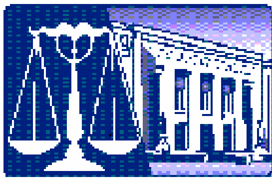

RCBA NewsBrief

Volume 12 December 2009

ROCKLAND COUNTY BAR ASSOCIATION

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COMMERCIAL LITIGATION ISSUES OF INTEREST

Submitted by Paul Savad, Esq.
Chair, Commercial and Corporate Law Committee;
Joseph Churgin, Esq., and Susan Cooper, Esq., of
SAVAD CHURGIN, Attorneys at Law

Your client operated his business in premises he leased from the property owner, who later contracted with a developer to sell the property. The developer simultaneously contracted with your client to purchase his leasehold, contingent on the developer receiving municipal approval of a specific site plan. The developer later modified its site plan, due to community opposition, and orally agreed to modify the contingency clause in your client's contract to sell the leasehold. As agreed, your client helped the developer obtain approval of the modified site plan. The developer then purchased the property from the owner, but refused to purchase your client's leasehold, because the municipality did not approve his original plan, and the oral modifications of your client's contract were not enforceable under the Statute of Frauds.

Will you defeat the developer's motion to dismiss your client's claim for breach of contract, waiver and estoppel?

The answer is yes.

In *Papagiannis v. Commerce Bank*, 9/22/09 N.Y.L.J. 28, (col. 3) (Sup. Ct. Suffolk Co.), Commerce Bank wanted to construct a branch office on Main Street in the Village of Northport, New York. The bank contracted in 2001 to buy Main Street property owned by Papatis and leased to Papagiannis, who operated a restaurant there. The bank simultaneously contracted with Papagiannis to purchase his business and his leasehold interest for $500,000. The contract with Papagiannis was contingent upon: (a) the simultaneous purchase of the property from Papatis, (b) the bank obtaining municipal approvals for a minimum of four drive-through lanes, and (c) Papagiannis remaining current on his rental payments until closing.

When the bank encountered public opposition, it submitted altered plans providing for only three drive-through lanes, instead of four. Papagiannis lost business, allegedly due to the bad publicity of the bank's project, stopped paying rent in 2002, and closed the restaurant in 2003, but continued to pay insurance on the premises and continued to cooperate with the bank, supporting its application.

The bank allegedly assured Papagiannis of its desire to close the deal as soon as possible, despite departures from the conditions of the contract. A 2004 letter from the owner's attorney memorialized an agreement among all parties to allocate $140,000 of the sales price to settle accumulated rent arrears at closing.

Continued on Page 2……………………..

We welcome your articles.
*****All articles submitted will be reviewed by the Executive Committee for approval*****

A year later, in 2005, Papatis commenced an eviction proceeding against Papagiannis, who then sought declaratory relief in the Supreme Court, based on the agreement to pay rental arrears with proceeds from the closing, which could not take place until approvals were granted. Papagiannis claims that Papatis and the bank asked that he withdraw his lawsuit. Both Papatis' eviction proceeding and Papagiannis' declaratory judgment action were withdrawn.

In 2007, the bank received its approvals with three drive-through lanes. The bank closed with Papatis, but would not close with Papagiannis, claiming that the contingencies of four drive-through lanes and rent payments being current had not been met.

Papagiannis sued the bank for breach of the 2001 contract, breach of the 2004 "accord", and breach of the 2005 "executory accord". The bank moved to dismiss all claims, based on the failure of the contingencies in the original contract, and upon the alleged oral modifications in 2004 and 2005 being barred by the Statute of Frauds.

The Court noted that the contract did not contain a clause precluding oral modifications, but that even if such a clause were present, an oral modification would be enforceable if it was partially performed, citing *Rose v. Spa Realty Associates* 42 N.Y. 2d 338 (1977), or if there had been detrimental reliance upon the oral modification, citing *Riverside Research Institute and Warwick Industries v. KMGA Inc.,* 108 A.D. 2d 365 (1st Dept. 1985).

The Court held that the statements allegedly made by representatives of the bank in 2004 reaffirming the desire to close, despite the fact that rental payments were in arrears, could constituted a waiver of that contingency, and the bank's submission of an altered plan for three drive-through lanes waived the contingency of four lanes. Papagiannis' withdrawal of the earlier declaratory judgment action in reliance on the bank's agreement to satisfy rental arrears from the closing proceeds supported an equitable estoppel to deny the agreement.

The Court denied the motion to dismiss, holding that the complaint sufficiently alleged causes of action for breach of contract, waiver, part performance, and estoppel.

***The lesson?* Oral modifications of a contract subject to the Statute of Frauds may be proven, if there was part performance of the modification, detrimental reliance, or waiver.**

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THE FREE SPEECH and the INTERNET SEMINAR THAT WAS SCHEDULED FOR NOVEMBER 5, 2009 HAS BEEN RESCHEDULED TO JANUARY 28, 2010 6-9 P.M. LATERRAZZA

ALL ASSIGNED COUNSEL PANEL MEMBERS

PLEASE NOTE:

**THE 2009 FISCAL YEAR IS COMING TO A CLOSE. PLEASE SEND IN YOUR VOUCHERS FOR CASES COMPLETED.
DO NOT HOLD YOUR VOUCHERS FOR THE 2010 BILLING CYCLE.**

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PERSONAL INJURY LITIGATION

1977 - "The King", Elvis Presley, dies; World Trade Center is completed; yearly inflation rate is 6.5%, Dow Jones closes at 831; average price for a gallon of gas is .65 cents; first MRI scanner is tested; New York State enacts its "no-fault" law.

2008 – estimated cost of the war in Iraq $3 trillion; U.S. "ok's" production and marketing of food from cloned animals; first African-American elected President; yearly inflation rate is -1.43%; Dow Jones closes at 8776; a gallon of gas peaks at $4.09; 13 States now have a "no-fault" law.

Prior to no-fault someone injured in a motor vehicle collision could sue relatively unfettered for their injury. An aggressive campaign was waged by the Insurance Industry that changes were necessary to the current system that would unclog overly burdening Courts and lowering automobile premiums. This would be accomplished by instituting a "threshold" to maintain an action for personal injuries. In exchange for this derogation of common law the carriers would, subject to limitations: a. make prompt payment of medical bills, wages, and other related expenses of the injured person without regard to fault (ergo, "no-fault") and b. not treat the injured as an adversary.

A "serious injury" is defined as a personal injury that results in: 1. death; 2. dismemberment; 3. significant disfigurement; 4. fracture; 5. loss of a fetus; 6. permanent loss of use of a body organ, member, function or system; 7. permanent consequential limitation of use of a body organ or member; 8. significant limitation of use of a body function or system; or 9. a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

In my opinion, the phrase "serious injury" has been manipulated by many who defend or oppose personal injury lawsuits. It is an insult and affront to anyone who has truly been injured to imply that their injury is not significant, debilitating, or life altering. Serious injury, or qualifying injury, merely means that certain injuries are court worthy while others are not. (This topic will be expanded during the next several months).

While certain injuries appear to automatically qualify - death, dismemberment, fracture; and others would seem to meet the "threshold" – significant disfigurement, loss of a fetus; most injuries are vociferously litigated as compensation worthy.

Several conundrums exist, for example a fracture of the "pinky toe" automatically qualifies while a lumbar laminectomy may not qualify. On a positive note for plaintiffs, establishing the threshold on one injury satisfies the litmus test for any additional injuries.

Although the number of lawsuits and the amount of recovery has declined since the implementation of the "no-fault" law, the Insurance Industry still disseminates misleading and false information: "reform" is necessary as there are too many lawsuits, the present system is being abused by plaintiffs and their lawyers, and change will save consumers money. Insurance talking points have been consistent over the years and, in this writer's opinion, are skewed. "We (USAA) didn't expect to make so much money (in 1997) said Steven F. Goldberg, who was in charge of pricing. [W]e were able to give some of it back as a dividend." After paying the dividend, the company's net profit in 1997 was $1.19 billion, up 39 percent from a year earlier.

Jeffrey M. Adams
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The above statements contained in this article are those of the author and the Rockland County Bar Association takes no position with respect to same. Comments and/or rebuttal from members of this Association is welcome.

[1]Article 51 of the New York State Insurance Law, enacted December 1, 1977.
[2]Formerly Section 671; monetary threshold.
[3]Excluded are certain accidents involving buses and large trucks, and all accidents involving motorcyclists and their passengers.
[4]Section 5102 (d).
[5]http://www.nytimes.com/1998/04/15/business/auto-insurance-is-now-cheaper-in-many-states.html?pagewanted=all

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Movin' Up, In & Out

IF YOU HAVE MOVED OR WILL BE MOVING, PLEASE CALL THE ASSOCIATION @ (845) 634-2149 SO WE CAN UPDATE OUR RECORDS.

CLE CALENDAR

December 1, 2009
Structured Settlements Seminar has been cancelled and will be rescheduled at a later date.
****

Tuesday, January 12, 2010
CLE: Criminal Law Update
Time: 6:00 p.m.– 9:00 p.m. (Registration @ 5:30 p.m.)
Light Dinner
Level: Transitional/Non-Transitional
Cost: $75.00 in advance; $85 at the door; $95 non-members
$40 paralegals and students
Place: **Good Samaritan Hospital Auditorium**
Credits: 3 (2.5 Professional Practice; .5 Ethics)

****

Thursday, January 28, 2010
CLE: Free Speech and the Internet
Time: 6:00 p.m.– 9:00 p.m. (Registration @ 5:30 p.m.)
Light Dinner
Level: Transitional/Non-Transitional
Cost: $75.00 in advance; $85 at the door; $95 non-members
$40 paralegals and students
Place: **Rockland BOCES, West Nyack, NY**
Credits: 3 (2.5 Professional Practice; .5 Ethics)

Credit is not given for partial attendance.

ATTENTION ALL MEMBERS

AS WE APPROACH THE WINTER MONTHS IT IS VERY IMPORTANT TO KNOW BEFORE YOU GO. LOG ON TO :
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Michael Zall

Attorney

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ANNOUNCEMENT

Elizabeth A. Haas, Esq. would like to bring the following announcement of the Southern District Bankruptcy Court to the attention of the Bar. The Amended Local Rules are available in Blacklined format at the Court's website, www.nysb.uscourts.gov.

Announcement
Important Notice Regarding Time Period Changes Effective December 1, 2009, Including 14-Day Deadlines for Filing Schedules, Statements, Chapter 13 Plans, and Bankruptcy Appellate Briefs

Among the time computation amendments to the Federal Rules of Bankruptcy Procedure that will take effect on December 1, 2009, are changes to 12 rules that will result in a reduction by one day (from 15 to 14 days) of the time to take action. The affected rules are Bankruptcy Rules 1007, 1019, 1020, 2015, 2015.1, 2016, 3015, 4001, 4002, 6004, 6007, and 8009. Please take note of these changes and particularly of the new 14-day deadline for filing schedules, statements, and other documents under Rule 1007(c); for filing a chapter 13 plan under Rule 3015(b); and for filing appellate briefs under Rule 8009(a).

Please also note that several of our Local Rules, General Orders and Guidelines have been amended and revised to conform to the time-related amendments to the Federal Rules of Bankruptcy Procedure, including Fed. R. Bankr. P. 2002. Some of the amendments include a significant change in time periods for filing pleadings. Amended Local Rules -- effective December 1, 2009 (Blacklined)

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COMMERCIAL LITIGATION ISSUES OF INTEREST
Submitted by Robert M. Rosenbith, Esq.

The real estate market is in a funk. Mortgage defaults are on the rise. As debtors become more desperate to retain their homes many resort, belatedly, to their lending documents to find defenses to their suddenly overwhelming defaults. So the rise in so-called lender liability cases.

At the closing the borrower has a foot high stack of papers in front of her. These documents, which include the note, mortgage and HUD-1 settlement statement, set forth a raft of information such as the lending rate, estimate of settlement costs, and payments. Usually, the borrower just signs or initials every page as instructed. So it goes, page after page. There is often few questions the client asks - of her attorney or anyone at the closing. The client is interested primarily in obtaining the mortgage loan; and the stack of papers is intimidating, to say the least.

Of course, if the borrower does read the papers, and the loan terms are not what she thought they would be, she could simply walk away from the closing. If this happens, you likely won't read about it in the report of cases.

Some time after the closing, things go bad. Typically, the interest rate has increased and the borrower is unable to service the loan. The borrower now reads the note and learns that the interest rate not a fixed rate, as she thought it would be, but a variable rate, and one that is now considerably higher than when the mortgage loan was made. The borrower believes that the lender took advantage of her lack of education, sophistication and/or language skills. This realization leads the borrower to intone such defenses as predatory lending, fraudulent inducement, breach of implied duty of good faith, misrepresentation, etc. These defenses usually fail. Why?

Nearly 80 years ago, the Court of Appeals penned these famous words:

> **Ordinarily, the signer of a deed or other instrument, expressive of a jural act, is conclusively bound thereby. That his mind never gave assent to the terms expressed is not material. (citation omitted) If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent; in either case the writing binds him. (citation omitted)**

***Pimpinello v. Swift & Co.*, 253 N.Y. 159, 162-163 (1930).**

Several recent cases highlight that *Pimpinello* is alive and well.

In *Fremont Investment and Loan v. Haley*, 23 Misc.3d 1138(A), 2009 WL 1636915 (N.Y.Sup), 2009 N.Y.Slip Op. 51186(U), a mortgage foreclosure action, Haley asserted the usual litany of defenses and counterclaims. These defenses and claims were based upon the lender making an allegedly unconscionable loan, one that the lender knew the borrower could not repay, and a patently erroneous loan application.

Fremont moved for summary judgment, providing the note and mortgage and an affidavit attesting to the fact that the mortgage is in default. The defendants produced their own affidavits in which they recited their need for $100,000 to pay medical bills, their house had been appraised at $780,000 and that the lender promised to lend $624,000. They also averred that they were not represented by counsel, did not receive copies of the lending documents at the closing, questioned other terms of the loan but failed to receive an adequate response and went to closing "not knowing any term or condition, other than the principal amount."

The defendants claimed they first learned that their monthly payment would be $5,700, which would increase to $6,400 after 3 years then adjust every six months thereafter, after they read the note. Further, their application to borrow, which had been prepared by their mortgage broker, contained numerous "inaccuracies" such as inflated income and assets.

Significantly, the defendants adduced no evidence that the lender had made any false statements - all of the information in the loan application was made by the mortgage broker the defendants had consulted; the borrowers had no direct communications with the lender. And the loan documents clearly set forth the terms of the lending.

The Supreme Court rejected the borrower's multi-faceted defenses and counterclaims citing to the *Pimpinello* rule.

The *Pimpinello* rule has been cited in numerous circumstances. E.g., Martin v. Citibank, N.A., 64 A.D.3d 477, 883 N.Y.S. 483 (1st Dept 1909) (lease agreement for safe deposit box). Accord: *Arnav Indus. Retire. Trust v. Brown, Raysman*, 96 N.Y.2d 300, 304, 727 N.Y.S.2d 688, 691 (2001)(legal malpractice action); *Cash v. Titan Financial Services, Inc.*, 58 A.D.3d 785, 873 N.Y.S. 642 (2nd Dept. 1909) (fraud action).

A key factor in these decisions is the obverse of the *Pimpinello* rule: you cannot avoid a document because you signed it even though you did not read it; you are bound because you had an affirmative obligation to read it before you signed it.

Moral: if you sign it, you are stuck with it. *Caveat Emptor*!

Robert M. Rosenblith is a commercial litigator with particular expertise in the law of negotiable instruments, letters of credit, bank deposits and collections and bank operations. His office is located in Chestnut Ridge, NY.

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☐ **Criminal Law Update - January 12, 2010** **6:00 p.m.— 9:00 p.m. $ 75.00**

☐ **Free Speech and the Internet - January 28, 2010** **6:00 p.m.— 9:00 p.m. $ 75.00**

Credit is not given for partial attendance.
Make sure your blue evaluation forms are completed and turned in to CLE Coordinator to receive your certificate.
If you pre-pay but are unable to attend the seminar you will be refunded the full amount only upon advance notice (3:00 P.M. the day of the seminar) of your non attendance.

***Kosher Meals are dependant on the delivery service available from the caterer. All kosher meals must be ordered in advance and require an extra charge of $10.00. Call the Association to place an order for a kosher meal. Please give us at least one weeks notice.*

****Hardship Policy****

THE ROCKLAND COUNTY BAR ASSOCIATION WILL WAIVE THE CLE SEMINAR FEE FOR AN INDIVIDUAL WITH APPROPRIATE PROOF OF HARDSHIP. PROOF MUST BE SUBMITTED ONE WEEK PRIOR TO SEMINAR. PLEASE CALL THE ASSOCIATION 845-634-2149 FOR MORE INFORMATION

The views expressed in the articles published in the RCBA Newsbrief are those of the authors and do not necessarily represent the policies of the Rockland County Bar Association.

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