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Agency; liability of disclosed agent. Account stated; failure to object. Plaintiff sued for accounting fees. Defendant argued that his lawyers, not he, had retained plaintiff. However, the court held, the firm was his agent and plaintiff so knew. Liabilities of an agent acting pursuant to the principal's authority are the responsibility of the latter. Defendant expressly authorized the firm to act and the retainer agreement indicated that he alone would be responsible for the fees. Defendant and his firm recognized that he was ultimately responsible and in fact he issued a check to plaintiff with a notation "on A/C" and thus was precluded from asserting that the fees paid were unreasonable. As to fees not paid, defendant claimed he had objected to bills but there was, the court held, no proof that the firm or he had conveyed these complaints to plaintiff. The firm's failure to complain to plaintiff and defendant's payment on account supported an account stated. Defendant offered only conclusory assertions in support of his counterclaims. Summary judgment for plaintiff on contract and account stated claims. Urbach Kahn & Werlin v. LeRoy, Index No. 603901/97, 8/21/98 (Cozier, J.).

Arbitration; obligation of individual. Corporations; piercing the veil. To compel arbitration it must be shown that the party unequivocally agreed to arbitrate the dispute. An individual who signs an agreement solely in a representative capacity is not bound to arbitrate. The agreement here provided that it was between petitioner and the corporate respondent. The individual respondent signed at the bottom in a space after the word "By." The omission of her title did not establish an intent to be bound personally. The near universal practice in the commercial context is for the representative to sign twice to create personal liability. An individual can be compelled to arbitrate if the corporate veil is pierced, where there are specific allegations of illegality, fraud, or use of the corporation to further the individual's personal business. The court held that petitioner had failed to raise an issue of fact sufficient to require a hearing on this issue in a case in which the gravamen was a simple alleged breach of a corporate contract. The veil will not be pierced if the controlling principal respects corporate formalities and the corporation pursues its own business. TMP Worldwide v. Potter-Clay, Index No. 105376/98, 8/28/98 (Cahn, J.).

Brokers; commission; transfer as condition. Plaintiff moved to reargue a decision to dismiss a claim against a defendant for lack of privity. Plaintiff sought a commission on a sale of real property but that defendant had been the potential buyer and had not entered into an agreement with plaintiff. Movant argued that the decision had been incorrect only insofar as the court had also interpreted the agreement to mean that a passage of title was required forplaintiff to recover a commission. Absent an agreement otherwise, a broker is entitled to a commission when he/she produces a buyer ready, willing and able to purchase on acceptable terms. Here, tho, the court held, the agreement provided that the transfer was a condition. Thus, the defendant referred to was not liable, nor were the selling defendants on claims for breach. Because of the existence of a contract, quantum meruit and unjust enrichment claims failed. Reargument granted but previous ruling adhered to; cross-motion to dismiss granted. Scardino v. Iversen, Index No. 10919/97, 8/19/98 (Stander, J.).

Bus. Corp. Law 630. As a general proposition, it has been held, ERISA preempts Section 630. Not every claim of an employee, however, falls within the scope of ERISA; the court must analyze the claims to determine that. Here, the court held, the papers did not sufficiently describe the nature of the claims so as to permit a conclusion, especially since the claims sued on were only those that had not been treated as preferred claims in a related bankruptcy proceeding. Abate v. Unger, Index No. 9919/87, 8/25/98 (Cahn, J.).

Class actions; certification. Action for breach of contract and other wrongs due to defendants' retroactive termination of health benefits without notice. The court rejected defendants' argument that certain claims could not be certified for class treatment as plaintiffs had not shown that anyone had been misled, including themselves, since they had received billing statements. The court said that defendants had allegedly pre-certified medical procedures at a time when the patients had purportedly been terminated and the statements themselves were alleged to have been misleading. The court held that since plaintiffs sought a declaration that defendants were required to give advance notice of termination, all subscribers could be considered part of the putative class. The court held that defendant's argument that there had been numerous versions of the contract over the period at issue failed as they did not indicate what the relevant terms were nor when the contracts had been in effect. The court thus found that the numerosity standard was met. The court rejected defendants' argument that issues of detrimental reliance predominated. There need not be identity. Requests for equitable relief affected all members, regardless of monetary damage, and the issue of the duty to notify was common and was separate from the question whether anyone relied. Damage proof, the court stated, would not defeat the class and there could be sub-classes as needed. On typicality, the court found irrelevant defendants' distinction between plaintiffs and the class on the basis of whether premiums had been paid since the common issue was prior notification. Reliance would not adversely impact here either. The court rejected the argument that one plaintiff would be an inadequate representative since she had refused to answer EBT questions based on marital privilege; defendants had failed to demonstrate why the privilege had been waived and did not seek a ruling and plaintiffs did not refuse to furnish discovery. Defendants failed to show that plaintiffs would prefer their own interests over those of the class, which the court found the same. The court held sufficient that plaintiffs had admitted their responsibility for costs and testified that they did not have to pay anything until the case was over. The court rejected defendants' complaints about plaintiffs' counsel. The court determined that many class members would have damages in small amounts so that class treatment would be superior and the only practical method. Motion granted. The court held that as only equitable relief was sought as to current subscribers, they need not be notified. The court found that plaintiffs were likely to succeed and ordered defendants to pay for notice to those who had been terminated, without prejudice to possible later apportionment. Makastchian v. Oxford Health Plans, Inc., Index No. 603653/96, 7/6/98 (Crane, J.).

Class actions. Certification. Motion for class action certification. The court held insufficient on numerosity the conclusory assertion that there were hundreds or thousands of prospective class members. The court held that the same warrant agreement was breached with regard to each class member (per collateral estoppel) and thus individual damage issues would not outweigh the common questions as to breach. The court found the claims typical since they arose out of the same course of conduct despite the fact that some warrants were held in an IRA and the rest in a joint account with plaintiff's wife. The court held that the custodian of the IRA would not be a necessary party; the wife would be but presumably would become a party by virtue of class membership. On the element of adequate protection of the class, various standards were met. But plaintiff's papers failed to address whether he had the means to pursue the case properly, an issue on which a defendant has a right to discovery. The court held that it could not conclude that the superiority element was satisfied yet given the open issues. The motion was denied with leave to renew on completion of class discovery. London v. Versus Technology, Inc., Index No. 120758/96, 7/2/98 (Ramos, J.).

Contracts; construction; waiver of time requirements. Defendant argued that portions of plaintiff's claim for workand extra services failed since no notice of differing site condition and no notice of additional compensation were given as required by the General Conditions in the contract documents. However, there was a work change directive issued by defendant and it indicated that the items for a change proposal were not due until the completion of the task. Further, defendant's employee was keeping track of extra work due to that task, pursuant to a job site meeting. Defendant, the court held, had waived the requirement in the contract documents to provide notice within seven days. The same conclusion was reached as to defendant's argument premised upon untimely notice of differing site condition. Intra-State Contracting Corp. v. Monroe County Water Authority, Index No. 4848/97, 9/28/98 (Stander, J.)

Contracts; interpretation. Settlements. Parties had resolved a dispute by an agreement. Defendant claimed that it had fulfilled its obligations thereunder by transferring stock. It claimed that in fact it had owed no balance to plaintiff and that plaintiff's filing of liens had pressured it into paying the debt and settling the case. The court held that defendant, with counsel's advice, had acknowledged the debt and could not now disavow its promises just because plaintiff had lawfully filed liens. Plaintiff claimed that under the agreement a transfer of stock had satisfied one part of the debt regardless of how much the value of the shares had increased and that another part of the debt remained. The agreement addressed how the parties would handle a decrease in the value of the shares, but not an increase. The court held that plaintiff was not entitled to a windfall. The court interpreted the agreement to require plaintiff to apply the additional value of the shares to the other part of the debt. Summary judgment granted accordingly. Robert Doscher Assoc. v. New World Coffee, Inc., Index No. 602819/97, 8/31/98 (Cozier, J.).

Discovery; materials from special litigation committee in derivative action. Privilege. Work product. Motion to compel Special Litigation Committee ("SLC") of corporate defendant to produce documents relating to interviews conducted by it and its counsel. This derivative action concerns alleged breaches of fiduciary duty by the defendant directors in regard to certain benefits paid to corporate officials. The SLC moved to dismiss on the ground that the suit is not in the best interests of Grace and submitted a lengthy report in support of the motion. The court noted that the SLC under Delaware law must prove its independence and that it conducted a reasonable inquiry in good faith. The court may direct limited discovery on this question. The court rejected SLC's argument that plaintiffs were seeking merits discovery and held that discovery of the documents was necessary. Extensive reliance on counsel was a factor favoring discovery. Denial of the disclosure would have allowed the SLC to insulate its inquiry from scrutiny where counsel conducted the interviews. Other discovery, the court held, did not moot this motion since it sought the only available documents revealing the subjects of the interviews. The court stated that some material protected by the attorney-client privilege might be in the documents, tho the privilege would be problematic here. An in camera review was ordered in which counsel's mental impressions, etc. would be protected. Weiser v. Grace, Index No. 106285/95, 8/31/98 (Cozier,J.).

Discovery; motion to quash subpoena. Non-party moved to quash subpoena served on an entity for movant's account records. Plaintiff served the subpoena on the entity as part of its effort to collect a judgment against defendant and argued that the charges shown on movant's credit card were relevant since the card movant used had been a corporate card given by defendant. The standard on such a motion, said the court, is whether the information sought is irrelevant to any proper inquiry. The court held that privacy concerns would not bar the inquiry here, that the Federal Right to Financial Privacy Act does not restrict access by private persons, and that Civil Rights Law 50-51 does not protect the type of information plaintiff sought. The court noted that New York does not recognize a common law right of privacy that could aid movant. Motion denied. Kaufman 8th Ave. Assoc. v. Scott Magazine Dist. Corp., Index No. 124575/93, 8/21/98 (Cozier, J.).

Discovery; protective order re attendance at EBTs. Procedure; pleading tortious interference, trade disparagement. Preliminary injunction. Plaintiff moved to exclude defendants from attending the depositions of one another in an action alleging misappropriation of trade secrets and unfair competition. Plaintiff argued that it would be unable to obtain spontaneous, candid and truthful testimony from each defendant if all were permitted to listen to one another's testimony prior to testifying. The trial courts, the court noted, have broad discretion in supervising disclosure. Altho generally each defendant has a right to attend the EBT of a witness or co-defendant, that right must be balanced against the plaintiff's right to elicit spontaneous, uncolored testimony uninfluenced by the testimony of another witness. What plaintiff sought was information about the actions of each defendant and those of the co-defendants. The testimony of each was alleged to be critical given the nature of the claims in the case. The court foundthat where the defendants are represented by the same attorney and have almost identical interests, the presence of the single attorney during the questioning of each would suffice to protect the defendants' interests. The court held that a protective order would promote plaintiff's right to elicit spontaneous, candid and truthful testimony and that plaintiff's interest outweighed the potential for prejudice to the defendants. Plaintiff also moved to dismiss counterclaims. As to tortious interference, the court held that defendants had failed to plead any act that was malicious, intentional or otherwise improper, or that defendants had suffered any damage as a result of a letter plaintiff had sent clients advising of its intention to protect its trade secrets. A trade disparagement claim was dismissed because of failure to identify and contest the allegedly false statements in the letter. Innuendo alone does not suffice. Defendants, the court held, had failed also to make the showing required for a preliminary injunction since there were no factual allegations demonstrating irreparable harm or showing likelihood of success. Motions for a protective order and to dismiss granted. Deskey Associates, Inc. v. Warner, Index No. 600119/97, 9/14/98 (Cozier, J.).

Disqualification. Plaintiff moved to disqualify defense counsel on the grounds that a partner was a son of an individual defendant and involved in some of the business of defendants and would be a witness as to elements of plaintiff's case. Plaintiff had to show that the son's testimony was necessary and would or might be prejudicial to the firm's client. The court held that plaintiff had failed to demonstrate that disqualification was justified at that point. The testimony at best could concern only a part of the case. The son denied the business link alleged and stated that he would not be appearing as an advocate in the case. His knowledge appeared limited and his testimony cumulative. Nor had plaintiff shown that it would be prejudicial. Appel v. The Dayan Organization Group, Index No. 605797/97, 8/24/98 (Cozier, J.).

Fiduciary duty and misrepresentation; purchaser of business. Plaintiff asserted that he had been defrauded by defendants into selling his stock to some defendants at an unreasonably low price without knowledge that the corporation was about to be sold. The corporate purchaser moved to dismiss claims for breach of fiduciary duty and fraud. Plaintiff argued that the seller had allegedly intentionally aided and abetted the other defendants in their breach of fiduciary duty and conspired with them to defraud plaintiff. The circumstances of such claims must be stated with sufficient detail (CPLR 3016 (b)). A claim of conspiracy alone is not actionable; there must be pleaded a specific wrongful act that might constitute an independent tort. The court held that plaintiff had not alleged any specific act by the seller on either claim. Mere inaction would not give rise to aiding and abetting liability for fraud or breach of fiduciary duty. The seller had no fiduciary duty to disclose information to plaintiff. Motion granted. Goldberg v. Moskowitz, Index No. 600619/98, 8/26/98 (Ramos, J.).

Indemnification (BCL 725). The court rejected defendant's argument that the court lacked subject matter jurisdiction because plaintiff had failed to seek indemnification in an earlier Federal action. The question rather was whether plaintiff showed reasonable cause for not having applied in the Federal case. The court found that plaintiff's counsel in the Federal case had had a conflict in that it also represented the defendant. The court also rejected defendant's argument that plaintiff failed to state a cause of action. The court held that the fact that plaintiff had been found to have violated the civil rights of the Federal plaintiffs would not dispose of his indemnification claim (BCL 722). The indemnification issue was not resolved in that case since it had not been raised. Defendant's allegations here also were found to be inconsistent with allegations in a malpractice action brought by it against the attorneys who had advised in connection with the board decision. Motion to dismiss denied. Biondi v. Beekman Hill House Apt. Corp., Index No. 606623/97, 7/23/98 (Ramos, J.).

Insurance. Decedent applied for a life insurance policy. The insurer had not issued one because of concern about the risk and had sought different terms at a different rate. The insurer sought dismissal of a claim that it had negligently failed to issue a policy. The court held that an insurer has no duty to process an application within any set time and dismissed the claim. Plaintiffs' claim for breach against the insurer was also dismissed. A condition precedent to the effectiveness of a policy is payment of the first premium. Plaintiffs did not allege that that had occurred. As to a negligence claim against the agent, the court found that conversations between the agent and the decedent might be barred by the Dead Man's Statute, but that in any case the conflicting affidavits raised questions of fact as to who had dragged out the application process in the wake of the insurer's initial demurral. Petrosky v. Brasner, Index No. 605317/97, 9/23/98 (Shainswit, J.).

Jury trial; breach of warranty claim. Plaintiffs' only remaining claim was denominated one for breach of warranty. However, plaintiffs prayed for a judgment rescinding their investment and restitution of the purchase price. As a general matter, the court said, only actions at law are entitled to be tried by jury. An action for rescission is one seeking equitable relief. Joinder of legal and equitable claims results in waiver of the right to trial by jury. Here plaintiffs, the court found, had attempted and intended to rescind the contract. The measure of damages in an action for rescission is recovery of the purchase price upon the return or tender of the property. In order for plaintiffs to be entitled to a rescissionary measure of damages there would have to be a finding that defendants had engaged in material misrepresentation, a finding that can only be made by the court. Therefore, the court ruled, plaintiffs were not entitlted to a jury trial. Motion to strike granted. Community Energy Alternatives Inc. v. Peatco II, L.P., Index No. 5359/91, 9/30/98 (Cozier, J.).

Labor Law 193. VP of Marketing and Sales was an executive not entitled to the protections of Sect. 193 with regard to deductions from severance pay as to wage supplements. Bianchi v. Chapman Instruments, Index No. 590/98, 7/1/98 (Stander, J.).

Misrepresentation. Agency; actual and apparent authority. Respondeat superior. Negligent supervision; lack of duty. Plaintiffs alleged that defendants had engaged in a scheme to induce them to invest in an IPO. The complaint contained only conclusory allegations that defendant Duke's employees had been involved save for one such, a co-defendant. Plaintiffs claimed that the relaying of messages to co-defendant Pepe and the failure of Duke employees to disclose that Pepe was not a Duke employee should have estopped Duke from challenging that Pepe was its authorized agent. Pepe did not have actual authority and plaintiffs had had a duty to inquire whether he had any. An employer is not liable if an employee acts on his own behalf for his own purposes. The requisite factual allegations on this point were held missing with regard to the actions of the employee co-defendant. All claims save one being premised on the actions of Pepe and the co-defendant employee, these claims were dismissed. As to negligent supervision, as Duke was not in privity with non-client plaintiffs, it owed plaintiffs no duty to supervise its employees with care. Motion granted. Kerr v. Hagins, Index No. 100070/97, 8/25/98 (Ramos, J.).

Mistake, unilateral. Negligent misrepresentation. Primary jurisdiction. A party who has made a payment based upon a unilateral mistake may recover unless the payee has changed position in reliance. Defendant here, the court held, had changed position and was entitled to summary judgment on this claim. Plaintiff also asserted misrepresentation. Plaintiff would have to show a special relationship, that information given had been false, and that plaintiff had reasonably relied. The court found that there was some evidence of negligence on plaintiff's part, but that there was an issue of fact as to whether defendant had made a negligent misrepresentation upon which plaintiff had reasonably relied. The court also rejected a primary jurisdiction argument. The PSC is expert in resolution of billing disputes, the court stated, but the issue was one of negligent misrepresentation, the amount of the bill being undisputed. Hudson River Club v. Consolidated Edison Co., Index No. 603704/97, 8/26/98 (Shainswit, J.).

Not-for-Profit Corp. Law. Procedure; pleading fraud (CPLR 3016(b)); summary judgment. NPCL; standing. Collateral estoppel. Plaintiff sued former officers of New York NPCL entity for waste. The defendants had been convicted of Federal crimes based upon their fraud at the entity. Defendants cross-moved to dismiss. CPLR 3016(b), the court ruled, was inapplicable since there were no allegations of common law fraud and the statutory claims had adequately been stated. The court held that the Attorney General had standing under the NPCL to sue former officers and directors to recover damages for misappropriation. As the same damages were not being sought by the entity in a pending Federal suit, that suit did not bar this one. The court rejected an argument premised on GOL 15-108. The plaintiff moved for partial summary judgment on collateral estoppel grounds. The court concluded that the failure of the AG to submit copies of all the pleadings with his initial papers did not doom the motion where a complete set was included in all of the papers in support, the motion had been fully litigated, and defendants claimed no prejudice. The court held that the Federal convictions satisfied the standards for collateral estoppel and that defendants were thus liable for certain sums misappropriated. The court found that there were issues of fact as to whether some monies had been repaid. Motion granted. Vacco v. Aramony, Index No. 401592/95, 7/13/98 (Crane, J.).

Nuisances; abatement. Prohibited adult establishments. Statutory construction. Judicial estoppel. Applications for preliminary injunctive relief to close three establishments. Hearings were held. The maxim *expressio unius* was held applicable to a zoning regulation. The court found that the interpretive factors urged by plaintiffs -- revenues andpatronage -- could not be considered along with area because of the use of "portion" in the regulation rather than "substantial use." This, the court stated, comported with the interpretation given by the Department of Buildings. The court said that the City would be judicially estopped from changing its position about the criteria to be considered in applying the regulation in view of statements made in Federal court. The burden was on plaintiffs by clear and convincing proof. The court stated that narrow, objective and definite standards were required in order to protect against arbitrary abridgement of speech. Although defendants argued that the City could monitor future developments, the court said that the City cannot constantly place inspectors in premises to ensure compliance. But the court rejected the notion that once abatement had occurred, periodic inspections did not represent an alternative to permanent closure. The plaintiffs argued that the abated condition of the places at issue still depressed property values, a consideration behind the regulation, but the court stated that the regulation had been drafted to permit a 60/40 area split. The court could only implement the regulation as written. Applications denied. City of New York v. Show World, Inc., Index No. 402702/98, 8/28/98 (Crane, J.).

Partnership; fiduciary duty of departing law firm partners. Plaintiffs had been partners in defendant law firm ("BAM"). In a post-trial decision, the court ruled on the question of whether they had breached any fiduciary duties. The court held that a plaintiff had the right to search for a new position and to depart. However, the court held that it had been improper for him to try to persuade another to leave who had not before considered doing so. The court also ruled that as these two were the only T&E partners, the encouragement of the other and the way in which the departure had been orchestrated had been done in part to cripple the department, which constituted a breach. Provision of redacted lists about T&E economics and work to the prospective new firm was not a breach, the court found. The firm failed to show that the partners had had discussions about their departure with associates. During a pre-departure waiting period, the outgoing partner has duties to the old partnership. In fact, unless otherwise agreed, even after termination, an agent owes a duty not to take advantage of a confidential relationship created during the old agency. The two partners had sent notices to the clients prior to leaving; the sending and wording of these did not constitute a breach. While still at BAM, the two had sent a memo to the new firm conveying confidential information about associates, almost all of whom were later hired away. The sending of the memo combined with the hiring constituted a breach, the court held. The court ruled that the two had breached their duty by taking certain correspondence files with them as these were the property of BAM and their absence would have made it hard for BAM to rebuild the T&E department. Gibbs v. Breed, Abbott & Morgan, Index No. 37028/92, 9/28/98 (Cahn, J.).

Piercing corporate veil. Conversion. Negligent misrepresentation; duty to speak. Procedure; summaryjudgment; standing. Statute of frauds. Promissory estoppel. Equitable estoppel. Plaintiff sought to hold sole shareholder personally liable for monies transferred from a custody account. The court found that this defendant had exercised complete dominion over the corporation. He personally had to authorize transactions. Here there was evidence, the court found, of his personal participation in the challenged activity. He claimed that he had not knowingly participated in a conversion, but the court stated that wrongful intent is not essential. Once he became aware that a corporate agent had converted the money, he had a duty either to return or replace the money. Conversion implies a withholding. A principal is liable if he/she later ratifies the acts of the agent and retains the benefits. This defendant had not raised a triable issue so summary judgment was granted for plaintiff. As for negligent misrepresentation, if the court were to consider that claim, a special relationship would be required, one of trust and confidence. The relationship between the plaintiff and defendant was the functional equivalent of privity. The court said that there were triable issues as to whether the standards for negligent misrepresentation were met. A like conclusion was reached as to other claims. On defendant Smith Barney's motion for summary judgment, the court noted that summary judgment may be granted for a non-moving party without the need for a cross-motion. The court rejected a standing argument arising out of a bankruptcy settlement. The court rejected a statute of frauds argument because of the existence of a confirmation letter signed by Smith Barney, which amounted to a contract, which Smith Barney had breached. The court also held that the elements of promissory estoppel had been satisfied here. The court dismissed an equitable estoppel claim for lack of exceptional circumstances. The court held that plaintiff and Smith Barney did not have the special relationship needed for a negligent misrepresentation claim. There were issues of fact as to agency liability. Bank of New York v. Manshul Constr. Corp., Index No. 601630/96, 8/5/98 (Ramos, J.).

Preemption. Contracts; oral employment at will. The court held that plaintiff's claim of breach of contract by not granting her permanent status upon the retirement of another worker was preempted by the Labor Management Relations Act in that the claim was inextricably intertwined with rights established and duties imposed by the collective bargaining agreement. That claim was time barred. The court also ruled that the claim failed under the at-will doctrine, which applied despite plaintiff's effort to give her claim a different name. It was inconsistent of plaintiff to seek to avoid preemption and at the same time to argue that the collective bargaining agreement would have afforded her protection from termination and that she should be considered not to have been an at-will employee. Rooney v. Tyson distinguished. Plaintiff's allegations were also found conclusory. Summary judgment granted. Adib-Beshara v. New York Times Co., Index No. 27754/91, 7/13/98 (Ramos, J.).

Procedure; amendment. Class actions; certification. Plaintiff's motion for leave to amend to add additional factual allegations to claims of fraud in quarterly reports and financial information disseminated to the detriment of shareholders was granted. The court noted that leave is to be freely granted and that defendants had failed to demonstrate some change of position, hindrance in the preparation of the case or significant trouble that could have been avoided had the original pleading contained the new allegations. The court observed that the case was not on the trial calendar and discovery was not yet complete and the additions would not have required reopening of depositions. The failure to submit an affidavit of merit would not defeat the motion. The court had already upheld the fraud claim and all that was being done now was the specification of the alleged fraudulent statements and detailing the role of a corporate official in regard thereto, under whose name the statements indisputably had been issued. The court approved the addition of that official as a party. In any event, plaintiff's affidavit in connection with a companion motion for class certification constituted an adequate affidavit of merit. The court also granted the motion to certify a class of purchasers of shares in an IPO. The court found that over 1700 persons would be in the class and their claims would be small. The court held that common questions predominated, even if some members might have been subjected to fewer than all alleged misrepresentations. As to reliance, the court held that once it was determined that the representations alleged were material and actionable, as had been held previously, reliance could be presumed subject to such proof as would be required at trial. Plaintiff was judged to be typical of the class and adequate. Rosan v. IWI Holding Ltd., Index No. 604731/96, 8/11/98 (Shainswit, J.).

Procedure; extraterritoriality of employment laws. Labor Law 193, 215. Employment at will. Defamation. Promissory estoppel. Fraudulent inducement. CPLR 5222 and 5241; constitutionality. Plaintiff alleged that his termination had violated CPLR 5252. New York employment statutes do not apply to conduct abroad. Here plaintiff had been employed and terminated in London. The court stated that plaintiff had not been terminated because the employer wished to avoid the administrative inconvenience accompanying income execution orders. The court heldthat Labor Law 193 and 215 do not apply abroad and the former does not apply to deductions made to benefit third parties (here an ex-wife and child). As plaintiff had been an employee at will, claims for tortious discharge and breach of contract were dismissed. A defamation claim was dismissed since it was premised on vague and speculative allegations and there is no cause of action in New York for compelled self-publication defamation (e.g., what he was forced to say in job interviews). A promissory estoppel claim was held deficient in that plaintiff could not have reasonably relied upon a promise in view of his at-will status. A fraudulent inducement claim was held deficient in that plaintiff admitted that he had not had a conversation about a promotion until after he had accepted employment, thus defeating reliance. Plaintiff's constitutional challenge to CPLR 5222 and 5241 failed since the conduct of his ex-wife's attorney in allegedly failing to follow the CPLR did not amount to state action and that of the employer was even more remote. The attorney was not a state actor because as an attorney she was an officer of the court. The court rejected the attack upon the statutes themselves. Claims against the attorney were also dismissed. Summary judgment granted. Marshak v. Robertson Stephens & Co., Index No. 601495/97, 9/1/98 (Shainswit, J.).

Procedure; other action pending (CPLR 3211(a)(4)); waiver; settlement; special proceeding. On a 3211(a)(4) motion there must be substantial identity of parties and claims. The court held that the respondent's proposed counterclaim for a large amount in legal fees differed from those in the other case. In that case respondent could not recover the damages it demanded here absent further pleadings. Further, petitioner here had agreed to post a bond in the amount sought by respondent. Petitioner argued that respondent had waived any right to fees by not originally asserting a lien. The court rejected the argument on the ground that respondent's failure initially to raise the lien issue while discussing the turning over of records did not amount to a clear manifestation of intent to waive. The court also held that respondent's claim was not barred by the terms of a settlement agreement since the sums sought were for work done after the case was settled. The court stated that the presumption in New York is that all matters are regular civil actions except where a special proceeding is specifically authorized. As there was no specific statutory authority for this matter's continuation as a special proceeding and as the need for discovery meant that an expeditious summary proceeding was not possible, the court converted the matter into a regular action (CPLR 103(c)). Bucyrus International, Inc. v. Milbank, Tweed, Hadley & McCloy, Index No. 108382/98, 9/15/98 (Shainswit, J.).

Procedure; pleading fraud and breach of fiduciary duty. Plaintiffs alleged that defendants had breached fiduciary duty and committed fraud in connection with the dissolution of a law firm and the creation of a new firm. The court dismissed these claims with leave to replead provided that the source of the information alleged was set forth. Defendants moved to dismiss the amended complaint claiming that it was not specific (CPLR 3016(b)) in regard to meetings, defendants' conspiracy, etc. The court held that the claims were not sufficiently stated and lacked particularity but upheld a conversion claim. Motion granted in part. Berkowitz v. Molod, Index No. 112474/97, 7/22/98 (Ramos, J.).

Procedure; reargument in guise of amendment. Indemnification. Defendant moved to conform answer, in effect, to amend answer to add cross-claims. The court rejected the motion since it was in reality an effort to achieve the reargument of an earlier decision, which had resolved the issues adversely to the theories set out in the cross-claims. Plaintiffs also moved for summary judgment for indemnification of legal services incurred in prosecuting this action. The court had earlier found that plaintiffs were entitled to indemnification for fees incurred defending an action against them as officers and directors. The court held that under the by-laws, plaintiffs could be indemnified for expenses incurred in this case since it was brought as a result of the earlier action. Lippman v. General Accident Ins. Co., Index No. 113258/94, 9/11/98 (Cahn, J.).

Procedure; standing. Where plaintiff member allegedly obtained permission of all disinterested members of a limited liability company, the court held that that member had standing to sue on behalf of the company. Plaintiff lacked any basis for suing in its own right for causes of action belonging to the company. The court upheld a claim for breach of contract by the NHL for considering a late franchise application after a set deadline. The court upheld a claim of breach of duty of good faith arising out of the NHL's permitting a late "amendment" of an application. The court rejected NHL's argument that exculpatory language in the application precluded the suit because the effect of the language so construed would be that NHL would have no obligations under the contract. A claim for promissory estoppel was dismissed because it had already been held that the promise may have been an implicit term of the agreement. The court found insufficient claims that NHL participated in breaches of fiduciary duties by others and thelike in view of the exculpatory clause and the lack of any allegations of intentional wrongdoing in regard thereto. The court held that the plain language of the company agreement permitted members to compete with the entity for the franchise. The court dismissed several claims premised upon an opposite interpretation of the agreement. The court ruled that a claim for injurious falsehood failed because it did not plead special damages with particularity. A claim for breach of a promise of confidentiality was sustained because the court found it possible that the promise could have been performed within one year for statute of frauds purposes. The court upheld a breach of fiduciary duty claim since such duties can be breached by contractually permissible conduct. The court rejected a motion to dismiss certain claims on forum non conveniens grounds since other claims would have to proceed here. Columbus Hockey Ltd. v. National Hockey League, Index No. 603437/97, 9/9/98 (Cahn, J.).

Procedure; statute of limitations (borrowing statute); fraud and breach of fiduciary duty. Pleading. Fiduciary duty. Collateral estoppel. Defendant argued that the action was time-barred under California law applicable by means of the borrowing statute. The court held that defendant had not sufficiently shown that California law applied because of material issues as to where the cause of action for fraud or breach of fiduciary duty had accrued. Arguably, the court found, economic loss occurred at plaintiff's principal place of business, but there was a dispute as to where that was at the time of the injury. The court rejected defendant's argument that plaintiff had failed to allege the circumstances with adequate detail (CPLR 3016(b)) for claims of aiding and abetting fraud and breach of fiduciary duty. The court ruled that plaintiff had alleged more than mere inaction by defendant as adviser to the promoters (National Westminster Bank). The court rejected defendant's argument that no fiduciary duty was owed until after the closing because plaintiff had alleged that it placed its trust in defendant and the issue is usually fact-sensitive. The court ruled against defendant on its collateral estoppel argument since the prior litigation had involved a default judgment, which is a tenuous predicate for collateral estoppel, and the moving papers did not contain papers from that case so as to permit a determination to be made. Motion to dismiss denied. Proforma Partners, LP v. Skadden, Arps, Slate, Meagher & Flom LLP, Index No. 606048/97, 8/24/98 (Cahn, J.).

Procedure; statute of limitations; fraud. Plaintiff's claim of fraud with regard to a repurchase by defendant of shares owned by plaintiff upon his resignation was held barred by the statute of limitations. The statute is six years from commission of the fraud or two years from discovery, whichever is longer. Whether a plaintiff could with reasonable diligence have discovered an alleged fraud turns on knowledge of facts from which fraud could reasonably have been inferred. An objective test is applied. This is a mixed question of law and fact. A claim should not be barred where it does not conclusively appear that plaintiff had or should have had knowledge of facts from which fraud might reasonably be inferred. Here, the court held, plaintiff could not have failed to possess such knowledge as early as 1989. There were acts by defendant and articles widely circulated at that time. This was more than mere suspicion. The claim was time-barred. Yatter v. William Morris Agency, Index No. 111543/95, 8/24/98 (Ramos, J.).

Procedure; stay of another action; disclosure versus contractual right to information. Plaintiff moved for an injunction against defendant's prosecution of a related case in North Carolina and for sanctions. The court stated that New York courts will enjoin proceedings in other states only where it is shown that the other case was not brought in good faith or was brought only to harass the party seeking the injunction. The court found that the application was supported only by bare, conclusory assertions. Citation of the difference in size between defendant and plaintiff and the former's prominence in the other state did not suffice. The court stated that it might be more efficient if all the parties' disputes could be resolved in one venue, but that consideration is not enough by itself. Nor would judicial economy be served where the New York case was more advanced than the other. Motion denied. Defendant's cross-motion for information granted. Defendant had a right to audit plaintiff's books under the license agreement and the passage of a discovery deadline in this case could not undermine that independent right, the court held. Network Industries Corp. v. Champion Products, Inc., Index No. 604566/97, 9/1/98 (Shainswit, J.).

Reinsurance; follow the fortunes; duty of reinsured. Ceding insurer sought to recover on reinsurance policy whereby reinsurer agreed to assume 80 % of insurer's policy limits on a certain excess policy. The ceding insurer argued that the reinsurance policy contained a "following form" clause and therefore the doctrine of "follow the fortunes/settlement" applied. (On the facts of this case, the court found, there was little significant distinction between following the form and following the fortunes/settlement.) Under follow the fortunes doctrine, the court said, a reinsurer generally is limited to two inquiries: did the insurer engage in fraud or collusion, and did a claim arise froma risk clearly outside the policy as reinsured? If those questions are answered in the negative, the reinsurer may not second-guess the resolution of a particular dispute. The reinsurer here contended that the clause does not apply when the cedent has breached a duty of utmost good faith and that there were questions of fact as to whether the insurer had breached that duty by failing to decline coverage because it had not received notice of the claim until six years after the litigation had begun and 13 years after the occurrence, as well as by handling the claim negligently. The reinsurer argued that notice to the insurer had clearly been untimely, but it was relying upon a specimen policy, the original not having been found. Further, the insurer contended that even if the notice had been late, it could waive that defense and still recover under the reinsurance policy. The court noted that Federal case law has held that if a settlement is not categorically outside the coverage, the excess insurer may waive a defense and the reinsurer may not deny coverage on that basis. Although an excess carrier can claim failure of notice without showing prejudice, that was not the law when the insurer was informed of the claim or when it agreed to settle. The reinsured owes the reinsurer a duty of good faith in the notice context, but the reinsurer here, the court stated, sought to impose a broad fiduciary duty that would result in second-guessing. There was, the court found, no allegation that the reinsured had acted in bad faith in settling. Summary judgment granted for plaintiff. Recovery of counsel fees in the reinsured's lawsuit against the primary insurer denied. Riunione Adriatica v. Atlanta Int. Ins. Co., Index No. 601722/97, 9/17/98 (Gammerman, J.).

Rescission; settlements; incapacity. Procedure; pleading incapacity, unconscionability, fraud and breach of fiduciary duty. Legal malpractice; settlement. Statute of limitations. Leave to replead. Claim for rescission of a release due to incapacity. The test, the court stated, was whether plaintiff had been incapable of making a voluntary rational decision, whether there had been a medically classified psychosis and whether the other party had known of the illness. The court held that the complaint failed to allege that defendants had known of the incapacity at the time the release was executed. The court found that plaintiff could not meet a more relaxed test. That plaintiff had consulted an attorney prior to signing was held dispositive. That plaintiff did not read the release himself was irrelevant. Nor did he act promptly, as required; he did not allege that the incapacity was continuous. The court also held that plaintiff had failed to show unconscionability in that he had only conclusorily alleged it. The court rejected a claim of legal malpractice against his then-attorney because his conduct allegedly resulted in an unfavorable settlement since it was purely speculative whether a more favorable result would have been obtained. Fraud and breach of fiduciary duty claims failed because the release had been upheld. These two claims and the malpractice claim against counsel were also time-barred (CPLR 214(6)). Motions to dismiss granted; leave to replead denied for lack of a showing of "good ground" (CPLR 3211(e)). Goldberg v. Moskowitz, Index No. 600619, 7/6/98 (Ramos, J.). [See above under **Fiduciary duty and misrepresentation**.]

Res judicata; splitting of cause of action; failure to prosecute. Pleading standing, authorization, piercing corporate veil. Statute of limitations; action on judgment; laches. In prior proceedings plaintiff 's predecessor had obtained a judgment against one defendant on a lease. Now plaintiff sought attorney's fees under the lease. Since the fees were an additional rent obligation under the lease, they could only be recovered in the action in which the rent claim was made. A later plenary action constituted, the court held, a splitting of a cause of action. As the claims against the other defendants for the fees were derivative, they failed too. The court rejected a standing argument on the ground that lack of capacity is an affirmative defense and plaintiff's allegation that it was a successor in interest sufficed to withstand a motion to dismiss. Nor did plaintiff have to plead authorization in this state and had in any event submitted proof thereof. The court upheld a cause of action to pierce the corporate veil as plaintiff had pled particularized facts tending to show that defendant had been conducting business in an individual capacity and moving personal funds in and out without regard to corporate form. The court rejected a statute of limitations argument since a judgment creditor has 20 years to enforce a judgment and laches was unavailable as an argument in an action at law. A res judicata argument failed since a dismissal for failure to prosecute is not a resolution on the merits. 122 East 42nd St., LLC v. Joseph M. Aronow, P.C., Index No. 120462/97, 8/20/98 (Cozier, J.).

Securities brokers; clearing services; liability for fraud of introducing broker. Defendant had been clearing broker for transactions between plaintiff and alleged class members and introducing broker. Plaintiff acknowledged that defendant had been acting as clearing agent and had been accepting orders from introducing broker without inquiry or investigation or liability for acts of said broker. Sale of securities, court held, cannot give rise to a consumer fraud claim under GBL 349. A clearing broker, the court ruled, owed no duty of care to the clients of an introducing broker. Thus, negligence and negligent misrepresentation claims also failed. Motion to dismiss granted. Schwarz v. Bear, Stearns& Co., Index No. 603795/97, 8/24/98 (Ramos, J.).

UCC; unconscionability; exclusive remedy. On summary judgment as to damage claims by a third-party plaintiff, the court stated that the issue was whether language in a warranty excluding consequential damages was unconscionable. The court held that the test is whether there is some showing of an absence of meaningful choice together with unreasonably favorable contract terms. Here, the court found, the parties were sophisticated commercial entities on an equal footing in this commercial transaction and the provision was not unconscionable. The warranty also provided that the exclusive remedy would be a repair of the system. Such a clause will generally be enforced unless it fails of its essential purpose, which is a jury question. The court held that the third-party plaintiff had presented enough to raise an issue of fact. Tertrac Assoc. v. May Dept. Stores, Index No. 1697/96, 9/9/98 (Stander, J.).

Unfair competition. Plaintiffs sued alleging that defendants had violated a license agreement for a certain gemstone by marketing very similar gems to persons not authorized under the agreement. A defendant may avoid liability for trade dress infringement by showing that the dress is functional, which it is if it is essential to the use or purpose of the article or affects its cost or quality. The court held that plaintiffs' patent for the gem was functional. The unfair competition and anti-dilution (GBL 360-*l*) claims were dismissed. Plaintiffs claimed that defendants had breached the agreement in that it prohibited them from selling gems covered by the patent and the equivalent. In contract interpretation, the court held, words should be given their plain meaning. The court held that the agreement in licensing only the structure of stones depicted in an appendix (two gems combined) did not prevent defendants from selling jewelry of three gems combined. The doctrine of equivalents is a principle of patent law, the court stated, and thus not relevant. Motion to dismiss granted. M. Fabrikant & Sons v. Charles Wolf, Inc., Index No. 606353/97, 8/11/98 (Shainswit, J.).

Usury. Fiduciary duty; lender and borrower. Plaintiffs claimed that defendant had cleverly disguised a loan to all the signatories of the loan agreement to look as if it were a loan between defendant and one entity only. Plaintiffs claimed that the cumulative interest rate under the agreement exceeded the allowable rate for loans to more than one borrower (GOL 501 (6)(b)). However, the court held, the loan documents clearly indicated that the loan had been between defendant and the entity and that loan was not subject to the usury laws. Plaintiffs also alleged that defendant had a fiduciary duty under the agreement and that he had breached that by acting in bad faith in failing to carry out his obligations. The court held that nothing in the agreement created a fiduciary duty. Mere failure to fulfill contractual obligations is not tantamount to breach of fiduciary duty. Motion to dismiss granted. Brissago, S.A. v. Schwartz, Index No. 606187/97, 8/26/98 (Shainswit, J.).

 THE NEXT ISSUE WILL BE POSTED ON THE HOME PAGES OF THE UNIFIED COURT SYSTEM AND COMMERCIAL AND FEDERAL LITIGATION SECTION ON JANUARY 20, 1999, COVERING DECISIONS ISSUED OCT.- DEC. 1998.

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