REAL ESTATE

Sports Tickets for Real Estate Attorneys – Title Regulation Annulled – Game On

By Andrew Lieb

Insurance Regulation 208 has been annulled in the Article 78 case of *New York State Land Title Association, Inc.; The Great American Title Agency, Inc.; and Venture Title Agency, Inc. v. The New York State Department of Financial Services; and Maria Vullo, in her official capacity as Superintendent of the New York State Department of Financial Services*.

As background, the Department of Financial Services (DFS) "adopted Insurance Regulation 208 on Oct. 18, 2017 and the regulation became effective on Dec. 18, 2017." Regulation 208 precluded title insurers from expending marketing costs on "meals, entertainment, gifts, vacations and free classes to select individuals," prevented certain expense reporting for rates, capped ancillary title charges on items like searches, recording fees, surveys, overnight mail and escrow services and precluded closer gratuities while regulating pick-up fees.

Now, Regulation 208 is annulled, and the industry may operate as it did prior to Dec. 18, 2017, except, to the extent that the decision is now before the First Department on appeal, where the deadline to perfect is Jan. 6, 2019. Thereafter, it is likely that this case will reach the Court of Appeals.

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The underlying decision on appeal analyzed three separate sections of Regulation 208, to wit: 11 NYCRR §§ 228.2, 228.3, and 228.5, which sections, respectively, address inducements, expense reporting for rates, and ancillary fees.

With respect to 228.2, inducements, the issue before the court was "whether Insurance Law § 6409 (d) was intended to prohibit marketing and entertainment expenses" by way of its "provision '*other consideration or valuable thing.*'" In finding that the regulation was inconsistent with its enabling statute, the court supported its holding by way of six distinct bases.

First, the court looked to the "legislative materials" underlying the last amendment to the statute in order to identify the statutory purpose. The court reviewed a senator's memorandum, a letter from the secretary of state to the counsel to the governor and a memorandum to the governor. These legislative materials "indicate[d to the court] that the Insurance Law was amended to prohibit *rebates* and *commissions*, not ordinary marketing and entertainment expenses."

Second, the court looked to the "[c]anons of statutory construction" in order to interpret the meaning of the phrase "other consideration or valuable thing," which exists within the statutory text. The court reviewed the phrase under the doctrine of *noscitur a sociis*, by referencing it to terms associated with it within the statute, such as "'rebate,' 'fee,' 'premium,' 'charge' and 'commission.'" In such, the court found that the phrase did not "embrace ordinary marketing and entertainment expenses" because the overall purpose of the statute was to address "remedy[ing] the mischief of *kickbacks*, not marketing and entertainment."

Third, the court looked to common sense and found that it would be absurd if the "Legislature intended to prohibit title insurance corporations from marketing themselves for business."

Fourth, the court looked to subsection (c) of 228.2 and found it illogical for DFS to argue on the one hand that the enabling legislation rendered marketing prohibited while on the other claiming "authority to delineate what types of marketing are permissible" by way of the subsection.

Fifth, the court identified precedent from the Second Circuit, which had held that § 6409 (d) "*bans the payment of commissions*."

Lastly, the court found that Financial Services Law § 201 does not provide an alternative enabling statute for the regulation because "the context of inducing title insurance business… is the province of Insurance Law § 6409 (d)."

Beyond these six bases for annulling 228.2, the court further insulated its holding by only addressing the threshold issue of "whether Insurance Law § 6409 (d) was intended to prohibit marketing and entertainment expenses," and not even reaching the issue of "whether Insurance Law § 6409 (d) mandates a *quid pro quo* for title insurance business," which the court acknowledged was the focus of petitioners' and respondents' briefs. Therefore, assuming the decision is not upheld on appeal, it should be remanded for consideration of such remaining issue.

Turning to 228.3, expense reporting for rates, the court simply annulled the section because it included "prohibited expenditures delineated in Section 228.2." Therefore, 228.3's fate is linked inextricably to the fate of 228.2 on appeal.

Next, the court addressed 228.5, ancillary fees, by first addressing subsection (d)(2), which eliminated pick-up fees for in-house closers. The court

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CONSUMER BANKRUPTCY

Motions for Reconsideration in Bankruptcy Court

By Craig D. Robins

You've just lost a motion in Bankruptcy Court and you really want to pursue the matter further; what are your options? Obviously, one choice is to file an appeal. However, another possibility is to bring a motion for reconsideration.

Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court, recently issued a decision denying such a motion in a Chapter 11 case, but in doing so, he provided a discussion of the essential elements needed to prevail. *In re: CCS.com.USA, Inc.*, (E.D.N.Y., Case No. 8-17-77476-ast, Aug. 23, 2018). Even though this case was one under Chapter 11, the concepts apply to consumer bankruptcy practitioners as well.

In this case a creditor filed a motion to dismiss. The judge gave the parties until Feb. 21, 2018 to file opposition or supplemental papers, and further advised them that the court would hold a ruling conference to advise the parties of the court's decision on March 7, 2018.

The conference was adjourned to the next day because the court had closed due to a snowstorm. However, the debtor did not file its papers until the evening of March 8, 2018, which was *after* the court held the ruling conference in which the judge rendered his decision. Needless to say, Judge Trust issued an order dismissing the case. Two weeks later, the debtor filed a very short, two-page motion "to vacate the dismissal order," and this motion did not contain any references whatsoever to case law or statutory authority.

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An important lesson to learn from this case is that if you are going to seek relief from the court, you should do it the right way. In his discussion, Judge Trust first noted that the debtor failed to specify a legal basis for relief and that he was deeming the application to be a motion to reconsider pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure.

Technically there is no "motion for reconsideration" in the Federal Rules of Civil Procedure. Any motion that draws into question the correctness of the judgment is functionally a motion under Bankruptcy Rule 9023 (which adopts Rules 59(e) and 60(b)), whatever its label. Thus, a motion to "reconsider," " for clarification," to " vacate," to "set aside," or to " reargue " is a motion under Rule 9023.

FRCP Rule 60(b) provides that the court may relieve a party from a final judgment, order, or proceeding for the following reasons: mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; the judgment is void; the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or any other reason that justifies relief.

FRCP Rule 59(e) provides that a motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Judge Trust pointed out that these motions are not vehicles for "taking a second bite at the apple." The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked. Facts that are not in the record of the original hearing are not considered to be facts that the court "overlooked."

The burden of proof is on the movant. The court stated that in order to prevail on this motion, the movant must satisfy the following three elements: "First, there must be "highly convincing" evidence supporting the motion; second, the moving party must show good cause for failing to act sooner; and third, the moving party must show that granting the motion will not impose an undue hardship on the other party. Judge Trust stated that it is axiomatic that relief under Rule 60(b) is invoked only upon a showing of exceptional circumstances.

Even though the debtor failed to articulate a basis for relief, Judge Trust determined that the motion for reconsideration was one seeking relief for "mistake, inadvertence, surprise, or excusable neglect."

The court quoted one of Chief Judge Carla E. Craig's decisions in which she

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Motion Practice: Avoiding the Pitfalls (Continued from page 13)

Capital, Inc. v. United Gen. Title Ins. Co., 128 A.D.3d 760, 762, 9 N.Y.S.3d 335, 336 [2d Dept 2015]). A pleading verified by an attorney pursuant to CPLR 3020(d)(3) is insufficient to establish its merits (*Triangle Props. # 2, LLC v. Narang*, 73 A.D.3d 1030, 1032, 903 N.Y.S.2d 424 [2d Dept 2010]). CPLR 3215(f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit made by the party (*HSBC Bank USA, N.A. v. Betts*, 67 A.D.3d 735, 736, 888 N.Y.S.2d 203 [2d Dept 2009]). Where a foreclosure complaint is not verified, there must be evidence demonstrating that the person giving the affidavit had the authority to act on behalf of the plaintiff (*HSBC Bank USA, Nat'l Ass'n v. Cooper*, 157 A.D.3d 775, 776, 69 N.Y.S.3d 350, 351 [2d Dept 2018]).

A defendant seeking to vacate an order awarding a default must demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious defense (*see* CPLR 5015[a][1]; *Zovko v. Quittner Realty, LLC*, 162 A.D.3d 1102,—-NYS3d—- [2d Dept 2018]).

The absence of a reasonable excuse for the defendant's default in answering renders it unnecessary to determine whether the defaulting defendant demonstrated the existence of a potentially meritorious defense (*U.S. Bank Nat'l Ass'n v. Grubb*, 162 A.D.3d 823, — NYS3d — [2d Dept 2018]). Where a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015(a)(4), and seeks a discretionary vacatur pursuant to CPLR 5015(a)(1), a court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015(a) (*HSBC Bank USA, Nat'l Ass'n v. Daniels*, — AD3d —, 2018 WL 3371614, at *1 [2d Dept, *decided* July 11, 2018]).

Added to the fall-out from the foreclosure crisis in the last 10 years is the frequency with which the Supreme Courts in Suffolk and Nassau counties are called upon to decide motions to dismiss the complaint as abandoned pursuant to CPLR 3215 (c). CPLR 3215(c) provides: If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, since it states that the court shall dismiss if proceedings to enter a default judgment are not taken within one year (*see HSBC Bank USA, N.A. v. Grella*, 145 A.D.3d 669, 671, 44 N.Y.S.3d 56 [2d Dept 2016]). It is not necessary for a plaintiff to obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c) (*see HSBC Bank USA, N.A. v. Roldan*, 155 A.D.3d 942, 944, 64 N.Y.S.3d 111 [2d Dept 2017]). So long as the plaintiff has initiated proceedings for the entry of a judgment within one year of the default, there is no basis for dismissal of the complaint pursuant to CPLR 3215(c).[3] This is so even where a timely motion for an order of reference is subsequently withdrawn.[4]

Failure to timely seek a default judgment may be excused if the plaintiff proffers a reasonable excuse for the delay in moving for a default judgment and demonstrates that the cause of action is potentially meritorious (*US Bank, Nat'l Ass'n v. Onuoha*, 162 A.D.3d 1094, — NYS3d — [2d Dept 2018]). The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court.[i] An excuse which matures after the expiration of the statutory limit for entering a default judgment with the clerk is legally insufficient to justify a plaintiff's failure to enter the default judgment (*JBBNY, LLC v. Begum*, 156 A.D.3d 769, 772, 67 N.Y.S.3d 284, 287 [2d Dept 2017]).

While a court has the discretion to accept law office failure as a reasonable excuse, such excuse must be supported by detailed allegations of fact explaining the law office failure.[5] It is within a court's discretion in rejecting the excuse of law office failure and dismissing the complaint as abandoned where the proffered excuse of law office failure is vague, conclusory, and unsubstantiated.[6]

The mere fact that the legislative intent underlying CPLR 3215(c) was to prevent plaintiffs from unreasonably delaying the determination of an action, does not foreclose the possibility that a defendant may waive the right to seek a dismissal pursuant to the section by his or her conduct (*Fed. Nat'l Mortg. Ass'n v. Heilpern*, —-AD3d—-, 2018 WL 3863292, at *2 [2d Dept, *decided* Aug. 15, 2018]; *Myers v. Slutsky*, 139 A.D.2d 709, 710, 527 N.Y.S.2d 464, 465 [2d Dept 1988]). The service of an answer and demand by a defendant, without taking advantage of the provisions of CPLR 3215(c), constitutes a waiver of the benefits of CPLR 3215(c) (*id*. at 711). In *HSBC USA v. Lugo*, the defendant waived her right to seek dismissal of the complaint as abandoned pursuant to CPLR 3215(c), because she did not object to plaintiff's treatment of her untimely answer as a notice of appearance and because she thereafter sought documents from plaintiff.[7]

Another frequently utilized motion is a motion to renew and/or reargue. These distinct motions addressed in CPLR 2221 were discussed in the original article about motion practice published in The Suffolk Lawyer 5 years ago. The previous article advised that the time to file a motion to reargue and/or to take an appeal from an order, that is to say, file a notice of appeal, is 30 days from service of the order with notice of entry. This follow-up points out a qualification to that general rule. The Supreme Court has jurisdiction to reconsider its prior order [r]egardless of statutory time limits concerning motions to reargue (*Liss v. Trans Auto Sys.*, 68 N.Y.2d 15, 20, 505 N.Y.S.2d 831, 496 N.E.2d 851 [1986]). Thus, in *Itzkowitz v. King Kullen Grocery Co.*, the Supreme Court was not bound to deny the defendant's motion to reargue merely because the motion to reargue was made beyond the 30-day limit defined in CPLR 2221(d)(3) where the defendant's appeal taken from the Supreme Court's prior order was still pending and unperfected as of the time that the motion for reargument was made.[8] Though rare, a court may review a previously-decided matter where there is a need to correct clear error.[9]

Join your colleagues at 6 p.m. on Nov. 8, 2018, to enhance your legal writing skills by learning from an expert, Justice Gerald Lebovits. One half credit will be allocated toward Ethics.

Note: Diane K. Farrell is a Court Attorney-Referee in the Foreclosure Department of the Suffolk County Supreme Court.

[1.] *U.S. Bank Nat. Ass'n v. Cox*, 148 A.D.3d 962, 963, 49 N.Y.S.3d 527, 529 (2d Dept 2017); *Flagstar Bank v. Bellafiore*, 94 A.D.3d 1044, 1045, 943 N.Y.S.2d 551, 552 (2d Dept 2012); *Wells Fargo Bank Minnesota Nat. Ass'n v. Perez*, 41 A.D.3d 590, 837 N.Y.S.2d 877, 878 (2d Dept 2007).

[2.] *Tan v. AB Capstone Dev., LLC*,—AD3d—, 2018 WL 3559107, at *1 (2d Dept, *decided* July 25, 2018); *Hudson City Sav. Bank v. Bomba*, 149 A.D.3d 704, 705, 51 N.Y.S.3d 570 (2d Dept 2017); *NYCTL 1998B2 Trust v. McGill*, 138 A.D.3d 1077, 1078, 30 N.Y.S.3d 308 (2d Dept 2016).

[3.] *Bank of Am., Nat'l Ass'n v. Lucido*,—AD3d—, 2018 WL 3371734, at *1 (2d Dept, *decided* July 11, 2018); *Deutsche Bank Nat'l Tr. Co. v. Delisser*, 161 A.D.3d 942, 77 N.Y.S.3d 678 (2d Dept 2018).

[4.] *Wells Fargo Bank, N.A. v. Mayen*, 155 A.D.3d 811, 813, 64 N.Y.S.3d 291, 293 (2d Dept 2017); *HSBC Bank USA, Nat. Ass'n v. Traore*, 139 A.D.3d 1009, 1011, 32 N.Y.S.3d 283, 285 (2d Dept 2016).

[i] *Pipinias v. J. Sackaris & Sons, Inc.*, 116 A.D.3d 752, 983 N.Y.S.2d 587 (2d Dept 2014); *Giglio v. NTIMP, Inc.*, 86 A.D.3d 301, 308, 926 N.Y.S.2d 546 (2d Dept 2011).

[5.] *See* CPLR 2005; *CEO Bus. Brokers, Inc. v. Alqabili*, 105 A.D.3d 989, 990, 963 N.Y.S.2d 711(2d Dept 2013); *HSBC Bank USA, N.A. v. Wider*, 101 A.D.3d 683, 955 N.Y.S.2d 202 (2d Dept 2012); *Ibrahim v. Nablus Sweets Corp.*, 161 A.D.3d 961, 77 N.Y.S.3d 439, 441 (2d Dept 2018).

[6.] *U.S. Bank, Nat. Ass'n v. Dorvelus*, 140 A.D.3d 850, 852, 32 N.Y.S.3d 631, 632 (2d Dept 2016); *Baruch v. Nassau Cty.*, 134 A.D.3d 658, 659, 20 N.Y.S.3d 425, 426 (2d Dept 2015); *Pipinias v. J. Sackaris & Sons, Inc.*, 116 A.D.3d 749, 752, 983 N.Y.S.2d 587, 590 (2d Dept 2014).

[7.] *HSBC USA v. Lugo*, 127 A.D.3d 502, 503, 9 N.Y.S.3d 6, 7 (2d Dept 2015); *see also US Bank Nat'l Ass'n v. Gustavia Home, LLC*, 156 A.D.3d 843, 844, 67 N.Y.S.3d 242, 244 (2d Dept 2017) (defendant=s predecessor in interest waived right to seek dismissal pursuant to CPLR 3215(c) by serving a notice of appearance and waiver, which constituted a formal appearance in the action); *Bank of Am., N.A. v. Rice*, 155 A.D.3d 593, 594, 63 N.Y.S.3d 486, 488 (2d Dept 2017)(same).

[8.] *Itzkowitz v. King Kullen Grocery Co.*, 22 A.D.3d 636, 638, 804 N.Y.S.2d 350, 352 (2d Dept 2005); *see also HSBC Bank USA, N.A. v. Halls*, 98 A.D.3d 718, 950 N.Y.S.2d 172, 174 (2d Dept 2012).

[9.] *Nat'l Mortg. Consultants v. Elizaitis*, 23 A.D.3d 630, 630, 804 N.Y.S.2d 799, 800 (2d Dept 2005).

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found DFS' justification for this subsection inconsistent. Specifically, the court addressed the enabling legislation, Insurance law §2314, by articulating that "[i]f the premium accounts for pick-up fees…, then any distinction based on the closer's status as in-house or independent is arbitrary," whereas "[i]f the premium does not account for pick up fees," then the regulation "is not rationally based."

Finally, the court held that "[h]aving annulled numerous sections of Insurance Regulation 208, it would be 'jurisprudentially unsound … to attempt to identify and exercise particular provisions while leaving the remainder of [Insurance Regulation 208] intact.'" As such, the court annulled the entirety of the regulation while explaining that had it reached the issue of the caps on ancillary fees it would have also annulled such fees because the caps were "taken without sound basis" and were not justified by "any economic or other analysis."

As a result, and unless the decision is reversed, sports tickets for real estate attorneys are available anew from title companies. However, can an attorney ethically accept such tickets without running afoul of Rule 1.8(f) of the Rules of Professional Conduct? An attorney can accept the tickets so long as the tickets are provided as a general marketing and entertainment expense rather than tied, as a *quid pro quo*, to a specific client's business. In May of 2018, my law firm, Lieb at Law, P.C. requested an opinion letter from the New York State Bar Association's Committee on Professional Ethics wherein we were advised that Rule 1.8(f) of the Rules of Professional Conduct generally "applies when a third party is paying a client's legal fees. As such, it would relate to the representation of a particular client." So, game on.

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.