

**THE SARATOGA COUNTY  
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By Nicholas M. Ihnatolya, Esq.
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# Saratoga County Bar Association *Law Notes*

*Serving the Interests of Justice*

## TORTS AND CIVIL PRACTICE UPDATE

By Timothy Higgins, Esq.

**Medical Malpractice  
Doctor vs. Doctor/Doctor vs.  
Insurance carrier**

**Malebranche v. Sunnyview  
Rehab. Hospital (Lahtinen,  
J., 12/6/07)**

Plaintiff, himself a physician, suffered a stroke and contended in his lawsuit that medical negligence permitted the stroke to progress and worsened his condition as a result of improper management of his blood pressure and an unacceptable delay in administering Heparin. At the close of plaintiff's proof at trial, Supreme Court (Reilly, J., Schenectady Co.) dismissed the action against three defendant neurologists for failure to show a prima facie case. The Third Department found that to be reversible error given proof, primarily through the

testimony of plaintiff's expert neurologist, that a blood pressure management plan consistent with acceptable medical practice was outlined but not followed, and such failure might have caused plaintiff to suffer a larger and more severe stroke.

**Elashker v. Medical Liability  
Mutual Ins. Co. (Rose, J.,  
12/6/07)**

This physician-plaintiff sued his malpractice insurance carrier (MLMIC) after it disclaimed coverage for an alleged sexual assault by the doctor on his patient. The setting of the alleged attack was a nursing home where the doctor was an attending physician and the plaintiff-patient was employed as a nurse. The plaintiff claimed the defendant's attack happened when

he, during a medical examination, was palpating her thyroid. MLMIC won summary judgment in Supreme Court (Bradley, J., Ulster Co.) and the Third Department affirmed, finding no insurance coverage available under the policy because there was no evidence that plaintiff ever complained about the physician's professional services or claimed what he did was malpractice.

**No expert = No recovery**

**Myers v. State of New  
York (Spain, J., 12/13/07)**  
**Wood v. State of New  
York (Rose, J., 11/29/07)**

Both of these medical malpractice actions were com-

Continued on page 3

## The Collaborative Divorce Association of the Capital District from Joanne M. White, Esq.

The first official meeting of the **Collaborative Divorce Association of the Capital District** will be held on **January 10, 2008 at 4:00 pm** at the law offices of Whiteman, Osterman and Hannah at One Commerce Plaza in Albany. Collaborative Divorce offers couples an opportunity to settle all matrimo-

nial and custody issues in the presence of their two attorneys, divorce coaches, mental health professionals and child therapists, as well as economists and financial advisers.

Attorneys who are interested in collaborative law are committed to the cooperative resolution of all issues and

work diligently to protect their clients' rights. Come and be a part of this exciting practice that is taking major US cities by storm!

Please RSVP to JoAnn Shartrand, Esq. at (518) 786-3900. Light refreshments will be served.

## Real Property Update

By Nicholas M. Ihnatolya, Esq. (originally published in the Nov. 2007 edition of the Albany Co. Bar Newsletter)

From the refinance craze of years ago and the subsequent housing boom where home prices soared to the current trend of homes lingering on the market for months with variable rate mortgages adjusting higher; the last few years have been witness to extraordinary activity in the real estate markets throughout the United States.

The recent "credit crisis" which has gripped the nation and the economic markets has caused Governor Spitzer and the Legislature to take steps to prevent further harm to residential property owners who are facing foreclosure. On August 1, 2007 Section 1320 of the New York Real Property Action and Procedures Law ("RPAPL") was enacted and became effective immediately. RPAPL Section 1320 requires that in an action to foreclose a mortgage on a residential property containing less than three units, the summons shall contain a new bold face notice in addition to what is currently required:

### **"NOTICE YOU ARE IN DANGER OF LOSING YOUR HOME**

If you do not respond to this summons and complaint by serving a copy of the answer on the attorney for the mortgage company who filed this foreclosure proceeding against you and filing the answer with the court, a default judgment may be entered and you can lose your home.

Speak to an attorney or go to the court where your case is pending for further information on how to answer the summons and protect your property.

Sending a payment to your mortgage company will not stop this foreclosure action.

**YOU MUST RESPOND BY SERVING A COPY OF THE ANSWER ON THE ATTORNEY FOR THE PLAINTIFF (MORTGAGE COMPANY) AND FILING THE ANSWER WITH THE COURT."**<sup>1</sup>

Further Section 3215(g)(3)(iii) of the CPLR was amended so that the additional notice requirement in CPLR Section 3215(g)(3)(i) now applies to residential mortgage foreclosures and provides the following:

"When a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first class mail to the defendant at his place of residence in a envelope bearing the legend "personal and confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt..."<sup>2</sup>

With the rise of centralized "foreclosure shops" and fewer practitioners bringing foreclosure actions, an interesting technicality for those attorneys representing a foreclosure defendant is that though the additional notice under the RPAPL is only required for residential properties containing less than three units, the notice requirements under the CPLR does not contain such a unit limitation.

### **TIME IS OF THE ESSENCE: A Little Less Public, But Just As Important**

Though it seems there is relentless focus on the "credit crisis", the world of real property continues to evolve in ways that are less public, but can be just as important.

For instance, in a Third Department Appellate Division case<sup>3</sup>, the parties entered into a real estate contract whereby Plaintiff - Seller agreed to sell to Defendant - Buyer a residence and the contract set the closing date on or before September 2, 2005 (as the typical residential real estate contract reads). During the summer leading up to the closing date,

the Defendant - Buyer had made several oral remarks to the listing broker that the closing had to occur on September 2, 2005. In late August Defendant - Buyer learned Plaintiff - Seller did not have title to the property due to failure to pay real estate taxes and Defendant - Buyer notified the listing broker that the contract would be terminated if closing did not occur by September 1, 2005. On September 1<sup>st</sup> the County, which had title, issued a quit claim redemption deed to the Plaintiff - Seller's attorney to be held in escrow pending payment of the taxes. Plaintiff - Seller's attorney subsequently notified the Defendant - Buyer and their Lender that the closing could take place, but Defendant - Buyer refused to purchase the property and Plaintiff - Seller later sold the property to someone else at a lower price.

Plaintiff - Seller commenced a breach of contract action to recover damages, including the difference in sale prices. The court found that (1) time was not of the essence even if the closing date is stated in a real estate contract, unless the contract specifically provides such; (2) a party may give notice that time is considered of the essence, but that notice must be clear, distinct, unequivocal, and provide a definite and reasonable time within which to perform; and (3) *any notice mandating a closing date prior to one set forth in the contract is unreasonable and premature* (emphasis added). Accordingly, Defendant - Buyer's oral statements to Plaintiff - Seller's broker did not fulfill the "time is of the essence" requirements.

Nicholas M. Ihnatolya is an attorney with *Sneeringer Monahan Provost Redgrave Title Agency, Inc.* Please contact Mr. Ihnatolya at:

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## TORTS AND CIVIL PRACTICE, continued from front page

menced by plaintiffs who were inmates in the New York State correctional system. At trial in the Court of Claims neither plaintiff offered expert testimony which the Third Department reminds us is a required element of a prima facie case “where medical issues are not within the ordinary experience and knowledge of lay persons”. As a result, the defense verdict in *Myers* is affirmed and the claimant’s judgment and award (which amounted to \$100 for each day that he was forced to ambulate without properly sized crutches) in *Wood* is reversed.

### Labor Law § 240

#### Dowling v. McCloskey Comm. Serv. Corp. (Cardona, P. J., 11/29/07)

The plaintiff painter sustained injuries in a 16-foot fall from an aluminum extension ladder that made “a creaking sound and the ladder slipped” out from underneath him. Supreme Court (Doyle, J., Albany Co.) denied plaintiff’s motion for summary judgment on liability under §240(1). The Third Department reversed, finding that plaintiff made a prima facie showing that the safety device he was given failed “to perform its function of supporting the worker” and that the burden of proof having shifted, defendant failed to “submit any evidence that the ladder was adequate and properly placed or that plaintiff’s conduct was the sole proximate cause of the injuries”.

#### Torres v. Mazzone Admin. Group, Inc. (Carpinello, J., 12/13/07)

This plaintiff was also working on a ladder that he claimed collapsed and caused the fall in

which he sustained injuries. Supreme Court (Kramer, J., Schenectady Co.) denied his §240(1) summary judgment motion, and the Third Department affirmed based on the defendant’s proof supporting the argument that plaintiff was the sole proximate cause of his injuries. (The ladder from which he fell was a smaller wooden ladder that plaintiff obtained and used for convenience of his work, rather than using the ladder supplied to him by his supervisor).

### Road cases versus municipalities

#### Racalbuto v. Redmond (Kane, J., 12/13/07)

Plaintiff’s southbound vehicle made a left turn and was struck by the defendant Redmond’s northbound car. The accident intersection is located at the crest of a hill, and plaintiff sued the County of Delaware on a theory of negligent failure to maintain the intersection in a safe and proper condition. Supreme Court (Lebous, J.) granted the county’s motion for summary judgment and the Third Department affirmed, finding the county made the necessary showing of qualified immunity from liability (*Weis v. Fote*) arising out of a highway planning decision absent evidence that the study was plainly inadequate or that there was no reasonable basis for the traffic plan.

#### Russo-Martorana v. Theophilakos (Lahtinen, J., 12/13/07)

This plaintiff and the defendant driver were involved in an accident at a “Y” intersection in the Town of Lloyd, Ul-

ster County. The town’s motion for summary judgment was denied by Supreme Court (Zwack, J., Ulster Co.) and the Third Department agreed that it could not be said that the intersection was reasonably safe for prudent drivers as a matter of law. Helpful to the plaintiff’s opposition to the motion was the deposition admission of the town highway superintendent that it was feasible drivers could become confused at the intersection due to lack of signage and poor visibility caused by curves, narrow roads and tree growth.

### Untimely disclosure nets trial delay but not preclusion

#### Jessmer v. Martin (Rose, J., 12/13/07)

This motor vehicle injury case was about one month away from trial and counsel were about to videotape the trial testimony of a treating doctor when plaintiff served defendants with a previously undisclosed medical report and a supplemental BOP. Defendants moved to preclude the deposition testimony and evidence of new injuries contending plaintiff’s late disclosure violated 22 NYCRR 202.17(g) and CPLR 3043(b). Supreme Court (Demarest, J., St. Lawrence Co.) found the disclosures to be untimely, adjourned the trial but denied the request for preclusion. The Third Department affirmed finding no abuse of the trial court’s broad discretion to supervise the discovery process, especially where any prejudice to defendants

was remedied by postponing the trial.

### Slips, trips and falls

#### MacDonald v. New York State ORDA (Cardona, P.J., 12/13/07)

Plaintiff, wearing ice skates, fell and broke her ankle while walking toward a bonfire located inside a skating oval. Among other things, plaintiff claimed she should have been warned about a two-inch difference in the height between the skating surface and interior section on which she fell. Defendant moved for summary judgment saying it had no duty to warn of an open and obvious condition and that plaintiff assumed the risk of falling because she opted not to travel on a designated path to the bonfire area. Supreme Court (Dawson, J., Essex Co.) found questions of fact precluding dismissal on the motion and the Third Department agreed, noting that it was undisputed that defendant was aware that not all skaters used the designated path.

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submit an item of interest



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## Torts and Civil Practice Update

Cont. from page 3

### Candelario v. Watervliet Housing Auth. (Lahtinen, J., 12/13/07)

The Third Department affirmed Supreme Court's (McNamara, J., Albany Co.) denial of defendant's motion for summary judgment where plaintiff slipped and fell on ice and snow in the parking lot of the apartment complex where she lived. The plaintiff claimed her fall happened about 25 hours after the end of a storm that dropped 5-6 inches of snow on the parking lot, and established a question of fact about the defendant's response to the storm by offering affidavits from several residents of the complex "stating that, at no time during January 2005 had they seen any evidence of sand, salt or other substances intended to melt ice in the parking lot."

### Dow v. Schenectady Co. Dept. of Social Services (Mugglin, J., 12/13/07)

Plaintiff claimed she was injured when the chair she was attempting to sit in slid out from underneath her, causing her to fall to the floor. Supreme Court (Giardino, J., Schenectady Co.) denied the defendant's motion for summary judgment and the Third Department affirmed restating the rule that a moving defendant cannot meet the burden of showing its entitlement to judgment as a matter of law by "relying on perceived gaps in the nonmoving party's proof". Here, the defendant failed to submit evidence of the condition of the chair or the floor, and therefore could not establish that it did not create the dangerous condition or that it did not have notice of same.

## Real Property Update, cont. from page 2

### **WARNING... SYSTEM ERROR: Erroneous Federal Tax Lien Releases**

Due to an Internal Revenue Service (IRS) system error on August 5, 2007, invalid lien releases were sent to an unspecified number of taxpayers. This matter impacts all states and the IRS was able to stop the shipment of releases that would otherwise be sent to local recorder's office, but could not stop the shipment of the taxpayer's copy. Thus, any IRS lien releases dated August 5, 2007 and marked "Taxpayer Copy" should be confirmed with the IRS even if it has been recorded.

### **AND IT KEEPS GETTING MORE EXPENSIVE TO SELL PROPERTY: Local Transfer Tax**

Continuing the trend of local municipalities imposing additional transfer tax for the sale of real property, as the Town of Red Hook levied during this past summer, Columbia County is the next region where it will be a little more expensive to sell real property. Effective December 1, 2007, any deeds recorded on or after that date in Columbia County will incur an additional local transfer tax at the rate of \$1.00 for each \$500.00 of consideration. The first \$150,000.00 of consideration on a single family residence is exempt. The tax is payable by the grantor unless the grantor is exempt from the payment and it then passes to the grantee. The tax will not apply to property under contract prior to the effective date of the tax; however, sufficient proof of the contract's existence prior to the effective date is required. To obtain a copy of the Columbia County Supplement Real Estate Transfer Tax Return (which will be needed along with the TP-584 for recording), please visit our website at [www.smprtle.com](http://www.smprtle.com) and click on Industry News.

### **MORTGAGE TAX INCREASE ALERT**

Effective November 1, 2007, Dutchess County will increase their mortgage recording tax from \$1.05 to \$1.30 for each one hundred dollar principal indebtedness or obligation and this new rate will apply for all documents recorded on or after November 1, 2007.

- 1 2007 Session Laws of New York Ch. 458.
- 2 2007 Session Laws of New York Ch. 458.
- 3 Weintraub v. Stankovic, 2007 NY Slip Op 06323 (Thrid Dept.), decided August 2, 2007.

*Announcements . . .*

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**Make a Note:**

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**Save the Date:**

The annual meeting of the Federated Bar of the Fourth Judicial District is:

**Friday, April 25, 2008 through  
Sunday, April 28, 2007  
at the  
Marriott Chateau Champlain Hotel  
Montreal, Canada**

**Please keep this date open  
for an exceptional meeting and  
CLE program.**



**Albany Law School**

presents

**The 14th Annual Kate Stoneman Day**

Thursday, March 6, 2008

at  
5:00pm

Arlinda Locklear will be with the Kate Stoneman Award and will deliver the celebration's keynote address. Ms. Locklear is a member of the Lumbee Tribe of North Carolina and the first Native American woman to appear in the U.S. Supreme Court.

Kate Stoneman Day is held in honor of the Law School's first female graduate who was also the first woman admitted to practice law in New York State. Kate Stoneman awards are given to individuals in the legal profession who have demonstrated a commitment to actively seeking change and expanding opportunities for women.

The event is FREE and open to the public. To RSVP, contact Tammy Weinman at (518) 445-3210 or twein@albanylaw.edu.

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