages were awarded. The court found that plaintiff had failed to show a breach on the claim with regard to cost overruns since there was proof of written authorization. On a third claim, the court also ruled that plaintiff had failed to carry his burden of proof regarding alleged unpaid rents. With regard to the sale of the sole assets of the partnership, the court held that the general partners had failed to furnish necessary information to the limited partners about the transaction, including with respect to conflicts of interest. However, over 2/3ds of the limited partners subsequently signed consents. Although these lacked full disclosure, they were reaffirmed at a later meeting, by which time the limited partners knew all material facts, had heard objections from plaintiff represented by counsel, and yet decided to confirm their consents. At least 2/3ds accepted the payout. The court held that the sale had been ratified. Even had the court found otherwise, it would have been unable to award damages, it stated, because plaintiff's proof thereon was conclusory. The court declined to award counsel fees (Partnership Law 115) to defendants since they had not been wholly successful and had conducted their affairs in a sloppy and arrogant manner, thereby causing plaintiff to have to bring suit. Therefore, the court awarded fees to plaintiff. Simonetti v. Plenge, Index No. 6861/88, 2/19/99 (Stander, J.).

Preemption; claim of rights to software preempted by Copyright Law. Procedure; statute of frauds. Plaintiff provided certain management services for a major apartment complex. Plaintiff created a software program to facilitate management services and allegedly leased it to defendants. Upon termination, plaintiff sought return of the program and defendants claimed to have paid it for the software. Plaintiff sought leave to amend and for a preliminary injunction. The court ruled that the claim to rights in the software fell within Federal copyright law. Computer programs are subject to copyright protection. Thus, there was preemption and the court found that there was no extra element that would have brought claims within an exception for the preservation of common law claims (17 USC 301(b)(3)). The conversion claim merely alleged wrongful copying and dominion, which were not enough. The court ruled the same as to a claim for unfair competition, which also failed for lack of allegations as to marketplace confusion. A breach of contract claim would not be precluded, the court ruled. However, the alleged oral contract had called for indefinite performance, had endured for four years and the claim was thus barred by the statute of frauds (GOL 5-701). Preliminary injunction and leave to amend denied. Amended complaint dismissed. Citywide Building Servs. Corp. v. Parkchester Preservation Co., Index No. 603660/98, 2/24/99 (Gammerman, J.)

Procedure; amendment. Preemption. Class actions; decertification. Insurance. Injunctive relief. Contract action against medical plan. Class previously certified on contract and GBL 349 claims. The court granted defendant leave to amend its answer to add a defense of preemption by ERISA. As to a three-year delay, lateness alone was not enough and the fact that the defense might defeat some non-moving class members' claims did not establish prejudice. The court refused to permit plaintiff to add an ERISA claim as plaintiff was not a plan participant. The court declined to decertify the class on the

ground that certain claims of almost all class members' were preempted, but instead amended the class order to redefine the class. The court granted plaintiff's motion for summary judgment on liability on the class claim for breach of contract due to defendant's application of an "anesthesia exclusion". Plaintiff's motion was denied insofar as it sought to enjoin defendant from denying claims based on this exclusion since defendant had changed its procedures and, in any event, damages would suffice so that there was no irreparable harm. Tanzer v. Health Insurance Plan, Index No. 114263/95, 1/25/99 (Gammerman, J.).

Procedure; collateral estoppel; statute of limitations; replevin of art work; laches. Action over ownership of painting. Defendants argued that plaintiffs were collaterally estopped by the decision in another case brought by these plaintiffs concerning another painting of the same artist and in which the plaintiffs were held barred by the statute of limitations and laches. Identity of issues is an element of collateral estoppel. Although, as in the other case, plaintiffs alleged theft and there was no proof that anyone had ever previously claimed that, the painting and its circumstances were not the same. Further, the law of the other state on timeliness differs from New York's. The court held that collateral estoppel was not a bar. As to statute of limitations, it does not begin to run in a replevin action until there is a demand for return and a refusal. But defendants argued that once an owner knows where property is, he cannotunreasonably delay making a demand. Here, the plaintiffs knew that defendants had the painting in 1968 but did not demand it until 1994. The court found that defendants were not wrongdoers. The court held that there should be no unreasonable delay in asserting that a painting has been stolen. Plaintiffs themselves had no knowledge of the matter. The person who discovered the alleged 1896 theft was dead and plaintiffs relied upon documents from 1926 submitted by counsel. The documents became available in the 1940's and plaintiffs offered no explanation why the discovery was not made then. The court held that the delayed demand was unreasonable as a matter of law and the case barred. The court held that the knowledge of whereabouts of the painting should be imputed to all plaintiffs as joint owners. As to laches, the court stated that plaintiffs would have to present some proof that there had been a theft but that they could not reasonably have known it earlier. No explanation had been offered as to why none of the heirs from 1926 had pursued an inquiry. Defendants would be prejudiced now given the deaths of key persons and the great passage of time. The court held that laches barred the case. Case dismissed. Hutchinson v. Horowitz, Index No. 604942/97, 1/8/99 (Crane, J.).

Procedure; conversion of motion to dismiss; statute of frauds on maritime contract; leave to amend. Alleged agreement for brokerage commissions on international marine transport contracts. Defendant moved to dismiss on statute of frauds grounds but then sought to convert the motion to one for summary judgment. The court stated that conversion was in order since the motion had been made after the filing of an answer; mislabeling a motion as one to dismiss rather than one for summary judgment is an irregularity that may be overlooked; and plaintiff had received notice of the request to convert and an opportunity to submit additional papers. New York's statute of frauds does not apply to maritime contracts because oral contracts are valid under maritime law. Just what is a maritime contract is elusive, the court stated. The court said that a contract is a maritime one if its subject matter relates to a ship in its use as such. The court held that the contract alleged here was a maritime one and that the statute of frauds was inapplicable. On a cross-motion to amend, the court held that plaintiff could not maintain a fraud claim as the alleged fraud merely related to a breach of contract and the same damages were sought on each claim. An effort to add a claim for punitive damages was rebuffed since no public right was allegedly at issue. The court permitted the addition of a claim for prima facie tort, finding that the pleadings alleged that the defendant's sole motive had been malice. The court also permitted the addition of a claim for an accounting, stating that it was for the jury whether a fiduciary relationship had existed. Summary judgment denied; leave to amend granted in part. Compania Tauben S/A v. Stolt Tankers Inc., Index No. 604663/97, 12/7/98 (Cozier, J.).

Procedure; CPLR 3211(a)(7) motion. Fiduciary duty. Negligent misrepresentations. Brokers; real estate; commissions. Standards on CPLR 3211(a)(7) motion. Alleged breach of fiduciary duty and negligent misrepresentation by actions of non-party co-broker towards prospective lessor. As to breach of fiduciary duty by misrepresentations within a business relationship, the claimant must establish that the fiduciary had or should have had superior knowledge about the subject matter. The only such misrepresentations alleged here that arguably fit this standard (status of local construction and local regulations) were ones, the court found, on which any reasonable inquiry would have disclosed the true facts. Counterclaiming defendant should have, but did not, make inquiry, which was material. Defendant acted unreasonably as a matter of law in relying on the co-broker's opinion as to the amount of food traffic in the area. The negligent misrepresentation claim failed since defendant could not establish reasonable reliance. Plaintiff was not a party to the lease nor an intended beneficiary and ordinarily would lack standing to assert provisions thereof as an affirmative defense. Here, though, the court held, the lease rendered the alleged harm from the alleged misrepresentations impossible. Counterclaims dismissed. Summary judgment for broker on unpaid commission. Lansco Corp. v. Fashion Cafe, Index No. 603548/97, 1/25/99 (Ramos, J.).

Procedure; forum selection clause. Action against internet access provider. Defendant moved to dismiss on the grounds of a forum selection clause. Such clauses are prima facie valid, not to be set aside except in cases of fraud or overreaching or where enforcement would be unreasonable and unjust. A heavy burden must be met, which was not done here, the court ruled. Allegations that fraud had permeated the agreement ignored the fact that plaintiffs had failed to allege, as required, that the inclusion of the clause was itself the product of fraud. The court rejected an argument that defendant had waived the clause by defending itself in litigation filed in Illinois. The court found that defendant had raised an intention to invoke the clause in that case prior to settling, thus avoiding a waiver. New York's interest in protecting its consumers, the court stated, did not require trial here since other states can enforce New York's laws. Case dismissed. DiLorenzo v. America Online, Index No. 605867/96, 1/22/99 (Cozier, J.).

Procedure; judicial admissions; reargument; expert reports on summary judgment. Motion to reargue. Standards. The court held that there had been no showing of misapprehended facts or misapplied law. The court rejected defendants' argument that plaintiff should be barred from challenging the cause of the accident for which insurance coverage was sought based on judicial admissions. The court found that plaintiff had conceded that the damage had been caused by an explosion of unspent fuel but only for purposes of plaintiff's motion for summary judgment. Alternative pleadings do not establish a judicial admission and that had been the case here. The court found that summary judgment was improper given disputes about the cause of the damage. The court held that it was proper to consider the report of a non-testifying expert in opposition to summary judgment; that was not the only evidence showing a conflict of fact. The court refused to weigh credibility of an expert on the motion. Reargument and summary judgment denied. Jamaica Public Service Co. v. AIU Ins. Co., Index No. 602889/96, 2/9/99 (Ramos, J.)

Procedure; law of the case. Misrepresentation; disclaimer; reasonable reliance. Contracts; interpretation; integration clause. Derivative swap transactions. Law of the case defined. The court held that its prior decisions and those of the First Department had resolved the duty to disclose issue, whether plaintiff had reasonably relied, and alleged recommendations regarding the suitability of the transactions and that these were law of the case. Further, fraud and fraudulent concealment claims had to be dismissed because a disclaimer precluded reasonable reliance. The court found that New York law applied although English law was said in the agreement to be controlling since the record showed no difference between the two. The agreement, the court stated, was intended to apply to all investment business. Thus it and its disclaimer would apply unless expressly superseded. The court held that a later agreement that effectuated a swap did not supersede the earlier despite the presence of an integration clause in the former. The court found that the integration clause permitted collateral agreements. Summary judgment granted. Societe Nationale v. Salomon Brothers Int. Ltd., Index No. 113154/96, 2/5/99 (Ramos, J.).

Procedure; personal jurisdiction; tortious conduct in the state (CPLR 302(a)(2)). Abuse of process; elements. Action for abuse of process premised on alleged misuse of litigation in Russia. A meeting in New York was claimed to be critical. The court held that a defendant which had not appeared at that meeting had not committed a tortious act in the state and was not subject to jurisdiction (CPLR 302(a)(2)). The opposite conclusion was reached as to other defendants who had been present. The fact that the party's president, a non-party, had commenced other litigation here did not constitute a corporate consent to jurisdiction. Where, as here, no party is a New York domiciliary, the law of the place of the tort applies. Under New York law, the complaint here failed, the court ruled. The mere commencement of the Russian civil action and the issuance of provisional orders of attachment did not suffice as the basis for such a claim. Efforts to coerce a settlement did not constitute or involve judicial process. Alleged unreasonable delay of the litigation did not amount to misuse of process. The court also held that defendants had not allegedly acted solely with intent to harm plaintiffs, but had been seeking return of their property. Nor were the defendants seeking an improper collateral advantage; they were trying to settle or succeed in the litigation. Motion to dismiss granted. Bonarco, Ltd. v. Cossington Overseas, Ltd., Index No. 110264/98, 2/11/99 (Cahn, J.).

Procedure; personal jurisdiction; trust transaction in New York. Indemnity; release; attorney's fees. Defendant moved to dismiss for lack of personal jurisdiction. The court held that defendant had engaged in purposeful activity in New York. At issue was a release drafted in New York, governed by New York law and requiring performance in New York, including payment to the New York trustee. The release had been premised on an accounting which the trustee had made in New York under New York law. Although defendant had signed it outside New York, that fact was not dispositive. There was a significant contact substantially related to plaintiff's cause of action. Defendant had agreed to indemnify the trustee form any and all claims arising from a trusteeship for certain years and to hold the trustee harmless from "any expenses of whatsoever kind". The court held that the release contemplated possible litigation relating to the trust and that defendant had

agreed to indemnify the trustee for any costs related thereto, necessarily including attorney's fees. Summary judgment would be granted to plaintiff but the court stayed the action pending the outcome of an action elsewhere that would resolve the validity of the indemnification agreement. Chemical Bank v. Thomason, Index No. 104408/96, 12/22/98 (Cozier, J.).

Procedure; professional malpractice; statute of limitations. Assignment; professional malpractice claims. Professional malpractice; equivalent of privity; third party beneficiary. Assignee sued law firm for breach ofcontract based on alleged failure to provide sound services in connection with a complex commercial loan transaction. Plaintiff also asserted claims premised upon virtual contractual privity and third-party beneficiary theory. In a legal malpractice claim based on defective documents, the limitations period begins to run when the documents are prepared and delivered to the client. The court found that it was not clear when this had happened and that defendant had continued to work on the transaction, thereby arguably tolling the statute. The court held that an assignment provision was insufficient to cause an assignment of legal malpractice claims, but that a subsequent agreement achieved that result. Dismissal under CPLR 3211(a)(1) on grounds of champerty and failure to assign all rights and claims was denied because the documentary evidence did not conclusively establish them. The court noted that there had been only one alleged direct contact between the firm and plaintiff and in that the firm had sought review by plaintiff's counsel. The court held that this contact and the fact that the assignor's agents had expressly been stated not to be acting as agents for plaintiff meant that there was not sufficient linking conduct under Credit Alliance. Even if this were sufficient contact, the court said, the alleged misrepresentation and reliance on it had occurred more than three years prior to commencement of the suit. The claim was time barred. The court held that there were no allegations sufficient to support a third-party beneficiary claim. State of California v. Shearman & Sterling, Index No. 121606/97, 2/2/99 (Shainswit, J.).

Procedure; statute of limitations; date of noncompliance. Real property; duties of commercial tenant; waiver. The court held that certain claims regarding fireproofing and asbestos abatement were time-barred. The date of accrual was the date the building was rendered out of compliance with fire regulations. That date here was the date of installation, which was outside the statutes for negligence and breach of contract. The court also held that the claim was not revived when the tenant vacated since the work was not included in tenant's exit work. Nor could labeling this claim as one for indemnity be allowed as that would circumvent the statute. As to a separate claim for abatement, the court found that there were questions in dispute as to whether the exit work disturbed the asbestos, which would be the time of accrual. The court held that certain work was not the responsibility of the tenant and dismissed claims based thereon. The tenant could not be compensated for property it had failed to remove in view of the lease terms and New York law. The court held that the failure of the landlord to repair after the tenant vacated did not cause a waiver of the tenant's obligation to repair. Summary judgment accordingly. Chemical Bank v. Stanley Stahl, Index No. 103367/94, 2/5/99 (Ramos, J.).

Procedure; statute of limitations; FIRREA. Plaintiff under FIRREA had six years from later of the date the cause of action accrued or the date the Corporation was appointed receiver or conservator. Can the period be restarted by an appointment as receiver/conservator to a bridge bank or a new bank? The court held that the key date was that of original appointment. Otherwise, there would be encouragement to delay collection, which is not in the best interests of the banking system and the insurance fund, and chances of abuse. Also there would be no repose on which the debtor could rely. Complaint dismissed. FDIC v. Weise Apartments, Index No. 123151/97, 1/8/99 (Crane, J.).

Procedure; statute of limitations; mechanic's lien. Notice of mechanic's lien filed in May 1998. The movant on a motion to dismiss contended that all work under the original contract had been completed in February 1997. However, the filing party submitted an affidavit stating that work was still being performed and additional materials provided within eight months prior to filing of the lien. The notice indicated the same thing. Accordingly, the court ruled that dismissal on statute of limitations grounds (Lien Law 10; CPLR 3211(a)(5)) was inappropriate. Grande'Vie Senior Living Community v. Dun-Rite Heating, Inc., Index No. 3481/98, 1/99 (Stander, J.).

Procedure; statute of limitations; place of accrual; questions of fact. Contracts; tort claims duplicative of contract claims. Plaintiff sued Cushman defendants based upon an allegedly excessive appraisal by them of the value of a shopping center property on which plaintiff lent some $ 49 million. Defendants argued that the events had occurred in Pennsylvania and that under its two-year statute of limitations on tort claims, claims for fraud and other wrongs failed. Plaintiff argued that the defendants had issued supplementary appraisals in 1992, 1993 and 1995 which allegedly covered up the 1989 appraisal, and that the law of New Jersey (where much of the wrong occurred) or the Netherlands (plaintiff's home country) controlled. And plaintiff claimed that in any event a 1995 tolling agreement revived claims against these defendants. The court ruled that the tort claims had accrued in Pennsylvania and its statute applied. The court stated that there were questions of fact as to whether plaintiff knew, or reasonably should have known, of the injury and its link to defendants. The issue of

the meaning of the tolling agreement, the court said, ought to be for thetrier of fact as well. However, the court held that the motion nevertheless had to be granted since plaintiff merely repeated and incorporated by reference the same facts for its contract and tort claims. A breach of contract is not tortious unless a legal duty independent of the contract itself has been violated. Partial summary judgment granted. Rodin Properties v. Ullman, Index No. 600901/95, 1/5/99 (Shainswit, J.).

Procedure; statute of limitations; replevin. Plaintiff sought to force auction house to comply with agreement to sell Dali paintings or return them to plaintiff. A claimant to the paintings moved to intervene. The court held that the three-year statute applied to the proposed claim(CPLR 214(3)). A claim for replevin against the good-faith purchaser of a stolen chattel does not accrue until the alleged owner has made a demand for return of the item and the demand has been refused. The intervenor's counsel wrote to defendant, which did not return the paintings. A demand alone, without a refusal, does not start the period running. Motion to intervene granted. Mormando v. Sotheby's Inc., Index No. 602002/98, 1/21/99 (Cahn, J.).

Procedure; summary judgment; conclusory assertions. UCC; statute of frauds. Assignee of estate of deceased designer sued seeking shares in defendant, compensation due, and life insurance benefits. Standards of summary judgment summarized. The court held that plaintiff's contention of an oral promise to sell stock was unsupported, did not make sense in light of a stock offering that had been withdrawn for lack of market interest, and was unenforceable (UCC 8-319(a)). The court held that plaintiff asserted his claim for compensation in conclusory fashion, which was contradicted by the realities of the business in question, and by past practice. The court found that the record showed that the deceased had not been an officer but an independent contractor. Therefore, he was not entitled to executive life insurance benefits. Summary judgment for defendants. Proios v. Nine West Group Inc., Index No. 110661/96, 2/25/99 (Ramos, J.).

Real property; conditions to sale. Motion for summary judgment on real estate sales contract. Cross-motion to declare the contract void and to dismiss the action. The court held that as a contract rider conditioned the sale on HPD entering into an agreement with the purchaser to resolve a certain Civil Court proceeding and as the only such agreement had been vacated by that Court, a condition had not been met and plaintiff was not entitled to specific performance. Further, plaintiff was not entitled to an order directing HPD to facilitate the sale by offering favorable settlement terms as that would be solely within the HPD's discretion. HPD had refused terms to defendant owner because a shareholder, also a shareholder in plaintiff, had repeatedly failed to maintain the property. Defendant was entitled to a judgment declaring the contract null and void. 110th Street LLC v. Tenrit Studios, Inc., Index No. 102094/97, 2/17/99 (Cozier, J.).

Real property; lis pendens. Debtor & Creditor Law 276-a. A lis pendens may be filed only when the judgment demanded would affect title to, or the possession, use or enjoyment of, real property and the court must be strict in interpreting this standard. As a result of a Federal action, title to property that had been fraudulently conveyed was transferred back. In this case, the judgment in which had motivated the conveyance, there was no longer a dispute as to an interest in the property and the defendant thus sought to cancel a lis pendens. However, the plaintiff wished to recover attorneys fees under Debtor & Creditor Law 276-a in the Federal case and thus sought to maintain the lis pendens. The court held that the grant of fees is an integral part of a fraudulent conveyance action and that a lis pendens relating to the claim for fees is appropriate until a final judgment in the Federal action was entered. The court ruled that it would permit the vacatur of the lis pendens but only if it was bonded in a set sum. Domino Media v. Kranis, Index No. 26926/91, 2/24/99 (Cahn, J.).

Restrictive covenant and trade secrets. Preliminary injunction; disputes of fact. Court upheld breach of restrictive covenant and breach of fiduciary duty claims. The court noted that an employee may secretly incorporate a competitive business prior to leaving, but may not use the employer's time, facilities, or secrets to advance same. The court also upheld tortious interference, unjust enrichment, and implied covenant claims. The court found that plaintiff had sufficiently alleged non-public information knowledge of which defendants had acquired through employment, and misappropriation thereof. The court held that it was not necessary to determine the viability of a confidentiality agreement since a fiduciary duty not to disclose was present. An unfair competition claim was sustained. On application for preliminary injunction, the court relied on the Restatement of Torts 757. The court held that plaintiff had failed to adduce enough proof to support the claim of trade secrets and confidential customer lists. Mere accessto such information does not constitute misappropriation. That issue was disputed sharply here, as was whether customers were readily knowable. The court concluded that plaintiff's chances of success were unclear. Application denied. Business Networks v. Complete Network Solutions, Index No. 605463/98, 2/19/99 (Ramos, J.).

Restrictive covenants. Unfair competition. Alleged breach of restrictive covenants and misuse of confidential information and trade secrets. The court found that certain agreements were no longer enforceable because they had been superseded by another by the latter's terms. The covenants in the later agreement were no longer enforceable, the court held. The

agreement expired in 1996 by its terms. The company expressly had declined to renew it. A remaining agreement provided that if the employee was terminated by a reduction in force, the non-compete provisions would apply only during the period the former employee was receiving severance or other compensation. The record, the court found, suggested that the termination had been due to a reduction in force. But even if not, the court stated, the covenant was too broad to be enforceable. It was not limited to direct competitors; covered a wide area; would have prevented the employee from starting his own business or acting as a consultant where similar products or services were involved. Furthermore, another employee of defendant corporation had independent knowledge of relevant information so that plaintiffs had not shown that it was necessary to prevent the hiring of the former employee. The court found that the bulk of the allegations of unfair competition were conclusory, speculative, and insufficient. A claim that the former employee had changed a password on a computer that had been given him containing confidential company information stated a claim. A mere denial by the employee did not suffice to justify summary judgment for defendants. Claims dismissed in part. Corporate Express Delivery Systems v. DeVito, Index No. 603933/97, 1/5/99 (Cahn, J.).

Settlement. Agreement to provide telecom services for resale to debit card users for international calls. A dispute arose over compliance with a settlement agreement. $ 4.7 million was paid but plaintiff claimed that defendants had failed to comply with other obligations. The court held that the payment of the money did not fully settle the case. Plaintiff had given notice of termination of all telecoms services as permitted if full compliance had not occurred. Signed releases were never exchanged and a stipulation of discontinuance was not filed. The settlement agreement had been intended as a global settlement of the parties' claims, including some not alleged in the complaint here. The fact that these had not been alleged was not a ground for dismissing the complaint, the court found, as many of the key provisions of the settlement had not been performed. Motion to dismiss complaint denied. Worldcom, Inc. v. Arya Int. Comms. Corp., Index No. 600387/98, 2/2/99 (Shainswit, J.).

UCC 3-419. Accounting; fiduciary relationship. Counsel fees. An instrument is converted when it is paid on a forged endorsement. UCC 3-419. A bank's acceptance of drafts without endorsement is commercially unreasonable as a matter of law and gives rise to liability under this section. Here the checks carried no endorsement. Thus defendant's argument that the endorsements were authorized was found without merit as there was nothing to authorize. Defendant's acceptance of unendorsed checks payable to a judgment debtor whose accounts had been restrained and the depositing of them in another entity's account could not be excused on the ground that the other entity had ultimately distributed the proceeds to the named payee. It was alleged here that defendant had had actual notice that plaintiff judgment creditor was the true owner of the checks. As to an accounting, a fiduciary relationship is required. The court held that plaintiff as a secured party had no greater rights against defendant than the judgment debtor, ie, those of a depositor (debtor-creditor). Therefore there was no basis for an accounting. The court held that plaintiff had failed to allege any factual basis for a claim for counsel fees under the Debtor & Creditor Law, only conclusory allegations on information and belief. European American Bank v. Chase Bank, Index No. 601986/98, 2/2/99 (Shainswit, J.).

THE NEXT ISSUE WILL BE POSTED ON THE HOME PAGES OF THE COMMERCIAL DIVISION AND THE COMMERCIAL AND FEDERAL LITIGATION SECTION ON **MAY 25, 1999**, COVERING DECISIONS ISSUED IN MARCH & APRIL
