COURT NOTES

By Ilene Sherwyn Cooper

APPELLATE DIVISION-SECOND DEPARTMENT

Attorney Resignations

The following attorneys, who are in good standing, with no complaints or charges pending against them, have voluntarily resigned from the practice of law in the State of New York:

Richard P. Broder
Max W. Custer, Jr.
Taina E. Edlund
Shane Daniel Fuhrman
Barry Harte Gottfried
Bram William Kranichfeld
James L. LaPann
Steven Paul Lieberman
Alicia Perez, admitted as Alicia Marie Perez
Eric B. Schoenfeld
Rachael Seevers, admitted as Rachael E. Seevers
Luanne M. Serafin, admitted as Luanne Melissa Muller
Ronald A. Siegel
Mark Elliot Sobel
Edward A. Sokoloff
Maria P. Sperando, admitted as Maria Patricia Sperando

Attorney Reinstatements Granted

The following attorneys have been reinstated to the roll of attorneys and counselors- at- law:

Lawrence D. Moringiello

Attorney Resignations Granted/Disciplinary Proceeding Pending


Ilene S. Cooper

Dawn M. Hughes: By decision and order of the court, the respondent was suspended from the practice of law based upon a finding of professional misconduct, and a failure to cooperate with the lawful demands of the Grievance Committee. The Grievance Committee was authorized to institute a disciplinary proceeding, and the matter was referred to a special referee. Prior to the disciplinary hearing, the respondent submitted an affidavit of resignation. The affidavit acknowledged that the respondent was subject to an investigation based upon charges of professional misconduct in connection with a real estate transaction, and that the respondent had failed to cooperate with the lawful demands of the Grievance Committee. The respondent stated that she could not successfully defend herself on the merits against charges predicated upon the foregoing. Further, she stated her resignation was freely and voluntary rendered, that she was fully aware of the implications of submitting her resignation, and that she was subject to an order directing that she make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and she was disbarred from the practice of law in the State of New York.

Gerald J. Mondora: By affidavit, respondent tendered his resignation on the grounds that he was the subject of an investigation pending against him by the Grievance Committee for the Ninth Judicial District based upon a complaint of professional misconduct alleging, *inter alia*, misuse of funds entrusted to his charge. He stated that he could not successfully defend himself on the merits against charges predicated upon the foregoing. Further, he stated his resignation was freely and voluntary rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Paul G. Vesnaver: By affidavit, respondent tendered his resignation on the grounds that he was the subject of an investigation pending against him by the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts based upon several complaints of professional misconduct involving misuse of funds entrusted to his charge. He stated that he could not successfully defend himself on the merits against charges predicated upon the foregoing. Further, he stated his resignation was freely and voluntary rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Attorneys Censured

William J. Bratton, III, admitted as William Joseph Bratton: By affirmation, on notice to the respondent, the Grievance Committee advised the court that the respondent had entered a plea of guilty in the Village Court of Elmsford, Westchester County, to driving, while intoxicated, an unclassified misdemeanor, and reckless endangerment, a class a misdemeanor. By decision and order, the Grievance

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REAL ESTATE

Defaults in Foreclosure are a Thing of the Past

By Andrew Lieb and Jay P. Sheryll

On June 23, 2016, Governor Andrew Cuomo signed into law an amendment to CPLR Rule 3408, which, at new subsection (m) thereof, effectively eliminates defaults in foreclosure actions as currently understood. Interestingly, the amendment is made to CPLR Rule 3480, which is the CPLR Rule titled "Mandatory settlement conference in residential foreclosure actions," and not to CPLR Rule 320, which is the CPLR Rule titled "Defendant's appearance," or to CPLR Rule 5015, which is the CPLR Rule titled "Relief from judgment or order," or to CPLR §3012(d), which is the CPLR subsection titled "Extension of time to appear or plead." This choice of placement raises questions about how the amendment will be effective in practice. Further questions are raised because the amendment includes superfluous language in expressly stating that the "default shall be deemed vacated" while also referencing the "reasonable excuse" language from both CPLR Rule 5015 and CPLR §3012(d). Still further, the new subsection does not eliminate the need for a defendant to formally answer, but only extends the time to answer, which presumptively will remain a problem for a foreclosure defendant to accomplish at a later date. These question marks need to be ironed out by practitioners and the courts after new subsection (m)'s effective date of December 20, 2016.


Andrew Lieb


Jay P. Sheryll

New subsection (m) to CPLR Rule 3408 states:

> A defendant who appears at the settlement conference but who failed to file a timely answer, pursuant to rule 320 of the civil practice law and rules, shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived within thirty days of initial appearance at the settlement conference. The default shall be deemed vacated upon service and filing of an answer.

As a result, defendants in foreclosure, as of December 20, 2016, will no longer need to answer, pursuant to

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Promoting Commitment to Justice for 50 Years Nassau Suffolk Law Services Hosts Anniversary Reception

Nassau Suffolk Law Services Committee Inc. *(Hempstead, Islandia & Riverhead, N.Y.)* will host its 50th Anniversary Reception on Wednesday, October 26, at the elegant, newly renovated Larkfield, in *East Northport*, from 6 to 10:30 p.m.

This year's milestone commemoration is themed "Celebrating Our Past, Inspiring our Future," and promises to be a momentous salute to the nonprofit firm's humble beginnings and impressive achievements with a view towards its continued future success and aspirations. The event will bring together staff and alumni, the judiciary and private bar, and community agencies, friends and supporters, for a fun-filled evening of good food, spirits, auctions and live music. The evening's honorees that will receive well-deserved congratulations for their service include: Douglas J. Good, Esq. Ruskin Moscou Faltischek. P.C.; Jane Reinhardt, Esq. Nassau Suffolk Law Services; James Denson, Paralegal Nassau Suffolk Law Services; Rudi DeWinter, Esq. Pro Bono Commitment to Justice Award; Susan West, Consumer Advocate, PSEG Long Island, The Barbara J. Mehrman Commitment to Justice Award.

All proceeds will benefit the critical legal programs that Law Services provides free of charge to low-income and disabled individuals in the Long Island community.

Tickets, sponsorships and ad information are available by emailing sjohnson@nsls.legal or online at www.nslawservices.org.

Defaults in Foreclosure are a Thing of the Past (Continued from page 6)

CPLR Rule 320, before appearing at a foreclosure settlement conference, pursuant to CPLR Rule 3408. In fact, foreclosure defendants now have over 90 days to answer a complaint from the date that such complaint is served. Ninety days is computed because the settlement conference is to occur "within sixty days after the date when proof of service upon such defendant is filed with the county clerk" and new subsection (m) provides a defendant with an additional "thirty days of initial appearance to serve and file an answer." Consequently, the deadline for a foreclosure defendant to answer has effectively been extended from 20 or 30 days, as the case may be, pursuant to CPLR Rule 320, to over 90 days under new subsection (m).

In light of subsection (m) delaying, not eliminating, the need for a foreclosure defendant to serve and file an answer, it is necessary that appropriate resources be made available at foreclosure settlement conferences in order to educate defendants of the deadline to answer following the conference. Otherwise, pushing back the cutoff before default will be fruitless and only pay only lip service to the plight of foreclosure defendant's ignorance of the legal process. In that vein, the amendment to CPLR Rule 3408 also includes a new subsection (l), to educate defendants about the legal process, which states:

> At the first settlement conference held pursuant to this section, if the defendant has not filed an answer or made a pre-answer motion to dismiss, the court shall:
> 1. advise the defendant of the requirement to answer the complaint;
> 2. explain what is required to answer a complaint in court;
> 3. advise that if an answer is not interposed the ability to contest the foreclosure action and assert defenses may be lost; and
> 4. provide information about available resources for foreclosure prevention assistance.
>
> At the first conference held pursuant to this section, the court shall also provide the defendant with a copy of the Consumer Bill of Rights provided for in section thirteen hundred three of the real property actions and proceedings law.

However, what is left unanswered in new subsection (l) is how the courts will "explain what is required to answer a complaint in court" and what resources will be provided to the courts to effectuate this great burden. Simply stated, drafting an answer requires a degree of legal knowledge that cannot be educated in five minutes, which is how long many conferences last in practice.

Assuming this first hurdle of educating defendants as to the nature of an answer is overcome, the new subsection (m) remains of questionable effectiveness in vacating a default because of CPLR Rule 320, CPLR Rule 5015 and CPLR §3012(d). The fact that CPLR Rule 320 was not also amended creates a contradiction in the CPLR as to when an answer is due. Better draftsmanship would have placed an exemption in the text of CPLR Rule 320 in addition to creating new subsection (m). Further, subsection (m)'s inclusion of both of the lines "presumed to have a reasonable excuse for the default" and "[t]he default shall be deemed vacated upon service and filing of an answer" creates ambiguity through redundancy.

Statutory interpretation requires that "[a] construction that would render a provision superfluous is to be avoided."[i] Including both the lines about the excuse presumed to be reasonable and that the default shall be deemed vacated in subsection (m) is superfluous because there is no need for the new subsection to address the reasonableness of the excuse for the default if the default is vacated irrespective of reasonableness. Nevertheless, if both sentences were somehow needed, it remains unclear if the reference to reasonableness is meant to address CPLR Rule 5015(a)(1) or CPLR §3012(d).

If the reference is intended to 5015(a)(1), then simply relying on subsection (m) should fail because subsection (m) does not address the "potentially meritorious defense" requirement, which is also required to vacate a default pursuant to the common law under 5015(a)(1)[2] Alternatively, if the reference is intended to CPLR §3012(d), then, again, simply relying on subsection (m) should fail because subsection (m) does not address the "upon such terms as may be just" requirement of the section nor does it address the issue that CPLR §3012(d) requires a party to raise the section in an application as a condition precedent to the section's applicability.

To flesh out the intent of the reference to reasonableness, it is important to distinguish between CPLR Rule 5015(a)(1), which is applicable to post-order of default, and CPLR §3012(d), which is applicable to pre-order of default. As a result, the only functional reference of new subsection (m) could be to CPLR §3012(d), not Rule 5015(a)(1), because the timeline of only providing thirty days to answer after a conference that is supposed to occur within 60 days of the filing of proof of service results in no time for motion practice to result in an order of default in the first instance.

Better draftsmanship would have been to exclude both the sentence about reasonableness and the sentence about vacating a default. Instead, subsection (m) should have simply indicated that an answer served and filed within 30 days of the conference would be deemed timely pursuant to CPLR Rule 320, while also amending CPLR Rule 320 accordingly.

In the end, these questions are all irrelevant, besides to practitioners, because no one wants a foreclosure defendant to default; not the lender, not the defendant, nor society at large. A default can put a cloud on title for a foreclosing plaintiff because of the possibility that such default can later be vacated pursuant to CPLR Rule 5015. A default can undermine the public's respect for the legal system because ignorance can make it seem that the legal system is taking a defendant's house without due process. A default hurts society at large because it reduces the chances for a foreclosure workout, including a modification, deed-in-lieu, and short sale, while leaving zombie properties in the default's wake.

As stated in Governor Cuomo's press release announcing the legislation, that includes subsection (m), since 2010 "the number of foreclosure default judgments has declined from 80% to less than 20%. This legislation will enhance the effectiveness of settlement conferences even further for homeowners by prescribing the rights and duties of the parties and clarifying how the process should work to best protect homeowners contesting foreclosures and prevent them from losing their homes." However, the legislation first needs some draftsmanship to be ironed out by the judicial process before its true effectiveness can be determined.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb is a past Co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer.

Note: Jay P. Sheryll is an associate attorney at Lieb at Law, P.C.

[1] Magjewski v. Bradalbin-Perth Cent. School Dist., 91 NY2d 577, 587 (1998)

Among Us (Continued from page 7)

Touro Law Center's Dean **Patricia E. Salkin** was the recipient of the 2016 Brava Award in the nonprofit category. The Brava Awards celebrate the distinguished achievements of 40 of Long Island's top women business leaders in various categories.

Regina Vetere, Executive Vice President, CBS Coverage, our insurance provider, has been selected as the recipient of the Stephen Gassman Award, which was presented at Nassau Bar's We Care Golf and Tennis Classic on July 25, 2016.

The honorable **Joseph C. Pastoressa** has been inducted into the Touro Law Center Builder's Society at the Annual Liberty and Justice Dinner on June 15, 2016 at the Garden City Hotel. The society honors those individuals who played a role in the establishment, creation and development of a solid foundation for the law school.

Condolences…

Honorary member **Louis Loring** passed away on May 21, 2016. Mr. Loring joined the SCBA in 1965.

Geoffrey Eric Serwer passed away on June 18, 2016. He was an active member of the SCBA since 1995.

New Members…

The Suffolk County Bar extends a warm welcome to its newest members: **David J. Alamia, Rudolph Baptiste, Steven M. Christman, Vincent J. Costa, Sarah Jane Fetherston, Maureen B. Godfrey, Heather Graham, Wendy L. Hodor, Maria Johnson, Megan Mackenzie, Charles W. Marino, James M. Marrin, Craig E. McElwee, Jason Moroff, Donald J. Neidhardt, Lorrain Paceleo, Lorraine Berlund Polin, Jennifer S. Raguso, Mary Ann Risavich-Birgeles, Susanne M. Roxbury, Kurt Schaub, Patricia A. Waite** and **Tor Jacob Worsoe.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: **Megan Christine Barden, Dina Foerster, Samy Moawad, Amol Nadkarni** and **Lisa Rousso.**