REAL PROPERTY

Top 10 Real Estate Laws of 2019

By Andrew Lieb

Now that 2020 is here it is important to be aware of the changes in the law for our industry. This is not a list about the best events from 2019, but instead, a list that highlights the new legal landscape that you face as real estate attorneys in 2019. Being familiar with these laws, cases and rules may help you to better address your client's goals and to make you money while helping you to avoid malpractice.

1. **Housing Stability and Tenant Protection Act:** By way of S6458, a 74 single-spaced tsunami, the state's rental industry has been transformed. This law concerns all facets of rentals, including commercial, residential, stabilized, controlled, conversions and more. Now, entire new leases and eviction procedures are required for all landlords throughout the state where landlords will have to choose between a risk approach or to have the many ambiguities in the law defined in someone else's case. 2020 will be the year of rental lawsuits when S6458 is fleshed-out in the courts.

Andrew Lieb

2. **Yellowstone Injunctions:** Back in 2018, the Appellate Division provided a path to eliminate Yellowstone Injunctions in *159 MP Corp. v. Redbridge Bedford, LLC*. In 2019, this case was affirmed by the Court of Appeals only to be thereafter reversed by the legislature when A2554 was enacted to "[p]rohibit[] commercial leases from including a waiver of the right to a declaratory judgment action and states that the inclusion of such a waiver in a commercial lease shall be null and void as against public policy." Now, we are back where we came from and Yellowstone Injunctions will continue to be the main event in commercial eviction proceedings.

3. **Lawful Source of Income and Gender Identity or Expression:** The New York State Human Rights Law was expanded through the addition of two new protected classes concerning housing discrimination. First, S1047, the Gender Expression Non-Discrimination Act, added protections for gender identity or expression to the human rights law. Then, the State Budget included Source of Income as a protected class. Interestingly, source of income was already a protected class in both Long Island counties' codes, but with the inclusion of the protected class within the state's law, a new cause of action has been created for lawsuits on what has historically been the most frequent basis for a housing discrimination claim.

4. **Deed Conveyance Notice:** By way of S5372, effective March 11, 2020, upon receiving a request to record a new conveyance, the county clerk or city registrar shall mail a written notice of the conveyance of real property to the current owner of record. Beyond the housekeeping that closing attorneys should do in alerting their clients about this new law, this new notice law will hopefully alert homeowners of fraud before a bona fide lender/purchaser for value can cut off the homeowner's rights in their property through subsequent transactions post-fraud.

5. **Disability Lease Exit:** By way of A2118, landlords must accept lease termination notices for tenants living with a "disability," as defined by law, or for the spouse or dependent of a tenant with such a disability, should the tenant need to relocate to an adult care facility, a residential health care facility, subsidized low income housing, or a residence of a family member. Counsel must be well versed in the required notices under this new statute and it's imperative that we, as attorneys, educate our clients as to tenant's rights under this statute before a landlord is exposed for non-compliance.

6. **Title Regulation 208 is Back:** 11 NYCRR 228 is binding on the title insurance industry thanks to the First Department's dismissal of *Matter of New York State Land Tit. Assn., Inc. v New York State Dept. of Fin. Servs*. The only two parts of Regulation 208 which remain annulled after this second reversal of the trial court are the ancillary fees at 228.5 and the closer payment restrictions. Now, title insurers are seriously

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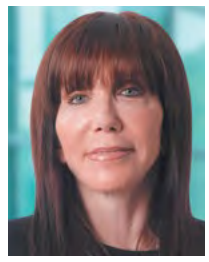
COURT NOTES

By Ilene Sherwyn Cooper



Ilene Sherwyn Cooper

Appellate Division-Second Department

Attorneys censured

Colin P. Astarita: By decision and order of the court, the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against the respondent. The petition contained two charges of professional misconduct against the respondent alleging, *inter alia*, misappropriation of funds entrusted to his charge as a fiduciary. The respondent filed an answer in which he admitted the factual specifications supporting the charges and asserted 10 defenses in mitigation, including the unintentional nature of the misappropriation, the absence of harm to any client, his timely good-faith effort to rectify the consequences of his misconduct, and his full and free disclosure to the Grievance Committee. The court noted that notwithstanding the mitigation advanced, the respondent had made cash withdrawals from his trust account and withdrew cash therefrom to pay his fee. Although respondent claimed that he did not know this conduct was unethical, the court opined that respondent was "held to the knowledge of the rules governing attorney escrow accounts." Moreover, the respondent's use of such funds resulted in a misappropriation of funds being held for a client that had been entrusted to his charge. Accordingly, under the totality of circumstances, the respondent was publicly censured.

Anthony J. Colleluori: Joint motion by the Grievance Committee and the respondent for discipline on consent and request the imposition of a public censure. As required, the respondent submitted an affidavit with the motion in which he conditionally admitted, *inter alia*, that he neglected a legal matter entrusted to him, failed to promptly refund a legal fee that had been paid in advance and that he did not earn, engaged in conduct prejudicial to the administration of justice, and engaged in conduct that adversely reflected on his fitness as a lawyer. The respondent consented to the agreed discipline of public censure, which was found to have been freely and voluntarily given, without coercion or duress. In mitigation, the respondent alleged, *inter alia*, that his wife suffers from debilitating medical issues, and that he is her primary caretaker, that he is disabled, and that his disability and that if his wife directly impacted his handling of the matter; that prior to becoming disabled he was an active member of the Nassau County Bar Association, that he had performed countless pro bono services, and had received an award from the New York State Bar Association for his contribution to criminal law education. The parties acknowledged that the respondent had a prior disciplinary history. Based on the foregoing, the court found that the motion for discipline on consent should be granted and that a public censure was warranted. Accordingly, under the totality of the circumstances, the respondent was publicly censured.

Attorney disbarred/incapacity found

Suzann Grossman-Kerner: Motion by the Grievance Committee for a determination that the respondent was incapacitated from practicing law by reason of mental disability or condition granted.

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is a past President of the Suffolk County Bar Association and past Chair of the New York State Bar Association Trusts and Estates Law Section.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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In re: Appointment of

ALAN S. TRUST

as Chief United States Bankruptcy Judge
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ADMINISTRATIVE ORDER 2020-02

Pursuant to the authority conferred by 28 U.S.C. Section 154(b), the Board of Judges for the United States District Court for the Eastern District of New York ("the Board of Judges"), in a vote concluded on January 23, 2020, approved the appointment of United States Bankruptcy Judge Alan S. Trust as Chief Judge of the United States Bankruptcy Court for the Eastern District of New York, effective October 1, 2020. Accordingly, it is hereby

ORDERED that United States Bankruptcy Judge Alan S. Trust shall serve as Chief United States Bankruptcy Judge commencing October 1, 2020 and continue to so serve until such time as determined by the Board of Judges.

SO ORDERED.

Dated: Brooklyn, New York
January 24, 2020

/s
Dora L. Irizarry
Chief Judge

President's Message (Continued from page 1)

our own collection of attorneys and judges charged with upholding the rule of law and everything this great nation stands for is the challenge. It is also what keeps us actively engaged in trying to make a mark, even a small one, towards that end and improving the quality of life for those whose lives we touch through our work.

One of the projects the Suffolk County Bar Association is working on this year is Restorative Justice, a full-day symposium on May 1, 2020, annual law day. We have a large active group of attorneys and judges, working hard to bring this to fruition. We intend to invite every school superintendent in both Suffolk and Nassau counties. The genesis of this project is the proposed amendment to Education Law §3214 to provide alternative methods to addressing student disciplinary offenses, in lieu of school suspension. Studies have proven that when a child is more frequently suspended, he or she is more likely to commit adult crimes and find themselves incarcerated. The goal is to establish programs to maintain the student in school, while addressing the behavior in a constructive manner, to prevent future negative behavior and ultimately, to stem the "school to prison pipeline." It would seem to benefit all of us to find better ways to turn a young behavior problem into a productive member of society rather than another prison statistic.

It strikes me as an interesting coincidence that our bar association has chosen to address these issues, and its underlying causes, at this particular time. A focus of the Restorative Justice project is addressing the incidence of "implicit bias" and how, whether on an individual or an institutional level, it affects our approach to certain litigants or our determination as to consequences or punishment for offenses. I do not know the answers, but these are the questions we need to ask ourselves.

Bias can come in many forms. We commonly think of bias as directed towards people of a different race, religion, color, sexual orientation, economic background or social strata. Perhaps, as human beings, we all suffer from some form of implicit bias. However, it is in being aware and recognizing the existence of those biases and challenging them within ourselves and in our institutions that applies to what we do, as lawyers and judges each day. The hope and goal of the Restorative Justice project is to shed some awareness and to find alternatives to the suspension of children from school when there may be a more productive approach. On a larger scale is the goal of preventing those biases from rearing its ugly head to the point of becoming unreasonable, irrational and dangerous and effecting how we treat each other, whether by allowing the rise of Anti-Semitism, or any other collective prejudice towards those that are different, or the removal of children from their parents or, conversely, allowing children to remain in abusive situations.

I would be remiss, however, not to mention the other side of the coin. I had the great privilege of attending the New York State Bar Association Annual Gala on January 31 held at the Museum of Natural History. It was a momentous, elegant evening, with 1000 guests held in the backlit aura of dinosaurs and mammoth elephants. The National Anthem was performed by the star of Hamilton on Broadway, a not so well kept secret. In attendance were many dignitaries, including both Appellate Division justices and the New York Court of Appeals Judiciary, Chief Judge Janet DiFiore, New York State Attorney General Letitia James. However, the real treat was the attendance of Elena Kagan, Associate Justice of the Supreme Court of the United States. An informal chat was held with Justice Kagan, who I have no doubt impressed the entire audience as not only brilliant, but possessed of an enormous sense of humor, engaging personality and supremely dedicated to her position and the awesome responsibility it entails. I will take the liberty of stating that, no doubt, in large part because she hails from New York! I was fortunate to be joined by many from Suffolk County, including United States District Court Judge Sandra J. Feuerstein, Family Court Judge Caren Loguercio, NYSBA President-Elect Scott Karson, past presidents John Gross, Harvey Besunder, Donna England and Jim Winkler, President-Elect, Judge Derrick Robinson, First Vice-President Dan Tambasco, Secretary Patrick McCormick and House of Delegate member Craig Purcell, as well as many others. I will say that, in speaking for myself and for all those in attendance, that it was a truly magical evening and one which confirmed our pride in being part of this great and proud profession of law.

Personal Injury (Continued from page 8)

ment of jury selection and cited issues with his expert witness. Defense counsel opposed the request and moved to dismiss based on plaintiff's failure to proceed to trial. The court offered plaintiff's counsel the opportunity to proceed with jury selection that day and start the trial Feb. 6, 2017, or Feb. 7, 2017, and to allow the plaintiff's expert witness to testify on Feb. 9, 2017. Plaintiff's attorney responded that his expert witness was not available then, and that both he and defense counsel had trial the following week. The court granted the defendant's motion to dismiss.

Plaintiff then moved to vacate the dismissal and to restore the action to the trial calendar, arguing that he presented a reasonable excuse for failure to proceed to trial. In support of the motion, plaintiff submitted an affidavit from his expert witness stating she was unavailable for trial the week of Jan. 30, 2017, due to the scheduling of her patients. The court denied plaintiff's motion stating that plaintiff failed to demonstrate a reasonable excuse for his default on Jan. 30, 2017.

The Appellate Division, Second Department, affirmed the Supreme Court's order, citing the following law. "Where a case is called for trial and one of the parties fails to appear or is unable to proceed, the trial court may '(1) adjourn the trial to another date, (2) mark the case 'off' or strike it from the calendar pursuant to CPRL 3404, (3) vacate the note of issue pursuant to Uniform Rules for Trial Courts (22 NYCRR) 202.21(e), or (4) dismiss the complaint . . . pursuant to Uniform Rules of Trial Courts (22 NYCRR) 202.27." Meledez v. Stack, 171 A.D.3d 726, 728 (2nd Dept 2019) (internal citations omitted).

Based on the foregoing law, the Meledez Court held that, "a court may dismiss an action when a plaintiff is unprepared to proceed to trial at the call of the calendar. In order to be relieved of that default, a plaintiff must demonstrate both a reasonable excuse for the default and a potentially meritorious cause of action. While public policy strongly favors the resolution of cases on the merits, a determination of whether an excuse is reasonable lies within the sound discretion of the Supreme Court. Here, the Supreme Court providently exercised its discretion in dismissing the action, because the plaintiff failed to demonstrate a reasonable excuse for why he was unprepared to proceed to trial on Jan. 30, 2017. The plaintiff's expert did not state that she was unavailable to testify on Feb. 9, 2017, as offered by the court and did not address whether the plaintiff's attorney had asked if she was available to testify during the second week in February. Although an expert witness's unavailability may provided a reasonable excuse for a party's inability to proceed to trial (see Vera v. Soohoo, 99 A.D.3d at 992), under the circumstances here, it cannot be said that the plaintiff sufficiently established the unavailability of the expert witness." Meledez v. Stack, 171 A.D.3d 726, 728-729 (2nd Dept 2019) (internal citations omitted).

Trial counsel seeking an adjournment based on the unavailability of an expert witness should be armed with as much detail as possible regarding the witness's unavailability and the merits of the cause of action. The more detail counsel can provide, including dates the expert is available (as opposed to unavailable), the more likely the court will find counsel's excuse reasonable and grant the adjournment. Counsel should also remind the client that an adjournment is not guaranteed, and the court has discretion to dismiss the case if counsel refuses to proceed to trial. If the court denies a request for an adjournment, it will likely be in the interest of the client to proceed without the unavailable expert witness, lest the case be dismissed without ever being tried.

Note: Paul Devlin is and associate at Gentile & Tambasco where his practice focuses on personal injury litigation. He is an active member of the SCBA serving on the Board of Directors and as co-chair of the Membership Services & Activities Committee. He may be reached at (631) 760-0923.

Real Property (continued from page 7)

restricted in soliciting business with no more sports tickets, golf outings, holiday parties, open houses, and wining and dining permitted.

7. **Foreclosure Standing and Cancellation of Debt:** By way of S5160, "the defense, in a mortgage foreclosure action, of the plaintiff's lack of standing is not waived because of the defendant's failure to raise such defense in his or her responsive pleading." Additionally, by way of Public Law No: 116-94, The Mortgage Forgiveness Debt Relief Act, 26 USC 108(a)(1)(E), was extended until Jan. 1, 2021. Now, mortgagors in pending foreclosure actions should instantly bring a motion to renew on any previously granted summary judgment decisions or orders of reference if standing was previously waived but could have been litigated on the merits. Further, with the Mortgage Forgiveness Debt Relief Act, short sales, deeds-in-lieu and modifications with debt forgiveness just became much more appealing to debtors.
8. **LLC Owner Disclosure:** By way of S1730, LLC purchaser anonymity is over. Now, disclosure of the beneficial ownership of a one-to four-family dwelling unit owned by an LLC must be disclosed on real estate transfer tax forms. Condominiums seem to be exempt from this disclosure by the regulator as the Department of Taxation and Finance omits such category from its forms/website.
9. **CE Grandfathering:** By way of A6082, effective July 1, 2021, real estate brokerage licensees are no longer exempt from continuing education through a previously existing statutory grandfathering clause. Additionally, two new required continuing education courses have been added, to wit: ethical business practices and recent legal matters governing the practice of real estate brokers and salespersons in New York. With every passing year, real estate brokerage continues to become an increasingly regulated trade.
10. **Nondelegable Duty to Maintain Under Code and Out-of-Possession Landlord:** In *Xiang Fu He v. Troon Management, Inc.,* the Court of Appeals held that a codified duty to maintain abutting sidewalks could not be transferred to a tenant. As such, out-of-possession landlord remains exposed to potential liability for slip and fall injuries on their property.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Smithtown and Manhasset. He 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 for The Suffolk Lawyer for years.