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RCBA NewsBrief

Volume 2

February 2010

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's mother signed a contract to purchase a multi-million dollar co-operative apartment as her residence. The mother gave a \$230,000 contract downpayment, and obtained the required approval from the building's co-op board for her occupancy. After receiving approval, but before the closing, your client's mother died. Your client, as executor of his mother's estate, demanded a return of the downpayment, since the parties all agreed that the apartment was being purchased solely for the mother's residence. The seller refused to return the downpayment, and filed a lawsuit to enforce the contract or keep the downpayment. Will your client defeat a summary judgment motion by the seller?

The answer is no.

In *Warner v. Kaplan*, 12/17/09 N.Y.L.J. 26 (col 1) (1st Dep't.), Ms. Altman signed a contract to purchase the Kaplans' co-operative apartment on Park Avenue in Manhattan for 2.3 million dollars. Altman gave a deposit of \$230,000, which was placed into escrow with the sellers' attorneys. Altman then submitted a timely application for approval by the building's co-op board of directors for her purchase and occupancy, and appeared for the obligatory interview. The co-op board voted to approve the application. Two weeks later, Altman died.

Altman's estate demanded return of the deposit. The Kaplans took the position that the contract was binding upon Altman's heirs, and if the estate refused to close, it would be in default and forfeit the deposit. Altman's estate then sued for return of the deposit and the Kaplans moved for summary judgment at the conclusion of discovery.

The court affirmed the grant of summary judgment in favor of the sellers', based primarily on a standard clause in the contract binding the parties' "heirs, personal and legal representatives and successors in interest." The court noted that a contract of sale is not generally terminated by the death of the purchaser, in contrast to a contract for personal services, which is terminated by the death of the servant.

In this case, the court found that the clause binding the heirs would be meaningless, if it did not bind the purchaser's estate to the contractual obligation to purchase the apartment.

The court rejected the estate's argument that Altman's death before closing excused performance, due to impossibility of performance, quoting *Kel Kim Corp. v. Central MKTS* 70 N.Y. 2d 900, 902 (1987):

"Impossibility excuses a party's performance only when the destruction of the subject matter of a contract for the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."

The court noted that the inclusion of the provision binding Altman's heirs conclusively disproved the applicability of the theory. The fact that the provision is a standard clause in a form contract did not make it any less enforceable, according to the court.

The court acknowledged that the estate's alternate argument that the contract's purpose had been frustrated would seem to apply, because the parties agreed that Altman was purchasing the apartment solely for her own residence.

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We welcome your articles.

****All articles submitted will be reviewed by the Executive Committee for approval****

However, “the doctrine of frustration of purpose . . . is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence”, quoting *Rebell v. Trask*, 220 A.D.2d 594, 598 (1995). The doctrine was not available to the Altman estate, because the contract made explicit provision for the death of a party.

Finally, the court ruled that the estate did not satisfy the contract’s requirement of board approval, since Altman’s death required the estate to seek approval of sale to the estate and occupancy by someone chosen by the estate. The estate’s failure to do so, combined with repudiation of the contract by demanding return of the deposit, entitled the sellers to keep the deposit as liquidated damages under the contract terms.

The Lesson?

Standard language making a real property sales contract binding upon heirs or representatives is often not considered, and may lead to unwanted and unanticipated results. Modify the clause where appropriate.

TO: ALL FAMILY LAW PRACTITIONERS IN THE ROCKLAND COUNTY FAMILY COURT

FROM: ALDEN B. SMITH, COURT ATTORNEY

This court would like you to be aware of the procedure that has been established in our visitation and custody matters when it relates to the service of papers and what you or your client may be responsible to do. In a *de novo* visitation or custody matter where a petition has been filed by you or your client and there is no prior order of visitation and/or custody, please be advised that the court will prepare the Order to Show Cause after the petition is filed. The Order to Show Cause signed by the Judge will be mailed to your client with the return date of the petition, a set of directions on service, the manner of service, i.e.; personal service, and the last day in which the respondent is to be served.

With regard to all other petitions, i.e.; modification, enforcement, or violation of a visitation and/or custody under the Family Court or another court, the court will send out a Notice of Appearance to the petitioner after the petition has been filed. Unlike the case of a *de novo* proceeding, where the petitioner must serve the respondent with the Order to Show Cause petition and other papers that are sent to him or her, in the case of a modification, enforcement or violation petition, a Summons will be mailed by the court to the respondent. A Notice of Appearance will be sent to the petitioner. The petitioner need not serve any papers on the respondent prior to the first court appearance on the petition.

Writing Tip of the Month
by Susan Cooper, Esq.

Briefly summarize your arguments up front.

Do you organize your points in an outline before writing? Or perhaps you just start to write, letting it all spill onto the page to see what develops, and organize it later? Maybe you do it differently each time.

Whatever your method, it is important to recognize that just because you know what you’re saying, doesn’t mean you’ve made it clear to the reader.

Whether you’re writing an affirmation, a brief or an opinion letter, it will be easier for the reader to follow your points if you briefly summarize them early in your papers. Your summary serves as a guide for the reader to put the facts and legal arguments in context as they read.

For example, do you know which facts in the following sentence are important to remember as you read further? “On January 15, 2008, at 6 p.m., Sam Spade went to the Topsy Turvey Grill on Main Street in Orangeburg, New York, where he saw Mahitabel, a cat, jump on the woman in a pink dress seated at the table near the window.”

Perhaps the time is important. Or maybe the pink dress visible from a window is important. Or maybe it’s only important that there was a cat on the scene. Who knows, without being alerted to what is important to notice?

So whatever your writing method, it is important to step back and review what you’ve actually written. Then make sure your main points are briefly summarized as early as possible in your papers. It’s well worth the effort.

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REMINDER
CELL PHONE NUMBERS GO PUBLIC THIS MONTH

All cell phone numbers are being released to telemarketing companies and you will start to receive sale calls.

YOU WILL BE CHARGED FOR THESE CALLS

To prevent this, call the following number from your cell phone: **888-382-1222**. It is the national DO NOT CALL list. It will only take a minute of your time. It blocks your number for 5 years. You must call from the cell phone number you want to have blocked.

**REQUEST FOR PROPOSALS
FOR LEGAL SERVICES
TOWN OF STONY POINT**

This request for Proposals (“RFP”) is issued by the TOWN OF STONY POINT, NEW YORK (“Town”) to determine the eligibility of experienced Legal Counsel to provide services for the Town of Stony Point. The purpose of this RFP is to establish the identity of individuals and organizations that are qualified for this service.

INTRODUCTION:

The Town of Stony Point, NY (“Town”), desires professional legal services to assist the Town Board and other Town entities such as the Planning and Zoning Boards or officials as necessary. The Town as a municipal entity has many requirements for legal services and only the most qualified professionals who provide the most effective and economical services will be selected.

WORK DESCRIPTION:

General Town legal services will be as follows:

Attend Town Board meetings including workshop meetings (usually 2 meetings per month); attend meeting of town boards and commissions as requested (usually 1 meeting per month for Zoning Board of Appeals and 1 meeting per month of the Planning Board) and provide legal advice to such boards. Attend other town meetings as requested by the Supervisor, provide legal advice to the supervisor and Town Board and to town departments as requested by the Supervisor, assist with drafting of town contracts, codes, resolutions and other town documents. Assist in preparation and review of formal decisions by town boards and commissions, review claims filed against the town and assist in hiring special counsel to represent the town as necessary and advise the town board on pending litigation.

CONSIDERATION OF PROPOSALS:

Proposals must be received no later than February 17, 2010 at 2:00 o’clock p.m. The Town Board will evaluate the proposals. The Town Board will make a determination based upon the experience and qualifications of the Firm and approach to services. The FIRM will be hired by way of a TOWN BOARD RESOLUTION to provide such services on or about MARCH 9, 2010.

All Respondents must submit a detailed statement of the services to be performed and the costs and fees anticipated to be incurred. Proposals may include a monthly retainer, and hourly rate or a monthly retainer against which the hourly rate will be billed. The hourly rate may be a blended rate or separate hourly fees for specific services, different attorneys or paralegal services.

APPLICATION SUBMISSION:

All applications become the property of the Town. The Town reserves the right to ask for additional information. Submissions will be promptly reviewed by the Town. Interviews and/or additional information may be requested by the Town. In order to be considered for designation, applications must be submitted to the Town Clerk by FEBRUARY 17, 2010 at 2:00 o’clock p.m.

All proposals should be delivered or mailed to arrive by the appointed date to:

**JOAN SKINNER, TOWN CLERK
74 East Main Street
Stony Point, New York 10980**

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CLE CALENDAR

Tuesday, February 9, 2010

**CLE: Changing Focus ~ Shifting Expectations
The NY Model for Batterer Program**
Time: 12:00 p.m.– 2:00 p.m. (Registration @ 11:30 a.m.)
Light Lunch

Level: Transitional/Non-Transitional
Cost: \$50.00 in advance; \$75 at the door; \$85 non-members
\$20 paralegals and students

Place: **Rockland County Courthouse
Jury Assembly Room, 2nd Floor, New City**
Credits: 2 (1.5 Professional Practice; .5 Ethics)

Wednesday, March 10, 2010


CLE: Marriage, Divorce and Taxes
Time: 12:00 p.m.– 2:00 p.m. (Registration @ 11:30 a.m.)
Light Lunch

Level: Transitional/Non-Transitional
Cost: \$50.00 in advance; \$75 at the door; \$85 non-members
\$20 paralegals and students

Place: **LaTerrazza, 291 South Main Street, New City**
Credits: 2 (1.5 Professional Practice; .5 Ethics)

Thomas Mohle, CPA
 201-546-6718

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Tyler Sean Fortune
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Bobby & Michelle (Tierney) Fortune
Big Sister Ashley

Michael Zall

Attorney

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INTERESTED IN THE LRS PLAN

The purposes of the Lawyer Referral Service are:

- To be a public service, available to assist the general public by providing an alternative source for any person who can afford to pay a reasonable fee for legal services and who does not have a lawyer by providing a referral to a lawyer who practices in Rockland County.
- To provide a vehicle for persons who need a legal representative but whose earnings or assets are too high for the standards set by Rockland County Legal Aid Society or Pro Bono New York.
- To establish a better rapport between the public and the legal profession.

However, the willing participation and continued support of lawyers practicing in Rockland County is crucial to the smooth operation of the Lawyer Referral Service.

Call 845-634-2149 for an application.

***** FREE SEMINAR *****

Redefining Investment Advice

Featured Speaker: Jay Totten,
 Regional Director at DFA.

Introduction by **Larry Luxenberg,** partner,
 Lexington Avenue Capital

7 p.m. Feb. 25 Comfort Inn, Nanuet, NY
 RSVP to luxenberg@lexingtonave.com or 845-708-5306

Lexington Avenue Capital offers financial planning and investment management specializing in retirement and Social Security strategies.

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THRESHOLD TIME LIMITATIONS IN EMPLOYMENT DISCRIMINATION CASES

This article is a brief review of the various and perhaps confusing time limitations applicable to filing employment discrimination proceedings with the Division of Human Rights and/or the EEOC. It is intended to help eliminate some of the uncertainties that arise when deciding whether or not an employment discrimination case that you're thinking about pursuing is timely.

Division of Human Rights – Article 15 of the N.Y. Executive Law is the Human Rights Law (§§ 290 – 301), which is administered by the Division of Human Rights, a N.Y. State agency headed by a Commissioner (§ 293). § 296 of the Human Rights Law forbids discrimination in employment in its various aspects because age, race, creed, color, national origin, sex, disability and marital status.

Equal Employment Opportunity Commission (“EEOC”) – The EEOC, with five Commissioners, is the child of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C.A. § 2000e-4. The EEOC was created by Congress to be the administrator of Title VII. Thereafter, it became responsible for the Americans with Disabilities Act (“ADA”), 42 U.S.C.A. §§ 12101, et seq., the Americans With Disabilities Act Amendments Act of 2008 (“ADA Amendments Act”), Pub. L. No. 110-325, 122 Stat. 3553 (2008), the Age Discrimination in Employment Act, 29 U.S.C.A. § 621, et seq. (“ADEA”), and the Equal Pay Act (“EPA”), 29 U.S.C.A. § 206(d).

Deferral – In New York State, the Division of Human Rights has been joined at the hip with the EEOC through a device called “deferral.” Deferral pacts (Work-Sharing Agreements) are made between the EEOC and those state employment discrimination agencies where, essentially, the state statutory discrimination prohibitions cover the same territory as do the federal statutes. N.Y. is a deferral state. When a N.Y. employee files an employment discrimination complaint with the Division of Human Rights or a similar charge with the EEOC, the allegations will be simultaneously accepted by both agencies in accordance with their Work-Sharing Agreement. It's one stop shopping. Both the federal agency and the state agency accept the dual filing with the issuance of separate case numbers. The processing of both the federal and the N.Y. State cases, including investigation, will then proceed in furtherance of the Work-Sharing Agreement. A deferral case has both state and federal filing limitations of 300 days. (42 U.S.C.A. § 2000e-5(e); 29 U.S.C.A. § 626(d); 42 U.S.C.A. § 12117(a).)

EEOC Basic Time Limitation – In those states in which there are no deferral agreements with the EEOC, the time limitation for filing with the EEOC shrinks to 180 days (42 U.S.C.A. § 2000e-5(e)(1)).

Filing Only with the Division of Human Rights – While the deferral filing procedure gives an advantage as to federal time limitations (300 days as opposed to 180 days), there is a distinct disadvantage as between the 300 days time limitation and the N.Y. State time limitations in absence of deferral. If circumstances permit, and you should decide instead to pursue a N.Y. State action under the Human Rights Law through the Division of Human Rights, but without a simultaneous filing with the EEOC, the limitation period bounces up to 1 year (Human Rights Law § 297 subd. 5.) One such circumstance arises when the 300 days time period has expired, thereby eliminating the possibility of filing with the EEOC. Nevertheless, you are not foreclosed from filing with the Division of Human Rights prior to the exhaustion of the 1 year period.

Filing in Court - If, instead, you decide to pursue a N.Y. State action under the Human Rights Law directly in court, but without resort to the Division of Human Rights, you may do so. The limitation period then leaps to 3 years (*Murphy v. American Home Products Corp.*, 461 N.Y.S.2d 232, 58 N.Y.2d 293 (1983)). Generally, the remedies of administrative review through the Division of Human Rights, as opposed to judicial review through the courts, are mutually exclusive. But where a complaint has been filed with the Division of Human Rights, and it dismisses that complaint for administrative convenience, an exception is thereby provided. In fact, under such circumstances, the 3 year Statute of Limitations will be tolled for the period prior to the date of dismissal for administrative convenience. (*Pan American v. NYS Human Rights Appeal Bd.*, 61 N.Y.2d 542, 475 N.Y.S.2d 256, 259, 463 N.E.2d 587 (1984)).

Actions Brought in Court by the EEOC – There is no time limitation. (*Occidental Life Ins. Co. of California v. E.E.O.C.*, 432 U.S. 355, 97 S. Ct. 2447, 53 L. Ed. 2d 402, 14 Fair Empl. Prac. Cas. (BNA) 1718, 14 Empl. Prac. Dec. (CCH) ¶7619 (1977)).

Questions or comments? Call Ray Kruse at (845) 354-3900 or e-mail rkruseesq@optonline.net.



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| <input type="checkbox"/> | Changing Focus - February 9, 2010 | 12:00 p.m.— 2:00 p.m. \$ 50.00 |
| <input type="checkbox"/> | Marriage, Divorce & Taxes - March 10, 2010 | 12:00 p.m.— 2:00 p.m. \$ 50.00 |
| <input type="checkbox"/> | Elder Law - March 23, 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

TOWN OF CLARKSTOWN OFFICE OF THE SUPERVISOR

The Economic Development Team of the Town of Clarkstown is holding a Business Forum on Thursday, February 25, 2010 at 8:30 a.m. - 11:00 a.m. at Clarkstown Town Hall, 10 Maple Avenue, New City.

The Business Forum will give you a chance to meet Town officials involved in the development, planning and approval process.

A light breakfast will be served. Please RSVP by February 13, 2010 by calling Erika Moschetti in my office at 845-639-2050 or emailing e_moschetti@town.clarkstown.ny.us.

**Sincerely,
Alexander J. Gromack
Supervisor**