REAL ESTATE

Top 10 Real Estate Laws of 2018

By Andrew Lieb

Now that 2019 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 2018, 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. Title Insurance: Regulations 206 and 208 sent shockwaves throughout the real estate industry at the end of 2017 and within much of 2018. Then, on July 5, 2018, a New York County Supreme Court Justice annulled both regulations in *New York State Land Title v. New York State Department of Financial Services,* 2018 NY Slip Op 31465(U). However, the case is now before the First Department and a decision is expected in the near term. Stay tuned for that decision as it will change the course of the title insurance industry in terms of ancillary fee restrictions, advertising rules, reductions in premiums and much more.

2. Repealed First Home Savings Program: As New York State could not get its act together last year in issuing the requisite regulations to effectuate its new First Home Savings Program, the prior legislation, at Tax Law §§612(b)(42), (c)(42) and (c)(43), has been repealed by S7316. Beyond repeal, the new legislation directs a study as to the feasibility and sustainability of such a program with a report to follow from The Division of Housing and Community Renewal.

Andrew Lieb

3. Referee Foreclosure Pay: Pursuant to S7287, CPLR §8003 was amended to increase the default fees (absent compensation having been fixed by the court or by consent of the parties) from $50 to $350 for "each day spent in the business of the reference."

4. Landlords and Mechanics' Liens: In *Ferrara v. Peaches Café LLC*, the Court of Appeals affirmed the Fourth Department's holding that "consent for purposes of Lien Law §3 may be inferred from the terms of the lease," if such terms require "the tenant to undertake the improvement work made by the lienors" regardless that a landlord neither "expressly or directly consent[ed] to the improvements" because "the Lien Law does not require any direct relationship between the property owner and the contractor." This case settled a conflict where the First and Second departments had previously held that a direct relationship was required for the lien to be effective. Moving forward, landlords must be advised of the risk in requiring build-outs and may want to obtain a line of credit or a bond to protect themselves during such a build-out.

5. Architectural Negligence: In *Dormitory Authority of the State of New York v. Samson Construction Co.,* the Court of Appeals held that a breach of contract and negligence cause of action are duplicative and should be dismissed where "no injury alleged" in the negligence cause of action "is not already encompassed in [the] contract claim." Moving forward, plaintiff's counsel should clearly articulate injuries that are caused by a breach of a professional standard of care as separate and apart from the contractual obligations of the parties if plaintiff wishes to concurrently proceed on both theories of liability.

6. Reasonable Modification / Disability Discrimination: In *Matter of Marine Holdings, LLC v. NYC Commission on Human Rights,* the Court of Appeals addressed the "undue hardship" defense to a reasonable modification request of a disabled tenant where such modification was allegedly "structurally infeasible," but admittedly "could be done." In effectively adopting a "could be done" standard, the court looked to prior similar conversions undertaken by the landlord and the lack of evidence that such similar conversions resulted in "any hardship" under the "unchanging burden to prove undue hardship." Interestingly, the court was unfazed by the fact that the construction required to effectuate the modification would result in four apartments being vacated for three months and the building's gas line being shut off. As a result, practitioners should be mindful that the undue hardship defense appears unavailable where a modification is theoretically possible, which almost always is the case.

7. Mortgage Debt Forgiveness Relief Act: By way of the Bipartisan Budget Act of 2018, Public Law No: 115-123, the Mortgage Debt Forgiveness Relief Act, at 26 USC 108(a)(1)(E), was retroactively extended for all of 2017. Now, if only the government could finally pass such a bill proactively (and retroactive for 2018), then struggling homeowners could make smart mortgage modification/short sale decisions.

8. Yellowstone Injunctions are Over: In *159 MP Corp. v. Redbridge Bedford, LLC,* the Appellate Division held that commercial tenants may waive declaratory judgment remedies in their written lease agreements. The court found that a lease containing the language, "it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings," waived a declaratory judgment and precluded Yellowstone relief. Moving forward, all commercial landlords should amend their leases to mirror the *159 MP Corp.* language.

(Continued on page 22)

CONSUMER BANKRUPTCY

Canine Conundrum: Exempting Doggy Insurance for Scout

By Craig D. Robins

Bankruptcy courts from time to time address odd and unusual situations. Judges seem to take delight in issuing decisions involving pets. And here we have both.

The Arizona Bankruptcy Court recently encountered a situation in which the Chapter 7 debtor's dog, Scout, underwent surgery just two weeks before the bankruptcy was filed in June 2018. The debtor, an animal lover, also had two cats. Although few consumer debtors do this, she listed her three pets collectively as assets in the schedules to her petition, with a collective value of $100. She also declared these "assets" as exempt for that amount.

Like many Americans concerned with the high cost of health care, this debtor had made sure that her loved ones were covered. Yes, she had a "Healthy Paws" Insurance Policy covering her pets' health care needs.

When Scout ate something he wasn't supposed to, sustaining serious internal injury, he needed immediate surgery. Although the veterinarian apparently didn't take insurance proceeds, the debtor, who was suffering financial adversity, was quite fortunate to be able to rely on a close friend to lend her about $7,000 to pay the vet.

Craig Robins

Several weeks after the surgery, which was also several weeks after the bankruptcy petition was filed, the debtor received an insurance check for 90 percent of the cost of treatment, as provided by the pet insurance policy. The debtor endorsed this check over to her friend.

The debtor then amended her schedule of personal property to include her ownership of the pet insurance policy, which she valued at $0.00, and the insurance benefits amount of $7,417.08. She also amended her schedule of exemptions to claim the pet insurance policy and benefits as entirely exempt. Incidentally, this was the first time the debtor revealed her ownership of either.

Of course, the Chapter 7 trustee objected to the debtor's insurance proceeds exemption. Judge Daniel P. Collins framed the question before the court, calling it an issue of first impression: Are the Insurance Proceeds exempt under state law, and if so, is the exemption amount limited to Scout's monetary value? *In re Hill*, 18-07595 (Bankr. D. Ariz., Nov. 15, 2018).

The judge started his legal analysis by observing that when the bankruptcy was filed, a bankruptcy estate was created which included Scout, the pet insurance policy and the insurance proceeds. The debtor used the Arizona state exemption scheme. The relevant exemption provision here provided that all money arising from any claim for damage to exempt property paid by insurance is exempt. The trustee claimed that this particular statute should not apply, but even if it did, the amount of the exemption should be limited to Scout's stated economic value.

The court looked at the plain meaning of the words in the statute which clearly indicated that a property insurance policy coverage applying to exempt property is exempt. "While Scout might be the Debtor's priceless faithful and loved companion, for bankruptcy purposes, Scout is 'property' of the Debtor's bankruptcy estate." The judge noted that the debtor declared Scout as an exempt asset and that no party in interest objected to this claimed exemption. As such, Scout was "exempt property."

Turning to the unusual nature of this asset, Judge Collins stated how one could argue that the state legislature created the relevant exemption statute thinking of damage to a car or home, but the language of the statute, he observed, does limit the definition of "exempt property." The judge concluded that the insurance proceeds were therefore exempt.

Addressing the fact that the debtor valued her pets, including Scout, at only

(Continued on page 26)

Focus on FOIL (Continued from page 6)

New York's Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Dashboard camera footage should be considered by the courts as analogous to body camera footage and should be available pursuant to state and federal Freedom of Information Law.

Should the government fail to turn over records, including those in electronic format, it must articulate the reasons why disclosure can be withheld. FOIL requires a "particularized and specific justification"[vii] for denying access to demanded documents rather than a "blanket" exemption.[viii] While the government may turn over certain documentation, it may elect to redact other portions of the documentation as following within one of the abovementioned exceptions. Police Body Camera footage should be no different.

On the one hand there is the statutory protections against public disclosure afforded by the legislature and, on the other, the civil right afforded by the Freedom of Information Law. The Committee on Open Government predicts that "in New York police agencies may attempt to block access based on Civil Rights Law §50-a, which makes confidential '[a]ll [police] personnel records used to evaluate performance toward continued employment or promotion…' " One should note, however, that "police departments who investigate persons who are no longer their employees are not conducting investigations of 'personnel' within the meaning of Civil Rights Law § 50-a (1). The plain meaning of the word personnel identifies individuals with some current employment relationship with an organization." Accordingly, once an officer is dismissed, one may be able to gain access to certain records, including various video footage. Even still, recent decisions may require an *in camera* inspection of such records to determine whether the Civil Rights Law applies.[9]

While the Committee on Open Government asks for the outright repeal of Civil Rights Law Section 50-a or, alternatively, its amendment, New York Courts have recently affirmed that Civil Rights Law Section 50-a continues to protect police misconduct records. This may include video footage. Whether the need to safeguard Police Body Camera footage will overcome FOIL's presumption of openness and the public's right to know is yet to be seen.

Note: Named a SuperLawyer, Cory Morris is admitted to practice in NY, EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CASAC-T. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

[i] Stony Brook University, *Body Worn Camera Program,* University Police Department (2019), *last accessed on* January 22, 2019, https://www.stonybrook.edu/commcms/police/safety/body_worn_cameras.

[ii] Committee on Open Government FOIL Advisory Opinion ("FOIL-AO") FOIL-AO-19365; see FOIL-AO-19202, FOIL-AO-13528.

[iii] Matter of Dilworth v. Westchester County Department of Correction, 93 A.D.3d 722, 724-725 (2nd Dep't. 2012) (see also Buffalo Broadcasting Co. v NYS Department of Correctional Services, 174 AD2d 212, 216 (3rd Dep't. 1992), *lv denied* 79 NY2d 759 (1992); Matter of Mack v. Howard, 91 A.D.3d 1315, 937 N.Y.S.2d 785 (4th Dep't. 2012).

[iv] Pennington v. Clark, 16 AD3d 1049 (4th Dep't. 2005).

[v] See Andrea Peterson, *President Obama Wants to Spend $75 Million to Buy Police Bodycams*, Wash. Post (Dec. 1, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/12/01/president-obama-wants-to-spend-75-million-to-buy-police-bodycams/.

[vi] Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win For All*, ACLU, P. 2 (Mar. 2015), accessible at: https://www.aclu.org/sites/default/files/field_document/police_body-mounted_cameras-v2.pdf.

[vii] Bredderman, Will, *"Fairness for All: Cuomo Seeks Criminal Justice and Prison Reform"*, Observer News (January 21, 2015), http://observer.com/2015/01/fairness-for-all-cuomo-seeks-criminal-justice-and-prison-reform/.

[viii] Ian Lovett, In California, *In California, a Champion for Police Cameras*, New York Times (Aug. 21, 2013), http://www.nytimes.com/2013/08/22/us/in-california-a-champion-for-police-cameras.html?pagewanted=all&_r=1.

[9] Data Tree, LLC v. Romaine, 9 N.Y.3d 454,463 (2007); Gould, 89 N.Y.2d at 276.

[x] DLJ Restaurant Corp. v. Department of Buildings of City of New York, 710 N.Y.S.2d 564, 566 (1st Dept. 2000); see also Matter of Capital Newspapers Div. Of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566 (1986).

[xi] Matter of Hearst Corp. v NY State Police, 132 AD3d 1128, 1130 (3rd Dept 2015).

[xii] Matter of Newsday, LLC v Nassau County Police Dept., 136 AD3d 828, 828 (2d Dep't. 2016).

Top 10 Real Estate Laws of 2018 (Continued from page 16)

9. New Real Estate Broker Qualifying Curriculum: On Sept. 1, 2018, new curriculum took effect for licensing real estate brokers. While real estate brokers remain required to take a 45-hour course and two tests to obtain licensing, they now must study an increased number of hours on the topic of agency law coupled with the new topics of license law, advanced fair housing/lending and transactional analysis. Moving forward, the law of agency will dominate the industry. As recent as 2016, agency was added as a required continuing education topic and it remains a constant issue within license law complaints and real estate brokerage litigation. Attorneys should familiarize themselves with this topic so that they can understand whether the broker with whom they are collaborating has a waived conflict of interest before collaborating on substance.

10.Sexual Harassment: On April 12, 2018, business in New York State was changed forever by way of S7848A. This legislation made New York State the leader in sexual harassment prevention throughout the country. Employers are now required to have sexual harassment policies, trainings, and complaint forms/protocol. There is a ban on confidentiality agreements and mandatory arbitration clauses for sexual harassment claims. The law extends to government bidders (including those located out-of-state) and it even extends the Executive Law to permit claims by non-employees (i.e., real estate brokers) against an employer for sexual harassment experienced at the workplace. It is noted that the state law doesn't require policies/trainings as to non-employees, but guidance does suggest that these non-employees receive policies/trainings. Additionally, New York City implemented a similar law, Local Law 96, which expressly requires trainings for non-employees. Moving forward, counsel must advise landlords, developers, contractors, brokers and the like of their annual policies/trainings burden. 2019 is expected to see an uptick in sexual harassment claims now that employees will know their rights. Are you prepared?

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Unwinding an Unwanted Transaction (Continued from page 14)

Our transactions

As indicated above, I was presented with two separate transactions that had to be rescinded in December of 2018. Both had occurred several months earlier during 2018.

In one transaction, a C corporation had distributed a minority interest in a subsidiary corporation to one of its shareholders in complete redemption of the shareholder's stock in the distributing corporation. For some inexplicable reason, both parties believed that the distribution was not a taxable event to either of them; the corporation did not consider Sec. 311(b) and the former shareholder did not consider Sec. 302(a).[3]

The redemption distribution was rescinded by having the "former" shareholder return to the distributing corporation the stock in the subsidiary and re-issuing stock in the distributing corporation to the shareholder. Between the date of the transaction and its rescission, no dividend distributions were made by either the corporation or the subsidiary, and no other event occurred that was inconsistent with the rescission of the redemption distribution.

In the second transaction, a partnership had contributed a wholly-owned disregarded entity (an LLC) to a newly-formed, and wholly-owned, C corporation subsidiary of the partnership. The partnership erroneously believed that it could obtain loans more easily through a corporation. The LLC membership interests were returned to the partnership in rescission of the contribution. As in the first case, there were no distributions by either the corporation or the LLC, nor did any other events occur that were inconsistent with the rescission.

A useful tool

In general, the best way to avoid a situation that calls for the rescission of a transaction is to refrain from undertaking the transaction without first vetting it in consultation with one's tax and corporate advisers.

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[1] For example, how might taxpayers rescind a merger? If you're facing this issue, feel free to contact me.

[2] *Hutcheson v. Commissioner*, T.C. Memo 1996-127.

[3] Under IRC Sec. 311(b), a distribution of appreciated property by a corporation to its shareholders is treated as a sale of such property by the corporation. Under IRC Sec. 302(a) and 302(b)(3), the redemption of a shareholder's entire equity in a corporation is treated as a sale of such equity by the shareholder.