

New York Law Journal

COURT DECISIONS

<b>First Department</b>	<b>Second Department</b>	Richmond County.....18	<b>U.S. Courts</b>
New York County.....18	Kings County.....18	Nassau County.....18	Southern District.....19
Bronx County.....18	Queens County.....18	Suffolk County.....19	

DECISIONS OF INTEREST

NEW YORK | CONTRACTUAL DISPUTES

**Client's Untimely Complaint Against Law Firm, Attorney in Contract Breach Suit Dismissed**

Defendants law firm moved to dismiss client Huang's contract breach action. Huang's complaint asserted defendants wrongfully charged her \$400 for a legal consultation without providing her any services. Yet, she filed the complaint 44 days after service of defendants' demand for it, without leave of court, and failed to demonstrate a reasonable excuse for the delay and a meritorious claim. The court stated the complaint, undisputedly untimely, must be dismissed under CPLR 3012(b), noting it was served 24 days after the deadline to serve it expired. Huang's counsel asserted he was not served with a demand for complaint, but the court found such contention was belied by defendants' affidavit of service. Thus, the court concluded as Huang failed to establish a reasonable excuse for the delay in filing the complaint, there was no need to address the claim's merits. Yet, it also noted Huang's affidavit did not address the merits of her claim, and only contained personal attacks on defendants. The court also found the allegations in the complaint were conclusory and failed to state a cause of action and would be dismissed under §3211(a)(7).



Justice Kathryn Freed  
Supreme Court

Huang v. Spinnell, 160188/2019 (April 27)

KINGS | CIVIL PROCEDURE

**Fact Questions Bar Reargument; Absent Allegations of Waste Motion for Receiver Denied**

Defendant moved to reargue a 2019 decision; plaintiffs cross-moved for appointment of a receiver to secure their interest in a property. Defendant awarded plaintiffs five percent of its ownership in 2015, and plaintiffs sought to enforce their ownership interests. Defendants moved for dismissal arguing Herbst became a member of the company and no transfers may be made without his consent, thus, the transfer was invalid requiring dismissal of the enforcement action. The court denied the motion finding little evidence Herbst was an owner as the company's K-1s did not list him as such. Defendant argued Herbst was appointed manager, not owner, and his absence on the K-1s did not mean there were questions of fact. The court noted if Herbst was an owner of defendant, as the sole manager his consent was required and the 2015 agreement would be rendered void. Yet, as fact questions if Herbst was a true owner as tax documents did not so indicate, and if he was the sole managing member existed, reargument was denied, and dismissal of the constructive trust claim was denied. As there were no allegations of waste or loss of the property, the motion for a receiver was denied.



Justice Leon Ruchelsman  
Supreme Court

Jensen v. 1050 Pacific LLC, 516881/2019 (April 22)

SECOND CIRCUIT | DISCOVERY

**Post-Judgment Appeal Rights Protect Vitality Of Asserted Psychotherapist-Patient Privilege**

In 2016 Rosner challenged an IRS finding he was not entitled to a tax refund for 2006 and 2008. Despite not seeking a refund until 2013, Rosner argued his claims were timely because three-year lookback period was suspended, under 26 USC §6511(h), because he could not manage his financial affairs due to disability. Supporting letters from his psychologist and psychiatrist stated he suffered from PTSD and other conditions since 2001. Rosner sued after the IRS rejected his claim. Asserting a psychotherapist-patient privilege, he objected to the government's request for records and testimony from the therapists submitting letters on his behalf. Second Circuit dismissed, for lack of jurisdiction, Rosner's interlocutory appeal of the court's finding he waived his psychotherapist-patient privilege by placing his mental health at issue. As a party Rosner's right to a post-judgment appeal, and other avenues of review, including mandamus, protected the vitality of the asserted psychotherapist-patient privilege. Thus Rosner's appeal fell within neither the collateral order doctrine nor the exception to finality created by *Pertman v. U.S.*



Per Curiam  
U.S. Court of Appeals

Rosner v. U.S., 19-687 (May 8)

U.S. - EDNY | CRIMINAL LAW

**Indictment Alleges Enterprise, RICO Charge; Dismissal, Severance of Counts Denied**

In 2017 West End Enterprise members Cooper, Washington, and Michael and Sharod Liburd were indicted on charges including racketeering and racketeering conspiracy. Cooper and Sharod pleaded not guilty on all counts. In Jan. 2019 the court denied Sharod's motion to dismiss the indictment, sever trial, and seek the court's recusal. After a July 29, 2019, oral argument, the court denied Cooper and Michael the indictment's dismissal, and severance of counts. The superseding indictment fulfilled the requirements for alleging an enterprise and RICO charge, and alleged each defendant agreed a conspirator would commit at least two acts of racketeering activity in the conduct of the enterprise's affairs. The counts Cooper and Michael sought to sever related to the indictment's RICO conspiracy counts, so that joinder of all counts was proper. As the counts to be severed were included as predicate acts of the alleged RICO conspiracy, at a separate trial the government would still be entitled to offer evidence of RICO conspiracy and enterprise in support of charges of obstruction of justice and Hobbs Act robbery.



District Judge Pamela Chen  
Eastern District

U.S. v. Cooper, 17-CR-296 (May 8)

NEW YORK | CONTRACTS

**Claims in Complaint Sufficiently Allege Contract's Termination Improper, Dismissal Denied**

Plaintiff, a social media marketing company, sued Platta, to recover damages for their failure to pay for services and their allegedly defamatory statements concerning plaintiffs. Defendants moved to dismiss the complaint, while plaintiffs cross-moved to reargue their denied motion for default judgment and leave to file an amended complaint. The court noted defendants' motion to dismiss extended plaintiffs' time to amend its complaint and they may do so as of right. Plaintiffs' amended complaint substantially changed the original complaint—adding specific factual allegations and removing many causes of action—mooting many arguments defendants asserted in their dismissal motion. The second cause of action in the amended complaint alleged defendants breached a contract in which plaintiffs were hired to manage Platta's political campaign but claimed defendants failed to pay for services rendered. Defendants argued plaintiffs were not entitled to expectation damages for failing to allege defendants' termination of the contract was improper. The court found the allegations sufficiently alleged a contract termination was improper, denying dismissal of contract breach claim.



Justice Paul Goetz  
Supreme Court

No Fault New York LLC v. Platta, 154477/2019 (April 30)

KINGS | CONTRACTS

**Defendants Granted Renewal, Court Adheres To Prior Motion Denying Dismissal of Complaint**

Defendants moved to renew their prior summary judgment motion, and upon same, granting dismissal of Kamel's complaint seeking specific performance of an alleged oral joint venture agreement. Kamel argued he and Aghelian agreed to purchase a property as equal partners, but Aghelian purchased the property without him and transferred it to an LLC solely owned and operated by Aghelian. The court found the Statute of Frauds did not apply to render the oral partnership or joint venture agreements to deal in real property void as defendants argued. Defendants moved for renewal arguing evidence was unavailable before completion of discovery and it should be clear the parties had no oral agreement. The court granted defendants leave to renew, but upon same, adhered to its prior decision and denied summary judgment dismissing the complaint finding no new evidence was proffered, nor any change in law presented to affect its prior decision the statute of frauds was inapplicable to the parties' alleged agreement. Also, the deposition evidence created more factual issues than it resolved, and credibility issues of the parties' versions of events barred granting summary judgment.



Justice Debra Silber  
Supreme Court

Kamel v. Aghelian, 517828/2017 (May 1)

U.S. - SDNY | CONTRACTUAL DISPUTES

**Pandemic, PAUSE Executive Order Did Not Render Settlement's Performance Impossible**

In their 2018 FLSA action Lantino, Cabello, and 138 opt-in plaintiffs alleged defendants operated their fitness businesses without sufficient funds to pay employees. The parties reached settlement on Sept. 9, 2019. Plaintiffs' Oct. 3 letter informed the court that although total damages were calculated at more than \$3.6 million, they agreed to a total settlement fund of \$300,000 to be paid over 25 months, but, in event of default, the settlement amount would be increased to \$1 million pursuant to a consent judgment. Granting plaintiff's April 29, 2020, motion seeking entry of the consent judgment in the amount of \$923,913.51—\$1 million less the \$76,086.49 paid by defendants before default—district court rejected defendants' argument the COVID-19 pandemic and the governor's March 22, 2020, PAUSE Executive Order, rendered their performance of the settlement agreement impossible. Defendants' performance was not excused under 407 E. 61st Garage Inc. v. Savoy Fifth Ave. Corp. and *Ebert v. Holiday Inn*. At best, they showed financial difficulties adversely affecting their ability to make the payments called for under the agreement.



Magistrate Judge Stewart Aaron  
Southern District

Lantino v. Clay LLC, 1:18-CV-12247 (May 8)

U.S. - EDNY | REAL ESTATE

**Mortgage's 2008 Acceleration Triggered Limitations Statute That Expired on June 30, 2014**

In June 2008, after Pinto-Bedoya defaulted on a note and mortgage, Downey Savings and Loan Assn. sought foreclosure in state court. While suit was pending, Downey assigned the note and mortgage to U.S. Bank N.A. whose June 24 and 30, 2014, letters purportedly de-accelerated the loan and reinstated it as an installment loan. U.S. Bank's July 15 pre-foreclosure notice told Pinto-Bedoya she could cure default by paying \$261,306.40. On July 16, it began sending her statements seeking \$2,900 monthly. In December 2016 a different mortgagee sought foreclosure. Plaintiff 53rd Street LLC was the successful bidder at a June 2018 foreclosure auction. Its instant action sought to cancel and discharge the disputed mortgage on grounds that the statute of limitations to foreclose had expired on June 30, 2014. Downey 2008 foreclosure action accelerated the mortgage, thus triggering the statute of limitations that expired on June 30, 2014. U.S. Bank's June 24, 2014, deceleration letter—sent only 6 days before the statute of limitations expired—was not a valid deceleration, and any future foreclosure action would be time-barred.



District Judge Ann Donnelly  
Eastern District

53rd Street LLC v. U.S. Bank N.A., 1:18-CV-4203 (May 8)

KINGS | CONTRACTS

**Intervention Denied, But Substituting Guardian As Defendant, Amending Caption Granted**

Easy Green 1525 LLC moved to intervene as a plaintiff. Plaintiffs sued defendant for specific performance to enforce a contract in which she agreed to sell the premises to plaintiffs. Their motion was granted, and plaintiffs were awarded a specified sum of attorney fees and defendant was directed to tender the premises to plaintiffs, who appealed and were granted a reversal of the award of fees and costs and denial of contempt as the Appellate Division found defendant was in contempt of prior court orders, directing a hearing to determine attorney fees. A guardian was appointed for defendant, and Easy was granted permission to pay off defendant's mortgage, and became owner of the premises. Easy commenced a holdover eviction proceeding against defendant and guardian, awarding Easy possession, yet, defendant and guardian refused to vacate. Easy sought to maintain an action for waste—lost rent caused by defendant and guardian's refusal to vacate. The court found this proposed claim was unlike plaintiffs' for specific performance. Yet, Easy's motion to intervene was denied, but its motion to substitute guardian for defendant and amend the caption was granted.



Justice Devin Cohen  
Supreme Court

Easy Green 1525 LLC v. Easy Green 1525 LLC, 503972/2014 (May 4)

KINGS | CONTRACTUAL DISPUTES

**Plaintiff's Complaint Lacks Requisite Elements To Support Piercing Corporate Veil Theory**

Wainer and Freedom Mortgage Corp. (FMC) moved to dismiss the complaint in this action arising from a real estate transaction regarding the subject property, 854 Herkimer St. Corp. sold the property to Amador but did not have a Certificate of Occupancy (CoO) as required and an escrow agreement provided Amador's mortgage lender, FMC, would hold \$25,000 in escrow until the CoO was submitted. Wainer executed the agreement on 854's behalf. Amador claimed 854 failed to deliver the CoO to her, thus, she sued for contract breach, among other things, claiming entitlement to the \$25,000. Amador noted Wainer was 854's sole owner, using it as a shell company to circumvent responsibilities. Wainer argued Amador failed to assert wrongdoing by him in an individual capacity and the unsubstantiated allegations were insufficient to pierce the corporate veil. The court found Amador failed to allege any material elements in her complaint, noting absent any claims Wainer's conduct constituted an abuse of the privilege of doing business in the corporate form, the complaint lacked a requisite element to support a claim against him under a piercing the corporate veil theory.



Justice Carolyn Wade  
Supreme Court

Amador v. 854 Herkimer St. Corp., 509663/2019 (May 4)

U.S. - SDNY | BANKRUPTCY

**'Chateaugay II' Factors Not Met; Appeal Of Jan. 14 Order Dismissed as Equitably Moot**

On Jan. 24, 2020, debtor RS Old Mill LLC and its owner appealed bankruptcy court's Jan. 14 order approving the sale of certain properties to RS Old Mills RD LLC nunc pro tunc to Sept. 5, 2017, and approving a 2019 settlement between trustee O'Toole and Suffer Partners LLC. District court granted O'Toole and Suffer the appeal's dismissal as equitably moot. There was a comprehensive change in circumstances after the debtor bought the subject properties from Novartis on Sept. 1, 2017. Nor did appellants show each *Chateaugay II* factor satisfied, so as to avoid their appeal's dismissal under the equitable mootness doctrine. As they never sought a stay, the appellants did not satisfy the last *Chateaugay II* factor, which required that they pursue "with diligence" a stay of the execution of the bankruptcy court's Jan. 14, 2020, order. Also, to reverse bankruptcy court's order would be to "unravel intricate transactions" so as to undermine the authorization for every transaction. The appellants also failed to join any creditors, also adversely affected by reversal of bankruptcy court's Jan. 14 order.



District Judge Vincent Briccetti  
Southern District

RS Old Mill LLC v. O'Toole, 20 CV 743 (May 8)

Don't just settle for the most visibility.  
Get the right visibility.

Lawjobs.com Advantage

The Lawjobs.com global network reaches attorneys, paralegals, business development executives, and legal professionals thousands of times a day, including 99% of the NLJ 250.

Experience the new Lawjobs.com today.

LAWJOBS.COM  
When results matter

