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Saratoga County Bar Association *Law Notes*

Serving the Interests of Justice

Real Property Update

By Nicholas M. Ihnatolya

As the credit markets continue to reel from the mortgage crisis, with the rippling effects now being felt in the credit card industry – many reports have surfaced that homeowners now make mortgage payments with credit cards or are choosing to make their credit card payments instead of their mortgage payments, calculating that it will be easier to deal with their mortgage holder than their credit card issuer – many people believe that the Capital Region is fairing better than larger areas such as Las Vegas or Florida. With the ramifications of the collapse of the sub-prime lending market still to be played out, the Committee on Professional Ethics of the New York State Bar Association has set forth its opinion on "Seller's Concessions," a method that is regularly used to help purchasers finance their closing costs. The narrow ethical opinion – can an attorney participate in a scheme to inflate the purchase price – ignores the larger issue; what effect has millions of artificially inflated real estate transactions had on fueling increases in market values and the growth and failure of the market for mortgaged backed securities?

ARE SELLER'S CONCESSIONS ETHICAL? A Review of Ethics Opinion 817

Does an attorney's participation in a residential closing with a "grossed up" sales price and "seller's concessions" violate New York's Code of Professional Responsibility? According to the Committee on Professional Ethics, "a lawyer may not ethically participate in such a 'gross up' of the actual purchase price and concomitant seller's concession, unless there is neither deception nor misrepresentation at work in the transaction."[1]

The facts considered by the Opinion involved an agreed sales price that was then increased by 3%, in return for which the seller granted the purchaser a "seller's concession" in the

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Criminal Law: Decisions of Interest

By George Conway, Esq.

In People v. Azim Hall [Slip Op. No. 2] the Court of Appeals in a split decision ruled that the police may perform a visual inspection of an arrestee's body cavity based upon reasonable suspicion that the arrestee is hiding evidence inside his or her body cavity but if the police see anything suspicious during the visual inspection of the arrestee's body cavity the police must get a search warrant to remove the suspicious object from the arrestee's body cavity unless there are exigent circumstances.

In People v. Gary White [Slip No. 38] the Court of Appeals in a split decision held that under the circumstances of this case post-Miranda statements were not required to be suppressed even though the defendant had been subjected to a period of pre-Miranda custodial interrogation without a pronounced break before the commencement of the post-Miranda interrogation. The circumstances included: the pre-Miranda custodial interrogation lasted no more than five minutes, the defendant first gave an exculpatory alibi after being read the Miranda warnings; the defendant made no incriminating statements before the

Tort & Civil Practice: Selected Cases from the Third Department

By Tim Higgins, Esq.

No duty to warn of "drowning machine"

Cohen v. State of New York (Malone, J., 4/3/08)

Three actions were combined into this claim arising out of the tragic drowning of four young adults near the Split Rock Falls swimming hole on the Boquet River in Essex County, within the confines of the defendant's Adirondack State Park. The decedents were summer camp counselors who died trying to save a fourth counselor who had gone into a whirlpool area downstream from the main swimming hole. The whirlpool, characterized as a "drowning machine" by claimants' counsel, was turbulent and the water level was 15 feet higher than normal due to recent heavy rains. The Court of Claims (Milano, J.) denied the State's motion for summary judgment but the Third Department reversed and dismissed all three claims, concluding the whirlpool area was an open and obvious hazard. Also significant to the appellate court was the fact that the turbulent waters were not easily accessible, making the whirlpool a danger "that defendant did not owe a duty to neutralize".

Trip, Slip, Bump & Fall

Gagnon v. Saratoga Springs (Peters, J., 5/1/08)

The plaintiff slipped and fell while leaving Congress Park where she and her family saw a fireworks show on the 4th of July. The City moved for summary judgment arguing that it had no prior written notice of the allegedly dangerous condition (an elevation difference between a grassy area and the lip of a curb) and no duty to provide lighting at the location of the fall. Supreme Court (Williams, J., Saratoga Co.) granted the motion and the Third Department affirmed, agreeing that the City did not have prior written notice (required by the City Charter) and concluding that the "slight height differential" between the grass and the curb was in an area not intended for walking and further that it was not the kind of dangerous situation that the City had a duty to illuminate.

Havens v. County of Saratoga (Cardona, P.J., 4/3/08)

The Third Department here reversed Supreme Court's (Williams, J., Saratoga Co.) decision granting the defendant summary judgment against a plaintiff who slipped and fell while she was an inmate at the county jail. The plaintiff, 17 years old at the time, was cleaning a shower stall and slipped on the soapy floor as she ran from the area immediately after turning on the water (intended to wash away the soap). The Appellate Division determined that the County failed to show that the plaintiff could have avoided the slippery surface by cleaning and rinsing the shower stall by a safer method, and offered no evidence that they made available equipment (such as floor mats or water shoes) that would have reduced the risk of slippage.

Jones v. County of Rensselaer (Carpinello, J., 5/1/08)

Plaintiff, appearing pro se, claimed he was hurt when we slipped in water located on the floor outside his cell at the county jail. But he testified at deposition that he did not see the water before his fall, nor did he know of anyone else who saw the water before the fall. Supreme Court (Hummel, J., Rensselaer County) granted the defendant's motion for summary judgment which the Third Department affirmed. An apparently fatal blow to the plaintiff's case was that his opposition to the summary judgment motion consisted of only a memorandum of law in which he argued, among other things, that "it was of 'no concern' to him 'how [the water] got on the floor, how long it was there or even who put it there'".

Repti v. McDonald's Corp. (Spain, J., 3/27/08)

The defendant corporation leased property from New York's State Thruway Authority at the Malden rest area in Ulster County where one of its food service restaurants was operated by a non-party pursuant to a franchise agreement. Plaintiff claimed she was hurt when a pair of handicap-accessible, electrically-operated doors at the rest area entrance closed suddenly and struck her from behind. McDonald's moved for summary judgment arguing, in part, that it owed no duty to the plaintiff and other "public users" by virtue of its franchise agreement with the operator of the restaurant. Supreme Court (Kavanagh, J., Ulster Co.) denied the motion and the Third Department affirmed. McDonald's evidence in support of the motion did not establish, as a matter of law, that as an out-of-possession landlord it "lacked control over the doors" alleged to have caused plaintiff's injuries. Furthermore, said the Court, the lease agreement between McDonald's and the Thruway Authority is not determinative of the question whether the Authority, or McDonald's, or its franchisee was responsible to maintain and repair the automatic doors at the entrance.

Enforcement of settlement

Canino v. Electronic Technologies Co. (Lahtinen, J., 3/20/08)

In 1998, plaintiff was hurt in a fall from a ladder while working for the defendant on an IBM property. He sued for damages under §240 and at the start of trial in 2006 settled his case by stipulation the terms of which called for IBM to mail to him a $500,000 settlement draft within 21 days. Payment wasn't made by the deadline. IBM was insured by Reliance which went into receivership in 2001, which meant payment of the claim needed the approval of the Liquidation Bureau of the State Insurance Department. The plaintiff, 83-years old at the time of settlement, refused to sign a new

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*please contact the editorial staff submit an item of interest

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stipulation acknowledging that payment of the settlement might be significantly delayed. Defendants moved to amend the original stipulation of settlement based on mistake and the plaintiff cross-moved for summary judgment. Supreme Court (Work, J., Ulster Co.) granted the cross-motion and the Third Department affirmed, noting that when the settlement was placed on the record, no mention was made that IBM's insurer was in receivership or that payment might by delayed beyond the agreed-upon 21 days.

Breach of contract: interest on plaintiff's verdict (CPLR 5001(b))

Pozament Corp. v. AES Westover, LLC (Malone, J., 5/1/08)
Plaintiff sued defendant for breach of contract and the jury returned a verdict for $184,456. Pursuant to CPLR 5001, plaintiff was also entitled to interest on the award, and the statute reads that when "damages were incurred at various times", the court should compute interest beginning at a "single reasonable intermediate date". Supreme Court (Lebous, J., Broome Co.) selected a date that was about the mid-point of the four-year contract, which the Third Department agreed was reasonable and therefore affirmed the decision below.

Labor Law §§ 240, 241(6)

Atkinson v. State of New York (Spain, J., 3/13/08)
Claimant was injured in a fall during a construction project on the exterior walls of a state prison in Malone, Franklin County. Prior to trial, the Court of Claims dismissed his Labor Law §240 cause of action and the Third Department affirmed. At trial, claimant lost again when the Court (Schweitzer, J.) found that there was no Industrial Code Rule 12 violation as needed to win on a claim under Labor Law §241(6). The Third Department affirmed this time too, agreeing that even if Rule 12 had been violated, claimant did not prove that the violation caused the accident.

Coverage issue decided against plaintiff

Lang v. Hanover Ins. Co. (Carpinello, J., 3/20/08)
Plaintiff brought suit after being shot in the eye with a paint ball. The shooter was a young man who lived in the home where the injury occurred, but he was not related in any way to the homeowners. Plaintiff won a default judgment against the 20-year old shooter, and then tried to collect on the judgment by way of the defendant's insurance policy which defined an "insured" to include "persons under the age of 21 and in the care of" the homeowners. Supreme Court (Relihan, J., Tompkins Co.) declared Hanover had no obligation to satisfy the judgment and the Third Department affirmed upon a finding that the shooter (who "paid rent when he had the money") was simply a "boarder" in the home and that the homeowners "did not undertake any financial, disciplinary or emotional responsibility for him".

Medical Malpractice

Biello* v. Albany Memorial Hospital (Lahtinen, J., 3/20/08)
A jury in Albany County Supreme Court returned a defense verdict and the plaintiff's motion to set aside that verdict was denied by the Court (McNamara, J.). There was "sharply conflicting evidence and expert opinions" regarding the merits of the plaintiff's contention that the surgeon who operated on her right ankle was responsible for a circular thermal burn on her right calf. The Third Department rejected plaintiff's appeal, finding the jury had sufficient support in the record for its verdict, and further concluded that allegedly improper questions about plaintiff's past drug use did not deprive her of a fair trial.

(*Plaintiff's appellate counsel: Michael J. Hutter, Esq. of Powers & Santola, LLP)

Velasquez v. Skory (Rose, J., 3/20/08)
Plaintiff claimed in this action that the defendant obstetrician, among other things, should have delivered her baby by C-section because vaginal delivery of the large for gestational age fetus caused a brachial plexus (nerves that operate arm and shoulder function) injury to the infant. The jury found for the defendant. Plaintiff claimed on appeal that Supreme Court (Monserrate, J., Schenectady Co.) erroneously failed to charge the jury on her "lack of informed consent" cause of action and did not ask on the verdict sheet whether that and other omissions by defendant were deviations from the standard of medical care. The Third Department rejected both arguments and affirmed, finding plaintiff waived any challenge to the informed consent charge by failing to object before the jury began deliberations and noting that even had the issue been timely raised, that Supreme Court did not err.

Real Property Update, Continued from front page

same 3% amount. The artificially inflated purchase price enables the purchaser to obtain a larger mortgage, based upon the increased contract amount and, in theory, use the additional mortgage proceeds to cover closing costs.

The Opinion expresses that, at a minimum, the gross up and seller's concession must be fully disclosed in the transaction documents. However, the Opinion stops short on defining "full disclosure" and passes up an opportunity to provide specific guidelines for attorneys by failing to detail which transaction documents the gross up and seller's concession should be reported on. Thus, this Opinion leaves two matters to be further resolved: (1) what forms should a seller's concession be reported on to satisfy the full disclosure standard set forth in the Opinion; and (2) how is the seller's concession disclosed to the secondary market – does an attorney's responsibility for full disclosure include disclosure to the secondary market?

In most Capital Region residential real estate transactions, the Purchase and Sale Contract is a standard form negotiated by the parties with input by the real estate brokers involved. An attorney is not usually hired until the gross up and concession are negotiated and set forth on the contract. Is the inclusion of the gross up and concession in the contract sufficient for full disclosure? Is reference to the concession in the HUD-1 at closing sufficient? Should the attorney include in their attorney approval letter additional language that states that the gross up and concession are contingent upon full disclosure in writing to the Lender? At a minimum, both attorneys should retain for their files copies of the transaction documents where disclosure is made as this discussion is most likely to continue.

YES, NO, UNKNOWN, N/A: What Should a Seller's Attorney do with the Property Condition Disclosure Statement?

When the Property Condition Disclosure Act was first enacted, the purpose behind a seller completing the Property Condition Disclosure Statement ("PCDS") was to provide a prospective purchaser with certain conditions and information concerning the property known to the seller and move New York away from a "Buyer Be Ware" state. Though the original intent behind the PCDS was not to provide a warranty of any kind, it has now been held that any knowingly false or incomplete statements by the seller can subject the seller to claims of fraud after the completion of the sale.

In Simone v. Homecheck Real Estate Services, Inc., the Seller-Defendant answered "No" to certain questions on the PCDS and the Plaintiff-Buyer's home inspector did not report that the property had any material defects during the inspection. However, after the closing Plaintiff-Buyer allegedly discovered several material defects with the property, including several leaks which resulted in mold and rot problems. Accordingly, Plaintiff-Buyer asserted two causes of action; fraud and breach of contract.

The breach of contract cause of action was dismissed since the contract provided for the property to be sold "as is" and had a specific merger clause therein. Thus, upon closing and delivery of the deed, the doctrine of merger extinguished any claim the buyer may have had regarding the contract. However, the court found that when a "Seller makes a false representation in a Disclosure Statement, such a representation may be proof of active concealment".[2] Therefore, the court held that the Supreme Court properly denied Defendant-Seller's motion to dismiss the cause of action alleging fraudulent misrepresentation.

This decision provides that the doctrine of merger does not apply to the PCDS and allows for a seller to be brought into court to defend his or her answers to the PCDS after title has been transferred. Justifiably so, a cause of action may be warranted against a seller who intentionally misrepresented facts about the property on the PCDS. However, what happens to the seller who mistakenly or accidentally completed the PCDS in error, with no intent to mislead or commit fraud? Does the $500.00 cost/credit of not completing the PCDS outweigh the expense and fees associated with defending a seller's answers?

In most transactions, an attorney rarely has an opportunity to counsel a seller about the ramifications of the PCDS before the contract is executed and the PCDS is provided to the purchaser. In some parts of the state, real estate brokers will not even show a house or strongly discourage an offer if the PCDS is not provided. Thus, what is an attorney to do in light of this decision? One option is for the attorney to explain the PCDS to the seller and verify the seller's answers to the PCDS and make any changes thereto during the attorney approval. Another option to consider is the inclusion of a provision in the attorney approval letter that the representations made in the PCDS shall not survive closing.

LATE BREAKING: Did You Know that the Legislature and Governor were Negotiating to Increase the Filing Fee of the RP-5217?

As part of the 2008 Budget process, the New York State Legislature and Governor's Office were negotiating an increase in the filing fee of the RP-5217 up to $575.00 for a transaction with a reported sales price of more than $1,000,000.00. The filing fee, which is currently $75.00 for qualifying residential and agricultural property or $165.00 for all other lands, would have varied from $75.00 to $400.00 based on the reported sales price if the property was qualifying residential property or agricultural property or $165.00 to $575.00 for all other lands. However, the Bill was not included in this year's final budget.

Please visit www.smprtitle.com and click on Industry News to obtain any late breaking industry news.

Footnotes appear on page 6

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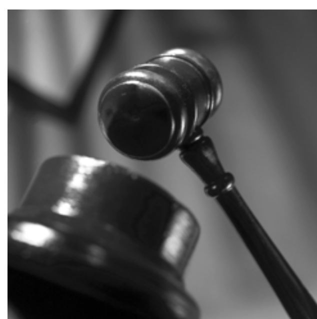
A special thanks to . . .

Stephen M. Dorsey and the entire Law Day Committee for a wonderful luncheon at the Canfield Casino (how about that Maggie Doherty?)

The Committee would also like to recognize the law firm of LeCours, Chertok & Yates, LLP as a sponsor of the event. Many thanks to all those who donated time and effort to the successful event.



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Join us for the premiere of our new video, "Legal Aid Matters."

The Inaugural Ruth Miner Award will be presented to Miriam Netter, Esq. & the Distinguished Service Award will be presented to E. Kimball Williams, Esq.

For further information contact Deanne Grimaldi at 689-6336 or dgrimaldi@lasnny.org

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Decisions of Interest, continued from page 3

Miranda warnings were read; there was a fifteen to twenty minute period of small talk followed by the defendant being allowed to smoke a cigarette and drink a soda just before the reading of the Miranda warnings, the defendant freely indicated his willingness to speak; the defendant acknowledged he understood his rights ; and the defendant signed a Miranda card before making any substantive statements.

In People v. Marcos Urbaez, [Slip Op. No. 35], the Court of Appeals in a unanimous decision held that the defendant – who convicted of attempted aggravated harassment after a non-jury trial- was not wrongfully stripped of his right to a jury trial when the People on the day of trial and over the objection of the defendant reduced the highest charge from aggravated harassment in the second degree, a class A misdemeanor, down to attempted aggravated harassment in the second degree, a class B misdemeanor.

Announcement . . .

The Fund for Modern Courts, together with the New York State Bar Association, invites you to a Continuing Legal Education program.
Lawyers and Members of the Public are Encouraged to Attend

Challenges to Justice in Domestic Violence Cases in New York State: Gaps, Successes and the Future

May 13, 2008 12-3:00
State Bar Center One Elk Street
Albany, NY

Domestic Violence continues to be prevalent in New York State. Each day, victims of domestic violence enter our court system seeking protection from abusers. Many innovations have enhanced the ability of the courts to meaningfully address domestic violence but gaps exist. The panelists will discuss the challenges, gaps and successes of the New York State court system. The program will focus on the providing greater access to the Family Court, the value of Integrated Domestic Violence and Domestic Violence courts, and the opportunities for more training and education of judges in our town and village courts. The panelists will address the issues from the perspective of legislators, the judiciary, prosecutors, educators and victims of domestic violence.
Panelist are: **Hon. George H. Winner, Jr**., Senator representing Chemung, Schuyler, Steuben, Tompkins, and part of Yates Counties; **Charlotte Watson**, Special Projects Coordinator, Judicial Institute, NYS Office of Court Administration, former Executive Director, NYS Office for the Prevention of Domestic Violence; **Patti Jo Newell**, Deputy Director/Director of Public Policy, The New York State Coalition Against Domestic Violence; **Hon. Linda Christopher**, Judge of the Family Court and Integrated Domestic Violence Court, Rockland County; **Hon. James A. Murphy III**, District Attorney, Saratoga County; **Stephanie Nilva, Esq**., Executive Director of Day One. The panel will be moderated by **Professor Mary Lynch**, Clinical Professor of Law and Co-Director, Albany Law Clinic & Justice Center.

2 CLE hours available
The forum is open to the public and free of charge. Lunch will be served.
Registration: Denise Kronstadt, Director of Advocacy, The Fund for Modern Courts
kronstadt@moderncourts.org or (212) 541-6741 x 103

Welcome New SCBA Members

Patricia Leonard
Matthew A. Maiello
David S. Kohn
Chris Obstarczyk
Christina D. Porter

Attorney ***Ed Wilcenski*** of the Clifton Park law firm of ***Jones, Wilcenski & Pleat, PLLC*** was a featured speaker at the 44th Annual International Conference of the Learning Disabilities Association of America, which took place in Chicago, Illinois. He presented on financial and legal planning for individuals with mild cognitive disabilities.

Jones, Wilcenski & Pleat, PLLC is a boutique law firm concentrating on estate planning and administration, special needs planning and elder law.

Real Property Update Footnotes:

1. Committee on Professional Ethics of the New York State Bar Association, Opinion 817 (2007).
2. Simone v. Homecheck Real Estate Services, Inc., 2007 NY Slip Op 6224 (Third Dept.), decided July 24, 2007.