2018 is All About Real Estate Law

By Andrew Lieb

Our President is Donald Trump and Donald Trump is real estate. Like him or not, the very fact that he is our president has everyone throughout the country thinking real estate. Will you be the next great real estate tycoon? To get there, you should appreciate the great breadth of real estate law that touches transactions, injuries, investments, collections and much more. Real estate counsel is an ever-present need for every business that peppers our landscape and the people that inhabit the residences throughout our community. *The Suffolk Lawyer's* Focus on Real Property Special Edition is a time to explore the interplay of real property law with your personal focus as an attorney at law.

Andrew Lieb

In this edition, Kenneth J. Landau, Esq. gives us the go to guide for premises liability depositions, while reminding transactional attorneys about the requisite insurance needed by their clients in order to avoid paying for claims in his article "Don't Slip Up Handling a Slip and Fall Deposition." Then, Dennis Valet, Esq. opens our eyes to the various angles that co-op and condo board members can be sued within the modern anti-discrimination landscape. Mr. Valet's article, "Condo and Co-op Boards Beware" doesn't just scare members off of the board, but it instead provides practical solutions to these exposure issues that board counsel must offer as part of their representation. Next, the team of Christopher A. Gorman, Esq. and James Wighaus provides the bar with a lesson on the intricacies of the statute of limitations with respect to mortgage foreclosure actions in their article, "The Effect of a Discontinuance on the Mortgage Foreclosure Statute of Limitations Period." Last, but certainly not least, the riveting Sabine K. Franco, Esq. demonstrates the breadth of knowledge required to be counsel to real estate developers in her article, "Considerations When Planning a Real Estate Investment Business." Together, you will begin to comprehend the great many topics that comprise the field of real estate law.

These articles are designed to ground educate and inspire us. They are the foundation of what is today because without learning about today, we cannot be prepared to leverage tomorrow.

In my sixth year as the Special Section Editor for Real Property, I need to thank our Editor-in-Chief, Laura Lane, who has made this all possible. Thank you to Ms. Lane and to all our writers. I hope that you enjoy this edition.

FOCUS ON REAL PROPERTY SPECIAL EDITION

Considerations When Planning a Real Estate Investment Business

By Sabine K. Franco

You are well known for your business acumen. Friends and acquaintances are constantly approaching you to invest in business opportunities. You are interested or passionate about real estate. So, you decide to create a real estate investment group, association, or business.

This is a fairly common scenario with many variations. The New York real estate market is still booming overall. Even considering recent lulls in sales. Inventory is low and properties are being snatched up before they hit the market. Sales prices in Brooklyn are up 2.7 percent[1], sales in Manhattan are down; however, low rates and fast consumption continue to stimulate the market to a degree. [2]

A common trend among new investors and developers is the creation of real estate syndications. Real estate syndication occurs when funds are pooled together from several investors and those funds are used to fund real estate projects, developments, and other real estate investment opportunities. Usually these projects or ventures require much larger resources than each individual investor would be able to fund on their own. However, counsel should be well aware that an interest in a real estate syndication is considered a security by law. As such, counsel must advise real estate entrepreneurs beyond simply offering entity creation. Additional services should concern regulatory compliance by way of securities filings on both the state and federal level.

Technically, a brick and mortar investment in real property is not a security, but with levels of ownership, multiplicity of owners, varying business acumen, and the capital of others, distinctions become less clear.[3] A security is basically the sale of an interest in a business and is technically defined, by way of the Howey Test, as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." It could be in the form of shares of stock, bonds, or other financial instruments that represent interest in a company, asset, or project. Qualifying as a security matters because securities are heavily regulated by both state and federal laws.

Sabine K. Franco

When it comes to regulation, there is a distinction between public and private securities. A public security offers interest to the public at large. Compliance with federal securities laws require extensive disclosure statements with the Securities and Exchange Commission (SEC) detailing the intricacies of the issuer's business. A private security is the sale of equity or debt to a limited group of investors. A private security does not require extensive SEC disclosures; however, it can be difficult to determine the difference between private and public offerings.[4] Compliance with SEC laws is a burdensome and expensive process for issuers.

The Martins Act, is a New York State specific securities law, codified under Chapter 20, Article 23-A of General Obligations Law, which was implemented in 1921 to protect the investing public from fraud, deception, and misrepresentation of those offering securities.[5]

Regardless of federal or state securities laws, counsel must appreciate that persons offering an interest in a real estate syndicate to the public are considered dealers. Dealers must register as such before approaching or soliciting investors. They must file a "state notice" and if necessary a "further state notice."[6] Among other exceptions, the Attorney General allows a permissive exemption from these filings for certain limited offerings with up to 40 persons or less, and sometimes above where consistent with exempt purposes.

The Martin Act does not expressly specify the distinction between a public versus private offering. As a result, the courts consistently look to the Federal Securities Act of 1933 for the interpretation as to whether or not The Martin Act exempts dealers of "Private offerings." The consensus is that the interpretation is pursuant to Rule 506 of Regulation D under the Securities Act.[7] There is an automatic exemption available to small offerings within New York State that are made to a promoter group, which consists of directors, principals or controlling individuals in a venture and or their spouses or children. There are other permissive exemptions that require application to the Attorney General. However, it is not so black and white.

On the public securities front, Real Estate Investment Trusts ("REIT's") are a commonly advised form of investment because of their reliability and high pay out rates. REITs often attempt to invest in real estate in an effort to promote community growth or revitalization. They are obligated to pay out 90 percent of their income to investors as dividends. Many REITs however, have found themselves on the biting end of the Martin Act.[8]

Those interested in putting together a real estate investment businesses may unknowingly find themselves in danger of facing serious legal ramifications. The Martin Act empowers the Attorney General to punish those believed to have either knowingly or inadvertently engaged in fraud, deception, or misrepresentation in the purchase, sale, giving of advice, as it relates to financial activity. The Attorney General and District Attorney may do whatever they deem necessary in order to gather information on an individual or entity suspected of fraudulent financial activity. If a violation is found, both you and your business entity, facilitating the investment or financial activity, can face civil and or criminal charges from misdemeanor to class E felony. Lack of *mens rea* or criminal intent is no defense. [9]

It is important to closely evaluate any investment ventures to be sure that you and your entity are not in violation of federal or state statues regulating business.

Note: Sabine K. Franco, is the principal attorney at Franco Law Firm, P.C., located in Garden City New York. She focuses her practice on real estate and business transactions.

[1] https://www.nytimes.com/2018/01/11/ realestate/brooklyn-real-estate-prices-climb-higher.html
[2] https://www.inman.com/2017/12/07/5-factors-influencing-new-york-citys-real-estate-market/
[3] https://www.compliancebuilding.com/ 2010/11/04/what-is-a-security-is-real-estate-a-security/, SEC v. Howey Co., 328 U.S. 293 (1946).
[4] https://www.law.georgetown.edu/careers/career-planning/practice-areas/securities.cfm
[5] NY CLS Gen Bus § 353
[6] Exemptions from Securities Offering Qualification Requirements Under New York Law by Robert N. Rapp, Case Western Reserve University School of Law
[7] Id.
[8] https://www.reit.com/what-reit
[9] NY CLS Gen Bus § 352-c.

The Effect of a Discontinuance on the Mortgage Foreclosure Statute of Limitations Period

By Christopher A. Gorman and James Wighaus

Pursuant to CPLR 213(4), the statute of limitations in a mortgage foreclosure action is six years. Once the mortgage debt is accelerated, the entire amount of the debt is due, and the statute of limitations begins to run from the date of acceleration. The commencement of a foreclosure action itself constitutes an acceleration of the debt. As a general rule, a lender may revoke its election to accelerate the mortgage by an affirmative act of revocation occurring before the six-year statute of limitations period has lapsed. Until recently, the courts were split on the issue of whether a lender's decision to discontinue a foreclosure action constituted an affirmative act of revocation.

In *NMNT Realty Corp. v. Knoxville 2012 Trust*,[i] the Appellate Division, Second Department addressed the above issue. The *NMNT Realty Corp.* decision is likely to spawn substantial discovery and motion practice in a number of mortgage foreclosure cases where the statute of limitations issue is being litigated.


Christopher Gorman

NMNT Realty Corp. decision

In *NMNT Realty Corp.*, on July 27, 2006, a predecessor lender commenced a mortgage foreclosure action on the basis of the mortgagors' alleged failure to make certain monthly payments under the subject promissory note and mortgage. In the complaint, the predecessor lender expressly stated that the predecessor lender elected to declare immediately due and payable the entire unpaid principal balance of the mortgage debt.

Subsequently, the predecessor lender filed a motion seeking to discontinue the action, which the Supreme Court granted by an order dated September 22, 2011. In February 2012, the plaintiff in the case purchased the property from the mortgagors (hereinafter, "Borrowers"). The mortgage and promissory note were assigned to the defendant in the case, Knoxville 2012 Trust (hereinafter, "Lender").

In May 2013, the Borrowers commenced an action against the Lender pursuant to RPAPL §1501(4), which provides that where the statute of limitations for a foreclosure action has expired, any person with an estate or interest in the property may maintain an action "to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom." The Borrowers sought an order canceling and discharging of record the mortgage on the grounds that any action to foreclose was barred by the statute of limitations.

The Lender filed a motion for summary judgment and the Borrowers filed a cross-motion for summary judgment. After the Supreme Court denied both on appeal, the Appellate Division, Second Department affirmed. The Appellate Division, Second Department stated that the Borrowers had met their *prima facie* burden on a motion for summary judgment by submitting a copy of the verified complaint from the prior foreclosure action, which the court concluded "established that the mortgage debt was accelerated on or about July 27, 2006." The six-year statute of limitations, therefore, had expired by the time the plaintiff commenced the new action on May 16, 2013.

The Lender submitted evidence in opposition to the Borrowers' cross-motion showing proof that the predecessor lender "moved for, and on September 22, 2011, was granted, an order that discontinued the foreclosure action, canceled the notice of pendency and vacated the judgment of foreclosure and sale it had been granted." The Appellate Division, Second Department concluded that the Lender "raised a triable issue of fact" as to whether the motion to discontinue the prior foreclosure action "constituted an affirmative act by the lender to revoke its election to accelerate."

The Borrowers argued that, because the prior foreclosure action was dismissed by the court, and never withdrawn by the predecessor lender, there was not an affirmative act by the lender

(Continued on page 24)

FOCUS ON REAL PROPERTY SPECIAL EDITION

Condo and Co-op Boards Beware — Discrimination in Housing

By Dennis Valet

Condominiums and cooperatives, especially high-end associations, are infamous for their lengthy, comprehensive, and often draconian purchase applications, by-laws, and house rules. In their quest to ensure that prospective new purchasers will be the proverbial "good neighbor" it is easy for a board of managers to inadvertently take discriminatory actions that expose the board to liability. This article examines some common issues a board of managers should consider when hiring an attorney to craft or review purchase applications, by-laws, and house rules that ensure compliance with ever-changing local, state, and federal discrimination laws.

Dennis Valet

Lawful source of income discrimination

New York City and Suffolk and Nassau counties have all enacted laws prohibiting discrimination on the basis of a resident's lawful source of income.[1] These laws make it illegal to discriminate based upon how an application will pay for their residence, so long as their source of income is legal. These laws bring into question the legality of applications which ask for employment history, a formerly critical piece of information relied upon by a board of managers in evaluating a potential purchaser. Asking for an applicant's employment status and history implies that only applicants who derive their income from gainful employment, in an industry acceptable to the board, will qualify, as opposed to applicants who derive their income from a source other than employment or unbecoming employment, such as housing vouchers or disability payments. When combined with disparate impact discrimination theories, a board that asks for employment history could potentially violate a lawful source of income discrimination law and expose the condominium or cooperative, including the individual board members to liability.

Pets, emotional support animals, and service animals

Residential condominiums and cooperatives are subject to the Federal Fair Housing Act (FHA) whereas commercial buildings are subject to the Federal Americans with Disabilities Act (ADA). These laws differ in how they treat emotional support animals[2]. Under the ADA, reasonable accommodations are not required for individuals with emotional support animals because only disabled individuals with a service animal are protected from discrimination. Current ADA rules limit service animals to dogs specifically trained to do work or perform certain tasks. The FHA, however, does not differentiate between emotional support animals and service animals in terms of the requirement to offer a disabled individual a reasonable accommodation.[3]

A board of managers that prohibits residents from keeping pets must be prepared to accept requests for reasonable accommodations made by individuals who are prescribed an emotional support animal to assist with a disability. While the ADA permits airlines to ban an emotional support peacock or hamster, the FHA requires a condominium or cooperative to make a reasonable accommodation for a disabled resident with an emotional support animal that meets current FHA rules and guidelines.

Parking spaces

It is common for a condominium or cooperative to assign a particular parking space to each unit, or to have rules prohibiting the reservation of certain spaces by residents (a/k/a first-come, first-serve). The Department of Housing and Urban Development has prosecuted condominiums who refuse to alter their parking rules to reasonably accommodate individuals who are disabled within the meaning of the FHA.[4] Courts within the Second Circuit have held that a reasonable accommodation can include the suspension of a "first-come first-serve policy," the assignment of parking spaces closer to the disabled individual's residence, and the repair of potholes in the parking lot.[5]

Rules specific to children

The FHA also prohibits discrimination based upon familial status, which generally refers to households with children under the age of 18.[6] By-laws and rules designed to regulate conduct within the association can often violate the FHA's familial status protected class. For example, a house rule stated, "Children under the age of 18 are not allowed in the pool or pool area at any time unless accompanied by their parents or legal guardian." A District Court held that this rule was facially discriminatory and was not enacted in the "least restrictive means to meet a compelling business necessity."[7] Similarly, at least one Federal District Court has held that house rules violate the FHA when they restrict children under 18 from using a clubhouse without adult supervision, restrict children under 12 from using a pool table, and require children under 18 to abide by a 10 p.m. curfew.[8]

(Continued on page 23)

FOCUS ON REAL PROPERTY SPECIAL EDITION

Don't Slip Up Handling a Slip and Fall Deposition

By Kenneth J. Landau

The nature of the defect and other facts in a slip and fall case are very important to establish at the deposition. Focused questions and answers might serve as the basis for, or prevent summary judgment motions, or lead to a victory or a defense verdict at trial. Important facts about the happening of the accident and surrounding conditions must be explored at the deposition as this may be the only opportunity to investigate or establish these aspects of a case. Liability may be enhanced or diminished depending on the questions posed and the answers given at a deposition.

This checklist can also be utilized when you prepare a client to testify or question a witness in a slip and fall negligence case. At your initial meeting with a client, obtaining this information will also help you to properly evaluate a case and assist you in preparing for discovery and trial, and be of help in settlement negotiations. Questions should include the following.

Kenneth J. Landau

Place of accident

- Exact location, including distance from nearest landmarks, building line, streets, curbs.
- Weather conditions.
- Lighting conditions.
- Obstructions to view, including heavy pedestrian traffic or possible distractions, including construction.
- Street address and signage.

Description of accident

- Path the plaintiff followed up to the place of the accident.
- Where was plaintiff was looking just before the accident and what did he or she see.
- Was there an alternate way to reach destination.
- Was there an alternate path, or safer path around defect.
- Why did they not see the defect, including possible distractions.
- Detailed description of the defect, including size, dimensions, depth.
- Position of and any warnings given by any fellow pedestrians.
- How and where they fell and came to rest after the accident.
- Parts of the body in contact with the ground and position on the ground.
- Damage to clothing.
- Bruising or bleeding to their body.
- Personal distractions, such as using a cell phone, earphones or headsets.
- Weather conditions and lighting and position of sun.
- Were they wearing glasses, or do they have vision problems.
- Were they carrying any items, bags or packages.
- Destination — time due there.
- Had they passed over that area before.
- When they last passed over it, and had they frequently passed over that area, prior problems they noticed, if any, with that area.
- Witnesses to their fall.
- Eyewitnesses to the accident.
- Notice witnesses as to the defect.
- Any photos taken at the time of the accident by cell phones of the parties, by passersby or surveillance cameras.
- Statements to first responders at scene, including police officers or other responders (or witnesses).
- Were they suffering from any disability or had they consumed any alcohol or medication (learning about medication can lead to questioning

(Continued on page 21)

FOCUS ON REAL PROPERTY SPECIAL EDITION

The Suffolk Lawyer wishes to thank Real Property Special Section Editor Andrew Lieb for contributing his time, effort and expertise to our April issue.

Bench Briefs (Continued from page 4)

for a plaintiff mortgagee to establish standing in a foreclosure it was the mortgage note that was the dispositive instrument, not the mortgage indenture. The court explained that this is because a mortgage is a security for the debt, the obligations of the mortgage pass as an incident to the passage of the note. Thereafter, a foreclosing plaintiff has standing if it is either the holder or assignee of the underlying note at the time that the action is commenced. Accordingly, the motion was denied, without prejudice with leave to renew upon proper papers.

Honorable Peter H. Mayer

Respondents' motion in lieu of an answer, which sought dismissal of the petitioner's second cause of action granted; "class of one" or selective enforcement of equal protection claims are not viable in New York.

In *In the matter of the application of William Pollina v. Setauket Fire Department, Inc. and Setauket Fire District Board of Fire Commissioners,* Index No. 8375/2016, decided on December 13, 2017, the court granted the respondents' motion in lieu of an answer, which sought dismissal of the petitioner's second cause of action.

Petitioner's second cause of action was premised upon a theory that he was denied non-line of duty medical leave not because of his membership in an identified class of individuals based on categories such as race, sex, and national origin, but simply for arbitrary and capricious reasons. Contrary to such contentions, however, such as "class of one" or selective enforcement of equal protection claims are not viable in New York. Consequently, the respondents' motion for partial dismissal was granted.

Motion for consolidation granted; proper venue for the consolidated action lies in the county where the first action was commenced.

In *Denise Torres v. Flambouyant Transport Inc. and Abdullah Barnes, Flambouyant Transport Inc. and Abdullah Barnes v. Edward J. Scott,* Index No.: 7030/2016, decided on January 9, 2018, the court granted the motion by third-party defendant for an order directing that the two actions be tried jointly. The court noted that as a general rule, where the actions were commenced in two different counties, proper venue for the consolidated action lies in the county where the first action was commenced. Deviation from this rule was permitted only whether there was a showing of special circumstances. In the instant case, the court found that there were no such special circumstances and would warrant deviation from the general rule. The court concluded that a venue of the consolidation should be Supreme Court, County of Suffolk.

Honorable Thomas F. Whelan

Motion for an order vacating judgments granted to the plaintiff pursuant to CPLR §5015(a)(3) denied; issue of standing was previously sought to be raised in the prior motions and had been waived by the defendants; also, motion untimely.

In *US Bank National Association, as Trustee for CSFB Heat 2006-4 c/o America's Servicing Company, 3476 Stateview Blvd., Ft. Mill, SC 29715 v. Brian Livingston, Camile Cascone, American Business Mortgage Services, Inc. and Vincent Cascone,* Index No.: 24168/2007, decided on January 11, 2018, the court denied the motion by defendants' for an order vacating judgments granted to the plaintiff pursuant to CPLR §5015(a)(3).

In deciding the motion, the court noted that a judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties and concludes all matters of defense which were or might have been litigated in the foreclosure action. The court continued and stated, no matter how new counsel seeks to mask this motion, the issue of standing was previously sought to be raised in the prior motions and had been waived by the defendants. The defendants were precluded from seeking to raise the issue again and precluded from making endless motions to vacate pursuant to CPLR §5015. The court concluded and states that this motion, made six years after entry of the judgment of foreclosure and sale was simply untimely. Accordingly, the motion was denied.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6% of her class. She is a Partner at Sahn Ward Coschignano, PLLC in Uniondale, a full service law firm concentrating in the areas of zoning and land use planning; real estate law and transactions; civil litigation; municipal law and legislative practice; environmental law; corporate/business law and commercial transactions; telecommunications law; labor and employment law; real estate tax certiorari and condemnation; and estate planning and administration. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

Effect of a Discontinuance on the Mortgage Foreclosure Statute of Limitations (Continued from page 12)

about pre-existing conditions).
- Initial medical care and description of accident.
- Did they point defect out to anyone or were they present when photographs of defect were taken.
- Description of defect should include all dimensions, including description of the edges.
- Type and condition of footwear they were wearing.
- Length of outer garments.
- Any damage to the footwear or movement of footwear during accident.
- If snow and ice played a role, the description of the snow and ice conditions near and at place of accident.
- Observations of anyone who may have removed snow there, when it had last snowed or started snowing or finished snowing within a few days of the accident.
- Others at scene, bystanders, representatives, owners, good Samaritans, first responders, police, etc.

Some questions to ask defendants (and prepare them to answer)
- Confirm ownership and control of the area.
- Confirm supervision of the area and responsibility for maintenance of area.
- Confirm responsibility for repairs to the area.
- When maintenance last performed for that area —nature of work performed, how often performed, by whom performed. The records kept of performance of maintenance; records listing responsibilities for maintaining or inspecting area.
- Prior accidents involving area.
- Prior complaints about area.
- Prior inspections of area, including those by municipalities, insurance carriers, risk managers, underwriters or management (whether conducted on daily or regular basis).
- How long since property was repaired or refurbished.
- Existing signs (or lack thereof).
- Do they own cones or signs to put around any defective conditions.
- Accident or incident reports kept in normal course of business.
- Any photos taken in the normal course of business after an accident (including surveillance or security cameras).
- Who from the defendant first responded or became aware of the incident.
- Are there representatives who went to the scene of the accident.
- Any conversations with the plaintiff.
- Any description of the accident or defect.
- Protocol for inspecting and cleaning the area if raining or snowing or other condition.
- Any reports of defective condition that day or prior to that day.
- Any records kept confirming the inspection or about the accident and documents and data entries involved.
- Logs kept, and entries made about accident.

Note to attorneys

It is very important when you represent real estate purchasers (or renters) that they obtain proper liability insurance to protect them in the event of a slip and fall or other lawsuit, even if it is frivolous. Care should be taken to make sure that all individual owners, partners, shareholders, etc. are each named as additional named insureds to prevent any coverage questions. Home purchasers should be careful to obtain the appropriate liability insurance, especially if it is for a second home or an investment property to avoid insurance disclaimers. If you are building or renovating a personal or business property, be sure that the owner(s) are named insureds on the insurance policy for all contractors. Also, be sure they have appropriate riders on their own policies to cover accidents during construction or renovation as these may be excluded by a traditional policy. Finally, encourage all homeowners to obtain umbrella insurance policies to protect them above and beyond the liability limits of their homeowner policy. The peace of mind this provides in the event of a lawsuit is well worth the cost.

Note: Kenneth J. Landau is a partner in the Mineola law firm of Shayne, Dachs, Sauer & Dachs, LLP concentrating in the representation of plaintiffs in negligence, medical malpractice, and insurance matters. He is involved in the litigation of civil matters in the Courts of Long Island, New York City, and Westchester. He is the host of the weekly radio program "Law You Should Know" broadcast every Wednesday at 3:00 p.m. and Sunday at 7:00 a.m. on WHPC 90.3 FM radio on Long Island or voicestream over the internet at www.ncc.edu/whpc. For Podcast search WHPC and iTunes.

Americans with Disabilities Act and Commercial Website Compliance (Continued from page 4)

law and regulation to catch up with new developments in technology. While the Second Circuit has not explicitly ruled on the issue, case examples exist in both the Southern District and Eastern District of New York where such lawsuits are allowed to move forward in what will likely be a costly litigation.

Without further regulatory action, these lawsuits are sure to increase. Many corporate entities will be forced to comply via litigation. For example, "[t]he [Hobby Lobby] website was found to be inaccessible, and the court agreed that for 20 years the DOJ has been saying that the ADA applies to private websites that are public accommodations. Therefore, Hobby Lobby's website should comply." Netflix was sued for failing to provide closed captioning. What about schools and government websites? Both Massachusetts Institute of Technology (MIT) and Harvard University were sued by the National Association for the Deaf after its success in the aforementioned Netflix lawsuit. Attorneys must advise their clients of the need to comply with the Americans with Disabilities Act within their facilities and on the web. Not only does this issue provide for an interesting academic discussion but it presents a major concern to the legal community as to the validity of some of these lawsuits[10] and the breadth of the ADA and its amendments.

Note: Cory Morris is a civil rights attorney, holding a master's Degree in General Psychology and currently the Principal Attorney at the Law Offices of Cory H. Morris. He can be reached at http://www.coryhmorris.com

[1] *Del-Orden v. Bonobos, Inc.*, No. 17 CIV. 2744 (PAE), 2017 WL 6547902, at *10 (S.D.N.Y. Dec. 20, 2017); see also *Andrews v. Blick Art Materials*, LLC, 268 F. Supp. 3d 381 (E.D.N.Y. 2017) (J. Weinstein).

[2] H.R. Rep. 101-485 (II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391.

[3] *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589, 119 S. Ct. 2176, 144 L.Ed.2d 540 (1999) (citing 42 U.S.C. § 12101(b)(1)).

[4] Elisa Edelberg, *What the Winn-Dixie Case Means for the Future of Web Accessibility*, 3 Play Media (January 4, 2018), https://www.3playmedia.com/2017/09/27/what-the-winn-dixie-case-means-for-the-future-of-web-accessibility/.

[5] *Nat'l Fed'n of the Blind v. Target Corp.* ("*Target*"), 452 F. Supp. 2d 1148, 953 (N.D. Cal. 2006) (citations omitted); *Reed v. CVS Pharmacy, Inc.*, 2017 WL 4457508, at *3 (C.D. Cal. Oct. 3, 2017).

[6] Alison Frankel, *Will Trump DOJ side with disabled plaintiffs in ADA website suits*, Reuters (October 19, 2017), https://www.reuters.com/article/legal-us-otc-ada/will-trump-doj-side-with-disabled-plaintiffs-in-ada-website-suits-idUSKBN1CO2WJ.

[7] *Target*, 452 F. Supp. 2d at 955 (citation omitted).

[8] See, e.g., *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing before the House Subcommittee on the Constitution of the House Committee on the Judiciary*, 106th Cong., 2d Sess. 65–010 (2000) ("It is the opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services."); 75 Fed. Reg. 43460–01 (July 6, 2010) ("The Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of 'public accommodations,' as defined by the statute and regulations.").

[9] *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations* ("*NOPR*"), 75 Fed. Reg. 43460–01, 2010 WL 2888003 (July 26, 2010).

[10] See, e.g., Dave Biscobing, *Judge tosses ADA serial suer's case out of federal court, sanctions attorneys*, ABC 15 (October 14, 2016), https://www.abc15.com/news/local-news/investigations/judge-tosses-ada-serial-suers-case-out-of-federal-court-sanctions-attorneys.

Vacating Orders of Filiation and Acknowledgments of Paternity (Continued from page 15)

K-R., 48 A.D.3d 683, 850 N.Y.S.2d 919 (2008). In *Danielle M*, the Appellate Division Second Department reversed the Nassau County Family Court which had dismissed the paternity petition. The Appellate Division Second Department stated "Contrary to the Family Court determination, a prior Acknowledgment of Paternity made in accordance with Family Court Act Section 516-a does not serve as an insuperable bar to a claim by one who is a stranger to the acknowledgment (See *Matter of Tyrone G. v. Fifi N.*, 189 A.D.2d 8, 14, 594 N.Y.S.2d 224 (1993), particularly where, as here, the male signatory of the acknowledgment dies prior to the commencement of the paternity proceeding (cf. Family Court Act Section 516-a [b][ii] [where signatory of acknowledgment dies, a proceeding to challenge the acknowledgment may still be commenced "by any of the persons authorized by (Family Court Act Article 5) to commence paternity proceedings"]. Said matter was remanded back to the Family Court for further proceedings.

In the matter of *Fidel A. v. Sharon N.*, 71 A.D.3d 437, 894 N.Y.S.2d 753 (2010), the Appellate Division First Department sustained an Order of the Bronx County Family Court, which granted the motion of Wayne N. to dismiss the petition of Fidel A. on the grounds of Equitable Estoppel. The Appellate Division First Department stated that even though the DNA tests showed Fidel A. to be the biological father of the child, the child knew Wayne N. as her father and Wayne N. had established a close parental relationship with the child. The Appellate Division further held that based on equitable estoppel, it was not in the child's best interest and would be detrimental to the child to allow Fidel A. to establish paternity.

Another interesting case regarding the issue of vacating an Acknowledgment of Paternity was the Queens County case of *Derrick H. v. Martha J.*, 82 A.D.3d 1236, 922 N.Y.S.2d 83 (2011). In *Martha J.*, the petitioner father sought to vacate an Acknowledgment of Paternity on the basis of mistake of fact. Petitioner father testified that he and the child's mother had engaged in a sexual relationship during the time of conception. Petitioner father further testified that he signed the Acknowledgment of Paternity as the child's mother told him that he was the child's father. Petitioner testified that he subsequently learned from respondent mother's family that respondent mother had another sexual partner during the time of conception. Respondent mother did not deny having another sexual partner during said relevant period. Respondent mother testified at the trial that she had told petitioner that he was not the child's father prior to the petitioner signing the Acknowledgment of Paternity. The Family Queens County Family Court found credible the testimony of petitioner that respondent had told him that he was the child's father. However, the Queens County Family Court held that petitioner was equitably estopped from denying paternity. The Appellate Department Second Department reversed the Queens County Family Court. The Appellate Department held that in this case, no parental child relationship existed as petitioner had only spent limited time with the child who was only three years old. The Appellate Department Second Department further held that ordering a DNA test to determine paternity in this matter would not be contrary to the child's best interest. Said matter was remanded to the Queens County Family Court for further proceedings.

In the Matter of *Dwayne J.B. v. Santos H.*, 89 A.D.3d 838, 932 N.Y.S.2d 378 (2011) the Appellate Division Second Department reversed the Nassau County Family Court, which had dismissed petitioner's paternity petition. The Family Court dismissed the paternity petition holding that petitioner lacked standing as the mother had submitted an Acknowledgment of Paternity to the court signed by her and another man. The Appellate Division Second Department held that as the petitioner was a stranger to the Acknowledgment of Paternity, the prior Acknowledgment of Paternity does not serve as an insuperable bar to his claim. Said matter was remanded to the Nassau County Family Court for further proceedings.

Note: John E. Raimondi serves as a Family Court Magistrate in Suffolk County Family Court. He was previously employed with the Suffolk County Legal Aid Society and was also a partner in Raimondi & Raimondi, P.C. He received his Bachelor's Degree from John Carroll University, Juris Doctor from Creighton University School of Law and an LLM, Summa Cum Laude from Touro Law School. He is a former Officer of the Suffolk Academy of Law, a frequent lecture at the Suffolk County Bar Association, an Advisory Committee Member of the Suffolk County Academy of Law, a Program Coordinator with the Suffolk Academy of Law and an Adjunct Professor at St. Joseph's College.

Beware Discrimination (Continued from page 12)

Cooperative leases

Because residents in a cooperative are parties to a lease, a board of managers of a cooperative must ensure compliance with lease disclosure requirements. Real Property Law §231-A(1) requires that "every residential lease shall provide conspicuous notice in bold face type as to the existence or non-existence of a maintained and operative sprinkler system in the leased premises." As a further example, cooperatives in New York City may be required to provide a bedbug infestation history disclosure.[9]

Boards of managers are encouraged to have their purchase applications, bylaws, and house rules reviewed regularly to ensure compliance with rapidly evolving anti-discrimination laws. What was legal yesterday may not be legal tomorrow.

Note: Dennis C. Valet is a senior associate at Lieb at Law, P.C. Mr. Valet focuses his practice on real estate litigation with an emphasis on representing licensed real estate brokerages and their agents.

[1] Currently, Westchester County's source of income discrimination law exempts co-ops and condominiums.

[2] State and local laws may not differentiate between residential and commercial with respect to emotional support animals.

[3] *See* FHEO Notice: FHEO-2013-01.

[4] HUD v. Avatar Properties, Inc., FHEO No. 01-14-0195-8.

[5] *Reyes v. Fairfield Properties*, 661 F.Supp.2d 249 (EDNY 2009).

[6] There are statutory exceptions for specialized communities, such as 55 or older communities, among others.

[7] *Iniestra v. Cliff Warren Investments, Inc.*, 886 F.Supp.2d 1161 (C.D.Cal. 2012).

[8] *Pack v. Fort Washington II*, 689 F.Supp.2d 1237 (E.D.Cal. 2009).

[9] NY ADC §27-2018.1.

Effect of a Discontinuance on the Mortgage Foreclosure Statute of Limitations *(Continued from page 11)*

to revoke its acceleration. The Appellate Division, Second Department rejected this argument, concluding that "[t]he Supreme Court properly found that the mortgagors' conclusory statements that the 'Order of Discontinuance was the result of procedural deficiencies in the proceedings,' . . . do not disprove an affirmative act of revocation."

Impact of the NMNT Realty decision

Respectfully, the decision of the Appellate Division can, at best, be described as somewhat awkward. It appears that what the Appellate Division did is allow borrowers to "re-litigate" the prior foreclosure action to ascertain what the lender's intent may have been in discontinuing the action. *NMNT Realty* left open the question of whether and under what circumstances a court can conclude that the lender's true intention in seeking to discontinue the prior foreclosure action stemmed from a procedural irregularity that was discovered in the prior proceeding and not from any intention on the part of the lender to actually revoke the acceleration of the debt.

Based upon *NMNT Realty*, one can expect that lenders, in moving to voluntarily discontinue foreclosure actions, will include a statement in their motion papers indicating that the motion to discontinue constitutes a revocation of the acceleration of the debt. However, such statements may not necessarily be dispositive of a lender's true intention in seeking to discontinue. Thus, the unintended consequence of the *NMNT Realty* decision may be that there ends up being discovery in mortgage foreclosure cases into a lender's true intentions where the question is raised regarding why a lender may have filed a motion seeking to discontinue a prior foreclosure action.

For instance, it is possible that deposition discovery or interrogatories can reveal that the lender discovered a procedural irregularity in the prior foreclosure proceeding, and that fact weighed in to some degree on the predecessor lender's decision to discontinue the prior foreclosure action. *NMNT Realty* does not explain how lower courts should address such a factual scenario – *i.e.*, where the lender may have had the intention of trying to discontinue a procedurally improper case. *NMNT Realty*, therefore, may engender a great deal of discovery and motion practice in mortgage foreclosure litigation where statute of limitations issues are raised by the borrowers and the intention of discontinuing prior foreclosure litigation is put at issue.

Note: Christopher A. Gorman is a partner at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, and Director of the firm's Real Estate and Construction Litigation Practice Group.

Note James Wighaus is a law clerk at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP.

Discoverability of Condemnor's Pre-Vesting Appraisal *(Continued from page 8)*

what condemnee is representing to such third party as the amount of "just compensation" it will have to pay for acquisition of the subject property.

Absent either of the circumstances above described, the court will be unaware of what the condemnor has previously adopted as its "highest approved appraisal." But then the effects of the body of case law which otherwise excludes discovery and/or use by condemnee against condemnor of an appraisal despite its adoption by condemnor as its "highest approved appraisal as required by both Sections 303 and 304 of the EDPL is an open invitation to condemnors to avoid the constitutional mandate of just compensation in the name of budget economy or to seek to "punish" the condemnee who would contest its original offer. We do not submit here that an offer of settlement by either party is admissible or should in any way be before the court at the time of trial and certainly condemnor is not restrained by the Eminent Domain Procedure Law or any other statute for making an offer of settlement which may exceed its "highest approved appraisal" and certainly that offer of settlement should not be before the trial court. But the case law as it now stands is an inducement to condemnor to seek out appraisers for purposes of trial who had not been involved in preparation of what has been previously represented by condemnor as its "highest approved appraisal," which are substantially below the appraisals mandated by Section 303 and, thus, creating a threat to condemnee that if it challenges the offer made by condemnor pursuant to Section 303, condemnee will run the risk (litigation is always a risk) of having to return with interest a portion of the advance payment made pursuant to EDPL § 304. Is that just compensation?

If a criminal prosecutor were to suppress evidence that might favor the position of a defendant in the hope of securing either a conviction or a confession, he would be removed from office. He who litigates with the state or challenges the state is entitled to the benefit of all that is in support of his position. The state should not be allowed to suppress anything. Should the constitutional right to "just compensation" be subject to a lesser standard? We respectfully submit that to require a condemnor at the very outset to prepare an appraisal of the damages that it will inflict and that such appraisal is required to be the "highest approved appraiser" and, thus, represents condemnor's opinion of what represents "just compensation" and then in the event of a contest to permit the condemnor to submit a lesser appraisal and suppress the content of that "highest approved appraisal," is in effect a denial of just compensation and a violation of the constitutional rights of the owner whose property has been appropriated or condemned for a public purpose. It, in effect, turns the quest for just compensation into a game of chance, in which the "house" is the condemnor.

To sum up: Both the State and Federal constitutions requires that when private property is acquired by eminent domain, that the owner thereof receive just compensation. New York Eminent Domain Procedure Law requires that condemnor obtain an appraisal and offer to the owner the amount of its "highest approved appraisal," which is then what the condemnor at that point represents to be just compensation. But if the owner does not believe that this represents just compensation, condemnor must nevertheless pay the sum represented by the highest approval appraisal as an advance payment. The condemnor is then permitted to suppress knowledge of that "highest approved appraisal" and file with the court for purposes of trial an appraisal of a lesser sum than its "highest approved appraisal;" thus threatening the property owner with the prospect of having to return some portion with interest of what has been previously represented as condemnor's highest approval appraisal and the just compensation to which the owner is entitled. Can this possibly represent just compensation?

Note: Edward Flower was admitted to the practice of law in New York State in April 1956 and has practiced since that time (62 years). He served as an Assistant County Attorney specializing in eminent domain matters and upon leaving that office in 1966, he has continued in that field to the present. Although he is 88 years of age, he continues to try eminent domain matters both in the New York State Court of Claims and the Supreme Court.

Pro Bono Attorney of the Month *(Continued from page 17)*

ing clients with minor children, given the toll divorce trials often have on young children.

Looking back on her earlier Pro Bono Project referrals, Ms. Brown is grateful for the opportunity they created for her to become acquainted with judges she had not yet appeared before. She finds the Project referrals to be a good way to build relationships with judges because they appreciate the pro bono service she is providing. Ms. Brown encourages other attorneys not currently accepting Project referrals to do so, commenting, "Lawyers who don't do pro bono are missing out on the complete calling of our profession."

Debra Brown and her wife Sherry Mederos have a large family consisting of three sons and ten grandchildren. In her spare time, Ms. Brown can be found boating and fishing off the South Shore.

The Pro Bono Project is extremely pleased to honor Debra Brown as the Pro Bono Attorney of the Month in light of the generous services she has provided to her pro bono clients over the years. We look forward to our continued work together on behalf of those in need for many years to come.

The Suffolk Pro Bono Project is a joint effort of Nassau Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County Pro Bono Foundation, who, for many years, have joined resources toward the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a nonprofit civil legal services agency, providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Ellen Krakow, Esq. 631 232-2400 x 3323.

Note: Ellen Krakow is the Suffolk Pro Bono Project Coordinator for Nassau Suffolk Law Services.