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Sabrina Charles-Pierre, Editor

ROCKLAND COUNTY BAR ASSOCIATION

1893 - 2018
125th Anniversary

NEWSBRIEF

www.rocklandbar.org **December 2018**

Dear Members,

I trust that this message finds you enjoying the start of Hanukkah and getting in the spirit for the Holidays yet to come! Since our last NewsBrief we had the opportunity to celebrate the achievements of our members at our Annual Dinner at Patriot Hills as well as honor our Chief Judge, the Honorable Janet DiFiore. What a fitting honor for our 125th Anniversary Gala! I wish to congratulate all our honorees and everyone who made our Gala so successful.

We are half way into our year working tirelessly to bring programming and services to the members of our Bar and Legal Community. It is imperative that our organization reach the needs of us all. To that end, we must find ways to maintain our relevance in our growing community. We need our young and diverse members to play an integral part our organization. We need the spirt, fire and distinctiveness of these attorneys to keep our organization flourishing. I challenge you all to identify these "live-wires" and encourage them to become active in our Bar Association so that their spark can ignite change and growth in the RCBA! I am happy that all Attorneys practicing for 10 years or less are invited to our Holiday Party for only $30! Invite your young Associates, bring them into the fold and I hope to see you all on Thursday December 13th at the Double Tree in Nanuet as we toast to the Season with our friends and colleagues!

Until then, my best,

Andrea F. Composto, Esq.

Remember, RCBA 125th Anniversary Mugs Will Be On Sale At The

Holiday Party – December 13

HAPPY HOLIDAYS

FROM THE OFFICERS, DIRECTORS AND STAFF

OF THE ROCKLAND COUNTY BAR

ASSOCIATION

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Attorney Advisors are still needed. To volunteer, please email ASAP to:

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Attorney Advisors receive three (3) CLE credits.

Brought to you by the RCBA Mock Trial Committee, Chris Exias and Sarah Lusk, Co-Chairs

COMMERCIAL LITIGATION ISSUES OF INTEREST **December 2018**

Submitted by Paul Savad, Esq.

Chair, Commercial and Corporate Law Committee,

Joseph Churgin, Esq., and Susan Cooper, Esq., of

SAVAD CHURGIN, LLP, Attorneys at Law

Your clients purchased a home for $5.4 million from an architect and her husband. The architect told your clients that she personally designed the construction drawings and acted as construction manager. She told your clients that she contracted with a builder to construct the home as a residence for her family, but now had to sell the home, due to problems with her husband's business. After your clients moved in, the patios began to sink. Your clients discovered that there were no footings under the patios, contrary to the construction drawings. The contract of sale to your clients provides that the sellers were liable after closing for any conditions the sellers were aware of that could serve as a claim against the builder. Your clients have recently learned that the sellers were engaged in buying properties and "flipping" them to new buyers. You sue the sellers for breach of contract and multiple causes of action sounding in fraud, including intentional concealment of material defects. You allege that the architect instructed the builder to cut corners to increase the sellers' profit margin. The sellers have moved to dismiss the action for failure to sue the builder, who they claim is a necessary party. Will you defeat the motion?

The answer is no.

In Blatt v. Johar, NYLJ 1525897431NY61194317 (Sup. Ct. Nassau Co., April 11, 2018, The Johars sold a home to the Blatts for $5.4 million. The complaint alleges that Ms. Johar is a licensed architect and either an engineer or a designer, who represented to the Blatts that she drew the construction drawings and acted as construction manager during the construction of the home, which was built as her family residence. She told the Blatts that she and her husband were selling the home due to issues with her husband's dental practice.

The Blatts allege that after they moved in, the four patios began to sink. The Blatts hired a contractor, who lifted the patio slabs, and discovered that the patios had no footings, although the construction drawings included footings. All four patios required reconstruction, and the rear yard required redesign as a result. The contract of sale obligated the Johars for any post-closing conditions the Johars were aware of that could serve as a claim against the builder.

The complaint alleged that Ms. Johar directed the builder to cut corners in order for the Johars to increase their profit, that they intentionally concealed material defects, and that the Johars were in the business of purchasing properties to "flip" to new buyers. The Blatts assert causes of action for fraud, fraudulent concealment, deceptive practices under GBL § 349, negligence, and breach of contract and implied warranty.

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The Johars moved to dismiss the action under CPLR §§ 1001 and 1003, for failure to join the builder as a necessary party. The Court agreed, citing Sweezy v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 19 N.Y.3d 543, which explained that the overall statutory design was intended to guarantee that absent parties would not be embarrassed by judgments purporting to bind their interests where they have not had an opportunity to be heard, and to protect against multiple lawsuits and inconsistent judgments. The Court found that the Blatts' complaint included allegations against the builder, a non-party who would not be heard. Joinder would serve judicial economy and would avoid prejudice against all parties.

The lesson? When commencing an action, it is best to name as defendants all parties who may be liable for the damages claimed by your client. If a court determines that an unnamed party is necessary in order to afford complete relief to the named parties, or that an unnamed party might be inequitably affected by a judgment, your action could be dismissed.

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125TH ANNIVERSARY

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MEMO

TO ALL RCBA COMMITTEE CHAIRS & VICE–CHAIRS

The Association is seeking articles from your committee for publication in the Bar's monthly Newsletter. The membership would greatly benefit from your input and would appreciate it. The article does not have to be complicated or long - a succinct piece of general interest and importance would be best.

If you are able to submit an article for the Newsletter it should be sent via email to sabrina@rocklandbar.org by the 15th of the month so that the Executive Board may review it.

Thank you!

THE PRACTICE PAGE

THE BURDEN OF PROOF IN SEEKING LEAVE TO FILE LATE NOTICES OF CLAIM

Hon. Mark C. Dillon*

Trial courts receive their fair share of petitions by claimants seeking leave to file late Notices of Claim upon municipalities. Often, the need for seeking leave is not the fault of the attorney, and is instead caused by the clients seeking counsel for the first time after the 90-day Notice of Claim period has already expired. The standards for determining such petitions have remained static for many years, except in one respect involving the burden of proof.

Sovereign immunity is waived for tort suits against municipal entities for claimants who serve a Notice of Claim within 90 days of the accrual of a cause of action (GML 50-e[1], 50-i[1]; *Matter of Zaid v City of New York*, 87 AD3d 661, 662). The purpose of the Notice of Claim is to provide the municipality with an early opportunity to investigate, and perhaps settle, the claim, to save taxpayers the cost and uncertainty of defending litigations.

When a Notice of Claim is not timely filed, the claimant may nevertheless commence a proceeding seeking leave to file a late notice (GML 50-e[5]). These applications may be granted or denied in the discretion of the court (*Cohen v Pearl River Union Free School Dist*., 51 NY2d 256, 265), after the court has engaged in a balanced consideration of the following non-exhaustive factors: 1) whether the municipality had received from any source within the 90 day period, or within a reasonable time thereafter, actual knowledge of the essential facts constituting the claim, 2) whether there was reasonable excuse for the failure of timely notice, and 3) whether the municipality's defense on the merits has been substantially prejudiced. No one factor is controlling, but the first has been held to be the most important in relation to the others (*Quinones v City of New York,* 139 AD3d 858).

For many years, the law was clear that the claimant bore the burden of proving entitlement to the relief sought by evidentially addressing the relevant factors. As to factor #1, claimants could argue the municipality had knowledge of the essential facts if it had in its timely possession accident reports, internal investigation, videos, letters, or other evidence (*E.g., Cruz v City of New York*, 149 AD3d 835). Such evidence would be examined by the court to determine whether it gave notice not just of an incident, but of facts underlying the legal theory on which liability could be predicated (*Whittaker v New York City Bd. of Educ*., 160 AD3d 874, 875-86). Likewise, as to Factor #2, claimants would directly possess information explaining their failure of timely notice, such as an extended hospitalization, and address the burden of proof through affidavit or record evidence.

However, as to Factor #3, the claimant's burden of proof is trickier as there has not yet been any discovery, and claimants do not necessarily have details about whether the target municipality has been actually prejudiced by their failure to serve a timely Notice of Claim. The mere passage of time does not normally constitute substantial prejudice (*Matter of Sarkisian Bros. v State Div. of Human Rights*, 48 NY2d 816, 818).

The claimants' burden of proof as to Factor #3 was a subject addressed by the Court of Appeals in *Newcomb v Middle Country Cent. School Dist.,* 28 NY3d 455. The court held, in an opinion by Chief Judge DiFiore, that as to Factor #3, the initial burden rests with the claimant, but the showing "need not be extensive" and may consist of "plausible argument that supports a finding of no substantial prejudice" (*Id.*, 901). This is a lessening of the traditional standard, as "argument" by a claimant is not necessarily "evidence." Where "plausible argument" is made, the burden then shifts to the municipality to "respond with a particularized *evidentiary* showing that the corporation will be substantially prejudiced if the late notice is permitted (*Id.*, 901). *Newcomb* does not address, and made no changes to, the *evidentiary* burden of proof that claimants must meet as to all of the other discretionary factors.

Mark C. Dillon is a Justice of the Appellate Division, Second Department, and an Adjunct Professor of New York Practice at Fordham Law School.

COMMITTEE CORNER

Criminal Law Committee Meeting
Monday, December 10, 2018
5:15pm @ the RCBA Offices

Zoning Committee Meeting
Tuesday, December 11, 2018
12:30pm @ the RCBA Offices

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In addition to ethics and professionalism, skills, law practice management, and areas of professional practice, a new category was added for diversity, inclusion and elimination of bias courses. This category of credit is effective January 1, 2018.

Experienced attorneys due to re-register on or after July 1, 2018 must complete at least one credit hour in the Diversity, Inclusion and Elimination of Bias CLE category of credit as part of their biennial CLE requirement. The transitional CLE requirement for newly admitted attorneys remains unchanged. For more information about the CLE Rules, visitnycourts.gov/Attorneys/CLE.

CLE REQUIREMENTS

Newly admitted attorneys must complete 32 credit hours of accredited "transitional" education within the first two years of admission to the Bar. Sixteen (16) credit hours must be completed in each of the first two years of admission to the Bar as follows: 3 hours of Ethics and Professionalism; 6 hours of Skills; 7 hours of Practice Management and/or areas of Professional Practice. Experienced Attorneys must complete 24 credit hours of CLE during each biennial reporting cycle: 4 credit hours must be in Ethics and Professionalism. The other credit hours may be a combination of the following categories: Ethics and Professionalism, Skills, Practice Management or Professional Practice.

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