NYCOURTS.GOV

Commercial Division - NY Supreme Court

Law Report

Volume 10 Number 2

A report on leading decisions issued by the Justices of the Commercial Division of the Supreme Court of the State of New York

Chief Judge of the State of New York
Honorable Judith S. Kaye

Chief Administrative Judge of the State of New York
Honorable Jonathan Lippman

July 2007

Justices of the Commercial Division

This issue covers Decisions from: APRIL-MAY 2007

THE LAW REPORT is published four times per year by the Commercial Division of the Supreme Court of the State of New York

The Commercial Division acknowledges with gratitude the assistance provided by the Commercial and Federal Litigation Section of the New York State Bar Association in the publication of The Law Report

LAW REPORT Editors:
Cecilia Blackburn, Esq.
Loren Schwartz

Section Chair:
Carrie Cohen, Esq.

Co-Editors for the Section:
Jonathan D. Lupkin, Esq.
Paul D. Sarkozi, Esq.

The following members of the Section contributed to the preparation of summaries contained in this issue: Mark Berman, David L. Carey, Lisa A. Coppola, Megan P. Davis, Deborah Deitsch-Perez, Ian M. Goldrich, Matthew R. Maron, Paul G. Marquez, Ira B. Matetsky, James E. Pfeffer, John Siegal, Mark I. Silberblatt, Colleen M. Tarpey, and Victoria Zaydman, Esqs.

Gratitude is also extended to the Appellate Practice Committee of the Section and to its Co-Chairs, Preeta D. Bansal and David H. Tennant, Esqs..

Arbitration; employment agreement; FAA; interstate commerce; punitive damages; validity. Procedure; sealing. Motion to compel arbitration of employment dispute.

The court determined that a broad arbitration clause in the employment agreement here was unambiguous and required arbitration. Plaintiff argued that punitive damages were the principal damages being sought. The AAA Commercial Arbitration Rules say nothing about the availability of such damages and New York law does not permit arbitrators to award them. However, the agreement involved commerce since plaintiff's job concerned commerce and he had been hired away from a job out-of-state. Under the FAA, the court held, punitive damages would be available in arbitration. Plaintiff further contended that the agreement was not valid because of fraud, duress and adhesion, but the court ruled that, rhetoric aside, plaintiff had not alleged specific conduct that supported his assertions and the cases he cited were distinguishable. Finally, a sealing order had properly been entered given the embarrassing allegations in the complaint and the limited public interest therein. Tong v. S.A.C. Capital Management, LLC , Index No. 100509/2007, 5/17/07 (Fried, J.).

Arbitration; expired employment agreement; continuation in practice; renewal; requirement for writing; unsigned shareholders agreement; part performance. Defendants moved to compel arbitration.

Defendants relied on an arbitration clause in individual plaintiff's employment agreement. That agreement had expired, but defendants argued that the parties had continued plaintiff's employment on the same terms thereafter (except that the employment relationship was on a year-to-year basis due to the statute of frauds). Under Vann, treatment of an agreement as continuing means that the arbitration provision governs. This rule was not avoided by considerations of renewal since the agreement here was silent as to renewal, although it did require a writing for a modification, waiver, or discharge. The expired agreement did not preclude renewal by conduct. Plaintiffs argued that an earlier shareholders agreement had expired and that a later proposed one, which contained no arbitration clause, controlled. The earlier agreement contained no terms indicating that it had expired. It contained a merger clause barring oral modifications. Plaintiffs alleged that the later agreement had been fully agreed upon by all parties, but, the court said, that got plaintiffs nowhere in view of the merger clause and the almost wholly executory form of the agreement. Plaintiffs cited part performance, but it had antedated the date of the agreement and so could not have been, as required, performance in reliance on the agreement. Plaintiffs referred to individual plaintiff's signing of guaranties, but that was not exclusively referable to the agreement. The issue of valuation of shares was one for arbitration under the earlier shareholders agreement, as well as under the employment agreement. Plaintiffs cited a condition precedent to arbitration which was, they claimed, illusory, which in turn rendered the entire provision unenforceable. But such a question, the court ruled, was one for the arbitrators. A forum selection clause would not render an arbitration provision ineffective. Further, claims fell within an arbitration provision of the operating agreement of an LLC. Calzone v. Larrabee , Index No. 01894/2007, 4/17/07 (Fisher, J.).**

Attorney and client; duty to keep confidences (DR 4-101); fiduciary duty; claim for damages by employing law firm. Conversion and replevin; taking of law firm documents; demand for return. Procedure; affidavit by counsel without personal knowledge.

Action by law firm against former associate alleging improper and unethical revelation of client confidences and secrets. Plaintiff moved for a preliminary injunction and defendant cross-moved to dismiss. The former was resolved. As to the latter, the court declined to recognize that an at-will associate could be sued for damages for breach of fiduciary duty based on a violation of DR 4-101, or alleged disclosure of confidential information. A violation of a disciplinary rule, without more, does not give rise to a cause of action for the client, and plaintiff's posture made his claim even less compelling. Further, no fiduciary duties exist between employer and an at-will employee. Plaintiff urged an exception to this rule, relying on ethical obligations and an employee's duty of loyalty. The latter, however, the court stated, has been limited to cases of unfair competition. No allegation of disloyalty as supported by the cases had been made against defendant here. Therefore, the fiduciary duty claim failed. The court declined to dismiss conversion and replevin claims as they gave rise to factual questions. The court rejected defendant's assertion that as an employee of the firm defendant had been entitled to access and remove partnership materials and information. A taking without right constitutes conversion and no demand is required for liability, as defendant suggested. In any case, even if defendant had had a right to possess documents initially, a

cause of action for replevin and conversion would arise when the owner demands the return, and a letter by a partner to defendant requesting a meeting to discuss return of firm documents and defendant's refusal to meet would satisfy this requirement. An affidavit stating that defendant had returned all documents had been made by his attorney without personal knowledge and was thus entitled to no weight. Dismissal in part. Sullivan & Cromwell LLP v. Charney, Index No. 600333/2007, 4/30/07 (Fried, J.). [See summary of related case below].

Attorney and client; attorney client privilege; CPLR §§ 3101(b), (d); 4503(a)(1); disclosure.

Defendants moved for an order compelling production of certain documents withheld by plaintiff on the grounds of privilege. Plaintiff claimed that the documents, notes taken during business meetings, had been prepared in anticipation of litigation with defendants and thus were protected under CPLR § 3101(d)(2) and attorney-client privilege. Plaintiff stated that at the time in question it had been represented by counsel who had provided advice as to the merits of a possible lawsuit based on the same underlying facts and circumstances involved in the case here. Plaintiff asserted that all notes had been prepared on the advice of counsel for purposes of communicating with counsel in order to obtain legal advice with regard to the anticipated litigation against defendants. Plaintiff claimed that it had preserved the confidentiality of the notes. Defendants maintained that the documents had been prepared in the course of non-privileged meetings during the ordinary course of business and emphasized that the notes had never been given to an attorney. Defendants cited Town of Babylon in support of their position that the significant lapse of time between the preparation of the notes and the filing of the complaint in this case created a presumption that the materials had not been prepared in anticipation of litigation. The court disagreed with defendant's reading of Town of Babylon and stated that both the content and the purpose of the notes were relevant, not simply the lapse of time, although the time lapse could be considered by the court as evidence that the documents had not been prepared in anticipation of litigation. After in camera inspection, the court determined that the notes appeared merely to be minutes of discussions at meetings conducted in the ordinary course of business five or six years prior and did not appear to have been prepared in anticipation of this litigation. The court found that the notes were relevant to issues in the instant litigation and were thus discoverable. The court next ruled that plaintiff had failed to meet its burden of establishing that the notes had been prepared for the purpose of obtaining legal advice. The court found significant the fact that the notes had never been turned over to an attorney. Plaintiff's use of the notes to communicate the facts of the present case could not convert them into privileged documents. Further, the notes did not constitute confidential communications between an attorney and client for the purpose of obtaining legal advice. Bischoff v. Boar's Head Provisions Co., Index No. 604265/2005, 5/8/07 (Lowe, J.).

Attorney and client; duty to keep confidences (DR 4-101). Procedure; pleading irrelevant matter and in non-succinct manner.

Motion by defendant firm to dismiss on the ground that the complaint improperly disclosed confidences of the firm and its clients in violation of plaintiff's duties as an attorney (DR 4-101) and his contractual obligations to defendant. The complaint identified a number of the firm's clients, some deals involving them, and some of the firm's attorneys who had worked thereon, and also disclosed information about firm dealings. The court stated that privileged matters are those where a confidential communication was made to the attorney by the client for the purpose of obtaining legal advice or services. Fee arrangements, for instance, are not so protected. The court held that the information in the complaint here was not privileged. DR 4-101 forbids more than just disclosure of privileged matters, the court said; it covers anything the client has requested be kept inviolate or disclosure of which would be embarrassing or detrimental. But defendant had cited no authority to support the assertion that, absent a specific client request, "client secrets" would embrace the names of clients, the names of attorneys who handled particular matters, attorney reviews, etc. Some of the information in question, the court noted, was to be found on defendant's website or in the press. However, the court found that some allegations in the complaint were irrelevant, were not stated concisely (CPLR 3014), or could potentially implicate DR 4-101. Complaint stricken. Plaintiff given leave to replead deleting material in accordance with the decision. Charney v. Sullivan & Cromwell LLP, Index No. 100625/2007, 4/30/07 (Fried, J.).

BCL §§ 1104 (a), 1113, 1117; dissolution; transfer of assets; contracts; receivership.

Respondent moved for an order determining that certain management contracts were to be treated as business assets for the purposes of a receivership order. The court had previously directed dissolution of the company pursuant to BCL § 1104 (a). After the shareholders had been unable to agree on the distribution of the company's assets, the court had directed the appointment of a receiver to oversee the liquidation. Further complications had arisen when the NYC Taxi and Limousine Commission had informed the company that their management license for their shareholder-owned taxicab medallions would not be renewed because of the pending dissolution. Petitioners had been advised by counsel to divide the medallions amongst themselves, or to form a new management company to manage the medallions until the dissolution was complete. Respondent had been urged to do the same with its shareholder-owned medallions, but respondent had opposed any transfer of the medallions. Respondent contended that petitioners had transferred some of the of the company's assets to several of their own companies and had illegally dealt with the medallions. Petitioners asserted that respondent had transferred its share of the medallions to another company. The court determined that petitioners had no right to engage in self-help in regard to the transfer of the corporation's assets during the dissolution. The court granted the branch of respondent's motion for an order determining that the medallion management contracts and any proceeds were to be treated as assets for the purposes of the receivership. The court then stated that the shareholders would have seven days after service of a copy of the order to come to an agreement about the distribution of the corporate assets, after which, if no agreement could be reached, the receiver would assume control of the assets. The court next granted the branch of the motion which pertained to determination of leasehold interests to the extent of declaring void petitioner's attempt to terminate a lease pursuant to BCL §§ 1113 and 1117 and directing the receiver to assume control of that interest. The court further directed the receiver to assume control of another leasehold interest. The court denied without prejudice to any reasonable determination made by the receiver the branch of the motion which pertained to the rights to occupy the leased premises. In re Weingarten, Index No. 2437/2004, 4/18/07 (Grays, J.).**

Commercial real property; lease; purchase option; right of first refusal; late rental payments; non-waiver clause; specific performance; equitable relief. Yellowstone injunction.

Plaintiff sought specific performance of a purchase option in its lease. Defendant moved to dismiss on the basis that plaintiff had breached its principal lease obligation by being late repeatedly with rent, in numerous cases over two weeks late. The court found that the terms of the purchase option lacked language conditioning it on a history of timely rental payments, in contrast to a provision conditioning a right of first refusal on plaintiff's not being in default "following notice and opportunity to cure." But even had the purchase option contained a timely payment provision, plaintiff was not in default as all its lease payments had been made or "cured." Defendant argued that plaintiff was foreclosed from exercising the purchase option because it had previously declined to exercise its right of first refusal. But the court had found earlier that the right had not even been triggered as defendant had not given plaintiff the proposed contract of sale nor met other requirements in a "so ordered" stipulation between the parties defining when the right would begin to run. Defendant argued that plaintiff's late rent payments gave it "unclean hands" that precluded equitable relief, but defendant had identified no concrete injury flowing from plaintiff's lateness. Further, the lease did not contain a non-waiver clause and required notice of default and no notice was outstanding when plaintiff had attempted to exercise its purchase option. Plaintiff did not need the Yellowstone injunction it sought based on defendant's having sent it a notice terminating its month-to-month tenancy. Defendant could not commence a holdover proceeding since plaintiff's lease had not yet expired. Summary judgment of specific performance granted to plaintiff. Long Beach Medical Center v. 249 East Park Corp., Index No. 543/2007, 5/17/07 (Austin, J.).**

Contracts; condition to performance; implied covenant of good faith. Misrepresentation; relation to contract. Mechanic's liens; foreclosure; burden on lienor.

The parties had entered into a contract by which defendants had performed certain services for plaintiff. A dispute ensued over the extent and quality of the work performed and plaintiff's duty to pay. The court held after trial that a fraud claim failed since the only fraud related to a contract. There was no proof of a misrepresentation extraneous to

the contract. A party to a contract cannot insist upon fulfillment of a condition when that party has been the cause of its nonperformance. Plaintiff had failed to establish that she bore no responsibility to pay because she had not yet sold real property. It was, the court stated, implied in the agreement that plaintiff would make a good faith effort to sell within a reasonable time after defendants finished work and so be able to pay defendants. Plaintiff had received an offer that she had turned down, but she failed to present proof to support the assertion that the price was not reasonable. Even if the sale was a condition precedent to defendants' right to payment, plaintiff was not entitled to judgment because she had removed the property from the market some years before. Plaintiff failed to present proof to sustain her claims about the defective quality of defendants' work. Defendants had placed a lien on the property. To foreclose, the lienor must carry the burden of showing due performance. The court held that defendants had carried their burden. Complaint dismissed. Judgment for defendants on counterclaim. Ireland v. Bonilla, Index No. 128625/2003, 4/9/07 (Emerson, J.).**

Contracts; construction; Lien Law § 37; pre-judgment interest; undertaking; res judicata.

Action arose out of a subcontract. Defendant had subcontracted with plaintiff for the fabrication and installation of pre-cast concrete panels on the exterior of a building which it was to construct. After the work had been completed, a dispute had arisen between the parties as to the balance remaining on the subcontract. Plaintiff was also claiming damages due to project delay, which it attributed to defendant. Plaintiff had filed a mechanics lien against the subject property, which the court had discharged after defendant had posted an undertaking. Plaintiff had commenced the underlying action and moved for summary judgment for the outstanding balance on the subcontract. After a non-jury trial, the court found defendant liable to plaintiff for prejudgment interest. Plaintiff sought a judgment against the bond (Lien Law § 37). In the alternative, plaintiff sought to resettle a judgment entered against defendant to impose liability on the surety. Plaintiff contended that defendant had failed to pay any of the interest awarded to plaintiff. Plaintiff further claimed that defendant surety had failed to pay the balance of the unpaid obligation of its principal. The surety argued that plaintiff's application should be barred under the principle of res judicata. Plaintiff argued that its Lien Law claim should not be barred because the undertaking issued by the surety had provided by its terms that it was to remain in effect until defendant subcontractor had paid the judgment. Plaintiff further claimed that the amounts recoverable on the interest judgment fell within the undertaking and were not in dispute and that defendant subcontractor had failed to fulfill its obligation to relieve the surety of liability under the bond. The court denied the motion, pointing out that plaintiff's claim had been previously litigated and dismissed after trial on the merits and that the prior judgment had extinguished all claims against the surety arising out of the same facts. The court further denied plaintiff's request to resettle the judgment, stating that the resettlement procedure was not to be used to effect substantial changes in, or to amplify, previous orders of the court. Modern Mosaic, Ltd. v. Sweet Associates, Index No. 1656/1999, 4/18/2007 (Platkin, J.).**

Contracts; employment; restrictive covenants; confidential business information; fiduciary duties of independent contractors; unfair competition. Procedure; preliminary injunction; likelihood of success; irreparability of harm despite two months' delay; balance of equities.

Application by real estate services company for a preliminary injunction against former employees and their business. Hearing held. One defendant had worked as sales agent for plaintiff. Plaintiff had maintained an office at a large condo building, had had management contracts with many units there, and had executed many leases there. At issue was whether defendant had to divest himself of contact information relating to clients with whom he had worked while at plaintiff and whether he should be forbidden to solicit these clients or do any work on behalf of them. Defendant had taken department customer lists, financial information, availability lists and other information when he left plaintiff, although a covenant in his employment agreement with plaintiff required him to return same and not disclose it for two years after his employment ended. The court held that plaintiff had shown a likelihood of success that this defendant had violated the agreement. Plaintiff contended that the information it had compiled in its availability list and contact list was a trade secret misappropriated by defendants. The court found that contact information, availability information, and financial data were not publicly available. The names of unit owners were available, but much time and effort would have been required to recreate the other information. Thus, plaintiff was

likely to prevail on its contention that the information taken was not readily ascertainable, as well as that defendants had not developed the contact list themselves. Leo Silfen was distinguishable because defendant here had not obtained customer names from casual memory or available lists, information here was not well-known to competitors, and defendant had copied confidential information. The court further determined that it was likely that plaintiff would succeed in its contention that the two individual defendants owed fiduciary duties to plaintiff that they had violated even though they were independent contractors. Plaintiff had also shown a likelihood of success as to its unfair competition claim. Injunctive relief could be awarded against the individual co-defendant even though he had left plaintiff and joined a business other than the corporate defendant for some months. Irreparable harm had been shown, though plaintiff had not acted for two months. The equities favored plaintiff. Injunction to be granted against solicitation or serving of plaintiff's clients, except those with whom defendants had already entered into contracts (to avoid harming the clients), but defendants would be barred from doing any additional work for these persons. Information to be returned and deleted from computers. D.S.M. Realty Corp. v. Goloso, Index No. 604407/2006, 4/16/07 (Fried, J.).

Contracts; employment; restrictive covenants; preliminary injunction; irreparable harm.

Application by plaintiff for a preliminary injunction enforcing terms of a confidentiality and restrictive covenant agreement with defendant former employee. A hearing was held and conflicting evidence presented regarding defendant's conduct, plaintiff's confidential information, etc. The court concluded that the motion should be denied because plaintiff had failed to carry its burden on the issue of irreparable harm. The court noted that the record contained a detailed description of the work done by defendant and his co-defendant company in alleged violation of the agreement. If it were to be found that defendants had breached their obligations, an adequate remedy at law could be granted. Master Mechanical Corp. v. Macaluso, Index No. 16280/2006, 4/26/07 (Emerson, J.).**

Contracts; employment; restrictive covenants; unfair competition.

Application for preliminary injunction against former employees and others. Two defendant employees of plaintiff had solicited two customers to join a new business the defendants were planning to establish and then had solicited other of plaintiff's employees to join them. Once the business was established, defendants took some of plaintiff's computers, client files, and other property and began contacting plaintiff's clients. The court stated that a preliminary injunction could be issued against former employees even without a restrictive covenant where they have breached trust or stolen proprietary information. Misappropriation of business information and good will justifies injunctive relief. Even absent a restrictive covenant here (although the court ruled that one defendant had signed one), an injunction was proper against solicitation of plaintiff's customers and use of information taken from plaintiff, for one year, a period that would be about what it would have taken defendants to position themselves to compete fairly. In addition, one defendant was enjoined from doing any business with plaintiff's three key customers. Creative Collections of New York, Inc., v. DiBlasi, Index No. 12455/2006, 4/24/07 (Curran, J.).**

Contracts; express warranties; advertisement; implied warranties; UCC 2-315. Fraud; relation to contract.

Defendants moved to dismiss a claim for breach of express warranty. The terms must be set forth with enough particularity to give fair motive. An express warranty, the court noted, can arise from the literature about a product or from an ad. The court stated that the claim here at first glance appeared inadequate because the cases indicate that the contract must be shown, but here it was not attached to the pleadings, for no reason. Still, the court held, plaintiff had a claim. Plaintiff alleged that the defendant company's ad that they could supply a product that could take care of a particular technical problem could be seen as an express warranty. The language here was unqualified and not expressed as an opinion and there were no disclaimers. Further, the question of whether ad statements were warranties and a part of the sale bargain or were puffing is a question of fact not suitable for resolution as a matter of law. An implied warranty claim was also sustained. Defendants had held themselves out as experts and had

indicated that they could supply a product that would solve plaintiff's problem. Plaintiff had paid for the system after raising a complaint, but this presented a fact question for the jury. UCC 2-315. The court declined to dismiss the fraud claim as it was predicated on representations extraneous to the contract, and defendants had failed to show that it arose solely by virtue of breach of warranties. Simmons v. Washing Equipment Technologies, Index No. 01204/2007, 4/10/07 (Fisher, J.).**

Contracts; interpretation; ambiguity; merger clause; order of precedence clause.

Plaintiff, provider of natural gas services, sought to recover for certain arrearages from defendant, an association. The arrearages were for services supplied to one of defendant's members, Jennifer Matthew Nursing Home. Home had signed an agreement with plaintiff in June 2003. In September 2003, because of exigent circumstances, defendant had signed an agreement. The court ruled that an attachment to the latter created an ambiguity. Whether an ambiguity is present cannot be evaluated in a vacuum; the entire agreement, the relation of the parties, and the circumstances under which an agreement was entered into have to be considered. The attachment referred the reader back to the June agreement under which the Home was obliged to pay, but the later agreement defined the customer as defendant. Hence, there was an ambiguity. The later agreement also listed the Home's account number as the one to be charged, which created a further ambiguity. On plaintiff's interpretation, whereby defendant was to be responsible, the citation of the account number would be meaningless, and an interpretation that renders a clause meaningless should be avoided. The merger clause would not bar extrinsic evidence: such evidence is allowed where a term is sufficiently ambiguous despite such a merger clause. On the other hand, a court may not vary a contract to suit its own notions. An order of precedence clause should not be applied to the rudimentary issue of which parties were to be bound. Therefore, extrinsic evidence was admissible and was overwhelmingly supportive of defendant's position that defendant had not been intended to be the obligor on this agreement. Summary judgment for defendant. Select Energy New York, Inc. v. Genesee Health Facilities Assn., Index No. 07121/2006, 5/07 (Fisher, J.).**

Contracts; interpretation; breach; design; assignment; liability; statute of limitations. Damages; consequential; incidental; limited remedy (UCC 2-719 (1) (a)); failure of remedy (UCC 2-719 (2)).

Plaintiff water taxi business, active in New York Harbor, sued defendants that had designed and built six defective aluminum water taxis. Defendants moved to dismiss as against NY defendant on the basis that the agreement had been assigned to the Connecticut defendant with plaintiff's written consent pursuant to terms in the agreement. Neither consent nor terms, however, specifically provided that assignment would release NY plaintiff from liability, the court found. It noted that a party to a contract is only released from continuing liability after assignment if there is an express agreement between the original contracting parties to that effect, or if the other party's consent is implied by facts beyond consent to the assignment. Here, plaintiff's CEO had believed with apparent reason that the assignment was only for routine accounting purposes. Defendants' own agreement did expressly provide that Connecticut defendant would assume liability, but plaintiff had not known that before consenting. Motion to dismiss as against NY defendant denied. Defendants moved to dismiss a breach of contract design claim because plaintiff had not objected to drawings and the agreement provided that, absent written objection within 14 days, drawings would be deemed approved. Looking at the contract, though, the court found that the objections were to trigger negotiations on adjusting the drawings and that the section's intent was not to preclude future claims. Further, the agreement required NY defendant to design the vessels consistent with "first-class" shipyard standards and to engage an architect. Plaintiff had relied on that architect and certainly not contemplated having to pay another to review the first one's drawings at risk of forever being barred from suing. Dismissal of the design claim denied. The court agreed with defendants, however, that a breach of workmanship claim duplicated a breach of warranty claim, as the contract's express warranties concerned quality of workmanship and materials. Defendants were wrong that the warranty claim was time-barred as the agreement lacked language specifically reducing the statutory four-year statute of limitations period, and the one-year warranty in the agreement to which defendants pointed only marked a period in which a claim could accrue should defendants fail to repair a defect of which they had been notified. Plaintiff had in each instance timely notified defendants of the vessels' defects and had four years from notice to file

suit. Defendants argued that plaintiff could not sue for damages. The UCC does permit an agreement to limit remedies to repair and replacement, as here. But even if a limited remedy seemed reasonable when a contract was made, a party may sue for damages where that remedy deprives it of a substantial benefit of the bargain. Whether it does is up to a jury, the court noted. Here, plaintiff's description of the vessels' chronic problems sufficiently alleged that the limited remedy had failed. Defendants were right, though, the court found, that the agreement precluded plaintiff from suing for consequential damages. Failure of a limited remedy does not itself invalidate agreement to exclude consequential damages unless the exclusion is unconscionable. Plaintiff could seek incidental damages, however. Plaintiff did not allege that it had rejected the vessels or gotten substitutes, but the UCC permits recovery of damages even after a buyer has accepted goods (UCC 2-714 (1)) and defines incidental damages as any reasonable expense incident to the breach. The claim survived. Plaintiff also sought recission/revocation of acceptance. The vessels had been in use for three or four years, but plaintiff argued that defendants had not admitted their fundamental flaws initially and then passed time in empty assurances that the flaws would be fixed. True, revocation is generally resorted to only after attempts at adjustments have failed, and the UCC notes that it should be permitted beyond the time for rejection after tender. Nevertheless, the court found that plaintiff could not allege that it had revoked acceptance within a reasonable time ((UCC 2-608 (2)). The court emphasized, though, that plaintiff's repeated complaints had preserved its right to sue for damages as asserted in the surviving claims. New York Trans Harbor LLC v. Derecktor Shipyards Conn, LLC , Index No. 23423/2006, 5/29/07 (Demarest, J.).**

Contracts; interpretation; license agreement, exclusivity; ambiguity.

Action arising out of licensing agreement for plaintiff's contact lens technology. The central issue was whether the agreement was exclusive or not. The court concluded that the agreement was ambiguous because it granted a perpetual, worldwide, non-exclusive license, but also provided that plaintiff's predecessor agreed not to disclose the know-how to any third parties. The court ruled that, when two provisions are inconsistent with one another, the first should be accepted. Thus, the agreement was considered to be non-exclusive based upon the earlier provision. This was consistent with an agreement that had given defendant the option to elect between an exclusive or non-exclusive agreement, with lower payment and royalty terms in the latter case. Defendant therefore had no obligation to develop or market the technology and could not have been in breach of the agreement for failing to do that. Plaintiff claimed that defendant had marketed other products derived from plaintiff's technology, but defendant presented testimony showing the distinctions whereas plaintiff relied on the views of an attorney lacking expertise to opine on the subject. The court found that plaintiff had failed to raise any issues of fact regarding plaintiff's allegation that defendant had misrepresented its plans to exploit plaintiff's technology. Case dismissed. Contacare v. Ciba-Geigy Corp ., Index No. 668/2001, 5/2/07 (Curran, J.).**

Contracts; stock purchase agreements; damages; unclean hands; interpretation; ambiguity; extrinsic evidence. Procedure; pleading; tortious interference; scienter; reliance; fraudulent inducement. Due diligence. Merger clause.

Action arising out of stock purchase agreements. Plaintiff claimed that defendants, though they had a right to transfer stock to their affiliates or associates, had engaged in a transfer that improperly evaded plaintiff's right of first refusal. The court rejected an affirmative defense that plaintiff had lacked the means to exercise the right and so had suffered no damages, finding that it was barred by the law of the case. An affirmative defense of unclean hands failed because plaintiff sought only monetary damages, plaintiff's counsel having so stipulated and the court having so ruled on a prior motion. The court rejected defendant's fourth affirmative defense that allegations of a claim for tortious interference were conclusory and vague and thus insufficient. The court held that the elements had been adequately asserted. Plaintiff argued that counterclaims based on alleged breaches of the first agreement failed because the second agreement had superceded the first. The court found that defendants gave controlling weight to one provision while ignoring the circumstances under which the agreement had been executed. Courts should examine the whole of a contract and the circumstances under which it was written. Looking at the circumstances, the court determined that the purpose of the second agreement had been to unwind the first subject only to the right of first refusal and an agreement to explore future alliances. The court found, however, that the second agreement

was ambiguous as to whether defendants retained the right to sue for breaches that had occurred prior to execution. Extrinsic evidence could be submitted after discovery. The court came to the same conclusion with regard to plaintiff's argument that a release from one defendant foreclosed counterclaims. The document did not expressly contain a release of plaintiff, there was a conflict between the caption and the body of the release in regard to its scope, and the nature of the matter was seemingly ancillary to the complete unwinding of the first agreement. Defendants claimed that they had been fraudulently induced to enter into the first agreement. The court held that the counterclaim, though lengthy, failed to plead scienter or reliance or specific evidentiary facts, but these defects were cured in a proposed amended answer. Plaintiff argued that as the second agreement had unwound the first, defendants could not have been damaged, but the court disagreed, noting that defendants had alleged transaction costs, loss of customers and other damages suffered despite the unwinding. Plaintiff asserted that defendants had failed to engage in due diligence, but the court could not decide that as a matter of law. A general merger clause was ineffective to preclude parol evidence of fraud in the inducement. Universal Express, Inc. v. CDS Merger Sub, Inc., Index No. 6723/2005, 5/30/07 (Platkin, J.).**

Corporation; ownership. Preliminary injunction; shareholder's meeting. Judicial estoppel. Equitable relief; clean hands.

Parties hotly contested the ownership of a company called ANO. Defendants sought a preliminary injunction to prevent a non-party company, of which ANO was majority shareholder, from holding a shareholders' meeting. Regarding ANO, individual plaintiff and defendant had entered into a nominee agreement that in its introductory clause said that defendant owned 50% of ANO's stock. But the non-party company's shareholder agreement, executed the same day with defendant present, and of which defendant had been aware, referred to plaintiff as ANO's sole owner. Consistent with such contradictions, 'ANO' itself combined references to both individual plaintiff's and defendant's names. Only plaintiff, however, had ever received a stock certificate for ANO, nor had there been approval for the transfer of any stock to defendants. And, the court noted, defendant at the hearing for the preliminary injunction had made it impossible to know whether he or his namesake company, co-defendant here, putatively owned ANO's stock; defendant had said that right after the nominee agreement he had "transferred" his interest to the company "in his head." Defendant had not demanded turnover of the stock until this action. Nor was it clear who had supplied capital enabling ANO to buy an interest in the non-party company; it was only shown that plaintiff's contributions were insufficient. However, defendant in his matrimonial action had submitted an affidavit of net worth making no mention of ANO and judicial estoppel would preclude defendant from taking an opposite position here. Further, the court found that a loan agreement citing individual parties as equal owners of ANO had been re-cast the same day at defendant's insistence to omit him as an owner in view of the matrimonial action. Defendant in response claimed that his company, not he, had always owned ANO's stock. If this were true, though, the company could not rely on the nominee agreement to establish its ownership as it had not been a signatory, and defendant could not rely on the agreement as he had never personally owned the stock. And, his namesake company had filed tax returns that did not reflect its purported interest in ANO and ANO's returns had listed plaintiff as its sole shareholder. Defendants, the court said, did not come with clean hands. Success on the merits was in doubt. Defendants argued that individual defendant's involvement in ANO's and its subsidiaries' business affairs, and defendant's loan to the non-party company ANO owned, indicated their ownership of ANO. The court said that these might, possibly, amount to the elements of a constructive trust and had permitted defendants to amend their answer to counterclaim for one. Nevertheless, defendants had failed to establish entitlement to a preliminary injunction to stop the board meeting as there was a statute of limitations issue. Further, a balancing of the equities weighed against granting the injunction that would paralyze the non-party company's operations. Defendants would not suffer irreparable harm, the court found. Plaintiff, at the board meeting, could vote ANO's disputed shares, but he would remain subject to fiduciary duty to ANO, and if he were to violate that duty, and should the court ultimately find that one or other of defendants were a shareholder, that defendant could sue on behalf of the corporation. Preliminary injunction denied. Yemini v. Goldberg, Index No. 12402/2005, 5/29/07 (Austin, J.).**

Fraudulent misrepresentation; class of persons defrauded; falsity. Negligent misrepresentation; special relationship. Fiduciary duty. Defenses; in pari delicto and unclean hands. Damages.

Motions for summary judgment and other relief by defendants.

Plaintiff had sold her seat on the New York Stock Exchange. A month later the Exchange had announced that it would merge with Archipelago Holdings LLC to create a for-profit, publicly traded entity. Plaintiff alleged that the NYSE CEO had held a meeting with working members and stated that the NYSE would not be going public. Plaintiff asserted claims for fraudulent and negligent misrepresentation and breach of fiduciary duty. Plaintiff had not attended this meeting, but her husband had. The court rejected plaintiff's argument that the fraudulent misrepresentation claim should survive on the authority of Restatement (2d) of Torts § 533, but did uphold it under Section 531 regarding liability to a class of persons and Ultramares. Plaintiff had been a seatholder at the time of the meeting and a reasonable jury could conclude that defendant had intended that seatholders would reasonably rely. The facts regarding falsity were in dispute and the court rejected defendants' contention that no reasonable jury could conclude that the NYSE had had plans to go public as of the date of the meeting. On negligent misrepresentation, there had been no privity here and defendant had not known that the husband was acting on plaintiff's behalf. Therefore, plaintiff could not show a special relationship and the claim had to be dismissed. Defendants argued that the fiduciary duty claim must fail because the purpose of the meeting had not been action by the CEO in the scope of his relationship with seatholders. On this there were questions of fact, the court concluded. Defendant's acts were arguably in violation of a confidentiality agreement and Lindner and so not shielded; this presented a jury question. Defendants relied upon in pari delicto and unclean hands. As an equitable defense, the latter was unavailable in this action for damages. As to the former, defendants argued that plaintiff had attempted to trade using insider information. The court postponed a ruling on this until further briefing. The fiduciary duty claim against the NYSE was dismissed since it had had no such duty to the seatholders. On damages, the court found Lama applicable and ruled that plaintiff's proposed measure of damages was too speculative. Plaintiff's projection of a reasonable time after notice of the fraud was too long. Plaintiff challenged the market price as an accurate reflection of value because the market was small and insufficient. The court ruled that the jury would decide this, as well as what was a reasonable period, although it would not exceed 60 days after the announcement. Prior to the trial date, plaintiff's counsel had made a statement to the press and showed a confidential document to the press. The court adjourned the trial for nine months to avoid any prejudicial impact. The court concluded that no further action was required. Motion granted in part. Wey v. New York Stock Exchange, Inc., Index No. 602510/2005, 4/10/07 (Ramos, J.).

Insurance; excess liability policies; follow form clause; annualized aggregate limits of liability; interpretation.

Declaratory judgment action regarding excess umbrella liability coverage and whether the aggregate limits of liability applied to the entire three-year policy term or separately on an annualized basis. Some of the policies were subscription form, quota share policies and all were follow form policies. Plaintiff argued in favor of annualized aggregate limits, contending that, though the excess policies did not contain the word "annual," the language of the underlying policies, to which the excess ones followed form, explicitly annualized aggregate limits. The court noted that the non-contradictory language of the underlying policy would control the excess policy containing a follow form clause. The court pointed out that the underlying policies were incorporated by the follow form clause into the excess policies subject to the declarations in the latter. The declarations pages did not define "in the aggregate," "limit of liability," or "occurrence" and "annual" did not appear therein. In contrast with this silence, the underlying policies stated that the aggregate limit of liability would be the insured's total loss in 12 months of the policy period. This condition of the underlying policies, the court ruled, would be incorporated into the excess policies by the follow form clause. The court declined to consider extrinsic evidence in view of the lack of ambiguity in the excess and underlying policies. Principles of contract interpretation, rather than of reinsurance law, applied here. Defendants argued that if plaintiff's interpretation were adopted, the amount of their resulting liability would differ from the amount stated in signature pages, thereby creating a contradictory term. The court rejected this argument because the amount on the signature pages did not define how the limits were to be applied. Partial summary judgment for plaintiff. Union Carbide Corp. v. Affiliated FM Ins. Co., Index No. 600804/2004, 4/12/07 (Ramos, J.).

Insurance; executive protection policy; allocation of proceeds; fraud and personal profit exclusions; "first in time, first in right."

Interpleader action by insurer to resolve competing claims to proceeds of a policy issued on behalf of Tyco Intl., Ltd. and its officers and directors. Plaintiff had paid out some $20 million of the $25 million policy limit for defense costs. Plaintiff wished to pay out the balance or pay it into court and be discharged. A dispute remained as to coverage for one defendant, a former Tyco director, who had pled guilty to a felony in connection with his receipt of a large finder's fee. Various civil actions were pending brought by or on behalf of Tyco shareholders. Tyco and this defendant disputed right to $3.3 million in remaining proceeds. The defendant argued that he should recover his past defense costs ($1.8 million) and subsequent defense costs before Tyco could be paid. Tyco argued that fraud and personal profit exclusions barred coverage for defendant. However, the court concluded, most of the allegations against defendant were legally and factually distinct from defendant's receipt of the fee, having to do with misrepresentations regarding Tyco's finances, improper accounting and bonuses and loans to defendants other than this one. The court exercised its equitable power to apportion proceeds. Payment to the defendant would reflect the intent of the policy that officers and directors would have priority over Tyco, which also could have resort to excess coverage. The general principle of "first in time, first in right" would not prevent this apportionment. Federal Insurance Co. v. Tyco International, Ltd., Index No. 601416/2004, 4/23/07 (Freedman, J.).

Insurance; "insured versus insured" exclusion; apportionment; sublimit for equitable relief. Fiduciary duty; breach; special relationship; insurer and insured. Covenant of good faith and fair dealing; relation to contract. Settlement offer; CPLR 4547.

Insurance coverage dispute arising out of a lawsuit commenced against Princeton that alleged misuse of foundation monies. The Robertson Foundation had been established in 1961 to fund and support the graduate program of the Woodrow Wilson School of Public and International Affairs. The Foundation, the endowment of which had increased to $600 million over the years, was governed by trustees, some family-appointed and others university-appointed. The former and some family members commenced an action in 2002 alleging that Princeton and the other trustees had breached fiduciary duties, abused their majority interest, and misappropriated funds by diverting them from the Foundation's mission to Princeton's general purposes. Here, defendant National Union had issued a policy protecting Princeton which provided an aggregate limit for coverages of $15 million and included defense costs. Defendants argued that the action was not covered by the policy because of an "insured versus insured" exclusion and that, if some claims were covered, coverage was limited to $5 million based on a sublimit for equitable relief. Defendants contended that the exclusion applied because the action was one brought by the Foundation, a "subsidiary" of the covered organization (the University), against the university-appointed trustees. The court noted that exclusions are strictly construed. The purpose of the exclusion is to prevent collusive lawsuits. Although there was no indication of collusion here, the court found, the exclusion applied because there were claims brought on behalf of the organization, which included subsidiaries such as the Foundation, against individual insureds. A derivative claim exception did not apply because the action was brought with the assistance and active participation of individual insureds, the family-appointed trustees. But, a narrow construction being required, the exclusion, the court held, applied only to the claims explicitly brought on behalf of the Foundation against individual insureds (two of 12 claims). The question then arose whether National was obliged to furnish all defense costs subject to recoupment of the uncovered claims or whether apportionment before resolution of the case was appropriate. The court concluded that the insurer might be able to allocate as the derivative claims against the university-appointed trustees were excluded, although apportionment was unlikely to affect the insurer's ultimate obligation, Princeton's costs having far exceeded the limit. The insurer also sought to limit coverage to the sublimit because the underlying claims were equitable, contending that the whole underlying action was equitable, while Princeton urged that the limit applied only to claims seeking equitable relief. The court stated that the distinction in question generally turns on the type of relief sought. The sublimit would not apply to claims seeking monetary damages or the return of funds. The New Jersey Chancery Court hears legal claims ancillary to equitable ones. The endorsement in question contemplated apportionment so, the court ruled, the insurer could allocate if apportionment was feasible. Princeton asserted a claim for breach of fiduciary duty, but the court held that nothing here took the case out of the ordinary relationship between insurer and insured, a non-fiduciary one. Princeton asserted a claim for breach of the implied covenant of good faith and fair dealing, but the essence of the claim was the breach of contract claim. An exhibit

reciting a settlement offer by defendants was not relevant and was likely inadmissible (CPLR 4547) and thus was ordered stricken. A claim under the New Jersey Consumer Fraud Act was held deficient. Trustees of Princeton University v. National Union Fire Ins. Co., Index No. 650202/2006, 4/10/07 (Freedman, J.).

Limited liability company; Limited Liability Company Law; Section 610; member's right to bring derivative action; common law right; evidence of LLC membership; standing; Section 408.

Plaintiffs were an individual and a LLC formed by plaintiff and a defendant. Defendant had admitted transferring company funds to his personal debit card and, according to plaintiffs, had engaged in unfair competition and committed other wrongs against the company. Defendants moved to dismiss on the grounds that the court was constrained to follow 2d Department precedent (Hoffman) that dismissed a suit because the Limited Liability Company Law (LLCL) contains no statutory authorization to a member to bring an action derivatively. The court noted, first of all, that more recently the 2d Department (Caprer) had acknowledged the prior holding, but held that, despite lacking statutory authority, an individual condominium owner had had the right to bring a derivative action. The court said that the Caprer rationale was compelling, recognizing that the right to bring a derivative action originates in common law; Caprer indicated that the 2d Department might be prepared to reconsider the Hoffman holding. Two Federal decisions were found persuasive, and their logic was tracked by the First Department in 2007 (Tzollis). The EDNY had stated that since an LLC combines characteristics of a partnership and corporation, in both of which the ownership interests have a statutory right to sue derivatively, it was "peculiar" that the NYS legislature had not specifically provided the right to LLC members. The court had stated that the common law right existed despite the legislature's not expressly including it in the LLCL. An SDNY case had noted that Hoffman did not even mention the common law right, which could only be displaced by a statement of "clear and specific legislative intent." In addition, the court here pointed out that Section 610 provides that an LLC member may not be party to proceedings by or against the company except to enforce a member's right against, or liability to, the company. Plaintiff here was in full compliance with § 610 in seeking both to enforce his right against, and on behalf of both himself and the company, a member's liability to, the LLC. Motion to dismiss for failure to state a cause of action denied. Defendants also moved to dismiss on the ground that plaintiff was not a member of the LLC. Plaintiff was not listed in the company's Articles of Organization, but LLCL does not require that all members be listed, the court found. Also, defendants had not shown that plaintiff had not been made a partner after inception, and in tax documents the individual parties had held themselves out as 50% owners. Dismissal based on lack of standing denied. Defendants further argued that if a derivative action were in fact permitted it could only be brought by a majority vote of members. But LLCL § 408(b), cited by defendants, did not apply as the company's Articles did not provide for managers and the default provisions applicable state that members vote in proportion to their respective interests. By this formula majority approval was impossible for practical purposes, each individual being half owner, so its lack did not preclude the suit. As to a claim to remove individual defendant as a member and transfer the company assets to individual plaintiff, the LLCL provides that no member may withdraw before the company's dissolution unless permitted by the operating agreement, and plaintiffs had not asked the court to dissolve the company. That claim was dismissed as was one for prima facie tort since there was no credible suggestion that defendants had acted in malice. However, plaintiffs' allegations of defendant's acts of theft, waste and similar wrongdoing adequately stated breaches of fiduciary duty to both the company and individual plaintiff and those claims survived. Likewise, wholly derivative claims of wrongful interference with contractual relations, unfair competition and the like based, among other things, on defendant's allegedly luring customers from the company to a competing defendant company using false statements that the former had financial woes, survived. Regarding the surviving claims, the court said that although it was in dispute whether plaintiff had a right to bring a derivative action, dismissal would only deprive both plaintiffs of a vehicle to redress the wrongs allegedly carried out by defendants. Out of the Box Promotions, LLC v. Koschitzki, Index No. 29586/2006, 5/10/07 (Demarest, J.).**

Partnerships; general partners; tax matters partners; fiduciary duty; participation in breach by corporate officer. Contracts; breach; liability of non-signatory officers; bad faith. Alter ego; piercing the corporate veil.

Action by limited partners of a limited partnership arising out of complex transactions involving the partnership, the general partner, and others. Certain defendants were alleged to have controlled the corporate general partner, which had failed to file partnership tax returns for a decade. Many other claims were alleged. On a motion to dismiss by some defendants the court stated that the general partner owed a fiduciary duty to the partnership and the limited partners; such a duty was also owed by the general partner as tax matters partner. Anyone who knowingly takes part with a fiduciary in a breach of trust is liable, including a corporate officer. Incumbency certificates listed some defendants as officers of the general partner and, though defendants challenged the forms, plaintiffs were entitled to an opportunity to obtain document discovery. Defendants also challenged the adequacy of allegations of knowing participation, but the court held that the pleading was adequate when given the required liberal construction. Plaintiffs needed depositions and other discovery. Plaintiffs asserted claims for breach of contract by the general partner and certain defendants in regard to the filing of tax returns based on the designation of a tax matters partner in the partnership agreement. Certain defendants pointed out that they had not signed the agreement and thus, the court noted, would generally not be liable for breach of contract; an officer will not generally be liable unless he/she purports to become bound personally. But, the court said, that is true only where the officer acted in good faith; the defendants here could be liable if they had taken the challenged actions as officers and the breach involved bad faith misrepresentations. Defendants also challenged related alter ego/piercing claims, but the court concluded that plaintiffs were entitled to discovery on the facts of control. Plaintiffs were allowed to amend their complaint in these regards. Plaintiffs cross-moved to dismiss affirmative defenses relating to a wrap-around mortgage. Defendants claimed that, if the court were to hold that the conversion of debt on the wrap-around loan to a limited partnership interest in the partnership was invalid, all of the net proceeds of the sale of the premises must be used to satisfy the loan. Plaintiffs agreed that a mortgage recording tax (Tax Law § 258 (1)) had not been paid as required and that this was a condition precedent to introducing the mortgage in this case. The mortgage had never been recorded. The court found that an issue regarding the tax had no bearing on the wrap-around note. The court had not resolved the validity of the conversion so the cross-motion was premature. Parklex Associates v. Parklex Associates, Index No. 14514/2006, 4/16/07 (Demarest, J.).**

Procedure; comity; CPLR 5304; personal jurisdiction; long arm statue; post-judgment interest.

Plaintiff moved for an order recognizing and enforcing in New York a money judgment which had been entered against defendant in Korea. Plaintiff further requested that the order entering judgment be for the United States dollar equivalent as granted in the Korean judgment. Plaintiff contended that defendant had consistently opposed enforcement of the judgment. Defendant argued that the Korean court that had granted the judgment had had no personal jurisdiction over it. Defendant contended that the judgment should not be enforced in the United States because the bases for personal jurisdiction set forth in CPLR 5304 (a)(2) had not been satisfied. An order granting defendant's motion to dismiss had been reversed by the Court of Appeals. The Court of Appeals had stated that lower courts might recognize other bases of jurisdiction, typically, the jurisdictional guidelines provided in CPLR 302, to determine whether a foreign court had had proper jurisdiction over a judgment debtor. The court had determined that personal jurisdiction existed even though New York has no tort of negligent performance of contract. Defendant maintained its contention that the Korean court had had no personal jurisdiction over it. The court ruled that it would follow the Court of Appeals' determination and that defendant's assertions regarding personal jurisdiction had been made too late and in the wrong court. The court stated that defendant had been properly served in the Korean action, had had the opportunity to contest the jurisdictional issue there, yet had not done so. Further, the court noted, defendant had failed to attempt to vacate the Korean judgment in that forum. Failure to enforce the judgment based on defendant's belated assertions could encourage U.S. corporate defendants operating in foreign countries to default in those forums and then contest personal jurisdiction in New York. Such actions, the court stated, would undermine the principle of comity, and, by extension, the provisions of CPLR Art. 53, which were intended to streamline enforcement of foreign judgments in New York. The court further observed that such actions could also prejudice foreign plaintiffs, who might be forced to litigate the same action in two separate forums, thus causing delay and additional expense. The court granted plaintiff's request that the Korean judgment be entered in the same amount in U.S. dollars as set forth in won in the Korean judgment. The court explained that the Korean won must be converted into U.S. dollars at the rate of exchange at the time the New York judgment was entered. Post-judgment interest would be added until the date of entry of judgment. Sung Hwan Co. Ltd. v. Rite Aid Corp., Index No. 112444/2001, 5/01/07 (Lowe, J.).

Procedure; injunction against pursuit of pending action abroad; comity; forum selection clause; judgment on the merits; bad faith commencement of foreign action; posting of bond; non-identical parties; irreparable harm.

At issue was plaintiff's application for an injunction preventing defendants from pursuing an action filed by them in Korea after commencement of this case, in which this court had granted plaintiff's motion for summary judgment as to liability under loan agreements for some $65 million. The Korean action sought a declaratory judgment of non-liability. The court had previously denied defendant's request for a stay of this action in favor of the Korean matter because of lack of a good faith and credible explanation for defendant's delay. Although comity militates against staying foreign proceedings generally, that can be done in some circumstance (Indosuez). Here, the court stated, a stay was appropriate as there was, as held previously, an enforceable forum selection clause and a forum non conveniens argument had been rejected. Forum selection clauses are increasingly important in international business transactions, the court noted, wherein parties are entitled to certainty. Failure to issue an injunction would nullify the clause. An anti-suit injunction would not violate principles of comity since comity is not implicated where a forum selection clause is involved, there being no possibility of treading on the legitimate prerogatives of the foreign jurisdiction. Further, there was a judgment on the merits, which was entitled to protection. Last, there was evidence of bad faith by defendants. The posting of a bond by defendants did not require a different outcome, nor did the presence of another defendant in the Korean case, a seemingly unnecessary party. Defendants argued that a showing of irreparable harm was required, but the court rejected this contention. DWHK Recovery Co. v. Daeha Company Ltd., Index No. 116222/2004, 4/25/07 (Lowe, J.).

Procedure; pleading; declaratory judgment claims; treatment as contract claims; notice of claims. Misrepresentation; pre-contract statements; disclaimers; merger clause; reliance; warranties in agreement; sophistication of investor and due diligence; relation to contract. Fraudulent inducement; CPLR 3016 (b); prediction; opinions. Damages; punitive; general public harm.

Action by private equity firm seeking to recover $4 million investment in mortgage banking concern on basis of alleged misrepresentations. Plaintiff asserted claims for declaratory relief, which the court deemed ordinary contract claims seeking indemnification for losses under an agreement to the extent plaintiff could prove that representations and warranties in the agreement regarding certain financial statements and regulatory compliance were false. The court found that the pleading provided defendants sufficient notice of claims against them. Defendants' principal challenge was to the complaint's reliance upon a pre-contractual confidential memo and oral statements regarding the financial condition of defendant company and regulatory compliance. The court agreed with defendants that disclaimers in the memo and a merger clause in the agreement barred reliance on pre-contract representations, though plaintiff could proceed as to warranties in the agreement. Plaintiff's status as a sophisticated investor and extensive due diligence by it would not automatically bar plaintiff from relief as to misrepresentations in the warranties since the warranties would be rendered meaningless by such an interpretation. Claims for fraud and misrepresentation, the court stated, were superfluous or insufficient since an action should proceed in contract rather than tort where, as here, parties have negotiated an indemnity provision in regard to all losses from defendant's fraud or misrepresentation. The damages plaintiff could obtain for the alleged fraud appeared to be the same as those obtainable through breach of contract. Fraudulent inducement claims failed (CPLR 3016(b)) since general allegations of lack of intent to perform a contract are insufficient, and statements of prediction or opinion are not actionable. A plea for punitive damages failed since this case did not involve egregious conduct directed at the general public. Inter-Atlantic Fund, LP v. Alvaro, Index No. 601611/2006, 4/13 /07 (Moskowitz, J.).

Procedure; pleading; RICO; common law fraud; GBL 349.

Action by automobile insurance carriers against certain companies, their principals, and their attorneys alleging involvement in a scheme of no-fault insurance fraud. Attorneys moved to dismiss RICO claims and claims of

common law fraud, violation of GBL 349, etc. Plaintiffs alleged that the attorneys had furthered the scheme. The court stated that a RICO claim requires proof of participation in an enterprise and that participation must be in the operation or management of the enterprise, not just in its activities or affairs. Various cases have held that claims against attorneys fell short in this regard. The court ruled that the allegations here failed to plead with the required specificity connection between the defendants and the violations or any pattern and failed to allege facts showing participation as required. A conspiracy claim similarly failed. The court found that the common law fraud claim was deficient, lacking adequate particularity (CPLR 3016 (b)). The alleged misconduct, having been directed at insurance companies rather than consumers, did not state a claim under GBL 349. Motion to dismiss granted. Allstate Insurance Co. v. Buziashvili, Index No. 603776/2003, 5/4/07 (Freedman, J.).

Shareholder derivative actions; demand on board (BCL 626 (c); futility; particularity.

Shareholders derivative action against officers and the board of Bed, Bath & Beyond alleging violations of fiduciary duty, waste, etc. in connection with a stock option backdating scheme. The court granted a motion to dismiss because plaintiff had failed to make a demand or plead board futility with particularity (BCL 626 (c). Three directors were interested, but plaintiff failed to allege why the other seven were interested. Conclusory allegations are insufficient, and the mere presence of directors on committees does not provide particularization as to individual participation or alleged collusion with interested directors. Further, the complaint was silent on the directors' alleged failure to keep informed, and the assertion of failure to exercise business judgment was conclusory, failing to allege with particularity that the transaction was so egregious on its face that it could not have been the product of sound business judgment. Wandel v. Eisenberg, Index No. 603665/2006, 5/3/07 (Ramos, J.).

Shareholder derivative actions; settlement; approval (BCL 626); factors; substantial benefit to corporation and shareholders.

Joint motion of the parties for court approval of a settlement of a derivative action against Citigroup's Board of Directors. Twenty-nine shareholders had filed objections and a hearing was held. Plaintiff here asserted that the Board had breached its fiduciary duties, mismanaged the company and wasted assets by failing to implement adequate internal controls, which led to improper arrangements with Enron and other companies, among other things. The complaint alleged claims that had been made in a prior action by plaintiff and various other actions, all of which had been dismissed. The court noted that plaintiff, as she admitted, faced great difficulty in proving liability. Counsel had found no evidence of misconduct by the Board and the defendants had defenses that could have been raised. The legal standard for proof of breach of fiduciary duty is very high, especially if the standard for Caremark claims were applied. The earlier cases had failed. The defendant argued for approval in what the court found to be conclusory fashion. The only benefits to Citigroup and its shareholders, the court found, would be elimination of the disruptive and distracting litigation and non-monetary benefits brought about by corporate governance reforms. The problem was that the plaintiff's efforts in favor of the latter had merely duplicated the corporation's own prior and independent efforts. Although arms-length negotiation and engagement in discovery are factors to consider, that they had occurred did not immunize the parties from judicial scrutiny of the terms of the settlement. Although plaintiff would have had a difficult time proving her case, defendants had not moved to dismiss, but instead had negotiated a settlement containing a broad release of the defendants and a $3.3 million fee for plaintiff's counsel. A court should not substitute its business judgment for that of the parties, the court said, but that does not mean the court should rubber stamp what the parties agree upon. That there were only a small number of objectants was not determinative. The court refused to approve the settlement because of the disparity between the reforms, which had already been introduced, and the broad general release, as well as the absence of consideration from the individual defendants. The release and payment of plaintiff's attorney's fees were prejudicial to Citigroup and its shareholders, and approval would set a dangerous precedent. The relevant standard is one of substantial benefit to the corporation, not any benefit. It was a red herring for defendants to say that they were trying to save Citigroup from future litigation costs since the same could be said whenever any derivative action settles. There would be no substantial benefit to Citigroup, the court ruled. The court further pointed out that there was no assurance in the

settlement that the reforms would be implemented for a set period of time. Approval denied. Carroll v. Weill, Index No. 600645/2006, 5/14/07 (Ramos, J.).

Trade secrets; misuse; secrecy; novelty. Procedure; summary judgment; feigned issue of fact; contradiction of deposition. Prima facie tort; motive.

Action by former employer alleging misuse of trade secrets. Defendants had been independent contractors who conducted free half-day seminars for realtors designed to attract them to attend a for-fee, all-day workshop. Defendants had not entered into employment agreements. When defendants resigned and formed their own business aimed at the mortgage lending business, they took nothing with them. The court found that the alleged trade secret was not one. The business model was used by others and plaintiff had taken no steps to protect it. It was presented repeatedly during the free seminars and attendees were not restricted from using any information gained. The model had not been physically appropriated and only existed in defendants' heads. The scripts used were not secrets. The presentations contained no novel ideas that could be stolen. The sales techniques here were neither novel nor secret, nor could plaintiff prevent defendants from carrying with them the faculties, skills and expertise required in the former position. The affidavit of plaintiff's principal contradicted his deposition testimony and sought to create a feigned issue. A claim for prima facie tort failed since defendants had had valid motives for their conduct. Summary judgement for defendants. Sales Strategies Group v. Fenton, Index No. 13343/2005, 4/2/07 (Fisher, J.).**

APPELLATE REVIEW OF LAW REPORT CASES

The editors are aware of the following appellate action with regard to cases summarized in this issue of the Law Report.

This information is provided for general information and the editors do not warrant the completeness or accuracy of this information. Counsel are advised to conduct their own cite checking of cases that are of interest to them.

Contacare v. Ciba-Geigy 2008 NY Slip Op 2281; 49 AD3rd 1215; 853 N.Y.S. 2d 783; 2008 N.Y. App. Div. LEXIS 2229

Sung Hwan v. Rite Aid 2007 NY Slip Op 9676;46 A.D.3d 288; 847 N.Y.S.2d 78; 2007 N.Y. App. Div. LEXIS 12397

CAUTION: *This collection of opinions is not part of the official reports. These opinions have not been edited and the final version of any of them that are published in the official reports may differ from the text as it appears on this website. These opinions are not available for publication in any official or unofficial reports, except the New York Law Journal, without the approval of the State Reporter or the Committee on Opinions.*

** The decisions discussed have been posted in PDF format, but the reader should be aware that these PDF copies may not be exact images of the original signed text as filed in the County Clerk's Office.